

The Impact of *Piazza* on the Baseball Antitrust Exemption

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I. INTRODUCTION

With the rise of sports as big business in America has come a parallel increase of legal activity seeking clarification of the role of professional sports in the labor market. Athletes, unions, and even owners have increasingly turned to the courts not only to resolve disputes, but also to define the legal positions of leagues and teams as employers and athletes as employees. Although baseball has enjoyed an exemption from federal antitrust laws since 1922,¹ Vincent Piazza and Vincent Tirendi, the spurned buyers of the San Francisco Giants, sued Major League Baseball (“MLB”) for violating federal antitrust laws by preventing their purchase of the team in 1992. But when MLB moved to dismiss the federal antitrust claims, Judge John Padova (“Judge Padova”) of the Eastern District of Pennsylvania denied MLB’s motion, holding that baseball’s antitrust exemption is limited to the “reserve clause.”² The case was settled before the trial

* J.D. UCLA School of Law, 1995. I would like to thank Professor Steve Derian for guiding me through this Comment; Gene Orza of the Major League Baseball Players Association for suggesting the topic; Robert Schweppe of the Los Angeles Dodgers for helping me figure out the minor league system; and my father Art Spander for encouraging my interest in sports as well as helping dig up all the baseball statistics I needed to write this Comment. Copyright 1994.

¹ Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922).

² Piazza v. Major League Baseball, 831 F. Supp. 420 (E.D. Pa. 1993). The reserve clause refers to those Major League Rules that govern player contracts and player movement. Major League Rules 3, 9, and 12: (1) require uniformity of player contracts, (2) confine a player to the club which has him under contract, (3) prevent tampering, (4) allow a Major

started.³ If Judge Padova's reasoning were followed by other courts,⁴ and the baseball antitrust exemption is narrowly confined to the reserve clause rather than all aspects of baseball, the impact on the sport of baseball will be great. Numerous aspects of baseball could be held to be illegal restraints of trade, including the draft and various restraints incorporated in the minor league system.

This Comment argues that under the reasoning of *Piazza*, the baseball draft and restraints in the minor league system can be found to violate section 1 of the Sherman Antitrust Act.⁵ Part II details the restrictive nature of the baseball draft and the minor league system. Part III analyzes Judge Padova's reading of the baseball antitrust precedents and his holding. Part IV argues that baseball is not exempt from federal antitrust laws through the non-statutory labor exemption. Part V argues that under current sports antitrust case law, the draft and the minor league exemptions likely violate Sherman 1. This Comment will set forth a prescription for a less restrictive baseball draft and minor league system.

League team which drafts or otherwise acquires a player to renew his contract for up to five years, and (5) allow a team to assign a player to one of its minor league affiliates or another club and bind the player to that assignment, among other things.

³ On October 14, 1993, Judge Padova denied MLB's motion for an amendment of the order in *Piazza* to certify for immediate appeal to the Third Circuit the denial of baseball's motion to dismiss the antitrust claims. *Id.*

On September 28, the day before jury selection was to begin, MLB and the plaintiffs settled. Exact terms of the settlement were not released, but *Piazza* and Tirendi received a cash settlement of approximately six to seven million dollars, a guarantee from MLB that the two men would be allowed to attempt to purchase another baseball team, and a public apology from MLB. Moreover, the grounds on which the case was settled were not made public. In addition to conspiracy to violate antitrust laws, the suit also alleged violation of civil rights, defamation, and interference with a contract. Hank Grezlak, *Baseball Issues Apology as Part of Settlement*, LEGAL INTELLIGENCER, Nov. 3, 1994, at 1.

⁴ The Florida Supreme Court recently noted *Piazza* when it held that baseball's antitrust exemption is limited to the reserve system and does not exempt from antitrust scrutiny an alleged conspiracy to prevent relocation of a baseball franchise in *Butterworth v. National League of Professional Baseball Clubs*, 644 So. 2d 1021, 1023-25 (Fla. 1994).

⁵ Section 1 of the Sherman Antitrust Act, provides in pertinent part: "Every 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, is declared to be illegal. . . ." In *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958), the Supreme Court held that only those agreements that "unreasonably" restrain trade come within the proscription of the Act.

II. THE BASEBALL DRAFT AND THE MINOR LEAGUE RESTRAINTS

The National Association of Professional Baseball Clubs (“National Association”) is commonly referred to as the minor leagues. The National Association includes 158 minor league teams in both the United States and Canada.⁶ It is governed both by the Professional Baseball Agreement (“PBA”), an agreement between MLB and the National Association, and the Professional Baseball Rules (“P.B. Rules”).⁷

Rule 4, of both the P.B. Rules and the Major League Rules,⁸ (“M.L. Rules”) delineates the baseball draft (“Draft”), held at the annual baseball summer meetings in June. The Draft consists of sixty rounds—that is, sixty selections by each of the twenty-eight major league teams or their minor league affiliates.⁹ The Draft was unilaterally instituted by the MLB owners in 1965.¹⁰ Teams can draft any eligible player, even if the player publicly states he does not desire to be drafted. According to Rule 3, any player in the United States who is in his final year of high school, third or fourth year of college, second year of junior college or has been out of college for at least 120 days is eligible to be drafted.¹¹ In addition, any player in Canada or Puerto Rico who has completed his eleventh year of school or is seventeen years of age can be selected in the Draft.¹²

⁶ Telephone Interview with Robert Schweppe, Los Angeles Dodgers Administrator of Minor League Operations, in Los Angeles, Cal. (Oct. 15, 1993) (hereinafter Schweppe Interview).

⁷ The Professional Baseball Rules are the governing rules of the minor leagues. They are unilaterally instituted by the clubs.

⁸ The Major League Rules are the governing rules of major league baseball which regulate all issues not controlled by the major league baseball collective bargaining agreement. The Major League Rules are also unilaterally imposed by management.

⁹ Schweppe Interview, *supra* note 6. According to Schweppe, there was no round limit to the Draft prior to 1992.

¹⁰ *In the Matter of the Arbitration Between Major League Baseball Players Association and the 28 Major League Clubs*, Grievance 93-2 at 6 (1992) (Nicolau, Arb.) [hereinafter *Arbitration Decision*].

¹¹ M.L. Rule 3; P.B. Rule 3.

¹² *Id.*

Once drafted, a player goes on the drafting club's negotiation list¹³ unless he signs a contract, becomes a college player by attending the first day of college classes, or is declared ineligible.¹⁴ Each team has exclusive rights to negotiate with and sign all the players on its negotiation list. If a player refuses to sign with the team he is drafted by, the only way he can enter professional baseball is to stay out of professional baseball until the following June and take his chances with the next team who drafts him and obtains his exclusive rights.¹⁵ Rule 3(j) expressly prohibits tampering with another team's players or players to whom a team possesses the negotiation rights.¹⁶

Once a player commences negotiations, additional restraints await, beginning with his contract. Minor league contracts must be one year in duration, and a player cannot play without signing a standard minor league contract before the start of each season.¹⁷ Although minor league contracts are limited to one year, the first contract a drafted player signs gives his drafting team six separate and successive annual renewal options, thereby giving the team exclusive rights to a drafted player's first seven seasons in the minor leagues.¹⁸ A minor league player does not gain free agency status and the accompanying ability to negotiate with any team until the beginning of his eighth season in professional baseball unless he is waived by his drafting team. Any time spent in the majors does not count toward a minor league team's seven seasons of exclusive rights.¹⁹

In addition, only salary is negotiable in a minor league renewal contract. While a player technically can negotiate his salary, he has very little leverage. The National Association has devised a rigid salary structure which establishes standard salary ranges for each

¹³ A drafted player remains on the drafting club's negotiation list until the closed period, which is the week prior to the Rule 4 (June) draft.

¹⁴ M.L. Rule 4(e); P.B. Rule 4(e).

¹⁵ ANDREW ZIMBALIST, *BASEBALL AND BILLIONS* 105-06 (1992).

¹⁶ M.L. Rule 3(j); P.B. Rule 3(j).

¹⁷ M.L. Rule 3(e)(4)(a); P.B. Rule 3(e)(4)(a).

¹⁸ Jeffrey Moorad, *Negotiating for the Professional Baseball Player*, in *THE LAW OF PROFESSIONAL AND AMATEUR SPORTS*, § 5.04 (Gary Uberstine, ed., 1988).

¹⁹ *Id.*

renewal year, and all minor league teams adhere to the structure.²⁰ Generally, first year Class A players make \$850 to \$950 a month, first year Class AA players earn \$1000 to \$1200 a month, and first year Class AAA players make between \$1250 and \$1500 a month.²¹ Set variables such as the age of player, the number of years he has been with the organization, and his performance and statistics are factors used to establish a player's salary within the limited range.²² A professional baseball player is prohibited from negotiating any additional aspect of his contract during his first seven seasons except for a signing bonus and an educational stipend during his initial contract negotiation.²³ P.B. Rule 3(b) expressly forbids bonus clauses tied to player or team performance.

In addition to contract, salary, and movement restraints, minor league baseball also imposes binding league arbitration on player salary and other disputes. Players dissatisfied with the result of contract negotiations can appeal to the President of the National Association, the National Association Executive Committee, and, finally, to the Commissioner of Baseball, but the Commissioner's word is final.²⁴ There is no ability for a player to appeal to an outside, impartial arbitrator.

While on the whole the minor league system imposes rigid restraints on players and potential players, two provisions give players a small amount of freedom. First, the Rule 5 (Winter) draft releases a player from seven seasons with a single team. The Rule 5 draft permits any major or minor league team to "draft"²⁵ any minor league player in his fourth²⁶ or later season in the minors if he is not

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ The drafting team must pay the original team between \$4000 and \$25,000 for the player depending on the league of the drafting team. If the player is not kept on the drafting team's roster for the entire season his original squad can "buy him back" for 50% of the purchase price.

²⁶ Players can be drafted after their third professional season if they first signed a baseball contract after the age of 19, or after their fourth professional season if they signed when they were younger than 19. Schweppe Interview, *supra* note 6.

placed on the major league affiliate's 40-man reserve list.²⁷ However, the drafting team can exercise the player's remaining options, so he is still not a free agent until his eighth season.

Rule 10(e) is the second provision which gives minor league players some freedom. Rule 10(e) restricts a MLB team's ability to "call up" minor league players. A major league team is limited to three seasons in which it can call up a minor leaguer without the player first having to clear waivers.²⁸ After three seasons of optioning a player between the majors and minors a team must place a player on waivers, where another team has the ability to pick him up. In addition, beginning with a player's sixth season in professional baseball, a team cannot option him back and forth without the player's permission. But again, this limitation on restraints does not give the minor league player much freedom.

