

MAJOR LEAGUE BROADCASTING:  
THE DELETERIOUS EFFECTS OF MAJOR  
LEAGUE BASEBALL’S ANTITRUST  
EXEMPTION ON NEVADA CONSUMERS  
WITH NO HOME TEAM

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## INTRODUCTION

It is 4pm on a hot summer Saturday in Henderson, Nevada. Phil, an avid St. Louis Cardinals fan, settles down in front of his TV, ready to watch the game. He bought an “all-access” subscription from his cable provider, and paid more than \$100 to ensure that he would be able to watch his beloved Cardinals. Phil scrolls through the guide, passing hundreds of other channels, until he reaches the large block of channels that read “Major League Baseball.” Imagine Phil’s surprise, and confusion, when he can’t find the Cardinals game.<sup>1</sup> He double-checks their schedule, and indeed, the first pitch was to be thrown at 4:05 p.m. PST. So why can’t Phil find the Cardinals game? Unfortunately for Phil, on this particular Saturday, the St. Louis Cardinals are playing the Los Angeles Dodgers. This means that Phil, despite his “all-access” subscription, will not be able to watch the Cardinals games this weekend.

What Phil—like hundreds of other consumers in Nevada—didn’t realize, is that his “all-access” subscription only allows him to watch *some* of the baseball games that are scheduled for broadcast. What Phil didn’t realize is that his living in Nevada has prevented him from watching certain teams’ games. Phil had no idea that he needed to have access to content provided to broadcasters by numerous regional sports networks to view all of the baseball games he expected to be included in his subscription. Instead of watching the Cardinals game as he had hoped, Phil will instead experience what many baseball fans have experienced: a sports broadcast “blackout.”

Understandably, Phil may have assumed that all baseball games would be part of an “all-access” game subscription. What Phil did not realize was that Major League Baseball (MLB) teams retain exclusive broadcast rights within their home team territories, allowing them to control how consumers access broadcasts within that region. Nevada consumers like Phil may have assumed that all baseball games are “out-of-market” for Nevadans, or that they are not “home team” games. After all, Nevada is not the home to any MLB team. However, this assumption—although logical—is vastly different from the reality. If we are to refer to “in-market” teams as our “home teams” for the purposes of telecasting rights, then Major League Baseball has determined that Southern

<sup>1</sup> Consumers like Phil may also experience a “blackout” by selecting the game, only to be greeted with the MLB’s “blackout message.” *Blackouts FAQ*, MLB.COM, [http://mlb.mlb.com/mlb/help/faq\\_blackout.jsp](http://mlb.mlb.com/mlb/help/faq_blackout.jsp) [<https://perma.cc/5GA8-RLYU>] (last visited Apr. 7, 2016).

Nevada has six home teams: the Oakland Athletics, the San Francisco Giants, the San Diego Padres, the Los Angeles Angels of Anaheim, the Arizona Diamondbacks, and the Los Angeles Dodgers.<sup>2</sup> By contrast, Northern Nevada has only two home teams: the Oakland Athletics and the San Francisco Giants. Similar to Southern Nevada, however, neither of these teams have any apparent, demonstrated relation to Nevada.<sup>3</sup>

This article will explore the impact that the high number of in-market games has on Nevadan consumers, and will primarily focus on Southern Nevada. Part I of this article will provide a curtailed overview on antitrust law. Part II will give a brief background and overview of the MLB telecasting rights,<sup>4</sup> and will also discuss who determines whether a team is in- or out-of-market. Part III of this article will discuss the long-standing “MLB Exemption,” which has kept the MLB outside of the reach of federal antitrust laws since 1922. Part III will also address recent legal challenges brought against the MLB and its antitrust exemption, and will address the analysis courts use when hearing these challenges. Part IV will look more specifically at Southern Nevada and will analyze whether the MLB’s conduct invokes provisions of both Federal and Nevada law by designating Southern Nevada as “home” to six baseball teams. Part IV will also look at the potential impact that the in- and out-of-market distinction has on Las Vegas consumers, and the recourse (or lack thereof) available to consumers who experience the blackout. Finally, this article will conclude by offering some suggestions for ways to limit or mitigate the burden that the MLB “Baseball Exemption” places on Nevadan consumers.<sup>5</sup>

#### I. A BRIEF PRIMER ON ANTITRUST LAW: WHAT ARE ANTITRUST LAWS, AND WHY SHOULD WE CARE?

If we were to oversimplify the scope and purpose of antitrust legislation, we could say that antitrust laws are meant to prevent anticompetitive business practices or unreasonable restrictions on competition that harm or undermine the free market of capitalism.<sup>6</sup> Although the antitrust laws contained in Title 15, Chapter 1 of the United States Code are more nuanced than this brief descrip-

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<sup>2</sup> *Blackout*, MLB.COM, <http://www.mlb.com/mlb/subscriptions/blackout.jsp?postalCode=%2089120> [<https://perma.cc/3VGA-5UCQ>] (last visited Apr. 7, 2016).

<sup>3</sup> *Blackout*, MLB.COM, <http://www.mlb.com/mlb/subscriptions/blackout.jsp?postalCode=%2089523> [<https://perma.cc/NZ7D-7SL5>] (last visited Apr. 7, 2016).

<sup>4</sup> Though this article is titled “Major League Broadcasting” as a tongue-in-cheek reference to its baseball content, the issue at hand is more properly referred to as “telecasting.” The terms “broadcasting” and “telecasting” will largely be used interchangeably throughout, referring predominantly to commercial television rights as opposed to other means of electronic mass communication like internet or radio transferal.

<sup>5</sup> In the interest of simplicity, this article will refer to this as the “Baseball Exemption,” but capitalization of the term should not be construed as recognition of its applicability to any of the proposed analyses contained herein.

<sup>6</sup> See generally Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2012); Clayton Antitrust Act, 15 U.S.C. §§ 12–27, 52–53 (2012); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

tion implies, the overarching purpose of the Chapter is to prevent unreasonable restraints to trade.<sup>7</sup> Antitrust laws benefit consumers and the market by prohibiting—and hopefully preventing—anticompetitive business practices, ultimately fostering an economy that encourages innovation, keeps service quality high, and pushes prices down.<sup>8</sup>

Antitrust laws first originated in America in the 1890s, when Congress enacted the Sherman Antitrust Act.<sup>9</sup> The Sherman Act prohibits companies from unreasonably restricting competition, and vests the Justice Department with authority to seek redress from federal courts for Sherman Act violations.<sup>10</sup> The Federal Trade Commission's authority to take action against antitrust violators offers American consumers further protection against anticompetitive practices.<sup>11</sup> Indeed, by enacting the Sherman Act, "Congress 'wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements. . . .'"<sup>12</sup> Without the protections offered by the Sherman Act and its progeny, corporations and conglomerates would have the capacity to consolidate power and fix product prices far above "fair market value." In a society based upon a free market economy, the consequences of inadequate antitrust laws could be devastating.

## II. MAJOR LEAGUE BROADCASTING RIGHTS

### A. "Home Television Territory" Organization for Major League Baseball

The MLB imposes strict restrictions on television broadcasting rights of live sporting events. The MLB's Constitution includes many provisions broadcasting of different franchises and Clubs to the exception of others.<sup>13</sup> Specifically, Article X, Section 3 of the MLB Constitution gives each Club exclusive contract rights to the live telecast of its home and away games, so long as those

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<sup>7</sup> See generally 15 U.S.C. §§ 1–7.

<sup>8</sup> See *Anticompetitive Practices*, FED. TRADE COMMISSION, <https://www.ftc.gov/enforcement/anticompetitive-practices> [<https://perma.cc/T3BU-DHFQ>] (last visited Apr. 7, 2016).

<sup>9</sup> 15 U.S.C. §§ 1–7.

<sup>10</sup> *Id.* § 4.

<sup>11</sup> See 15 U.S.C. § 45 (2012) (giving the FTC authority to use its administrative powers to enforce the Sherman Act); *Fed. Trade Comm'n v. Sperry & Hutchinson Trading Stamp Co.*, 405 U.S. 233 (1972) (stating that the FTC has authority to take action against a company's "unfair" business practices, even if those practices don't truly violate the Antitrust laws).

<sup>12</sup> *Gulf Oil Corp. v. Copp Paving Co.*, 419 US 186, 194 (1974) (quoting *United States v. Se. Underwriters Ass'n*, 322 U.S. 533, 558 (1944)).

<sup>13</sup> MAJOR LEAGUE CONST. art. VIII, § 9, [http://www.ipmall.info/hosted\\_resources/SportsEntLaw\\_Institute/League%20Constitutions%20&%20Bylaws/MLConstitutionJune2005Update.pdf](http://www.ipmall.info/hosted_resources/SportsEntLaw_Institute/League%20Constitutions%20&%20Bylaws/MLConstitutionJune2005Update.pdf) [<https://perma.cc/WA4S-EX5R>] (last visited Apr. 7, 2016). In the interest of clarity and simplicity, due to the frequent use of the term "MLB" throughout this article, the authors will refer to the Major League Constitution—the governing document for Major League Baseball—as "the MLB Constitution."

agreements are limited to the area of the Club's "home television territory" (HTT).<sup>14</sup> These exclusive rights apply to all regular-season home and away games.<sup>15</sup> Notable exceptions to the HTT limitations are post-season and championship games.<sup>16</sup> Additional exceptions are games that ESPN elects to air itself, which are available to all consumers with access to an ESPN broadcast, and without regard to a given HTT.<sup>17</sup>

Though the MLB's limitation of broadcasting rights within HTTs is unambiguous, the actual boundaries of the territories remain unclear. Article VIII of the MLB Constitution provides, in part, that "the definitions of the home television territories of the Major League Clubs shall be maintained in the Commissioner's Office."<sup>18</sup> Consequently, the actual boundaries of a Club's HTT are not necessarily public knowledge.<sup>19</sup> This is in contrast to a Club's "operating territories," which are clearly designated in the MLB Constitution, and are comparatively limited in geographic scope.<sup>20</sup> With few deviations, a Club's operating territory is confined to the county where the team is located, and those counties in the immediate vicinity.<sup>21</sup>

Although the MLB Constitution does not determine the official areas of the HTT, and they are not otherwise publically available through the MLB, there are several approximated territory maps online that purport to depict the territories' likely configuration.<sup>22</sup> These maps have been generated through a number of investigative approaches, including through contacting broadcasters, Clubs, and through zip code search results performed on MLB.com—the most common way for consumers to determine which HTT (or HTTs) they fall within.<sup>23</sup> To market its all-inclusive television and online-viewing packages, the MLB website allows users to enter their zip code and find out which Club's (or Clubs') live games are blacked out given the residence at which the consumer will watch his or her game package.<sup>24</sup> These resources, as of this writing, are

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<sup>14</sup> *Id.* art. X, § 3.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* § 4.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* art. VIII, § 9.

