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DEVELOPMENTS IN THE APPLICATION OF ANTI-TRUST LAWS TO PROFESSIONAL TEAM SPORTS*

By Maxwell Keith†

An analysis of the case of Radovich v. National Football League,¹ holding that professional football is within the scope of the antitrust laws, will be attempted herein by first discussing the circumstances which led up to the Radovich decision, then considering the effect of the Radovich case, and then by considering the developments which the decision has induced.

The Situation Before the Radovich Decision

The federal antitrust laws² regulate the nation's business economy. These laws are our basic economic constitution. They decree that competition, not combination, is the law of the land.³ They prevent the economic oppression of the individual and give him protection against destructive practices engaged in by those who wield existing power in the industry.⁴ They form the framework of our distributive economic system and guarantee, as far as federal power extends, every person the opportunity to engage in business and obtain his competitive worth.⁵ Included in their

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*The Hastings Law Journal has undertaken to provide for a discussion of the decision in Radovich v. National Football League. In 9 Hastings L.J. 18 (1957), Mr. John O'Dea, an attorney for the National Football League, contributed an article entitled "Professional Sports and the Antitrust Laws." Mr. Keith, one of the attorneys who represented the plaintiff, contributes this article.

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² The basic antitrust statute is popularly known as the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1957). Section 1 provides in pertinent part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . .

Section 2 provides:

Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

³ Fashion Originators' Guild v. FTC, 312 U.S. 457, 467 (1941).


⁵ "The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948). See Anderson v. Shippers' Ass'n of the Pacific Coast, 272 U.S. 359 (1926). See also cases cited note 4 supra.
aims are the prevention of trusts and the evils felt to occur when monopoly conditions occur in an industry. Organized professional sport leagues operate akin to a "trust" in form. A professional sporting league is a closely knit combination of firms or corporations formed by an agreement which regulates the activities of the individual members and delegates authority to a commissioner or president. The organization of all owners in an industry allows the displacement of the free competitive market. The evils of the "trust" organization were attacked in the debates preceding the enactment of the Sherman Antitrust Bill in 1890.

The sport leagues control a significant part of our national income. They directly affect the young athlete. In this sphere they have undertaken to assume responsibilities over one of the most important aspects of American life, the final development of physical abilities and nationwide identification with such abilities. The athletic world promises to many a young man a rainbow of wealth, status and acclaim. The professional sporting trusts are the end of the rainbow. Yet until recently these professional sporting trusts were virtually above the law. They could operate free of the federal antitrust laws, and this meant that they could operate over and above the American economic constitution, and be outside the rules of business conduct which assured fair play and equal opportunity. And since they were interstate in nature and operation this meant that they were in essence another "sovereign state," uncontrolled and unregulated by any single state. Since these leagues have been interstate monopolies in their respective fields of baseball, football, hockey and basketball this meant that their edicts and declarations were virtually "law." These "laws" were incapable

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6 Senator Sherman, in his discussion of his bill, referred to the trust as follows: "But associated enterprise and capital are not satisfied with partnerships and corporations competing with each other, and have invented a new form of combination commonly called trusts, that seeks to avoid competition by combining the controlling corporations, partnerships, and individuals engaged in the same business, and placing the power and property of the combination under the government of a few individuals, and often under the control of a single man called a trustee, a chairman, or a president." 21 Cong. Rec. 2457 (1890). It is noted that Senator Sherman specifically condemned the ability of the trust to command the price of labor without fear of strikes. Ibid.

7 As of 1950 the personal consumption expenditure of the public for professional baseball, football, hockey and basketball was approximately $140,000,000. H.R. Rep. No. 2002, 82d Cong., 2d Sess. 90 (1952).

of attack as federal questions, and beyond the authority of the federal government.

**The Federal Baseball Case**

This enormous power was brought about by the case of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs.*

In this case, the plaintiff, a member of a putative third baseball league, had charged that organized baseball had intended to control the baseball industry, ruin the new league, and drive him out of business. The jury awarded the plaintiff damages in the amount of $80,000.00. But the appellate court held that baseball was not under the antitrust laws because not engaged in interstate trade and commerce. The Supreme Court, per Justice Holmes, affirmed, saying: "The business is giving exhibitions of baseball, which are purely state affairs."

It must be pointed out that Justice Holmes was rendering a decision at a time when the commerce clause of the Constitution had less vitality than that which subsequent economic conditions produced. In 1895 the Supreme Court had held that manufacturing, agriculture, mining and production in any form within a state were outside federal jurisdiction. The impact of this decision had not been fully dissipated by 1922, although it had been substantially cut down. As the federal government began to adopt extensive regulations as to nationwide industrial conditions, the commerce clause of the Constitution became the legal battleground. By 1942 the power of the Congress under the commerce clause was extensive.

The antitrust laws, by the extension of the commerce clause, were applicable to all industries doing business in, or substantially affecting, interstate trade and commerce.

What, then, of the *Federal Baseball* case? In 1949 the Second Circuit Court of Appeals, in *Gardella v. Chandler,* held that although *Federal Baseball* was not an "impotent zombie," it did not prevent a baseball player from seeking damages under the antitrust laws as a result of a boycott imposed upon him for playing in the Mexican League upon his request to play baseball in the United States. Judge Frank condemned the "reserve

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10 259 U.S. 200 (1922).
11 269 Fed. 681 (D.C. Cir. 1920).
16 172 F.2d 402 (2d Cir. 1949).
clause” system of baseball, and held it was opposed to the public policy of the United States. Judge Frank stated: 17

For the “reserve clause”, as has been observed, results in something resembling peonage of the baseball player. By accepting the “reserve clause”—and all players in organized baseball must “accept” it—a player binds himself not to sign a contract with, or play for, any club other than the club which originally employs him or its assignee.

