

# IN THE WAKE OF THE FLOOD

JOHN P. MORRIS\*

## INTRODUCTION

When the Supreme Court agreed to intervene in Curt Flood's efforts to have the reserve clause of professional baseball scrutinized under the antitrust laws, many people hoped that the Court would use the occasion to present definitive guidelines for generalized application of the antitrust laws to professional sports. The Court, however, chose to ignore these questions and, in an opinion which reads like a catechism of the virtues of baseball, continued to allow baseball to operate unfettered by restraints on its anti-competitive practices.<sup>1</sup> In taking this position, the Court increased pressure for further legislative control of the sports industry. It is likely that this continued public scrutiny will extend beyond baseball and include the other professional sports. Hence, an appraisal of the public policy issues raised by the present operation of the business of sports is appropriate.

Professional sports is one of the major entertainment institutions in the United States today. In the last twenty years, baseball has expanded from sixteen to twenty-four teams, basketball from eight to twenty-eight teams, and football from twenty-one to twenty-six teams.<sup>2</sup> These additional teams result in expanded schedules and an overlapping of seasons between sports. The baseball season moves into its last phase, prior to the World Series, when the football season is well underway and basketball players are beginning extensive pre-season practice. Television coverage of these various events has likewise expanded tremendously.<sup>3</sup> The impact of this professional sports expansion has not only affected the social patterns and attitudes of the public, but, in addition, the heavy scheduling, constant travel, and extended seasons have taken their physical toll on the professional athlete.<sup>4</sup>

While the baseball industry has developed without competitive controls,<sup>5</sup> it has only been in recent years that the collective decisions made by sports organizations have been seriously challenged.<sup>6</sup> As a result, the sports industry remains a virtual

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\* Professor of Law, Arizona State University.

<sup>1</sup> Flood v. Kuhn, 407 U.S. 258 (1972). The Court upheld professional baseball's long-standing exemption from the antitrust laws on the basis of its decisions in Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953), and Federal Baseball Club v. National League, 259 U.S. 200 (1922). The Court held that, although the exemption is aberrant in view of its failure to similarly exempt other interstate professional sports, Congress, through its inaction, had sanctioned this anomaly. It was, therefore, for Congress, not the Court, to rectify the situation.

<sup>2</sup> See, e.g., Washington Post, Sept. 23, 1972, § D, at 2, cols. 2 & 3 (baseball); *Hearings on S. 2373 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 92d Cong., 1st & 2d Sess., pt. 1, at 99 (1972) [hereinafter cited as *Basketball Hearings*] (basketball); N.Y. Times, Oct. 9, 1972, at 42, col. 2 (football).

<sup>3</sup> See 117 CONG. REC. 8282-84 (1971) (remarks of Representative Udall).

<sup>4</sup> See generally J. BOUTON, *BALL FOUR* (1970); D. MEGGYSEY, *OUT OF THEIR LEAGUE* (1970).

<sup>5</sup> Flood v. Kuhn, 407 U.S. 258, 269-82 (1972).

<sup>6</sup> See Wall Street Journal, Nov. 3, 1972, at 27, col. 5.

private government, controlling the lives of hundreds of players, exerting a tremendous financial impact on the communities in which franchises are located, and affecting the value systems of thousands of people.

These developments have not been unnoticed by Congress, and the prospect of federal legislation has become a central question for baseball, and the professional sports industry in general. At various times since 1951, appropriate committees in both the House and the Senate have conducted hearings and have seriously discussed diverse mechanisms for clarifying the legal relationship of the professional sports organizations to the antitrust laws.<sup>7</sup> The most defensible notion which has evolved from these hearings is "that the public interest is best served by keeping the essentially business aspects of the team sports involved within the antitrust laws" while exempting those considered unique to the sports industry.<sup>8</sup> Aspects considered unique to the industry involve the following subject areas:

- (1) the equalization of competitive playing strengths [sic];
- (2) the employment, selection, or eligibility of players, or the reservation, selection, or assignment of player contracts;
- (3) the right to operate within specific geographic areas; or
- (4) the preservation of public confidence in the honesty in sports contests.<sup>9</sup>

Although never fully expressed as legislation approved by both houses, congressional concern seems to be based upon the belief that the public's interest in professional sports is adequately protected by maintaining a competitive balance among the member clubs of each professional league. Maintenance of such competitive balance requires that each league be able to establish territorial restrictions in order to achieve overall geographical balance. Congress seems to approve the further concept that self-regulation by a league is the best way to both achieve the desired balance and maintain public confidence in the integrity of the sport.<sup>10</sup> As the Court observed in the *Flood* case, the legislative proposals considered by Congress, if enacted, would not only extend the concept of the reserve system to other professional sports, but would also be far more expansive than the existing procedures under which all other professional sports leagues now operate.<sup>11</sup>

The "positive inaction" of Congress in the past may not provide an accurate guide to the future treatment of professional sports in the legislative process. There are indications that Congress in its most recent inquiry is prepared to accept that exempting most league and team activities from the antitrust laws is unnecessary for industry survival; that the antitrust laws have generally included recognition of the unique cooperative needs of the sports industry; and that the competitive

<sup>7</sup> *Flood v. Kuhn*, 407 U.S. 258, 281 n.17 (1972); *Hearings on S. 950 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess., 173-75 (1965) [hereinafter cited as *Professional Sports Hearings*].

