MARQUETTE UNIVERSITY LAW SCHOOL LEGAL STUDIES RESEARCH PAPER SERIES
RESEARCH PAPER NO. 09-02

MARQUETTE
UNIVERSITY

LAW SCHOOL

BASEBALL: AN ILLUSTRATION OF HOW PROFESSIONAL SPORTS ARE STRUCTURED, INTERNALLY GOVERNED, AND LEGALLY REGULATED IN THE USA

Matthew J. Mitten

(January 2009)

Matthew J. Mitten
Professor of Law
Director, National Sports Law Institute
Marquette University Law School
Sensenbrenner Hall
P.O. Box 1881
Milwaukee, Wisconsin 53201-1881

Baseball: An Illustration of How Professional Sports Are Structured, Internally Governed, and Legally Regulated in the USA

Professor Matthew J. Mitten
Director, National Sports Law Institute and
LL.M. in Sports Law Program for Foreign Lawyers
Marquette University Law School
Milwaukee, Wisconsin, USA[1]

Baseball, as it is in the United States, is very popular in the Republic of Korea. In recent years Korea's national baseball team has been very successful playing in international competitions. For example, Korea won the gold medal at the 2008 Beijing Olympic Games with an exciting 3-2 victory over Cuba[2] and advanced to the semi-final round of the inaugural World Baseball Classic in 2006. Several Koreans currently play or formerly have played with Major League Baseball teams in the U.S.[3]

Baseball is one of the few sports that originated in the U.S.; whereas, many of the world's sports (including football or soccer) can trace their origins to England. Its rules were standardized and codified by the Knickerbocker club of New York City in the 1840s. Baseball has been described as America's National Pastime, although other team sports such as basketball and football (also known as American gridiron) now are equally popular in the U.S.[4]

---

[1] Presentation during Legal Issues on the Culture, Art, Sports and Entertainment Industry Comparative and International Law Seminar at Dongguk University, Seoul, Korea on October 17, 2008.

[2] Unfortunately, baseball and softball are being eliminated as Olympic sports in 2012. These sports are played primarily in the Americas and Asia and may lack the global appeal of other sports. The Summer Olympic Games overlap with the Major League Baseball, which has prevented most of the world's best baseball players from representing their respective home countries in the Olympics. Hopefully the International Olympic Committee will reinstate both baseball and softball as Olympic sports in the near future.

[3] These players include Cha-Seung Baek, Jung Keun Bong, Jin Ho Cho, Hee-Seop Choi, Shin-Soo Choo, Byung-Hyun Kim, Sun-Woo Kim, Dae-Sung Koo, Sang-Hoon Lee, Chan Ho Park, Jae Kuk Ryu, and Jae Weong Seo.

[4] Sports are a microcosm of society, and professional baseball was segregated throughout a significant part of its history, as were most other professional sports and intercollegiate athletics and much of U.S. society. Although approximately two dozen African Americans played professional baseball in the 1880s, the sport became segregated

In 1871 the National Association of Professional Baseball Players became the first professional sports league in the U.S. Its successor, the National League, which was formed in 1876, is the world's first example of a "closed" league. In other words, unlike the English model of an "open" league with a promotion and relegation system,[5] the same clubs generally remain in the league from year to year regardless of their on-field performance. The Korean Baseball Organization is another current example of a closed professional league.

All four of the major U.S. professional sports leagues (e.g., Major League Baseball (MLB), National Basketball Association (NBA), National Football Association (NFL), and National Hockey League (NHL)) are private associations of their respective member clubs.[6] Each is independently owned and operated and has a vote on league matters. Each league is governed by a commissioner selected and paid by its clubs (which each has a voting representative on its board of governors or directors) who has broad authority to impose discipline, resolve disputes, and make decisions consistent with the "best interests of the game" as determined by his sole judgment. The historical origin of this centralized individual authority is Judge Kennesaw Mountain Landis's 1921 insistence that he be given complete authority and

---

in the 1890s pursuant to a "gentlemen's agreement" to exclude black and dark-skinned Latino players from MLB clubs. It was not until 1947 that Jackie Robinson, an African-American man, reintegrated professional baseball in the U.S. by playing for the Brooklyn Dodgers MLB club. Today, a majority of NFL and NBA players are African American, and there are a substantial number of athletes of color (predominately Latinos) in MLB. There currently are no limits on the maximum number of foreign nationals eligible to play for MLB clubs or in other major professional leagues in the U.S. Although several African Americans have been managers of MLB clubs, persons of color historically have held relatively few major league coaching and senior-level administrative positions so equal opportunity and full integration at all levels of professional sports has not occurred yet.

