

**FILED**  
United States Court of Appeals  
Tenth Circuit

**PUBLISH**

**AUG 27 1996**

**UNITED STATES COURT OF APPEALS  
TENTH CIRCUIT**

**PATRICK FISHER**  
Clerk

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CARDTOONS, L.C., an Oklahoma  
Limited Liability Company,

Plaintiff - Appellee,

v.

No. 95-5006

MAJOR LEAGUE BASEBALL  
PLAYERS ASSOCIATION, an  
unincorporated association,

Defendant - Appellant.

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First Amendment Publishing, Inc.,  
Joseph Mauro, pro se,

Amicus Curiae.

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**APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA  
(D. Ct. No. 93-C-576-E)**

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Russell S. Jones, Jr. (William E. Quirk with him on the briefs), Shughart,  
Thomson & Kilroy, Kansas City, Missouri, appearing for the Appellant.

James W. Tilly (Keith A. Ward with him on the brief), Tilly & Ward, Tulsa,  
Oklahoma, appearing for the Appellee.

Joseph Mauro, pro se, filed an amicus curiae brief for First Amendment  
Publishing, Inc.

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Before TACHA, LOGAN, and REAVLEY,\* Circuit Judges.

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TACHA, Circuit Judge.

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Cardtoons, L.C., (“Cardtoons”) brought this action to obtain a declaratory judgment that its parody trading cards featuring active major league baseball players do not infringe on the publicity rights of members of the Major League Baseball Players Association (“MLBPA”). The district court held that the trading cards constitute expression protected by the First Amendment and therefore read a parody exception into Oklahoma’s statutory right of publicity. MLBPA appeals, arguing that (1) the district court lacked jurisdiction to issue a declaratory judgment and (2) Cardtoons does not have a First Amendment right to market its trading cards. We exercise jurisdiction pursuant to 28 U.S.C. § 1291. Because Cardtoons’ First Amendment right to free expression outweighs MLBPA’s proprietary right of publicity, we affirm.

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\*The Honorable Thomas M. Reavley, Senior Circuit Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

## **I. Background**

Cardtoons formed in late 1992 to produce parody trading cards featuring caricatures of major league baseball players. Cardtoons contracted with a political cartoonist, a sports artist, and a sports author and journalist, who designed a set of 130 cards. The majority of the cards, 71, have caricatures of active major league baseball players on the front and humorous commentary about their careers on the back. The balance of the set is comprised of 20 “Big Bang Bucks” cards (cartoon drawings of currency with caricatures of the most highly paid players on the front, yearly salary statistics on the back), 10 “Spectra” cards (caricatures of active players on the front, nothing on the back), 10 retired player cards (caricatures of retired players on the front, humorous commentary about their careers on the back), 11 “Politics in Baseball” cards (cartoons featuring caricatures of political and sports figures on the front, humorous text on the back), 7 standing cards (caricatures of team logos on the front, humorous text on the back), and 1 checklist card. Except for the Spectra cards, the back of each card bears the Cardtoons logo and the following statement: “Cardtoons baseball is a parody and is NOT licensed by Major League Baseball Properties or Major League Baseball Players Association.”

A person reasonably familiar with baseball can readily identify the players lampooned on the parody trading cards. The cards use similar names,

recognizable caricatures, distinctive team colors, and commentary about individual players. For example, the card parodying San Francisco Giants' outfielder Barry Bonds calls him "Treasury Bonds," and features a recognizable caricature of Bonds, complete with earring, tipping a bat boy for a 24 carat gold "Fort Knoxville Slugger." The back of the card has a team logo (the "Gents"), and the following text:

Redemption qualities and why Treasury Bonds is the league's most valuable player:

1. Having Bonds on your team is like having money in the bank.
2. He plays so hard he gives 110 percent, compounded daily.
3. He turned down the chance to play other sports because he has a high interest rate in baseball.
4. He deposits the ball in the bleachers.
5. He is into male bonding.
6. He is a money player.
7. He has a 24-karat Gold Glove.
8. He always cashes in on the payoff pitch.

NOTICE: Bonds is not tax-free in all states but is double exempt.

At the end of the 1992 season, Barry Bonds was a two-time winner of the National League's Most Valuable Player award, a three-time winner of a Gold Glove award, and had just signed a six-year contract for \$43.75 million, making him the highest-paid player in baseball. Richard Hoffer, The Importance of Being Barry: The Giants' Barry Bonds is the Best Player in the Game Today--Just Ask Him, Sports Illustrated, May 24, 1993, at 13. No one the least bit familiar with

the game of baseball would mistake Cardtoons' "Treasury Bonds" for anyone other than the Giants' Barry Bonds. Other caricatures, such as "Ken Spiffy, Jr." of the "Mari-Nerds" (Ken Griffey, Jr., of the Seattle Mariners), are equally identifiable.

The trading cards ridicule the players using a variety of themes. A number of the cards, including the "Treasury Bonds" card and all of the Big Bang Bucks cards, humorously criticize players for their substantial salaries. (The irony of MLBPA's counterclaim for profits from the cards is not lost on this panel.) Other trading cards mock the players' narcissism, as exemplified by the card featuring "Egotisticky Henderson" of the "Pathetics," parodying Ricky Henderson, then of the Oakland Athletics. The card features a caricature of Henderson raising his finger in a "number one" sign while patting himself on the back, with the following text:

Egotisticky Henderson, accepting the "Me-Me Award" from himself at the annual "Egotisticky Henderson Fan Club" banquet, sponsored by Egotisticky Henderson:

"I would just like to thank myself for all I have done. (Pause for cheers.) I am the greatest of all time. (Raise arms triumphantly.) I love myself. (Pause for more cheers.) I am honored to know me. (Pause for louder cheers.) I wish there were two of me so I could spend more time with myself. (Wipe tears from eyes.) I couldn't have done it without me. (Remove cap and hold it aloft.) It's friends like me that keep me going. (Wave to crowd and acknowledge standing ovation.)

The remainder of the cards poke fun at things such as the players' names ("Chili

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