ANTITRUST—THE NONSTATUTORY LABOR EXEMPTION—A MULTI-EMPLOYER BARGAINING UNIT MAY CONTINUE TO IMPOSE ANTI-COMPETITIVE TERMS OF AN EXPIRED COLLECTIVE BARGAINING AGREEMENT AS LONG AS A COLLECTIVE BARGAINING RELATIONSHIP EXISTS: *National Basketball Ass'n v. Williams*, 45 F.3d 684 (2d Cir. 1995).

I. INTRODUCTION

Collective bargaining is universally practiced throughout the professional sports industry.[1] As a part of the collective bargaining process, individual teams within a league join to form a single multi-employer bargaining unit[2] which negotiates long-term contracts with the league's players' union.[3] Any restraints of trade[4] embodied in the resulting collective bar-

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1. Erwin G. Krasnow & Herman M. Levy, *Unionization and Professional Sports*, 51 GEO. L.J. 748, 750 (1963). Professional baseball, basketball, football and hockey players have formed unions, referred to as players' associations, which appoint representatives to bargain with the teams in their respective leagues. *Id.* The National Labor Relations Act defines collective bargaining as:

> [A] procedure looking toward the making of collective bargaining agreements between employer and accredited representatives of union employees concerning wages, hours, and other conditions of employment, and requires that parties deal with each other with open and fair minds and sincerely endeavor to overcome obstacles existing between them to the end that employment relations may be stabilized and obstruction to free flow of commerce prevented.

29 U.S.C. § 185(5) (1996).

2. Cym H. Lowell, *Collective Bargaining and the Professional Team Sport Industry*, LAW & CONTEMP. PROBS., Feb. 1974, at 15. "Multi-employer bargaining" refers to the common practice of several employers within an industry joining together and electing a representative to bargain with a the union which represents their employees. *Id.* The practice was designed to allow small employers to band together to match the formidable bargaining strength of unions. *Id.* Multi-employer bargaining is essential in the professional sports context to ensure that the negotiated contract applies uniformly to all the teams in the league. PAUL D. STAUDOHAR, THE SPORTS INDUSTRY & COLLECTIVE BARGAINING 10-14 (1986).

3. STAUDOHAR, *supra* note 2, at 10-14. The multi-employer unit bargains over certain aspects of wages, hours and working conditions. *Id.* However, only in the professional sports context do parties to the collective bargaining agreement retain the power to negotiate significant elements of the employment contract on an individual basis. RAY YASSER ET AL., SPORTS LAW 259 (2d ed. 1994).

4. YASSER ET AL., *supra* note 3, at 263.

> Historically, professional sports teams have utilized various devices to tie players to specific teams, thus restricting player movement from team to team. The most popular player restraints have been the reserve clause, option clause, draft

gaining agreement (hereinafter "CBA") are exempt from scrutiny under federal antitrust law[5] by the judicially created "nonstatutory labor exemption."[6]

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system, no-tampering rules and free-agent compensation agreements. The reserve clause gives a club the exclusive right to the player for succeeding seasons. The option clause allows a club to renew player contracts at the option of the club, usually providing for exercise of the option at a lesser salary. Draft systems divide the amateur or free agent supply of players among the clubs of a league, awarding each club the exclusive right to contract with a player drafted. Free agent compensation schemes require compensation in the form of players or draft choices to a team losing a player to another club. League and team management justify these player restraints as necessary to preserve competition and economic viability. Player associations view the system as indentured servitude, if not outright slavery, serving solely to limit player salaries, thus preserving club profits.

Id.

5. 15 U.S.C. § 1 *et seq.* Federal antitrust policy is codified in the Sherman Act which, in pertinent part, states:

> [e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade, or commerce among the several States, or with foreign nations, is declared to be illegal.

15 U.S.C. § 1 (1996).

6. YASSER ET AL., *supra* note 3, at 263. There are actually two distinct labor exemptions. *Id.* The first arises from several statutory sources, while the other is judicially created. *Id.* The statutory labor exemption has its origins in the Clayton Act and the Norris-LaGuardia Act. *Id.* Section 6 of the Clayton Act declares that unions are not combinations in restraint of trade and that "nothing contained in the antitrust laws shall be construed . . . to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof . . . ." 15 U.S.C. § 17 (1996). Section 20 of the Clayton Act limits the power of courts to grant injunctions in labor disputes. 29 U.S.C. § 52 (1996). The Norris-LaGuardia Act expanded the classifications of protected union activities and further restricted the use of injunctions in labor controversies. 29 U.S.C. §§ 101-15 (1996). Together the Clayton and Norris-LaGuardia Acts shield a fairly wide range of union activities. JOHN C. WEISTART & CYM H. LOWELL, THE LAW OF SPORTS 528-29. However, "[t]he statutes responded to issues which were most pressing at the time they were enacted and thus are drafted so as to provide antitrust immunity [only] for certain types of union tactics, including strikes, boycotts, and other group actions." *Id.* at 529. The statutory exemption does not apply to concerted actions taken by labor organizations and employers, including collective bargaining. *Id.*

In addition to the statutory exemption, the Supreme Court has articulated a nonstatutory labor exemption which provides antitrust immunity for certain agreements reached between unions and employers. Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 691 (1965). In *Jewel Tea*, the Court concluded that a restraint involving a mandatory subject of collective bargaining under the National Labor Relations Act was exempt from the Sherman Act if it was of legitimate concern to the union's members, notwithstanding its significant negative effect on competition. *Id.* at 691. The Court maintained that the "exemption of union-employer agreements is very much a matter of accommodating the coverage of the Sherman Act to the policy of the labor laws." *Id.* at 689. *See also* Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 621-22 (1975) (stating that "[t]he nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions").

However, it is not uncommon for a collective bargaining agreement to expire before a new agreement has been reached. During this interim period, professional sports leagues often continue to operate while collective bargaining sessions aimed at forging a new agreement take place.[7] Meanwhile, the ambiguity surrounding the terms which should govern the business practices of the teams within the league during these sometimes prolonged interim periods can prove to be problematic.

Teams generally continue the practices that were embodied in the previous collective bargaining agreement, effectively maintaining the status quo. In actuality, labor law requires such action on the part of all employers engaged in collective bargaining.[8] Not surprisingly, players maintain that, absent their consent, the continued imposition of any restrictive provisions by owners after a CBA expires is a violation of federal antitrust laws.[9] The difference of opinion between teams and players on this subject arises from the inability of courts and scholars to precisely define the scope of the nonstatutory labor exemption with sufficient precision.[10]

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7. Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 358 (1988). The National Football League (NFL) played the 1974-76 seasons without a collective bargaining agreement while the owners and players bargained over free agency. *Id.* The NFL owners and players also continued to play in 1988 and 1989 after the 1982 collective bargaining agreement expired in 1987. *Id.* The National Hockey League (NHL) played the entire 1993-94 schedule without a collective bargaining agreement in place. John Helyar, *Hockey's Delay May Check the Rise in its Popularity*, WALL ST. J., Oct. 3, 1994, at B1. The National Basketball Association's owners and players, by way of a temporary no-strike, no lock-out pledge, agreed to play the entire 1993-94 season, including the playoffs, without a collective bargaining agreement. Bryan Burwell, *NBA, Players Offer Refreshing Change*, USA TODAY, Oct. 28, 1994, at C3. Most recently, the 1995 Major League Baseball (MLB) season was played without a collective bargaining agreement or a no-strike, no-lockout pledge. John Helyar, *Owners Vote to Play Ball On April 26,* WALL ST. J., Apr. 3, 1995, at A2.

8. NLRB v. Katz, 369 U.S. 736 (1962); *see also* Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960, 965 (D.N.J. 1987) (noting that the contention that antitrust immunity ends at the moment a CBA expires conflicts with National Labor Relations Act, under which the owners have an obligation, even after the collective bargaining agreement expires, to bargain fully and in good faith before altering a term or condition of employment that is a mandatory subject of collective bargaining); *see also* National Basketball Ass'n v. Williams, 875 F. Supp. 1069, 1076 (1994) (expressing approval of *Bridgeman*'s holding).

9. Brown v. Professional Football, Inc., 782 F. Supp. 125 (D.D.C. 1991), *rev'd*, 50 F.3d 1041 (D.C. Cir. 1995). Only one court, the United States District Court for the District of Columbia in *Brown*, has adopted this view. *Id.* For a comprehensive treatment of this viewpoint, *see* Lock, *supra* note 7.

10. *See* Brown v. Pro Football, Inc., 782 F. Supp. 125, 129-34 (D.D.C. 1991) (labor exemption properly ends upon termination of the collective bargaining agreement), *rev'd*,

The National Basketball Association (hereinafter "NBA") teams and players repeatedly encounter this divisive issue whenever they attempt to negotiate a CBA.[11] The owners steadfastly refuse to eliminate provisions which restrain player mobility[12] and in recent years, they also implemented a controversial salary cap which limits players' earnings.[13] On the other side of the bargaining table, the players have filed

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50 F.3d 1041 (D.C. Cir. 1995); Powell v. National Football League, 678 F. Supp. 777, 778 (D. Minn. 1988) ("a labor exemption relating to a mandatory subject survive[s] expiration of the collective bargaining agreement until the parties reach impasse *as to that issue*") (emphasis original), *rev'd*, 930 F.2d 1293 (8th Cir. 1989) (exemption lasts as long as a collective bargaining relationship exists between employers and employees), *cert denied*, 498 U.S. 1040 (1991); Bridgeman, 675 F. Supp. at 963-67 (exemption expires when the employer no longer "reasonably believes that the [challenged] practice or a close variant of it will be incorporated into the collective bargaining agreement"); Lock, *supra* note 7, at 400 (advocating ending immunity under the exemption at expiration of the collective bargaining agreement); Kieran Corcoran, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports*, 94 COLUM. L. REV. 1045, 1071 (1994) (suggesting that union consent should be required to extend the exemption beyond the expiration of collective bargaining agreement); Jonathan S. Shapiro, Note, *Warming the Bench: The Nonstatutory Labor Exemption in the National Football League*, 61 FORDHAM L. REV. 1203, 1218-27 (1993) (concluding that impasse represents the best solution); Glen St. Louis, *Keeping the Playing Field Level: The Implications, Effects and Applications of the Nonstatutory Labor Exemption on the 1994 National Basketball Association Collective Bargaining Process*, 1993 DET. C.L. REV. 1221 (1993) (suggesting that a no-consent date should be pre-selected by bargaining parties or that union consent should be implied after expiration of the CBA until revoked by union); Daniel C. Nester, *Labor Exemption to Antitrust Scrutiny in Professional Sports*, 15 S. ILL. U. L.J. 123 (1990) (advocating ending the exemption at impasse).