<sup>19</sup> Numerous outlets have, however, created maps that indicate rough boundaries for the broadcasting regions. See Nathaniel Grow, *End the Blackouts*, *HARDBALL TIMES* (Jan. 14, 2015), <http://www.hardballtimes.com/end-the-blackouts> [<https://perma.cc/2FRN-AA35>]. These territorial maps, as discussed hereafter, have provided consumers exposure to market divisions that, pursuant to the MLB Constitution, would otherwise remain with the Commissioner's Office. MAJOR LEAGUE CONST. art. VIII, § 9. Consumer transparency will be discussed at greater length *infra*.

<sup>20</sup> MAJOR LEAGUE CONST. art. VIII, § 8.

<sup>21</sup> *Id.*

<sup>22</sup> See Grow, *supra* note 19.

<sup>23</sup> See, e.g., *id.*

<sup>24</sup> *Blackout Restrictions*, MLB.COM, <http://mlb.mlb.com/mlb/subscriptions/index.jsp#blackout> [<https://perma.cc/6UTB-GRT9>] (last visited Apr. 7, 2016).

the only way the average consumer can approximate the area of the HTT that controls available broadcasts.

In addition to a glaring lack of transparency, another issue that arises when considering these maps is that the HTT broadcasting rights often extend significantly further than a Club's ordinary operating territory and, in some circumstances, present significant overlaps among clubs.<sup>25</sup>

### B. Regional Sports Networks

Because each MLB Club retains exclusive rights to contract with television networks, consumers within the boundaries of that HTT experience multiple limitations upon their access to the Club's games. Consumers can generally only watch a team's live games if they have access to the network that has contracted to carry its games.<sup>26</sup> Clubs have determined that the most profitable manner to exercise these exclusive rights is to offer their live game telecasts through the use of regional sports networks.<sup>27</sup> The term "regional sports network" (RSN) generally refers to a content-specific television station that offers live broadcasts of professional and college sports to a local or regional market.<sup>28</sup> The San Francisco Giants, for example, utilize Comcast Sports Net (CSN) Bay Area as their RSN; CSN governs the exclusive broadcasting rights to all San Francisco Giants games within the HTT.<sup>29</sup>

After paying for the right to be the exclusive provider of a Club's telecasts within its HTT, the RSN then negotiates with various satellite and cable providers within that HTT.<sup>30</sup> These negotiations determine a viewer's actual access to a Club's games. Generally, if the RSN is unable to reach an agreement with

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<sup>25</sup> The most egregious of these overlaps appear to be in Iowa and Southern Nevada, both of which are claimed as HTTs of six MLB teams. See Erik Malinowski, *WTF MLB? Baseball Strikes Out with Its Streaming Policies*, ROLLINGSTONE (June 5, 2015), <http://www.rollingstone.com/sports/features/wtf-mlb-baseball-strikes-out-with-its-streaming-policies-20150605> [https://perma.cc/3DAL-R3JE]. However, it is perhaps the U.S. Territory of Guam that best highlights the ridiculousness of the MLB blackout policy. People in Guam cannot watch Oakland A's or San Francisco Giants games because they are in the Northern California "home" territory, even though Guam is nearly 5800 miles away from the Bay Area. *Id.*

<sup>26</sup> *Blackout Restrictions*, *supra* note 24.

<sup>27</sup> See Maury Brown, *Through July, MLB Telecasts on Regional Sports Networks Dominate Prime Time TV*, FORBES (Aug. 5, 2014), <http://www.forbes.com/sites/maurybrown/2014/08/05/mlb-telecasts-on-regional-sports-networks-dominate-prime-time-television/#268c3bf12c24> [https://perma.cc/P39P-PSYS] (discussing Major League Baseball's success in using regional sports networks, author Maury Brown noted that "[e]ach regional sports network televises an average of 148 MLB game per season, most in prime time (7p-11p), when the television audience is the greatest and advertisers are looking to get the best bang for their buck.").

<sup>28</sup> See George Foster et al., *Determinants of Regional Sport Network Television Ratings in MLB, NBA, and NHL*, 28 J. SPORT MGMT. 356, 357 (2014).

<sup>29</sup> See *Giants Talk*, COMCAST SPORTSNET BAY AREA, <http://www.csnbayarea.com/giants> [https://perma.cc/QC95-HJBW] (last visited Apr. 7, 2016).

<sup>30</sup> See Foster *supra* note 28, at 358.

a provider, consumers within the Club's HTT will be unable to watch the live game telecasts of that respective Club. As an added consequence of this blackout, consumers have limited apparent recourse beyond making additional purchases with a competing provider that carries that RSN. Further, it is not necessarily apparent to consumers who, exactly, is to blame for game blackouts.

This brings us back Phil, the St. Louis Cardinals' fan, sitting on his couch wondering why he couldn't watch his team. Part of Phil's hypothetical problem was that his beloved Cardinals were playing the Los Angeles Dodgers. In 2014, the Dodgers made their own television channel—SportsNet LA—and signed an exclusive deal with Time Warner Cable (TWC), giving TWC the right to run and distribute SportsNet LA.<sup>31</sup> For fourteen months, TWC essentially held Dodgers games hostage: TWC customers could watch Dodgers games on SportsNet LA, but TWC would not lower the per-home price for other distributors.<sup>32</sup> Because of the stalemate between TWC and other cable providers, *more than half* of the Los Angeles market was precluded from watching Dodgers games in 2014.<sup>33</sup> Luckily for many Dodgers fans, this impasse came to an end when Charter Communications began carrying SportsNet LA in mid-2015.<sup>34</sup> However, Phil remains unlucky because he lives in Las Vegas, and SportsNet LA continues to be unavailable to most Las Vegas consumers.

### C. Major League Baseball Broadcasting in Nevada

Nevada is in an interesting situation when it comes to MLB Home Television Territories and the corresponding RSNs. Pursuant to the MLB Constitution, a Club could have significant control over areas of Nevada, provided that those areas fell within that Club's operating territory. Again, this territory

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<sup>31</sup> Mike Axisa, *Dodgers Announce Deal with Time Warner, Launch of SportsNet LA*, CBS SPORTS (Jan. 28, 2013, 11:38 AM), <http://www.cbssports.com/mlb/eye-on-baseball/21620862/dodgers-announce-deal-with-time-warner-launch-of-sportsnet-la> [https://perma.cc/XS6T-NCWR]; see TIME WARNER CABLE SPORTSNET LA, <http://watch.sportsnetla.com/?redirect=http%3A%2F%2Fwww.sportsnetla.com%2F> [https://perma.cc/5Y7B-XLVE] (last visited Apr. 7, 2016).

<sup>32</sup> Ed Sherman, *As TV Battle Looms, Many Dodgers Fans Left in Dark*, USA TODAY (Feb. 26, 2014, 11:20 AM), <http://www.usatoday.com/story/sports/mlb/2014/02/25/dodgers-signed-a-mega-86-billion-pact-with-time-warner-cable/5819387> [https://perma.cc/KJJ9-HQTQ] (“DirecTV, Verizon FiOS and AT&T U-Verse are among the carriers balking at charging their subscribers \$4.50-\$5 month per month to carry SportsNet LA. ESPN, by comparison, gets about \$5.40 per home, TNT \$1.20.”).

<sup>33</sup> *Id.* (“Time Warner’s 2 million cable subscribers in Los Angeles will get their Dodger baseball from the moment the channel launches. The remaining 55% of the market’s TV households are at the mercy of the network and their cable or satellite provider reaching an agreement.”).

<sup>34</sup> Meg James, *Charter to Carry Dodgers Channel, SportsNet LA, Beginning Tuesday*, L.A. TIMES (June 4, 2015, 5:40 PM), <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-charter-to-carry-dodger-channel-june-9-20150604-story.html> [https://perma.cc/ZN9S-A8QA]. However, it is worth noting that Charter only began carrying SportsNet LA once it decided to acquire TWC for approximately \$57 billion; the other pay-TV operators still refuse to pay the fees necessary to carry SportsNet LA. *Id.*

would generally be limited to the county where the Club is located, as well as immediately surrounding counties. The reality, however, is that Nevada is not home to any MLB Clubs. To be sure, no MLB Club has any physical home team presence in Nevada whatsoever, nor any apparent direct connection to Nevada consumers. Accordingly, no portion of Nevada falls within any Club's operating territory to the same extent that Southern California, for example, is squarely within the Los Angeles Dodgers' operating area.

However, the geographic limits placed on a Club's operating territory does not correlate with the boundaries of a Club's HTT. For example, despite the obvious fact that no MLB club has a physical presence in Nevada, Northern Nevada falls within both Oakland's and San Francisco's HTT.<sup>35</sup> Accordingly, California Bay Area teams (the San Francisco Giants and Oakland Athletics) have near complete control over the access to their games in a neighboring state that has no MLB presence of its own.

The HTT situation in Southern Nevada is even more troubling. Las Vegas and the surrounding area falls within a significant overlap of *six* different MLB Clubs and their RSNs: The Los Angeles Angels of Anaheim (Fox Sports West),<sup>36</sup> the San Francisco Giants (CSN Bay Area),<sup>37</sup> the Oakland Athletics (CSN California),<sup>38</sup> the Los Angeles Dodgers (SportsNet by Time Warner Cable Company),<sup>39</sup> the San Diego Padres (Fox Sports San Diego),<sup>40</sup> and the Arizona Diamondbacks (Fox Sports Arizona).<sup>41</sup>

The obvious question is why the boundaries of HTTs need to be exponentially greater than the boundaries of a Club's operating territory. The MLB Constitution offers no clear-cut answer, but the use of RSNs as the lynchpin in distributing live-game telecasts indicates that the MLB and its Clubs treat Nevada consumers as leverage for negotiations. This is apparent from the fact that the larger the boundary of a Club's HTT, the more consumers the RSN can claim to have control over when it negotiates with a cable or satellite provider. In this context, control over an HTT equates to control over recipients of advertising, because sports fans are more likely to watch a game live than record it for later viewing.<sup>42</sup>

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<sup>35</sup> Grow, *supra* note 19.

<sup>36</sup> *RSNs and Their Big League Rights*, SPORTS BUS. J. 22 (Mar. 17, 2014), <http://www.sportsbusinessdaily.com/Journal/Issues/2014/03/17/In-Depth/RSN-chart.aspx> [<https://perma.cc/YQ86-KRB4>].