[5] In such a system, the worst clubs in the league are relegated to the next lower level of competition and a corresponding number of the best clubs from that league take their place by being promoted to the higher level of competition. For example, in English soccer's Premier League, the bottom three clubs in the yearly standings are relegated to the next level and replaced by the top three clubs in the second best English professional soccer league. *See generally* S. Ross & S. Szymanski, *Fans of the World Unite! : A (Capitalist) Manifesto For Sports Consumers* (Stanford Univ. Press 2008).

[6] The NBA, NFL, and MLB are international sports leagues because some of their member clubs are located in Canada.

control over "whatever and whoever had to do with baseball" to become MLB's first commissioner.[7]

The nature and scope of a league commissioner's authority is contractual and derived from the league's constitution, bylaws, and operating rules. Courts generally provide significant deference to a league commissioner's "best interests" authority (especially when his decisions are challenged by a league's member club) and hold that "whether he was right or wrong is beyond the competence and the jurisdiction of this court to decide."[8] Although the scope of its judicial review is very limited, "a court will require a league commissioner to have valid authority to act, to comply with rudimentary notions of due process, to not act in bad faith, and to not contravene any state or federal laws."[9]

Because U.S. professional sports leagues are closed, each league determines the number of its member clubs, which are located in cities throughout the U.S. Pursuant to an agreement among team owners, each club is given an exclusive geographical area in which no other league clubs are located (except for very large metropolitan areas such as New York City and Los Angeles which may be shared by two clubs). A club is named after the city (e.g., Chicago Cubs) or geographical region (e.g., New England Patriots) in which it is located, rather than after the individual or company that owns it as Korea Baseball Organization clubs are named (e.g., Samsung Lions). Generally, a super-majority affirmative vote (e.g., ¾) of the league's existing clubs is necessary to admit a new club to the league. As a result, there may be more cities

[7] Judge Landis was a member of the Marquette University Law School faculty during the 1908-09 academic year. The current Major League Baseball Commissioner, Allan H. ("Bud") Selig, who is a Milwaukee native and former owner of the Milwaukee Brewers MLB club, will begin teaching in Marquette Law School's Sports Law program in 2009.

[8] Finley v. Kuhn, 569 F.2d 527, 539 (7th Cir.), *cert. denied*, 439 U.S. 876 (1978).

[9] M. Mitten, T. Davis, R. Smith & R. Berry, *Sports Law and Regulation: Cases, Materials, and Problems* at 437 (Aspen 2005) (hereafter "Mitten & Davis")

nationwide that desire to host a major league professional club than there are clubs in a particular league. To become a "major league" city, some mid-major U.S. cities such as Charlotte, Memphis, Nashville, and Oklahoma City recently have offered to provide a playing facility and multi-million dollar public subsidies to attract a major league sports club.

Major League Baseball clubs, like their counterparts in other U.S. professional sports leagues, periodically relocate to different cities. Because of declining fan support in Montreal, the Montreal Expos MLB club recently moved to Washington, D.C and was renamed the Washington Nationals. During recent years some clubs have engaged in "franchise free agency"[10] because clubs are permitted to retain certain designated revenues generated by their playing facilities (e.g., gate receipts, personal seat licenses, and income from luxury suites, concessions, and parking) rather than sharing them with other league clubs. Thus, club owners have a significant economic incentive to relocate to another city offering substantial public subsidies and/or free or below market rent for a new playing facility, or to threaten to do so unless its current host city agrees to subsidize renovation of an existing stadium or construction of a new one. For example, in 2008 the Seattle Supersonics NBA club relocated to Oklahoma City to take advantage of a more favorable arena deal and changed its team name to the "Thunder."

Some courts have found that damages are not an adequate remedy for a club's breach of its playing facility lease and that its premature relocation would cause irreparable harm to its host

[10] *See generally* Matthew J. Mitten & Bruce W. Burton, *Professional Sports Franchise Relocations From Private Law and Public Law Perspectives: Balancing Marketplace Competition, League Autonomy, and the Need for a Level Playing Field,* 56 MD. L. REV. 57 (1997).

city and fans. In *City of New York v. New York Yankees*,[11], the court enjoined MLB's New York Yankees from playing any home games outside New York City's Yankee Stadium and stated:

> Much more is at stake than merely the loss of direct and indirect revenue to the City. The Yankee pinstripes belong to New York like Central Park, like the Statute of Liberty, like the Metropolitan Museum of Art, like the Metropolitan Opera, like the Stock Exchange, like the lights of Broadway, etc. Collectively, they are the 'Big Apple.' Any loss represents a diminution of the quality of life here, a blow to the City's standing at the top, however, narcissistic that perception may be.