11. *See* Wood v. National Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987); National Basketball Ass'n v. Williams, 857 F. Supp. 1069 (S.D.N.Y. 1994), *aff'd*, 45 F.3d 684 (2d. Cir. 1995); Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960 (D.N.J. 1987); Robertson v. National Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975).

12. LIONEL S. SOBEL, PROFESSIONAL SPORTS & THE LAW 116-18 (1977). From the NBA's inception through the 1976-77 season, the NBA Uniform Player Contract contained numerous provisions which greatly inhibited player movement. *Id.* The contract gave a team the right to prevent a player under contract from signing to play for another NBA franchise and the right to sell or trade players regardless of their wishes. *Id.* Furthermore, tampering with players under contract to play for another NBA team was strictly prohibited, and could be punished by suspension or expulsion from the league, a $5,000 fine, or both. *Id.* In addition, the standard "option clause" contained in the Uniform Player Contract provided that following the last season for which a player was under contract, a team could simply mail the player a new contract before September 1 of the next season. *Id.* If the player refused to sign the contract by October 1, the player's contract was automatically renewed and extended for one year. *Id.* These restraints prevented NBA players from obtaining fair market value for their services. *Id.*

13. *See* Jeffery E. Levine, *The Legality and Efficacy of the National Basketball Association's Salary Cap*,11 CARDOZO ARTS & ENT. L.J. 71 (1992); Scott J. Foraker, *The National Basketball Association's Salary Cap: An Antitrust Violation?*, 59 CAL. L REV. 157 (1985).

one antitrust suit after another alleging that the league's restrictive provisions violate the antitrust laws.[14] The United States Court of Appeals for the Second Circuit, in *National Basketball Ass'n v. Williams*, recently addressed the issue of whether a multi-employer bargaining unit may continue to impose the anti-competitive terms of an expired collective bargaining agreement.[15]

II. Factual and Legal Background to *National Basketball Ass'n v. Williams*

Williams presented the United States Court of Appeals for the Second Circuit with the discrete issue of whether a multi-employer bargaining unit comprised of the twenty-seven NBA teams[16] could continue to impose the restrictive provisions contained within the 1988 CBA on the NBA players even after that agreement had expired.[17] In *Williams*, the NBA teams filed a class action suit in the United States District Court for the Southern District of New York on June 17, 1994, seeking a declaratory judgment against a class of present and future NBA players.[18] The NBA teams sought a declaration, prior to the expiration of the 1988 CBA, that the continued imposition of the college draft,[19] right of first refusal,[20] and salary cap[21]

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14. *See supra* note 11.

15. 45 F.3d 684 (2d Cir. 1995).

16. Since the inception of this litigation the NBA has expanded to twenty-nine teams. Roger Thurow, *O Canada! Are You Gonna Love This Game*, Wall St. J., Nov. 3, 1995, at B7. Beginning with the 1995-96 season, the Toronto Raptors and the Vancouver Grizzlies were added as expansion franchises. *Id.* Each of the new teams paid the league an entrance fee of $125 million. *Id.*

17. *Williams*, 45 F.3d at 687. Although raised, the Court of Appeals for the Second Circuit did not reach the issue of whether the college draft, right of first refusal, or salary cap provisions would survive scrutiny under the Rule of Reason standard if the nonstatutory labor exemption to the antitrust laws did not apply. *Id.* at 688.

18. *Id.* at 685-86. The 1988 Collective Bargaining Agreement expired on June 23, 1994, following the last playoff game of the 1993-94 season. *Id.* The NBA players had announced on May 4, 1994, that they would refuse to negotiate with the league until after the 1988 CBA had expired. *Id.*

19. 1988 National Basketball Association Collective Bargaining Agreement (hereinafter 1988 CBA), Art. IV, Sec. 5(1)(b). The college draft is the process by which exclusive rights to negotiate with eligible college players are apportioned among the NBA teams. *Id.* In general, the college draft allows the teams with the worst records from the previous season to select earlier than the teams with the better records. A player who is drafted by a particular team may negotiate only with that team. *Id.* A player who is not drafted may negotiate with any team. *Id.*

20. 1988 CBA, Art. V, Sec. 5 (a)(b). The right of first refusal permits a player whose contract has expired to negotiate with all the teams in the NBA. *Id.* However, the team

provisions of the 1988 CBA would not violate the federal antitrust laws.[22]

The NBA teams argued that the nonstatutory labor exemption provided them with a defense to any antitrust claims and, alternatively, that these provisions were valid under the antitrust laws because they were not solely anti-competitive.[23] The NBA players and the National Basketball Players' Association (hereinafter "NBPA") counterclaimed that these practices violated the Sherman Antitrust Act because they constituted unreasonable restraints of trade no longer incorporated in a governing CBA.[24] Relying on the fact that the

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which employed the player during the previous season has 15 days to match any offer made by another team and thus retain the player's services at a fair market price. SOBEL, *supra* note 12, at 118.

21. 1988 CBA, Art. VII, Part A, Sec. (e). Section (e) provides that: "[s]alary cap shall mean the then current maximum amount that each team can pay in salaries during an NBA season, subject to the rules and exceptions set forth in this agreement." *Id.* The salary cap is designed to function as a revenue sharing arrangement by which players are assured that they will be paid a specific portion of the gross revenues earned by NBA teams. *Williams*, 857 F. Supp. at 1074. The actual amount of the annual salary cap is calculated by taking the greater of:

(a) $6.7 million in 1988-89
$7.4 million in 1989-90
$8.1 million in 1990-91
$8.9 million in 1991-92
$9.8 million in 1992-93
$10.8 million in 1993-94, or

(b) 53% of defined gross revenues, less 4.3% defined gross revenues, divided by the number of teams in the NBA as of July 31 of each year other than expansion teams which have not completed three full seasons.

1988 CBA, Art. VII, Part D, Sec. 1. The salary cap can be exceeded by a team which wants to resign a veteran player, but the cap may not be exceeded in order to acquire new players. 1988 CBA, Art. VII, Part F, Sec. 1(d).

22. *Williams*, 45 F.3d at 686. There are two different types of antitrust violations, those which are condemned on a *per se* basis and those which are not. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 169-70 (1977). The former are evaluated under a strict liability-type standard, while the latter are analyzed under the so-called Rule of Reason standard. *Id.* The *per se* antitrust violation doctrine "invalidates without further inquiry arrangements which directly stifle competition." *Id.* In contrast, the Rule of Reason doctrine mandates that, "where an arrangement does not obviously stifle competition, but may adversely affect it, analysis of the arrangement must be pursued to gauge its purpose and affect." *Id.*

23. *Williams*, 45 F.3d at 686. The NBA teams argued that under the Rule of Reason standard, the disputed provisions of the 1988 CBA would be upheld because of their procompetitive characteristics. *Williams*, 857 F. Supp. at 1071. The district court agreed in dicta, and asserted that although the provisions are undoubtedly restraints of trade, they do not constitute undue restraints of trade as required for a violation of § 1 of the Sherman Act. *Id.* at 1078.

24. *Williams*, 45 F.3d at 686. The defendants claimed that the college draft, right of

Supreme Court had specifically upheld the legality of multi-employer bargaining, the United States Court of Appeals for the Second Circuit affirmed the district court's holding that the antitrust laws have no application during negotiations between NBA teams and the NBPA as long as a collective bargaining relationship exists.[25]

A. *The History of Collective Bargaining in the NBA*

The NBA players initially challenged the NBA's use of anti-competitive player restrictions in the 1975 case of *Robertson v. National Basketball Ass'n*,[26] they sought a declaratory judgment that the reserve clause,[27] compensation clause,[28] and college draft[29] constituted violations of the federal antitrust laws.[30] However, the district court's denial of the NBA teams' motion for summary judgment led to a court-approved settlement agreement,[31] the terms of which were incorporated into the 1976 CBA.[32] After the 1976 CBA expired, in June of 1979,

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first refusal, and the salary cap provisions were "naked agreements among competitors designed . . . to fix . . . labor costs." *Id.* at 687. Absent justification under the Rule of Reason standard or some defense, employers who compete for labor may not agree among themselves to purchase labor only on certain specified terms and conditions. Anderson v. Shipowners' Ass'n, 272 U.S. 359 (1926). Furthermore, such a cartel may not enforce its will through an agreement to boycott those who do not abide by its rules. Eastern Retail Lumber Dealers Ass'n v. United States, 234 U.S. 600 (1914). Such conduct would be *per se* illegal. *Id.*

25. *Williams*, 45 F.3d at 686-87, 693.

26. 389 F. Supp. 867 (S.D.N.Y. 1975).

27. *Robertson*, 389 F. Supp. at 893. The "reserve clause" allowed a team to perpetually renew a veteran player's contract at the team's discretion. *Id.*

28. *Id.* at 891. The "compensation clause" mandated that if a player did sign with another club, the acquiring team was obligated to compensate the player's former team with either a draft choice or a lump sum of money at the discretion of the NBA Commissioner. *Id.*; *see also* Mackey v. National Football League, 543 F.2d 606, 610-11 (8th Cir. 1976) (finding that a similar compensation system in the NFL, known as the Rozelle Rule, was a violation of § 1 of the Sherman Act under a Rule of Reason analysis).

29. *See supra* note 19 and accompanying text for an explanation of the college draft.

30. *Robertson*, 389 F. Supp. at 867.

31. Robertson v. National Basketball Ass'n, 72 F.R.D. 64 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1976). Under the terms of the settlement, the NBA paid the player class $4.3 million, which was disbursed among the class members according to a weighted formula which distributed proportionally more money to those players who had more experience in the league. *Robertson*, 72 F.R.D. at 67. The settlement agreement stipulated that it would be binding on both parties through the end of the 1986-87 NBA season. *Williams*, 857 F. Supp. at 1071. Furthermore, it expressly provided that the players had not waived their right to resort to the legal system in order to challenge the unilateral imposition of any rule, policy, practice or agreement by the NBA in the future. *Id.*

32. *Robertson*, 72 F.R.D. at 67. The settlement agreement extensively revised the

the NBA teams and players entered into another collective bargaining agreement on October 10, 1980, which also included provisions for a college draft and a right of first refusal.[33]

When the 1980 CBA expired in 1982,[34] the NBA sought to introduce a controversial salary cap provision in an effort to stop the rapid escalation of player salaries, which had become so high that a majority of NBA teams were operating at a loss.[35] The players responded by filing a lawsuit challenging the legality of the salary cap.[36] After a special master determined that a salary cap would violate the terms of the *Robertson* settlement agreement,[37] the players and the NBA teams signed a Memorandum of Understanding which modified the expired 1980 CBA to include a salary cap.[38] This Understand-

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rules under which the NBA operated. *Id.* It did away with the NBA's option clause, which meant that teams would no longer be able to unilaterally renew a player's contract. WEISTART & LOWELL, *supra* note 6, at 508. The option and compensation clause systems for veteran players were to be eliminated within four years and to be replaced by a system of free agency with a right of first refusal from 1981-87. *Id.* Under the free agency system, after a player's contract expires the player is free to negotiate with any team. *Id.* However, a free agent's ability to actually sign with another team is restricted by a right of first refusal which is granted to his former team. *Id.* Using this right, the free agent's former team can match the offer of any other team negotiating with the player and thereby retain the player's services at a fair market value. *Id.*

In addition, the settlement agreement eliminated the reserve option clause for rookies. *Id.* Under the new system, if a rookie does not want to play for the team which drafted him, he may opt to sit the year out and re-enter the draft pool again the following year. *Id.* If the player does not sign with a team after the second draft, he becomes a free agent and can sign with any team. *Id.*

33. *Williams*, 857 F. Supp. at 1071.

