HOW JUSTICE OLIVER WENDELL HOLMES MADE IT HARD FOR IOWANS TO BE BASEBALL FANS AND WHY THAT MIGHT BE CHANGING

ABSTRACT

In many parts of the United States it is extremely expensive—or in some cases impossible—for baseball fans to watch their favorite Major League Baseball teams. Many times when fans turn on their television to catch their favorite team they are greeted with a black screen. This black screen means the game is blacked out in that fan's region. For other sports and forms of entertainment, the black screen would constitute a violation of federal antitrust law. However, due to a history that started in the Supreme Court in the 1920s, Major League Baseball enjoys an exemption to federal antitrust laws that allows it to get away with blackouts. This Note suggests that the exemption is archaic and explores the cause-and-effect relationship the exemption has on both the on-field product of Major League Baseball and the fans trying to watch the game at home.

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I. HOW DID WE GET TO THIS POINT?

In Carmel-by-the-Sea, California it is illegal to wear shoes with heels more than two inches tall,[1] and some say it is illegal in North Dakota to serve pretzels and beer at the same time.[2] In Beacon, New York some allege that pinball machines are not allowed within city limits,[3] and in the United States, Major League Baseball (MLB) is not considered interstate commerce.[4] Many outdated laws exist that are no longer enforced, but they are still on the books because they have long since been forgotten.[5] Occasionally, articles about these archaic laws appear, entertaining their readers with laws that seem ridiculous in today's context.[6] Harmless, they are good for a laugh, and then they are forgotten once more. These laws could be considered analogous to the policy basis for MLB's federal antitrust exemption, except that wearing three-inch stilettos in Carmel-by-the-Sea, California is possible, while watching the Twins from Ankeny, Iowa (without a special cable package) is not.[7]

In 1922, in the opinion for *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, Justice Oliver Wendell Holmes provided the precedent on which today's MLB federal antitrust exemption exists.[8] In *Federal Baseball Club of Baltimore*, a baseball team from Baltimore was part of the Federal League of Professional Base Ball Clubs.[9] The club sued the American and National Leagues after the two

1. CARMEL-BY-THE-SEA, CAL., MUNICIPAL CODE § 8.44.020 (2017).

2. *See, e.g.*, Chris Opfer, *10 Completely Archaic Laws Still on the Books: 5 Beer and Pretzels Don't Mix*, HOW STUFF WORKS (Oct. 29, 2012), http://people.howstuffworks.com/10-archaic-laws6.htm. *But see Fact or Fiction: Beer and Pretzel Laws*, KFYR-TV (June 21, 2013, 4:40 PM), http:/www.kfyrtv.com/story/22657831/fact-or-fiction-beer-and-pretzel-laws [https://web.archive.org/web/20130626032440/http:/www.kfyrtv.com/story/22657831/fact-or-fiction-beer-and-pretzel-laws].

3. *See, e.g.*, Chris Opfer, *10 Completely Archaic Laws Still on the Books: 2 No Pinball*, HOW STUFF WORKS (Oct. 29, 2012), http://people.howstuffworks.com/10-archaic-laws9.htm.

4. Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 208–09 (1922).

5. *See, e.g.*, Christina Sterbenz & Melia Robinson, *Here Are the Most Ridiculous Laws in Every State*, BUSINESS INSIDER (Feb. 21, 2014), http://www.businessinsider.com/most-ridiculous-law-in-every-state-2014-2.

6. *See, e.g.*, *id.*

7. *Packages*, DirecTV, https://www.directv.com/DTVAPP/pepod/configure.jsp#package-section (last visited Apr. 25, 2017).

8. *Fed. Baseball Club of Balt., Inc.*, 259 U.S. at 209.

9. *Id.* at 207.

leagues bought some teams from the Federal League, and then persuaded the remaining clubs—except the Baltimore club—to leave the Federal League.[10] Left without a league, the Baltimore club brought suit alleging that the other leagues were trying to monopolize baseball in violation of federal antitrust law.[11]

Justice Holmes reasoned that despite baseball's requirement of "constantly repeated travelling on the part of clubs, . . . [baseball] does not become commerce among the States because [that] transportation . . . takes place."[12] On this reasoning, the Court affirmed the lower court's decision and held that MLB was not within the federal antitrust laws.[13]

In 1953, MLB's antitrust exemption was challenged in *Toolson v. New York Yankees, Inc.* when MLB players brought suit against MLB, alleging a federal antitrust violation stemming from MLB's reserve clause.[14] MLB's reserve clause was a "provision in the player contract which [gave] to the club in organized baseball which first sign[ed] a player a continuing and exclusive right to his services."[15] This provision was part of the "rules and regulations" of MLB, preventing other teams from offering a contract to another team's player.[16] This created an artificially low demand for the player, forcing him to sign a contract for compensation below his market value.[17]

The *Toolson* Court refused to re-examine whether baseball was interstate commerce subject to antitrust laws and affirmed the decision in favor of MLB based on the holding in *Federal Baseball Club of Baltimore*.[18] The Court reasoned that Congress, up to that point, had 30 years to pass legislation overruling *Federal Baseball Club of Baltimore*, and "if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation."[19]

In 1961, Congress did act, passing the Sports Broadcasting Act (SBA), which affects the antitrust exemption analysis of MLB's broadcasting

10. *Id.*

11. *Id.* Federal antitrust law consists of statutes that "protect trade and commerce against unlawful restraints and monopolies." 15 U.S.C. § 12(a) (2012).

12. *Fed. Baseball Club of Balt., Inc.*, 259 U.S. at 208–09.

13. *Id.* at 208.

14. Toolson v. N.Y.C. Yankees, Inc., 346 U.S. 356, 362 (1953) (Burton, J., dissenting).

15. *Id.* at 362 n.10 (citing H.R. REP. No. 82-2002, at 111 (1952)).

16. *Id.* (citing H.R. REP. No. 82-2002, at 111 (1952)).

17. *Id.* at 362–64.

18. *Id.* at 357.

19. *Id.*

rights.[20] The SBA "created an antitrust exemption for certain types of professional sports broadcasting agreements, particularly league-wide contracts for over-the-air broadcasts."[21] An example of an agreement protected by the SBA would be the National Football League's (NFL) deal with the National Broadcasting Company (NBC) for Sunday Night Football, which allows NBC to broadcast one NFL game per week, nationwide, during football season.[22] However, the SBA would not protect regional television agreements: "The Act expressly did not apply to any agreement that 'prohibits . . . [the] televising [of] any games within any [geographic] area, except within the home territory of a member club of the league on a day when such club is playing at home.'"[23] While the Supreme Court has not explicitly stated the SBA preempts MLB's antitrust exemption, it has stated the SBA:

> demonstrates Congress' recognition that agreements among league members to sell television rights in a cooperative fashion could run afoul of the [federal antitrust laws], and in particular reflects its awareness of the decision in *United States v. National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953), which held that an agreement among the teams of the National Football League [not to telecast games in certain geographic areas at certain times] violated [federal antitrust laws].[24]

In 1972, MLB's federal antitrust exemption was once again before the Supreme Court.[25] In 1972, in *Flood v. Kuhn*, Curt Flood sued the Commissioner of baseball, the 2 baseball leagues, and all 24 MLB teams, alleging an antitrust violation after he was traded from the St. Louis Cardinals to the Philadelphia Phillies without his consent.[26] Not wanting to play for the Phillies, Flood asked to become a free agent, and when his request was denied, he retired and brought suit.[27] The Court declared, "Professional baseball is a business and it is engaged in interstate commerce."[28] The Court went on to call MLB "an exception and anomaly" stating, "*Federal Baseball* [*Club of Baltimore*] and *Toolson* have become an

20. 15 U.S.C. § 1291 (2012).
21. Laumann v. NHL, 56 F. Supp. 3d 280, 293 (S.D.N.Y. 2014).
22. *See id.*
23. *Id.* (quoting 15 U.S.C. § 1291).
24. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 104 n.28 (1984).
25. Flood v. Kuhn, 407 U.S. 258, 258–59 (1972).
26. *Id.* at 265.
27. *Id.*
28. *Id.* at 282.