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Adam Buckman, *Networks in the Hunt for DVR-Proof Non-Sports Programming*, TVNEWS DAILY (June 22, 2015, 11:41 AM), <http://www.mediapost.com/publications/television-news-daily/edition/2015/06/22/?print> [<https://perma.cc/YL6N-HEPB>] ("Live sports comprise the most DVR-proof category of programming of them all, since the nature of sports is antithetical to the concept of time-shifted TV watching.").



The consequence of this overlap appears to be a restraint on output; Nevada consumers have their broadcasting options limited by multiple competing Clubs that have no Nevada connection (beyond casual fans in that particular consumer base), all of which limit the Clubs' home games to the RSN of their choice within their HTT. This means that because Las Vegas has been deemed a part of the Giants' and the Diamondbacks' HTT, consumers in Las Vegas would have to subscribe to CSN Bay Area and Fox Sports Arizona in order to watch these "in-market" games.<sup>43</sup> In turn, the consumer's ability to subscribe to either RSN depends on whether his or her provider (e.g., DirecTV or Cox Cable) has successfully negotiated for the right to offer that RSN to its customers.

Though all of Nevada is subject to HTT division to some extent, this overlap creates the most disparate impact in Southern Nevada. Nevada consumers who pay for presumably exhaustive "season ticket"-style broadcast subscriptions<sup>44</sup> will be able to view all out-of-market games without issue. These same consumers, however, will experience a blackout for all in-market games, unless they subscribe to each of the in-market Clubs' RSN broadcasting agreements.

In theory, this requires a Southern Nevada consumer who has presumably paid for "all" MLB games to additionally purchase the telecast from each of the six overlapping clubs' RSN agreements to actually ensure access to those games.<sup>45</sup> Otherwise, all telecasts of the in-market games will be blacked out pursuant to the MLB broadcast policy and, consequently, remain generally unavailable to paying consumers.<sup>46</sup>

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<sup>43</sup> While this is generally true, the authors recognize that, in prior seasons, live telecasts of *some* Diamondbacks and Padres games have been available via simulcast to Cox Cable subscribers on a "Cox Community Channel", which is not an RSN. In the past, more Padres games than Diamondbacks games have been accessible in this manner. Currently, it is unknown how the Cox Community Channel obtained simulcast rights to these games, and it's unclear whether either the Diamondbacks or Padres will allow Cox Cable to continue offering any games via simulcast in the future. This limited exception appears to apply only to Padres and Diamondbacks games; we found no evidence that any Dodgers, Angels, Giants or Athletics games have ever been accessible in this manner in Southern Nevada.

<sup>44</sup> The most notable of these is the popular "MLB Extra Innings" package provided by DirecTV which, as its promotional materials denote, provides "almost 100 out-of-market games a week" to subscribers. *MLB Extra Innings*, DIRECTV, <http://www.directv.com/sports/mlb> [<https://perma.cc/AP59-U64R>] (last visited Apr. 7, 2016).

<sup>45</sup> In the past, this would have required a consumer to keep abreast of which television providers held contracts with which RSNs and (potentially) purchase channel packages from multiple providers. However, the MLB has recently announced that it will begin offering single team subscriptions so that fans can watch a team's entire season without blackouts. See Gershon Rabinowitz, *Breaking Down MLB.TV's Single Team Package*, BASEBALL ESSENTIAL (Jan. 5, 2016), <http://www.baseballessential.com/news/2016/01/05/breaking-down-mlb-tvs-single-team-package> [<https://perma.cc/3PKC-YVBE>].

<sup>46</sup> To date, only the in-market live game telecast was potentially available for any games involving an in-market team. Pursuant to a pending class action settlement discussed *infra*, consumers may now have the ability to watch the out-of-market team's live telecast even when the opponent is an in-market team (e.g., the ability to watch the Yankees telecast of a Yankees-Giants matchup, rather than the Giants' telecast). However, this option is condi-

*D. In-Market vs. Out-of-Market Games*

The HTTs' impact on access to in-market games also restricts access to out-of-market games, which is often disappointing to consumers who invest in greater "season ticket"-style broadcasting subscriptions like the MLB's own "MLB Extra Innings" package.<sup>47</sup> The distinction between in-market and out-of-market games is best understood by reference to a live game telecast of a specific MLB Club.

For illustrative purposes, we will again discuss the San Francisco Giants. The Giants control the distribution of all live game telecasts of Giants games in Northern Nevada as an "in-market" game, as Northern Nevada falls within the Giants' HTT.<sup>48</sup> Accordingly, these games are only accessible in Northern Nevada through the Giants' RSN—CSN Bay Area. Northern Nevada, however, is outside of the designated HTT of the New York Yankees, so the telecast of all live Yankees games in Northern Nevada is generally considered "out-of-market." Because the Yankees do not have HTT control of Northern Nevada, consumers in that region have other options for viewing most Yankees games, including "season ticket"-style broadcast subscriptions. However, if the Yankees play the Giants, a Yankees fan living in Northern Nevada won't be able to view the live telecast of that game via the standard Extra Innings Package, because that game is considered an in-market game for the Giants.

In sum, the HTTs impact access to nearly every regular-season game played by the six Clubs that claim Southern Nevada (and the two that claim Northern Nevada). Access to these "in-market" games is restricted to fans of those particular Clubs, but even fans of other Clubs have their access restricted to certain "out-of-market" games if the opponent happens to be one of the six Clubs claiming Southern Nevada.<sup>49</sup>

*E. The Existence of an Adequate Product Market in Southern Nevada*

In analyzing antitrust concerns posed by the HTTs present in Southern Nevada, it is necessary to evaluate whether an adequate product market exists for antitrust purposes. The six MLB Clubs that claim Southern Nevada within their HTTs impact access to nearly of all those teams' live games in Southern Nevada, excluding games aired on ESPN and post-season and championship games.<sup>50</sup> Because those six Clubs are the only ones that claim Southern Nevada

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tioned on the consumer subscribing to the particular RSN that carries the in-market telecasts. *See infra* notes 94, 97.

<sup>47</sup> *See MLB Extra Innings, supra* note 44.

<sup>48</sup> Grow, *supra* note 19.

<sup>49</sup> Pursuant to a pending class action settlement, consumers may have more access to out-of-market games going forward, but that expanded access will still be subject to the HTTs, requiring that consumers subscribe to the RSN affiliated with an in-market team in order to enjoy the benefits of expanded access to out-of-market games. *See infra* notes 94, 97.

<sup>50</sup> *See* Maury Brown, *2009 Season Begins with MLB Blackout Policy Still a Bone of Contention*, FOXSPORTS: THE BIZ OF BASEBALL (Mar. 26, 2009, 2:02 PM),

da, there is a compelling argument that the live game telecasts of those Clubs constitute a sufficient product market and geographic market in an antitrust analysis.<sup>51</sup> The geographic region is comprised of a significant portion of Southern Nevada, including the entirety of Clark County and surrounding areas.<sup>52</sup> The six Clubs that claim Southern Nevada exercise nearly complete control over all broadcasts of that type within that region.

There is a risk, however, that a broader product market is available because the business generated by those Clubs alone constitutes merely 20 percent of all competing Clubs nationally.<sup>53</sup> Narrowing the market analysis to games played by the respective clubs, the HTT restrictions impact roughly 40 percent of all games broadcast in Southern Nevada (i.e., any live games that involve any of the six Clubs).<sup>54</sup>

As an alternative to considering all MLB-generated business as the relevant market, an argument can be made that there is a significant in-between market for live game telecasts involving Clubs competing within the National League West (NL West) and the American League West (AL West).<sup>55</sup> All of the Clubs that claim Southern Nevada are among the 10 total teams within the NL West and the AL West. Defining the market according to these specific regional leagues, rather than MLB coverage nationally, better exemplifies the impact of the HTTs in the area: roughly 70 percent of league play in Southern Nevada is restricted by this HTT overlap, a significant increase from the broader 20 percent estimation for nationwide competition.<sup>56</sup>

There are merits to either product market definition, but the acceptance of the larger market serves to minimize the anticompetitive impact of the MLB's broadcasting restrictions. It is important in this analysis to again acknowledge the fact that, despite the myriad broadcasting restrictions that impact Nevada consumers, all restrictions are created by Clubs that have no physical presence whatsoever in Nevada. This supports the more-narrow, "regional league" prod-

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[http://bizofbaseball.com/index.php?option=com\\_content&view=article&id=3120:2009-season-begins-with-mlb-blackout-policy-still-a-bone-of-contention&catid=48:ei-mlb-network&Itemid=82](http://bizofbaseball.com/index.php?option=com_content&view=article&id=3120:2009-season-begins-with-mlb-blackout-policy-still-a-bone-of-contention&catid=48:ei-mlb-network&Itemid=82).

<sup>51</sup> See generally Philip Nelson, *Monopoly Power, Market Definition, and the Cellophane Fallacy*, U. S. DEP'T JUSTICE (June 25, 2015), <http://www.justice.gov/atr/monopoly-power-market-definition-and-cellophane-fallacy> [https://perma.cc/MA7B-CVE3].

<sup>52</sup> See Grow, *supra* note 19.

<sup>53</sup> Of the 30 national MLB Clubs nationally, the six teams claiming the Southern Nevada region within their HTT represent 20 percent of the League's teams. *Id.*

<sup>54</sup> There are 30 Major League Baseball teams (15 teams in the NL and 15 teams in the AL) and six teams claiming the region within their HTT (even in the smaller markets of the individual leagues and regions, six teams hold telecasting rights due to RSN agreements). *Major League Baseball Standings*, SPORTS ILLUSTRATED, <http://www.si.com/mlb/standings?season=2016&grouping=conference> [http://perma.cc/3F4K-JXG8] (last visited Apr. 7, 2016).

<sup>55</sup> *Id.*

<sup>56</sup> See Wendy Thurm, *MLB Strongly Defends Local Broadcast Territories in Court*, FANGRAPHS (May 23, 2014), <http://www.fangraphs.com/blogs/mlb-strongly-defends-local-broadcast-territories-in-court> [https://perma.cc/2FTA-BXDV].

uct market analysis due to the fact that the overlapping HTT boundaries are a consequence of regional Clubs claiming areas beyond their accepted (and defined) operating territories under the MLB Constitution. Because these encroaching HTT boundaries emanate from teams in the western region that are within either the NL West or the AL West, the product market ought to be defined by live game telecasts within those leagues and the affected consumers of those games.

