Testimony of

Mr. Donald M. Fehr

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Mr. Chairman, Senator Hatch and Members of the Committee:

My name is Donald Fehr, and I serve as the Executive Director of the Major League Baseball Players Association (MLBPA), a position I have been privileged to hold for more than a decade and a half. Quite frankly, given the passage of the Curt Flood Act of 1998 - for which I again thank the Committee for its considerable time and effort - I did not expect to be invited again to testify on the subject of the antitrust exemption allegedly enjoyed by Major League Baseball (MLB) this soon, if at all. Nevertheless, since the Committee is once more hearing testimony on this issue, I thank you for permitting me to express the views of the MLBPA. I appreciate the opportunity to be here.

As I understand it, the question under consideration is whether, as a matter of sound public policy, it is appropriate for Major League Baseball to enjoy an exemption from the antitrust laws for any purposes other than those served by the Sports Broadcasting Act, 15 U.S.C. Sec 1291. My views on the appropriateness of any antitrust exemption for Major League Baseball have been set forth many times in prior testimony before this and other Committees, and need no extensive review here. Accordingly, I will make only a few brief comments, respond to any questions put by members of the Committee at the hearing, and then supplement the record following the hearing to the extent appropriate and desired by members of the Committee.

As set forth in my written testimony to the House Judiciary Committee on 6 December 2001 (copy attached), in 1979 the National Commission for the Review of Antitrust Laws and Procedures made the following recommendations with respect to antitrust immunities:

1. Free market competition, protected by the antitrust laws, should continue to be the general organizing principle for our economy.

2. Exceptions from this general principle should only be made when there is compelling evidence of the unworkability of competition or a clearly paramount social purpose.

3. Where such an exception is required, the least anticompetitive method of achieving the regulatory objective should be employed.

4. Existing antitrust immunities should be reexamined.

Moreover, the Commission went on to make clear that those seeking to create or maintain an antitrust exemption have the burden of proof "to show a convincing public interest rationale" for

the exemption, and that "[T]he defects in the marketplace necessary to justify an antitrust exemption must be substantial and clear". (Emphasis supplied.)

Simply put, I know of no compelling evidence which demonstrates the unworkability of competition in MLB, much less a clearly paramount social purpose to be served by an antitrust exemption; nor am I aware that any defects in the marketplace sufficient to warrant an exemption have been demonstrated by substantial and clear evidence. Absent such evidence and such a demonstration, it is difficult to see how granting an exemption in favor of baseball's owners - for that is whom the exemption runs to - represents sound public policy. This conclusion is buttressed by the experience of the other professional team sports, most notably the National Football League (NFL) and the National Basketball Association (NBA), both of which operate successfully, but operate subject to the antitrust laws.

The so-called baseball exemption did not come about because the Congress concluded that an exemption should be granted. Rather, the exemption came about because the Supreme Court in Federal Baseball, in 1922, found the exhibitions of baseball games to be "purely state affairs". Had the case been heard a few years later, that same finding would clearly have been inconsistent with the emerging concept of interstate commerce, and we would likely not be here today. This is not a case in which a public policy rationale for an antitrust exemption has been articulated.

Obviously, there is no remaining question about professional baseball's status with respect to interstate commerce. The fact that it is in interstate commerce is undeniable; the Supreme Court in Flood so held, and the industry itself admits it. MLB has gone so far as to invoke the Constitution's Commerce Clause for protection against state enforcement actions!

So what precisely is it about the organization or operation of Major League Baseball that justifies its belief that its conduct, even if conceded to be unreasonably anticompetitive, should nonetheless be shielded from judicial review under the antitrust laws? Surely, if MLB is to enjoy special status under the antitrust laws, its current owners, which include some of the largest and most successful corporations in the world, should be able to specifically articulate those practices in which they engage or may wish to engage which would otherwise violate the antitrust laws. But it is not enough to simply articulate what practices would constitute an antitrust violation in order to make the case for an exemption; more is required. It is up to MLB to demonstrate in a compelling way why it is in the public interest for the practices it feels would be unreasonably anticompetitive to nevertheless be permitted. Remember that a showing that certain conduct is, in fact, reasonable (e.g., that "contraction" under the current facts is not unreasonably anticompetitive) does not justify an exemption from the antitrust laws; rather, such a showing would demonstrate that the conduct was not violative of the antitrust laws in the first place, and would therefore not support the case for damages.

