# The National Hockey League's Faceoff with Antitrust: *McCourt v. California Sports, Inc.*

If the everyday sports fan were asked to describe the most outstanding characteristic of a professional athlete, he might reply "overpaid." Indeed, the business of professional sport has expanded tremendously in the past twenty years, and multimillion dollar contracts are becoming more the rule, rather than the exception. Yet, while the layman's view of the professional athlete may be correct, it is only partly so. Those who are somewhat better versed in the area have recognized that while the professional athlete may be overpaid, he is subject to a system that some have compared to slavery. During the 1971 Senate hearings on a bill to authorize the merger of the American and National Basketball Associations, then Senator Sam Ervin of North Carolina commented:

> Many years ago, the term 'chattel' was used to denote the legal status of slaves. That is, they were considered a type of chattel which was owned as a piece of furniture or livestock was owned. This use of the term 'chattel' applied to human beings and the condition it stands for are so abhorrent that we don't even like to acknowledge that they ever existed. Yet, in a real sense that is what these hearings are about today—modern peonage and the giant sports trusts.[1]

Like slaves, professional athletes are traded sometimes by request and sometimes, as in the case of Dale McCourt, against their will. Such practices would be unheard of in most other industries, but it is demanded by the unique nature of professional sports. The success and power of a professional team, and the league of which it is a part, depend upon competition. Competition means fan interest, and fan interest means success. This is why professional teams have attempted to bind players to them by imposing what are commonly called equalization provisions.[2] While the era of free agency[3] has impeded the power of a professional team to bind any particular athlete to it, the robbing Peter to pay Paul idea behind equalization provisions has allowed the teams to hold on to some of their competitive edge by requiring compensation in the form of money or man from the competitor that has lured their athlete(s) away.

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1. *Hearings on S. 2373 before the Subcomm. on Antitrust and Monopoly of the Sen. Comm. on Judiciary*, 92d Cong., 1st Sess. 12 (1971).

2. Equalization provisions are part of overall schemes called reserve systems that are designed to protect teams from loss of players. National Hockey League By-Law 9A 6 provides:

> Each time that a player becomes a free agent and the right to his services is subsequently acquired by any Member Club other than the club with which he was last under contract or by any club owned or controlled by any such Member Club, the Member Club first acquiring the right to his services, or owning or controlling the club first acquiring that right, shall make an equalization payment to the Member Club with which such player was previously under contract . . . .

600 F.2d 1193, 1203–09 (6th Cir. 1979).

3. Paragraph 17 (c) of the National Hockey League Standard Players Contract allows a player to sign a Players Option Contract, which is to last for one season. At the conclusion of that contract the player becomes a free agent and has the right to negotiate with any club in the league or with any other club. 600 F.2d 1193, 1194 n.2 (6th Cir. 1979).

Perhaps, at least in part, it was the feeling of slavery that prompted professional athletes to organize and form unions during the 1960s. They hoped unionization would help them obtain a better bargaining position with team owners and would lead to the removal of restrictive league by-laws that were incorporated into their contracts.[4]

Indeed, the federal labor laws express a preference for the collective bargaining process[5] and its resulting agreements. There is, on the other hand, a strong federal policy favoring a competitive system and the efficiencies it creates. The promotion of economic efficiencies is the goal of antitrust. When, through the collective bargaining process, union and employer arrive at agreements that restrain competition and are otherwise violative of the antitrust laws, the courts are put in the precarious position of deciding whether the values seen in collective bargaining outweigh those of antitrust, thus entitling such collectively bargained agreements to an exemption from the antitrust laws.

The unionization of professional athletes has drawn professional sports into this arena of conflict between the federal antitrust and labor laws, a conflict that has resulted in the utilization of the athletes' union bargaining tool against an athlete in the case of *McCourt v. California Sports, Inc.*[6] McCourt (a player) challenged the validity of the National Hockey League's (NHL) equalization provision, By-Law 9A, under the antitrust laws. His challenge failed because, according to the court, the equalization provision was arrived at through bona fide arm's length collective bargaining, which entitled it to a nonstatutory labor exemption from the antitrust laws.

This Case Comment will briefly review the development of the labor exemption from the antitrust laws and its application in similar suits challenging similar equalization provisions in professional baseball, football and hockey. A brief look at the reasons for and against equalization provisions will reveal both why they are probably violative of the antitrust laws and why we should not do away with them. The *McCourt* dissent raises some interesting questions and offers some convincing arguments. This Case Comment answers these questions and refutes these arguments, concluding that the majority in *McCourt* probably reached the correct result.

4. The equalization provision contained in By-Law 9A, which was incorporated into Paragraph 18 of the Standard Players Contract signed by McCourt, provided in part: "[P]arties mutually promise and agree to be legally bound by the Constitution and By-Laws of the League and by all terms and provisions thereof." 600 F.2d 1193, 1195 n.2 (6th Cir. 1979).

5. 29 U.S.C. § 151 (1976), provides in part:

> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to *wages, hours, and other working conditions*, and by restoring equality of bargaining power between employers and employees . . . .
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> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred *by encouraging* the practice and procedure of collective bargaining . . . .

(emphasis added).

6. 600 F.2d 1193 (6th Cir. 1979).

## I. THE DEVELOPMENT OF THE LABOR EXEMPTION FROM THE ANTITRUST LAWS

### A. *The Statutory Exemption*

The purpose of the Sherman Act[7] is to protect consumers against rising prices and limitations on production and to prevent the deterioration of product quality, a purpose which the Act attempts to achieve by forcing businessmen to compete with one another.[8] Section 1 of the Act prohibits combinations or conspiracies in restraint of trade.[9] Section 2 proscribes monopolies.[10] Some feared that the Act would be applicable to unions whose activities (strikes, boycotts, and the like) clearly "monopolized" the labor market.[11] The fear was born out of the *Danberry Hatters* case,[12] in which the Supreme Court held that the union's secondary activity of urging a consumer boycott against the struck hat manufacturer was an unlawful restraint of trade and a violation of the Sherman Act. Still, unions were an essential element in the laborers' quest to deal in equality with their employers[13] and, in hopes of remedying any doubt about a union's ability to function under the antitrust laws, Congress passed the Clayton Act.[14] Section 6 of the Act made it clear that the labor of a human being was not a commodity or article of commerce and that nothing in the antitrust laws could forbid the existence of labor unions. Section 20 of the Clayton Act limited the courts' ability to interfere in union-employer disputes concerning terms and conditions of employment unless it was necessary to prevent irreparable injury to property.[15]

The seemingly broad scope of the Clayton Act was narrowed by the Supreme Court holding in *Duplex Printing Press Company v. Deering*.[16] The

7. 15 U.S.C. §§ 1–7 (1976).
8. Cox, *Labor and the Antitrust Laws*, 104 U. PA. L. REV. 252, 256 (1955).
9. 15 U.S.C. § 1 (1980): "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 . . . ."
10. 15 U.S.C. § 2 (1980): "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 . . . shall be deemed guilty of a felony . . . ."
11. *See* note 8 *supra*.
12. Loewe v. Lawlor, 208 U.S. 274 (1908).
13. American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 209 (1921).
14. 15 U.S.C. § 17 (1980) in relevant part states:

> 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 and operation of labor . . . organizations . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations . . . be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

15. 29 U.S.C. § 52 (1976), in relevant part states:

> No restraining order or injunction shall be granted by any court of the United States, . . . in any case . . . growing out of, a dispute concerning terms and conditions of employment, unless necessary to prevent irreparable injury to property . . . for which injury there is no adequate remedy at law . . . .
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> And no such restraining order or injunction shall prohibit any person or persons . . . from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means to do so; . . . or from peacefully persuading any person to work or abstain from working; . . . nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

16. 254 U.S. 443 (1921).