Under *Piazza*, both the Draft and the contract restraints in the minor leagues ("Minor League Restraints") can be found to be illegal restraints of trade.

III. CURRENT INTERPRETATIONS OF THE BASEBALL ANTITRUST EXEMPTION

A. *The Supreme Court Decisions*

The purpose of this section is to summarize the history of the baseball antitrust exemption and analyze the *Piazza* court's reading of baseball antitrust case law. I will argue that under *Piazza*'s reading of the baseball antitrust precedents, the baseball antitrust exemption could be restricted to the reserve clause of MLB.

The Draft and the Minor League Restraints can initially be analyzed as illegal restraints of trade because a series of Supreme Court cases suggests that they may not be subject to baseball's

²⁷ P.B. Rule 5(f).

²⁸ M.L. Rule 10(e).

antitrust exemption. The Court has examined the exemption on three separate occasions, in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*,²⁹ in *Toolson v. New York Yankees, Inc.*,³⁰ and, most recently, in *Flood v. Kuhn*.³¹ *Federal Baseball* held that the federal antitrust laws did not apply to the business of baseball.³² The Federal League, left without an organization within which to compete after the league folded, sued the American and National leagues for violating the Sherman Antitrust Act ("Sherman Act") through their use of reserve clauses. Federal Baseball claimed the two leagues' reserve clauses prohibited it from obtaining players from those leagues.³³ Writing for a unanimous Supreme Court, Justice Holmes held that the business of giving exhibitions of baseball games for profit does not constitute trade or commerce within the meaning of the Sherman Act, and thus the Sherman Act does not apply to that business.³⁴

In *Toolson*, the Supreme Court affirmed its holding in *Federal Baseball*. The suit alleging harm from the reserve clause under federal antitrust laws was brought by a member of the Yankee baseball system who, after refusing to play for his assigned club, was blacklisted by all professional teams.³⁵ The plaintiff attempted to distinguish *Federal Baseball* by arguing that *Federal Baseball* was obsolete because baseball constituted commerce and thus federal antitrust laws applied to the sport. Toolson also argued that MLB's interstate radio and television broadcasts as well as MLB's sale of interstate advertising constituted interstate commerce.³⁶ But in a

²⁹ 259 U.S. 200 (1922).

³⁰ 346 U.S. 356 (1953).

³¹ 407 U.S. 258 (1972).

³² *Federal Baseball*, 259 U.S. at 208-09.

³³ At the time of *Federal Baseball* there was no free agency in baseball. Therefore, the reserve clause required a player who was tendered a contract to renew his contract with the same club every year. Players who refused to sign with the same club were made ineligible. Thus, the Federal Baseball league was unable to obtain any players under contract in either the American or National leagues.

³⁴ *Federal Baseball*, 259 U.S. at 209.

³⁵ *Toolson v. New York Yankees, Inc.*, 101 F. Supp. 93, 93 (S.D. Cal. 1951), *aff'd*, 200 F.2d 198 (9th Cir. 1952), *aff'd*, 346 U.S. 353 (1953).

³⁶ *Id.* at 93-94.

short per curiam opinion, the Court refused to overturn *Federal Baseball* “so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws,” and refused to address the plaintiff’s arguments.³⁷

Finally, in *Flood* the Supreme Court found that baseball was a business involved in interstate commerce but the Court nevertheless refused to overturn *Federal Baseball*. Curt Flood, one of the league’s leading players, was traded, then sued the Commissioner of Baseball because he was dissatisfied with the reserve clause in his contract and the reserve system³⁸ generally and alleged that the reserve clause violated federal antitrust laws.³⁹ In finding that baseball is a business engaged in interstate commerce, Flood looked to other sports and noted that the fact that baseball’s reserve system enjoyed an exemption from antitrust laws was “an anomaly,” and “an aberration.”⁴⁰ The Court, however, reasoned that the anomalous exemption was protected by the doctrine of *stare decisis*. The Court also found that Congress had “no intention to subject baseball’s reserve system to the antitrust statutes”⁴¹ because if Congress were unhappy with the exemption created by *Federal Baseball* it would have created legislation to eliminate it. Therefore the Court held that it would “adhere once again to *Federal Baseball* and *Toolson* and to their application to professional baseball.”⁴²

B. *The Piazza Court Reading of the Precedents*

In *Piazza*, MLB moved to dismiss the case on the grounds that the *Federal Baseball* exemption applied broadly to the entire business of

³⁷ *Toolson*, 346 U.S. at 357.

³⁸ *Flood* defines the reserve system as the reserve clause and all Major League Baseball Rules designed to complement the clause in confining the player to the club that has him under contract and otherwise providing contract uniformity. *Flood*, 407 U.S. at 259 n.1.

³⁹ *Id.* at 265-66.

⁴⁰ *Id.* at 282.

⁴¹ *Id.* at 283.

⁴² *Id.* at 284.

baseball and therefore precluded the plaintiffs' suit. The *Piazza* court responded by declaring that the exemption was confined to the reserve clause. To determine this issue, the *Piazza* court looked to the three baseball cases, *Federal Baseball*, *Toolson*, and *Flood* (the "Baseball Trilogy") and held that the Baseball Trilogy limits baseball's antitrust exemption to the facts of the cases—to the reserve system of professional baseball.⁴³

First, *Piazza* found that the Baseball Trilogy limits the baseball exemption to the reserve clause and not to the business of baseball.⁴⁴ The *Piazza* court found that the baseball exemption most likely applied generally to the business of baseball between 1922 and 1972⁴⁵ because the holding in *Federal Baseball* was based upon the finding that the business of professional baseball, as opposed to the business of moving players, was not interstate commerce and therefore not subject to the federal antitrust laws.⁴⁶

However, Judge Padova read *Flood* as undermining the rule of *Federal Baseball* and limiting the precedential value of the cases to solely "the particular facts there involved."⁴⁷ To come to this conclusion, Judge Padova first noted that the *Flood* Court examined the "analytical underpinnings of *Federal Baseball*, that the business of exhibiting baseball games is not interstate commerce,"⁴⁸ and found that the *Flood* Court rejected this reasoning in the "clearest possible terms" since *Flood* held that baseball is indeed a "business . . . engaged in interstate commerce."⁴⁹ Judge Padova then noted that

⁴³ *Piazza v. Major League Baseball*, 831 F. Supp 420, 435-36.

⁴⁴ *Id.* at 435.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* (citing *Flood*, 407 U.S. at 282).

⁴⁹ *Id.* According to Judge Padova, this finding that baseball is engaged in interstate commerce: (1) overturned the finding in *Federal Baseball* that the business of baseball is not interstate commerce; (2) limited the holding of *Federal Baseball* to result *stare decisis*—to its result, not its rule; and (3) implied that the actual business of baseball could, therefore, be subject to federal antitrust laws. Judge Padova also concluded that because *Toolson* undermined the rule of *Federal Baseball* by finding that baseball is engaged in interstate commerce, the reasoning of *Federal Baseball* is no longer valid and the case is only precedential for its disposition. *Id.*

once the *Flood* Court limited the holding of *Federal Baseball* to its disposition, the Court went ahead and justified the very same result, thus limiting the baseball antitrust exemption to baseball's reserve clause. According to Judge Padova, the *Flood* Court refused to overturn the result of *Federal Baseball* because the *Flood* Court found that Congress had refrained from legislating the baseball exemption and had decided the elimination of the exemption was best left to Congress.⁵⁰ This refusal to negate the result of *Federal Baseball* reaffirmed the existence of a baseball exemption—one, however, limited to the reserve clause.⁵¹

Finally, Judge Padova refused to follow the Seventh Circuit's decision in *Finley v. Kuhn*.⁵² In *Finley*, the plaintiff argued on appeal that the exemption only applies to the reserve system of MLB, but the *Finley* court held that *Flood* continued to extend the antitrust exemption to the entire business of baseball rather than merely to the reserve clause.⁵³ The *Piazza* court disagreed with the *Finley* court's interpretation of *Flood*, in that *Finley* took a much broader view of *Flood*'s actual holding. Judge Padova believed *Finley* was bad law⁵⁴ and therefore of no precedential value. According to the *Piazza* court's reading, *Flood* limits baseball's antitrust exemption to the reserve system and all lower courts must follow *Flood*'s ruling.

Following the reasoning of *Piazza*, baseball's antitrust exemption

⁵⁰ *Id.* (citing *Flood*, 407 U.S. at 283-84).

⁵¹ *Id.* at 435-36. Judge Padova found two additional affirmations of his reading of *Flood*'s new limitation. The first is the *Flood* Court's reaffirmation of a prior statement of the Court that "*Toolson* was a narrow application of the doctrine of *Stare Decisis*." *Id.* at 435 (citing *Flood*, 407 U.S. at 276) (quoting *United States v. Shubert*, 348 U.S. 222, 228-30 (1955)). Judge Padova's second affirmation is the first sentence of the *Flood* opinion, "For the third time in 50 years the Court is asked specifically to rule that professional baseball's reserve system is within the reach of the federal antitrust laws," which Judge Padova said characterizes the *Federal Baseball*, *Toolson*, and *Flood* decisions as limiting the exemption to the reserve clause. *Id.* (citing *Flood*, 407 U.S. at 259).

⁵² *Charles O. Finley v. Kuhn*, 569 F.2d 527 (7th Cir.), *cert. denied*, 439 U.S. 876 (1978).

⁵³ *Id.* at 541.

⁵⁴ Judge Padova said that the Seventh Circuit failed to note the extent to which the *Flood* decision turned on the reserve clause and that the application of *stare decisis* allows no other way to read *Flood* than as limiting the precedential value of *Federal Baseball* and *Toolson* to the precise facts there involved. *Piazza*, 831 F. Supp. at 436.

could be limited to only the major league reserve clause. Judge Padova's reading of *Flood* limits the exemption to the facts of *Federal Baseball*, *Toolson* and *Flood*. Two of the three cases were brought by and referred to only major league players or owners. Former major league owners sued in *Federal Baseball* and a major league player brought *Flood*. And while the third, *Toolson*, was brought by a blacklisted minor league player, the Court referred only to "professional" baseball.⁵⁵ More significantly, according to Judge Padova, *Flood*'s definition of the reserve system specifically delineates the major leagues.⁵⁶

However, even if *Piazza* restricts the baseball antitrust exemption only to the reserve clause of baseball as a whole, the decision removes one more chink from the exemption's armor. In addition to its narrowing by Judge Padova, the baseball antitrust exemption is also under attack by Congress.⁵⁷ It is not unlikely that in the near future a member of the judiciary or Congress will further limit the baseball antitrust exemption so that it only applies to the major league system.

