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Interference on Both Sides: The Case Against the NFL-NFLPA Contract

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I. Introduction

In April 1993, the National Football League (NFL or League) and the National Football League Players Association (NFLPA or Association) entered into a collective bargaining agreement that will govern their relationship into the year 2000.[1] Several provisions of that contract, most notably those limiting monies teams may spend on salaries for veteran players (salary cap)[2] and first year players (rookie salary cap),[3] as well as rules foreclosing mobility for a single so-called "franchise" player,[4] have greatly affected NFL teams[5] and have engendered well-publicized and bitter criticism from players,[6] coaches,[7] and observers[8] of the NFL.

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1. NFL COLLECTIVE BARGAINING AGREEMENT 1993-2000.

2. *Id.* at art. XXIV, §§ 3-4.

3. *Id.* at art. XVII, § 3.

4. *Id.* at art. XX, §§ 1-17.

5. *See* Vito Stellino, *Redskins Get Down and Cheap*, BALTIMORE SUN, July 7, 1994, at C1 (describing Washington Redskins' release of fifteen veteran players to reduce its player payroll from $52 million, spent in 1993, to $34.6 million, as required by cap). Many veteran players were released, including Art Monk, the NFL's career leader in receptions, who declined the Washington Redskins' offer of $600,000 for the 1994 season. *Monk, Skins Part*, MIAMI HERALD, Apr. 7, 1994, at D3. The team reported that it reduced Monk's salary, which had been $1.15 million in 1993, because of the salary cap. *Id.* Linebacker Kurt Gouveia's salary was reduced from $1.02 million to $500,000. Stellino, *supra*.

Other teams with highly paid veterans, including the San Francisco 49ers, the Buffalo Bills, the New York Giants, and the Dallas Cowboys, also felt the effect of the cap, losing some veteran players and reducing the salaries of others. *See* Dave Goldberg, *Commish to Coaches: Put a Cap on It*, LEXINGTON HERALD-LEADER, Apr. 27, 1994, at C8; *see also Tagliabue Tries to Back Off*, N.Y. TIMES, July 24, 1994, at C2. New York Giants Quarterback Phil Simms attributed his release directly to the cap. *Tagliabue Tries to Back Off*, *supra*. The roster of virtually every team was affected by the cap. *See id.*; *see also* Perry A. Farrell, *Cap Dance: Lions Switch Linebackers*, DET. FREE PRESS, July 16, 1994, at B1.

For a description of the effect of the rookie salary cap on NFL teams, see Jason Cole, *In Era of Salary Cap, Have Agents Become Superfluous?*, SUN-SENTINEL (Ft. Lauderdale), July 10, 1994, at C16 (suggesting that rookie salaries have become standardized under cap); Stellino, *supra* (noting that teams must cut salaries of other players to accommodate rookie salaries); E.M. Swift, *On the Spot*, SPORTS ILLUSTRATED, Sept. 5, 1994, at 33 (explaining that rookies will have to play at starting positions because teams have cut veteran players to accommodate salary cap).

6. Player bitterness about the agreement was widespread. *See* S.A. Paolantonio, *A Lot of Players Would Just Love to Scrap the Cap Their Union Accepted*, PHILADELPHIA INQUIRER, May 8, 1994, at C9; *cf.* Gordon Forbes, *Cap Critics Vent Frustration — Agents, Older Players Say Pay System Unbalanced*, USA TODAY, May 5, 1994, at C10. Miami Dolphins linebacker Bryan Cox stated that the NFL owners "whipped our butts" in negotiations, and Reggie White described the salary cap as "definitely too low." Paolantonio, *supra*. Players often blamed the NFLPA for having agreed to the arrangement. *Disturbed by the*

Under most circumstances, the inclusion of such provisions in a bona fide collective bargaining agreement would insulate them from antitrust scrutiny under the nonstatutory exemption to the antitrust laws.[9] As this Article will demonstrate, however, the NFL and the NFLPA (collectively, the Parties) violated well-established principles of labor law by negotiating their contract at a time when the NFLPA was officially decertified and therefore was no longer the players' collective bargaining representative. As a result, their contract cannot be said to be the product of bona fide, arm's-length collective bargaining — a prerequisite to antitrust immunity under the nonstatutory labor exemption.[10]

The consequences of these facts are plain: The Parties' unlawfully created collective bargaining contract will not shield the salary caps, the

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Peace; Cowboys Irvin, Smith Shout About Labor Deal, THE RECORD (Bergen, N.J.), May 8, 1993, at B5; Goldberg, *supra* note 5, at C8 ("When . . . executive director Gene Upshaw briefed the Super Bowl champion Dallas Cowboys on terms of the seven-year agreement . . . Michael Irvin and Emmitt Smith shouted at him, then walked out of the meeting.").

7. Manny Topol, *Tags Gags NFL Team Officials*, NEWSDAY (New York), Apr. 26, 1994, at A71. Tampa Bay Buccaneers coach Sam Wyche was quoted as saying "[a]ll of us are going to have to let go players who should be on our teams . . . ." *Id.* Several team officials, including the general managers of the Buffalo Bills and Green Bay Packers and the head coach of the New York Giants, expressed similar frustration at having lost veteran players as a result of the cap. Goldberg, *supra* note 5. Indeed, so bitter and widespread was the criticism of the salary cap that NFL Commissioner Paul Tagliabue issued a memorandum excoriating general managers and coaches for complaining about the cap and warning that future criticism could result in fines of up to $10,000 for "conduct detrimental to the league." *Heisman Winner is Non Pick*, FRESNO BEE, Apr. 26, 1994, at C3; *Salisbury Agrees to 1-Year Deal with Oilers*, MINNEAPOLIS STAR TRIB., Apr. 26, 1994, at C7; Topol, *supra*.

8. Bob Kravitz, *Defense Still Missing From Broncos' Formula*, ROCKY MOUNTAIN NEWS, Apr. 25, 1994, at B2 (condemning "Gene Upshaw and his band of thieves, who ridiculously agreed to this salary cap without the agreement of the union's constituency"). Sports agent Steve Feldman explained, "The cap is absolutely the worst thing that ever happened to pro football . . . . Ten to 12 players will get huge amounts of money. Thirty or 35 on the other side of the locker room will be making $200,000." Forbes, *supra* note 6.

The importance of the salary cap to players and teams in other sports has been remarkable. *See* Richard Justice, *Baseball Proposes Salary Cap; Move Heats Up Talk of Strike*, WASH. POST, June 15, 1994, at D1 (discussing salary cap proposal for baseball players). Disagreement over salary cap proposals, of course, were at the heart of negotiations in baseball which ultimately resulted in the 1994 work stoppage and the cancellation of the championship season. *See* Cynthia Lambert, *Goodenow Warns Wings Players of Possible Lockout by Owners*, DET. FREE PRESS, Sept. 14, 1994, at F1. In addition, before ultimately reaching an agreement, the National Hockey League and the NHL Players' Association were deadlocked on the issue.

9. *See infra* Part III.B.1 (discussing nonstatutory labor exemption).

10. *See infra* note 64 and accompanying text (listing prerequisites for application of nonstatutory labor exemption).

franchise player designation, or any other anticompetitive contractual provision from substantive antitrust challenge. Given that the nonstatutory labor exemption is the primary impediment to such a challenge[11] — and that similar challenges to other player restraint mechanisms have universally succeeded when subjected to antitrust examination[12] — the significance of this thesis should be apparent.

II. Overview

Part III of this Article reviews the recent history of the Parties' collective bargaining relationship. This history reveals that the Association's longstanding efforts to modify rules limiting player mobility through collective bargaining and through the 1987 work stoppage were wholly unsuccessful.[13] Indeed, between 1987 and 1993, the Parties operated without a collective bargaining agreement, and the rules limiting player mobility were unilaterally imposed by the NFL.[14]

At the same time, individual player antitrust challenges to those player restraint rules were foreclosed. This outcome was fixed in 1989 by *Powell v. NFL*,[15] in which the United States Court of Appeals for the Eighth Circuit held that the "ongoing collective bargaining relationship" between the League and the Association rendered the rules exempt from antitrust scrutiny under the nonstatutory labor exemption to the antitrust laws.[16]

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11. *But see infra* note 114 (explaining that analysis in White v. NFL, 836 F. Supp. 1508 (D. Minn. 1993), *aff'd*, 41 F.3d 404 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2569 (1995), may effectively prevent class members from challenging current collective bargaining agreement).

12. *See* Mackey v. NFL, 407 F. Supp. 1000, 1007-08 (D. Minn. 1975) (holding that Rozelle Rule violated antitrust laws under per se and rule of reason tests), *aff'd in part and rev'd in part*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *see also* Smith v. Pro-Football, Inc., 420 F. Supp. 738, 744-47 (D.D.C. 1976) (holding that NFL draft and other restrictions violated antitrust laws under per se and rule of reason tests), *aff'd in part and rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978); Robertson v. NBA, 389 F. Supp. 867, 890-96 (S.D.N.Y. 1975) (holding NBA player restraint system constituted per se violation of antitrust laws). Kapp v. NFL, 390 F. Supp. 73, 82-83 (N.D. Cal. 1974) (holding that Rozelle Rule, draft, and other rules violated antitrust laws under rule of reason test), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979).

13. *See Strike Chronology*, TIMES UNION (Albany), Oct. 16, 1987, at D2 (chronologizing events of 1987 NFL strike).

14. *See infra* notes 86-87 and accompanying text (discussing player restraint rules imposed by NFL between 1987 and 1993).

15. 930 F.2d 1293 (8th Cir. 1989).

16. Powell v. NFL, 930 F.2d 1293, 1304 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991). For purposes of brevity, this doctrine will be referred to in this Article as the "labor

Because the salary caps, franchise player designation, and other potentially anticompetitive rules contained in the Parties' current agreement are free from antitrust scrutiny only if they fall within the labor exemption, some digression from the chronicle of events is necessary to discuss this doctrine and its prerequisites. Part III of this Article, therefore, also briefly reviews the history, role, and requirements of the labor exemption to the antitrust laws.