Judge Hand would not commit himself on the legality of the “reserve clause” structure, but ruled that a restraint which prevented a player from practicing his calling was an actionable restraint of trade. Judge Chase did not believe that the antitrust laws applied to baseball at all. It appeared as if the courts would not grant organized professional sports an exemption from the application of the antitrust laws where there was a showing of injury to players whose livelihood and pursuit of happiness in the sports world were subject to group boycott. 18

Congressional Study

After the Gardella decision baseball settled the case without resort to the Supreme Court. Bills were then introduced in the House and Senate which would have granted the “organized professional sports enterprises” exemption from the antitrust laws. 19 These bills contemplated that such sports enterprises be completely exempt from the antitrust laws. On July 30, 1951, the Subcommittee on Study of Monopoly Power of the Committee of the Judiciary, House of Representatives, conducted a study of organized baseball. Its report was issued on May 27, 1952. It concluded that baseball was engaged in interstate commerce, and recommended that no such sweeping legislative action should be undertaken until the status of Federal Baseball was clarified in the courts. 20

Then came Toolson v. New York Yankees. 21 Toolson was a demoted player in the New York Yankees farm system who complained of the re-

17 Id. at 409–10.
18 The individual injured by a violation of the antitrust laws has a direct right to sue the violators under section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15 (1952):
 Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy and shall recover threefold the damages by him sustained, and cost of suit, including a reasonable attorney’s fee.
21 346 U.S. 356 (1953). A writ of certiorari was taken from 200 F.2d 198 (9th Cir. 1952). The cases of Corbett v. Chandler, 202 F.2d 428 (6th Cir. 1953) and Kowalski v. Chandler, 202 F.2d 413 (6th Cir. 1953) were also included in the hearing. The Kowalski case involved the denial of advancement opportunities, and the Corbett case involved the recognition by baseball of a contract in the Mexican League.
serve clause agreement and its enforcement. Here the Supreme Court was faced with the issue of whether or not it should overrule *Federal Baseball* in view of the recent congressional study of organized baseball. The Supreme Court held, in a per curiam decision, that it was for Congress, not the Court, to overrule *Federal Baseball* as to the "business of baseball" which had been specifically investigated by Congress and which had been the subject of specific prior Supreme Court ruling.

**The International Boxing Club Decision**

The next decision to touch the professional sport world under the antitrust laws was *United States v. International Boxing Club.*[^22] Here the United States alleged that the defendants had conspired to monopolize the promotion, exhibition and sale of radio, television and motion picture rights of professional championship boxing contests in the United States. It was alleged that the defendants conspired to purchase promotional control of certain championships; acquired the assets of competitors; and acquired the exclusive use of principal stadia and arenas. It was charged that as a condition of being afforded an opportunity to engage in a championship contest contenders were required to enter into a contract. Pursuant to this contract the contender, if he won the contest and thereby became a champion, would engage in title bouts only under the promotion of the defendants for a period of from three to five years. The complaint alleged that over twenty-five per cent of the defendants' income was attributed to television, motion picture, and radio revenues.

The issue confronting the Supreme Court was whether or not antitrust immunity of professional sports would be extended beyond the business of baseball. The Court refused to make this extension. It said:[^23]

> The issue confronting us is, therefore, not whether a previously granted exemption should continue, but whether an exemption should be granted in the first instance. And that issue is for Congress to resolve, not this Court.

The Court noted that it had never held that the boxing business was not subject to the antitrust laws, and that Congress had specifically refused to grant organized sports a sweeping immunity from the antitrust laws.

Shortly after the *Gardella* decision a professional football player, William Radovich, filed a complaint under the antitrust laws. The complaint charged that the National Football League had conspired to monopolize


[^23]: 348 U.S. at 243.
the business of football and attempted to destroy the rival All-America Conference. It complained that the defendants enforced sanctions against players who violated the “reserve clause” contracts. The complaint also charged that the defendants used a uniform player's contract which reserved the football player to one club and which prevented him from ever playing for any team other than his original employer unless the employer consented to the change. The defendants moved for dismissal after answer in the district court, and the motion for dismissal was granted. The dismissal occurred before the decision in the *International Boxing Club* case. The appellate court affirmed the district court and held that the *Toolson* case still applied to group team sports.\(^{24}\) It held as an additional ground that the complaint had failed to allege an adverse effect on the public interest.

The Supreme Court in the *Radovich* case followed its reasoning in the *International Boxing Club* case. It held that professional football, like boxing, had never been the subject of a prior Supreme Court ruling, and that the Court could not grant industries a sweeping exemption from antitrust application. It then held that the complaint had sufficiently alleged that the defendants were engaged in interstate commerce and had violated the antitrust laws. The Court also said that the antitrust laws protected victims of forbidden practices as well as the public and that a professional athlete had a cause of action against those alleged to have violated the antitrust laws to his injury. The Court further held that all businesses engaged in interstate commerce were under the scope of the antitrust laws, except the business of baseball. In this respect, the *Radovich* decision represents the end of constant applications for judicial exemptions from antitrust liability by interstate industry groups under *Federal Baseball* and *Toolson*.

**The Effect of the Radovich Decision**

It would appear that the effect of the *Radovich* decision was to place the contracts, agreements and practices of organized professional sport leagues, with the exception of baseball, under the full vigor of the federal antitrust laws. Since these laws provide for free and open competitive conditions at all stages of the distributive system, these contracts, agreements and practices would have to be reconciled with such provisions. An unrestricted antitrust approach to these practices would at least include the following: free and equal opportunity for the development of franchises in communities which do not have professional sport teams; equality of bargaining between the individual professional athlete and the franchise

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\(^{24}\) *Radovich v. National Football League*, 231 F.2d 620 (9th Cir., 1956).
or team owners; complete contractual freedom with respect to radio and television broadcasting of the league's presentations; subjection of the use of power by the commissioner to remedial processes.

