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Picking Players in the College Draft Could be Picking Trouble with Antitrust Law

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PICKING PLAYERS IN THE COLLEGE DRAFT COULD BE PICKING TROUBLE WITH ANTITRUST LAW

I. INTRODUCTION

The events during the summer and fall of 1994 exposed fans to the volatile relations between owners of professional sports franchises and their players. On August 12, 1994, the Major League Baseball (MLB) players went on strike, resulting in the first cancellation of the World Series since 1904.[1] Fearing the same economic pressure from its players, the National Hockey League (NHL) instituted a lock-out beginning September 30, 1994.[2] Both leagues had been operating without collective bargaining agreements between the teams and players.[3] The NHL and its players reached a tentative agreement on January 11, 1995, and saved the season from being canceled.[4] The MLB teams and its players did not reach an agreement before a federal judge issued an injunction to resume play under the rules of the expired collective bargaining agreement.[5]

The National Basketball Association (NBA) collective bargaining agreement also expired at the end of the 1993-1994 season.[6] The expiration prompted the NBA to seek a judgment in federal court declaring that three heavily de-

1. *National Basketball Associaton*, The Sports Network, Computer Info. Network, Oct. 27, 1994, *available in* LEXIS, Nexis Library, NEWS file.

2. *Id.*

3. *Id.* To equalize the bargaining power between individual employees and corporate employers, the National Labor Relations Act (NLRA) allows employees to organize and bargain collectively. 29 U.S.C. § 151 (1988). A "collective bargaining agreement" is a labor agreement between a union and employer which sets forth the terms of employment for those employees in the union. *See id.*

4. *NHL Players Accept Final Offer — Season Saved*, S.F. CHRON., Jan. 12, 1995, at A1. The players agreed to a salary limit for rookies, cutbacks in arbitration rights, and free agency when they reach the age of 32 within four years of joining the league. *Id.*

5. Jody Goldstein, *NBA Begins First Work Stoppage; Lockout May Bring Players Together*, HOUS. CHRON., July 1, 1995, at Sports 1.

6. Collective Bargaining Agreement Between National Basketball Association and the National Basketball Players Association, Art. XXXV, § 1 (1988) (on file with author) [hereinafter 1988 NBA Agreement].

bated player restraints were not a violation of antitrust laws.[7] The court discussed the application of the nonstatutory labor exemption[8] to an expired agreement and found that antitrust immunity did exist.[9] Thus, the challenged player restraints can be imposed by the NBA, as long as a collective bargaining relationship exists.[10] The United States Court of Appeals for the Second Circuit affirmed this decision.[11]

Although the NBA and its players did not have a collective bargaining agreement during the 1994-1995 season, the two parties made a "no-lockout, no-strike" agreement in October 1994, guaranteeing that the season would not be interrupted.[12] Because the owners and players could not reach a new agreement before the expiration of this moratorium, the NBA locked out its players until a collective bargaining agreement was reached.[13] This lock-out was the first work

7. National Basketball Ass'n v. Williams, 857 F. Supp. 1069 (S.D.N.Y. 1994), *aff'd*, 45 F.3d 684 (2d Cir. 1995). The NBA and the National Basketball Players Association (NBPA) have disputed the salary cap, the right of first refusal, and the college draft in the past. *See, e.g.*, Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960 (D.N.J. 1987); Wood v. National Basketball Ass'n, 602 F. Supp. 525 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954 (2d Cir. 1987).

8. *See* discussion *infra* part II.A.3.

9. *Williams*, 857 F. Supp. at 1078. The court reviewed four standards for determining when a collective bargaining agreement expires, and ultimately relied on the standard established in Powell v. National Football League, 930 F.2d 1293 (8th Cir. 1989) (holding that the nonstatutory labor exemption protects agreements conceived in an ongoing collective bargaining agreement from challenges under the antitrust laws), *cert. denied*, 498 U.S. 1040 (1991). *Williams*, 857 F. Supp. at 1074-78. *See also* discussion *infra* part II.B.2.

10. *Williams*, 857 F. Supp. at 1078. The court also assumed that the nonstatutory labor exemption did not apply and undertook the antitrust rule of reason analysis. *Id.* The court held the players "failed to show that the alleged restraints of trade are on balance unreasonably anti-competitive." *Id.* at 1079. Because their "pro-competitive effects . . . outweigh their restrictive consequences," the restraints did not violate antitrust laws. *Id.*

11. National Basketball Ass'n v. Williams, 45 F.3d 684, 685 (2d Cir. 1995). The Second Circuit agreed that antitrust immunity exists on the grounds that multiemployer collective bargaining is embodied in labor laws. *Id.* at 688. The court stated that "antitrust laws do not prohibit employers from acting jointly in bargaining with a common union." *Id.* Because labor law protects the league's actions, the court declined to apply the rule of reason analysis. *Id.*

12. Lee Shappell, *It's History — NBA Locks Out Players*, ARIZ. REPUBLIC, July 1, 1995, at C1.

13. *Id.* The players opposed a luxury tax on a team re-signing a free agent at a salary that causes the team to exceed the salary cap. *Id.*

stoppage in NBA history.[14] A group of players petitioned the National Labor Relations Board (NLRB) to decertify the union,[15] and the NLRB granted an election.[16]

On September 12, 1995, the players voted to accept the deal agreed upon by the NBA and players,[17] and rejected decertification by a 226 to 134 vote.[18] The lock-out ended on September 18, 1995, after both the players and owners approved the collective bargaining agreement.[19] The new collective bargaining agreement has a six-year life with terms including: (1) an increase in the salary cap with restrictions on signing the teams' own free agents; (2) an increase in the minimum salaries; (3) a rookie salary schedule; (4) a provision allowing players to receive portions of more revenue sources; and (5) a decrease in the number of college draft rounds from two to one after three years of the agreement.[20]

The labor disputes of 1994-1995 are common in the professional sports arena.[21] The past is filled with unhappy players making antitrust challenges against the restraints imposed upon them.[22] These players have been successful in cases where the player restraint was imposed without arm's-length bargaining, or where the restraint was unreasona-

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14. Murray Chass, *NBA Locks Out Players in First Work Stoppage*, N.Y. TIMES, July 1, 1995, at 27.

15. Shappell, *supra* note 12, at C1.

16. Rosco Nance, *NBA Union Split over Vote Process*, USA TODAY, July 6, 1995, at C1.

17. *NBA, Union Agree on Deal*, S.F. CHRON., Aug. 9, 1995, at D1.

18. Michael Wilbon, *Players Know It's Best to Just Say 'Yes,'* WASH. POST, Sept. 13, 1995, at C1.

19. *See* Richard Justice, *Player Reps Approve NBA Labor Agreement*, S.F. CHRON., Sept. 14, 1995, at B1; David Steele, *NBA Owners Approve Labor Deal*, S.F. CHRON., Sept. 16, 1995, at B1.

20. *The Deal*, CHI. SUN-TIMES, Sept. 13, 1995, at 126. This comment will focus on the terms of the 1988 NBA Agreement, even though the events of 1995 resulted in a change in some of those terms.

21. *See* discussion *infra* part II.B.

22. *See, e.g.*, Flood v. Kuhn, 407 U.S. 258 (1972) (challenging baseball's reserve system); Wood v. National Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987) (challenging NBA salary cap, college draft, and prohibition of player corporations); Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976) (challenging the NFL "Rozelle Rule" as a restriction on free agency), *cert. dismissed*, 434 U.S. 801 (1977); Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960 (D.N.J. 1987) (challenging NBA salary cap, right of first refusal compensation, and college draft); Smith v. Pro-Football, Inc., 420 F. Supp. 738 (D.D.C. 1976) (challenging NFL college player draft), *aff'd in part, rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978).

ble.[23] The leagues[24] have prevailed, however, when the challenged term has been part of a fully negotiated collective bargaining agreement.[25]

Although players who are parties to collective bargaining agreements have not been completely successful in challenging the restraints based on antitrust laws, courts have not addressed the issue of whether a potential player of professional sports can successfully challenge the player restrictions in an existing agreement.[26] This comment concludes that player restraints, in particular the college draft,[27] can be successfully challenged by a potential player for violation of antitrust laws.

Before this issue is addressed, it must be placed in its proper context. The background section first explains the dynamics of antitrust and labor law.[28] Second, the labor exemptions are discussed in relation to professional sports.[29] Third, a review of the college draft procedure will show that it has group boycott and price fixing features which violate antitrust laws.[30] Finally, the analysis applies the labor exemption to the college draft, and it delineates the problem with using existing antitrust and labor law in the unique industry of professional sports.[31] The analysis exposes a dichotomy which emerges between certain potential players who are bound by the labor exemption, and other remote potential players who can successfully challenge the college draft.[32]

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23. *See, e.g.*, Smith v. Pro-Football, Inc., 593 F.2d 1173, 1173 (D.C. Cir. 1978); Mackey v. National Football League, 543 F.2d 606, 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

24. The terms "teams" and "leagues" will be used interchangeably throughout this comment, since both entities are usually aligned against the players.

25. *See, e.g.*, Powell v. National Football League, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991); Wood v. National Basketball Ass'n, 809 F.2d 954, 954 (2d Cir. 1987); Zimmerman v. National Football League, 632 F. Supp. 398 (D.D.C. 1986).

26. Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 341 n.15.

27. *See* discussion *infra* part II.C. The college draft (or "the draft") is the method used by leagues to allocate incoming talent to the teams. Even though the NBA college draft will be referred to throughout this comment, the issues and proposals addressed can be applied to any professional sports league.

28. *See* discussion *infra* part II.A.

29. *See* discussion *infra* part II.B.

30. *See* discussion *infra* part II.C.

31. *See* discussion *infra* part III.

32. *See* discussion *infra* part III.

Those affiliated with the sports industry are uncertain whether potential players are bound by an existing collective bargaining agreement. Because potential players' decisions are affected by agreement terms, clarity is needed in determining who is a party to the agreement.

This comment proposes that the differences between the groups of potential players can be resolved using one of two methods.[33] First, a statutory scheme addressing the unique aspects of the professional sports industry would eliminate the dichotomy between the different potential players.[34] Alternatively, narrowing the judicial interpretation of the term "employees" in professional sports cases will fuse the two groups of potential players.[35] Implementing either of these options will remove the uncertainty that currently pervades professional sports law.

The following discussion of the existing antitrust and labor laws that govern professional sports opens the door to discovering why certain potential players can successfully challenge the college draft while others cannot.