This review shows that anticompetitive agreements between labor and management may be shielded from antitrust challenge only if they meet three now well-established and defined criteria.[17] First, the agreement must primarily affect the parties themselves, and not strangers to their relationship. Next, the matter under scrutiny must concern a mandatory subject of bargaining under the National Labor Relations Act (NLRA).[18] Finally, and most germane to the thesis of this Article, the agreement must be the product of bona fide, arm's-length collective bargaining — a prerequisite that is lacking in the Parties' current contract.[19]

Returning to the sequence of events leading to the current collective bargaining agreement, this Article shows that the practical effect of the Eighth Circuit's holding in *Powell* was that the labor exemption would remain an obstacle to individual antitrust challenges to the player mobility restraints as long as a collective bargaining relationship between the NFL and the NFLPA continued.

Consequently — and within two days following the court's decision in *Powell* — the NFLPA began the process of officially terminating its status as the players' collective bargaining representative. The NFLPA took this unusual, even extreme, step for the avowed purpose of ending its collective bargaining relationship with the League and thereby extinguishing the labor exemption as a barrier to individual antitrust actions by players.[20]

Immediately thereafter, NFL players brought individual antitrust actions challenging League rules restricting their movement among teams. And, shed of the labor exemption, they met with immediate success. In Septem-

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exemption."

17. *See* Mackey v. NFL, 543 F.2d 606, 614-15 (8th Cir. 1976) (discussing prerequisites to qualifying for labor exemption to antitrust laws), *cert. dismissed*, 434 U.S. 801 (1977).

18. 29 U.S.C. §§ 151-169 (1994).

19. *See infra* note 64 and accompanying text (discussing prerequisite of arm's-length collective bargaining relationship to application of labor exemption)

20. *See infra* notes 78-85 and accompanying text (discussing NFLPA's termination of its status as collective bargaining representative following decision of United States Court of Appeals for the Eighth Circuit in Powell v. NFL, 678 F. Supp. 777 (D. Minn. 1988), *rev'd*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991)).

ber 1992 a federal court jury in *McNeil v. NFL*[21] found the NFL rule governing player mobility then in effect[22] to be violative of the antitrust laws and awarded damages of $1.63 million and unrestricted free agency to four of the eight player plaintiffs.[23] Within two weeks, Reggie White and four other players lodged a similar suit against the NFL seeking free agency and damages.[24]

On February 26, 1993 the NFL and the NFLPA settled the matter of *White v. NFL*.[25] That settlement, which comprised nearly two hundred pages, included the specific terms of what would later become the Parties' collective bargaining agreement after the NFL again recognized the NFLPA as the players' representative.[26] At the time of the Parties' settlement, however, the NFLPA was avowedly and purposely no longer the players' collective bargaining representative.

The thesis of this Article is straightforward: Under firmly established principles of labor law, employers and unions are forbidden from negotiating or entering into agreements unless and until a majority of the employees themselves have expressed their desire to be so represented.[27] This principle, discussed in Part IV, grows out of our nation's historical experience with so-called "company unions" — organizations created or fostered by employers for the purpose of avoiding bona fide, arm's-length collective bargaining with their employees' freely selected representatives.[28] In this instance, the contract between the NFL and the NFLPA was negotiated at a time when the NFLPA was indisputably, and by design, not the players' collective bargaining representative.

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21. Civ. No. 4-90-476, 1992 WL 315292 (D. Minn. Sept. 10, 1992).

22. The rule under examination in *McNeil* was the so-called "Plan B," which in effect restrained 37 of the 55 players on each team from contracting with other teams. Jeffrey Pash, *Free Agency Litigation in the National Football League*, PRAC. L. INST., Mar.-Apr. 1993, at 3-4.

23. McNeil v. NFL, Civ. No. 4-90-476, 1992 WL 315292, at *1 (D. Minn. Sept. 10, 1992); Richard Sandomir, *Judge Holds Key to NFL's Future*, HOUSTON CHRON., Sept. 11, 1992, at 5 (Sports).

24. White v. NFL, 822 F. Supp. 1389, 1394 (D. Minn. 1993) ("Plaintiffs filed the present antitrust class action on September 21, 1992, less than two weeks after a jury rendered its verdict in *McNeil v. NFL*.") (citation omitted).

25. *Id.* at 1395-96. For a description of the role of the NFLPA in the *White* litigation and its settlement, see *infra* part V.

26. *See infra* notes 90-99 and accompanying text (discussing initiation and settlement of *White* case).

27. *See infra* notes 100-07 and accompanying text (discussing NLRA's prohibition on employer interference with employees' formation of unions).

28. *Id.*

Because the League recognized and bargained a contract with an organization — the NFLPA — that had deliberately ceased to be the players' collective bargaining representative, the 1993-2000 NFL-NFLPA collective bargaining contract cannot be said to be the product of bona fide, arm's-length bargaining. Consequently, their contract failed the last of the criteria necessary to shelter the provisions from antitrust examination. The significance of this sequence of events is inescapable: The Parties' defectively made collective bargaining contract will not, as they surely assume, shield the salary caps, the franchise player designation, or any other allegedly anticompetitive element contained within it from individual antitrust challenge.

III. The Parties' Relationship

A. The 1987 Negotiations

Until the NFL and the NFLPA settled their long-standing differences in April 1993 and reached their current agreement, labor and management in professional football had operated without a contract since August 1987. At that time, the primary disagreement between the Parties — as has so often been the case — revolved around the inherent conflict in professional team sports between the players' desire to freely market their services and the teams' desire to restrain player mobility.[29]

In 1987 the particular restraints giving rise to labor-management strife were those limiting player free agency. The NFLPA sought in negotiations to modify the so-called "first refusal/compensation system" then in effect. Under that system, a player's current team had the right to match any offer made by another NFL team and thereby retain the player. Even if the current team elected not to match the offer, it was still entitled to "compen-

29. The tension between player restraint mechanisms and players' desire to freely market their services has been among the most long-standing and distinctive themes in sports law. Player restraints have existed since at least the advent of the reserve system in professional baseball in 1879 and have given rise to much of the significant unrest and litigation since that time. *See generally* Robert A. McCormick, *Baseball's Third Strike: The Triumph of Collective Bargaining in Professional Baseball*, 35 VAND. L. REV. 1131 (1982). For examples of such lawsuits, see Flood v. Kuhn, 407 U.S. 258 (1972) (baseball); Powell v. NFL, 678 F. Supp. 777 (D. Minn. 1988) (football), *rev'd*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991); McCourt v. California Sports, Inc., 460 F. Supp. 904 (E.D. Mich. 1978) (hockey), *vacated*, 600 F.2d 1193 (6th Cir. 1979); Mackey v. NFL, 407 F. Supp. 1000 (D. Minn. 1975) (football), *aff'd in part and rev'd in part*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); Robertson v. NBA, 389 F. Supp. 867 (S.D.N.Y. 1975) (basketball); Kapp v. NFL, 390 F. Supp. 73 (N.D. Cal. 1974) (football), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979). *See also* Robert McCormick, *Court Tackles NFL Players*, NAT'L L. J., Mar. 28, 1988, at 13, 13-14 (discussing *Powell* case).

sation" from the new team in the form of draft choices — the number and quality of which depended primarily upon transferring the player's salary with the new team.[30]

The Parties could not resolve their differences and in September 1987 the NFLPA began a league-wide work stoppage.[31] As even casual observers will remember, the strike was rendered ineffectual when teams hired replacement players,[32] veteran players crossed picket lines,[33] and games proceeded uninterrupted.[34] Three weeks later, the NFLPA capitulated and players returned to work without a contract[35] — a status that continued until 1993.

B. Powell v. NFL

Having failed to obtain greater freedom for its members through collective bargaining and economic pressure, the NFLPA turned next to the antitrust laws and the federal courts. In October 1987 Marvin Powell, then-NFLPA President, filed suit on behalf of the Association and a group of players challenging essentially every element of the NFL player restraint system. The suit challenged, among other things, the college draft, the first

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30. Pash, *supra* note 22, at 2. The first refusal/compensation system had been preceded by the so-called "Rozelle Rule." *Id.* at 1-2. Under that rule, when a free agent moved to a new team the two teams would attempt to agree upon appropriate compensation, as in a trade. *Id.* at 1. If the teams were unable to agree, the NFL Commissioner was empowered to resolve disputes by awarding a different player or other compensation to the former team. *Id.* In Mackey v. NFL, 407 F. Supp. 1000 (D. Minn. 1975), *aff'd in part and rev'd in part*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977), the court determined that the Rozelle Rule violated § 1 of the Sherman Act, 15 U.S.C. § 1 (1994). *Mackey*, 407 F. Supp. at 1007-08.

31. *Strike Chronology*, *supra* note 13. The 1,585 NFLPA members struck following the Monday night game on September 22. *Id.*

32. *See* Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 367.

33. *Strike Chronology*, *supra* note 13. In the first full day of the strike, September 23, 1987, two prominent players, Mark Wilson and Gary Hogeboom, crossed the picket line. *Id.* By September 30, 1987, 15 more players had abandoned the strike, including Danny White, the quarterback of the Dallas Cowboys. *Id.* By October 7, 1987, 129 players had returned to work. *Id.* One week later, on the final day to report and to be paid for the week, the NFL's Most Valuable Player in 1986, Lawrence Taylor, as well as All-Pros Steve Largent and Andre Tippett, reported to work, swelling the total to 228. *Id.*

34. Lock, *supra* note 32, at 357, 367; *cf.* Ed Garvey, *Foreword to Ethan Lock*, The Scope of the Labor Exemption in Professional Sports: *A Perspective on Collective Bargaining in the NFL*, 1989 DUKE L.J. 328, 330 (discussing ease with which NFL thwarted Players' strike in 1987).

35. Pash, *supra* note 22, at 3; *see also Strike Chronology*, *supra* note 13. On October 15, 1987 the 24-day strike ended as the NFLPA officially abandoned the strike and instructed players to return to work without a contract. *Strike Chronology*, *supra* note 13.

refusal/compensation scheme, and the standard player contract on the grounds that they unlawfully restrained trade in the market for players' services.[36]

The threshold and more significant question in *Powell*, however, was whether the labor exemption shielded the League and the player restraint rules from antitrust scrutiny. This issue was the linchpin to the challenge; if the rules fell within the labor exemption, their anticompetitive effects were beyond the purview of the antitrust laws.[37]

1. The Nonstatutory Labor Exemption to the Antitrust Laws

The nonstatutory labor exemption to the antitrust laws was pivotal to the resolution of *Powell*. Because its requirements are also central to this Article's thesis, some discussion of the origin and development of this doctrine is essential.

