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Fourth and Goal: Player Restraints in Professional Sports, a Look Back and a Look Ahead

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NOTES

FOURTH AND GOAL: PLAYER RESTRAINTS IN PROFESSIONAL SPORTS, A LOOK BACK AND A LOOK AHEAD

The application of antitrust law to professional sports was initially examined in 1914.[1] Since that time, many professional athletes have resorted to antitrust litigation to challenge restraints imposed upon them by various leagues.[2] Although player restraints differ in form depending on the sport in question,[3] the legal ramifications are always the same: player restraints in professional sports restrict free competition for jobs, and may therefore violate federal antitrust law.

Most suits have challenged the barriers to free agency,[4] which is the ability of a player to move from one team to another once

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[1] *See* American League Baseball Club v. Chase, 149 N.Y.S. 6 (Sup. Ct. 1914); *infra* note 33 and accompanying text (discussing *Chase*); *see also* Flood v. Kuhn, 407 U.S. 258 (1972) (suggesting that special treatment given to professional baseball should end with legislative, not judicial resolution); Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953) (allowing judicially-established exception to antitrust law for professional baseball); Federal Baseball Club v. National League, 259 U.S. 200 (1922).

[2] *See, e.g.*, McCourt v. California Sports, Inc., 460 F. Supp. 904 (E.D. Mich. 1978), *vacated*, 600 F.2d 1193 (6th Cir. 1979); Smith v. Pro-Football, Inc., 420 F. Supp. 738 (D.D.C. 1976), *modified*, 593 F.2d 1173 (D.C. Cir. 1978); Mackey v. NFL, 407 F. Supp. 1000 (D. Minn. 1975), *modified*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972).

[3] *See* WALTER T. CHAMPION, JR., FUNDAMENTALS OF SPORTS LAW § 26.3, at 465-66 (1990) ("Player restraints can take a variety of forms, but mostly they will restrict either player mobility or the player's ability to negotiate increases in salary.").

[4] *See, e.g.*, Robertson v. NBA, 389 F. Supp. 867 (S.D.N.Y. 1975) (involving claim that NBA draft, uniform player contract, and reserve clause violated antitrust laws); Kapp v. NFL, 390 F. Supp. 73 (N.D. Cal. 1974) (finding NFL reserved and draft systems violated antitrust laws), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979).

the contract with his original team has expired.[5] Players believe that restraints on mobility interfere with the freedom to work where they wish at a salary determined by the free market.[6] Team owners, however, defend their restraint practices primarily on the basis that they help maintain competitive parity within the respective leagues.[7]

This Note traces the history of challenges to player restraints as violations of federal antitrust law. Part I reviews the substantive antitrust and labor law principles which have been applied in sports cases and discusses baseball's unique exemption from the antitrust laws. Part II explores various player restraints employed by sports leagues and the manner in which courts have addressed them, highlighting the current application of these restraints in collective bargaining agreements ("CBAs"). Part III uses empirical data regarding league economics and competitive balance to examine the impact of free agency on professional sports. Finally, Part IV proposes a free agency system which can be incorporated into future CBAs. This section is particularly relevant in light of the recently resolved struggle between the NFL and its players, which culminated in a new agreement on free agency.[8]

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[5] *See* WARREN FREEDMAN, PROFESSIONAL SPORTS AND ANTITRUST 18 (1987); GEORGE W. SCHUBERT ET AL., SPORTS LAW 125 (1986); NHL BY-LAW § 9A.1 (on file with ST. JOHN'S LAW REVIEW) ("[A] player . . . who becomes a free agent . . . shall have the right to negotiate and contract with any Member club . . . .").

[6] *See, e.g.*, Flood v. Kuhn, 407 U.S. 258, 265-66 (1972); *Mackey*, 407 F. Supp. at 1005-07; *Robertson*, 389 F. Supp. at 873-74; *see also* Michael S. Hobel, *Application of the Labor Exemption After the Expiration of Collective Bargaining Agreements in Professional Sports*, 57 N.Y.U. L. REV. 164, 165 (1982) (noting that courts recognize that player restraints restrict competition for jobs).

[7] *See, e.g.*, *Mackey*, 543 F.2d at 621; McCourt v. California Sports, Inc., 460 F. Supp. 904, 909 (E.D. Mich. 1978), *vacated*, 600 F.2d 1193 (6th Cir. 1979); Smith v. Pro-Football, Inc., 420 F. Supp. 738, 745 (D.D.C. 1976), *modified*, 593 F.2d 1173 (D.C. Cir. 1978); *see also infra* note 249 and accompanying text (noting that justification for restraints is to preclude wealthy teams from signing best players).

[8] Leonard Shapiro, *Labor Peace NFL's Top Priority; Tagliabue Warns That Right Form of Free Agency Must Be Found*, WASH. POST, Oct. 30, 1992, at C5. Reggie White filed a class action suit seeking to have 300 players declared unrestricted free agents after February 1, 1993. *Id.* The suit was settled, and a new seven-year agreement was signed by the NFL and its players. Gary Myers, *NFL, Players Reach Accord*, N.Y. DAILY NEWS, Jan. 7, 1993, at 59.

I. ANTITRUST LAW AND ITS APPLICATION TO PROFESSIONAL SPORTS

A. *The Relevant Antitrust and Labor Law*

In order to gain a clear understanding of the application of antitrust law to player restraints, it is necessary to examine three judicially created antitrust doctrines: the nonstatutory labor exemption from antitrust law,[9] per se violations of the Sherman Antitrust Act,[10] and the Rule of Reason.[11]

1. The Nonstatutory Labor Exemption from Antitrust Law

The nonstatutory labor exemption shields the results of collective bargaining from antitrust scrutiny[12] when there has been "good-faith and arms-length negotiation between the employer

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[9] *See* Powell v. NFL, 888 F.2d 559 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991); *see also* Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339 (1989) (concluding that labor law exemption expired simultaneously with collective bargaining agreement in NFL-NFLPA dispute); Rondell Marks, *Labor and Antitrust: Striking a Balance Without Balancing*, 35 AM. U. L. REV. 699 (1986) (establishing tests for labor exemption, eliminating need to balance interests of labor and antitrust laws on case-by-case basis); Note, *Releasing Superstars from Peonage: Union Consent and the Nonstatutory Labor Exemption*, 104 HARV. L. REV. 874 (1991) (arguing that union consent must be prerequisite to availability of nonstatutory labor exemption) [hereinafter *Releasing Superstars*].

[10] *See, e.g.*, United States v. General Motors Corp., 384 U.S. 127 (1966) (effort to stop discounters from selling Chevrolet automobiles); Paramount Famous Lasky Corp. v. United States, 282 U.S. 30 (1930) (film distributors would not do business with exhibitors not signing standard contract); *see also* Curtis J. Polk, *Should Market Power Be a Surrogate For Balancing in Applying the Rule-of-Reason?*, 55 GEO. WASH. L. REV. 764, 769 n.34 (1987) (listing per se violation cases).

[11] *See* Ernest Gellhorn & Teresa Tatham, *Making Sense Out of the Rule of Reason*, 35 CASE W. RES. L. REV. 155 (1985).

[12] *Releasing Superstars*, *supra* note 9, at 877 n.27. The statutory labor exemption, in contrast, protects union bargaining activities from antitrust liability. *Id.*

The nonstatutory labor exemption originated in response to a pair of Supreme Court decisions which found activities of labor unions to be violations of the Sherman Act. *See* FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 139-42 (1930). In Loewe v. Lawlor, 208 U.S. 274 (1908), the Court held that boycott of those who deal with the employer (secondary boycott) in order to compel unionization of the employer's shop violated the Sherman Act. *Id.* at 292-95. No distinction was made between combinations of capital and combinations of labor:

> [T]he source of the evil was not regarded as material, and the evil in its entirety is dealt with. They made the interdiction include combinations of labor as well as of capital; in fact, all combinations in restraint of commerce, without reference to the character of the persons who entered into them.

Id. at 302.

Similarly, in Gompers v. Bucks Stove and Range Co., 221 U.S. 418 (1911), the Court enjoined a boycott orchestrated by a labor union against its employer. It was wary of the potential for harm of such actions:

> But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms . . . . [I]t is the duty of government to protect the one against the many, as well as the many against the one.

Id. at 439. As a result of these cases, Congress was pressured by the unions for protection out of fear that the courts would destroy their movement. *See* FRANKFURTER & GREENE, *supra*.

Section 6 of the Clayton Act, 15 U.S.C. § 17 (1992), was Congress' response. It provides that:

> 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, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Id.

In addition, Section 20 of the Act, 29 U.S.C. § 52 (1992), substantially restricts the power of courts to issue injunctions or restraining orders during labor disputes. *See* LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 237, at 723 (1977). Unfortunately for labor interests, however, the Supreme Court construed Section 20 narrowly in Duplex Printing Press Co. v. Deering, when the Court upheld an injunction against a secondary boycott similar to the one in *Loewe*. 254 U.S. 443 (1921). The Court interpreted the phrase, "in any case between an employer and employees . . . or growing out of a dispute concerning terms and conditions of employment" to apply solely to actions taken by employees against their immediate employers. *Id.* at 470.

The Norris-Laguardia Act, 29 U.S.C. §§ 101-15 (1992), was passed in 1932 to expressly overrule *Duplex*. *See* U.S. v. Hutcheson, 312 U.S. 219, 231 (1941). "[T]he allowable area of union activity was not to be restricted, as it had been in the *Duplex* case, to an immediate employer-employee relation[ship]." *Id.; see also* Barry S. Roberts & Brian A. Powers, *Defining the Relationship Between Antitrust Law and Labor Law: Professional Sports and the Current Legal Battleground*, 19 WM. & MARY L. REV. 395, 420-21 (1978).

The Act also expands the phrase "labor dispute" to include tactics such as secondary boycotts and picketing. 29 U.S.C. § 104 (1992). Further, the Act denies courts the power to issue injunctions in labor disputes based solely on the grounds that the parties "are engaged in an unlawful combination or conspiracy." *Id.* § 105. Justice Goldberg's separate opinion in *Jewel Tea* stated that the Norris-Laguardia Act was more than merely relief from injunctions. Local 189 Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 703-04 (1965). Its purpose was to reaffirm the goals of the Clayton Act and "'withdraw federal courts from a type of controversy for which many believed they were ill-suited and from participation in which, it was feared, judicial prestige might suffer.'" *Id.* at 704 (quoting Marine Cooks and Stewards v. Panama S.S. Co., 362 U.S. 365, 370 n.7 (1960)).

The protection of labor activities is far-reaching. *See Hutcheson*, 312 U.S. at 233-37 (giving broad reading to § 20 of Clayton Act to immunize unions from criminal antitrust liability).

> 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

and the union on mandatory subjects of collective bargaining."[13] The term "mandatory subjects" has been defined by statute to include "wages, hours and other terms and conditions of employment."[14] Restrictions on player mobility clearly fall within this classification;[15] therefore, sports leagues have used this definition to defend their restrictive practices as exempt from antitrust inquiry.[16]

2. Per Se Violations of the Sherman Antitrust Act and the Modern Approach to the Rule of Reason

The Sherman Antitrust Act of 1890[17] provides for broad condemnation of anticompetitive agreements restraining interstate commerce.[18] The Supreme Court, however, has recognized that all agreements can be said to restrain trade in some manner, and has

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> 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.

Id. at 232 (footnote omitted); *see* Apex Hosiery Co. v. Leader, 310 U.S. 469, 501-03 (1940) (holding that statutory exemption reaches collective activities which are inherently anticompetitive).

Unions, by their very nature, are groups of people acting together in restraint of free competition and trade. *See* UMW v. Pennington, 381 U.S. 657, 666 (1965). The Supreme Court "has recognized that a legitimate aim of any national labor organization is to obtain uniformity of labor standards and that a consequence of such union activity may be to eliminate competition based on differences in such standards." *Id.*; *see also* Archibald Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. PA. L. REV. 252, 254 (1955); Michael S. Jacobs & Ralph K. Winter, *Antitrust Principles and Collective Bargaining By Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 21 n.47 (1971). "A union is a horizontal agreement between competitors to fix the prices (wages) at which they will work." *Id.*

[13] CHAMPION, *supra* note 3, § 26.2, at 460; *cf.* Philip J. Closius, *Professional Sports and Antitrust Law: The Ground Rules of Immunity, Exemption, and Liability, in* GOVERNMENT AND SPORT: THE PUBLIC POLICY ISSUES 143 (Arthur T. Johnson & James H. Frey eds., 1985) (noting that not all good-faith provisions secured by unions will be exempt from antitrust laws).

[14] National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1992). The term "mandatory subjects" was borrowed by the Court from the statute. *See id.*

[15] Mackey v. NFL, 543 F.2d 606, 615 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

[16] *See, e.g.*, *McCourt* 460 F. Supp. at 910; *Mackey*, 407 F. Supp. at 1003; Robertson v. NBA, 389 F. Supp. 867, 881-82 (S.D.N.Y. 1975); *Kapp*, 390 F. Supp. at 84.

This is a unique application of the nonstatutory labor exemption. Ordinarily, an employer will use the exemption as a defense to a suit brought by a third party harmed by an alleged anticompetitive practice incorporated in a CBA. Gary R. Roberts, *McNeil Opened NFL Antitrust Door*, NAT'L L.J., Feb. 22, 1993, at 26.

[17] 15 U.S.C. §§ 1-2 (1992).

[18] *Id.* § 1. "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." *Id.*

therefore rejected a literal interpretation of the statute.[19] Accordingly, the Court has adopted a "Rule of Reason" approach and has held that the Act prohibits only "unreasonable restraints" on trade.[20] Whether a challenged restraint will be deemed "unreasonable" depends on a broad inquiry into the restraint's effect on competition, balancing the anticompetitive effects of the restraint with any procompetitive effects.[21] This broad inquiry has had its difficulties.[22] For example, in order to prove that a given restraint is unreasonable, a plaintiff must present extensive data and expert testimony.[23] As a partial solution to this problem, the Court has concluded that certain practices are so unreasonable and anticompetitive that they are illegal per se.[24] Although there are several acts which fall within this category,[25] the Court has recently demonstrated unwillingness to expand this area.[26]

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19 *See* Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918). Applying the Sherman Act literally would destroy the free market system. Gary R. Roberts, *Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Restraints*, 75 GEO. L.J. 19, 29 n.40 (1986); Closius, *supra* note 13, at 154.

20 Standard Oil Co. v. United States, 221 U.S. 1, 59-62 (1911); Roberts, *supra* note 16, at 26.

21 *Chicago Board of Trade*, 246 U.S. at 238. "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Id.*; *see also* Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 (1977) (noting Rule of Reason was judicially established).

22 *See* Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CAL. L. REV. 266, 268 (1986) (suggesting "constitution-like vagueness" and indeterminacy which plagues antitrust inquiries); *see also* Gellhorn & Tatham, *supra* note 11 (providing guidelines on when to apply per se rule or Rule of Reason standards).