II. BACKGROUND

A. *The Dynamics Of Antitrust and Labor Law*

When Congress promulgated the Sherman Act of 1890[36] to deter restraints on competition, it did not specifically address the agreements between unions and employers which inherently interfere with commercial business activities.[37] Subsequent congressional acts protected labor unions from antitrust law, while common law created an exemption for collective bargaining agreements.[38] The dynamics of these policies are explored in this section.

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33. *See* discussion *infra* part IV.

34. *See* discussion *infra* part IV.A.

35. *See* discussion *infra* part IV.B.

36. 15 U.S.C. §§ 1-7 (1988).

37. Kieran M. Corcoran, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports*, 94 COLUM. L. REV. 1045, 1048 (1994).

38. *Id.* at 1049-52.

1. *Scope of the Antitrust Law*

Antitrust law, as codified in the Sherman Act, was promulgated to preserve a competitive business economy.[39] In section 1 of the Act, Congress proscribes contracts, combinations, and conspiracies that restrain trade.[40] Section 2 further prohibits monopolies in trade or commerce.[41] With the exception of MLB, the Supreme Court has found professional sports leagues are subject to antitrust law because of the volume of interstate business involved in their activities.[42]

The Court has found violations of the Sherman Act when industries engage in unreasonable restraints of trade.[43] Courts have used two methods to analyze the reasonableness of a restraint of trade: the per se rule and the rule of reason.[44]

a. *The Per Se Rule*

Some practices are presumed to be unreasonable because of their obvious effect on competition and lack of any valuable use.[45] Elaborate inquiry into the reasonableness of these practices is unwarranted, and they are considered per se ille-

39. Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 801-03 (1945).

40. 15 U.S.C. § 1 (1988). This section provides in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *Id.*

41. 15 U.S.C. § 2 (1988). This section provides in part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." *Id.*

42. *See, e.g.*, Haywood v. National Basketball Ass'n, 401 U.S. 1204 (1971) (basketball); Radovich v. National Football League, 352 U.S. 445, 452 (1957) (football); United States v. International Boxing Club, 348 U.S. 236 (1955) (boxing). *But see* Federal Baseball Club v. National League of Prof. Baseball Clubs, 259 U.S. 200 (1922) (holding baseball is exempt from antitrust liability); Flood v. Kuhn, 407 U.S. 258 (1972) (affirming the baseball exemption based on stare decisis, but admitting baseball does constitute interstate commerce). Since baseball has been exempted from antitrust law, any reference to professional sports leagues in this comment does not include MLB. The baseball exemption, however, is in danger as a result of the 1994-1995 strike. Reynolds Holding, *Antitrust Question Raised Again*, S.F. CHRON., Sept. 16, 1994, at A1.

43. Standard Oil Co. v. United States, 221 U.S. 1, 60 (1991) ("[T]he standard of reason . . . was intended to be the measure used.").

44. LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 166 (1977).

45. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).

gal.[46] For example, fixing price or output is a per se illegal activity since it is an agreement among competitors for the purpose of earning monopoly profits.[47] Resale price maintenance[48] is another per se illegal activity because it denies retailers the ability to set a price at a level lucrative for themselves.[49] Group boycotts were traditionally presumed illegal per se.[50] Because the rule of group boycotts has become eroded by exceptions, the rule of reason has recently been adopted by the courts.[51] However, per se analysis is appropriate with a naked boycott, which is a concerted refusal to deal, without a showing that the refusal is ancillary to any legitimate group activity.[52]

Consequently, a practice can be deemed per se illegal when either of two situations exist.[53] The first situation is when the practice will cause substantial injury to competition in the great majority of instances.[54] The second is when inquiry into the practice at issue would be complicated, time consuming, expensive, and uncertain.[55]

In the professional sports industry, some courts have applied the per se rule to player restraints because they have characteristics like group boycotts and price fixing.[56] Most courts have rejected the per se rule and elected the rule of

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46. *Id.*

47. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 140 (1994).

48. Resale price maintenance occurs when a manufacturer regulates the price at which a product is resold by wholesalers or retailers. *Id.* at 393.

49. *Id.* at 394.

50. *See* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959) ("Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category.").

51. *See* Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co., 472 U.S. 284, 298 (1985) ("The mere allegation of a concerted refusal to deal does not suffice because not all concerted refusals to deal are predominantly anticompetitive.").

52. HOVENKAMP, *supra* note 47, at 201.

53. SULLIVAN, *supra* note 44, at 193.

54. *Id.*

55. *Id.*

56. Smith v. Pro-Football, Inc., 420 F. Supp. 738, 744 (D.D.C. 1976) (recognizing the draft as "a group boycott in its classic and most pernicious form"), *aff'd in part, rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978). This holding was reversed on appeal recognizing that the majority of courts reject the per se analysis in professional sports. *See* Smith v. Pro-Football, Inc., 593 F.2d 1173, 1178 (D.C. Cir. 1978). Therefore, this comment will follow case law and analyze the antitrust implications of the college draft under the rule of reason. *See* discussion *infra* part III.D.

reason analysis because of the uniqueness of professional sports.[57]

b. *The Rule of Reason*

The standard under the rule of reason is "whether the restraint imposed is justified by legitimate business purposes, and is no more restrictive than necessary."[58] To inquire into a restraint's reasonableness, the rule of reason analysis is applied when courts are faced with a "unique or novel business situation."[59]

Several factors make the professional sports industry unique. First, unlike other industries, professional sports leagues have no competition for players' services.[60] Teams within the leagues are not economic competitors, but rather work jointly to provide entertainment.[61] Second, the players' unions are not comparable to industrial unions because the players are not in a central location, and they possess a wide range of skills, shorter career spans, and seasonal employment.[62] Because of these inherent factors, the rule of reason analysis has been deemed the appropriate standard in professional sports cases.[63]

Courts have applied the antitrust analysis to labor unions because they generally "obstruct[ ] the free flow of commerce between the states."[64] Congress, however, intended labor unions to be outside the scope of antitrust law and enacted the Clayton Act of 1914[65] to reaffirm this intent.

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57. Mackey v. National Football League, 543 F.2d 606, 619 (8th Cir. 1976) (concluding that the unique nature of the business of professional football renders it inappropriate to mechanically apply per se illegality rules), *cert. dismissed*, 434 U.S. 801 (1977).

58. *Id.* at 620 (citing Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918); Worthen Bank & Trust Co. v. National BankAmericard Inc., 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974)).

59. *Id.* at 619.

60. *See* Lock, *supra* note 26, at 356. Although players have the option of playing in other countries such as Europe, Canada, and Japan, these leagues are not competitors to United States leagues because they are not in American markets, and spectator or television revenues and salaries are much lower. *See id.* at 356 n.99.

61. *See id.* at 357.

62. *See id.* at 356.

63. *See* Mackey v. National Football League, 543 F.2d 606, 618-20 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

64. Loewe v. Lawlor, 208 U.S. 274, 293 (1908) (holding boycott of stores that sold hats produced by striking union members violated the Sherman Act).

65. 15 U.S.C. § 17 (1988). This section provides in part:

2. *The Statutory Labor Exemption*

The Clayton Act was designed to limit the courts' application of injunctive relief against labor union activities.[66] Still, courts narrowly interpreted the Clayton Act as not wholly exempting union activities from the Sherman Act.[67]

The most recognized case in which the Supreme Court found labor activity unlawful was *Duplex Printing Press v. Deering*.[68] In that case, the labor union attempted to unionize one plant of a newspaper press manufacturer by enlisting the help of employees of other affiliated plants.[69] The actions of these employees consisted of threatening customers or trucking companies hired by the customers, notifying repair shops not to repair Duplex presses, and preventing the sale of presses.[70] The Court found these activities constituted a "secondary boycott"[71] and were not protected by the Clayton Act.[72] Because the Court circumvented the purpose of the Clayton Act, further congressional action was necessary.

In response to *Duplex Printing*, Congress enacted the Norris-LaGuardia Act[73] to provide further protection for unions. This Act restricts judicial injunctions, in the interest of public policy, to a limited number of labor activities.[74] In effect, the Norris-LaGuardia Act reasserts the general public

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> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence of labor, agriculture, or horticultural organizations, instituted for the purposes of mutual help, . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof . . . .

Id.

66. 15 U.S.C. § 52 (1988).

67. Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 805-06 (1945) (reviewing the cases involving union activities found in violation of the Sherman Act).

68. 254 U.S. 443 (1921).

69. *Duplex Printing Press*, 254 U.S. at 464.

70. *Id.*

71. The Court defined "secondary boycott" as exercising coercive pressure upon customers for the purpose of stopping business with the employer through fear of loss or damage to themselves. *Id.* at 466.

72. *Id.* at 475.

73. 29 U.S.C. §§ 101-115 (1988).

74. 29 U.S.C. § 102 ("It is necessary that [the individual unorganized worker] have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment."). *See also* 29 U.S.C. §§ 104, 105, and 113 (regarding limitations on restraining orders and injunctions).

policy first stated in the Clayton Act because it does not specify the types of permissible union activity.[75] Together, the Clayton Act and the Norris-LaGuardia Act constitute the statutory labor exemption which shields certain union activity from antitrust liability.[76]

The statutory labor exemption, however, does not encompass the collective bargaining agreements between unions and non-labor groups or employers which inherently restrain trade.[77] The collective bargaining process is promoted by Congress in the National Labor Relations Act (NLRA) of 1947.[78] Congress believed that "the protection by law of the rights of employees to bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the free flow of commerce by removing certain recognized sources of industrial strife."[79] Unfortunately, the NLRA does not clarify how the agreements reached through collective bargaining are protected from antitrust laws. Therefore, courts have the task of determining when antitrust law should apply to collective bargaining agreements.[80]

3. *The Nonstatutory Labor Exemption*

Courts have recognized that the purpose of the NLRA would be undermined if antitrust laws were applicable to agreements between unions and employers.[81] Consequently, they have balanced the interest of preserving a competitive business economy with the rights of labor in collective bargaining by formulating what is referred to as the nonstatutory labor exemption.[82] The Supreme Court articulated this doctrine in *Amalgamated Meat Cutters v. Jewel Tea Co.*[83] as follows:

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75. JOHN C. WEISTART & CYM H. LOWELL, THE LAW OF SPORTS 529 (1979).

76. Lock, *supra* note 26, at 351; Corcoran, *supra* note 37, at 1049.

77. *See* Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960, 964 (D.N.J. 1987) (citing United States v. Hutcheson, 312 U.S. 219 (1941)).

78. 29 U.S.C. §§ 141-188 (1988).

79. 29 U.S.C. § 151 (1988).

80. WEISTART & LOWELL, *supra* note 75, at 529.

81. Mackey v. National Football League, 543 F.2d 606, 613 (8th Cir. 1976) (citing Connell Co. v. Plumbers & Steamfitters, Local Union No. 100, 421 U.S. 616 (1965)), *cert. dismissed*, 434 U.S. 801 (1977).

82. Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 806 (1945).

83. 381 U.S. 676 (1965).

> Weighing the respective interests involved, we think the national labor policy expressed in the National Labor Relations Act places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work. An agreement on these subjects between the union and the employers in a bargaining union is not illegal under the Sherman Act . . . .[84]

Courts, however, have applied the nonstatutory labor exemption only to parties of the agreement and to matters that primarily affect the employment relationship.[85] Thus, the scope of the nonstatutory labor exemption has been defined by courts in consideration of public policy on a case-by-case basis.[86]

In the professional sports arena, courts have formed and applied a specific test to determine whether the nonstatutory labor exemption[87] prohibits players from challenging restraints in the collective bargaining agreement.[88] The evolution of this test is discussed in the following section.

B. *The Labor Exemption and Professional Sports*

Because every major professional sports league has a union to represent player interests, the agreements between the leagues, teams, and players may be subject to the labor exemption.[89] The professional sports cases focus on challenges by current players against player restraints encompassed in a valid or expired collective bargaining agreement.

1. *The* Mackey *Standard*

In *Mackey v. National Football League*,[90] veteran players challenged a restraint known as the "Rozelle Rule."[91] The

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84. *Amalgamated Meat Cutters*, 381 U.S. at 691.

85. *See, e.g.*, Connell Co. v. Plumbers & Steamfitters, Local Union No. 100, 421 U.S. 616, 616 (1965); *Amalgamated Meat Cutters*, 381 U.S. at 676; *see also* Lock, *supra* note 16, at 352.

86. WEISTART & LOWELL, *supra* note 75, at 530.

87. The remainder of this comment will refer to the nonstatutory labor exemption as "the labor exemption."

88. *See infra* notes 89-104 and accompanying text.

89. By the late 1960's, the various players' associations were recognized as unions and considered to be the players' exclusive bargaining representative. ROBERT C. BERRY & GLENN M. WONG, 1 LAW AND BUSINESS OF THE SPORTS INDUSTRIES 107 (1986).

90. 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

91. *Mackey*, 543 F.2d at 611. The "Rozelle Rule" mandated that a team signing a free agent player (the player's contract with an NFL team had ex-

National Football League (NFL) unilaterally adopted the "Rozelle Rule" as a term of the NFL's Constitution and Bylaws which bound the players through their Standard Player Contracts.[92] The players asserted that the "Rozelle Rule" restricted players' movement between teams and depressed player salaries.[93] The NFL indicated that the term was necessary for maintaining competitive balance among the teams and for protecting the investment made in scouting, selecting, and developing players.[94] To determine the validity of the "Rozelle Rule," the court answered two questions: (1) whether the collective bargaining agreement provided the labor exemption shield for the term; and (2) if not, whether the term was so unreasonable as to violate antitrust law.[95]

a. *The Labor Exemption Elements*

After reviewing the history of the labor exemption,[96] the court concluded that protection of a collective bargaining agreement depends on "whether the relevant federal labor policy is deserving of pre-eminence over federal antitrust policy under the circumstances of the particular case."[97] The labor exemption will shield agreement terms if three factors exist.[98] The *Mackey* court stated that the following elements would accommodate both antitrust and labor laws:

> 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,

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pired) pay compensation to the player's former club. *Id.* at 610. If mutual terms were not met, the Commissioner (Alvin Ray "Pete" Rozelle) was authorized to award compensation. *Id.* at 611.

92. *Id.* at 610. The Standard Player Contracts provided that the players agreed to comply with and be bound by the NFL Constitution and Bylaws. *Id.* at 613.

93. *Id.* at 615. Professional sports players have maintained that player restraints such as the "Rozelle Rule," right of first refusal, salary cap, and college draft, restrict players' movement and suppress salaries. *See supra* note 22. The professional sports cases discussed in this comment also used this rationale.

94. *Mackey*, 543 F.2d at 611. The leagues consistently defend their practices, stating the necessity of maintaining competitive balance. *See infra* notes 195-99 and accompanying text.

95. *Mackey*, 543 F.2d at 609.

96. *Id.* at 611-13.

97. *Id.* at 613.

98. *Id.* at 614.

> 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 antitrust laws only where the agreement sought to be exempted is the product of bona fide *arm's-length bargaining*.[99]

As courts continued to use this test, the factors were clarified. For instance, the term "parties to the collective bargaining relationship" has been interpreted broadly.[100] Additionally, the NLRA defined "mandatory subjects of bargaining" as "wages, hours, and other terms and conditions of employment."[101] Finally, courts examined the history of the parties' negotiations to find whether "arm's-length bargaining" occurred.[102]

If these three elements exist, the rights of labor to collectively bargain outweigh the antitrust laws.[103] In contrast, if one of these elements is missing, antitrust law will override labor law, making the rule of reason analysis applicable.[104]

b. *Application of the Standard*

Before determining whether antitrust law was involved, the *Mackey* court applied the three factors to the facts of the case.[105] The court quickly stated that the first element was met because only parties to the agreement — veteran players — were affected by the "Rozelle Rule."[106] The term was also found to be a mandatory subject of bargaining because it af-

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99. *Id.* (citations omitted) (emphasis added). Although *Mackey* is not a Supreme Court case, courts faced with the issue of collective bargaining in professional sports have followed *Mackey*'s three-part test, or have employed similar tests, to determine if the nonstatutory labor exemption applied. *See, e.g.*, Wood v. National Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987); National Basketball Ass'n v. Williams, 857 F. Supp. 1069, 1074 (S.D.N.Y. 1994), *aff'd*, 45 F.3d 684 (2d Cir. 1995); Brown v. Pro Football, Inc., 782 F. Supp. 125, 130 (D.D.C. 1991), *rev'd*, 50 F.3d 1041 (D.C. Cir. 1995); Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960, 964-65 (D.N.J. 1987); Zimmerman v. National Football League, 632 F. Supp. 398, 403-04 (D.D.C. 1986).

100. *See* discussion *infra* part II.B.3.

101. 29 U.S.C. § 158(d) (1988).

102. *See* Mackey v. National Football League, 543 F.2d 606, 615-16 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); Zimmerman v. National Football League, 632 F. Supp. 398, 403-04 (D.D.C. 1986).

103. *Mackey*, 543 F.2d at 614.

104. *Id.*

105. *Id.* at 615-16.

106. *Id.* at 615.

fected player mobility and repressed salaries.[107] Finally, the court found the rule was not a product of bona fide arm's-length negotiation, but was unilaterally implemented by the league prior to the agreement's execution.[108] Thus, the labor exemption did not shield the "Rozelle Rule."[109]

Next, the court examined the reasonableness of the restraint to determine if it violated antitrust law.[110] The court dismissed the application of the per se rule because of the uniqueness of NFL operations.[111] Under the rule of reason analysis, the restraint was found unreasonable because of its unlimited duration, lack of procedural safeguards, and the availability of less restrictive alternatives.[112] Hence, the court held the "Rozelle Rule" was a violation of antitrust law.[113]

2. *Extending the Labor Exemption Beyond the Agreement's Expiration*

The NFL revised the term in its next agreement, but the Right of First Refusal/Compensation provision was also challenged.[114] In *Powell v. National Football League* (*Powell I*), the court found the three *Mackey* factors present,[115] and the issue became whether the labor exemption shielded the new provision even after the collective bargaining agreement ex-

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107. *Id.*

108. *Mackey*, 543 F.2d at 616. Although the union received increased pension benefits and players' rights to individually negotiate their salaries, the court found that the exchange was not quid pro quo. *Id.* Additionally, the court indicated that the union's status quo acceptance of the unilaterally implemented terms did not immunize the "Rozelle Rule" from antitrust scrutiny. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 619.

112. *Id.* at 622.

113. *Mackey*, 543 F.2d at 622.

114. Powell v. National Football League, 678 F. Supp. 777 (D. Minn. 1988), *rev'd*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991). Under the Right of First Refusal/Compensation provision, when a veteran player's contract expired and a competing NFL team made an offer to that player, the current team had the right to match the offer. *Id.* at 779. If the current team decided not to match the offer, the competing club was required to pay "compensation" to it. *Id.* Under this system, only one player moved in 10 years. *Id.* at 780-81.

115. *Id.* at 784. Unlike the "Rozelle Rule," the Right of First Refusal/Compensation provision was incorporated into an extensively negotiated collective bargaining agreement. *Id.* at 780.

pired.[116] The court held that the labor exemption survives past the expiration of the agreement until the parties reach an impasse.[117]

This decision, however, was overruled by the United States Court of Appeals for the Eighth Circuit (*Powell II*).[118] *Powell II* rejected the impasse standard because it did not consider the available remedies under federal labor law for unfair labor practices.[119] Instead, the court held that the labor exemption continues as long as there is an ongoing collective bargaining relationship.[120]

Courts have followed different standards regarding the duration of the labor exemption, as evidenced by the different standards in *Powell I* and *Powell II*.[121] Two district courts also used different standards. In *Bridgeman v. National Basketball Ass'n*,[122] the United States District Court for the District of New Jersey stated that the labor exemption survives as long as "the employer continues to impose that restriction unchanged, and reasonably believes that the practice or a close variant of it will be incorporated in the next collective bargaining agreement."[123] However, in *Brown v. Pro Football, Inc.*,[124] the United States District Court for the District of Columbia found that the expiration of the collective bargaining agreement eliminated the labor exemption.[125] These cases illustrate how different outcomes can result from similar situations when there is no clear application of the labor exemption to the unique industry of professional sports.

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116. *Id.* at 783.

117. *Id.* at 787.

118. Powell v. National Football League, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991).

119. *Id.* at 1302. Labor law remedies include employee strikes, employer lock-outs, and petitioning the NLRB for a cease and desist order prohibiting the unfair labor practice. *Id.*

120. *Id.* at 1303. As a result of this decision, the NFL Player's Association decertified as a union to terminate the collective bargaining relationship so that it could bring antitrust actions against the NFL. *See* McNeil v. National Football League, 790 F. Supp. 871 (D. Minn. 1992).

121. A complete analysis of the duration of the labor exemption can be found in Lock, *supra* note 26.

122. 675 F. Supp. 960 (D.N.J. 1987).

123. *Bridgeman*, 675 F. Supp. at 967.

124. 782 F. Supp. 125 (D.D.C. 1991), *rev'd*, 50 F.3d 1041, 1052 (D.C. Cir. 1995) (holding that the *Powell II* standard is applicable because the courts must recognize a "proper respect for national labor policy").

125. *Brown*, 782 F. Supp. at 135.