The nonstatutory labor exemption doctrine is an outgrowth of the United States Supreme Court's efforts to harmonize national antitrust and labor policies.[38] As has been abundantly explicated elsewhere, those policies

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36. Powell v. NFL, 678 F. Supp. 777, 778 & n.1 (D. Minn. 1988), *rev'd*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991).

37. *See infra* Part III.B.1 (discussing duration of labor exemption).

38. The so-called nonstatutory labor exemption, as its name denotes, should be distinguished from the exemption accorded specific unilateral union activities under §§ 6 and 20 of the Clayton Act, ch. 323, §§ 6, 20, 38 Stat. 730, 731, 738 (1914) (codified at 15 U.S.C. § 17 (1994) and 29 U.S.C. § 52 (1994)). Judicial review of congressional efforts to create an antitrust exemption for labor has limited the statutory exemption to specific unilateral union activities. *See, e.g.*, Connell Constr. Co. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616, 622-26 (1975) (concluding that multi-employer collective bargaining agreement was not entitled to antitrust exemption because it placed direct restraints on subcontractor competition); United States v. Hutcheson, 312 U.S. 219, 233-37 (1941) (concluding that conventional union activities directed at rival union are not prohibited by antitrust laws); *cf.* Milton Handler & William C. Zifchak, *Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption*, 81 COLUM. L. REV. 459, 475-83 (1981) (discussing Supreme Court cases interpreting statutory exemption). Negotiated agreements between unions and employers, therefore, are not subject to the statutory exemption. *See* UMW v. Pennington, 381 U.S. 657, 665-66 (1965) (concluding that attempt to impose industry-wide standards in negotiated agreement with employer would not be entitled to statutory antitrust exemption).

As early as 1941, however, the Supreme Court recognized in United States v. Hutcheson, 312 U.S. 219 (1941), that accommodating antitrust and labor policy required that some labor-management agreements be accorded a nonstatutory exemption from the antitrust laws. *Id.* at 233-37 (discussing broad legislative purpose behind Congress' enactment of labor statutes); *see also Connell*, 421 U.S. at 621-23. As Justice Goldberg observed, to do otherwise would permit unions and employers to conduct "industrial warfare" but would

are in some important ways inherently at cross-purposes.[39] Antitrust law seeks to preserve free economic competition,[40] but labor law protects collective bargaining and certain union or concerted employee activities.[41]

Unions are by their nature and purpose anticompetitive.[42] As the United States Supreme Court has recognized repeatedly, a central goal of the labor

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prohibit them from peacefully resolving their disputes. Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 712 (1965) (Goldberg, J., dissenting).

39. *See generally* EDWARD B. MILLER, ANTITRUST LAWS AND EMPLOYEE RELATIONS (1984); Archibald Cox, *Labor and the Antitrust Laws — A Preliminary Analysis*, 104 U. PA. L. REV. 252 (1955); Archibald Cox, *Labor and the Antitrust Laws: Pennington and Jewel Tea*, 46 B.U. L. REV. 317 (1966); Daniel J. Gifford, *Redefining the Antitrust Labor Exemption*, 72 MINN. L. REV. 1379 (1988); Handler & Zifchak, *supra* note 38; Douglas L. Leslie, *Principles of Labor Antitrust*, 66 VA. L. REV. 1183 (1980); Bernard D. Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws*, 32 U. CHI. L. REV. 659 (1965); Theodore J. St. Antoine, Connell*: Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603 (1976); Ralph K. Winter, Jr., *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14 (1963).

40. *See* Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."); Allen Bradley Co. v. Local Union No. 3, IBEW, 325 U.S. 797, 806 (1945) ("[Antitrust policy] . . . seeks to preserve a competitive business economy . . . ."); LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 3, at 14 (1977) ("The purpose of the antitrust laws is to promote competition and to inhibit monopoly and restraints upon freedom of trade in all sectors of the economy to which these laws apply."); *see also* Clarence Fried & William H. Crabtree, *Labor*, 33 ANTITRUST L.J. 38, 40 (1967) ("The declared policy of Congress regarding all antitrust legislation is the preservation and advancement of competition in the marketplace.").

41. Congress' purpose in this regard was described plainly in the preamble to the NLRA which states:

> It is declared hereby to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151 (1994). The NLRA further provides that employees "have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Id.* § 157.

42. ARCHIBALD COX ET AL., CASES AND MATERIALS ON LABOR LAW 922 (11th ed. 1991) ("In short, unionization, collective bargaining and standardization of wages and working conditions are inherently inconsistent with many of the assumptions at the heart of antitrust policy."); St. Antoine, *supra* note 39, at 604 ("From the outset, the difficulty in applying the antitrust concept to organized labor has been that the two are intrinsically incompatible. The antitrust laws are designed to promote competition, and unions, avowedly and unabashedly, are designed to limit it.").

movement is to reduce competition among employees regarding wages and conditions of employment.[43] For example, unions, as a matter of course, seek agreements with employers that establish uniform terms. One consequence of such uniformity is that the opportunity of any individual employee to sell his or her services on more favorable terms is foreclosed.[44] Some employees are advantaged by such agreements; others' ability to secure a better individual bargain are limited by such standardization.[45]

Examples of union objectives having obvious anticompetitive effects include uniform wage rates, seniority systems, and hiring halls. Uniform wage rates — present in most industries with union contracts (other than the sports industry) — result in a competitive disadvantage for highly skilled workers who could command a wage greater than the standard rate. Seniority systems and hiring halls similarly disadvantage less senior but more highly skilled employees.

Collective bargaining agreements between employers and unions are therefore frequently "contract[s] [or] combination[s] in . . . restraint of trade" within the literal language of the Sherman Act.[46] At the same time,

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43. UMW v. Pennington, 381 U.S. 657, 666 (1965) ("This Court has recognized that a legitimate aim of any national labor organization is to obtain uniformity of labor standards and that a consequence of such union activity may be to eliminate competition based on differences in such standards.") (citing Apex Hosiery Co. v. Leader, 310 U.S. 469, 503 (1940)).

44. JOHN C. WEISTART & CYM H. LOWELL, THE LAW OF SPORTS § 5.05(c), at 549 (1979). It is a fundamental tenet of labor law that the rights of an individual must yield to those of the group. The Supreme Court has observed:

> But it is urged that some employees may lose by the collective agreement, that an individual workman may sometimes have, or be capable of getting, better terms than those obtainable by the group . . . . [W]e find the mere possibility that such agreements might be made no ground for holding generally that individual contracts may survive [over] collective ones. The practice and philosophy of collective bargaining looks with suspicion on such individual advantages.

J.I. Case Co. v. NLRB, 321 U.S. 332, 338 (1944); *see also* HARRY H. WELLINGTON, LABOR AND THE LEGAL PROCESS 130 (1968) (discussing why individual bargaining is not permitted).

45. Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 9-10 (1971); *see* WEISTART & LOWELL, *supra* note 44, § 5.05(g), at 562.

46. 15 U.S.C. § 1 (1994). It is clear, however, that Congress' primary purpose in enacting the Sherman Act was to deal with business monopolies and restrictive trade practices, not trade union activities. Apex Hosiery Co. v. Leader, 310 U.S. 469, 492-93 (1940) ("The end sought [by the Sherman Act] was the prevention of restraints to free competition in business and commercial transactions . . . ."). Indeed, a genuine question exists as to whether Congress intended the Act to apply to groups of employees at all. *See* EDWARD BERMAN, LABOR AND THE SHERMAN ACT 51 (1930) ("On the basis of the congressional

labor-management agreements regarding such matters as wages, seniority systems, and hiring halls are entirely permissible under the NLRA.[47] Indeed, in view of the fact that such issues normally constitute mandatory subjects of bargaining under the NLRA,[48] they are plainly matters about which national labor policy encourages agreement.

The effort to accommodate these two important yet conflicting national policies has been left largely to the courts.[49] As the Supreme Court has stated crisply:

> [W]e have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.[50]

The contours of the labor exemption have been shaped by the Supreme Court in a series of decisions wholly outside the sports context.[51] At the

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debates . . . it is believed that no valid evidence can be found in the records of the legislative proceedings that Congress intended the Anti-trust Act to apply to labor organizations.").

47. *Cf. Pennington*, 381 U.S. at 666 (acknowledging that labor organizations seek to obtain "uniformity of labor standards").

48. *See* Houston Chapter, Associated Gen. Contractors of America, Inc., 143 N.L.R.B. 409, 411-13 (1963) (hiring halls are mandatory subject of bargaining), *enforcement granted*, 349 F.2d 449 (5th Cir. 1965), *cert. denied*, 382 U.S. 1026 (1966); United States Gypsum Co., 94 N.L.R.B. 112, 114 (1951) (seniority systems are mandatory subjects of bargaining), *modified*, 206 F.2d 410 (5th Cir. 1953), *cert. denied*, 347 U.S. 912 (1954); 1 THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT ch. 17, pts. II.A, IV.B.1, IV.B.3 (Charles J. Morris et al. eds., 2d ed. 1983 & 3d Supp. 1982-1986).

49. Having limited the statutory exemption to unilateral union activities, the Court, in essence, left to the common law the task of formulating standards for the application of the nonstatutory labor exemption to labor-management agreements with allegedly anticompetitive effects.

50. Allen Bradley Co. v. Local Union No. 3, IBEW, 325 U.S. 797, 806 (1945).

51. *See, e.g.*, Connell Constr. Co. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616, 623-26 (1975) (refusing to exempt multi-employer collective bargaining agreement that placed direct restraint on subcontractor market from antitrust scrutiny); Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 688-97 (1965) (concluding that agreement restricting marketing hours was entitled to labor exemption); UMW v. Pennington, 381 U.S. 657, 665-66, 669 (1965) (concluding that negotiated agreement between union and employer attempting to secure "uniform labor standards" throughout industry was not exempt from antitrust scrutiny); *Allen Bradley Co.*, 325 U.S. at 808 (concluding that labor unions could not assist nonlabor groups in forming monopolies to control market); United States v. Hutcheson, 312 U.S. 219, 233-37 (1941) (concluding that

same time, because professional sports leagues have virtually always restrained player movement,[52] the degree to which player restraint rules might be sheltered from antitrust review has been an extraordinarily important and vigorously tested question. As the following section will demonstrate, litigation challenging such rules in professional sports leagues has prompted the emergence of a broadly accepted standard for the application of the labor exemption doctrine. It is this standard that the NFL-NFLPA contract cannot meet.

