LOOKING BACK TO *MACKEY V. NFL* TO REVIVE THE NON-STATUTORY LABOR EXEMPTION IN PROFESSIONAL SPORTS

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INTRODUCTION

"When Ohio State won the Fiesta Bowl three years ago, Maurice Clarett was at the center of the celebration. When the Buckeyes won the Fiesta Bowl again Monday night, Clarett was headed to jail."[1] Eight months later, Clarett was charged with a felony for carrying a concealed weapon.[2] Clarett's problems began when he ran afoul of the National Football League's ("NFL") rule that prohibits college undergraduates from entering the NFL draft unless they are three years removed from their high school graduation.[3]

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1. Lee Jenkins, *On Day Recalling His Glory, Clarett Turns Himself In*, N.Y. Times, Jan. 3, 2006, at D1.

2. Frank Litsky, *Chase Ends in a Scuffle and Trouble for Clarett*, N.Y. TIMES, Aug. 10, 2006, at C19.

3. Clarett v. Nat'l Football League (*Clarett I*), 306 F. Supp. 2d 379, 385-87 (S.D.N.Y. 2004); Clarett v. Nat'l Football League (*Clarett II*), 306 F. Supp. 2d 411 (S.D.N.Y. 2004), *stay den.;* Clarett v. Nat'l Football League (*Clarett III*), 369 F.3d 124

Unfortunately for Clarett, he was unable to play what would have been his second year at Ohio State because he was suspended by the National Collegiate Athletic Association ("NCAA").[4] To add insult to injury, he was ineligible for the draft because of the NFL's three year rule.[5]

Clarett sued the NFL, claiming that the league's draft eligibility rule was an unreasonable restraint of trade in violation of the Sherman Antitrust Act and the Clayton Act.[6] Judge Scheindlin, of the Southern District of New York, granted Clarett's Motion for Summary Judgment (*"Clarett I"*),[7] stating that, since the eligibility rule violated the antitrust laws, Clarett could not be prevented from entering the 2004 NFL draft.[8] On February 11, 2004, Judge Scheindlin denied the NFL's motion to stay pending appeal:

> If a stay is granted Clarett will miss the 2004 draft. He will not be eligible to play in the NFL until the 2005 draft . . . If the stay is granted, Clarett will have effectively *lost* his lawsuit.[9] [A]t worst,

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(2d Cir. 2004), *rev'd*, 306 F. Supp. 2d 379 (S.D.N.Y. 2004).

He sought to be included in the pool of players eligible for the 2004 NFL draft to be held on April 24-25, 2004. *See Clarett I*, 306 F. Supp. 2d at 382; *Clarett III*, 369 F.3d at 126; Mike Freeman, *Buckeyes Suspend Clarett for Year,* N.Y. TIMES, Sept. 11, 2003, at D1.

Clarett was unable to enter the NFL's 2004 draft class because of a rule in the NFL's Constitution and Bylaws entitled, "Special Eligibility." *Clarett I*, 306 F. Supp. 2d at 385-87. *See generally* Robert Koch, *4th and Goal: Maurice Clarett Tackles the NFL Eligibility Rule,* 24 LOY. L.A. ENT. L. REV. 291-92 (2004).

Under the NFL eligibility rules, Clarett was not able to participate in the college draft until the Spring of 2005 since he graduated from high school in December 2001. *Clarett I,* 306 F. Supp. 2d at 388. *See generally* Civil Action No. 03 Civ. 7441, Compl.; Memorandum in Support of the NFL's Motion for Summary Judgment, *Clarett I*, No. 03 Civ. 7441 (S.D.N.Y. 2004); Memorandum of the NFL in Opposition to Plaintiff's Motion for Summary Judgment and in Support of the NFL's Cross-Motion for Summary Judgment, *Clarett I*, No. 03 Civ. 7441 (S.D.N.Y. 2004); Plaintiff's Memorandum in Opposition to Defendant NFL's Motion for Summary Judgment, *Clarett I*, No. 03 Civ. 7441 (S.D.N.Y. 2004); and Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, *Clarett I*, No. 03 Civ. 7441 (S.D.N.Y. 2004).

4. *Clarett I*, 306 F. Supp. 2d at 388.

5. *Id.*

6. *Id.* at 390; 15 U.S.C. § 1 (2000); 15 U.S.C. §§ 12-27 (2000).

7. *Clarett I*, 306 F. Supp. 2d at 410-11.

8. *Id.*

9. *Id.* at 414 ("[W]eighing . . . the relevant factors and case law plainly counsels against the issuance of a stay...I held that, as a matter of law, Clarett is eligible to participate in the 2004 draft. It would be perverse indeed to stay that order pending appeal.").

> the NFL will be forced to tolerate the handful of younger players who are selected in the 2004 draft.[10]

Judge Scheindlin found for Clarett because she believed that the NFL's eligibility rule did not fall within the non-statutory labor exemption,[11] in large part because it was not a mandatory subject of collective bargaining.[12] The mandatory subjects of collective bargaining include wages, hours, and conditions of employment.[13] The eligibility rule did not reference any of these subjects. Further, it effectively prevented a class of potential players from being employable,[14] and, according to the judge, mandatory subjects "affect only those who are employed or eligible for employment."[15] Additionally, the NFL eligibility rule was not the product of an arm's length negotiation between the league and the player's union.[16] For these reasons Judge Scheindlin held that the NFL's rule was not immune from antitrust scrutiny because it served as a complete bar to entry for players like Clarett.[17]