<sup>8</sup> *Professional Sports Hearings* 177.

<sup>9</sup> *Id.* at 3.

<sup>10</sup> *Id.* at 173-75.

<sup>11</sup> *Flood v. Kuhn*, 407 U.S. 258, 281-82 (1972).

processes, protected by the Sherman Act, are still the most viable way to preserve and to accommodate the principle of economic freedom.<sup>12</sup> The recent legislative proposals concerning the requested merger of the National and the American Basketball Associations reflect a marked change in basic congressional policy toward professional sports.<sup>13</sup> This new shift in direction may be the wave of the future.

The purpose of this article is to investigate the extent to which the unique attributes of professional sports can be accommodated under traditional antitrust doctrine. It is accepted that legal doctrine ought not be applied to cause a radical change in the nature of the sports involved. The following analysis suggests the manner in which this goal can be achieved while also effectuating necessary changes in relationships within the industry.

## I

### ANTITRUST LAWS AND THE UNIQUE ASPECTS OF PROFESSIONAL ATHLETICS

#### A. Equalization of Competitive Playing Strengths

Equalization of the competitive playing strengths of the teams comprising a professional sports league is achieved by controlling the distribution of player talent within the league. All professional sports leagues exercise tight control over their labor force, either by the overly restrictive reserve clause tacitly approved in *Flood* for baseball teams, or by the less onerous option clause adopted by those professional leagues subject to the antitrust laws.<sup>14</sup>

The option clause theoretically binds the athlete to his club for only one year after the expiration of his contract. When the athlete elects to play out his option, he may receive only ninety per cent of his salary for the prior year.<sup>15</sup> After the expiration of the one year period, he becomes a free agent and may negotiate with any other team.<sup>16</sup> If nothing more were involved, this arrangement would do much to achieve a balance between competing interests. Even in its present form, it provides both the team owner and the fans with adequate notice of the athlete's intention. It also enhances the athlete's bargaining position, while preserving equality of playing strength on the field.

There is, however, one aspect of the option procedure which tends to erode what-

<sup>12</sup> *Id.* at 291-92 (dissenting opinion), citing *United States v. Topco Associates*, 405 U.S. 596, 610 (1972).

<sup>13</sup> See Amendment to S. 2373, 92d Cong., 1st Sess. (1971). This document suggests certain amendments to S. 2373 authorizing the merger of the two basketball leagues. These amendments provide, *inter alia*, for sharing of gate receipts in an amount of not less than thirty per cent; stipulate that any payments made by the ABA for membership in the expanded league shall be solely from television revenues; amend the television policy pertaining to blackout of home games already sold out; protect high school and college contests on specified days for a specified time; and limit the option arrangements to one year.

<sup>14</sup> See *Flood v. Kuhn*, 407 U.S. 258, 280 n.16 (1972), and articles cited therein, particularly Comment, *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 *YALE L.J.* 576 (1953).

<sup>15</sup> See, e.g., National Football League Rule 10 (1968).

<sup>16</sup> *Id.*

ever theoretical advantage the procedure extends to the professional athlete. This is the "forced trade" provision. If another owner picks up the option of an athlete, that owner may be required by the league commissioner to assign players from his club to the athlete's former club. The "forced trade" provision raises the prospect of retaliatory trades when an owner attempts to tamper with the star players of the other clubs.<sup>17</sup> The "forced trade" provision, therefore, has the effect of providing a significant disincentive for another owner to sign a player who has played out his option. The net result is that a dissatisfied player has only a severely limited opportunity to attempt to market his skills to another club. Because of this restriction, the requirement that a player who chooses to exercise the option must wait a year after his contract has expired and play for a reduced salary during that year provides that player's club with enough economic advantage to allow the two parties to come to terms where it is worthwhile to do so. It can be argued, then, that the "forced trade" provision is more restrictive than is necessary to achieve its purpose of stabilizing the distribution of player talent. It virtually reduces the option clause to a reserve clause. Once the "forced trade" provision is modified or deleted, acceptance of the option clause under the antitrust law will operate not only to preserve the public interest in professional sports but also may, over time, actually increase the bargaining position of the athlete.<sup>18</sup>

The option procedure presently used by those professional teams subject to the antitrust laws is designed to strike a balance between the interests of the fans and the interests of the athlete. When used in conjunction with the other reforms described in this article, it can be a strong factor in contributing to the stability of a franchise. Such stability is of particular concern to a third—but often ignored—major constituency of the professional sports industry—the municipal corporation. Municipalities perform a basic function in the professional sports industry: they provide the stadiums, fieldhouses, and other types of arenas in which the contests are held. Municipalities are willing to assume this role only if a franchise is likely to prosper and remain in that area. The success of a franchise and, in the long run, the success of a league depend upon continued fan support, which will be forthcoming only if the basic concept of equalization of playing strengths is preserved. Thus, the necessary participation of cities and of other municipal corporations also requires continuation of at least some control over the distribution of player talent.