aberration confined to baseball."[29] The Court went on to hold that this "aberration . . . has been with us now for half a century, . . . [and is] fully entitled to the benefit of *stare decisis*."[30] The decision left MLB's antitrust exemption intact but provided a few clarifications in doing so. Besides stating that the original rationale behind the antitrust exception from *Federal Baseball Club of Baltimore* was an aberration, the Court also stated other professional sports do not enjoy the same antitrust exemption that MLB does.[31] Further, the Court mentioned that "[t]he advent of radio and television, with their consequent increased coverage and additional revenues, has not occasioned an overruling of *Federal Baseball Club of Baltimore* and *Toolson*."[32] The Court echoed the *Toolson* Court in saying that Congress's inaction in regards to the reserve clause was convincing enough to keep the precedent intact.[33]

In 1975, three years after *Flood*, MLB's reserve clause was struck a fatal blow, which consequently was the first major blow to MLB's antitrust exemption. Following the 1975 season, Andy Messersmith and Dave McNally, two MLB pitchers, again challenged MLB's reserve clause hoping to gain free agency.[34] However, unlike *Flood*, the case was heard before an independent arbitrator who "ruled that the reserve clause granted a team only one additional year of service from a player, putting an end to perpetual renewal right the clubs had claimed for so long."[35] MLB players had finally gained the right to free agency previously denied for years under the antitrust exemption.[36] The owners of MLB teams did not give in lightly and appealed the decision, but the district court and the Eighth Circuit upheld the arbitrator's decision using a narrow standard of review.[37]

The decision did not overturn any prior decisions regarding MLB's antitrust exemption because the decision was upheld by the court, which ruled that the arbitrator "was interpreting the contract, and that was exactly

29. *Id.*

30. *Id.* at 282.

31. *Id.* at 282–83. The Court merely pointed out that MLB was an anomaly of federal antitrust law and gave no reason as to why history turned out the way it did. *Id.*

32. *Id.* at 283.

33. *Id.* at 283–84.

34. *Our History*, MLB PLAYERS (June 29, 2016), http://www.mlbplayers.com/ViewArticle.dbml?ATCLID=211042995&DB_OEM_ID=34000.

35. *Id.*

36. *Id.*

37. Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 532 F.2d 615, 617 (8th Cir. 1976); *see also* Roger I. Abrams, *Arbitrator Seitz Sets the Players Free*, SOC'Y FOR AM. BASEBALL RESEARCH, http://sabr.org/research/arbitrator-seitz-sets-players-free (last visited June 3, 2017).

what [MLB and the players] said they wanted. The fact that the owners thought he was wrong on the merits was irrelevant on review."[38] Upholding the decision using contract law instead of overturning MLB's federal antitrust exemption allowed the players to gain free agency while leaving the *Federal Baseball Club of Baltimore* decision intact.[39]

In 1998, as a formality, that arbitral decision finally arrived in the form of legislation called the Curt Flood Act of 1998.[40] The Curt Flood Act was Congress's first response to MLB's antitrust exemption, and it discarded MLB's antitrust exemption within the context of players' employment.[41] Essentially, the Curt Flood Act formalized the arbitrator's ruling from 1975 allowing free agency.[42] The Act did not overrule *Federal Baseball Club of Baltimore*'s MLB federal antitrust exemption as a whole, only the employment portion.[43] The Act explicitly stated:

> This section does not create, permit or imply a cause of action by which to challenge under the antitrust laws, or otherwise apply the antitrust laws to, any conduct, acts, practices, or agreements that do not directly relate to or affect employment of major league baseball players to play baseball at the major league level . . . ."[44]

The Act then provided a nonexclusive list of MLB antitrust issues that the Curt Flood Act did not apply to, including:

> (1) minor league baseball players; (2) organized minor league baseball; (3) "franchise expansion, location or relocation, [and] franchise ownership issues;" (4) conduct and agreements related to the Sports Broadcasting Act of 1961; (5) umpires and other employees of organized professional baseball; and (6) any conduct or agreements with persons not in the business of Major League Baseball.[45]

38. Abrams, *supra* note 37.

39. *See Kansas City Royals Baseball Corp.*, 532 F.2d at 630–31.

40. Curt Flood Act of 1998, 15 U.S.C. § 26b (2012).

41. *Id.* The Curt Flood Act allowed MLB players to sign with other teams as free agents, but did not prohibit MLB from using its historic federal antitrust exemption in other ways. *Id.* § 26b(a)–(b).

42. *See id.* § 26b(a); Abrams, *supra* note 37.

43. 15 U.S.C. § 26b(b).

44. *Id.*

45. Justin B. Bryant, Note, *Analyzing the Scope of Major League Baseball's Antitrust Exemption in Light of* San Jose v. Office of the Commissioner of Baseball, 89 NOTRE DAME L. REV. 1841, 1850 (2014) (alteration in original).

After the enactment of the Curt Flood Act, the prevalent issue attacking MLB's antitrust exemption changed from the reserve clause—an employment issue—to the antitrust violation of MLB teams' territorial rights.[46] MLB has divided geographical locations into territories and given each team the right to a particular territory.[47] A team can block another team from moving into its territory.[48] For example, while it did not end in litigation on antitrust grounds, the move of the Montreal Expos (who subsequently changed their name to the Nationals) to Washington, D.C., in 2004 showed the power MLB's antitrust exemption had over a team's territorial rights.[49] At the time of the move, the Baltimore Orioles owned the territorial rights to Washington, D.C.[50] In order to convince the Orioles to let them move to D.C., the Nationals agreed to "a deal whereby the Orioles would hold a majority partnership profit interest in MASN [, the regional television broadcaster of Orioles games,] and get to telecast Nationals games at a substantial discount from 2005 to 2011."[51] That discount led to a substantial amount of money for Peter Angelos, owner of the Baltimore Orioles.[52] It allowed MASN, the regional baseball network in which Angelos had a majority stake, to pay the Nationals $29 million per year for six years to broadcast Nationals games when some speculated those rights could have netted the Nationals $100 million per year.[53] There is conjecture that because of the deal with the Nationals, MASN was able to bring in $100 million in annual profits.[54]

The Nationals and Orioles set the background for how much a team's territorial rights can be worth and were able to work out a deal that benefitted both teams.[55] When teams are unable to work out a deal, MLB's

46. *Id.* at 1850–51.

47. Brian Cassella, *Major League Baseball Settles with Fans Over Out-of-Market Broadcasts*, CHI. TRIB. (Jan. 20, 2016), http://www.chicagotribune.com/business/ct-major-league-baseball-broadcasts-20160119-story.html.

48. *See, e.g.*, John Shea & Susan Slusser, *A's, Giants Issue Territorial-Rights Statements*, SF GATE (Oct. 12, 2014), http://www.sfgate.com/sports/article/A-s-Giants-issue-territorial-rights-statements-3390528.php.

49. Eriq Gardner, *Baltimore Orioles Triumph in MLB Civil War over TV Money*, HOLLYWOOD REP. (Nov. 4, 2015), http://www.hollywoodreporter.com/thr-esq/baltimore-orioles-triumph-mlb-civil-837077.

50. Drew Forrester, *MASN Has Gobs of Money but They Don't Want to Give Any of It to the Nationals*, WNST 1 (June 12, 2012), http://wnst.net/baltimore-orioles/masn-has-gobs-of-money-but-they-dont-want-to-give-any-of-it-to-the-nationals/.