International Association of Machinists had combined with its local affiliate to interfere with and restrain the manufacturer's trade by means of a secondary boycott. With the asserted goal of unionizing the manufacturer's factory, the union exerted pressures on the customers of the printing press company not to buy, transport, install, or repair the company's printing presses. The company sought Sherman Act relief, while the union claimed that sections 6 and 20 of the Clayton Act exempted its activities from antitrust sanctions. The Court held the statutory exemption of the Clayton Act inapplicable, stating: "there is nothing in [section 6 of the Clayton Act] to exempt such an organization [a union] or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade."[17] The Court went on to hold that section 20 of the Clayton Act was operative only in disputes between employers and their immediate employees,[18] rendering the union weapon of secondary boycotts still subject to the Sherman Act.[19]

During the 1930s, Congress passed legislation designed to curtail the role of the courts in the formation of labor policy. The Norris-LaGuardia Act,[20] enacted in 1932, limited the power of federal courts to issue injunctions in labor disputes by enumerating specific acts that were not subject to restraining orders or injunctions, as well as expanding the Supreme Court's *Duplex* definition of what constituted a labor dispute.[21] The Wagner Act of 1935[22] expressed the federal policy favoring union organization and collective bargaining. None of the labor laws, however, made any reference to what sort of union activities would violate the Sherman Act. In *Apex Hosiery Co. v. Leader*,[23] the Court attempted to strike a balance between the freedom to organize granted to unions by the federal labor laws, and the proscriptions on those efforts by the antitrust laws. The Court refused to grant Sherman Act relief to a hosiery manufacturer victimized by a violent sitdown strike, even though the union had engaged in activity that prevented the shipment of goods to out-of-state customers. The Court felt that the Sherman Act would not

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17. *Id.* at 469.

18. *Id.* at 472–74.

19. *See* Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws*, 32 U. CHI. L. REV. 659, 665 (1965).

20. 29 U.S.C. § 101 (1976).

21. 29 U.S.C. § 104 (1976), provides in relevant part:

No court of the United States shall have jurisdiction to issue any restraining order or . . . injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work . . . ;

(b) Becoming or remaining a member of any labor organization . . . .

29 U.S.C. § 113 (c), provides:

The term "labor dispute" includes any controversy concerning terms and conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

22. 29 U.S.C. §§ 151–168 (1976). *See* note 5 *supra*.

23. 310 U.S. 469 (1940).

apply to strikes or other obstructions to interstate commerce unless they had an effect or were intended to have an effect on prices.[24] Since the union's purpose in *Apex* was to organize and no effect on prices had been shown, the Court refused to grant the manufacturer antitrust relief. The Court did hold, however, that the Sherman Act would have been applicable to the union's activity if the strike had affected commercial competition,[25] illustrating that while the unions had obtained greater freedom from Sherman Act scrutiny for certain activities, no clear exemption was as yet available to them.

The Court did carve out a labor exemption from the antitrust laws in *United States v. Hutcheson.*[26] A lengthy dispute between carpenters and machinists over the installation of machinery at a new brewery culminated in a strike by the carpenters at the site of the brewery. In addition to the strike, the carpenters picketed the brewery and sent out union publications requesting that union members and their friends refrain from buying Anheuser-Busch beer.[27] The union was charged with violating section 1 of the Sherman Act. The Court, by reading the Norris-LaGuardia Act in conjunction with section 20 of the Clayton Act, held that the Sherman Act was inapplicable to the practices specifically enumerated in section 20.[28] Thus the section 20 practices of peaceful strikes and boycotts were statutorily excluded from the Sherman Act, at least if they occurred in the course of a labor dispute.[29] The breadth of labor's statutory exemption was solidified in *Hutcheson* by Justice Frankfurter's oft-quoted passage:

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.[30]

Reading *Apex* and *Hutcheson* together, it can be said that union restraints on the labor market are statutorily exempt from the Sherman Act if the restraints are the result of activities condoned by the Norris-LaGuardia Act and section 20 of the Clayton Act. On the other hand, *Hutcheson* indicated that labor's statutory exemption from the Sherman Act would be lost once the union combined with employer groups in conspiracies to obtain restrictions on the product market.

The court faced the issue of employer-union combinations in *Allen Bradley Co. v. Local 3, International Brotherhood of Electrical Workers.*[31]

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24. *Id.* at 501. *See also* Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws*, 32 U. CHI. L. REV. 659, 666 (1965).
25. 310 U.S. 469, 495 (1940).
26. 312 U.S. 219 (1941).
27. *Id.* at 228.
28. *Id.* at 230.
29. *See* Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws*, 32 U. CHI. L. REV. 659, 668 (1965).
30. 312 U.S. 219, 232 (1941).
31. 325 U.S. 797 (1945).

The union, which had jurisdiction over the metropolitan area of New York City, sought to obtain more work for its members. It realized that local manufacturers—employers of the local members—must have the widest possible outlets for their products in order to increase demand, which in turn would increase work for union members. The union waged an aggressive campaign to obtain closed-shop agreements with all electrical equipment manufacturers and contractors. Under the closed-shop agreements, contractors were obligated to purchase equipment only from local manufacturers who also had closed-shop agreements with the union, and the manufacturers obligated themselves to confine their New York City sales to contractors who employed the Local's members. Free from outside competition, the local manufacturers raised their prices. Wages went up and worker's hours were shortened. Allen Bradley and other electrical equipment manufacturers located outside of New York City were prevented from selling their products in the city because of the closed-shop agreements. To overcome that obstacle, the outside manufacturers filed suit against the union claiming it had violated sections 1 and 2 of the Sherman Act. The Court found the union guilty of Sherman Act violations and expressed the opinion that congressional intent was not to allow unions and nonlabor groups to combine to create business monopolies that would control the marketing of goods and services. The Court emphatically proscribed such activities, stating:

> So far as the union might have achieved [the result of individual refusals of all their employers to buy electrical equipment not made by the union] acting alone, it would have been the natural consequence of labor union activities exempted by the Clayton Act from the coverage of the Sherman Act. But when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts.[32]

Thus, unions would be guilty of Sherman Act violations when they aided nonlabor groups in creating business monopolies.[33]

*Apex, Hutcheson* and *Allen Bradley* indicated that those union activities enumerated in section 20 of the Clayton Act and the Norris LaGuardia Act would be immune from the antitrust laws if the activity furthered the union's own interests and was not a knowing part of a larger business combination designed to increase price or regulate supply in the product market.[34]

B. *The Development of the Non-Statutory Labor Exemption*

The Court had indicated in *Allen Bradley* that it would recognize certain union activities to be exempt from the antitrust laws if those activities related

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32. *Id.* at 809 (citation omitted).

33. *Id.* at 808.

