Testimony of

Mr. Robert DuPuy

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Mr. Chairman, my name is Robert A. DuPuy. I serve as Executive Vice President, Administration, and Chief Legal Officer for Major League Baseball. I have held this position since 1998, and prior to that served as outside counsel to the Commissioner and the Major League Executive Council. I appreciate the opportunity to testify before the Committee today on S.1704, introduced by Senator Wellstone, and more generally about baseball's antitrust exemption.

Let me first address baseball's exemption. That exemption has been of great importance to all of professional baseball for 80 years. As the Committee knows, the United States Supreme Court found the business of baseball to be exempt from the antitrust laws in 1922. That finding was reaffirmed in 1953 and then again in 1972, and over the years it has been applied by numerous federal district courts and circuit courts, including only a few weeks ago by the federal district court in Tallahassee, Florida.

Major League Baseball has not abused its exemption, but instead has used it to benefit the sport and its fans. One of the most important of those benefits is the ability to control franchise movement. Baseball has long had a policy of franchise stability, and we have made great efforts over the last several decades to prevent teams from abandoning their communities. Those efforts have been an unqualified success. The last time a franchise relocated was prior to the 1972 season. That record over the last 30 years most certainly would not have been possible without our antitrust exemption. Indeed, during that same period of time the National Football League has had seven franchise relocations, the National Basketball Association eleven and the National Hockey League eight, a total of 26 in the other major sports. Again, baseball has had zero, and it is not a coincidence that baseball is the only sport with an exemption.

The exemption also protects and supports baseball's extensive minor league system, which provides for the training and development of future major league players and also provides professional baseball to 160 small and medium-size communities throughout the country. A number of aspects of that extensive system would be exposed to attack under the antitrust laws without the exemption, thereby greatly increasing the likelihood of a different type of player development system with fewer players, fewer teams and fewer locations for fans to watch professional baseball. Major League Baseball invests $150 million per year in the minor leagues. Without the protections afforded us by the exemption, a less costly yet less accessible system would no doubt be developed and perhaps millions of the 35 million fans who attended games this past year could lose the opportunity.

Many other matters in baseball would be subject to challenge without the exemption, such as regulation of certain ownership requirements, the Commissioner's disciplinary authority over clubs, equipment standards and others. If the exemption were removed, based on the experiences

of other sports, baseball would almost certainly have to defend a large number of antitrust lawsuits. But unlike the experiences of other sports, we would have to defend these suits after being allowed for 80 years to develop with our exemption in place. With the possibility of treble damages in every case, no one could predict with any degree of certainty what baseball would be like after that onslaught of litigation.

We understand that S. 1704 was introduced by Senator Wellstone in response to baseball's vote to reduce the number of major league teams by two for the 2002 season. Let me be clear: no one desires contraction, no one wants to deprive even a single fan of Major League Baseball. Commissioner Selig was one of the last to be convinced of contraction's necessity. But the unassailable truth is that given the current economic structure of baseball, there are markets which have demonstrated over time that they cannot support a major league team, let alone a competitive major league team. Contraction is an attempt to face up to the economic realities facing the industry, so as to deliver a competitive product at the highest level to as many fans as possible.

Commissioner Selig and the owners are willing to confront the economic issues of the game and deal with them rather than sweep them under the rug as has been done for the past thirty years. Without a competitive product on the field, interest in the game will erode. With more and more entertainment options available, and with the seasons for major sports overlapping more and more, fans will turn to other, more competitive options. It is far preferable that baseball attempt to solve its problems in a coordinated, limited and carefully managed process than risk having a number of teams file bankruptcy, perhaps even in the middle of a season, with the resultant chaos that would inevitably ensue.

Contraction is not intended to be punitive. It is clearly heartrending for those fans who might lose their teams. But it is intended to advance consumer welfare in the end, to protect competition (not competitors) and to allow twenty-eight teams to improve their competitive posture and economic stability and to allow Major League Baseball to be affordable to the fans, all objectives consistent with the tenets of antitrust law. For example, in one instance, a contraction candidate receives 80% of its total revenues from central baseball, while another receives in excess of 50%. That $100 million a year subsidy borne by the other twenty-eight clubs at some point must inevitably lead to higher ticket prices across the entire industry, while the communities at issue continue not to support their teams.

No legitimate public policy is served by legislation that would force baseball to constantly defend before antitrust juries the reasonableness of its efforts to promote franchise stability and competitive balance.