Congress renewed its assault on the exemption in 1993⁵⁸ and has increased efforts to restrict or repeal the exemption since the commencement of the 1994 baseball strike (the "Strike").⁵⁹ The first piece of recent legislation was introduced by Senator Howard

⁵⁵ *Toolson*, 345 U.S. at 356-57.

⁵⁶ *Piazza*, 831 F. Supp. at 434 (citing *Flood*, 407 U.S. at 259).

⁵⁷ See *supra* notes 3-4.

⁵⁸ While declining to overturn the baseball antitrust exemption, the Supreme Court in *Flood* said, "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." *Flood*, 407 U.S. at 282. Since 1972 various legislation has been introduced to reduce or completely remove baseball's exemption, without success. However, since 1993 a series of bills affecting the antitrust exemption have been introduced in both the House and the Senate for the first time.

⁵⁹ On August 12, 1994, the major league players began their eighth work stoppage since 1972 due to the termination of the major league baseball collective bargaining agreement and the players' and owners' inability to negotiate a new labor agreement. "[E]very time a collective bargaining agreement is over, there is either a lockout or a strike. It is virtually automatic." *Baseball's Antitrust Exemption: Hearings Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. 153 (1993) (testimony of James W. Quinn). On September 12, 1994, acting Commissioner Bud Selig canceled the remainder of the 1994 season, including the World Series.

Metzenbaum on March 4, 1993.⁶⁰ In addition to providing that professional baseball teams and leagues composed of such teams would be subject to antitrust laws, the bill was written, in part, to rectify the restrictive situation forced on minor league players.⁶¹ Although it was defeated by committee vote,⁶² a similar bill was introduced that same year in the House.⁶³ The combination of the defeat of his 1993 Senate bill and the threat of a baseball strike motivated Senator Metzenbaum to co-sponsor another bill restricting the baseball antitrust exemption. On August 11, 1994 Senator Metzenbaum introduced *The Baseball Fans Protection Act of 1994*, which, while not repealing the antitrust exemption, would allow the antitrust laws “to be invoked if the owners impose a salary cap or any other terms and conditions on the players.”⁶⁴ Another Senate bill limiting the baseball antitrust exemption was introduced on August 17, 1994.⁶⁵ While not designed to directly repeal the exemption, this bill’s establishment of a National

⁶⁰ S. 500, 103d Cong., 1st Sess. (1993). The bill was cosponsored by Senators Mack, Graham, Leahy, Warner, Wellstone, Bingaman, Robb, Lott, and Kerrey. 139 CONG. REC. S2416 (daily ed. Mar. 4, 1993).

⁶¹ *The Professional Baseball Antitrust Reform Act of 1993* was written to specifically “reverse the result of the decisions of the Supreme Court of the United States in *Federal Baseball v. National League*, *Toolson v. New York Yankees*, and *Flood v. Kuhn*” and to apply the antitrust laws to the business of professional baseball, and to eliminate the “severe restrictions on player mobility imposed on minor leaguers.” 139 CONG. REC. S2418-19 (daily ed. Mar. 4, 1993) (text of S. 500 and Questions and Answers Regarding Major League Baseball’s Antitrust Exemption).

⁶² The bill died in the Senate Judiciary Committee in June 1993 when it received only two votes. Thomas S. Mulligan, *Baseball Antitrust Loophole May Strike Out*, L.A. TIMES, Sept. 22, 1994, at D1.

⁶³ H.R. 108 was introduced by Congressmen Bilirakis, Bunning, and McCollum on January 6, 1993. 139 CONG. REC. H103 (daily ed. Jan. 6, 1993). In a hearing on the antitrust exemption before the House Committee on the Judiciary, Donald Fehr, General Counsel of the MLBPA, Professor Steven S. Ross, a specialist on sports economics, and James W. Quinn, a lawyer specializing in sports labor and antitrust issues, argued that the baseball antitrust exemption should be repealed. *Baseball’s Antitrust Exemption: Hearings Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. 118-91 (1993).

⁶⁴ Once the owners and players resolved differences and sign a new agreement the bill would expire. 140 CONG. REC. S11,342 (daily ed. Aug. 11, 1994) (statement of Sen. Metzenbaum). The bill was “killed” in committee in early September 1994, but as of September 15, 1994, Senator Metzenbaum was hoping to use a floor amendment to keep the bill alive in the Senate. Mulligan, *supra* note 62, at D1.

⁶⁵ 140 CONG. REC. S11,994-96 (daily ed. Aug. 17, 1994).

Commission on Major League Baseball could affect the exemption through the bill's requirement that the Commission study the need for the exemption and the effects of its repeal.⁶⁶ A new House bill, *The Baseball Fans and Communities Protection Act* was introduced on August 18, 1994 to apply federal antitrust laws to major league baseball.⁶⁷ While Senator Metzenbaum withdrew his floor amendment to try to keep alive *The Baseball Fans Protection Act* on September 30, 1994, Senator Moynihan announced that when the new Congress convened in January of 1995 he would introduce legislation to repeal baseball's antitrust exemption.⁶⁸ Thus, even if the logic of the *Piazza* decision limits the baseball antitrust exemption to the reserve clause of professional baseball, it is likely that in light of the recent introduction of numerous bills which seek to narrow or repeal the exemption, the baseball antitrust exemption will soon be further limited to apply only to MLB.

If the exemption is limited to the reserve clause of major league baseball, *i.e.*, to the reserving of major league players and the additional major league rules which govern this, the exemption would not extend to the day to day operations—and the governing rules—of the minor leagues. It can be argued, however, that baseball's reserve system is an integrated whole and the exemption would have to apply to both major and minor league players because major league teams call up minor leaguers to play in the majors and major leaguer players are sent down to the minors. It can be argued that this is what the *Flood* Court meant when it defined the reserve system as the reserve

⁶⁶ The *National Commission on Major League Baseball Act of 1994*, introduced by Senator DeConcini, would establish a five-person commission with oversight and regulatory control over baseball, including the ability to impose binding arbitration in the event of a labor impasse. The commission would be comprised of five members appointed by the President of the United States: three "fans," one member of the Major League Baseball Players Association, and one representative of the owners of Major League Baseball. 140 CONG. REC. S11,994-96 (daily ed. Aug. 17, 1994).

⁶⁷ 140 CONG. REC. E1764 (daily ed. Aug. 18, 1994). The bill, sponsored by Representative Mike Synar of Oklahoma, began subcommittee hearings on September 22, 1994. Mulligan, *supra* note 62, at D1.

⁶⁸ Tom Diemen, *Metzenbaum Drops Bid to Intervene in Baseball*, CLEVELAND PLAIN DEALER, Sept. 30 1994, at 5A; Mark Maske, *Congress to Enter Baseball Dispute*, WASHINGTON POST, Dec. 24, 1994 at F1.

clause and all Major League rules affecting the clause by tying a player to the club that has him under contract.⁶⁹

However, under the assumption that the antitrust exemption only applies to the reserve clause of major league baseball, minor league baseball would not be protected from federal antitrust laws. In this scenario, the Draft and the Minor League Restraints can be found to be illegal restraints of trade.

IV. MINOR LEAGUE RESTRAINTS AND THE NON-STATUTORY LABOR EXEMPTION

A. *The Non-Statutory Labor Exemption*

Even if the baseball antitrust exemption does not protect the Draft or the Minor League Restraints from antitrust scrutiny, baseball might seek antitrust immunity for them under the non-statutory labor exemption. The Clayton Act in section 5 and section 20⁷⁰ and the Norris LaGuardia Act⁷¹ exempt certain union activities, such as secondary picketing and group boycotts, as well as “legitimate labor activities unilaterally undertaken by a union in furtherance of its own interests” from antitrust laws in order to encourage “legitimate collective activity” by employee unions.⁷² To supplement the statutory exemptions, the Supreme Court has created a “limited non-statutory exemption” to cover certain union-employer agreements in order to further the congressional policy favoring collective bargaining.⁷³ The Eighth Circuit in *Mackey v. National Football*

⁶⁹ *Flood*, 407 U.S. at 259.

⁷⁰ 15 U.S.C. § 17 (1994); 29 U.S.C. § 52 (1994).

⁷¹ 29 U.S.C. §§ 104, 105, 113 (1994).

⁷² *Mackey v. National Football League*, 543 F.2d 606, 611 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977).

⁷³ *Id.* at 611-12.

League “devised”⁷⁴ a three-part test to determine whether a professional sports league’s policies restraining trade can attain immunity from antitrust laws: (1) The restraint of trade must primarily affect only the parties to the collective bargaining relationship; (2) The agreement sought to be exempted must be a mandatory subject of collective bargaining; and (3) The agreement sought to be exempted must be the product of bona fide arm’s-length bargaining.⁷⁵ According to the *Mackey* court, if a restraint satisfies all three prongs of the test it can be found exempt from federal antitrust statutes.

B. *The Non-Statutory Labor Exemption Does Not Apply to Minor League Restraints*

1. Does Not Primarily Affect Parties to the Collective Bargaining Agreement

The Draft and the Minor League Restraints may not enjoy non-statutory protection from antitrust laws because neither appears to satisfy the first prong of the *Mackey* test. Minor league players are not parties to the collective bargaining relationship despite the possibility of characterizing draftees and minor leaguers as “potential” players.

MLB could try to argue that drafted players as well as minor league players are parties to any collective bargaining because *Wood v. National Basketball Association*⁷⁶ and its progeny held that

⁷⁴ The *Mackey* court articulated a test applying to the sports context policies the Supreme Court found should be emphasized when analyzing whether to extend non-statutory labor protection to labor agreements. See *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., Inc.*, 381 U.S. 676 (1965); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965).

⁷⁵ *Mackey*, 543 F.2d at 614. For a labor provision to be a product of bona fide arm’s-length bargaining, the *Mackey* court required the provision to be legitimately bargained for during negotiations between management and the union. Factors the court looked at included whether or not the provision was unilaterally instituted by management, whether the provision is beneficial to the union and its members, and the relative strength of the union. *Id.* at 615.

