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Free Agency in the NFL: Evolution or Revolution

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FREE AGENCY IN THE NFL: EVOLUTION OR REVOLUTION?

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I. INTRODUCTION

THE National Football League (NFL), which began operating in 1920, is an unincorporated association, or league, of thirty professional football clubs.[1] The NFL performs various functions, including scheduling and organizing the pattern of games played between the member teams. Like other businesses, one of the primary goals of the NFL is profit. Unlike other businesses, however, the success of professional football depends on cooperative competition. While the teams attempt to defeat each other on the field, they cooperate to achieve the optimum entertainment package off the field.

To accomplish its goals, the NFL has instituted certain rules governing, among other things, the terms and conditions of employment. These rules are set forth in the NFL Constitution and Bylaws, which expressly govern the conduct of the NFL and its member clubs and implicitly govern the conduct of the players.[2] The Constitution and Bylaws are applied to the players through the NFL Player Contract.[3] Each NFL player must sign this contract, which requires him to adhere to the NFL Constitution and Bylaws.[4]

The most litigated of the rules governing the terms and conditions of player employment has been the restrictions on free agency. The NFL has repeatedly sought to restrict player movement to ensure the best competitive

1. *See* Mackey v. NFL, 543 F.2d 606, 610 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977); McNeil v. NFL, 790 F. Supp. 871, 893 n.26 (D. Minn. 1992).

2. Mackey v. NFL, 407 F. Supp. 1000, 1004 (D. Minn. 1975), *aff'd*, 543 F.2d 606 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977).

3. The Standard Players Contract was a standardized contract used by the NFL from the early 1950s to 1976. Powell v. NFL, 678 F. Supp. 777, 779 (D. Minn. 1988), *rev'd*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991) [hereinafter *Powell I*]. *See generally* JOHN C. WEISTART & CYM H. LOWELL, THE LAW OF SPORTS 196-305 (1979 and 1985 Supplement) (for a discussion of the Standard Player Contract and related issues). From 1977 to present, the NFL has used a contract known as the NFL Player Contract, which is uniform in all respects except for duration and compensation. *Id. See generally* GEORGE W. SCHUBERT ET AL., SPORTS LAW 350-56 (1986) (for the text of the NFL Player Contract). Although the primary target of the antitrust battle has been the free agency restrictions, the NFL Player Contract has also been attacked as the conduit through which the restrictions are applied to the players. *Id.*; *Mackey*, 407 F. Supp. at 1005. In order to play football, a player is required to accept the terms of the NFL Player Contract. *Mackey*, 407 F. Supp. at 1005 (citing NFL CONSTITUTION AND BYLAWS § 15.6).

4. *Mackey*, 543 F.2d at 613.

balance among the teams. The players, on the other hand, have repeatedly sought unrestricted free agency. Every professional football player has a vested interest in his freedom of choice — choice about the team with which to play and the length of the stay. Because freedom of choice and movement is a basic principle of the American job market, it would be untenable to consider such restrictions on our own careers. Covenants not to compete represent the most analogous restriction to the player restraints at issue, and even those are limited in duration, geographical area, and scope.

Because the NFL and its owners will always seek to restrict the players in some form and because the players will seek unrestricted movement, free agency will always be an issue. This comment discusses the evolution, or revolution as it may be, of free agency and its future. Since all of the claims against the NFL concerning free agency are based on the federal antitrust laws, Part II sets forth the basic antitrust principles applicable to professional sports, and more specifically, to the NFL. Part III discusses the history of player restraints and the cases affecting them, as well as the effects of those cases on the general antitrust principles set forth in Part II. Part IV discusses the recent case of *McNeil v. NFL* and its effects on player restraints. Part V introduces the 1993 Collective Bargaining Agreement (1993 Agreement) and the relevant provisions concerning free agency. Finally, Part VI concludes with an analysis of the legal standards and principles that will govern any future disputes which may arise after the expiration of the 1993 Agreement.

II. ANTITRUST LAW APPLICABLE TO THE NFL

The Sherman Antitrust Act[5] was passed in 1890 to regulate the abuses in commercial activity that arose amid the Industrial Revolution.[6] The primary purpose of antitrust law was, and still is, to promote competition.[7] In this regard, section 1 of the Sherman Act states that "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal."[8] Applying the antitrust laws in the context of professional sports presents unique problems. Unlike most businesses, which seek to eliminate competition, "the cooperation of teams off the playing field is necessary to effective and meaningful competition on the playing field."[9] Certain anticompetitive activities are therefore necessary to the success and existence of professional sports. The benefit of these activities must, however, be weighed against their anticompetitive effect to insure

5. 15 U.S.C. §§ 1, 2 (1988 & Supp. IV 1992).

6. RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 23 (1976).

7. U.S. v. Colgate, 250 U.S. 300, 307 (1919) (holding that the purpose of the Sherman Act is "in a word to preserve the right of freedom to trade"); *see also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635 (1985) ("The Sherman Act is designed to promote national interest in a competitive economy . . . .") (quoting American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 826 (2d Cir. 1968)).

8. 15 U.S.C. § 1 (1988 & Supp. IV 1992).

9. WILLIAM R. ANDERSON AND C. PAUL ROGERS III, ANTITRUST LAW: POLICY AND PRACTICE 910 (2d ed. 1992).

that the underlying policies of the antitrust laws are respected. The Supreme Court specifically held that professional football is by no means immune from the antitrust laws.[10] In every other professional sport, the Supreme Court weighed the benefits and harms of the challenged restraint, and for almost every such sport, has applied the antitrust laws to invalidate the anticompetitive conduct.[11]

In 1914 Congress enacted the Clayton Act[12] to supplement the antitrust legislation embodied in the Sherman Act.[13] Although the Clayton Act primarily regulates price discrimination and price fixing arrangements,[14] several of its sections have been construed as exempting from the antitrust laws certain potentially anticompetitive activities conducted by labor unions.[15] Two general types of exemptions exist in the antitrust laws: the statutory labor exemption, a statutory exemption derived from specific provisions of the Clayton and Norris-LaGuardia Acts, and the nonstatutory labor exemption, a judicially created exemption established to further federal labor policies left unprotected by the statutory exemption. Where an exemption applies, the conduct is beyond the reach of the antitrust laws.

A. EXEMPTIONS

1. Statutory Labor Exemption

As an unintended result of applying the antitrust laws, the development of unions was impeded.[16] To further federal labor policy, Congress created a statutory exemption from the antitrust laws for unilateral union activities.[17] The statutory exemption insulates certain legitimate, although anti-competitive, union activities from the antitrust laws.[18] Summarizing the scope of the statutory labor exemption, the court in *Bridgeman v. NBA*[19] stated:

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10. *See* Radovich v. NFL, 352 U.S. 445 (1957) (holding that the exemption from the antitrust laws enjoyed by professional baseball did not extend to professional football and that the plaintiff's complaint sufficiently alleged a cause of action under the Sherman Act).

11. *See* NCAA v. Board of Regents, 468 U.S. 85 (1984); Haywood v. National Basketball Ass'n, 401 U.S. 1204 (1971) (professional basketball); United States v. International Boxing Club of New York, 348 U.S. 236 (1955) (professional boxing). *But see* Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922) (holding that organized baseball is not subject to the antitrust laws because it is not involved in interstate commerce). Although the Supreme Court subsequently held that professional baseball is engaged in interstate commerce, the Court's strict adherence to its previous decision, based on the doctrine of stare decisis, has made attempts to overturn baseball's antitrust "exemption" unsuccessful. *See* ANDERSON & ROGERS, *supra* note 9, at 910 (citing Flood v. Kuhn, 407 U.S. 258, 282 (1972) and Toolson v. New York Yankees, 346 U.S. 356 (1953)).

12. Ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-27 (1988 & Supp. IV 1992)).

13. CHARLES W. DUNN, M.A., THE FEDERAL ANTI-TRUST LAW 18 (1930).

14. *See* 15 U.S.C. § 13 (1988); *see also* DUNN, *supra* note 13, at 19.

15. *See* Bridgeman v. National Basketball Assoc., 675 F. Supp. 960, 963-64 (D.N.J. 1987); Cordova v. Bache & Co., 321 F. Supp. 600, 606 (S.D.N.Y. 1970).

16. Ethan Lock, *Powell v. National Football League: The Eighth Circuit Sacks the National Football League Players Association*, 67 DENV. U. L. REV. 135, 139 (1990).

17. Phillip J. Clossius, *Exemption and Immunities, in* GOVERNMENT AND SPORT 140, 142 (Arthur T. Johnson & James H. Frey eds., 1985).

18. *Powell I*, 678 F. Supp. at 782.

19. 675 F. Supp. 960 (D.N.J. 1987).

> The concept of a labor exemption finds its source in sections 6 and 20 of the Clayton Act, 15 U.S.C. section 17 and 29 U.S.C. section 52, and the Norris-LaGuardia Act, 29 U.S.C. sections 104, 105 and 113. Those provisions declare that labor unions are not combinations or conspiracies in restraint of trade and specifically exempt certain union activities such as secondary picketing and group boycotts from the coverage of the antitrust laws. This statutory exemption insulated inherently anticompetitive collective activities by employees because they are favored by federal labor policy.
>
> The statutory exemption extends to legitimate labor activities unilaterally undertaken by a union in furtherance of its own interests. It does not extend to concerted action or agreements between unions and nonlabor groups.[20]

As noted by the court in *Bridgeman*, the application of the statutory exemption extends only to unilateral union activities, and not to the collective bargaining between a union and the employer.[21] Because the exemption protects a union only so long as it acts unilaterally, the union is subject to antitrust liability once management agrees to implement the union's demands.[22] To fill this gap between unilateral union activity and legitimate collective bargaining, the Supreme Court created the nonstatutory labor exemption.[23]

2. *Nonstatutory Exemption*

The Supreme Court has "recognized that in order to properly accommodate the congressional policy favoring free competition . . . with the congressional policy favoring collective bargaining . . . certain union-employer agreements must be accorded a limited nonstatutory exemption from antitrust sanctions."[24] While the statutory and nonstatutory exemptions provide similar protection from the antitrust laws, they differ in several important aspects. First, because the nonstatutory exemption is a judicially established doctrine, it does not afford the same absolute immunity as its statutory counterpart.[25] Immunity arises only where the "relevant federal

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20. *Id.* at 963-64. Section 6 provides that "[n]othing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations . . . ; nor shall such organizations . . . be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws." 15 U.S.C. § 17 (1988).

Section 20 precludes courts from exercising their injunctive power in any labor dispute "unless necessary to prevent irreparable injury to property, or to a property right, . . . for which injury there is no adequate remedy at law." 29 U.S.C. § 52 (1988). Section 20 then enumerates certain union activities that are absolutely protected from a restraining order or injunction by the courts. *Id.*

21. *See* WILLIAM C. HOLMES, ANTITRUST LAW HANDBOOK 531 (1993); ANDERSON & ROGERS, *supra* note 9, at 900-01.

22. ANDERSON & ROGERS, *supra* note 9, at 900.

23. *Id.*

24. *Powell I*, 678 F. Supp. at 782; *see also* Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 621 (1975) (the nonstatutory exemption has as its source the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions); Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689 (1965) ("[The e]xemption for union-employer agreements is very much a matter of accommodating the coverage of the Sherman Act to the policy of the labor laws.").