34. *See* Comment, Connell: *Broadening Labor's Antitrust Liability While Narrowing Its Construction Industry Proviso Protection,* 27 CATH. U. L. REV. 305, 311 (1978).

to efforts to obtain better wages, hours, and working conditions for its members and if the union acted alone.[35] The same union activities may or may not be in violation of the Sherman Act depending on whether the union acted alone or in combinations with business groups.[36]

The applicability of the labor exemption from the Sherman Act becomes doubtful when it appears that anticompetitive repercussions on the product market are the objective rather than merely the result of any particular collective bargaining agreement.[37] The Court considered this problem in the companion cases of *United Mine Workers v. Pennington*[38] and *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*[39]

In *Pennington,* the union had entered into a collective bargaining agreement with several coal companies, large and small. A small operator alleged that the union and certain large coal operators had conspired to restrain and monopolize interstate commerce in violation of sections 1 and 2 of the Sherman Act. The purposes of this attempt were to eliminate the small nonunionized operators from the industry, to limit production, and to preempt the market for the large unionized operators. The Court held such activity to be a violation of the antitrust laws. In a plurality opinion, Justice White said that a union could conclude a wage agreement with a multi-employer bargaining unit without violating the antitrust laws,[40] and that the federal labor laws expressed a favoritism for collectively bargained agreements concerning wages, hours, and other working conditions (mandatory subjects of bargaining)[41] because they eliminated substantial obstructions to the free flow of commerce. This policy, however, does not automatically exempt from Sherman Act scrutiny an agreement resulting from union-employer negotiations over compulsory subjects of bargaining.[42] The union in *Pennington* forfeited its exemption when it was shown that it had agreed with one set of employers to impose a certain wage scale on other bargaining units.[43] Justice White went on to say:

> One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertak-

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35. 325 U.S. 797, 807 (1945).

36. A good example of the *Allen Bradley* doctrine is seen in Local 175, International Bhd. of Elec. Workers v. United States, 219 F.2d 431 (6th Cir.), *cert. denied,* 349 U.S. 917 (1955). There it was held that a union could not further the interests of its members by helping an employer group to gain monopoly power in a product market through rigged bidding and noncompetitive allocation of contracts.

37. *See* Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws,* 32 U. CHI. L. REV. 659, 689 (1965).

38. 381 U.S. 657 (1965).

39. 381 U.S. 676 (1965).

40. 381 U.S. 657, 664 (1965).

41. *See* note 5 *supra.* Under § 8 (d) of the National Labor Relations Act, 29 U.S.C. § 158 (d) (1976), mandatory subjects of bargaining in a collective bargaining agreement include "wages," "hours," and other "terms and conditions of employment."

42. 381 U.S. 657, 665 (1965).

43. *Id.*

> ing to secure the same wages, hours or other conditions of employment from the remaining employers in the industry.[44]

Justices Douglas, Black, and Clark agreed with White's conclusion, basing their reasoning on *Allen Bradley*. They felt that

> [if the] employers and the union agreed on a wage scale that exceeded the financial ability of some operators to pay and that if it was made for the purpose of forcing some employers out of business, the union as well as the employers who participated in the arrangement with the union should be found to have violated the antitrust laws.[45]

*Jewel Tea* concerned a union's effort to have a meat marketing hours restriction placed in its collective bargaining agreement with several supermarket chains in the Chicago area. The union was concerned with the working hours of its butchers since the supermarkets wanted to maintain self-serve meat counters after 6 p.m. The restriction was inserted in the collective bargaining agreement, notwithstanding the fact that the employers had asked for a relaxation of the restriction. All the employers agreed to the restriction with the exception of National Tea Co. and Jewel Tea Co. Jewel eventually signed the agreement under the threat of a strike. Jewel then filed suit claiming the restriction violated sections 1 and 2 of the Sherman Act.[46] Justice White felt that the agreement was entitled to a nonstatutory exemption from the Sherman Act.[47] He stated the issue to be

> whether the marketing hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of national labor policy and is therefore exempt from the Sherman Act.[48]

White felt the agreement was entitled to a nonstatutory exemption from the Sherman Act because the National Labor Relations Act had placed union-employer agreements concerning when, as well as how long, employees must work beyond antitrust scrutiny.[49] The fact that employers and unions are required to bargain about wages, hours, and working conditions "weighs heavily in favor of antitrust exemption for agreements on these subjects."[50] This agreement represented a valid union concern and was not a part of an employer conspiracy to put restrictions on the product market. Justices Goldberg, Harlan, and Stewart dissented in *Pennington*[51] and agreed with the

44. *Id.* at 665–66.
45. *Id.* at 672–75 (Douglas, J., concurring).
46. 381 U.S. 676, 681 (1965).
47. *Id.* at 688.
48. *Id.* at 689–90.
49. *Id.* at 691.
50. *Id.* at 689.
51. 381 U.S. 657 (1965).

decision in *Jewel Tea*.[52] They felt that the Court should follow the *Hutcheson*[53] analysis, which recognized that labor's antitrust exemption was derived from a synthesis of all pertinent labor legislation.[54] They believed that, to effectuate congressional intent, collective bargaining agreements that concerned mandatory subjects of bargaining under the Labor Act should not be held subject to the antitrust laws. To tell employers and unions that they must bargain over wages, hours, and working conditions but still may be subject to the antitrust laws would, according to Goldberg, "stultify the Congressional scheme."[55] Justices Douglas, Black, and Clark dissented in *Jewel Tea*, expressing the opinion that *Allen Bradley* foreclosed such an expansive view of the labor exemption to the antitrust laws.[56]

The decisions in *Jewel Tea* and *Pennington* left the question of labor's exemption from the Sherman Act somewhat unclear. In *Pennington* the Court found bargaining about wages and working conditions (mandatory subjects of bargaining) to be violative of the Sherman Act when it was used to drive other competitors out of business. On the other hand, the Court in *Jewel Tea* upheld a marketing hours restriction that put a direct restraint on the product market of self-serve meat sales because the restriction was intimately related to a legitimate union concern—working hours of butchers. *Pennington* and *Jewel Tea* expressed the Court's belief that if a particular collective bargaining agreement concerned the mandatory subjects of bargaining, wages, hours, and working conditions, the evidence would weigh heavily in favor of granting that collective bargaining agreement a limited nonstatutory exemption from the Sherman Act even though its effect was to restrain the product market. Justice White refused to go that far, feeling that the agreement, even though concerning mandatory subjects of bargaining, had to reflect legitimate union concerns and not be a mere employer-union combination to exclude competition. Indeed, three Justices felt that if the collective bargaining agreement contained mandatory subjects of bargaining, the agreement was automatically exempt from the Sherman Act.[57]

In 1975 the Court again had the opportunity to determine the breadth of labor's exemption from the Sherman Act in *Connell Construction Co. v. Plumbers and Steamfitters Local 100*.[58] The union had attempted to organize mechanical subcontractors by staging pickets against several general contractors, including Connell. The union wanted to force the general contractors to agree to deal only with subcontractors who were parties to the union's collec-

52. 381 U.S. 676 (1965).
53. *See* text accompanying notes 26–30 *supra*.
54. In addition to §§ 6 and 20 of the Clayton Act and the Norris-LaGuardia Act, Justice Goldberg referred to the Fair Labor Standards Act, 52 Stat. 1060, as amended, 29 U.S.C. §§ 201–19 (1976), the Walsh-Healey Act, 49 Stat. 2036, as amended, 41 U.S.C. §§ 35–45 (1976), and the Wagner Act with its Taft-Hartley and Landrum-Griffin amendments, 29 U.S.C. § 158 (d).
55. 381 U.S. 676, 711–12 (1965).
56. *Id.* at 735 (Douglas, J., dissenting).
57. *Id.* at 689–93.
58. 421 U.S. 616 (1975).

tive bargaining agreement. The picketing succeeded and Connell signed an agreement to deal only with unionized subcontractors. Connell then sought to have the agreement rendered invalid as being violative of sections 1 and 2 of the Sherman Act. The union claimed that the agreement made with Connell was entitled to the nonstatutory exemption from the Sherman Act. The Court, in an opinion by Justice Powell, held that the agreement between the union and Connell was not entitled to a nonstatutory exemption from the Sherman Act. In so doing, the Court appeared to retreat from Justice White's position in *Jewel Tea* toward the position taken by Justice Goldberg in that case.

