IN THE SUPREME COURT OF FLORIDA

ROBERT A. BUTTERWORTH, Attorney
General of the State of Florida,

Petitioner,

v. CASE NO. 82,287

THE NATIONAL LEAGUE OF PROFESSIONAL
BASEBALL CLUBS and WILLIAM D. WHITE,
as President,

Respondents.
_____/

DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL FOR
THE FIFTH DISTRICT OF FLORIDA

INITIAL BRIEF OF PETITIONER ROBERT A. BUTTERWORTH, ATTORNEY GENERAL OF THE STATE OF FLORIDA

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PRELIMINARY STATEMENT

In this brief, Petitioner Robert A. Butterworth, the Attorney General of the State of Florida, will be referred to as "Attorney General." Respondent National League of Professional Baseball Clubs and William D. White, will be referred to as "Respondent".

References to the trial court record on appeal will be designated in accordance with the Index to Appeal with page numbers preceded by "R".

I. STATEMENT OF THE CASE AND FACTS

A. The Case

This matter comes before the Court as a certified question from the Fifth District Court of Appeal affirming a final order by the Circuit Court of the Ninth Judicial Circuit, granting Respondent's Petition to Set Aside Civil Investigative Demands and denying the Attorney General's Cross Motion to Compel. The antitrust civil investigative demands at issue ("CID's") were directed to the National League of Professional Baseball ("National League") and its President, William D. White ("White") who were Petitioners in the trial court and are Respondents here. (R. 84)

The Attorney General of Florida has been given broad powers by the Florida Legislature to investigate and enforce both the federal and Florida antitrust laws. In aid of the Attorney General's broad enforcement responsibilities, the Legislature has also invested the Attorney General with the authority to serve a Civil Investigative Demand upon any person who he has "reason to believe" may be in possession, custody or control of any documentary material or information" relevant to a violation of the federal or state antitrust laws. Section 542.28, Florida Statutes. A CID may request documents, answers to written interrogatories or oral testimony under oath. Section 542.28(1), Florida Statutes.

The CID's in question were served upon Respondents on November 12, 1992. (R. 84) They sought certain documents from

The National League and testimony from Mr. White, as the League President, to assist the Attorney General in determining whether the Respondents and/or others had violated the antitrust laws by working to defeat a Tampa Bay investors' group bid to purchase the San Francisco Giants baseball club. (R. 84-85)

The National League and White then filed their Petition to Set Aside Civil Investigative Demands. (R. 83-93) The Attorney General filed a response and a Cross Motion to Compel compliance with the CIDs. The National League and Mr. White contended that any conduct in which they engaged was completely exempt from the antitrust laws and that no antitrust action by the Attorney General could ever succeed. Therefore, they contended, no investigation of their activities could take place and thus the CIDs should be set aside. (R. 85-86)

A hearing was held on December 31, 1992. (R. 1-82) Judge Stroker's Order granting Respondent's Petition to Set Aside Civil Investigative Demands and denying the Attorney General's Motion to Compel was filed on January 4, 1993. (R. 167-170) The trial Court's order found that "Decisions concerning ownership and location of baseball franchise clearly fall within the ambit of baseball's exemption." (R. 169)

The Attorney General appealed to the Fifth District Court of Appeal which affirmed certifying to this Court the following question:

"Does the antitrust exemption for baseball recognized by the United States Supreme Court in Federal Baseball Club of

Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200, 42 S.Ct. 465, 66 L.Ed. 898 (1922) and its progeny exempt all decisions involving the sale and location of baseball franchises from federal and Florida antitrust law?"

B. The Facts[1]

On June 2, 1992, voters in San Jose, California rejected a bond issue to help finance construction of a new baseball stadium in the San Francisco Bay area to replace Candlestick Park, the home of the San Francisco Giants baseball club. It was the fourth time that voters in San Francisco Bay area had voted down an effort to build a new baseball stadium for the Giants to replace cold, windy Candlestick which is now 30 years-old.

On June 11, 1992, then Commissioner of Baseball, Fay Vincent, met with San Francisco Giants owner Robert Lurie and gave him specific permission to explore options for the sale or relocation of the San Francisco Giants franchise. At that time Vincent publicly stated that the Giants met his relocation criteria because the franchise had been losing money in San

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[1]Since the trial court held no evidentiary hearing on the facts and indeed quashed the CIDs before any facts could be gathered, these facts are taken from the Attorney General's Cross Motion to Compel Compliance and Memorandum in Opposition to Petition to Set Aside Civil Investigative Demands. (R. 94-98) It is the State's position that the trial court abused its discretion in not allowing the State to develop the facts of this case pursuant to its CID authority prior to ruling that the baseball exemption applied. Without fully developed facts, it was premature, if not impossible, for the trial court to find that the baseball exemption applied to this case. See Piazza v. Major League Baseball, et al., Case No. CIV 92-7173 (U.S.D.C. E.D. Pa. August 4, 1993) at pp. 52-54, Appendix.

