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THE LESSON OF THE 2011 NFL AND NBA LOCKOUTS: WHY COURTS SHOULD NOT IMMEDIATELY RECOGNIZE PLAYERS' UNION DISCLAIMERS OF REPRESENTATION

Ross Siler

Abstract: The NFL and NBA lockouts of 2011 challenged the limits of the balance courts have struck between collective bargaining protections and antitrust liability. In each lockout, the respective players' union argued that the bargaining relationship with team owners ended once the union disclaimed interest in continuing as its players' bargaining representative. The players further argued that with the bargaining relationship terminated, the nonstatutory labor exemption no longer shielded owners from antitrust liability for their cooperative agreements and activity. Ultimately, both lockouts settled without courts deciding whether a disclaimer of representation marks what the Supreme Court has described as an "extreme outer boundary" that is "sufficiently distant in time and in circumstances" from the bargaining process such that the nonstatutory labor exemption might no longer protect employers from antitrust liability. This Comment argues that courts should be wary of recognizing disclaimers as terminating the exemption in the wake of the 2011 lockouts. Instead, courts should extend the exemption for a reasonable period following disclaimer. By doing so, courts would reduce the possibility of introducing instability and uncertainty in the bargaining process, which the Court has recognized in the past as a significant concern. Such an extension also would help separate deserving antitrust claims from mere bargaining tactics while allowing the economic pressures facing both sides to shape their ultimate agreement.

INTRODUCTION

For professional football and basketball fans, 2011 will be remembered as the "Year of the Lockout." After collective bargaining agreements (CBAs) in the National Football League (NFL) and National Basketball Association (NBA) expired, team owners in each league locked out their players for months until new CBAs could be reached.¹

With hundreds of millions of dollars at stake in these bitter labor

1. See Complaint at 1, *Anthony v. Nat'l Basketball Ass'n*, No. C11-05525 (N.D. Cal. Nov. 15, 2011) [hereinafter *Anthony Complaint*]; Complaint at 1, *Brady v. Nat'l Football League*, 779 F. Supp. 2d 992 (D. Minn. 2011) (No. 11CV00639) [hereinafter *Brady Complaint*]; Brief for Major League Baseball Players' Association et al. as Amici Curiae Supporting Appellees at 14, *Brady v. Nat'l Football League*, 644 F.3d 661 (8th Cir. 2011) (No. 11-1898), 2011 WL 2129898 ("A 'lockout' occurs when an owner temporarily stops 'furnishing . . . work to employees in an effort to get for the employer more desirable terms' and a 'fundamental purpose underlying economic lockouts is that the union may end the lockout and return the employees to work by agreeing to the employer's demands.'") (quoting 2 JOHN E. HIGGINS, JR., *THE DEVELOPING LABOR LAW* 1638, 1672 (5th ed. 2006)).

battles, players in both leagues followed the same legal game plan—dissolving their unions and accusing the owners of antitrust violations.² The players' union in each league—the National Football League Players Association (NFLPA) and National Basketball Players Association (NBPA)—disclaimed its interest in continuing to serve as its respective players' bargaining representative.³ Although the disclaimers were not formal decertifications, the players asserted that the disclaimers dissolved their unions in identical fashion.⁴ Accordingly, the players said, labor law no longer shielded the owners from antitrust litigation.⁵

Following the disclaimers, players in each league filed class-action antitrust suits, claiming that the owners had engaged in group boycotts and attempted price-fixing in violation of the Sherman Act.⁶ The players argued that by dissolving their unions, they had abandoned collective bargaining and the owners were now liable under antitrust law.⁷ The players could have achieved the same result by decertifying their unions, but decertification brings additional logistical and legal consequences.⁸ By disclaiming, the players dissolved their unions through a less demanding and more immediate process, but one with less certainty in litigation.⁹ The resulting legal battles in both leagues involved some of the biggest stars in each sport, as well as several of the country's most prominent lawyers.¹⁰

2. See Howard Beck, *After a Stagnant 12 Months, the N.B.A. Faces its Own Labor Countdown*, N.Y. TIMES, Feb. 18, 2011, at B11. Tulane sports law professor Gabe Feldman said: "I think the N.B.A. and N.B.P.A. can sort of go to school on what's happening right now" in the NFL. *Id.* He also said, "There are certainly different pressure points for each, but the general strategy we're seeing could be the same." *Id.*

3. Anthony Complaint, *supra* note 1, at 4–5; Brady Complaint, *supra* note 1, at 21–22.

4. Anthony Complaint, *supra* note 1, at 5, 21–22; Brady Complaint, *supra* note 1, at 3. A decertification is a formal election concerning a union's status as an employees' bargaining representative. See *infra* Part III.

5. Anthony Complaint, *supra* note 1, at 5, 21–22; Brady Complaint, *supra* note 1, at 3.

6. Anthony Complaint, *supra* note 1, at 5, 17–18; Brady Complaint, *supra* note 1, at 3, 39–40. The Sherman Act, 15 U.S.C. § 1 (2006), declares that every contract, combination, or conspiracy in restraint of trade or commerce is illegal.

7. Brady Complaint *supra* note 1, at 3, 27–30; Anthony Complaint, *supra* note 1, at 18–19.

8. See *infra* Part III.

9. See *infra* Part III.

10. Three of the plaintiffs in the NFL players' suit were Super Bowl-winning quarterbacks Tom Brady, Peyton Manning, and Drew Brees. See Brady Complaint, *supra* note 1, at 5–6, 31–32; Clifton Brown, *End of the Rainbow*, N.Y. TIMES, Feb. 5, 2007, at D1. Two of the plaintiffs in the NBA players' suit were star players Carmelo Anthony and Kevin Durant. See Anthony Complaint, *supra* note 1, at 8, 19; Jonathan Abrams, *This is the Way Durant Signs: Not with a Bang but on Twitter*, N.Y. TIMES, July 8, 2010, at B13. Among the lawyers who represented the players and owners were David Boies, Paul Clement and Theodore Olson. See Judy Battista, *N.F.L. Hires*

The biggest difference between each lockout was the timing of each union's disclaimer. The NFLPA disclaimed representation the day before the CBA was set to expire; its players filed suit concurrently as the football owners imposed a lockout.¹¹ Ultimately, the Eighth Circuit rejected a U.S. District Court judge's injunction of the lockout.¹² However, the Eighth Circuit offered no opinion on the merits of the players' antitrust claims or the effectiveness of the disclaimer of representation.¹³ The Eighth Circuit held only that the District Court could not enjoin the lockout under the Norris-LaGuardia Act,¹⁴ which restricts courts from issuing injunctions in cases involving or growing out of a labor dispute.¹⁵

By contrast, the locked-out NBA players attempted to negotiate a new CBA with owners for four-and-a-half months after their CBA expired before the NBPA disclaimed representation.¹⁶ The basketball players filed suit the following day.¹⁷ By then, NBA Commissioner David Stern already had canceled the season's first month.¹⁸ In the end, the NBA players never progressed beyond the filing stage in their suit.¹⁹ With the league facing the possibility of a lost season, the owners and players settled the suit and reached agreement on a new CBA two weeks after the NBPA's disclaimer.²⁰

Both unions' suits challenged the balance that courts have attempted to strike in labor jurisprudence between laws encouraging collective bargaining and laws discouraging anti-competitive behavior by either side. To strike this balance, courts have endorsed a so-called nonstatutory labor exemption, which allows employers some freedom to

Attorneys for Suit Against Players, N.Y. TIMES, Mar. 12, 2011, <http://www.nytimes.com/2011/03/13/sports/football/13boies.html>; Judy Battista, *Headed Back to Court, N.F.L. May Gain Clarity*, N.Y. TIMES, June 1, 2011, at B13; Ken Belson, *Lawyer for N.F.L. in Lockout Joins Players in N.B.A. Fight*, N.Y. TIMES, Nov. 15, 2011, at B14.

11. Brady Complaint, *supra* note 1, at 21–22.

12. *Brady v. Nat'l Football League*, 644 F.3d 661, 663 (8th Cir. 2011).

13. *Id.* at 682.

14. 29 U.S.C. § 101 (2006).

15. *Brady*, 644 F.3d at 680–82.

16. Anthony Complaint, *supra* note 1, at 3–4; Howard Beck, *N.B.A. Season in Peril as Players Reject Offer and Disband Union*, N.Y. TIMES, Nov. 15, 2011, at A1.

17. Anthony Complaint, *supra* note 1, at 3–4.

18. Howard Beck, *N.B.A. Talks Stall, and More Games Are Canceled*, N.Y. TIMES, Oct. 29, 2011, at D4.

19. Howard Beck, *N.B.A. Reaches Tentative Deal to Save Season*, N.Y. TIMES, Nov. 27, 2011, at A1.

20. *Id.*

act in cooperation without violating antitrust laws.²¹ Even in cases where employers and unions have taken entrenched positions, courts have refused to expose employers to antitrust liability given what they cite as a congressional preference for collective bargaining—even strained and stalled bargaining.²² In its most significant ruling on the subject, the Supreme Court in 1996 held in *Brown v. Pro Football, Inc.*²³ that NFL owners could impose salary restrictions for a new subclass of players after bargaining to an impasse with the NFLPA on the subject.²⁴ In an 8-1 decision, the Court sided with the owners, expressing concern about the potentially destabilizing effect that antitrust liability could have on collective bargaining in such circumstances.²⁵

However, the Court held that such protection from antitrust liability does not continue indefinitely for employers negotiating with a union.²⁶ The Court held that “an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process.”²⁷ The Court suggested that the nonstatutory labor exemption would last until the collapse of the collective bargaining relationship.²⁸ But the Court expressly declined to define the limits where the nonstatutory labor exemption no longer would shield an employer from antitrust liability.²⁹

After dissolving their unions by disclaiming representation in 2011, the NFL and NBA players argued that the collective bargaining relationship had ended and therefore the nonstatutory labor exemption no longer protected the owners from antitrust liability.³⁰ As support, the players looked to *Brown*, in which the Court signaled that the formal decertification of a union would mark the collapse of collective bargaining.³¹ However, the 2011 lockouts failed to resolve several

21. See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 250 (1996).

22. *Id.* at 249–50.

23. 518 U.S. 231.

24. *Id.* at 233–34.

25. *Id.* at 241–42.

26. *Id.* at 250.

27. *Id.*

28. *Id.* (The Court endorsed the “suggest[ion] that exemption lasts until collapse of the collective-bargaining relationship, as evidenced by decertification of the union.”).

29. *Id.* (“We need not decide in this case whether, or where, within these extreme outer boundaries to draw that line.”).

30. Brady Complaint, *supra* note 1, at 3, 30; Anthony Complaint, *supra* note 1, at 18–19.

31. See *supra* note 28 and accompanying text.

significant questions based on the players' contention. Does a union's disclaimer of representation suffice as a collapse of the collective bargaining relationship? Is a disclaimer of representation "sufficiently distant in time and in circumstances" from the bargaining process such that the nonstatutory labor exemption no longer should shield employers from antitrust liability?³² Does a disclaimer of representation amount to one of the "extreme outer boundaries" noted in *Brown* where the line between collective-bargaining protections and antitrust liability should be drawn?³³ Although a U.S. District Court judge issued a favorable ruling for the NFL players, the Eighth Circuit reached no conclusion, leaving these questions unanswered.³⁴

Although the 2011 lockouts had particular importance in the sports world, this Comment argues that courts should be wary of accepting disclaimers of representation as extinguishing the nonstatutory labor exemption. Courts should either defer to the National Labor Relations Board (NLRB) in determining whether a disclaimer amounts to a good-faith termination of collective bargaining, or extend antitrust protection to employers for a reasonable period following a union's disclaimer. The destabilizing effect on collective bargaining that concerned the Court in *Brown* is just as apparent when a union's unilateral and instantaneous disclaimer can expose employers to antitrust liability. Much as the NFL owners argued in 2011, *Brown* represents a "fundamental recognition that the labor laws cannot function unless collective bargaining is given significant room to operate, even after one side unilaterally asserts that the relationship is over."³⁵ A union's instantaneous renunciation of collective bargaining through a disclaimer—as opposed to a formal decertification—threatens the collective bargaining and antitrust balance that courts have attempted to strike.

Part I of this Comment offers background about both leagues' lockouts in 2011. Parts II, III and IV examine the background of the nonstatutory labor exemption, the Supreme Court's *Brown* decision, and the differences between disclaimers and decertification of unions respectively. Part V recounts the NFL players' 1989 and 1991 court battles that served as precedent for the 2011 lockouts. Part VI explores the NFL players' suit in 2011 and the subsequent victories and defeats in court. Part VII addresses the NBA players' suit in 2011 and the quick

32. *Brown*, 518 U.S. at 250.