An antitrust examination of the practices of the sporting leagues would clearly take into consideration the following conditions.

**Monopoly Power**

The organized professional sporting leagues hold monopoly power in their fields. There can be little doubt that each of the sports of baseball, football, basketball and hockey are free of any competition from other leagues or individuals. They are monopolies, so the few men who hold franchises in these leagues are operating free of any competitive struggle, and control the industry.

Apart from the question of how this monopoly control was acquired, it would appear that the constitutions and bylaws of these leagues as now in effect can prevent effective competition from developing. Applications for new franchises and the entry of new teams into these leagues are subject to the vote of the existing franchise owners. Existing owners thus have veto power over the desire of community sponsors to field professional teams. The only alternative methods for a city to obtain professional teams, apart from such veto power, is by the formation of an entire new league, a venture requiring enormous capital and cooperation from entrenched competitors.

**Treatment of Players**

The professional sport leagues place the player in the position of being a semi-chattel. The player must sign a uniformly adopted contract, and baseball's major league rule 1(c) requires that unanimous approval of both leagues must be obtained before the circuit of either major league can be changed to include any city in the circuit of the other major league. Changes to cities not in the major leagues need only be voted or approved by the major league to which the club is a member. Express provision, however, is allowed for the inclusion of a third league composed of eight clubs into major league baseball upon the satisfaction of enumerated conditions. 1957 Hearings 1587. The National League and the American League, however, can consist of not more than ten members. National League, constitution and rules, art. 3.1, id. at 1421; American League, constitution and bylaws, art. V, § 3, id. at 1394. N.F.L. requires unanimous approval for new membership. Constitution and bylaws, art. V, § 3, id. at 2580-80p. N.H.L. requires a three-fourths vote to approve new membership. Constitution, art. III, § 3, id. at 3012. N.B.A. requires a two-thirds vote to approve new membership. Constitution and by laws, cls. 11 and 13, id. at 2938-39.

The uniform or standard player's contracts appear as follows: Major league baseball, 1957 Hearings 1491; minor league, id. at 392; N.F.L., id. at 2748; N.B.A., id. at 3958; N.H.L., id. at 3007.

Baseball's major league rules 3 (a) requires the use of a uniform player's contract containing a reserve clause. 1957 Hearings 1589. The player is not eligible to play for any other club than his original club, and lists are circulated to insure this. Major league rule 4, id. at 1598. However a club has no right to reserve a player to whom it is indebted for arrears in salary as to
this contract can then be bought and sold by the team owners. The player can be traded, and the player must play for the assignee of his contract. The athlete may be prevented from entering into competitive negotiations with various club owners and may be subjected to practices which limit his bargaining potentials.

which no bona fide undecided dispute exists. Upon application to the commissioner the player in such a situation may become a free agent. Further, a player reserved for two consecutive years on a retired, restricted, disqualified or ineligible list is omitted from future reserve lists. But he shall not be eligible until first reinstated according to rule 16, and upon such reinstatement he is restored to his reserving club. Rule 16 governs the reinstatement of players and provides for such reinstatement by application to the commissioner through the president of the club. At 1620–21. A player on an ineligible list cannot play until the lapse of one year. Upon the refusal of a player to sign with his reserving club he is ineligible to play for any team until reinstated. With respect to these rules, commissioner of baseball, stated: "At that time [1952], the major-league rule 15 provided that any player who jumped his contract or reservation should not be eligible to make application for reinstatement for five years. Rule 15 (b) provided that a player who, without permission, failed to report to the club within 10 days after the opening of the season would be ineligible. Since those hearings, the rules have been revised. The penalty of 5 years of mandatory ineligibility for a major-league player who jumps his contract or reservation was eliminated in December 1951. At the same time, provision was made that the player who failed to report within 10 days should be placed on a restricted list (from which reinstatement would be automatic upon application) rather than upon the ineligible list. By amendments adopted in 1952, only those players found guilty of misconduct, such as throwing games, under major-minor league rule 21, or moral turpitude, are placed on the ineligible list. Players who jump their contracts are placed on the disqualified list, and there is no longer any restriction on the time within which reinstatement may be applied for. There is now no rule barring prompt reinstatement of a player who jumps to an outside league. The policy of the commissioner and the president of the national association is to permit ready reinstatement of restricted-list and disqualified-list players." 1957 Hearings 168.

N.F.L. requires the adoption of a uniform player's contract, and the ineligibility of players who refuse to sign a contract. (The reserve clause in football is limited to a one year period) Constitution and by-laws, art. XII, § 4; art. XIII. 1957 Hearings 2580ac–80ad. N.H.L. provides that a player may be suspended by his club if he refuses the offer of salary. Thereafter the president fixes the salary. And a reserved player who does not sign a contract with a club may be suspended by the president with resort to appeal to the board of governors. Bylaws, §§ 17.5–17.11, id. at 3067–68. The club owner in the N.B.A. has the right to suspend any player for noncompliance with his contract provisions. Constitution and bylaws, § 41, id. at 2953. Such a suspension may result in a blacklist. Ibid.

Uniform or standard player contract provisions: Major league baseball, para. 6(a), 1957 Hearings 1492; N.F.L. para. 9, id. at 2750; N.B.A. para. 10, id. at 2960; N.H.L. para. 11, id. at 3008.