⁷⁶ 809 F.2d 954 (2d Cir. 1987).

potential future players are represented by the exclusive bargaining agent of current players and therefore are parties to the bargaining relationship and bound by the terms of any collective bargaining agreement (“CBA”). Wood was a player unhappy with the National Basketball Association (“NBA”) draft, salary cap, and prohibition of player corporations. The court dismissed Wood’s antitrust claims, holding that the non-statutory exemption protected the NBA restraints and that a drafted NBA player was subject to the NBA’s CBA. The *Wood* court compared Wood’s status to that of any new employee in an industry with a collective bargaining agreement.⁷⁷ Because the *Wood* court found that the player restrictions were collectively bargained for and were mandatory subjects of bargaining, the restraints satisfied the *Mackey* test.⁷⁸

Similarly, in *Zimmerman v. National Football League*,⁷⁹ the court dismissed with prejudice the antitrust suit of a former United States Football League (“USFL”) player who was drafted in the National Football League’s (“NFL”) supplemental draft. The court found that the supplemental draft had been bargained for between the NFL and the player’s association (“NFLPA”). The *Zimmerman* court emphasized that the union represents all potential players, and quoted the district court from *Wood* for the proposition that, “[a]t the time an agreement is signed between the owners and the players’ exclusive bargaining representative, all players within the bargaining unit and those who enter the bargaining unit are bound by its terms.”⁸⁰

One court found that potential players were not bound by the league’s CBA. *Brown v. National Football League* held that the non-statutory exemption did not apply to the new NFL rule which fixed the

⁷⁷ Judge Winter found that while the level of specialization and talent combined with press exposure make professional athletes more visible than other workers, they are subject to the same labor laws. He then emphasized that it is common for CBA’s to “set standard wages for employees with differing responsibilities,” provide for certain workers to be hired at specified wages, disadvantage new members of the union, and regulate competition. *Id.* at 959-60.

⁷⁸ *Id.* at 960-62.

⁷⁹ 632 F. Supp. 398 (D.D.C. 1986).

⁸⁰ *Id.* at 405 (quoting *Wood v. National Basketball Ass’n*, 602 F. Supp. 525, 529 (S.D.N.Y. 1984), *aff’d*, 809 F.2d 954 (2d. Cir. 1987)).

salaries of developmental squad players.⁸¹ However, the reason it did not apply was that the NFL CBA had expired.⁸² The court emphasized that Brown and other developmental squad players were subject to any valid CBA and any bona fide bargains between the league and the NFLPA because the plaintiffs again were potential players.⁸³

MLB could argue that drafted and minor league players are similar to the not-yet professional athletes in *Wood*, *Zimmerman*, and *Brown* and therefore are subject to the MLB CBA and any valid player restraints found by a court to be collectively bargained. MLB can also point out that the broad language in *Brown* and especially in *Zimmerman* suggests that all potential members of a unionized sports league are subject to any bona fide arm's-length agreements. Therefore any collectively bargained baseball restraint should apply to all potential major leaguers, including those stranded in the minor leagues. However, the situation of minor league and drafted baseball players is distinguishable from that of potential NBA and NFL players, so much so, that the *Wood* line of cases should not be of precedential value. Minor league and drafted baseball players thus should not be found to be parties to the bargaining relationship and would not satisfy the first prong of the *Mackey* test.

There are three main differences between minor league baseball players and potential NBA and NFL players. First, drafted football and basketball players sign contracts and play with the "major league" clubs immediately after signing, but baseball players usually do not play for a major league team for years, if at all. Almost every drafted player who signs a professional baseball contract competes in the minors before ever playing for the "big league" squad.⁸⁴ The average major league player spends three years in the minors before he is called up, and only one of ten minor league players ever makes

⁸¹ 782 F. Supp 125, 131 (D.D.C. 1991).

⁸² *Id.*

⁸³ *Id.* at 129.

⁸⁴ The last drafted player to play directly for the major leagues and skip the minor leagues entirely was John Olerud, drafted in 1989. However, Darren Dreifort, drafted in 1993 by the Los Angeles Dodgers, started his first professional baseball season in the major leagues in 1994, but was sent down to a minor league affiliate before the All-Star Game.

it to the majors.⁸⁵ Second, the player unions in both the NBA and NFL “represent”⁸⁶ all drafted players, but the Major League Baseball Players Association (“MLBPA”) does not represent drafted players until they actually play in the major leagues. Ninety percent of minor leaguers never play in the major leagues; the ten percent who do can wallow in the minors for years before they make the major leagues and attain representation. Third, the situation of minor league players is completely distinguishable from that of the athletes in *Zimmerman*. Zimmerman would have been impacted by the NFL’s supplemental draft only if he decided to leave the USFL and had attempted to negotiate with any NFL teams. Only then would he have been restricted to negotiating with the team that drafted him. Thus, a minor league player’s antitrust claims would be analogous to Zimmerman’s only if the NFL and the union had reached an agreement as to what USFL salaries should be, as MLB and the MLBPA have done with professional baseball salaries.

Accordingly, the situation of drafted and minor league baseball players likely does not satisfy *Mackey*’s first prong. *Mackey* held that Congress’ intent to favor the labor policy of collective bargaining “may potentially be given preeminence over federal antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship.”⁸⁷ A large number of professional baseball players are affected by the restraints imposed by MLB. However, the restraints affecting minor league players are not incorporated into the CBA. Thus, MLB cannot demonstrate that the restraints incorporated into the baseball CBA or other bargained-for restraints primarily affect parties to the collective bargaining relationship because the restraints contained in the baseball CBA only indirectly affect minor league players and not for a number of years. Therefore the Draft and the Minor League Restraints should not satisfy

⁸⁵ ZIMBALIST, *supra* note 15, at 106.

⁸⁶ The NBA and NFL players associations do not technically represent players until they becomes employees. They assist drafted players. The rules in the NBA and NFL CBA’s have a much more immediate impact on football and basketball players than the rules in the MLB CBA have on drafted baseball players.

⁸⁷ *Mackey*, 543 F.2d at 614 (citing *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., Inc.*, 381 U.S. 676 (1965)).

the first prong of the *Mackey* test.

2. Not a Mandatory Subject of Bargaining

The Draft and the Minor League Restraints are not exempt from antitrust laws under the non-statutory labor exemption because the restraints are not mandatory subjects of bargaining and thus do not satisfy prong two of the *Mackey* test.

Under section 8(d) of the National Labor Relations Act,⁸⁸ mandatory subjects of bargaining are collective bargaining topics that pertain to “wages, hours, and other terms and conditions of employment.”⁸⁹ MLB could argue that the restraints pertain to wages, hours, or other terms of employment because *Wood* held that the NBA draft is a mandatory subject. Thus, since the Draft is similar in purpose and operation to that of the NBA, in that both drafts aim to supply their respective leagues with new talent by giving teams a set number of “selections,” the Minor League Restraints could also be mandatory subjects. If undrafted and minor league players are somehow found to be parties to collective bargaining, then, indeed, their interests are affected by bona fide agreements and *Wood* would apply and satisfy the second prong.

However, if potential draftees and minor league players cannot be found to be parties to the collective bargaining agreement, as I have argued above, then it is likely that neither the Draft nor the Minor League Restraints can be found mandatory subjects of bargaining because potential major league players are not parties to the bargaining agreement. In addition, MLB has argued “vigorously” that the Draft is not a mandatory subject of bargaining in the arbitration proceedings under the CBA,⁹⁰ so to plead the opposite now would be a complete reversal in position. Therefore, the Draft and the Minor League Restraints probably cannot be shown to be mandatory subjects of

⁸⁸ 29 U.S.C. § 158(d) (1994).

⁸⁹ *Mackey*, 543 F.2d at 615. See also *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).

⁹⁰ *Arbitration Decision*, *supra* note 10.

bargaining and would likely fail prong two of the *Mackey* test.

3. Not a Bona Fide Arm's-Length Agreement

Even if a court somehow finds that the Draft and the Minor League Restraints satisfy the first two prongs of the *Mackey* test, the player restraints are not exempt under the non-statutory labor exemption because they likely do not satisfy the third and final prong of the test. Despite the existence of the Arbitration Decision, the restraints are not the result of a bona fide arm's-length agreement.⁹¹

In arbitration proceedings under the CBA in 1991, baseball's outside arbitration panel (the "Panel"), held that draft picks and free agent compensation are linked and any rule changes affecting the "value" of draft picks must be bargained for,⁹² thus providing a tenuous connection between undrafted players and the MLB CBA. If any connection could be found between undrafted players and the CBA, any non-statutory exemption would also apply to the undrafted players. Thus, if any exemption applied to the undrafted players, the draft would also be exempt from the Sherman Act.

In 1991 MLB unilaterally amended M.L. Rules 3 and 4 to allow major league clubs to retain exclusive bargaining rights over drafted college-bound high school players for five years rather than the existing one, and non-college bound players for two years.⁹³ The MLBPA challenged the amendments as violating Article XVIII of the MLB-MLBPA CBA. The union claimed the amendments unilaterally altered a rule which affects an existing player benefit or imposes a new obligation on players without negotiating the change. The MLBPA won the ensuing arbitration hearing.

The MLBPA argued that the amendments altered the value of the bargain the two sides struck during the 1990 collective bargaining negotiations regarding Article XX—club compensation for free agent

⁹¹ See *supra* note 74.

⁹² *Arbitration Decision*, *supra* note 10, at 15-17.

⁹³ *Id.* at 3.

signings.⁹⁴ The negotiations resulted in the requirement that a signing club give the team losing a player either a first or a second round draft pick when it signs a free agent ranked in the top fifty percent at his position.⁹⁵ MLB, on the other hand, contended that the amendments were valid because Rule 4 had nothing to do with the CBA since: (1) The Draft is not governed by the CBA; and (2) Rule 4 applies strictly to minor leaguers and undrafted players who are not and could not, by law, be members of the bargaining unit.⁹⁶

The Panel held that the amendments were not valid rule changes because they were not bargained for between management and the MLBPA. The Panel found that the amendments made “elemental and profound” modifications to Rules 3 and 4 because they altered the economic bargain made by MLB and the player’s union by significantly detracting from the signing power of drafted college-bound players, thus increasing the “value” of a college-bound draftee.⁹⁷ Alterations affecting the value of draftees must be bargained for, the Panel held, because while for the most part Rules 3 and 4 govern individuals who are not members of the bargaining unit, Article XX provides a connection between the bargained-for agreement and draft picks. The Panel reasoned that free agents might become less attractive under the new rules because clubs might become more reticent to give up the now more valuable draft picks if the free agent signing required the club to give draft choice compensation to the former team. Since the free agent draft choice linkage is embodied in the CBA and free agents are members of the bargaining unit, the Panel found that Rules 3 and 4 can be said to affect parties to the bargaining unit.⁹⁸

Thus, on the basis of the Arbitration Decision, MLB can argue that

⁹⁴ *Id.* at 5-6.

⁹⁵ *Id.*

⁹⁶ *Id.* at 6-7.

⁹⁷ *Id.* at 13-15. Because a drafting team would have control over a drafted player for a longer period of time, the player would have less signing power and, in turn, less leverage. Thus, the drafted player would be more valuable to the drafting team, which could potentially scare teams away from signing free agents because of a desire to retain the “valuable” draft picks.