I understand that the Committee has requested testimony on the role that baseball's antitrust exemption has played in the recent litigation in Minnesota and Florida. The exemption played no role in the Minnesota litigation. That case concerned only the Minnesota Twins' Metrodome lease for the 2002 season. In Florida, Attorney General Butterworth issued civil investigative demands against baseball, seeking to investigate possible antitrust violations in the state of Florida. Judge Robert Hinkle of the United States District Court for the Northern District of Florida, Tallahassee Division, applied baseball's exemption to prohibit that investigation. The case is on appeal to the Eleventh Circuit Court of Appeals, which has had occasion to uphold

baseball's exemption in the past. Although we expect the preliminary injunction to be affirmed and made permanent, the case provides a vivid example of an attempt by a local official to use the antitrust laws to advance local interests in a way that might be in direct conflict with the interests of fans in one or more other states.

Ironically, the presence of Attorney General Butterworth from Florida underscores this very issue. In 1992, the Florida Attorney General sued baseball to try to force the relocation of the San Francisco Giants to Tampa. Baseball resisted moving the Giants and then Chairman of the Executive Council Selig came before Congress for three hearings, including one in St. Petersburg, Florida before a very hostile gallery. Baseball stayed in San Francisco, although the owner was forced to take $15 million less than Tampa was prepared to pay for the franchise, because now-Commissioner Selig and members of the Executive Council believed San Francisco deserved to keep its team. Today the Giants play before sellouts in one of baseball's premiere facilities and the fans of San Francisco had the thrill of watching Barry Bonds set the home run record this past season.

Since then, Florida has gotten two teams, and Attorney General Butterworth is attempting to invoke the same principles he used to try to force the Giants to Tampa to prevent the Marlins or Devil Rays from relocating or being contracted. Imagine if the Twins had in fact pursued relocation to Orlando as was discussed at one point. The Florida Attorney General and the Minnesota Attorney General would be here on opposite sides of the same issue.

Federal Judge Hinkle recently wrote "It is difficult to conceive of a decision more integral to the business of Major League Baseball than the number of clubs that will be allowed to compete." Baseball has not abused its exemption, it has acted in the fans' best interests, it deserves to retain the exemption. In some respects, contraction is less subject to review than relocation. Relocation often involves an owner choosing to leave one market for perceived greener pastures. Baseball has not allowed that in more than thirty years. Contraction is a decision that one or more markets cannot be viable. While the impact on the fans in that location is the same, the element of economic instability on the part of the club is even more compelling.

The industry's financial results that led the clubs to the decision to contract have been widely reported. The independent Blue Ribbon Panel, consisting of former Federal Reserve Chairman Paul Volcker, former Senate Majority Leader George Mitchell, Yale President Richard Levin and noted commentator George Will, issued their report in July 2000, and made several recommendations for dealing with the issue of competitive imbalance. The report and an update to that report have been provided to the Committee and will be available again at the time of the hearing. The update clearly demonstrates that since the first report was issued, both the economics of the game and the competitive balance of the game have further deteriorated. None of the recommendations of the Panel has been achieved at the bargaining table. Instead the union has, as it did in 1996 with highly-respected mediator Bill Usery, chosen instead to attack the credibility of the report and the members of the Panel.

The losses of the industry are real; the competitive imbalance problem is apparent even to the most casual fan who watches only the playoffs and sees the same teams win year in and year out. Those who would put up obstacles to the legitimate attempts to deal with baseball's core economic issues, whether by legislation, litigation or grievance, are only forestalling and perhaps

exacerbating the inevitable correction which will have to occur if fans are to have faith and hope that their teams can compete. The status quo is not working and is not acceptable.

In 1997-98, the Commissioner's Office and the union worked closely with this Committee to craft a carefully worded change to our exemption. After much discussion, all parties agreed to the wording of legislation that was signed into law by the President in October 1998. That legislation, the Curt Flood Act, provides Major League players the same rights under the antitrust laws in the area of labor relations as other professional athletes have. All parties at the time believed the change created the right balance for the exemption. We continue to stand by the agreement and believe that no further changes are necessary or appropriate.

S.1704, introduced by Senator Wellstone, would open baseball to attack in areas in which baseball has worked hardest and achieved the most for the benefit of fans at all levels. In particular, baseball's admirable record of franchise stability would be threatened, creating the distinct possibility of teams moving, uncontrolled, from city to city. Our extensive minor league system would be in jeopardy, and any player development system taking its place would undoubtedly be consolidated and involve fewer communities. The legislation would spawn many lawsuits in local courts with conflicting objectives and inconsistent rulings, all of which would change the face of baseball unpredictably and damage the sport irreparably. Such results cannot be in the best interests of baseball or its millions of fans.

For all of the above reasons, we urge in the strongest terms that S.1704 not be enacted.

Thank you, again, Mr. Chairman, for the opportunity to testify before you today, and I ask that my full statement be made part of the record of this proceeding.