On May 24, 2004, the Second Circuit reversed and remanded Judge Scheindlin's decision.[18] The Second Circuit viewed the eligibility rule as a condition for initial employment that affected the job security of veteran players and had a tangible effect on mandatory collective bargaining subjects for current NFL players.[19] The court reasoned that, although the rule was "tailored to the unique circumstances of a professional sports league, the eligibility rules for the draft represent a quite literal condition for initial employment and for that reason alone might constitute a mandatory bargaining subject."[20] Additionally, the eligibility rule affected the job security of current players because it reduced market competition for entering players.[21] The Second Circuit

10. *Id.* at 412.
11. *Id.* at 395-96.
12. *Clarett I*, 306 F. Supp. 2d at 395-96.
13. *Id.* at 395.
14. *Id.* at 393.
15. *Id.*
16. *Id.* at 396.
17. *Clarett I*, 306 F. Supp. 2d at 382.
18. *Clarett III*, 369 F.3d at 143.
19. *Id.* at 139-40.
20. *Id.* at 139.
21. *Id.* at 140.

reasoned that, even though the NFL and the National Football League Players Association ("NFLPA") did not bargain over the eligibility rule, per se, the non-statutory labor exemption still applied since the rule was included in the NFL's Constitution and Bylaws.[22] The Second Circuit believed that it was sufficient that the NFLPA was aware of the eligibility rule[23] and that the union generally agreed to waive any challenge to the NFL Constitution and Bylaws.[24]

Many scholars have examined different facets of this case,[25] but this Article will analyze Judge Scheindlin's opinion as a conscious effort to diminish the near-Draconian effect of the non-statutory labor exemption by reasserting the logic of *Mackey v. National Football League*,[26] a case decided by the Eighth Circuit Court of Appeals in 1976.[27] Citing to *Mackey*, Judge Scheindlin insisted that "labor laws cannot be used to shield anticompetitive agreements between employers and unions that affect only those outside of the bargaining unit."[28]

Before analyzing her decision, it is important to understand the antitrust laws in general and the statutory and non-statutory labor exemptions to these laws in particular. While antitrust is a complicated subject, for present purposes it is enough to note that the thrust of the statutes is to preserve competition in the marketplace, a goal which is achieved in large part by prohibiting agreements in restraint of trade.[29] While such agreements are not always "per se" illegal,[30] an agreement by rivals not to compete for

22. *Id.* at 142. *See generally* Adam Epstein, *The Empire Strikes Back: NFL Cuts Clarett, Sacks Scheindlin*, 22 ENT. & SPORTS L. 12 (2005); Michael Scheinkman, Comment, *Running Out of Bounds: Over Extending the Labor Antitrust Exemption in Clarett v. National Football League*, 79 ST. JOHN'S L. REV. 733 (2005).

23. *Clarett III*, 369 F.3d at 142.

24. *Id.*

25. *See, e.g.*, Walter T. Champion, Jr., *Clarett v. NFL and the Reincarnation of the Non-Statutory Labor Exemption in Professional Sports*, 47 S. TEX. L. REV. 587 (2006); Tyler Pensyl, *Let Clarett Play: Why the Non-Statutory Labor Exemption Should Not Exempt the NFL's Draft Eligibility Rule From the Antitrust Laws*, 37 U. TOL. L. REV. 523 (2006); Herb Smith, II, Comment, *Clarett v. NFL: More a Warning Than a Victory*, 7 FLA. COASTAL L. REV. 745 (2006).

26. 407 F. Supp. 1000 (D. Minn. 1975), *rev'd in part, aff'd in part*, 543 F.2d 606 (8th Cir. 1976).

27. *Clarett I*, 306 F. Supp. 2d at 391, 393, 395.

28. *Id.* at 395 (citing *Mackey*, 543 F.2d at 614).

29. 15 U.S.C. § 1.

30. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223-25 (1940).

employees would clearly be suspect under those laws but for a recognized exemption.[31]

One possible exemption is the "statutory" labor exemption derived from the Clayton Act[32] and the Norris-LaGuardia Act.[33] These statutes declare that labor unions do not pose an unreasonable restraint on trade, and, accordingly, they exempt certain union activities, such as secondary picketing and boycotts, from antitrust scrutiny.[34]

In contrast, the non-statutory labor exemption not only derives from the statutory labor exemption, but goes further to protect certain union activities and agreements from antitrust scrutiny.[35] The non-statutory labor exemption was developed by the United States Supreme Court in non-sports cases such as *Lee Connell Construction v. Plumbers & Steamfitters Local Union No. 100*[36] and *Local Union No. 189 v. Jewel Tea Co* (*"Jewel Tea"*).[37] This exemption favors the application of labor law over antitrust law by allowing collective bargaining over topics such as wages, hours, and working conditions.[38] Under this exemption, any union-management agreement that is the product of good faith negotiations will be protected from an antitrust attack.[39] The purpose of the exemption is to further the "national labor policy favoring free and private collective bargaining, which

31. United States v. General Motors Corp., 384 U.S. 127, 145 (1966). *See* WALTER T. CHAMPION, Jr., SPORTS LAW IN A NUTSHELL 72 (3d ed. 2005).

32. 15 U.S.C. §§ 12-27.

33. 29 U.S.C. §§ 101-15 (2000).

34. Lee Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622 (1975); *Clarett I*, 306 F. Supp. 2d at 391; WALTER T. CHAMPION, Jr., FUNDAMENTALS OF SPORTS LAW 530 (ThompsonWest 2d ed. 2004).

