



NINTH CIRCUIT AFFIRMS LONG-STANDING ANTITRUST EXEMPTION FOR MLB, RULES THAT IT EXTENDS TO MINOR LEAGUE PLAYERS

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If you spend any amount of time following professional sports, you have likely heard players, coaches, commentators, and league officials speak about the virtue of competition for their leagues. The idea that competition is always a good, purifying venture for professional sports is a routine talking point by those associated with the leagues. But when it comes to these professional sports leagues' views—specifically, Major League Baseball's (MLB)—on the enforcement of the Sherman Act, the usual benefits of competition seem to disappear. MLB is structured to stymie some aspects of a competitive environment, and the law supports it doing so.

The latest example of a court's view on this anticompetitive behavior came on June 26, 2017, when the Ninth Circuit affirmed a district court's dismissal of a class action lawsuit filed by Minor League Baseball (MiLB) players. This decision affirmed the continuing validity of a nearly century-old exemption from antitrust scrutiny for MLB and its minor league affiliates.

The class action lawsuit, styled *Miranda v. Selig*¹ was filed by a putative class made up of current and former MiLB players against former MLB Commissioner Bud Selig and the 30 MLB teams. The plaintiffs alleged that for all levels of the minor league system, MLB and the 30 MLB teams impermissibly colluded to suppress the salaries of minor league players.

In a typical antitrust case, these allegations, combined with even a modest amount of evidence, would likely survive a motion to dismiss under the lenient pleading standards of *Bell Atlantic v. Twombly*.² In fact, like *Miranda*, *Twombly* was a case brought under § 1 of the Sherman Act. And even though it is now well-settled law that *Twombly* applies with equal force to all causes of action, initially some courts thought that it applied only in the antitrust arena—with good cause: The Supreme Court “granted certiorari to address the proper standard for pleading an antitrust conspiracy

through allegations of parallel conduct.”³ It was not until two years later that the Supreme Court clarified that its “decision in *Twombly* expounded the pleading standard for ‘all civil actions,’ and it applies to antitrust and discrimination suits alike.”⁴

Even with this relatively low bar, however, the Ninth Circuit in *Miranda* dismissed the MiLB players' action in a brief opinion. This opinion focused almost entirely on a little-known exemption to the antitrust laws commonly referred to as the “business of baseball” exemption. To understand why the Ninth Circuit so easily affirmed the dismissal, it is important to discuss the structure of the MLB, its role as America's national pastime, and our highest court's creation of this special exemption for the MLB and the MLB alone.

Background

The MLB is made up of 30 organizations. Each of these organizations has a number of corresponding minor league teams of varying skill levels. These minor league teams constitute an MLB organization's “farm system” that provides a training ground and instruction for the MLB teams to groom potential MLB athletes. The farm system is structured like the judiciary, with multiple teams per organization that all lead up to the highest level, should a prospect reach that

level of skill. For example, each MLB team has a Class AAA team that typically comprises an organization's prospects closest to being able to contribute to the MLB team, while an organization's Class AA and Class A teams comprise relatively more inexperienced players. Just like most cases do not reach the Supreme Court, most prospects do not reach their organization's MLB team—though since MLB players do not have life tenure, minor league players have a much better chance of feeling the grass under their feet at Yankee Stadium than district court judges do of donning a robe at 1 First Street.

Like other professional sports leagues, MLB has an annual draft for new players. But unlike the National Football Association, National Basketball Association, and National Hockey League, MLB players almost never begin their careers with the professional sports team who drafts them. Instead, they are assigned to one of their drafting MLB team's minor league squads. In fact, except in the rarest of circumstances, it takes several years for an individual player to ascend through an organization's minor league system and play for one of the 30 MLB teams.