In all the sport leagues except baseball provision is made that player-owner disputes shall be decided by the commissioner or president, whose decision is final. N.F.L. constitution and bylaws, article I, § 14 provides that the commissioner's decision shall be "final, binding, conclusive and without appeal." And it further provides that he and the N.F.L. and all owners and clubs are released from liability. 1957 Hearings 2580f–80g. The uniform player's contract provides in paragraph 4 that "all matters in dispute between the player and the club shall be referred to the Commissioner." At 2749. For the N.H.L. provisions see note 26 supra. The N.B.A. uniform player's contract, paragraph 20, provides that in case of dispute between the player and the club, as to matters covered by the contract, the matter must be submitted to the president whose decision is final. As to matters not covered by the contract the player
The reserve clause. Before a player may play for a team he must sign a uniform player's contract with a given club owner. Thus, the club owner has no discretion in the type of contract he uses in employing the player. The uniform player's contract requires the player to play for the team owner, and allows the owner the option to renew the contract. This is the so-called "reserve clause." All the sport leagues except football allow the option to be exercised year after year. Football limits it to one year. However, the record contains few examples of professional football players ever having successfully waited out the one year to become free agents. Upon signing of the contract, the player becomes a property right and can be sold, traded or waived out of the club by the owner to other owners. Once the player signs the uniform player's contract he cannot usually become a free bargaining agent unless he is waived out of the club and no other club owner calls the waiver.

The rights of the owner to the contract provisions in the contract are not enforced by resort to the courts, but by extra-judicial sanctions of ineligibility, suspension, or blacklisting. Thus a player can only play in the league if he has signed a contract with a club owner. Once he does so, he is on the reserve list of the club owner. No other club owner can then bargain with him. He is limited to play with his own club owner. If he disputes his salary, he must either bargain it out with the club owner, or not be employed in the league at all. The dispute in all sports except baseball is resolved has the right to appeal from the president's determination to a committee of the board of governors, the members of which are chosen by the player, and the determination of this committee is binding on all parties. Baseball's major league rule 22 provides that all clubs and players must submit all disputes, except player compensation disputes, to the commissioner, whose decisions shall be accepted as final. Major league baseball allows two player representatives to attend meetings of the executive council and they exercise votes as to matters concerning the standard form of player's contract, its provisions or regulations, or the player's pension plan. Statement of Commissioner Ford Frick, major league rule 26, id. at 1627-28.

Uniform or standard player contract provisions: Major league baseball, paras. 10(a), 10(b), 1957 Hearings 1493; N.B.A. para. 22, id. at 2962; N.H.L. para. 17, id. at 3008.

Waiver provisions appear as follows: Major league baseball rules 8 and 10, 1957 Hearings 1604-05, 1608-10; N.F.L., constitution and by laws, art. XV, id. at 2580af-80ah; N.B.A., by laws §§ 27-35, id. at 2952; N.H.L., by-laws § 11, id. at 3050-52. In major league baseball an unconditional release waiver allows the player to terminate his contract on option. Major league rule 8(a) (4), id. at 1604.

It is unlawful conduct and subjects the owner to fine for him to tamper with players. These rules appear, in part, as follows: Major league baseball rule 3(g), 1957 Hearings 1591; N.F.L., constitution and by laws, art. VIII, § 4, art. X, art. XIV, § 3, id. at 2580v, 2580ad-80af; N.H.L., by laws, §§ 9, 15, id. at 3047, 3050; N.B.A., constitution, § 85, id. at 2948, by laws, §§ 16-21, id. at 2950-51. See also note 26 supra.

See notes 26 and 28 supra.
by the commissioner or president who may declare the player ineligible.

The ineligibility of a player is not limited to the option or reserve clauses, but may be related to issues entirely apart from the uniform player's contract. Thus, the player may be blacklisted for having played in competitive leagues, for refusing to be traded, or for otherwise refusing to abide by the edicts of the club owner or the commissioner.

Furthermore, the play may be subjected to a variety of restraints found in the uniform player's contract or in the constitutions and bylaws of the leagues which seriously impair his earnings. These restraints are discussed herein by reference to the chronology of the player's entry into a league. They are the "player draft," the extent of the ineligibility list or boycott, and the use of provisions of the uniform player's contract which affect the player's earning abilities.

The player draft. The National Football League and the National Basketball Association operate by means of a player draft. This draft allows the club owners to pick college players upon entry into the league by a selection system based on the inverse order of the club's final standing in the league in the previous season. A meeting is held and the team owner picks the player with whom he will contract. The player must either sign with the drafter or not play at all.

85 See note 28 supra.
86 Baseball's Major League-National Association rule 15(c)(2) places a player on the disqualified list for playing for a club containing ineligible players. 1957 Hearings 1675–76. N.F.L., constitution and by laws, article VIII, § 7 bans a player for a season if said player is under contract with a club owner, does not report for the first regular games, and has played in any other league (an exception may be American minor leagues or teams). Id. at 2580w. Boycotts may be enforced against American players who seek reentry from Canada on the decision of the commissioner, since all players who have played in Canada must have a hearing before the commissioner. Ibid. N.B.A., uniform player's contract paragraph 4(a) provides that the player will not engage in strike activity or "interfere in any manner whatsoever with the operation or conduct of the business of said Association or of any member thereof." For violation of this provision the president is empowered to suspend the player for an indefinite period. 1957 Hearings 2958. N.H.L. by-laws, § 17.5 provides that a player under contract with a member club who, without the written permission of such club, plays with a club of any other league or organization, may be suspended or expelled at the discretion and ruling of the President. Id. at 3067.
87 The draft provisions appear as follows: N.F.L., 1957 Hearings 2580w–80t; N.H.L., id. at 3061–65; N.B.A., id. at 2954–55; major league baseball, id. at 1656–59. Leslie M. O'Connor, President of the Pacific Coast League, in his letter to Hon. Emanuel Celler, dated July 25, 1957, states as to the player draft: "The common, statutory and constitutional law of the States and the United States, and probably the law of other countries, is completely hostile to notions that any person's natural right to contract for his own labor, and to earn his livelihood thereby, can be thus confined and restricted. Any enterprise, whether in sport or otherwise, which asserts its ability to live rests upon such a 'right' as it thus confiscates, is founded upon quicksand. That such a 'right' is not essential is demonstrated by baseball's successful operation of many years. It is merely a measure to curtail costs of player recruitment. And football is most fortunately situated in that it gets most, if not all, of its players from the colleges. They are
Ineligibility, blacklist, boycott and ban. The leagues may be considered separately on the subject of player ineligibility and enforcement of contract provisions by group refusal to deal. Baseball and hockey are in one category because they have working agreements with virtually all potential competitors. The National Football League is in another category because it has potential competition from the Canadian football leagues. As seen above, contacts by American football players with the Canadian leagues will result in a hearing before the commissioner before eligibility can be established in the National Football League.