33. *Id.*

34. *See* Brady v. Nat'l Football League, 644 F.3d 661, 682 (8th Cir. 2011).

35. *See* Brief in Opposition to Plaintiffs' Motion for a Preliminary Injunction at 35, Brady v. Nat'l Football League, 779 F. Supp. 2d 992 (D. Minn. 2011) (No. 11CV00639).

resolution that followed out of court. Finally, Part VIII argues that future courts faced with a players' union's disclaimer of representation, followed by an antitrust suit, should extend nonstatutory labor exemption protections for a reasonable period following such disclaimer.

I. BOTH THE NFL AND NBA ENDURED MONTHS-LONG LOCKOUTS IN 2011 OVER THE SPLIT OF REVENUES IN EACH LEAGUE

Two of the world's most prominent professional sports leagues, the NFL and NBA are composed of dozens of separately owned and independently operated teams—thirty-two teams in the NFL and thirty teams in the NBA.³⁶ A CBA governs the labor relationship in each league—in particular, player-salary rules and restrictions—and is the product of negotiations between the owners and players.³⁷ The NFL and NBA players traditionally have been represented by unions, who in turn bargain with the owners regarding terms of the CBA.³⁸ But the labor relationship in both leagues broke down in 2011 as players and owners battled over the future split of revenues in their respective new CBAs.³⁹ With no agreement, the owners in each league locked out the players and effectively suspended operations.⁴⁰

During the lockouts, contact between teams and players ceased—players could not train at team facilities, and teams could not sign players to contracts.⁴¹ The NBA went so far as to remove all images of active players from its website.⁴² The NFL lockout was its first since 1987; the NBA lockout was its first since 1999.⁴³ And with their respective lockouts overlapping in July 2011, the two leagues made sports history: for only the second time, two of the four major

36. See Anthony Complaint, *supra* note 1, at 6–7; Brady Complaint, *supra* note 1, at 7–9.

37. See Anthony Complaint, *supra* note 1, at 3; Brady Complaint, *supra* note 1, at 19–21.

38. See Anthony Complaint, *supra* note 1, at 3; Brady Complaint, *supra* note 1, at 19–21.

39. See Brady Complaint, *supra* note 1, at 19–22, *Brady*, 779 F. Supp. 2d 992 (No. 11CV00639); Anthony Complaint, *supra* note 1, at 4.

40. See Brady Complaint, *supra* note 1, at 23; Anthony Complaint, *supra* note 1, at 3.

41. See Judy Battista, *End of N.F.L. Lockout is Imminent, if Elusive*, N.Y. TIMES, July 25, 2011, at D5; Howard Beck & Richard Sandomir, *Lockout is to Be Partially Lifted*, N.Y. TIMES, Nov. 30, 2011, at B18; Howard Fendrich, *Lockout Leaves NFL in Limbo After Talks Break Off*, ASSOCIATED PRESS, Mar. 12, 2011, available at <http://sports.espn.go.com/nfl/news/story?id=6205936>.

42. See Howard Beck, *Players Are Locked Out of N.B.A.'s Web Site, Too*, N.Y. TIMES, July 2, 2011, at D6.

43. See Judy Battista, *As N.F.L. Talks Fail, '11 Season Seems in Doubt*, N.Y. TIMES, Mar. 12, 2011, at A1; Howard Beck, *Stalemate in Labor Talks Forces N.B.A. to Shut Down*, N.Y. TIMES, July 1, 2011, at B9.

professional sports leagues shut down simultaneously due to labor strife.⁴⁴

Owners in both leagues sought an increased percentage of revenues they share with players.⁴⁵ While the NFL owners did not dispute their teams' profitability under the expired CBA, the NBA claimed that as many as twenty-two of its thirty teams lost more than \$300 million combined during the previous season.⁴⁶

The two lockouts stretched for months.⁴⁷ The NFL endured a 136-day lockout before owners and players agreed to a ten-year CBA—the longest sports labor deal in history.⁴⁸ The lone scheduling casualty was the cancellation of an annual preseason game.⁴⁹ Otherwise, the owners and players reached agreement in time for teams to hold training camps and play full schedules.⁵⁰ By contrast, the NBA's 149-day lockout also produced a new CBA, but not in time to salvage a full season of games.⁵¹ The season began nearly eight weeks late on December 25, with the lost games costing both the owners and players an estimated \$400 million each.⁵² Instead of the usual eighty-two games, each team played only sixty-six games in the 2011–12 season.⁵³

44. Brian Mahoney, *NBA Lockout Begins As Sides Fail to Reach New Deal*, ASSOCIATED PRESS, July 1, 2011, available at <http://sports.espn.go.com/nba/news/story?id=6723645>. The four major professional sports leagues are Major League Baseball, the National Basketball Association, the National Football League, and the National Hockey League. The other time two of the four leagues shut down simultaneously came in 1994 when Major League Baseball players went on strike and National Hockey League owners locked out players. *Id.* Baseball's work stoppage that year ultimately led to the cancellation of the World Series. *Id.*

45. See Joe Drape, *Lockout is Strategy With Risks For Owners*, N.Y. TIMES, Jan. 30, 2011, at SP1; Beck, *supra* note 43. The NFL owners wanted \$1 billion in revenues previously shared with players. See Drape, *supra*. The owners also wanted to lengthen the season from sixteen to eighteen games. *Id.*

46. See Battista, *supra* note 43; Beck, *supra* note 43. According to Forbes magazine, seventeen of thirty NBA teams lost money the previous season. See Beck, *supra* notes 2, 43.

47. See Beck, *supra* note 19 (NBA); Jarrett Bell, *Done Deal, NFL on Fast Track*, USA TODAY, July 26, 2011, at 1C (NFL).

48. See Bell, *supra* note 47, at 1C.

49. See Judy Battista, *As the Lockout Ends, the Scrambling Begins*, N.Y. TIMES, July 26, 2011, at B10. The NFL owners ratified the proposal 31-0 and player representatives from the thirty teams unanimously approved the deal on July 25, 2011. *Id.* The first NFL training camps opened two days later. *Id.*

50. *Id.*

51. See Beck, *supra* note 19.

52. *Id.*

53. *Id.*

II. IF NOT FOR COLLECTIVE BARGAINING AGREEMENTS AND THE NONSTATUTORY LABOR EXEMPTION, TEAM OWNERS COULD FACE ANTITRUST LIABILITY

Courts have long recognized the inherent conflict between antitrust laws (such as the Sherman Act⁵⁴ and the Clayton Act⁵⁵) that encourage economic competition and labor laws (such as the National Labor Relations Act,⁵⁶ Clayton Act,⁵⁷ and Norris-LaGuardia Act⁵⁸) that express a preference for resolving labor-management disputes through collective bargaining.⁵⁹ One labor law, the National Labor Relations Act (NLRA), encourages collective bargaining by allowing workers to form unions to negotiate terms and conditions of employment.⁶⁰ At the same time, workers have the right not to be represented by a union.⁶¹ Other labor laws, including the Clayton Act and Norris-LaGuardia Act, limit federal courts from enjoining union activities.⁶² Courts recognize that successful collective bargaining requires cooperative activity both by employers and workers.⁶³ And so long as restraints on competition are imposed through collective bargaining, courts will generally shield such cooperative activity from antitrust liability.⁶⁴ The collective bargaining

54. 15 U.S.C. § 1 (2006).

55. *Id.* § 12.

56. 29 U.S.C. §§ 151–58 (2006).

57. 15 U.S.C. § 17; 29 U.S.C. § 52 (2006). Section 6 of the Clayton Act creates a basic statutory exemption for labor unions: “[N]or shall such organizations . . . be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.” 15 U.S.C. § 17.

58. 29 U.S.C. §§ 101–05, 113 (2006).

59. See Gabriel Feldman, *Antitrust Versus Labor Law in Professional Sports: Balancing the Scales After Brady v. NFL and Anthony v. NBA*, 45 U.C. DAVIS L. REV. 1221, 1223 (2012).

60. 29 U.S.C. § 151 (2006) (“It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”).

61. 29 U.S.C. § 157; see also Feldman, *supra* note 59, at 1225 n.16.

62. See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 253 n.2 (1996) (Stevens, J., dissent); *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1048 (D.C. Cir. 1995).

63. See 29 U.S.C. §§ 101–15; 15 U.S.C. § 17 (2006); see also *Brown*, 518 U.S. at 237 (“As a matter of logic, it would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves or with each other any of the competition-restricting agreements potentially necessary to make the process work or its results mutually acceptable.”).

64. See *Brown*, 518 U.S. at 237.

must be lawful under labor law and primarily affect the limited labor market the bargaining relationship encompasses.⁶⁵

The Supreme Court has recognized a “proper accommodation” as necessary to further both congressional policy favoring collective bargaining through the NLRA and congressional policy promoting economic competition under antitrust law.⁶⁶ This balancing requires shielding some union-employer agreements from antitrust liability under the nonstatutory labor exemption.⁶⁷ The exemption extends the same protections from antitrust liability for cooperative union activity to cooperative activity for multiemployer units.⁶⁸ The D.C. Circuit has emphasized that the exemption is focused on the “process” surrounding collective bargaining and not the ultimate “product” of a collective bargaining agreement.⁶⁹ The court also stressed the need to safeguard the “delicate balance of countervailing power” belonging to employers and workers in the bargaining process.⁷⁰ As courts have interpreted the nonstatutory labor exemption, employees face a choice during bargaining of taking advantage of the collective bargaining process and the protections of labor law—such as the right to strike or bring an action before the NLRB—or foregoing those protections to bring an antitrust suit, but not both together.⁷¹

Despite the public’s interest in professional sports, the Supreme Court also has made clear that the various leagues, teams, and players generally are entitled no special treatment under antitrust law.⁷² In professional sports, the nature of a league of independently owned and operated teams inherently conflicts with the Sherman Act’s prohibitions

65. See *Brown*, 50 F.3d at 1048.

66. See *Connell Constr. Co. v. Plumbers & Steamfitters, Local Union No. 100*, 421 U.S. 616, 622 (1975).

67. See *id.*; *Brown*, 518 U.S. at 234, 237; see also Feldman, *supra* note 59, at 1224.

68. See PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* 134 (3d ed. 2006) (“Whenever a collective bargaining agreement results in antitrust immunity for employees, the same immunity must presumably be afforded to employers bargaining or preparing to bargain on the other side of the same table. Thus the ‘non-statutory’ exemption [exists] The question is one of applying simple logic to labor policy, and the logic applies equally to single employers and multi-employer bargaining groups, provided that the latter are all involved in the same bargaining with the same set of unions over the same terms.”).

69. *Brown*, 50 F.3d at 1050.

70. *Id.* at 1052.

71. See *id.* at 1057; see also Feldman, *supra* note 59, at 1247–48 (observing that “*Brown* appears to present employees with an either-or proposition” regarding labor or antitrust law).

72. See *Brown*, 518 U.S. at 248 (“We can understand how professional sports may be special in terms of, say, interest, excitement, or concern. But we do not understand how they are special in respect to labor law’s antitrust exemption.”).

against contracts, combinations, and conspiracies in restraint of trade.⁷³ Teams compete on and off the field for championships, fan interest, and revenues.⁷⁴ However, teams also must cooperate regarding rules, scheduling, roster sizes, and numerous other issues.⁷⁵ Courts recognize that some anti-competitive restraints are acceptable to foster competitive balance in a league.⁷⁶ As described by the Second Circuit in 2004, the NFL and NBA engage in a collective bargaining relationship with their players that is “provided for” and “promoted by” federal labor law.⁷⁷ Although the teams are independently owned, they can act jointly as a multiemployer bargaining unit in setting the terms and conditions of their players’ employment and their sport’s rules.⁷⁸ As long as they set these terms and conditions through collective bargaining, the owners can operate a league of teams without facing antitrust liability.⁷⁹

However, with the collective bargaining relationship in both leagues tested in 2011, the NFL and NBA players challenged the limits of the nonstatutory labor exemption in their antitrust suits.⁸⁰ They argued that the exemption no longer applied because they had dissolved their unions and therefore no longer were engaged in a bargaining relationship.⁸¹ A ruling in favor of the players would have exposed owners in both leagues to enormous potential liability, with the Clayton Act providing for the recovery of treble (triple) damages by a successful antitrust plaintiff.⁸² And the players looked to the Supreme Court’s *Brown* decision to frame the nonstatutory labor exemption’s parameters.