### B. Selection and Employment of Players

All professional sports leagues have selection procedures which, together with the reserve clause in baseball or with the option system in the other professional sports, permit control of the distribution of player talent.<sup>19</sup> It was formerly thought

<sup>17</sup> *Basketball Hearings*, pt. 1, at 414-15; *Id.*, pt. 2, at 788.

<sup>18</sup> *Id.* See also *Wall Street Journal*, Nov. 3, 1972, at 27, col. 5.

<sup>19</sup> See *Professional Sports Hearings* 162-72; Comment, *The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws*, 81 *HARV. L. REV.* 418 (1967).

to be necessary to exempt from the antitrust laws the league rules governing the drafting of prospective professional baseball players in order to protect baseball's farm system once the sport was made subject to such laws.<sup>20</sup> This exemption, of course, is now unnecessary inasmuch as baseball remains beyond the scope of the antitrust laws. Furthermore, the draft procedures of those professional sports leagues which are subject to competitive controls have not been attacked directly and, as will be shown, can probably continue to operate within the antitrust laws as reasonable restraints.<sup>21</sup>

The draft procedure practiced by the National Football League is far more restrictive than that used by the American and the National Leagues in baseball. Under the NFL draft procedures member clubs select in reverse order of their league standings as of the close of the preceding season. To this extent, the baseball clubs follow the same selection procedure. However, the draft rights thus acquired by a football club remain the rights of that club in perpetuity.<sup>22</sup> Thus, the player must strike a bargain with the club holding draft rights to him or refuse to play.<sup>23</sup> The draft procedures of professional hockey and basketball are similar to those of the NFL. Baseball clubs, on the other hand, have exclusive rights to negotiate with a player for six months, after which time his name is again placed in a pool. His original club cannot select him at the next meeting at which he becomes eligible unless he indicates in writing to the Commissioner of Baseball that he has no objection.<sup>24</sup>

Before draft procedures can be evaluated, they must be viewed as a part of the entire player control system. While professional football employs draft procedures which are initially more confining than those in baseball, the approach of the former is ostensibly less restrictive after the player signs a contract because of the option clause. Under the procedure used in football, the player acquires the option to bargain with other clubs at a point during his playing career if he so desires. After a player has signed his initial contract and has established himself in the professional ranks, his bargaining power will be greater than it was before his skills were tested as a professional. Thus, the athlete actually enhances his bargaining position through his development as a professional. With removal of the "forced trade" provision, the player's increased bargaining power under the option clause could be a significant factor in permitting him to gain employment at his real worth.

Professional baseball, on the other hand, gives the player his bargaining rights at a time when he must still establish himself as a professional product. Even though

<sup>20</sup> See SENATE COMM. ON THE JUDICIARY, PROFESSIONAL SPORTS ANTITRUST ACT OF 1960, S. REP. NO. 1620, 86th Cong., 2d Sess. (1960).

<sup>21</sup> Comment, *The Super Bowl and the Sherman Act*, *supra* note 19; *United States v. National Football League*, 116 F. Supp. 319, 323 (E.D. Pa. 1953).

<sup>22</sup> *Basketball Hearings*, pt. 1, at 413-15.

<sup>23</sup> *Id.*

<sup>24</sup> See *Professional Sports Hearings* 162-72; *Basketball Hearings*, pt. 1, at 413-15.

the player can refuse to sign with the team holding the draft rights to him and wait to be drafted by another team, his bargaining position is relatively weak because he has not yet demonstrated his playing ability. Furthermore, once the player signs his initial contract, the reserve clause becomes operative and whatever bargaining rights he did have are substantially diminished.<sup>25</sup>

Ideally, taking into account the interests of all the constituencies of professional sports, the baseball selection procedure coupled with football's option arrangement, without the "forced trade" provision, would constitute the best overall player control system, allowing expansion of professional sports enterprises while maintaining the quality of the exhibition.<sup>26</sup> Under present interpretations of the antitrust laws the NFL draft procedures would probably be considered reasonable restraints, but they are more restrictive than necessary. Modification of these procedures along the lines of baseball's selection process would provide more bargaining options to the player and, hence, present a more acceptable alternative.