### III. THE MAJOR LEAGUE BASEBALL ANTITRUST EXEMPTION

#### A. *The Origins of the Major League Baseball Exemption and the Power of Stare Decisis*

Antitrust laws are a necessary and long-standing staple in American jurisprudence. Congress first enacted the Sherman Act, the cornerstone of antitrust law, in 1890.<sup>57</sup> The Sherman Act states, in relevant part, that “[e]very 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 declared to be illegal.”<sup>58</sup> Antitrust laws are designed to protect the competitive nature of business in a capitalist system, thereby protecting consumers from exploitation.<sup>59</sup> Indeed, the Supreme Court has stated that the Sherman Act was designed to be a “consumer welfare prescription,” and that “[any] restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law.”<sup>60</sup>

However, despite this emphasis on consumer welfare, the business of professional baseball has long been exempted from scrutiny under antitrust law. This judicially-created exemption arose in 1922, when the United States Supreme Court decided *Federal Baseball Club of Baltimore, Inc. v. Nat’l League of Prof’l Baseball Clubs*.<sup>61</sup> In *Federal Baseball*, the Court held that commercial exhibition of baseball games were state events; because there was no interstate commerce involved in baseball game exhibitions in 1922, they were not subject to federal antitrust law at that time.<sup>62</sup>

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<sup>57</sup> 15 U.S.C. § 1 (2012).

<sup>58</sup> *Id.*

<sup>59</sup> See Daniel A. Crane, *Market Power Without Market Definition*, 90 NOTRE DAME L. REV. 31, 35 (2014) (“Today there is a wide consensus that the primary, if not exclusive, goal of antitrust law is to promote economic efficiency and consumer welfare by deterring firms from subverting the competitive process and thus deriving the power to reduce output, price above competitive levels, and stymie innovation.”).

<sup>60</sup> *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 107 (1984).

<sup>61</sup> *Fed. Baseball Club of Balt., Inc. v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200, 208–09 (1922).

<sup>62</sup> *Id.* It is worth noting that the *Federal Baseball* opinion never uses the word “exemption;” the holding was based simply on the Court’s determination of whether the subject matter involved interstate commerce.

Over the next fifty years, the Supreme Court upheld and clarified the Baseball Exemption through two subsequent decisions. When deciding *Toolson v. New York Yankees*, the first case to invoke the Baseball Exemption, the Court further insulated the professional baseball industry from federal antitrust liability because, at the time, major league baseball had “been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation.”<sup>63</sup> Later, in *Flood v. Kuhn*, the Court acknowledged that the Baseball Exemption is an “aberration” but again upheld the protection on the basis of *stare decisis*:

Even though others might regard this as “unrealistic, inconsistent, or illogical,” the aberration is an established one, and one that has been recognized not only in *Federal Baseball* and *Toolson*, but in *Shubert*, *International Boxing*, and *Radovich*, as well, a total of five consecutive cases in this Court. It is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis*, and one that has survived the Court’s expanding concept of interstate commerce. It rests on a recognition and an acceptance of baseball’s unique characteristics and needs.<sup>64</sup>

In its reasoning, the *Flood* Court was careful to distinguish baseball from other sports industries when it noted that “[o]ther professional sports operating interstate—football, boxing, basketball, and, presumably, hockey and golf—are not so exempt.”<sup>65</sup> The Court reasoned that Congress wanted the Baseball Exemption to endure, because Congress had not amended the Sherman Act to expressly include Major League Baseball after the decision in *Federal Baseball*.<sup>66</sup> Therefore, the *Flood* Court opined that if Major League Baseball is ever to be subject to the provisions of federal antitrust law, it would have to be through express legislative action.<sup>67</sup>

When looked at in a vacuum, the Court’s decision in *Flood* solidly stands on the grounds of separation of powers. The Sherman Act has been amended numerous times since the *Federal Baseball* decision, and Congress has not subsequently sought to legislatively undo or clarify the Baseball Exemption.<sup>68</sup> However, the continued existence of the Baseball Exemption seems to disregard the vast differences between modern Major League Baseball and the MLB of the 1920s. In 1922, the Court had to consider whether the Sherman Act applied to baseball exhibitions in which the *only* interstate actions were transporting players from one stadium to another.<sup>69</sup> Under those circumstances, it was

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<sup>63</sup> *Toolson v. N.Y. Yankees*, 346 U.S. 356, 356 (1953).

<sup>64</sup> *Flood v. Kuhn*, 407 U.S. 258, 282 (1972) (citation omitted) (quoting *Radovich v. Nat’l Football League*, 352 U.S. 445, 452 (1957)).

<sup>65</sup> *Id.* at 282–83.

<sup>66</sup> *Id.* at 283.

<sup>67</sup> *Id.*

<sup>68</sup> 15 U.S.C. §§ 1–7 (2012).

<sup>69</sup> *Fed. Baseball Club of Balt., Inc. v. Nat’l League of Prof’l Baseball Clubs*, 259 U.S. 200, 208–09 (1922).

reasonable for the Court to hold that the business of baseball was purely intrastate.<sup>70</sup>

However, in 1972—fifty years after *Federal Baseball*—the *Flood* Court realized, and stated unequivocally, that “professional baseball is a business . . . engaged in interstate commerce.”<sup>71</sup> Because of this, the endurance of the Baseball Exemption rests on Major League Baseball’s reliance on its existence<sup>72</sup> and the presumption that subjecting the MLB to antitrust laws now—after letting it develop for nearly 100 years under the assumption that it was exempt from antitrust regulation—would be inherently unfair.<sup>73</sup>

*B. Distinguishing the Sports Broadcasting Act Exemption from the Baseball Antitrust Exemption*

Though Congress has not yet chosen to legislatively reverse or narrow the longstanding Baseball Exemption, it has defined specific exemptions with regard to broadcasting activities. In 1961, Congress passed the Sports Broadcasting Act,<sup>74</sup> which created a particularized exemption to the antitrust laws as applied to the televising of sporting events.

The Sports Broadcasting Act created an exemption that allows professional sports teams that “sell or otherwise transfer” their rights in sponsored telecasting of games uninhibited by antitrust law.<sup>75</sup> Section 1292, however, limits this exemption by providing that the person to whom such rights are sold or transferred cannot be prohibited from televising the games within any area.<sup>76</sup> As a caveat to this limitation, § 1292 also preserves each team’s right to impose restrictions on the telecasting of games “within the home territory of a member club of the league on a day when such club is playing a game at home.”<sup>77</sup>

Importantly, the antitrust exemption provided by § 1291 applies only to “sponsored telecasting” of a team’s games and is inapplicable to non-sponsored telecasting.<sup>78</sup> As the United States District Court for the Southern District of California noted, the term “sponsored telecasting” refers to over-the-air (free

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<sup>70</sup> It may be worth noting that the first radio broadcast of a major league baseball game occurred on August 5, 1921, less than one year before *Federal Baseball* was argued and decided. Christopher H. Sterling, *Radio Broadcasting*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/topic/radio/Juvenile-action-and-adventure-series#ref1123774> [<https://perma.cc/X9MB-V84T>]. It may further be worth noting that this original 1921 broadcast was of a game between two Pennsylvania teams. *Id.*

<sup>71</sup> *Flood*, 407 U.S. at 282.

<sup>72</sup> Brent Kendall, *Major League Baseball Scores Victory at Supreme Court*, WALL STREET J. (Oct. 5, 2015), <http://www.wsj.com/articles/major-league-baseball-scores-victory-in-supreme-court-ruling-1444054214>.

<sup>73</sup> See *Toolson v. New York Yankees*, 346 U.S. 356, 357 (1953).

<sup>74</sup> 15 U.S.C. §§ 1291–95.

<sup>75</sup> *Id.* § 1291.

<sup>76</sup> *Id.* § 1292.

<sup>77</sup> *Id.*

<sup>78</sup> *Kingray v. Nat’l Basketball Ass’n*, 188 F. Supp.2d 1177, 1183 (S.D. Cal. 2002).

broadcasting), and non-sponsored telecasting refers to national cable (pay) broadcasting.<sup>79</sup> Similarly, the United States District Court for the Southern District of New York also relied on this distinction in *Laumann v. National Hockey League*, which held that the antitrust exemption provided by § 1291 did not apply to the telecasting of out-of-market games.<sup>80</sup>

In sum, the exemption provided by the Sports Broadcasting Act does not extend to channels of distribution such as cable television, pay-per-view, and satellite television networks.<sup>81</sup> In order to watch the games of the six Clubs that claim Southern Nevada as a home TV territory, Nevada consumers must subscribe to one of the affiliated RSNs, all of which are non-sponsored forms of telecasting.

Accordingly, the Sports Broadcasting Act exemption is inapplicable to the broadcasting of MLB clubs via RSNs, and antitrust concerns raised by MLB broadcasting activities rest strictly within the purview of the preexisting Baseball Exemption.<sup>82</sup> Similar to the exemption provided by the Sports Broadcasting Act, however, the Baseball Exemption has not developed without challenges along the way.

### C. *Recent Criticisms and Legal Challenges to the Baseball Exemption*

The history of the Baseball Exemption has garnered significant criticism from the legal community and has been the subject of more recent limitations to its scope. Notably, in 1982, the United States District Court for the Southern District of Texas acknowledged, in *Henderson Broadcasting Corp. v. Houston Sports Ass'n*, that the baseball antitrust exemption has little place in modernity beyond the principle of *stare decisis*.<sup>83</sup> The court acknowledged the longstanding presumption against exemptions to the antitrust laws, as well as the heightened burden placed upon defendants to prove that their actions are actually exempted from those laws.<sup>84</sup>

The court also observed that other courts had limited the Baseball Exemption as applicable only to those aspects of baseball that are integral to the sport, and that it does not extend to “related activities which merely enhance its commercial success.”<sup>85</sup> The *Houston Sports* court further noted that the Supreme Court, in creating the Baseball Exemption, implied that broadcasting activities are “not central enough to baseball to be encompassed in the baseball

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<sup>79</sup> *Id.*

<sup>80</sup> *Laumann v. Nat'l Hockey League*, 907 F. Supp. 2d 465, 485 (S.D.N.Y. 2012).

<sup>81</sup> 15 U.S.C. §§ 1292–95.

<sup>82</sup> See Wendy Thurm, *MLB Strongly Defends Local Broadcast Territories in Court*, FANGRAPHS (May 23, 2014), <http://www.fangraphs.com/blogs/mlb-strongly-defends-local-broadcast-territories-in-court> [<https://perma.cc/5RS4-ZTUR>].

<sup>83</sup> *Henderson Broad. Corp. v. Houston Sports Ass'n*, 541 F. Supp. 263, 267 (S.D. Tex. 1982).

<sup>84</sup> *Id.* at 265.