23 JOHN C. WEISTART & CYN LOWELL, THE LAW OF SPORTS § 5.07, at 593 (1979).

24 Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1956). The Court stated that "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are *conclusively presumed* to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Id.* (emphasis added). Hence, the per se illegal category was created. *Id.*

25 *See, e.g.*, California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 102-03 (1980) (vertical price fixing); United States v. Topco Ass'n, 405 U.S. 596, 609-11 (1972) (horizontal market allocation); Klor's Inc. v. Broadway-Hale Stores, 359 U.S. 207, 212 (1959) (group boycotts and concerted refusals to deal where intent is to restrain competition).

26 *Topco Ass'n*, 405 U.S. at 607-08. "It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act." *Id.* Furthermore, a mechanical application of the per se rule, even when applicable, is frowned upon:

> [E]asy labels do not always supply ready answers .... Literalness is overly simplistic and often overbroad .... [I]t is necessary to characterize the chal-

For instance, in *NCAA v. Board of Regents of the University of Oklahoma*,[27] the Supreme Court considered a plan in which the NCAA attempted to minimize the adverse effect of live television upon game attendance by limiting each member school's television exposure and financial compensation as well as the total amount of televised college football games.[28] Both lower courts found that the NCAA restrictions constituted per se violations of the Sherman Act.[29] Although setting prices and restraining output are ordinarily illegal per se,[30] the Supreme Court disagreed, and instead applied a Rule of Reason test because the "case involve[d] an industry in which horizontal restraints on competition [were] essential if the product [was] to be available at all."[31] The Court nevertheless held that even under the Rule of Reason standard, the anticompetitive effects of the restriction outweighed any possible procompetitive effects, and the restraint could not stand.[32]

> lenged conduct as falling within or without that category of behavior to which we apply the label "per se price fixing." That will often, but not always, be a simple matter.

Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1, 8-9 (1979) (footnote omitted); *see also id.* at 13 n.24.

27 468 U.S. 85 (1984).

28 *Id.* at 91-94. The controversy arose when two NCAA schools, both members of a sub-association within the NCAA, contracted with a different network to televise games. *Id.* at 94-95. The NCAA threatened disciplinary action against any school performing the contract. *Id.* at 95. The schools brought suit to enjoin such actions. *Id.*

29 546 F. Supp. 1276, 1304-11 (W.D. Okla. 1982), *modified*, 707 F.2d 1147, 1153-56 (10th Cir. 1983).

30 468 U.S. at 100. "Horizontal price-fixing and output limitation are ordinarily condemned as a matter of law under an 'illegal per se' approach because the probability that these practices are anticompetitive is so high . . . ." *Id.*

31 *Id.* at 101.

32 *Id.* at 104-20. It has been noted that the *NCAA* espouses a policy that the per se approach will not be used "in the evaluation of cooperative sports regulations." WEISTART & LOWELL, *supra* note 23 (Supp. 1985), § 5.10, at 120; *see also* Gary R. Roberts, *The Evolving Confusion of Professional Sports Antitrust, the Rule of Reason, and the Doctrine of Ancillary Restraints*, 61 S. CAL. L. REV. 945, 948 n.8 (1988). The circuit courts prior and subsequent to this case have followed this policy. *See, e.g.*, Los Angeles Memorial Coliseum Comm'n v. NFL, 726 F.2d 1381, 1392 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984); North Am. Soccer League v. NFL, 670 F.2d 1249, 1258-59 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982); Smith v. Pro-Football, Inc., 593 F.2d 1173, 1177-82 (D.C. Cir. 1978); Mackey v. NFL, 543 F.2d 606, 620 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

B. *Application to Professional Sports*

1. Baseball's Exemption

The Supreme Court addressed the application of antitrust law to baseball[33] in the landmark case of *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.[34] In its complaint, the Federal Baseball Club alleged that the defendant-leagues conspired to monopolize the baseball business by purchasing some of the plaintiff's fellow member league clubs and inducing others to leave.[35] The Court, finding for the defendants, held that baseball did not constitute interstate commerce and therefore was not subject to federal antitrust law.[36]

After several legal attacks on *Federal Baseball*,[37] the Court was presented with another antitrust challenge to baseball in *Toolson v. New York Yankees*.[38] *Toolson* was a consolidation of cases challenging major league baseball's reserve system,[39] which allowed a team to retain perpetual rights over its players.[40] Es-

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[33] American League Baseball Club v. Chase, 149 N.Y.S. 6 (Sup. Ct. 1914), was the first case to examine baseball and antitrust. The court was asked to specifically enforce a contract between a player and an owner after the player signed a contract with a team in another league. *Id.* at 7-8. Although the player's services were unique and a proper substitute was not available, *id.* at 8, the court refused to issue the injunction due to lack of mutuality. *Id.* at 14. The court also addressed the antitrust issue, but found that organized baseball was not interstate commerce subject to control by Congress. *Id.* at 16-17. In dicta, however, it was noted that organized baseball was an "illegal combination." *Id.* at 17.

[34] 259 U.S. 200 (1922).

[35] *Id.* at 207. The plaintiff was the sole remaining member of the Federal League, a competitor of the National and American Leagues. *Id.*

[36] *Id.* at 208-09. Justice Holmes wrote:

> The business is giving exhibitions of base ball, which are purely state affairs. It is true that . . . competitions must be arranged between clubs from different cities and States. But . . . the transport is a mere incident, not the essential thing. That to which it is incident . . . would not be called trade or commerce in the commonly accepted use of those words . . . . [P]ersonal effort, not related to production, is not a subject of commerce.

Id.

[37] *See* Gardella v. Chandler, 172 F.2d 402, 408-11 (2d Cir. 1949) (reasoning of *Federal Baseball* severely weakened by Supreme Court); *see also* John W. Neville, *Baseball and the Antitrust Laws*, 16 FORDHAM L. REV. 208, 214-15 (1947) (expanding definition of commerce makes holding less viable); Comment, *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 YALE L.J. 576, 608-11 (1952) (organized baseball is interstate commerce).

[38] 346 U.S. 356 (1953) (per curiam).

[39] Kowalski v. Chandler, 202 F.2d 413 (6th Cir. 1953), and Corbett v. Chandler, 202 F.2d 428 (6th Cir. 1953), were the other cases.

[40] *See* WEISTART & LOWELL, *supra* note 23, § 3.12, at 283; *see also* Flood v. Kuhn, 407 U.S. 258, 289 (1972) (Marshall, J., dissenting) (player bound to club for entire

sentially, a player who is unhappy with his position has two options: he may either request a trade to another team or retire.[41] Furthermore, the team is free to trade or release the player without his consent regardless of whether he is satisfied with his position.[42]

In a per curiam opinion, the Supreme Court affirmed the lower courts' dismissals of the complaints by noting that Congress had, by its silence, acquiesced to the ruling in *Federal Baseball*.[43] A vigorous dissent, however, argued that organized baseball had become involved in interstate activity to a degree sufficient to trigger application of the Sherman Act.[44]

Toolson was subsequently applied by lower courts,[45] but not without reservation.[46] In 1972, the Court confronted another challenge to baseball's reserve system in *Flood v. Kuhn*,[47] which stands as the last high court ruling on baseball's antitrust exemption. Curt Flood, an all-star centerfielder for the St. Louis Cardinals, was traded to the Philadelphia Phillies without con-

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professional career); *In re* The Twelve Clubs Comprising Nat'l League of Professional Baseball Clubs and The Twelve Clubs Comprising Am. League of Professional Baseball Clubs, 66 Lab. Arb. (BNA) 101, 103-04 (1975) (Seitz, Arb.) [hereinafter *Messersmith Arbitration*] (defining and explaining function of reserve system).

41 *See* CHAMPION, *supra* note 3, § 25.4, at 447.

42 *Id.*; *Flood*, 407 U.S. at 289 (Marshall, J., dissenting).

43 *Toolson*, 346 U.S. at 357. "Congress has had the ruling under consideration but has not seen fit to bring such business under these laws .... The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust litigation." *Id.*

44 *Id.* at 357-65 (Burton, J., dissenting). The Court's opinion would be nothing more than an ordinary application of *stare decisis* were it not for one important factor: in the thirty-one years between *Federal Baseball* and *Toolson*, the very definition of interstate commerce had been dramatically altered. *See, e.g.*, United States v. National Ass'n of Real Estate Boards, 339 U.S. 485, 490-92 (1950) (extending classification of commerce to include personal services for purposes of Sherman Act).

45 *See, e.g.*, State v. Milwaukee Braves, Inc., 31 Wis. 2d 699 (1966) (holding that state antitrust laws were no longer applicable to baseball), *cert. denied*, 385 U.S. 990 (1966).

46 Salerno v. American League of Professional Baseball Clubs, 429 F.2d 1003 (2d Cir. 1970), *cert. denied sub nom.* Salerno v. Kuhn, 400 U.S. 1001 (1971). Judge Friendly "freely acknowledge[d] ... that *Federal Baseball* was not one of Mr. Justice Holmes' happiest days [and] that the rationale of *Toolson* [was] extremely dubious." *Id.* at 1005. While he felt bound to apply those cases, he stated that the members of his court would not "fall out of their chairs with surprise at the news that *Federal Baseball* and *Toolson* had been overruled ...." *Id.*

47 407 U.S. 258 (1972).

sent or notice.[48] He refused to report to the Phillies and brought suit.[49]

Unlike the *Toolson* Court, the Court in *Flood* relied upon more than "mere congressional silence and passivity."[50] The Court found it significant that over fifty bills regarding baseball's antitrust exemption had been introduced since *Toolson*, and not one had passed both houses of Congress.[51] Although it was recognized that reaffirming an antitrust exemption for baseball seemed to contradict the Court's handling of other sports,[52] fifty years of precedent proved too much for Mr. Flood to overcome, and the exemption stood.[53] A stern dissent criticized the majority for its rigid application of *stare decisis*[54] and argued that the apparent interstate nature of baseball should subject it to federal antitrust law.[55]

Since the *Flood* decision, legislative bills to remove the exemption have been introduced in Congress, but have gained little

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[48] *Id.* at 264-65.

[49] *Id.* at 265.

[50] *Id.* at 283. Congress had "by its positive inaction . . . clearly evinced a desire not to disapprove [this grant of immunity] legislatively." *Id.* at 283-84.

[51] *Id.* at 281; *see also id.* at 281 n.17 (itemizing various bills considered by Congress on baseball's exemption).

[52] *Flood*, 407 U.S. at 282-83. Justice Blackmun noted:

> With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. *Federal Baseball* and *Toolson* have become an aberration confined to baseball . . . . Other professional sports operating interstate—football, boxing, basketball, and, presumably, hockey and golf—are not so exempt.

Id. (footnotes omitted).

[53] *Id.* at 282.

> It is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis*, and one that has survived the Court's expanding concept of interstate commerce. It rests on a recognition and an acceptance of baseball's unique characteristics and needs.

Id.

[54] *Id.* at 292-93 (Marshall, J., dissenting).

[55] *Id.* at 286-87 (Douglas, J., dissenting); *see also* John R. Allison, *Professional Sports and the Antitrust Laws: Status of the Reserve System*, 25 BAYLOR L. REV. 1 (1973); Jacobs & Winter, *supra* note 12; Arthur J. Keeffe, *The Flood Case at Ebbtide*, 59 A.B.A. J. 91 (1973); John P. Morris, *In the Wake of the Flood*, 38 LAW & CONTEMP. PROBS. 85 (1973) (commenting on *Flood* case).

support.[56] The success of baseball players in collective bargaining has been cited as a reason for such legislative inaction.[57]

2. Applicability to Other Sports

It is significant to note that baseball was the only sport played on a national level at the time of *Federal Baseball*.[58] Conflicts arising out of other sports did not reach the courts until the definition of interstate commerce was broadened by New Deal case law,[59] which expansion created a wider scope for potential antitrust violations.[60]

For example, in *Radovich v. NFL*,[61] the Supreme Court held that football was subject to antitrust law.[62] The Court explicitly limited the antitrust exemption to baseball based on the *Toolson* rationale of congressional acquiescence.[63] The discriminatory treatment of football as compared with baseball troubled some members of the Court, who in turn suggested the need for a legislative response to remedy such incongruous results.[64] With little hope of a judicial or legislative exemption from antitrust law, the

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[56] *See* PAUL D. STAUDOHAR, THE SPORTS INDUSTRY AND COLLECTIVE BARGAINING 21 (1989) (noting 1977 and 1988 proposals to strip baseball of its exemption); *see also* Robert G. Berger, *After the Strikes: A Reexamination of Professional Baseball's Exemption from the Antitrust Laws*, 45 U. PITT. L. REV. 209 (1983) (calling on Congress to remove exemption).

[57] *See* STAUDOHAR, *supra* note 56, at 21.

[58] *See* 1 ROBERT C. BERRY & GLENN M. WONG, LAW AND BUSINESS OF THE SPORTS INDUSTRIES § 2.23, at 97-98 (1986); ROBERT C. BERRY, ET AL., Labor Relations in Professional Sports 30 (1986).

[59] *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 124 (1942) (abolishing distinctions between production, consumption, and marketing for purposes of commerce power regulation); NLRB v. Jones & Laughlin Steel Co., 301 U.S. 1, 37 (1937) (holding intrastate activities having substantial relation to interstate commerce subject to federal legislation); *see also* United States v. National Ass'n of Real Estate Boards, 339 U.S. 485, 490-92 (1950) (extending classification of commerce to include personal services for purposes of Sherman Act).

[60] NLRB, 301 U.S. at 31; BERRY & WONG, *supra* note 58, § 2.23, at 98.

[61] 352 U.S. 445 (1957).

[62] *Id.* at 452. Radovich left the NFL while under contract with a member club and played two seasons in a rival league before attempting to join an NFL affiliate who was not in competition with the league. *Id.* at 448. The NFL "black-listed" him by threatening to discipline any affiliated club which signed him. *Id.* By this time, the competing league had folded. *Id.* at 448 n.4.

[63] *Id.* at 451. "As long as the Congress continues to acquiesce we should adhere to—but not extend—the interpretation of the [Sherman] Act made in those cases." *Id.*

[64] *Id.* at 456 (Harlan, J., dissenting).

> I am unable to distinguish football from baseball under the rationale of *Federal Baseball* and *Toolson* . . . . I think it far better to leave it to be dealt with by Congress than for this Court to becloud the situation further, either

NFL has since sought to avoid antitrust liability on other grounds.[65]

Coincidental to the *Radovich* decision, two lower courts held that basketball was not immune from antitrust law.[66] Thus, even though the Supreme Court has not ruled on the subject, basketball is also deemed to be subject to federal antitrust law.[67]

Similarly, there is no high court ruling with respect to hockey.[68] In 1972, a series of district court cases applied the Sherman Act to challenges of hockey's reserve system.[69] Soon thereaf-

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by making untenable distinctions between baseball and other professional sports or by discriminatory fiat in favor of baseball.