### C. The Right to Operate Within Specific Geographic Areas

The operation of the professional sports industry involves peculiar economic problems which clearly distinguish it from ordinary businesses.<sup>27</sup> To be successful, the individual clubs must be members of a league. As previously mentioned, the clubs that form the league must be relatively equal in playing strength in order to sustain public interest in the sport. Such interest is essential if attendance at the games is to be maintained. In addition, each club must be located in a market area which has the capability of supporting a sports franchise. These factors, along with the substantial revenue which can be derived from the sale of television rights, form the basis for a successful franchise.<sup>28</sup>

The unique economics of professional sports gives rise to unusual decision-making practices and market allocation procedures. Although franchise owners have the apparent power to make independent decisions, they actually exercise little real power by themselves. Decisions of any magnitude are generally interdependent, involving league functions. The league thus becomes the focus of decision-making—similar to a single firm.<sup>29</sup> Agreement at the league level as to the geographic division of market areas is essential to the success of the individual franchises and the survival of the league. While this practice of allocating marketing territories raises the question of a possible antitrust violation, the peculiar economic aspects of the industry would seem to justify the league's efforts at territorial allocation. Division of territories in professional sports should not be

<sup>25</sup> *Basketball Hearings*, pt. 1, at 414-15.

<sup>26</sup> *Id.* at 413-19.

<sup>27</sup> *See, e.g., American Football League v. National Football League*, 116 F. Supp. 319, 322-27 (E.D. Pa. 1953).

<sup>28</sup> *American Football League v. National Football League*, 205 F. Supp. 60, 62-63 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963). *See also Basketball Hearings*, pt. 1, at 400-02.

<sup>29</sup> *See Neale, The Peculiar Economics of Professional Sports*, 78 Q.J. Econ. 1 (1964).

viewed as a per se violation of the antitrust laws but must be examined under the "rule of reason."<sup>30</sup> When analyzed under this rule, this marketing practice has been recognized as a restraint of trade but not one which is unreasonable.<sup>31</sup> This is the position the courts have taken when faced with the issue,<sup>32</sup> and since the courts have found such territorial restrictions acceptable under the antitrust laws, there is no need for Congress to create an exemption in this area.

#### D. Preservation of Public Confidence in the Honesty of Sports Contests

In a professional sports league, league officials are presently permitted to make decisions binding on the members of the league in areas affecting public confidence. The league has the right to discipline players and clubs by fines, suspensions, and other penalties—including expulsion of a player from professional sports.<sup>33</sup> The antitrust laws have been interpreted as permitting the leagues to exercise this power, but the industry has not adopted the safeguards necessary to insure procedural and substantive fairness in this regard.<sup>34</sup>

Speaking about the principle of self-regulation as it relates to stock market transactions, the Supreme Court has held that "it is clear that no justification can be offered for [such] self-regulation conducted without provision for some method of telling a protesting nonmember why a rule is being invoked so as to harm him and allowing him to reply in explanation of his position."<sup>35</sup> The Court further observed that provision for a hearing would effectively contribute to the smooth functioning of the "antitrust court."<sup>36</sup> In the area of professional athletics, the antitrust regulations have been adapted to accommodate the concept of league self-regulation, based on the need to preserve the public's confidence in the honesty and integrity of the sport. The leagues have not, however, accepted the responsibility with uniformity but have adapted their internal procedures to the law only on a case by case basis.<sup>37</sup> The burden this places upon the complainant is a particularly harsh one, since it is, in essence, an ad hoc procedure.

<sup>30</sup> *United States v. National Football League*, 116 F. Supp. 319, 322-23 (E.D. Pa. 1953).

<sup>31</sup> *Id.* at 323-26.

<sup>32</sup> *Id.* See also *American Football League v. National Football League*, 205 F. Supp. 60, 63-67 (D. Md. 1962), *aff'd*, 323 F.2d 124, 128-30 (4th Cir. 1963).

<sup>33</sup> See, e.g., *Washington State Bowling Proprietors' Ass'n v. Pacific Lanes, Inc.*, 356 F.2d 371 (9th Cir. 1966), *cert. denied*, 384 U.S. 963 (1966); *Deeseu v. Professional Golfers' Ass'n of America*, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966); *Molinas v. National Basketball Ass'n*, 190 F. Supp. 241 (S.D.N.Y. 1961); *Professional Sports Hearings* 198-99.

<sup>34</sup> See *Haywood v. National Basketball Ass'n*, 401 U.S. 1204 (1971); *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971). In the *Denver Rockets* case, the court focused on the issue of notice and hearing. Relying on *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), the court stated, at 1065, that "[a]ccording to the Court, the requirement of a hearing will, in itself, act as a check on illegitimate self-regulation. In addition, it will provide the antitrust court with a record from which it can determine whether the self-regulation is justified, necessary and sufficiently limited."