35. CHAMPION, FUNDAMENTALS, *supra* note 34, at 530. *See also* Jonathan S. Shapiro, Note, *Warming the Bench: The Non-Statutory Labor Exemption in the National Football League*, 61 FORDHAM L. REV. 1203 (Apr. 1993); Robert A. McCormick & Matthew C. McKinnon, *Professional Football's Draft Eligibility Rule: The Labor Exemption in Professional Sports*, 33 EMORY L.J. 375 (1984).

36. 421 U.S. at 622-23.

37. 381 U.S. 676, 689-91 (1965).

38. *Clarett I*, 306 F. Supp. 2d at 391.

39. CHAMPION, FUNDAMENTALS, *supra* note 34, at 530. *See also* Jessica Cohen, *Sharing the Wealth: Don't Call Us, We'll Call You: Why Revenue Sharing is a Permissive Subject and Therefore the Labor Exemption Does Not Apply*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 609, 623 (2002); Chris Dickerson, Note, *Brown v. Pro Football, Inc, The Non-Statutory Exemption from Antitrust Liability Becomes a Management Weapon*, 1997 WIS. L. REV. 1047 (1997); Michael S. Jacobs & Ralph K. Winters, *Antitrust Principles and Collective Bargaining by Athletes: of Superstars in Peonage*, 81 YALE L.J. 1 (1971).

requires good-faith bargaining over wages, hours, and working conditions."[40]

Together the various exemptions to the antitrust laws in sports[41] have all but negated antitrust laws from serving as an effective mechanism to protect athletes from management's anti-competitive practices.[42] The major exemptions include baseball's anomalous common law exemption,[43] certain specific NFL exemptions,[44] the statutory labor exemption,[45] and the non-statutory labor exemption.[46]

As we will see, however, there is considerable debate as to whether the non-statutory exemption should reach beyond matters that were, in fact, the subject of collective bargaining.

I. JUDGE SCHEINDLIN AND THE APPLICATION OF *MACKEY*

In *Clarett I*, Judge Scheindlin found for Maurice Clarett because she believed that the non-statutory labor exemption[47] should be applied only if: (1) the exemption was a mandatory subject of collective bargaining,[48] (2) the exemption covered only those actions that affect employers within the bargaining unit,[49] and (3) the exemption was a product of an arm's length negotiation.[50] The exemption, therefore, was "inapplicable because the rule *only* affects players, like Clarett, who are complete strangers to the bargaining relationship."[51] Judge

40. *Clarett I*, 306 F. Supp. 2d at 391 (quoting Brown v. Pro. Football, Inc., 518 U.S. 231, 236 (1996) (emphasis added)).

41. CHAMPION, NUTSHELL, *supra* note 31, at 63-72.

42. *See generally* CHAMPION, FUNDAMENTALS, *supra* note 34, at 530 (detailing the various exceptions to the antitrust laws and how courts have interpreted them).

43. *Id.* at 529. *See* Flood v. Kuhn, 407 U.S. 258 (1972). The exception was categorized as "a derelict in the stream of law." *Id.* at 286. (Douglas, J. dissenting). *See also* Walter T. Champion Jr., *Baseball's Antitrust Exemption Revisited: 21 Years After Flood v. Kuhn*, 19 T. MARSHALL L. REV. 573 (1994).

44. *See* 15 U.S.C. § 1291 (2000) (allows unitary video packages and merger of AFL and NFL draft systems); 15 U.S.C. § 1292 (allows blackouts).

45. *See* CHAMPION, FUNDAMENTALS, *supra* note 34, at 530. The statutory labor exemption originated in provisions of the Clayton Anti-Trust Act, 15 U.S.C. §§ 12-27, and the Norris-LaGuardia Act, 29 U.S.C. §§ 101-15. *See supra* notes 32-34 and accompanying text.

46. *Lee Connell Constr. Co.*, 421 U.S. at 622; *Jewel Tea*, 381 U.S. at 676. *See also* CHAMPION, NUTSHELL, *supra* note 31, at 67-72.

47. *See supra* notes 32-39 and accompanying text.

48. *Clarett I*, 306 F. Supp. 2d at 393-97.

49. *Id.* at 393.

50. *Id.* at 393-97.

51. *Id.* at 393.

Scheindlin declared, "[t]he labor laws cannot be used to shield anticompetitive agreements between employers and unions that affect only those outside the unit."[52] Players like Clarett, "who are categorically denied eligibility for employment, even temporarily, cannot be bound by the terms of employment they cannot obtain."[53]

The NFL admitted that the eligibility rule did not appear anywhere in the NFL-NFLPA collective bargaining agreement ("C.B.A.") and that the rule was not incorporated by reference into the C.B.A.[54] Judge Scheindlin also stated that "the exemption can only cover actions that affect employers within the bargaining unit or those who seek to become employers and will therefore be bound by those actions."[55]

Judge Scheindlin knew that if the non-statutory exemption continued unabated and the rule stayed as applied, Clarett, whose college eligibility was eliminated,[56] would not be eligible for employment[57] even though he was sought-after by the NFL scouts.[58] The judge reasoned that because Clarett was an "NFL-caliber player", he would have been drafted if he was permitted to participate in the 2004 NFL draft.[59] Indeed, he most likely would have been drafted in the first round, which would have resulted in a contract with a multi-million dollar signing bonus.[60] The judge understood that the only thing preventing Clarett from achieving his goal to play in the NFL was the league's eligibility rule that prevented him from entering the draft since he was not three seasons removed from his high school graduation.[61]