This goes to the very heart of the matter. In practical effect, an exemption means that the question of whether MLB is acting in an unreasonably anticompetitive manner may not be asked;

the inquiry may not be made. There is no standard against which the conduct may be weighed; there is no forum in which the facts can be ascertained; there is no judge or jury before whom a complaint may be heard. Moreover, if there is to be an exemption, an undefined or blanket exemption means that any conduct not specifically covered by the antitrust laws, whether or not foreseeable, may be claimed to be exempt; one does not know what the extent of the exemption is or might be. The question which then arises is whether this is a sound basis upon which to formulate public policy.

What, then, should our public policy be? Should baseball be treated differently than other businesses, than other sports? For what purposes? To what extent? It is apparently the position of baseball's owners that, with the exception of the Curt Flood Act, the holding in Federal Baseball means that any and all of its other actions are immune from antitrust scrutiny. Thus, in their view, no one in Minnesota may even ask if the actions or motives of the decision to contract the Twins were in furtherance of an objective forbidden by the antitrust laws, nor may the Attorney General of Florida even investigate the facts with respect to the Florida teams. What public policy underlies this result? Is the doctrine of stare decisis being served at the expense of sound policy and equal justice?

In my view, the reading of the cases that makes the most sense in the context of public policy is the opinion of Judge Padova in Piazza (a copy of which is attached), which was endorsed by the Florida Supreme Court. When the "Curt Flood Act of 1998" (CFA) was enacted, it was my view that the combination of Piazza and the CFA would virtually eliminate any special immunity for MLB, leaving it with only those statutory immunities Congress has or will deem appropriate for major league sports, such as the non-statutory exemption provided by labor law. (See the "Sports Broadcasting Act of 1961" , which expressly grants immunity to Baseball and the other professional team sports for its collective actions in selling national broadcasting rights.) However, subsequently, the Minnesota Supreme Court, and, recently, a federal district court in Florida have gone the other way. Thus, it is unclear what the status of the law is. I expect that uncertainty to remain until the Supreme Court again considers the question - for the first time in a case not about the reserve system - or until the Congress clarifies the law.

Everyone understands that this Committee is holding this hearing, as the House Judiciary Committee did two months ago, because of the decision by MLB's owners to eliminate, or "contract" two franchises, rather than attempt to sell or relocate them. The question then becomes whether the Congress should consider legislation to clarify the law, so as to make it clear that such decisions either must comply with the antitrust laws, or that the owners have an exemption in this respect. While there is no doubt of my position, given my testimony in hearings before this Committee and others over nearly two decades, I believe that it is in the public interest to clarify the law, even if that clarification is that there is, in fact, a compelling public policy interest such that baseball's owners should enjoy an exemption from the antitrust laws. And the case is there to be argued. On the one hand, MLB can be asked to demonstrate why it is in the public interest for an exemption to be had; alternatively, the people of Minnesota and elsewhere should have the opportunity to demonstrate why it is in the public interest for unreasonably anticompetitive actions with respect to the number and location of franchises to be subject to appropriate sanction (and at the very least, investigation) under the antitrust laws.

In a very real sense, the entire debate about the number and location of franchises simply comes down to whether such decisions should be made by owners free from the public policy standard established by the antitrust laws or some other standard established by the Congress, or whether the owners of major league teams should be required to conform their actions to conduct not unreasonably anticompetitive. Should the public policy of the United States be that that the owners have unlimited discretion - regardless of the action taken or the motive behind it - or should such decisions be made against the backdrop of the antitrust laws, with the courts able to ascertain the facts and determine whether the conduct passes muster?

I thank the Committee for the opportunity to submit my views, and I will be happy to answer any questions.

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