34. *Id.* The 1980 CBA expired on June 1, 1982. *Id.* Although the league and the players had not yet signed a new collective bargaining agreement, the 1982-83 NBA season began as scheduled. Wood v. National Basketball Ass'n, 809 F.2d 954, 957 (2d Cir. 1987).

35. *Williams*, 857 F. Supp. at 1072.

36. Lanier v. National Basketball Ass'n, 82 Civ. 4935 (S.D.N.Y. 1983).

37. *Williams*, 857 F. Supp. at 1072. A special master appointed to hear disputes under the *Robertson* settlement agreement determined that because the salary cap would violate the terms of the settlement, it could only be implemented if the NBA and the NBPA jointly requested the district court approve a modification of that agreement under FED. R. CIV. P. 23(e). *Wood*, 809 F.2d at 958.

38. *Williams*, 857 F. Supp at 1072. The NBA and NBPA reached an agreement in principle with the league on March 31, 1983, only 48 hours before a strike deadline set by the players. *Wood*, 809 F.2d at 957. The terms of the agreement were set forth on April 18, 1983 in a Memorandum of Understanding. *Id.* The Memorandum included the college draft and first refusal provisions as earlier agreements had and it also instituted a new salary cap provision. *Id.* Although labeled as a "salary cap", the Memorandum actually established both a maximum and a minimum team salary. *Id.* The agreement also estab-

ing was ultimately incorporated into the 1983 CBA and remained in effect through the end of the 1986-87 season.[39]

After a brief Moratorium Agreement[40] expired on October 1, 1987, the players commenced an action in the United States District Court for the District of New Jersey, seeking a ruling that the college draft, the right of first refusal, and the salary cap violated the antitrust laws.[41] After an unfavorable ruling for the players on the labor exemption issue and a successful decertification vote,[42] the parties reached an agreement, which included the aforementioned provisions in the 1988 CBA.[43] When the 1988 CBA expired in 1994, the players again demanded that the three disputed employment practices be eliminated.[44] Finally, on June 15, 1994, in a letter from the players to the league, the players stated that they would not resume bargaining until after the 1988 CBA had expired.[45]

Fearful of exposing the league to treble damages under the antitrust laws[46] for continuing to impose the terms of the 1988 CBA after its expiration, the NBA teams sought a declaratory judgment in the United States District Court for the Southern District of New York that the nonstatutory labor exemption would shield the teams from any antitrust claims raised by the

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lished a minimum for individual player salaries. *Id.* After a hearing was held to address the fairness of the proposed modification, it was approved by the district court on June 13, 1983 (1983 CBA). *Id.*

39. *Williams*, 857 F. Supp. at 1072.

40. *Williams*, 857 F. Supp. at 1072. On June 8, 1987, the NBA and the players entered into a Moratorium Agreement to facilitate negotiations whereby the challenged practices would remain in effect, but no new contracts would be signed. *Id.*

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

42. *Id.* at 967. After the *Bridgeman* court held that the NBA teams could use the nonstatutory labor exemption as a defense to the antitrust claims, the NBA players voted to decertify their union, the NBPA. STAUDOHAR, *supra* note 2, at 128. This was necessary in order to force the NBA teams back to the bargaining table. *Id.*

43. *Williams*, 857 F. Supp. at 1072.

44. *Id.* At a formal bargaining session on April 7, 1994, the players delivered a position paper to the NBA expressing their view that the college draft, right of first refusal, and salary cap provisions would "be subject to successful challenge under the antitrust laws." *Id.* at 1073. This position was reiterated at another formal bargaining session, held on May 4, 1994. *Id.*

45. *Id.*

46. Section 4 of the Clayton Act provides, in relevant part:

> any person who shall be injured in his business or property by reason of anything in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1996).

players.[47] Furthermore, the NBA teams sought a second declaration that the college draft, right of first refusal, and salary cap were lawful under the antitrust laws.[48] On June 27, 1994, the NBA players counterclaimed, asserting that the continued imposition of these practices violated the Sherman Act because they were not embodied in an unexpired CBA.[49] Trial was conducted on July 12, 1994 after Judge Kevin T. Duffy consolidated the preliminary hearing with the trial on the merits.[50] On July 18, Judge Duffy granted the NBA teams' request for declaratory relief and dismissed the players' counterclaim.[51]

In reaching its decision, the district court first reviewed the Supreme Court cases from which the nonstatutory labor exemption emanates.[52] Judge Duffy noted that from *Allen Bradley Co. v. Local Union No. 3, IBEW*[53] to *United Mine Workers of America v. Pennington*,[54] the majority of the Supreme Court consistently held that for the Sherman Act to apply, a group of employers must conspire to use a union to harm their competitors in the product market.[55] Therefore, the district court con-

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47. *Williams*, 857 F. Supp. at 1071.

48. *Id.*

49. *Williams*, 45 F.3d at 686. On the following day, Judge John F. Keenan issued the temporary restraining order which the players had requested, barring the NBA teams from entering into contracts with players until the case was resolved on the merits. *Id.*

50. *Id.*

51. *Id.*

52. *Williams*, 857 F. Supp. at 1076.

53. 325 U.S. 797 (1945). In *Allen Bradley*, the Supreme Court held that New York City electrical equipment manufacturers and contractors had conspired with a local union to restrain trade in violation of the Sherman Act. *Id.* at 808. In various collective bargaining agreements, the contractors agreed to purchase equipment exclusively from local manufacturers, who had entered into closed-shop agreements with the union. *Id.* at 799-800. In return, the manufacturers agreed to confine their New York City sales of electrical equipment to contractors employing the union's members. *Id.* This effectively foreclosed sales of electrical equipment in New York City by manufacturers located outside of New York. *Id.* The Court concluded that the mere fact that the union's agreement to assist employers in restraining trade in the employers' product market was obtained by the terms of a collective bargaining agreement was not sufficient to immunize the parties' agreement from antitrust liability. *Id.* at 808.

54. 381 U.S. 657 (1965). In *Pennington*, a group of large coal companies entered into a multi-employer collective bargaining agreement with the United Mine Workers that provided for increased wages and pension payments. *Id.* In exchange for those benefits, the union agreed that it would attempt to drive smaller coal companies out of the industry by seeking similar benefit concessions from them without regard to their ability to pay. *Id.* The Supreme Court held that a union forfeits its antitrust immunity when it conspires with the employers "to eliminate competition from the industry." *Id.* at 665-66.

55. *Williams*, 857 F. Supp. at 1078 (citing Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars and Peonage*, 81 YALE L.J. 22, 26 (1971)

cluded that where a dispute arises concerning the labor market, antitrust actions should not be allowed to subvert the federal labor policy.[56] Accordingly, Judge Duffy adopted a standard under which the nonstatutory labor exemption applies "as long as a collective bargaining relationship exists."[57] Applying this standard, the district court in *Williams* held that the multi-employer bargaining unit comprised of the NBA teams could impose the restrictive terms of the 1988 CBA after it expired without risking scrutiny under the antitrust laws.[58] On appeal, the United States Court of Appeals for the Second Circuit affirmed the district court's adoption of this standard as a proper accommodation of the aims of federal labor policy.[59]

B. *Court Rulings Applying the Nonstatutory Labor Exemption in the Professional Sports Industry*

The first case to address the application of the nonstatutory labor exemption to multi-employer bargaining units in the professional sports context[60] was *Mackey v. National Football League*.[61] In *Mackey*, a group of professional football players challenged the legality of the National Football League's (hereinafter "NFL") "Rozelle Rule" under the federal antitrust

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(maintaining that for the Sherman Act to apply to collective bargaining agreements "one group of employers must conspire to use the union to hurt their competitors")).

56. *Williams*, 857 F. Supp. at 1078.

57. *Id.* (citing *Powell II*, 930 F.2d at 1303).

58. *Id.* In dicta, the district court concluded that even if the nonstatutory labor exemption did not shield the NBA from antitrust liability, the challenged provisions did not violate the antitrust laws. *Id.*

59. *Williams*, 45 F.3d 684 (2d Cir. 1995).

60. The uncertainty surrounding the appropriate scope of the nonstatutory labor exemption is magnified in the context of professional sports by the inverse nature of employee-employer relations in the industry. *See* Weistart & Lowell, *supra* note 6, at 525; Corcoran, *supra* note 10, at 1056. In other industries, it is usually the union which attempts to avail itself of the nonstatutory labor exemption in order to defend a suit brought by an employer who opposes a provision of the collective bargaining agreement which the union insisted upon including therein. Corcoran, *supra* note 10, at 1056. However, in sports context it is typically the team owners who have insisted that restrictive provisions be included in the collective bargaining agreement rather than the union. *Id.* Thus, the players, as members of the union, will often be plaintiffs in the sports context, while owners will raise the nonstatutory labor exemption as a defense. *Id.* In such a scenario, the relevant inquiry involves not whether an exercise of union power is protected by the nonstatutory labor exemption, but whether team owners can utilize the exemption to immunize restraints that are unfavorable to players from antitrust scrutiny. *Id.*

61. 407 F. Supp. 1000 (D. Minn 1975), *aff'd*, 543 F.2d 606 (8th Cir. 1976).

laws.[62] The Rozelle Rule was a compensation system which greatly decreased the value of "free agency" to NFL players. Under the rule, if an NFL player decided upon the expiration of his contract to sign with another team, the NFL commissioner could order the player's new team to compensate his prior team by giving them the exclusive rights to one or more other players or draft picks.[63] The United States Court of Appeals for the Eighth Circuit held that, although the nonstatutory labor exemption could be asserted by employers,[64] the NFL's Rozelle Rule was not protected from antitrust scrutiny by the exemption.[65]

In *Mackey,* the court of appeals articulated a three part test for ascertaining the applicability of the nonstatutory labor exemption.[66] For the exemption to apply, the court held that: (1) the challenged restraint must primarily affect only parties to the collective bargaining relationship; (2) the agreement must concern a mandatory subject of collective bargaining;[67] and (3)

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62. *Mackey,* 543 F.2d at 610. The "Rozelle Rule", named after former NFL commissioner Pete Rozelle, was unilaterally adopted by the NFL member clubs as an amendment to the League's Constitution and By-Laws. *Id.* The challenged provision was set forth in § 12.1(H) of the NFL Constitution, which stated in pertinent part:

> Any player, whose contract with a League club has expired, shall thereupon be a free agent and shall no longer be considered a member of that club following the expiration date of such contract. Whenever a player, becoming a free-agent in such a manner, thereafter signed a contract with a different club in the League, then, unless mutually satisfactory arrangements have been concluded between the two League clubs, the Commissioner may name and then award to the former club one or more players . . . of the acquiring club as the Commissioner in his sole discretion deems fair and equitable . . . .