73. See 15 U.S.C. § 1 (2006); *Am. Needle, Inc. v. Nat’l Football League*, __U.S.__, 130 S. Ct. 2201, 2207 (2010).

74. *Am. Needle*, 130 S. Ct. at 2212–13.

75. See *Clarett v. Nat’l Football League*, 369 F.3d 124, 141 (2d Cir. 2004); *Nat’l Basketball Ass’n v. Williams*, 45 F.3d 684, 689 (2d Cir. 1995) (“In the sports industry, multiemployer bargaining exists not only for the reasons stated above but also because some terms and conditions of employment must be the same for all teams in a sports league.”).

76. See *Mackey v. Nat’l Football League*, 543 F.2d 606, 621 (8th Cir. 1976) (“We do recognize, as did the district court, that the NFL has a strong and unique interest in maintaining competitive balance among its teams.”).

77. See *Clarett*, 369 F.3d at 130.

78. *Id.*

79. *Id.*

80. See *supra* notes 30–32.

81. See *supra* notes 30–32.

82. 15 U.S.C. § 15 (2006).

III. IN *BROWN*, THE COURT CLARIFIED THAT THE EXEMPTION WILL NOT APPLY INDEFINITELY, BUT DECLINED TO DEFINE ITS “EXTREME OUTER BOUNDARIES”

In 1996, the Supreme Court explored the boundaries of the relationship between collective bargaining protections and antitrust liability and the limits of the nonstatutory labor exemption in *Brown v. Pro Football, Inc.*⁸³ The Court heard the appeal of a class-action suit brought by a group of football players against NFL owners.⁸⁴ In an 8-1 decision, the Court held that the nonstatutory labor exemption protected the owners from antitrust liability for their imposition of terms after reaching an impasse in bargaining with the NFLPA.⁸⁵ The Court’s ruling that the nonstatutory labor exemption could extend beyond impasse—but not indefinitely—would have important implications when the NFL and NBA players’ unions disclaimed representation and argued that this had terminated the collective bargaining relationship in 2011.⁸⁶

The case arose from the NFL’s desire to allow each team to carry six developmental squad players in addition to the players on its regular roster.⁸⁷ These rookie and second-year players would practice and play in only limited circumstances.⁸⁸ The NFLPA wanted the developmental squad players to have the same benefits and protections as full-fledged, regular-roster players, including the ability to individually negotiate salaries with teams.⁸⁹ The NFL and NFLPA attempted to negotiate terms regarding the developmental squad players but reached an impasse after two months.⁹⁰ The NFL owners then unilaterally instituted a developmental squad program, under which each player would sign a uniform contract and earn \$1000 a week.⁹¹ A year later, 235 former

83. 518 U.S. 231, 233 (1996) (“This question in this case arises at the intersection of the Nation’s labor and antitrust laws.”).

84. *Id.* at 233–34. The Court made clear that it would give the players and owners no special treatment under the country’s labor laws. *See id.* at 249 (“[I]t would be odd to fashion an antitrust exemption that gave additional advantages to professional football players . . . that transport workers, coal miners, or meat packers would not enjoy.”).

85. *Id.* at 250.

86. *See* Brady Complaint, *supra* note 1, at 1, 21–23, 27–30; Anthony Complaint, *supra* note 1, at 1, 17–21 (discussion of nonstatutory labor exemption defense).

87. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 234 (1996).

88. *Id.*

89. *Id.*

90. *Id.* at 235.

91. *Id.*

developmental squad players brought an antitrust suit against the owners.⁹²

The Court considered whether the nonstatutory labor exemption protected the NFL owners in a situation where they bargained to impasse, then imposed their last, best offer.⁹³ The Court noted that stalled bargaining is far from the end of bargaining, describing impasse as a “recurring feature” in negotiations.⁹⁴ The majority further termed “impasse” as a “temporary deadlock or hiatus in negotiations.”⁹⁵ In almost all cases, the Court added, both sides will break an impasse, “through either a change in mind or the application of economic force.”⁹⁶

Writing for the majority, Justice Stephen Breyer offered background for the Court’s interpretation of the nonstatutory labor exemption.⁹⁷ The Court infers the exemption from federal labor law and the preference for free and private collective bargaining, which requires good-faith bargaining over wages, hours, and working conditions.⁹⁸ The exemption is a counterpart to federal labor law’s protections for unions and labor organizations from antitrust liability; it extends similar protections to multiemployer units.⁹⁹ The nonstatutory labor exemption is consistent with Congress’ desire to “prevent judicial use of antitrust law to resolve labor disputes.”¹⁰⁰ In the Court’s view, the nonstatutory labor exemption protects employer conduct that (1) took place during and immediately after collective-bargaining negotiations; (2) grew out of, and was directly related to, the lawful operation of the bargaining process; (3) involved a matter that the parties were required to negotiate collectively; and (4) concerned only the parties to the collective bargaining

92. *Id.*

93. *Id.* at 234.

94. *Id.* at 245 (citing *Bonanno Linen Serv. Inc. v. NLRB*, 454 U.S. 404, 412 (1982)).

95. *Id.*

96. *Id.* at 245–46. The Court also described impasse and the implementation of proposals as an “integral part of the bargaining process.” *Id.* at 239. And the Court additionally noted that impasse may be a tactic brought on deliberately by one of the parties for “strategic purposes” during the bargaining process. *Id.* at 246.

97. *Id.* at 235–38.

98. *Id.* at 236.

99. *Id.* at 237 (“[I]t would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves or with each other *any* of the competition-restricting agreements potentially necessary to make the process work or its results mutually acceptable.”) (emphasis in original).

100. *Id.* at 236.

relationship.¹⁰¹

In particular, the Court noted that the NFL owners faced a no-win situation if the nonstatutory labor exemption did not protect their imposition of terms:¹⁰²

If the antitrust laws apply, what are employers to do once impasse is reached? If all impose terms similar to their last joint offer, they invite an antitrust action premised upon identical behavior . . . as tending to show a common understanding or agreement. If any, or all, of them individually impose terms that differ significantly from that offer, they invite an unfair labor practice charge All this is to say that to permit antitrust liability here threatens to introduce instability and uncertainty into the collective-bargaining process, for antitrust law often forbids or discourages the kinds of joint discussions and behavior that the collective-bargaining process invites or requires.¹⁰³

The Court additionally expressed concern about terminating the exemption at the point of impasse because such a rule “creates an exemption that can evaporate in the middle of the bargaining process.”¹⁰⁴

Most significantly for the NFL and NBA players in 2011, the Court held that the exemption would not indefinitely shield employers’ conduct.¹⁰⁵ The Court stated that an agreement between employers could be “sufficiently distant in time and in circumstances” from collective bargaining such that subjecting employers to antitrust liability would not “significantly interfere” with the bargaining process.¹⁰⁶ As such, the Court suggested that the exemption would last until the “collapse of the collective bargaining relationship.”¹⁰⁷ A union’s decertification is an example of such a collapse.¹⁰⁸

The Court cited the D.C. Circuit’s *Brown* decision¹⁰⁹ in endorsing decertification as one possible boundary between collective bargaining

101. *Id.* at 250.

102. *Id.* at 241–42.

103. *Id.*

104. *Id.* at 246.

105. *Id.* at 250 (“Our holding is not intended to insulate from antitrust review every joint imposition of terms by employers . . .”).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Brown v. Pro Football, Inc.*, 50 F.3d 1041 (D.C. Cir. 1995).

protections and antitrust liability.¹¹⁰ The D.C. Circuit had held that workers must choose between invoking the protections of labor law or the Sherman Act.¹¹¹ Chief Judge Harry T. Edwards wrote, “If employees wish to seek the protections of the Sherman Act, they may forego unionization or even decertify their unions.”¹¹² But employees could not take advantage of the many federal labor law protections Judge Edwards cited—including enhanced bargaining power as a union, the establishment of mandatory subjects of bargaining, protection of the right to strike, and ability to bring an unfair labor practice charge before the NLRB—while also pursuing antitrust litigation.¹¹³ Judge Edwards further noted that the NFL players previously had chosen to dissolve their union in successfully bringing an antitrust suit against NFL owners in 1991.¹¹⁴ By opting to remain a union, Judge Edwards concluded that the players would win concessions not through antitrust suits, but with “shrewd bargaining, favorable grievance settlements, victories in arbitration, and, when necessary, by striking.”¹¹⁵

The Supreme Court did not adopt Judge Edwards’ reasoning or language beyond simply approving that decertification could mark one possible boundary for the exemption.¹¹⁶ The Court added that another boundary could be an “extremely long” impasse marked by “instability” or “defunctness” of the employer unit.¹¹⁷ Either way, the Court described both decertification and a protracted impasse as “extreme outer boundaries” where the nonstatutory labor exemption might no longer protect employers from antitrust liability.¹¹⁸ But the Court expressly declined to decide “whether, or where, within” such boundaries to draw the line between collective bargaining protections and antitrust liability.¹¹⁹ The Court added that it would be inappropriate to do so without the “detailed views” of the NLRB.¹²⁰ As far as a disclaimer of

110. *Brown*, 518 U.S. at 250.

111. *Brown*, 50 F.3d at 1057.

112. *Id.*

113. *Id.*

114. *Id.* (citing Note, *Releasing Superstars from Peonage: Union Consent and the Nonstatutory Labor Exemption*, 104 HARV. L. REV. 874, 883 (1991)).

115. *Id.*

116. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 251 (1996).

117. *Id.* at 250 (citing *El Cerrito Mill & Lumber Co.*, 316 N.L.R.B. 1005, 1006–07 (1995), 1995 WL 152166).

118. *Id.*

119. *Id.* (“We need not decide in this case whether, or where, within these extreme outer boundaries to draw that line.”).

120. *Id.* (citing *NLRB v. Truck Drivers Local Union No. 449 (Buffalo Linen)*, 353 U.S. 87, 96

representation, the Court never addressed whether such action would mark an “extreme outer boundary” of collective bargaining allowing employees to bring an antitrust suit.¹²¹

IV. ALTHOUGH DISCLAIMER AND DECERTIFICATION BOTH FUNCTIONALLY DISSOLVE A UNION, IMPORTANT DISTINCTIONS EXIST BETWEEN THE TWO

In 2011, the NFL and NBA players chose between two mechanisms—decertification and disclaimer of representation—to dissolve their unions before bringing their antitrust suits.¹²² This Part addresses the difference between decertification and disclaimer, as well as two significant NLRB rulings on the effectiveness of disclaimers.

Although both mechanisms serve to end a union’s representation of employees, important distinctions exist between the two.¹²³ Decertification is statutorily defined by the National Labor Relations Act and managed by the NLRB; a group of employees can call for a decertification election by submitting a petition to the NLRB signed by thirty percent of union members.¹²⁴ The NLRB then schedules an election, typically within a month or two of the submission of the petition.¹²⁵ If a majority of members vote for decertification, then the union ceases to represent the employees.¹²⁶ Most significantly, once a union decertifies, it cannot re-form for twelve months.¹²⁷

A disclaimer of representation, by contrast, has none of the formality of a decertification election.¹²⁸ The union leadership—which for the

(1957)).

121. *Id.* Judge Edwards’ decision for the D.C. Circuit in *Brown* seemingly endorsed a disclaimer as being sufficient. Judge Edwards noted the NFLPA’s dissolution in *Powell v. Nat’l Football League*, 930 F.2d 1293 (8th Cir. 1989), which was accomplished through a disclaimer, as well as the ability of workers to “forego unionization or even decertify their unions.” See *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1057 (D.C. Cir. 1995).

122. See Feldman, *supra* note 59, at 1256 nn.196–98 (2012).

123. *Id.*

124. 29 U.S.C. § 159 (2006).

125. See Feldman, *supra* note 59, at 1256 n.197; see also Gabriel A. Feldman, *The Issues Behind the NBA Players’ Decertification Strategy*, HUFFINGTON POST (Nov. 8, 2011 8:27 a.m.), http://www.huffingtonpost.com/gabriel-a-feldman/the-legal-issues-behind-t_2_b_1081107.html (noting that uncontested decertification elections can take place within thirty days of verification of petitions; an election might take place within forty-five to sixty days for a complex decertification such as the NBA players’).

126. See Feldman, *supra* note 59, at 1256 n.197.

127. 29 U.S.C. § 159.