Justice Powell recognized that the source of the nonstatutory exemption came from the strong labor policy favoring the association of employees to eliminate competition over wage and working conditions. The union's ability to organize workers and standardize wages would affect price competition among employers, but the congressional goals expressed in the federal labor laws could never be achieved if the effect on business competition were to be considered a violation of the antitrust laws.[59] Powell went on to state: "[W]hile the statutory exemption allows unions to accomplish some restraints by acting unilaterally, . . . the non-statutory exemption offers no similar protection when a union and a nonlabor party agree to restrain competition in a business market."[60] Powell felt that the union's goal of organizing the subcontractors was legal but its methods were not.[61] The restraint on the business market had substantial anticompetitive effects and "would not follow naturally from the elimination of competition over wages and working conditions. It contravene[d] antitrust policies to a degree not justified by congressional labor policy, and therefore cannot claim a nonstatutory exemption from the antitrust laws."[62]

The union in *Connell* had no interest in unionizing employees of the contractors. The agreement reached with Connell was, therefore, not made a part of a collective bargaining agreement. If it had, according to Powell, the agreement might have been entitled to a nonstatutory exemption.[63] Powell cited the opinion of Goldberg in *Jewel Tea* indicating a shift towards the view taken by Goldberg, Harlan, and Stewart that collective bargaining agreements concerning mandatory subjects of bargaining were exempt from Sherman Act scrutiny.[64]

Thus, it is relatively well settled that the existence of labor unions as well as many of the activities in which they engage are statutorily exempt from the Sherman Act under section 20 of the Clayton Act and the Norris-LaGuardia Act. That statutory immunity, however, extends only to a point short of

59. *Id.* at 622.
60. *Id.* at 622–23 (citation omitted).
61. *Id.* at 625.
62. *Id.*
63. *Id.* at 625–26.
64. *See* text accompanying notes 53–55 *supra*.

union-employer combinations that restrain the product market.[65] Since union-employer combinations are involved in the process of collective bargaining, which is looked on with favor by the federal labor laws, the Court has granted a nonstatutory exemption to certain collective bargaining agreements that restrain the product market if they at least concern mandatory subjects of bargaining and are not established for the purpose of excluding competitors.[66]

All the cases thus far considered differ from the issues presented by the professional sports cases in that the former dealt with union-management agreements that worked to the detriment of management's competitors while the latter have dealt with agreements that work to the detriment of the labor force—that is, the players. Before considering whether equalization provisions employed in professional sports are entitled to a nonstatutory exemption from the Sherman Act because they are the product of bona fide arm's-length collective bargaining over a mandatory subject, it will be helpful to look at equalization provisions, the purposes such provisions serve, and the manner in which it is argued they violate section 1 of the Sherman Act.

## II. Equalization Provisions: The Purpose and the Problems

Team owners say that equalization provisions, such as By-Law 9A considered in *McCourt*,[67] are necessary to maintain the economic solvency of all the teams in the league and to maintain the number of employment opportunities for the players. If it were not for such compensation agreements, the owners argue, the rich teams would get richer, the poor teams would get poorer, and the fan interest would decline; if the fan interest declines to a point that it is no longer feasible to maintain a team, the team folds; and if a team folds, the league is weakened and, since there are fewer teams, there are fewer employment opportunities for professional athletes. Of course, if the primary objective of compensation agreements such as By-Law 9A is to maintain a competitive balance in the League, the competitive history of the NHL seems to indicate that the equalization provisions employed have been less than successful. Some form of restriction on movement of hockey players has been incorporated into the players' contracts since 1958.[68] From that time until McCourt filed suit in 1978, the Montreal Canadiens have won the Stanley Cup, the "World Series of Hockey," twelve times.[69] On the other hand, the lack of competitive balance may be due to differences in the respective wealth of NHL club owners, the development of good minor league talent from which the NHL parent can draw, and coaching abilities. One might argue, with at least some degree of force, that without an equalization provision such as By-Law 9A there would be even less competitive balance in the NHL.

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65. *See* text accompanying notes 32–33 *supra*.
66. *See* text accompanying notes 46–57 *supra*.
67. 600 F.2d 1193 (6th Cir. 1979).
68. *See* Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 480 (E.D. Pa. 1972).
69. 1979 World Almanac 837.

The players argue that equalization provisions restrain competition for their services, significantly deter clubs from signing free agents, deny players the right to sell their services in a free and open market, and result in lower salaries than would be obtained if free competitive bidding were allowed. The players believe that the restraints caused by these provisions are more restrictive than are necessary to achieve their asserted goals, and as such violate section 1 of the Sherman Act under the rule of reason standard.[70]

Equalization provisions affect free agents because member teams may be less likely to sign them for fear that the team may have to give up valuable players or draft choices.[71] The free agent, therefore, becomes less marketable and, even if a team is willing to take a chance and sign him, that team will have to consider the cost of the equalization payment when it negotiates salary and benefits. Players such as McCourt are affected for obvious reasons. They are forced to move themselves and their families, which creates personal hardships. Professional hardships may result if the player is not able to draw the kind of salary from his new team that he drew from his old team.

As will be seen by the antitrust treatment of equalization provisions in other sports cases, it is highly probable that a court will find an equalization provision such as By-Law 9A not to be justified by any legitimate purpose and thus a violation of section 1 of the Sherman Act under the rule of reason standard.[72] It then becomes paramount to the survival of an equalization provision that it be incorporated into a collective bargaining agreement in a way that would entitle it to a nonstatutory labor exemption from the Sherman Act.

## III. ANTITRUST CHALLENGES IN PROFESSIONAL SPORTS

### A. *Baseball*

Baseball, America's grand old game, is enjoyed by millions of people every year. From the questioning apprehension of spring training to the nervous tension of the Fall Classic, baseball, according to some, possesses that certain something that other professional sports seem to lack. While that is a matter of personal predilictions and conceivable dispute, baseball does possess a certain legal advantage that other professional sports do not enjoy—a judicially sanctioned exemption from the antitrust laws.

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70. *See* note 92 *infra*.

71. NHL By-Law 9A 8 (c) provides in part:

The Club's proposals and the arbitrator's determination of equalization must be limited to:

(i) the assignment of a contract or contracts for the services of a player or players binding upon such player or players for at least the next season; and/or

(ii) choices in any intra-league and/or amateur drafts to be held at any time subsequent to such proposal and/or unsigned draft choices or negotiation nominees; and/or

(iii) cash.

72. *See* Mackey v. National Football League, 543 F.2d 612 (8th Cir. 1976).