Francisco, because the voters had indicated that baseball was no longer important, and because there was no immediate prospect of improvement.

Over the next several weeks, Giants owner Robert Lurie engaged in negotiations with a group of investors from the Tampa Bay area who wished to purchase the Giants franchise and move it to Florida to play in the St. Petersburg Suncoast Dome. On August 6, 1992, Mr. Lurie signed a letter of intent with the Tampa Bay investors to sell the franchise subject to the approval of Major League Baseball.

During the weeks that followed, Respondent White and others, both inside Major League Baseball and outside Major League Baseball, engaged in an extraordinary campaign to undercut the Tampa offer and to develop a competing offer from investors who would keep the franchise in San Francisco. Numerous other potential investors were contacted, some of whom refused to invest after reviewing the Giants' financial situation. Ultimately, with the help of officials from the City and County of San Francisco, a group of investors was put together.

In contravention of their own stated intentions, policies and procedures, Mr. White, other baseball officials, and certain National League owners worked in secret during the period from August, 1992 through October, 1992 to help formulate and refine this competing offer from San Francisco investors and to delay formal consideration of the Tampa offer until the competing offer could be formalized.

As San Francisco Mayor Frank Jordan testified before the United States Senate Subcommittee on antitrust monopolies and business rights, "without the [National] League's intervention, we would not have been permitted to submit a competing offer . . ." Hearings on "Baseball's Antitrust Immunity" before Subcommittee on Antitrust Monopolies and Business Rights of the Senate Committee on the Judiciary, 102d Cong. 2d Session (Dec. 10, 1992).

On November 10, 1992, the baseball owners met in Scottsdale, Arizona and voted by secret vote against approval of the sale of the Giants to the Tampa Bay investors despite the fact that the Ownership Committee had previously approved the Tampa Bay owners as buyers.

On November 21, 1992, Robert Lurie signed a contract to sell the Giants to the group of San Francisco investors for $100 million or $15 million less than had been offered by the Tampa Bay investors.

This was the seventh time in recent years that Tampa Bay had been frustrated in its attempts to secure a Major League Baseball franchise.

It was apparent to the Attorney General that there was a potential antitrust violation inasmuch as it appeared as though some persons within baseball had conspired outside the formal process of review and approval with persons outside of the

business of baseball to deny Tampa Bay a baseball franchise. Accordingly, the Attorney General issued CIDs to further investigate these potentially unlawful activities.

II. SUMMARY OF ARGUMENT

The certified question should be answered in the negative. The antitrust exemption for baseball was created by the United States Supreme Court in the Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, et al., 259 U.S. 200 (1922) decision in 1922 which involved a challenge to the so-called reserve clause and its effect on a competing baseball league. The Court ruled in that case that professional baseball was not involved in interstate commerce and that it was therefore exempt from the federal antitrust laws. Since that case, the Supreme Court has twice upheld the exemption (both times involving reserve clause cases) on the grounds of stare decisis, even though the Court has itself admitted that the rationale of the Federal Baseball decision is wrong.

The Supreme Court has repeatedly held that antitrust exemptions must be narrowly construed. The Supreme Court has never applied the baseball antitrust exemption to any activity other than to the reserve clause and under the rule of stare decisis, the exemption should not be given application to activities other than the reserve clause.

Even applying the exemption more broadly to "the business of baseball" as did the trial court, the conduct which the Attorney General seeks to investigate is not exempt. The Attorney General does not seek to investigate the owners for their formal decision not to approve the sale of the Giants to the Tampa investors. Instead, he seeks to investigate the conduct of certain owners

and league officials leading up to the league vote. No court has ever defined what is included in "the business of baseball." There are, however, hundreds of formal rules, regulations and guidelines previously drafted, adopted and followed by owners and league officials governing every aspect of baseball's operations including ownership transfers. Nowhere in those hundreds of rules is there anything which would authorize or approve the conduct which the Attorney General seeks to investigate. Because the conduct under investigation took place outside the formal rules of baseball and without authorization or approval, it cannot be the "business of baseball" and is therefore not exempt.

III. ARGUMENT

ISSUE: DECISIONS CONCERNING THE OWNERSHIP AND LOCATION OF BASEBALL FRANCHISES ARE NOT EXEMPT FROM THE ANTITRUST LAWS.

A. The Trial Court Erred in Finding That Baseball's Antitrust Exemption Applies to the Activity the Attorney General Seeks to Investigate.