25. *See* Robertson v. NBA, 389 F. Supp. 867, 888 (S.D.N.Y. 1975) (stating that

labor policy is deserving of pre-eminence over federal antitrust policy under the circumstances of the particular case."[26] This determination requires the court to weigh the competing policies of antitrust and labor law.[27]

Second, in addition to protecting the union's activity, the nonstatutory labor exemption also protects management from antitrust scrutiny.[28] This result arguably conflicts with the original purpose of the nonstatutory labor exemption—to protect unions and their activities from antitrust scrutiny.[29] As a result of insulating unions, however, the nonstatutory exemption provides management derivative protection from the antitrust laws.[30]

Finally, the scope of the nonstatutory labor exemption is not clearly defined.[31] No general standard exists for applying the exemption to union-management agreements. More importantly, in the context of professional sports, the Supreme Court has yet to address whether the nonstatutory labor exemption continues to apply in an expired agreement and, if applicable, when the protection of the exemption terminates.[32]

B. METHODS OF ANALYSIS

The express language of section 1, that "every contract, combination . . . , or conspiracy, in restraint of trade" is illegal, would, if read literally, render every business agreement illegal.[33] In *Standard Oil Co. v. United States*[34] the Supreme Court held, however, that the "standard of reason . . . was intended to be the measure used for the purpose of determining whether . . . a particular act had or had not brought about the wrong against which the statute provided."[35] In this respect, the Supreme Court has stated: "A conclusion that a restraint of trade is unreasonable may be based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices."[36] The Supreme Court has delineated two methods of analysis that may be used to determine whether a particular act

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"[m]andatory subjects of collective bargaining do not carry talismanic immunity from the antitrust laws").

26. *Mackey*, 543 F.2d at 613; *see also*, Amalgamated Meat Cutters & Butchers Workmen of N. Am. v. Wetterau Foods, 597 F.2d 133, 136 (8th Cir. 1979).

27. Clossius, *supra* note 17, at 142.

28. *See Mackey*, 543 F.2d at 612.

29. *See Jewel Tea*, 381 U.S. at 700-13; Allen Bradley Co. v. Local Union No. 3, IBEW, 325 U.S. 797, 801-08 (1945); United States v. Hutcheson, 312 U.S. 219, 229-37 (1941).

30. WEISTART & LOWELL, *supra* note 3, at 527.

31. *Id.* at 525.

32. Powell v. NFL, 498 U.S. 1040, 1040 (1991) (In denying certiorari, the Supreme Court refused to consider the issue of the termination of the nonstatutory labor exemption.).

33. *See* Northern Pacific R.R. Co. v. United States, 356 U.S. 1 (1958); Chicago Board of Trade v. United States, 246 U.S. 231 (1918).

34. 221 U.S. 1, 60 (1911); *see also* Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 342-43 (1982); National Soc'y of Professional Eng'rs, v. United States, 435 U.S. 679, 687-88 (1978); *Chicago Bd. of Trade*, 246 U.S. at 238.

35. *Standard Oil*, 221 U.S. at 60.

36. NCAA v. Board of Regents, 468 U.S. 85, 103 (1984) (quoting *National Soc'y of Professional Eng'rs*, 435 U.S. at 690).

constitutes an unreasonable restraint of trade in violation of section 1: the per se rule and the Rule of Reason.

1. The Per Se Rule

As courts gain experience with conduct subject to the antitrust laws, certain activities are identified "as being so consistently unreasonable that they may be deemed to be illegal per se, without inquiry into their purported justification."[37] The per se rule is, however, "limited to certain categories of agreements that are so plainly anticompetitive and lacking in redeeming virtue that they are conclusively presumed to be illegal without elaborate inquiry into the precise harm that they caused or their business justification."[38] Examples of per se violations include horizontal price-fixing agreements,[39] vertical restraints that include "some agreement on price or price levels,"[40] horizontal agreements to divide territory,[41] and certain types of tying arrangements.[42]

Merely pleading a per se violation, however, is insufficient to sustain a complaint.[43] The conduct in question must be examined, and the Supreme Court has stated that the essential inquiry is "whether or not the challenged restraint enhances competition."[44] This determination "may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct."[45]

The unique nature of the sports industry creates problems when applying these principles to professional sports. First, because cooperation is necessary to successful competition between the teams, the NFL more closely resembles a joint venture than a true competitive industry.[46] In this regard, the Supreme Court has stated that "[j]oint ventures and other cooperative arrangements are . . . not usually unlawful."[47] The Court cautioned, however, that "joint ventures have no immunity from the antitrust laws."[48]

Second, the economic impact of free agency and other restraints on the sports industry is uncertain.[49] This uncertainty is due in part to the limited

37. *Mackey*, 543 F.2d at 618.

38. The Five Smiths, Inc. v. NFLPA, 788 F. Supp. 1042, 1046 (D. Minn. 1992); *see, e.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958); Stifel, Nicolaus & Co. v. Dain, Kalman & Quail, Inc., 578 F.2d 1256, 1259 (8th Cir. 1978).

39. *See* Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 436 n.19 (1990).

40. Business Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 735-36 (1988).

41. *See, e.g.*, United States v. Topco Ass'n, 405 U.S. 596, 608 (1972).

42. *See, e.g.*, *Northern Pac. Ry.*, 356 U.S. at 5-6.

43. *The Five Smiths*, 788 F. Supp. at 1045.

44. *NCAA*, 468 U.S. at 104.

45. *Id.* at 104 n.26.

46. *Mackey*, 543 F.2d at 619.

47. Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 23 (1979); *see also The Five Smiths*, 788 F. Supp. at 1049 n.5 (stating that "[a] trade association is not a walking conspiracy of its members").

48. *NCAA*, 468 U.S. at 113.

49. *See* Smith v. Pro Football, Inc., 593 F.2d 1173, 1182 (D.C. Cir. 1979) (holding that the NFL draft was not a per se violation, the court stated that "courts have had too little experience with this type of restraint, and know too little of the economic and business stuff

experience of the courts in dealing with these issues.[50] Since a court will invoke the per se rule only when it can conclude that, "on the strength of *unambiguous experience*, the challenged action is a 'naked restraint[ ] of trade with no purpose except stifling of competition,' "[51] the courts have been unwilling to apply the per se rule to player restraints in the context of professional sports.[52] Instead, the courts have turned to the Rule of Reason in analyzing the conduct in question.

2. *Rule of Reason*

The Rule of Reason has its origins in the Supreme Court's decision in *Standard Oil Co. v. United States*,[53] in which the Court analyzed "all the circumstances" to determine whether the conduct in question was "unreasonably restrictive of competitive conditions."[54] In order to state a Rule of Reason claim under section 1 of the Sherman Act, a plaintiff must allege concerted action that is intended to harm or unreasonably restrain competition and actually causes such injury to competition.[55] In determining whether a restraint "unreasonably" restrains trade, a court should "consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable."[56] To prove the effect of the conduct, the plaintiff must allege a relevant market[57] that has been adversely affected by

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from which it issues, confidently to declare it illegal [as a per se violation]"); *Mackey*, 543 F.2d at 618-20; *see also* White Motor Co. v. United States, 372 U.S. 253, 263 (1963).

50. *Smith*, 593 F.2d at 1182.

51. *White Motor Co.*, 372 U.S. at 263 (emphasis added) (quoting *Topco*, 405 U.S. at 608).

52. *See* Richard E. Bartok, Note, *NFL Free Agency Restrictions Under Antitrust Attack*, 1991 DUKE L.J. 503, 517 (1991) (finding that no appellate courts have applied the per se rule to player restrictions).

53. 221 U.S. 1 (1911).

54. *Standard Oil*, 221 U.S. at 58.

55. Rosenbrough Monument Co. v. Memorial Park Cemetery Ass'n, 666 F.2d 1130, 1138 (8th Cir. 1981), *cert. denied*, 457 U.S. 1111 (1982).

56. *Chicago Bd. of Trade*, 246 U.S. at 238.

57. "The relevant market provides the basis on which to balance competitive harms and benefits of the restraint at issue." Los Angeles Memorial Coliseum Comm'n v. NFL, 726 F.2d 1381, 1392 (9th Cir. 1984), *cert. denied*, 469 U.S. 990 (1984); *see also* Kaplan v. Burroughs Corp., 611 F.2d 286, 291 (9th Cir. 1979); Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 268-269 (7th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982).

> In the antitrust context, the relevant market has two components: the product market and the geographic market. Product market definition involves the process of describing those groups of producers which, because of the similarity of their products, have the ability—actual or potential—to take significant amounts of business away from each other. A market definition must look at all relevant sources of supply, either actual rivals or eager potential entrants to the market. Two related tests are used in arriving at the product market: first, reasonable interchangeability for the same or similar uses; and second, cross-elasticity of demand, an economic term describing the responsiveness of sales of one product to price changes in another. Similar considerations determine the relevant geographic market, which describes the "economically significant" area of effective competition in which the relevant products are traded.

Los Angeles Memorial Coliseum Comm'n, 726 F.2d at 1392-93 (quoting *Kaplan*, 611 F.2d at 292).

the challenged restraint.[58] Other relevant facts to be considered in determining the legality of the restraint include: "the history of the restraint, the evil believed to exist, the reason for adopting the particular remedy and the purpose or end sought to be attained."[59]

In the context of professional football, the analysis is much the same. The court must first "determine whether [a restraint] is significantly anticompetitive in purpose or effect."[60] Such a determination requires an examination of the specific business involved, the history of the restraint, and the purpose(s) of the restraint.[61] If the analysis reveals legitimate, procompetitive business purposes, the court must then weigh the "anticompetitive evils" against the "procompetitive virtues" of the restraint.[62] The challenged restraint constitutes a substantial impediment to competition and is unreasonable if the anticompetitive effects outweigh the procompetitive virtues.[63]

The Supreme Court has, however, placed several limitations on the scope of the Rule of Reason analysis. First, the Court noted that it is not necessary to establish a party's monopoly or market power in order to establish the unreasonableness of a given restraint:

> While the reasonableness of a particular alleged restraint often depends on the market power of the parties involved, . . . market power is only one test of reasonableness. And where the anticompetitive effects of conduct can be ascertained through means short of extensive market analysis, and where no countervailing competitive virtues are evident, a lengthy analysis of market power is not necessary.[64]

Second, the Supreme Court stated that the Rule of Reason "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason."[65] Instead, the inquiry must be "confined to a consideration of [the restraint's] impact on competitive conditions."[66]

III. HISTORY OF PLAYER RESTRAINTS

A. THE ROZELLE RULE

In 1963, the NFL unilaterally amended its Constitution and Bylaws to adopt the provision known as the Rozelle Rule, named after the then Commissioner of the NFL, Alvin Ray "Pete" Rozelle. The Rozelle Rule, embod-

58. *See, e.g.*, Razorback Ready Mix Concrete Co. v. Weaver, 761 F.2d 484, 488 (8th Cir. 1985).

59. BLACK'S LAW DICTIONARY 1332 (6 ed. 1990) (citing United States v. National Soc'y of Professional Eng'rs, 404 F. Supp. 457, 463 (D.D.C. 1975)).

60. Smith v. Pro Football, Inc., 593 F.2d 1173, 1183 (D.C. Cir. 1978); Brown v. Pro Football, Inc., No. Civ.A.90-1071, 1992 U.S. Dist. LEXIS 2903, at *28 (D.D.C. June 22, 1992).

