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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

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

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SUMMARY OF ARGUMENT

Despite all of the rhetoric, this case is really about whether the application of baseball's exemption to the conduct which the Attorney General seeks to investigate is sufficiently clear to block the investigation before it even starts.

As he has maintained from the beginning, the Attorney General believes that it is not. First, as the Piazza decision points outs, baseball's antitrust exemption is now clearly limited to the reserve clause and nothing else. Even taking a more expansive view, Piazza found that the exemption probably didn't apply. Second, the Attorney General contends that baseball's exemption has always been limited to the reserve clause because that is the context of the Federal Baseball, Toolson, and Flood decisions. Third, even if it is the business of baseball which is exempt, the activities in question are not the business of baseball are therefore not exempt.

For those reasons the certified question should be answered in the negative.

ARGUMENT

1. The Attorney General Should Be Permitted To Investigate the Conduct In Question Because It Is Not Clearly Exempt.

In responding to the certified question, the single issue that this Court must decide in this case is whether the Attorney General should be allowed to investigate the circumstances surrounding and leading up to the formal vote of major league owners in November, 1992 not to approve the sale of the San Francisco Giants to the Tampa Bay Investment Group.

The Court is not required to decide whether an antitrust violation has occurred nor is the Court required to decide the scope of any antitrust exemption. This Court is not even being asked to decide whether the conduct which the Attorney General seeks to investigate is outside the scope of baseball's exemption. Rather, the only issue is whether its conduct might be outside the exemption.

If there is any doubt about whether the conduct under investigation is exempt, the investigation should be allowed to proceed. Associated Container Transp. (Australia) Ltd. v. United States, 705 F.2d 53, 59 (2nd Cir. 1983) (availability of Noerr-Pennington and Act of State immunity unclear); FTC v. Monahan, 832 F.2d 688 (1st Cir. 1987) (applicability of state action exemption to Massachusetts Pharmacy Bd. unclear); Ajello v. Hartford Federal Savings & Loan, 346 A.2d 113 (Conn. 1975) (Antitrust CID by Connecticut Attorney General to savings and

loan upheld because all of savings and loans' activities not regulated by Federal Home Loan Bank Board.)

Respondents' argument that the conduct which the Attorney General seeks to investigate is clearly exempt runs into a major obstacle, the Piazza v. Major League Baseball, et al., Case No. CIV 92-7173 (U.S.D.C. E.D. Pa. August 4, 1993) decision. The best argument Respondents can make is that Piazza is "wrongly decided". Respondents' Answer Brief at p. 31, et seq.[1] However, in support of that contention their only argument is that the Piazza court misread Flood v. Kuhn, 407 U.S. 258 (1972) to apply only to the reserve clause. Respondents contend that the Supreme Court in Flood intended to continue the broad exemption for the "business of baseball". Respondents' Answer Brief at 34. Respondents err on both grounds.

First, it is clear the holding in Flood is confined to the reserve system. That was the only issue before the Court. Second, the Court recognized in Flood that Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball

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[1]Respondents' sole remaining argument, that the Attorney General conceded at oral argument that the exemption applied beyond the reserve clause, is constructed out of a quote from the argument before Judge Stroker. Respondents' Answer Brief at 32. What Respondents neglect to point out to the Court is that those statements were made in the context of the Attorney General's alternative argument that the "business of baseball" is limited to that which is authorized by the official rules. At the time of the quote, the Attorney General had already finished his argument on the first issue, that the exemption is limited to the reserve clause. Indeed, the Attorney General has argued before both the circuit court and the district court of appeal that the exemption is limited to the reserve clause. This is not a new argument as Respondents would mistakenly have this Court believe.

Clubs, et al., 259 U.S. 200 (1922) and Toolson v. New York Yankees, 346 U.S. 356 (1953) were about the reserve system. As the Court stated:

> In view of all of this, it seems appropriate now to say that:
> 1. Professional baseball is a business and it is engaged in interstate commerce.
> 2. With its reserve system enjoying an exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. Federal Baseball and Toolson have become an aberration confined to baseball.

407 U.S. at 282.

This is plain and unambiguous language. Had the Court in Flood meant to exempt all of the business of baseball, it would have said "With the business of baseball enjoying exemption from the federal antitrust laws . . ." Instead, it limited its language, carefully chosen, to the reserve clause and then went on to cite Federal Baseball and Toolson. Third, even if the Flood Court intended to exempt the "business of baseball", that's not what it did. By rejecting the underpinning of Federal Baseball, that baseball is not interstate commerce, the Court, as Judge Padova meticulously explained in Piazza, totally undercut Federal Baseball's stare decisis impact. All that remains is the rule stare decisis of Flood and that is limited to the reserve clause which was the only issue in that case. Judge Padova's legal analysis of the application of stare decisis is flawless; even Respondents do not challenge it. And the simple result is that

whatever the exemption was before, all that is left after Flood, intended or not, is an exemption for the reserve clause.