The CIDs in question in this case were issued pursuant to the Florida Antitrust Act, particularly §542.28 Fla. Stat. (Supp. 1992), as part of an investigation to ascertain:

> whether there is, has been or may be a violation of
>
> 15 U.S.C. Sections 1 or 2, Section 542.18, Florida Statutes; Section 542.19, Florida Statutes
>
> by conduct, activities or proposed action of the following nature:
>
> A combination or conspiracy in restraint of trade in connection with the sale and purchase of the San Francisco Giants baseball franchise.

(R. 84-85)

Respondents contend and the trial court so ruled, (R. 169) that the conduct the Attorney General seeks to investigate is exempt from the antitrust laws; therefore, the Court held that no investigation of their activities can take place and the CIDs should be set aside. (R. 169-170)

The trial court held that one area of business activity that has clearly and consistently been considered exempt is the "matter of the structure of the league." (R. 169)

> The composition of the leagues, that is, where professional baseball is played and with whom, is a fundamental consideration of professional baseball and

> the heart of its business activity. Decisions concerning ownership and location of baseball franchises clearly fall within the ambit of baseball's antitrust exemption.

(R. 169)

Contrary to the trial court's opinion, the Attorney General contends that decisions concerning the ownership and location of franchises are not covered by baseball's limited antitrust exemption.

In contrast to what Respondents would have this Court believe, baseball's antitrust exemption is, in fact, very narrow. No decision of the U.S. Supreme Court dealing with baseball has ever applied the exemption to any aspect of the business of baseball other than the reserve clause and certainly no court has ever held that the activities of baseball owners not directly related to the sale or transfer of a franchise, outside the formal approval process, are exempt from application the antitrust laws.

1. Baseball's Antitrust Exemption is Limited to the Reserve Clause.

The exemption from the federal antitrust law enjoyed by professional baseball is based on three Supreme Court decisions; Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, et al., 259 U.S. 200 (1922); Toolson v. New York Yankees, 346 U.S. 356 (1953) and Flood v. Kuhn, 407 U.S. 258 (1972). In Federal Baseball, the plaintiff refused to sign an agreement between the two major leagues and found itself without any clubs to play, the rest of its league having either

disbanded or joined the other two leagues. It sued the defendant major leagues for conspiring to monopolize the baseball business through the reserve clause system which required players to contract with their teams for one year and for the succeeding season.

The Court concluded that the federal antitrust laws did not apply to the dispute because the business of putting on baseball exhibitions was not interstate commerce. As Justice Holmes put it:

> The business is giving exhibitions of baseball, which are purely state affairs. It is true that in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and States. But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business. According to the distinction insisted upon in Hooper v. California, 155 U.S. 648, 655, 15 Sup. Ct. 207, 39 L. Ed. 297, the transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of those words. As it is put by the defendant, personal efforts, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place. To repeat the illustrations given by the Court below, a firm of lawyers sending out a member to argue a case, or the Chautaugua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another State.
>
> If we are right the plaintiff's business is to be described in the same way and the restrictions by contract that prevented the plaintiff from getting players to break their bargains and the other conduct charged against the defendants were not an interference with commerce among the States.

259 U.S. at 208-209, 42 S.Ct. at 466.

Respondents contend that, "Federal Baseball was not a case about the reserve clause. In that seminal decision, the issue was whether the major leagues could be found liable under the antitrust laws for refusing to admit a franchise owned by the plaintiff, the owner of a team in a competing league, into their league" (R. 136).

The Respondents' contention is just plain wrong. The opinion of the Circuit Court of Appeals in that case, National League of Professional Baseball Clubs v. Federal Baseball Clubs of Baltimore, Inc., 269 F. 681 (D.C. Cir. 1920), contains a thorough recitation of the facts which clearly show that the case was not about a jilted franchise excluded from the league, but rather it was a suit aimed directly at the reserve clause by a franchise which had refused to become part of the National League. As the circuit court in Federal Baseball explained:

> The [Federal] league continued in existence, with more or less success, until December 1915 when an agreement called the "Peace Agreement" was entered into between it, the National League, and the American League of Professional Baseball Clubs. This agreement resulted in the dissolution of the Federal League and all of its constituent clubs, save the appellee. The latter refused to become a party to the agreement, but as there were none of its league clubs left after the dissolution with which to compete, it ceased to operate. Respondent, asserting that the disbandment of the league and the consequent injury to it were due to acts of the appellants done in violation of Section 1 and 2 of the Sherman Act, instituted the action.

