Published on *The National Law Review* https://natlawreview.com

Will Supreme Court Review Challenges to Baseball Antitrust Exemption?

Article By:

Bruce D. Sokler

You don't think of sports website FanGraphs as a go-to source for legal analysis. But in a provocative April 30th post by Nathaniel Grow, https://www.fangraphs.com/blogs/the-supreme-court-might-reconsider-mlbs-antitrust-exemption/, it was suggested that maybe—just maybe—the Supreme Court might be winding up to reexamine baseball's anomalous antitrust exemption.

Baseball's judicially-created antitrust exemption is now nearly 100 years ago. *Federal Baseball Club v. National League,* 259 U.S. 200 (1922). Justice Holmes' opinion has stood the test of time. The Court held that baseball is not engaged in a business in interstate commerce—it's the national pastime. Justice Blackmun's opening section, delineating all the baseball greats, in the 1972 opinion *Flood v. Kuhn,* 407 U.S. 258 (1972) upholding the exemption, could be envisioned read aloud by James Earl Jones in "Field Of Dreams."

Since 1972, litigants have looked for loopholes or limiting factors in the exemption—or even asked for it to be overturned. All have failed, and the Supreme Court has declined in the last four decades to take another baseball antitrust case.

So what is different this year? The FanGraphs post noticed what potentially could be a straw in the wind. Or maybe it will be nothing.

There are two petitions for certiorari pending at the Supreme Court. In one, *Wyckoff v. Office of the Commissioner, No. 17-1079* two former scouts allege that baseball and its teams have colluded to depress the market for scouts. In the second, *Right Field Rooftops v. Chicago Cubs, No. 17-1074,* the plaintiffs assert that the Cubs have unlawfully attempted to monopolize the market for watching their games in-person by purchasing a number of the formerly competing rooftop businesses operating across the street from Wrigley Field and also blocking the view of some of the remaining rooftops by installing new, expanded scoreboards.

Neither petition asks the Supreme Court to overturn the exemption in its entirety. Both argue that consistent with the general rule that antitrust exemptions should be narrowly construed, the baseball exemption should not applied to their cases.

There is a potential straw in the wind noted by Professor Grow. As had been done previously, the respondents in the cases waived their right to file an opposition brief to the petition for certiorari. However, unlike the previous cases, after the cases were first circulated for conference, the Supreme Court entered an order directing that opposition briefs be filed. They have now done so arguing that the exemption covers “the business of baseball” and that both cases fit within the business of baseball.

At the end of the day, the straw will likely float to the ground, and certiorari will be denied. The cases have again been distributed for the May 17th Conference.

National Law Review, Volume VIII, Number 133