Of course, as Respondents' note, Piazza is only a federal district court opinion and would ordinarily not be entitled to as much precedent as a federal appellate court decision. However, Piazza is not just any federal district court decision. It is a federal district court decision based upon the exact same set of facts that the Attorney General seeks to investigate. Because Piazza is a federal district court decision based on these same facts, it should be given heavy precedential weight. Zorick v. Tynes, 372 So.2d 133, 139 (Fla. 1st D.C.A. 1979).[2]

In sum, Piazza is not wrongly decided. Judge Padova's analysis of Flood and the application of stare decisis are correct. And, if not controlling precedent for this Court looking at the same set of facts, it is, at a minimum, an example of what the Attorney General has argued in this case from the outset. And that is that it is possible to examine these facts and conclude that the conduct in question is not covered by baseball's antitrust exemption. If it is possible for a federal district court to look at these same facts and conclude that the exemption does not apply, how can this Court then deny the Attorney General the right to investigate to determine whether there is a theory which he wishes to advance on behalf of the

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[2]This is particularly true here because the federal courts have exclusive jurisdiction over federal antitrust claims. Miller v. Granados, 529 F.2d 393 (5th Cir. 1976); N.A.P. Consumer Electronics Corp. v. Electron Tubes International, Inc., 458 So.2d 831 (Fla. 3rd D.C.A. 1984).

State of Florida and the City of St. Petersburg, that would allege the conduct to be unlawful? Clearly, the Monahan and Ajello cases support the argument that if the application of the exemption is not absolutely clear, the investigation should be allowed to proceed. Here, Piazza shows that the application of the exemption to these facts is unclear and for that reason it would be wrong to terminate the Attorney General's statutory right to investigate this conduct.

2. Baseball's Antitrust Exemption Covers Only The Reserve Clause.

The parties have spilled buckets of ink on this issue. Now Respondents have resorted to quoting Federal Baseball's brief before the Supreme Court. Yet, those briefs reveal that the gravamen of Federal Baseball's complaint was the reserve clause and its effect of restricting the supply of available qualified players. See Federal Baseball Brief at p. 170, Appendix A to Respondents' Brief. It doesn't matter , as Respondents somehow imagine, that the Federal Baseball plaintiffs were competitors, not players. Respondents' Brief at p. 16. The anticompetitive impact of the reserve system on a competitor is obvious. By denying your competitor league a supply of qualified players you make it impossible for that league to put a desirable product on the field to attract fans.[3] Federal Baseball's other theories

[3]By contrast, the absence of antitrust protection for a reserve clause in football allowed the development of a competing league, the AFL in the early 1960's. Had football enjoyed baseball's reserve clause immunity the result might have been

(the defendants' refusal to schedule games, trade players or lease ball parks) might not even amount to violations of the antitrust laws under a rule of reason analysis.

What's more important, however, is that the circuit court of appeals and in turn the Supreme Court didn't address other aspects of Federal Baseball's complaint except the reserve clause. Quite simply, it is the Supreme Court's opinion, which considered only the circuit court opinion from below, that creates the contours of the exemption, not the Federal Baseball's briefs.[4]

Similarly, Respondents' argue that Corbett v. Chandler, 346 U.S. 356 (1953) one of the two other cases decided with Toolson, involved issues other than the reserve clause.[5] Respondents' brief at 19. That may be true, but it is clear that Corbett was primarily a reserve clause case. An examination of the Amended Complaint in Corbett (Appendix B to Respondents' Brief) reveals no less than 30 references to the "reserve clause" or "right to reservation" in just 14 pages. Corbett is hardly a case to cite

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very different.

[4]At footnote 4 of Respondents' brief, they cite authorities which contend that Federal Baseball had "nothing to do" with the reserve clause. Even Respondents' would recognize that those authorities are wrong. The reserve clause was clearly an important issue in Federal Baseball if not the only issue.