128. As the NFL owners described it in their appeal to the Eighth Circuit, “Lacking the formality of decertification—an employee-driven process supervised by the NLRB that includes a vote by

NFLPA and NBPA included an executive committee of current players—renounces its interest in representing its workers in collective bargaining.¹²⁹ Disclaimer requires no petition, vote, or recognition involving the NLRB, and the union’s role as the worker’s bargaining representative terminates immediately.¹³⁰

Whether through decertification or disclaimer of representation, employees forfeit important labor rights by dissolving their unions.¹³¹ They lose the right to strike and the ability to bring an NLRB action against employers for failing to bargain in good faith.¹³² For the football players in 2011, the NFL considered unilaterally imposing an enhanced drug-testing program after the union dissolved.¹³³ Previously, the NFL owners unilaterally lengthened the league’s season to seventeen games and cut insurance benefits after the union disclaimed representation in 1989.¹³⁴

But the instantaneous termination of representation through a disclaimer raises concerns about its potential tactical use. In its briefs, the NFL argued that “[d]isclaimer, unlike decertification, can be undone as quickly as it is asserted.”¹³⁵ The league’s chief concern was that a disclaimer can be “manipulated by the parties for bargaining purposes,” particularly if a court views it as a boundary between collective bargaining protections and antitrust liability.¹³⁶ The NFL added that courts should defer to the NLRB in determining whether a disclaimer is valid or whether it is “simply a sham” not to be recognized.¹³⁷

secret ballot—disclaimer is literally a paper-thin statement, issued unilaterally by a union.” Opening Brief of Appellants at 46, *Brady v. Nat’l Football League*, 644 F.3d 661 (8th Cir. 2011) (No. 0:11-cv-00639-SRN-JJG), 2011 WL 2003085.

129. See Feldman *supra* note 59, at 1256 n.197 (“A disclaimer of interest occurs when a showing has been made that more than 50% of the employees in the union do not wish to be represented by the union.”); see also Feldman, *supra* note 125, *The Issues Behind the NBA Players’ Decertification Strategy*, (“Disclaimer is a less complicated process that could happen immediately—the union must simply renounce its interest in representing the employees in collective bargaining.”).

130. See *supra* note 129.

131. See *Brady v. Nat’l Football League*, 779 F. Supp. 2d 992, 1018 (D. Minn. 2011).

132. *Id.* at 1001 (citing *Powell v. Nat’l Football League*, 764 F. Supp. 1351, 1359 (D. Minn. 1991)).

133. Judy Battista, *N.F.L. Considers Forcing New Testing Standards*, N.Y. TIMES, May 9, 2011, at D2.

134. *Brady*, 779 F. Supp. 2d at 1001 (citing *Powell*, 764 F. Supp. at 1359).

135. Reply Brief of Appellants at 32, *Brady v. Nat’l Football League*, 644 F.3d 661 (8th Cir. 2011) (No. 0:11-cv-00639-SRN-JJG), 2011 WL 2179417.

136. *Id.*

137. Opening Brief of Appellants at 35, *Brady*, 644 F.3d 661 (No. 0:11-cv-00639-SRN-JJG), 2011 WL 1750480.

Both the NFL owners and players cited a June 1991 NLRB advisory opinion that a previous disclaimer by the NFLPA was valid.¹³⁸ In that advisory opinion (*In re Pittsburgh Steelers, Inc.*¹³⁹), the NLRB expressed that the NFLPA's disclaimer was effective because it was "unequivocal, made in good faith, and unaccompanied by any inconsistent conduct."¹⁴⁰ The opinion called a decertification election "an unnecessary waste of time and resources" for a union that already has made a valid disclaimer.¹⁴¹ The opinion also addressed the NFL's contention that the union's disclaimer was motivated by litigation strategy.¹⁴² The fact that the players were attempting to deny owners a defense to antitrust liability was "irrelevant" in the NLRB's view as long as the disclaimer "is otherwise unequivocal and adhered to."¹⁴³

The *Pittsburgh Steelers* ruling, however, is not the NLRB's only word on the subject of disclaimers. In a 1958 case involving a group of workers bargaining with an association of department stores, the NLRB noted that a disclaimer must mark a "sincere abandonment, with relative permanency" of bargaining.¹⁴⁴ The NLRB focused on the workers' continued picketing as inconsistent behavior with having disclaimed representation as a union.¹⁴⁵ The NLRB concluded that the workers' "bare statement of disclaimer" was not enough "if the surrounding circumstances justify an inference to the contrary."¹⁴⁶ The NLRB described the union's disclaimer as "a measure of momentary expedience, or strategy in bargaining."¹⁴⁷ In a 1964 case, the NLRB further declared that it was not compelled to recognize a disclaimer "just because the union uses the word," while ignoring contrary circumstances.¹⁴⁸ "The question must be decided in each case whether the union has in truth disclaimed, or whether its alleged disclaimer is

138. *In re Pittsburgh Steelers, Inc.*, Case 6-CA-23143, 1991 WL 144468, at *1 (June 26, 1991).

139. Case 6-CA-23143, 1991 WL 144468.

140. *Id.* at *2 n.8. Robert E. Allen, the NLRB's associate general counsel, authored the advisory opinion in response to a regional director's request for advice. *Id.* at *1, *4. The NLRB's Office of General Counsel responds to requests for advice from any of the agency's regional directors by issuing a final determination through an advice memorandum. See *Brady v. Nat'l Football League*, 779 F. Supp. 2d 992, 1016 n.25 (D. Minn. 2011).

141. *Pittsburgh Steelers*, 1991 WL 144468, at *2 n.8.

142. *Id.*

143. *Id.*

144. *Retail Associates, Inc.*, 120 N.L.R.B. 388, 394 (Apr. 11, 1958), 1958 WL 13328.

145. *Id.* at 392-93.

146. *Id.* at 392.

147. *Id.* at 394.

148. *Capitol Market No. 1*, 145 N.L.R.B. 1430, 1431 (Jan. 1, 1964), 1964 WL 16218.

simply a sham and for that reason not to be given force and effect.”¹⁴⁹

The NFL owners looked to the 1958 NLRB ruling in arguing in 2011 that the players’ disclaimer was not a “sincere abandonment” of bargaining.¹⁵⁰ A U.S. District Court judge in Minnesota found that the NFL players validly disclaimed their union, citing the NLRB’s *Pittsburgh Steelers* ruling and rejecting the owners’ argument that the court needed to defer to the NLRB on the issue.¹⁵¹ The Eighth Circuit, however, ultimately did not resolve the question on appeal.¹⁵²

V. IN 1991, THE NFL PLAYERS DISSOLVED THEIR UNION WITH A DISCLAIMER RECOGNIZED BY THE U.S. DISTRICT COURT IN MINNESOTA

The acrimonious history between the NFL players and owners shaped their labor battle in 2011. They have had what the Eighth Circuit described in 1989 as an “often tempestuous relationship” going back decades.¹⁵³ Before the players opted in 2011 to dissolve their union and bring antitrust suits, the two sides litigated over free agency in 1989 and 1991—cases that also concerned a disclaimer’s effectiveness.¹⁵⁴ Those cases served as important precedent when the owners and players returned to court in 2011.¹⁵⁵

In 1991, U.S. District Court Judge David Doty in Minnesota found that a group of players could bring an antitrust suit against the owners.¹⁵⁶ This followed the NFLPA’s decision to disclaim interest in serving as the players’ bargaining representative in the wake of an Eighth Circuit decision in 1989.¹⁵⁷ Judge Doty found that the union had ceased to engage in collective bargaining dating to November 1989—some

149. *Id.* at 1432.

150. Reply Brief of Appellants at 26, *Brady v. Nat’l Football League*, 644 F.3d 661 (8th Cir. 2011) (No. 0:11-cv-00639-SRN-JJG), 2011 WL 2179417.

151. *See infra* notes 197–203.

152. *See Brady*, 644 F.3d at 682.

153. *See Powell v. Nat’l Football League*, 930 F.2d 1293, 1303 (8th Cir. 1989).

154. *See id.*; *Powell v. Nat’l Football League*, 764 F. Supp. 1351 (D. Minn. 1991).

155. *See* Plaintiff’s Motion for a Preliminary Injunction at 4, *Brady v. Nat’l Football League*, 779 F. Supp. 2d 992 (D. Minn. 2011) (No. 11–639), 2011 WL 958695.

156. *Powell*, 764 F. Supp. at 1359 (“Because no ‘ongoing collective bargaining relationship’ exists, the court determines that nonstatutory labor exemption has ended.”). The decision was reported as *Powell v. National Football League*, but Judge Doty notes in a later decision that it should have been reported as *McNeil v. National Football League* given the motions that were decided. *See McNeil*, 777 F. Supp. 1475, 1478 n.1 (D. Minn. 1991).

157. *Powell*, 764 F. Supp. at 1354, 1356.

eighteen months before his decision.¹⁵⁸ He ruled that the NFL owners were not forever exempt from antitrust laws and that the nonstatutory labor exemption would not apply “if the affected employees ceased to be represented by a certified union.”¹⁵⁹ That had happened with the NFL players, leading Judge Doty to deny the owners’ motion for summary judgment.¹⁶⁰ After later losing at trial, the NFL owners settled with the players, agreeing upon a deal that included a new collective bargaining agreement giving players greater rights as free agents to sign with new teams.¹⁶¹ The union also re-formed at the owners’ request.¹⁶²

Two years earlier, in 1989, the Eighth Circuit set the stage for Judge Doty’s ruling by holding that the players had to choose between continued bargaining or antitrust litigation.¹⁶³ Although the owners and players had reached an impasse in bargaining, the court emphasized the economic and legal tools both sides still had to resolve the dispute.¹⁶⁴ The union could strike, the owners could lock out the players, and both could petition the NLRB, charging the other with unfair labor practices.¹⁶⁵ But to allow the players to bring an antitrust suit as a union at impasse would “improperly upset the careful balance established by Congress through the labor law.”¹⁶⁶ The court concluded by reviewing the choices facing the owners and players.¹⁶⁷ The two sides could continue bargaining, which the court “strongly urge[d]” them to do.¹⁶⁸ They could resort to economic force or present claims to the NLRB.¹⁶⁹ But as long as either side could bring claims before the NLRB, or until

158. *Id.* at 1358. Judge Doty issued his decision on May 23, 1991. *Id.* at 1351.

159. *Id.* at 1356, 1358 (“The *Powell* court . . . expressly rejected the idea that the NFL defendants enjoy endless antitrust immunity.”).

160. *Id.* at 1358–59.

161. See *White v. Nat’l Football League*, 822 F. Supp. 1389, 1398 (D. Minn. 1993); *McNeil v. Nat’l Football League*, Civ. No. 4-90-476, 1992 WL 315292, at *1 (D. Minn. 1992) (special verdict form). A jury awarded \$543,000 in damages, which the court then trebled. The parties settled the litigation before the District Court entered final judgment in *McNeil*. *Id.*

162. See *White*, 822 F. Supp. at 1398; *McNeil*, 1992 WL 315292, at *1.

163. See *Powell v. Nat’l Football League*, 930 F.2d 1293, 1301–02 (8th Cir. 1989). In her decision in *Brady*, Judge Susan Richard Nelson described the Eighth Circuit’s *Powell* holding as requiring the NFLPA to “jettison[] the entire collective bargaining apparatus—and the rights and benefits it provided to them” before bringing Sherman Act claims against the owners. *Brady v. Nat’l Football League*, 779 F. Supp. 2d 992, 1000 (D. Minn. 2011).

164. *Powell*, 930 F.2d at 1302.

165. *Id.*

166. *Id.*

167. *Id.* at 1303–04.

168. *Id.* at 1303.

169. *Id.*

those claims were resolved, the court held that the labor relationship between the owners and players continued and the nonstatutory labor exemption extended to shield the owners from antitrust liability.¹⁷⁰

Following the Eighth Circuit's decision, the NFLPA's executive committee voted to disclaim representation.¹⁷¹ The NFLPA notified NFL management of the decision, and a "substantial majority" of players signed petitions in the following weeks stating that neither the NFLPA nor any other entity was entitled to act as their bargaining representative.¹⁷² A month after the executive committee's decision, player representatives from each team unanimously voted to end the NFLPA's status as their bargaining representative and to restructure the organization.¹⁷³ Judge Doty later recounted these steps the players undertook in executing the disclaimer.¹⁷⁴

In his decision, Judge Doty expressed that the majority will of employees is what defines the bargaining relationship.¹⁷⁵ Under Section 7 of the National Labor Relations Act, employees have an unconditional right not to unionize and not to engage in collective bargaining.¹⁷⁶ Because certification is not required to create a collective bargaining relationship, Judge Doty reasoned that decertification is not required to end it.¹⁷⁷ Judge Doty thus found it unnecessary for the NLRB to decertify the union and allowed the players' antitrust claims to go forward.¹⁷⁸

The NFL players would look to the cases from 1989 and 1991 in their 2011 fight with owners.