3. *Defining the Scope of Parties to the Collective Bargaining Relationship*

Each standard above was discussed in the context of whether the restraint could be challenged by current players, since a collective bargaining agreement term can be shielded by the labor exemption if it affects only the parties to the bargaining relationship.[126] In *Powell I* and *Powell II*, the restraint was challenged by NFL veteran players.[127] The *Bridgeman* plaintiffs consisted of current and former NBA players and first round draft choices.[128] In *Brown*, the players were part of NFL developmental squads.[129] The plaintiffs in these cases were found to be parties to the collective bargaining relationship because they were current or drafted players.[130] The following cases have also broadly defined the scope of parties to the collective bargaining relationship.[131]

a. Wood: *A Drafted Player*

In *Wood v. National Basketball Ass'n*,[132] three terms of the NBA collective bargaining agreement were challenged by a drafted player who never signed a contract.[133] Reviewing the development of these provisions in the NBA's collective bargaining history, the court noted the terms were in a settlement agreement approved by it and the court of appeals.[134] The court speculated that it was unlikely an agreement con-

126. *See supra* notes 98-102 and accompanying text.

127. Powell v. National Football League, 678 F. Supp. 777, 778 (D. Minn. 1988), *rev'd*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991).

128. Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960, 961 (D.N.J. 1987).

129. Brown v. Pro Football, Inc., 782 F. Supp. 125, 127 (D.D.C. 1991), *rev'd*, 50 F.3d 1041 (D.C. Cir. 1995).

130. *Bridgeman*, 675 F. Supp. at 965 n.4 ("[The player restraints] affect only the terms and conditions upon which current and prospective players are employed by NBA teams and do not affect any product market in which the NBA competes.").

131. *See* Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941). The broad definition of "employee" is expressed by Congress in understanding that self-organization of employees may extend beyond a single plant or employer. *Id.* at 192 (citing H.R. REP. No. 1147, 74th Cong., 1st Sess. 9 (1937)).

132. 602 F. Supp. 525 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954 (2d Cir. 1987).

133. *Wood*, 602 F. Supp. at 526. The three challenged terms were the NBA salary cap, the college draft, and the prohibition of players corporations. *Id.*

134. *Id.* at 528 (referring to Robertson v. National Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975), *aff'd*, 556 F.2d 682 (2d Cir. 1977)).

taining provisions in violation of antitrust law would be acceptable to "two levels of the judiciary."[135]

Indeed, the player's claim that he was not bound by the agreement, since he was not an NBA player when the contract was implemented, was rejected.[136] The court stated: "At the time an agreement is signed between the owners and the players' exclusive bargaining representative, all players within the bargaining unit during the life of the agreement are bound by its terms."[137] Thus, the court held the labor exemption applied because the player came within the bargaining unit when he was drafted.[138]

This decision was affirmed by the court of appeals,[139] relying on the NLRA, which defines "employee" as any employee, not limited to the employees of a particular employer.[140] The appellate court compared the college draft to a hiring hall where unions provide for the exclusive referral of workers, and noted that many union-employer agreements disadvantage newcomers.[141] The court also found that restrictions to parties outside the bargaining unit were a "commonplace consequence" of collective bargaining agreements.[142] The antitrust challenge was consequently denied.[143]

b. Zimmerman: *A Player for Another Professional League*

Relying on the *Wood* decision, the court in *Zimmerman v. National Football League*[144] found a player for the United States Football League (USFL) a party to the NFL collective bargaining relationship.[145] The player challenged an NFL procedure called the "supplemental draft," where teams se-

135. *Id.*
136. *Id.* at 529.
137. *Id.* (citing J.I. Case Co. v. NLRB, 321 U.S. 332, 335 (1944); NLRB v. Laney & Duke Storage Warehouse Co., 369 F.2d 859, 866 (5th Cir. 1966)).
138. *Wood*, 602 F. Supp. at 528.
139. Wood v. National Basketball Ass'n, 809 F.2d 954, 959 (2d Cir. 1987).
140. 29 U.S.C. § 152(3) (1988).
141. *Wood*, 809 F.2d at 960.
142. *Id.*
143. *Id.* at 963.
144. 632 F. Supp. 398 (D.D.C. 1986).
145. *Zimmerman*, 632 F. Supp. at 405 ("As a potential NFL player, Zimmerman was part of the collective bargaining relationship between the NFLPA and the NFL to the extent necessary for purposes of the labor exemption.").

lected players already under contract with professional football leagues other than the NFL.[146] Once a player was drafted, as in the college draft, he was restricted to negotiate only with that team if he attempted to enter the NFL.[147] The challenger had been drafted in the supplemental draft while he was playing for the USFL.[148]

To determine if the labor exemption applied, the court followed the three-part *Mackey* test and found all elements had been met.[149] As in *Wood*, the player was considered a potential employee and part of the collective bargaining relationship.[150] Thus, the labor exemption shielded the claim against antitrust scrutiny.[151] Hence, *Zimmerman* made it lawful for the NFL to implement a supplemental draft of USFL players to secure their services in the event they left the USFL, locking the players into negotiations with only one NFL team.[152]

c. *Players Within or Entering the Bargaining Unit During the Term of the Agreement*

These broad interpretations of who is a party to the bargaining relationship have made it difficult for any potential player of professional sports to challenge a collective bargaining term because of the labor exemption.

Wood, relying on a Supreme Court decision, indicated that the collective bargaining relationship consists of "all players within the bargaining unit and those who enter the bargaining unit during the life of the agreement."[153] In professional sports, a player does not become part of the bargaining relationship until he[154] has *entered* the bargaining

146. *Id.* at 400.

147. *See* discussion *infra* part II.C.

148. *Zimmerman*, 632 F. Supp. at 402.

149. *Id.* at 408.

150. *Id.* at 405. The agreement was also found to be formed under arm's-length negotiations because there was an adequate exchange of terms. *Id.* at 408.

151. *Id.*

152. *Id.* at 405.

153. Wood v. National Basketball Ass'n, 602 F. Supp. 525, 529 (S.D.N.Y. 1984) (citing J.I. Case Co. v. NLRB, 321 U.S. 332, 335 (1944)), *aff'd*, 809 F.2d 954 (2d Cir. 1987).

154. The author will refer to potential players as males since the focus of this comment is on professional basketball players. This language is in no way intended to be sexist, but a recognition of the reality that only males currently play in the professional ranks of the NBA.

unit.[155] In other words, he becomes a party to the bargaining relationship once he has been drafted by or signed a contract with a team.[156] It is disputable whether a person who has not been drafted by or contracted with a team can challenge the college draft, since he has not entered the bargaining unit. This comment suggests that a remote potential player is affected by the college draft and can successfully bring an antitrust action.[157] The discussion below indicates that the college draft has group boycott and price fixing characteristics that violate antitrust laws.

C. *The College Draft*

Men seeking entry into a league are subject to the college draft implemented by the professional sports leagues. The college draft was adopted by the leagues prior to unionization of the players in order to allocate new players among existing teams.[158] After the players recognized the unions, the college draft was incorporated into the subsequent existing collective bargaining agreements.[159] The following review of the NBA college draft process and the conflicts that arise exemplifies the need for modification in this area of professional sports law.

1. *The NBA College Draft*

a. *The Lottery System*

The college draft is the selection of players made in inverse order of the team's standing during the previous season.[160] The effect of this process is to allow the unsuccessful teams to select the most talented players in the draft.[161] The purpose of the college draft is supposedly to equalize playing talent among the teams in the league.[162]

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155. *Wood*, 602 F. Supp. at 529.

156. 1988 NBA Agreement, *supra* note 6, Art. XXIX. The Player's Association is the exclusive bargaining representative for persons who are "employed as professional basketball players (and/or who may become so employed during the term of the contract)." *Id.*

157. *See* discussion *infra* part III.

158. Interview with Ethan Lock, Esq., professor at Arizona State University, in Palo Alto, Cal. (Sept. 18, 1994) [hereinafter Lock Interview]. *See also* WEISTART & LOWELL, *supra* note 75, at 504.

159. 1988 NBA Agreement, *supra* note 6, Art. IV.

160. WEISTART & LOWELL, *supra* note 75, at 504.

161. *Id.*

162. *Id.*

With the lottery system, however, the team with the worst record is not guaranteed to pick first.[163] The seven lowest ranked teams are involved in the lottery system.[164] Cards indicating each of the seven teams are randomly drawn from a drum.[165] The team chosen first picks seventh in the draft; the team chosen second, sixth; etc.[166] This process continues until all teams are drawn, with the last team earning the number one draft position.[167]

b. *The NBA Terms*

Once a player is drafted ("draftee"), he is bound by the terms of the collective bargaining agreement between the NBA and the union.[168] Article IV of the 1988 NBA Agreement outlines the situations in which a draftee is limited to negotiating with only one team.[169] First, the team has exclusive rights to negotiate with the draftee for one year as long as the team has made the required tender.[170] The player who does not accept the team's offer re-enters the draft the following year ("subsequent draft").[171]

Second, during the subsequent draft, another (or the same) team can draft the player and retain exclusive rights for one year if the required tender is made.[172] If the player does not accept the second offer, he is able to negotiate with

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163. Ted Steinberg, *Negotiating National Basketball Association Contracts*, *in* 2 LAW OF PROFESSIONAL AND AMATEUR SPORTS § 7.03[1] (Gary A. Uberstine ed., 1994).

164. *Id.*

165. *Id.* The three worst teams are not placed into the drum until the seventh selection is made, so that they are guaranteed a position in the top six. *Id.*

166. *Id.*

167. *Id.*

168. *See, e.g.*, Wood v. National Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987); Zimmerman v. National Football League, 632 F. Supp. 398 (D.D.C. 1986).

169. 1988 NBA Agreement, *supra* note 6, Art. IV. Although the NBA and its players agreed to new terms effective September 18, 1995, the only significant change in the draft provisions is the decrease in the number of rounds after the third year of the agreement. *The Deal*, *supra* note 20, at 126.

170. 1988 NBA Agreement, *supra* note 6, Art. IV, § 1(b). "Required tender" means delivering a contract to the player on or before September 5 following the draft (which occurs in June), that contains the team's signature and is in the form of the standard player contract for a one-year term at the minimum salary. *Id.*

171. *Id.* § 1(c).

172. *Id.*

any team one year later.[173] Consequently, if a player is drafted, the team can exclusively negotiate with him for a maximum of two years.[174] If the team never makes the required tender or the player is not drafted in the subsequent draft, however, he is free to negotiate with any team.[175] A team that negotiates with a player it did not select is penalized.[176] Thus, teams will exclusively negotiate with only those players they have drafted.