<sup>35</sup> *Silver v. New York Stock Exchange*, 373 U.S. 341, 361 (1963).

<sup>36</sup> *Id.* at 362.

<sup>37</sup> See, e.g., note 34 *supra*. See also discussion in *Basketball Hearings*, pt. 2, at 971-74.

The professional sports industry does not need an exemption from the antitrust laws to perform the function of policing itself, but legislation may be required to force the leagues to establish procedural safeguards and to provide a forum for deciding questions concerning individual complaints. It seems both unwise and unjust to allow such extensive disciplinary power to be vested in a league commissioner or league office without provision for appeal. Without legislative action, changes in the existing league self-regulation procedures may well take place only at a very slow pace, as these procedures are challenged in court.<sup>38</sup> A more timely response by the leagues would, of course, remove the need for congressional intervention. Because this approach would give the leagues final say in defining the control mechanism, it is somewhat surprising that its attractiveness has not prompted the appropriate response.

## II

### THE IMPACT OF THE BROADCASTING EXEMPTION

Conflicting, and unfortunately misleading, impressions result if one looks at both what Congress has done and proposed to do with respect to subjecting professional sports to the antitrust laws. On the one hand, the basic thrust of most of the recent legislative proposals has been that the public interest is best served by keeping a segment of the professional sports industry subject to the antitrust laws, that segment being defined as the "business" aspects of professional team sports. In recent years, Congress never seriously considered exempting all activities of any professional sports cartel from competitive regulation, as the Court continues to do with baseball.<sup>39</sup> Yet, the Supreme Court in *Flood* was able to look at the congressional deliberations and find *support* for the whole-scale baseball exemption which it provided. This confusion, in part, results from the fact that some affirmative actions are easily misinterpreted in their significance for the broader question of the congressional attitude toward the sports industry. It is true that contrary to the general approach of congressional *proposals*, the positive congressional action which has been taken appears to exempt certain *business practices* of the professional sports industry from the application of the antitrust laws, while keeping essentially sports activities subject to them.<sup>40</sup> In *Flood* the Court cites the Sports Broadcasting Act of 1961, and the Merger Addition thereto, for the proposition that both were "expansive rather than restrictive as to antitrust exemption."<sup>41</sup> The implication of this statement is that, because Congress withdrew certain practices of the professional sports leagues from coverage by the antitrust laws, there is a predisposition

<sup>38</sup> See note 34 *supra*. See also *Erving v. National Basketball Ass'n*, Civil No. 17194 (N.D. Ga., filed Sept. 23, 1972).

<sup>39</sup> *Flood v. Kuhn*, 407 U.S. 258, 284 (1972). See also SENATE COMM. ON THE JUDICIARY, PROFESSIONAL SPORTS ANTITRUST ACT OF 1960, S. REP. NO. 1620, 86th Cong., 2d Sess. (1960); *Professional Sports Hearings*.

<sup>40</sup> Sports Broadcasting Act, and Merger Addition thereto, 15 U.S.C. §§ 1291-95 (1970).

<sup>41</sup> 407 U.S. at 281-82.

on its part for further exemption of activities of the professional sports leagues from competitive regulation.<sup>42</sup> This misreads the impact of Congress' actions and produces a judicial attitude which may inhibit further progress toward the restoration of desirable competitive practices in the sports industry.

Properly viewed, the exemptions created by Congress were actually narrow in scope and limited to specific business practices of the professional sports industry.<sup>43</sup> Both exemptions arose out of activities of the professional football cartel which are unique to the sports industry. An examination of the source of the broadcast exemption both provides some insight into the economic forces which govern professional sports,<sup>44</sup> and suggests their limited value as an accurate prediction of the congressional attitude.

Agreement by the members of a league to have the revenue from each game shared by its participants contributes to the financial stability of the weaker franchises and thus to the stability of the league itself. The experience of professional football with this noncompetitive, but essential, business practice of revenue sharing is instructive. The American Football League was created in 1959, and eight teams were fielded for the 1960 season. The appearance of this rival to the more-established National Football League brought with it intense competition for player personnel, coaches, and spectators. Competition for spectators not only involved acquisition of advantageous territorial sites but also national television coverage.<sup>45</sup> The new league, realizing that television revenues were a major factor in the success of such a venture, agreed to pool all of the league's television rights, to sell them as a single package, and to divide the proceeds equally among the eight teams.<sup>46</sup> In 1960 the AFL concluded a national television contract with ABC to broadcast its "Game of the Week." The new AFL needed a multi-year national television contract to give financial stability to each franchise while prestige could be built at the gate.<sup>47</sup>

Prior to 1961, the NFL allowed its members to negotiate their own television and radio contracts with sponsors and to retain the income derived therefrom.<sup>48</sup> The financial status of each club depended completely on local financial support—from the sale of tickets, concessions, and local broadcasting rights.<sup>49</sup> Regional television markets were a major factor affecting the financial strength of a team. The disparity in the financial strengths of the teams which resulted from this purely

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<sup>42</sup> *Id.*

<sup>43</sup> See Sports Broadcasting Act, 15 U.S.C. §§ 1291-95 (1970).