51. Gardner, *supra* note 49.

52. Forrester, *supra* note 50, at 1.

53. *Id.*

54. *Id.*

55. *Id.* at 3.

antitrust exemption takes center stage once again. In *City of San Jose v. Office of the Commissioner of Baseball*, the Oakland Athletics challenged the San Francisco Giants' territorial rights by claiming they were a violation of federal antitrust law.[56] The Oakland Athletics wanted to move to San Jose, California, but San Jose was considered within the territory of the Giants.[57] Because MLB bylaws grant the Giants exclusive rights to San Jose, the Athletics were prevented from moving to San Jose despite the San Jose City Council executing an option agreement to purchase land owned by the city to build a new stadium for the Athletics.[58] San Jose claimed that MLB was an "'unlawful monopoly' which excluded San Jose from competing with other cities for a Major League Baseball franchise."[59]

In an opinion by United States Court of Appeals for the Ninth Circuit, the court held that MLB's antitrust exemption remained valid as applied to a team's territorial rights.[60] The court looked at the congressional intent behind the Curt Flood Act and concluded "when Congress specifically legislates in a field and explicitly exempts an issue from that legislation, our ability to infer congressional intent to leave that issue undisturbed is at its apex."[61] By leaving team relocation out of the Curt Flood Act, the court rationalized that Congress was aware the antitrust exemption could possibly apply to a team trying to relocate.[62] Congress did not address the issue, but did make the effort to overturn the exemption in another area, specifically in the area of player free agency.[63] The court concluded that by remaining quiet on whether MLB's antitrust exemption applied to team relocation, Congress was agreeing with the current status quo, which was that the exemption did apply to team relocation.[64] The *City of San Jose* court said it could not overrule the decision in *Flood* and that it would be left up to the Supreme Court or Congress if they wanted to decide that MLB's antitrust exemption did not apply to team relocation.[65] The Supreme Court decided

56. City of San Jose v. Office of the Comm'r of Baseball, 776 F.3d 686, 688 (9th Cir. 2015); Bryant, *supra* note 45, at 1850.
57. *City of San Jose*, 776 F.3d at 687–88.
58. *Id.*
59. Bryant, *supra* note 45, at 1851.
60. *City of San Jose*, 776 F.3d at 691.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 692.

not to grant certiorari to San Jose and left the Ninth Circuit's decision in place.[66]

II. THE CURRENT BROADCAST PROBLEM

Recently, a lawsuit was filed in the United States District Court for the Southern District of New York bringing a new challenge to MLB's federal antitrust exemption to the forefront. In *Garber v. Office of the Commissioner of Baseball*—which was combined with another case and proceeded under the name *Laumann v. NHL*—plaintiffs alleged that MLB's territorial rules, which created its broadcasting blackout policy, were a violation of federal antitrust laws.[67] In denying MLB's motion for summary judgment, the district court held MLB's federal antitrust exemption did not apply to broadcasting.[68] The plaintiffs in *Laumann* alleged MLB's exclusive geographical territories make it increasingly difficult for fans to watch baseball games.[69]

A. *How MLB's Broadcasting Policy Works*

Currently, baseball broadcasting is structured around Regional Sports Networks (RSNs).[70] Like the geographical territories in the *City of San Jose* case, MLB also divides its broadcasting rights into territories, and each team is assigned a home television territory (HTT).[71] Each team agrees to license its games for broadcasts only within its HTT.[72] For example, if the Kansas City Royals' HTT included northern Missouri and all of Nebraska, it could only sell the rights to its home and away games to a broadcaster within that territory.[73] So if Fox Broadcasting Company wanted to pay the Royals to broadcast the Royals' games, the Royals could only sell Fox the rights to northern Missouri and Nebraska. Once these rights are acquired, an RSN is formed.[74] Fox's RSN showing Royals' games is called Fox Sports Kansas

66. City of San Jose v. Office of the Comm'r of Baseball, 136 S. Ct. 36 (2015); Janie McCauley, *Supreme Court Rejects Appeal from San Jose in Bid to Lure Baseball's Athletics from Oakland*, U.S. NEWS (Oct. 15, 2015), https://www.usnews.com/news/politics/articles/2015/10/05/supreme-court-rejects-san-jose-appeal-over-athletics-move.

67. Laumann v. NHL, 56 F. Supp. 3d 280, 285–86 (S.D.N.Y. 2014).

68. *Id.* at 295.

69. *Id.* at 286–88.

70. *Id.* at 287.

71. *Id.* at 286.

72. *Id.*

73. *See id.* at 286–87.

74. *See* Dave Warner, *The High Cost of Regional Sports Networks*, WHAT YOU PAY

City (FSKC).[75] If Fox wanted the rights to broadcast Royals games in a different territory, say Florida, it could not buy those rights from the Royals.

Once an RSN is created, the broadcaster, in this case Fox, produces the telecast of the Royals games.[76] However, because of the HTT arrangement, it can only sell its RSN channel to cable or satellite companies within the Royals' HTT.[77] Once a cable or satellite provider reaches an agreement to carry an RSN, it does not mean that the cable or satellite provider must carry the RSN throughout the team's entire HTT.[78] Following the Royals example, a cable provider may reach a deal with Fox to carry the FSKC RSN, but then decide to distribute it only to northern Missouri—leaving cable subscribers in Nebraska without Royals baseball. While this is an unlikely scenario, and a decision that would almost never be made by companies trying to get as many cable subscribers as they can, it does have a large impact on and provides a huge disadvantage to fans who live in states without an MLB team. Nowhere is the problem more prevalent than in the state of Iowa.

B. *Watching Your Favorite Baseball Team in Iowa Can Be Difficult*

Iowa is not home to any MLB team, but due to its proximity to many major cities, it is considered to be within the HTTs of six teams.[79] Iowa is included within the HTT of the Kansas City Royals, Milwaukee Brewers, St. Louis Cardinals, Chicago White Sox, Chicago Cubs, and Minnesota Twins.[80] Unlike the hypothetical scenario in which the Royals are not carried by a

FOR SPORTS (Apr. 17, 2013), http://www.whatyoupayforsports.com/2013/04/the-high-cost-of-regional-sports-networks/.

75. *About Fox Sports Kansas City*, FOX SPORTS (Sept. 12, 2015), http://www.foxsports.com/kansas-city/story/about-fox-sports-kansas-city-091215.

76. *Id.*

77. *See Laumann*, 56 F. Supp. 3d at 287.

78. *Id.*

79. Ryan Fagan, *MLB.tv's Blackout Rules and You: Which Cities Are Impacted the Most?*, SPORTING NEWS (May 24, 2014), http://www.sportingnews.com/mlb/news/mlb-blackout-rules-antitrust-suit-court-update-charlotte-iowa-las-vegas-honolulu/n8hnb02g9ack1pbom49git08u; *see also Blackout Restrictions*, MLB.TV, http://mlb.mlb.com/mlb/subscriptions/index.jsp#blackout (last visited July 11, 2017) (listing MLB teams within HTTs by zip code).

80. Fagan, *supra* note 79; Southern Nevada is the only other part of the country that falls within the HTTs of six teams. *See* Search Results for Zip Code 89046 in *MLB.tv Help Center*, MLB.TV, http://mlb.mlb.com/mlb/subscriptions/blackout.jsp?postalCode=89046 (last visited Apr. 26, 2017) (showing that zip code 89046 is a zip code for Clark County, Nevada).

cable provider in Nebraska, cable and satellite customers in Iowa frequently only have the option to purchase television packages that do not carry their favorite baseball team's RSN.[81] This is because cable or satellite providers typically include only one, or, if in a large metropolitan area, two RSNs as part of their basic cable subscription.[82] Fans are stuck with what is provided by the cable or satellite provider.

In Iowa it is better and easier to be a fan of a team that does not claim Iowa within its HTT because it is easier to watch the team's games; this is due to out-of-market (OOM) packages. OOM packages are created by a combination of RSNs. [83] When a broadcaster wants to buy a team's broadcasting rights within the team's HTT, the broadcaster must agree to provide MLB with free telecasts of the team's games.[84] The telecasts from all the RSNs around the country are then packaged together to create OOM packages, which MLB then sells directly to cable and satellite providers or to internet customers.[85] OOM packages do not provide subscribers with all games because they "exclude in-market games to 'avoid diverting viewers from local RSNs that produce the live game feeds that form the OOM packages.'"[86] If a Royals fan in Iowa is unable to buy a cable package with the Royals' RSN, alternatively, that fan cannot buy an OOM package to watch the Royals because MLB will blackout all Royals games on that fan's subscription. [87]

However, that same Royals fan would have to pay the same price as a Red Sox fan for the OOM package because buying the whole slate of games

81. Royals, Cubs, White Sox, Brewers, and Cardinals fans living in northwest Iowa are often times unable to buy a cable package with their favorite team. *See, e.g.*, *Services: Digital Basic*, COMMUNITY AGENCY, www.tcaexpress.net/cable.html (last visited June 3, 2017) (indicating the only RSN channel offered in its package is the Twin's RSN, Fox Sports North); *see also About*, COMMUNITY AGENCY, www.tcaexpress.net/about.html (last visited June 3, 2017) ("The Community Agency (TCA) is a joint effort between four Northwest Iowa cities . . . . to provide high-tech telecommunication service[s] . . . ."); *North*, FOX SPORTS, www.foxsports.com/north (last visited June 3, 2017) (using team logo icons to indicate coverage includes the Minnesota Twins).