2. *The Conflict*

The players bidding for a spot on a professional team are selling their services. The college draft limits the player to negotiating with one team.[177] Although the players may negotiate with any team under certain circumstances,[178] they argue that the college draft acts as a limit on their bargaining power.[179] In order to play professional sports, the incoming player must go along with the system set up by the leagues.[180] If the player cannot reach an agreement with the drafting team, he cannot play in the league.[181] Essentially, the league has maintained a group boycott because it refuses to deal with the players unless they adhere to the league's terms.[182]

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173. *Id.*

174. Nothing in the 1988 NBA Agreement precludes a team from drafting the player in the subsequent draft after they could not reach agreement the prior year. 1988 NBA Agreement, *supra* note 6, Art. IV, § 1(c).

175. *Id.* § 1(d), (e). However, the team will make the required tender because it desires to have exclusive rights over a player. Lock Interview, *supra* note 158.

176. National Basketball Ass'n v. Williams, 857 F. Supp. 1069, 1073 (S.D.N.Y. 1994), *aff'd*, 45 F.3d 684 (2d Cir. 1995).

177. *See supra* notes 168-76 and accompanying text.

178. These circumstances include: the team does not make the required tender on or before September 5; the player does not sign a contract after two draft years; the player does not sign a contract and is not drafted in the second draft year; or when the player is not drafted. 1988 NBA Agreement, *supra* note 6, Art. IV, § 1(c)-(e).

179. WEISTART & LOWELL, *supra* note 75, at 504.

180. Robertson v. National Basketball Ass'n, 389 F. Supp. 867, 892 (S.D.N.Y. 1975) (reviewing the draft and reserve clauses of a settlement agreement which eventually became the collective bargaining agreement), *aff'd*, 556 F.2d 682 (2d Cir. 1977). A detailed history of NBA collective bargaining can be found in *Williams*, 857 F. Supp. at 1069.

181. Smith v. Pro-Football, Inc., 593 F.2d 1173, 1176 (D.C. Cir. 1978).

182. *Robertson*, 389 F. Supp. at 893.

The issue of the college draft's legality under antitrust law was addressed in *Smith v. Pro-Football*.[183] The player was the twelfth selection in the NFL college draft.[184] He signed a one-year, $50,000 contract, even though he was expected to be one of the best defensive backs ever to play football.[185] The player argued that the group boycott aspects of the draft made it impossible for him to obtain the true value of his services.[186]

The court found that the draft was not a group boycott in the traditional sense, because teams were not combining to exclude competitors on their level of the market.[187] The draft did, however, call for cooperation among participants, which resulted in some type of concerted refusal to deal.[188] Using the rule of reason analysis,[189] the court found the draft was an unreasonable restraint of trade because of its "anticompetitive impact on the market of players' services."[190] Additionally, the draft went beyond the level of restraint reasonably necessary to accomplish whatever legitimate business purposes might be asserted, because there were less restrictive alternatives.[191] Hence, *Smith* found that the draft was an unreasonable restraint on trade in violation of the antitrust laws.[192]

In addition to the group boycott, the players have generally asserted that the draft results in a concerted refusal to deal, which, in turn, suppresses salaries to the point of price fixing. Price fixing applies to "any arrangement among competitors which, in purpose or effect, directly or indirectly inhibits price competition."[193] Since the players can only negotiate with one team, they contend that the league is price

183. *Smith*, 593 F.2d at 1174.

184. Smith v. Pro-Football, Inc., 420 F. Supp. 738, 740 (D.D.C. 1976), *aff'd in part, rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978).

185. *Id.*

186. *Id.* at 741.

187. Smith v. Pro-Football, Inc., 593 F.2d 1173, 1179 (D.C. Cir. 1978).

188. *Id.* at 1180.

189. *Id.* (discussing why the per se rule is inappropriate to apply in professional sports).

190. *Id.* at 1183.

191. *Id.* at 1187. The court listed several viable alternatives, such as decreasing the number of players a team may sign, allowing negotiations with the team of the players' choice if the drafting team did not make an acceptable offer, running fewer rounds, or eliminating the draft. *Id.* at 1188.

192. *Smith*, 593 F.2d at 1189.

193. SULLIVAN, *supra* note 44, at 198.

fixing because the system eliminates economic competition in the hiring of players.[194] Considering the above antitrust problems, the players believe they have valid claims against the leagues.

In contrast, the leagues argue that their stated purpose for the college draft is to maintain a competitive balance between the teams.[195] Without the draft, the best players will migrate to the teams that can pay the highest salaries.[196] Additionally, the draft prevents winning teams from accumulating talent by allowing weaker teams the chance at the best entering players.[197] If a limited number of teams continually received the best talent, the leagues believe the game would become predictable and fan interest would dissipate.[198] Therefore, the leagues contend that the college draft is necessary for the viability of the league as a whole.[199]

The argument between the players and the leagues has been repeatedly litigated.[200] The courts, however, have not weighed the arguments when someone more remote from the bargaining relationship, but affected like drafted players, challenges the player restraints.

III. ANALYSIS

A. *Statement of the Problem*

The college draft acts adversely against all players who want to enter the league. As the following hypothetical will illustrate, however, only certain potential players can effectively challenge the college draft as a violation of antitrust law.[201] Because of courts' broad application of the labor exemption, one group of potential players is covered by collective bargaining agreement terms, while the other group is not.[202] Thus, there is a dichotomy between those who can successfully challenge player restraints and those who cannot.

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194. Robertson v. National Basketball Ass'n, 389 F. Supp. 867, 893 (S.D.N.Y. 1975), *aff'd*, 556 F.2d 682 (2d Cir. 1977).
195. WEISTART & LOWELL, *supra* note 75, at 505.
196. *Id.* at 596.
197. *Id.*
198. *See id.*
199. *Id.*
200. *See* discussion *supra* part II.B.
201. *See* discussion *infra* part III.B.
202. *See* discussion *infra* part III.C.

This comment proposes two solutions that will bridge the gap between the different potential players.[203] Adopting either of the proposals suggested in part IV would bring clarification into professional sports law by eliminating the uncertainty of whether potential players are bound by the existing collective bargaining agreement. Once the law has been solidified, those affiliated with the sports industry will be able to make informed decisions regarding the coverage of collective bargaining agreements.

B. *Illustrative Hypothetical*[204]

Suppose the NBA has a collective bargaining agreement for a six year term, from June 1995 to June 2001. This agreement also contains a college draft system identical to the one described in part II.C. Assume a high school senior ("the senior") with exceptional basketball skills graduates in June 1996. He has two choices. First, he can renounce his intercollegiate eligibility and elect to enter the 1996 NBA draft.[205] Alternatively, the senior can enter college, play intercollegiate sports for four or five years,[206] and then enter the 2000 or 2001 draft.[207] In either case, he will enter the draft during the term of the six year agreement. According to case law, he is considered a potential player and a party to the collective bargaining relationship.[208] Thus, the senior could not successfully challenge the college draft because of the labor exemption.

Further assume an equally talented high school junior ("the junior") graduates in 1997 with the same options as the senior. If the junior elects to enter the draft after his high school graduation, he will be subject to the draft because he enters the league during the term of the agreement.[209] On

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203. *See* discussion *infra* part IV.

204. The following hypothetical will be referred to throughout the remainder of this comment to illustrate the problems with the application of the labor exemption to the college draft.

205. 1988 NBA Agreement, *supra* note 6, Art. IV, § 1(h).

206. A college player's eligibility clock starts when he begins full-time studies. He has five years to play four years of intercollegiate sports. The extra year is called the "red shirt" year, in which the player practices with the team but does not play in games. The player can red shirt any year; but if he chooses not to red shirt, he can only play four years. Lock Interview, *supra* note 158.

207. 1988 NBA Agreement, *supra* note 6, Art. IV, § 1(h).

208. *See supra* notes 126-56 and accompanying text.

209. *See supra* notes 126-56 and accompanying text.

the other hand, the junior can attend college and play five years of intercollegiate sports. By the time he enters the professional sports arena in 2002, the agreement will have expired. Any new agreement may eliminate the draft provision,[210] or the union may no longer exist.[211] Hence, the junior is not considered a party to the collective bargaining relationship since he will not enter the league during the term of the agreement.

Because the future of the college draft is uncertain, the junior's decision as to which path he chooses is affected by the agreement. For example, if the draft applies when the junior graduates from high school, his incoming salary may be repressed from the negotiation restrictions.[212] The junior most likely will take a wait-and-see attitude, since he may not face such a constraint if he attends college first. Alternatively, the junior can successfully challenge the college draft, as a violation of antitrust law, before he graduates from high school.[213]

C. *The Labor Exemption Should Not Apply*

The first hurdle to overcome when challenging a player restraint is the labor exemption. Since the college draft is encompassed in an existing collective bargaining agreement, the labor exemption may create a barrier against the application of antitrust law.[214]

1. *Application of the Second and Third Elements of the* Mackey *Standard*

Using the *Mackey* analysis, one factor to consider is whether the college draft is a mandatory subject of bargain-

210. The new NBA agreement reduced the draft from two rounds to one round after three years. *The Deal*, *supra* note 20, at 126. There is also the possibility that the draft will ultimately be eliminated.

211. *See supra* note 120. Additionally, several NBA players began a decertification effort during the 1995 lock-out, which illustrates the players' desire to bargain individually. *NBA Dissidents Hang Tough on Decertification*, S.F. CHRON., Aug. 17, 1995, at D5.

212. *See supra* notes 177-200 and accompanying text.

213. As will be explained in part III.C.2, the junior is not a party to the bargaining relationship who is affected by the agreement. His injury gives him standing to sue. *Cf.* Zimmerman v. National Football League, 632 F. Supp. 398, 408 (D.D.C. 1986) (finding no injury because, whether he was drafted in the supplemental draft or the regular draft, he would have been restricted to negotiating with only one team).

214. *See supra* notes 81-157 and accompanying text.

ing.[215] The courts agree that the college draft affects the terms and conditions of employment since it determines which team has exclusive rights to the player's services.[216] Accordingly, it has been found that the matters inherent in the college draft constitute mandatory subjects of bargaining.[217]

A second factor of the *Mackey* analysis is whether the collective bargaining agreement is the product of bona fide arm's-length negotiations.[218] The college draft was first implemented by the league before the union was formed.[219] Once the players recognized the union, the negotiations between the NBA and the players' union created a colorful history of extensive bargaining, including court supervision.[220] Since 1976, the collective bargaining agreements have contained a provision implementing the college draft.[221] Consequently, the courts have concluded that the college draft is the result of bona fide arm's-length negotiations.[222]

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215. Mackey v. National Football League, 543 F.2d 606, 614 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

216. Wood v. National Basketball Ass'n, 602 F. Supp. 525, 528 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954 (2d Cir. 1987). *See also* Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960, 964 n.4 (D.N.J. 1987).