The major leagues of baseball have entered into an agreement with the National Association of Professional Baseball Leagues, or the minor leagues, which covers virtually all of baseball. This agreement extends the enforcement of the ineligibility lists of major and minor league baseball throughout the baseball world. Thus, baseball can subject the player to an industry-wide blacklist and boycott operating both in the major and minor leagues. Likewise, the National Hockey League has had a working agreement with other professional and amateur organizations covering virtually the entire hockey world.

Uniform player contract conditions. (i) Non-payment for exhibition season. The sport leagues do not provide that a player’s salary commences at the time the contract is signed, covering exhibition season play, but rather the contract payments begin at the start of the so-called regular or championship play-off season. But the exhibition season may call for the developed there and, additionally, they often bring with them, very profitably to the professional sport, outstanding reputations for skill. Baseball’s player-recruitment and development costs are immensely greater; and in large measure the players benefit therefrom, which is why players generally favor baseball’s reserve-clause system. Even were the football ‘right’ essential, it would remain inconceivable that the House Judiciary Committee would recommend or the Congress would adopt, legislation specifically approving it, or that the courts would fail to denounce such legislation as an intolerable violation of the basic human and constitutional rights of the ‘individual unorganized worker’ (quoting from the ‘public policy of the United States’ expressed in the Norris-La Guardia Act) ‘helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment.’ Are not outstanding athletes entitled to the rights of other citizens? ‘The right to pursue . . . (ordinary employments) without let or hindrance . . . is a distinguishing privilege of citizens of the United States and an essential element of that freedom which they claim as their birthright (Butchers Union v. Crescent City Co., 111 U.S. 746, 757; also see Dant v. Virginia, 129 U.S. 114, 121; Meyer v. Nebraska, 252 U.S. 390, 399; Coppage v. Kansas, 236 U.S. 1, 26, 28, 30; and many other cases which could be cited).’ 1957 Hearings 2909, 2911.

37a See note 36 supra.
38 Major League-National Association Rules, 1957 Hearings 1644–84. The rules providing for recognition of ineligible, suspended, and disqualified lists are rules 13–16, id. at 1674–76.
39 Statement of C. S. Campbell, President, N.H.L., 1957 Hearings, 2979–86, 2984–85. Thus the refusal of the hockey player to abide by the salary decision of the President of the N.H.L. could result in an industry wide ineligibility. By laws, §§ 12, 17.6, 17.7, 1957 Hearings 3053, 3067.
40 N.F.L., standard player’s contract, paras. 1, 3, 1957 Hearings 2748–49. N.B.A., uniform player’s contract, paragraphs 1 and 2, specifically provides that employment begins October 1, but that salary is not paid until November 15. Id. at 2958. Major league baseball’s uniform
same type of operation and play as the regular season. Football, for example, has an extensive exhibition season. These exhibition games are usually televised and are well attended by paying fans. But the football player has no uniform contract right to payment for participating in the exhibition games.\(^4\)

(ii) Non-payment of full contract price upon termination of the contract. There is a variety of treatment between leagues as to whether or not the player will receive full contract pay upon severance from the team. The National Football League provides that a player may be severed from the team upon the decision of the head coach that he is not in "excellent physical condition," or if in the opinion of the head coach the "player's work or conduct in the performance of this contract is unsatisfactory as compared with the work and conduct of other members of the club's squad of players . . ." Upon such termination the football player may receive compensation only for prior service.\(^4\) Thus, a football player may have no contract right to a full year's pay upon injury. Basketball, hockey, and baseball, however, provide that the player will receive his contract right to a full season's salary if he is injured as a result of playing with the club.\(^4\)

**Television and Radio**

Whether or not the public may see televised sport presentations depends upon either group-imposed rules and regulations or upon understandings that recognize the ability of the club owner to control all telecasting as to presentations in his home city.

Again the leagues may be treated separately. This is so because of the decision in *United States v. National Football League*.\(^4\) In this case the constitution and bylaw provisions of the National Football League covering the subject of television and broadcasting were the subject of extensive examination by the federal court. The court held that such constitution and bylaws were contracts in restraint of trade, and applied the antitrust

player's contract, paragraph 2, provides that the contract salary shall commence at the start of the "playing season," and paragraph 1 distinguishes the training season, the exhibition games season, the playing season, and the World Series. Id. at 1491. N.H.L., standard player's contract, paragraph 1, provides that payment shall start at the commencement of the regular league championship schedule of games or following the date reporting, whichever is later. Id. at 3007.

\(^{41}\) See note 40 supra. But the constitution and by laws of the N.F.L., article XX, § 2, item 3, specifically provides that the clubs must play at least five pre-season, non-conference games. 1957 Hearings 2580a.

\(^{42}\) N.F.L., standard player's contract, paras. 6 and 7. 1957 Hearings 2749.