In *Federal Baseball Club v. National League*,[73] the Supreme Court declared that baseball was not interstate commerce and was not subject to the antitrust laws. Fifty years passed and the Court's decision deflected several antitrust challenges to baseball and its reserve system. Attempts at obtaining a congressional overruling of *Federal Baseball* also proved fruitless. In 1952, the Report of the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary concluded: "[T]he overwhelming preponderance of the evidence established baseball's need for a reserve clause. Baseball's history shows that chaotic conditions prevailed when there was no reserve clause. Experience points to no feasible substitute to protect the integrity of the game or to guarantee a comparatively even competitive struggle."[74] In 1953, the Court affirmed its *Federal Baseball* decision in *Toolson v. New York Yankees, Inc.*[75] The Court listed four reasons for maintaining the viability of baseball's antitrust exemption. First, the Court noted the congressional awareness of the *Federal Baseball* decision and its lack of any effort to legislatively overrule it. Second, baseball had been left to develop for thirty years on the understanding that it would not be subject to the antitrust laws. Third, the Court did not want to overrule *Federal Baseball* for fear of its retroactive effect. The fourth and final reason for maintaining the exemption was the Court's feeling that if the reserve clause contained any antitrust evils they should be dealt with via legislation.[76]

In 1972, the Court again had the opportunity to strike down baseball's reserve system, which contained equalization provisions. In *Flood v. Kuhn*,[77] the Court again held baseball's reserve system not subject to the antitrust laws, stating that "Congress, by its positive inaction, has allowed those decisions [*Federal Baseball* and *Toolson*] to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove of them legislatively."[78] The Court did, however, limit the exemption to baseball and recognized that "[o]ther professional sports operating interstate—football, boxing, basketball, and, presumably, hockey and golf—are not so exempt."[79] Because the Court reached the decision on other grounds, it found it unnecessary to consider the argument of the Commissioner of baseball that the reserve system was a mandatory subject of collective bargaining, incorporated into the collective bargaining agreement signed by the players union, and thus entitled to a nonstatutory exemption from the Sherman Act.[80] The Commissioner's argument was based on Justice Goldberg's reasoning in *Jewel Tea*.[81]

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73. 259 U.S. 200 (1922).
74. H.R. REP. NO. 2002, 82d Cong., 2d Sess. 229 (1952).
75. 346 U.S. 356 (1953).
76. *Id.* at 357.
77. 407 U.S. 258 (1972).
78. *Id.* at 283–84.
79. *Id.* at 282–83.
80. *Id.* at 285.
81. *See* text accompanying notes 53–55 *supra*. Mr. Goldberg happened to be counsel for Mr. Flood.

Justice Marshall, dissenting in *Flood*,[82] spoke to the possible applicability of the nonstatutory exemption from the Sherman Act to the reserve system since the reserve system was made a part of a collective bargaining agreement signed by the players union, the Major League Players Association.[83] Marshall pointed to the fact that none of the cases in the area were precisely on point. These cases all had concerned union-management agreements that worked to the detriment of management's competitors. In the professional sports area, however, the reserve system worked to the detriment of labor. Justice Marshall also pointed to Flood's claim that the reserve system was thrust upon the players by the owners and that the recently formed players union had not had time to modify or eradicate it.[84] He felt that if Flood's claim were true, exemption from the antitrust laws would be questionable.[85]

B. *Football*

While baseball's reserve system has enjoyed a unique exemption from the antitrust laws, football has not been so fortunate.[86] Football's reserve clause, named the "Rozelle Rule," after Football Commissioner Pete Rozelle, was virtually identical to the NHL's By-Law 9A.[87] Like By-Law 9A, the Rozelle Rule required a team that signed a free agent to compensate the free agent's former team. Several football players challenged the validity of the rule under the antitrust laws in *Mackey v. National Football League*.[88] Since the *McCourt* decision was premised on the foundations laid in *Mackey*, a somewhat extensive review of that case is in order.

The players in *Mackey* alleged that the enforcement by the National Football League of the Rozelle Rule constituted a concerted refusal to deal[89] and a group boycott,[90] and thus a *per se* violation of the Sherman Act.[91] The district court agreed, and in the alternative, found that the Rozelle Rule constituted a violation of the antitrust laws under the rule of reason

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82. 407 U.S. 258, 288 (1972).

83. *See* text accompanying notes 47–49 *supra*.

84. 407 U.S. 258, 294 (1972).

85. *Id.* at 295.

86. *See* Radovich v. National Football League, 352 U.S. 445 (1957).

87. *See* note 2 *supra*. The only difference between By-Law 9A and the Rozelle Rule was that the Rozelle Rule called for the Commissioner of Football to determine the reasonable compensation for the acquisition of a free agent should the teams be unable to agree. By-Law 9A provided for an independent arbiter to make the decision in case of such an impasse.

88. 407 F. Supp. 1000 (D. Minn. 1975), *aff'd*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

89. A concerted refusal to deal has been defined as "an agreement by two or more persons not to do business with other individuals, or to do business with them only on specific terms." *See* Note, *Concerted Refusals to Deal Under the Federal Antitrust Laws*, 71 HARV. L. REV. 1531 (1958).

90. A group boycott usually means a refusal to deal or an inducement of others not to deal or have business relations with tradesmen. *See* Kalinowski, *The Per Se Doctrine—An Emerging Philosophy of Antitrust Law*, 11 U.C.L.A. L. REV. 569, 580 n.49 (1964).

91. 407 F. Supp. 1000, 1007 (D. Minn. 1975). Certain types of restraints such as price fixing, group boycotts, and concerted refusals to deal are so consistently unreasonable that they may be deemed illegal per se without inquiring into their purported justifications. *See generally* Fashion Originators Guild v. FTC, 312 U.S. 457 (1941); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

standard.[92] The court rejected the National Football League's argument that the Rozelle Rule was exempt from Sherman Act sanctions, stating that the labor exemption extended only to labor union activities and not the activities of employers. The court felt that even if the exemption could be extended to cover the activities of employers as a general rule, it could not be so extended under the facts of the case.[93]

On appeal, the players argued, as the district court had found, that only employee groups were entitled to the labor exemption and that the defendants, an employer group, could not assert the exemption. The Eighth Circuit disagreed, stating as follows:

> Since the basis of the nonstatutory exemption is the national policy favoring collective bargaining, and since the exemption extends to agreements, the benefits of the exemption logically extend to both parties to the agreement. Accordingly, under appropriate circumstances, we find that a non-labor group may avail itself of the labor exemption.[94]

The court then embarked on the task of trying to determine the governing principles established by the Supreme Court in the labor exemption area. According to the court, *Connell*,[95] *Jewel Tea*,[96] and *Pennington*[97] stood for the proposition that the availability of the nonstatutory exemption for a particular agreement turned upon whether the relevant federal labor policy deserved pre-eminence over federal antitrust policy under the circumstances of the particular case.[98] The court felt that labor policy would be pre-eminent if three tests were satisfied. First, the restraint on trade created by the collective bargaining agreement must primarily affect only the parties to the collective bargaining relationship.[99] Imposition of terms of a collective bargaining agreement on other bargaining units was the concern of *Pennington*.[100] Second, the agreement could be exempted only if it concerned a mandatory subject of collective bargaining.[101] To hold agreements concerning mandatory subjects of collective bargaining subject to the antitrust laws would run contrary to the policies of the federal labor laws, a concern of the Court in *Jewel Tea*.[102] Third, the agreement sought to be exempted has to be the product of bona fide arm's length bargaining,[103] the final requirement deduced from *Jewel Tea*.

92. In making a determination under the rule of reason standard, the court will determine whether the restraint imposed is justified by legitimate business purposes and is no more restrictive than necessary to achieve those legitimate purposes. *See* Chicago Board of Trade v. United States, 246 U.S. 231 (1918); P. AREEDA & D. TURNER, 2 ANTITRUST LAW ¶ 314b at 47 (1978).

93. 407 F. Supp. 1000, 1008 (D. Minn. 1975).

94. 543 F.2d 606, 612 (8th Cir. 1976).

95. *See* text accompanying note 58 *supra*.

96. *See* text accompanying note 39 *supra*.

97. *See* text accompanying note 38 *supra*.