Federal antitrust law, popularly known as the Sherman Act[12] (named for Senator Sherman who sponsored this legislation), has played a significant role in the development, structuring, and governance of U.S. professional sports leagues.[13] However, it is ironic that in 1922, the first time the U.S. Supreme Court considered an antitrust case involving professional sports, the Court held that the federal antitrust laws do not apply to professional baseball.

In *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*[14], the plaintiff alleged that the American League and National League conspired to monopolize professional baseball in the U.S. by acquiring all of the Federal League's clubs except its Baltimore, Maryland club. This caused the Federal League to cease operations, which left no baseball league for the plaintiff's club to play in because the American League and

---

[11] 458 N.Y.S.2d 486, 489-90 (N.Y. Sup. Ct. 1983).

[12] 15 U.S.C. §1 et. seq.

[13] For example, antitrust law considerations have influenced decisions regarding the business model pursuant to which a league is structured, *Fraser v. Major League Soccer*, 284 F.3d 47 (1st Cir. 2002), which clubs are permitted entry into the league, *Mid-South Grizzlies v. NFL*, 720 F.2d 772 (3d Cir. 1983), who may acquire and own a league club, *Levin v NBA,* 385 F. Supp. 149 (S.D.N.Y. 1974), where clubs are located, *Los Angeles Memorial Coliseum v. NFL*, 726 F.2d 1381 (9th Cir.),*cert. denied*, 469 U.S. 990 (1984), and how revenues from the licensing and sale of league and club intellectual property rights are licensed and sold. *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290 (2d. Cir. 2008); *American Needle v.* 538 F.3d 736 (7th Cir. 2008)*; Chicago Professional Sports Ltd. Partnership v. NBA* 95 F.3d 593 (7th Cir. 1996).

[14] 259 U.S. 200 (1922).

National League are closed leagues. The Supreme Court ruled that organized professional baseball is not subject to the Sherman Act and dismissed plaintiff's complaint. Congress enacted the Sherman Act pursuant to its federal constitutional authority to regulate interstate commerce among the fifty states in the U.S. It has no power to regulate wholly intrastate commerce through federal legislation such as the Sherman Act. The Court acknowledged that professional baseball is a business, thereby satisfying the statute's commerce requirement, but concluded that "giving exhibitions of base ball . . . are purely state affairs."[15] Although professional baseball clubs crossed state lines to play games, the Court observed that the games occurred wholly intrastate and did not involve the interstate movement of goods, which was the only commerce then subject to the Sherman Act because the Court narrowly construed Congress's authority to regulate interstate commerce during the 1920s.

The Supreme Court subsequently took a much broader view of Congress's constitutional authority to regulate and held that other professional sports such as football,[16] basketball,[17] and boxing,[18] are subject to the Sherman Act because their business activities, which are national in scope, involve interstate commerce. In 1972, in *Flood v. Kuhn*,[19] the Supreme Court acknowledged that professional baseball, like other national professional sports leagues and organizations, "is engaged in interstate commerce."[20] However, the Court refused to eliminate baseball's fifty-year old antitrust exemption by overruling *Federal Baseball Club*. Recognizing

[15] Id. at 208.

[16] Radovich v. NFL, 352 U.S. 445 (1957).

[17] Haywood v. NBA, 401 U.S. 1204 (1971).

[18] U.S. v. Int'l Boxing Club, 348 U.S. 236 (1955).

[19] 407 U.S. 258 (1972).

[20] Id. at 282.

it is inconsistent to exempt baseball but not other sports from the Sherman Act, the Court stated that this "aberration"[21] is justified by "baseball's unique characteristics and needs."[22] Observing that "[r]emedial legislation has been introduced repeatedly in Congress but none has ever been enacted," the Court explained that "since 1922 baseball, with full and continuing congressional awareness, has been allowed to develop and to expand unhindered by federal legislative action."[23] Thus, MLB player Curt Flood was precluded from challenging Major League Baseball's "reserve clause," which permitted a club to retain perpetual rights to a player even after his contract expired, on antitrust grounds.

There is a nationwide minor league baseball system of professional baseball player development, the costs of which are incurred by MLB clubs. By comparison, U.S. universities that have Division 1 intercollegiate football and basketball programs function as a *de facto* system of player development for the National Football League and National Basketball Association, the full costs of which are borne by the individual universities rather than being subsidized in whole or in part by the NFL or the NBA.