Id.

[65] *See supra* notes 12-16 and accompanying text (explaining nonstatutory labor exemption defense).

The NFL has also tried to avoid antitrust liability by use of the "single entity" theory. The league argues that it is really a joint venture with the member clubs as joint venturers. *See* Closius, *supra* note 13, at 150. Thus, according to the NFL, it should be immune from antitrust liability, "since, as a single entity, it cannot contract, conspire, or combine with itself." *Id.* This defense has been rejected by at least two federal circuit courts of appeals. *See* Los Angeles Memorial Coliseum Comm'n v. NFL, 726 F.2d 1381, 1387-90 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984); North Am. Soccer League v. NFL, 670 F.2d 1249, 1256-58 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982).

The commentary on this defense is divided. *See* Myron C. Grauer, *Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 MICH. L. REV. 1, 2-6 (1983); Gary R. Roberts, *The Antitrust Status of Sports Leagues Revisited*, 64 TUL. L. REV. 117, 119-20 (1989); John C. Weistart, *League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry*, 1984 DUKE L.J. 1013, 1044-64 (1984) (arguing in support of single-entity defense). *But see* Lee Goldman, *Sports, Antitrust, and the Single-Entity Theory*, 63 TUL. L. REV. 751, 761-89 (1989); Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single Entity Theory: A Defense of the Status Quo*, 67 IND. L.J. 25, 43-46 (1991) (arguing against use of single-entity defense).

[66] *See* Washington Professional Basketball Corp. v. NBA, 147 F. Supp. 154, 155 (S.D.N.Y. 1956); *cf.* Central N.Y. Basketball, Inc. v. Barnett, 181 N.E.2d 506, 517 (Ohio 1961) (approving restriction on player mobility under Rule of Reason).

[67] *See, e.g.*, *Flood*, 407 U.S. at 283 (discussing anomaly of baseball's antitrust exemption); Haywood v. NBA, 401 U.S. 1204, 1205-06 (Douglas, Circuit Justice 1971) (reinstating preliminary injunction issued against NBA "Four Year Rule"); Robertson v. NBA, 389 F. Supp. 867, 880 (S.D.N.Y. 1975).

[68] *See Flood*, 407 U.S. at 283 (stating baseball's exemption is unique and "presuming" hockey is not exempt).

[69] *See, e.g.*, Boston Professional Hockey Ass'n v. Cheevers, 348 F. Supp. 261, 266 (D. Mass. 1972); Nassau Sports, Inc. v. Hampton, 355 F. Supp. 733, 735 (D. Minn. 1972). The most important of these cases was Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972), where Judge Higginbotham held that "hockey is not exempt from the federal anti-trust law . . . ." *Id.* at 466 n.3.

ter, in *McCourt v. California Sports, Inc.*,[70] the Sixth Circuit followed suit.[71] Thus, it appears that hockey is indeed subject to antitrust laws.

II. PLAYER RESTRAINTS

A. *The Reserve System and Option Clauses*

A reserve system is used by team owners to bind a player to a particular team in perpetuity.[72] It is this eternal nature of a reserve system that makes it so onerous.[73] Typically, a player's contract will contain a clause providing for a one-year unilateral renewal by the club if no agreement is reached on a new contract.[74] The renewal clause carries forward into each new contract and can theoretically be exercised indefinitely by the team.[75] In contrast are "pure option clauses," which restrict the team's renewal right to one year.[76] Football is the only sport which expressly provides for these pure option clauses.[77] Some state courts, however, have held that this limitation is also implied in basketball contracts.[78]

1. Baseball

Attacks on baseball's reserve system date back to the 19th century.[79] The Supreme Court, however, has continually upheld

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[70] 600 F.2d 1193 (6th Cir. 1979).

[71] *See id.* at 1197-98 (applying nonstatutory labor exemption from antitrust laws).

[72] *Flood*, 407 U.S. at 289 (Marshall, J., dissenting); *see supra* notes 40-42 and accompanying text (discussion of reserve system).

[73] *Flood*, 407 U.S. at 289.

[74] *See, e.g.*, Baseball Contract § 10(a) (quoted in WEISTART & LOWELL, *supra* note 23, § 5.03, at 501). "If . . . the Player and the Club have not agreed upon the terms of such contract, then . . . the Club shall have the right . . . to renew this contract for a period of one year *on the same terms*." *Id.* (emphasis added).

[75] *Id.*

[76] WEISTART & LOWELL, *supra* note 23, § 5.03, at 502.

[77] *See, e.g.*, Kapp v. NFL, 390 F. Supp. 73, 77 (N.D. Cal. 1974) (referring to paragraph 10 of Standard Player Contract containing option clause), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979).

[78] *See* Lemat Corp. v. Barry, 80 Cal. Rptr. 240, 243 (1969); Central N.Y. Basketball, Inc. v. Barnett, 181 N.E.2d 506, 507 (Ohio 1961). In Robertson v. NBA, 389 F. Supp. 867, 891 (S.D.N.Y. 1975), the players contended that this option was actually perpetual in operation.

[79] *See, e.g.*, Metropolitan Exhibition Co. v. Ewing, 42 F. 198 (S.D.N.Y. 1890) (denying club remedy in action against player refusing to negotiate reserve contract); Metropolitan Exhibition Co. v. Ward, 9 N.Y.S. 779 (Sup. Ct. 1890) (contract not sufficiently definite to restrain player from contracting with other teams). In Toolson v.

baseball's exemption from the antitrust laws, an exemption which simultaneously protected baseball's reserve system.[80] As recently as 1972, in *Flood v. Kuhn*,[81] the Court denied a challenge to the reserve system as an antitrust violation.[82] The Court, however, did warn the owners to resolve their differences with the players by negotiation before Congress intervened.[83]

In 1968, several years before *Flood*, an agreement was reached between the players and owners to resolve future disputes over collective bargaining by arbitration.[84] Originally, the Commissioner was the arbitrator.[85] Beginning in 1970, independent arbitrators were used.[86] Surprisingly, this seemingly minor concession by the owners led to the overthrow of baseball's perpetual reserve system,[87] beginning with the *Messersmith Arbitration*.[88] The key issue in *Messersmith* was the duration of the club's right to renew the players' contracts: the players argued that they were free agents after the team initially exercised their right of renewal to keep the player for one additional year; the owners argued that their right of renewal was perpetual.[89] The arbitrator agreed with the players, granting them free agency,[90] and in so

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New York Yankees, 346 U.S. 356 (1953) (per curiam), the Supreme Court dismissed plaintiff's challenge to the reserve system, without even considering its merits, by applying baseball's antitrust exemption. *Id.*

80 *See supra* notes 33-57 and accompanying text (development of baseball's exemption).

81 407 U.S. 258 (1972); *see supra* notes 48-49 and accompanying text (detailing facts of *Flood* case). In addition to alleging antitrust violations, Flood claimed that the reserve system was a method of involuntary servitude that violated the Thirteenth Amendment. 407 U.S. at 265-66.

82 407 U.S. at 285.

83 *Id.* at 286 (Burger, C.J., concurring).

84 Telephone interview with Eugene Orza, Associate General Counsel, Major League Baseball Players Association, in New York, N.Y. (July 23, 1993).

85 *Id.*

86 *Id.*

87 *See infra* notes 88-98 (detailing end of baseball's perpetual reserve system). It should be noted that there was no call to abolish the reserve system. *Messersmith Arbitration*, 66 Lab. Arb. (BNA) 101, 112 (1975) (Seitz, Arb.). In fact, the players conceded that some form of it was necessary for the proper operation of the league. *See* Flood v. Kuhn, 316 F. Supp. 271, 275-76 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972).

88 66 Lab. Arb. (BNA) 101 (1975) (Seitz, Arb.). In the *Messersmith Arbitration*, two players, Andy Messersmith and Dave McNally, had their contracts automatically renewed by their clubs as authorized in § 10(a) of their contracts. *Id.*; *see supra* note 74 (quoting § 10(a) of Baseball Contract).

89 *Messersmith Arbitration*, 66 Lab. Arb. (BNA) at 112-13.

90 *Id.* at 118.

doing, overcame language in the Major League Rules which appeared to support the owners' position.[91] The decision, however, was binding only upon the players who had brought the challenge.[92]

Although an adverse judicial decision would establish a binding precedent on the league with respect to all players, the league opted for judicial review of the arbitrator's decision.[93] In *Kansas City Royals Baseball Corp. v. MLB Players Ass'n*,[94] the owners presented evidence that the perpetual nature of the reserve system had always been presumed.[95] The district court, however, relied solely on evidence existing subsequent to the collective bar-

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> The grievances of Messersmith and McNally are sustained. There is no contractual bond between these players and the Los Angeles and the Montreal clubs, respectively. Absent such a contract, their clubs had no right or power, under the Basic Agreement, the Uniform Player Contract or the Major League Rules to reserve their services for their exclusive use for any period beyond the "renewal year" in the contracts which these players had theretofore signed with their clubs.

Id.

Arbitrator Seitz was troubled by what he perceived to be an unclear intent in § 10(a) to bind the player in perpetuity. *Id.* at 113.

91 *See id.* at 111. Arbitrator Seitz also had to overcome Major League Rule 4(a) which required that each team provide the Commissioner and League President with

> [A] list of not exceeding forty . . . active and eligible players, whom the club desires to reserve for the ensuing season . . . and thereafter no player on any list shall be eligible to play for or negotiate with any other club until his contract has been assigned or he has been released.

Id. (quoting Rule 4(a)).

The leagues also argued that even if the teams were limited by § 10(a) of the Baseball Contract to one renewal, the language of Rule 4(a) gave them the exclusive right of negotiation for all reserved players. *Id.* at 111 n.23. Arbitrator Seitz ruled that a contract was a condition precedent to placing a player on the reserved list; since all contractual ties were terminated at the end of the option year, the reservation of these players had no legal effect. *Id.* at 116-17.

92 WEISTART & LOWELL, *supra* note 23, § 5.07, at 593.

93 *Id.* § 4.05, at 354.

94 409 F. Supp. 233 (W.D. Mo.), *aff'd*, 532 F.2d 615 (8th Cir. 1976). The owners originally brought suit to enjoin the arbitration. *Id.* at 236. By stipulation, it was agreed that the arbitration would be completed before judicial proceedings commenced. *Id.*

95 *Kansas City Royals*, 532 F.2d at 630-31. The leagues hoped to establish that a perpetual reserve system was a matter of usage in the baseball industry. WEISTART & LOWELL, *supra* note 23, § 5.03, at 519. Under the general rule that ambiguous contract terms are read in light of the surrounding facts and circumstances, including custom and usage, the existence of a perpetual reserve system could have been read into the contract. *See* ARTHUR CORBIN, CORBIN ON CONTRACTS §§ 544-45, 556-58 (1951); *see, e.g.*, Flood v. Kuhn, 316 F. Supp. 271, 275-76 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972).

gaining relationship in the sport,[96] which showed only that the parties had never reached agreement on the definition of the reserve system.[97] In such a situation, the arbitrator is given broad deference when interpreting an ambiguous term in a contract; therefore, the arbitrator's decision in *Messersmith* went undisturbed.[98]

The rules regarding free agency have since been incorporated into the Major League Agreement between the players, owners, and leagues.[99] A player whose contract has expired and who has performed six years of major league service is eligible to become a free agent.[100] Players whose contracts have expired and who have

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[96] *Kansas City Royals*, 409 F. Supp. at 243. The court summarily dismissed any evidence which preceded the collective bargaining relationship. *Id.* Judge Oliver observed:

> [T]he history of how club owners may have run their business in the 19th Century and that portion of the 20th Century before they entered into a collective bargaining agreement with a recognized labor organization representing its employees simply is not relevant or material to the determination of the legal questions presented in this case.

Id.

[97] *Id.* at 246; *see also Kansas City Royals*, 532 F.2d at 631 (recognizing disparities between each party's definition of reserve system).

[98] WEISTART & LOWELL, *supra* note 23, § 5.07, at 593. This principle is especially evident in labor arbitration, where awards will not be set aside on judicial review without a showing of "clear infidelity" to the agreement by the arbitrator. *See* United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568-69 (1960) (strong deference to arbitrator's decisions); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 585 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960) (court may refuse enforcement of arbitrator's decision on showing that arbitrator demonstrated infidelity to language of agreement).

[99] BASIC AGREEMENT BETWEEN THE AMERICAN LEAGUE OF PROFESSIONAL BASEBALL CLUBS AND THE NATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS AND MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION, Jan. 1, 1990, at art. XX, § B, *reprinted in* LAW OF PROFESSIONAL AND AMATEUR SPORTS, at 5-63 (Gary Uberstine ed. 1990) [hereinafter 1990 MLB AGREEMENT].

[100] *Id.* § B(1), at 5-63.

There are additional procedural requirements which must be satisfied. First, the player must file his intent to become a free agent within the fifteen day period beginning on October 15 or the day after the last World Series game, whichever is later. *Id.* § B(2)(a), at 5-63. Second, he must inform the Player Relations Committee of his intentions, a requirement typically fulfilled on his behalf by the Players Association. *Id.*; Telephone interview with Eugene Orza, *supra* note 84. Once these two conditions are fulfilled, the player is free to negotiate with any team upon expiration of the fifteen day period. 1990 MLB AGREEMENT, *supra* note 99, art. XX, § B(2), *reprinted in* LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 99, at 5-63.

The former team has a right to re-sign the player. *Id.* § B(3), at 5-64. The team must offer the player salary arbitration before December 7th. *Id.* If the player accepts the offer by December 19th, he is bound to his former team for another year at a salary to be determined through the normal salary arbitration process. *Id.* If the offer

not completed six years of service, however, can only negotiate with their original clubs.[101] If there is no agreement on salary, the matter is submitted to binding arbitration to determine the player's salary for the following year.[102] Furthermore, many players who become free agents and sign with other clubs cannot become free agents again until they complete an additional five years of major league service.[103]

2. Hockey

Hockey had a perpetual reserve system which operated similarly to baseball's until 1972[104] when the World Hockey Association (WHA)[105] attempted to enjoin its operation.[106] In *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*,[107] the United States District Court for the Eastern District of Penn-

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is not accepted, then the team's right to negotiate expires on January 8th and is not reactivated until May 1st. *Id.* at 5-64 to -65. Likewise, if an offer to arbitrate is not made by December 7th, all negotiating rights are lost until May 1st. *Id.* at 5-64.

Players generally spend some time in the minor leagues, so the six years preceding free agent eligibility in the major leagues may actually be more like ten years as a professional baseball player. *See* Robert C. Berry, *Collective Bargaining in Professional Sports, in* LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 99, § 4.02[3], at 4-12.