82. *See, e.g.*, *Channel Lineup: Altoona, Bondurant, Carlisle, Des Moines, Hartford, Norwalk, Pleasant Hill, Polk Co., Waukee & West Des Moines, IA*, MY MEDIACOM, https://mediacomtoday-lineup.com/lineup/76/altoona_bondurant_carlisle_des_moines_hartford.aspx (last visited June 3, 2017) (including Fox Sports Midwest Plus, Fox Sports Midwest, and Fox Sports 1 in its basic Family TV Package, effective April 10, 2017); *Services: Digital Basic*, *supra* note 81 (including only the RSN Fox Sports North).

83. *Laumann*, 56 F. Supp. 3d at 288.

84. *Id.* at 287.

85. *Id.* at 287–88.

86. *Id.* at 288 (citations omitted).

87. *See Blackout Restrictions*, *supra* note 79.

is the only OOM option available.[88] Unlike a Red Sox fan, who would only have Red Sox games blacked out on their OOM and would be able to access the Red Sox RSN through a cable or satellite subscription,[89] OOM subscribers in Iowa would have six teams blacked out on their OOM subscription. If none of those teams are playing each other on a given day, Iowa OOM subscribers could have as many as 12 teams blacked out—the six teams who have HTTs in Iowa, and the six teams those teams are playing. Twelve teams is almost half the teams in MLB.[90] The only OOM option available is buying every MLB game. For the same cost, Iowa baseball fans are getting about half the product of their Boston counterparts.

III. A NEW CHALLENGE APPEARS TO CONTEST MLB'S FEDERAL ANTITRUST EXEMPTION

Laumann v. NHL is a combination of two different lawsuits; one filed against the National Hockey League (NHL), and the other filed against MLB.[91] Both complaints allege a violation of federal antitrust law, and it could be the case that finally lets Iowa baseball fans watch baseball again.[92]

For years, MLB has relied on its federal antitrust exemption in order to implement its broadcasting policies, which include its broadcasting blackouts. In 2012, *Garber v. Office of the Commissioner of Baseball* was filed and challenged those polices by alleging that MLB was violating federal antitrust laws, and that MLB's federal antitrust exemption did not apply to broadcasting.[93] At the same time, fans of the NHL were running into the same issues while trying to watch their favorite teams and also filed a suit alleging the NHL was violating federal antitrust laws.[94] The lawsuits were combined into one action, and across the country, especially in places like

88. *See Laumann*, 56 F. Supp. 3d at 288.

89. *Boston Channel Lineups*, RCN, http://www.rcn.com/boston/digital-cable-tv/channel-lineups/ (last visited Apr. 26, 2017); *MLB.tv Help Center*, MLB.TV, http://www.mlb.com/mlb/subscriptions/blackout.jsp?postalCode=02108 (last visited June 3, 2017).

90. MLB consists of 30 teams. *Team-by-Team Information*, MLB, http://mlb.mlb.com/team/ (last visited Apr. 26, 2017).

91. *Laumann*, 56 F. Supp. 3d at 285.

92. *See id.*

93. Nathaniel Grow, *The Impending Battle Over the Future of Televised Baseball*, FAN GRAPHS (Jan. 11, 2016), http://www.fangraphs.com/blogs/the-impending-battle-over-the-future-of-televised-baseball/.

94. *Laumann*, 56 F. Supp. 3d at 286.

Iowa, fans watched in the hopes of being able to watch their favorite teams again.[95]

A. *MLB's Federal Antitrust Exemption Does Not Apply to Its Broadcasting Policies*

The first and possibly largest hurdle the plaintiffs had to overcome in *Garber* was MLB's federal antitrust exemption. Following the filing of the suit, MLB quickly moved for summary judgment based on its federal antitrust exemption.[96] MLB argued that in *Toolson* the Supreme Court had "affirmed dismissal of *all* of the plaintiff's claims, including the factual allegations related to territorial broadcasting."[97] MLB argued that this meant the Supreme Court understood territorial broadcasting to fall within MLB's antitrust exemption.[98] The court disagreed, reasoning that the *Toolson* Court had not meant to include broadcasting rights under MLB's antitrust exception.[99] The court explained that its opinion was based on the *Toolson* opinion's failure to mention—at any court level—broadcasting rights.[100] Further, the court held that "the Supreme Court [had] expressly limited its holding in *Toolson* to the [confines] of the decision in *Federal Baseball* [*Club of Baltimore*], which rested entirely on interstate commerce grounds and did not involve broadcasting-related allegations."[101] The court explained that television broadcasting is an interstate industry by nature and that it does not fall within the antitrust exemption created in *Federal Baseball Club of Baltimore* because *Toolson*, by failing to mention territorial broadcasting restrictions, did not expand the exemption created in *Federal Baseball Club of Baltimore*.[102]

The court also reasoned that the Sports Broadcasting Act of 1961 was further proof that MLB's antitrust exemption did not apply to broadcasting.[103] The SBA granted limited immunity to a narrow category of broadcasting agreements, and the court reasoned that the SBA would be pointless if all of MLB's broadcasting agreements were already covered by its federal antitrust exemption.[104] The court also mentioned that the SBA

95. *See id.*
96. *Id.*
97. *Id.* at 295.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* The SBA enables professional sports leagues to make a deal on behalf of

expressly excluded from protection most agreements that involved geographic broadcasting territories—the SBA protected national deals—which implied Congress meant for broadcasting territories based on geography to be subject to federal antitrust laws.[105]

The court supported its holding by citing *Henderson Broadcasting Corp. v. Houston Sports Association*, which was the only published federal opinion to address whether MLB's federal antitrust exemption applied to broadcasting after the passing of the SBA.[106] The *Henderson* court reasoned:

> [The Supreme Court] has implied that broadcasting is not central enough to baseball to be encompassed in the baseball exemption . . . Congressional action does not support an extension of the exemption to radio broadcasting . . . [and] lower federal courts have declined to apply the baseball exemption in suits involving business enterprises which, like broadcasting, are related to but separate and distinct from baseball.[107]

Following this decision the court certified the *Garber* suit as a class action, but contemporaneously ruled that plaintiffs may only seek injunctive relief, taking away the monetary incentive for plaintiffs to pursue the suit.[108] In June 2015, the plaintiffs suing the NHL bowed out, accepting a settlement offer.[109] The settlement provided for a five-year window where the NHL would offer "single-team packages for at least 20 percent below the cost of bundled packages."[110] The NHL also discounted the price for users who renewed their package early for the 2015–2016 season, which lowered the cost from about $159 for a bundled package to $105 for a single-team package.[111] Early commentators said "the settlement could provide between

the entire league to give a third party exclusive rights to stream a game nationally. *Id.* at 293. This would apply to popular deals such as Monday Night Football and Sunday Night Baseball. In these instances, the games are provided to the national audience as a whole and are not blacked out in a specific region. *See id.*

105. *Id.* at 295.

106. *Id.* at 296 (citing Henderson Broad. Corp. v. Hous. Sports Ass'n, 541 F. Supp. 263, 265 (S.D. Tex. 1982)).

107. *Id.* at 296 (alterations in original) (quoting *Henderson Broad. Corp.*, 541 F. Supp. at 265).