Judge Scheindlin reasoned that, since the statutory exemption does not apply to the NFL eligibility rule, antitrust scrutiny could be avoided only if the non-statutory labor exemption applied.[62] In deciding whether that exemption applied, she looked to three sources. Perhaps the most

52. *Id.* (discussing *Mackey*, 543 F.2d at 614).
53. *Clarett I*, 306 F. Supp. 2d at 396.
54. *Id.* at 396. *See generally* Champion, *supra* note 25, at 594.
55. *Clarett I*, 306 F. Supp. 2d at 393.
56. *Id.* at 388. *See also* Freeman, *supra* note 3.
57. *Clarett I*, 306 F. Supp. 2d at 388.
58. *Id.*
59. *Id.*
60. Compl. ¶ 31.
61. *Clarett I*, 306 F. Supp. 2d at 382.
62. *Id.* at 391 (internal citations omitted).

important was *Brown v. Pro Football, Inc.*, which held that the non-statutory labor exemption applies only to mandatory subjects of collective bargaining and relates only to conduct arising from the collective bargaining process.[63] Secondly, Judge Scheindlin, looked to the Second Circuit's opinion in *Local 210, Laborer's International Union of North America v. Labor Relations Division Associated General Contractors of America*[64] ("Local 210"), which restricts the exemption to policies affecting mandatory subjects of collective bargaining.[65] Finally, she looked to the Eighth Circuit's decision in *Mackey v. NFL* to supplement the "tests" enunciated in *Local 210* and *Brown*.[66]

According to Judge Scheindlin, *Mackey* served as the key to understanding why the non-statutory labor exemption does not protect the NFL's eligibility rule from antitrust scrutiny.[67] *Mackey* stands for the proposition that the non-statutory exemption should apply only where the particular rule is the product of bona fide arm's length bargaining.[68] *Mackey* is based on the presumption that labor exemptions are the result of a union's consent and seeks to uphold the negotiation process.[69]

In *Mackey*, John Mackey, a football player, sued to determine if the NFL's "Rozelle Rule" violated antitrust laws.[70] The Rozelle Rule allowed the commissioner of the NFL, at his discretion, to require that a club, who acquired a free agent, compensate the former team with money, players, and/or draft picks.[71] Although the Rozelle Rule did not deal with a mandatory subject of collective bargaining, it operated as a restriction on a player's mobility to move freely from team to team, thus depressing salaries.[72] The *Mackey* court rejected the league's claim that the non-statutory exemption immunized the Rozelle Rule from antitrust scrutiny. It held that there was no bona fide arm's length bargaining over the

63. *Id.* at 393 (citing *Brown* 518 U.S. at 239).
64. 844 F.2d 69 (2d Cir. 1988).
65. *Clarett I*, 306 F. Supp. 2d at 392.
66. *Id.* at 393 (citing *Mackey*, 543 F.2d at 614).
67. *Id.* at 391, 393, 395.
68. Powell v. Nat'l Football League, 930 F.2d 1293, 1307-10 (8th Cir. 1989) (Lay, J., dissenting).
69. *Id.* at 1308.
70. *Mackey*, 543 F.2d at 609-10.
71. *Id.* at 610-11.
72. *Id.* at 615.

Rozelle Rule because it remained unchanged since it had been unilaterally promulgated by management.[73]

In the district court opinion in *Mackey*, Judge Larson agreed with the players on every issue and found the Rozelle Rule to be a per se violation of the antitrust laws.[74] He also rejected the NFL's contention that the Rozelle Rule was protected by the non-statutory labor exemption because the weakness of the union precluded effective collective bargaining.[75] On appeal, the Eighth Circuit affirmed Judge Larson's conclusions by holding that the Rozelle Rule violated antitrust laws and that the non-statutory labor exemption was inapplicable. Judge Lay writing for the panel offered management its only solace-the hope that serious good-faith bargaining would trigger the application of the exemption.[76]

Judge Lay set forth a test that granted immunity from antitrust scrutiny when three conditions were met.[77] First, the restraint on trade must affect only the parties to the collective bargaining agreement.[78] Second, the restraint must be a mandatory subject of collective bargaining.[79] Third, the collective bargaining agreement must be a product of a bona fide, arm's length negotiation.[80] Judge Lay concluded that the non-statutory labor "exemption cannot be invoked where, as in the case before him, the agreement was not the product of bona fide arm's length negotiations."[81] The Judge stated: "The union's acceptance of the status quo by the continuance of the Rozelle Rule in the initial collective bargaining agreements under the circumstances of this case cannot serve to immunize the Rozelle Rule from the scrutiny of the Sherman Act."[82] Accordingly, the Rozelle Rule was struck down as a violation of the antitrust laws.[83]

In looking to *Mackey*, Judge Scheindlin noted that the Second Circuit had not adopted a test for the application of the non-statutory exemption. She looked favorably to the

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73. *Id.* at 616. *See also* CHAMPION, NUTSHELL, *supra* note 31, at 68-69.
74. *Mackey*, 407 F. Supp. at 1007.
75. *Id.* at 1002, 1007, 1010.
76. *Mackey*, 543 F.2d at 623.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Mackey*, 543 F.2d at 623.
82. *Id.*
83. *Id.*

Sixth and Ninth Circuits who had adopted *Mackey's* three-prong test.[84] Further, *Mackey* is consistent with the Second Circuit's opinion in *Local 210* because both decisions restrict the exemption's application to policies affecting mandatory subjects of collective bargaining.[85] As such, Judge Scheindlin reframed the three-prong *Mackey* test to govern Clarett's claim:

> First, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily *affects only the parties to the collective bargaining relationship.* Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted *concerns a mandatory subject of collective bargaining.* Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the *product of bona fide arm's length bargaining.*[86]

Judge Scheindlin echoed the logic in *Mackey* by emphasizing that Clarett was not in the bargaining relationship and the rule in question was neither a mandatory subject of collective bargaining nor a product of legitimate negotiation.[87] She reasoned that labor policies favoring collective bargaining may trump antitrust laws only if parties to the collective bargaining relationship are affected by the restraint on trade.[88] Since Clarett was a stranger to the bargaining relationship, the exemption should not be applied.[89] Her point is straightforward and appealing: labor laws cannot be used as a shield to protect anticompetitive agreements that affect strangers to the collective bargaining unit.[90]

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84. *Clarett I*, 306 F. Supp. 2d at 392; Cont'l Mar. of S.F. v. Pac. Coast Metal Trades Dist. Council, 817 F.2d 1391, 1393 (9th Cir. 1987); McCourt v. Cal. Sports, Inc., 600 F.2d 1193, 1187-90 (6th Cir. 1979).

85. *Clarett I*, 306 F. Supp. 2d at 392.

86. *Id.* at 391 (quoting *Mackey*, 543 F.2d at 614) (emphasis supplied by Judge Scheindlin).

87. *Id.* at 386.

88. *Id.* at 395.

89. *Id.*

90. *Clarett I*, 306 F. Supp. 2d at 395.

II. THE SECOND CIRCUIT'S APPLICATION OF *BROWN V. PRO. FOOTBALL, INC.*

In reversing Judge Scheindlin, the Second Circuit relied heavily on *Brown v. Pro Football, Inc.* It recognized that "*Brown* does not reverse *Mackey* (Per Se)," but it should have written that "*Brown* does not reverse *Mackey* (At All)."

The Supreme Court in *Brown* did not define the contours of the non-statutory labor exemption,[91] but it did confirm that the non-statutory labor exemption allows what would otherwise have been an illegal restraint of trade in violation of section 1 of the Sherman Act.[92] *Brown* held that the exemption protected "the NFL's unilateral implementation of new salary caps for developmental squad players after its . . . agreement with the . . . union had expired and negotiations . . . over that proposal reached an impasse."[93] As such, the Court expanded the exemption beyond the actual collective bargaining process but, still limited it to conduct stemming from the collective bargaining process, and, therefore, to mandatory subjects of collective bargaining.[94] In this regard, *Brown* is consistent with *Mackey,* which envisioned situations where "non-labor parties may potentially avail themselves of the . . . exemption whe[n] they are parties to . . . agreements pertaining to mandatory subjects."[95]

To say it another way, *Brown*, did "not interpret the exemption as broadly."[96] It did not apply the exemption simply because of the existence of a collective bargaining agreement.[97] Instead, the *Brown* Court indicated that the exemption is applied properly only where certain other conditions were also met.[98] These conditions were similar to the *Mackey* test, which stipulated that in addition to the existence of a collective bargaining relationship, the provision must only affect the parties to the agreement, it must concern a mandatory subject of collective bargaining, and the parties

91. *Clarett III*, 369 F.3d at 138 (citing *Brown*, 518 U.S. at 250).
92. *Brown*, 518 U.S. at 235.
93. *Clarett III*, 369 F.3d at 135 (citing *Brown*, 518 U.S. 231). *See generally* Dickerson, *supra* note 39.
94. *Clarett I*, 306 F. Supp. 2d at 393 (citing *Brown,* 518 U.S. at 239).
95. *Mackey*, 543 F.2d at 623.
96. *Id.*
97. *Id. See generally* Dickerson, *supra* note 39.
98. *Id.*

must have bargained in good faith.[99] By implication, the *Brown* Court intimated its approval of the similar approach utilized in *Mackey*.[100]

Writing for the majority, Justice Breyer continually referred to mandatory subjects in the collective bargaining agreement.[101] He articulated the following specific reasons for finding an exemption in *Brown*:

> That conduct took place during and immediately after a collective-bargaining negotiation. It grew out of, and was directly related to, the lawful operation of the bargaining process. It involved a matter that the parties were required to negotiate collectively. And it concerned only the parties to the collective-bargaining relationship. Our holding is not intended to insulate from antitrust review every joint imposition of terms by employers, for an agreement among employer's 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. We need not decide in this case whether or where, within these extreme outer boundaries to draw that line. Nor would it be appropriate for us to do so without the detailed views of the Board.[102] [103]

The Second Circuit in *Clarett III* found that the non-statutory exemption was applicable based on reasoning similar to that in *Brown*. In doing so, the Second Circuit argued that the *Brown* reasoning comported with its previous decisions in this area.[104] In particular, the Second Circuit

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99. *Id. See generally* Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339 (1989); McCormick & McKinnon, *supra* note 85; Shapiro, *supra* note 85.

100. *Brown*, 518 U.S. at 235.

101. *Id.* at 236, 238, 241, 250.

102. *Id.* at 250.

103. In his dissent in *Brown*, Justice Stevens noted that the "limited judicial exemption complements its statutory counterpart by ensuring that unions which engage in collective bargaining to enhance employees' wages may enjoy the benefits of the resulting agreements." Justice Stevens also warned that "exemptions should be construed narrowly, and judicially crafted exemptions more narrowly still."[0] *Id.* at 258 (Stevens, J., dissenting).

