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105TH CONGRESS *1st Session* | SENATE | REPORT 105–118

CURT FLOOD ACT OF 1997

OCTOBER 29, 1997.—Ordered to be printed

Mr. HATCH, from the Committee on the Judiciary, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 53]

The Committee on the Judiciary, to which was referred the bill (S. 53) to require the general application of the antitrust laws to major league baseball, and for other purposes, having considered the same and amendments thereto, reports favorably thereon, with an amendment in the nature of a substitute, and recommends that the bill, as amended, do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Curt Flood Act of 1997".

SEC. 2. PURPOSE.

It is the purpose of this legislation to clarify that major league baseball players are covered under the antitrust laws (i.e., that major league players will have the

same rights under the antitrust laws as do other professional athletes, e.g., football and basketball players), along with a provision that makes it clear that the passage of this Act does not change the application of the antitrust laws in any other context or with respect to any other person or entity.

SEC. 3. APPLICATION OF THE ANTITRUST LAWS TO PROFESSIONAL MAJOR LEAGUE BASEBALL.

The Clayton Act (15 U.S.C. 12 et seq.) is amended by adding at the end the following new section:

"SEC. 27. (a) The conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball relating to or affecting employment to play baseball at the major league level are subject to the antitrust laws to the same extent such conduct, acts, practices, or agreements would be subject to the antitrust laws if engaged in by persons in any other professional sports business affecting interstate commerce; provided, however, that nothing in this subsection shall be construed as providing the basis for any negative inference regarding the caselaw concerning the applicability of the antitrust laws to minor league baseball.

"(b) Nothing contained in subsection (a) of this section shall be deemed to change the application of the antitrust laws to the conduct, acts, practices, or agreements by, between, or among persons engaging in, conducting, or participating in the business of organized professional baseball, except the conduct, acts, practices, or agreements to which subsection (a) of this section shall apply. More specifically, but not by way of limitation, this section shall not be deemed to change the application of the antitrust laws to:

"(1) the organized professional baseball amateur draft, the reserve clause as applied to minor league players, the agreement between organized professional major league baseball teams and the teams of the National Association of Professional Baseball Leagues, commonly known as the 'Professional Baseball Agreement', the relationship between organized professional major league baseball and organized professional minor league baseball, or any other matter relating to professional organized baseball's minor leagues;

"(2) any conduct, acts, practices, or agreements of persons in the business of organized professional baseball relating to franchise expansion, location or relocation, franchise ownership issues, including ownership transfers, and the relationship between the Office of the Commissioner and franchise owners;

"(3) any conduct, acts, practices, or agreements protected by Public Law 87–331 (15 U.S.C. 1291 et seq.) (commonly known as the 'Sports Broadcasting Act of 1961'); or

"(4) the relationship between persons in the business of organized professional baseball and umpires or other individuals who are employed in the business of organized professional baseball by such persons.

"(c) As used in this section, 'persons' means any individual, partnership, corporation, or unincorporated association or any combination or association thereof.".

I. PURPOSE

The purpose of S. 53 is to clarify that major league baseball players and owners have the same legal rights, and are subject to the same restrictions, under the antitrust laws as the players and owners in other professional sports leagues. As the bill expressly provides, it is not intended to affect the applicability or inapplicability of the antitrust laws in any other manner or context.

As set forth in the S. Rept. 104–231, accompanying S. 627, the "Major League Baseball Antitrust Reform Act of 1995," a bill that was reported out of the Judiciary Committee but not enacted during the 104th Congress, the unfortunate baseball strike of 1994–95 reemphasized the need for Congress to clarify its intent to apply to professional baseball the same rules of fair and open competition that are followed by all other unregulated business enterprises in this country, including other sports leagues. In short, other professional athletes and similarly situated employees have alternatives

to striking specifically because of the antitrust laws.[1] It is the Committee's belief that the applicability of the antitrust laws to major league baseball player-owner employment relations will significantly reduce the likelihood of future baseball strikes.

II. LEGISLATIVE HISTORY

A. INTRODUCTION OF S. 53

Many bills have been introduced over the decades addressing the subject of baseball's antitrust exemption. During the 104th Congress, this Committee reported out S. 627, a bill intended to affirm that major league baseball's owners and players were subject to the Nation's antitrust laws. This bill, however, was not considered by the full Senate during the 104th Congress.