108. Grow, *supra* note 93.

109. Jonathan Stempel, *NHL, Broadcasters Settle Lawsuit Over TV Blackouts*, REUTERS (June 11, 2015), http://www.reuters.com/article/nhl-broadcasters-antitrust-settlement-idUSL1N0YX1ZW20150611.

110. *Id.*

111. Plaintiff's Memorandum in Support of Motion for Preliminary Approval of

$21 million and $28 million of value to the class in the form of lower prices and better game-watching options."[112] The settlement permitted the NHL to keep its blackouts in place, allowing it to refrain from altering the HTT method on which the *Laumann* and *Garber* lawsuits focused.[113]

In the months following the settlement in *Laumman*, MLB announced a new out-of-market streaming plan that would allow consumers to purchase the games of an individual out-of-market team rather than buy every out-of-market team's games.[114] This new package was almost identical to the NHL package produced in the *Laumann* settlement. Additionally, MLB announced that the 2016 season would see some in-market streaming.[115] The catch was that only teams whose RSNs were owned by Fox would allow in-market streaming. [116] Further, in order to stream a game, in-market consumers also had to subscribe to cable or satellite and already receive the in-market RSN channel they wanted to stream.[117] MLB made no changes to its blackout polices or HTTs, with the end result being consumers could pay a little less if they only wanted to watch the games for one out-of-market team.[118] Many of the plaintiffs' attorneys in *Garber* were the same attorneys who settled in *Laumann*.[119] This fact, along with MLB's recently announced

Class Action Settlement at 2, Laumann v. NHL, 56 F. Supp. 3d 280 (S.D.N.Y. 2014) (No. 1:12-cv-01817-SAS), 2016 WL 879772.

112. Max Stendahl, *NHL Settlement Approved in Broadcast Antitrust Case*, LAW 360 (Sept. 1, 2015), https://www.law360.com/articles/697822/nhl-settlement-approved-in-broadcast-antitrust-case.

113. *See* Jeff John Roberts, *Cheaper Sports on the Way Thanks to NHL "Blackout" Settlement, MLB Could Follow*, FORTUNE (June 12, 2015), fortune.com/2015/06/12/nhl-blackouts-settlement/.

114. Mike Axisa, *MLB to Offer Single-Team MLB.tv Packages in 2016*, CBS SPORTS (Dec. 29, 2015), http://www.cbssports.com/mlb/eye-on-baseball/25430538/mlb-to-offer-single-team-mlbtv-packages-in-2016.

115. John Ourand & Eric Fisher, *MLB, Fox Break Impasse in Streaming Talks*, Sports Business (Aug. 17, 2015), http://www.sportsbusinessdaily.com/Journal/Issues/2015/08/17/Media/MLB-streaming.aspx. Streaming refers to the method of accessing data, such as watching baseball games, over the internet. *Streaming*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/streaming (last visited June 6, 2017). As an example, in-market streaming would allow a Rockies fan in Colorado to watch Rockies games over the internet.

116. Ourand & Fisher, *supra* note 115. Fox Sports owns the RSNs of exactly half the teams in baseball. Jared Newman, *In-Market Baseball Streaming Starts Next Year, but Not Through MLB.TV*, TECH HIVE (Nov. 20, 2015), http://www.techhive.com/article/3006947/streaming-services/in-market-baseball-streaming-starts-next-year-but-not-through-mlb-tv.html.

117. Newman, *supra* note 116.

118. Ourand & Fisher, *supra* note 115.

119. *Compare* Laumann v. NHL, 56 F. Supp. 3d 280, 284 (S.D.N.Y. 2014), *with*

streaming changes and lack of monetary incentive to continue to pursue MLB's alleged antitrust violation, led *Garber* to become a likely candidate for settlement.[120]

B. *The* Garber *Trial*

While the district court ruled MLB's federal antitrust exemption inapplicable, had the case gone to trial, the plaintiffs would still have had to prove that MLB's blackouts and HTT polices were a violation of federal antitrust law. To do this, plaintiffs would have had to turn to "Section 1 of the Sherman Act [, which] prohibits '[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.'"[121] The question to be answered in a Section 1 case is "whether the challenged conduct stems from independent decision or from an agreement, tacit or express."[122] If it is the latter, then the plaintiff can prove conspiracy by presenting evidence that the defendant and another "had a conscious commitment to a common scheme designed to achieve an unlawful objective."[123]

Plaintiffs would have had no problem proving that MLB's clubs conspired together when setting up their HTT policy. MLB has acknowledged that it has territorial rules that all teams comply with.[124] The real issue at trial—at least at the district court level—would have hinged on whether MLB's HTT rules and blackout polices were actually more beneficial than harmful to consumers.[125]

C. *MLB's Territorial Exclusivity Will Not Be a Per Se Violation of Antitrust Law*

"Section 1 [of the Sherman Act] 'outlaw[s] only *unreasonable* restraints.'"[126] For the MLB's restrictions to be considered an unreasonable

Plaintiffs' Pretrial Memorandum of Law at 25–26, Garber v. Office of the Comm'r of Baseball, No. 12-cv-03704 (S.D.N.Y. Jan. 4, 2016), 2017 WL 752183.

120. The case settled in January 2016. *See Garber Case: MLB Reaches Settlement*, SPORTS ILLUSTRATED (Jan. 19, 2016), https://www.si.com/mlb/2016/01/19/garber-case-settlement-tv-packages/.

121. *Laumann*, 56 F. Supp. 3d at 289 (alterations in original) (citing 15 U.S.C. § 1 (2012)).

122. *Id.* (citation omitted).

123. *Id.*

124. *Id.* at 298.

125. *See id.* at 297.

126. *Id.* at 290 (alteration in original) (citation omitted).

restraint, "plaintiff[s] must demonstrate 'concerted action between at least two legally distinct economic entities' that 'constitute[s] an unreasonable restraint of trade either per se or under the rule of reason.'"[127] Per se violations are anticompetitive arrangements that lack any "redeeming virtue" to the consumer.[128] If an anticompetitive agreement is not deemed a per se violation, then the court will use the rule of reason to determine if the agreement is a violation of federal antitrust law.[129]

MLB would have argued—most likely successfully—that its territorial rules and blackout polices can, in some cases, actually benefit consumers, and the court should apply the rule of reason in determining whether they are in violation of antitrust law.[130] Plaintiffs would have raised little resistance to the issue, but had alleged that the territorial system is a per se violation of antitrust laws if the system did not involve sports.[131]

In determining whether a system is a per se violation of the Sherman Act Section 1, courts look at various factors. The plaintiffs cited the following explanation:

> One way the firm can free itself from competition is by agreeing with sellers of the same product that they will not enter each other's markets; such an agreement will create a series of regional or local (. . .) monopolies. An agreement on output also equates to a price-fixing agreement. If firms raise price, the market's demand for their product will fall, so the amount supplied will fall too—in other words, output will be restricted. If instead the firms restrict output directly, price will as mentioned rise in order to limit demand to the reduced supply. Thus, with exceptions not relevant here, raising price, reducing output, and dividing markets have the same anticompetitive effects.[132]

127. *Id.* (second alteration in original). The rule of reason applies if a "situation . . . does not involve a vertical restraint which has achieved garden variety status . . . . [such as] tie-in, . . . exclusive dealing arrangement, ... [or the like, the situation] must be carefully looked at on its own facts, in order to reveal whether any restraint of trade it causes is 'reasonable.'" Travelers Ins. Co. v. Blue Cross of W. Pa., 481 F.2d 80, 84 (3d Cir. 1973).

128. *Laumann*, 56 F. Supp. 3d at 290 (citation omitted).

129. *Id.* (citation omitted).

130. Defendants' Trial Memorandum of Law at 9, Garber v. Office of the Comm'r of Baseball, No. 12-cv-03704 (S.D.N.Y. Jan. 4, 2016), 2017 WL 752183.

131. Plaintiffs' Pretrial Memorandum of Law, *supra* note 119, at 5 (citing United States v. Topco Assocs., 405 U.S. 596, 608 (1972)).