<sup>85</sup> *Id.*

exemption.”<sup>86</sup> This 1982 approach to broadcasting, despite pertaining specifically to radio broadcasts, is particularly instructive when it comes to evaluating the current state of MLB television broadcasting restrictions.

In addition to the *Houston Sports* court’s perceived limitations to the scope of the Baseball Exemption, more contemporary precedent supports the inapplicability of the Baseball Exemption to live game telecasts. For example, the United States Supreme Court addressed the distinction between the NFL and its aggregate teams in *American Needle, Inc. v. National Football League*.<sup>87</sup> In that case, the Court held that the numerous teams comprising the NFL should not be treated as a single entity for purposes of claims under Section 1 of the Sherman Act with regards to marketing of the teams’ individually owned intellectual property.<sup>88</sup> Although the opinion did not address the historical exemption of baseball from the antitrust laws, legal scholars have already concluded that the *American Needle* holding indicates an increased willingness by the Supreme Court to both subject sports leagues to antitrust inquiry and to analyze their actions under the rule of reason test.<sup>89</sup>

Under traditional antitrust analysis,<sup>90</sup> the “rule of reason” test is used to determine whether the allegedly anticompetitive behavior unreasonably restrains trade.<sup>91</sup> Unlike actions that are considered to be illegal per se,<sup>92</sup> courts analyze actions under the rule of reason based upon totality of the circumstances.<sup>93</sup> The *American Needle* court’s decision to apply the rule of reason test to sports leagues’ activity indicates that a fact-dependent analysis of the overall anticompetitive effect of commercial activities may eventually supplant the historical exemption to antitrust inquiry.

Perhaps more importantly, the United States District Court for the Southern District of New York relied on the holding in *American Needle* when concluding that “[t]he fact that the NHL and MLB are lawful joint ventures does not preclude plaintiffs from challenging the Leagues’ particular policies under the rule of reason.”<sup>94</sup> In so ruling, the court extended the *American Needle* holding

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<sup>86</sup> *Id.* at 265, 267.

<sup>87</sup> 560 U.S. 183, 186 (2010).

<sup>88</sup> *Id.*

<sup>89</sup> Michael J. Mozes & Ben Glicksman, *Adjusting the Stream? Analyzing Major League Baseball’s Antitrust Exemption After American Needle*, 2 HARV. J. SPORTS & ENT. L. 265, 290 (2011).

<sup>90</sup> *See infra* Part IV.

<sup>91</sup> *See infra* Part IV.

<sup>92</sup> *See infra* Part IV.

<sup>93</sup> *See infra* Part IV.

<sup>94</sup> *Laumann v. Nat’l Hockey League*, 907 F. Supp. 2d 465, 485 (S.D.N.Y. 2012). Note that the *Laumann* case was filed as Case No. 1:12-cv-01817-SAS in the Southern District of New York. A separate class action, *Garber vs. MLB*, was filed as Case No. 1:12-cv-03704-SAS in the Southern District of New York. The two cases were later consolidated, with court opinions pertaining to both issued under the *Laumann* case name (as cited throughout). The *Laumann* class plaintiffs reached a settlement with the NHL in 2015, while the *Garber* class plaintiffs continued litigation until their recent settlement with MLB. *See infra* note 97.



to include the live telecast markets in professional baseball and professional hockey.<sup>95</sup> NHL live game telecasts were also the subject of the court's analysis, and the court importantly drew parallels between the NHL and the MLB, particularly with regard to their respective telecasting arrangements.<sup>96</sup> This comparison served to acknowledge how similarly situated these sports leagues are in the market, and raised further questions about the applicability of the Baseball Exemption to the benefit of one league—and one sport—over another.

Recently, a class of plaintiffs sued the MLB and affiliated sports broadcasters in *Garber v. MLB*, raising factual and legal allegations that are parallel to the circumstances in Southern Nevada.<sup>97</sup> In the *Garber* case, two classes of plaintiffs alleged that, due to the HTTs, they were subjected to unreasonably high prices and an unreasonable number of “blackout” games.<sup>98</sup> The most

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<sup>95</sup> *Laumann*, 907 F. Supp. 2d at 486.

<sup>96</sup> *Id.* at 488.

<sup>97</sup> Class Action Complaint at 2–8, *Laumann*, 907 F.Supp.2d 465 (2012) (No. 12 Civ 3704 (SAS)); *Laumann*, 907 F. Supp. 2d at 471. It is important to note that, as of the time of this writing, MLB and the Garber class plaintiffs have filed a proposed class action settlement agreement, and a fairness hearing is currently scheduled for April 25, 2016 for the court's approval. The proposed settlement terms provide various degrees of relief for the plaintiff classes. First, the settlement will allow, but not require, Comcast and DirecTV to offer single team television packages alongside a league-wide “MLB Extra Innings”-type package at a discounted rate. Second, MLB.tv, Comcast, and DirecTV will provide an add-on option for subscribers to a league-wide package that allows users to “Follow Your Team” and view all telecasts of a specific out-of-market club, similar to the television option. Yet, both the single-team and “Follow Your Team” options are subject to the HTTs and exclusive rights of in-market Clubs; i.e., the full benefit of either option can only be realized by *also* subscribing to the RSN of the respective in-market team(s). Class Action Settlement Agreement, *Garber v. Office of the Comm’r of Baseball*, 120 F. Supp. 3d 334 (2014) (No. 12 Civ 3704 (SAS)) (S.D.N.Y. Jan 20, 2016) (identifying settlement terms between the *Garber* plaintiffs and defendants in the *Laumann* case, as proposed for court approval).

Third (in more limited circumstances) consumers who do not have access to pertinent distributors (part of a market of “Unserved Fans”) will have the option to purchase in-market telecasts via MLB.tv without having to subscribe to an unavailable intermediary RSN, subject to MLB verifying that such consumer truly has no available access to a distributor. Fourth, the proposed settlement identifies MLB price relief for MLB.tv and MLB Extra Innings packages for standard out-of-market games with limitations on price increases in upcoming years. It is worth noting that, though numerous proposed provisions are geared to the internet plaintiffs, some consumers may have equivalent cable recourse through television streaming devices like Roku, Apple TV, proprietary “smart TV” software, and other internet-to-television options. *Id.*

The settlement provisions, however, are subject to certain limitations. Notably, the duration of the relief offered is limited to only five years beginning with either the 2016 or 2017 baseball season (depending on the particular settlement term). Additionally, not all teams' telecasts are covered by the settlement; only a portion of RSNs are owned by the Defendants to whom the terms apply. Arguably most importantly, however, the HTT scheme that underpinned the *Garber* case and posture the Southern Nevada in-market overlap remains untouched. The existence and scope of the HTT boundaries and the consequent blackouts will continue, presumably allowing RSNs to retain their local bargaining power throughout the settlement period and after its duration. *Id.*

<sup>98</sup> *Laumann*, 907 F. Supp. 2d at 474.

analogous class is comprised of consumers who purchased cable packages through television providers like Comcast and DirecTV with the expectation of watching live baseball game broadcasts.<sup>99</sup> Plaintiffs allege, and other observers agree,<sup>100</sup> that the MLB's ability to enter into exclusive contracts with television networks pressures consumers into purchasing both cable subscriptions and out-of-market cable packages to account for the blackout. The result is a functional "double-dipping" by the League due to their elimination of competition amongst broadcasters,<sup>101</sup> and an apparent restraint of trade.

Even more recently, the *Laumann* court explicitly rejected the MLB's argument that the historical Baseball Exemption should apply to live game telecasts.<sup>102</sup> In support of its decision to patently reject the applicability of the ninety-two-year-old Baseball Exemption, the court noted a prior instance in which the scope of the Baseball Exemption was narrowed: "[i]n 1998, Congress passed the Curt Flood Act, which effectively removed employment-related agreements from the baseball exemption. The Act did not alter the applicability of the antitrust laws to 'any conduct, acts, practices, or agreements other than . . . employment of major league baseball players.'" <sup>103</sup>

Simply put, courts seem less content than ever to resign rule of reason analyses to the principle of *stare decisis* alone. These recent decisions may provide a solid foundation for future challenges to the Baseball Exemption.<sup>104</sup>

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<sup>99</sup> *Id.*; Nathan M. Hennagin, *Blackout or Blackmail? How Garber v. MLB Will Shed Light on Major League Baseball's Broadcasting Cartel*, 8 BROOK. J. CORP., FIN. & COM. L. 158, 175 (2013).

<sup>100</sup> See Hennagin, *supra* note 99, at 159 (arguing in 2013 that the *Garber* plaintiffs should prevail against the MLB in the Southern District of New York notwithstanding the Baseball Exemption); see also Jeff Passan, *TV Blackouts Case Against MLB at Critical Point*, YAHOO! SPORTS (Sept. 21, 2012, 1:41 AM), <http://sports.yahoo.com/news/tv-blackout-case-against-mlb-at-critical-point.html> [<https://perma.cc/RVL9-L5ND>]. In that article, sports journalist Jeff Passan opined that, upon the filing of the *Garber* complaint, *the case represented* "the workaround code for the working person." *Id.* (claiming that *Garber* "[was] the suit behind which every baseball fan should stand. It's 2012, where everything is available everywhere, and pure greed is keeping baseball off our TVs, our tablets, our laptops and our phones. If baseball refuses to budge on an issue so archaic, so absurd and so blatant in its indifference toward people who want to buy one of their products, the league should suffer through the embarrassment of getting clowned by the fans whom it clowns with black TV screens. It may move slowly—most antitrust lawsuits do—but if this succeeds, it will be a decades-forward leap in one fell swoop."). As discussed *supra*, the proposed settlement in the *Laumann* case (with which the *Garber* claims were consolidated), indicated incremental change and a potential step in the right direction, just not necessarily the "decades-forward leap" that proponents hoped for. In the meantime, the Southern Nevada HTT overlap remains untouched, albeit illuminated.

<sup>101</sup> Hennagin, *supra* note 99, at 175.

<sup>102</sup> *Garber v. Office of the Comm'r of Baseball*, No. 12 Civ. 3704 (SAS), 2014 U.S. Dist. LEXIS 133743, at \*2 (S.D.N.Y. Sept. 22, 2014) (denying MLB's Motion for Summary Judgment and holding that the exemption is inapplicable to broadcasting activities).

<sup>103</sup> *Id.* at \*3 (quoting 15 U.S.C. § 26b(b)).