Id. at 610-11 (quoting NFL CONSTITUTION AND BY-LAWS § 12.1(H)).

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

64. *Id.* at 612. In *Mackey,* the Eighth Circuit explicitly rejected the NFL players contention that only employee groups are entitled to the raise the nonstatutory labor exemption. *Id.* The court of appeals stated that "[s]ince the basis of the nonstatutory exemption is the national policy favoring collective bargaining, and since the exemption extends to agreements, the benefits of the exemption logically extend to both parties to the agreement." *Id.*

65. *Id.* at 616.

66. *Id.* at 614.

67. 29 U.S.C. § 158(d) (1994). The National Labor Relations Act mandates that employers and unions bargain over certain workplace related issues. *Id.* Section 8 of the National Labor Relations Act states:

> (d) Obligation to bargain collectively
>
> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to . . . confer in good faith with respect to wages, hours and other terms and conditions of employment . . . .

the agreement must be the product of bona fide arms-length bargaining.[68] Focusing on the third requirement, the court of appeals concluded that although the Rozelle Rule had been agreed to in consecutive CBAs, the NFL teams had in fact unilaterally imposed the Rozelle Rule on a weak union without obtaining its consent.[69] However, the *Mackey* court did not reach the issue of whether the terms of a collective bargaining agreement might extend beyond its formal expiration.[70]

In the same year that *Mackey* was decided, *Robertson v. National Basketball Ass'n*,[71] dealt with issue of whether the nonstatutory labor exemption provided NBA teams with a valid defense to antitrust claims brought by NBA players.[72] In *Robertson*, NBA players sought a declaratory judgment that the reserve clause, compensation clause, and college draft constituted violations of the antitrust laws.[73] At trial, the NBA teams raised the nonstatutory labor exemption as a defense, but the district court denied the NBA teams' motion for summary judgment on this ground, holding that the exemption

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Id.

68. *Mackey*, 543 F.2d at 614. The court of appeals indicated that the issue of whether bona fide arms-length bargaining occurred with respect to a particular restraint sought to be exempted can be determined by examining the negotiating history. *Id.* at 615-16. Relevant criteria include the relative bargaining strengths of the parties and whether the party challenging the restraint acquired benefits in exchange for accepting the restriction. *Id.* at 616.

69. *Id.* at 616. The court of appeals reviewed the record and determined that bona fide arm's length bargaining over the Rozelle Rule had not taken place prior to the ratification of the 1968 and 1970 CBAs. *Id.* The court noted that the National Football League Players' Association (NFLPA) had a relatively weak bargaining position because it had only been formally recognized by the NLRB in 1968 and that the Rozelle Rule was not an issue in bargaining sessions. *Id.* at 612-13. Therefore, the court found that the Rozelle Rule did not benefit the players, and had simply remained unchanged since its unilateral imposition by the NFL. *Id.* The court specifically stated that, "[t]he union's acceptance of the status quo by the continuance of the Rozelle Rule in the initial CBAs under the circumstances of this case cannot serve to immunize the Rozelle Rule from the scrutiny of the Sherman Act." *Id.*

70. *Id.*

71. 389 F. Supp. 867 (S.D.N.Y. 1976).

72. *Id.*

73. *Id.* at 873. The NBPA alleged that the NBA violated the antitrust laws by "(1) controlling, regulating, and dictating the terms upon which professional major league basketball is played in the United States; (2) allocating and dividing the market of professional player talent; and (3) enforcing its monopoly and restraint of trade through boycotts, blacklists and concerted refusals to deal." *Id.* at 873-74. The NBPA further asserted that the "NBA's purported objective is the elimination of all competition in the acquisition, allocation, and employment of the services of professional basketball players — all in violation of Sections 1 and 2 of the Sherman Act." *Id.* at 873-74.

shielded only unions and not employers.[74] In so holding, the district court expressly rejected the two-part test advocated by the NBA teams for determining whether the nonstatutory labor exemption shields employers from antitrust claims.[75]

Judge Robert Carter opined that the NBA teams' test failed to recognize that there are limits on the extent to which the terms of a CBA may violate other laws merely because they happen to pertain to mandatory subjects of collective bargaining.[76] The court emphasized, as the court in *Mackey* had, that

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74. *Id.* at 884-89. The *Robertson* court unequivocally stated:

> There is no operative labor exemption barring or protecting the defendants [NBA and NBA teams] from being sued for antitrust violations. The statutory basis for labor's exemption from the application of the antitrust laws are found in Sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17, 29 U.S.C. § 52. A simple and concise answer to the defendant's contention is that the exemption extends only to labor or union activities, and not to the activities of employers.

Id. at 884-85.

In support of this conclusion, the court relied on *Allen Bradley*, which made clear that the nonstatutory labor exemption was created primarily for the benefit of the unions. *Id.* at 886. While the district court in *Robertson* acknowledged that subsequent cases had recognized a limited exemption for employers which are sued by third parties for the activities of unions, it emphasized that this exemption extends only to protect the actions of employers insofar as they occurred in connection with collective bargaining negotiations with unions. *Id.* The court explained that the nonstatutory labor exemption is to function solely as a shield against antitrust claims challenging the joint actions of unions and employers who are engaged in the collective bargaining process and exemption may not be utilized by either party as a sword to further monopolistic ends. *Id.* (citing Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 499-500 (E.D. Pa. 1972)).

75. *Id.* at 886-88. The NBA argued that the nonstatutory labor exemption should provide immunity to an employer when the anti-competitive practices are not directed at non-parties to the collective bargaining relationship and when the challenged practices are also mandatory subjects of collective bargaining. *Id.* at 886. The NBA cited *Jewel Tea* and *Pennington* to support this conclusion. Id. However, the *Robertson* court concluded that neither case actually provided a precedent for extending the exemption to employers. *Id.* at 887. The court maintained that "[t]here is no statement or suggestion in *Pennington* that an employer has an exemption from an antitrust suit by its employees, or by any other party. It was assumed that the large coal operators [employers] would have liable regardless of the union's liability." *Id*; *see supra* note 53 for a discussion of *Pennington.*

The district court also viewed the *Jewel Tea* case as focusing solely on the issue of whether a union could be held liable under the antitrust laws because it had been able to force employers to accept anti-competitive provisions contained in the collective bargaining agreements. *Id.* In *Jewel Tea,* a union had successfully imposed uniform closing hours on all meat departments through the use of identical provisions contained in all its collective bargaining agreements with retail employers. *Id.* The *Robertson* court pointed out that the opinion of the Supreme Court in *Jewel Tea* did not make any mention of whether employers were exempt from antitrust scrutiny in such a circumstance. *Id.*

76. *Robertson*, 389 F. Supp. at 888-89. The court stated that "[m]andatory subjects of collective bargaining do not carry talismanic immunity from the antitrust laws." *Id.*

in order for the terms of a CBA to be outside the purview of the antitrust laws, the union must have acted in its own self-interest and not have conspired with a group of employers.[77] In effect, the district court held that employers are only exempt from the antitrust laws when, during the course of genuine bargaining, a union consents to anti-competitive terms because they are judged to be in the best interests of its members.[78] Consequently, the court in *Robertson* held that the unresolved issue of whether the restraints had actually been implemented as a result of bona fide collective bargaining negotiations between the NBA teams and the NBPA prevented it from granting summary judgment in favor of the NBA players.[79] Although the district court denied the NBA teams' motion for summary judgment, the teams and the NBPA opted to settle the *Robertson* case out of court.[80]

However, this settlement only serve to frustrate the next attempt by the NBA players to hold the NBA owners liable for imposing terms of employment which violated federal anti-

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77. *Id.* at 889 (citing Intercontinental Container Transp. Corp. v. New York Shipping Ass'n, 426 F.2d 884, 887 (2d Cir. 1970)).

78. *Id.* at 893-94. The court viewed this issue as critical because if the NBPA had initially deemed these restraints to be in the best interests of the NBA players, the restraints would then be exempt from antitrust review. Id; *see* WEISTART & LOWELL, *supra* note 6, at 550 (asserting that employer activities would be immune from antitrust scrutiny when they were the product of collective bargaining). The NBPA denied that collective bargaining negotiations ever occurred with regard to any of these restraints, and that they had ever been considered to be in the best interests of the union and its members. *Id.* However, the court found that a genuine issue of fact existed as to whether the college draft, reserve clause, and compensation clause were regulated by collective bargaining agreements entered into by the NBA and the players. *Id.* In essence, the court merely stated that where there is no "conspiracy" or "combination" in restraint of trade, the union and the employers which are party to the collective bargaining process cannot be held liable under § 1 of the Sherman Act. In this way, the court attempted to draw a bright-line between labor law and antitrust law.

79. *Robertson,* 389 F. Supp. at 895. The court concluded that the challenged restraints were *per se* violations of the Sherman Act. *Id.* at 893-94. The court condemned the college draft and reserve system as group boycotts based on the NBA teams' concerted refusals to deal with the players except through these restrictive mechanisms. *Id.* at 893. The court also characterized these two schemes as analogous to price-fixing devices due to their tendency to reduce competitive bidding in the hiring of players, which in turn reduced the cost of employing these players. *Id; see* WEISTART & LOWELL, *supra* note 6, at 550 (theorizing that if the rules in *Robertson* were "imposed by unilateral employer action, without specific union approval or acquiescence, then it would indeed appear that the action ought not to be immunized from the antitrust laws simply because it affected the employment relationship").