269 F. at 682 (emphasis supplied).

The court went on to state that:

> Generally speaking, every player was required to contract with his club that he would serve it for one

> year, and would enter into a new contract "for the succeeding season at a salary to be determined by the parties to such contract. The quoted part is spoken of as the "reserve clause," and it is found, in effect, in the contracts of the minor league players, as well as in those of the major league players . . . . . It is provided in the rules adopted by the leagues and in the National Agreement that, if a player violates the reserve clause, is guilty of "contract-jumping," he shall be punished by being treated as ineligible to serve in any club of the leagues until he has been formally reinstated, and a list of such ineligible players is kept by the leagues . . . . The reserve clause and the publication of the ineligible lists, together with other restrictive provisions, had the effect of deterring players from violating their contracts, and hence the Federal League and its constituent clubs, of which the appellee was one, were unable to obtain players who had contracts with the appellants; in other words, these things had the intended effect, viz. of preventing players from disregarding their obligations. On these provisions, all having for their purpose the preservation by each club of its necessary quota, and no more, of players, rests of the gravamen of appellee's case.

269 F. at 687-88 (emphasis supplied).

Thus, Federal Baseball was a case purely and simply about the reserve clause and its impact upon potential competition, as were both the Toolson and Flood cases, in which the Supreme Court, though rejecting the rationale of Federal Baseball's

decision, upheld baseball's antitrust exemption on the basis of stare decisis.[2]

The importance of this point cannot be over-emphasized. Since the antitrust exemption for Major League Baseball is anomalous and rests solely upon stare decisis, it must be given a strict and narrow interpretation. See, Union Labor Life Insurance Co. v. Pireno, 458 U.S. 199, 126 (1982); U.S. v. First City National Bank, 386 U.S. 361, 368 (1967); California v. Federal Power Commission, 369 U.S. 482, 485 (1962). Indeed, the U.S. Supreme Court has itself illustrated its intent to narrowly construe the antitrust exemption for baseball by denying it to other sports such as football, basketball and boxing. See Radovich v. National Football League, 352 U.S. 445 (1957); Haywood v. National Basketball Ass'n, 401 U.S. 1204 (1971); U.S. International Boxing Club, 348 U.S. 236 (1955). Thus, any interpretation of the baseball antitrust exemption which extends

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[2]In Toolson, Yankee pitcher George Toolson claimed that enforcement of the reserve clause by placing his name on the ineligibility list, effectively denied him his means of livelihood. 346 U.S. at 362-363, n. 10 (Burton J., dissenting). In a per curiam decision, the Court upheld the antitrust exemption established in Federal Baseball on the basis of stare decisis "without re-examination of the underlying issues." 346 U.S. at 357.

In Flood, Cardinals' outfielder Curt Flood objected that the reserve clause allowed him to be traded to the Philadelphia Phillies without consent or even consultation. Although the Court ruled in direct contradiction of the original premise of the exemption in Federal Baseball, that "professional baseball is a business and it is engaged in interstate commerce," the Court nonetheless upheld the dismissal of Flood's suit. The only rationale was that, even though baseball's antitrust exemption is aberrational, "it is an established one" entitled to the benefit of stare decisis. Flood, 407 U.S. at 282.

the exemption beyond its factual roots in the reserve clause, is erroneous as a matter of law.

Baseball's antitrust immunity has been widely disparaged and ridiculed by courts and legal scholars. Even the U.S. Supreme Court itself has admitted that baseball's antitrust exemption is a mistake and an "anomaly." Flood, 407 U.S. 282 (1972). The Court has also acknowledged the exemption is "unrealistic, inconsistent and illogical." Radovich v. National Football League, 352 U.S. 445, 450-52 (1957).

Other federal courts have been less charitable calling the Federal Baseball decision, "not one of Mr. Justice Holmes' happiest days" and branding the rationale of Toolson "extremely dubious." Salerno v. American League of Professional Baseball Clubs, 429 F.2d 1003, 1005 (2nd Cir. 1970).

Because the exemption is aberrant and rests solely on stare decisis, trial courts have typically given the exemption a very narrow interpretation, holding that it does not protect activities outside those which are part of baseball's "unique needs and characteristics. " See, Postema v. National League of Professional Baseball Clubs, 799 F. Supp. 1475 (S.D.N.Y. 1992) (baseball's antitrust federal exemption does not protect against minor league female umpire's monopoly and restraint of trade allegations resulting from refusal to promote her to the major leagues); Henderson Broadcasting Corp. v. Houston Sports Assn., Inc., 541 F. Supp. 263 (S.D. Texas 1982) (antitrust exemption does not protect agreement between professional baseball teams

and radio station to restrain trade in baseball broadcast market).