170. *Id.* at 1303–04. In an interesting footnote, the court addressed the NFL's legal concessions, one of which was that owners could face liability under the Sherman Act if the players ceased to be represented by a certified union. *Id.* at 1303 n.12.

171. *See Powell v. Nat'l Football League*, 764 F. Supp. 1351, 1354 (D. Minn. 1991).

172. *Id.* at 1354 & n.1.

173. *Id.* at 1354.

174. *Id.* at 1354, 1356.

175. *Id.* at 1357.

176. *Id.* at 1358.

177. *Id.*

178. *Id.* at 1358–59 (“The NFLPA also concedes that it has lost its majority status and may no longer bargain on the players’ behalf. Thus, there is no need for the NLRB to decertify the NFLPA.”). In a footnote, Judge Doty cited NLRB guidelines requiring no decertification election in cases where a union no longer wishes to continue as a bargaining representative. *Id.* at 1358 n.7.

VI. THE NFL PLAYERS IN 2011 INITIALLY WON A FAVORABLE RULING REGARDING THE DISCLAIMER, BUT THE EIGHTH CIRCUIT ULTIMATELY LEFT THE ISSUE UNRESOLVED

After the NFLPA disclaimed representation and the players filed their antitrust suit in 2011, the players won a favorable ruling in U.S. District Court in Minnesota when Judge Susan Richard Nelson enjoined the lockout.¹⁷⁹ The Eighth Circuit later reversed that decision, holding that the injunction violated the Norris-LaGuardia Act, which prohibits courts from issuing injunctions in cases growing out of labor disputes.¹⁸⁰ However, the Eighth Circuit did not rule on the disclaimer's effectiveness or the merits of the players' antitrust claims, leaving unanswered the question of whether the disclaimer would constitute an "extreme outer boundary" of the collective bargaining relationship and nonstatutory labor exemption.¹⁸¹

Unlike their battles in the 1990s over free agency, the NFL owners and players clashed in 2011 over the split of revenues.¹⁸² The owners wanted a greater share of the league's \$9 billion in annual revenues—players previously received 59.5% of revenues, after deducting the first \$1 billion as cost credits for league expenses.¹⁸³ The owners also sought a rookie wage scale and longer season.¹⁸⁴ The owners and players unsuccessfully bargained for sixteen days with federal mediator George Cohen prior to expiration of the CBA.¹⁸⁵ Then, with the CBA only hours away from expiring, the NFLPA dissolved effective at 4 p.m. on March 11, 2011.¹⁸⁶ This was accomplished through a disclaimer of representation: the player representatives from the league's thirty-two teams voted to approve the disclaimer.¹⁸⁷ Declaring itself no longer the players' bargaining representative, the NFLPA reclassified as a

179. See *Brady v. Nat'l Football League*, 779 F. Supp. 2d 992, 1042–43 (D. Minn. 2011).

180. See *Brady v. Nat'l Football League*, 644 F.3d 661 (8th Cir. 2011).

181. *Id.* at 682; see also *Brown v. Pro Football, Inc.*, 518 U.S. 231, 250 (1996).

182. See Judy Battista, *In Labor Clash, N.F.L.'s Union Calls Old Play*, N.Y. TIMES, Mar. 2, 2011, at A1.

183. See Jarrett Bell, *The Last Game Until? A Looming Lockout by NFL Owners Could Put the 2011 Season on Hold*, USA TODAY, Feb. 4, 2011, at A1.

184. Drape, *supra* note 45.

185. See Battista, *supra* note 43.

186. See Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction at 5, *Brady v. Nat'l Football League*, 779 F. Supp. 2d 992 (D. Minn. 2011) (No. 0:11-cv-00639-SRN-JJG), 2011 WL 956159.

187. See *Brady Complaint*, *supra* note 1, at 22.

professional association with the Department of Labor and Internal Revenue Service.¹⁸⁸ The timing of the disclaimer was critical: the existing CBA barred the players from bringing an antitrust suit for six months once it expired.¹⁸⁹

That same day, ten players filed a class-action antitrust suit in U.S. District Court in Minnesota, while the NFL owners locked out players effective at midnight.¹⁹⁰ The owners argued that the NFLPA's disclaimer was invalid and the nonstatutory labor exemption still protected their conduct.¹⁹¹ Further, the owners emphasized that the disclaimer occurred "literally *during*" a bargaining session.¹⁹² The owners argued that the players' "tactical and unilateral" decision to disclaim representation could not "instantaneously oust" federal labor law and the owners' labor law rights.¹⁹³ The owners argued: "A union cannot, by a tactical decision akin to the flip of a switch, transform a multiemployer bargaining unit's lawful use of economic tools afforded it under the labor law into an antitrust violation" with treble damages and injunctive relief.¹⁹⁴ The owners also contended that the NLRB would find the players' disclaimer was not made in good faith and instead was employed for "momentary expedienc[y]."¹⁹⁵ Notably, the owners used the players' media comments against them, quoting players who suggested that the union would continue functioning even after purportedly being dissolved.¹⁹⁶

188. See *Brady*, 779 F. Supp. 2d at 1003–04. During negotiations, the NFLPA received conditional approval from players to disclaim interest in collective bargaining if union leadership later found it was advantageous to do so. See also Opening Brief of Appellants at 6–7, *Brady v. Nat'l Football League*, 644 F.3d 661 (8th Cir. 2011) (No. 11-1898). Executive director DeMaurice Smith asked for authority to dissolve the union in the fall. See Battista, *supra* note 182. The NFL argued that the players submitted no voting cards or other written documentation authorizing the disclaimer prior to the CBA's expiration. See Brief of Appellants at 7 n.4, *Brady v. Nat'l Football League*, 644 F.3d 661 (8th Cir. 2011) (No. 11-1898).

189. See Feldman, *The Issues Behind the NBA Players' Decertification Strategy*, *supra* note 125. The NFL owners in their previous settlement also agreed not to challenge the players' right to dissolve the union and pursue antitrust remedies if the players agreed to reform the union for a new CBA. See *Brady* Complaint, *supra* note 1, at 19.

190. The players' chief antitrust complaints related to the NFL's salary cap and college draft as well as its franchise player designations imposing restrictions on player free agency. See *Brady* Complaint, *supra* note 1, at 24–27.

191. See Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction at 9, *Brady*, 779 F. Supp. 2d 992 (No. 11CV00639), 2011 WL 956159.

192. See *id.* (emphasis in original).

193. *Id.*

194. *Id.*

195. *Id.* at 21 (quoting *Retail Associates, Inc.*, 120 N.L.R.B. 388, 394 (1955)).

196. *Id.* at 16. One player said the disclaimer was a "good decision and a good strategy on our part as a union." *Id.* Another said the purpose of disclaimer was to have an "ace up our sleeve." *Id.*

A month after the players' suit, Judge Nelson issued an injunction halting the lockout after finding the players' disclaimer effectively terminated the collective bargaining relationship.¹⁹⁷ In particular, Judge Nelson rejected the owners' argument that the court needed to defer to the NLRB in determining whether the disclaimer was effective.¹⁹⁸ She echoed Judge Doty in finding that decertification was not required to end a bargaining relationship and cited the NLRB's "numerous opinions" over the years addressing disclaimers.¹⁹⁹ Judge Nelson ruled that the players' disclaimer was unequivocal, made in good faith, and unaccompanied by inconsistent conduct.²⁰⁰ Judge Nelson noted that "no legal support" existed for the requirement that a disclaimer be a permanent abandonment of collective bargaining, adding, "[e]mployees have the right not only to organize as a union but also to refrain from such representation and, as relevant here, to 'de-unionize.'"²⁰¹ Because the players gave up "significant rights" by disclaiming, Judge Nelson found that "any subjective motivation" regarding the disclaimer was irrelevant.²⁰² This was consistent with the NLRB's standard from its 1991 *Pittsburgh Steelers* advisory opinion for evaluating disclaimers.²⁰³

With the players having disclaimed representation, Judge Nelson found that the collective bargaining relationship had ended entirely.²⁰⁴ She distinguished the present circumstances with those in *Brown* in which the owners and players had reached impasse.²⁰⁵ The NFLPA's dissolution provided a "clear boundary" marking the end of collective bargaining.²⁰⁶ "There is no need to wait and see if any temporary impasse will be surmounted or prove intractable," Judge Nelson

at 15. Derrick Mason, another football player, said the players were "per se, no," not a union, "but we're still going to act as one" and would "try to as a whole get a deal done." *Id.* at 16.

197. *Brady*, 779 F. Supp. 2d at 1042–43.

198. *Id.* at 1021–22.

199. *Id.* at 1014–15.

200. *Id.* at 1022.

201. *Id.* at 1015.

202. *Id.* at 1018.

203. *Id.* at 1015–19; see also *In re Pittsburgh Steelers, Inc.*, Case 6–CA–23143, 1991 WL 144468, at *1, *4 n.8 (June 26, 1991).

204. *Brady*, 779 F. Supp. 2d at 1021–22 ("[U]nlike impasse—which occurs within the collective bargaining process of negotiations, but frequently amounts to nothing more than a 'timeout'—such a disclaimer removes the dispute from the collective bargaining framework.").

205. *Id.* at 1040 ("*Brown* concerned an impasse occurring within the context of a collective bargaining relationship that likely could continue. Here, in contrast, the parties have left the collective bargaining framework entirely.>").

206. *Id.* at 1020.

wrote.²⁰⁷ The players' disclaimer triggered a "definitive and immediate" renunciation of collective bargaining and labor law protections.²⁰⁸ Judge Nelson lastly found "nothing inherently unfair or inequitable" with the players' disclaimer instantaneously ending the bargaining relationship, noting that the players lost significant rights and faced similar consequences from their decision.²⁰⁹

Judge Nelson went on to find that the Norris-LaGuardia Act did not prohibit the court from issuing an injunction halting the lockout because the collective bargaining relationship between the owners and players no longer existed.²¹⁰ As for the players' antitrust claims, Judge Nelson suggested that the players' disclaimer left the owners exposed to liability.²¹¹

The owners appealed to the Eighth Circuit, arguing again that the union's disclaimer was tactical and the nonstatutory labor exemption continued to offer antitrust protection, as well as contending that the District Court should have deferred to the NLRB.²¹² The owners asserted that "no student of the history of this industry" could believe that the players had abandoned the union.²¹³ The owners cited *Brown* in arguing that the disclaimer must be sufficiently distant in time and circumstances from bargaining for the exemption to cease.²¹⁴ The owners argued: "In the context of multiemployer bargaining, the mere *potential* for antitrust scrutiny, activated at an unpredictable time by unilateral decision of the potential antitrust plaintiffs across the bargaining table, would frustrate federal labor law by inhibiting collective action and robust negotiations *throughout* the bargaining process."²¹⁵ Their final argument concerned Judge Nelson's authority to issue an injunction under the Norris-LaGuardia Act because the issues grew out of a labor dispute.²¹⁶ Four

207. *Id.* at 1021.

208. *Id.*

209. *Id.*

210. *Id.* at 1042–43.

211. *Id.* at 1040 ("Although it remains to be decided whether the nonstatutory labor exemption still applies to protect the League from antitrust claims regarding player restraints, it is clear that the holding of *Brown*, which is confined to impasse, offers no absolute shield against such claims.").

212. See Reply Brief of Appellant at 22, 26–27, 29–35, *Brady v. Nat'l Football League*, 644 F.3d 661 (8th Cir. 2011) (No. 0:11-cv-00639-SRN-JJG), 2011 WL 2179417.

213. *Id.* at 22.

214. *Id.* at 32.

215. See Opening Brief of Appellant at 45, *Brady*, 644 F.3d 661 (No. 0:11-cv-00639-SRN-JJG), 2011 WL 2003085 (emphasis in original).

216. See Reply Brief of Appellant at 2–6, *Brady*, 644 F.3d 661 (No. 0:11-cv-00639-SRN-JJG), 2011 WL 2179417.

days after Judge Nelson's decision, the Eighth Circuit granted a temporary stay of the injunction pending appeal.²¹⁷

Three weeks later, the Eighth Circuit granted a full stay pending appeal of Judge Nelson's injunction, expressing skepticism about her interpretation of the Norris-LaGuardia Act.²¹⁸ In a 2-1 decision, the court held that it could not reconcile the timing of the players' suit with Judge Nelson's finding that the case did not arise or grow out of a labor dispute and that Norris-LaGuardia therefore did not apply.²¹⁹ Following the decision, the NFL called on players to resume negotiations and "control their own destiny" on a new CBA.²²⁰

After granting the stay pending appeal in May, the Eighth Circuit heard oral arguments in June and reversed Judge Nelson's decision.²²¹ Arguing for the owners, former Solicitor General Paul Clement notably claimed that the exemption should extend for at least a year after a union dissolves.²²² The same Eighth Circuit panel split 2-1 and again rejected Judge Nelson's interpretation of the Norris-LaGuardia Act.²²³ The court held that the case arose from a labor dispute, noting that the players and owners were parties to a CBA for more than eighteen years and had bargained for more than two years before the players' suit.²²⁴ The court also noted that the NFLPA disclaimed and players filed suit in a single day.²²⁵ Judge Steven Colloton wrote for the majority: "The labor dispute

217. *Brady v. Nat'l Football League*, 638 F.3d 1004 (8th Cir. 2011).