On January 21, 1997, Senators Hatch, Leahy, Thurmond, and Moynihan introduced S. 53, the Curt Flood Act of 1997, which was virtually identical to S. 627 from the 104th Congress. On June 17, 1997, this Committee held a hearing on S. 53. The witnesses were Donald A. Fehr, executive director of the Major League Baseball Players Association, and Dan Peltier, a former minor league baseball player. Mr. Allan H. Selig, chairman of the Major League Executive Council, and Mr. Stanley Brand, vice president of the National Association of Professional Baseball Leagues, Inc., were also invited to testify at the hearing, but did not attend.

B. THE AMENDMENT IN THE NATURE OF A SUBSTITUTE

1. THE AGREEMENT BETWEEN MAJOR LEAGUE BASEBALL OWNERS AND PLAYERS TO SEEK ANTITRUST LEGISLATION

The 1990 collective-bargaining agreement between the major league baseball players union and major league owners ("Basic Agreement") expired in December 1993, subsequent to which the industry, and the Nation, suffered through the unfortunate strike that suspended portions of the 1994 and 1995 seasons, including the 1994 World Series. After protracted negotiations, a new Basic Agreement was finally signed in March 1997. As part of this new agreement, the owners and players reached what was described by both sides as a landmark pact regarding the applicability of the antitrust laws to major league baseball. The parties memorialized this agreement in article XXVIII of the Basic Agreement, which reads in pertinent part as follows:

> The Clubs and the Association will jointly request and cooperate in lobbying the Congress to pass a law that will clarify that Major League Baseball players are covered under the antitrust laws (i.e. that Major League Players have the same rights under the antitrust laws as do other professional athletes, e.g. football and basketball players),

[1] As described in S. Rept. 104–231, the courts have developed a "nonstatutory" labor exemption from the antitrust laws. See, e.g., *Brown* v. *Pro Football, Inc.*, 116 S.Ct. 2116 (1996). Although courts and academics have disagreed on the precise extent and scope of this exemption, it is clear that, at some point, the nonstatutory labor exemption ends and employees have a right to invoke the antitrust laws. Like its predecessor S. 627, S. 53 is intended to clarify the applicability of the antitrust laws in those contexts where the nonstatutory labor exemption does not apply, and is not intended to affect the scope or extent of that exemption.

> along with a provision that makes it clear that passage of that bill does not change the application of the antitrust laws in any other context or with respect to any other person or entity.

2. THE AMENDMENT IN THE NATURE OF A SUBSTITUTE

The sponsors of S. 53 continue to support it as introduced. After introduction, however, the owners and players reached the above-referenced agreement regarding the applicability of the antitrust laws to major league baseball. Senators Hatch and Leahy subsequently made clear their willingness to substitute language designed to implement the intent of the owners' and players' agreement, believing that a bill which enjoyed both the owners' and players' support would be passed expeditiously.

After considerable prodding from Senator Hatch, on June 12, 1997, the owners ratified specific legislative language, earlier agreed to by representatives of the owners and the players, intended to clarify that major league baseball players have the same rights under the antitrust laws as other professional athletes. This language provided the basis for the amendment in the nature of a substitute to S. 53, offered by Senator Hatch at the Committee's Executive Business Meeting on July 31, 1997.

C. THE MINOR LEAGUES AND SENATOR HATCH'S AMENDMENT

The Committee has consistently sought not to adversely affect the legal status of the minor leagues or minor league players. Thus, S. 53 (much like its predecessor, S. 627) expressly states that:

> Nothing in this section shall be construed to affect * * * the applicability or nonapplicability of the antitrust laws to the amateur draft of professional baseball, the minor league reserve clause, the agreement between professional major league baseball teams and teams of the National Association of Baseball, commonly known as the "Professional Baseball Agreement", or any other matter relating to the minor leagues.

Notwithstanding this relatively clear language, Mr. Stanley Brand indicated to the Committee that he still had concerns. As a consequence, Mr. Selig stated in a June 16, 1997, letter to the Chairman that, although the owners' Executive Council had formally approved the legislative language which ultimately became the amendment in the nature of a substitute to S. 53, their "support was tempered by the fact that our business partner, the National Association of Professional Baseball Leagues (NAPBL) has concern as to whether the proposed legislation adequately protects their interests."

Responding to this concern, when the amendment in the nature of a substitute to S. 53 was marked up at the Committee's July 31, 1997, Executive Business Meeting, Senator Hatch offered an amendment intended to clarify even further that S. 53 would have no impact on the legal status of the minor leagues. This amendment stated that "nothing in this subsection shall be construed as

providing the basis for any negative inference regarding the caselaw concerning the applicability of the antitrust laws to minor league baseball," and was incorporated by voice vote.