[5]Toolson was clearly a case which involved only the reserve clause.

to suggest that reserve clause was not the focus of baseball's antitrust exemption.[6]

Respondents' next argument, that this case involves an area, "league structure," which is recognized as part of baseball's exemption is totally false. "League structure" refers to the two leagues of Major League Baseball and their agreements to play games only in their respective leagues. This case involves an ownership transfer issue and then only tangentially since the Attorney General seeks to investigate conduct occurring before the ownership vote. This is simply not a "league structure" case.

Respondents' final argument is that Congress and legal commentators have interpreted baseball's antitrust exemption to cover issues other than the reserve clause. Respondents' Brief at pp. 23-31. These arguments are largely irrelevant. Do Respondents suggest that the views of Congressmen should be substituted for the analysis of Supreme Court cases? If the antitrust exemption for baseball was a Congressionally passed exemption the argument might not be so far-fetched. But baseball's antitrust exemption was created entirely by the Supreme Court, not Congress. Why then are the views of Congressmen relevant? Clearly they are not.

What's more, let's look at what those Congressmen were trying to do. As the Supreme Court noted in Flood:

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[6]As with Federal Baseball, Corbett's other theories of denying the Pacific Coast League major league status are likely not antitrust violations under a rule of reason standard.

> Since Toolson, more than 50 bills have been introduced in Congress relative to the applicability or non-applicability of the antitrust laws to baseball. A few of those passed one house or the other. Those that did would have expanded, not restricted, the reserve system's exemption to other professional league sports.

407 U.S. at 281. (Footnotes omitted, emphasis supplied.) This quotation reveals two things. First, as the underscored language above indicates, the Flood Court viewed the exemption as limited to the reserve clause. Second, most of these Congressional "experts" were intent on giving other professional sports expanded antitrust exemptions, not limiting baseball's exemption, and consequently opined that baseball's exemption was equally expansive.

But even if that were not the case, no member of Congress trying to pass remedial legislation would try to minimize or restrict the reach of baseball's antitrust exemption since to do so would minimize the problem and reduce the need for remedial legislation. Thus, resort to Congressional testimony on the issue is probably misleading.

Finally, these expansive interpretations of baseball's antitrust exemption from Congress and other commentators prove too much. If baseball has a "blanket exemption" as many of the commentators believe, or if the exemption is not "limited in any particular way," as the Justice Department official opined in 1976, then cases like Postema v. National League of Professional Baseball Clubs, 799 F.Supp. 1475 (S.D.N.Y. 1992) and Henderson Broadcasting Corp v. Houston Sports Ass'n, Inc., 541 F.Supp. 263

(S.D. Tex. 1982) were wrongly decided. And then even Judge Stroker was wrong when he found that baseball's exemption was not unlimited in its scope. (R 168.) Clearly, the "carte blanche" interpretation of baseball's antitrust exemption advanced by Respondents through the mouths of the Congressional "experts" and other commentators is not reality.

3. The Activities Which the Attorney General Seeks To Investigate Are Not the Business of Baseball.

Respondents continue to misapprehend the focus of what the Attorney General seeks to investigate. He does not seek to investigate the formal league vote rejecting the Tampa Bay ownership bid for the Giants. Nor does the Attorney General seek to investigate decisions relating to the "structure of the league". What the Attorney General wishes to investigate are the activities of certain owners, certain league officials, and certain persons outside of baseball relating to the development of a competing franchise ownership offer. These activities were totally outside the scope of any rule or regulation covering baseball and are therefore not part of the business of baseball.

Respondents' argument implies that the business of baseball can be just about anything it wants to be. It criticizes the Attorney General's position that the business of baseball should be defined by its rules and regulation as making "no sense". Respondents' Brief at 42. But the reverse is true. Antitrust exemptions are to be considered as narrowly as possible. Union

Labor Life Insurance Co. v. Pireno, 458 U.S. 199, 226 (1982). Every exemption is given definite limits. For example, the exemption for the business of insurance is applied only to activities of insurance companies which involve the spreading and underwriting of risk. Group Life & Health Ins. v. Royal Drug Co., 440 U.S. 205, 211-12 (1979). In the state action immunity area the exempt activities of private persons are limited to those undertaken pursuant to a clearly articulated and affirmatively expressed statutory scheme to and which are actively supervised by the State. California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

The same must be true with baseball's exemption. If it is the "business of baseball" which is exempt, as Respondents contend, then what are its limits? The Attorney General suggests that those limits are the rules and regulations written by baseball itself. As argued in his initial brief, the case law supports this argument. See Petitioner's Initial Brief at pp. 20-26 and cases cited therein.[7]

The activities which the Attorney General seeks to investigate revolve around the creation of a competing offer and the favorable treatment that offer was given by certain league officials. These activities were not authorized by any rule or

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[7]Respondents' contention at page 41 of their brief that Finley v. Kuhn involved no specific rule or regulation is flatly wrong. The entire dispute revolved around an interpretation of the Major League Agreement and Major League Rules. 569 F.2d 532-535. By contrast Respondents can cite no rule or regulation which even arguably supports the conduct which the Attorney General wishes to investigate.

regulation. They were not even necessary discussions, negotiations and associations leading up to that formal decision. They were outside the business of baseball altogether. To immunize these activities would allow almost any group to conspire and agree to anything remotely related to the business of baseball and then claim an antitrust exemption. This is hardly what the Supreme Court had in mind.