132. *Id.* (quoting Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 744 F. 2d 588, 594–95 (7th Cir. 1984)).

While MLB's broadcasting territories would seem to fit within the definition of a per se Section 1 violation, plaintiffs acknowledged that courts have created an exception for a per se violation as it relates to sports leagues.[133] The reason for the exception is that in sports leagues, joint activity is required for there to be a product at all.[134] For example, there would be no baseball games to sell at all if only one MLB team existed. One team cannot play itself. Additionally, teams must come together to agree on things such as rules.[135] Thus, cooperation between teams, unlike in other industries, is needed for the product to be available at all.[136] The defendants would have likely been successful in arguing that the court should apply the rule of reason; thus, the majority of arguments would have been based upon what should happen when the rule of reason is applied.

D. *The Rule of Reason as Applied to the Sherman Act Section 1*

The Second Circuit applies a burden-shifting framework when analyzing the rule of reason.[137] Plaintiffs had the initial burden of proving that MLB's territorial exclusivity has an actual adverse effect on competition.[138] If the plaintiffs could have proven that MLB's territories and blackouts had an adverse effect on competition, then MLB would be required to provide evidence that proved its agreements have pro-competitive effects.[139] Once MLB offered this evidence, then plaintiffs would be required to "prove that any legitimate competitive benefits offered by defendants could have been achieved through less restrictive means."[140] The court would have then weighed the pros and cons presented by both sides to determine if MLB's HTTs and blackouts were more likely to promote or destroy competition.[141]

Plaintiffs could have met their initial burden of proving that MLB's territorial exclusivity has an actual adverse effect on competition by showing that MLB has market power and that MLB's actions have increased price,

133. *Id.* at 5–6.
134. *Id.* (quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 101 (1984)).
135. *Id.* at 7.
136. *Id.*
137. Laumann v. NHL, 56 F. Supp. 3d 280, 291 (S.D.N.Y. 2014).
138. *Id.*
139. *See id.*
140. *See id.* (quoting MLB Props., Inc. v. Salvino, Inc., 542 F.3d 290, 317 (2d Cir. 2008)).
141. *See id.*

restricted output, or decreased quality.[142] Plaintiffs would have argued that this burden is met because MLB's "territorial exclusivity *is* anticompetitive—it reflects an explicit agreement among competitors, purposely designed to prevent competition."[143] The Supreme Court has held that "when there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.'"[144] MLB's rules only allow a team to sell the broadcasting rights for its individual HTT.[145] Limiting a team to a certain geographical territory is, by its very nature, restrictive. However, MLB was prepared to argue that it lacked the market power necessary to violate Section 1 of the Sherman Act.[146] If MLB does not have market power, then plaintiffs cannot meet their initial burden of proof.[147]

In order for MLB to have the market power necessary to violate antitrust law, there must actually be a defined market.[148] Plaintiffs claimed the market in *Garber* is restricted to MLB broadcasts.[149] Under antitrust law the market is determined by "the extent to which consumers will change their consumption of one product in response to a price change in another, *i.e.*, the 'cross-elasticity of demand.'"[150] MLB argued that baseball competes with other sports and nonsports entertainment for its consumers.[151] MLB would have tried to prove that people who watch baseball consider other products as substitutes for baseball games.[152] For example, someone watching baseball on TV would consider the cost of watching an MLB game compared to the cost of watching an NFL game or an NBA game; not just the cost of watching an out-of-market baseball team compared to the cost of watching an in-market baseball team.[153] MLB claimed its online

142. *Id.*

143. Plaintiffs' Pretrial Memorandum of Law, *supra* note 119, at 7 (quoting Laumann v. NHL, No. 12-cv-1817 (SAS), 2015 WL 2330107, at *2 (S.D.N.Y. May 14, 2015)).

144. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 109 (1984) (quoting Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978)).

145. *Laumann*, 56 F. Supp. 3d at 286.

146. Defendants' Trial Memorandum of Law, *supra* note 130, at 10–12.

147. *See Laumann*, 56 F. Supp. 3d at 291.

148. *See id.*

149. Defendants' Trial Memorandum of Law, *supra* note 130, at 10; Plaintiffs' Pretrial Memorandum of Law, *supra* note 119, at 9–11.

150. Defendants' Trial Memorandum of Law, *supra* note 130, at 10 (quoting Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 469 (1992)).

151. *Id.*

152. *Id.* at 11.

153. *See id.*

broadcasting service competes with the likes of Netflix and Hulu.[154] MLB said there is no "baseball market" of which it had the power over; rather, there existed a vast market of entertainment programming of which MLB had little power over and priced its baseball broadcasting products to compete in this space.[155] Because the plaintiffs would have used the wrong confines to describe the market which they claimed MLB controls, MLB would have argued that plaintiffs had failed to meet their initial burden of proof.[156]

Due to the economic complexity of this area, it is likely both sides would have had to rely heavily on expert testimony.[157] Avid baseball fans likely find the idea of watching Netflix as an appropriate substitute for watching baseball preposterous, but there are certainly a number of consumers who would be just as entertained watching the new season of *House of Cards* as they would be watching Mike Trout chase down fly balls in the outfield. However, MLB came to this conclusion based on research suggesting that if fans are not watching their favorite team, they tend to watch something other than baseball.[158] As the plaintiffs suggested, at some level all products become substitutes for one another because consumers who do not spend money on one thing have that money to spend on something else.[159] Further, MLB acknowledged that it does not consider the Netflixes and Hulus of the world when setting its price for its online out-of-market packages.[160] The court would likely have sided with the plaintiffs here, as the court already said, "It is well established that 'there are peculiar and unique characteristics that set major league men's . . . baseball apart from other sports or leisure actives, . . . close substitutes do not exist' and that the Leagues possess monopolies of their respective sports."[161] The court would have likely decided that the plaintiffs in *Garber* had met their initial burden of proof. The court would have then turned to MLB to offer proof of the benefits of this restriction.

MLB argued that its HTT and blackout polices actually enhanced competition.[162] MLB believed that its HTTs promoted competitive balance,

154. *Id.*
155. *Id.* at 11–12.
156. *Id.*
157. *See id.*
158. *Id.* at 11; Plaintiffs' Pretrial Memorandum of Law, *supra* note 119, at 10.
159. Plaintiffs' Pretrial Memorandum of Law, *supra* note 119, at 10.
160. *Id.* at 11.
161. *Id.* at 9–10. (quoting Laumann v. NHL, 907 F. Supp. 2d 465, 491–92 (S.D.N.Y. 2012)).
162. Defendants' Trial Memorandum of Law, *supra* note 130, at 12.

which courts have recognized as "'essential' to 'the viability of the Clubs and public interest in the sport.'"[163] The rationale is that no sports league wants its results to be lopsided year after year.[164] For example, if the Yankees crushed every other team, winning the championship each year, it would decrease the quality of the product. There is a reason that the NBA is more popular than the Harlem Globetrotters. MLB believed that if teams were allowed to sell their broadcasting rights for all territories, the more popular teams would end up with a substantial amount of more money, enabling them to buy better players, and upsetting MLB's competitive balance.[165] MLB pointed out that its on-field product is very competitive under its current structure, as 28 out of 30 MLB teams have earned a spot in the playoffs over the last 10 years.[166]

The argument that HTTs and blackout polices promote competitive balance appears to be a weak one. The HTT system only allows teams to sell their broadcasting rights within their HTT, but there is no cap on how much they can sell those rights for, allowing some teams to sell their rights for 15 times the amount others receive.[167] Plaintiffs argued HTTs have the opposite effect because they lock teams into territories that are not of equal value.[168] For instance, if the Kansas City Royals had the power to sell their broadcasts in larger markets—such as New York or Los Angeles—it is certain they would be able to receive more revenue.[169] If the court had agreed with MLB and held that HTTs foster competitive balance, MLB would still have had to show that there are no less restrictive means than HTTs to accomplish that competitive balance. [170] One less restrictive alternative the plaintiffs suggested was for MLB to increase revenue sharing among the teams.[171] This

163. *Id.* (quoting MLB Props., Inc. v. Salvino, Inc., 542 F.3d 290, 331–32 (2d Cir. 2008)).