<sup>104</sup> Eriq Gardner, *Judge Rules MLB's Antitrust Exemption Doesn't Apply to Television Broadcast Rights*, HOLLYWOOD REP. (Aug. 9, 2014, 9:04 AM)

## IV. THE BASEBALL EXEMPTION AND NEVADA

A. *Revisiting Traditional Antitrust Analysis*

The Clayton Act permits private parties to institute actions under the federal antitrust laws for damages and injunctive relief.<sup>105</sup> However, a private plaintiff only has standing to enforce Sections 1 and 2 of the Sherman Act if he or she suffered antitrust injury and is a proper party to bring suit.<sup>106</sup> In making this determination, a court must “evaluate the plaintiff’s harm, the alleged wrongdoing by the defendants, and the relationship between them.”<sup>107</sup>

More than thirty years ago, the Supreme Court laid out a five-factor test to determine whether a plaintiff had proper standing to invoke the protection of the antitrust laws.<sup>108</sup> First, a plaintiff must show that his alleged injury is “of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.”<sup>109</sup>

However, suffering an antitrust injury alone not necessarily sufficient for a plaintiff to have standing.<sup>110</sup> Once a plaintiff has cleared that initial hurdle, he must then show that he is a proper plaintiff in light of four “efficient enforcer” factors:

- (1) ‘the directness or indirectness of the asserted injury;’
- (2) ‘the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement;’
- (3) the speculativeness of the alleged injury; and
- (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries.<sup>111</sup>

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<http://www.hollywoodreporter.com/thr-esq/judge-rules-mlbs-antitrust-exemption-724368>  
[<https://perma.cc/F2SE-WJGT>].

<sup>105</sup> 15 U.S.C. §§ 12–27.

<sup>106</sup> 15 U.S.C. § 15; *see also* Ill. Brick Co. v. Illinois, 431 U.S. 720, 735 (1977) (holding that indirect purchasers do not have standing to sue for antitrust injuries).

<sup>107</sup> *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 (1983). Section 4 of the Clayton Act broadly defines who may maintain a private action for treble damages under the antitrust laws. 15 U.S.C. § 15. Although a prospective private plaintiff may be able to evidence that it suffered an antitrust injury and is entitled to injunctive relief, additional factors must be met for the plaintiff to have standing to pursue treble damages.

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<sup>109</sup> *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

<sup>110</sup> *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110 nn. 5–6 (1986) (“[A] showing of antitrust injury is necessary, but not always sufficient.”).

<sup>111</sup> *Volvo N. Am. Corp. v. Men’s Int’l Prof’l Tennis Council*, 857 F.2d 55, 66 (2d Cir. 1988). The Ninth Circuit has similarly held that the court must weigh five factors when considering standing: “(1) the nature of the plaintiff’s alleged injury; that is, whether it was the type the antitrust laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages.” *Am. Ad Mgmt., Inc. v. Gen. Tel. Co.*, 190 F.3d 1051, 1054–55 (9th Cir. 1999).

These factors only determine whether a plaintiff's claim will be heard. Actually succeeding on the merits, however, is an entirely different hurdle.

*B. Applying Section 1 of the Sherman Act*

As discussed above, section 1 of the Sherman Act prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.”<sup>112</sup> The Supreme Court has clarified that Section 1 “outlaw[s] only *unreasonable* restraints.”<sup>113</sup> To establish a Section 1 violation, a plaintiff must allege (1) “‘a combination or some form of concerted action between at least two legally distinct economic entities’ that (2) ‘constituted an unreasonable restraint of trade either per se or under the rule of reason.’”<sup>114</sup>

Certain agreements that courts, after “considerable experience with the type of restraint at issue,” determine to have “manifestly anti-competitive effects . . . and lack . . . any redeeming virtue,” are deemed per se violations of the Sherman Act.<sup>115</sup> Such Sherman Act violations are considered to be “necessarily illegal.”<sup>116</sup> However, if an alleged trade restraint falls outside this “necessarily illegal” category, “[t]he rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1.”<sup>117</sup> “The rule [of reason] distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest.”<sup>118</sup> A court must “determine whether the . . . restriction is a naked restraint on trade, and thus invalid, or one that is ancillary to the legitimate and competitive purposes of the business association and thus valid.”<sup>119</sup>

The Supreme Court adopted the following burden-shifting approach for the rule of reason:

[P]laintiffs bear an initial burden to demonstrate the defendants’ challenged behavior had an *actual* adverse effect on competition as a whole in the relevant market . . . . [E]vidence that plaintiffs have been harmed as individual competitors will not suffice. . . . If the plaintiffs satisfy their initial burden, the burden shifts to the defendants to offer evidence of the pro-competitive effects of their

<sup>112</sup> 15 U.S.C. § 1 (2012).

<sup>113</sup> *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (internal quotation marks omitted) (emphasis in original); see 15 U.S.C. § 1.

<sup>114</sup> *Primetime 24 Joint Venture v. Nat’l Broad. Co.*, 219 F.3d 92, 103 (2d Cir. 2000) (quoting *Capital Imaging Assocs. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 542 (2d Cir. 1993)).

<sup>115</sup> *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (internal quotations and citations omitted). Categorizing a restraint as *per se* illegal “eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work.” *Id.*

<sup>116</sup> *Id.* at 886–87.

<sup>117</sup> *Id.* at 885.

<sup>118</sup> *Id.*

<sup>119</sup> *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006).

agreement . . . . Assuming defendants can provide such proof, the burden shifts back to the plaintiffs to prove that any legitimate competitive benefits offered by defendants could have been achieved through less restrictive means.<sup>120</sup>

Finally, as an alternative to “per se” and “rule of reason” analyses, certain challenged practices warrant an “abbreviated or quick-look rule of reason analysis.”<sup>121</sup> This “quick-look” analysis occurs in situations when a more thorough review is unwarranted “because the great likelihood of anticompetitive effects can be easily ascertained”<sup>122</sup> or in situations where the “restraints on competition are essential if the product is to be available at all . . . [therefore] the agreement is likely to survive the Rule of Reason.”<sup>123</sup> The “quick-look” analysis has been summarized as one that is applicable if

“an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.”. . . It is not appropriate, however, where the anticompetitive effects of an agreement are not obvious or [the agreement] may “have a net procompetitive effect, or possibly no effect at all on competition.”<sup>124</sup>

### C. Consumer Protection Laws in Nevada

Nevada provided many consumer protections through its enactment of the Nevada Unfair Trade Practices Act (NUTPA), which largely echoes, and is read in concert with, federal antitrust law.<sup>125</sup> Nevada Revised Statute section 598A.060(1)(b) prohibits division of markets, inclusive of agreements between competitors to divide territories.<sup>126</sup> Additionally, NRS section 598A.060(1)(c) prohibits allocation of customers, including agreements between competitors not to sell to specified customers of a competitor.<sup>127</sup>

<sup>120</sup> *Major League Baseball Props., Inc. v. Salvino, Inc. (Salvino II)*, 542 F.3d 290, 317 (2nd Cir. 2008) (internal quotation omitted). In making this determination “the factfinder weighs all of the circumstances of a case” including “specific information about the relevant business . . . the restraint’s history, nature, and effect . . . and [w]hether the businesses involved have market power.” *Leegin*, 551 U.S. at 886–87 (citations omitted).

<sup>121</sup> *Salvino (Salvino II)*, 542 F.3d at 317.

<sup>122</sup> *Id.* The Supreme Court found an abbreviated analysis appropriate where a plan expressly limited the number of college football games that could be televised and fixed a minimum price for those games. *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 106–10 (1984) (holding that no “detailed market analysis” was necessary to find that the NCAA’s television broadcasting plan placed a facial restraint on trade that had the effect of “utterly destroy[ing] free market competition.”).

<sup>123</sup> *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 203 (2010) (noting that the Rule of Reason “can sometimes be applied in the twinkling of an eye” and that certain “features of the NFL may save agreements amongst the teams . . . for example . . . the interest in maintaining a competitive balance”) (citations omitted).

<sup>124</sup> *Major League Baseball Props., Inc. v. Salvino Inc. (Salvino I)*, 420 F.Supp.2d 212, 220 (S.D.N.Y. 2005) (quoting *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 770–71 (1999)).

<sup>125</sup> *Compare* NEV. REV. STAT. § 598A (2010), *with* 15 U.S.C. §§ 1–7 (2012), *and* 15 U.S.C. §§ 12–27 (2012).

<sup>126</sup> NEV. REV. STAT. § 598A.060(1)(b) (2010).

<sup>127</sup> NEV. REV. STAT. § 598A.060(1)(c) (2010).

The MLB Constitution,<sup>128</sup> with its aforementioned provisions concerning HTTs, is functionally an agreement among the MLB and competing MLB Clubs, and the designation of HTTs is a division of both markets and the consumers residing within them.<sup>129</sup> It would appear as though, by these divisions, the MLB and the RSNs are violating NUTPA. This market allocation seemingly supports a conspiracy claim under Section 1 of the Sherman Act as well, though such claims are impractical to bring and are rarely pursued.<sup>130</sup>

As addressed in the Introduction, this Article seeks to identify an issue that disproportionately impacts Nevadans, and to gauge whether an analysis under the rule of reason would empower a court—state or federal—to find the MLB’s activity violative of the antitrust laws. Though there is no obvious answer or solution; there are only potentially anticompetitive issues related to MLB telecasting in Nevada. The legality of these issues, however, is dependent on a variety of factors including, as discussed above, the election of the proper analysis, the definition of the relevant product market, and the indication of the specific injury to competition necessitating the application of antitrust law.

#### *D. Looking Away from Per Se Illegality and a “Quick Look”*

Courts have traditionally viewed certain actions, including horizontal customer allocation and horizontal territorial allocation, to be illegal per se.<sup>131</sup> However, the per se rule does not necessarily apply when the alleged conduct is taken by professional, or organized amateur, sports leagues. As discussed above, courts have increasingly recognized that the business of organized sports leagues encompasses industries in which some horizontal restraints on competition are essential if the product is to be available at all.<sup>132</sup> Furthermore, courts’ hesitation to apply the per se analysis absent “considerable experience” with that particular type of restraint renders per se illegality inappropriate when applied to a somewhat novel broadcasting discussion.<sup>133</sup>

By contrast, the “quick look” analysis, which is employed as a truncated rule of reason analysis, is likely inapplicable to MLB telecasting arrangements. A number of courts have found the “quick look” analysis to be inapplicable to

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<sup>128</sup> MAJOR LEAGUE CONST. art. VIII, § 9, [http://www.ipmall.info/hosted\\_resources/SportsEntLaw\\_Institute/League%20Constitutions%20&%20Bylaws/MLConstitutionJune2005Update.pdf](http://www.ipmall.info/hosted_resources/SportsEntLaw_Institute/League%20Constitutions%20&%20Bylaws/MLConstitutionJune2005Update.pdf) [https://perma.cc/WA4S-EX5R ] (last visited Apr. 7, 2016).