61. *Smith*, 593 F.2d at 1183; *Brown*, 1992 U.S. Dist. LEXIS at *28.

62. *Smith*, 593 F.2d at 1183; *Brown*, 1992 U.S. Dist. LEXIS at *28.

63. *Smith*, 593 F.2d at 1183; *Brown*, 1992 U.S. Dist. LEXIS at *28.

64. *NCAA*, 468 U.S. at 110-11 n.42 (quoting Brief for United States as Amicus Curiae at 19-20, *NCAA* (No. 83-271)).

65. *National Soc'y of Professional Eng'rs*, 435 U.S. at 688.

66. *Id.* at 690.

ied in section 12.1(H) of the Constitution,[67] supplemented the prior reserve system, which bound a player to a team for only two years, allowing him to become a free agent after fulfillment of the two-year obligation.[68] The Rozelle Rule left the reserve system in place, and specifically stated that "[a]ny player, whose contract with a League club has expired, shall . . . become a free agent."[69] This first sentence appeared to establish unrestricted free agency after a player completed his option year.

The sentence that followed, however, made free agency illusory. In order for a player to sign with a different team, the two teams had to reach a "mutually satisfactory arrangement[ ]," or the Commissioner, in his sole discretion, could compensate the former club with an award of one or more players from the acquiring club.[70] Because the decision of the Commissioner was final and conclusive, few teams were willing to risk an unknown compensation if an arrangement could not be agreed upon.[71] Therefore, where the two clubs were unable to work out a compensation agreement, the effect of the Rozelle Rule was to leave the player with only two choices—resign with his former club or forego playing football.[72]

B. *MACKEY V. NFL*

In 1975, a group of NFL players attacked the Rozelle Rule by initiating a suit against the NFL, the twenty-six member clubs, and Commissioner Rozelle.[73] The players alleged that the imposition and enforcement of the Rozelle Rule constituted an illegal combination and conspiracy in restraint of trade denying professional football players the right to freely contract for

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67. Section 12.1(H) stated:

> Any player, whose contract with a League club has expired, shall thereupon become a free agent and shall no longer be considered a member of the team of that club following the expiration date of such contract. Whenever a player, becoming a free agent in such manner, thereafter signed a contract with a different club in the League, then, unless mutually satisfactory arrangements have been concluded between the two League clubs, the Commissioner may name and then award to the former club one or more players, from . . . the acquiring club as the Commissioner in his sole discretion deems fair and equitable; any such decision by the Commissioner shall be final and conclusive.

NFL CONSTITUTION AND BYLAWS § 12.1(H) (*quoted in Mackey*, 543 F.2d at 610-11).

68. *See Mackey*, 543 F.2d at 610. The reserve system had its basis in § 15.1 of the NFL Constitution and Bylaws, which required that all player contracts be substantially identical to the Standard Player Contract, and the option clause set forth in the Standard Player Contract, which allowed a team to renew a player's contract for one year, with no right of renewal thereafter. *Id.* at 610 & n.5.

69. NFL CONSTITUTION AND BYLAWS § 12.1(H); *see also Mackey*, 407 F. Supp. at 1004, 1006.

70. *Id.*

71. As the Eighth Circuit noted in *Mackey*, from 1963 to 1974, only four players, of the 176 that played out their options during that period, signed under circumstances in which the Commissioner awarded compensation. *Mackey*, 543 F.2d at 611. For a detailed account of those trades, see the district court's opinion in *Mackey*, 407 F. Supp. at 1004-05. Only 34 of those 176 players signed with other teams, with the clubs reaching mutually agreed upon compensation in 27 of those cases. *Mackey*, 543 F.2d at 611.

72. *Mackey*, 407 F. Supp. at 1006.

73. Mackey v. NFL, 407 F. Supp. 1000 (D. Minn. 1975), *aff'd in part, rev'd in part*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

their services. The district court held that the Rozelle Rule constituted a violation of the Sherman Antitrust Act and was therefore an illegal restraint of trade.[74] The court based its decision primarily on the per se rule, stating that "[t]he Rozelle Rule and its related practices constitute a concerted refusal to deal and a group boycott on the part of defendants," making the rule "so clearly contrary to public policy that it is *per se* illegal under the Sherman Act."[75] As a secondary determination, the court analyzed the Rozelle Rule under the Rule of Reason. After considering the restraint's anticompetitive effects and business justifications, the district court held that the justifications were insufficient to override the antitrust laws.[76]

On appeal, the Eighth Circuit considered the antitrust issues presented and, in affirming the district court's holding in part, established several important principles which would guide future courts in their decisions concerning the antitrust laws' application to player restraints. First, after finding the statutory labor exemption unavailable,[77] the Eighth Circuit held that the NFL and its member clubs, even though non-labor groups, could avail themselves of the nonstatutory labor exemption under appropriate circumstances.[78]

Second, the court set forth the proper accommodation between the federal labor and antitrust policies necessary to determine the applicability of the nonstatutory labor exemption.[79] The Eighth Circuit found the proper accommodation to be:

> First, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship. Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining.[80]

Applying these principles, the court summarily dismissed the first accommodation, opining that the Rozelle Rule "clear[ly] . . . affect[ed] only the parties

74. *Mackey*, 407 F. Supp. at 1007.

75. *Id.*

76. *Id.* at 1007-08.

77. The court addressed the labor exemption issue first since, if the conduct fell within the purview of either the statutory or nonstatutory labor exemption, an inquiry into the application of the antitrust laws would be unnecessary. The court found the statutory labor exemption inapplicable because it "does not extend to concerted action or agreements between unions and non-labor groups." *Mackey*, 543 F.2d at 611; *see also supra* notes 16-23 and accompanying text for a discussion of the statutory labor exemption.

78. *Mackey*, 543 F.2d at 612; *see also supra* notes 24-32 and accompanying text for a discussion of the nonstatutory labor exemption.

79. In considering the nonstatutory exemption, the court reiterated the Supreme Court's holding that "in order to properly accommodate the congressional policy favoring free competition in business markets with the congressional policy favoring collective bargaining[,] . . . certain union-employer agreements must be accorded a limited nonstatutory exemption from the antitrust sanctions." *Mackey*, 543 F.2d at 611-12.

80. *Id.* at 614 (citations omitted).

to the agreements sought to be exempted."[81]

Turning to the second accommodation, the court relied on section 8(d) of the National Labor Relations Act to define mandatory subjects of bargaining as those pertaining to "wages, hours, and other terms and conditions of employment."[82] Moreover, the court found that a mandatory subject of bargaining depends on its practical effect, not its form.[83] Because the Rule had the effect of restricting player movement and depressing player salaries, the court concluded that the Rule pertained to the terms and conditions of employment and therefore constituted a mandatory subject of bargaining.[84]

Finally, the court addressed the third accommodation of whether the Rozelle Rule was the product of arm's-length bargaining. In concluding that the Rule was not, in fact, the product of arm's-length negotiations, the Eighth Circuit focused on the parties' collective bargaining history. First, the court noted that the Rule was unilaterally imposed upon the players in 1963.[85] Second, the court found that in neither the 1968 nor the 1970 CBA was there serious discussion of or negotiation concerning the Rozelle Rule.[86] Instead, the Rule was incorporated merely by reference through the Standard Player Contract, which required the players to comply with the NFL Constitution and Bylaws, including section 12.1(H), the Rozelle Rule.[87] Finally, as institution of this suit clearly evinces, the players consistently sought the elimination of the Rozelle Rule upon termination of the 1970 CBA in 1974.[88] Because the restraint was not the product of arm's-length negotiations, it did not qualify for the labor exemption, and was therefore subject to the antitrust laws.

The third important principle established by the Eighth Circuit in *Mackey* was that NFL player services constitute the relevant product market for antitrust analysis and that such market is subject to the antitrust laws. The court initially faced the argument that section 6 of the Clayton Act and the Supreme Court's interpretation of that section precluded application of the Sherman Act to restraints on player services. Section 6 states that "[t]he labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor."[89] Based on this section, the Supreme Court has stated: "[I]t would seem plain that restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act."[90]

Although this language appears to support defendants' argument, the

81. *Id.* at 615.
82. *Id.* (quoting 29 U.S.C. § 158(d) (1988)).
83. *Id.* (citing Federation of Musicians v. Carroll, 391 U.S. 99 (1968)).
84. *Mackey*, 543 F.2d at 615.
85. *Id.* at 616.
86. *Id.* at 612-13.
87. *Id.* at 613.
88. *Id.*
89. *Mackey*, 543 F.2d at 615 (quoting 15 U.S.C. § 17 (1988)).
90. *Id.* (quoting Apex Hosiery Co. v. Leader, 310 U.S. 469, 503 (1940)).

court considered the context within which section 6 was enacted: "Section 6 . . . was enacted for the benefit of unions to exempt certain of their activities from the antitrust laws after courts had applied the Sherman Act to legitimate labor activities."[91] Additionally, the court considered the fact that other courts "have not hesitated to apply the Sherman Act to club owner imposed restraints on competition for players' services."[92] The court therefore concluded that restraints on competition within the market for players' services are subject to the antitrust laws.[93]

Finally, the Eighth Circuit established that the Rozelle Rule and, more broadly, restraints on player services are to be analyzed under the Rule of Reason, not the per se rule. After examining the substantive legal principles underlying the per se rule, the court held that the unique circumstances of this case made application of the per se rule inappropriate.[94] First, the NFL resembles "a joint venture in that each member club has a stake in the success of the other teams."[95] Because of the unique nature of the business of professional football, the court held that a mechanical application of the per se rule, "fashioned in a different context," was inappropriate.[96] Moreover, one of the underlying purposes of the per se rule is judicial economy—to "avoid[] the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved . . . ."[97] Because an "exhaustive inquiry into the operation of the NFL and the effects of and justifications for the Rozelle Rule" had already been undertaken, judicial economy and efficiency could not be a basis for application of the per se rule.[98]

Turning to the Rule of Reason, the court found that the proper inquiry should consider not only the legitimate business purposes of the restraint, but also whether such restraint was no more restrictive than necessary.[99] Addressing the Rozelle Rule's anticompetitive effects, the Eighth Circuit upheld the district court's findings that the restraint:

> significantly deters clubs from negotiating with and signing free agents; that it acts as a substantial deterrent to players playing out their options and becoming free agents; that it significantly decreases players' bargaining power in contract negotiations; that players are thus denied the right to sell their services in a free and open market; that as a result, the salaries paid by each club are lower than if competitive bidding were allowed to prevail; and that absent the Rozelle Rule, there would be increased movement in interstate commerce of players from one club to

91. *Id.*
92. *Id.*
93. *Mackey*, 543 F.2d at 618.
94. *Id.* at 619.
95. *Id.*
96. *Id.*
97. *Id.* at 619 & n.26 (quoting Northern Pac. R.R. v. United States, 356 U.S. 1, 5 (1958)).
98. *Mackey*, 543 F.2d at 620. During 55 days of trial, 68 witnesses presented testimony, either orally in court or solely through deposition transcript, and the parties presented over 400 exhibits. *Mackey*, 407 F. Supp. at 1002. The trial transcript extended to over 11,000 pages. *Id.*
99. *Mackey*, 543 F.2d at 620.

another.[100]