The most recent and perhaps the most comprehensive opinion analyzing baseball's antitrust exemption came in a case dealing with exactly the same set of facts presented here. In Piazza v. Major League Baseball, CIV 92-7173 (U.S.D.C. E.D. Pa. August 4, 1993), (a copy of that opinion is attached hereto as an appendix), the United States District Court for the Eastern District of Pennsylvania denied Major League Baseball's Motion to Dismiss the antitrust claims of two individuals who were at one time part of the same Tampa Bay Investor Group involved in the present case whose bid to buy the San Francisco Giants was rejected.

In that case, the court conducted a comprehensive analysis of the underpinnings of baseball's antitrust exemption and the application of stare decisis and concluded that baseball's antitrust exemption must be limited strictly to the reserve clause. The court reached this conclusion based upon its reading of Flood v. Kuhn where the Supreme Court expressly overruled the holding in Federal Baseball that baseball was not interstate commerce. Because the Flood court rejected the rationale of Federal Baseball, the Piazza court concluded that the proper application of stare decisis requires that Federal Baseball's exemption be restricted to its facts which involves only the reserve clause. Piazza at pp. 46-47.

The Piazza court held that Major League Baseball's conduct under these same circumstances presented here was a restraint on competition in the market for ownership of team franchises and was therefore not protected by the Federal Baseball antitrust exemption. Piazza at pp. 48-50.

But the Piazza court did not stop there. It went on to also analyze Baseball's conduct under an alternate theory that it called an "expansive version" which would apply the exemption more broadly to the "business of baseball." Here the Piazza court analyzed the Federal Baseball antitrust exemption as if it applied to activities other than the reserve clause. It concluded that the exemption clearly did apply to the business of putting on baseball game exhibitions, a market separate and distinct from the market at issue which was the market for ownership interests in team franchises. On the other hand, the court also concluded that activities such as moving players and equipment from game to game, broadcasting games, and employment relations with non-players were not covered by the exemption. Piazza at pp. 51-52.

As to the market for ownership interests in team franchises, the Piazza court decided that it was impossible to determine whether the exemption applied without a factual record. Thus, it concluded that even under an expansive view of the exemption and applying "rule stare decisis" it was impossible to conclude without further facts whether the exemption applied to restraints

effecting the market for ownership of franchises or the market for ownership and relocation of franchises. Piazza at p. 52.

The analysis by the federal district court in Piazza is foursquare with the position advocated by the Attorney General from the outset of these proceedings. That position is that the antitrust exemption for baseball is limited to the reserve clause, but even if the exemption applies more broadly, it is impossible to determine whether the exemption applies in this case without further development of the facts. In other words, that decisions involving the ownership and location of baseball franchises are not always covered by the exemption.

The decision of the Piazza court must be given great weight and consideration by this Court. As a state court construing an exemption under federal law as applied to the same set of facts, this Court as matter of comity must defer to the reasoning of the federal court reviewing the same set of facts. Florida Statutes Section 542.32. There is no way to reconcile the analysis of Piazza with the trial court's order in this case. The trial court erred in extending baseball's tenuous antitrust exemption to conduct which no federal court had previously found to be covered by the exemption. Unless this Court reverses that erroneous decision, a truly bizarre anomaly will result. Two former members of the Tampa Bay Group will be allowed to proceed with a suit challenging baseball's activities on this deal while the Attorney General of Florida will be precluded from even investigating the matter.

2. The Conduct Which the Attorney General Seeks to Investigate Is Not the "Business of Baseball."

The Respondents contended and the trial court found that it is the "business of baseball that is exempt." (R. 169) Specifically the trial court held that: "The composition of the leagues, that is, where professional baseball is played and with whom, is a fundamental consideration of professional baseball and at the heart of its business activity. Decisions concerning ownership and location of baseball franchises clearly fall within the ambit of baseball's antitrust exemption." (R. 169)

The trial court's conclusion was incorrect for two reasons. First, as argued above, the Attorney General does not concede that any activity of baseball except the reserve clause is covered by the exemption and, in light of the ruling in Piazza, the trial court therefore clearly erred in holding that the exemption covered the "business of baseball." Second, even if the exemption is extended to cover "the business of baseball," the Attorney General contends here, as he did below, that the activity he seeks to investigate is not the business of baseball and is not exempt even under that expanded view of the exemption. (R. 29-32)

a) The Term "Business of Baseball" Has Never Been Defined.

It must first be noted that nowhere has the Supreme Court or any other court for that matter, defined what constitutes the "business of baseball." Nor has any court ever enumerated the factors which might be considered in determining what constitutes

the business of baseball. See, e.g., Group Life & Health Ins. v. Royal Drug Co., 440 U.S. 205, 211-212 (1979) (defining the primary element of "the business of insurance" to include the "spreading and underwriting of a policyholder's risk").