<sup>129</sup> See *Id.* arts. III, IX.

<sup>130</sup> 15 U.S.C. § 1 (2012).

<sup>131</sup> See OFFICE OF THE U.S. ATTORNEYS, U.S. DEP’T. JUSTICE, U.S. ATTORNEYS’ ANTITRUST RESOURCE MANUAL § 8, <http://www.justice.gov/usam/antitrust-resource-manual-8-identifying-sherman-act-violations> [https://perma.cc/JU47-73S6] (last visited Apr. 12, 2016).

<sup>132</sup> *Am. Needle, Inc., v. Nat’l Football League*, 560 U.S. 183, 202–04 (2010) (holding that, “[w]hen ‘restraints on competition are essential if the product is to be available at all,’ per se rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason”).

<sup>133</sup> See *Leegin Creative Leather Prods., v. PSKS, Inc.*, 551 U.S. 877, 887 (2007).

the business of organized sports leagues because, in the language of the Second Circuit Court of Appeals in *Major League Baseball Prop., Inc. v. Salvano, Inc.*, “the casual observer could not summarily conclude” that the arrangements in question had an anticompetitive effect on customers.<sup>134</sup> The telecasting discussion at issue, despite having received a less-than-positive reaction from the media and consumers alike, is not apparently anticompetitive to the extent that the “quick look” analysis is applicable.<sup>135</sup> It does not appear that there has been sufficient legal development on the telecasting issue or information on the anticompetitive impact of these broadcasting restrictions to relegate the antitrust analysis to a mere “casual observ[ation].”<sup>136</sup>

As discussed above, since 1984 the “rule of reason” analysis has been applied with greater frequency to gauge the anticompetitive nature of business activities in professional organized sports.<sup>137</sup> With that in mind, and given the developments in the *Laumann v. National Hockey League* case, this discussion is best addressed within the context of the “rule of reason.”<sup>138</sup> Even so, employing the rule of reason rather than a per se analysis does not change the ultimate focus of a court’s inquiry; in both cases, the construct is applied “to form a judgment about the competitive significance of the restraint”<sup>139</sup>

*E. The Rule of Reason Absent the Baseball Exemption—Analyzing the Circumstances Rather than Ignoring the Problem*

If presented with a legal challenge from Southern Nevada consumer plaintiffs, a court could, consistent with the Supreme Court’s perspective on organized professional and collegiate sports leagues as stated in *American Needle*<sup>140</sup> and *NCAA*,<sup>141</sup> apply the rule of reason test and reexamine broadcasting with a critical eye toward the Baseball Exemption.<sup>142</sup> In *Laumann*, the Southern District of New York repeatedly acknowledged the appropriate application of the rule of reason in the context of live game telecasts.<sup>143</sup> The court indicated that

<sup>134</sup> 542 F.3d 290, 307 (2008).

<sup>135</sup> Gardner, *supra* note 104.

<sup>136</sup> *Salvano (Salvano II)*, 542 F.3d at 307.

<sup>137</sup> *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 107 (1984).

<sup>138</sup> *Laumann v. Nat’l Hockey League*, 907 F. Supp. 2d 465, 485 (S.D.N.Y. 2012).

<sup>139</sup> *Nat’l Collegiate Athletic Ass’n*, 468 U.S. at 103 (1984) (citing *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978)).

<sup>140</sup> *See generally American Needle, Inc. v. Nat’l Football League*, 560 U.S. 183 (2010).

<sup>141</sup> *See generally Nat’l Collegiate Athletic Ass’n*, 468 U.S. 85.

<sup>142</sup> *See generally American Needle*, 560 U.S. 183.

<sup>143</sup> *Laumann*, 907 F. Supp. 2d at 485, 488. In denying the MLB’s Motion to Dismiss, the Court was critical of the MLB’s “legitimate joint ventures” argument, in which defendants argues that “the production and distribution of live telecasts of games—is ‘core activity’ immune from antitrust scrutiny.” *Id.* at 488. The court explained that “the notion that ‘the exhibition of [ ] league games on television and the Internet’ is clearly a ‘league issue’ is contrary to longstanding precedent that agreements limiting the telecasting of professional

inherently anticompetitive broadcasting agreements, even those that are essential for the product to be available at all, do not warrant blanket immunity from antitrust scrutiny.<sup>144</sup>

A United States District Court could, for example, analyze issues similar to those presented in *Garber*,<sup>145</sup> with an eye toward the disproportionate impact of the HTT overlap as it pertains to the Southern Nevada market. Pursuant to *NCAA* and consistent with the *Laumann*<sup>146</sup> court's analysis, the court could examine whether MLB inter-club contracting with RSNs within their respective HTTs presents a horizontal restraint on competition<sup>147</sup> and market allocation that is violative of antitrust law.

The court would be able to examine what justifications exist for the origin and broad scope of the HTTs. The court could further evaluate whether the establishment of HTTs, and the resulting exclusive agreements between MLB Clubs and their RSNs that allow RSNs to sell telecasting rights to distributors, restricts competition amongst RSNs for live game telecasts, the entry of new RSNs and alternative intermediaries for broadcast right distribution, and competition between Clubs for viewership in a given territory. The court would have an opportunity to analyze the reality that, in order to access additional programming, the end consumer has to "buy in" to an RSN's regional monopoly by purchasing broadcasting packages with another in-market distributor and/or out-of-market game packages. The court could additionally analyze the consequences of these agreements, including price impacts on the end consumer and potential "double-dipping,"<sup>148</sup> as they pertain to the six-Club HTT overlap in Southern Nevada.

Southern Nevada consumers could argue that the MLB-HTT arrangements arbitrarily create artificial demand for a product, and that the price for the product (i.e., the price to subscribe to an RSN) is based on manufactured demand rather than actual demand. Consumers can further emphasize how the HTTs require consumers to pursue broadcasting from numerous distributors, or switch from one distributor to another, for access to live games because six clubs have exclusive broadcasting authority within the region. Consumers

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sports games are subject to antitrust scrutiny, and analyzed under the rule of reason." *Id.* The court noted that, "[e]ven if certain agreements by sports leagues with respect to telecasting games may be 'essential if the product is to be available at all' this does not give league agreements regarding television rights blanket immunity from antitrust scrutiny." *Id.*

<sup>144</sup> *Id.* at 488.

<sup>145</sup> See generally *Nat'l Collegiate Athletic Ass'n*, 468 U.S. 85.

<sup>146</sup> See generally *Laumann*, 907 F. Supp. 2d 465.

<sup>147</sup> Many courts, including the Ninth Circuit, have recognized that "a horizontal agreement that allocates a market between competitors and 'restrict[s] each company's ability to compete for the other's [business]' may injure competition." *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1198 (9th Cir. 2012).

<sup>148</sup> The consequences of which, as alleged by the *Laumann* Plaintiffs, are reduced output, raising prices, and rendering output as "unresponsive to consumer preference to view live . . . games, including local games, through both internet and television media." *Laumann*, 907 F. Supp. 2d at 475.



could also argue that the agreements allow RSNs and their affiliated Clubs to charge supracompetitive prices due to the RSNs' exclusive control of in-market broadcasts. Additionally, consumers could pursue an "output control" theory as did the *Laumann*<sup>149</sup> plaintiffs, arguing that clubs are unreasonably restricted from telecasting their out-of-market games beyond their MLB-drawn territory, irrespective of consumer demand. The consequence is the unreasonable further stifling of competition by consolidating out-of-market broadcast agreements through the MLB.

The court could also look to the Supreme Court's findings in *NCAA* and observe the striking similarities between the underlying facts in that case and the impact of the HTTs on consumers in Southern Nevada. Specifically, the *NCAA* court found that the NCAA's television plan restricted the ability of NCAA members to sell television rights, and absent those restrictions, many more games would have been shown on television.<sup>150</sup> Thus, the television plan was an output restriction having the effect of raising the prices paid for television rights.<sup>151</sup> Further, the NCAA's price structure was unresponsive to viewer demand and unrelated to the prices that would prevail in a competitive market.<sup>152</sup> Finally, the television plan dictated who was able to procure television rights, which effectively destroyed free market competition for live game telecasts.<sup>153</sup>

To proceed with a private consumer challenge, Southern Nevadans would need to establish that they have antitrust standing. In a vacuum, this complaint would allege that the consumer experienced a blackout as a consequence of the MLB's HTT designation, and that broadcasters charged supracompetitive prices for the consumer to view the desired games. The court would look for circumstances as discussed above: a consumer who has purchased presumably comprehensive broadcasting of live games is forced to pay a supracompetitive amount to secure the ability to watch any one of the six teams who claim Southern Nevada within their HTT through a distributor secured via an exclusive RSN agreement. Southern Nevadans can align their complaint with the arguments presented by the *Laumann*<sup>154</sup> plaintiffs by articulating injuries to competition with regard to distribution agreements of both in- and out-of-market games.

A Southern Nevada consumer-based challenge would allow a prospective class from a disproportionately impacted market to subject the archaic Baseball Exemption to further judicial scrutiny. Provided that a plaintiff class could satisfy its initial burden of establishing a violation of antitrust law—the burden would then shift to the MLB, its respective Clubs, and RSNs to either: (1) pro-

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<sup>149</sup> See generally *id.*

<sup>150</sup> *Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 105.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 106.

<sup>153</sup> *Id.* at 108.

<sup>154</sup> See generally *Laumann*, 907 F. Supp. 2d 465.

vide evidence of the pro-competitive effects of the HTTs and resulting broadcasting agreements; or, if no such effect exists, (2) evidence how, absent the protections of the Baseball Exemption, the restraints posed by these agreements are essential for live game telecasts to be available at all. In short, a Southern Nevada challenge could allow courts to revisit the issues posed, and left yet unresolved, by the *Laumann* case while highlighting the additional impacts particular to the Southern Nevada market.<sup>155</sup>

#### F. Consumer Recourse

Unfortunately, one of the biggest problems for baseball fans is that the Baseball Exemption, and the lack of transparency in broadcasting agreements, leaves consumers without apparent avenues of recovery.<sup>156</sup>

For example, the Oakland A's recently explored the possibility of moving to a new stadium in San Jose.<sup>157</sup> The MLB blocked the move, determining that San Jose fell squarely within the operating territory of the San Francisco Giants.<sup>158</sup> To relocate to another team's territory, at least three-fourths of MLB Clubs must agree to the A's proposed move.<sup>159</sup> Although the City of San Jose brought suit against the MLB, asserting that the Baseball Exemption did not extend to the issue of franchise relocation, the courts were not persuaded.<sup>160</sup> After losing in both the federal district court<sup>161</sup> and the Ninth Circuit,<sup>162</sup> the City of San Jose appealed to the United State Supreme Court in the hopes that the

<sup>155</sup> See generally *id.*

<sup>156</sup> It is not just MLB fans who find themselves without recourse; even MLB teams are beholden to the anomalistic features of the Baseball Exemption, as discussed *supra* note 5.