While there are many differences between being a member of an organization's MLB team and being part of its minor league affiliates, the biggest difference is that while MLB players make on average \$4.47 million per year, and a minimum of \$535,000, MiLB players make far less. According to the plaintiffs in *Miranda*, the salaries for MiLB players are not subject to a competitive marketplace. Instead, MLB requires that all first-year minor league players earn roughly \$1,100 per month, Class A minor league players \$1,250 per month, Class AA minor league players \$1,500 per month, and Class AAA minor league players \$2,150 per month. Minor league players receive no salary for spring training (the period before the official beginning of the season in which the organization trains in preparation for the season), during which they work 50 to 60 hours per week. And since baseball is a seasonal sport, these athletes are only paid for the months that the season occurs. While the highest draft picks in the MLB draft are typically awarded signing bonuses worth thousands if not millions of dollars, the vast majority of minor league players do not receive a signing bonus. In fact, most do not ever get promoted to their parent MLB team.

Perhaps the aspect of minor league employment that is most dissimilar from any other job is that these minor league players do not have the option to jump from one organization's farm system to another organization's farm system, or even a foreign league. According to the allegations in the plaintiffs' brief, the MLB requires all franchises to use its uniform player contract, which contains a "reserve clause." The reserve clause confers upon the MLB franchises exclusive rights to their minor league players for seven seasons. This provision precludes players from playing for any other baseball team during the contract period, whether the team is an MLB franchise. This restriction has enormous consequences.

Imagine, for example, that an MLB team has two young players who both play the same position. They are the same age, were drafted in the same year, and were therefore placed on the same minor league team by the MLB team. If one player entrenches himself as a full-time player at that position, what is the second player to do? Because of the MLB's reserve clause, he cannot leave that organization of his own volition to find everyday work as a full-time player at that position—at least, not until seven seasons elapse. The backup player is thus kept in a backup role with no opportunity for increased playing time, except for a trade, injury, position change, or unexpect-

ed decline by the starting player. Thus, he would have to wait for the starting player to be promoted before he could become an everyday player at his position at the minor league affiliate that the starting player just vacated. And even then, if the first player becomes the MLB team's starter, the second player has no path to the type of everyday playing experience in the major league that leads to mass exposure and large contracts. In sports, the potential career of a professional athlete is far more limited than in most other businesses, and every year that a player does not maximize his earning potential has a huge relative impact on his career earnings. This restriction on a player's ability to freely transfer his talent to another organization seems like a textbook Sherman Act violation, and one that could result in millions of dollars in damage to individual players.

History of the Business of Baseball Exemption

The Sherman Act was enacted "to protect trade and commerce against unlawful restraints and monopolies."⁵ Under the Sherman Act, "every contract ... in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal."⁶ It is prohibited to "monopolize any part of the trade or commerce among the several states, or with foreign nations."⁷ In 1914, Congress passed the Clayton Act to supplement existing federal antitrust law.⁸ Section 4 of the Clayton Act grants standing to those injured by antitrust actions to sue in federal district court.⁹

MLB's compliance (or lack thereof) with the Sherman and Clayton Acts came to a head in 1922. In *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*,¹⁰ the Supreme Court held that the business of baseball does not constitute trade or commerce among the several states, and therefore is not bound by antitrust laws because the "business is giving exhibitions of baseball, which are purely state affairs."¹¹ This reasoning does not hold up under today's thinking. As Judge Alex Kozinski explained in a 2015 case discussing whether designation of franchises to particular geographic territories interferes with the public exhibition of professional baseball, the reasoning behind the Supreme Court's decision in *Federal Baseball* reflected the "era's soon-to-be-outmoded interpretation of the Commerce Clause."¹²

The Supreme Court affirmed *Federal Baseball* 30 years later, but its reasoning was grounded in a different (yet brief) analysis. In *Toolson v. New York Yankees Inc.*,¹³ the Court recognized in a one-paragraph *per curiam* opinion that the Commerce Clause reasoning no longer applied. More critically, the Court observed that despite the fact that it had been over 30 years since it held in *Federal Baseball* that the federal antitrust laws did not apply to baseball, Congress had not legislated to the contrary. Therefore, "if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation."¹⁴ In a fascinating show of deference, the Supreme Court thus left it to Congress to legislate the baseball exemption out of the law and decided that the judiciary should stay out of it.