Against these anticompetitive effects, the court considered the defendants' justifications for the restraint: protection of investment, player continuity, and competitive balance. Player development costs, such as scouting and training expenses, constitute ordinary costs of doing business, which are nonrecoverable.[101] Therefore, protection of investment and the need to recoup these costs could not justify the restraint imposed.[102] In addition, the court held that the concept of player continuity, which is based on the need for players to work together over extended periods of time in order to establish an effectively functioning team, was also an insufficient justification.[103] The court noted that player movement and turnover already existed by way of trades, retirement, and the entrance of new players.[104] Moreover, the court held that even if the quality of play declined, the justification could not prevail over the restraint's anticompetitive effects.[105]

Finally, the court considered the defendants' most persuasive justification, that unrestricted free agency would allow the most attractive teams, because of their location, opportunities, etc., to accumulate the most talented players, thereby destroying the competitive balance necessary for the success of the NFL.[106] Although the court recognized the NFL's "strong and unique interest in maintaining competitive balance," it found that the restraint "is far more restrictive than necessary to serve any legitimate purposes."[107] In this respect, the court based its determination on the fact that the Rozelle Rule applied to every player regardless of status or ability, that it was unlimited in duration, and that there were no procedural safeguards in its enforcement.[108]

C. RIGHT OF FIRST REFUSAL/COMPENSATION SYSTEM

As part of a class action settlement in *Mackey*, the NFLPA and the NFL Management Council developed a revised system of free agency known as the Right of First Refusal/Compensation (RFR/C) system.[109] The RFR/C system was later incorporated into the 1977 Collective Bargaining Agreement (1977 Agreement), which went into effect on March 1, 1977.[110] Under the revised system, an automatic one-year option clause, similar to the earlier reserve rule, was required in the contract of every rookie who signed for only one year.[111] Once a player satisfied his option year or, where no option

100. *Id.*
101. *Mackey*, 543 F.2d at 621.
102. *Id.*
103. *Id.*
104. *Id.* at 621.
105. *Id.*
106. *Id.*
107. *Id.* at 622.
108. *Id.*
109. *See* Alexander v. NFL, No. 4-76-Civ-123, 1977 WL 1497, at **2, 4 (D. Minn. Aug. 1, 1977), *aff'd sub nom.*, Reynolds v. NFL, 584 F.2d 280 (8th Cir. 1978).
110. *Powell I*, 678 F. Supp. at 780.
111. *See* 1982 Collective Bargaining Agreement, art. XIV, § 2 (Dec. 11, 1982) [hereinafter

clause existed, completed his contract, he became a free agent, subject to two important restrictions. First, the free agent's team had the option to match any offer made to a player and retain his services.[112] Second, even if the free agent's team refused to match an offer, the team was still entitled to compensation from the acquiring team in the form of future draft choices.[113]

Although the RFR/C system was designed to eliminate the problems of the Rozelle Rule,[114] the actual effect of the revised system on free agency was insignificant. During the five years in which the 1977 Agreement was in effect, fewer than 50 of the 600 players were given offers from other NFL teams after receiving free agent status.[115] Moreover, fewer than twenty players actually moved teams, with most of the moves resulting from trade arrangements.[116] On only one occasion did a player transfer clubs in an arrangement involving draft choice compensation.[117]

The 1982 Collective Bargaining Agreement (1982 Agreement), which was executed December 11, 1982, retained the Right of First Refusal/Compensation system.[118] The only change in the system included an increase in the salary levels at which draft choice compensation would be triggered,[119] which adjusted player salaries for inflation.[120] During the five years in which the 1982 Agreement was in effect, the movement of players between teams actually decreased from the five year period of the 1977 Agreement. Only one of the approximately 1400 players who became veteran free agents during the term of the 1982 Agreement received an offer from another team, and no veteran player actually moved teams under the Right of First Refusal/Compensation scheme.[121]

The 1982 Agreement expired in August 1987.[122] On September 22, 1987, when negotiations failed to produce a new agreement, the members of the NFLPA went on strike.[123] The NFLPA ended the strike twenty-four days later on October 15, 1987, even though the parties had failed to reach a compromise on the veteran free agency issue and even though the NFL continued to apply the provisions of the expired 1982 Agreement.[124] On that

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1982 Agreement]. For rookies who signed for more than one year or for veteran players, an option clause could be included in their contract, but was not required. *Id.* The 1977 Agreement expired on July 15, 1982. *Powell I*, 678 F. Supp. at 780. On December 11, 1982, the NFLPA and the NFL Management Council executed the 1982 Agreement, which retained the RFR/C system with only minor revision. *Id.* at 780-81.

112. 1982 Agreement, art. XV, § 4.

113. *Id.* §§ 11-12.

114. *See Alexander*, 1977 WL 1497, at **20-22.

115. *Powell I*, 678 F. Supp. at 780.

116. *Id.*

117. *Id.*

118. 1982 Agreement, art. XV, §§ 1-8.

119. *Powell I*, 678 F. Supp. at 781.

120. Bartok, *supra* note 52, at 511.

121. *Powell I*, 678 F. Supp. at 781 (emphasis added).

122. Powell v. NFL, 930 F.2d 1293, 1296 (8th Cir. 1989), *cert. denied*, 111 S. Ct. 711 (1991) [hereinafter *Powell III*].

123. *Id.*

124. *Id.*

day, however, the NFLPA filed suit against the NFL and its member clubs for essentially the same claims as those brought in *Mackey*.

D. *POWELL V. NFL:* TERMINATION OF THE LABOR EXEMPTION

A federal district court in Minnesota had occasion to determine the scope of the nonstatutory labor exemption in *Powell v. NFL*[125] (*Powell I*) when several professional NFL players brought suit against the NFL and its member organizations alleging violations of the Sherman Act. More specifically, the court confronted the issues left unresolved in *Mackey v. NFL*: whether the nonstatutory labor exemption extends beyond the expiration of the CBA and, if so, when the exemption terminates.[126] After the plaintiffs filed motions for partial summary judgment and for a preliminary injunction concerning the RFR/C system and NFL Player Contract, defendants filed a cross-motion seeking summary judgment on the basis that the nonstatutory labor exemption insulated the challenged restraints from the antitrust laws.

Although recognizing that the 1982 Agreement had terminated, the court held that basic labor law principles and the accommodation of antitrust and labor policies required the continuation of the nonstatutory labor exemption beyond the expiration of the agreement.[127] The Eighth Circuit, on interlocutory appeal, also concluded that the federal labor policy dictated the extension of the nonstatutory labor exemption beyond the expiration of the 1982 Agreement.[128] Each court reached different results, however, on what test should be applied to determine when the exemption terminates. Because of this controversy over which standard best accommodates the policies underlying the nonstatutory labor exemption, both the district court's and the Eighth Circuit's tests should be further examined.

1. At Impasse

After considering, and ultimately rejecting, the tests submitted by both

125. 678 F. Supp. 777 (D. Minn. 1988), *rev'd*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991).

126. Because the court in *Mackey* found the nonstatutory labor exemption inapplicable, it never reached these issues. *Mackey*, 543 F.2d at 616. In fact, the Eighth Circuit specifically stated that "[i]n view of our holding, we need not decide whether the effect of an agreement extends beyond its formal expiration date for purposes of the labor exemption." *Id.* at n.18.

127. *Powell I*, 678 F. Supp. at 783-86. The court relied on the "survival doctrine," which provides for the "survival" of provisions relating to mandatory subjects of bargaining beyond the formal expiration of a collective bargaining agreement. *Id.* at 783-84. As a prerequisite for the applicability of the survival doctrine, the conduct in question must have been exempt during the existence of the agreement. *Id.* at 783. The court found that the resolution of this issue required an examination of the principles set forth in *Mackey* concerning the proper accommodation between federal labor and antitrust policies. *Id.* at 784. Although the plaintiffs conceded that the provisions of the 1982 Agreement satisfied the first two elements of the *Mackey* test, they argued that the player restraints were not the product of arm's-length bargaining. The court concluded, however, that sufficient evidence existed which indicated the presence of bona fide arm's-length bargaining. *Id.* Therefore, the nonstatutory labor exemption protected the player restraints during the existence of the 1982 Agreement.

128. *Powell III*, 930 F.2d at 1300-01.

parties,[129] the district court adopted its own test and concluded that:

> [a]fter balancing the various competing interests, . . . proper accommodation of labor and antitrust interests requires that a labor exemption relating to a mandatory bargaining subject survive expiration of the collective bargaining agreement until the parties reach impasse *as to that issue*; thereafter, the term or condition is no longer immune from scrutiny under the antitrust laws, and the employer runs the risk that continued imposition of the condition will subject the employer to liability.[130]

In reaching its conclusion, the court determined that mandatory subjects of bargaining must continue past expiration of the agreement.[131] The court based this determination on the purpose of the National Labor Relations Act (NLRA)[132] and other persuasive authorities that require maintenance of the status quo in order to provide a suitable environment where negotiation of a new collective bargaining agreement can occur.[133] Survival of the nonstatutory labor exemption not only protects and fosters this negotiating environment, but the exemption also accommodates antitrust and labor policies.[134] Because the need to maintain the status quo ends when a new agreement is concluded or the parties reach impasse, the exemption also terminates.[135] To determine when impasse has been reached, "[t]he test is simply whether, following intense, good faith negotiations, the parties have exhausted the prospects of concluding an agreement."[136] The court in *Powell I*, however, never reached the issue of whether impasse had occurred. Since a duty to bargain in good faith existed between the NFL owners and players, and since the defendants had filed a charge with the National Labor Relations Board (NLRB) alleging that the plaintiffs had bargained in bad faith, the court stayed its decision until the NLRB's determination of the issue.[137]

In *Powell v. NFL*,[138] after the associate general counsel to the NLRB dismissed the owner's charge of bad faith bargaining, the federal district court of Minnesota reconsidered the parties' motions.[139] At a June 17, 1988 hearing on the motions, the court held that the parties had reached a bargaining impasse over the free agency issue and that the restraints concerning that issue were now subject to the antitrust laws.[140]

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129. *Powell I*, 678 F. Supp. at 786-88 (setting forth the standards proposed by plaintiffs and defendants).

130. *Id.* at 788.

131. *Id.* at 784; *see also* 29 U.S.C. § 158(a)(5), (b)(3), (d) (1988).

132. 29 U.S.C. §§ 151-70 (1988).

133. *Powell I*, 678 F. Supp. at 785.

134. *Id.*

135. *Id.* at 784.

136. *Id.* at 788 (quoting Taft Broadcasting Co., 163 N.L.R.B. No. 55, 1967, NLRB Dec. (CCH) ¶ 21,170 (Mar. 20, 1967)).

137. *Id.* at 789.

138. 690 F. Supp. 812 (D. Minn. 1988), *rev'd*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991) [hereinafter *Powell II*].

139. *Id.* at 814.