2. *The Role of the Labor Exemption in Sports Litigation and the Emergence of Standards for its Application*

The significance of the labor exemption doctrine in professional sports litigation cannot be overstated. During the past two decades, professional athletes repeatedly have challenged traditional player restraints such as the player draft,[53] reserve clauses,[54] and free agent indemnity arrangements,[55]

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conventional union activities directed at rival union are not prohibited by antitrust laws); Apex Hosiery Co. v. Leader, 310 U.S. 469, 503-04 (1940) (explaining that "sit-down" strikes and wage agreements between unions and employers do not violate antitrust laws). In December 1995 the Court granted a petition for certiorari in Brown v. Pro-Football, Inc., 50 F.3d 1041 (D.C. Cir. 1995), *cert. granted*, 116 S. Ct. 593 (1995). Resolution of the issue in this case will determine the duration of the labor exemption.

52. *See supra* note 29 (citing cases involving legality of player restraint mechanisms in professional sports).

53. The player draft allocates contracting rights to new players among league teams, traditionally in inverse order of the teams' performance during the prior season. Smith v. Pro-Football, Inc., 593 F.2d 1173, 1175 (D.C. Cir. 1978).

54. Reserve systems traditionally were characterized by a perpetual right in the employing team to renew the contract of the player and were enforced through no-tampering agreements. *See* Flood v. Kuhn, 407 U.S. 258, 259-61 n.1 (1972) (discussing similar arrangement in professional baseball); WEISTART & LOWELL, *supra* note 44, § 5.03(c), at 505-06 (discussing no-tampering agreements); Simon Rottenberg, *The Baseball Players' Labor Market*, 64 J. POL. ECON. 242, 245 (1956) (same).

55. Historically, indemnity arrangements among teams insured that if a player left a team to play for another team within the league, the original team would be compensated in the form of a player, draft rights, or money. League bylaws sometimes provided that if the former team and the acquiring team could not agree on the type or the amount of compensation the former team should receive, then the determination would be made by the league commissioner. In essence, the compensation was a forced trade. *See* WEISTART & LOWELL, *supra* note 44, § 5.03(a), at 502-03. These arrangements produced considerable litigation. For a discussion of the operation of indemnity arrangements, see Mackey v. NFL, 407 F. Supp. 1000, 1003-05 (D. Minn. 1975), *aff'd in part and rev'd in part*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); Kapp v. NFL, 390 F. Supp. 73, 75-77 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979); Robert-

arguing that such rules impermissibly operated to restrain their ability to market their services freely.[56] In response, the various leagues argued, *inter alia*, that the restraints were the product of collective bargaining between the leagues and the player associations, and consequently, that they should be shielded from antitrust attack by players whose own representatives had agreed to the arrangements under challenge.[57]

Out of this controversy, a now broadly accepted standard emerged for the applicability of the labor exemption in cases challenging collectively bargained player restraints. Indeed, this standard has been applied uniformly in all subsequent litigation challenging player restraint rules.[58] The criteria

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son v. NBA, 389 F. Supp. 867, 873-74 (S.D.N.Y. 1975). In these cases, players claimed that the forced compensation schemes operated to discourage prospective employing club owners from hiring available players and therefore restrained player mobility. *See* WEISTART & LOWELL, *supra* note 44, § 5.03(a), at 503.

56. *See, e.g.*, McCourt v. California Sports, Inc., 460 F. Supp. 904, 905 (E.D. Mich. 1978) (hockey), *vacated*, 600 F.2d 1193 (6th Cir. 1979); Smith v. Pro-Football, Inc., 420 F. Supp. 738, 740 (D.D.C. 1976) (football), *aff'd in part and rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978); Mackey v. NFL, 407 F. Supp. 1000, 1002 (D. Minn. 1975) (football), *aff'd in part and rev'd in part*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); Robertson v. NBA, 389 F. Supp. 867, 872-73 (S.D.N.Y. 1975) (basketball), *aff'd*, 556 F.2d 682 (2d Cir. 1977); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 465 (E.D. Pa. 1972) (hockey); Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1052 (C.D. Cal. 1971) (basketball).

57. This argument was presaged in a 1971 *Yale Law Journal* article by Michael Jacobs and Professor Ralph Winter. *See* Jacobs & Winter, *supra* note 45, at 14. The authors argued that a petition for certiorari had been improvidently granted in Flood v. Kuhn, 407 U.S. 258 (1972). Jacobs & Winter, *supra* note 45, at 28-29. In that case, Curt Flood had been traded by the St. Louis Cardinals to the Philadelphia Phillies without consultation and against his wishes. *Flood*, 407 U.S. at 265. Rule 9 of the Major League Rules stated that "upon receipt of written notice of such assignment," the player was "bound to serve the assignee." *Id.* at 259-61 n.1. In ¶ 6(a) of his Uniform Player Contract, Flood had agreed that he could be so assigned. *Id.*

Flood's first and most important cause of action complained that the reserve system violated the Sherman Act. *Id.* at 265. Jacobs and Winter, however, responded:

> For years the impact of antitrust principles on the arrangements allocating players among teams in professional sports has been hotly disputed. Now recent events seem to have brought this issue to a head. A malaise among good athletes like Curt Flood has increased the tempo of litigation . . . . We enter this crowded arena, not to solve the antitrust dilemma, but to put it to rest. For, in the form in which it is generally debated, it is an issue whose time has come and gone, an issue which has suffered that modern fate worse than death: irrelevancy.

Jacobs & Winter, *supra* note 45, at 1.

58. *See* Powell v. NFL, 930 F.2d 1293, 1298-99 (8th Cir.1989) (applying three-part test for nonstatutory labor exemption), *cert. denied*, 498 U.S. 1040 (1991); McCourt v. California Sports, Inc., 600 F.2d 1193, 1197-98 (6th Cir. 1979) (same); NBA v. Williams,

were first formulated by the Eighth Circuit in *Mackey v. NFL*.[59] There, a group of active and retired NFL players argued that the then-existing free agent indemnity system, known as the Rozelle Rule, operated to restrain players' ability to market their services freely.[60] The NFL defended the Rule in part on the grounds that the Rule was incorporated into the collective bargaining contract[61] and that proper accommodation of federal labor and antitrust policy required that the agreement be immunized from antitrust interdiction.[62]

The court rejected the League's labor exemption defense.[63] In so doing, it fashioned the following standard for determining when the labor exemption would shield agreed-upon restraints from antitrust challenge:

> 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.[64]

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857 F. Supp. 1069, 1074 (S.D.N.Y. 1994) (same), *aff'd*, 45 F.3d 684 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3070 (U.S. July 24, 1995) (No. 95-137); Zimmerman v. NFL, 632 F. Supp. 398, 403-04 (D.D.C. 1986) (same); *see also* Brown v. Pro-Football, Inc., 50 F.3d 1041, 1056-58 (D.C. Cir. 1995) (applying nonstatutory labor exemption to player restraint mechanism), *cert. granted*, 116 S. Ct. 593 (1995).

59. 543 F.2d 606 (8th Cir. 1976).

60. Mackey v. NFL, 543 F.2d 606, 609-10 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). The players also claimed that the draft, the standard player contract, the option clause, and the no-tampering agreement constituted impermissible anticompetitive practices of the defendants. *Id.* at 611 n.6.

61. *Id.* at 612. The 1968 contract between the Association and the League incorporated by reference the NFL constitution and bylaws, of which the Rozelle Rule was a part. The 1970 agreement, although not referring to the Rule directly, did require that all players sign the standard player contract. That contract, in turn, provided that the player agreed to comply with and to be bound by the League constitution and bylaws. Further, representatives of the Parties testified that it was their understanding that the Rozelle Rule would remain in effect for the duration of the 1970 agreement. *Id.* at 612-13.

62. *Id.* at 612.

63. *Id.* at 616. The appeal of this case was the first time that a federal court of appeals considered the immunity issue in the context of professional league sports. *See* WEISTART & LOWELL, *supra* note 44, § 5.06(a), at 576.

64. *Mackey*, 543 F.2d at 614-15 (citations omitted). In applying the labor exemption test, the Eighth Circuit specifically rejected an argument by the players that the labor

This formula was distilled neatly from Supreme Court precedent regarding the nature of the labor exemption. For example, with respect to the first requirement, the Court uniformly had found labor-management agreements primarily affecting third parties to be outside the labor exemption.[65] In contrast, it had held agreements primarily restraining the parties themselves to be sheltered by the labor exemption.[66] Regarding the second element of the standard, the Court consistently had held that only agreements concerning mandatory subjects of bargaining under the NLRA would be shielded.[67] Finally, and most germane to this Article's thesis, the Court had viewed the purpose of the labor exemption as preserving the integrity of the collective bargaining process and therefore had found the exemption applicable only to "bona fide" labor-management agreements.[68]

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exemption extends only to labor or union activities and not to the activities of employers. *Id.* at 612.

In *Mackey*, the Eighth Circuit concluded that the indemnity arrangement affected only the parties to the agreement, and although it was technically an arrangement among owners, it operated to restrict a player's mobility and to depress a player's salary. *Id.* at 615, 620. Accordingly, the court concluded that the rule was related intimately to wages and thus constituted a mandatory subject of bargaining under the NLRA. *Id.* at 615.

On the third prong of the labor exemption test, the NFL's defense faltered. The Eighth Circuit found that substantial evidence supported the lower court's finding that there had not been "bona fide arm's-length bargaining over the Rozelle Rule" and that the simple acceptance of the rule by the union did not serve to immunize it. *Id.* at 616.

65. *See* UMW v. Pennington, 381 U.S. 657, 665 (1965) ("[A] union forfeits its exemption . . . when . . . it has agreed with one set of employers to impose a certain wage scale on other bargaining units."); Allen Bradley Co. v. Local Union No. 3, IBEW, 325 U.S. 797, 808-09 (1945) (stating that agreement between union and employer that attempted to control markets and prices was outside scope of labor exemption).

66. Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 688-89 (1965) (exempting agreement affecting only employer and its unions from antitrust scrutiny).

67. *See id.* at 689 (exempting agreement on marketing hours from antitrust scrutiny); *Pennington*, 381 U.S. at 664 (acknowledging that wage agreement dealt with subject "about which employers and unions must bargain"); *Allen Bradley Co.*, 325 U.S. at 808 (stating that § 6 of Clayton Act does not exempt agreements that attempt to help employer control market and prices).