After *Toolson*, antitrust challenges were brought up in other professional sports leagues. And while the Supreme Court had just upheld the business of baseball exception, these other professional sports did not receive the same outcome that the MLB had.

The Supreme Court first declined to extend the business of baseball exemption to professional boxing in *United States v. International Boxing Club of New York*,¹⁵ where it noted that: "The controlling consideration in *Federal Baseball* and *Hart* was, instead,

a very practical one—the degree of interstate activity involved in the particular business under review. It follows that *stare decisis* cannot help the defendants here; for, contrary to their argument, *Federal Baseball* did not hold that all businesses based on professional sports were outside the scope of the antitrust laws. The issue confronting us is, therefore, not whether a previously granted exemption should continue, but whether an exemption should be granted in the first instance. And that issue is for Congress to resolve, not this Court.”¹⁶

The Supreme Court rejected similar arguments for professional football¹⁷ and professional basketball,¹⁸ holding that the business of baseball exemption could not be extended to other sports leagues. The question of how baseball could be treated differently from other professional sports was conclusively answered in *Radovich*: “It seems that this language would have made it clear that the Court intended to isolate these cases by limiting them to baseball, but since *Toolson* and *Federal Baseball* are still cited as controlling authority in antitrust actions involving other fields of business, we now specifically limit the rule there established to the facts there involved (i.e., the business of organized professional baseball). As long as the Congress continues to acquiesce we should adhere to—but not extend—the interpretation of the act made in those cases... If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer, aside from the distinctions between the businesses, that were we considering the question of baseball for the first time upon a clean slate we would have no doubts. But *Federal Baseball* held the business of baseball outside the scope of the act. No other business claiming the coverage of those cases has such an adjudication.”¹⁹

Nearly two decades after *Toolson*, the Supreme Court affirmed the business of baseball exemption in a more explanatory opinion. The Court recognized that “with its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. *Federal Baseball* and *Toolson* have become an aberration confined to baseball.”²⁰ However, it affirmed the holdings of the aberrational *Federal Baseball* and *Toolson*, holding that, “We continue to be loath, 50 years after *Federal Baseball* and almost two decades after *Toolson*, to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.”²¹ Just as it had in *Toolson*, the Court noted that its jurisprudence had not been rejected by Congress, and so it would refrain from overturning decades-old law.

In 1998, Congress finally responded to the Supreme Court’s repeated requests for congressional interpretation on the business of baseball exemption by passing the Curt Flood Act.²² While the purpose of the Act was to “to state that Major League Baseball players are covered under the antitrust laws,” in reality the Act confirmed the long-standing business of baseball exemption. Importantly, the act did not grant any rights to minor league players, including “any reserve clause as applied to minor league players.”

Miranda v. Selig

The plaintiffs in *Miranda* alleged that the MLB and the 30 MLB teams conspired to fix and depress MiLB players’ compensation in violation of §§ 1 and 2 of the Sherman Act. This conspiracy eliminated competition for the amount of compensation MiLB players receive, and the conspiracy in fact resulted in salaries for minor league players being artificially depressed.

The defendants’ counter-argument was even more straightforward: The Supreme Court had repeatedly and consistently enforced the business of baseball exemption to dismiss a variety of antitrust claims, and *stare decisis* compelled that the case be dismissed.

While the plaintiffs conceded that the Supreme Court affirmed the business of baseball exemption numerous times, they argued that none of *Federal Baseball*, *Toolson*, or *Flood* cases decided whether a conspiracy by MLB and the 30 MLB teams to fix MiLB players’ salaries was exempt from the federal antitrust laws. Therefore, *stare decisis* did not compel the Court to dismiss the action. The defendants objected to this notion, pointing out that the Ninth Circuit had just one year earlier ruled in *San Jose* that baseball’s antitrust exemption extends to “the entire ‘business of providing public baseball games for profit between clubs of professional baseball players.’”²³