140. *Id.*

Considering the utility of the impasse standard, the court in *Powell II* found that its formulation for impasse promoted the collective bargaining relationship by respecting the obligation to bargain in good faith following expiration of the collective bargaining agreement.[141] Moreover, as one commentator has argued, "[i]mpasse provides a proper foundation for accommodating labor and antitrust policy in determining the scope of the labor exemption."[142] Finally, impasse is generally definable. The Supreme Court defines impasse as "that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless."[143] Similarly, the NLRB defines impasse as "generally synonymous with deadlock . . . . No impasse can occur until there appears no realistic possibility that continuing discussions concerning the provisions at issue would be fruitful."[144] The NLRB has enumerated some of the considerations for determining when impasse occurs:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.[145]

Noting these considerations, along with the definitions and principles set forth above, the impasse standard represents a workable and flexible standard to evaluate and determine if and when the labor policy no longer deserves preeminence over the antitrust laws, thereby terminating the nonstatutory labor exemption. Arguments that the impasse standard is too ambiguous must fail. Impasse is no more difficult to apply than the *Mackey* test[146] or survival doctrine,[147] which represent an accommodation of the labor and antitrust interests underlying the nonstatutory labor exemption. Nor is the impasse standard more difficult than the Rule of Reason,[148] which represents an accommodation of the antitrust laws and the unique nature of the NFL. Determinations that properly accommodate these interests, however difficult to apply, are necessary evils if the principles they further are to be advanced. Any bright line test would constitute nothing more than an

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141. *Id.* at 815.

142. Bradley R. Cahoon, *Powell v. National Football League: Modified Impasse Standard Determines Scope of Labor Exemption*, 1990 UTAH L. REV. 381, 399 (1990); *see also Powell III*, 930 F.2d at 1304-10 (Heaney, Senior J., Lay, C.J., McMillian, J., dissenting) (arguing that the impasse standard is more consistent with the interests of antitrust and labor laws).

143. Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 543 n.5 (1988).

144. *See* Marriott In-Flite Serv., 258 N.L.R.B. No. 99, 1981, NLRB Dec. (CCH) ¶ 18,550 (Sept. 30, 1981), *enforced* 113 L.R.R.M. (BNA) 3528, *aff'd* 729 F.2d 1441 (2d Cir. 1983); Marco, Inc., 258 N.L.R.B. No. 16, 1981-82, NLRB Dec. (CCH) ¶ 18,478 (Sept. 21, 1981); J.D. Lunsford Plumbing, Heating & Air Conditioning Inc., 254 N.L.R.B. No. 170, 1980-81, NLRB Dec. (CCH) ¶ 17,939 (Mar. 12, 1980), *aff'd sub nom.*, Sheet Metal Workers Int'l Assoc., Local 9 v. NLRB, 684 F.2d 1033 (D.C. Cir. 1982).

145. *Taft Broadcasting Co.*, 163 N.L.R.B. No. 55 (1967).

146. *See supra* notes 77-85 and accompanying text.

147. *See supra* note 127.

148. *See supra* notes 54-66 and accompanying text.

arbitrary determination that, although promoting judicial efficiency and economy, would subvert the antitrust and labor law principles.

2. *The "Ongoing Collective Bargaining Relationship"*

On January 6, 1989, the district court certified its January 29, 1988 opinion (*Powell I*) for appeal to the Eighth Circuit.[149] The Eighth Circuit reversed the district court's ruling that the nonstatutory labor exemption expires upon impasse.[150] The court concluded that federal labor law, not antitrust law, governed the action.[151] The court opined that the procedures and remedies available under the labor laws sufficiently protected the parties in the bargaining process so as to preclude application of the antitrust laws.[152]

The court further held that the nonstatutory labor exemption applies beyond impasse.[153] While finding that management is not forever exempt from the antitrust laws once a collective bargaining agreement is in place,[154] the court did not establish exactly when the exemption might terminate. The court provided only general guidance in making such a determination. Delineating the scope of the nonstatutory labor exemption, the court noted that unilateral changes in the terms and conditions of employment reasonably comprehended within pre-impasse proposals may be implemented after impasse has occurred.[155] From there, the court held that agreements "conceived in an ongoing collective bargaining relationship" are protected from antitrust scrutiny.[156] The Eighth Circuit therefore extended broad protection to terms either originally contained in the CBA or reasonably comprehended as extending from the original terms.[157] The court's only definitive statement concerning when the exemption might terminate was that, "as long as there is a possibility that proceedings may be commenced before the [National Labor Relations] Board, or until final resolution of Board proceedings and appeals therefrom, the labor relationship continues and the labor exemption applies."[158] Under the facts of the case, however, the court found that it was not compelled to decide when the exemption might terminate

149. Powell v. NFL, 711 F. Supp. 959 (D. Minn. 1989).
150. *Powell III*, 930 F.2d at 1299.
151. *Id.* at 1295.
152. *See id.* at 1300-03. As to the procedures available under the labor laws after the expiration of the agreement, the court found that: 1) there is a continuing obligation to bargain in good faith; 2) there is an obligation to maintain current wages and working conditions prior to impasse; and 3) once impasse is reached, employers may only impose new or different terms that are reasonably contemplated within the scope of the pre-impasse proposals. *Id.* at 1300-01. Further, as to the remedies available under the labor laws, the court found that: 1) the union can strike; 2) the employer can lock out the employees; and 3) the parties may petition the NLRB for a cease-and-desist order prohibiting conduct constituting an unfair labor practice. *Id.* at 1302.
153. *Id.* at 1304.
154. *Id.* at 1303.
155. *Powell III*, 930 F.2d at 1302.
156. *Id.* at 1303.
157. *Id.*
158. *Id.* at 1303-04.

under these principles.[159]

The standard set forth by the Eighth Circuit in *Powell III* creates several problems. First, the standard provides little guidance in applying the nonstatutory labor exemption and antitrust laws to collective bargaining agreements. In concluding that the parties had "not yet reached the point in negotiations where it would be appropriate to permit an action under the Sherman Act,"[160] the court implied that the parties were still engaged in an ongoing collective bargaining relationship. This relationship existed even though the court concluded that the parties had reached impasse and that the players were playing under unilaterally imposed restraints.[161] Considering that the players went on strike over free agency[162] and that the parties failed to reach an agreement two years after the expiration of the 1982 Agreement,[163] it is difficult to imagine the point at which the ongoing collective bargaining relationship ends. In *Powell I* Judge Doty noted that "the collective bargaining relationship between an employer and a particular union exists for as long as that union continues to be the recognized bargaining representative of a majority of the employees."[164] Based on this statement and the Eighth Circuit's new standard, decertification of the NFLPA as the players' collective bargaining representative appeared to be the only method of ensuring the termination of an "ongoing collective bargaining relationship."[165] Unfortunately, decertification is exactly the position into which the NFLPA and its member players were forced.[166]

Second, the decision in *Powell III* may actually discourage agreement between the parties. The court held that the parties may either bargain further, resort to economic force, or file claims with the NLRB.[167] The current history of the parties' bargaining efforts indicates that nothing will be gained from further bargaining.[168] History also indicates that the union does not have sufficient economic power to force the NFL to implement an unrestricted free agency system.[169] Finally, the associate general counsel to the

159. *Id.* at 1303.

160. *Powell III*, 930 F.2d at 1302.

161. *See id.* at 1303. After noting that unilateral changes in the terms and conditions of employment may be made after impasse, the court found that "the challenged restraints were imposed by the League only after they had been forwarded in negotiations and subsequently rejected by the Players." *Id.* at 1302-03. Therefore, since unilateral changes may be made only after impasse and since Plan B was implemented over the players' objection, impasse must have been reached.

162. *Id.* at 1296.

163. *Id.* The parties went on strike in September of 1987, and this case came before the court of appeals in November 1989. *Id.*

164. *Powell I*, 678 F. Supp. at 788 n.18.

165. For a discussion of the detrimental effects that decertification would have on the players, see Jeffrey D. Schneider, *Unsportsmanlike Conduct: The Lack of Free Agency in the NFL*, 64 S. CAL. L. REV. 797, 846-49 (1991).

166. *See supra* notes 153-66 and accompanying text.

167. *Powell III*, 930 F.2d at 1303.

168. Since the expiration of the 1982 Agreement, the players have refused to agree to any restriction on free agency. Lock, *supra* note 16, at 152-53. Additionally, NFL management has withdrawn from and terminated both contributions to the NFL pension and the accruals of severance pay starting in the 1989 season. *Id.* at 153.

169. Although the NFLPA has gained more bargaining power since the restraints imposed

NLRB dismissed the NFL's charge of bad faith bargaining on the part of the players,[170] and the players did not contend that the NFL bargained in bad faith.[171] The NLRB also found "the question of free agency to be an issue of such overriding importance that no agreement could be reached as long as there was disagreement on that issue."[172] Moreover, it is unlikely that the NLRB would consider any claims, on the basis that it is "for the courts to decide whether the antitrust laws are being violated."[173] Therefore, under the standard in *Powell III*, as long as the NFL continues to bargain in good faith, the players will be forced to play indefinitely under the unilaterally imposed player restraints regardless of whether the restraints violate the antitrust laws.

Finally, the dissent in *Powell III* argues that the court, while purporting to apply *Mackey*, ignored its principles.[174] Although *Mackey* left open the question of when the labor exemption expires, the court clearly implied that the exemption should protect illegal restraints only so long as such restraints are part of bona fide collective bargaining.[175] This view is consistent with Supreme Court decisions addressing the scope of the labor exemption.[176] Further, the *Mackey* decision was "founded on the principles that an employer's exemption owes its existence to union consent, and is aimed at preserving the integrity of the negotiating process."[177] The majority reasons that, after expiration of a collective bargaining agreement and notwithstanding impasse, a restraint contained in a previously bargained-for agreement retains its immunity as the product of collective bargaining.[178] Such reasoning subverts the *Mackey* principles by allowing the labor exemption to extend beyond impasse,[179] a point already found by the Supreme Court to be a deadlock or hiatus in negotiations.[180]

As a result of its decision, the Eighth Circuit "has intervened to remove the players' rights under the antitrust laws from the bargaining table and has unjustifiably given the owners a continuing right to circumvent the antitrust

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in *Mackey*, the inability of the players to force a compromise after a twenty-four day strike indicates that the union is on less than equal footing with the NFL. *See Powell I*, 678 F. Supp. at 781.

170. *Powell II*, 690 F. Supp. at 814.

171. *Powell III*, 930 F.2d at 1303.

172. *Id.* at 1304 n.2.

173. *Id.* at 1305 (Heaney, J., dissenting).

174. *Id.* at 1308 (Lay, C.J., dissenting).

175. *Mackey*, 543 F.2d at 614 (stating that "the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's length bargaining").

176. *See, e.g.*, Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 621-22 (1975) (stating that the "nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions"); Amalgamated Meat Cutters Local 189 v. Jewel Tea Co., 381 U.S. 676, 689 (1965) (pointing out that the "exemption for union-employer agreements is very much a matter of accommodating the coverage of the Sherman Act to the policy of the labor laws").

177. *Powell III*, 930 F.2d at 1308 (Lay, C.J., dissenting).

178. *Id.* at 1302-03.

179. *Id.* at 1309 (Lay, C.J., dissenting).

180. Charles D. Bonanno Linen Service, Inc. v. N.L.R.B., 454 U.S. 404, 412 (1982).

laws."[181] Chief Judge Lay stated in the conclusion of his dissenting opinion that "the union should not be compelled, short of self-destruction, to accept illegal restraints it deems undesirable."[182] Because the Supreme Court refused to grant certiorari,[183] the standard established in *Powell III* currently controls the issue, at least in the Eighth Circuit, and it will be the duty of the district court to interpret the scope of that standard.