164. *Id.* at 12–13.

165. *Id.* at 13.

166. *Id.*

167. Plaintiffs' Pretrial Memorandum of Law, *supra* note 119, at 19.

168. *Id.*

169. *See id.*

170. Laumann v. NHL, 56 F. Supp. 3d 280, 291 (S.D.N.Y. 2014).

171. Plaintiffs' Pretrial Memorandum of Law, *supra* note 119, at 21. There are many possible ways MLB could add to competitive balance that would be a less restrictive alternative to HTTs. *See infra* text accompanying notes 194–96. Another idea would be to change the rules regarding MLB teams' acquisition of international talent. Currently, MLB's international acquisition system slots a certain amount of money each team can spend on international players—players from other countries who are not included in MLB's annual draft. *See* Todd Zolecki, *Phils' International Pool Limit Highest in Baseball*, MLB (Feb. 24, 2016), http://m.mlb.com/news/article/165354734/phillies-have-highest-international-pool-limit. The worse a team is, the more money MLB allows them

would allow for more competition among the teams for the broadcasting market while maintaining the high quality of the on-field competition that is required for MLB to provide a quality product.[172]

MLB also raised the argument that market exclusivity actually facilitates innovation, providing fans with a better product.[173] It is hard to dispute that MLB has not been at the forefront of broadcasting innovation—

to spend on international players. Ben Badler, *2015-16 MLB International Bonus Pools*, BASEBALL AMERICA (Feb. 26, 2015), http://www.baseballamerica.com/international/2015-16-mlb-international-bonus-pools/#xeg1xVtejKfu7v5e.97. If a team exceeds its MLB allotment for a given year, then it is not allowed to sign a player for more than $300,000 during the next two signing periods (the next two years), and must pay a 100 percent tax on the amount it went over its allotted pool. Zolecki, *supra*. For example, if the Yankees had a pool of $500,000 for the 2015–2016 pool year and signed an international prospect to a contract worth $1 million, they would be required to pay MLB a $1 million tax, and would be unable to sign an international free agent for more than $300,000 in the 2016–2017 and 2017–2018 signing periods. *See id.* This system causes teams with a greater amount of money to spend like crazy every third year and then to sit out for two years. For example, in 2014 the Yankees spent $14.51 million on international players with an allotted pool of $2.2 million, and the Red Sox spent $3.95 million on international players with an allotted pool of $1.88 million. Mike Axisa, *Breaking Down the Yankees' Record International Free Agent Haul*, RIVER AVE BLUES (July 8, 2014), http://riveraveblues.com/2014/07/breaking-down-the-yankees-record-international-free-agent-haul-105870/; Will Woodward, *Red Sox Busy as International Signing Period Opens*, SOX PROSPECTS (July 3, 2014), http://news.soxprospects.com/2014/07/red-sox-busy-as-international-signing.html. In 2015 the Dodgers spent $45 million on international players with an allotted pool of $2 million. Badler, *supra*; Jesse Spector, *Dodgers' Spending Spree is No Reason for MLB to Have International Draft*, SPORTING NEWS (Nov. 24, 2015), http://www.sportingnews.com/mlb-news/4662003-mlb-international-draft-dodgers-international-signings-free-agents-yankees-red-sox-cubs-bonus-pools. With enough wealthy teams to compete in the international player market every year, it becomes more difficult for low-revenue teams to sign international players. Spector, *supra*. Every year wealthy teams can use their money to acquire the best international prospects. *See* Spector, *supra*. The system is not conducive to competitive balance, and MLB agrees. *See* Ben Badler, *New MLB International Signing Rules*, BASEBALL AMERICA (Dec. 2, 2016), http://www.baseballamerica.com/international/new-mlb-international-signing-rules/#1XfAGLS3l86J8MHQ.97. In December of 2016, MLB and the MLB Players Association entered into a new collective bargaining agreement. *Id.* When it is implemented in 2017 it will bring substantial changes to MLB's international signing rules. *Id.* The new system implements hard caps meaning teams will no longer be able to spend extreme amounts of money every third year. *Id.* This new system enhances competitive balance by creating equal access for all teams to the best international talent, and presents a less restrictive alternative to HTTs. *See id.*

172. *See* Plaintiffs' Pretrial Memorandum of Law, *supra* note 119, at 21.

173. Defendants' Trial Memorandum of Law, *supra* note 130, at 15.

they have been.[174] The debate is centered around whether those innovations were fueled by MLB's HTTs. MLB was adamant that without the ability of its agreement to receive the broadcasts of RSNs and sell out-of-market packages to consumers, streaming baseball games online through MLB.tv would not be possible.[175] MLB did not believe that teams could have undertaken a successful streaming project on their own due to the highly technical requirements to sustain such a project.[176] MLB believed the innovation benefit goes beyond creating a successful way to stream baseball games over the internet. MLB said the exclusivity of the HTTs reassure teams that their large investments into their clubs will not be used for the benefit of other teams.[177] MLB believed that teams leverage their exclusive HTTs to urge their RSNs to invest in their broadcast production, and to enhance the quality and quantity of MLB broadcasts by telecasting as many games as possible.[178] MLB cited the 4,542 games—nearly two broadcasts of each game—broadcast locally in 2012 as proof of the quantity of MLB broadcasts.[179] MLB pointed to the local announcers, which they urge create a fan-friendly product, as proof of the quality of the MLB broadcasts.[180] MLB was convinced these outcomes would not be attained without the current HTT system.[181]

Plaintiffs summarized MLB's contention that HTTs help innovation by clarifying that MLB's "core defense, in other words, is not that the prices consumers pay for in-market telecasts would not decrease—but that they would decrease so much that they would cause a loss of investment and output."[182] Plaintiffs disagreed with the economics behind this statement, believing that MLB games would be offered even if the prices paid by consumers dropped sharply.[183] They pointed out that RSNs already had the

174. MLB was the first sports league to stream its entire season online, and it built such a successful streaming platform that it spun its streaming division off so that it could offer its streaming services to other leagues and entertainment companies such as HBO. *Id.* at 14; Keach Hagey & Amol Sharma, *HBO to Use MLB Advanced Media for Stand-Alone Streaming Product: Move Prompts Departure of Cable Channel's Chief Technology Officer*, WALL STREET J. (Dec. 9, 2014), http://www.wsj.com/articles/hbo-to-use-mlb-advanced-media-for-stand-alone-streaming-product-1418150584?mod=WSJ_.

175. Defendants' Trial Memorandum of Law, *supra* note 130, at 14.

176. *Id.*

177. *Id.* at 15.

178. *Id.* at 14–15.

179. *Id.* at 15.

180. *Id.*

181. *Id.*

182. Plaintiffs' Pretrial Memorandum of Law, *supra* note 119, at 4.

183. *Id.*

technology to broadcast their games nationally, and indeed they did, but that those broadcasts are just blacked out outside of the RSN's exclusive territory.[184] Plaintiffs argued that it would cost next to nothing to lift those blackouts so that those broadcasts could be seen nationwide.[185] As an example, plaintiffs used minor league baseball, which has minuscule popularity compared to MLB, but still has many of its games broadcast over the internet with almost no territorial restraints.[186] This example shows that even if RSNs lose the financial benefit that having no competing broadcasts in their HTTs affords, they would still be willing to broadcast games, and innovate the technology needed because, as minor league baseball has shown, it is still economical to do so.[187] Further, "Sports without territorial restraints, such as college football and basketball, are widely available."[188]

The economic issues at the forefront of this litigation were deep and vast. The court would have had to consider whether MLB's HTTs provided more benefit to consumers than damage.[189] The court would also have had to consider whether MLB could reach the same results with methods that are more consumer friendly.[190] The fact the court did not rely on MLB's historical federal antitrust exemption to dismiss the lawsuit suggests the