III. VOTE OF THE COMMITTEE

On July 31, 1997, with a quorum present, the Committee on the Judiciary ordered S. 53 favorably reported by a vote of 11 yeas to 6 nays, with Senator Kohl having recused himself. In compliance with paragraph 7 of rule XXVI of the Standing Rules of the Senate, the members of the Committee voted as follows on S. 53:

YEAS	NAYS
Hatch	Grassley
Thurmond	Sessions
Specter (proxy)	Biden
Thompson (proxy)	Feinstein
Kyl (proxy)	Durbin
DeWine	Torricelli
Ashcroft (proxy)	
Abraham	
Leahy	
Kennedy	
Feingold	

Senator Hatch, together with Senator Leahy, offered a substitute amendment to reflect the agreement that had been reached between major league baseball owners and players. This amendment was agreed to by unanimous consent.

Senator Hatch offered an amendment to the substitute, to further clarify that this bill shall not be construed to affect the applicability of the antitrust laws to minor league baseball. The amendment was agreed to by voice vote, with Senators Biden and Feinstein noted as having voted nay.

IV. SECTION-BY-SECTION ANALYSIS

Section 1 states the bill's short title, the "Curt Flood Act of 1997."

Section 2 states that the bill's purpose is to clarify that major league professional baseball players have the same rights under the antitrust laws as do other professional athletes.

Section 3 amends the Clayton Act to add a new section 27. New subsection 27(a) states that the antitrust laws apply to actions relating to professional baseball players' employment to play baseball at the major league level. Reflecting the Committee's interest in reporting a bill enjoying the support of both the owners and players, subsection 27(a) implements the owners' and players' agreement that major league baseball players have the same rights under the antitrust laws as, for example, do professional football and basketball players. The phrase "the antitrust laws shall apply" is intended to incorporate the entire jurisprudence of the antitrust laws, as it now exists and as it may develop. Subsection 27(a) also specifies that nothing within the subsection provides a basis for any negative inference regarding the caselaw concerning the applicability of the antitrust laws to minor league baseball.

S. 53 was specifically drafted so that it would not implicate issues or actions other than those specified in subsection 27(a). Thus, subsection 27(b) makes explicit the Committee's intent that the passage of this bill does not affect the applicability or non-applicability of the antitrust laws in any other context beyond that specified in subsection 27(a). With regard to contexts, actions or issues outside the scope of subsection 27(a) (that is, not constituting "conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball relating to or affecting employment to play baseball at the major league level"), the law as it exists today is not changed by this bill. The specific areas listed in the four subparts of new subsection 27(b) are intended to be merely illustrative of the areas and/or issues as to which the law remains unchanged by this bill. The specific reference to the minor leagues in subsection 27(a) is only intended to clarify that the passage of the bill will have no impact on the law, or the future development of the law, governing the applicability of the antitrust laws to the minor leagues. This reference is not intended to provide any inference or limitation regarding the scope of other issues and/or areas as to which the law remains unchanged by this bill.

V. COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 23, 1997.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 53, the Curt Flood Act of 1997.

If you wish further details on this estimate, we will be please to provide them. The CBO staff contacts are Susanne S. Mehlman (for federal costs) and Matt Eyles (for the private-sector impact).

Sincerely,

JUNE E. O'NEILL, *Director.*

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

S. 53—CURT FLOOD ACT OF 1997; AS ORDERED REPORTED BY THE SENATE COMMITTEE ON THE JUDICIARY ON JULY 31, 1997

S. 53 would remove major league baseball's current exemption from antitrust laws, except that it would retain the antitrust exemption for minor league baseball and for decisions regarding league expansion, franchise location, the amateur draft and broadcast rights, and employment relations with nonplayers, such as umpires. By removing the antitrust exemption under these limited circumstances, S. 53 would allow the players to challenge in federal court certain conduct by the team owners. Therefore, enacting S. 53 would impose additional costs on the U.S. court system to the extent that additional antitrust cases are filed. However, CBO does

not expect any resulting increase in case load or court costs to be significant.

Because enactment of S. 53 would not affect direct spending or receipts, pay-as-you-go procedures would not apply to the bill. S. 53 contains no intergovernment mandates as defined in the Unfunded Mandates Reform Act of 1995 (UMRA) and would impose no costs on state, local, or tribal governments.