E. PLAN B

On November 17, 1988, while *Powell v. NFL* was being litigated, the NFL owners offered the players a choice of two free agency plans.[184] When negotiations over free agency failed, the owners unilaterally implemented the second proposal, known as Plan B, in February of 1989.[185] Under Plan B, NFL teams have the right to protect thirty-seven of the players on the roster at the end of each NFL season, leaving the remaining players unprotected and unrestricted free agents.[186] The protected players, however, are still subject to the Right of First Refusal/Compensation system that applied in the 1977 and 1982 Agreements.[187] Moreover, since each NFL team is allowed a forty-seven player roster,[188] only the top players are protected.

In the first season following the implementation of Plan B, 229 of the 619 *unprotected* and unrestricted players switched teams.[189] Additionally, the average salary for the first 100 players who made a move increased 43.5% from $146,500 to $259,300.[190] On the other hand, not one *protected* player changed teams during the same period.[191] Although not as broad as the RFR/C system, Plan B still restricted a substantial number of players from freely switching teams.

In addition to protecting thirty-seven of each team's top players, Plan B also required all players, protected as well as unprotected, to forfeit all pension and severance benefits upon switching teams.[192] Further, the accrual of any benefits prior to the implementation of Plan B became nontransferable to a free agent's new team.[193] Finally, all other benefits were frozen at 1982 levels.[194]

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181. *Powell III*, 930 F.2d at 1307 (Heaney, J., dissenting).
182. *Id.* at 1309 (Lay, C.J., dissenting).
183. *Powell*, 498 U.S. 1040 (1991).
184. *See Powell III*, 930 F.2d at 1303 n.10.
185. *Id.*
186. Craig Neff, *A Semiopen Field*, SPORTS ILLUSTRATED, Apr. 10, 1989, at 14.
187. Gordon Forbes, *Controversial New Plan Goes Into Effect Today*, USA TODAY, Feb. 1, 1989, at 3C.
188. *Clubs Set Standby Plan to Free Fringe Players*, WASH. POST, Jan. 12, 1989, at B6.
189. Neff, *supra* note 186, at 14.
190. *Id.*
191. Larry Weisman, *Unprotected Free Agents Getting All The Offers*, USA TODAY, Mar. 2, 1989, at 3C.
192. Manny Topol, *NFL's Costly Freedom*, NEWSDAY, Nov. 18, 1988, at 191.
193. *Id.*
194. *Id.*

F. DECERTIFICATION OF THE NFLPA

After the Eighth Circuit's decision in *Powell III*, the NFL players were left with few options: "bargain further[,] . . . resort to economic force . . . [or] present claims to the National Labor Relations Board."[195] As noted previously, none of these options provided adequate relief.[196] With all other avenues of recourse effectively foreclosed, the players were left with only one choice: decertification. On November 3, 1989, the Executive Committee of the NFLPA decided to abandon its status as the collective bargaining representative of the NFL players.[197] On November 6, 1989, the Executive Committee notified the NFL Management Council of its decision.[198] Then on December 5, 1989, player representatives from the twenty-four NFL teams unanimously voted to end the NFLPA's status as the players' collective bargaining representative.[199] As a result, the NFLPA became a voluntary professional association.

Based upon these events, the federal district court in Minnesota held on May 23, 1991, that the players were no longer part of an ongoing collective bargaining relationship with the NFL.[200] The court then held that, since no ongoing collective bargaining relationship existed, the nonstatutory labor exemption terminated.[201] The *Powell* saga had finally ended, and, based on the termination of the labor exemption, new attacks on the NFL player restraints were beginning.

IV. *McNEIL v. NFL*[202]

In what would be the most important decision ever to affect professional football, eight individual football players whose contracts expired on February 1, 1990, filed suit against the NFL and its member clubs. Plaintiffs alleged that the NFL defendants violated section 1 of the Sherman Act as a result of illegal restraints imposed under Plan B during the 1990-1991 NFL season. Because of the importance of the court's determinations on the motions for summary judgment, these motions will be set forth in detail below.

A. PRETRIAL MOTIONS

1. Defendants' Motion for Summary Judgment on All Claims

Defendants moved for summary judgment contending, first, that they functioned as a single economic entity and were therefore incapable of conspiring within the meaning of section 1 of the Sherman Act, and second, that the antitrust laws do not apply to restraints that operate solely within a labor

195. *Powell III*, 930 F.2d at 1303.
196. *See supra* notes 168-73 and accompanying text.
197. Powell v. NFL, 764 F. Supp. 1351, 1354 (D. Minn. 1991).
198. *Id.*
199. *Id.*
200. *Id.* at 1358.
201. *Id.* The court also decertified the class to the extent that any claims survived the court of appeals' decision. *Id.*
202. 790 F. Supp. 871 (D. Minn. 1992).

market. The court held that the defendants' first argument had been expressly rejected by both the Ninth and Second Circuits.[203] The court further noted that the defendants' position had been implicitly rejected in all cases holding that various NFL player restraints violated the antitrust laws.[204] Additionally, the Supreme Court has stated that "joint ventures have no immunity from antitrust laws."[205]

The court also rejected defendants' second argument on the basis that the Eighth Circuit had expressly rejected the same argument twice before[206] and that "Supreme Court precedent clearly holds that the antitrust laws apply to restraints that operate solely within a labor market."[207]

2. *Defendants' Motion for Partial Summary Judgment on Plaintiffs' Damages Claim*

Defendants also moved for partial summary judgment on plaintiffs' damage claims, arguing that, based on the court's rulings in the *Powell* litigation, plaintiffs cannot recover damages under the Plan B player restraint system for the 1990-1991 season. More specifically, the defendants asserted that antitrust liability does not accrue until the date on which a judicial determination renders the nonstatutory labor exemption inapplicable, which would be May 23, 1991,[208] for purposes of this case.[209]

The court recapped the relevant decisions in the *Powell* litigation. First, the court recognized the Eighth Circuit's holding that the nonstatutory labor exemption would continue to protect the player restraints as long as an ongoing collective bargaining relationship existed between the parties. Second, the court restated its own subsequent determination that the labor exemption ended between November and December of 1989.[210] The court concluded that the significant date for determining accrual of damages was the date of the triggering event, not the date on which the court issues its decision.[211] The court based its determination on *Powell v. NFL*,[212] which concluded that the termination of the collective bargaining relationship does not depend on a judicial determination "but rather on whether a majority of

203. *McNeil*, 790 F. Supp. at 879; *see* Los Angeles Memorial Coliseum Comm'n v. NFL, 726 F.2d 1381, 1388-90 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984); North Am. Soccer League v. NFL, 670 F.2d 1249, 1256-58 (2d. Cir.), *cert. denied*, 459 U.S. 1074 (1982).

204. *McNeil*, 790 F. Supp. at 879 n.8.

205. NCAA v. Board of Regents, 468 U.S. 85, 113 (1984).

206. *See, e.g.*, *Powell III*, 930 F.2d at 1298-99 & n.4; *Mackey*, 543 F.2d at 616-18.

207. *McNeil*, 790 F. Supp. at 881.

208. *See* Powell v. NFL, 764 F. Supp. 1351, 1351 (May 23, 1991, was the date on which the court rendered its decision, stating that the labor exemption had terminated around December of 1989).

209. Defendants also argued that, based upon the decision in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) (concerning the standards for retroactive application of judicial decisions), this court's May 23, 1991, decision in *McNeil* should be applied only prospectively. While the court concluded that *Chevron* did not preclude retroactive application of Powell v. NFL, 764 F. Supp. 1351 (D. Minn. 1991), detailed discussion of this issue is beyond the scope of this comment. *See McNeil*, 790 F. Supp. at 884-89.

210. *McNeil*, 790 F. Supp. at 883.

211. *Id.* at 884.

212. 764 F. Supp. 1351 (D. Minn. 1991).

the employees in a bargaining unit support a particular union as their bargaining representative."[213] Antitrust damages, therefore, accrue from the date on which the collective bargaining relationship ended, between November and December of 1989 in this case.[214]

3. *Plaintiffs' Motion for Partial Summary Judgment Regarding Defendants' Monopoly Power in Relevant Markets*

Plaintiffs moved for partial summary judgment on the following issues: (1) a relevant market for the services of professional football players exists in the United States; (2) a relevant market for professional football exists in the United States; and (3) the defendants possess monopoly power in each of these relevant markets. Plaintiffs sought to collaterally estop[215] the defendants from relitigating these issues.[216] Estoppel on the issue of market power would save the plaintiffs considerable burden and expense. Although market power is one test of "reasonableness," "[t]he reasonableness of a particular alleged restraint often depends on the market power of the parties."[217] If the players could not persuade the court to apply the per se rule, then they would be forced to incur the burden and expense of the more complex Rule of Reason analysis.[218]

a. The Existence of a Relevant Market for the Services of Professional Football Players in the United States

Plaintiffs challenged an agreement by defendants to restrain competition between member teams for the services of professional football players. As-

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213. *Id.* (quoting Powell v. NFL, 764 F. Supp 1351, 1357 (D. Minn. 1991)).

214. *Id.*

215. The court set forth the principles of collateral estoppel:

> Collateral estoppel refers to the preclusive effect given a prior determination of fact or law in a later suit between the same parties or their privies. The doctrine is applied to conserve judicial resources, and to avoid unnecessary expense and the risk of inconsistent judgments. Collateral estoppel is appropriate where: 1) The issue was identical to one raised in a prior adjudication; 2) There was final judgment on the merits; 3) The estopped party was a party or in privity with a party to the prior adjudication; and 4) The estopped party was given a full and fair opportunity to be heard on the adjudicated issue. Where, however, a party seeks to give preclusive effect to a purely factual, as opposed to legal, determination, that party must also show that the factual determination must have been essential to the prior judgment.

McNeil, 790 F. Supp. at 890 (citations omitted).

216. *Id.* The plaintiffs were actually attempting to use the doctrine of collateral estoppel offensively. The plaintiffs were not party to any previous litigation with the defendants and were seeking to use the previous judgments against the defendants. *Id.* Offensive use of collateral estoppel lies within the trial court's discretion, which should consider the following three factors when making the determination:

> (1) Whether a plaintiff is being rewarded for failing to join in the prior action; (2) Whether the defendants had an incentive to litigate the first action "fully and vigorously"; and (3) Whether there are any procedural opportunities available to defendants in the second action that were not available to them in the first action of a "kind that might be likely to cause a different result."

Id. (quoting Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331-32 (1979)).

217. *NCAA*, 468 U.S. at 110 n.42.

218. *See* Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 n.16 (1977).

serting that the relevant market[219] for the competitive impact of the challenged restraint was the U.S. market for services of major league professional football players, the plaintiffs argued that defendants should be collaterally estopped from relitigating the definition of that relevant market based on the decisions in *Mackey*,[220] *Kapp v. NFL*,[221] and *Smith v. Pro Football, Inc.*,[222] all of which decided the issue against the NFL. The court, after examining the decisions in these cases, determined that:

> the NFL defendants should be precluded from relitigating the determination that the services of major league professional football players in the United States constitutes a relevant market for purposes of plaintiffs' claims. The court finds that all of the requirements for collateral estoppel have been met: the issue of what constitutes a relevant market in the present case is identical to the issue litigated in the prior cases, the resolution of the issue was necessary to the prior decisions, there was a final judgment on the merits against the NFL defendants in both *Mackey* and *Smith*, defendants in the present case were also defendants in the prior cases and defendants had a full and fair opportunity to litigate the issue in both the *Mackey* and *Smith* cases. Based on the foregoing, the court concludes that the NFL defendants are collaterally estopped from relitigating the issue of the existence of a relevant market for the services of professional league football players in the United States.[223]

b. The Existence of a Relevant Market for Professional Football in the United States

Plaintiffs further alleged that there was a relevant market for major league professional football in the United States that served as the source of the NFL defendants' power to monopolize the relevant market for professional football players' services. Plaintiffs argued that the defendants should be collaterally estopped from relitigating the existence of that relevant market

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219. "A relevant market is defined generally as 'the area of effective competition' and contains both a product element, determined by the availability and interchangeability of substitutes, and a geographic element, those areas in which the interchangeable substitutes are traded." *McNeil*, 790 F. Supp. at 890 (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962)); *see also supra* note 55.