104. *Clarett III*, 369 F.3d at 135. *See generally* Darren Dummit, *Upon Further Review: Why the NFL May Not Be Free After Clarett, and Why Professional Sports May Be Free from Antitrust Law*, 8 VAND. J. ENT. & TECH. L. 149 (2005); Epstein, *supra* note 22; Eleanor Hynes, *Unnecessary Roughness: Clarett v. NFL Blitzes the College Draft and Exemplifies Why Antitrust Law is Also A Game of Inches*, 19 ST. JOHN'S J. LEGAL COMMENT. 577 (2005); Pensyl, *supra* note 25; Scheinkman, *supra* note 22; Ronald Terk Sia, *Clarett v. National Football League: Defining the Non-Statutory Labor Exemption to Antitrust Law as it Pertains to Restraints Primarily Focused in Labor*

discussed *Caldwell v. American Basketball Association*,[105] *National Basketball Association v. Williams*,[106] and *Wood v. National Basketball Association*.[107] These cases involved claims by league players that the concerted actions of their respective leagues violated the antitrust laws because the actions imposed an unreasonable restraint on trade for the players' services.[108] The Second Circuit held that the non-statutory labor exemption was applicable in each of these three cases.[109] The court reasoned that since the relationships between the players and their leagues were governed by a collective bargaining agreement, and subject to federal labor laws, allowing an antitrust suit to proceed against the leagues would undermine labor law policies.[110] Specifically, the Second Circuit was concerned that "the congressional policy favoring collective bargaining, the bargaining parties' freedom of contract, and the widespread use of multi-employer bargaining units" would be weakened.[111] It found that similar reasoning led the *Brown* Court to hold that the non-statutory labor exemption protected the NFL's implementation of salary caps after its collective bargaining agreement expired and negotiations over the proposal proved unfruitful.[112]

However, in *Brown* Justice Breyer indicated that the "holding is not intended to insulate from antitrust review every joint imposition of terms by employers."[113] Thus, even

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Markets and Restraints Primarily Focused in Business Markets, 4 PIERCE L. REV. 155 (2005).

105. 66 F.3d 523 (2d Cir. 1995) (involving an ABA player who was suspended pursuant to an alleged contract violation).

106. 45 F.3d 684 (2d Cir. 1995) (involving a class of NBA players who refused to negotiate with the NBA teams until their collective bargaining agreement expired).

107. 809 F.2d 954 (2d Cir. 1987) (action brought by an NBA player who claimed that the salary cap, college draft, and prohibition of player corporations violated the Sherman Antitrust Act and were not exempt from antitrust scrutiny).

108. *Clarett III*, 369 F.3d at 134-35. *See generally* Daniel Applegate, *The NBA Gets a College Education: An Antitrust and Labor Analysis of the NBA's Minimum Age Limit*, 56 CASE W. RES. L. REV. 825 (2006); Michael McCann & Joseph Rosen, *Legality of Age Restrictions in the NBA and the NFL*, 56 CASE W. RES. L. REV. 731 (2006); Nicholas Wurth, *The Legality of an Age Requirement in the National Basketball League After the Second Circuit's Decision in Clarett v. NFL*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 103 (2005).

109. *Clarett III*, 369 F.3d at 135.

110. *Id.*

111. *Id.*

112. *Id.*

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

the Second Circuit in *Clarett III* was forced to admit that *Brown* did not define the boundaries of the exemption.[114]

Although the contours of the exemption were not defined by the *Brown* Court, there is nothing in the decision to suggest that application of the exemption to a rule that was not bargained for would be appropriate.[115] Judge Scheindlin reiterated *Brown's* analysis emphasizing that the exemption established "a . . . labor policy . . . favoring . . . collective bargaining which requires good-faith bargaining over wages, hours, and working conditions."[116] Judge Scheindlin also noted that *Brown* recognized that collective bargaining was of utmost importance.[117] Judge Scheindlin's interpretation of *Brown* can be fairly summarized as follows: the exemption should be limited to those mandatory subjects that were fairly negotiated.[118]

III. THE SECOND CIRCUIT IN *CLARETT III* CIRCUMVENTS *MACKEY*

As we have seen, Judge Scheindlin in *Clarett I* relied on the three-prong *Mackey* test, but the Second Circuit in *Clarett III* held that the application of *Mackey* was inappropriate.[119] It believed that *Mackey* could not be reconciled with the Supreme Court's treatment of the exemption in *Brown*.[120] Thus, the Second Circuit declined to adopt the *Mackey* test as the proper tool to employ in defining the boundaries of the

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114. *Clarett III*, 369 F.3d at 138. *See also Brown*, 518 U.S. at 250.

115. Champion, *supra* note 25, at 613. *See also Brown*, 518 U.S. at 248-50.

116. *Clarett I*, 306 F. Supp. 2d at 391 (quoting *Brown*, 518 U.S. at 236) (emphasis added by Judge Scheindlin). *See generally* Jason Abeln, Chris Brown, & Neil Desai, Comment & Casenote, *Lingering Questions After Clarett v. NFL: A Hypothetical Consideration of Antitrust and Sports*, 73 U. CIN. L. REV. 1767 (2005); Scott Freedman, Comment, *An End Run Around Antitrust Law: The Second Circuit's Blanket Application of the Non-Statutory Labor Exemption in Clarett v. NFL*, 45 SANTA CLARA L. REV. 155 (2004); John Gerba, Comment, *Instant Replay: A Review of the Case of Maurice Clarett, The Application of the Non-Statutory Labor Exemption and It's Protection of the NFL Draft Eligibility Rule*, 73 FORDHAM L. REV. 2383 (2005); Michael Lombardo, *Losing Collegiate Eligibility: How Mike Williams & Maurice Clarett Lost Their Chance to Perform on College Athletics Biggest Stage*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 19 (2005); Jocelyn Sum, Note, *Clarett v. National Football League*, 20 BERKELEY TECH. L.J. 807 (2005).