S. 53 would impose a new private-sector mandate as defined in UMRA by applying the antitrust laws to the conduct of owners of major league baseball teams in employment relations with major league players. As a result, the owners would be prohibited from engaging in anticompetitive employment-related activities that are now permissible under their judicially-created exemption from the antitrust laws. Thus, if enacted, S. 53 would place owners of major league baseball teams in the same position as owners in the other major professional sports leagues by making their actions subject to judicial review. In most lawsuits alleging an antitrust violation, federal courts would review the conduct of owners under the "rule of reason" standard and examine the economic consequences of the action for its procompetitive and anticompetitive effects. Some conduct, such as collusion, would be per se violations of antitrust law. Owners found to be in violation would be subject to treble monetary damages.

If enacted, S. 53 would represent an explicit reversal by the Congress of a portion of baseball's 75-year-old exemption from the antitrust laws created by the Supreme Court's decision in *Federal Baseball Club, Inc.* v. *National League of Professional Baseball Clubs,* 259 U.S. 200 (1922). In that case, the Court determined that baseball was not a business involved in interstate commerce and, therefore, was not subject to the antitrust laws, which prohibit anticompetitive behavior and unreasonable restraint of trade. In subsequent legal challenges to the ruling in *Federal Baseball,* the most noteworthy being *Flood* v. *Kuhn,* 407 U.S. 258 (1972), the Supreme Court acknowledged that its 1922 decision was flawed, yet it declined to overturn baseball's antitrust exemption on the grounds that this anomaly should be rectified by the Congress. Thus, the bill would impose a new legislatively-crafted enforceable duty on the business of baseball, which fits the definition of a private-sector mandate in UMRA.

CBO estimates that the direct cost, as defined in UMRA, of the private-sector mandate in S. 53 would not likely exceed the $100 million statutory threshold. Direct costs would be imposed on owners to the extent that they would have to employ counsel to defend their actions against antitrust suits from which they are now immune. Moreover, baseball operates under a collective bargaining agreement that runs through the 2000 season, and players have the option to extend the current agreement through the 2001 season. Under that agreement players have recourse against owners who engage in collusion on the terms of player contracts and can recover treble damages through a process of binding arbitration. Consequently, S. 53 would probably impose no direct costs from 1998 through 2000 or 2001 because no antitrust suits would be initiated while the collective bargaining agreement is in effect. Costs in subsequent years are not likely to exceed the $100 million statu-

tory threshold. CBO does not count possible monetary damages that may be assessed against owners for antitrust infractions a cost of complying with a private-sector mandate because CBO assumes that owners would comply with the law's prohibition against anti-competitive behavior.

The CBO staff contacts for this estimate are Susanne S. Mehlman (for federal costs) and Matt Eyles (for the private-sector impact). This estimate was approved by Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

VI. REGULATORY IMPACT STATEMENT

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee concluded that no significant additional regulatory impact or impact on personal privacy would be incurred in carrying out the provisions of this legislation. After due consideration, the Committee concluded that enactment of the Act would not create any significant additional paperwork.

VII. MINORITY VIEWS OF SENATORS GRASSLEY, BIDEN, FEINSTEIN, AND DURBIN

We oppose passage of this legislation for a number of reasons. We advocate a comprehensive approach, from the fans' perspective, to examining the problems in professional baseball. Most of these problems would exist regardless of antitrust liability. Indeed, in attempting to solve baseball's labor relations difficulties by modifying the antitrust laws, we run too great a risk of creating more problems than we solve.

Unfortunately, as reported by this Committee, S. 53, "The Curt Flood Act of 1997," takes the potentially counterproductive step of engaging in a piecemeal approach to the issues confronting baseball by addressing only the application of the antitrust laws to major league baseball labor relations. What is more, it is far from clear that S. 53 even adequately addresses the labor relations issue. Under current law, major league owners can unilaterally impose new labor conditions on players following the expiration of a collective-bargaining agreement. Players then have two choices: (1) accept the unilateral terms and "play ball" or (2) go on strike. This bill is designed to give the players a third option. It would allow players to sue the owners under the antitrust laws for unilaterally imposing collusive and unfair labor conditions. We support the goal of encouraging the owners and the players to resolve their differences at the bargaining table prior to Opening Day. But, it is far from clear that S. 53 will generate the promised benefit of strengthening the players' hand and reducing the likelihood of future strikes. For one thing, the bill says nothing about the nonstatutory labor exemption, which removes union members engaged in collective bargaining from the reach of applicable antitrust laws. In other words, if S. 53 became law in its current form, the players may not be able to sue without decertifying their union.