\(^{43}\) N.H.L., standard player's contract, paragraph 5 allows suspension by the club for physical unfitness without full contract pay, but excepts "unless such condition is the direct result of playing hockey for the club." 1957 Hearings 3008. The N.B.A. contract, paragraph 6, is similar. Id. at 2959. So is baseball's major league uniform player's contract, paragraph 7(c). Id. at 1492.

standard of the "rule of reason" to them. It then concluded that the following were in unreasonable restraint of trade: (a) Agreements to prevent the broadcasting of contests either when the team was playing at home or away from home; (b) Agreements to prevent the sale of rights for the telecasting of outside games in a club's home territory on the day when the home club is permitting the telecast of its road games in its home territory. Thus, the court enjoined the league from restricting the sale of television rights by other team owners when the home team is playing away and its gate receipts are not affected by the telecast of other games.

The televising of major league baseball contests seems to be subject to the decisions of the home city owners. Thus, the nationally televised "game of the week" did not appear in San Francisco upon the advent of the San Francisco Giants. The Giants, according to newspaper reports, had signed a "pay" television agreement, and did not televise their games at all. The situation with respect to the National Football League's championship playoff game and world championship game raises an additional problem. Neither San Francisco nor Detroit was able to watch televising of their teams' final 1957 games even though the games were complete sell-outs and were not included in the season's subscription price. Despite public demand and requests by government officials the blackout of the games was maintained.

**Powers of the Commissioner or President**

The sport leagues allow the commissioner or president large powers in their relations with players and in the ability to impose fines and sanctions designed to protect the integrity of the game. The decisions of the commissioner with respect to the player, except in baseball, appear to be final and unappealable in all areas. He is not a player's representative, but is appointed by the club owners. In the important field of owner control, however, his powers are more limited. For example, an owner may not be expelled from a league without the vote of the other owners.45

**Applicability of Antitrust Laws**

Clearly the sporting leagues considered as extra-governmental trusts or considered in the light of their constitutional and bylaw restrictions on

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45 Major league baseball's National League requires a unanimous vote of all members, except the charged club, for termination. Constitution and rules, art. 3.9(1), 1957 Hearings 1425. The American League provides that six members must approve the expulsion. Constitution § 7, id. at 1396. N.F.L. requires an 13/12 vote. Constitution and bylaws, § 16, id. at 2580h. N.H.L. requires a 3/4 vote of all members of the league, including the member charged, for suspension of a member. Constitution, arts. 3.9, 3.10, id. at 3014-15. N.B.A. requires a 2/3 vote, also including the member charged. Constitution and by laws, cl. 22, id. at 2940-41.
the free market are in violation of federal antitrust standards.\textsuperscript{46} The statements of the Supreme Court in \textit{Fashion Originators' Guild v. FTC}\textsuperscript{47} would seem to apply to the sporting leagues. The Court stated:\textsuperscript{48}

Under the Sherman Act, competition not combination should be the law of trade. And among the many respects in which the Guild's plan runs contrary to the policy of the Sherman Act are these: it narrows the outlets to which garment and textile manufacturers can sell and the sources from which retailers can buy; subjects all retailers and manufacturers who decline to comply with the Guild's program to an organized boycott; takes away the freedom of action of members by requiring each to reveal to the Guild the intimate details of their individual affairs; and has both as its necessary tendency and as its purpose and effect the direct suppression of competition from the sale of unregistered textiles and copied designs. In addition to all this, the combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the national legislature and violates the statute.' [Citations omitted.]

The antitrust laws as presently applicable probably affect the following practices in the sporting leagues so as to subject them to judicial examination or administrative action. The veto power of existing club owners to prevent new franchises would be subject to the establishment of conditions which would allow free and equal access into the leagues by all cities, provided they could meet reasonable population and capital requirements. The player would have access to the federal courts for redress of league practices imposed on him which limit his compensation, freedom to play, and bargaining position. Conduct of the leagues with respect to radio and television agreements would be treated as any other restraint of trade. Prerogative power of the commissioner or president would be subject to stipulated administrative standards and judicial review.

\textbf{Developments After the Radovich Decision}

Another effect of the Radovich decision was to cause the control of the organized professional sport leagues to be placed directly in the hands of the federal government under the commerce clause. The Supreme Court

\textsuperscript{46} \textit{Cf.} Anderson v. Shipowners' Ass'n of the Pacific Coast, 272 U.S. 359 (1926), where the Supreme Court held that employers could not agree to fix the terms and conditions of employment and deny employees freedom of selection.

\textsuperscript{47} 312 U.S. 457 (1941).

\textsuperscript{48} \textit{Id.} at 465–66.

held that Congress had regulated organized professional team sports in its
general regulation of all interstate businesses under the antitrust laws, with
the one exception of baseball. As to baseball, the Court stated that Con-
gress had the power to provide for its coverage under these laws. Thus, the
Congress was faced with the problem of how to exercise its constitutional
powers in the regulation of the interstate sporting leagues. Should the anti-
trust laws apply or should other standards or rules be adopted?