101 *See* 1990 MLB AGREEMENT, *supra* note 99, art. XX, § B(1), *reprinted in* LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 99, at 5-63. "[E]ach club may have title to and reserve up to 40 Player contracts. A club shall retain title to a contract and reservation rights until . . . the Player becomes a free agent, as set forth in this agreement . . . ." *Id.*

102 *Id.* at art. VI, § F(1), at 5-35.

103 *Id.* at art. XX, § D(1), at 5-68. Unranked free agents, *infra* note 139, are not subject to this rule. Telephone interview with Eugene Orza, *supra* note 84.

104 Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 480-85 (E.D. Pa. 1972) (describing history of NHL reserve system). The renewal option has historically been interpreted as perpetual. *Id.* at 480. *But see* Lemat Corp. v. Barry, 80 Cal. Rptr. 240, 243 (1969); Central N.Y. Basketball, Inc. v. Barnett, 181 N.E.2d 506, 507 (Ohio 1961) (holding similar language in NBA player contract amounted to one-year option).

105 351 F. Supp. at 466. The WHA was a newly formed league which sought instant credibility and future viability by signing some established NHL players, most notably, superstar Bobby Hull of the Chicago Black Hawks. *Id.* at 492. In attempting to sign these players, the WHA encouraged them to disregard the reserve clauses of their contracts. *Id.*

106 *Id.* at 493. Specifically, the WHA charge was two-fold: first, the reserve system was an illegal restraint of trade; and second, the NHL had monopolized the supply of hockey players. *Id.* at 493, 503-05; *see also* Sherman Antitrust Act of 1890 §§ 1-2, 15 U.S.C. §§ 1-2 (1992) (forbidding monopoly of interstate trade).

107 351 F. Supp. at 462.

sylvania issued a preliminary injunction[108] against further use of the reserve system,[109] noting, however, that some restraints were necessary for the NHL to operate efficiently.[110]

The NHL reached a settlement with the WHA by instituting a right of renewal device to replace the reserve system.[111] This procedure, which can be found in every player's contract,[112] allows either the club or the player to bind the other party for one year after the contract has expired.[113] If the club does not exercise this option, the player may elect to become a free agent.[114] If, however, either party does exercise its right of renewal, the player becomes a free agent at the end of the additional year.[115]

3. Basketball

Basketball's reserve system was challenged in *Robertson v. NBA*.[116] The league defended the system on the grounds that it really only provided for a one-year option,[117] making the player a

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[108] *Id.* at 519. The basis of the injunction was premised on the second charge rather than the first. *Id.* at 504.

[109] *Id.* at 519. Judge Higginbotham ruled:

> [I]t is hereby ordered that the National Hockey League, its member clubs and teams, . . . are preliminarily enjoined from further prosecuting, commencing, or threatening to commence any legal proceeding pursuant to and/or to enforce the so-called "reserve clause" . . . of the National Hockey League Standard Player's Contract, against any player, coach or other person whose contract, but for the reserve clause, expired on or before November 8, 1972.

Id.

[110] *Id.* at 486, 504; *see also* Note, *The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws*, 81 HARV. L. REV. 418, 422 (1967) (describing rationale and advantages of reserve system).

[111] WEISTART & LOWELL, *supra* note 23, § 5.03, at 515.

[112] NHL STANDARD PLAYER CONTRACT ¶ 18 (on file with ST. JOHN'S LAW REVIEW).

[113] *Id.* In order to exercise this right the team has two alternatives. First, it may offer a termination contract, which is a one year contract containing no future renewal options. NHL BY-LAW § 9A.11. If the player accepts, he becomes a free agent at the end of the year. NHL STANDARD PLAYER CONTRACT, *supra* note 112, ¶ 18(a). If the player does not accept, he immediately becomes a free agent. *Id.* Second, the team may offer another Standard Player Contract with a right to salary arbitration if an agreement on salary cannot be reached. *Id.* ¶¶ 18(b), 18(d).

[114] *Id.* ¶¶ 18(a), 18(b). If the player does not elect to become a free agent, he can compel the team to provide an option contract with the same terms as the prior contract, but without renewal rights. *Id.* ¶ 18(c). After the option season, the player becomes a free agent. *Id.*

[115] *See supra* notes 113-14 (explaining procedure for becoming free agent).

[116] 389 F. Supp. 867 (S.D.N.Y. 1975). The complaint included challenges to the collegiate draft and to free agent compensation. *Id.* at 874-75.

[117] *Id.* at 891. This interpretation was also adopted by two state courts. *See* Lemat Corp. v. Barry, 80 Cal. Rptr. 240, 244 (1969); Central N.Y. Basketball, Inc. v. Barnett, 181 N.E.2d 506, 509-10 (Ohio 1961).

free agent after the year had expired.[118] Although the district court did not pass judgment on this issue, it noted that even if the league's interpretation was correct, other restraints used by the league, such as a compensation system and the collegiate draft,[119] did violate the Sherman Act.[120] The court also rejected the league's assertion that the restraints were immune from antitrust attack due to the nonstatutory labor exemption, as there was no evidence of good faith negotiation between the NBA and its players.[121]

The parties entered negotiations and reached a settlement[122] which has since been incorporated into the new CBA.[123] There is no reserve system per se, but there are limits on the mobility of potential free agents.[124]

4. Football

As noted earlier, football did not have a reserve system, but rather operated under a pure option system, which limited a team's renewal right to one year.[125] In *Kapp v. NFL*,[126] the court found that this option system was not "patently unreasonable,"

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118 *Robertson*, 389 F. Supp. at 891.

119 *Id.* at 891-92.

120 *Id.* at 890-93. Judge Carter observed that "[p]ractically all of the . . . league restraints appear to be per se violative of the Sherman Act . . . . The player draft and perpetual reserve system are readily susceptible to condemnation as group boycotts based on the NBA's concerted refusal to deal with the players save through these uniform restrictive practices." *Id.*

121 *Id.* at 895.

> I must confess that it 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 defendants were able to prove at trial their highly dubious contention that these restraints were adopted at the behest of the Players Association.

Id.; *see also* CHAMPION, supra note 3, § 26.2, at 460 (noting requirements of nonstatutory labor exemption).

122 Robertson v. NBA, 72 F.R.D. 64 (S.D.N.Y. 1976) (approving settlement of class action), *aff'd*, 556 F.2d 682 (2d Cir. 1977).

123 COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NATIONAL BASKETBALL ASSOCIATION AND THE NATIONAL BASKETBALL PLAYERS ASSOCIATION, Nov. 1, 1988, at art. V, *reprinted in* LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 99, at 7-43 [hereinafter 1988 NBA AGREEMENT].

124 *Id.* §§ 1-5, at 7-68 to -72; *see infra* notes 211-16 and accompanying text (detailing limits posed by agreement).

125 *See supra* note 77 and accompanying text.

126 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979).

but its validity was never actually determined.[127] Later, however, in *Mackey v. NFL*,[128] although the option system was termed an "anticompetitive practice,"[129] it was upheld by the court because of its nonoppressive length.[130]

B. *Free Agent Compensation*

Once a player has become a free agent and signs with another team, his former team is usually entitled to compensation, which may include draft picks, active players, or cash.[131] In essence, a "forced trade" occurs when the new team must give up valuable consideration for signing a free agent.[132] The leagues view it as a fair means of compensating for the loss of a player's services.[133] Players, however, claim that it unfairly restricts their mobility

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127 *Id.* at 82-83. "The option rule . . . gives the club an option for one additional year of service at 90% of the contract salary unless otherwise agreed." *Id.* at 82. The rules set forth by the NFL "leave the matters of duration and salary to free negotiation between players and clubs." *Id.* at 82-83. The court concluded that this option provision taken by itself "cannot be said to so extend the original term and salary as to render it patently unreasonable." *Id.* The court found it unnecessary to determine the validity of the option rule because in order to grant summary judgment there need be one illegal constraint on trade. *Id.*

128 407 F. Supp. 1000 (D. Minn. 1975), *modified*, 543 F.2d 606 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977).

129 *Id.* at 1008.

130 *See Kapp*, 390 F. Supp. at 82-83 (finding option clause reasonable because duration left to negotiation).

131 *See, e.g.*, 1990 MLB AGREEMENT, *supra* note 99, at art. XX, § B(4), *reprinted in* LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 99, at 5-65 to -66 (player's former team receives compensation consisting of amateur draft choices); NHL BY-LAW § 9A (player's former team entitled amateur draft choices or final offer arbitration); COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION AND THE NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL, May 6, 1993, at art. XIX, §§ 2-3 [hereinafter 1993 NFL AGREEMENT] (restricted free agent's former team entitled to amateur draft picks); *see also* McCourt v. California Sports Inc., 460 F. Supp. 904 (E.D. Mich. 1978) (under 1974 Standard Player's Contract, free agent's former club entitled to combination of assignment of player contracts, draft choices, and cash), *vacated*, 600 F.2d 1193 (6th Cir. 1979); *Kapp*, 390 F. Supp. at 82 (discussing "Rozelle" rule requiring that player's former club be compensated with active players).

132 WEISTART & LOWELL, *supra* note 23, § 5.03, at 503.

133 *See, e.g.*, NHL BY-LAW § 9A.7.

> The purpose of the equalization payment shall be to compensate a player's prior Member Club fairly for loss of the right to his services when that player becomes a free agent and the right to his services is acquired by another Member Club or a club owned or controlled by another Member Club.

Id.

since the new team may be reluctant to pay such high compensation.[134]

1. Baseball

The current free agent compensation structure was established after the 1985 strike.[135] Only future amateur draft choices may be used as compensation.[136] This was carried over into the 1990 agreement with a caveat; a team must offer salary arbitration to the departing player in order to be entitled to compensation.[137] The departing player is classified into one of three groups based on a complicated statistical formula which ranks the player with others who play the same position.[138] The proper compensation is determined based on this classification.[139]

2. Football

a. History

Although traditionally an NFL player could become a free agent at the end of his option year, his mobility would remain severely restricted under a league-supervised system of free agent compensation.[140] Under the Rozelle Rule, prior to the signing of a

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134 *See, e.g., McCourt*, 460 F. Supp. at 907; Mackey v. NFL, 407 F. Supp. 1000, 1006 (D. Minn. 1975), *modified*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *Kapp*, 390 F. Supp. at 78.

135 BERRY ET AL., *supra* note 58, at 267.

136 Telephone interview with Eugene Orza, *supra* note 84. From 1981 to 1985 free agent compensation involved the selection of other major league players. *Id.* These selections were made directly from the signing teams and indirectly from a pool of unprotected players. *Id.*

137 1990 MLB AGREEMENT, *supra* note 99, at art. XX, § B(4)(c), *reprinted in* LAW OF PROFESSIONAL AND AMATEUR SPORTS, at 5-65.

138 Jeffrey S. Moorad, *Negotiating for the Professional Baseball Player, in* LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 99, § 5.05[5][b], at 5-20 n.102.

139 1990 MLB AGREEMENT, *supra* note 99, at art. XX, § B(4), *reprinted in* LAW OF PROFESSIONAL AND AMATEUR SPORTS, at 5-65 to -66.

Type A players rank in the upper 30% of their position. *Id.* Their departure is compensated directly by the signing team's first round in the following year's amateur draft. *Id.* In addition, a supplemental selection between the first and second rounds of the draft is granted to the club. *Id.* Type B players rank in the upper 50% of their position but not in the top 30%. *Id.* The former team gets a first round draft pick from the signing team, with no supplemental pick. *Id.* Type C players rank in the top 60% of their position but not in the upper 50%. *Id.* As compensation, the former team receives a supplemental pick between the second and third rounds of the draft. *Id.* There is no compensation required for those who rank below 60%. *Id.*

140 CONSTITUTION AND BY-LAWS FOR THE NATIONAL FOOTBALL LEAGUE, art. 12.1(H), *reprinted in* WEISTART & LOWELL, *supra* note 23, § 5.03, at 502-03 n.167. The Rozelle Rule stated:

free agent, the old and new clubs were required to negotiate "mutually satisfactory arrangements" regarding the compensation to be provided to the former; if this could not be accomplished, the Commissioner had authority to make a final determination on the issue.[141]

The Rozelle Rule was first challenged in *Kapp v. NFL*,[142] in which the district court applied the Rule of Reason standard, rather than the mechanical per se approach.[143] Using this method, the court found that the Rozelle Rule *as applied* was unreasonable due to its scope and duration as well as the excessive power given to the Commissioner.[144] The court also rejected the NFL's claim that the nonstatutory labor exemption[145] protected

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

Id.

141 *Id.*

142 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979). Joe Kapp, a quarterback for the Minnesota Vikings, played out his contract in 1969 and became a free agent when he refused to re-sign with the Vikings. *Id.* at 76. Although other teams were interested in his services, no offers were forthcoming. *Id.* He eventually signed with the New England Patriots, who compensated the Vikings, but he was later forced to sit out when he refused to sign a Standard Player Contract which would bind him to all league rules. *Id.* at 77.

143 *Id.* at 82. Judge Sweigert gave two reasons for his decision. First, he felt that the unique nature of sports requires some restraints on player mobility in order to promote competitive balance. *Id.* at 81. Second, the per se approach would prevent collective bargaining on those restraints necessary for proper league operation. *Id.* at 81-82.

144 *Id.* at 82.

> [A] rule imposing restraint virtually unlimited in time and extent, goes far beyond any possible need for fair protection of the interests of the club-employers or the purposes of the NFL and . . . imposes upon the player-employees such undue hardship as to be an unreasonable restraint . . . . Similarly, the so-called "one-man rule", . . . vesting final decision in the NFL Commissioner, is also patently unreasonable, . . . insofar as that unilateral kind of arbitration is used to interpret or enforce other NFL rules involving restrictions on the rights of players or clubs to free employment choice.

Id.

145 *See supra* notes 12-16 and accompanying text (detailing nonstatutory labor exemption).

the Rule from antitrust scrutiny.[146] On appeal, this holding was upheld.[147]

Another group of players led a similar assault on the Rozelle Rule in *Mackey v. NFL*.[148] In that case the district court held that the Rule and its related provisions[149] were per se illegal[150] or alternatively, invalid under the Rule of Reason.[151] As in *Kapp*, the NFL raised the labor exemption as a defense, but it was summarily struck down.[152]

Although the basic holding of the trial court in *Mackey* was upheld on appeal,[153] the appellate court specifically rejected the per se approach and adopted the Rule of Reason standard for player restraints.[154] In addition, the *Mackey* court set forth a

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146 *Kapp*, 390 F. Supp. at 85-86. The NFL argued that the disputed restraints were part of the Standard Player Contract, which was a subject of collective bargaining. *Id.* at 78-79. As such, an individual employee had no grounds for complaint. *Id.* at 84. The court, however, held that even if the restraints were accepted by the players, the CBA was not yet effective when the disputed restraints were enforced against the players. *Id.* at 85-86. Therefore, the exemption could not be asserted. *Id.* In dictum, the court hinted that the labor exemption, even where present, was not an automatic insulator for all restrictions on an employee's right to freely seek work. *Id.* This is a restatement of Justice Marshall's vigorous dissent in Flood v. Kuhn, 407 U.S. 258, 295-96 (1972).