218. *Brady v. Nat'l Football League*, 640 F.3d 785, 789–91 (8th Cir. 2011).

219. *Id.* The court held that given the "close temporal and substantive relationship" between the players' suit and the league's labor dispute, "we struggle at this juncture to see why this case is not at least one 'growing out of a labor dispute.'" *Id.* at 791–92.

220. See Judy Battista, *Owners Win Delay in Lockout Case, Keeping N.F.L. Shut*, N.Y. TIMES, May 17, 2011, at B16.

221. *Brady*, 644 F.3d at 663; see Judy Battista, *Judge Advises N.F.L. and Players to Continue Efforts to End Dispute*, N.Y. TIMES, June 4, 2011, at D6. Judge Bye told the lawyers arguing the case, "We won't . . . be all that hurt that you're leaving us out if you should go out and settle the case." *Id.*

222. *Id.* ("Clement also said the nonstatutory labor exemption should apply for at least a business cycle after a union dissolves itself—meaning the lockout would not be subject to antitrust law for at least a year—and he called antitrust charges made by players 'extraneous.'). Judge Bye noted in his dissent that the NFL advocated for the exemption to continue for a year or one business cycle following the union's dissolution. *Brady*, 644 F.3d at 687 (Bye, J., dissenting) ("At some point in the 'arising out of' spectrum, the antitrust immunities stemming from statutory and nonstatutory labor exemptions must come to an end and give way to antitrust remedies. Such point does not come a year from the union disclaimer, nor one business cycle from it, as suggested by the League's counsel. Rather, such point comes at the moment of the union disclaimer.').

223. *Brady*, 644 F.3d at 663, 673.

224. *Id.* at 673.

225. *Id.*

did not suddenly disappear just because the Players elected to pursue the dispute through antitrust litigation rather than collective bargaining.”²²⁶ However, the Eighth Circuit did not rule on whether the exemption continued to apply following the players’ disclaimer.²²⁷ With the case continuing no further, the Eighth Circuit’s decision left all issues regarding the effectiveness of a disclaimer of representation and the exemption’s boundaries unresolved.²²⁸

Even as they awaited the Eighth Circuit’s ruling, the NFL owners and players resumed bargaining.²²⁹ They reached agreement on a new CBA in time to play a full season, cancelling only an annual preseason game.²³⁰ Players received forty-seven percent of all revenues, with most cost-credit deductions for owners eliminated.²³¹ Owners agreed to shorten off-season training programs and reduce practice time during the preseason and regular season.²³² To approve the new CBA following their disclaimer, the players voted to reconstitute the union and then approved the CBA.²³³

Although the NBA players similarly dissolved their union through a disclaimer, they did so only after months of unsuccessful bargaining following imposition of the lockout.²³⁴ With players and owners reaching agreement on a new CBA two weeks after the disclaimer (and with the clock ticking on their season), no court issued a comparable ruling in the NBA lockout as in the NFL lockout.²³⁵

226. *Id.*

227. *Id.* at 682 (“In particular, we express no view on whether the League’s nonstatutory labor exemption from the antitrust laws continues after the union’s disclaimer.”).

228. *Id.*

229. See Judy Battista, *N.F.L. Set to Proceed Toward Deal with Players*, N.Y. TIMES, June 22, 2011, at B12.

230. See Battista, *supra* notes 41, 49.

231. See Ken Belson, *With Lockout Over, One Jet is Left to Explain It To His Teammates*, N.Y. TIMES, Aug. 2, 2011, at B10. The owners sought cost-credit deductions for business expenses including stadium enhancements, running the NFL television network, promotional activities, and overseas marketing. See Battista, *supra* note 43; Tom Pedulla, *The NFL’s Labor Dispute: Answers to Key Questions*, USA TODAY, Feb. 14, 2011.

232. See *supra* note 231.

233. See Judy Battista, *Owners Vote in Favor of Tentative Labor Deal*, N.Y. TIMES, July 22, 2011, at B11. The NFLPA wanted to collect union cards from players before re-forming to bolster its contention that the dissolution was not a sham to gain bargaining leverage. This was important in the event the union’s legitimacy was challenged in future negotiations. *Id.*

234. See *infra* Part VII.

235. See *infra* Part VII.

VII. THE NBA PLAYERS REFRAINED FROM DISSOLVING
THEIR UNION FOR MONTHS BEFORE THE LOCKOUT WAS
QUICKLY RESOLVED FOLLOWING THEIR DISCLAIMER

The NBA owners' commitment to a "fundamental overhaul" of league economics marked the beginning of the basketball lockout.²³⁶ Owners claimed that twenty-two of the league's thirty teams were losing money and that those losses amounted to hundreds of millions of dollars annually.²³⁷ Billions of dollars separated the owners' and the players' proposals when the CBA expired on July 1, 2011, and the owners imposed a lockout.²³⁸ Unlike the NFL players, however, the NBA players negotiated with the team owners on a new CBA for nearly four-and-a-half months following the lockout before dissolving their union and filing antitrust suits.²³⁹ From the start of the lockout, NBPA officials viewed dissolving the union as a last-ditch option and pledged to continue negotiating with owners.²⁴⁰ But as months passed with no resolution, the NBPA faced mounting pressure to decertify or disclaim representation, driven by several prominent players' agents.²⁴¹

The owners and players engaged in months of bruising negotiations, marked by the repeated breakdown of talks, and finally culminating in a take-it-or-leave-it offer that NBA Commissioner David Stern issued in

236. See Beck, *supra* note 2.

237. See Beck, *supra* notes 2, 43. The owners sought not only an increased share of revenues, but also restrictions on player movement as free agents, shorter contracts, a tougher salary cap, and lower salaries. See Beck, *supra* notes 2, 43.

238. See Beck, *supra* notes 2, 43; Mahoney, *supra* note 44. NBA Commissioner David Stern said: "We had a great year in terms of the appreciation of our fans for our game. It just wasn't a profitable one for the owners, and it wasn't one that many of the smaller market teams particularly enjoyed or felt included in." Mahoney, *supra* note 44.

239. See Beck, *supra* note 16 ("The N.F.L. players dissolved their union before their labor deal had expired. The N.B.A. players have been trying to negotiate a new deal for more than four months, and did not disband their union until the league ostensibly stopped negotiating.").

240. Beck, *supra* note 43. NBPA executive director Billy Hunter's pledged to continue to negotiate; "That was sort of the closing agreement up there, that we would not let the imposition of a lockout stop us from meeting." *Id.*

241. See Adrian Wojnarowski, *NBA Union Faces Test of Strength*, YAHOO.COM, Sept. 14, 2011, <http://sports.yahoo.com/news/nba-union-faces-test-strength-074200148—nba.html>. Agents viewed the prospect of an unfavorable court ruling as the only way to win concessions from owners. Adrian Wojnarowski, *Agents Pushing for Clear Union Strategy*, YAHOO.COM, Sept. 7, 2011, <http://sports.yahoo.com/news/agents-pushing-clear-union-strategy-185200144—nba.html>; Adrian Wojnarowski, *NBA Agents Want Union to Decertify*, YAHOO.COM, July 23, 2011, http://sports.yahoo.com/nba/news?slug=aw-wojnarowski_nba_agents_decertification_072311 (quoting a prominent agent as saying, "We have one weapon left, and that's decertification. We need to use it,").

November.²⁴² Either the players could accept a proposed 50/50 split of revenues or Stern promised the owners' next "reset" offer would include a 53/47 split of revenues in the owners' favor, along with a hard salary cap and shorter contracts.²⁴³ The 50/50 split amounted to a \$3 billion giveback by players in a potential ten-year CBA.²⁴⁴ After the players rejected the proposal, the NBPA resorted to its last-ditch option and disclaimed interest in continuing to represent the players in bargaining.²⁴⁵ By then, Stern had canceled the season's first month of games.²⁴⁶ Now facing the possibility of a lost season, Stern described the players' decision as sending the NBA into a "nuclear winter" of uncertainty.²⁴⁷ A lost season would have cost the players and owners an estimated \$2 billion collectively for each side.²⁴⁸

Once they opted to dissolve their union, the NBA players mirrored the NFL players' actions. The NBPA disclaimed representation and a group of players filed antitrust suits the following day.²⁴⁹ One group of players brought suit in U.S. District Court for the Northern District of California while another group did so in U.S. District Court in Minnesota, where the NFL players had won a favorable ruling from Judge Nelson only months earlier.²⁵⁰ The players charged that as early as 2007, Stern and

242. See Howard Beck, *A Final Proposal, with Hopes of a Vote*, N.Y. TIMES, Nov. 11, 2011, at B15. After meeting with owners and players for thirty hours over three days in October, federal mediator George Cohen walked away from the talks saying, "No useful purpose would be served by requesting the parties to continue the mediation process at this time." Howard Beck, *N.B.A. Talks Break Off, Threatening November Games*, N.Y. TIMES, Oct. 21, 2011, at B16. That same day, NBPA executive director Billy Hunter claimed that the NBA had planned for two or three years to lock out the players, break the union, and impose a new economic system. *Id.*

243. See Beck, *supra* note 242; Howard Beck, *Facing Deadline, Players Committee Will Confer*, N.Y. TIMES, Nov. 7, 2011, at D4.

244. See Howard Beck, *N.B.A. Negotiations Resume, with Possible Breakthrough*, N.Y. TIMES, Nov. 10, 2011, at B13.

245. See Beck, *supra* notes 16, 19.

246. See *id.*

247. See *id.*

248. See Howard Beck, *Long Shot by Players is a Nudge Toward Deal*, N.Y. TIMES, Nov. 18, 2011, at B18.

249. See Class Action Complaint at 15–16, *Butler v. Nat'l Basketball Ass'n*, No. 011-cv-03352-PJS-SER (D. Minn. filed Nov. 15, 2011); see also Howard Beck, *In Attempt to Force Talks, Players File Antitrust Suits*, N.Y. TIMES, Nov. 16, 2011, at B15; Beck, *supra* note 16. The player representatives from the NBA's thirty teams voted unanimously for the NBPA to disclaim its role as the players' bargaining representative. According to the players, a substantial majority of players previously signed authorization cards empowering the NBPA to disclaim representation if unionization no longer was in the players' best interests. The NBPA converted to a trade association and started the process of reclassifying with the Department of Labor and the IRS.

250. See Class Action Complaint at 1, *Butler*, No. 011-cv-03352-PJS-SER; Anthony Complaint, *supra* note 1, at 1; Beck, *supra* note 249.

Deputy Commissioner Adam Silver met with NBPA Executive Director Billy Hunter and informed Hunter that the owners were “prepared to lock out the players for two years to get everything” they wanted in a new CBA.²⁵¹ The players added that Stern promised a potential deal would only get worse during the lockout.²⁵² The players also asserted that the league wanted to guarantee owners a ten percent profit annually, regardless of whether their teams succeeded on the basketball court.²⁵³

In anticipation of the players’ suit, the NBA preemptively sued the NBPA in U.S. District Court for the Southern District of New York in August 2011, seeking a declaratory judgment that any disclaimer would be ineffective.²⁵⁴ The owners claimed that the NBPA had threatened to disclaim dozens of times and bring antitrust litigation in every CBA negotiation dating to 1970.²⁵⁵ The owners argued: “[D]espite the NBPA’s repeated invocation of the antitrust laws in an effort to gain leverage in bargaining, the ultimate resolution on each such occasion . . . has always been the same: a collectively-bargained agreement between the NBA and NBPA negotiated pursuant to federal labor law containing the very practices the NBPA had challenged as antitrust violations.”²⁵⁶ The NBA called the threatened disclaimer “an impermissible negotiating tactic” and not a “good faith, permanent relinquishment” of bargaining rights.²⁵⁷ The NBA sought a declaratory judgment that its lockout was legal and that the nonstatutory labor exemption protected owners from antitrust liability.²⁵⁸ Conversely, the NBA requested that if the court found the disclaimer valid, it declare all contracts between players and teams void and unenforceable as the product of a now-defunct bargaining process.²⁵⁹

After more than four months of failed bargaining through the lockout, the NBA players contended in their lawsuits that the collective bargaining relationship had collapsed in the context of *Brown*.²⁶⁰ The players noted that they bargained twenty-three times even before the

251. See Anthony Complaint, *supra* note 1, at 12.

252. *Id.*

253. Anthony Complaint, *supra* note 1, at 13.

254. Class Action Complaint for Declaratory Relief at 1, Nat’l Basketball Ass’n v. Nat’l Basketball Players Ass’n, No. 11CV05369 (S.D.N.Y. filed Aug. 2, 2011), 2011 WL 3274242.