98. 543 F.2d 606, 613 (8th Cir. 1976).

99. *Id.* at 614.

100. *See* text accompanying notes 38–44 *supra*.

101. 543 F.2d 606, 614 (8th Cir. 1976).

102. *See* text accompanying notes 47–55 *supra*.

103. 543 F.2d 606, 614 (8th Cir. 1976).

Since it was "clear" that the restraint of trade caused by the Rozelle Rule affected only the parties to the agreement, the court sought to determine whether the Rozelle Rule was a mandatory subject of collective bargaining in that it was related to wages, hours, and working conditions as provided in section 8 (d) of the National Labor Relations Act.[104] The court found that while the Rozelle Rule did not deal with wages, hours, and working conditions on its face, it did restrict a player's ability to move from one team to another and it depressed players' salaries. Since it had an effect on salaries, the court felt the Rozelle Rule constituted a mandatory subject within the meaning of the Act.[105] The court ultimately held the nonstatutory exemption inapplicable because the Rozelle Rule was thrust upon the infant players union and thus was never a subject of bona fide arm's length collective bargaining prior to the execution of the collective bargaining agreements.[106] The court went on to find that the Rozelle Rule was an unreasonable restraint of trade in violation of section 1 of the Sherman Act because it was "significantly more restrictive than necessary to serve any legitimate purposes it might have [had],"[107] since it operated as a perpetual restriction on player movement.

C. *Hockey*

Antitrust challenges to the NHL's reserve system began after the formation of the World Hockey Association (WHA).[108] The WHA challenged the NHL's reserve system in the case of *Philadelphia World Hockey Club v. Philadelphia Hockey Club.*[109] The reserve clause embodied in the players' contracts not only prevented them from signing contracts with member NHL clubs of their own choosing but also prevented them from signing to play in the WHA. The court in *Philadelphia Hockey* enjoined the NHL from enforcing the reserve clause because there was a substantial likelihood that it violated section 2 of the Sherman Act.[110] The court held that the nonstatutory labor exemption was inapplicable, stating that "restraining, anti-competitive acts will not be immunized from the Sherman Act."[111] The court felt that the labor exemption could be defensively utilized by the union and an employer as a shield against Sherman Act proceedings when there was bona fide collective bargaining. It could not, however, be seized upon by either party and be destructively wielded as a sword by engaging in monopolistic or other anti-

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104. *See* note 134 *infra.*

105. 543 F.2d 606, 615 (8th Cir. 1976).

106. *Id.* at 616.

107. *Id.* at 622.

108. The World Hockey Association ceased to exist in 1979. Four of its teams are now members of the National Hockey League.

109. 351 F. Supp. 462 (E.D. Pa. 1972).

110. *Id.* at 518.

111. *Id.* at 499. *See also* Robertson v. National Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975), *aff'd* 556 F.2d 682 (2d Cir. 1977), where the court refused to grant a labor exemption to the N.B.A. The court based its decision on language from *Pennington* that said "there are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean the agreement reached may disregard other laws . . . ." 381 U.S. 657, 665 (1965).

competitive conduct.[112] The court reasoned that the problem was similar to the one posed in *Allen Bradley*[113] and that the NHL could not be the beneficiary of a labor exemption to excuse it from its otherwise monopolistic practices. According to the court, the NHL was primarily responsible for devising and perpetuating a monopoly in the "product" market of all hockey players via the reserve system.[114]

*Boston Professional Hockey Association, Inc. v. Cheevers*[115] was a suit by an NHL team, the Boston Bruins, to prevent two of its star players from playing for a WHA team. The court refused to issue an injunction restraining the players from signing with the WHA club, stating in part:

> In light of the fact that this complex [reserve] system dominates and controls a hockey player's career . . . it would be unrealistic to rule that the Bruins sustained their burden of showing that there is a probability that this tangled web of legal instruments will not be found to restrain trade in professional hockey.[116]

*Nassau Sports v. Hampson*,[117] like *Cheevers*, was a suit by an NHL club to prohibit a player from signing with a WHA club. The court refused to grant the NHL team's request for an injunction, stating that the restrictive clause in the player's contract, which was based on a similar provision to By-Law 9A, might possibly be found a violation of sections 1 and 2 of the Sherman Act.[118]

These district court cases concerned either a WHA club suing an NHL club to have the NHL's reserve system struck down as a violation of the antitrust laws, or an NHL club suing a player to have the reserve clause in his contract enforced. *McCourt*, on the other hand, was a player's attempt to have the reserve clause in his contract struck down as a violation of the Sherman Act, notwithstanding the fact that the reserve system was made a part of a collective bargaining agreement signed by the players union, the National Hockey League Players Association.

The *McCourt* case provided another opportunity for a court to consider the applicability of the nonstatutory exemption to a restrictive equalization provision similar to the "Rozelle Rule" considered in *Mackey*.

## IV. THE *McCOURT* DILEMMA

### A. *The Facts*

Dale McCourt signed a National Hockey League standard player's contract with the Detroit Hockey Club, Inc. to play professional hockey with the Detroit Red Wings for a period of three years beginning with the 1977–78

112. 351 F. Supp. 462, 499–500 (E.D. Pa. 1972).
113. *See* text accompanying notes 31–33 *supra*.
114. 351 F. Supp. 462, 500 (E.D. Pa. 1972).
115. 348 F. Supp. 261 (D. Mass.), *remanded on other grounds*, 472 F.2d 127 (1st Cir. 1972).
116. *Id.* at 267.
117. 355 F. Supp. 733 (D. Minn. 1972).
118. *Id.* at 736.

season. In 1978 the Red Wings acquired the services of Rogatien Vachon, a free agent who had played out his option with the Los Angeles Kings. Pursuant to National Hockey League By-Law 9A, Detroit assigned McCourt's contract to Los Angeles as an equalization payment for the acquisition of Vachon. Rather than report to the Kings, McCourt brought suit against the Los Angeles Kings and the NHL in the United States District Court for the Eastern District of Michigan.[119]

McCourt claimed that the National Hockey League reserve system and the assignment of his contract to the Los Angeles Kings violated section 1 of the Sherman Act,[120] thus entitling him to injunctive relief pursuant to sections 4 and 10 of the Clayton Act.[121] Defendants claimed that even if By-Law 9A violated section 1 of the Sherman Act, it was incorporated into the collective bargaining agreement with the National Hockey League Players Association and was thus entitled to the nonstatutory exemption from the antitrust laws.[122]

The district court entered a preliminary injunction restraining the defendants from sending McCourt to California. In an opinion accompanying the issuance of the preliminary injunction, the district judge held that By-Law 9A unreasonably restrained trade in commerce in violation of section 1 of the Sherman Act.[123] Having thus ruled, the district judge went on to hold that defendants were not entitled to the benefit of the nonstatutory labor exemption from antitrust sanctions because

> [t]he preponderance of evidence . . . establishes that bylaw 9A was not the product of bona fide arm's length bargaining over any of its anticompetitive provisions . . . . The bylaw was included in the collective bargaining agreement to give the impression that it was a bargained-for provision. When labor and non-labor groups combine to insert into a collective bargaining agreement a non-negotiated provision, courts will not afford either party the non-statutory labor exemption.[124]

The district court in *McCourt* recognized that the National Hockey League Players Association was opposed to incorporation of By-Law 9A into the collective bargaining agreement. The Players Association agreed to include By-Law 9A in the collective bargaining agreement only after the NHL conceded that the Players Association could terminate the entire agreement if the NHL merged with the WHA.[125] Mr. Ziegler, President of the NHL, indicated that "although the NHL was willing to negotiate on equalization at any time, the players had to adhere to the bylaw because the Standard Player's Contract required them to adhere to all bylaws adopted by the NHL."[126] In light of the above facts, the district court rejected the NHL's argument that