Far from "not making sense" an interpretation which, as does the one advanced by the Attorney General, places practical, real and definable limits on baseball's antitrust exemption is not just sound policy, it is a policy required by Supreme Court precedent. It is Respondents' "we know it when we see it" approach which is impractical nonsense and must be rejected.

4. The Attorney General Investigation Is Not Politically Motivated.

Respondents have, from the outset, tried to impugn the integrity of the Attorney General's investigation by dismissing it as "politics." This accusation is as insulting as it is false. Politics, of course, is an integral part of the business of government. The Attorney General became involved in this case at the request of officials from the City of St. Petersburg who have an empty baseball facility which is eating up tax dollars. The Attorney General is authorized by statute to represent units of local government in antitrust cases. Section 542.27, Florida Statutes. To suggest that the Attorney general was "politically motivated" in his desire to carry out his statutory

responsibility when requested by city officials is truly bizarre. One can suppose then that calling out the National Guard to assist with Hurricane Andrew when requested by South Florida officials was a "politically motivated" act by Governor Chiles.

Respondents even resort to incomplete quotations to support their ridiculous position. See Respondents' Brief at p. 49. The full quote appears at R 48.

The point is that baseball is big business and it is important business to local government. Certainly San Francisco Mayor Frank Jordan recognized this. Certainly baseball owners (including some of the nation's wealthiest individuals and even great media conglomerates such as WGN and Turner Broadcasting) recognize the political nature of the game. We even have a tradition of the President throwing out the first ball on opening day. Baseball owners regularly lavish attention, tickets and presumably campaign contributions on local members of the House and Senate in no small measure to insure that they will not vote to strip baseball of its exemption. Indeed, baseball and politics are inexorably intertwined.

What is at stake in this case is for the Attorney General is not political points, nor even a franchise for St. Petersburg. What is at stake is his own statutory right to conduct antitrust investigations. If not overturned, the trial court's order suggests that any potential antitrust target can profit by challenging the Attorney General's ability to investigate supposedly "exempt" conduct and then crying "politics" and

"harassment." These pathetic attacks on the Attorney General's authority in an effort to avoid answering questions about its conduct should be soundly rejected by this Court.

CONCLUSION

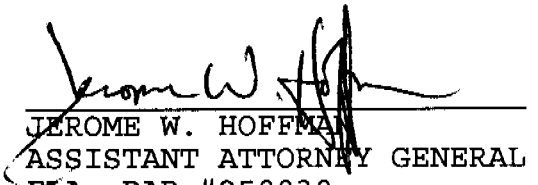
For all of its glory in the past, baseball today is in a state of disrepair. Owners can't agree on a commissioner. They pay exorbitant salaries for journeyman players and has-beens. Owners ritualistically moan that they are losing money despite record attendance and television revenues. All of these facts undermined the public's confidence in the game. Racism and even collusion by owners against players are not just allegations but proven facts. In this context, to suggest that the Attorney General of Florida is not entitled to investigate activities which are not covered by any established rule is simply bizarre.

It is particularly strange to argue that there is no possibility that the investigation will find non-exempt antitrust violations when a federal district court looking at the exact same facts concluded that the exemption probably does not apply.

The Attorney General's right to investigate in this case is clear. The certified question should be answered in the negative and the lower court's order should be reversed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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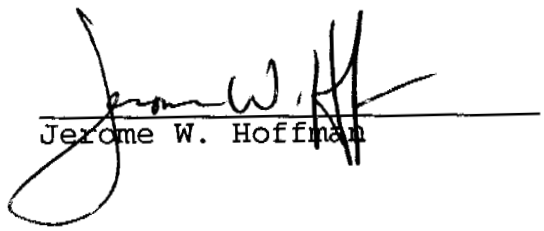
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing REPLY BRIEF OF APPELLANT 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 13th day of December, 1993.



Jerome W. Hoffman