217. Smith v. Pro-Football, Inc., 420 F. Supp. 738, 743 (D.D.C. 1976) ("It is clear that the union and the teams could collectively bargain all monetary compensation, benefits, incentives, and guarantees to be paid to first-year players as mandatory subjects."), *aff'd in part, rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978).

218. *Mackey*, 543 F.2d at 614.

219. Lock Interview, *supra* note 158.

220. *See* Robertson v. National Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975), *aff'd*, 556 F.2d 682 (2d Cir. 1977).

221. National Basketball Ass'n v. Williams, 45 F.3d 684, 686 (2d Cir. 1995).

222. *See* National Basketball Ass'n v. Williams, 857 F. Supp. 1069, 1072 (S.D.N.Y. 1994), *aff'd*, 45 F.3d 684 (2d Cir. 1995); Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960 (D.N.J. 1987). *But see* Smith v. Pro-Football, Inc., 420 F. Supp. 738 (D.D.C. 1976), *aff'd in part, rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978). The player was drafted by the NFL prior to inception of the players' association. The court stated that the exemption does not extend to arrangements imposed unilaterally by employers prior to recognition of union representation. *Id.* at 742.

2. *Application of the First* Mackey *Element*

The final factor of the *Mackey* analysis brings the college draft outside the labor exemption if it is challenged by a remote player[223] affected by its application.

a. *Remote Players are Outside the Collective Bargaining Relationship*

Consider the junior in the scenario above.[224] He may not avail himself to the college draft until the agreement has expired. The courts agree that potential players are part of the collective bargaining relationship when those players will become employed *during* the term of the agreement.[225] Assuming the junior elects to attend college and does not leave college early to play professional basketball, he will not be drafted by or contract with any team during the term of the agreement. Thus, the junior would not be considered an employee or potential player and would be excluded from the collective bargaining relationship.

The foundation for considering potential employees part of the collective bargaining unit was formed in industrial cases.[226] Because these cases found that potential employees are part of the bargaining relationship, the union must consider them when bargaining.[227] In addition, the definition of "employees" has been interpreted broadly because of Congress' intent to cover self-organization of employees that extends beyond a single plant or employer.[228]

The purpose of this broad definition cannot be extended to the professional sports arena because of the inherent differences between the two fields.[229] The uniqueness of the players' skills and talent is not comparable to the uniform

223. For the purposes of this comment, "remote player" refers to a man in the position of the junior in the illustrative hypothetical — someone who would not enter the league during the term of the collective bargaining agreement.

224. *See supra* notes 205-13 and accompanying text.

225. Wood v. National Basketball Ass'n, 602 F. Supp. 525, 529 (S.D.N.Y. 1984) (citing J.I. Case Co. v. NLRB, 321 U.S. 332, 335 (1944)), *aff'd*, 809 F.2d 954 (2d Cir. 1987).

226. *See* NLRB v. Hearst Publications, 322 U.S. 111 (1944); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); Willmar Elec. Serv., Inc. v. NLRB, 968 F.2d 1327 (D.C. Cir. 1992).

227. *Wood*, 602 F. Supp. at 529 (citing NLRB v. Laney & Duke Storage Warehouse Co., 369 F.2d 859 (5th Cir. 1966)).

228. *See supra* note 131.

229. Lock, *supra* note 26, at 354.

skills of industrial workers.[230] Also, the men who become professional players are few and far between, whereas the industrial worker is more easily nurtured.[231] Finally, the shorter career span and seasonal employment of professional sports players create different needs than those of industrial workers.[232] Therefore, the general rules governing industrial cases cannot encompass the unique industry of professional sports.

The inclusion of pre-college men in the group of potential players makes the coverage too far-reaching. In the industrial setting, potential employees do not become part of the bargaining unit until they are applicants of the employer.[233] Likewise, the junior does not become a member of the professional sports bargaining relationship until he submits himself to the college draft or the professional arena.[234]

In the illustrative hypothetical, the junior would bring his cause of action before entering the league. Unlike the player in *Wood*,[235] the junior would not be drafted by a team when he brings his antitrust action. The *Wood* court emphasized that union representation is intended to provide the best deal for the greatest number of employees.[236] The junior cannot even be considered one of the "greatest number of employees" since he is not, or will not become an employee during the term of the agreement. The broad application of the labor exemption, however, allows the agreement to reach the junior.

Similarly, the junior is not aligned with *Zimmerman*[237] because he has not elected to enter the professional sports arena prior to challenging the college draft. The *Zimmerman* court explained that one purpose of limiting the labor exemp-

230. Each player has an individual skill in which he excels. For example, Shaquille O'Neil dominates in shot blocking, Mark Price shoots three-pointers, and John Stockton gives assists. It is rare to see an all-around player like Michael Jordan, who excels everywhere on the court.

231. The NBA consists of only 324 active players. 1988 NBA Agreement, *supra* note 6, Art. XXVI, § 1.

232. *See* Lock, *supra* note 26, at 354-55.

233. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Fibreboard Corp. v. NLRB, 379 U.S. 203 (1964); Willmar Elec. Serv., Inc. v. NLRB, 968 F.2d 1327 (D.C. Cir. 1992).

234. *See supra* notes 126-56 and accompanying text.

235. *See supra* notes 132-43 and accompanying text.

236. Wood v. National Basketball Ass'n, 809 F.2d 954, 959 (2d Cir. 1987).

237. *See supra* notes 144-52 and accompanying text.

tion to parties of the collective bargaining relationship is "to withhold the exemption from agreements that primarily affect . . . economic actors completely removed from the bargaining relationship."[238] A pre-college man, like the junior, is "completely removed from the bargaining relationship" since it cannot be determined if he will be an employee during the term of the agreement.

If courts allow the labor exemption to apply to such a remote player, essentially, they would be promoting the anticompetitive activity of buyers of services, and the spirit of the Sherman Act would be undermined.[239] Considering the labor disputes of 1994-1995, whether the college draft provision will be included in future agreements is questionable.[240] Because of the constant turnover in the industry,[241] the desires of the majority of players are also changing. Further, at some point, the majority of players in the league will not have been parties to the collective bargaining agreement. The agreement should not bind that group of players who did not formally agree to it.[242] In conclusion, the junior's class is too remote to determine that it is covered by the college draft.

b. *Remote Players are Affected by the College Draft*

Since the remote player is not a party to the collective bargaining relationship, the labor exemption will not apply if he is affected by the college draft.[243] In the above hypothetical, the college draft affects the junior's ability to choose when to enter the league.[244] The college draft represses the sala-

238. Zimmerman v. National Football League, 632 F. Supp. 398, 405 (D.D.C. 1986).

239. *See supra* notes 39-65 and accompanying text.

240. *See supra* notes 1-20 and accompanying text.

241. For example, the NFL has a 25% league-wide turnover rate. Lock, *supra* note 26, at 397.

242. The rookie salary scale implemented in the 1995 agreement between the NBA and NBPA capped the 1995 draftees' salaries at approximately $3.3 million per year for a three-year contract. Harvey Araton, *Less Pay, More Pressure Greet N.B.A. Newcomers*, N.Y. TIMES, Sept. 24, 1995, at G1. This agreement was made by those veteran players who would not be affected by the cap, including those players who signed contracts just under $100 million the prior year. *Id.*

243. Mackey v. National Football League, 543 F.2d 606, 614 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

244. *See supra* notes 204-13 and accompanying text.

ries of those entering the league.[245] If the junior wants to become eligible for the draft when he graduates from high school, his potential salary would be lower than if he waited until the collective bargaining agreement expired.[246] If he decides to attend college and wait to see if the college draft will be included in future agreements, the junior will spend money on tuition and books, rather than earn money.

Other factors are relevant to the junior's choice between entering the college draft and attending college. Such elements include desire for education, tentative position in the draft,[247] incentive to develop skills, and financial hardship.[248] The implementation of the college draft, however, remains among these ingredients because the chance to play professional sports does not fall upon all men.[249] When the opportunity arises, a talented player will want to enter the league instead of risking injury while playing intercollegiate sports.[250]

Because a player who is not currently involved with the league has not challenged any player restrictions, it appears that courts would not extend the labor exemption to remote players who have a stake in the effect of the college draft, but would find a violation of antitrust law.[251]

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245. *See supra* notes 177-200 and accompanying text.

246. *See supra* notes 177-200 and accompanying text.

247. The players picked in the college draft's higher positions usually obtain better salaries. For example, the 1994 number one draft pick signed a contract worth over $68 million. Gary Shelton, *Insanity Puts NBA Ship on Crash Course*, ST. PETERSBURG TIMES, Nov. 4, 1994, at C1.

248. Lock Interview, *supra* note 158.

249. *See supra* note 231.

250. *See* Sam Smith, *Garnett's NBA Potential Rates No More than a Big ?*, CHI. TRIB., Jan. 15, 1995, at C10 (reviewing NBA players who skipped college, most notably Shawn Kemp of Seattle). *But see* Adrian Wojnarowski, *Garnett's Success, Our Failure*, FRESNO BEE, July 23, 1995, at D1 (indicating that, because Garnett did not meet the NCAA freshman eligibility standards, he declared himself eligible for the NBA draft).

251. In Robertson v. National Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975), *aff'd*, 556 F.2d 682 (2d Cir. 1977), the court stated:

> [I]t is difficult for me to conceive of any theory or set of circumstances pursuant to which the college draft, blacklisting, boycotts and refusals to deal could be saved from Sherman Act condemnation, even if [the NBA was] able to prove at trial their highly dubious contention that these restraints were adopted at the behest of the Players' Association.

Id. at 895.

D. *The College Draft Violates Antitrust Law*

Under the assumption that the labor exemption does not prevent a remote potential player from challenging the college draft, the application of antitrust law to the draft must be further examined. As noted, the rule of reason analysis is applicable to the player restraints enforced in professional sports.[252] The reasonableness of the restraint is determined by inquiring whether it is justified by a legitimate business purpose and is not more restrictive than necessary.[253] The following section analyzes whether the college draft is reasonable under the rule of reason.