147 *Kapp*, 586 F.2d at 650.

148 407 F. Supp. 1000 (D. Minn. 1975), *modified*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). While *Kapp* was on appeal, John Mackey, an all-pro tight end for the Baltimore Colts, led a group of active and retired players seeking injunctive relief from the Rozelle Rule as well as monetary damages. *Id.* at 1002.

149 *Id.* at 1005-06. These practices included the Standard Player Contract, the option clause, the draft and the no tampering rule. *Id.*

150 *Id.* at 1007. According to the court, the restraints amounted to a group boycott and a concerted refusal to deal, which have historically been condemned under the per se approach. *Id.*; *see also* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959) (group boycotts and refusals to deal forbidden).

151 *Mackey*, 407 F. Supp. at 1007. Judge Larson gave three reasons for this conclusion. First, the Rule was too broad in its application, applying not only to the best players as the target of restriction, but to marginal players as well. *Id.* Second, the Rule lacked the most fundamental safeguards of due process. *Id.* Finally, the unlimited duration of the Rule made it unreasonable. *Id.*

152 *Id.* at 1008-10. The court reasoned that the nonstatutory labor exemption could not be applicable where an anticompetitive provision was unilaterally imposed upon a weak union. *Id.* at 1010; *see also Flood*, 407 U.S. at 295-96 (Marshall, J., dissenting) (questioning use of exemption when union lacks strength to fight restriction). Judge Larson also noted that the union remained too weak to fight any further application of the Rozelle Rule. *Mackey*, 407 F. Supp. at 1010. Thus, the exemption was unavailable. *Id.*

153 *Mackey*, 543 F.2d at 623.

154 *Id.* at 619. Chief Judge Lay explained:

> [T]he NFL assumes *some* of the characteristics of a joint venture in that each member club has a stake in the success of the other teams . . . . Although

three-prong test for determining when the nonstatutory labor exemption can be used: 1) the restraint primarily affects only the parties to the CBA; 2) the agreement contains a mandatory subject of bargaining; and 3) the agreement comes from bona fide, arms-length negotiating.[155] In *Mackey*, failure to satisfy the third prong prevented the NFL from claiming the benefit of this exemption.[156]

Ironically, despite their success in court, the players soon bargained away their victory[157] in the 1977 and 1982 NFL Agreements, which changed only the method of free agent compensation.[158] Most notably, an objective compensation formula was adopted, eliminating the need for the Commissioner to settle disputes.[159] In addition, the former team also had a right of first refusal on any offer the player received from another team.[160] Otherwise, the Rozelle Rule was left undisturbed.[161]

> businessmen cannot wholly evade the antitrust laws by characterizing their operation as a joint venture, we conclude that the unique nature of the business of professional football renders it inappropriate to mechanically apply *per se* illegality rules . . . . This is particularly true where, as here, the alleged restraint does not completely eliminate competition for players' services . . . . In similar circumstances, when faced with a unique or novel business situation, courts have eschewed a *per se* analysis in favor of an inquiry into the reasonableness of the restraint under the circumstances.

Id. (second emphasis added) (citations omitted).

Furthermore, "[i]t may be that some reasonable restrictions relating to player transfers are necessary for the successful operation of the NFL." *Id.* at 623.

155 *Id.* at 614.

156 *Id.* at 615. Applying the test to the facts at hand, the court concluded that the Rozelle Rule satisfied the first two prongs. *Id.* However, the court accepted the district court's findings that the Rule was thrust upon a weak union, and that the players did not receive consideration for agreeing to the restraint. *Id.* at 616. Hence, the exemption could not be applied. *Id.*

157 STAUDOHAR, *supra* note 56, at 88; *see* Francis E. Zollers, *From Gridiron to Courtroom to Bargaining Table: The New National Football League Agreement*, 17 AM. BUS. L.J. 133 (1979-80) (discussion of 1977 agreement).

158 COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION AND THE NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL, Dec. 11, 1982, at art. XV, *reprinted in* BERRY & WONG, *supra* note 58, § 3.44, at 185-86 [hereinafter 1982 NFL AGREEMENT].

159 Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 348-49 n.57 (1989).

160 1982 NFL AGREEMENT, *supra* note 158, at art. XV, *reprinted in* BERRY & WONG, *supra* note 58, § 3.44, at 185-86. A discussion of the details of this system is not particularly necessary or important in light of the monumental recent developments in NFL litigation. *See infra* notes 162-92 and accompanying text.

161 Lock, *supra* note 159 at 348-49. The restrictive effect of the "new" system is best exemplified by the fact that only two players changed teams as free agents between 1977 and 1991, a time when the new team was required to compensate the

b. Recent Developments

After the 1982 Agreement expired in 1987, the players went on strike, primarily for free agency.[162] The strike quickly fell apart, however, and the players elected to continue the season.[163] Shortly thereafter, the players brought suit.[164]

In *Powell v. NFL*,[165] the players challenged the Right of First Refusal/Compensation System.[166] The United States District Court for the District of Minnesota refused to grant the NFL absolute protection through the nonstatutory labor exemption.[167] A more troublesome issue in *Powell*, however, was the extent to which the labor exemption continues once the CBA has expired,[168] a question that remained unanswered after the *Mackey* decision.[169] The district court held that the exemption continues until an "impasse"[170] is reached between the bargaining parties. A later

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former. *Id.* at 348-49 n.57. In 1977, Norm Thompson moved from the St. Louis Cardinals to the Baltimore Colts in exchange for a third round draft choice; in 1988, Wilbur Marshall moved from the Chicago Bears to the Washington Redskins in exchange for two first round draft choices. *Id.* It is interesting to note that the cost for Marshall was not too onerous since the Redskins, as Super Bowl champions the year before, surrendered the last draft choice of the first round. STAUDOHAR, *supra* note 56, at 89; *see also* Leigh Steinberg, *Negotiating Contracts in the National Football League, in* LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 99, § 6.02[1][b][ii]-[iii], at 6-5 to -6 (discussing lack of free agent movement from 1989-1991). Such repercussions have helped spark recent court actions against the NFL. *See infra* notes 162-92 and accompanying text.

162 Lock, *supra* note 159, at 367.

163 James D. McFarland, *Views of Sport; Strike Aftermath: The Union's Next Step*, N.Y. TIMES, Oct. 18, 1987, § 5, at 13.

164 *See infra* note 165 and accompanying text.

165 678 F. Supp. 777 (D. Minn. 1988), *rev'd*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991) [hereinafter *Powell I*].

166 *Id.* at 779.

167 *Id.* at 783. The court refused to "extend indefinite, blanket protection to union-employer agreements merely because the challenged activity [arose] within the context of mandatory collective bargaining." *Id.*

168 *Id.*; *see also* Lock, *supra* note 159 (court declined to address result of expiration of agreement on labor exemption); Hobel, *supra* note 6, at 195-98 (suggesting that expiration date does not trigger retraction of labor exemption); *Releasing Superstars*, *supra* note 12, at 888-94 (discussing whether labor exemption should continue after expiration of CBA).

169 543 F.2d 606, 616 n.18 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). "[W]e need not decide whether the effect of an agreement extends beyond its formal expiration date for purposes of the labor exemption." *Id.*

170 *Powell I*, 678 F. Supp. at 788. Impasse occurs when good faith negotiations fail to create an agreement between the parties. *Id.* at 784 n.15.

hearing established that an impasse had indeed been reached in *Powell*.[171]

The Eighth Circuit reversed, however, finding that an impasse is not the endpoint of the exemption.[172] Even if it were, the court noted that an impasse had not been reached.[173] The court held that as long as an "ongoing collective bargaining relationship" exists, the exemption may continue.[174]

In response, the NFL Players' Association decertified and ceased to act as the collective bargaining unit for the players.[175] This was achieved through a vote of 62% of the active union members.[176] In a later proceeding, the *Powell* court determined that the "ongoing collective bargaining relationship" was nonexistent;[177] therefore, the NFL no longer had the benefit of the nonstatutory labor exemption.[178]

While the *Powell* appeal was pending, the NFL owners unilaterally altered the existing free agent system, creating Plan B.[179] Under Plan B, each team was allowed to reserve thirty-seven players on their roster who were subject to the Right of First Refusal/Compensation System.[180] Those not reserved became un-

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171 Powell v. NFL, 711 F. Supp. 959, 961 (D. Minn.), *rev'd*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991) [hereinafter *Powell III*]. The district court set the date of impasse at June 17, 1988. *Id.* The court denied the players' request for a preliminary injunction against the player restraints. Powell v. NFL, 690 F. Supp. 812, 818 (D. Minn. 1989)[hereinafter *Powell II*].

172 Powell v. NFL, 930 F.2d 1293, 1302 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991) [hereinafter *Powell*].

173 *Id.* at 1304 n.2.

174 *Id.* at 1303-04. The implication of this statement is that the mere presence of an active union may protect the restraints from antitrust liability. *See id.* The dissent, however, stressed that union *approval*, as opposed to mere *involvement*, should be determinative. *Id.* at 1305 (Heaney, J., dissenting) (emphasis added); *see Releasing Superstars*, *supra* note 12, at 885 (criticizing *Powell* and arguing that union consent should determine applicability of exemption).

175 Powell and McNeil v. NFL, 764 F. Supp. 1351, 1356 (D. Minn. 1991) [hereinafter *McNeil I*] (detailing decertification process).

176 *Id.* The court also held that a formal decertification process was not necessary to end the collective bargaining relationship; rather, rejection by a majority of employees was enough. *Id.* at 1358. This analysis was posed by the dissent in *Powell*, but not answered. *Powell*, 930 F.2d at 1305 (Heaney, J., dissenting).

177 *McNeil I*, 764 F. Supp. at 1358. The NFL took advantage of the situation by altering insurance benefits and extending the season. *Id.* at 1359. These actions would not have been possible if a collective bargaining relationship existed. *Id.*

178 *Id.*

179 *See* Lock, *supra* note 159, at 347.

180 *See* Steinberg, *supra* note 161, § 6.02[1][b], at 6-4; *see also* 1982 NFL AGREEMENT, *supra* note 158, at art. XV, *reprinted in* BERRY & WONG, *supra* note 58, § 3.44, at 185-86 (detailing compensation system).

restricted free agents.[181] Plan B was somewhat beneficial to the players, particularly in terms of salaries.[182]

The players again commenced suit in *McNeil v. NFL*.[183] The court rejected the NFL's "single entity" defense—that its member clubs act as a single economic unit, and thus, could not form illegal combinations.[184] The players' request for per se scrutiny of Plan B was also rejected.[185] After a lengthy trial, the jury found the restraints to be excessive and returned a verdict in favor of the players.[186] The jury, however, acknowledged that some restrictions should still be allowed.[187]

Immediately thereafter, ten free agents filed suit seeking to declare themselves free of the Plan B restrictions.[188] The district court enjoined the NFL from using Plan B against the players for a period of five days.[189] During those five days the players were free to sign with other teams and three of them did.[190]

Reggie White of the Philadelphia Eagles then brought a class action suit against the NFL, asking that all players whose contracts were to expire on February 1, 1993 be declared unrestricted

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181 Steinberg, *supra* note 161, § 6.02[1][b], at 6-4. Plan B players were free to move from February 1 to April 1. *Id.* Although some players gained freedom, over 1000 players, most of them high-profile players, did not. *Id.*

182 Ian C. Pulver, *A Face Off Between the National Hockey League and the National Hockey League Players' Association: The Goal a More Competitively Balanced League*, 2 MARQ. SPORTS L.J. 39, 59 (1991) (quoting M.J. Duberstein, *Plan B Unrestricted Players: The Two Year Record*, SIGNALS, Pub. No. 1, National Football League Players' Association 18 (Winter 1990-91)). Those who moved via Plan B in 1989 and 1990 saw their salaries improve by 61%. *Id.* By extension, reserved players also saw their salaries increase. *See* WILLIAM J. BAUMOL & ALAN S. BLINDER, ECONOMICS PRINCIPLES AND POLICY 819 (1988) (monopsonist must raise wage rate when taking on another employee); Steinberg, *supra* note 161, § 6.02[1][b][ii], at 6-5.

183 McNeil v. NFL, 790 F. Supp. 871 (D. Minn. 1992) [hereinafter *McNeil II*].

184 *Id.* at 880; *see supra* note 65 (discussing "single entity" defense).

185 *McNeil II*, 790 F. Supp. at 897; *see supra* notes 24-26 and accompanying text (noting per se violations of Sherman Act).

186 Bob Oates, *Analysis, Will NFL Have to Go to Plan C?*, L.A. TIMES, Sept. 11, 1992, at C1. All told, there were 32 witnesses and 1700 pieces of evidence. *Id.*

187 *Id.*

188 Jackson v. NFL, 802 F. Supp. 226, 228 (D. Minn. 1992).

189 *Id.* at 235. At the end, only four players remained: Keith Jackson, Webster Slaughter, Garin Veris, and D.J. Dozier. *Id.* at 228. The other six were freed from their respective teams' reserved lists by being traded or released. *Id.*

190 Don Pierson, *Long Wait Begins in the NFL: Freed Players Start to Move*, CHI. TRIB., Sept. 30, 1992, at C1. Jackson signed with the Miami Dolphins, Slaughter with the Houston Oilers, and Veris with the San Francisco 49ers. *Id.* Dozier was released by the Detroit Lions. *Id.*

free agents.[191] The suit settled, and the longstanding struggle between the NFL and its players was finally resolved in a new CBA, with a liberalized system of free agency.[192]

3. Hockey

The NHL unilaterally introduced a free agent compensation system after its perpetual reserve system was struck down.[193] That system was indistinguishable from the Rozelle Rule[194] except for one key difference: if the teams could not agree on the amount of compensation, a neutral, binding arbitrator would make the final decision.[195] In *McCourt v. California Sports, Inc.*, a player sued to enjoin the league from enforcing such an arbitration award.[196] The NHL defended its compensation system by claiming immunity from antitrust liability through the nonstatutory labor exemption.[197] The district court held the exemption inapplicable because the third prong of the *Mackey* test, that the agreement come from bona fide, arms-length negotiating, was not satisfied by a system thrust upon a weak union with little or no bargaining power.[198] The court also rejected the NHL's contention

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191 Shapiro, *supra* note 8. Nearly 300 players would have become unrestricted free agents. *Id.*

192 *See infra* notes 304-27 and accompanying text (discussion of new NFL agreement).

193 WEISTART & LOWELL, *supra* note 23, § 5.06, at 93; *see also supra* notes 104-10 and accompanying text (discussing elimination of NHL reserve system).