184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* at 4–5.
188. *Id.* at 5. Although not used by plaintiffs as a counterargument to MLB's assertion that HTTs allow for more broadcasts of MLB games, the Los Angeles Dodgers' current TV situation shows the negative impact HTTs can have on local broadcasts. In 2013 Time Warner Cable (TWC) and the Dodgers entered into a 25-year, $8.35 billion agreement where TWC would be the distributor of the Dodgers' RSN. Meg James, *Charter to Carry Dodgers Channel, SportsNet LA, Beginning Tuesday*, L.A. TIMES (June 4, 2015), http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-charter-to-carry-dodger-channel-june-9-20150604-story.html. TWC wanted to charge other cable and satellite providers almost $5 per subscriber for the right to carry the Dodgers' RSN. Howard Cole, *Dodgers TV Blackout? I'd Rather Fight Than Switch!*, FORBES (Feb. 16, 2016), http://www.forbes.com/sites/howardcole/2016/02/16/dodgers-tv-blackout-id-rather-fight-than-switch/#2f83acdd4cc9. As a result, many cable providers—with the exception of TWC itself and Charter (who subsequently bought TWC)—decided not to carry the RSN. *Id.* Consequently, the fifth straight season approaches with 70 percent of viewers in the Dodgers' HTT left without the Dodgers' channel and unable to watch their team without switching cable providers (which can be costly to do). *Id.* The Dodgers example is the perfect illustration of the harm the monopoly power of the HTTs can have.
189. *See* Laumann v. NHL, 56 F. Supp. 3d 280, 291 (S.D.N.Y. 2014).
190. Grow, *supra* note 93; *see Laumann*, 56 F. Supp. 3d at 291.

court believed there was merit to the plaintiffs' arguments.[191] It does not take too much effort to understand why the court may feel this way. First, MLB has relied on its federal antitrust exemption for too long. It is archaic, and other sports leagues have thrived outside the protection it offers.[192] Second, competitive balance can be achieved through alternative means. Enhanced revenue-sharing among teams, as the plaintiffs suggested, is one way that could happen.[193] Others include a possible expansion of the draft system already in place.[194] Regardless, it is easy to think of alternative—and quite frankly better—ways for MLB to balance competition.[195] Third, with the money brought in by broadcasting sports, it is highly doubtful fewer games would be available if HTTs were extinguished.[196] Finally, while MLB's best

191. *See* Grow, *supra* note 93.

192. *See supra* note 188 and accompanying text.

193. Plaintiffs' Pretrial Memorandum of Law, *supra* note 119, at 21; *see supra* note 171 and accompanying text.

194. Teams in smaller markets are currently put into a pool to receive more draft picks during MLB's annual draft. Teddy Cahill, *Competitive Balance Lottery Pays Out 12 Draft Picks: Marlins Get First Pick of Round A, Followed by Rockies, Cards, Brewers, Padres, Tribe*, MLB (July 23, 2014), http://m.mlb.com/news/article/85923640/competitive-balance-lottery-pays-out-12-draft-picks. These picks help balance the competition because, while richer teams may sign better, higher-priced free agents, it gives teams with less revenue more opportunities to control young talent. *See id.* An expansion of this process could be enacted if larger-market teams start dominating the current system.

195. *See, e.g.*, Plaintiffs' Pretrial Memorandum of Law, *supra* note 119, at 21; *supra* note 171 and accompanying text.

196. Iowa baseball fans would find this argument especially hard to swallow because of the readily available football and basketball games for the state's flagship institutions. Both the University of Iowa and Iowa State University have agreements in place to broadcast all of their football and basketball games. *See, e.g.*, Andrew Logue, *New TV Deals Should Result in About $50 Million Yearly for Iowa*, DES MOINES REG. (June 25, 2016), http://www.desmoinesregister.com/story/sports/2016/06/25/big-ten-conference-media-rights-deal-questions/86369754/; *TV and Online Coverage of Cyclone Men's Basketball*, CYCLONES (Oct. 10, 2010), http://www.cyclones.com/news/2010/10/28/205020128.aspx. The teams of both schools are worth much less than any MLB team, so it is more than a reach to suggest that broadcasters would drop an MLB team's games without HTTs, or that an MLB team could not negotiate with a broadcaster individually. Darren Everson, *What Is Your Team Worth?*, WALL STREET J. (Jan. 7, 2013), http://www.wsj.com/articles/SB10001424127887324391104578225802183417888; (Iowa and Iowa State's football teams are worth $384.4 and $140.3 million, respectively); Mike Ozanian, *MLB Team Values 2015: 30. Tampa Bay Rays*, FORBES (Mar. 25, 2015), http://www.forbes.com/pictures/mlm45fkhjm/30-tampa-bay-rays/ (the least valuable team as of 2015 in MLB is worth $625 million). Further, MLB's argument that teams could not build their own streaming platform is preposterous—other sports teams have been able to create such platforms without the economic pull of even one MLB team.

argument was that it does not control the market, that argument should have failed. The court had already held that MLB's product is unique,[197] and it should have agreed with the plaintiffs' argument that at some level all products become substitutes for one another.[198]

Unfortunately, the Supreme Court will have to wait to undo the archaic federal antitrust exception that was created by Oliver Wendell Holmes so many years ago and will have to wait a while longer to finally bring a market's supply of games to match the market demand for baseball both in Iowa and across the country; just before the case was set to begin in January 2016, the two sides settled, as many had been predicting since the *Laumann* settlement in June 2015.[199]

MLB agreed to offer single-team, out-of-market packages for $84.99—"a 23 percent drop from the previously cheapest option available"—and reduce the cost of the full out-of-market streaming packages to $110 per year.[200] Besides pricing, MLB created "Follow Your Team," which allows "MLB.TV subscribers who purchase this new option for an additional $10 [to] be able to watch out-of-market broadcasts of games featuring in-market teams, so long as they subscribe to the local club's regional sports network (RSN)."[201] The Follow Your Team feature would allow Twins fans living in Ankeny, Iowa, to watch the Twins play the Yankees, provided those fans subscribe to a television service that provides them access to the Yankees RSN.[202] This matchup would allow fans to watch about six Twins games a year—about 4 percent of Twins games (certainly an underwhelming number for even the casual fan)—assuming they only receive one RSN with their television package.[203]

For example, Iowa State University, an entity worth less than any MLB team, has created its own streaming platform called cyclone.tv. CYCLONES.TV, http://www.cyclones.com/mediaPortal/player.dbml (last visited June 4, 2017).

197. Laumann v. NHL, 907 F. Supp. 2d 465, 491–92 (S.D.N.Y. 2012).

198. Plaintiffs' Pretrial Memorandum of Law, *supra* note 119, at 11.

199. Jacob Emert, *MLB TV Settlement is 'Big Win for Baseball Fans'*, WASH. POST (Jan. 19, 2016), https://www.washingtonpost.com/news/early-lead/wp/2016/01/19/mlb-tv-settlement-is-big-win-for-baseball-fans/.

200. *Id.*

201. Nathaniel Grow, *MLB Settles TV Lawsuit, Preserves Blackouts*, FAN GRAPHS (Jan. 20, 2016), http://www.fangraphs.com/blogs/mlb-settles-tv-lawsuit-preserves-blackouts/.

202. *Id.*

203. *See id.*

Most importantly, the agreement leaves in place MLB's current blackout policy.[204] The agreement does allow "anyone who is completely unable to receive cable or satellite television service at their home" to petition MLB to allow them to access in-market streaming.[205] However, it "does not apply to those fans who are simply unable to subscribe to a particular RSN via their local cable provider."[206] Consequently, "this new option won't help fans in Iowa . . . who often find themselves blacked out from as many as five or six games per night."[207] Baseball fans in Iowa must continue to watch teams they care nothing about and can only hope someone brings a new lawsuit regarding MLB's blackout policies and is willing to see it through until the end. Go Royals!

Thor Klinker∗

204. *Id.*

205. Nathaniel Grow, *More Details on the MLB TV Lawsuit Settlement*, FAN GRAPHS (Jan. 20, 2016), http://www.fangraphs.com/blogs/instagraphs/more-details-on-the-mlb-tv-lawsuit-settlement/.

206. *Id.*

207. *Id.*

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