1. *Restraint on Trade*

The college draft acts as a restraint on players in the trade of their talents.[254] For example, the junior in the hypothetical above would not be allowed to participate in the league unless he agreed to the terms of the collective bargaining agreement.[255] If he did submit himself to the agreement, he would have a lower salary as a result of negotiating with only one team.[256] Hence, the college draft has the effect of a group boycott because the teams have refused to deal with players.[257]

Additionally, the junior's salary is suppressed because the teams have agreed not to compete with each other in the purchase of his services.[258] The college draft has the effect of price fixing, because negotiation with one team eliminates economic competition in the hiring of players.[259]

Consequently, the presence of the college draft inhibits the choices the junior can make when he graduates from high school. Limiting the junior's choices of when and where he may practice his trade is the ultimate restraint on trade.[260]

252. *See supra* notes 39-65 and accompanying text.
253. *See supra* notes 58-65 and accompanying text.
254. *See supra* notes 177-200 and accompanying text.
255. *See supra* notes 177-200 and accompanying text.
256. *See supra* notes 177-200 and accompanying text.
257. *See supra* notes 183-92 and accompanying text.
258. *See supra* notes 193-94 and accompanying text.
259. *See* Robertson v. National Basketball Ass'n, 389 F. Supp. 867, 893 (S.D.N.Y. 1975), *aff'd*, 556 F.2d 682 (2d Cir. 1977).
260. "[W]hatever other conduct the [antitrust] Acts may forbid, they certainly forbid all restraints of trade which were unlawful at common-law, and one of the oldest and best established of these is a contract which unreasonably forbids anyone to practice his calling." Mackey v. National Football League,

2. *No Legitimate Business Purpose*

The leagues have consistently believed the college draft is necessary to achieve competitive balance in the game.[261] The argument states that if the draft was not present, the better players would want to play with the most lucrative teams.[262] As a result, the successful teams in large markets would be able to "stack" their roster with the best players and dominate in playing competition.[263] Without the college draft and other player restraints,[264] the leagues predicted that both the quality of the game and the leagues' viability would decline.[265]

The effect of the college draft in maintaining the competitive balance is subject to debate. First, the lottery system implemented by the NBA to determine what team drafts first indicates the flaw in the league's argument that the worst team should have first choice.[266] One view indicates that "the lottery system is more of a public relations event than an opportunity for the clubs which don't qualify for the playoffs to participate in a system to bring parity to the league."[267] Whether the less successful teams need the college draft to survive is equally questionable, because the lottery system and ability to trade draft picks does not guarantee a specific position in the draft.[268]

Second, there are factors other than salary that determine a player's choice of team. Such factors include unre-

543 F.2d 606, 622 n.32 (8th Cir. 1976) (quoting Gardella v. Chandler, 172 F.2d 402, 408 (2d Cir. 1949)), *cert. dismissed*, 434 U.S. 801 (1977).

261. Smith v. Pro-Football, Inc., 593 F.2d 1173, 1175 (D.C. Cir. 1978). *See also* WEISTART & LOWELL, *supra* note 75, at 595.

262. WEISTART & LOWELL, *supra* note 75, at 596.

263. *Id.*

264. One restraint is the salary cap which limits players' salaries. In exchange for a guaranteed percentage of team's gross defined revenue, the players agreed to a ceiling on the total amount the team may spend on salaries. National Basketball Ass'n v. Williams, 857 F. Supp. 1069, 1073 (S.D.N.Y. 1994) (citing 1988 NBA Agreement, *supra* note 6, Art. VII), *aff'd*, 45 F.3d 684 (2d Cir. 1995). Also, free agency restrictions inhibit players from moving between teams. Under the Right of First Refusal system, a team has the ability to match any offer to its player who has played for less than four years or has not completed at least two contracts. If the team matches the offer, the player cannot move to the other team. *Id.* (citing 1988 NBA Agreement, *supra* note 6, Art. V).

265. WEISTART & LOWELL, *supra* note 75, at 596.

266. *See supra* notes 160-67 and accompanying text.

267. Steinberg, *supra* note 163, § 7.03(1).

268. *See* WEISTART & LOWELL, *supra* note 75, at 624.

lated business opportunities, educational opportunities, racial discrimination and general community atmosphere, climate, disputes with owners, and disagreements with coaching staff and management.[269] With these outside influences, it is difficult to ascertain what drives a player to choose a certain team. The college draft, however, does not allow the incoming player to even make a choice.

Finally, the leagues have failed to show the relative impact the college draft has on the playing competition.[270] Regardless of the talent a team acquires in the draft, the chances of that team having an immediate impact in the league are minimal.[271] In addition, other player restraints, such as the salary cap and free agency terms, essentially result in keeping team expenses and movement of players limited.[272] It appears that the greater influence on a team's success is management organization, coaching and scouting staff, and making trades or selecting draft choices.[273]

The *Smith* court recognized that the impact of the college draft was different when the leagues were first developing.[274] Because of factors such as television broadcasting, changes in coaching staff, and management of the organization, teams are equally competitive regardless of their standing in the college draft.[275] In conclusion, the benefits of the college

269. Smith v. Pro-Football, Inc., 593 F.2d 1173, 1183 n.46 (D.C. Cir. 1978) (citing Joint Appendix filed with the court).

270. *Id. See also* WEISTART & LOWELL, *supra* note 75, at 623.

271. In 1992, the Orlando Magic used the number one draft pick for Shaquille O'Neil. That year, the team did not make it to the playoffs. But, the Charlotte Hornets, with number two pick Alonzo Mourning, did go to the playoffs. Lacy J. Banks, *This Season's Elements of Surprise*, CHI. SUN-TIMES, Apr. 19, 1993, at 21. Comparatively, with player restraints similar to the NBA, the NFL has had 12 out of the 28 teams fail to make a Super Bowl appearance since the 1970 NFL-AFL merger. *NFC Championship Preview*, S.F. EXAMINER, Jan. 15, 1995, at C1.

272. John Steigerwald, *An Antiquated Idea*, PITT. POST GAZETTE, Oct. 22, 1994, at C3 (supporting the elimination of the NFL college draft because it has been made obsolete by the salary cap and free agency restrictions).

273. Steinberg, *supra* note 163, § 7.03(3)(a).

274. Smith v. Pro-Football, Inc., 593 F.2d 1173, 1185 n.46 (D.C. Cir. 1978). Before 1950, the leagues were not influenced by television broadcasting, which brought greater exposure to professional sports. *Id.* The NFL allocates television revenues equally among the teams for financial stability. *Id.* The NBA's salary cap limits the amount each team can spend on player salaries to promote a stable league. 1988 NBA Agreement, *supra* note 6, Art. VII.

275. *Smith*, 593 F.2d at 1185 n.46.

draft once perceived by the teams have dissipated as the leagues have become more sophisticated.

3. *The College Draft is More Restrictive than Necessary*

The NBA college draft restricts the top fifty-four players entering the league from negotiating with any team for their services.[276] As noted in *Smith*, "[t]he draft inescapably forces each seller of football services to deal with one, and only one buyer, robbing the seller, as in any monopsonistic [sic] market, of any real bargaining power."[277] Notwithstanding the apparent need to maintain competitive balance, "the draft is anticompetitive in its effect on the market for players' services, because it virtually eliminates economic competition among buyers for the services of sellers."[278]

The college draft challenged in *Smith* consisted of sixteen rounds which restricted 386 players.[279] Like the NFL college draft, the NBA draft is concerned with dispersing the *best* players.[280] Since even average players are affected by the draft,[281] there are less restrictive alternatives to accommodate the leagues.[282]

First, the provision restricting the draftee to negotiate with one team if required tender is delivered could be changed. As it now applies, the offer is hollow, since teams will meet the required tender to retain exclusive bargaining rights.[283] The team only has to offer the minimum salary applicable to the player in the required tender.[284] This provision could be modified to allow the draftee to negotiate with other teams if the drafting team offers the minimum salary. A change in the required tender does not upset the competitive balance between teams, because it will only make a team offer in "honesty."

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276. 1988 NBA Agreement, *supra* note 6, Art. IV, § 1(a).
277. *Smith*, 593 F.2d at 1185.
278. *Id.* at 1186.
279. *Id.* at 1175.
280. *Id.* at 1187.
281. Smith v. Pro-Football, Inc., 420 F. Supp. 738, 746 (D.D.C. 1976) ("In each crop of college players there are 5 to 10 'blue chip' or virtually certain 'all-pro' players."), *aff'd in part, rev'd in part,* 593 F.2d 1173 (D.C. Cir. 1978).
282. *See supra* note 191.
283. *See supra* notes 168-76 and accompanying text.
284. 1988 NBA Agreement, *supra* note 6, Art. IV, § 1(b).

Second, elimination of the college draft would allow players to freely market their services. With the salary cap,[285] there are limits on the salary levels so that teams do not have to be concerned about expenses.[286] Also, since players are not strictly concerned about salary, they will not migrate to the lucrative teams.[287]

Smith states that "a player draft can survive scrutiny under the rule of reason only if it is demonstrated to have positive, economically *procompetitive* benefits that offset its anticompetitive effect."[288] The NBA college draft no longer has any demonstrable procompetitive benefits because of the acknowledged advancements in the league.[289] In addition, the anticompetitive effect is large because the college draft does act as a restraint on the players' ability to market their services.[290]

Antitrust law was enacted to prevent interference of trade.[291] The potential players are supplying the leagues with their trade. The college draft inherently restrains the players from obtaining the best price for their talents. The college draft's interference with a man's ability to play professional sports is what antitrust law was designed to prevent.[292] Therefore, a remote potential player could successfully challenge the college draft. As the hypothetical illustrates, however, only certain potential players can take advantage of antitrust laws.

IV. PROPOSAL

This comment proposes eliminating the dichotomy that exists between those potential players who can successfully challenge the college draft and those who cannot. There are two options that will effectively meet this goal. First, this comment proposes bridging the gap between the two types of

285. *See supra* note 264.

286. Steigerwald, *supra* note 272 ("The salary cap does what the draft was invented to do. It protects the owners from themselves. By keeping college players guessing about their value, even in an every-man-for-himself situation, teams would pay no more than they're paying now.").

287. *See supra* note 269 and accompanying text.

288. Smith v. Pro-Football, Inc., 593 F.2d 1173, 1188-89 (D.C. Cir. 1978).

289. *See supra* notes 270-75 and accompanying text.

290. *See supra* notes 254-60 and accompanying text.

291. *See supra* notes 39-65 and accompanying text.

292. *See supra* note 260.

players by providing a statute that specifically accommodates the unique aspects of professional sports. Alternatively, if the current antitrust and labor laws still apply on a case-by-case basis, the void can be filled by narrowing the scope of the term "employees" strictly in professional sports cases. Each option is discussed and evaluated in the following sections.

A. *Professional Sports Statute*

The current antitrust and labor laws were developed for the purpose of maintaining competition in an industrial setting.[293] The current statutory scheme does not adequately address the problems discussed in this comment because of the unique nature of professional sports.[294] The most effective way to eliminate the dichotomy between those players who can successfully challenge player restraints and those who cannot, is to amend the statutes to include a provision addressing professional sports.