Immediately following the Radovich case, various bills were introduced
regarding application of the antitrust laws to organized professional team
sports.50 One provided that the sports be brought squarely within the ambit
of the laws. Others granted limited or complete exemption. The House then
conducted hearings51 which lasted from June 17 to August 8, 1957. Ap-
pearing as witnesses were the commissioners of the four sport leagues along
with players and player association attorneys. The commissioners con-
tended that sporting leagues were different from all other industries in that
the owners are not competitive to one another. On the contrary, they
argued, they must cooperate in order to insure operation of the leagues.
Further, they urged that their present practices had been in operation for
many years and that they had been found to be indispensable for the proper
functioning of the business. If these practices should violate the antitrust
laws and be held unlawful, it was said the leagues would be faced with
insurmountable difficulties of operation. They were fearful that without
their present practices they would be unable to function, in that the wealthy
teams would obtain the best available talent, which would prevent competi-
tive playing strength. This argument is the basic justification for the player
draft. The commissioners also feared the possibility of multitudinous liti-
gation. They submitted statements outlining their positions.52

Committee Report

On May 13, 1958, the House Subcommittee issued its Report on the
Applicability of Antitrust Laws to Professional Team Sports.53 The report
contained three views. The majority view was that the sport leagues should
be subjected to the antitrust laws, but that they should have the benefit of
having the courts consider their practices as reasonable. The sport leagues

51 1957 Hearings.
52 Ford C. Frick, Commissioner of Baseball, 1957 Hearings 164–72; George M. Trautman,
President, National Association of Professional Baseball Leagues, id. at 211–17; Bert Bell,
Commissioner, N.F.L., id. at 2722–35; Maurice Podoloff, President, N.B.A., id. at 2904–08;
C. S. Campbell, President, N.H.L., id. at 2979–86.
would have the ability to prove that the practices attacked, if within the enumeration of the bill, were reasonably necessary for the "equalization of competitive playing strength," the right to operate within geographical territories, and the "preservation of public confidence in the honesty of the sport contests." The majority view thus precluded the application of the per se rule\(^{54}\) of illegality to the sport leagues. The majority stated:\(^{55}\)

The ordinary commercial enterprise is expected to make every legitimate effort to sell as much of its products or services as possible. The fact that in the course of aggressively seeking business in this manner many of its competitors may be unable to remain in business, is not of particular concern to it. Participants in professional team sports that are organized in leagues, however, are unable to compete fully in their ordinary commercial practices. While it is essential that on the playing field there must be continuous and vigorous competition between the opposing clubs in order that spectator interest may be stimulated and continued, the various clubs within the sport cannot compete fully, for example, to secure the player talent that is essential for their business needs. The history of baseball demonstrates that unless arrangements are made to prevent competition among the clubs for players, the larger and richer teams outbid their rivals for the best players and become so powerful and one-sided that spectator interest in the contests threatens to be lost, with the entire industry accordingly placed in jeopardy.

With respect to the practices of the leagues in their relations with players, the majority stated:\(^{56}\)

The committee is of the view that a reasonable reserve clause recognition system, supplemented by farm systems, player draft and waiver rules, or a reasonable player selection system, are needed for the continuation of the sports in which such procedures have been developed and are utilized. The committee believes, however, that these procedures, embodying as they do provisions for group boycotts, reasonably may be applied only to participants within a particular sport. Group boycotts which are applied against persons who have left the organized professional team sports would be unreasonable. An example is contained in the provisions of section 30.09 of the National Association Agreement in the prohibition against permitting former employees to use parks or stadia even for exhibition purposes after they have become separated from the organized sport.

A minority took the position that the organized sport leagues should be entirely free of liability in the federal courts under the antitrust laws in

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\(^{54}\) In antitrust litigation, under the per se rule of illegality, certain agreements or practices, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. Among the agreements in per se restraint of trade are price fixing, division of markets, group boycotts and tying arrangements. Northern Pac. Ry. v. United States, 356 U.S. 1 (1958).


\(^{56}\) Id. at 8.
certain enumerated fields without the application of either the rule of reason or the per se rule. An additional view held that sport contests are not trade or business and should not be covered by the antitrust laws.

House Action

The view favoring exemption from the antitrust laws prevailed in the House. The doctrine of "reasonably necessary" was defeated on June 24, 1958, by voice vote. Instead, the House passed the Walter Bill which would completely exempt professional sport leagues in the spheres enumerated in the bill. (See appendix.) There then followed hearings before the Senate Judiciary Committee, Subcommittee on Antitrust and Monopoly. On August 1, 1958, the Senate subcommittee voted to table the House bill. Subsequently Congress adjourned, and at this writing the Radovich decision is still in force.

Issues Confronting the Senate

Delegation of Authority to Private Parties

The Walter Bill may come before the Senate for action in the next Congress. A basic problem confronting it is this. The Walter Bill would exempt from operation of the federal antitrust laws activities that are concededly interstate commerce. As such, they are subject to the regulation of Congress and a federally imposed standard of conduct. Of course Congress has the power to exempt the sport leagues from this regulation. It has done so with other trades and industries. But Congress has not granted extensive exemptions from commerce and antitrust regulation to industry groups without delegating federal authority over the industry involved to state government or a responsible federal agency. Furthermore, in delegating authority it has been held that Congress must set up a primary standard of conduct.

The Walter Bill would provide for non-responsibility to the federal antitrust laws and the basic standard of conduct established by them. The sport leagues would be subject to no standard but that of the leagues themselves. Would this not be in essence a delegation of federal power to pri-

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57 Id. at 10-11.

58 The Insurance Antitrust Moratorium Act, 59 Stat. 33 (1945), as amended, 15 U.S.C. §§ 1011-15 (1952), exempting the interstate insurance business from the antitrust laws, specifically delegated authority to the several states for "continued regulation." The Webb-Export Trade Associations Act, 40 Stat. 516 (1918), as amended, 15 U.S.C. §§ 61-65 (1952), exempting export association agreements from the antitrust laws, specifically provided that the Federal Trade Commission should have information and investigative powers to insure that trade and commerce among the several states was not subject to such agreements.

vate parties, monopolists, and hence unconstitutional? An attempt to dele-
gate authority to set minimum wages to a majority of the producers in
an industry has been held unconstitutional. Since the leagues are con-
trolled by the club owners it would seem there is a similar situation here.
It may be concluded that the Walter Bill is open to objection on this ground.
There is no delegation of authority to a responsible agency.