⁹⁸ *Id.* at 15.

the Draft is bargained-for. Since the Arbitration Decision holds that the parties must bargain for changes to the Draft which affect the value of draft picks, MLB can maintain that the Draft is bargained-for to satisfy the third prong of the *Mackey* test and the non-statutory labor exemption.

However, despite the Arbitration Decision and the tenuous link to undrafted players, neither the Draft nor the Minor League Restraints can likely meet the *Mackey* requirement of a bona fide arm's-length agreement and would thus fail the third prong. The Arbitration Decision holds that there is a link between parties to the agreement (free agents) and parties not in the bargaining unit (draft picks). Thus, MLB could argue that the Draft is impliedly embodied in the CBA, as the NFL argued that the Rozelle Rule was embodied in the NFL CBA through cross reference. However, the Draft is still not a bona fide arm's-length agreement. Both the Draft and the Minor League Restraints were unilaterally imposed on professional baseball players by MLB—there was no quid pro quo. The major league clubs stated at the arbitration hearing that they unilaterally instituted the Draft⁹⁹—*i.e.*, there were no good faith negotiations for the Draft. The Minor League Restraints are embodied in the P.B. Rules, which are also unilaterally imposed by MLB. The *Mackey* court found that while the Rozelle Rule was impliedly embodied in the NFL CBA, the players association did not get anything in return through negotiations for the rule, and the rule therefore failed to meet the criteria of a bona fide arm's-length agreement. By analogy, therefore, even though the Draft could be found to be impliedly embodied in the baseball CBA, since management insisted that it unilaterally instituted the Draft the players' union did not get anything in return, and the Draft would fail to satisfy the third prong of the *Mackey* test. Thus, under the *Mackey* line of reasoning, neither the Draft nor the Baseball Restraints can be found to be bona fide arm's-length agreements.

MLB could still try to prove that the restraints satisfy the third prong of the test by analogizing the baseball situation to that of *McCourt v. California Sports*.¹⁰⁰ In *McCourt*, the Sixth Circuit

⁹⁹ *Id.* at 6.

¹⁰⁰ 600 F.2d 1193 (6th Cir. 1979).

overturned the district court decision and found that the National Hockey League's ("NHL") reserve system had been "bargained for" despite the fact that the NHL Players Association had adamantly opposed the provision. The court found that the mere presence of a subject later incorporated into the CBA as a topic during negotiations satisfied the bona fide arm's-length requirement and the *Mackey* test.¹⁰¹ By analogy, if the MLBPA raised the Draft as a topic during the 1990 negotiations and the owners refused to negotiate the issue, MLB could argue that since the union merely introduced the subject the Draft is a bona-fide agreement under *McCourt*.

However, the situation here is more closely analogous to *Mackey* itself because the owners unilaterally instituted a rule which had not been altered through negotiations. The *Mackey* court found that the Rozelle Rule did not satisfy the third prong because the rule had been unilaterally imposed by the NFL and had not been substantially altered through negotiations since its original imposition.¹⁰² Similarly, in baseball the owners unilaterally imposed the Draft and the P.B. Rules and neither has been substantially modified through collective bargaining. In addition, the restraints cannot be arm's-length negotiations even under *McCourt* if MLB's position that the Draft has "never been a subject of bargaining between the parties"¹⁰³ is true. Therefore, neither the Draft nor the Minor League Restraints are the subject of bona fide arm's-length agreements and thus fail to meet the third-prong of the *Mackey* test.

In sum, because they do not satisfy the *Mackey* criteria, the Draft

¹⁰¹ *Id.* at 1202-03. In *McCourt*, a hockey player who was awarded as an "equalization payment" when his team signed a free agent claimed that the hockey reserve system, including the right of a team to get cash or player compensation for losing a free agent, was an illegal restraint of trade under the Sherman Act. *Id.* The district court held the rule was an illegal restraint after finding the by-law was not a result of a bona fide agreement and thus failed the third prong of the *Mackey* test. *McCourt*, 460 F. Supp. 904, 911-12 (E.D. Mich 1978). However, the Sixth Circuit reversed, finding that the by-law was, indeed, a product of a bona fide arm's-length agreement because the NHL's reserve system was a topic of bargaining during negotiations for the 1970 CBA even though the results of the bargaining on this subject were not favorable to the players. *McCourt*, 600 F.2d at 1203.

¹⁰² *Mackey*, 543 F.2d at 615.

¹⁰³ *Arbitration Decision*, *supra* note 10, at 6; *see also supra* note 89 and accompanying text.

and the Minor League Restraints would probably not be found exempt from the federal antitrust laws through the non-statutory labor exemption. Moreover, if the Draft and the Minor League Restraints are not exempt from antitrust laws through either the baseball exemption or the non-statutory labor exemption then they can likely be found to be illegal restraints of trade under section 1 of the Sherman Act.

V. ILLEGAL RESTRAINTS OF TRADE UNDER SECTION 1 OF THE SHERMAN ACT

This section asserts that both the Draft and the Minor League Restraints can be found violative of section 1 of the Sherman Act as illegal restraints of trade in the “market” for player services¹⁰⁴ under the rule of reason¹⁰⁵ analysis.

A. *Rule of Reason Applied to Sports Cases*

1. The Standard

Section 1 of the Sherman Act declares that “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States” is illegal.¹⁰⁶ The *Mackey* court found that section 1 applies to restraints within a market for professional athletes’

¹⁰⁴ In all antitrust cases, sports or otherwise, the plaintiff must first allege in which market the complained-of policy or action limits free trade. In sports Sherman section 1 cases, the Supreme Court has found that the correct market is the market for the professional athletes’ services in the appropriate type of sport (*i.e.*, football, basketball, hockey).

¹⁰⁵ If a restraint of trade is not a *per se* violation of section 1 of the Sherman Act, *i.e.* if the restraint is not a blatant concerted refusal to deal, a court must apply the rule of reason analysis to the practice in question. In *Board of Trade of Chicago v. United States*, 246 U.S. 231 (1918), the Court articulated the test for rule of reason analysis as: whether the restraint imposed is justified by legitimate business purposes, and is no more restrictive than necessary.

¹⁰⁶ 15 U.S.C. § 1 (1994).

services.¹⁰⁷ However, *Mackey* also declared that once a court finds a restraint of trade in this market to be subject to antitrust laws, it should apply the rule of reason analysis¹⁰⁸ to determine if the sports league has violated the Sherman Act because the restraint cannot be a *per se* violation.¹⁰⁹ Even though the Supreme Court has held that group boycotts and concerted refusals to deal are so pernicious that they can be classified as *per se* violations, *Mackey* found that since teams within sports leagues are not competitors in the traditional sense, a court must look into the justifications behind the restraint to decide whether the restraint is illegal.¹¹⁰

The *Mackey* court articulated the rule of reason test to analyze whether restraints in a market for player services should be found unreasonable under the Sherman Act. The test balancing the evils against the virtues of anticompetitive restraints was then more clearly articulated in *Smith v. Pro-Football, Inc.*¹¹¹ as a three-part analysis. *Smith* found that a court should first analyze whether a restraint is significantly anticompetitive in purpose or effect and in doing so should look to facts peculiar to the business, the history of the restraint, and the reasons why the restraint was imposed.¹¹² Second, if a court finds a restraint is significantly anticompetitive in purpose or effect, it should next analyze whether the restraint has legitimate

¹⁰⁷ *Mackey*, 543 F.2d at 618.

¹⁰⁸ *Id.* at 619.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* This assumes that the courts will continue to find sports leagues competitors in at least some aspects of their business operations. The Supreme Court has never ruled on whether sports leagues should be treated as single entities and therefore acquire immunity from the Sherman Act. The Chief Justice of the Supreme Court has expressed some sympathy to this theory in a denial of certiorari. See *National Football League v. North American Soccer League*, 459 U.S. 1074 (1982) (Rehnquist, J., dissenting from denial of certiorari). Moreover, although every court to address the issue has found that player services is a relevant market, this does not necessarily square with the Supreme Court's recent reliance on a challenged antitrust restraint's impact on *consumer welfare*. Arguably a player restraint keeps ticket prices down, so it may be found to benefit consumers. No court has bought this argument. However, the Supreme Court has not yet heard the argument, so it is still a viable consideration.

¹¹¹ 593 F.2d 1173 (D.C. Cir. 1978).

¹¹² *Id.* at 1183.

business purposes whose realization serves to promote competition.¹¹³ Finally, a court should balance the anticompetitive evils against the restraint's procompetitive virtues. *Smith* found that a restraint should be held unreasonable if it has a "net effect" of substantially impeding competition."¹¹⁴

The most recent application of the rule of reason test in the sports context can be found in the jury instructions in *McNeil v. National Football League*.¹¹⁵ The court laid out the test in the following way:

(1) What the relevant market is in which the restraint should be analyzed;¹¹⁶

(2) Whether the restraint has a substantially harmful effect on competition in the relevant market; *if so*

(3) Whether restraint significantly furthers a procompetitive interest;

If not, the restraint is unreasonable.

If it does, then

(4) Is the restraint the least restrictive means of accomplishing the procompetitive interest?¹¹⁷

Because *McNeil* is the most recent case applying the rule of reason test in the sports league context, I will use the *McNeil* test in analyzing whether the baseball restraints are unreasonable restraints of trade.

¹¹³ *Id.*

¹¹⁴ *Id.* (citing L.A. SULLIVAN, ANTITRUST 187-88 (1977)).

¹¹⁵ Jury Instructions for *McNeil v. National Football League*, 1992-2 Trade Cas. (CCH) ¶ 69,982 (D. Minn. May 1993).

¹¹⁶ Although this was not an actual written element of the jury instructions, it is the first question in all Sherman antitrust cases.

¹¹⁷ The final prong of the instruction was "Did the Plaintiff suffer an antitrust injury?" which is a part of any antitrust case.

2. A Historical Look at the Relevant Cases

Since the early 1970's a number of federal courts across the country have held restraints in markets for player services to be unreasonable restraints of trade. *Denver Rockets v. All-Pro Management, Inc.*¹¹⁸ was the first case to find a player restraint anticompetitive under section 1 of the Sherman Act. *Denver Rockets* held that the NBA's rule prohibiting teams from signing players until four years after the player's high school class had graduated (the "NBA Rule") violated section 1. The *Denver Rockets* court and a number of other early courts applied the *per se* rule¹¹⁹ to find various player restraints violative of antitrust laws.¹²⁰ However, following *Mackey*, courts have decided that the rule of reason¹²¹ analysis is more appropriate in the sports context because teams within leagues are not competitors in the traditional sense. *Denver Rockets* found that the NBA Rule was a group boycott and an illegal primary concerted refusal to deal¹²² and therefore violated section 1 of the Sherman Act as a *per se* illegal restraint of trade.¹²³

In 1975, the *Mackey* court found the NFL's Rozelle Rule, which required any NFL club signing a free agent to compensate the former team with a suitable player, to be an unreasonable restraint under the Sherman Act's section 1.¹²⁴ After determining the relevant market to be the market for player services, the court found the rule was

¹¹⁸ 325 F. Supp. 1049 (C.D. Cal. 1971).