194 *See supra* notes 140-41 and accompanying text (detailing Rozelle Rule).

195 STAUDOHAR, *supra* note 56, at 150. Under the Rozelle Rule, the commissioner made the ultimate decision if an agreement could not be reached. *See supra* note 140 (language of Rozelle Rule).

196 460 F. Supp. 904 (E.D. Mich. 1978), *vacated*, 600 F.2d 1193 (6th Cir. 1979). An arbitrator decided that the Detroit Red Wings had to give up Dale McCourt as compensation for signing goaltender Rogie Vachon of the Los Angeles Kings. *McCourt*, 600 F.2d at 1196. As a rookie, McCourt led the Red Wings in scoring. *Id.* McCourt refused to report to the Kings and brought suit. *Id.*

197 *McCourt*, 460 F. Supp. at 910.

198 *Id.* at 910-11. Judge DiMascio stated:

> The 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 evidence establishes that the bylaw was unilaterally imposed upon the NHLPA and was incorporated into the collective bargaining agreement in the identical language it contained when it was first adopted by the League.
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> . . . .
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> . . .[T]he mere inclusion of bylaw 9A in the collective bargaining agreement cannot serve to immunize it from antitrust sanctions. The evidence . . . persuades us that the parties did not collectively bargain for bylaw 9A.

Id.

that the players received valid consideration for the inclusion of the system in the CBA.[199]

Although there was considerable evidence to show that the players did not want this system,[200] the Sixth Circuit reversed, finding that the third prong of the *Mackey* test had been satisfied; the players bargained against the system and lost fairly.[201] Furthermore, unlike the district court, the Sixth Circuit found that the NHL owners provided consideration to the players in exchange for their acceptance of the system, in that the players were given the option to terminate the agreement if the NHL merged with the WHA.[202] *McCourt* was thus distinguishable from *Mackey* since the disputed restraint was specifically included in the CBA.[203]

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[199] *Id.* at 911. "The bylaw was included in the collective bargaining agreement to give the impression that it was a bargained-for provision." *Id.*

[200] *McCourt*, 600 F.2d at 1202-03.

> It is apparent from those very findings that the NHLPA used every form of negotiating pressure it could muster. It developed an alternate reserve system . . . only to have the proposal rejected by the players. It refused to attend a proposed meeting with the owners to discuss the reserve system further. It threatened to strike. It threatened to commence an antitrust suit and to recommend that the players not attend training camp.

Id. at 1202.

[201] *Id.* at 1203. Judge Engel reasoned:

> [T]he inclusion of the reserve system in the collective bargaining agreement was the product of good faith, arm's-length bargaining . . . . [W]hat the trial court saw as a failure to negotiate was in fact simply the failure to succeed, after the most intensive negotiations, in keeping an unwanted provision out of the contract. This failure was a part of and not apart from the collective bargaining process . . . .

Id. The fact that one side prevailed does not mean that good faith negotiations did not take place. *Id.* at 1200 (citation omitted); *see* National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1992) ("[S]uch obligation [to bargain collectively] does not compel either party to agree to a proposal or require the making of a concession . . . .").

[202] *McCourt*, 600 F.2d at 1202.

[203] Robert C. Berry & William B. Gould, *A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls and Strikes*, 31 CASE W. RES. L. REV. 685, 769 (1981). "*McCourt* had the . . . distinction of being the first major sports case to confront the labor exemption when the clause in controversy was specifically incorporated into the league's collective bargaining agreement." *Id.*

Even after he lost on appeal, McCourt refused to go to Los Angeles. Pulver, *supra* note 182, at 39, 46-47. The Los Angeles Kings and Detroit Red Wings ultimately agreed on a different compensation package consisting of a player and two draft choices. *Id.*

The case generated a significant amount of commentary. *See* Christopher B. Andrews, Note, *Labor Exemption to the Antitrust Laws, Shielding an Anticompetitive Provision Devised by an Employer Group in Its Own Interest:* McCourt v. California Sports, Inc., 21 B.C. L. REV. 680 (1980); Douglas A. Econn, Note, *Servitude in Professional Sports*—McCourt v. California Sports, Inc., 2 WHITTIER L. REV. 559 (1980);

With several modifications, hockey emerged from its most recent strike with a new compensation system.[204] Players are now placed into three age groups.[205] Group I contains the youngest players, who may choose whether their former team is entitled to draft pick compensation, or as in *McCourt*, allow an arbitrator to select one of the club's compensation offers.[206] Group II players have the same option,[207] however, in this category, compensation is determined by the player's new salary.[208] Group III players are unrestricted and no type of compensation for the former team is required.[209]

Due to the potential unfairness with this approach,[210] it is submitted that the NHL should allow arbitrators to determine the

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Paul L. Nelson, Note, *Professional Sports and the Nonstatutory Labor Exemption to Federal Antitrust Law:* McCourt v. California Sports, Inc., 11 U. TOL. L. REV. 633 (1980).

204 *Players are the Big Winners*, THE SPORTING NEWS, Apr. 20, 1992, at 51.

205 *Id.* Group I consists of players who are 24 years of age or younger; Group II is comprised of players from 25-29 years of age; and Group III is composed of players who are 30 years of age or older. *Id.*

206 *Id.* If a Group I player chooses to entitle his former team to draft pick compensation, his old team also receives a right of first refusal. *Id.*

207 *Id.* The former team gets a right of first refusal no matter what choice a Group II player makes. *Id.* If the player signs for less than $350,000 a year, however, no right of first refusal is allowed. *Id.*

208 *Id.* Draft pick compensation for Group II players is tied directly to the players' new salary:

New Salary (Year)	Compensation
Under $200,000	None
$200,000 - $250,000	One third round pick
$251,000 - $350,000	One second round pick
$351,000 - $500,000	One first round pick
$501,000 - $1,000,000	Two first round picks
Over $1,000,000	Three first round picks.

Id.

209 *Id.*

210 Pulver, *supra* note 182, at 49 n.56 (citing NHL BY-LAW § 9A.8(c)). The potential unfairness can best be seen in the Brendan Shanahan-Scott Stevens case. *Id.* at 49-51, 86-87. The St. Louis Blues surrendered five first round draft picks as compensation for signing Stevens from the Washington Capitals in 1990. *Id.* at 52. The following year, they signed Shanahan from the New Jersey Devils. *Id.* at 49. The Blues and Devils could not agree on compensation so the matter went before an arbitrator. *Id.* at 49-50. The Devils asked for Stevens while the Blues offered a combination of players and draft choices. *Id.* The arbitrator, bound to choose one side or the other, sent Stevens to New Jersey. *Id.* at 50. The Blues' final price for Shanahan was five first round draft choices plus Scott Stevens. *Id.* at 86; *see also* Bob Verdi, *Blues Pay Dearly for 'Free' Agent*, CHI. TRIB., Sept. 5, 1991, at 1 (criticizing NHL arbitration system).

compensation required for signing Group I players, rather than forcing them to select one of the club's offers.

4. Basketball

The NBA is the only professional sports league where a player's former team receives no free agent compensation.[211] Free agents are classified into two groups: restricted and unrestricted.[212] Restricted free agents are those who have not fully performed two player contracts[213] and have less than four years of NBA service at the end of the 1992-93 season.[214] These players are subject to a right of first refusal whereby a former team can match any offer a player receives and retain that player's services.[215] All other players are unrestricted and are free to move as they wish.[216]

C. *The Collegiate/Amateur Draft*

A draft is the process of selection of amateur players by professional teams.[217] Generally, teams with poorer records pick before those with better records.[218] The purpose of this is to help improve the weaker teams so that the league may become more

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211 BERRY & WONG, *supra* note 58, § 3.45, at 190. The issue of free agent compensation was not discussed in Robertson v. NBA since its details were not in the record. 389 F. Supp. 867, 891 (S.D.N.Y. 1975); *see supra* notes 116-22 and accompanying text (discussing *Robertson*).

212 1988 NBA AGREEMENT, *supra* note 123, at art. V, *reprinted in* LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 99, at 7-68.

213 *Id.* § 1(b), at 7-69. If a player receives a negotiated extension of his first contract, for purposes of determining his free agency status, he is deemed to have performed one contract and remains restricted. *Id.* § 1(c), at 7-69.

214 *Id.* § 1(a)(1)(vi), at 7-68; *see id.* § 1(a)(2), at 7-68 to -69 (calculating years of service).

215 *Id.* § 3(a)-(f), at 7-70 to -71. To be able to exercise its right, the former team must make a Qualifying Offer to the player before July 1. *Id.* § 3(a)-(b), at 7-70. The offer must include a one year slot at a salary of at least 125% of the salary paid in the last year of the player's previous contract, or $250,000, whichever is greater. *Id.* § 3(b), at 7-70. If a player receives an offer from a different team, he must submit it to his former team. *Id.* § 5, at 7-71. If his former team does not match the offer within fifteen days, the player is deemed to have entered into a binding contract with the new team. *Id.* § 5(b), at 7-71.

216 *Id.* § 2(c)(6), at 7-69 to -70. A powerful limitation on widespread player mobility is the salary cap, which limits the amount of money each NBA team can spend on player salaries. *See id.* at art. VII, at 7-77 to -95; *see also infra* notes 277-83 and accompanying text (broad discussion of salary cap).

217 WEISTART & LOWELL, *supra* note 23, § 5.03, at 504.

218 *Id.*

competitive.[219] Once chosen, a player can negotiate only with the team that selected him.[220] It has been argued that this restriction acts as a group boycott of the player,[221] thus violating the Sherman Act.[222]

The first case to address the draft issue was *Smith v. Pro-Football, Inc.*[223] James (Yazoo) Smith was drafted as the twelfth pick in the first round of the 1968 draft by the Washington Redskins.[224] Although Smith signed a one year contract, his career ended after the 1968 season due to a neck injury.[225] Smith claimed that he would have earned more money, with possible guaranteed payments for injuries, had he been free to negotiate with any team.[226]

The district court condemned the draft as a group boycott, a per se violation of the Sherman Act.[227] Since Smith was drafted before a CBA was in place, the nonstatutory labor exemption could not be applied.[228] Furthermore, the *Smith* decision preceded the Eighth Circuit's determination in *Mackey* that a Rule of Reason analysis should be applied to player restraints.[229] The court noted, however, that even under a Rule of Reason approach, the draft did not pass muster.[230] Accordingly, the court suggested

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219 *Id.*; *see* Zollers, *supra* note 157, at 147-48.

220 Smith v. Pro-Football, 420 F. Supp. 738, 741 (D.D.C. 1976), *modified*, 593 F.2d 1173 (D.C. Cir. 1978). The drafted player faces a monopsony, in which there is only one buyer for his services. *See* JACK HIRSHLEIFER, PRICE THEORY AND APPLICATIONS 304 n.1 (1984). This should be distinguished from a monopoly, which is a lone *seller* of goods or services. *Id.* A monopsonist pays lower wages than a perfect competitor. *See* BAUMOL & BLINDER, *supra* note 182, at 819.

221 *See Smith*, 420 F. Supp. at 746 (draft system "utterly strips [players] of any measure of control over the marketing of their talents").

222 *See, e.g.*, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959) (defining scope and forbidden status of group boycotts).

223 420 F. Supp. 738 (D.D.C. 1976), *modified*, 593 F.2d 1173 (D.C. Cir. 1978).

224 *Id.* at 740.

225 *Id.* at 740-41.

226 *Id.* at 741.

227 *Id.* at 744. "This outright, undisguised refusal to deal constitutes a group boycott in its classic and most pernicious form, a device which has long been condemned as a *per se* violation of the antitrust laws." *Id.* (citations omitted).

228 *Smith*, 420 F. Supp. at 742; *see also Kapp*, 390 F. Supp. at 85-86 (player not bound by retroactive application of CBA). *See generally supra* notes 12-16 (discussing nonstatutory labor exemption).

229 *See supra* note 154 and accompanying text (discussing *Mackey* and Rule of Reason).

230 *Smith*, 420 F. Supp. at 745. The NFL claimed that in the absence of a draft, the more talented players would flock to the wealthy teams. *Id.* at 745-46. The league contended, therefore, that the draft was indispensable to maintaining the "competi-

less restrictive draft alternatives which might survive such a standard.[231]

The Court of Appeals for the District of Columbia Circuit, having had the benefit of the *Mackey* opinion, rejected the per se holding of the lower court.[232] The court found that the draft differed from a group boycott in two ways: (1) NFL teams are not pure competitors, but more like joint venturers;[233] and (2) the draft was designed to be procompetitive rather than anticompetitive.[234] The *effect* of the draft *as applied*, however, was deemed to be an unreasonable restraint of trade, by "eliminat[ing] economic competition among buyers for the services of sellers."[235] In addition, any alleged procompetitive effects were athletic and not economic, so the Rule of Reason balancing test could not help the NFL.[236] Nevertheless, the court conceded that some form of draft system was necessary.[237]

While *Smith* was on appeal, the NFL and the union reached an agreement on draft provisions.[238] The most notable changes

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tive balance" needed to attract and hold spectator interest. *Id.* The court, skeptical of these claims, stated that the draft was only one of many factors affecting players' decisions to play in one city rather than another and that, as it stood, the draft was too restrictive. *Id.* at 746.

231 *Id.* at 747. For example, at the time of *Smith*, a draft consisting of two rounds instead of the seventeen would be less restrictive. *Id.* Although the court conceded that draft restraints may be needed to insure that the best players are distributed throughout the league, a less restrictive draft with only two rounds would affect only 56 players, as opposed to the 476 players by a seventeen round draft. *Id.*

The court also suggested allowing several teams to draft a particular player while restricting the number of players each team could sign. *Id.* Each player could then decide which offer to accept, allowing for a "more [expanded] free market system for determining new-player salaries." *Id.*

232 Smith v. Pro-Football, Inc., 593 F.2d 1173, 1178 (D.C. Cir. 1978).

233 *Id.* at 1179; *see also* Mackey v. NFL, 543 F.2d 606, 619 (8th Cir. 1976) (noting joint venture characteristics of NFL), *cert. dismissed*, 434 U.S. 801 (1977).

234 *Smith*, 593 F.2d at 1179. "The draft . . . is designed not to insulate the NFL from competition, but to improve the entertainment product by enhancing its teams' competitive equality." *Id.* (footnote omitted).

235 *Id.* at 1186.

236 *Id.* "Because the draft's 'anticompetitive' and 'procompetitive' effects are not comparable, it is impossible to 'net them out' in the usual rule-of-reason balancing." *Id.*

237 *Id.* at 1187 ("[W]e do not foreclose the possibility that some type of player selection system might be defended as serving 'to regulate and promote . . . competition' in the market for players' services." (quoting National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 696 (1978))).

