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# Will 'Leegin' Pave the Way for Ending Baseball's Antitrust Exemption?

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When you ask people to go clean out the attic, it is sometimes hard to understand why they are quick to toss out one thing as old worthless junk while hanging onto another that really doesn't seem to be much different or in any better condition.

That thought comes to mind when considering the U.S. Supreme Court's treatment of two doctrines from the early days of antitrust: the 1911 per se prohibition against minimum resale price maintenance and the 1922 exemption of professional baseball from the antitrust laws.

Both doctrines have been the subject of fierce analytic criticism for many years. The Supreme Court has held repeatedly that stare decisis considerations require professional baseball's antitrust exemption to remain intact given Congress' refusal to repeal it. Yet the Court's recent decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*<sup>1</sup> held that stare decisis considerations did not bar the Court from casting aside the 96-year-old per se prohibition against minimum resale price maintenance established in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,<sup>2</sup> which Congress likewise had not repealed, and subjecting minimum resale price maintenance instead to a "rule of reason" analysis.

Is there really a difference that can account for these disparate results? Or has *Leegin* now cleared away the last remaining shred of support for retaining professional baseball's antitrust exemption?

### BASEBALL'S ANTITRUST EXEMPTION

Baseball's antitrust exemption originated in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*,

which held that professional baseball exhibitions were not subject to the antitrust laws because they did not constitute interstate commerce in the sense used in the Sherman Act.<sup>3</sup> The antitrust status of baseball came before the Supreme Court again more than three decades later, in *Toolson v. New York Yankees, Inc.*,<sup>4</sup> by which time the cramped conception of interstate commerce from the early days of antitrust on which *Federal*



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*Baseball* had rested had long since been abandoned by the Court. Over dissents that decried the substantive incorrectness of the original *Federal Baseball* ruling, the Court held that stare decisis principles required that the precedent be left in place. The Court noted that the *Federal Baseball* ruling had been in place for 30 years, that the business had developed during that time based on the original ruling and that Congress, with awareness of the ruling, had not chosen to enact legislation to alter it. The Court concluded, "We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation."<sup>5</sup>

There then followed several other cases in which other professional sports invoked baseball's antitrust exemption to argue that they too must be treated as exempt from the antitrust laws.

But the Court did not agree. Rather than extend the substantively dubious baseball rule, which seemed to be surviving only by dint of stare decisis, the Court held that the antitrust

laws were applicable to professional boxing,<sup>6</sup> professional football<sup>7</sup> and professional basketball.<sup>8</sup> The Court held that the baseball precedents should be confined to the particular facts and industry they concerned.<sup>9</sup> Conceding that, "were we considering the question of baseball for the first time upon a clean slate we would have no doubts" that baseball should be subject to the antitrust laws,<sup>10</sup> the Court concluded that, irrespective of how these other sports might compare to baseball, "[a]s long as the Congress continues to acquiesce we should adhere to -- but not extend -- the interpretation of the Act made in [the baseball] cases."<sup>11</sup>

Baseball's hard-to-defend antitrust exemption survived yet another challenge thanks to stare decisis in 1972, in the famous Curt Flood case, *Flood v. Kuhn*.<sup>12</sup> The Court there termed professional baseball's antitrust exemption "an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of stare decisis, and one that has survived the Court's expanding concept of interstate commerce."<sup>13</sup> Thus, "[w]e continue to be loath, 50 years after *Federal Baseball* and almost two decades after *Toolson*, to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively."<sup>14</sup> The Court added, "[i]f there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court."<sup>15</sup>

Foes of baseball's antitrust exemption finally gained a small victory in 1998, but only legislatively. Congress in 1998 passed the Curt Flood Act, which partially lifted the antitrust exemption for professional baseball.<sup>16</sup> However, the exemption was lifted only in connection with player employment matters and only at the major league level.<sup>17</sup> In all other respects, baseball's antitrust exemption remained unchanged, and indeed the law expressly provided that it did not provide any basis for "changing the application of the antitrust laws" to any other aspect of baseball.<sup>18</sup>

### A LOOSER APPROACH TO ANTITRUST STARE DECISIS IN 'LEEGIN'?

Perhaps surprisingly to those familiar with the saga of baseball's antitrust exemption, the Supreme Court's recent decision in *Leegin* found stare decisis to pose little hindrance to overturning an arguably questionable precedent from the early days of federal antitrust jurisprudence. While much of the discussion in *Leegin* concerned the substantive antitrust merits of whether minimum resale price maintenance should properly be subject to a case-by-case "rule of reason" analysis rather than the across-the-board per se prohibition announced in *Dr. Miles* in 1911,<sup>19</sup>

the Court also found itself able to dispense with the stare decisis issues posed by that 1911 decision. The reasons given as to why, however, seem equally applicable to the 1922 baseball decision.

First, while agreeing that "concerns about maintaining settled law are strong when the question is one of statutory interpretation," the Court in *Leegin* held that "[s]tare decisis is not as significant in this case" because the issue involved "the scope of the Sherman Act," which "[f]rom the beginning the Court has treated ... as a common-law statute."<sup>20</sup> The Sherman Act is, of course, the very same statute that was interpreted in *Federal Baseball*.