¹¹⁹ Under a *per se* analysis, a court looks to see whether antitrust violations are so consistently unreasonable that they could be deemed illegal *per se*, without an inquiry into the restraints' purported justifications.

¹²⁰ See *Robertson v. National Basketball Ass'n*, 622 F.2d 34 (2d Cir. 1988). In *Robertson*, the court denied the NBA's motion for summary judgment in finding that the NBA draft, the NBA reserve system, the NBA uniform contract, and NBA boycotts and blacklists could all be held to be *per se* illegal restraints of trade. See also *Mackey v. National Football League*, 407 F. Supp. 1000 (D. Minn. 1976); *Smith v. Pro-Football*, 420 F. Supp. 738 (D.D.C. 1976).

¹²¹ Under a rule of reason analysis the judge or jury looks at all the circumstances before deciding whether a restriction should be found to violate the antitrust laws.

¹²² *Denver Rockets*, 325 F. Supp. at 1261.

¹²³ *Id.*

¹²⁴ *Mackey*, 543 F.2d at 622.

unreasonable for four reasons: (1) the rule significantly impeded NFL teams from signing free agents; (2) the rule acted as a substantial deterrent to players becoming free agents; (3) the rule greatly decreased players' bargaining power in contract negotiations; and (4) the rule denied players the right to sell their services in a free market, which lowered salaries and diminished movement of players between clubs.¹²⁵

Continuing with the balancing test, the *Mackey* court then found that the Rozelle Rule had only one legitimate business purpose which promoted competition—maintaining competitive balance.¹²⁶ The NFL claimed the need to protect teams' investment in player development costs and the need for player continuity were procompetitive purposes which outweighed the Rule's restraints.¹²⁷ The *Mackey* court rejected both of these arguments outright. The court did find that maintaining competitive balance was a "strong and unique interest,"¹²⁸ but held that the Rozelle Rule was "significantly more restrictive than necessary" since it was unlimited in duration and had no procedural safeguards.¹²⁹ Since it found the procompetitive virtue of maintaining competitive balance was outweighed by the Rule's anticompetitive effects, the *Mackey* court held that the Rozelle Rule unreasonably restrained trade in violation of the Sherman Act section 1.¹³⁰

Two years after *Mackey*, the Court of Appeals for the District of Columbia held that the 1968 version of the NFL draft was an unreasonable restraint of trade in *Smith*.¹³¹ The *Smith* court reformulated the *Mackey* rule of reason test for a restraint of trade in the market for player services into a distinct three-part test.¹³² The

¹²⁵ *Id.* at 620.

¹²⁶ *Id.* at 620-21.

¹²⁷ *Id.*

¹²⁸ *Id.* at 621.

¹²⁹ *Id.* at 622.

¹³⁰ *Id.*

¹³¹ 593 F.2d 1173, 1187.

¹³² See *supra* notes 111-14 and accompanying text. *North American Soccer League v. National Football League*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982), used *Smith's* formulation of the balancing test to find a sports league restraint unreasonable, in this case a cross-ownership ban.

court then found the NFL's sixteen round draft, which prohibited teams from negotiating with any eligible players before the draft and from negotiating with or signing any players drafted by any other team, a violation of section 1 of the Sherman Act.¹³³

In *Smith* the court again initially determined the relevant market to be that for player services.¹³⁴ The court next found the draft anticompetitive in that it: (1) restricted the movement of players; (2) forced players to deal with one, and only one team; (3) robbed the seller of any real bargaining power; and (4) kept salaries under market-level.¹³⁵ Third, the *Smith* court determined that the NFL asserted no relevant procompetitive virtues of the draft. The court was not persuaded that any of the NFL's arguments promoted competition in the market for players' services, finding that the draft did not maintain a competitive balance on the field and did not maintain economic competition between teams.¹³⁶ Since the draft had no relevant economic procompetitive virtues, *Smith* declared that it could not balance the factors and held the draft an unreasonable restraint of trade.¹³⁷

Most recently, in *McNeil*, a jury found the NFL's Plan B to be unreasonably anticompetitive under the Sherman Act section 1.¹³⁸ Plan B instituted a limited free agency for professional football players by allowing NFL veterans not placed on their teams' 37-man protected roster to sell their services to the highest bidder. The jury found Plan B to be an unreasonable restraint of trade because they found Plan B was not the least restrictive means of achieving the league's procompetitive purpose of maintaining competitive balance among the teams.

¹³³ *Smith*, 593 F.2d at 1187.

¹³⁴ *Id.* at 1183.

¹³⁵ *Id.* at 1185.

¹³⁶ *Id.* The *Smith* court's analysis was adopted by *Brown v. National Football League*, 782 F. Supp 125 (D.D.C. 1991), and ensuing courts (*see* notes 83-85 and accompanying text). But there is still some question as to whether this analysis will be adopted by courts today. For an alternative analysis proposed by the *Smith* dissent, *see infra* notes 158-66 and accompanying text.

¹³⁷ *Smith*, 593 F.2d at 1187.

¹³⁸ Jury Instructions for *McNeil v. National Football League*, 1992-2 Trade Cas. (CCH) ¶ 69,982 (D. Minn May 1993).

B. *The Rule of Reason Applied To the Baseball Draft*

The MLB draft can be found an unlawful restraint of trade under section 1 of the Sherman Act. Under a rule of reason analysis, baseball's sixty round draft is probably illegal.

First, the relevant market for the Draft is the market for players' services. Like the football players in *Mackey* and *Smith*, drafted baseball players are trying to sell their athletic services to a professional team.

Second, the Draft has a substantially harmful effect on competition in the market for baseball players' services pursuant to the second prong of the *McNeil* test. In *Smith*, the court found the NFL's sixteen round college-player-only draft anticompetitive in that it: (1) restricted the movement of players; and (2) forced players to deal with only one team. Both of these restrictions, the court found, robbed the athletes of any real bargaining power and kept salaries below a free market-level. By analogy, the Draft can be found at least as restrictive as the NFL draft. The annual Draft grants the exclusive negotiating rights not only of college athletes but also of high school baseball players to the drafting team. The draftees' movement is restricted; players are drafted by one team or the team's affiliate who can then hold their minor league rights for the next six and a half years. Draftees have little or no bargaining power; they are forced to deal with only one team and face a rigid minor league salary structure. Thus, the Draft can be found anticompetitive.

Third, the Draft does not significantly further any procompetitive interests in the relevant market, that of players' services, under prong three of the *McNeil* rule of reason test. While MLB could argue that the game of baseball is distinguishable from professional football and therefore its draft is competitively necessary, a court would be unlikely to give substantial weight to the league's argument. MLB could assert that the Draft is necessary to ensure the financial stability of professional baseball. Because so many players enter professional baseball every year, the argument would follow, baseball needs a draft or bidding for amateur players would drive salaries unaffordably high.

However, not only did the *Smith* court reject a similar argument,¹³⁹ but the NFL has since reduced its draft from fifteen to seven rounds—leaving undrafted players to sign as free agents—and the league is thriving. Of course, the NFL needs fewer players than baseball, but by halving the size of the football draft and signing remaining players as free agents, the NFL has not bankrupt the league. Thus, a court is not likely to be persuaded that the Draft is a procompetitive virtue in that it promotes financial stability.

MLB may also argue that the Draft promotes competition by maintaining a competitive balance on the baseball field. MLB could argue that because only a small percentage of minor league players develop major league potential, each team needs a large player pool and the Draft therefore is necessary to provide each team with equal opportunities to sign amateur players. However, the Draft is very unpredictable. Some of the game's greatest players of the past decade were drafted after the tenth round, including Roger Clemens (drafted in the twelfth round), Jose Canseco (drafted in the fifteenth round), and Ryne Sandberg (drafted in the twentieth round).¹⁴⁰ Even Nolan Ryan, considered one of the greatest pitchers of the past two decades, was drafted in the tenth round.¹⁴¹ Therefore, it seems that MLB teams have the same probability developing a future major league player from an undrafted free agent, if the draft is reduced, as developing a drafted player under the current regime, since drafting order appears to not always bear a direct relationship to a player's eventual development. Thus, a court could find that the Draft has no compelling procompetitive virtues.

Fourth, under the final prong of the *McNeil* test, the Draft is not the least restrictive means of obtaining players to maintain an economic and competitive balance in baseball. The Draft is almost the most restrictive means possible. Most American baseball players must be drafted to play professional baseball. Since up to 1680 players are

¹³⁹ *Smith*, 593 F.2d at 1187.

¹⁴⁰ ZIMBALIST, *supra* note 15, at 111.

¹⁴¹ *Id.*

drafted every year,¹⁴² few qualified amateur players remain as prospective free agents. The Draft can thus be found considerably more restrictive than the unreasonable football draft in *Smith*.

While MLB again can argue that its more restrictive draft is justified because baseball is so much more unpredictable than football, if the Draft is so unreliable and so few players pan out, then the purpose of the Draft is ineffectual. Teams should be able both to: (1) bid for the players they want; and (2) sign the number of players they need. Since under the *McNeil* standard only the least restrictive restraint survives Sherman Act section 1 scrutiny, the Draft should be found an unreasonable restraint of trade.¹⁴³

Finally, a trier of fact could find that drafted baseball players have suffered an antitrust injury. The Draft has no compelling procompetitive virtues but has a substantially harmful affect on the market for player services and is much more restrictive than necessary. Therefore, as the *Smith* court said, "the outcome is plain."¹⁴⁴ The Draft would likely be found an unreasonable restraint of trade and a violation of the Sherman Act.

C. *Rule of Reason Test Applied To the Minor League Restraints*

As with the Draft, the Minor League Restraints could be an unreasonable restraint of trade under the *McNeil* rule of reason balancing test. Analyzed together, the minor league rules which (1) give exclusive negotiating rights and six years of options to drafting teams, (2) require one-year minor league contracts with practically non-negotiable terms, and (3) allow only in-house arbitration, are grossly anticompetitive. The Minor League Restraints can thereby be found violative of the antitrust policies of section 1 of the Sherman Act.

¹⁴² The 28 MLB teams can draft up to 60 players each. See Schweppe Interview, *supra* note 6.

¹⁴³ See *infra* Part VI for a discussion of less restrictive ways in which MLB can accomplish its goals of providing new talent to major league clubs while still maintaining economic and competitive balance.

¹⁴⁴ *Smith*, 593 F.2d at 1187.