<sup>44</sup> See generally *American Football League v. National Football League*, 205 F. Supp. 60 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963); *United States v. National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953).

<sup>45</sup> *American Football League v. National Football League*, 205 F. Supp. 60, 65, 75-76 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963).

<sup>46</sup> *Hearing on H.R. 8757 Before the Antitrust Subcomm. (Subcomm. No. 5) of the House Comm. on the Judiciary*, 87th Cong., 1st Sess., ser. 13 (1961) [hereinafter cited as *Hearing on Telecasting*].

<sup>47</sup> *Id.*

<sup>48</sup> See *United States v. National Football League*, 196 F. Supp. 445 (E.D. Pa. 1961).

<sup>49</sup> See *Hearing on Telecasting* 57-60.

competitive practice could not be tolerated because it would ultimately affect the weaker clubs' ability to maintain playing strength on the field.<sup>50</sup> Those clubs not having access to large regional metropolitan markets could not compete for or afford to retain the good players. The additional competition offered by the AFL compounded the NFL's problem. In 1961, the NFL entered into a contract with CBS to televise its league games nationally, the owners agreeing to a pooling arrangement which would result in an equal distribution of the fee which was generated.<sup>51</sup>

The decision of the NFL in 1961 to share television revenues represented a firm commitment to the concept of revenue sharing and was a sharp departure from its previous policies.<sup>52</sup> The NFL's new policy could not, however, be implemented immediately. Since 1953 the NFL had been operating under a decree entered pursuant to *United States v. National Football League*, which permitted the league to blackout telecasts of games into a club's territory when the team was playing at its home stadium, but which enjoined imposition of other restrictions on TV and radio broadcasts by the league.<sup>53</sup> When the NFL entered into the contract with CBS in 1961, the league petitioned a federal district court for a construction of the terms of the contract to determine whether it violated the 1953 ruling. Speaking for the District Court of the Eastern District of Pennsylvania, Judge Grimm declared that the contract violated the terms of the decree.<sup>54</sup> A month after Judge Grimm entered his order invalidating the NFL-CBS contract, Congress began its consideration of the Sports Broadcasting Act, which exempted the joint sale of television rights by the various professional sports leagues from the antitrust laws. One month later, the Sports Broadcasting Act became law.<sup>55</sup>

The basic issue with which Congress had been confronted in its consideration of this legislation had been explored previously by the courts.<sup>56</sup> It was clear that the action proposed by the NFL would bring financial stability to the member clubs through the additional revenue from expanded television coverage. At the same time, the growing national television audience would benefit from the arrangement and more cities would be able to support football franchises.<sup>57</sup>

The other professional sports leagues supported passage of the Sports Broad-

<sup>50</sup> *Id.* at 50-52.

<sup>51</sup> See *United States v. National Football League*, 196 F. Supp. 445 (E.D. Pa. 1961). It should be noted that the joint sale of television rights is not the only example of revenue sharing within professional football. The gate receipts of a professional football game are shared on a basis of sixty per cent for the home team and forty per cent for the visiting team. This division of gate receipts really amounts to equal sharing, since the additional twenty per cent for the home team is attributable to the overhead cost of hosting the game.

<sup>52</sup> See *United States v. National Football League*, 196 F. Supp. 445 (E.D. Pa. 1961).

<sup>53</sup> 116 F. Supp. 319 (E.D. Pa. 1953).

<sup>54</sup> *United States v. National Football League*, 196 F. Supp. 445 (E.D. Pa. 1961).

<sup>55</sup> Sports Broadcasting Act, 15 U.S.C. §§ 1291-95 (1970).

<sup>56</sup> See, e.g., *United States v. National Football League*, 196 F. Supp. 445 (E.D. Pa. 1961); *United States v. National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953).

<sup>57</sup> See *Hearing on Telecasting* 50-52, 57-60.

casting Act.<sup>58</sup> Baseball gave the Act its qualified support but expressed no desire to change its own television policy, which, like the policy of football prior to 1961, permitted each club to deal separately with television stations and networks and to retain the proceeds from its own contracts.<sup>59</sup> Furthermore, baseball continued its policy of unequal distribution of gate receipts. The baseball industry did not have the competitive and legal pressures at work to move it in the direction of a system of income distribution. Professional football had adopted such an arrangement and subsequently demonstrated that equality on the playing field is directly related to equality of income. The football cartel also proved that economic stability for all of its member clubs benefits the many constituencies of the industry.<sup>60</sup>

Thus, while the Supreme Court is technically correct that the Sports Broadcasting Act represented an expansion of the antitrust exemption by Congress, it improperly generalized from that action a congressional intention to continue to disregard the similarities between professional sports and other industry. The broadcast exemption dealt with only a limited aspect of the sports operation and one which was unique in its historical origins. The simple fact remains that Congress has not given its knowing approval to exemption of all aspects of sports. To so conclude misreads the underlying concerns which have surfaced in other legislative proposals.