Historically, Congress was reluctant to enact legislation that eliminates or limits baseball's antitrust exemption in a manner that would permit the structure and operation of the minor league baseball system from being challenged on antitrust grounds. A successful antitrust suit by minor league baseball players (or others) likely would increase MLB clubs' costs of operating this nationwide system that places teams in more than 100 medium and small cities, which provides a very popular source of local community entertainment and civic pride. Increased costs may result in the elimination of unprofitable minor league baseball clubs as a

[21] Id.

[22] Id.

[23] Id. at 283.

cost-savings measure, which would upset residents in communities that lose a team and may ignite a public backlash against Congress for enacting legislation perceived to cause such adverse local effects. Obviously, this is a scenario that members of Congress, particularly those having minor league baseball clubs in their electoral districts, have wanted to avoid.

In 1998, Congress enacted the *Curt Flood Act* [24] (named after the MLB player who was the plaintiff in *Flood v. Kuhn*), which limited baseball's broad common law antitrust immunity. This legislation, which is the product of a joint Congressional lobbying effort by MLB and the players union in accordance with a provision in their 1994 CBA, gave MLB players the same right to challenge their employment terms on antitrust grounds as other professional athletes.[25] However, the *Curt Flood Act* does not permit antitrust challenges to any conduct or agreements relating to or affecting a minor league baseball player's employment.[26]

In 1966 MLB players unionized under federal labor law,[27] and in 1968 their union negotiated the first collective bargaining agreement ("CBA") in professional sports. The CBA provided that disputes regarding the interpretation and application of their labor agreement, unless otherwise excluded, were to be resolved by final and binding arbitration before an independent labor arbitrator.

---

[24] 15 U.S.C. §26b.

[25] As a practical matter, MLB players must choose to de-certify their union to avoid the effect of the non-statutory labor exemption, which bars antitrust claims challenging labor market restraints as long as there is an on-going collective bargaining relationship between the players union and league clubs. See *Brown v. Pro Football, Inc*., 518 U.S. 231 (1996).

[26] 15 U.S.C. §26b (b) (1).

[27] However, it was unclear whether the players had the right to do so until the National Labor Relations Board (NLRB)'s 1969 determination that a labor dispute involving Major League Baseball umpires has the requisite effects on interstate commerce to justify its certification of a bargaining unit on whose behalf their chosen union could engage in collective bargaining. *The American League of Professional Baseball Clubs and Ass'n of National Baseball League Umpires*, 180 N.L.R.B. 190 (1969).

In a 1976 labor arbitration proceeding, *National & American League Professional Baseball Clubs v MLBPA,*[28] two baseball players successfully invalidated MLB's reserve clause. The arbitrator ruled that a Uniform Player Contract (UPC) provision giving his current club the right to renew a player's contract "for the period of one [renewal] year" does not permit the club to unilaterally retain rights to the player beyond the first renewal year. The arbitrator reached this conclusion despite a provision in the MLB CBA stating that "this Agreement does not deal with the reserve system," because, as he explained, he was merely exercising his "sole duty to interpret and apply the agreements [i.e., the terms of the CBA and UPC] of the parties."

The MLB clubs expressed concern that the arbitrator's ruling effectively invalidated the perpetual reserve system in place for most of professional baseball's history, which would encourage many baseball players to become free agents at the end of their renewal years and sign new contracts with the wealthiest clubs. This in turn would disrupt competitive balance among MLB clubs and threaten the sport's integrity as well as motivate club owners to over-extend themselves financially and engage in improvident bidding to acquire the best players and to have a winning team. The arbitrator responded that the parties should negotiate "to reach agreement on measures that will give assurance of a reserve system that will meet the needs of the clubs and protect them from the damage they fear this decision will cause, and, at the same time, meet the needs of the players." The clubs and players union ultimately entered into a new CBA providing that each player achieves free agent status after six years of credited MLB service, which is still the current standard.

Today, federal labor law, which governs the unionization and collective bargaining processes, is of primary importance in labor and employment matters between U.S. major professional leagues and clubs on one side, and players and their union on the other side.

[28] 66 Labor Arbitration 101 (1976).