Respondents contend and the court below held that the business of baseball includes "decisions concerning ownership and location of baseball franchises." (R. 169) As the Piazza court explained, this may or may not be true depending upon the particular facts involved, even if it is first assumed that the exemption extends beyond the reserve clause.

b) The Activity Involved Here Is Not The "Business of Baseball."

Even if the expanded view of the exemption is adopted covering the "business of baseball," the activity in question is not the business of baseball because it is not official activity engaged in by team owners pursuant to League Rules. The Attorney General does not seek to investigate "decisions concerning ownership and location of baseball franchises." Indeed, the Attorney General conceded at the hearing that if the expanded interpretation of the exemption is adopted and if the investigation focused solely upon the actual decision (the vote) of the owners not to approve the sale to the Tampa Bay investors, the exemption might then apply. (R. 29-32) This would be a situation directly analogous to the State of Wisconsin's challenge under its state antitrust law to the decision to move the Milwaukee Braves to Atlanta. State v. Milwaukee Braves, Inc., 144 N.W. 2d 1 (Wis. 1966). But, as the Attorney General

made clear below, the investigation does not involve the formal decision by owners in Scottsdale, Arizona on November 10, 1992 to not approve the sale of the Giants to the Tampa investors. (R. 29-32) Nor does it involve the investigation of any regular pre-meeting activities which occurred in preparation for that meeting. It does not even involve any activities which were specifically authorized by any of the formal rules governing the operations of Major League Baseball including the Major League Agreement and Rules, the Commissioners' Control Interest Transfers-Guidelines and Procedures, or the Constitution and Rules of the National League.

Instead, the activities under investigation are primarily those which took place between a few owners, various National League officials, certain outside investors and officials from the City of San Francisco to conspire, totally outside any of the rules, to create a second offer to compete with the Tampa Bay offer and then to guide and engineer this second offer into a position where it could provide an alternative to the Tampa offer. At the same time, those same persons conspired outside the rules to undercut, delay and frustrate the consideration of the Tampa offer to buy more time to create and nurture the competing offer. (R. 29-32).

Respondents can cite to no rule, regulation, guideline or article of any of the myriad official documents which govern Major League Baseball which authorizes, guides, instructs or

allows owners and league officials to engage in such conduct.[3] There is, in fact, no league rule or regulation which allows some owners and league officials to agree to create a competing offer to purchase another owner's franchise, and, without the knowledge or approval of that other owner to negotiate the sale of his franchise for him. This conduct is exactly what the Attorney General wishes to investigate.

The only rules or guidelines that remotely come close to addressing these issues is the Commissioner's Control Interest Transfers-Guidelines and Procedures dated February 11, 1988 which require an owner to keep the Commissioner's Office and the League President apprised of negotiations to sell a franchise. However, nothing in these Guidelines, or in any other rule, authorizes any owner or league official to take any action on that sale until the matter is submitted to the owners for final approval by vote.

The various rules which govern baseball are otherwise very detailed and complete. They cover virtually every aspect of the business and the game of baseball from franchise finances to ground rule doubles. What's more, these are rules which the owners and league officials wrote themselves. If they are incomplete or leave doubt concerning the authorization to perform any act they can only blame themselves. These various rules and

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[3]Indeed, present as counsel for Respondents at the hearing below was Mr. Robert Kheel who has been general counsel for the National League for many years. (R. 3) Presumably, Mr. Kheel would be well familiar with the formal rules of baseball and could have cited any rule which authorizes the alleged activities.

regulations provided an opportunity for the League to define for itself what constitutes "the business of baseball" and they did so. They left very little out, but nothing in these rules addresses the conduct which the Attorney General seeks to investigate. Therefore, the conduct under investigation cannot, by definition, constitute the "business of baseball."

An examination of each of the trial court decisions relied upon by the Respondents clearly highlights the distinction between authorized and unauthorized action. In Professional Baseball Schools and Clubs, Inc. v. Kuhn, 693 F.2d 1005, 1086 (11th Cir. 1982) (cited by Respondents at R. 137), the activities involved were all matters covered by the league rules, the player assignment system, the franchise location system, and the Carolina League's rules requiring member teams to only play games with other teams belonging to the National Association.

In Portland Baseball Club, Inc. v. Kuhn, 368 F. Supp. 1004 (D. Oreg. 1971), aff'd 491 F.2d 1101, 1103 (9th Cir. 1974) (cited by Respondents at R. 137) a former minor league owner sued under both contract and antitrust theories for compensation for locating a Major League franchise within his territory. The suit revolved around the compensation rules of baseball "the heart of which is Rule 1(a) of the Professional Baseball Rules." 491 F.2d at 1102.