Should the matter of intra-league revenue sharing receive further attention by Congress or the courts, it can be hoped that the legitimacy of the basic notion, for antitrust purposes, will be reaffirmed. The practice produces benefits to others, as well as to the immediate recipients.

One of the constituencies of professional sports whose interest is promoted by the practice is the particular municipality or city hosting a franchise. As has been noted, many cities and counties invest local tax dollars in building stadiums and fieldhouses specifically for professional teams. When making such investments, communities need the assurance that, in return for such a massive, long-term commitment, the franchise will remain in that area. While a franchise can give local municipalities written assurances, such assurances are not enough.<sup>61</sup> The practice of revenue sharing, however, can provide additional, and very real, protection, because the economic stability which is created means that the local franchise gains strength from the financial stability of the cartel. To date, the important role played by the municipal corporation and the risk involved in committing local tax

<sup>58</sup> *Id.* at 64-66, 69.

<sup>59</sup> *Id.*

<sup>60</sup> Along these lines, it has been suggested, with regard to professional basketball, that merger of the NBA and the ABA is not the major issue, but that development of some sort of provision for revenue sharing is. *Basketball Hearings*, pt. 1, at 340-43. In basketball, however, revenue sharing may be a long time in coming because of the disparities in size of the various arenas. Until there is a uniform minimum number of seats—approximately 15,000 for each arena—the owners will be reluctant to adopt a revenue sharing policy.

<sup>61</sup> The local franchise may make binding assurances, but it can go into bankruptcy and cancel such contracts. *In re Pacific Northwest Sports, Inc.*, No. 66822 (W.D. Wash., Oct. 26, 1970).

dollars to the construction of playing facilities are aspects of the industry which have largely been ignored by Congress.<sup>62</sup>

### III

#### COMMENTS ON MERGERS

Two professional sports cartels are now going through the cycle experienced by professional football during the years 1959-1966. With the formation of the World Hockey Association, the competitive struggle between leagues in the hockey industry is beginning to surface with full force.<sup>63</sup> Moreover, the level of league competition within the basketball industry has progressed to the point that the owners from both leagues have requested that Congress create an exemption from the antitrust laws so that the leagues can consummate a proposed merger.<sup>64</sup> The economic forces driving the professional basketball industry to extend its cartel are the same as those which led to the expansion of the football industry and the same as those which are now beginning to operate within the hockey industry.<sup>65</sup>

The history of the basketball industry provides an interesting perspective on the potentially damaging effects of inter-league competition. And at least one aspect of that history suggests that merger, without more, may not provide the answer to achieving franchise stability. The National Basketball Association (NBA), shortly after its creation, found itself engaged in a competitive showdown with the Basketball Association of America (BAA). In 1949 the two rival leagues merged to form a single league with seventeen teams. Despite the fact that it was the older league and had better player personnel, the NBA was forced to adopt this course in order to avoid the competitive advantage which the BAA had with its better fieldhouses and territorial locations. For many teams the advantages of merger were short-lived; many of the franchises collapsed or moved to larger cities, eventually leaving only eight of the original franchises surviving. Over the years the number of NBA franchises gradually increased to seventeen once again by 1967. In that year the American Basketball Association (ABA) came into force. Competition for players, coaches, and territorial sites erupted anew and created a major battle which has not yet run its full course. Both leagues, however, realized that the struggle for new players was financially damaging to the owners and could not continue, and predictably, the two leagues began merger negotiations. This action elicited a response from the NBA Players Association in the form of an

<sup>62</sup> *Professional Sports Hearings* 101-03 (remarks of Senator Proxmire). Even the proposed merger between the NBA and the ABA provides no protection for municipalities. It is assumed that by adopting revenue sharing, the problem of the movement of franchises will be solved.

<sup>63</sup> See *Philadelphia World Hockey Club v. Philadelphia Hockey Club*, C.A. No. 72-1661 (E.D. Pa., Nov. 8, 1972).

<sup>64</sup> See S. 2373, 92d Cong., 1st Sess. (1971). See also *Basketball Hearings*.