80. Robertson v. National Basketball Ass'n, 72 F.R.D. 64 (S.D.N.Y. 1976), *aff'd,* 556 F.2d 682 (2d Cir. 1976).

trust laws.[81] In *Wood v. National Basketball Ass'n*,[82] O. Leon Wood, a collegiate basketball player, challenged the legality of the salary cap, college draft, and the league's prohibition of player corporations under the federal antitrust laws.[83] The United States District Court for the Southern District of New York, applying the *Mackey* test, held that the nonstatutory labor exemption immunized these three provisions of the 1983 Memorandum of Understanding from antitrust review because the NBPA had consented to the *Robertson* settlement.[84]

On appeal, the United States Court of Appeals for the Second Circuit largely discarded *Mackey's* consent requirement and premised its novel holding on the policies underlying the federal labor laws.[85] The court held that Wood could not challenge the provisions of the 1983 Memorandum of Understanding even though he had not been a member of the NBPA union when the agreement had been negotiated.[86]

Writing for the court, Circuit Judge Ralph K. Winter emphasized that the inclusion of the college draft and salary cap provisions within the 1983 Memorandum of Understanding was not accomplished unilaterally by the NBA teams acting as horizontal competitors.[87] Rather, Judge Winter viewed these

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81. Once the terms of the *Robertson* settlement agreement were incorporated into the 1976 CBA, and subsequently into the 1980 CBA, it became extremely difficult for the NBA players to challenge the anti-competitive restraints being employed by the league. This was because the restraints were now viewed as having been the product of arms-length collective bargaining. *See* Wood v. National Basketball Ass'n, 602 F. Supp. 525, 528 (S.D.N.Y. 1984), *aff'd,* 556 F.2d 682 (2d Cir. 1976) (finding that the salary cap and college draft provisions involved mandatory subjects of collective bargaining and were the result of arms-length negotiations).

82. 602 F. Supp. 525 (S.D.N.Y. 1984), *aff'd,* 809 F.2d 954 (2d Cir. 1987).

83. *Wood,* 602 F. Supp. at 525. Wood was selected by the Philadelphia 76ers in the first round of the 1984 NBA College Draft. *Id.* at 527. However, because the 76ers' were already over the salary cap, they could only offer Wood a one-year contract for $75,000. *Id.* Wood sought an injunction from the district court ordering NBA teams other than the 76ers to make offers to him in violation of the 1983 CBA. *Id.* He claimed that the salary cap, college draft, and prohibition on player corporations contained within the 1983 Memorandum of Understanding were *per se* violations of § 1 of the Sherman Act as they applied to him because he was not a member of the NBPA when the agreement was forged. *Id.* at 529. Wood alleged that, by adopting these three restraints, the NBA teams had effectively agreed to eliminate all competition among themselves in the employment of collegiate basketball players. *Id.*

84. *Id.* at 528.

85. *Wood,* 809 F.2d at 959.

86. *Wood,* 809 F.2d at 960-61.

87. *Id.* at 959.

provisions as the product of a CBA[88] between a multi-employer bargaining unit and a union.[89] Therefore, the court of appeals concluded that federal labor laws, which provide for an exclusive bargaining representative to bargain on behalf of all of a union's members, prevented Wood from bargaining individually with NBA teams.[90] The court reasoned that this was appropriate even though Wood had not been a member of the NBPA when the agreement had been negotiated and could not fully realize his free market value under the terms of the agreement.[91] Judge Winter maintained that if individual bargaining were allowed, the antitrust laws[92] would subvert a

88. *See* Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 22 (1971). This seminal article, co-authored by then Professor Winter, suggests that once a collective bargaining relationship exists, two fundamental principles should take precedence. *Id.* at 6. First, the recognition of the exclusive bargaining power of the elected bargaining agent and, second, freedom of contract between the employer and union. *Id.*

The authors maintain that by prohibiting individual bargaining by talented and average employees alike, the union's collective position is strengthened because employers cannot simply compensate the best workers at the expense of less talented ones. *Id.* at 8. If the more talented workers could individually bargain with employers, the union would have no leverage to exact minimum guarantees for all employees. *Id.*

Furthermore, although employers and unions must collectively bargain in good faith over mandatory subjects, the article points out that this duty "does not compel either party to agree to a proposal or require the making of a concession." *Id.* at 11 n. 31 (quoting NLRA § 8(d) (1964)). Therefore, parties may bargain hard to enforce their demands and rely on freedom of contract to protect the end result of the bargaining process. *Id.* The authors view this as an efficient method of resolving disputes which should lead to industrial peace as both sides explain their positions and find room for compromise. *Id.* at 12. Their conclusion is that because labor law is designed to preserve the bilateral monopoly created between multi-employer bargaining units and unions, antitrust claims between these two groups must be eliminated. *Id.* at 22.

89. *Wood*, 809 F.2d at 959. The court held that the college draft and salary cap provisions of the 1983 Memorandum of Understanding applied to Wood irrespective of the fact that he was not a member of the NBPA when the agreement was negotiated. *Id.* at 960. Judge Winter noted that the definition of "employee" in the National Labor Relations Act included others outside the bargaining unit. *Id.* (quoting 29 U.S.C. § 152(3)) ("[t]he term 'employee' shall include any employee, *and shall not be limited to the employees of a particular employer* . . . .").

90. *Wood*, 809 F.2d at 959.

91. *Wood*, 809 F.2d at 959. The court maintained that, "recognition of a right to individual bargaining without the consent of the exclusive representative would undermine the status and effectiveness of the exclusive representative, and result in individual contracts that reduce the amount of wages and other benefits available for other workers." *Id.* at 961. *See* Jacobs & Winter, *supra* note 88 (stating that "because the exercise of individual bargaining power is extinguished, it is a fact of life that the talented individual may fare less well in collective bargaining than he would if he bargained on his own").

92. *Wood*, 809 F.2d at 960-63. The court rejected Wood's argument that *Connell*

unique form of freedom of contract[93] which federal labor policy explicitly permits.[94] On these grounds, the United States Court of Appeals for the Second Circuit held that the nonstatutory labor exemption applied and affirmed the district court's grant of judgment for the NBA teams.[95]

After the *Robertson* settlement agreement and the 1983 CBA expired in 1987,[96] a group of NBA players and first round draft picks filed a suit in the United States District Court for the District of New Jersey alleging that the NBA teams' continued imposition of the college draft, right of first refusal, and salary cap constituted antitrust violations.[97] This case, *Bridgeman v. National Basketball Ass'n*, was the first to confront the issue of how far the nonstatutory labor exemption

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Construction Co., *Jewel Tea*, and *Pennington* supported the contention that a party outside the collective bargaining process, who is injured by the anti-competitive terms within a collective bargaining agreement, may have an antitrust remedy. *Id.* Judge Winter stressed that these decisions dealt with *employers* who had been harmed when a union conspired with a group of employers to restrain competition in the product market, not with employees not party to the collective bargaining negotiations. *Id*; *see also* Jacobs & Winter, *supra* note 88, at 26 (stating that "the line that the Supreme Court has consistently sought to draw . . . is the line between the product market and the labor market").

93. *Wood*, 809 F.2d at 961. Judge Winter maintained that the freedom of employees "to eliminate competition among themselves through a governmentally supervised majority vote selecting an exclusive bargaining representative" who may then negotiate a collective bargaining agreement with a group of employers is inherently efficient and fosters labor peace. *Id.* at 959, 961; *see also* Jacobs & Winter, *supra* note 88, at 11 (arguing that although this approach "may well seem overly to favor the strong over the weak . . . it is based on sound considerations which call for rejection of any attempts to bring about government intervention in bargaining in professional sports").

94. *Wood*, 809 F.2d at 959. Judge Winter supported his conclusion by referring to § 9(a) of the National Labor Relations Act, which provides that "[r]epresentatives . . . selected . . . by the majority of the employees in a unit . . . shall be the exclusive representatives of all employees in such unit for the purposes of collective bargaining." *Id.* (quoting 29 U.S.C. § 159(a)). By framing the issue as one of whether Wood had a right to bargain individually, Judge Winter managed to entirely avoid the issue of whether nonstatutory labor exemption extended to protect the multi-employer bargaining unit. *Id.* Nevertheless, one can infer from the reasoning of Judge Winter's opinion that had a veteran member of the NBPA challenged the provisions of the Memorandum of Understanding, the court of appeals would have held that the nonstatutory labor exemption applied. *See* Jacobs & Winter, *supra* note 88, at 22 (alluding to the fact that multi-employer bargaining has been declared by the Supreme Court to be authorized by the National Labor Relations Act and collusive joint proposals are "part and parcel of collective bargaining in the United States").

95. *Wood*, 809 F.2d at 963.

96. Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960, 962 (D.N.J. 1987). The settlement agreement provided that it would expire at the end of the 1986-87 NBA season. *Id.*

97. *Id.*

should extend to immunize player restraints imposed by a multi-employer bargaining unit after the expiration of a CBA.[98] The NBA players argued that once the 1983 CBA expired, the NBA teams lacked the union consent required under *Mackey* to invoke the nonstatutory labor exemption.[99] At the other extreme, the NBA moved for summary judgment on the ground that the labor exemption extended indefinitely beyond the expiration of the 1983 CBA as long as the league adhered to the provisions of the expired CBA.[100]

Refusing to completely disregard *Mackey's* consent requirement, the district court fashioned its own implied consent standard[101] between these two extremes, holding that the exemption extends to a particular restraint "only as long as an employer continues to impose it unchanged, and reasonably believes that the practice or a close variant of it will be incorpo-

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98. *Id.* at 964.

99. *Id.* Applying the *Mackey* test, the district court observed that the restraints were well within the purview of the nonstatutory labor exemption while the 1983 CBA was in effect. *Id.* at 965 n.4. The players conceded this point. *Id.* at 964. Nonetheless, the players argued that because courts generally refuse to apply the labor exemption when the challenged practices are not authorized by a valid CBA, the players' consent to the continued imposition of the restraints was required in order to shield the NBA from antitrust liability. *Id.* at 964-65.

100. *Id.* at 964-65.

101. *Bridgeman*, 675 F. Supp. at 967. In *Bridgeman*, the district court found both the players' and the NBA teams' positions untenable. *Id.* at 965-66. The court flatly refused to accept the players' contention that the exemption should vanish at the exact moment the agreement expired, concluding that such a rule would be inconsistent with the NBA team owners' obligations under the NLRA. *Id.* at 965. The court found this position unacceptable. *Id.* The court noted that under the NLRA, the owners have an obligation, even after the collective bargaining agreement expires, to bargain fully and in good faith before altering a term or condition of employment that is a mandatory subject of collective bargaining. *Id.* Moreover, the court maintained that a breach of this obligation could be deemed an unfair labor practice. *Id.* (citing 29 U.S.C. § 158(a)(5)). Therefore, the court asserted that the terms of a CBA must extend beyond its expiration to some degree. *Id.* Otherwise, employers' fear of antitrust liability during the interim periods between collective bargaining agreements would inhibit the collective bargaining process. *Id.* at 965-66.