We also believe that the ability of the players to sue the owners is not the only issue in professional sports today. Other important issues include league expansion and franchise movement, taxpayer-financed stadiums, revenue sharing, player salaries, and fan access to television coverage. Despite the Committee's efforts, we have not addressed these issues, other than to say that this legislation will not affect the current system in these areas. This legislation continues to leave fans vulnerable to major league franchise relocations and broadcasting decisions. In short, S. 53 in our view attempts a simple fix to a complex problem and risks further alienating the fans and irreparably harming the national pastime.

We are particularly concerned about the consequences of this bill for minor league baseball. The minor leagues legitimately fear that if S. 53 becomes law without being modified to protect them, the major league teams will discontinue their financing of the minor leagues and look for an alternative to the minors for developing

players. Minor league teams in our home States promote community-based and affordable events for citizens who for financial or geographic reasons cannot attend major league games. Destruction of minor league baseball, the sport for the fans in towns and small cities across America, cannot be the effect of any bill we pass.

The proponents of this legislation argue that the current language adequately protects the minor leagues. The limited evidence before the Committee does not support their argument. At a February 15, 1995, Antitrust Subcommittee hearing, the former Assistant Attorney General for the Antitrust Division of the United States Department of Justice, James F. Rill, testifying on behalf of the owners, expressed the minor leagues' fears that removal of the antitrust exemption, even on a limited basis, threatens to end the major league funding upon which the minor leagues' viability depends. The reason is clear: the majors pay 100 percent of the salaries of all minor league players, managers, coaches, and trainers—and supply five dozen baseballs per game—in return for the prospect of major league talent someday down the line. Without the ability to reserve their players, major league teams will no longer have assurance that they can realize their investment in minor league players. Moreover, the current major and minor league systems are inextricably intertwined. Attempting to address the major league separately in this bill may lead to extensive litigation and ultimately prove unworkable.

This Committee needs to understand the relationship between minor league baseball and major league baseball's antitrust exemption more fully before we pass this bill. Left unresolved, this issue may generate more litigation, more lawyers' fees, and more uncertainty than we already have today. We hope that future consideration of this issue will explore more fully the intended and unintended consequences of congressional action in this area. And, most important, we urge our colleagues to focus on how repeal of the antitrust exemption for major league baseball would affect fans of both the minor and the major leagues.

CHUCK GRASSLEY.
JOE BIDEN.
DIANNE FEINSTEIN.
DICK DURBIN.

VIII. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 53, as reported, are shown as follows (existing law which would be omitted is enclosed in bold brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman type):

UNITED STATES CODE

* * * * * * *

TITLE 15—COMMERCE AND TRADE

* * * * * * *

CHAPTER 1—MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

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§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

* * * * * * *

§ 12. Definitions; short title

(a) "Antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; and also this Act.

* * * * * * *

SEC. 27. (a) The conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball relating to or affecting employment to play baseball at the major league level are subject to the antitrust laws to the same extent such conduct, acts, practices, or agreements would be subject to the antitrust laws if engaged in by persons in any other professional sports business affecting interstate commerce; provided, however, that nothing in this subsection shall be construed as providing the basis for any negative inference regarding the caselaw concerning the applicability of the antitrust laws to minor league baseball.

(b) Nothing contained in subsection (a) of this section shall be deemed to change the application of the antitrust laws to the conduct, acts, practices, or agreements by, between, or among persons engaging in, conducting, or participating in the business of organized professional baseball, except the conduct, acts, practices, or agreements to which subsection (a) of this section shall apply. More specifically, but not by way of limitation, this section shall not be deemed to change the application of the antitrust laws to:

(1) the organized professional baseball amateur draft, the reserve clause as applied to minor league players, the agreement between organized professional major league baseball teams and the teams of the National Association of Professional Baseball Leagues, commonly known as the "Professional Baseball Agreement", the relationship between organized professional major league baseball and organized professional minor league baseball, or any other matter relating to professional organized baseball's minor leagues;

(2) any conduct, acts, practices, or agreements of persons in the business of organized professional baseball relating to franchise expansion, location or relocation, franchise ownership issues, including ownership transfers, and the relationship between the Office of the Commissioner and franchise owners;

(3) any conduct, acts, practices, or agreements protected by Public Law 87–331 (15 U.S.C. 1291 et seq.) (commonly known as the "Sports Broadcasting Act of 1961"); or

(4) the relationship between persons in the business of organized professional baseball and umpires or other individuals who are employed in the business of organized professional baseball by such persons.

(c) As used in this section, "persons" means any individual, partnership, corporation, or unincorporated association or any combination or association thereof.

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