238 *See* Jeffrey D. Schneider, Note, *Unsportsmanlike Conduct: The Lack of Free Agency in the NFL*, 64 S. CAL. L. REV. 797, 812 (1991) (draft system one of many issues on which players "caved in").

were the twelve-round limit[239] and the nonperpetual right of exclusive negotiation.[240] These changes alone would not insulate the draft from antitrust scrutiny; however, presuming that the *Mackey* test was satisfied by the collective bargaining that brought about the draft agreement,[241] the nonstatutory labor exemption would apply and preclude antitrust inquiry.[242]

The basketball draft was challenged in *Robertson v. NBA*.[243] The court's preliminary determination was that the draft acted as a group boycott, a per se violation of the Sherman Act.[244] The case eventually settled, however, and as part of the settlement, the parties agreed that a player who could not reach an agreement with the team which drafted him would be permitted to re-enter the draft the following year.[245] Thus, a player is no longer required to negotiate with the team that drafted him for more than one year.[246]

Beginning in 1988, the number of draft rounds was reduced to three and currently stands at two, as mandated by the most recent CBA.[247] Interestingly, the district court in *Smith* posited that a two-round draft would be a less restrictive means of distributing

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239 *Id.* at 812 n.110. The new NFL Agreement establishes a seven-round limit starting in 1994. 1993 NFL AGREEMENT, *supra* note 131, at art. XVI, § 2.

240 *See* Zollers, *supra* note 157, at 148. The drafting team has exclusive negotiating rights for one year at the end of which the player may re-enter the draft if unsigned. *Id.* If he remains unsigned after the second draft, he becomes an unrestricted free agent who may contract with any team. *Id.*; *see also* 1993 NFL AGREEMENT, *supra* note 131, at art. XVI, §§ 4(b), 8 (containing same provisions).

241 Mackey v. NFL, 543 F.2d 606, 614 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *see also supra* notes 155-56, 159 and accompanying text (discussing *Mackey* test).

242 *See Mackey*, 543 F.2d at 613; *see also supra* notes 12-16 and accompanying text (detailing nonstatutory labor exemption).

243 389 F. Supp. 867, 891 nn.43-44, 892 (S.D.N.Y. 1975).

244 *Id.* at 893. The court noted Justice Douglas' reinstatement of a preliminary injunction against the NBA's "Four-year Rule," which prohibited contract negotiations with a player who had graduated from high school within the previous four years. *Id.* at 893-94 n.48 (citing Haywood v. NBA, 401 U.S. 1204 (Douglas, Circuit Justice, 1971)).

245 STAUDOHAR, *supra* note 56, at 120.

246 *Id.* The draft was unsuccessfully challenged by a player who joined the NBA after the 1983 Agreement was ratified. Wood v. NBA, 602 F. Supp. 525 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954 (2d Cir. 1987). The basis of the suit was that he could not be bound by an agreement that he was not a party to. *Id.* at 529.

247 1988 NBA AGREEMENT, *supra* note 123, at art. IV, § 1(a), *reprinted in* LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 99, at 7-64.

talent by limiting the number of players who would be obligated to negotiate with only one club.[248]

III. Economics and Competitive Balance

The justification for restraints on player mobility is the fear that absent such restrictions, players would migrate to wealthy big city teams, damaging the league's competitive balance.[249] This result is predicated on the economic theory of wage determination in professional sports, which dictates that players' salaries are a product of the net revenue they create for their teams.[250] Teams become wealthy through increased revenue, which in turn, directly relates to the quality of the team's play.[251] As a result, these wealthier teams will attract the quality free agents.[252] Whether this analysis is accurate, however, is debatable.

A. Economic Developments Pertaining to Free Agency

1. Team Owners as Profit Maximizers

A typical profit-maximizing monopsonist will purchase labor until the marginal revenue product of the additional unit of labor equals its marginal factor cost.[253] Marginal revenue product (MRP) refers to the increased benefit, through revenue, of the additional labor unit.[254] Marginal factor cost (MFC) is the increase in cost, mostly through salary, of the additional unit.[255]

In the sports world, it is possible, indeed probable, that there are team owners who would place success on the field ahead of profits, signing free agents whose MFC exceeds MRP.[256] Although this notion tends to detract from the proposition that

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248 *Smith*, 420 F. Supp. at 747.

249 *See, e.g.*, Reynolds v. NFL, 584 F.2d 280, 287 (8th Cir. 1978) (complete freedom of movement would result in best franchises acquiring most of top players); *Mackey*, 543 F.2d at 621.

250 Roger G. Noll, *The Economics of Sports Leagues, in* Law of Professional and Amateur Sports, *supra* note 99, § 17.03[4], at 17-25.

251 *Id.*

252 *Id.*

253 Hirshleifer, *supra* note 220, at 348.

254 *Id.*

255 *Id.*

256 *See Smith*, 420 F. Supp. at 746. "According to this argument, the owners . . . [would] not care if they [lost] money on the operation of their teams, as long as they [won] games, i.e. they do not conform to the principles of economic decision-making upon which the antitrust laws are premised." *Id.*

such owners are typical profit maximizers,[257] such doubt is alleviated by recognition that success on the field has its long-term economic advantages.[258] It is submitted that an owner may accept short-term economic losses in the hope that playing success will increase revenues in the future, effectively paying off the earlier investment. Consequently, it is suggested that owners are long-term profit maximizers, and that, whether player restraints exist or not, players will still move to wealthier markets.

For example, suppose a third baseman on the Houston Astros has a salary of $750,000 and brings in $1 million in revenue. The Boston Red Sox conclude that the same player could produce $2 million in revenue for them. Assuming that both teams are profit maximizers, in an unrestricted system, the Red Sox will sign the player for some salary over $1 million, since Houston cannot pay more than $1 million and make a profit on the player. Consequently, Houston would lose the $250,000 in profit the player creates.

Similarly, under the restraint of the free agent compensation system, Houston will accept some amount above $250,000 for the loss of the player. If Boston pays $500,000, Houston would still make money even without the player. Boston would benefit as well, since its marginal costs would still be less than $2 million. The payment to Houston, however, would probably reduce the salary paid to the player. As far as the teams are concerned, the only difference in the two scenarios is the benefit, or lack thereof, to the former team.[259]

2. Equality of Revenue in the NFL

A successful team will have higher attendance figures, and consequently, higher revenues[260] over subsequent seasons.[261] A

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257 David Mills, *The Blue Line and the Bottom Line: Entrepreneurs and the Business of Hockey in Canada, 1927-90, in* THE BUSINESS OF PROFESSIONAL SPORTS 175, 192-93 (Paul D. Staudohar & James A. Mangan eds. 1991) (discussing Edmonton Oilers owner Peter Pocklington and his desire to place profits before performance).

258 *See* Noll, *supra* note 250, § 17.03[1], at 17-15.

259 *Id.* § 17.03[4], at 17-25 to -26.

260 WEISTART & LOWELL, *supra* note 23, § 5.07, at 595 (citing HENRY DEMMERT, THE ECONOMICS OF PROFESSIONAL TEAM SPORTS 11 (1973)). Professor Demmert divided the 1971 baseball teams into two groups based on their won-lost records: good and poor. *Id.* An analysis of the attendance figures of various games yielded the following results:

notable exception to this rule can be found in the NFL,[262] where all teams share television and merchandising revenue equally.[263] In addition, the visiting team is entitled to 40% of gate receipts.[264] This has resulted in a distribution of revenue ranging from $43-$47 million per year per team.[265] It has been argued that equalizing revenue reduces the incentive for owners to improve their clubs because future success will not lead to significantly higher revenues.[266] Although this argument is valid, it is submitted that the NFL posture is preferable to that of major league baseball's, where wide disparities in revenue inhibit certain teams from signing necessary players, thus preventing improvement on the field.[267]

3. Player Salaries in Baseball

Free agency has helped fuel the dramatic rise in player salaries since 1976.[268] This increase was tempered in the mid-80's through illegal collusive agreements between the owners not to

Visiting Team	Home Team	Avg. Attendance
Good	Good	24,610
Poor	Good	16,066
Good	Poor	11,349
Poor	Poor	9,806

Id. As can be seen, a good team attracts more fans, whether at home or on the road. *See id.*

261 Noll, *supra* note 250, § 17.03[1], at 17-15.

262 *Id.* § 17.02[1], at 17-6. "In general, the profitability of football teams is not closely correlated with their success on the playing field or even their total revenues." *Id.*

263 Mike Dorning, *Hockey Touted as Growth Sport of the 90's*, CALGARY HERALD, Oct. 11, 1992, at F7.

264 *Id.*

265 *Id.*

266 Lock, *supra* note 159, at 358 n.108; *see supra* note 261 and accompanying text.

267 *See infra* notes 320-23 and accompanying text (discussing baseball's revenue structure and proposing revenue sharing system).

268 Pulver, *supra* note 182, at 64. "[T]he implementation of a free agent system has had a direct effect on the escalation of player salaries in Major League Baseball." *Id.* The following table shows the trend in average salaries.

bid on free agents in an effort to keep salaries down.[269] The current CBA includes a provision specifically forbidding such actions.[270] If baseball owners are profit maximizers, then the revenues produced by free agents should still exceed costs, even at these higher salaries.[271]

An issue which needs to be addressed, however, is the tremendous difference in local television broadcasting revenues around the league.[272] With player costs in baseball reaching sev-

Year	Average Salary	Percent Change
1976	51,500	12.0
1977	76,066	47.7
1978	99,876	31.3
1979	113,558	13.7
1980	143,756	26.6
1981	185,651	29.1
1982	241,497	30.1
1983	291,108	20.5
1984	329,408	13.2
1985	371,157	12.7
1986	410,517	10.6
1987	402,094	–2.1
1988	449,826	11.9
1989	497,254	10.5*
1990	597,537	20.2*
1991	851,492*	42.5*
1992	1,012,424*	18.9*
1993	1,120,247*	10.6*

* calculations performed by author

Id. at 64 n.126 (reporting 1976-1990 salary figures); *Six Times a Whopper for Bobby B.*, THE SPORTING NEWS, Dec. 16, 1991, at 31 (reporting 1991 salary figure); *Seventy-one Players in $3 Million League*, CHI. TRIB., Dec. 17, 1992, at N3 (reporting 1992 salary figure); Phil Rogers, *Fighting Off Curveballs; Despite Dire Predictions, Baseball Still A Hit*, DALLAS MORNING NEWS, Oct. 17, 1993, at 1A (reporting 1993 salary figure).

269 STAUDOHAR, *supra* note 56, at 40-41. For their actions, the owners were ordered by an arbitrator to pay over $100 million in damages. *See* Ross Newhan, *Owners' Penalties Multiply; Collusion: Second Ruling by Baseball Arbitrator Puts the Fine at $102.5 Million*, L.A. TIMES, Sept. 18, 1990, at C1. In addition to fining the owners, earlier collusion rulings reinstated the free agency status of some players so that other teams could take a "new-look" at them. *Id.* For example, "new-look" free agency allowed Kirk Gibson to leave the Detroit Tigers and sign with the Los Angeles Dodgers. *Id.*

270 1990 MLB AGREEMENT, *supra* note 99, at art. XX, § F, *reprinted in* LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 99, at 5-69 to -71.

271 *See supra* notes 253-59 and accompanying text.

272 Jerome Holtzman, *In Cost Squeeze, Baseball Charting the Unknown*, CHI. TRIB., Oct. 4, 1992, at C1 (listing each baseball team's annual local television revenue).

enty percent of revenue,[273] it is suggested that some form of revenue sharing is needed so that certain teams do not become permanently mired in mediocrity by being unable to afford the higher salaries of better players.[274] Presently, there are some indications that the owners are moving towards such a system.[275]

4. The Salary Cap in the NBA

In an effort to control salaries, proposals have been made to limit the amount a team may spend.[276] The NBA currently uses such a system,[277] reserving 53 percent of the league's gross revenues for salaries.[278] That amount, after some minor deductions, is divided evenly among the teams to determine what each may spend.[279] There are certain exceptions, however.[280] The most notable allows teams to exceed the cap when resigning their own free agents.[281] No such exception exists regarding free agents from other teams.[282] Despite the liberal rules governing mobility, this salary cap effectively limits free agent movement in the NBA.[283]

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273 *Id.*

274 Peter Gammons, *It's Back to Square One for the Pirates*, BOSTON GLOBE, Nov. 8, 1992, at 55 (tracing dismantling of three time National League East champion Pittsburgh Pirates due to insufficient revenue to sign all-star free agents); Ray Parisi, Jr., *Pirates Trade Lind, Waive Four Players*, WASH. TIMES, Nov. 20, 1992, at D4 (same).

275 *Sportscenter* (ESPN television broadcast, Feb. 23, 1993) (Peter Gammons, Diamond Notes).

276 *See* Pulver, *supra* note 182, at 83-84 (discussing salary cap in hockey); Murray Chass, *For Baseball, the Worst of Times May Come After the Best of Seven*, N.Y. TIMES, Oct. 19, 1992, at 154 (discussing salary cap in baseball); Manny Topol, *Tagliabue: Cap Yes, Four-Year Plan No*, N.Y. NEWSDAY, Oct. 22, 1992, at 154 (discussing salary cap in football).

277 *See* 1988 NBA AGREEMENT, *supra* note 123, at art. VII, *reprinted in* LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 99, at 7-77 to -95.

278 *See id.* at Part D, § 1(b).

279 *Id.*

280 *Id.* at Part F, §§ 1-7.

281 *Id.* § 1(b)(3)(d).

282 1988 NBA AGREEMENT, *supra* note 123, at art. VII, Part F, § 1(b)(3)(d), *reprinted in* LAW OF PROFESSIONAL AND AMATUER SPORTS, *supra* note 99, at 7-89.

283 *See supra* notes 211-16 and accompanying text (detailing NBA free agency rules). Indeed, the salary cap has been criticized for this reason. *See* D. Albert Daspin, *Of Hoops, Labor Dupes and Antitrust Ally-Oops: Fouling Out the Salary Cap*, 62 IND. L.J. 95, 104-06 (1986); Scott J. Foraker, Note, *The National Basketball Association Salary Cap: An Antitrust Violation?*, 59 S. CAL. L. REV. 157, 172-73 (1985).

The cap's effect on competition has also been debated. *Compare* Charles Grantham, *Dinosaur Shifts Balance to Owners*, USA TODAY, Nov. 10, 1992, at 12C (removing salary cap will increase competition) *with* Gary Bettman, *Fans Benefit from Alli-*

B. *Competitive Balance*

The pivotal question in this area is whether free agency has destroyed competitive balance. It is first noted that reserve system era mega-dynasties like the Boston Celtics, New York Yankees, and Montreal Canadiens no longer exist.[284] Additionally, by using a common statistical device, known as the standard deviation,[285] it can be shown that player mobility does not necessarily have a negative impact on competitive balance.[286] The standard deviation measures the variation in a given sample by comparing the average number of times each team should reach the semifinals under the conditions of perfect competition to the actual number of times each team made the semifinals.[287] The smaller the amount of deviation, the greater the equality in the sampled sport.[288] Examining the semifinalists for each sport from 1977 to 1992,[289] the standard deviations are as follows: baseball (1.61), football (1.78), basketball (2.60), and hockey (2.72).[290] Thus, the free agent mobility in baseball since the *Messersmith* decision has produced the greatest variety of champions.[291]

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ance, USA TODAY, Nov. 10, 1992, at 12C (using salary cap has increased competitive balance).