Once again the relevant market is baseball player services,¹⁴⁵ so a court first will look to the effect of the restraints on competition in this market under the second prong of the *McNeil* rule of reason test. A court is likely to find that the Minor League Restraints have a substantially harmful effect on competition in the market for player services. *Mackey* held a restraint which significantly decreased players' bargaining power in contract negotiations to be an antitrust violation.¹⁴⁶ In the minor leagues, baseball players have almost no negotiating power. National Association players have virtually no bargaining power in contract negotiations. Minor league players have to play for the same team or its affiliate for up to seven seasons and in their renewal contracts they can negotiate only a salary based on a league-wide scale. *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*¹⁴⁷ suggested that an arbitration process denying players access to an outside, impartial arbitrator would be an unreasonable restraint under the Sherman Act.¹⁴⁸ Minor league players can arbitrate disputes only with employees of MLB. Thus, the situation in minor league baseball is closely analogous to that of the NHL. Additionally, in *Brown v. National Football League*, the court found an unbargained-for wage system to be an illegal restraint.¹⁴⁹ Theoretically minor league players can bargain for their salaries. However, since all 158 National Association teams supposedly adhere to a fairly rigid pay scale, minor league players face a similarly restraining situation. The restraints therefore deny minor league players significant bargaining power.

Also, the Minor League Restraints have a harmful effect on competition because National Association players are almost completely prevented from selling their services. A minor league

¹⁴⁵ See *supra* note 109 and accompanying text.

¹⁴⁶ *Mackey*, 543 F.2d 606, 622.

¹⁴⁷ 351 F. Supp. 462 (E.D. Pa. 1972).

¹⁴⁸ In granting a preliminary injunction to a former NHL player who "jumped" to be a player-coach in the World Hockey League, The *Philadelphia Hockey* court suggested that providing only a league employee, in this case the NHL president, as a final arbitrator when a sports team holds a renewable option on a player's contract would violate the Sherman Act. *Id.* at 506.

¹⁴⁹ 782 F. Supp. 125, 131 (D.D.C. 1991).

player must play for the same major league affiliate for his first seven seasons, unless he is called up to the major leagues, cut, or drafted in the winter draft—in which case the second team obtains his remaining option years. A player does not have the opportunity to sell his services on the open market until his eighth season in professional baseball—by which point most minor leaguers are in the majors or have retired. Analogously, the *Mackey* court found the Rozelle Rule to be an illegal restraint because it hindered players from selling their services in the NFL.¹⁵⁰ The Minor League Restraints have the same impact on baseball players. Thus, because they both severely limit players' bargaining power and prevent players from selling their services, the Minor League Restraints severely limit competition.

The National Association system of restraints might, however, be found to further a procompetitive interest to balance against the restraints' anticompetitive effects. Under the second prong of the *McNeil* test this interest can negate the finding of substantially harmful effects on competition in prong one. MLB's strongest procompetitive argument would be that the Minor League Restraints are necessary to keep player development costs at a reasonable level. In 1989,¹⁵¹ each major league team spent an average of \$5.5 million dollars on player development¹⁵²—or \$1.8 million per minor league player promoted to the majors. However, a court could find that despite MLB's extensive minor league expenses, controlling player development costs does not justify the imposition of illegal restraints. Development outlays are the cost of doing business in all industries. In fact, the *Mackey* trial court rejected a similar argument by the NFL in justification of football's anti-free agency restraint, reasoning that "these expenses are similar to those incurred by other businesses . . . there is no right to compensation for this type of investment."¹⁵³ In addition, under the finding of *National Society of Professional*

¹⁵⁰ See *supra* notes 123-28 and accompanying text.

¹⁵¹ The average 1993 outlays were approximately the same as in 1989. Schweppe Interview, *supra* note 6.

¹⁵² ZIMBALIST, *supra* note 15, at 113.

¹⁵³ *Mackey*, 543 F.2d at 621.

Engineers v. United States,¹⁵⁴ courts simply cannot consider an employer's desire to curb costs to be a valid argument under antitrust law.

Despite *Mackey*, a court could find that controlling baseball's significant player development costs is a valid procompetitive interest because MLB's player development is quite dissimilar from football. When a player is selected in the football draft, he either plays in the NFL or is cut. The only "developmental system" is a six-man practice squad per professional club, which costs teams approximately \$12,000 a week in salaries. In contrast, in baseball over ninety-nine percent of drafted players spend at least one year, and often more, in the 158 team minor leagues.¹⁵⁵ Baseball requires a developmental system since few drafted players have the skills for the major league, and only one out of every ten players drafted ever even plays in the major leagues. Since development costs of baseball are much higher than for football, a court, may indeed, find these player development costs more compelling a valid procompetitive interest.

MLB's second potential argument that the goal of maintaining competitive balance justifies the Minor League Restraints would not likely be found a valid interest. Not only does the *Smith* court's rebuttal that the teams are not financial competitors on the playing field apply,¹⁵⁶ but it also appears that the restrictions have been imposed to maintain competitive equality in the major leagues, not in professional baseball. Teams are continually moving players between minor league levels as well as between the minor and major leagues. MLB's goal for the minor leagues seems to be to develop major league players—not to win the Class AA crown.¹⁵⁷ The structure of the minor leagues also belies MLB's argument. The National Association includes five separate levels of competition and eighteen leagues. If the restraints are utilized for the benefit of the minor

¹⁵⁴ 435 U.S. 679 (1978). The court held that while the professional society's safety justification for prohibiting competitive bidding by its engineer members was a legitimate concern, it was not a valid argument for a procompetitive restraint under antitrust law.

¹⁵⁵ Schweppe Interview, *supra* note 6.

¹⁵⁶ *Smith*, 593 F.2d 1173, 1185. See *supra* notes 131-37 and accompanying text.

¹⁵⁷ This is true, of course, unless a court were to adopt the rationale discussed in the dissent in *Smith*. See *infra* part V.D.

league's competitiveness, then in what are they attempting to maintain a competitive balance? Additionally, National Association teams would probably be more balanced by signing proven free agents than through retaining draftees for seven years since the Draft is so arbitrary. Therefore, maintaining a competitive balance is not a compelling procompetitive interest. Thus, the Minor League Restraints appear to have only one legitimate procompetitive interest to balance against the restraints' anticompetitive interests: maintaining player development costs.

Even if controlling player development costs is found to be a valid procompetitive interest, the Minor League Restraints are not the least restrictive means of controlling costs and therefore fail the third prong of the *Mackey* test. To the contrary, the restraints are almost the most restrictive possible means. Minor league baseball players probably have the weakest bargaining power and the least ability to sell their services of any professional team sport athletes in the country. Under the Major League rules, major league players can file for salary arbitration after three seasons and can become free agents after six, and since 1994, professional football players can attain free agency status under the NFL CBA after four years in the NFL. But many "farm team" baseball players cannot freely sell their services until their eighth season. Before achieving free agency, MLB, NFL and NBA players can negotiate their salaries and numerous other benefits and mediate contract disputes through outside arbitrators. Minor league players are limited to negotiating scaled salaries. The NFL and NBA examples demonstrate that there are less restrictive means than the current Minor League Restraints, and thus the restraints would likely fail the *McNeil* test.

In conclusion, if a court were to apply the final balancing test, it would likely find that the Minor League Restraints' procompetitive interest is outweighed by the restraints' significant restriction of competition in the market for baseball player services. The Minor League Restraints could thus be found to violate section 1 of the Sherman Act.

D. *MLB's Reasonable Restraint Argument—the Smith Dissent*

While *Smith* has become a standard for plaintiffs trying to show an antitrust injury in the player services market, the case is also significant for its dissent. Judge MacKinnon's lengthy dissenting opinion remains the most detailed and impassioned circuit court argument in favor of legally maintaining restrictions on player services.¹⁵⁸

Judge MacKinnon maintained that the *Smith* majority focused on the incorrect market and utilized an inappropriate test in concluding that the NFL draft was an illegal restraint of trade. Instead of the market for player services, he believed the true market in which to analyze the effects of the draft should be the larger market for entertainment.¹⁵⁹ In addition, Judge MacKinnon argued that once a court focuses on the more general market it should follow the analysis from *Professional Engineers* and utilize an inquiry into competitive conditions, not a balancing test between anticompetitive and procompetitive factors, to analyze the reasonableness of a restraint.¹⁶⁰ Thus, according to the *Smith* dissent, "[a] restraint need not be procompetitive to be valid; the question is whether the restraint is 'unreasonably restrictive of competitive conditions.'" ¹⁶¹

Under this test, the *Smith* dissent argued that NFL draft was "not [an] unreasonable" restraint of trade.¹⁶² In the expanded market for entertainment, the D.C. Circuit judge found that the draft materially enhanced the "vitality of the NFL" and the economic benefits of

¹⁵⁸ *Smith*, 593 F.2d at 1205-15 (MacKinnon, J., dissenting). Judge MacKinnon's notion of a larger entertainment market is supported by a several other courts, including then-Associate Justice Rehnquist's dissent to the denial of certiorari in *North American Soccer League*, 459 U.S. 1074 (Rehnquist, J., dissenting from denial of certiorari), see *supra* note 109, and the Ninth Circuit's characterization of the jury instructions in *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381 (9th Cir.), *cert. denied sub nom.* *National Football League v. Oakland Raiders*, 469 U.S. 990 (1984).

¹⁵⁹ *Id.* at 1215 (MacKinnon, J., dissenting).

¹⁶⁰ *Id.* at 1205 (citing *National Soc'y of Professional Eng'rs v. United States*, 433 U.S. 679).

¹⁶¹ *Id.* at 1207 (quoting *Professional Eng'rs*, 435 U.S. at 694).

¹⁶² *Id.* at 1217.

football players.¹⁶³ Judge MacKinnon reasoned that because the draft had a direct effect on the vitality of the league in a business sense, it was not an unreasonably restrictive restraint.¹⁶⁴ In addition, he argued that because the draft limited the number of amateur players with which teams could negotiate, the negative impact on players' ability to sell their services was balanced out.¹⁶⁵ Thus he found that the NFL draft was not unreasonably restrictive of competitive conditions and was therefore a legal restraint of trade.¹⁶⁶ However, despite Judge MacKinnon's eloquent analysis, his reasoning has not been adopted by any circuit, and courts have continued to focus on the anticompetitive effects within the player services market.

If MLB could somehow persuade a court that the correct analysis of baseball player restraints is that of the *Smith* dissent, the league could maintain that the Draft and the Minor League Restraints are "not unreasonable" restraints of trade. First, MLB could argue that the Draft positively affects players' bargaining power. The owners could mimic Judge MacKinnon's argument that the draft also works in reverse, limiting the number of players with whom teams can negotiate, and thereby giving the players more bargaining power. If all potential draftees were free agents, the argument would go, teams would be negotiating with numerous prospects for the same position which might make the player expendable or would at least drive player salaries down.