The Ninth Circuit ruled in favor of the defendants and affirmed the district court’s dismissal of the plaintiffs’ action. First, it noted that plaintiffs’ notion that the baseball exemption did not apply to minor league players was inapposite since “Minor League Baseball players are employed and paid by MLB, and MLB employs minor league players with the hope that some of them will develop into major league players. Therefore, the employment of minor league players is precisely the type of activity that falls within the antitrust exemption for the business of baseball.”²⁴

Moreover, and more crucially for an understanding of the business of baseball exemption, the Court ruled that the plaintiffs “misapprehend the doctrine of *stare decisis*, particularly as it applies to intermediate federal appeals courts ... both the Supreme Court and our Court have repeatedly upheld the business-of-baseball exemption. We are bound by these decisions.”²⁵ The Court’s analysis was succinct and did not mince words. The rulings by the Supreme Court over the past century had compelled its decision.

So nearly a century after the Supreme Court in *Federal Baseball* held that the MLB was not subject to the federal antitrust laws, it is clear that this ruling is still good law. Some critics may question whether this type of blind devotion to a previous ruling is advisable, especially when considering how the *actual* business of baseball has changed so drastically. In 1922, the MLB was made up of 16 teams; today it has 30. In 1922, the MLB was just a year removed from its first commissioner—respected federal judge Kennesaw Mountain Landis—banning eight members of the Chicago White Sox (better known as the “Black Sox”) for their role in conspiring to fix the 1919 World Series. Today, the average baseball franchise is worth \$1.2 billion, and the MLB earned nearly \$10 billion in revenue for 2016. It is safe to say that the sport is in a much different position than it was in 1922.

And yet, despite all of the differences between our modern MLB and the MLB that the Supreme Court considered in *Federal Baseball*, courts today are bound by rulings grounded in an opinion 95 years old. And it appears that none of the courts, Congress, or MLB will do anything to change that. ☉



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Endnotes

¹*Miranda v. Selig*, 830 F.3d 1237 (9th Cir. 2017).

²*Bell Atlantic v. Twombly*, 550 U.S. 544 (2007).

³*Id.* at 553.

⁴*Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

⁵Sherman Act, ch. 647, 26 Stat. 209 (1890).

⁶15 U.S.C. § 1.

⁷15 U.S.C. § 2.

⁸Clayton Act, ch. 323, 38 Stat. 731 (1914).

⁹15 U.S.C. § 15(a).

¹⁰*Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922).

¹¹*Id.* at 208.

¹²*City of San Jose v. Office of the Comm'r of Baseball*, 776 F.3d 686, 688 (9th Cir. 2015).

¹³*Toolson v. New York Yankees Inc.*, 346 U.S. 356 (1953).

¹⁴*Id.* at 357.

¹⁵*United States v. Int'l Boxing Club of N.Y.*, 348 U.S. 236 (1955).

¹⁶*Id.* at 240.

¹⁷*Radovich v. Nat'l Football League*, 352 U.S. 445 (1957).

¹⁸*Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204 (1971).

¹⁹*Radovich*, 352 U.S. at 452.

²⁰*Flood v. Kuhn*, 407 U.S. 258, 283 (1972).

²¹*Id.* at 284-85.

²²Curt Flood Act of 1998, Pub. L. No. 105-297, 112 Stat. 2824.

²³*City of San Jose*, 776 F.3d at 690.

²⁴*Miranda*, 830 F.3d at 1242.

²⁵*Id.* at 1243 (internal citations omitted).