68. In *Jewel Tea*, the Court wrote

> Thus the issue in this case is whether the marketing-hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through *bona fide*, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act. We think that it is.

Because of its universal acceptance as an accurate formulation of Supreme Court teachings, the *Mackey* standard is the proper template against which to assess the many restraints embodied in the current NFL-NFLPA contract to determine whether they warrant immunity under the labor exemption. This Article concludes that they do not.

C. Powell *Revisited*

In *Powell*, the question was whether the rules under challenge — the draft, the right of first refusal, and the standard player agreement — fell within the reach of the labor exemption, and if they did, whether the labor exemption continued to shield them even after the Parties' contract had expired.[69] The district court, applying the *Mackey* standard, held that the restraints under scrutiny satisfied each element of that test and were insulated during the life of the agreement. That is, the court found the alleged restraints to be mandatory subjects of bargaining that affected only the Parties themselves and to be "in all probability, the product of bona fide arm's-length bargaining."[70]

Regarding the more significant question of the exemption's duration, the district court held that the exemption survived the expiration of the contract and continued to insulate any particular issue from antitrust review until the Parties reached a bargaining impasse regarding that issue.[71] On interlocutory appeal, however, the Eighth Circuit reversed the district court's opinion concerning this latter holding.[72] The Eighth Circuit held instead that the exemption continued beyond an impasse and shielded all terms and conditions of employment "conceived in an ongoing collective bargaining relationship" from antitrust review.[73] Put simply, the Eighth Circuit's decision in

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Jewel Tea, 381 U.S. at 689 (emphasis added) (footnote omitted); *see also In re* Detroit Auto Dealers Ass'n, 955 F.2d 457, 461 (6th Cir. 1992) (endorsing FTC's determination that primary purpose of exemption is to preserve integrity of collective bargaining process); Mackey v. NFL, 543 F.2d 606, 612 n.10 (8th Cir. 1976) ("To preserve the integrity of the negotiating process, employers who bargain in good faith must be entitled to claim the antitrust exemption.") (quoting Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840, 847 n.14 (3d Cir. 1974)), *cert. dismissed*, 434 U.S. 801 (1977).

69. Powell v. NFL, 678 F. Supp. 777, 782 (D. Minn. 1988), *rev'd*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991).

70. *Id.* at 784. Indeed, on appeal, the Parties did not disagree that the expired agreement met the three-prong test for antitrust immunity. *Powell*, 930 F.2d at 1298-99.

71. *Powell*, 678 F. Supp. at 788-89 ("[A] determination that the parties have reached impasse as to a particular issue results in termination of the labor exemption protecting that particular provision.").

72. *Powell*, 930 F.2d at 1304.

73. *Id.* at 1303.

Powell effectively meant that as long as the NFL and the NFLPA maintained an "ongoing collective bargaining relationship," disagreements regarding player mobility would be resolved only through collective bargaining and labor law, and would be exempt from antitrust review.[74]

The *Powell* holding as to the duration of the labor exemption gave rise to a vigorous scholarly debate.[75] As a practical matter, however, it meant

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74. *See* NBA v. Williams, 45 F.3d 684 (2d Cir. 1995) (applying labor exemption to player restraint system), *petition for cert. filed*, 64 U.S.L.W. 3070 (U.S. July 24, 1995) (No. 95-137). In *Williams*, the United States Court of Appeals for the Second Circuit endorsed the Eighth Circuit's approach and similarly applied the nonstatutory labor exemption to unilaterally maintained player restraint mechanisms — including the draft, the right of first refusal, and the revenue sharing/salary cap system — in the NBA for as long as the NBA and the NBA Players Association's collective bargaining relationship existed. *Id.* at 686, 688-93.

Most recently, in Brown v. Pro-Football, Inc., 50 F.3d 1041 (D.C. Cir 1995), *cert. granted*, 116 S. Ct. 593 (1995), the United States Court of Appeals for the District of Columbia Circuit articulated the breadth of the exemption somewhat differently — but to the same effect — and held that the labor exemption continues to shelter unilaterally enforced player restraints that are "imposed through the collective bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining." *Id.* at 1056.

75. *See, e.g.*, Lock, *supra* note 32, at 395-400 (arguing that duration of exemption should be coextensive with Parties' collective bargaining agreement); Ethan Lock, Powell v. National Football League: *The Eighth Circuit Sacks the National Football League Players Association*, 67 DENV. U. L. REV. 135, 153 (1990) (arguing that exemption should end at bargaining impasse); Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 GEO. L.J. 19, 62-63 (1986) (arguing that labor exemption should insulate all conduct by either party to bargaining relationship that pertains to mandatory subjects of bargaining); Bradley R. Cahoon, Note, Powell v. National Football League: *Modified Impasse Standard Determines Scope of Labor Exemption*, 1990 UTAH L. REV. 381, 401-06 (arguing that exemption should end when parties reach "modified impasse"); Kieran M. Cochran, Note, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports*, 94 COLUM. L. REV. 1045, 1071-75 (1994) (arguing that exemption should shield agreement until it is "clearly unreasonable" for parties to believe disputed provision will appear "in that form in succeeding agreement"); Michael S. Hobel, Note, *Application of the Labor Exemption After the Expiration of Collective Bargaining Agreements in Professional Sports*, 57 N.Y.U. L. REV. 164, 196-97 (1982) (arguing that labor exemption should continue to shield agreement beyond bargaining impasse as long as good faith bargaining continues); Daniel C. Nester, Comment, *Labor Exemption to Antitrust Scrutiny in Professional Sports*, 15 S. ILL. L.J. 123, 144 (1990) (arguing that exemption should end at bargaining impasse); Note, *Releasing Superstars from Peonage: Union Consent and the Nonstatutory Labor Exemption*, 104 HARV. L. REV. 874, 888-94 (1991) (same); Jonathan S. Shapiro, Note, *Warming the Bench: The Nonstatutory Labor Exemption in the National Football League*, 61 FORDHAM L. REV. 1203, 1233 (1993) (arguing that exemption should end at bargaining impasse). This question regarding the duration of the labor exemption should be resolved by the United

that the NFL's continued implementation of the first refusal/compensation scheme — as well as Plan B[76] — would be insulated from antitrust challenge for as long as the players remained represented by the NFLPA.[77]

D. NFLPA Disavowal of Collective Bargaining

The lesson of the *Powell* holding was not lost on the NFLPA, which moved swiftly to terminate its status as the players' collective bargaining representative. The Eighth Circuit's decision in *Powell* was rendered on November 1, 1989. On November 3, 1989 the NFLPA Executive Committee voted to abandon collective bargaining in order to nullify the labor exemption defense.[78] Thereafter, more than nine hundred of the approximately fifteen hundred NFL players signed petitions revoking the authority of the NFLPA or any other organization to engage in collective bargaining on their behalf.[79] On December 5, 1989 NFLPA "player representatives from the twenty-four NFL teams met and unanimously voted to end the NFLPA's status as the players' collective bargaining representative."[80] They also enacted new bylaws under which "no officer, employee or member of the NFLPA [would be] authorized to discuss, deal or negotiate with the NFL or any of its member clubs or their agents."[81]

These maneuvers, of course, were invited by the *Powell* decision and were designed unabashedly to end the "ongoing collective bargaining relationship" between the NFL and the NFLPA. To insure this nonrepresentative status, the NFLPA reorganized itself as a trade association and revised its bylaws specifically to prohibit collective bargaining with the NFL.[82] The Association also filed a "labor organization termination" notice with the United States Department of Labor and was reclassified by the Internal Revenue Service from a labor organization to a business league.[83]

States Supreme Court's decision in Brown v. Pro-Football, Inc., 50 F.3d 1041 (D.C. Cir. 1995), *cert. granted*, 116 S. Ct. 593 (1995).

76. *See* Pash, *supra* note 22, at 3-4 (explaining details of Plan B).

77. This teaching was later confirmed by the Second Circuit's decision in NBA v. Williams, which held that unilaterally maintained player restraint systems will be insulated for as long as the collective bargaining relationship exists. *Williams*, 45 F.3d at 692-93; *see also Brown*, 50 F.3d at 1056-58.

78. Powell v. NFL, 764 F. Supp. 1351, 1354, 1356 (D. Minn. 1991).

79. *Id.* at 1354 n.1.

80. *Id.* at 1354.

81. *Id.* at 1356.

82. *Id.* at 1354.

83. *Id.*

In withdrawing their representation rights from the NFLPA,[84] the players accomplished their goal of eliminating any continued application of the labor exemption — the only remaining obstacle to individual antitrust challenges to the player restraint rules.[85] Those challenges immediately followed.

E. "Plan B" and the Players' Response: McNeil v. NFL *and* White v. NFL

In February 1989 while the *Powell* case was pending, the NFL, presumably recognizing that the first refusal/compensation scheme then in place was vulnerable to antitrust attack, unilaterally implemented its so-called "Plan B."[86] Under Plan B, teams were allowed to "protect" thirty-seven of their fifty-five players by applying the first refusal/compensation system to those players. The remaining players were accorded free agency status and were permitted to negotiate freely for their services.[87]

After being released from the "ongoing collective bargaining relationship," Freeman McNeil and seven other players filed an antitrust lawsuit in April 1990 against the NFL, challenging Plan B.[88] In September 1992 a federal court jury found Plan B violative of the antitrust laws and awarded damages of $1.63 million and unrestricted free agency to four of the eight player plaintiffs.[89]

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84. *See* James W. Quinn, *A Look at the McNeil Litigation*, PRAC. L. INST., Mar.-Apr. 1993, at 3 (discussing NFLPA's withdrawal as players bargaining representative). In fact, the NFLPA only withdrew as the players' bargaining representative, *id.*, and was not decertified pursuant to an NLRB election. Moreover, the Association's later renaissance and the League's recognition of that representative status after the terms of the agreement were reached also were accomplished without an NLRB election. The Parties, however, referred to the NFLPA as having been recertified. Paul Domowtich, *NFL Halts Jones' End-Around Try at Cutting Own Merchandising Deal*, FT. WORTH STAR-TELEGRAM, Apr. 11, 1993, at 6. This evidence, at the least, does not detract from an inference that the relationship between the League and the Association was less than arm's-length and that consequently their agreement was less than "bona fide."