117. *Clarett I*, 306 F. Supp. 2d at 391.

118. *Id.* at 393. *See also Brown*, 518 U.S. at 239.

119. *Clarett III*, 369 F.3d at 133.

120. *Id.* at 134.

exemption - instead, the court opted to follow its precedent in *Local 210,* which favored the balancing test articulated in *Jewel Tea.*[121]

Fundamentally, the Second Circuit in *Clarett III* disagreed with the assumption in *Mackey* that the Supreme Court's decisions in *Lee Connell*[122] and *Jewel Tea*[123] "dictate the appropriate boundaries of the non-statutory exemption for cases in which the only alleged anticompetitive effect of the challenged restraint is on a labor market around a collective bargaining relationship."[124] According to the Second Circuit, those cases provided only limited assistance in situations such as Clarett's because they involved *employers* who argued that they were injured as a result of being excluded from the product market.[125]

The Second Circuit further asserted that Clarett challenged the eligibility rule only on the grounds that it is an unreasonable restraint on the market for players' services:[126]

> Thus, we need not decide here whether the *Mackey* factors aptly characterize the limits of the exemption in cases in which employers use agreements with their unions to disadvantage their competitors in the product or business markets, because our cases have counseled a decidedly different approach where, as here, the plaintiff complains of a restraint upon a unionized labor market characterized by a collective bargaining relationship with a multi-employer bargaining unit.[127]

Instead of following *Mackey*, the Second Circuit chose to apply previous cases holding the exemption defeated the players' claims.[128] However, in doing so, the Second Circuit

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121. *Id.* at 133.

122. 421 U.S. at 616 (holding that the non-statutory exemption was not applicable because the union "made nonunion subcontractors ineligible to compete for a portion of the available work. This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions.").

123. 381 U.S. at 676 (stating that "the marketing-hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act.").

124. *Clarett III*, 369 F.3d at 134.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 135. *See supra* notes 104-12 and accompanying text.

was forced to construct an argument to circumvent the fact that there was no bargaining over the rule.[129] *Caldwell*, *Williams*, and *Wood*, all involved player restraint mechanisms that were negotiated and included as a part of the collective bargaining agreement.[130] *Clarett III* analogized to those decisions by claiming that the eligibility rule in question was included in the NFL's Constitution and Bylaws;[131] thus, the union was aware of the rule,[132] and it chose to waive any challenge to the Constitution and Bylaws.[133] The court found it significant that the union "acquiesced in the continuing operation of the eligibility rule contained therein - at least for the duration of the agreement."[134] The Second Circuit, like the Supreme Court in *Brown*, declined to "fashion an antitrust exemption [giving] additional advantages to professional football players . . . that transport workers, coal miners, or meat packers would not enjoy."[135]

In place of the *Mackey* test, the Second Circuit boldly formulated an alternative theory;[136] *Mackey* viewed the exemption as inapplicable if the agreement did not arise from a bona fide arm's length negotiation.[137] But *Clarett III* finds the absence of any negotiations not dispositive, and thus circumvents *Mackey* almost entirely. Because of this misclassification, the Second Circuit stated that it need not decide whether the *Mackey* test properly defined the limitations of the exemption.[138]

IV. WHY *MACKEY* IS STILL THE BEST ANSWER

To Judge Scheindlin in *Clarett I*, *Mackey* was the best approach to employ in deciding whether the non-statutory labor exemption was applicable to professional sports because labor laws would not protect employers and unions who create anticompetitive agreements affecting those outside of the

129. *Clarett III*, 369 F.3d at 142-43.
130. *See generally Clarett III*, 369 F.3d at 130-43. *See also Caldwell*, 66 F.3d at 523; *Williams*, 45 F.3d at 684; *Wood*, 809 F.2d at 954.
131. *Clarett III*, 369 F.3d at 142.
132. *Id.*
133. *Id. See generally* Champion, *supra* note 25.
134. *Clarett III*, 369 F.3d at 142.
135. *Id.* at 143 (citing *Brown*, 518 U.S. at 249).
136. *Id.* at 130-38.
137. *Mackey*, 543 F.2d at 623.
138. *Clarett III*, 369 F.3d at 134 (internal citations omitted).

bargaining relationship.[139] In Clarett's case, she viewed the exemption as inapplicable because the rule affected only those outside of the bargaining relationship.[140] Judge Scheindlin stated "the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects *only* the parties to the collective bargaining relationship."[141] Under *Mackey*, the exemption would apply only if each of the following elements were met: (1) the agreement is a product of bona fide arm's length bargaining; (2) it concerns a mandatory subject of collective bargaining; and (3) the restraint affects only those parties to the bargaining relationship.[142] Clarett would prevail under the *Mackey* test if the NFL's eligibility rule failed to satisfy any one of the three prongs; since the rule failed all three, it was not exempt from antitrust scrutiny.[143] Given that the exemption shelters only labor-management agreements from antitrust examination, the fact that the eligibility rule was never the subject of an arm's length negotiation automatically removed it from the coverage of the exemption.[144]

For the labor exemption to apply under *Mackey*, the NFL would have to demonstrate that actual collective bargaining occurred and that the union considered and approved the challenged restraint.[145] But the NFLPA could not have considered the rule when it was first implemented over 50 years ago, since the union was not in existence at the time,[146] nor did the union ever bargain over it once it was formed and recognized. In *Mackey*, the rule in question was made a part of the collective bargaining agreement only through

139. *Id.* at 395 (citing *Mackey*, 543 F.2d at 614).