Next, the Court in *Leegin* stated that "[i]n the antitrust context the fact that a decision has been 'called into serious question' justifies our reevaluation of it."<sup>21</sup> This is equally true of the antitrust exemption, which since the 1950s even the Supreme Court itself has been unwilling to defend on its merits or extend to any other professional sport.<sup>22</sup>

The Court in *Leegin* further defended departing from stare decisis because "we have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings," particularly when the early precedent "was decided not long after enactment of the Sherman Act when the Court had little experience with antitrust analysis."<sup>23</sup> *Leegin* additionally justified departing from such precedents when they are "inconsistent with a principled framework" and "make [l]ittle economic sense when analyzed with our other cases" in the same area.<sup>24</sup> But even the Supreme Court itself has freely acknowledged that the exemption granted baseball in the infancy of federal antitrust jurisprudence is inconsistent with modern antitrust law and how that law has been applied to other professional sports.<sup>25</sup>

Some might argue that the fact that Congress only partially repealed baseball's antitrust exemption in the Curt Flood Act effectively constituted ratification of the remainder of that exemption. But *Leegin* rejected a similar argument. Opponents of minimum resale price maintenance argued in *Leegin* that the 1975 repeal of the 1937 Miller-Tydings Fair Trade Act and the 1952 Consumer Goods Pricing Act (both of which had authorized certain vertical price-setting agreements notwithstanding *Dr. Miles*) effectively constituted congressional ratification of the *Dr. Miles* rule. But the Court disagreed, stating that such congressional action just "once again placed these restraints within the ambit of § 1 of the Sherman Act," where courts would be able "to develop governing principles of law" in the common-law tradition.<sup>26</sup>

Lastly, although the Supreme Court in *Toolson* had justified adhering to stare decisis by noting that baseball had "been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation,"<sup>27</sup> the Court in *Leegin* gave short shrift to the notion that "[r]eliance interests" might require

adherence to the 96-year-old *Dr. Miles* rule, asserting that "[t]he reliance interests here ... cannot justify an inefficient rule."<sup>28</sup>

## CONCLUSION

Some might argue that the fierce clinging to *stare decisis* in the baseball antitrust cases was never really justified once the state of antitrust law had changed so dramatically from where it stood in 1922. The dissenters in some of the baseball cases certainly saw logical inconsistency in how seriously the baseball antitrust precedent was being taken when the antitrust status of other professional sports was in question.<sup>29</sup> Indeed, one recent commentator went so far as to term the 1972 *Flood v. Kuhn* ruling as "a notable example of judicial powerlessness in the face of a self-created dilemma, an object lesson in conservative principles run amok."<sup>30</sup>

Whatever the merits of these arguments, it seems evident that the Supreme Court's *stare decisis* analysis in *Leegin* -- when an even older antitrust ruling was under scrutiny -- will pose a formidable obstacle to having *stare decisis* serve as the last bulwark protecting baseball's antitrust exemption whenever that exemption might face a new legal challenge. The Court's latest antitrust ruling may ultimately have undermined far more than the just the resale price maintenance precedent at issue in that case.

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## :::FOOTNOTES:::

1. 127 S. Ct. 2705 (June 28, 2007).
2. 220 U.S. 373 (1911).
3. 259 U.S. 200 (1922).
4. 346 U.S. 356 (1953) (per curiam).
5. *Id.* at 357.
6. *United States v. Int'l Boxing Club of New York, Inc.*, 348 U.S. 236, 242-44 (1955).
7. *Radovich v. Nat'l Football League*, 352 U.S. 445, 451-52 (1957).
8. *In re Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204, 1205-06 (Douglas, C.J.).
9. See *Int'l Boxing*, 348 U.S. at 243; *Radovich*, 352 U.S. at 451.

10. *Radovich*, 352 U.S. at 452.
11. *Id.* at 451; see also *id.* at 452 n.8. This position provoked strong dissents, which argued that without any meaningful differentiating factor that could justify treating these other sports differently from baseball under the antitrust laws, proper respect for *stare decisis* required applying the rationale of the baseball exemption to these other sports too. See *Int'l Boxing*, 348 U.S. at 248-50 (Frankfurter, J. dissenting); *Radovich*, 352 U.S. at 455-56 (Frankfurter, J. dissenting).
12. 407 U.S. 258 (1972).
13. *Id.* at 282.
14. *Id.* at 283-84.
15. *Id.* at 284.
16. Pub. L. No. 105-297, 112 Stat. 2824, codified at 15 U.S.C. §26b.
17. *Id.* §26b(a).
18. *Id.* §26b(b).
19. See 127 S. Ct. at 2712-20; see also *id.* at 2725-31 (Breyer, J., dissenting).
20. *Id.* at 2720.
21. *Id.* at 2721 (quotation omitted).
22. See text accompanying notes 4-14, *supra*.
23. 127 S. Ct. at 2721 (quotation omitted).
24. *Id.* at 2722.
25. See, e.g., *Int'l Boxing*, 348 U.S. at 240-41; *Radovich*, 352 U.S. at 452; *Flood v. Kuhn*, 407 U.S. at 274-84.
26. 127 S. Ct. at 2724 (quotation omitted).
27. 346 U.S. at 357.
28. 127 S. Ct. at 2724.
29. See note 11, *supra*.
30. Roger I. Abrams, "Legal Bases: Baseball and the Law," 69 (1998).

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