85. Powell v. NFL, 764 F. Supp. 1351, 1359 (D. Minn. 1991). The district court declared that "[b]ecause no 'ongoing collective bargaining relationship' exists, the court determines that [the] nonstatutory labor exemption has ended." *Id.*

86. The designation grew out of two bargaining proposals — "Proposal A" and "Proposal B" — offered by the NFL during collective bargaining in the fall of 1988. Pash, *supra* note 22, at 3-4. "Proposal A" included increased benefits and a revised first refusal/compensation system. *Id.* at 4. "Proposal B" granted unrestricted free agency to some players while freezing benefits at their then-current levels. *Id.*

87. *Id.*

88. McNeil v. NFL, Civ. No. 4-90-476, 1992 WL 315292 (D. Minn. Sept. 10, 1992).

89. *Id.* at *1; Sandomir, *supra* note 23, at 5.

The barrier to individual player antitrust lawsuits against the NFL had burst. Within two weeks, Reggie White and four other players lodged a similar federal suit against the NFL seeking free agency and damages.[90]

The *McNeil* award and the prospect that other federal courts would find similarly in favor of White and countless additional players,[91] prompted the League to seek a swift and comprehensive reconciliation with the NFLPA. The reason for the League's courtship of the NFLPA was plain: As long as the NFL and the NFLPA had an "ongoing collective bargaining relationship" — and especially if they had a contract providing for player restraints — any individual player challenge to those restraints would be foreclosed under the labor exemption to the antitrust laws. In the absence of that relationship, the League faced the certain fate of repeated and likely successful challenges to Plan B and any other player restraint scheme. The NFLPA, likewise desirous of reaching a contract and re-emerging from its defunct status, agreed to a settlement in the *White* case,[92] and in the process, bound its members to a remarkably lengthy seven-year collective bargaining contract containing numerous significant player restraints. On February 26, 1993 a comprehensive settlement of the *White* litigation was reached. The two-hundred page settlement agreement contained the specific terms of the Parties' current collective bargaining agreement and included the contentious issues of the salary caps and the franchise player designation.[93]

Immediately thereafter, the NFLPA began efforts to reconstitute itself as the players' collective bargaining representative; Association representatives asserted that a majority of players supported the NFLPA.[94] Shortly thereafter, they announced that player support was sufficient so that the League could lawfully recognize the NFLPA without an NLRB election.[95]

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90. White v. NFL, 822 F. Supp. 1389, 1394 (D. Minn. 1993).

91. Immediately after the *McNeil* decision, Keith Jackson and nine other players obtained a temporary restraining order and a preliminary injunction against the League's continued maintenance of Plan B. This relief enabled Jackson and three other players to negotiate freely with any NFL club for the 1992 season. Jackson v. NFL, 802 F. Supp. 226, 235 (D. Minn. 1992); Shapiro, *supra* note 75, at 1213.

92. Regarding the role of the NFLPA in the *White* settlement, see *infra* part V.

93. Stipulation and Settlement Agreement, White v. NFL, 822 F. Supp. 1389 (D. Minn. 1993) (No. 4-92-906). In fact, the essential terms of the Parties' settlement and agreement were reached in late December 1992. *See* Mark Asher, *NFL, Players Reach Tentative Deal, Ending 5-Year Impasse; Free Agency Greatly Expanded*, WASH. POST, Dec. 23, 1992, at B1.

94. *NFLPA Set to Recertify as Union*, SEATTLE TIMES, Mar. 14, 1993, at C10.

95. *NFL's Looking to Add Roster Strategy*, SAN DIEGO UNION TRIB., Mar. 23, 1993, at D2.

By early April 1993 the NFLPA stated that collective bargaining negotiations with the League would soon be completed.[96] In early May 1993 the NFL and the NFLPA jointly announced the completion of the agreement pending player ratification.[97] By late June 1993 the ratification process had been completed, and the Parties formally executed their collective bargaining agreement.[98] As a final, albeit ministerial, matter, the district court approved the Parties' settlement agreement.[99]

IV. The Parties' Bargain and Section 8(a)(2) of the NLRA

> It shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . .[100]

The infirmity in the above-described sequence of events may be simply stated: Under Section 8(a)(2) of the NLRA, employers may not lawfully

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96. Domowitch, *supra* note 84, at 6.

97. *NFL Owners, Union Agree to 7-Year Deal*, SAN DIEGO UNION TRIB., May 7, 1993, at D1.

98. *Aikman Out 2 Months After Back Surgery*, WASH. POST, June 19, 1993, at G2; *NFL, Players Make Their Deal Official*, CALGARY HERALD, June 30, 1993, at F8.

99. White v. NFL, 836 F. Supp. 1508, 1510-11 (D. Minn. 1993), *aff'd*, 41 F.3d 404 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2569 (1995). In its approval of the Parties' agreement, the district court, accepting the Parties' mutual representations, made the following remarkable findings, none of which was true:

> (a) The NFLPA has been lawfully formed and selected by the players to serve as the exclusive collective bargaining representative of all present and future NFL players.
> (b) Neither the NFL nor any of its members have taken any action which in any way hindered or supported the formation of the NFLPA as the exclusive collective bargaining representative of all present and future NFL players.
> (c) The NFL and its member clubs have lawfully recognized the NFLPA as the players' exclusive collective bargaining representative.
> (d) Accordingly, the NFLPA is fully authorized and empowered to enter into a new collective bargaining agreement with the NFL and its member clubs.

Id. at 1498.

The court, in a raw exercise of judicial power, granted the Parties' joint motion to enjoin permanently all pending and future actions by class members challenging the agreement. White v. NFL, 822 F. Supp. 1389, 1433-35, 1436-37 (D. Minn. 1993). By this, the court allowed itself to become the enforcing mechanism for the Parties' collusive and anti-competitive arrangement.

100. National Labor Relations Act, ch. 372, § 8(a)(2), 49 Stat. 449, 452 (1935) (codified at 29 U.S.C. § 158(a)(2) (1994)).

recognize or bargain with employee representatives until a majority of the employees themselves have selected that representative.[101] This prohibition is an outgrowth of both our national experience with so-called "company unions" and Congress' judgment that employees — not their employers or unions — should determine who represents them.[102] When an employer recognizes and bargains with a union before a majority of the employees have demonstrated their support for that union, the employer commits a per se violation of Section 8(a)(2).[103] Similarly, the union in such an arrangement likewise interferes with employee free choice and violates Section 8(b)(1)(a) of the NLRA.[104]

From its inception, the National Labor Relations Board (NLRB) consistently has applied Section 8(a)(2) to condemn management involvement in or on behalf of labor organizations.[105] Indeed, the NLRB's unwavering enforcement of the prohibition has been described as maintaining "a strict

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101. *See* ILGWU v. NLRB (Bernhard-Altmann Texas Corp.), 366 U.S. 731, 737-38 (1961) (holding that granting exclusive bargaining status to agency selected by minority of employees constituted violation of § 8(a)(2)).

102. In the late 1920s and early 1930s, employers facing the prospect of unionization often created or fostered organizations ostensibly to represent employees' concerns regarding wages, working conditions, or grievances. Such organizations were thought to interfere with employees' freedom to select their collective bargaining representatives and the prohibition of those organizations was, unquestionably, Congress' primary objective in enacting § 8(a)(2) of the NLRA. *See* ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 195 (1976).

103. Indeed, it has been observed that "[a] labor organization may be recognized as bargaining representative for all employees only when it has been, in the terms of section 9(a) of the Labor Act, 'designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes.'" *Id.* at 203 (quoting 29 U.S.C. § 159(a) (1994)); *see also Bernhard-Altmann Texas Corp.*, 366 U.S. at 737-38 (holding that granting exclusive bargaining status to agency selected by minority of employees constituted violation of § 8(a)(2)); NLRB v. Clappers Mfg., 458 F.2d 414, 418 (3d Cir. 1972) (enforcing order finding violation of § 8(a)(2)).

104. The NLRA states, "It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in Section 157 of this title . . . ." 29 U.S.C. § 158(b)(1)(A) (1994). For examples of court cases finding violations, see NLRB v. Local Union No. 103, Int'l Ass'n of Bridge Workers, 434 U.S. 335, 346-49 (1978) (finding violation of NLRA); *Bernhard-Altmann Texas Corp.*, 366 U.S. at 737-38 (same); Ellery Products Mfg. Co., 149 N.L.R.B. 1388, 1388 (1964) (same); Kenrich Petrochemicals, Inc., 149 N.L.R.B. 910, 910-11 (1964) (same).

105. *See generally* Julius Getman, *The* Midwest Piping *Doctrine: An Example of the Need for Reappraisal of Labor Board Dogma*, 31 U. CHI. L. REV. 292 (1964); Note, *New Standards for Domination and Support Under Section 8(a)(2)*, 82 YALE L.J. 510 (1973) [hereinafter *New Standards*]; Note, *Section 8(a)(2): Employer Assistance to Plant Unions and Committees*, 9 STAN. L. REV. 351 (1957).

dichotomy between labor and management."[106] So plain is the prohibition of Section 8(a)(2) that intent plays no role in its application.[107]

In the instant matter, the NFL bargained and reached an agreement with an organization — the NFLPA — that was neither lawfully recognized nor certified by the NLRB. To the contrary, the NFLPA was officially and purposely no longer the players' representative when the significant terms of the contract were reached. This undisputed fact alone establishes the illegality of the Parties' conduct.

It will likely be pointed out that after the settlement in *White*, the Association was reconstituted as the players' representative,[108] and by this it will be argued that the players ratified their representatives' prior agreement. The infirmity in this argument, however, is as plain as the unlawful Parties' conduct: As a matter of settled law, the Parties could not retroactively sanitize their unlawfully created agreement.

In *ILGWU v. NLRB (Bernhard-Altmann Texas Corp.)*,[109] the Supreme Court faced precisely the same facts as those presented here. There, the employer recognized and bargained with a union in the good faith but

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106. *New Standards*, *supra* note 105, at 510-11; *see also* Ansin Shoe Mfg. Co., 1 N.L.R.B. 929, 935 (1936) (stating that statutory prohibition against management domination and interference with labor organizations "must be broadly interpreted to cover any conduct upon the part of an employer which is intended to bring into being, even indirectly, some organization which he considers favorable to his interests").