119. McCourt v. California Sports, Inc., 460 F. Supp. 904 (E.D. Mich. 1978).
120. *See* note 9 *supra*.
121. 15 U.S.C. §§ 15 & 26 (1976).
122. 460 F. Supp. 904, 910 (E.D. Mich. 1978).
123. *Id.* at 907.
124. *Id.* at 910–11.
125. *Id.* at 911.
126. *Id. See* note 4 *supra*.

the Players Association had received a substantial *quid pro quo* for adopting By-Law 9A and that this was evidence that the By-Law was a product of bona fide arm's length collective bargaining.[127]

The appellate court reached a different conclusion. It held that the principles set forth in *Mackey* were properly applicable, but that the district court had incorrectly applied them.[128]

Following the *Mackey* standards, the Sixth Circuit found, first, that the restraint on trade caused by By-Law 9A primarily affected only the parties to the collective bargaining relationship, the hockey players. The WHA, which would also have been affected, had accepted the system in a settlement following *Philadelphia Hockey*.[129] Second, the court held By-Law 9A to be a mandatory subject of collective bargaining within the meaning of section 8 (d) of the National Labor Relations Act.[130] The court considered it a term and condition of employment of the hockey players because of the restraints it put on a player's ability to move from one team to another. Third, the court, disagreeing with the lower court, found that By-Law 9A *was* the product of bona fide arm's length bargaining.[131] The court recognized that while the NHL owners did not budge on their insistence of incorporating By-Law 9A into the collective bargaining agreement, they yielded on other issues such as increased bonus money for players whose teams finished high in their divisions, and other monetary benefits. The court disagreed with the trial court's finding that those benefits were a result of a threat of an antitrust suit to void By-Law 9A. The appellate court also relied on the fact that the NHL accepted a provision in the collective bargaining agreement, providing that the entire agreement would be voided should the NHL and WHA merge.[132]

The fact that the NHL introduced and insisted that By-Law 9A be incorporated into the collective bargaining agreement was, according to the court, inconsequential since nothing in the labor law compelled either party negotiating over mandatory subjects of collective bargaining to yield on its initial bargaining position.[133] Section 8 (d) of the National Labor Relations Act expressly provides that the obligation to bargain over wages, hours, and working conditions does not compel either party to agree to a proposal or concede any part of their position.[134]

127. 460 F. Supp. 904, 911 (E.D. Mich. 1978).
128. 600 F.2d 1193, 1203 (6th Cir. 1979).
129. *Id.* at 1198 n.8.
130. *Id.* at 1198. *See* note 41 *supra*.
131. 600 F.2d 1193, 1203 (6th Cir. 1979).
132. *Id.* at 1202–03.
133. *Id.* at 1200.
134. 29 U.S.C. § 158 (d) (1980), in relevant part provides as follows:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

For cases consistent with this view, *see* NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952); NLRB v. United Clay Mines Corp., 219 F.2d 120 (6th Cir. 1955). *But see* NLRB v. Montgomery Ward & Co., 133 F.2d

B. *The Concerns of the Dissent*

The *McCourt* dissent relied heavily on the *Allen Bradley* principle of not recognizing a labor exemption for a particular collective bargaining agreement if the union participated with a combination of businessmen who had complete power to eliminate all competition among themselves and to prevent all competition from others.[135] The dissent seems to have failed to recognize the important fact that in *Allen Bradley*, the challenger to the union activity was not a union member, but rather an outsider who wished to compete in a market that was closed to it by the union agreements with the insiders.[136] *Allen Bradley* is at least entitled to an interpretation that union agreements that impose restraints on the product market by affecting competitors outside of the collective bargaining agreement would not be entitled to a labor exemption from the Sherman Act. This line of reasoning seems to have been maintained by the Court in *Pennington.*[137] In *McCourt,* the outside competitor analogous to *Allen Bradley* was the WHA, which had accepted the NHL's reserve system in a settlement following the *Philadelphia Hockey* case.[138]

Indeed, some commentators have argued that *Allen Bradley* and *Pennington* stand for the proposition that employers must conspire to use the union to hurt their competitors before an agreement reached through the collective bargaining process would be subject to antitrust scrutiny.[139] These writers contend that the line the Court has sought to draw is one between the product market and the labor market.[140] They believe that reserve clauses are labor market issues and thus are not subject to the antitrust laws. Prior to the *McCourt* decision, the courts had refused to go that far, perhaps because they have recognized that Congress has put limits on what can be agreed upon in the collective bargaining process,[141] and by relying on the phrase in *Pennington* that "there are limits to what a union or employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement may disregard other laws,"[142] an otherwise valid collective bargaining agreement cannot be used to circumvent the antitrust Laws.

676, 686 (9th Cir. 1943), in which it was stated that § 8 (d) meant "an obligation to participate actively in good faith bargaining in the deliberations with a present intention to find a basis for an agreement." Not only must the employer "have an open mind and a sincere desire to reach an agreement" but "a sincere effort must be made to reach a common ground." Furthermore, according to the National Labor Relations Board and the Second Circuit Court of Appeals in NLRB v. General Elec. Co., 418 F2d 736, 757 (2d Cir. 1970), a "take it or leave it" attitude on the part of the employer is not good faith bargaining under § 8 (d).

135. *See* text accompanying note 31 *supra.*

136. *See* text accompanying note 31 *supra.*

137. *See* text accompanying notes 42–45 *supra.*

138. *See* text accompanying note 129 *supra.*

139. Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage,* 81 YALE L.J. 1, 26 (1971).

140. *Id.* at 26.

141. For example, the Fair Labor Standards Act, 29 U.S.C. § 206 (1976), establishes minimum wages below which no collective bargaining agreement may go. *See also* Federal Occupational Health and Safety Act, 29 U.S.C. §§ 651–78 (1976), which specifies working conditions that cannot be avoided by any collective bargaining agreement.

142. United Mine Workers v. Pennington, 381 U.S. 657, 665 (1965). For an excellent discussion of the arguments against granting a labor exemption to reserve clauses embodied in collective bargaining agreements, *see* L. SOBEL, PROFESSIONAL SPORTS & THE LAW 323–29 (1977).

Nevertheless, Justice White's opinion in *Jewel* indicated that union-employer agreements placing restraints on the product market would be exempt from the Sherman Act if they were "intimately related to wages, hours and working conditions [and were] in pursuit of [the union's] own labor policies, and not at the behest of or in combination with non-labor groups . . . ."[143] One might interpret Justice White's opinion in *Jewel* to mean that only agreements sought by the union would be entitled to a labor exemption, and the dissent in *McCourt* seems to have adopted this reasoning,[144] yet it was rejected in *Mackey.*[145] It is the agreement that is subject to the exemption, and not the party who introduces it. To hold otherwise would undermine the collective bargaining process by declaring that the union representative has no authority to make agreements on behalf of the players—at least insofar as management-initiated provisions that arguably violate antitrust are concerned. Yet, allowing an individual player to raise antitrust exemptions to such agreements would be to ignore the first principle of the National Labor Relations Act that employees in a bargaining unit lose their right to bargain individually when a majority votes to be represented by a union.[146]

This is not to say that McCourt did not have standing to sue.[147] What it does say is that McCourt could not succeed in an antitrust challenge to the reserve clause if it was incorporated into a collective bargaining agreement arrived at through bona fide arm's length bargaining, affected only the parties to the agreement, and concerned a mandatory subject of collective bargaining.[148]

The *McCourt* dissent read the majority to say that the Eighth Circuit had effectively overruled its *Mackey* decision[149] in *Reynolds v. National Football*

143. 381 U.S. 676, 681 (1965). *See* text accompanying note 48 *supra.*

144. 600 F.2d 1193, 1212 (6th Cir. 1979). *See* Smith v. Pro Football, Inc., 420 F. Supp. 738, 744 (D.D.C. 1976), *aff'd in part,* 593 F.2d 1173 (D.C. Cir. 1978). The district court in *Smith* felt that if a bargain was concluded as a result of "bona fide arm's length bargaining in pursuit [of the union's own] policies and not at the behest of non-labor groups it is exempt from the antitrust laws."