1. *The Current Law Supports the Proposed Statute*

Antitrust laws contain a section that exempts professional sports under certain circumstances.[295] First, the teams can jointly agree to sell or transfer rights in telecasting the games they produce.[296] Second, the NFL was granted the right to merge with the American Football League (AFL) without violating antitrust laws against monopolies.[297] Otherwise, professional sports are subject to the Sherman Act.[298] Since Congress was able to enact these statutes without compromising the purpose of the antitrust laws, it is equally capable of creating a law that addresses the problem of the labor exemption reaching remote players.

The proposed statute would be an amendment to the NLRA, since its purpose is to protect the interests of the labor market rather than to completely exempt professional sports from antitrust law.[299] The proposed statute would first contain a provision recognizing that the NLRA is applicable to

293. SULLIVAN, *supra* note 44, at 20.
294. *See supra* notes 60-63 and accompanying text.
295. 15 U.S.C. § 1291 (1988).
296. *Id.*
297. *Id.*
298. *Id.* § 1294. Recall that MLB is the only professional sports league exempt from antitrust law. *See supra* note 42.
299. 29 U.S.C. § 151 (1988).

the services of professional sports players. For example, the statute could state:

> To equalize the bargaining position of professional sports players with the power of the owners, teams, and leagues, the provisions of the National Labor Relations Act are applicable to those professional sports players who organize to negotiate the terms and conditions of their employment or other mutual aid or protection.

Through this provision, the players will explicitly be authorized to form labor organizations and to collectively bargain.[300]

2. *Specific Sections to Eliminate the Problem*

Next, the proposed statute should contain a provision specifically addressing the problem of the labor exemption. Elimination of this problem can be achieved using one of the following two methods.

a. *Limit the Expiration of Collective Bargaining Agreements*

The first way to eliminate the dichotomy between different players is to limit the time length of any collective bargaining agreement between the leagues and players. The proposed provision could state:

> Any collective bargaining agreement between professional sports leagues, teams, owners, and the players' selected bargaining representative shall not have a term longer than four (4) years.

If the collective bargaining agreement is limited to four or less years, the reach of the labor exemption would also be limited. The labor exemption applies to those players in the collective bargaining relationship.[301] The courts have determined that potential players are part of the collective bargaining relationship when they enter the league during the term of the agreement.[302] If the agreement had a shorter time length, it would not reach as many remote players.

For example, an agreement lasting from 1995 to 1999 would only apply to those men in college during that time. It

300. *See id.* § 157.
301. *See supra* notes 126-56 and accompanying text.
302. *See supra* notes 126-56 and accompanying text.

would not encompass the high school senior or junior discussed in the illustrative hypothetical because they would not be entering the league until 2001 and 2002, respectively.[303]

Limiting the time period that the agreement covers would also meet the unique needs of professional sports because it takes into consideration the high turnover of players.[304] With the constant change of players in the league, it cannot be determined if the majority supports the union. A shorter agreement will allow the current players to re-evaluate the union more often. If the majority does not approve of the union, they can vote to decertify and bargain individually.[305]

The continuous evaluation of the union will also pressure it to bargain in the interest of entering players. For example, if the high school junior decides to immediately enter the league, he will be subject to the collective bargaining agreement which expires in 1998. However, he will only have to play under those terms for two years, after which he can promote a change in terms or the union. Consequently, a statute mandating the limited time period of collective bargaining agreements in professional sports addresses the problem of the agreement reaching remote players.

b. *Develop Separate Bargaining Units for Current Players and Potential Players*

Alternatively, the proposed statute could contain a provision differentiating between current player bargaining units and potential player bargaining units. The NLRA specifically excludes certain employees from different bargaining units.[306] Bargaining units are segregated because the employees have different interests that cannot be adequately represented by one union.[307] Similarly, the interests of current players conflict with those of potential players.[308] For example, the veteran players are concerned with player

303. *See supra* notes 205-13 and accompanying text.

304. Lock, *supra* note 26, at 354.

305. *See supra* note 211.

306. 29 U.S.C. § 159(b) (1988) (prohibiting the NLRB from certifying a unit consisting of professional employees and those who are not professionals).

307. The NLRB shall create bargaining units "in order to assure to employees the fullest freedom in exercising the rights guaranteed by [NLRA]." *Id.*

308. *See* Lock, *supra* note 26, at 354 (discussing the different interests of superstars and marginal players).

movement and no salary restrictions while in the league, whereas potential players want freedom to negotiate with any team when entering the league.[309] These two desires conflict because the veteran players may compromise the entering players' position to benefit themselves. Recent examples of this conflict are the new NBA and NHL agreements. The current NBA players agreed to a rookie salary scale, while the NHL players chose a salary limit for rookies in lieu of a salary cap as a whole.[310] Because of these conflicts, the players' unions have a difficult time representing both groups. Thus, a statute segregating the current players from the potential players is feasible. Such statute could state:

> The NLRB shall not decide that any unit is appropriate for the purposes of collective bargaining if such unit consists of both current professional sports players and those potential players who are not currently playing for the specific league.

Once the potential players have their own bargaining representative, if their interests are not being adequately met, they can reach the union through a breach of the duty of fair representation.[311] In addition, the agreements that are made in good faith would be subject to the labor exemption for *all* potential players.[312]

Both of the proposed statute sections are in harmony with the current labor law policy. First, the proposed statutes encourage labor organization as well as leagues' negotiation with the selected representative.[313] Second, since the other provisions of the NLRA would apply to the employer-employee relationship, the parties would have remedies for

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309. *Compare* Bridgeman v. National Basketball Ass'n, 675 F. Supp 960 (D.N.J. 1987) (veterans challenging college player draft, salary cap, and right of first refusal) *with* Wood v. National Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987) (unsigned draftee challenging college draft, salary cap, and prohibition of players corporations). The salary cap is a concern for both groups because it operates as a ceiling on the total amount a team may spend on all players' salaries. National Basketball Ass'n v. Williams, 857 F. Supp. 1069, 1073 (S.D.N.Y. 1994), *aff'd*, 45 F.3d 684 (2d Cir. 1995).

310. *See NHL Players Accept Final Offer — Season Saved*, S.F. CHRON., Jan. 12, 1995, at A1; *see also The Deal*, *supra* note 20, at 126.

311. Wood v. National Basketball Ass'n, 809 F.2d 954, 962 (2d Cir. 1987) (suggesting a cause of action against the union for breach of fair representation in discrimination against new employees instead of an antitrust action).

312. *See supra* notes 126-56 and accompanying text.

313. 29 U.S.C. § 151 (1988).

violation of the proposed statutes.[314] Finally, the proposed statutes address the problem of the college draft being applied to men remote from the bargaining unit. By allowing both current and potential players the opportunity to challenge the college draft provisions, either through collective bargaining or antitrust law, the proposed statutes bridge the gap created by the labor exemption.

B. *Narrow Judicial Interpretation of "Employees"*

Even if the proposed statute scheme is not implemented, the courts could resolve the identified problem by narrowing the scope of "employees" as applied in the first element of the *Mackey* test to one which is applicable only in professional sports cases. The current broad application of the term "employees" reaches players too remote from the collective bargaining relationship.[315] As a result, there is a dichotomy between potential players who can possibly challenge the college draft and those who cannot.

The broad standard, however, was created to meet the needs of industrial workers.[316] Because of the unique characteristics of the professional sports industry, the application of this standard in professional sports cases has been misplaced.[317] A narrower standard has been supported by the Supreme Court even in industrial cases.[318] Regardless, such standard could be limited to professional sports cases because the industry is not comparable to other industries.[319]

A narrow application of "employees" would take remote potential players outside the collective bargaining relationship and allow them to challenge the terms of the agreement

314. *Id.* § 158. *But see* Lock, *supra* note 26, at 409 (criticizing the remedies available as too lenient in the professional sport arena).

315. *See* discussion *supra* part III.C.2.

316. *See supra* notes 226-28 and accompanying text.

317. Lock, *supra* note 26, at 418.

318. Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 166 (1971) ("[L]egislative history . . . itself indicates that the term 'employees' is not to be stretched beyond its plain meaning embracing only those who work for another for hire.").

319. *See supra* notes 229-32 and accompanying text. However, *Wood II* compared the draft to hiring practices of other industries. Wood v. National Basketball Ass'n, 809 F.2d 954, 960 (2d Cir. 1987). The court further indicated "[i]f Wood's antitrust claim were to succeed, all of these common place arrangements would be subject to similar challenges, and federal labor policy would essentially collapse unless a wholly unprincipled, judge-made exception were created for professional athletes." *Id.* at 961.

under antitrust law.[320] Because these remote players have an interest in the trade of their labor, they should not be subject to restraints imposed on them by parties who have no incentive to fairly represent them. The narrow standard would also accomplish labor policy, because persons who did not express approval of the collective bargaining representative would not be subject to the terms of its agreements.[321]

Although a statutory scheme is more consistent, the courts can also implement rules that address the problems discussed in this comment. So long as courts uniformly apply a narrow meaning to "employees," the remote potential players will have equal success in challenging the college draft. By narrowing the first element of the *Mackey* test to exclude potential employees,[322] the labor exemption does not overreach its purpose and bar persons outside the collective bargaining relationship from bringing antitrust action against the leagues.

V. CONCLUSION

Although the NBA has not faced interruptions in its season like MLB and the NHL, there is no guarantee such an event will not occur without a collective bargaining agreement. The college draft has been included in collective bargaining agreements since the players have been unionized.[323] If the next NBA agreement contains a college draft provision, it may be subject to antitrust law if it is challenged by a remote potential player.[324] However, courts' application of the labor exemption to agreements between leagues and players creates a dichotomy between those potential players who can successfully challenge and those who cannot.[325]

This comment proposes to eliminate the differences between potential players in one of three ways.[326] First, a statute could be added to the NLRA limiting the time length of professional sports collective bargaining agreements. Sec-

320. *See* Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

321. The employee group has the right to refrain from collective bargaining activities. 29 U.S.C. § 157 (1988).

322. *See supra* notes 90-104 and accompanying text.

323. *See* discussion *supra* part II.C.

324. *See* discussion *supra* part III.

325. *See* discussion *supra* part III.

326. *See* discussion *supra* part IV.

ond, a statute amending the NLRA could create separate bargaining units for current and potential players. Third, courts could uniformly narrow their interpretation of "employees" when applying the test for the labor exemption. Without these changes, professional sports lawyers, agents, leagues, and players will continue to be uncertain as to who is covered by the collective bargaining agreements between the leagues and the players' unions.

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