However, this argument would fail even under the *Smith* dissent's

¹⁶³ *Id.* at 1208.

¹⁶⁴ *Id.* at 1214-15. According to MacKinnon, the NFL is a "natural monopoly" and the draft enables the league to maintain competitive balance within the monopoly. In turn, he argued that competitive balance has allowed the league to maintain a quality product, which in turn has allowed the league to generate more revenue and increase player salaries. Thus, Judge MacKinnon argued, the draft was not unreasonably restrictive.

¹⁶⁵ *Id.* at 1211-12. Judge MacKinnon argued that because an NFL team, such as the Washington Redskins in *Smith*, not only was prohibited from negotiating with players other than drafted, but was forced to pass over equally qualified players at the same or other positions in making the team's selection, the draft limited the players with whom any team could negotiate. Judge MacKinnon reasoned that this restriction on teams' ability to engage in negotiations with desired players "balanced out" the players' restriction which forced them to deal with only the drafting team. *Id.*

¹⁶⁶ *Id.* at 1217.

competitive-conditions analysis for two reasons. First, the Draft is not the same as the NFL draft involved in *Smith*. The Draft has sixty rounds, not the sixteen of the NFL draft considered in *Smith*, and baseball has only nine positions, so most teams are currently drafting multiple players at each position which results in more competition and less bargaining power for most drafted baseball players. Second, free agency in major league baseball, football, and basketball has caused salaries to skyrocket, not to plunge as Judge MacKinnon predicted.¹⁶⁷ So there is no empirical evidence that the restraints positively affect baseball players' bargaining power even under a competitive-conditions analysis.

MLB could also argue that the restraints are not unreasonable because they keep baseball financially healthy and competitive by limiting player costs. According to this argument, the Draft and the Minor League Restraints are necessary because there are so many potential professional baseball players. MLB must therefore prevent costs from increasing rapidly, or tickets and other prices will rise and baseball will lose its market share in the entertainment market.

At first glance this appears to be a valid argument because paying minor league players only \$1000 per month for a four and a half month season while the average major league player earns over \$1 million a season¹⁶⁸ ensures that player development costs are contained. However, *Mackey* rejected player development costs as a valid rationale in support of financial competitiveness.¹⁶⁹ In addition, even if the relevant market were entertainment and not player services, player development costs as a percentage of overall operating costs are so low¹⁷⁰ that the argument loses impact. While the average team expends somewhere near \$5.5 million dollars annually

¹⁶⁷ ASSOCIATED PRESS, Apr. 6, 1991. Between 1972, when Curt Flood sued MLB and helped catalyze the initiation of free agency in 1975, and 1982, the average MLB salary went from \$34,092 to \$241,497. Between 1982 and 1992, during which period all MLB players with five years of major league service became able to attain free agency, the average salary grew to \$1,028,667. *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ See *supra* notes 127-29 and accompanying text.

¹⁷⁰ ZIMBALIST, *supra* note 15, at 113.

on its minor league affiliates,¹⁷¹ the average club also pays at least one player as much or more than its total outlay for minor league player development. In 1993 Barry Bonds and Ryne Sandberg each had a contract averaging more than \$7 million dollars a season, fifteen players earned more than \$5 million annually and forty players earned at least \$4 million a year.¹⁷² Finally, despite the fact that baseball is the least expensive and most accessible professional sport, the game is already losing some of its share in the entertainment market to basketball and football, despite existing restraints limiting player development costs. Thus, it is dubious whether the Draft and the Minor League Restraints make MLB significantly competitive even in the entertainment market.

In sum, the Draft and the Minor League Restraints are likely not reasonable restraints of trade under a competitive conditions analysis. Therefore, both the Draft and the Minor League Restraints can be found to be illegal restraints of trade in violation of section 1 of the Sherman Act.

VI. LESS RESTRICTIVE ALTERNATIVES

This section looks to the reasoning of *Smith* and the *McNeil* jury instructions to propose a baseball player draft and a minor league system which could be more reasonable restraints under section 1 of the Sherman Act.

The *Smith* court, after holding the NFL draft unreasonable, suggested a number of alternatives to make the NFL draft "less anticompetitive."¹⁷³ First, the court supported the trial judge's recommendation that a player selection system permitting "more than one team to draft each player, while restricting the number of players

¹⁷¹ *Id.*

¹⁷² Jeffrey Moorad, *Opening Day Salaries*, Oakland Athletics Opening Day Press Release (Apr. 1993) (on file with *UCLA Entertainment Law Review*).

¹⁷³ *Smith*, 593 F.2d at 1187.

any one team might sign” might be a legal draft.¹⁷⁴ Second, the court proposed a system in which a drafted player who could not come to terms with the drafting team be allowed to negotiate with any interested team.¹⁷⁵ Third, the court said that holding a second draft every year, in which players who could not come to terms with the original drafting teams have the opportunity to be selected by an other team, would be less anticompetitive.¹⁷⁶ Fourth, *Smith* proposed holding a draft with fewer rounds. That way, only the most talented players would be selected and more “average” players could negotiate as free agents.¹⁷⁷ In turn, the court suggested, all salaries might rise, because by forcing teams to compete for the services of the less desirable players, the salary “floor” would be elevated.¹⁷⁸ The *Smith* court also noted that the least restrictive situation would be to abolish the draft completely while simultaneously instituting a system of revenue sharing.¹⁷⁹

The *Smith* court’s suggestions could be used to reshape the Draft and the restrictive minor league provisions into less anticompetitive restraints. It is true that some of the court’s proposals are impracticable and others do not apply to the sport of baseball. However, when *Smith*’s recommendations are considered along with the restraints in the market for player services that were found to be unreasonable by other courts and the *McNeil* jury instructions requiring less restrictive alternatives, they can provide a useful foundation for formulating a less restrictive draft and minor league system.

Therefore, I propose an annual fifteen round draft held in mid-to-late June. Any qualified undrafted player could attempt to sell his services to the highest bidder. Teams would hold exclusive negotiating rights to all drafted players until January, at which time drafted-but-unsigned players could either negotiate a deal with any interested team or return to the draft pool. Clubs would lose their

¹⁷⁴ *Id.* at 1188.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

rights to college-bound players once the draftees attend their first collegiate class. Undrafted or unsigned players who return to school would not lose their collegiate eligibility.

A fifteen round baseball draft can be found reasonable under section 1 of the Sherman Act despite the fact that *Smith* found a sixteen round football draft unreasonable. The differences between professional football and professional baseball¹⁸⁰ and the proposed measures of additional player leverage make this suggested draft more reasonable in Sherman Act terms. Baseball needs a somewhat more extensive draft than football because in addition to selecting players for the twenty-eight major league clubs, baseball also utilizes its draft as a player development tool.

A fifteen round baseball draft would allow for the selection of sufficient new talent to maintain the competitiveness of professional baseball squads and to develop players for the major leagues while still providing teams with some latitude for prospects who do not reach their potential. Simultaneously, the proposed draft would give drafted players increased bargaining power. With only fifteen selections rather than the current sixty, the drafting team will not necessarily select other players at the draftee's position, conferring some leverage to non-first round selections. In addition, by allowing players to turn pro after two, rather than three, years of college, playing college baseball becomes a more viable option and a better source of leverage for drafted high school players. The curtailed draft also allows what the *Smith* majority labeled "the more average players" to try to negotiate in a free market, thereby raising the floor of the amateur players' market. Smaller drafts have been successful in both the NFL (which had eight rounds in 1993, seven rounds in 1994) and the NBA (which now has two rounds) in that the most talented amateur players are drafted, the rest have the ability to sign contracts with any interested teams, and entry-level salaries have increased. The proposed draft could have similar effects on baseball.

I also propose a number of minor league modifications to allow National Association players more leverage and fewer movement

¹⁸⁰ See *supra*, pp. 129-30 and note 155 and accompanying text.

restrictions, thus making the minor league system of restraints less anticompetitive. First, I propose a maximum of three one-year options which would give teams no more than four years of exclusive rights to any professional baseball player. If a player is not called up the majors by his fourth season, he would become a free agent and have the ability to negotiate with any minor or major league team. This alteration would still allow teams to develop players and would provide for some consistency of rosters year to year in the minor leagues. At the same time, the reduction in the number of options would both raise salaries of free agents, which should have a "trickle-down" effect on other players' salaries, and award minor league players free agency after four years. Second, I suggest that the National Association both abolish the league-wide salary structure and allow minor league players to negotiate for terms other than salary. These modifications would give a professional baseball player more flexibility to contract in each of his first four years when he is bound to his drafting team. Providing a minor league player the ability to bargain for performance or awards bonuses would also increase the player's leverage by giving him more negotiating options. Third, I propose an outside arbitrator be used to settle contract and other disputes between players and professional baseball in order to give minor league players a more just dispute resolution mechanism. Collectively, the proposed minor league modifications would decrease the restrictiveness of the National Association restraints and increase players' negotiating leverage and ability to sell their services. The Minor League Restraints would thereby become more reasonable.

In sum, the above proposals make the Draft and the Minor League Restraints less anticompetitive. I am not suggesting that a jury would necessarily find these proposals the least restrictive alternative, as the *McNeil* jury instructions suggested a restraint on player services must be. However, they are more reasonable than the existing restrictions. My proposed draft and minor league restraints are thus more likely to be found reasonable restraints of trade under section 1 of the Sherman Act.

VII. CONCLUSION

In conclusion, certain interstate aspects of the business of professional baseball may now be violations of the Sherman Antitrust Act. If the *Piazza* court's reading of *Federal Baseball*, *Toolson*, and *Flood* are correct, the baseball exemption is limited to the reserve clause of baseball, and is likely to soon be limited to the reserve clause of major league baseball. Therefore every aspect of baseball not within the reserve clause, including the annual June draft and a number of restraints within the minor league system, would be subject to federal antitrust laws.

Neither the Draft nor the Minor League Restraints are immune from the Sherman Act via the non-statutory labor exemption because neither primarily affects the parties to the bargaining relationship, is a mandatory subject of bargaining, or is a bona fide arm's-length agreement. Finally, both the Draft and the Minor League Restraints can be found to be unreasonable restraints of trade because both: (1) have significant anticompetitive effects which outweigh any possible procompetitive interests; and (2) are more restrictive than necessary. Thus, both the Draft and the Minor League Restraints can be found to violate section 1 of the Sherman Act as illegal restraints of trade. This Comment suggests an alternative baseball draft as well as minor league restraints which allow baseball to function as a competitive sport while possibly passing antitrust muster.