Player Employment Issue

As to league practices in the areas of player employment control and
equalization of player strength, the bill denies the players the benefits of the 
Radovich decision. On the other hand, a commendable provision is the 
allowance of collective bargaining between players and owners. But with 
league power over the players left intact it is difficult to see how players could be in any substantially better position through the use of this machinery.

As noted, there are four practices, engaged in to varying degrees in 
some or all of the sports, which directly affect the player. These are the reserve clause contract; rules of ineligibility, blacklist and ban; non-
payment for exhibition games and non-payment of full contract salary upon termination; and the player draft system. The Walter Bill may be held to exempt these practices from attack under the antitrust laws. But is it not difficult to defend these practices as being urgent necessities rather than merely convenient methods of operation?

Reserve clause. Under the present reserve clause contracts the club owner is not only getting the benefit of an exclusive-services contract, but he is also depriving the player of his bargaining powers at the end of the year, even though the owner only has an optional hold on the player. If the owners, however, were to enter into exclusive-service contracts for longer periods of time, say two to five years, with no reserve clause, they would still be deriving benefits for the period of the contract but would not be depriving the player of his bargaining powers at the end of the period. In the absence of such a contract it would appear unfair to prevent the player from seeking competitive bidding for his services. If such a contract were valid it would seem that special antitrust treatment would be unnecessary, for the owner would have resort to the courts, perhaps for specific performance of the contract, or at least for contract damages, if the contract were breached.

Ineligibility, blacklist, and ban. The same comments may be made here. Valid contracts are enforced by the courts and not by private parties

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60 Carter v. Carter Coal Co., 298 U.S. 238 (1936). In Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398, 399 (1940), the Court clearly indicated delegation of powers to an industry without the supervision of a responsible agency would be invalid. See also note 48 supra.
using extra-judicial sanctions. When such sanctions impose conditions which make it impossible for an athlete to obtain his livelihood in his profession, private parties are allowed to assume the dictates of the sovereign. The probability of contract litigation would seem to be a sufficient sanction against the player’s breaching a valid player contract and against other owners from inducing a breach of such contract. The enforcement of sanctions into other leagues is clearly unrelated to equalization of competitive playing strength, and would seem especially subject to an allowance of remedial action in the federal courts.

*Uniform Contract Conditions.* Provisions in a group-imposed uniform player’s contract with respect to non-payment for exhibition games and for non-payment of full contract salary upon termination at the option of the owner have absolutely no relation to the equalization of competitive playing strength, so again an antitrust exemption does not seem justified.

*Player Draft.* There is no question that the player draft, as a method of selecting players, is convenient to the leagues, but can it be defended as reasonably necessary? The draft requires the players to shoulder, in full, the problem of equal playing strength. Essentially, though, this is the owners’ problem and should be met by them. Also, several points may be made as to the actual value of the player draft as a tool in maintaining equality of playing strength among the teams. In professional football, for example, franchise owners frequently trade future draft picks for active players, which is clearly contradictory to the supposed purpose of the draft. Also, it is certainly arguable that the scouting system, and not money, is the real key to the selection of players. That is, no team owner really knows that he is getting a valuable player simply on the basis of that player’s “price tag.” Many of today’s professional stars were unknowns in college or amateur ranks, and the poorer teams have as much opportunity to discover these players as the wealthier clubs.

Historically a few teams have, in fact, dominated the professional football leagues despite the draft, which is designed to equalize playing strength. It seems that the success of teams is more dependent on coaching and scouting ability than on key draft choices. Also, the colleges are producing more good athletes in football and basketball than can be absorbed in the professional leagues, so it would seem that the draft is unnecessary. In addition the football player draft covers approximately 360 football players, which is virtually the entire supply of talent, so it is not limited to just the top few players as would be supposed if its sole purpose was to equalize playing strength.

**Conclusion**

The practices of the organized professional sport leagues certainly raise antitrust issues. The question now is whether these leagues will be required to conform to the standards of the antitrust laws or whether
other standards of conduct will be applied to the leagues. The immediate answer to this question will have to come from the United States Senate. It is felt that the sporting leagues themselves can come forth with affirmative proposals effecting substantial changes in their internal operation. Such changes ought to be accomplished before the leagues are allowed antitrust exemption in any of their activities.

APPENDIX


AN ACT

To limit the applicability of the antitrust laws so as to exempt certain aspects of designated professional team sports, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of July 2, 1890, as amended (26 Stat. 209; The Act of October 15, 1914, as amended (38 Stat. 730); and the Federal Trade Commission Act, as amended (38 Stat. 717), shall not apply to any contract, agreement, rule, course of conduct, or other activity by, between, or among persons conducting, engaging in, or participating in the organized professional team sports of baseball, football, basketball, and hockey which relate to—

(1) the equalization of competitive playing strengths;
(2) the employment, selection, or eligibility of players, or the reservation, selection, or assignment of player contracts;
(3) the right to operate within specified geographic areas;
(4) the regulation of rights to broadcast and telecast reports and pictures of sports contests; or
(5) the preservation of public confidence in the honesty in sports contests.

Sec. 2. As used in this Act, “persons” means any individual, partnership, corporation or unincorporated association, or any combination or association thereof.

Sec. 3. Nothing in this Act shall affect any cause of action existing on the effective date hereof in respect to the organized professional team sports of baseball, football, basketball, or hockey.

Sec. 4. Nothing in this Act shall be construed to deprive any players in the organized professional team sports of baseball, football, basketball, or hockey of any right to bargain collectively, or to engage in other associated activities for their mutual aid or protection.

Sec. 5. Except as provided in section 1 of this Act, nothing contained in this Act shall affect the applicability of the antitrust laws to the organized professional team sports of baseball, football, basketball, or hockey.