<sup>65</sup> Over time, due to financial rewards, popularity, and media exposure, the demand for professional sports exhibitions moves through certain, relatively predictable, cycles. See *American Football League v. National Football League*, 205 F. Supp. 60 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963).

antitrust suit seeking to enjoin the merger. The Players Association succeeded in obtaining a preliminary injunction.<sup>66</sup>

The hearings on Senate Bill 2373, the proposed basketball merger exemption, were primarily concerned with player control problems and a common draft. The opposition of the NBA Players Association has been so intense and so effective that the owners have agreed to modify the option procedure and leave discussion of the so-called "forced trade" provision to an independent arbitration panel.<sup>67</sup>

In its consideration of the proposed basketball merger, Congress should re-examine in detail the structure and the operation of the professional football and baseball cartels. One issue which this approach would explore and which the owners from the two basketball leagues have failed to consider in their testimony at the hearings is the matter of revenue sharing and its affect on the stability of a franchise. With respect to professional football, revenue sharing clearly appears to have been a major factor in the development of the industry. The decision to share revenues committed the franchise owners to the concept of equalization of playing strength and underscores their concern for the survival of the league as a whole. The basketball cartels have made no such commitment either to Congress or to themselves.<sup>68</sup> Without this commitment, professional basketball cannot hope to maintain its present franchises, and in light of past experience, merger may not have the curative powers which some want to attribute to it. Many of those resisting revenue sharing have difficulty with the notion that the league's financial stability should be more important than an individual club's profits. What seems not to be appreciated is that the stability of the franchises is essential if the industry is to fulfill its commitment to its many constituencies. Hence, conditioning approval of the merger upon adoption of an equitable revenue sharing procedure by the leagues is a desirable course of action.

#### CONCLUSION

Much of the commentary on the application of the antitrust laws to professional sports has focused on the extreme positions of that issue. It is often urged either that all sports activity ought to be exempt from antitrust scrutiny or that all collective action of the cartel should be seen as improperly conspiratorial. The point of this paper has been to examine the middle ground in which the antitrust controls are applied but in a manner which does not undermine the unique aspects of the sports industry.

The points which emerge from an examination of the economic realities of sports are that no league cartel can afford to have financially weak members,

<sup>66</sup> *Robertson v. National Basketball Ass'n*, 1970 Trade Cas. ¶73,282. (S.D.N.Y. 1970).

<sup>67</sup> *Basketball Hearings*, pt. 2, at 866-77; *Robertson v. National Basketball Ass'n*, 1970 Trade Cas. ¶73,282 (S.D.N.Y. 1970). The amended bill reported out of the Subcommittee on Antitrust and Monopoly would permit the proposed merger on certain conditions, among which is limiting player restraint to only a one year option. See *Washington Post*, Oct. 10, 1972, § D, at 3, col. 7.

<sup>68</sup> See *Washington Post*, Sept. 8, 1972, § D, at 9, col. 4; *Id.*, Sept. 22, 1972, § D, at 3, col. 2.

and that survival of the individual clubs is essential to the survival of the league. Appreciation of these facts should have a substantial impact upon the view which policy-makers take toward league actions such as those taken to allocate franchises, equalize player strengths, and regulate broadcasting practices.

Concern for the relative strength of members within a league should also influence both the public's and the league's attitudes toward revenue allocation. The absence of revenue sharing among member clubs perpetuates any disparity of the financial strengths of league members and directly affects the ability of the weaker clubs to maintain equal playing strength on the field. The financially weak clubs can raise capital only by selling the contracts of their better players to the financially stronger clubs. This procedure diminishes the playing strength of the weaker franchises and continually keeps them at a disadvantage on the playing field. Without equal talent, the level of competition and the public's overall interest in the sport suffers. In order to avoid this situation, the decision of the AFL and NFL to adopt revenue sharing on an equitable basis should be extended to other professional team sports and should apply both to gate receipts and to broadcasting revenues. A particularly attractive feature of this approach is that it furthers the interest of the municipalities in which franchises are located, constituencies which have been generally neglected in the past. The additional assurance that a franchise will prosper and, consequently, remain in its location, reduces the municipality's risk involved in investing in the franchise.

It also seems clear that the public can fully expect more from professional leagues in terms of self-regulation. A number of fruitful avenues of internal regulation have yet to be explored. For example, employment of an arbitration panel could operate to bring out more palatable practices in diverse matters ranging from player discipline to charges under the option system of improper tampering by one owner with another team's players. It must be admitted, however, that the leagues' inclination for self-regulation has not been strong and their track record unimpressive. Unless there is a fairly significant redirection in this regard, the pressure for legislative intervention will continue to intensify.

In an examination of the legal status of the collectivism of league control, the notion which continually reasserts itself is that this is an area in which pervasive governmental regulatory controls of the sort proposed by the strongest critics are neither necessary nor desirable. Rather than pursuing a policy of unfettered economic competition between teams, the approach should be one which makes only the limited adjustments necessary to satisfy the interests of the various constituencies. Since prevailing doctrines of antitrust law can be applied to make many of these adjustments, attention should first be focused on those avenues of recommended action.