Even the decision in Charles O. Finley & Co. v. Kuhn, 569 F.2d 527 (7th Cir. 1978) cert. denied, 439 U.S. 876 (1978), upon which Respondents and the court below heavily relied (R. 134,

168), involved a dispute over the interpretation of various parts of the Major League Agreement and the Major League Rules which empower the Commissioner of Baseball to take certain acts. 569 F.2d at 532-535.

As the Wisconsin Supreme Court stated in the Milwaukee Braves case:

> [i]t does seem clear that the exemption at least covers the agreements and rules which provide for the structure of the organization and the decisions which are necessary steps in maintaining it. The type of decision involved in this case, in essence, whether to admit a new member in order to replace an existing member which desired to move to a new area, appears to be so much an incident of league operation as to fall within the exemption.

144 N.W. 2d at 15. [emphasis supplied]

The facts of the above cited cases stand in sharp contrast to the activities which the Attorney General wishes to investigate involving clandestine meetings and negotiations among a few owners, some league officials and certain outside investors. It is simply too facile to say that conduct which is nowhere mentioned, much less authorized, by any of the hundreds of rules and regulations governing Major League Baseball is somehow still "the business of baseball." To allow the Respondents to ignore these self-written rules and regulations and to sweep other conduct within the definition of their business would be tantamount to applying the exemption, in contravention of the trial court's own admonitions, to "any and all activities which may have some attenuated relation with the business of baseball." (R. 168) Such an interpretation would

also violate the admonitions of the Supreme Court to construe antitrust exemptions narrowly and would frustrate almost any attempt to check the spread of baseball's monopoly into other areas.

Just as was true in Royal Drug, 440 U.S. 205 with the "business of insurance," the "business of baseball" must here have some practical and well defined objective limits. The Attorney General's contention is that if the various rules and regulations governing baseball do not include an activity, that activity cannot be the "business of baseball." Because the activity which the Attorney General wishes to investigate is not covered anywhere in those rules, that activity is not the "business of baseball" and is therefore not exempt from the antitrust laws even under the trial court's own expanded view of the exemption.

B. The Trial Court Erred as a Matter of Law in Quashing the CIDs Where There Existed a Possibility of Non-Exempt Conduct.

The Attorney General contended below that he is entitled to investigate an exempt entity to determine whether the conduct to be investigated is inside or outside the exemption. (R. 104, 169) The trial court recognized "that it would generally be premature to apply an antitrust exemption at a subpoena enforcement hearing." (R. 169) Nevertheless, the trial court went on to do exactly that by erroneously concluding that if "[b]aseball's decision to keep the Giants in San Francisco is exempt from the antitrust laws, then the necessary discussions, negotiations and

associations leading to that decision must also be protected and exempted business activity." (R. 169-170) Basically, the trial court concluded that there was no set of facts under which the activity in question would not be exempt.

The trial court's reasoning reveals the danger of attempting to apply exemptions to alleged activities before any investigation of the facts has been undertaken.[4] The above-quoted passage from the trial court's order erroneously assumes that the discussions, negotiations and associations leading to the decision to keep the Giants in San Francisco were in fact "necessary." Without knowing anything about those discussions or the participants, the trial court made what amounted to factual finding nowhere supported in the record and concluded that those discussions were "necessary." In effect, the trial court made a factual conclusion following the hearing without any evidence presented about the very facts that the Attorney General sought to investigate.

The seminal case in this area is Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946). In that case a subpoena was issued to determine whether the petitioners had violated the Fair Labor Standards Act. Petitioners argued that the Act was inapplicable to them and that the question of coverage should be adjudicated before the subpoena could be enforced. The Supreme

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[4]The Attorney General contends that the trial court abused its discretion in denying the Attorney General any opportunity to develop facts to support his theory. The factual assumptions made by the trial court under such circumstances are clearly erroneous as they are without any support.

Court ruled that the subpoena should be enforced so as to give the Administrator the ability to use his subpoena power to gather evidence upon the question of coverage in the first instance. 327 U.S., 214.

Similarly, in FTC v. Monahan, 832 F.2d 688 (1st Cir. 1987), FTC subpoenas to the Massachusetts Pharmacy Board were challenged on the grounds that the conduct to be investigated was exempt under the state action doctrine. The First Circuit rejected that argument, finding that where there was any factual uncertainty over the applicability of the exemption, the agency should be allowed to investigate. The Court also concluded that the disputes over the applicability of the exemption should not be "settled in a subpoena enforcement proceeding." 832 F.2d at 690. See also, Associated Container Transp. (Australia LTD) v. United States, 705 F.2d 53 (2nd Cir. 1983) (antitrust CID upheld overruling objection that conduct was exempt under Noerr-Pennington doctrine and Act of State doctrine); Australia/Eastern USA Shipping Conference v. United States, 1982-1 CCH TRADE CASES ¶ 64,721 (D.C. Cir. 1981) (antitrust CIDs enforced over claim by shipping companies that they were exempt under the shipping Act of 1916.)