140. *Clarett I*, 306 F. Supp. 2d at 395.

141. *Id.* at 395 n.100 (quoting *Mackey*, 543 F.2d at 614 (emphasis added by Judge Scheindlin)).

142. *Mackey*, 543 F.2d at 614-15.

143. *Clarett I*, 306 F. Supp. 2d at 392-97.

144. *Mackey*, 543 F.2d at 611 n.6.

145. *See* Robertson v. Nat'l Basketball Ass'n, 389 F. Supp. 867, 895 (S.D.N.Y. 1975); Phila. World Hockey Club v. Phila. Hockey Club, Inc., 351 F. Supp. 462, 498-99. (E.D. Pa. 1972).

146. *See* Smith v. Pro-Football, 420 F. Supp. 738, 742 (1976) (labor exemption inapplicable because NFLPA did not become players' exclusive bargaining representative until after restraints of player draft were imposed on plaintiff), *rev'd on other grounds*, 593 F.2d 1173 (D.C. Cir. 1978); *Phila. World Hockey Club*, 351 F. Supp. at 498-9 (labor exemption inapplicable where reserve clause was created by the NHL before the players' association came into existence).

incorporation by reference. *Mackey* held that such incorporation was not sufficient to show that the rule was the product of bona fide arm's length bargaining.[147] The rule remained unchanged since it was unilaterally implemented prior to collective bargaining and the union had received no *quid pro quo* for its inclusion in the collective bargaining agreement.[148]

The Supreme Court in *Jewel Tea* noted that "employers and unions are required to bargain about wages, hours, and working conditions, and this fact weighs heavily in favor of antitrust exemption for agreements on these subjects."[149] The non-statutory labor exemption does not protect anticompetitive agreements that relate to subjects other than wages, hours, or working conditions.[150] The NFL's eligibility rule cannot, as a matter of law, be deemed a mandatory subject of bargaining, as it does not concern wages, hours, or other terms and conditions of employment of football players currently employed by NFL teams.[151] Clarett was not an employee of any team in the NFL. The NFLPA did not, and could not represent him; therefore the NFL's duty to bargain did not include matters that would involve Clarett. In fact, courts have expressly held that matters exclusively concerning prospective or former employees do not constitute mandatory subjects of collective bargaining.[152]

Mackey's three-prong test has been used by a number of courts as a means to determine whether the non-statutory

147. *Mackey*, 543 F.2d at 613, 616.

148. *Id. See also Phila. World Hockey Club*, 351 F. Supp. 467, 484-86. In this case, the district court found that certain league agreements designed to limit player mobility violated the antitrust laws. The court scrutinized the extent of the actual bargaining and determined that the rules were not a product of collective bargaining because they were originally inserted into player contracts before the advent of the union. In the absence of serious, intensive arm's length bargaining the challenged rules did not warrant an exemption from the antitrust laws[0].

149. *Jewel Tea*, 381 U.S. at 689.

150. *Mackey*, 543 F.2d at 614; *Robertson*, 389 F. Supp. at 890.

151. *Robertson*, 389 F. Supp. at 889-90 (finding that the reserve clause, player draft, and non-competition agreement were not mandatory subjects of bargaining according to the NLRB).

152. *See* Allied Chem. & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971). *See also* N.L.R.B. v. USPS, 18 F.3d 1089, 1098 (3d Cir. 1994) (holding that an employer generally has no duty to bargain over practices that involve non-unit employees); Star Tribune, 295 N.L.R.B. 543, 546 (1989) (employer did not breach its duty to bargain when it unilaterally implemented a drug-screening for job applicants, who are not "employees" within the meaning of the NLRA).

exemption is applicable to player restraint mechanisms in professional sports leagues.[153] If all three factors are present, then the exemption will apply; however, if one of the prongs is absent, like in Clarett's case, the exemption will not apply and the rule will be subject to antitrust analysis instead.[154]

CONCLUSION

Significantly, in *Brown*, Justice Breyer declared that "[o]ur holding is not intended to insulate from antitrust review every joint imposition of terms by employers."[155] *Mackey's* philosophy is consistent with that maxim. Judge Scheindlin used *Mackey's* persuasive logic in her *Clarett I* decision. On the other hand, the Second Circuit's *Clarett III* opinion mostly discussed the preeminence of labor laws over antitrust law in deciding the legality of player restraint mechanisms in professional sports. The result of this is that the Second Circuit has unfortunately, but effectively, circumvented, or at least seriously marginalized, *Mackey's* three-prong test.[156] Because of the failure to apply *Mackey*, Clarett could not challenge the NFL eligibility rule and his dreams of entering the 2004 NFL draft were over.

153. *See, e.g.*, Wurth, *supra* note 108, at 112-18.

154. *See generally* CHAMPION, FUNDAMENTALS, *supra* note 34.

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

156. *Clarett III*, 369 F.3d at 133. Specifically, the district court found that the rules exclude strangers to the bargaining relationship from entering the draft, do not concern wages, hours, or working conditions of current NFL players, and were not the product of bona fide arm's length negotiations during the process that culminated in the current collective bargaining agreement. *Id.* (citing *Clarett I*, 306 F. Supp. 2d at 395-97 (citation omitted), referring to *Mackey's* three-prong test).