284 *See* Sam Smith, *Reinsdorf Warily Talks of "Dynasty"*, CHI. TRIB., Nov. 8, 1992, at 17.

285 *See* W.J. CONOVER & RONALD L. IMAN, INTRODUCTION TO MODERN BUSINESS STATISTICS 114 (1983).

286 *See infra* notes 287-91 and accompanying text.

287 *See generally* CONOVER & IMAN, *supra* note 285.

288 *Id.*

289 *See* Steven F. Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 675-76 (1989) (using standard deviation method to show greater competitive balance in baseball than in football).

290 *See* INFORMATION PLEASE ALMANAC 913-15, 923-24, 932-34, 992-94 (Otto Johnson ed., 1993) (listing semifinalists). *See generally* CONOVER & IMAN, *supra* note 285, at 114. The standard deviation is calculated as follows. First, the average number of times each team should reach the semifinals over the given period under perfect competition is established. *See id.* This average is subtracted from the actual number of times each individual team has made the semifinals. *See id.* Each result is squared and then added together. *Id.* This sum is divided by the number of teams in the league minus one. *See id.* Finally, the square root is taken. *Id.* This is the standard deviation. *Id.*

291 66 Lab. Arb. (BNA) 101 (1975) (Seitz, Arb.). Nine different teams won the ten World Series played between 1976 and 1985. WORLD ALMANAC & BOOK OF FACTS 889 (Hana U. Lane ed., 1985). The other sports with less player movement had more repeat champions. *Id.* There were three different Stanley Cup champions, five different Super Bowl champions, and six different NBA champions in the same period. *Id.* at 807, 820, 840.

Apparently, then, free agents are not going only to the wealthy teams, as the theory of wage determination in sports predicts.[292] In fact, two baseball studies concluded that a franchise's success and local population had little bearing on player movement.[293] This is further illustrated by noting that the Los Angeles Dodgers and the New York Mets, two of the wealthiest teams in baseball, had a net *loss* of free agents in the decade after *Messersmith*.[294] It is clear, therefore, that many factors affect where a player wants to go; money is helpful, but not necessarily dispositive.[295]

IV. A MODEST PROPOSAL

A. *Problems with Unrestricted Free Agency*

It is submitted that unrestricted free agency is not in the best interests of either the owners or the players.[296] Most players concede the validity of *some* restraints on player movement,[297] owing to the law of supply and demand.[298] If there were a surplus of free agents on the market each year, the excess supply would lower the prices owners would be willing to pay for player services.[299]

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292 *See supra* note 250 and accompanying text.

293 *See* Ross, *supra* note 289, at 683 (indicating there is "no systematic relationship" between team's standing and its ability to sign free agents) (citation omitted).

294 *Id.*

295 *See, e.g.*, Joseph Durso, *Mark Davis Signs with Royals for $13 Million*, N.Y. TIMES, Dec. 12, 1988, § 13, at 15. "[T]his is the fifth best offer we had, . . . if we were going for money records, we could have gone someplace else . . . . Mark always felt Kansas City was one of the leading places to play, with its ball park and the town itself." *Id.* (quoting Davis' agent); *see also* Ross, *supra* note 289, at 682 n.168.

> The simple fact is that professional athletes have as many geographical preferences as lawyers, teachers, machinists, or Congressmen. Some people want to live on the coast, some in the Midwest, and some in the South. Their choices are based on family background, where their families live, where they went to school, where they wish to raise a family, where they have educational and vocational opportunities. While obviously money is a factor, there are many others. *The primary one that I have found in talking with professional athletes is that they will go where they can perform.*

Id. (quoting Ed Garvey, former Director of the NFL Players' Association).

296 WEISTART & LOWELL, *supra* note 23, § 5.07, at 595-96.

297 *See, e.g.*, Flood v. Kuhn, 316 F. Supp. 271, 276 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972); *see also* Topol, *supra* note 276 (suggesting Reggie White publicly admitted unrestricted free agency was not what players were looking for).

298 *See* BAUMOL & BLINDER, *supra* note 182, at 62.

299 *See id.* This assumes that the owners' demand for free agents is constant. *See id.* By restricting supply, the players can keep their salaries higher. *See id.*

From the owners' perspective, free agency means many additional costs beyond player salaries. Most significant is the expense of developing a player's skills over the early part of his career.[300] In sports like football, it also means the extra time invested by teaching new players offensive and defensive systems.[301]

B. A Proposed Free Agency System

Accepting the proposition that some restrictions on player movement are necessary, the difficulty arises in delineating which restrictions should and should not continue. The proposed system which follows attempts to reach a balance between the legitimate interests of both players and owners. The newly-signed NFL agreement will be compared.[302]

1. Minimum Years of Service

A "two contract" rule is suggested, whereby a player's mobility is restricted until he has fully performed two contracts as well as five years of major league service.[303] Similarly, the NFL agreement requires five years of service, regardless of the number of contracts completed.[304]

2. Free Agent Compensation

During this restrictive period, a player is free to sign with any club, subject to the former team's right of first refusal on any offer received by the player. This right, however, may only be exercised by former teams offering a twenty percent increase over the

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300 *See, e.g.*, Mackey v. NFL, 543 F.2d 606, 621 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). This argument against free agency was explicitly rejected as an ordinary cost of business which was not unique to sports. *Id.* Nonetheless, it is a real expense and it can be substantial. Holtzman, *supra* note 272 (estimating that player-related expenses for given club consume 70% of total club revenue).

301 Don Pierson, *Miami's Shula: Witness for the Prosecution? Dolphins Quickly Reap Free Agent Reward*, CHI. TRIB., Oct. 11, 1992, at C11. Former Pittsburgh Steelers head coach Chuck Noll testified at the *McNeil* jury trial about the complexity of these systems. *Id.*

302 *See* 1993 NFL AGREEMENT, *supra* note 131.

303 *See, e.g.*, 1988 NBA AGREEMENT, *supra* note 123, at art. V, § 1(a), (b), *reprinted in* LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 99, at 7-68 to -69. This requirement is similar to the NBA rule, but with a slightly longer waiting period. *See id.*

304 1993 NFL AGREEMENT, *supra* note 131, at art. XIX, § 1(a).

player's previous salary.[305] Should the former team choose not to match an offer received by a player, that team is entitled to compensation from the new team. As in baseball, the amount of compensation will depend on how statistically successful the player has been.[306] The compensation provided will consist solely of future draft choices, with a maximum of one first round and one second round draft choice.[307] In order to limit the burden on the new club, multiple draft choices given as compensation can be exercised only in successive drafts, they cannot be used in the same draft.

In marked contrast to prior agreements, the current NFL agreement does not restrict player mobility after five years of service.[308] Teams which lose certain unrestricted free agents get compensatory picks from the league, however, which may be exercised in the latter rounds.[309] Free agents with less than five years of service are still subject to a Right of First Refusal/Compensation System.[310] It is submitted that this kind of system encourages

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305 *See* 1988 NBA AGREEMENT, *supra* note 123, at art. V, § 3(a), (b), *reprinted in* LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 99, at 7-70.

306 *See* 1990 MLB AGREEMENT, *supra* note 99, at art. XX, § B(4), *reprinted in* LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 99, at 5-65 to -66. Our system could break down players in the following manner: top 15%, 15-30%, 30-45%, and 45-60%.

307 *See* McCourt v. California Sports, Inc., 460 F. Supp. 904, 910 (E.D. Mich. 1978), *rev'd on other grounds*, 600 F.2d 1193 (6th Cir. 1979). "[A] capable, talented rookie draft choice can be as exciting as an established player and sometimes is as much an attraction for sports fans." *Id.* An analysis of the first round NHL picks from 1985-1987 shows that about 62% are currently on NHL rosters. THE HOCKEY NEWS, Nov. 6, 1992 (listing of players on NHL rosters). It is estimated that 80% of the players in the NBA were drafted in the first two rounds. STAUDOHAR, *supra* note 56, at 129.

308 1993 NFL AGREEMENT, *supra* note 131, at art. XIX, § 1(a). Free agents may sign with other clubs only from March 1 to July 15. *Id.* § 1(b)(i). The original club may offer the player a 10% salary increase on June 1, and if the player is still unsigned by July 15, he may only negotiate or sign with his original club for another year. *Id.* If he is still unsigned after the additional year, he again becomes a free agent. *Id.* § 1(b)(iii). However, the original team cannot retain him on July 15 with a salary increase. *See id.*; *see also* 1982 NFL AGREEMENT, *supra* note 158 at art. XV, *reprinted in* BERRY & WONG, *supra* note 58, § 3.44, at 185-86 (detailing compensation required for all free agents).

309 1993 NFL AGREEMENT, *supra* note 131, at art. XVI, § 2.

310 *Id.* at art. XIX, §§ 2-3. Restricted free agents may sign with new clubs from March 1 to April 23. *Id.* § 2(h). All restricted free agents are subject to a right of first refusal. *Id.* § 3(a). The former club has seven days to match the offer before losing all rights to the player who will be deemed to have entered into a binding contract with his new club. *Id.* § 3(c). The former club receives draft choice compensation which escalates in proportion to the player's new salary. *Id.* § 2(b).

wealthier teams to sign large numbers of free agents as they are not responsible for providing compensation to the player's former team. Although draft choice compensation may seem minimal to some, it is suggested that a club cannot afford to surrender too many draft choices without sacrificing its future success.[311]

Further, under the NFL agreement, each team is given the option to designate a "franchise player" who is not eligible to become a free agent for the duration of his designation.[312] This may be exercised once a year during the life of the agreement.[313] In addition, a right of first refusal can be exercised against two players in 1993, one in 1994, and one in 1999.[314]

3. Collegiate/Amateur Draft

The collegiate/amateur draft should be retained. One need only look at the dramatic turnaround of the Dallas Cowboys,[315] or the huge difference Shaquille O'Neal has made for the Orlando Magic,[316] to conclude that the draft makes losing teams successful. However, the draft as constituted need not extend beyond four or five rounds. The NFL agreement lowered the number of rounds from twelve[317] to seven.[318] As long as the best players are allocated, there is no reason to restrict the rest.[319] Furthermore, it is suggested that new, young players are more susceptible to the lure of big city money and fame than older, established players.

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311 Paul Needell, *Two Fly with Jets*, N.Y. DAILY NEWS, Mar. 9, 1993, at 56. In fact, two prominent players, Ronnie Lott and Leonard Marshall, have already signed with the New York Jets and their very wealthy owner Leon Hess. *Id.*

312 1993 NFL AGREEMENT, *supra* note 131, at art. XX, § 1. In order for a team to retain its rights to a franchise player, it must offer either a 20% salary increase or the average salary of the five highest paid players at his position, whichever is greater. *Id.* § 2(a).

313 *Id.* § 1.

314 *Id.* § 3(a). In order to exercise this right, the free agent must be offered a 20% salary increase or the average salary of the ten highest paid players at his position, whichever is greater. *Id.* § 4(a).

315 Ed Werder, *Silver Streak: This May Be a Trophy Season for the Cowboys, Who Have Used Bold Moves to Rocket Back to Prominence*, THE SPORTING NEWS, Nov. 16, 1992, at 12.

316 Harvey Araton, *Nets Control Magic, Not O'Neal*, N.Y. TIMES, Nov. 15, 1992, § 8, at 1 ("[T]he Magic is still an expansion team unless the 7-foot-1-inch rookie is throwing around his 303 pounds.").

317 Schneider, *supra* note 238, at 812 n.110.

318 1993 NFL AGREEMENT, *supra* note 131, at art. XVI, § 2.

319 *See* Smith v. Pro-Football, Inc., 420 F. Supp. 738, 747 (D.D.C. 1976), *modified*, 593 F.2d 1173 (D.C. Cir. 1978).

Allowing them pure freedom of movement could destroy competitive balance.

4. Revenue Sharing

It is submitted that free agency works best when all teams have sufficient resources to pursue players. A potential problem area is major league baseball, where local television revenues range from $3.5 million to $50 million per year, thus affecting the ability to sign free agents.[320] A possible solution is to require those teams whose local television revenue exceeds the league average of $10 million[321] to place one-half of the excess into a fund. The fund would then be distributed so that each team would receive a guaranteed minimum of $10 million. Thus, Seattle would receive $10 million instead of $3.5 million,[322] while the Yankees' $50 million[323] would become $30 million. Any funds remaining after distribution would be returned to the contributing clubs in proportion to their contribution.

5. Salary Cap

This proposal does not contemplate the existence of a salary cap.[324] It is submitted, however, that although a salary cap generally is not good for competition, it may be helpful in the NFL. As noted earlier, the current NFL agreement tends to encourage wealthier teams to sign many free agents.[325] A salary cap may help counteract this result, thus benefiting competition.

The NFL agreement has a provision which provides for automatic implementation of a salary cap starting at 64% of revenues if player costs reach 67% of revenues, a level which has not yet been reached.[326] In return, the minimum years of service for be-

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320 *See* Holtzman, *supra* note 272 (listing local television revenues for each baseball team).

321 *See* Louis Guth, *Today's Topic: Economy of Baseball; Financial Trouble Spots Darkest Clouds on Game's Horizon*, USA TODAY, Mar. 5, 1991, at 10C.

322 Holtzman, *supra* note 272.

323 *Id.*

324 *See supra* notes 277-83 and accompanying text (discussing NBA salary cap).

325 *See supra* note 311 and accompanying text (discussing free agent moves of New York Jets).

326 1993 NFL AGREEMENT, *supra* note 131, at art. XXIV, §§ 2, 4(a). The agreement does contain a total rookie salary cap of $2 million per team. *Id.* at art. XVII, § 3(a).

coming an unrestricted free agent are reduced from five to four, in consideration for implementing the cap.[327]

CONCLUSION

For nearly sixty years, courts were reluctant to take action against player restraints. The past twenty years, however, have seen a dramatic turnaround, owing to a rise in litigation brought on by players with the backing of increasingly powerful unions. The courts have generally been sympathetic to the players' arguments and have struck down most restraints on antitrust grounds.

Unrestricted free agency is not a desirable goal. Restrictions help maximize player salaries while minimizing team costs. A system with some restrictions, which allows movement throughout a player's career, strikes the proper balance between the interests of players and clubs. It is time for players and owners to reach some kind of agreement and take this issue out of the courts. The fans deserve this much.

Shant H. Chalian

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[327] *Id.* at art. XIX, § 1(a).