Likewise, the district court in *Bridgeman* found fault with the NBA teams' argument that the nonstatutory labor exemption should be extended indefinitely beyond the expiration of a collective bargaining agreement. *Id.* at 966. Far from encouraging collective bargaining, the court opined that such a rule, if adopted, would discourage unions from entering into collective agreements for fear that the restraints, once imposed, would become permanent, regardless of the players' continued consent to their imposition. *Id.*

Lastly, the district court also refused to adopt an "impasse" standard, characterizing impasse as merely a temporary deadlock which occurs and is broken frequently during the course of the bargaining process, rather than an end to all negotiations. *Id.* at 966 (citing Charles D. Bonnano Linen Serv., Inc. v. NLRB, 454 U.S. 404, 412 (1982)).

rated in the next collective bargaining agreement."[102] However, because the question of whether the NBA teams believed the salary cap, college draft and right of first refusal provisions would be included in the subsequent CBA was a factual one, the United States District Court for the District of New Jersey denied the NBA teams' motion for summary judgment.[103]

The *Bridgeman* implied consent or "reasonableness" standard was expressly rejected by the United States District Court for the District of Minnesota in *Powell v. National Football League (Powell I)*.[104] Judge David S. Doty concluded that such a test, if adopted, would discourage collective bargaining by providing unions with an incentive to make it unequivocally clear immediately after the expiration of a CBA that they no longer consented to its restrictive provisions, thereby instantly subjecting the employers to antitrust liability.[105] Neverthe-

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102. *Bridgeman*, 675 F. Supp. at 967. In an attempt to frame its test in a manner which would accommodate *Mackey's* consent based holding, the court theorized that "[w]hen the employer no longer has such a reasonable belief, it is then unilaterally imposing the restriction on its employees, and the restraint can no longer be deemed the product of arm's-length negotiation between the union and the employer." *Id.* This point may occur before, during or after impasse. *Id.* Several commentators have attacked the practicality of the *Bridgeman* reasonableness standard. *See, e.g.,* Lock, *supra* note 7, at 371. Professor Lock maintains that the abstract and largely subjective nature of the reasonableness test would make it difficult for a court to determine when the test has been satisfied. *Id.* In addition, Professor Lock questions the appropriateness of linking the existence of the labor exemption to the perception of the employer, whose perception is necessarily derivative of the union's. *Id.* Finally, Professor Lock asserts that the *Bridgeman* test fails to adequately accommodate employers who are duty bound to impose the restrictions until impasse under labor law. *Id.* at 372-73. Another commentator suggests that the *Bridgeman* test may also encourage parties to engage in strategic behavior designed to disguise their true intentions. Corcoran, *supra* note 10, at 1063. Corcoran theorizes that:

> [u]nder the *Bridgeman* test, owners have an incentive to act in a manner that indicates that they hold a reasonable belief that restraints will be reincorporated in the new agreement, while the union has the incentive to overplay its belligerence in order to undermine and disprove the reasonableness of any possible reasonable employer belief.

Id.

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

104. Powell v. National Football League, 678 F. Supp. 777 (D.Minn. 1988) (Powell I), *rev'd*, 930 F.2d 1293 (8th Cir. 1989) (Powell II), *cert denied*, 498 U.S. 1040 (1991). The *Powell* case involved challenges to two different sets of employment rules: (1) the veteran player reservation rules that had been included in the most recently expired collective bargaining agreement which the league, pursuant to its labor law obligation, had continued to impose through January 1989; and (2) a new system of "Plan B" free agency rules which the league had proposed during bargaining, negotiated on until impasse, and then unilaterally imposed on February 1, 1989. *Powell*, 930 F.2d at 1303.

105. *Powell*, 678 F. Supp. at 786-87.

less, the court refused to abandon the *Mackey* consent test entirely and accept the NFL teams' argument that the challenged restraints were automatically immune from antitrust scrutiny merely because a bargaining relationship existed between the parties.[106]

Rather, the district court in *Powell I* held that, despite a lack of union consent, the federal labor laws require that the nonstatutory labor exemption extends to immunize challenged restraints within an expired CBA until the parties bargain to the point of impasse on those restraints.[107] Judge Doty favored the impasse test because it requires parties to bargain in good faith until impasse and it only delays enforcement of the antitrust laws until continued negotiations over the restraint become pointless.[108] However, the district court did not rule on whether impasse had actually been reached, finding it indeterminable on the facts of the case.[109]

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106. *Powell*, 678 F. Supp. at 778. The court maintained that granting such absolute immunity would entirely subvert the policies embodied in the antitrust laws. *Id.* Nor did the district court accept the owners' contention that the status quo doctrine justified extended the scope of the exemption indefinitely with regard to the terms of an expired CBA. *Id.* The court also rejected the players' argument that the exemption expires when the union makes "unequivocally clear" its lack of continued consent to the challenged provisions. *Id.* at 786.

107. *Id.* at 777. The *Powell I* court believed that only this "impasse" test would promote good faith bargaining after the expiration of a collective bargaining agreement, and that consequently it strikes the correct balance between antitrust and labor law. *Id.* at 778-79; *see also* Jonathan S. Shapiro, Note, *Warming the Bench: The Non-Statutory Labor Exemption in the National Football League*, 61 FORDHAM L. REV. 1203, 1218-27 (1993) (concluding that impasse standard represents the "best solution"). However, at least one commentator has expressed dissatisfaction with the *Powell I* impasse standard. *See* Lock, *supra* note 7, at 374-75. Professor Lock maintains that the impasse standard fails to effectively promote collective bargaining because it provides the union with an incentive to cause impasse at the earliest possible moment in negotiations. *Id.* at 374. While Professor Lock acknowledges that an action with the NLRB for an unfair labor practice may be sought when a union undertakes such a devious course of action, he views the NLRB dispute resolution process as creating an unnecessary delay in negotiations. *Id.* at 374-75. The problem with the *Powell I* decision, according to Lock, is that the Minnesota district court failed to appreciate that the status quo doctrine (which requires employers to adhere to the terms of an expired CBA until impasse) is solely a labor law principle and, as such, it should not override the policies behind the nonstatutory labor exemption, which is designed to accommodate both the labor laws and the antitrust laws. *Id.* at 375. Thus, Lock maintains that the policy of not extending the labor exemption beyond the expiration of the collective bargaining agreement is entirely appropriate, even though it exposes employers to antitrust liability immediately. *Id.* Lock justifies this outcome by reiterating that for the labor exemption to apply, union consent is required. *Id.* at 376.

108. *Powell*, 678 F. Supp. at 789.

109. *Id.*

The decision of the district court in *Powell I* was reversed by the United States Court of Appeals for the Eighth Circuit in *Powell v. National Football League (Powell II)*.[110] In *Powell II*, a majority of the three judge panel held that labor law was controlling[111] and that, therefore, the nonstatutory labor exemption must extend beyond impasse as long as "an ongoing collective bargaining relationship" exists.[112] In rejecting the impasse standard adopted by the district court, Circuit Judge John R. Gibson opined that impasse should be considered a lawful stage of the collective bargaining process for which employers should not be penalized.[113] The court of appeals main-

110. 930 F.2d 1293 (8th Cir. 1989), *cert denied,* 498 U.S. 1040 (1991). The only issue presented on appeal was whether the NFL's continued imposition of the provision in the expired 1982 CBA establishing a right of first refusal compensation system constituted an unlawful restraint of trade. *Powell*, 930 F.2d at 1295.

111. *Id.* at 1295. The court acknowledged that after impasse the labor laws authorize an employer not only to adhere to the status quo as to wages and working conditions, but to implement new or different employment terms which were reasonably contemplated within the scope of their pre-impasse proposals. *Id.* at 1302.

112. *Id.* at 1303. The Eighth Circuit's holding has prompted criticism from many commentators. *See* Corcoran, *supra* note 10, at 1067-69 (asserting that the *Powell II* standard fails to comply with *Mackey's* requirement of union consent to restraints, grants employees an unbargained-for right, provides owners with an incentive to force and maintain impasse, and forces union's to decertify in order to gain leverage at bargaining table); Note, *Releasing Superstars From Peonage: Union Consent and the Nonstatutory Labor Exemption*, 104 HARV. L. REV. 874, 891 (1991) (explaining that all standards which extend the exemption beyond impasse violate freedom of contract rights to establish duration of one's agreement); Ethan Lock, *Powell v. National Football League: The Eighth Circuit Sacks the National Football League Players Association*, 67 DENV. U. L. REV. 135, 151-53 (1990) (arguing that the Eighth Circuit erred in concluding that restraints are, even after impasse, products of collective bargaining); Nester, *supra* note 10, at 136-40 (1990) (arguing that the court's decision to allow exemption to continue beyond impasse gives employers undue advantage in CBA negotiations).

113. *Powell II*, 930 F.2d at 1299 (citing Charles D. Bonnano Linen Serv., Inc. v. NLRB, 454 U.S. 404 (1982)). The court of appeals emphasized that the Supreme Court characterized impasse as a recurring feature of the collective bargaining process, and not one which is sufficiently destructive to group bargaining to justify a party's withdrawal from the process. *Id.* The court of appeals agreed with the Supreme Court that "permitting withdrawal at impasse would, as a practical matter, undermine the utility of multiemployer bargaining." *Id.* Nevertheless, the *Powell II* court's reliance on the temporary nature of impasse as a justification for extending the scope of the nonstatutory labor exemption may have been misplaced. *See Bridgeman*, 675 F. Supp. at 965-67; Lock, *supra* note 111. Lock suggests that impasse is a labor law concept and, as such, it should not serve as a guideline for accommodating conflicting antitrust law and labor law policies. Lock, *supra* note 111, at 148. Furthermore, Lock argues that extending the nonstatutory labor exemption beyond impasse and allowing NFL teams to unilaterally implement pre-impasse proposals simply serves to force an agreement on issues when agreement is lacking. *Id.* at 149. He maintains that forcing such a result overlooks the fact that federal labor law is designed to protect the process of collective bargaining and

tained that the labor laws provide a number of tools with which parties may exert force, including strikes, lockouts, and NLRB unfair labor practice claims.[114] Consequently, the court concluded that to allow the players to also wield an antitrust lever to exert pressure would upset the "level playing field" created by the labor laws.[115]

In so holding, the *Powell II* court implicitly accepted the NFL's argument that the "impasse" standard provides a union, such as the National Football League Players' Association (hereinafter "NFLPA"), with an incentive to force an impasse in order to pursue an antitrust claim.[116] For these reasons, the Eighth Circuit reversed the district court and granted partial summary judgment to the NFL teams.[117]

In a lengthy dissent, Senior Circuit Judge Gerald W. Heaney advocated the adoption of the impasse standard for determining when the labor exemption terminates.[118] Judge Heaney maintained that the majority's ruling was inconsistent with *Mackey* because it extended the nonstatutory labor exemption to immunize both old and new restraints which were not the product of arms-length bargaining, but were simply unilaterally imposed after impasse.[119] Judge Heaney emphasized that, "union approval is a prerequisite to the application

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does not mandate that bargaining necessarily culminate in an agreement between the two parties. *Id.*

114. *Powell II*, 930 F.2d at 1302. *But see St. Louis*, *supra* note 10, at 1245, 1267 (suggesting that the NFLPA cannot effectively utilize these normal labor remedies because of high turnover within their respective unions and the corresponding unwillingness of players to forego their best income earning years in order to benefit the union's future members).