Application of these principles has led at least two state courts to reject similar challenges to antitrust CIDs served upon allegedly exempt persons by the attorneys general in their state. In Attorney General of Texas v. Allstate Insurance Co., 687 S.W.2d 803 (Tex. App. 5 Dist. 1985) the court overruled an

objection to an antitrust CID served by the Texas Attorney General on Allstate. The court rejected Allstate's argument that they were exempt from the federal antitrust laws and ordered Allstate to respond to the CID holding that it was possible that the conduct under investigation by the Attorney General was outside the scope of the federal antitrust exemption for insurers.

Similarly in Ajello v. Hartford Federal Savings & Loan Assn., 347 A.2d 113 (Conn. 1975), the court overruled an objection to an antitrust CID served by the Connecticut Attorney General raised by a savings and loan that its conduct was exempt from the antitrust laws because it was regulated by the Federal Home Loan Bank Board. The court found the CID proper because the Board did not regulate all aspects of the saving institution's business and because the facts were not well enough developed to determine whether the Board's regulatory action would preempt the antitrust laws.

Thus, in the case at hand, it was error as a matter of law for the trial court to determine, without any facts before it concerning the conduct in question and before any investigation had been done, that the conduct under investigation fell within the exemption. As noted by the federal district court in Piazza, even if an expansive view of the exemption is taken, it is possible to develop facts 'to demonstrate that team ownership is not central to baseball's unique characteristics." Piazza at p. 52. As that court concluded, "Without a factual record [the

court] would be engaged in mere speculation in deciding now whether it is or is not." Piazza at p. 54. The proper time for Respondents to raise their exemption would be after the development of a full factual record specifying the unlawful conduct. "[T]he mere assertion of the exemption should not be allowed to halt the investigation." Associated Container Transp. (Australia LTD) v. United States, 705 F.2d at 59. Yet, this is exactly what the trial court allowed Respondents to do.

CONCLUSION

In granting the Motion to Set Aside the Civil Investigative Demands, the trial court failed to narrowly construe baseball's antitrust exemption. The antitrust exemption for baseball is built upon a now abandoned legal rationale and it is supported now only by stare decisis. In light of the well settled principle that antitrust exemptions should be narrowly construed, it was clearly error for the trial court to conclude that the activities which the Attorney General sought to investigate were covered by baseball's antitrust exemption. The trial court's ruling gave baseball's antitrust exemption an extraordinarily broad interpretation when every court to have ever considered the exemption has narrowed it.

At a minimum, the trial court's decision to apply the antitrust exemption to the conduct in question was premature. The Attorney General should have been given an opportunity to investigate and develop facts so as to be able to determine whether the conduct was exempt.

For all of the above stated reasons, Petitioner prays that this Court answer the certified question in the negative and reverse and remand the decision of the District Court of Appeal with instructions to grant the Attorney General's Cross-Motion to Compel Compliance so that the investigation may proceed.

Respectfully submitted,

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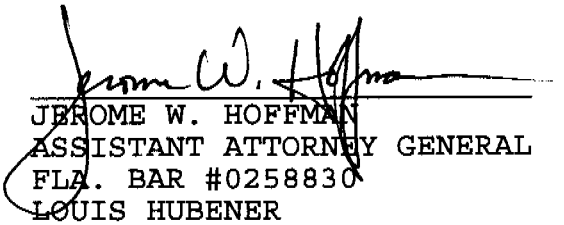
ATTORNEY GENERAL



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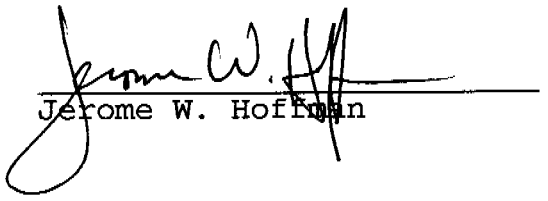
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing INITIAL BRIEF OF PETITIONER ROBERT A. BUTTERWORTH, ATTORNEY GENERAL OF THE STATE OF FLORIDA was sent via U.S. Mail to Mr. Gregory A. Presnell; Akerman, Senterfitt & Eidson, P.A.; 17th Floor, Firstate Tower; 255 South Orange Avenue; Post Office Box 231; Orlando, Florida 32802 and Mr. Robert Kheel; Willkie Farr & Gallagher; One Citicorp Center; 153 East 53rd Street; New York, New York 10022 on this 4TH day of OCTOBER, 1993.



Jerome W. Hoffman