145. *See* text accompanying note 94 *supra.*

146. 29 U.S.C. § 159 (a) (1976), provides in part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ."

*See* Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975). *See also* NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1975), where it was said:

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents. . . ." (Citations omitted.)

147. *See* Flood v. Kuhn, 407 U.S. 258 (1972).

148. *See* text accompanying notes 99–107 *supra.*

149. 600 F.2d 1193, 1214 (6th Cir. 1979).

*League.*[150] Following the *Mackey* decision, the NFL and the players reached a settlement that produced a modified Rozelle Rule. The settlement was challenged in *Reynolds*. The Eighth Circuit affirmed its *Mackey* decision and upheld the settlement because, unlike *Mackey*, the settlement had been the subject of bona fide arm's length collective bargaining. It was clear that the court in *Reynolds* did not overrule its *Mackey* decision, and it is probable that the *McCourt* majority interpreted *Reynolds* that way. *Mackey* merely held that the nonstatutory exemption was not available because the facts of the case indicated that the Rozelle Rule had never been the subject of bona fide arm's length collective bargaining. The court in *Mackey* had agreed with the lower court's finding that because the National Football League Players Association was relatively new and financially weak when the Rozelle Rule was imposed on it, there was no bona fide arm's length bargaining over the Rozelle Rule prior to the signings of the 1968 and 1970 collective bargaining agreements.[151] That was no longer true when the *Reynolds* case came before the court, and thus the modified Rozelle Rule was entitled to the nonstatutory labor exemption from the Sherman Act.

Indeed, *Mackey* might be interpreted to mean that *unilateral* imposition of restrictive agreements on a weak union is evidence that the agreement was not the subject of collective bagaining and thus not entitled to be the nonstatutory exemption from the Sherman Act. Even assuming that the National Hockey League Players Association was weak at the time By-Law 9A was agreed to, the *McCourt* majority disregarded that interpretation of *Mackey* and instead based its decision on section 8 (d) of the National Labor Relations Act, which does not require either party to change from its original position in the process of collective bargaining.[152]

The dissent felt that if any exemption for reserve clauses were to be found in the area of professional sports, it should be created by Congress and not by judicial interpretation of congressional labor law policies.[153] Congress has considered several proposals to exempt professional sports from antitrust sanctions,[154] yet none have matured into law. The only statutory action that Congress has taken expresses congressional unwillingness to act by stating:

> (N)othing contained in this chapter shall be deemed to change, determine, or otherwise affect, the applicability or non-applicability of the antitrust laws to any act, contract, agreement, rule, course of conduct or other activity by, between, or among persons engaging in, conducting, or participating in the organized professional team sports of football, baseball or hockey.[155]

150. 584 F.2d 280 (8th Cir. 1978).
151. Mackey v. National Football League, 543 F.2d 606, 616 (8th Cir. 1976).
152. *See* text accompanying note 133 *supra*.
153. 600 F.2d 1193, 1209 (6th Cir. 1979).
154. *See* Flood v. Kuhn, 407 U.S. 258, 281 n.40 (1972).
155. 15 U.S.C. § 1294 (1976).

Perhaps by finding that the equalization provision of By-Law 9A was entitled to a nonstatutory labor exemption from the Sherman Act, the *McCourt* majority put its seal of approval on a provision that was more restrictive than was necessary to achieve its stated goals and thus violative of the Sherman Act but for the labor exemption. The result of *Mackey*, which held that the labor exemption did not apply, was the redrawing of a less restrictive Rozelle Rule. Perhaps the same outcome will be reached in the NHL: the merger between the WHA and the NHL in 1979 nullified the collective bargaining agreement at issue in *McCourt*.[156] But if a court were to deny a labor exemption to collective bargaining agreements with the hope that less restrictive agreements could be *arrived at*, the industrial peace that collective bargaining is supposed to achieve would be put in serious danger. "Denying a demand to a party may thus increase the chances of a strike because it lessens the area of possible compromise without affecting the underlying strength of the parties."[157]

The players in professional sports have chosen to unionize with the idea that they can obtain more benefits from team owners by joining forces and bargaining collectively. With that in mind, it is easy to fall into the dissent's line of reasoning. The possibility exists, of course, that had there been no players union, McCourt might successfully have challenged By-Law 9A since there would have been no opportunity for owners to claim a labor exemption from the antitrust laws.

The dissent believed the issue to be not whether there was good faith arm's length bargaining over By-Law 9A, but rather

> whether an association of employers may in the organized sports industry (here it is hockey) gain exemption from the antitrust laws for an agreement among themselves to restrict otherwise free competition in employment of hockey players by imposing their employer-devised agreement upon a union representing that class of employees through use of economic inducement or compulsion.[158]

The dissent answered the question in the negative and, while there are strong arguments to support that position, the majority holding in *McCourt* was probably correct. The Supreme Court in *Jewel Tea*[159] recognized congressional favoritism for collective bargaining agreements concerning wages, hours, and working conditions. *McCourt* did not concern any union-employer conspiracy to exclude competitors as was the case in *Allen Bradley*[160] and *Pennington*.[161] Even if it had, it would seem that the proper party to assert that claim would be the WHA since its members were the ones who were being excluded. Nevertheless, the courts have allowed players to challenge

156. *See* text accompanying note 125 *supra*.

157. Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 13 (1971).

158. 600 F.2d 1193, 1206 (6th Cir. 1979).

159. *See* text accompanying notes 47–50 *supra*.

160. *See* text accompanying note 31 *supra*.

161. *See* text accompanying notes 38–45 *supra*.

equalization provisions incorporated into collective bargaining agreements under the antitrust laws, and until *McCourt* the players have been nothing but successful. McCourt quite properly failed in his challenge because the equalization provision he challenged affected only the parties to the agreement, and the others who were affected acquiesced. It concerned a mandatory subject of bargaining—a condition of employment about which the parties must bargain under section 8 (d) of the National Labor Relations Act[162]—and was the product of bona fide arm's length bargaining. When an agreement meets these standards, the policies embodied in the antitrust laws are outweighed by the federal policy favoring collective bargaining embodied in the labor laws.

## V. Conclusion

The courts have struggled with the delicate task of balancing the seemingly contradictory federal labor and antitrust policies for the better part of this century. The unionization of professional athletes has dragged professional sports into this uncertain area of the law. It seems as though the *McCourt* decision has taken a step in the right direction by giving due recognition to federal labor policy favoring agreements reached through the collective bargaining process. Perhaps, with the increasing strength of player unions, the indices of slavery surrounding professional sports will be abrogated via the collective bargaining process. Should that not prove to be the case, it would seem that the time is ripe for the Supreme Court to decide this difficult issue.

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162. *See* text accompanying note 41 *supra*.