115. *Id.* at 1303. The NFL conceded that the Sherman Act could be found applicable, depending on the circumstances. *Id.* For example, if a challenged restraint related to a permissive rather than a mandatory subject of collective bargaining or had been imposed on employees outside the collective bargaining process, the Sherman Act would apply. *Id.* at n.12. Antitrust laws would also apply if the affected employees ceased to be represented by a certified union. *Id.*

116. *Powell*, 930 F.2d at 1299. Curiously, the result reached by the Eighth Circuit in *Powell II* belies it own reasoning. Nester, *supra* note 10, at 138 (1990). While the court of appeals premised its decision on the fact that ending the nonstatutory labor exemption at impasse would have removed the NFLPA's incentive to bargain and encouraged impasse, the court failed to recognize that extending the nonstatutory exemption beyond impasse would provide the NFL owners with a similar incentive to create an impasse so that they would be able to unilaterally impose any terms they wished. *Id.*

117. *Powell*, 930 F.2d at 1304.

118. *Id.* at 1305.

119. *Id*; *see* Lock, *supra* note 7, at 395 (asserting that *Mackey* held that federal labor policy was subordinate to the antitrust laws in the limited instance "where the chal-

or continuation of the exemption."[120] The dissenting opinion also sharply criticized the majority's decision as forcing the NBA players to make a choice between decertifying their union and foregoing their collective bargaining rights in order to pursue an antitrust claim against the NBA teams or being bound by anti-competitive player restraints indefinitely.[121]

In 1991, the decision in *Powell II* notwithstanding, the United States District Court for the District of Columbia reverted to the *Mackey* consent-based analysis for determining the scope of the nonstatutory labor exemption in *Brown v. Pro Football, Inc. (Brown I)*.[122] In *Brown I*, the NFL players instituted a class action lawsuit challenging the NFL's policy of fixing a uniform wage for "practice squad" players.[123] The policy was unilaterally imposed by the league after the sides had bargained to impasse over the proposals regarding practice squad wages.[124] The district court held that the nonstatutory labor exemption terminates when a CBA expires, and that the NFL's unilateral imposition of the new policy was a violation of the

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lenged restraint was the product, not of consent or arm's-length negotiations, but resulted from a significant mismatch in relative bargaining position").

120. *Powell II*, 930 F.2d at 1305; *see* Note, *supra* note 111, at 882 (arguing that a labor exemption standard not based on union consent allows employers to impose otherwise illegal restrictions on their employees and unjustifiably requires employees to forego their right to unionize in order to exercise a remedy under the antitrust laws).

121. *Powell II*, 930 F.2d at 1305-06. In response to *Powell II*, the NFL players decertified their union and ceased all bargaining with the NFL. Corcoran, *supra* note 10, at 1064. After decertification in *Powell v. National Football League (McNeil)*, the Minnesota district court found that, as a result of the termination of the collective bargaining relationship through decertification, the labor exemption defense was no longer available to the owners and the antitrust laws were applicable. Powell v. National Football League, 764 F. Supp. 1351 (D. Minn. 1991); *see also* Jeffrey D. Schneider, *Unsportsmanlike Conduct: The Lack of Free Agency in the NFL*, 64 CAL. L. REV. 797, 846-49 (1991) (discussing the negative consequences of decertification).

122. 782 F. Supp. 125 (D.D.C. 1991), *rev'd*, 50 F.3d 1041 (D.C. Cir. 1995), *cert. granted*, 64 U.S.L.W. 3414 (U.S. Dec. 8, 1995) (No. 95-388). *See* Michael E. Lowenstein, *Magna Carta For Multi-employer Bargaining?: Brown v. Pro Football*, 10 ANTITRUST 41 (Spring 1996) (exploring the issues to be discussed by the Supreme Court.)

123. *Brown*, 782 F. Supp. at 127. Under the terms of 1989 Resolution G-2, each NFL team was permitted to establish a developmental or practice squad in addition to its team roster. *Id.* The developmental squad could consist of up to six players who were either rookies or first year free agents. *Id.*

124. *Id.* The NFL had proposed to pay the developmental squad players a uniform wage of $1,000 per week. *Id.* The NFLPA's adopted the position that this uniform wage was unacceptable and that developmental squad players must have the right to negotiate their own salaries. *Id.* at 128. After reaching an impasse on the issue, NFL Commissioner Paul Tagliabue sent a memorandum to each team prohibiting teams from paying developmental squad players in excess of $1,000 per week. *Id.*

antitrust laws.[125]

Judge Royce C. Lamberth reasoned that extending the exemption beyond the expiration of a CBA would hinder collective bargaining by removing any incentive for the NFL teams to negotiate a new CBA.[126] In support of this contention, the court referred to the fact that although the 1982 CBA expired in 1987, the NFL had yet to sign a new agreement by 1991.[127]

The court stressed that it did not subscribe to the view that the NFLPA must forego its collective bargaining rights and decertify in order to escape the terms of an expired CBA and reinstate the NFL teams' liability under the antitrust laws.[128] Rather, Judge Lamberth opined that antitrust liability should be recognized once the union no longer consents to the continued imposition of the restraints.[129] Therefore, the United States District Court for the District of Columbia denied the NFL's motion for summary judgment which had asserted the labor exemption as a defense.[130]

III. *NATIONAL BASKETBALL ASS'N V. WILLIAMS*

As is evident from the *Bridgeman*, *Powell* and *Brown* holdings, considerable disagreement exists regarding the applicability of the nonstatutory labor exemption during the period

125. *Id.* at 129-34.

126. *Id.* at 131.

127. *Id.* The *Brown* court was especially critical of the fact that the terms of the expired collective bargaining agreement had been enforced on the players for four years by "a judicial fiction ostensibly fashioned to promote the negotiations of new collective bargaining agreement[s]. . . ." *Id.*

128. *Brown*, 782 F. Supp. at 132 (citing *Powell II*, 930 F.2d at 1310 (Lay, C.J., dissenting)). The district court stressed that the threat of treble damages under the antitrust laws is an essential economic weapon which unions may utilize when engaged in collective bargaining negotiations with employers. *Id.* at 133.

129. *Id.* at 133 (citing Lock, *supra* note 7, at 376). The district court concluded that terminating the labor exemption when a collective bargaining agreement expires was the only way to provide parties with a certain deadline which would encourage negotiation. *Id.* at 131-32.

130. *Id.* at 139. The district court's ruling was reversed on appeal to the United States Court of Appeals for the District of Columbia Circuit. Brown v. Pro Football, Inc., 50 F.3d 1041 (D.D.C. 1995). In reversing, the court of appeals expressly rejected the district court's holding that the scope of the nonstatutory labor exemption is exactly coextensive with the duration of the NFL's collective bargaining agreement. *Id.* at 1045-46. Instead, a majority of the court held that parties to a collective bargaining agreement are afforded the exemption beyond the formal expiration of those agreements "so long as the challenged restraints are lawful under the labor laws and primarily affect only a labor market organized around a collective bargaining relationship." *Id.* at 1048.

after a CBA expires.[131] In *Williams*, the United States Court of Appeals for the Second Circuit clarified this area of the law by following the Eighth Circuit and abandoning the *Mackey* consent requirement in favor of a standard which extends the nonstatutory labor exemption indefinitely beyond the termination of a CBA as long as a collective bargaining relationship exists.[132] The district court premised its grant of declaratory relief and its dismissal of the players' counterclaim on the distinction which the Supreme Court has consistently drawn between the labor and product markets when evaluating the applicability of the labor exemption.[133] In affirming the district court's decision, the court of appeals held that where an antitrust claim arises out of a restraint of trade in the labor market federal labor law takes precedence over antitrust law.[134]

Writing for the court, Judge Winter began by examining the precise nature of the NBA players' counterclaim.[135] Judge Winter construed the players' counterclaim as suggesting that multi-employer bargaining groups, such as the NBA teams, should not be able to collectively impose any terms of employment by way of economic force without the consent of the NBA players.[136] Acknowledging that the players' counterclaim relied on the classic antitrust principle that horizontal competitors for labor may not agree among themselves to only purchase that labor on certain terms and conditions,[137] the court concluded that the players' position failed to make sufficient accommodations for the federal labor laws.[138] Upon inquiring as to what terms should govern the NBA during the interim periods between effective CBA, Judge Winter was un-

131. *Williams*, 857 F. Supp. at 1074 (noting that the four cases dealing with the precise issue presented all adopted different standards).

132. *Williams*, 45 F.3d at 692-93.

133. *Williams*, 857 F. Supp. at 1078 (citing *Wood*, 809 F. Supp. at 963).

134. *Id.* at 1078; *Williams*, 45 F.3d at 693; *see also* Jacobs & Winter, *supra* note 88, at 26 (concluding that when determining whether the antitrust laws apply to the terms of a collective bargaining agreement, "[t]he line that the Court has consistently sought to draw . . . is the line between the product market and the labor market").

135. *Williams*, 45 F.3d at 687-88.

136. *Id.* By framing the issue in this way, Judge Winter successfully distinguished most of the prior case law addressing the proper scope of the nonstatutory labor exemption. *Id.* at 689. (distinguishing *Powell II, Brown,* and *Bridgeman* because those cases only raised the multi-employer bargaining issue "obliquely, if at all.")

137. *Id.* at 687 (citing Anderson v. Shipowners' Ass'n, 272 U.S. 359 (1926)).

138. *Id.*

able to propose an alternative to having the NBA teams maintain the status quo and continue imposing the terms of the expired CBA.[139]

In rejecting the players' counterclaim, the court of appeals reviewed the history of multi-employer bargaining with respect to both the antitrust laws and the labor laws.[140] Given the dearth of case law suggesting otherwise, the court held that multi-employer bargaining units may use economic force during the bargaining process in order to set the terms and conditions of employment after the expiration of a CBA.[141] Because the court of appeals ruled that the nonstatutory exemption applied, it did not reach the issue of whether the salary cap, right of first refusal and college draft actually violated the antitrust laws.[142]

In support of its holding, the *Williams* court first set forth what it considered to be the primary purpose of multi-employer bargaining.[143] Judge Winter maintained that multi-employer bargaining allows employers to form a common front with regard to the terms and conditions to be offered to a union and enables the employers to lockout all union members employed by the bargaining units' members should negotiations fail.[144] The court emphasized that this prevents unions from striking one employer at a time, forcing each individual employer to accept the union's most extreme demands.[145] Furthermore, the court noted that, in the professional sports context, multi-employer bargaining is essential because sports leagues require common rules regarding the "[n]umber of games, length of season, playoff structures and roster size and composition."[146] The court concluded that the players' counter-

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139. *Id.* at 688.