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a conflict between the U.S. Court of Appeals for the Sixth Circuit and the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit regarding the proper interpretation of §§ 3729(a)(2) and 3729(a)(3) of the FCA. In *Allison Engine*, the district court had held that all three sections of former § 3729(a) required a showing that the false claim at issue had actually been presented to the government for liability to attach. *Allison Engine*, 471 F.3d 610, 613 (6th Cir. 2006). The Supreme Court stated that this opinion conflicted with the D.C. Circuit's holding in *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004). *Allison Engine*, 553 U.S. at 668. In *Totten*, the district court dismissed the complaint alleging that the defendants violated § 3729(a)(1) by submitting false invoices to Amtrak. *Totten*, 380 F.3d at 490. The D.C. Circuit affirmed, finding that "Amtrak is not the government," and that under the plain language of § 3729(a)(1), "claims must be presented to an officer or employee of the government before liability can attach." *Id.* at 490. With *Allison Engine*, the Supreme Court undertook to resolve this conflict. 553 U.S. at 668. It concluded that "it is insufficient for a plaintiff asserting a § 3729(a)(2) claim to show merely that '[t]he false statement's use ... result[ed] in obtaining or getting payment or approval of the claim,' or that 'government money was used to pay the false or fraudulent claim'" as the Sixth Circuit had held. *Id.* at 665 (citations omitted). Instead, the Supreme Court held that the focus should be on the defendant's intent. Thus, for a claim under subsection (a)(1), the plaintiff need not present evidence that the defendant himself presented the false claim to the government, but there must be evidence that the defendant submitted a false claim and that the claim was ultimately submitted to the government for payment or approval. Although Congress effectively overruled *Allison Engine* with FERA, many OIG interpretations published in the *Federal Register* now stand as well-meaning, but incorrect attempts to apply *Allison Engine*. See *infra* note 9 and accompanying text.

⁵²See *United States ex rel. Wall v. Vista Care*, 778 F.Supp.2d 709, 715 n.23 (N.D. Tex. 2011) (citing *Kanneganti*, 565 F.3d at 190).

⁵³See *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 185 (5th Cir. 2009) (noting that in FCA cases, liability could be established where the pleading contains an indicia of reliability, though the precise amount of bills submitted may be missing).

⁵⁴*Chorches v. American Med. Response Inc.*, 865 F.3d 71, 81 (2d Cir. 2017).

⁵⁵*Id.* at *81.

⁵⁶*Id.* at *81-82 (internal citations omitted).

⁵⁷*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

⁵⁸Fed. R. Civ. P. 12(b)(6).

⁵⁹*Twombly*, 550 U.S. at 544.

⁶⁰*Id.* at 555.

⁶¹*Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

⁶²*Id.* at 678.

⁶³*Id.* at 678-79.

⁶⁴*Id.* at 679.

⁶⁵*Id.*

⁶⁶*Id.*

⁶⁷See T.S. Ellis III & Nitin Shah, *Iqbal, Twombly, and What Comes Next: A Suggested Empirical Approach*, 114 PENN. ST. L. REV.: PENN. STATIM 64 (2010), www.pennstatelawreview.org/114/114%20Penn%20Statim%2064.pdf.

⁶⁸The second order of dismissal is normally "with prejudice," thereby foreclosing the possibility of a third motion to dismiss. If a motion to amend is necessary, always include the amended pleading with the motion. Otherwise, the court of appeals will have nothing to consider in reviewing the trial courts abuse of discretion.

⁶⁹*Foman v. Davis*, 371 U.S. 178, 182, (1962).

⁷⁰*United States ex rel. Ellis v. City of Minneapolis*, No. 11-CV-0416 (D. Minn. Dec. 12, 2012). ("The third motion to amend filed by Blodgett's attorney was accompanied by a copy of the proposed amended complaint. But that supposedly 'streamline[d]' amended complaint [ECF No. 67 at 2] weighed in at a remarkable 182 pages and 351 paragraphs—well over 100 pages longer than the original complaint, and over 20 pages longer than the pro se amended complaint that Judge Leung *rejected* as failing to comply with Rule 8. [ECF No. 68] Needless to say, the proposed amended complaint does not come close to complying with Rule 8, and thus Blodgett's motion to amend [ECF No. 57] is denied").

⁷¹*Gurman v. Metropolitan Hous. & Redev. Auth.*, 842 F. Supp. 2d 1151, 1152 (D. Minn. 2011) (quoting Fed. R. Civ. P. 8(a)(2)).