Several important labor law judicial precedents establishing the bounds of permissible conduct by both sides in the collective bargaining process have arisen out of MLB labor disputes. For example, it is now clearly established that league clubs must provide appropriate financial documentation to the players union if their collective bargaining representatives claim an inability to meet the union's economic terms.[29] League clubs must collectively bargain in good faith with the players union concerning wages, hours, and other working conditions (which includes free agency, salary caps,[30] salary arbitration, and reserve systems) until impasse before federal labor law permits them to impose unilaterally their terms.[31]

Drug testing programs and player sanctions for violations are mandatory subjects of collective bargaining under federal labor law because they are terms and conditions of employment. Each major league professional sport's program is different; current suspensions for a player's first drug testing offense generally ranges from one-fourth to one-third of the league's number of regular season games. For example, MLB players face a 50-game suspension for testing positive for the use of anabolic steroids, which is proportionately longer than the corresponding NBA, NFL, and NHL sanctions imposed on first-time offenders based on the length of these leagues' respective seasons.

Arbitration generally is used to resolve individual labor and employment disputes between a player and his club or league in U.S. professional sports. For example, matters relating to player discipline for on-field or off-field misconduct, violations of drug policies, and contract terms typically are subject to mandatory arbitration. If the arbitrator has jurisdiction to

[29] *Silverman v. Major League Baseball Player Relations Committee, Inc.*, 516 F. Supp. 588 (S.D.N.Y. 1981).

[30] Major League Baseball does not have a per-team aggregate player salary cap (as the NBA, NFL, and NHL do), but MLB clubs whose annual total expenditures for player salaries exceed a certain amount must pay a luxury tax, which is redistributed to other MLB clubs with lower player payrolls.

[31] *Silverman v. Major League Baseball Player Relations Committee, Inc.*, 880 F. Supp. 246 (S.D.N.Y. 1995).

decide the dispute pursuant to agreement of the parties, judicial review of the merits of the arbitration award is very limited. Legal challenges to baseball arbitration awards have generated some important generally applicable principles regarding the nature and scope of post-award judicial review. In *Major League Baseball Players Ass'n v. Garvey*,[32] the Supreme Court held:

> if an 'arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision.' It is only when the arbitrator strays from interpretation and application of the agreement and effectively 'dispenses his own brand of industrial justice' that his decision may be unenforceable.

U.S. major professional sports leagues annually generate multi-billion dollar revenues from the sale of national television, radio, and internet broadcasting rights to their clubs' games and licensing royalties from the sale of merchandise bearing the clubs' trademarks and logos. For example, MLB's television contracts alone will generate revenues of approximately $5.3 billion through 2013. These revenues generally are shared by league clubs on a pro rata basis as a means of maintaining competitive balance among league clubs, which are based in cities with significantly different populations and local revenue generating capacities. Federal intellectual property law, particularly copyright and trademark laws, protects the rights of the league and its member clubs from infringement. As technology develops, intellectual property law must be applied by courts to determine the legally protectable scope of their exclusive rights.

Well-known U.S. professional athletes may earn substantial income from promoting and endorsing a wide variety of products and services, thereby exploiting their commercially valuable right of publicity which was initially recognized under state law in a 1953 case

[32] 532 U.S. 504 509 (2001). See also *Kansas City Royals v. Major League Baseball Players Ass'n*, 532 F.2d 615, 621 (8th Cir. 1976) (judicial review of arbitration award "is limited to the question of whether it 'draws its essence from the collective bargaining agreement.'").

involving the unauthorized use of MLB players' photographs on baseball trading cards. [33] Income earned from the licensing of a player's identity to sell products and services may be greater than that derived from his or her athletic ability or success. For example, in 2007 Tiger Woods earned $22,902,706 from playing golf and almost $100 million in endorsement income.

In summary, Major League Baseball, the NBA, the NFL, and the NHL are closed major professional sports leagues that generate multi-billion dollar annual revenues because their respective sports are extremely popular with fans within and outside of the U.S. During the 2008 season MLB clubs collectively generated approximately $6.5 billion in revenues. Each league's member clubs are privately owned and operated, generally by very wealthy individual owners. All of them are governed by a commissioner who has broad "best interests of the game" authority. Players in all four leagues have chosen to unionize, with the terms and conditions of their employment determined by collective bargaining negotiations between their union and representatives of the league's clubs. Federal antitrust and labor law are two of the most important laws that have influenced the development of U.S. professional sports leagues and have an important role in regulating their business activities. Federal and state intellectual property laws also are very significant because these laws define and protect the scope of league, club, and player intellectual property rights that generate multi-billion dollar revenues annually.

[33] *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.,* 202 F.2d 866 (2d Cir. 1953).