The labor-management dichotomy has been made sweeping by this broad statutory interpretation and the definition given to the term "labor organization": "any organization of any kind . . . in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. § 152(5) (1994). In interpreting this broad definition, the Supreme Court held in NLRB v. Cabot Carbon Co., 360 U.S. 203 (1959), that a committee organized by the employer to provide "a procedure for considering employees' ideas and problems of mutual interest to employees and management," *id.* at 205, was a labor organization under the NLRA. *Id.* at 218. The Court concluded that the statutory phrase "dealing with" went beyond mere "bargaining." *Id.* at 210-13. Therefore, because the committee discussed such matters as job classification, holidays, vacations, and similar matters, the organization existed at least in part for the purpose of "dealing with" the employer regarding terms and conditions of employment. *Id.* at 213-15. In this case, there can be no dispute that the NFL "dealt with" the NFLPA regarding "rates of pay" and "conditions of work" when the NFLPA was not the players' freely selected representative.

107. *See* ILGWU v. NLRB, 366 U.S. 731, 739 (1961) ("We find nothing in the statutory language prescribing *scienter* as an element of the unfair labor practices here involved."); *see also Clappers Mfg.*, 458 F.2d at 418 (unlawful employer domination found "although his intentions may have been exemplary").

108. *See supra* text accompanying notes 94-95 (discussing reformation of NFLPA as Players' collective bargaining representative).

109. 366 U.S. 731 (1961).

mistaken belief that the union enjoyed the support of a majority of employees. Later, after the union had obtained documented majority support, the employer and the union reached a formal collective bargaining agreement. The Court, however, held that the after-acquired majority support did not remove the taint of the earlier unlawful recognition and noted that the employer's improper recognition itself created "a deceptive cloak of authority with which to persuasively elicit additional employee support."[110]

In *Bernhard-Altmann*, the Supreme Court addressed and condemned exactly the same sequence followed by the NFL and the NFLPA in reaching their current agreement. In both matters the employer and the union negotiated collective bargaining agreements at times when the unions did not represent a majority of employees and later attempted to ratify those improperly created agreements. Just as this conduct was found illegal in *Bernhard-Altmann*, so must it be determined here.[111] The actions of the NFL and the NFLPA interfered with the players' statutory right to freely select their own representatives — a patent violation of the NLRA.[112] Consequently, the collective bargaining contract was not only unlawfully created, it was the antithesis of a bona fide, arm's-length agreement.[113] As such, it cannot provide the Parties and their agreement refuge from antitrust scrutiny.[114]

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110. ILGWU v. NLRB (Bernhard-Altmann Texas Corp.), 366 U.S. 731, 736 (1961).

111. In a thinly veiled effort to avoid their legal obligations, the Parties agreed in the *White* settlement that after reorganization of the NFLPA, they would together petition the court for a determination that the NFLPA "was lawfully formed and selected by the players to serve as the exclusive collective bargaining representative of all present and future NFL players" and "that neither the NFL nor any of its members have taken any action which in any way hindered or supported the formation" of the NFLPA. *White*, 856 F. Supp. at 1498.

112. In NLRB v. Local Union No. 103, Int'l Ass'n of Bridge Workers, 434 U.S. 335 (1978), the Court observed that "both [the] union and employer commit unfair practices when they sign a collective-bargaining agreement recognizing the union as the exclusive bargaining representative when in fact only a minority of the employees have authorized the union to represent their interests." *Id.* at 344.

113. In *In re* Detroit Auto Dealers Ass'n, 955 F.2d 457 (6th Cir. 1992), *cert. denied*, 506 U.S. 973 (1992), the Sixth Circuit found an agreement between the dealers and their employees limiting marketing hours to be outside the nonstatutory labor exemption on the grounds that the agreement was reached to avoid unionization and arm's-length bargaining and thus was not the product of arm's-length collective bargaining. *Id.* at 467.

114. There remains an important question as to which players could lodge such an antitrust action. Although a full exploration of this question is beyond the scope of this Article, the following observations seem warranted: First, because the *White* matter was concluded by settlement and not by litigation, no collateral estoppel effect could attach to the district court's findings. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) ("When an issue of law or fact is actually litigated . . . the determination is conclusive in a subsequent action between the parties . . . ."); CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND

V. *The Role of the NFLPA in* White

It will likely be argued that because the NFLPA was not a plaintiff, defendant, or intervenor in the *White* litigation, its role in the settlement could not be deemed to have been collective bargaining on behalf of NFL players. The following facts, however, demonstrate that notwithstanding the district court's findings to the contrary,[115] the NFLPA's involvement in

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PROCEDURE § 4419, at 177 (1981) ("Basic statements of the requirements for issue preclusion demand that the issues have been both actually litigated and actually decided."). At most, there could be claim preclusion, or res judicata, effect accorded the district court's approval of the *White* settlement.

In addition, it is noteworthy that Judge Doty could not decide the res judicata effect of his own judgment. *See, e.g.*, Gonzales v. Cassidy, 474 F.2d 67, 73 n.11 (5th Cir. 1973) (noting that deciding res judicata effect of settlement in class action suit "necessarily requires a hindsight approach to the issue of adequate representation"); Cherner v. Transitron Elec. Corp., 221 F. Supp. 48, 53 (D. Mass. 1963) (recognizing that court hearing particular suit cannot determine binding force of that action); Note, *Binding Effect of Class Actions*, 67 HARV. L. REV. 1059, 1060 (1954) ("[T]he binding force of a particular action cannot be determined accurately by the court which hears the class suit . . . ."). Thus, any challenge to the court's findings — for example, that conflict of interest considerations or inadequate representation deprived the absent class members of due process rights — necessarily would be litigated in another forum.

In this instance, the wide disparity of interests among players calls into question the appropriateness of the class designation as well as the adequacy of representation. As one court noted, "With a class thus sharply divided in opinion it would be absured [sic] to say that the leader of one faction in the internecine struggle could adequately represent the whole membership." Ford v. Metropolitan Dist. Council, 323 F. Supp. 1136, 1140 (E.D. Pa. 1970). Indeed, in Tice v. Pro Football, Inc., 812 F. Supp. 255 (D.D.C. 1993), one of the many cases settled in *White*, Judge Royce Lamberth described several "serious concerns" about the adequacy of class counsel and the named representatives, potential conflicts among class members, and most significantly, the actions of the NFL and the NFLPA in settling *White* without consulting counsel for the named *Tice* plaintiffs. *Id.* at 257-59. These facts and arguments raise substantial questions as to whether Judge Doty's determinations ought to be given res judicata effect by another court.

Judge Doty, in keeping with his heavy-handed approach to *White*, enjoined any future litigation of the issues raised in that matter. White v. NFL, 822 F. Supp. 1389, 1433-35, 1436-37 (D. Minn. 1993). This injunction against future litigation by all class members presents a serious disincentive to continued litigation by class members. At the same time, however, *nothing* in the *White* settlement or Judge Doty's order can preclude antitrust challenges to the contract — and the advancement of the thesis of this Article — by NFL players entering the League after the conclusion of the *White* litigation. Nonpresent players and absent class members cannot be bound by an action to which they were not a party. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 34(3) (1982) ("A person who is not a party to an action is not bound by or entitled to the benefits of res judicata . . . .").

115. The district court made the following conclusion:

[T]he NFLPA's role in the settlement negotiations leading to the Stipulation and

White was so significant and intimate that the Settlement Agreement itself constituted a collectively bargained agreement between the NFL and the NFLPA.

First, even a cursory review of the Settlement Agreement shows the significant activity of the NFLPA. Not only did the NFLPA finance the *White* litigation, it was a named party in some of the twenty-two cases designated as "Related Litigation"[116] that were settled simultaneously with *White*. Moreover, the NFLPA specifically agreed to be bound by the terms of the Settlement Agreement.[117] In addition, the League agreed to pay more than eighteen million dollars to a fund benefitting the NFLPA for expenses incurred in the prosecution of *White*,[118] as well an additional ten million dollars in settlement of the related litigation to which the NFLPA was a party.[119] Next, the NFLPA, along with members of the *White* class, agreed as part of the settlement not to sue the League on antitrust grounds over any "term or condition of employment" contained in the Settlement Agreement.[120] The NFL likewise agreed not to sue the NFLPA or any plaintiff class member over any claim asserted in the litigation.[121] Finally, the NFLPA, along with the plaintiff class and the defendants, pledged

> their best efforts and cooperation to secure Court Approval of this Agreement; to defend the Agreement or Court Approval of the Agreement in any forum in which they may be challenged; and to implement the provi-

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> Settlement Agreement does not provide a basis on which to disapprove of the settlement. Both this court and the General Counsel of the NLRB have concluded that by sponsoring various lawsuits, the NFLPA was not thereby acting as the players' collective bargaining representative.

White v. NFL, 822 F. Supp. 1389, 1430 (D. Minn. 1993).

116. Stipulation and Settlement Agreement at art. I(u) and App. A, White v. NFL, 822 F. Supp. 1389 (D. Minn. 1993) (No. 4-92-906).

117. In Article XX, § 2 of the Stipulation and Settlement Agreement, the NFLPA, along with the NFL clubs, agreed to be "bound by and have the benefits of the Agreement and the Final Consent Judgement." *Id.* at art. XX, § 2. Indeed, in a letter to Commissioner Tagliabue, attached at Appendix B to the Settlement Agreement, Mr. Upshaw wrote:

> This letter confirms that the National Football League Players Association, which has financed the above-referenced litigation and is a party in certain of the related litigations which are simultaneously being settled in conjunction with the above referenced litigation, agrees that it will be legally bound by the terms of the Stipulation and Settlement Agreement, dated February 26, 1993.

Id. at app. B.

118. *Id.* at art. XII, § 6.

119. *Id.* at art. XII, §§ 4, 8(c).

120. *Id.* at art. XIX, § 1.

121. *Id.* at art. XIX, § 2.

> sions of the Agreement in a manner consistent with good faith and fair dealing.[122]

These facts plainly establish that the NFLPA negotiated the terms of the *White* Settlement Agreement and was, in fact, a party to it. It is, in short, simply inconceivable that the NFLPA, whose rights and interests were affected so greatly, was not a principal part of that settlement.[123] Indeed, shortly after the agreement was first announced in January 1993, Mr. Upshaw declared, "[F]or the first time, the players are the partners of the owners."[124]

The remaining question, then, is whether these actions constituted collective bargaining. The NLRA states:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder . . . .[125]

This language describes precisely what happened when the NFL and the NFLPA negotiated the terms of the *White* Settlement Agreement. That Agreement resolved all of the major, long-standing issues of contention between the NFL and the NFLPA including the college draft provisions,[126]

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122. *Id.* at art. XIX, § 6.