255. *Id.* at 10.

256. *Id.* at 10–11.

257. *Id.* at 2.

258. *Id.* at 17–18.

259. *Id.* at 21.

260. See Anthony Complaint, *supra* note 1, at 17–19, 20–21.

CBA expired, offered hundreds of millions of dollars in concessions, and faced nonnegotiable demands in return from owners.²⁶¹ They cited Stern's words accompanying his November ultimatum—"We have made our revised proposal and we're not planning to make another one"—as evidence that the league had no intention of negotiating material changes to its proposal.²⁶² The players argued that these collective circumstances marked the abandonment of collective bargaining by owners even before their disclaimer.²⁶³ They further cited their own "caution and reluctance" in disclaiming representation, noting that the NBPA had never taken such a step since its establishment in 1954 despite facing pressure to do so during previous negotiations.²⁶⁴ Unlike the NFL players, who disclaimed following a bargaining session and on the eve of their CBA's expiration, the NBA players argued that their disclaimer was prompted by months (if not years) of frustrated negotiations.²⁶⁵

With the clock ticking on their season, though, the NBA owners and players resumed negotiations and resolved the lockout two weeks after the disclaimer and start of litigation.²⁶⁶ The players consolidated their suits in the days after filing, but no court heard arguments or ruled on the issues raised.²⁶⁷ Following a fifteen-hour bargaining session, the owners and players announced agreement on a new CBA at 3:40 a.m. on November 26, 2011.²⁶⁸ The agreement came in time for the league to salvage a sixty-six-game season beginning on Christmas.²⁶⁹ Owners received \$300 million in annual salary concessions from players, who

261. *Id.* at 12–13, 18.

262. *Id.* at 17.

263. *Id.* at 3–5, 17–18.

264. *Id.* at 17.

265. *See id.* at 12–17 (citing NBA owners' intransigence in negotiations dating to June 2007). The NBA players cited the ultimatum as evidence of the owners' "effective destruction" of the bargaining process in their Complaint. *See id.* at 4. Some commentators have argued that because the NBA players waited months before disclaiming, a court might have been more inclined to view their disclaimer as marking the end of the collective bargaining relationship. *See* Gabe Feldman, *NBA Lockout: The NBA's Nuclear Winter—Where Do We Go From Here?*, GRANTLAND.COM, Nov. 22, 2011, http://www.grantland.com/blog/the-triangle/post/_/id/10276/nba-lockout-the-nba%E2%80%99s-nuclear-winter-%E2%80%94-where-do-we-go-from-here ("Why did Billy Hunter wait so long after the CBA expired to disclaim interest? . . . Maybe he though[t] the delay would strengthen the players' argument that the disclaimer ended the non-statutory labor exemption.").

266. Beck, *supra* notes 19, 244.

267. *See* Howard Beck, *N.B.A. Players Merge Lawsuits; No Hearing Date Set*, N.Y. TIMES, Nov. 22, 2011, at B18.

268. Beck, *supra* note 19.

269. *Id.*

received 51.2 percent of revenues under the new CBA for the 2011–12 season.²⁷⁰ Executive Director Hunter said at the press conference announcing the agreement, “We just thought that rather than try to pursue this in court, it was in both of our interests to try to reach a resolution.”²⁷¹

VIII. THE NFL AND NBA LOCKOUTS SHOULD LEAVE COURTS WARY OF RECOGNIZING FUTURE UNION DISCLAIMERS

Although the NFL and NBA lockouts left the question unanswered of whether a union’s disclaimer of representation terminates the collective bargaining relationship in the context of *Brown*, courts should be wary of recognizing future disclaimers. The destabilizing effect of a disclaimer on the collective bargaining process should concern courts that previously have struggled to strike the proper balance between encouraging bargaining while preserving the possibility of antitrust liability.²⁷² In the event of a disclaimer, courts have a variety of options to consider for marking the boundary between collective bargaining protections and antitrust liability.²⁷³ Those options include insisting on a formal decertification by the union (despite being portrayed as unnecessary by courts in the past);²⁷⁴ deferring to the NLRB in determining whether a disclaimer is effective;²⁷⁵ or extending the nonstatutory labor exemption for a reasonable period following a disclaimer.²⁷⁶

This Comment argues that courts should extend the exemption for a reasonable period following a disclaimer as the best means of separating deserving antitrust claims from those merely used as bargaining tactics. The NFL owners argued before the Eighth Circuit that such a reasonable period could extend for either a year or one business cycle following a union’s disclaimer.²⁷⁷ This is a reasonable standard: by applying such a principle, courts would minimize the potentially destabilizing effect on

270. See *id.*; Marc Stein, *Billy Hunter Sends Players Memo on BRI*, ESPN.COM, Nov. 27, 2011, http://espn.go.com/nba/story/_id/7285446/billy-hunter-tells-players-get-512-percent-bri-2011-12.

271. See Beck, *supra* note 19.

272. See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 241–42 (1996).

273. See *infra* notes 274–76.

274. See *Brown*, 518 U.S. at 250; *Brady v. Nat’l Football League*, 779 F. Supp. 2d 992, 1042–43 (D. Minn. 2011); *Powell v. Nat’l Football League*, 764 F. Supp. 1351, 1358 (D. Minn. 1991).

275. See *Brown*, 518 U.S. at 250.

276. The NFL owners advocated for the latter during arguments before the Eighth Circuit in the *Brady* case. See *supra* note 222.

277. See *supra* note 222.

the bargaining process that the Supreme Court emphasized in connection with the impasse in *Brown*.²⁷⁸ In addition, this would allow courts to distinguish between claims brought by plaintiffs such as the *Powell* players, who pursued antitrust litigation without a union for eighteen months, and the *Brady* players, who filed suit the same day as they disclaimed representation and dissolved the union.²⁷⁹

A. *By Immediately Recognizing a Players' Union's Disclaimer, Courts Risk Destabilizing the Bargaining Process*

The prospect of destabilizing in the bargaining process that so concerned the Court in *Brown* directly applies when a union is capable of unilaterally disclaiming representation, followed by its members immediately bringing an antitrust suit against the employer.²⁸⁰ The NFL owners emphasized this potential threat to the bargaining process in their arguments in *Brady*.²⁸¹ In the 2011 lockouts, the NFL and NBA players went from bargaining to antitrust litigation in a matter of hours—whether it was prior to expiration of a CBA for the NFL players or months into a lockout for the NBA players.²⁸² The NFL owners noted that the players' legal argument for terminating the nonstatutory labor exemption would “immediately and easily convert collective conduct *encouraged* by the labor laws into conduct *condemned* by the antitrust laws.”²⁸³ As a result, the NFL players' actions are difficult to view as sufficiently distant in time and circumstances from the bargaining process to terminate the exemption and to expose employers to antitrust

278. See *Brown*, 518 U.S. at 241–42, 246.

279. See *Powell*, 764 F. Supp. at 1358; *Brady* Complaint, *supra* note 1, at 21–23; *supra* note 158.

280. See *Brown*, 518 U.S. at 241–42, 246.

281. See Opening Brief of Appellants at 48, *Brady v. Nat'l Football League*, 644 F.3d 661 (8th Cir. 2011) (No. 11-1898) (“[T]he decision to engage in collective bargaining, especially multiemployer collective bargaining, has consequences. Even if a union purports to reverse that decision, it has no reasonable basis to assume that it can instantly and unilaterally shift the governing legal structure to the immediate disadvantage, if not peril, of the multiemployer bargaining unit.”).

282. As the NFL owners argued in their brief to the Eighth Circuit:

When, as in this case, an antitrust suit follows disclaimer by mere hours, when that disclaimer is in direct response to events at the collective bargaining table and even more when there are strong indications that the union will return and enter into a new collective bargaining agreement, the suit cannot be said to be ‘sufficiently distant in time and circumstances’ from the collective bargaining process unless those words have no meaning.

Opening Brief of Appellants at 48–49, *Brady*, 644 F.3d 661 (No. 11-1898).

283. *Id.* at 48 (emphasis in original).

liability.²⁸⁴ Although the Court addressed a bargaining impasse in *Brown*, it voiced an underlying concern about circumstances that “threaten to introduce instability and uncertainty in the collective-bargaining process, for antitrust law often forbids or discourages the kinds of joint discussions and behavior that the collective-bargaining process invites or requires.”²⁸⁵ These are the same factors present when a players’ union can disclaim interest and immediately file an antitrust suit, claiming the end of a bargaining relationship that was present just hours earlier.²⁸⁶

One key consideration is that a disclaimer can mark the end of union representation and termination of a bargaining relationship, but it also can be reversed just as quickly if the union opts to re-form.²⁸⁷ The labor rights that Judge Nelson and others have emphasized that a union sacrifices in dissolving are far from being lost forever when a union can reconstitute just as easily as it disbanded.²⁸⁸ This is critically different from a formal decertification, which would prohibit a union from reforming for twelve months—a consequence requiring significantly greater consideration by union members weighing what steps to take.²⁸⁹ In advocating for extending the exemption beyond a union’s disclaimer, the NFL owners noted the likelihood of resuming collective bargaining.²⁹⁰ The NFL owners also cited the threat that recognizing unilateral disclaimers would pose to employers, especially in light of a union’s ability to manipulate a disclaimer for bargaining purposes.²⁹¹ As the NFL and NBA lockouts showed, the players’ antitrust suits—after they had seemingly ended the bargaining relationship with owners—were in fact resolved with negotiations culminating in new CBAs and re-

284. See *Brown*, 518 U.S. at 250.

285. *Id.* at 241–42 (1996).

286. See *supra* note 282.

287. See Feldman, *supra* note 59, at 1260 n.223 (“The dissolution of the union, either through decertification or disclaimer of interest, need not be permanent. In fact, if the employer consents, there is no limit on how quickly a dissolved union can re-form.”).

288. See Feldman, *supra* note 59, at 1260 n.223.

289. See *supra* note 127.

290. See *supra* notes 213, 229.

291. See Opening Brief of Appellants at 45, *Brady v. Nat’l Football League*, 644 F.3d 661 (8th Cir. 2011) (No. 11-1898) (“In both situations, the exemption must continue not only because there is a prospect that collective bargaining will resume, but also because the prospect that the exemption could abruptly end due to a union’s unilateral action would significantly impede, stifle, and hinder the collective bargaining process *from its outset*. Moreover, either can be readily ‘manipulated by the [union] for bargaining purposes.’” (emphasis in original) (quoting *Brown v. Pro Football, Inc.*, 518 U.S. 246 (1996))).

formation of the respective unions.²⁹²

Although Judge Nelson cited the 1991 *Powell* decision in recognizing the NFLPA's 2011 disclaimer, courts also should not be afraid to distinguish the *Powell* circumstances.²⁹³ By the time Judge Doty ruled in *Powell*, the NFL players were eighteen months removed from their disclaimer.²⁹⁴ Judge Doty found no inconsistent conduct by the players in that time.²⁹⁵ He also noted that the players suffered in the absence of a union, with the NFL lengthening the season and reducing their benefits unilaterally.²⁹⁶ By contrast, the NFLPA was only a month removed from its disclaimer when Judge Nelson ruled in 2011.²⁹⁷ Judge Nelson addressed this concern by stating, "The fact that substantial time had passed in [*Powell*] since the union's disclaimer is not controlling here, because Judge Doty did not condition his ruling on the legal effect of disclaimer based on any such temporal restrictions."²⁹⁸

However, courts should revisit the *Powell* precedent with a better appreciation for how such disclaimers played out during the 2011 lockouts. A court that extends the nonstatutory labor exemption for a reasonable period following a players' union's disclaimer can both recognize deserving plaintiffs such as those in *Powell* while guarding against destabilizing the bargaining relationship.