220. 543 F.2d at 616-18, 622 (holding the Rozelle Rule to be an unreasonable restraint of trade in violation of the Sherman Act; and further holding that the relevant market was the market for professional football players' services).

221. 390 F. Supp. 73, 82 (N.D. Cal. 1974), *aff'd in part, dismissed in part as moot*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979) (granting plaintiffs' motion for partial summary judgment on various restraints implemented by the NFL defendants, including the Rozelle Rule; also resolving the relevant market issue in holding that the Rozelle Rule restrained players' movement among the "clubs of a league that holds a virtual monopoly of professional football employment in the United States").

222. 420 F. Supp. 738 (D.D.C. 1976), *aff'd in part, rev'd in part*, 593 F.2d 1173, 1183-87 (D.C. Cir. 1978). Applying the Rule of Reason to the college draft of football players, the district court resolved the issue of what constitutes the relevant market, finding it to be the "competition among the teams for the services of college players." *Id.* at 746. The court of appeals held the draft to be "anticompetitive in its effect on the market for players' services, because it virtually eliminates economic competition among buyers for the services of sellers." 593 F.2d at 1186.

223. *McNeil*, 790 F. Supp. at 892-93.

or their monopoly power in that market based on *United States Football League v. NFL*.[224] In *USFL* a rival professional football league and its member teams brought suit against the NFL defendants, claiming that the defendants violated Section 2 of the Sherman Act by monopolizing the market for major league professional football in the United States. After a ten-week trial, the jury found that the NFL defendants had "willfully acquired or maintained monopoly power in a relevant market consisting of major league professional football in the United States."[225] The district court rejected the NFL defendants' motion for a judgment notwithstanding the verdict and specifically affirmed the jury's finding of the relevant market and the jury's verdict that the NFL defendants had willfully monopolized that market.[226]

The *McNeil* court held that application of collateral estoppel was appropriate based on the judgment in *USFL*.[227] In so holding, the court concluded that:

> the same issues of the definition and existence of a relevant market and defendants' monopoly power in that market were raised in the USFL case and were essential to the USFL's proof of liability under Section 2 of the Sherman Act. Defendants also fully litigated both the parameters of the relevant market and their possession of monopoly power in that market . . . . [T]he jury's finding was necessary to final judgment, final judgment was rendered against defendants on the merits of those issues and the decision was affirmed by the Second Circuit.[228]

c. The Existence of the NFL Defendants' Monopoly Power in the Relevant Market for Services of Professional Football Players in the United States

Finally, the plaintiffs argued that the NFL defendants had monopoly power in the relevant market of professional football players' services in the United States. The plaintiffs conceded, however, that this issue had never been resolved by the courts. Since collateral estoppel requires that the issue have been previously adjudicated, the court held that the plaintiffs were not entitled to collateral estoppel on this issue.[229]

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224. 644 F. Supp. 1040 (S.D.N.Y. 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988).

225. *Id.*

226. *Id.* at 1056-57.

227. *McNeil*, 790 F. Supp. at 893.

228. *Id.* (citations omitted). The defendants attempted to argue that, due to the nominal award of damages in *USFL*, they had no incentive to litigate those issues. The court held, however, that the defendants "had every incentive to litigate those issues because plaintiffs sought over $1.7 billion dollars in treble damages." *Id.* at 894. The defendants also attempted to argue that the issues determined in *USFL* were irrelevant. The court dismissed that argument, concluding that the existence of the defendants' monopoly power is relevant to the extent that the plaintiffs' claims are judged under the Rule of Reason. *Id.* at 895. The court also found the existence of defendants' monopoly power relevant "for purposes of determining whether the challenged restraints are more anticompetitive because they have been imposed by a monopolist because under the Sherman Act, a monopolist is often precluded from engaging in a practice that would be lawful in the absence of monopoly power." *Id.*

229. *Id.* at 896.

4. *Plaintiffs' Motion for Partial Summary Judgment Concerning Application of the Per Se Rule to the Plan B Right of First Refusal/Compensation System*

Plaintiffs moved for partial summary judgment on the appropriate standard to be used in applying the antitrust laws. Attempting to persuade the court to apply the per se rule to Plan B, the players argued that " 'there is now sufficient judicial experience to warrant application of the per se rule to find [Plan B] unlawful.' "[230] The court noted, however, that all of the cases cited in support of the plaintiffs' proposition applied the Rule of Reason, not the per se rule.[231] Additionally, the court noted that Plan B had never been the subject of antitrust scrutiny.[232] Finally, the court concluded that it was bound by the *Mackey* decision, "in which the Eighth Circuit determined that the Rozelle Rule should be judged under the rule of reason rather than the per se rule."[233] Therefore, the court denied the plaintiffs' motion for summary judgment on the issue of the application of the per se rule.[234]

B. TRIAL

The case of *McNeil v. NFL* went to trial on June 15, 1992. After thirty-six days of testimony, the jury returned a verdict for the eight NFL player plaintiffs on September 10, 1992, finding that Plan B violated Section 1 of the Sherman Act and awarding the plaintiffs $543,000.[235] More specifically, the jury found that the effect of Plan B was to substantially harm competition in the relevant market for the services of professional football players.[236] Additionally, the jury also decided that although Plan B contributed to the competitive balance in the NFL, it was more restrictive than necessary to maintain that balance.[237] Finally, as evidenced by the award of damages, the jury found that the plaintiffs suffered economic injury as a direct result of Plan B.[238]

On September 21, 1992, less than two weeks after the verdict in *McNeil v. NFL*, five NFL players filed a class action challenging various player rules and restraints.[239] Because of the doctrine of collateral estoppel, the NFL and its member clubs would be estopped from denying liability for the imposition and enforcement of Plan B, thereby exposing the League to damages

230. Plaintiffs' Memorandum in Support of Their Motion for Partial Summary Judgment at 1, 15 (*quoted in McNeil*, 790 F. Supp. at 896).

231. *McNeil*, 790 F. Supp. at 897.

232. *Id. Smith* involved a challenge to the college draft, and *Mackey* and *Kapp* both challenged the Rozelle Rule. *Id.*

233. *McNeil*, 790 F. Supp. at 897.

234. *Id.*

235. McNeil v. NFL, Civ. No. 4-90-476, 1992 WL 315292, at *1 (D. Minn. Sept. 10, 1992); *see also* Don Pierson, *Jury's Verdict May Transform Pro Football*, CHI. TRIB., Sept. 11, 1992, at 1C.

236. *McNeil*, 1992 WL 315292, at *1 (answer to question of fact number one).

237. *Id.* (answer to questions of fact numbers two and three).

238. *Id.* (answer to questions of fact numbers four and five).

239. *See* White v. NFL, 822 F. Supp. 1389, 1394 (D. Minn. 1993).

in the neighborhood of $211 million.[240] With arguments on *White* set to begin November 12, 1992, and realizing the potential consequences of that case, the NFL and the players began negotiating a settlement agreement and a new collective bargaining agreement. On January 6, 1993, the NFL and its players reached a tentative agreement to settle their dispute and agreed to a new seven-year contract, ending a remarkable five-year period since the expiration of the 1982 Collective Bargaining Agreement in 1987.[241]

V. THE 1993 COLLECTIVE BARGAINING AGREEMENT

A. TERMS OF THE AGREEMENT

Before becoming the official 1993 Collective Bargaining Agreement (1993 Agreement), the NFLPA had to be recertified as the players' collective bargaining representative.[242] On March 23, 1993, Richard A. Berthelsen, General Counsel of the NFLPA, sent a letter to Commissioner Paul Tagliabue informing him that " '[a] majority of the players on 1992 season-ending rosters have now signed cards authorizing the NFLPA to represent them for the purposes of collective bargaining.' "[243] On April 30, 1993, the District Court of Minnesota concluded that the NFLPA once again represented the players as their exclusive collective bargaining representative.[244]

On May 6, 1993, the NFLPA and the NFL reached an agreement on the terms of a new CBA and on the terms of a Stipulation and Settlement Agreement concerning the outstanding cases.[245] The terms of the Stipulation and Settlement Agreement concerning free agency were incorporated into the 1993 Agreement,[246] which went into effect on March 31, 1993.

The 1993 Agreement will cover seven seasons, from 1993 to 1999,[247] and allow veteran players, those players with five years of experience, unrestricted free agency for the first time in the history of professional football.[248] Once a player becomes a free agent, he will have four and a half months, from March 1 to July 15, to negotiate with other teams.[249] Some

240. *See* Lester Munson, *The Shape of Things to Come*, SPORTS ILLUSTRATED, June 29, 1992, at 76; Lester Munson, *Plan B, as in Bogus*, SPORTS ILLUSTRATED, Sept. 21, 1992, at 7.

241. Gerald Eskenazi, *N.F.L. Labor Accord Is Reached Allowing Free Agency For Players*, N.Y. TIMES, Jan. 7, 1993, at A1; *see also* White v. NFL, 836 F. Supp. 1458 (D. Minn. 1993).

242. *White*, 836 F. Supp. 1465, 1498 (D. Minn. 1993).

243. *See White*, 822 F. Supp. at 1435. The American Arbitration Association reported on March 26, 1993, that 873 cards, sufficient to establish a majority standing of the NFLPA, had been executed and returned. *Id.*

244. *Id.*

245. *See White*, 836 F. Supp. at 1465-66.

246. *See White*, 822 F. Supp. at 1412-13; *White*, 836 F. Supp. at 1498 (amending various terms of the Stipulation Settlement Agreement). *See also* NFL Collective Bargaining Agreement 1993-2000 arts. XIX, XX [1993 Agreement].

247. NFL Collective Bargaining Agreement 1993-2000 art. LVIII.

248. 1993 Agreement art. XIX § 1(a). The closest the NFL players came to unrestricted free agency was the reserve system and the decision in Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) (holding the Rozelle Rule in violation of the antitrust laws). The players bargained both of these away, however, exchanging the reserve system for the Rozelle Rule and the Rozelle Rule for the Right of First Refusal/Compensation System. *See supra* text accompanying notes 67-124.

249. 1993 Agreement art. XIX § 1(b).

exclusions and exceptions in the new free-agency system still exist, but they are few, and come at the price of the owners, rather than the players.