<sup>157</sup> Zachary Zagger, *San Jose Loss Shows MLB Antitrust Immunity Is Here to Stay*, LAW360, (October 6, 2015, 9:32 PM), <http://www.law360.com/articles/711475/san-jose-loss-shows-mlb-antitrust-immunity-is-here-to-stay> [<https://perma.cc/LY8U-LLNU>].

<sup>158</sup> *Id.*

<sup>159</sup> MAJOR LEAGUE CONST. art. VIII, § 9, [http://www.ipmall.info/hosted\\_resources/SportsEntLawInstitute/League%20Constitutions%20&%20Bylaws/MLCnsitutionJune2005Update.pdf](http://www.ipmall.info/hosted_resources/SportsEntLawInstitute/League%20Constitutions%20&%20Bylaws/MLCnsitutionJune2005Update.pdf) [<https://perma.cc/WA4S-EX5R>] (last visited Apr. 7, 2016).

<sup>160</sup> *San Jose v. Office of the Comm'r of Baseball*, 776 F.3d 686, 687 (9th Cir. 2015) *cert denied* 136 S. Ct. 36 (2015) ("The City of San Jose steps up to the plate to challenge the baseball industry's 92-year old exemption from the antitrust laws. It joins the long line of litigants that have sought to overturn one of federal law's most enduring anomalies.").

<sup>161</sup> *San Jose v. Office of the Comm'r of Baseball*, No. 5:13-cv-02787-RMW, 2014 WL 7670300 at \*1 (Jan. 3, 2014 N.D. Cal.).

<sup>162</sup> Affirming the district court's dismissal of the majority of San Jose's claims against the MLB based upon the Baseball Exemption, Judge Kozinski of the Ninth Circuit Court of Appeals wrote:

Like Casey, San Jose has struck out here. The scope of the Supreme Court's holding in *Flood* plainly extends to questions of franchise relocation. San Jose is, at bottom, asking us to deem *Flood* wrongly decided, and that we cannot do. Only Congress and the Supreme Court are empowered to question *Flood's* continued vitality, and with it, the fate of baseball's singular and historic exemption from the antitrust laws.

*San Jose*, 776 F.3d at 692.

Court would reconsider its stance that the “business of baseball” was above antitrust law; the Court denied certiorari.<sup>163</sup>

In the current landscape, it seems as though consumers—both private individuals and business owners—are stuck. Traditional avenues of consumer recovery—such as private litigation, state *parens patriae* actions,<sup>164</sup> direct customer complaints, and the like—provide little reprieve from corporate activity that remains untouched due to the standing Exemption. Consumers of other traditional goods and services, like an individual shopping for a used car, may be protected by state lemon laws<sup>165</sup> or can—at the very least—file a complaint with the Better Business Bureau.<sup>166</sup> Here, the unanticipated content drought is one bolstered by a nearly 100-year-old status quo.

For the time being, Southern Nevada consumers looking to enjoy up to 40 percent of live MLB game telecasts must hope that their cable or satellite providers have contracted with the proper RSNs chosen by the six teams staking claim to the region. Unfortunately, with the Baseball Exemption firmly in place and few legal challenges on the horizon,<sup>167</sup> baseball fans—like our hypothetical

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<sup>163</sup> See generally Zagger, *supra* note 157; see also *San Jose v. Office of the Comm’r of Baseball*, 136 S. Ct. 36.

<sup>164</sup> Some State Attorneys General pursue *parens patriae* actions on behalf of citizens for antitrust violations and deceptive trade practices. Though not considered to be a direct remedy to the consumer, state representative actions have been regarded as a significant preventative measure and deterrent against anticompetitive corporate behavior. See generally JAY L. HIMES, STATE PARENS PATRIAE AUTHORITY: THE EVOLUTION OF THE STATE ATTORNEY GENERAL’S AUTHORITY (2004), <http://apps.americanbar.org/antitrust/at-committees/at-state/pdf/publications/other-pubs/parens.pdf> [<https://perma.cc/FU4V-LECH>].

In some circumstances, *parens patriae* actions can yield more direct benefits to consumers by bolstering the State coffers with funds earmarked to address the harm caused by the anticompetitive action. For example, State Attorneys General were integral in the joint state and federal settlements involving residential mortgage foreclosures and loan servicing, informally known collectively as “the National Mortgage Settlement.” See *Joint State-Federal National Mortgage Servicing Settlements*, NAT’L MORTGAGE SETTLEMENT, <http://www.nationalmortgagesettlement.com> [<https://perma.cc/HRR2-BZ5C>] (last visited Apr. 12, 2016). Of the \$57,368,430 settlement Nevada garnered in one of those suits, roughly \$11.7 million was earmarked to create a dedicated call center staffed by housing counselors. See *National Mortgage Settlement Summary*, NAT’L CONF. ST. LEGISLATORS, <http://www.ncsl.org/research/financial-services-and-commerce/national-mortgage-settlement-summary.aspx> [<https://perma.cc/9D2A-EM95>] (last visited Apr. 12, 2016); see also *About Home Again*, HOME AGAIN NEV. HOMEOWNER RELIEF PROGRAM, <http://www.homeagainnevada.gov/about> [<https://perma.cc/TNS9-H4WG>] (last visited Apr. 12, 2016). The funds provided some recourse to Nevada consumers through the development of resources for those who may have been impacted by the residential mortgage crisis. *Id.*

<sup>165</sup> See NEV. REV. STAT. § 597.682–688 (2010) (Nevada’s lemon law buyback statute, providing traditional protections for consumers purchasing defective motor vehicles).

<sup>166</sup> BETTER BUS. BUREAU, <https://www.bbb.org> [<https://perma.cc/QD52-KZG7>] (last visited Apr. 27, 2016) (a well-known nonprofit organization focusing on consumer protection by consolidating customer reviews and facilitating dispute resolution through industry self-regulation).

<sup>167</sup> It is worth reiterating that, at the time of this writing, the *Laumann* case in the Southern District of New York was approaching settlement approval rather than proceeding to trial.

Cardinals fan Phil—may have to suffer broadcasting blackouts for the foreseeable future.

#### CONCLUSION

It may seem as though challenging the Baseball Exemption is a Sisyphean effort,<sup>168</sup> given the enduring reliance on *stare decisis*. However, as detailed above, legislative efforts are starting to narrow the broad reach of the Baseball Exemption. Perhaps more importantly, the 1972 *Flood* decision acknowledged that baseball is a business, and that—as a business—it is engaged in interstate commerce.<sup>169</sup> Thus, the foundation for change has already been laid. The Supreme Court’s decision to deny certiorari to the City of San Jose need not be the harbinger of enduring futility that some believe it to be; although the Court declined to review the application of the Baseball Exemption in the context of a franchise relocation, the Court has yet to hear a consumer-based challenge.

Despite the Supreme Court’s hesitation in overturning or limiting the Baseball Exemption, it is possible that a consumer-based challenge would implicate principles of antitrust law that previous lawsuits have not. While some courts have thought it unfair to extinguish the Baseball Exemption, after letting the MLB operate under its guise for nearly a century, only Judge Scheindlin of the Southern District of New York has witnessed firsthand the manner in which the MLB treats its fans under the protections afforded to them by their perceived immunity.<sup>170</sup> Although the pending settlement will likely allow the MLB to avoid adjudication on the merits, Judge Scheindlin’s opinion was clear; unilaterally and arbitrarily allocating consumers among Clubs, and using those allocations to manufacture demand is not part and parcel “the business of baseball.”<sup>171</sup>

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*See generally* Laumann v. Nat’l Hockey League, 907 F. Supp. 2d 465 (2012). The proposed settlement terms discussed in *supra* note 97 do not impact the HTT designations in Nevada, and the resolution of the matter leaves the application of the Baseball Exemption untested for higher courts.

<sup>168</sup> The authors note that challenging the longstanding exemption outright, regardless of the legal grounds, is likely an act of futility. In circumstances like those presented in Southern Nevada at the time of writing, it is difficult to gauge the extent to which any possible antitrust violation has occurred, only that principles of antitrust law are evoked by an apparent impact on competition and ultimate consumers. Taking this situation as an opportunity to invalidate, in its entirety, one of the principles upon which the business of Major League Baseball has developed is not unlike the mythical plight of Sisyphus: an uphill battle that will invariably leave challengers exactly where they started. *See Sisyphus*, ENCYCLOPÆDIA BRITANNICA, <http://www.britannica.com/topic/Sisyphus> [https://perma.cc/Q4MR-3WER] (last visited Apr. 12, 2016) (summarizing the Greek myth of Sisyphus, a king of Corinth who was punished in death by having to eternally push a boulder up a hill only to have it roll back down to where he began).

<sup>169</sup> *See Flood v. Kuhn*, 407 U.S. 258, 282 (1972).

<sup>170</sup> *Laumann*, 907 F. Supp. 2d 465.

<sup>171</sup> *Id.*

If a consumer class brought suit challenging the anticompetitive effects of the HTTs—specifically, asserting that their existence has unlawfully restrained trade by restricting output and inflating prices disproportionately in Southern Nevada compared to other markets—the Court may be compelled to apply a rule of reason analysis to the application of the Baseball Exemption on live game telecasts. This could result in a long-overdue reassessment of the Baseball Exemption, and could benefit Southern Nevada baseball fans.

Recent challenges like the *Laumann*<sup>172</sup> case indicate that consumers around the country are dissatisfied, and that courts are becoming progressively more receptive to evaluating the Baseball Exemption in light of its current impact rather than the historical status that has allowed it to survive to this day.<sup>173</sup>

The appropriate remedy, at least for Southern Nevada, could be derived through eliminating HTTs entirely. Unless a particular Club can offer a compelling and verifiable justification for its hold over the territory that would withstand rule of reason scrutiny, the MLB could be precluded from continuing any territorial telecasting restrictions. Removing this restraint, for example, would allow telecasters other than previously prescribed RSNs to compete for coverage and consumers, while allowing MLB clubs to retain interest in their home operating territories. Broadcasters would regain an opportunity to obtain the rights to game broadcasts notwithstanding the territorial lines drawn by the MLB. Importantly, those individuals, business operators, advertisers, and other consumers who invest in broadcasting with the expectation of access to games would not be left wondering why the anticipated festivities have been replaced with a black screen.

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 492.