B. Instead, Courts Should Extend Nonstatutory Labor Exemption Protections for a Reasonable Period Following a Disclaimer

By extending the exemption to shield employers from antitrust liability for a reasonable period following a union's disclaimer, courts would wisely delay recognizing disclaimers from plaintiffs such as those in *Brady* while allowing plaintiffs such as those in *Powell* to pursue antitrust litigation.²⁹⁹ A union that wanted to expedite its antitrust claims could opt for formal decertification—which the Supreme Court endorsed

292. See *supra* notes 229–33, 266–71.

293. See *supra* notes 134, 156–60.

294. See *Powell v. Nat'l Football League*, 764 F. Supp. 1351, 1354 (D. Minn. 1991). The NFLPA officially disclaimed representation in November and December 1989; Judge Doty issued his decision on May 23, 1991. *Id.* at 1351.

295. *Id.* at 1358 ("The NFLPA no longer engages in collective bargaining and has also refused every overture by the NFL defendants to bargain since November of 1989.").

296. *Id.* at 1359.

297. Judge Nelson issued her ruling on April 25, 2011. *Brady v. Nat'l Football League*, 779 F. Supp. 2d 992 (D. Minn. 2011). The players filed their complaint on March 11, 2011. *Id.* at 1003–04.

298. *Id.* at 1041.

299. See *Powell*, 764 F. Supp. 1351; *Brady*, 779 F. Supp. 2d at 1042–43.

in *Brown* as an outer boundary for the nonstatutory labor exemption—but would sacrifice labor-law rights and the ability to re-form for twelve months by doing so.³⁰⁰ This would help separate deserving antitrust claims from tactical moves designed to enhance bargaining leverage.³⁰¹ This is also in line with courts’ preference for resolving collective bargaining disputes through “voluntary agreement and labor remedies rather than judicial intervention.”³⁰²

By extending the exemption’s protections for a reasonable period following a disclaimer, courts also could delay to allow the NLRB to determine the validity of such a disclaimer.³⁰³ As the NFL owners argued, the validity of a disclaimer is a legal question best reserved to the agency’s administrative expertise.³⁰⁴ The Supreme Court made clear in *Brown* that it would not attempt to draw any dividing lines for the nonstatutory labor exemption without the NLRB’s specialized knowledge.³⁰⁵ In her *Brady* decision, Judge Nelson noted the NLRB’s

300. Some writers have even questioned whether courts should recognize a formal decertification occurring soon after a stall in bargaining. See Marc J. Yoskowitz, Note, *A Confluence of Labor and Antitrust Law: The Possibility of Union Decertification in the National Basketball Association to Avoid the Bounds of Labor Law and Move Into the Realm of Antitrust*, 1998 COLUM. BUS. L. REV. 579, 617 (1998) (“[Should decertification] take place early in the process, without good faith attempts at negotiations, and prior to a prolonged impasse, this tactic will be viewed as a sham, and courts will reject this tactic and maintain the nonstatutory labor exemption.”).

301. Tulane sports law professor Gabriel Feldman argues that players should be able to pursue antitrust remedies as soon as they dissolve their union. He additionally argues that decertification and disclaimer of interest equally terminate a union and the collective bargaining relationship. See Feldman, *supra* note 59, at 1254–61 (“[A contrary theory] subverts federal labor policy by effectively depriving employees of their statutorily protected right to opt out of a union by penalizing their initial involvement with a union.”).

302. See Feldman, *supra* note 59, at 1230.

303. The NFL owners argued in *Brady* that the NLRB had primary jurisdiction to rule on the validity of the players’ disclaimer. See Opening Brief of Appellants at 31–39, *Brady v. Nat’l Football League*, 644 F.3d 661 (8th Cir. 2011) (No. 11-1898) (“The fact that the District Court felt the need to engage in that long excursion [into NLRB precedents concerning the validity of disclaimers] is a clear signal that the court was intruding into the Board’s primary jurisdiction.”).

304. Reply Brief of Appellants at 24, *Brady*, 644 F.3d 661 (No. 0:11-cv-00639-SRN-JJG), 2011 WL 2179417. The NFL argued that the NLRB “and not the District Court, should assess the facts pertaining to this disclaimer in light of the policies underlying” the National Labor Relations Act. *Id.* The NFL owners also noted that the *Pittsburgh Steelers* ruling was not binding precedent for the Board and that the advisory opinion did not take into account the NFLPA’s re-formation after 1991. *Id.* at 24–25.

During the 2011 lockout, the NFL owners filed an unfair labor practice charge with the NLRB pursuant to the NLRA. See Opening Brief of Appellants at 10, *Brady*, 644 F.3d 661 (No. 11-1898); Judy Battista, *N.F.L. Claims Union Is Not Bargaining in Good Faith*, N.Y. TIMES, Feb. 15, 2011, at B14; see also 29 U.S.C. 158 (2006).

305. See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 250 (1996) (“Nor would it be appropriate for us to do so without the detailed views of the Board, to whose ‘specialized judgment’ Congress ‘intended to leave’ many of the ‘inevitable questions concerning multiemployer bargaining bound to

long-established criteria for recognizing a disclaimer in finding that she could apply the standard herself.³⁰⁶ However, the NLRB's *Pittsburgh Steelers* opinion is more than twenty years old and has not been revisited in the wake of the high-profile disclaimers in 2011 by the NFL and NBA players.³⁰⁷

The NLRB might very well view the criteria for an unequivocal and good-faith disclaimer differently now than it did two decades ago. This is especially possible in light of the many media reports about the tactical nature of the players' disclaimers during the 2011 lockouts and the circumstances through which both lockouts were resolved.³⁰⁸ The NLRB has emphasized the requirement that a disclaimer constitute a "sincere abandonment with relative permanency" of bargaining and that a "bare statement of disclaimer" is not enough.³⁰⁹ At the same time, the NLRB could endorse the reasoning in the *Pittsburgh Steelers* opinion. On one hand, by recognizing such disclaimers as valid, the NLRB risks allowing unions to switch from bargaining to antitrust litigation at a moment's notice, potentially undermining the entire collective bargaining process. On the other hand, by declining to recognize such disclaimers, the NLRB strikes a blow to the principle that workers have as much right not to be represented by a union as to be represented.³¹⁰ Either way, the extension of the nonstatutory labor exemption would allow a court to defer to the NLRB on the validity of a disclaimer, as the Court endorsed in *Brown*, and again help separate deserving antitrust claims from the undeserving.

Finally, by extending the exemption protections for a reasonable time following disclaimer, courts would wisely allow the economic pressures facing both sides to dictate their ultimate agreement. The billions at

arise in the future.'").

306. *Brady*, 779 F. Supp. 2d at 1019, 1021.

307. *In re Pittsburgh Steelers, Inc.*, Case 6–CA–23143, 1991 WL 144468, at *1 (June 26, 1991).

308. The NFL players reportedly agreed to decertify days before the expiration of the CBA. Judy Battista, *Sides Seeking Leverage Before Deadline in N.F.L.*, N.Y. TIMES, Feb. 27, 2011, at SP1. Other reports suggested the tactical nature of the players' disclaimer: "[U]nion leaders say they would decertify simply as a way to get players back on the field and to prevent a work stoppage that threatens the 2011 season." See Battista, *supra* note 182.

309. See *supra* notes 144–49.

310. See 29 U.S.C. § 157 (2006) ("Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title." (emphasis added)).

stake each season in professional sports is simply staggering: the *Brady* plaintiffs estimated NFL revenues at \$8.5 billion annually;³¹¹ the *Anthony* plaintiffs estimated NBA revenues at nearly \$4 billion annually.³¹² Professional athletes, meanwhile, can ill afford to lose a full season of salary given the brevity of their careers.³¹³ In light of these factors, courts should appreciate the incentive for both sides to return to the bargaining table, no matter how frustrated their negotiations. In 2011, even before the Eighth Circuit heard oral arguments concerning the NFL owners' appeal, the owners and players had resumed negotiations.³¹⁴ After the court issued its decision, the owners and players went so far as to issue a joint statement expressing "mutual recognition that this matter must be resolved through negotiation" and commitment to playing a full season.³¹⁵ The NFL acknowledged in its brief to the Eighth Circuit that for all the fears of a lost season, "there is no reason to assume that [a season will be lost], particularly with the powerful economic incentive for both sides to come to a compromise."³¹⁶ The NBA, meanwhile, faced pressure from its television partners, who pay a combined \$1 billion a season to broadcast games.³¹⁷

Perhaps because of these economic incentives, courts have expressed strong reluctance to hear such cases in the first place.³¹⁸ As Judge Kermit Bye of the Eighth Circuit told the NFL owners and players: "We will take this case and render a decision in due course. We won't, I might also say, be all that hurt that you're leaving us out if you should go out

311. See *Brady* Complaint, *supra* note 1, at 13.

312. See *Anthony* Complaint, *supra* note 1, at 10.

313. See *Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315, 1319 (D. Conn. 1977) ("The career of a professional athlete is more limited than that of persons engaged in almost any other occupation. Consequently the loss of even one year of playing time is very detrimental.").

314. See *Battista*, *supra* note 221. In an interview after oral arguments, Paul Clement said, "There's no question that to the extent what's going on is continuing negotiations, what that underscores is that the union has not disappeared forever." *Battista*, *supra* note 221. Clement added, "Everybody can make their own judgment, but the problem with the argument is that it assumes the union is gone forever, and I don't think many people who are students of this game or students of this industry really believe that is a fact." *Battista*, *supra* note 221.

315. See *Judy Battista, Court Rules Lockout by N.F.L. Can Go On*, N.Y. TIMES, July 9, 2011, at D5.

316. See Opening Brief for Appellant at 58, *Brady v. Nat'l Football League*, 644 F.3d 661 (8th Cir. 2011) (No. 11-1898), 2011 WL 2003085.

317. See Amy Chozik, *Basketball in Doubt, TV Tries to Fill a Gap*, N.Y. TIMES, Nov. 16, 2011, at B3. During the lockout, one cable channel had to substitute episodes of *CSI: Crime Scene Investigation* for previously scheduled games. *Id.*

318. See *Battista*, *supra* note 221.

and settle the case.”³¹⁹ Judge Bye added that if the court did reach a decision: “[T]hat’s probably something both sides are not going to like, but at least it will be a decision.”³²⁰ By recognizing a disclaimer as terminating the bargaining relationship only after a reasonable period, courts would avoid overriding the economic pressures facing each side to reach agreement—while avoiding entering cases they have expressed reluctance to hear in the first place.

For owners and players in professional sports, the economic interests at stake are so significant that they caution a court not to overreach in evaluating antitrust claims and the extent of the nonstatutory labor exemption. Extending the nonstatutory labor exemption for a reasonable period following disclaimer—such as the year or one business cycle the NFL owners advocated—would prevent such overreaching. As one commentator noted following resolution of the NFL lockout, the sides reached agreement not because of antitrust litigation but through bargaining—“reluctant bargaining, but bargaining nonetheless.”³²¹

CONCLUSION

With the Eighth Circuit leaving the question unresolved, the NFL and NBA lockouts failed to answer whether a disclaimer of representation terminates the bargaining relationship and extinguishes the nonstatutory labor exemption’s antitrust protections. The Supreme Court expressed in *Brown* that “extreme outer boundaries” exist such that the exemption will not shield employers from antitrust liability indefinitely. However, the Court also expressed its significant concern about destabilizing the bargaining process. The prospect of allowing players’ unions to disclaim representation and immediately file antitrust suits, such as the NFL and NBA players did during the 2011 lockouts, threatens the stability of the bargaining process that was of such concern in *Brown*.

Accordingly, courts considering future disclaimers of representation should find that nonstatutory labor exemption protections will continue to shield employers for a reasonable period following disclaimer. A reasonable period should be defined as one year or one business cycle. Such an extension would avoid compromising the bargaining process while allowing courts to better distinguish deserving plaintiffs from

319. *Id.*

320. *See id.*

321. *See* Lester Munson, *NFL Lockout Question: Was it Worth it?* ESPN.COM, July 26, 2011, http://espn.go.com/espn/commentary/story/_/page/munson-110725/nfl-lockout-settlement-questions-answers.

those using antitrust law exclusively as a bargaining tactic.³²² An extension additionally would allow courts to delay ruling on the contested antitrust issues and allow the NLRB to consider the effectiveness of a disclaimer while avoiding judicial overreaching in labor disputes where the billions of dollars at stake in a single season are most likely to shape the ultimate resolution between owners and players.

322. As previously noted, a union that wanted to expedite its antitrust claims could opt for formal decertification. The Supreme Court endorsed formal decertification in *Brown* as an outer boundary for the nonstatutory labor exemption. *See supra* note 300.