In the first year of the agreement, each NFL team was allowed to exclude one player from the free-agent pool, considered the "Franchise Player," and have the right of first refusal on two other players.[250] The Franchise Player must be offered a contract with compensation that equals or exceeds the average salary of the top five highest paid players at his position or 120% of his prior year salary, whichever is greater.[251] Similarly, the Transition Players must be offered contracts with compensation that equals or exceeds the average salaries of the top ten highest paid players at that position or 120% of their prior year's salary, whichever is greater.[252] In the second year, teams will be permitted to exclude a Franchise Player and one Transition Player.[253] Except in 1999, when each club will be permitted to designate one Transition Player in addition to the Franchise Player, each team will be limited to only the Franchise Player after the second year.[254]

In addition to free agency, the players will receive, in the form of salaries and benefits, a greater percentage of designated league gross revenue.[255] Designated league gross revenue includes local, national, and international television revenues and gate receipts.[256] Due to the contractual nature of television revenues and the relatively stable gate receipts, these amounts should remain generally fixed for the foreseeable future.[257] The designated gross league revenue does not include merchandise sales, stadium luxury suites or stadium concession sales.[258] The percentage will increase from the current fifty-seven percent[259] to a maximum of sixty-seven percent of designated league gross revenues.[260] Once player salaries and benefits reach sixty-seven percent, a salary cap will be imposed on each team, reducing the players' percentage of league gross revenue to a maximum sixty-four percent the next year, then sixty-three percent the next year, and finally sixty-two per-

250. *Id.* art. XX §§ 1, 3. The Right of First Refusal/Compensation (RFR/C) here is similar in operation to that under the previous Right of First Refusal/Compensation System. *See supra* text accompanying notes 17-31. There are, however, two important differences. First, the new RFR/C system applies only to "Restricted Free Agents," those veteran players who have played at least three, but less than five years, and "Transition Players," those players permitted to be designated under section 3 of Article XX. 1993 Agreement arts. XIX § 2, XX § 3(b). Second, the Qualifying Offer amounts, which represent the minimum dollar amounts that must be tendered in order to invoke the RFR/C system, have been substantially raised. *See id.* art. XIX § 2(b). Therefore, it is entirely feasible that a Restricted Free Agent could sign with another team without ever invoking the RFR/C system.

251. 1993 Agreement art. XX § 2(c).

252. *Id.* art. XX § 4(a).

253. *Id.* art. XX § 3(a).

254. *Id.*

255. Eskenazi, *supra* note 241, at B1. Designated league gross revenues amount to approximately 95% of the league's gross revenues.

256. Toni Grossi, *NFL Owners Find Labor Peace Isn't that Costly After All*, PLAIN DEALER, Feb. 15, 1993, at 3E.

257. *Id.*

258. *Id.*

259. Tim Cowlishaw, *A Look at NFL Free Agency*, DALLAS MORNING NEWS, Feb. 7, 1993, at 28B.

260. Eskenazi, *supra* note 241, at B7.

cent for each year thereafter.[261] The salary cap, however, is only effective from 1994 to 1998.[262] The cap was delayed "to allow the league and its teams to become comfortable with the concept of free agency and because the contract specifies that the cap does not come into play until salaries and benefits leaguewide reach sixty-seven percent of the N.F.L.'s gross revenues."[263] Also, for each year in which a salary cap is effective, the players must receive a minimum of fifty-eight percent of designated revenues.[264] In return for the salary cap, the players will receive free agency after only four years.[265]

The agreement will also include a provision known as the Rooney Rule, which will generally prevent the four teams that participated in the NFC and AFC Championship games from entering the free-agent market.[266] An exception exists where one of the teams loses a player through free agency, in which case the team can sign a player with up to, but not more than, an equivalent compensation.[267] The rule also affects the next four playoff teams. Those teams can sign only one free agent over $1,500,000 but may sign an unlimited number of free agents under $1,000,000.[268] Additionally, those teams will be allowed to replace lost free agents in the same manner as the top four clubs.[269] The restrictions on the top eight teams are not permanent, however, and apply only in years where no salary cap exists.[270] Unfortunately, it is uncertain when the cap will go into effect.[271]

Finally the agreement includes provisions regarding litigation settlement, application of the antitrust laws, and the expiration of the agreement. The owners will pay approximately $195 million to settle all outstanding litigation against the NFL concerning free agency.[272] Additionally, to protect themselves against the uncertainty of the nonstatutory labor exemption, the parties specifically agreed that "the labor exemption from the antitrust laws applies during the express term of this Agreement and to any conduct of the NFL and the NFLPA taken in accordance with the terms of this Agreement during its express term."[273] Moreover, the NFL players agreed not to commence an action under the antitrust laws following expiration of the Agreement, until either: "(i) the Management Council and NFLPA have bargained to impasse; or (ii) six months after such expiration, whichever is later . . . ."[274] In return for this assurance from the players, the NFL and its member clubs agreed to waive any right to assert the labor exemption de-

261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*
265. Eskenazi, *supra* note 241, at B7.
266. Cowlishaw, *supra* note 259, at 28B.
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*
271. Cowlishaw, *supra* note 259, at 28B.
272. Eskenazi, *supra* note 241, at B7.
273. 1993 Agreement art. LVII § 2.
274. *Id.* art. LVII § 3(a).

fense "based upon any claim that the termination by the NFLPA of its status as a collective bargaining representative is or would be a sham, pretext, ineffective, requires additional steps, or has not in fact occurred."[275]

B. EFFECTS OF THE AGREEMENT

The NFL has been arguing since *Mackey v. NFL* that free agency would destroy the League by disrupting the competitive balance necessary to the presentation of a successful entertainment product.[276] More recently, NFL Commissioner Paul Tagliabue stated that free agency would create "doormat" teams, leading to "blowout games" and the destruction of the NFL's competitive balance.[277] The feared consequences of free agency never, of course, materialized. These arguments were nothing more than facades to the underlying reasons for free agency: retention of quality players and suppression of player salaries.

Under the new 1993 Agreement, approximately 120 players changed teams during the four-and-a-half-month free agency period in 1993.[278] Additionally, these players enjoyed average pay hikes of more than 125%.[279] The large-market argument, that the best players would transfer to the largest cities, also failed to materialize. For example, defensive end Reggie White left Philadelphia, the nation's fifth-largest city, for Green Bay, the NFL's smallest city.[280] Linebacker Hardy Nickerson, after receiving offers from twenty teams, left the Pittsburgh Steelers for the Tampa Bay Buccaneers.[281] The Atlanta Falcons, the League's worst defensive team in 1992, signed Pro Bowl defensive end Pierce Holt, who turned down a larger offer from the New York Jets.[282] The Indianapolis Colts signed the League's best available tackle, Will Wolford, and center, Kirk Lowdermilk.[283] These are just a few of the examples.[284]

All that glitters is not gold, however. Several new restrictions have been implemented. The most important is the salary cap, which limits the amount expended on player salaries to sixty-seven percent of the teams' collective revenue.[285] Moreover, when expenditures reach sixty-seven percent, the percentage allowed to be expended the following years falls to sixty-four percent. Assuming that each team grosses approximately $45 million, the salary cap per team will be around $30 million.[286] As player salaries rise in the new competitive market for player services, staying under this cap may

275. *Id.* art. LVII § 3(b).
276. *See Mackey*, 543 F.2d at 611; *McNeil*, 790 F. Supp. at 897.
277. Jerry Kirshenbaum, *Ah, Freedom*, SPORTS ILLUSTRATED, Dec. 14, 1992, at 10.
278. Peter King, *The League of the Free*, SPORTS ILLUSTRATED, July 26, 1993, at 32.
279. Danny Sheidan, *Playboy's Pro Football Forecast*, PLAYBOY, Oct. 1993, at 108.
280. King, *supra* note 278, at 32.
281. *Id.*
282. *Id.*
283. *Id.*
284. For a detailed report of who went where, see King, *supra* note 278, at 32-35. *See also* Sheidan, *supra* note 279, at 108-18.
285. Sheidan, *supra* note 273, at 108.
286. *See id.* at 108.

prove difficult. For example, the Washington Redskins spent $31.7 million on salaries last season, and nineteen of its players alone made $20.2 million. In addition to having the second highest paid running back in the League, Emmitt Smith at $13.6 million, the Dallas Cowboys just resigned Troy Aikman for the largest contract in NFL history—$50 million over eight years.[287] It has been argued that, with salaries soaring and a cap on the amount that can be spent on those salaries, a caste system will develop.[288] Considering the recent advances in the salaries of the most talented players, such a system is certainly plausible, and even likely.

Other restrictions of the new 1993 Agreement are the Franchise and Transition Player(s). As discussed previously, every team is allowed to designate one Franchise Player each year of the Agreement. Additionally, two Transition Players are allowed to be designated by each team in 1993, one in 1994, and one in 1999. Considering the history of player restraints, the players have come a long way regarding the number of players who may be unconditionally restricted: from every player in the NFL under the Rozelle Rule to no more than three players on each team under the 1993 Agreement. Although not as comforting to the Franchise or Transition Player(s), the 1993 Agreement fairly accommodates the League's argument for competitive balance and the players' interests in freedom of movement.

VI. CONCLUSION

The fight over free agency is, for the moment, at an end. The parties have specifically agreed that the nonstatutory labor exemption shall apply for the term of the 1993 Agreement to any conduct taken in accordance with the terms of the Agreement. Therefore, as long as the conduct is within the terms of the agreement, the antitrust laws will be inapplicable until the Agreement expires. This will eliminate the issue in *Mackey v. NFL*. Moreover, after the expiration of the Agreement, no player may commence suit against the NFL under the antitrust laws for at least six months. Even after six months, the parties must still determine if they have bargained to an impasse. If they have, the players may file suit against the NFL.

After suit has been filed, the players will be faced with the Eighth Circuit's decision in *Powell v. NFL*, which held that the labor exemption applies as long as a continuing collective bargaining relationship exists. Faced with this standard, the players would again have to decertify the NFLPA as their exclusive collective bargaining representative to terminate the labor exemption. In the meantime, however, the NFL will have unilaterally implemented its own terms once the impasse was reached. The possibility exists, however, that with two strong dissents[289] and the adoption by other courts

287. Frank Litsky, *Aikman on Receiving End of $50 Million*, N.Y. TIMES, Dec. 24, 1993, at B9.

288. *See* Sheidan, *supra* note 273, at 108.

289. *Powell III*, 930 F.2d at 1304-10 (Heaney, Senior J., Lay, C.J., McMillian, J., dissenting).

of standards closer to impasse,[290] the Eighth Circuit may reconsider its decision in *Powell.*

Once the labor exemption terminates, the court must analyze the conduct under the antitrust laws. In this respect, the court, guided by the Rule of Reason, must first determine whether the restraint is significantly anticompetitive based on an analysis of the industry involved, the history of the restraint, and the justifications for the restraint. The players will be able to collaterally estop the defendants from arguing the issue of the relevant market for player services and for professional football.

If legitimate business reasons exist for the restraint, the court must then weigh the anticompetitive effects against the procompetitive justifications. The court must also consider whether the restraint is no more restrictive than necessary. If the court is faced with the restraint on Franchise or Transition Players, the justifications for the restraint—competitive balance and quality of play—may be sufficient to outweigh the restraint's anticompetitive effects. Because of this, courts have recognized the unique nature of the NFL as a joint venture, and have noted that some restrictions may be necessary to the success of the NFL. Depending upon the future of the restraints in the 1993 Agreement, such restraints, if attacked, may be the first in NFL History to survive antitrust scrutiny. Hopefully, the 1993 Agreement will perform to the satisfaction of both parties, thereby obviating the need for another showdown in the courtroom. Regardless of the outcome, however, one thing is certain—professional football will survive.

290. *See* Brown v. Pro Football, 1993 WL 522950 (D.D.C. Dec. 13, 1991); *Powell I*, 678 F. Supp. at 784-85; *Bridgeman*, 675 F. Supp. at 966.