123. *See* Note, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports*, 94 COLUM L. REV. 1045, 1045 (1994) (noting role of NFLPA in *White* settlement negotiations). The role of the NFLPA in the *White* litigation and settlement was so widely recognized that observers uniformly characterized the NFLPA as a party to it. For example, a recent *Columbia Law Review* note examining the question of the duration of the labor exemption stated:

> The importance of this issue was most recently illustrated by the protracted labor negotiations between the National Football League Players Association (NFLPA) and the National Football League (NFL). On January 6, 1993, the NFLPA and the NFLMC came to terms on a seven year collective bargaining agreement.

Id. at 1045; *see also* Gerald Eskenazi, *NFL Labor Accord is Reached, Allowing Free Agency for Players*, N.Y. TIMES, Jan. 7, 1993, at A1, B15; Michael S. Kagnoff, *While Free Agents Reap Benefits of NFL Labor Settlement Agreement, Rookies Get Set for Further Legal Battles*, 1 SPORTS L.J. 106 (1994).

124. Pete Foley, *Can the NFL and the Players Be Successful as Partners?*, N.Y. TIMES, Jan. 10, 1993, § 8, at 9.

125. 29 U.S.C. § 158(d) (1994).

126. Stipulation and Settlement Agreement at art.IV, White v. NFL, 822 F. Supp. 1389 (D. Minn. 1993) (No. 4-92-906).

the rookie salary cap provision,[127] the free agency procedures and restrictions,[128] franchise player rules,[129] and, most importantly, the salary cap provisions.[130] That these matters so affect wages, hours, and terms and conditions of employment as to be mandatory subjects of bargaining under the NLRA is beyond debate. Indeed, as has been noted already, the NFLPA itself recognized the character of its agreement by specifically promising to refrain from suing the NFL on antitrust grounds over any "term or condition of employment" contained within the Settlement Agreement.[131] These provisions, agreed upon in January and February of 1993 as part of the *White* Settlement Agreement, then reappeared in the NFL-NFLPA collective bargaining contract announced by the NFL and the NFLPA in May.

Under these circumstances, for the district court to assert that "the parties did not engage in collective bargaining prior to the NFLPA's reformation as a union"[132] or that collective bargaining did not begin between the NFL and the NFLPA until March 31, 1993[133] bespeaks either a fundamental misapprehension of collective bargaining or a desire to settle the law suit so powerful as to require that the facts be ignored.[134]

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127. *Id.* at art. V.

128. *Id.* at art. VII.

129. *Id.* at art. VIII.

130. *Id.* at art. X.

131. *Id.* at art. XIX, § 1.

132. White v. NFL, 836 F. Supp. 1458, 1499 (D. Minn. 1993), *aff'd*, 41 F.3d 404 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2569 (1995).

133. White v. NFL, 822 F. Supp. 1389, 1397 (D. Minn. 1993).

134. Judge Doty was heavily involved in the settlement of the *White* matter. Thus, on January 6, 1993 the *New York Times* reported that

> United States District Judge David Doty monitored six hours of negotiations today between representatives of the National Football League's owners and players and told both sides that if they did not settle their five-year-old labor dispute on Wednesday he would rule on the motions before his court.
>
> Both parties, who met in Doty's courtroom from 10 A.M. to 4 P.M., were summoned last week by Doty after a tentative settlement initially trumpeted by both sides appeared close to collapsing. The primary issue is the players' demand for a comprehensive free-agency plan that would allow players to move freely . . . .
>
> . . .
>
> "It's at a very, very sensitive area of negotiation," said Doty of the talks. "They are going on their way from here but will continue to work and talk and respond to me by tomorrow. I gathered from them ideas on how to compromise. I had them separated at times. Tomorrow if they don't come together, all bets are off."

Thomas George, *Judge Decides to Put A Deadline on Deadlock*, N.Y. TIMES, Jan. 6, 1993,

What happened in this case is transparent. The NFLPA terminated its status as collective bargaining representative so that players could lodge substantive antitrust challenges against the NFL and avoid the labor exemption. It then negotiated the settlement of *White* while simultaneously disclaiming representative status. Although its sponsorship of *White* and other litigation might not, by itself, have transformed the NFLPA into the players' collective bargaining representative,[135] its negotiation of a collective bargaining agreement completed its metamorphosis.

VI. Survival of the Claim

As one final and revealing argument, the Parties may be expected to note that the six-month statute of limitations under the NLRA[136] has elapsed, and accordingly, whatever illegality may have attended their conduct in 1993, the statute of limitations precludes any NLRA challenge to the agreement's formation.

Putting aside any contention that the Parties' ongoing application of the contract and its many restraints renders their conduct a "continuing" violation of the NLRA,[137] any reliance on the statute of limitations is beside the

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at B11.

135. The court described the General Counsel of the NLRB as having "concluded that by sponsoring various lawsuits, the NFLPA was not thereby acting as the players' collective bargaining representative." *White*, 822 F. Supp. at 1430. This citation was to a June 26, 1991 memorandum addressing the question whether the NFL's continued recognition of the NFLPA after its disclaimer and reorganization constituted a violation of §§ 8(a)(1) and 8(a)(2) of the NLRA by interfering with a rival union's efforts to organize NFL players. The quote upon which the court relied stated:

> In addition, the fact that the disclaimer was motivated by "litigation strategy," i.e., to deprive the NFL of a defense to players' antitrust suits and to free the players to engage in individual bargaining for free agency, is irrelevant so long as the disclaimer is otherwise unequivocal and adhered to.

Memorandum from Robert E. Allen, Assoc. General Counsel to NLRB, to Gerald Kobell, Regional Director Region Six, No. 6-CA-23143, 1991 WL 144468, at *4 n.8 (N.L.R.B.G.C. June 26, 1991). In this case, of course, the NFLPA's disclaimer was not adhered to.

136. 29 U.S.C. § 160(b) (1994) ("[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . .").

137. Although an argument might be made that the annual application of the contract's restraints to players, including new players, constitutes a "continuing" violation of the NLRA, the Supreme Court has narrowly interpreted that theory under the Act. In a highly analogous case to that present here, the Court held that the unfair labor practice occurred at the time of the illegal recognition, thus barring an unfair labor practice charge filed more than six months later. Local Lodge No. 1424, Int'l Ass'n of Machinists v. NLRB, 362 U.S.

point. In order for the Parties' collective bargaining agreement to avoid antitrust scrutiny under the labor exemption to the antitrust laws, that agreement must be the product of "bona fide, arm's-length" negotiations. This requirement exists so that labor and management cannot evade the antitrust laws by subterfuge. As the Supreme Court has nicely written, "[B]enefits to organized labor cannot be utilized as a cat's-paw to pull employers' chestnuts out of the antitrust fires."[138] In this case, it cannot be said the NFL-NFLPA agreement is the product of bona fide, arm's-length collective bargaining, regardless of whether or not the NLRB prosecuted the matter. Just as the Parties cannot sanitize their unlawful conduct by declaration, neither does the passing of the statute of limitations make their agreement "bona fide."[139]

The fact remains that the Parties, in their mutual self-interest, entered into an agreement in plain violation of an important national labor policy — that employees freely select their own representatives.[140] Their conduct

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411, 419 (1960). There, the fact that the contract continued in force until the date of the filing of the charge did not make the violation a "continuing" one. *Id.* at 422-23.

138. United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460, 464 (1949) (citing Allen Bradley Co. v. Local Union No. 3, IBEW, 325 U.S. 797 (1945)); *see also* Flood v. Kuhn, 407 U.S. 258, 294 (1972) (Marshall, J., dissenting) (quoting *Women's Sportswear*, 336 U.S. at 464).

139. *See* 51 AM. JUR. 2d *Limitation of Actions* § 22 (1970) ("The general rule in this respect, supported by the great preponderance of the authorities on the subject, is that a statute of limitations operates on the remedy directly only and does not extinguish the substantive right."). In this regard, it bears remembering that the passing of a statute of limitations affects neither the unlawfulness of an underlying wrong nor the moral obligation of the wrongdoer, but only the remedy of one party to recover. Thus, an express or implied contract barred by the running of the statute of limitations is revived solely by the acknowledgment of its existence by the party to be charged. *See also* Lockerby v. Sawyer, 189 N.W. 989, 990-91 (Mich. 1922) (permitting estate owed money by beneficiary to set off notes evidencing debt against bequest — even though statute of limitations had run).

140. It is for this reason that the district court's injunction against all actions by class members challenging the agreement, *supra* note 114, will not prevail. It is axiomatic that a "prerequisite for the maintenance of a class suit is that the named representatives fairly and adequately protect the interests of the absent class members." JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 729 (2d ed. 1993). This is especially true where, as here, the interests of the Parties in reaching the settlement agreement and the interests of many class members in alleviating the effects of the player restraint mechanisms were in sharp conflict. For example, in the leading case of Hansberry v. Lee, 311 U.S. 32 (1940), the Supreme Court held that plaintiffs seeking to challenge racially restrictive covenants were not bound by a prior judgment enforcing those covenants, *id.* at 44-46, "because their interests had not been adequately represented by class representatives whose objectives had been to establish

breached that policy and their resulting contract cannot properly be characterized as a bona fide, arm's-length agreement.

VII. Conclusion

The lady doth protest too much, methinks.[141]

The Parties were well-versed in this law and fully aware of the unlawfulness of their conduct. Thus, in an astonishing display of hubris and duplicity, they began their contract as follows:

PREAMBLE

> This Agreement, which is the product of bona fide, arm's-length collective bargaining, is made and entered into on the 6th day of May, 1993, in accordance with the provisions of the National Labor Relations Act . . . .[142]

Notwithstanding their protestations to the contrary, however, the NFL and the NFLPA, in settling their legal battles, agreed upon the terms of a collective bargaining contract at a time when the Association was officially decertified and no longer the players' union. Thus, their agreement was not the product of bona fide, arm's-length collective bargaining, and as a consequence, its anticompetitive provisions, including salary caps and the franchise player designation, are subject to antitrust attack.

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the validity of the covenant, rather than to strike it down." FRIEDENTHAL, *supra*, § 731.

141. WILLIAM SHAKESPEARE, HAMLET act III, sc. ii, l.225. (Harold Jenkins ed., Methuen 1982).

142. NFL COLLECTIVE BARGAINING AGREEMENT 1993-2000, pmbl., at 1.