140. *Williams*, 45 F.3d at 689-93.

141. *Id.* at 688. The court of appeals specifically stated that "[t]he labor laws . . . embody a conscious congressional decision to permit multi-employer organizations to bargain hard and use economic force to resolve disputes with unions over terms and conditions of employment." *Id.*

142. *Id.*

143. *Id.* at 688-89.

144. *Id.*

145. *Williams*, 45 F.3d at 688 (citing Charles D. Bonnano Linen Serv., Inc. v. NLRB, 454 U.S. 404, 409-10 n. 3 (1982)).

146. *Id.* at 689. The court of appeals appears to be alluding to the fact that, under traditional antitrust Rule of Reason analysis, the NBA teams function less like a price fixing labor cartel and more like a group of employers undertaking a joint venture. *See Williams*, 857 F. Supp. at 1078-79 (the district court explicitly stated that NBA teams

claim was wholly inconsistent with the primary purpose of multi-employer bargaining; allowing employers to establish and maintain a unified front and bargain hard over the terms and conditions of employment with a common union.[147]

The court then proceeded to trace the history of multi-employer bargaining under the federal antitrust laws.[148] Judge Winter highlighted the fact that, although multi-employer bargaining pre-dates the Sherman Act, over the course of the more than one hundred years since the Act's passage, the practices of multi-employer bargaining units have gone entirely unchallenged.[149] Moreover, the court theorized that even if multi-employer bargaining was within the purview of the Sherman Act, the statutory exemption found in section 4 of the Norris-LaGuardia Act, when read in conjunction with section 20 of the Clayton Act, clearly exempts "[b]ecoming or remaining a member . . . of any employer organization from the antitrust laws."[150] The court cited *California State Council of Carpenters v. Associated General Contractors*,[151] as the only case directly addressing whether multi-employer bargaining violates the antitrust laws.[152] In that case, the Ninth Circuit clearly held that restraints imposed on wages and working conditions are not considered violations of the antitrust laws.[153] The *Williams* court relied on this history to support its conclusion that the general understanding of multi-employer bargaining was at odds with the NBA players' antitrust counterclaim.[154]

Judge Winter next examined the relationship of multi-employer bargaining to federal labor laws. The court recognized

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"operate basically as a joint venture in producing an entertainment product" and that cooperation is necessary to insure competitive balance among the competing NBA teams).

147. *Williams*, 45 F.3d at 688. Judge Winter viewed the ability of unions to insist upon terms, and ultimately obtain them through the use of economic force, as the multi-employer bargaining unit's reason for existence. *Id.*

148. *Id.* at 689-90.

149. *Id.* at 689.

150. *Id.*

151. 648 F.2d 527, 535 (9th Cir. 1991).

152. *Id.* The court stated that agreements between employers do not violate the antitrust laws unless such an agreement "has an anticompetitive purpose or effect on some aspect of competition other than competition over wages or working conditions." *Id.* (quoting *Connell*, 421 U.S. at 635).

153. *Williams*, 45 F.3d at 690.

154. *Id.*

that NBA teams have an obligation, under the labor laws, to bargain in good faith which requires them to maintain the status quo and impose the terms of the expired 1988 CBA until an impasse is reached.[155] Furthermore, the court contended that teams may resort to the use of economic force, including lockouts, in support of their demands.[156] As such, the court construed the NBA players' counterclaim as alleging that such conduct is prohibited by the antitrust laws.[157] Relying on the fact that the Supreme Court had unanimously held, in *NLRB v. Truck Drivers Local Union No. 449 ("Buffalo Linen")*,[158] that multi-employer bargaining was necessary to effectuate the goal of fostering labor peace through collective bargaining, Judge Winter flatly rejected the NBA players' argument.[159]

Because the court deemed any application of the antitrust laws to employer units engaged in the collective bargaining process as antithetical to the concept of multi-employer bargaining, it expressed its approval of the Eighth Circuit's holding in *Powell II* extending the nonstatutory labor exemption beyond the formal expiration of a CBA, so long as a collective bargaining relationship exists.[160] In *Williams*, the court as-

155. *Id.* at 691 (citing NLRB v. Katz, 369 U.S. 736 (1962)).

156. *Id.*

157. *Williams*, 45 F.3d at 691.

158. 353 U.S. at 95-96. *Buffalo Linen* involved a multi-employer bargaining unit comprised of eight horizontal competitors for labor in the linen industry. *Id.* at 89 During the course of negotiating a new collective bargaining agreement with the linen employers, the union instituted a strike of one of the eight employers. *Id.* at 90. In response, the other seven linen employers locked-out their union employees. *Id.* The NLRB held that the lockout was justified as a reasonable measure to preserve multi-employer bargaining in the face of the threat of being forced into submission one at a time by the union. *Id.* at 91. The court of appeals overturned the Board's finding, holding that the preservation of the multi-employer bargaining scheme did not justify a lockout. *Id.* at 92. The Supreme Court unanimously reversed, holding that the right of a multi-employer bargaining unit of small employers to lockout its employees in order to preserve its strengthened bargaining position with respect to a large union must be balanced against the rights of the union to strike *Id.* at 95-96. The Court also stated that "in many industries . . . multi-employer bargaining . . . was a vital factor in the effectuation of the national policy promoting labor peace through strengthened collective bargaining." *Id.* at 95.

159. *Williams*, 45 F.3d at 692.

160. *Id.* at 693. The Second Circuit's wholesale adoption of the Eighth Circuit's holding in *Powell II* made the *Williams* holding broader than was necessary based on the facts of the case. *Williams* merely dealt with an antitrust challenge to a multi-employer group's maintenance of the status quo after the expiration of the NBA's 1988 collective bargaining agreement. Nonetheless, the Second Circuit set forth the broad holding that antitrust law has no application to the terms of employment so long as a collective bargaining relationship exists.

serted that the only limits on the conduct of multi-employer units engaged in the collective bargaining process stem directly from the labor laws.[161] Accordingly, the United States Court of Appeals for the Second Circuit affirmed the district court's grant of declaratory judgment in favor of the NBA teams, as well as its dismissal of the NBA players' antitrust counterclaim.[162]

IV. CONCLUSION

The Second Circuit Court of Appeals' holding in *National Basketball Ass'n v. Williams* has done little to promote collective bargaining in the National Basketball Association. On the contrary, in the wake of the decision, the National Basketball Association has found itself beleaguered by the worst labor problems in its history.[163] On June 21, 1995, the same day on which NBA Commissioner David Stern and NBPA executive director Simon Gourdine announced a tentative six-year CBA, a group of star NBA players petitioned the National Labor Relations Board to decertify the NBPA as the players' exclusive bargaining representative.[164] While the NBA team owners subsequently approved the new CBA by a unanimous vote on June 23, the players postponed a ratification vote by the union's twenty-seven player representatives and demanded that their union leaders reopen collective bargaining negotiations.[165]

Subsequently, on June 29, seven NBA star players filed yet

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161. *Id.*

162. *Id.*

163. *See* John Helyar, *NBA's Longest Game: Owners vs. Players*, WALL ST. J., June 16, 1995, at B10 (noting that over the past two decades, baseball has had eight work stoppages, football has endured three strikes, and hockey has suffered one half-season lockout, while basketball had never missed a single game due to labor strife).

164. *A Thrill Ride of Ups and Downs, Highs and Lows*, USA TODAY, April 22, 1996, at 15E.

165. *NBA Lockout Looms, Legal Battles Continue*, NEWARK STAR-LEDGER, June 30, 1995 at 70. Players were mainly concerned with the so-called luxury tax. *Id.* Under the proposed six-year deal, teams who exceed their salary cap by re-signing players would have been required to pay a luxury tax of 50 percent on the amount by which they exceeded the cap during next season and 100 percent each year thereafter. *Id.* The NBA's star players and their agents believed the tax would have slowed the rise in player salaries. *Id.* By the terms of the proposed agreement, the NBA owners had agreed to include provisions which would prevent teams from exercising a right of first refusal, eliminate the second round of the NBA college draft, and turn over a portion of licensing revenues to the players. *NBA Players Seek to Decertify Union*, NEWARK STAR-LEDGER, June 23, 1995 at 78.

another class-action lawsuit against the NBA and its teams in the United States District Court for the District of Minnesota. The lawsuit challenged the legality of the college draft, the salary cap and free agency restrictions under the antitrust laws and also asserted that a lockout of the NBA players would constitute an illegal group boycott in violation of the antitrust laws.[166] The NBA teams ignored the lawsuit's allegations and locked out the NBA players on July 1, 1995, effectively halting all discussions on player-related matters.[167]

The NBA players' lawsuit was ultimately put on hold while the NBA's star players attempted to persuade their fellow union members to decertify the NBPA. After the decertification vote failed by a 236 to 134 margin, NBA player representatives and the teams tentatively agreed to the terms of a new six-year collective bargaining agreement on August 8, 1995.[168] This signaled the end of the NBA's lockout of its players, but it did not necessarily resolve the underlying conflict between the teams and the players. The August 8th agreement was never finalized and, as recently as May 26, 1996 the NBA was still attempting to enforce the agreement on the newly elected NBA player representatives who have refused to sign it.[169]

That such labor strife would ensue after the *Williams* decision should have been readily foreseeable to the Second Circuit

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166. Mark Asher, *Jordan, Ewing, Join Class-Action Lawsuit*, WASH. POST., June 29, 1995, at BO6. Anticipating a lockout by the league on July 1, counsel for the players maintained that the antitrust suit was designed to put the league on notice that they would be subject to the antitrust laws on that date. *Id.* July 1 was the date on which the no-strike, no-lockout pledge expired and, presumably, counsel for the players believed that the nonstatutory labor exemption would expire on that date as well. *Id.* However, the NLRB's regional office in New York maintained that according to the Second Circuit's ruling in *Williams*, the NBA players could not proceed with an antitrust suit as long as they remained unionized. *Id.* The regional director noted that the presumption that the union continues as the players' representative may be rebutted by a decertification vote. *Id.*

167. Murray Chase, *NBA to Lock Out Players in First Labor Conflict*, N.Y. TIMES, July 1, 1995 at 27. Although the 1995 summer "lockout" did not cancel any NBA scheduled games, it did cancel all player payments, summer leagues, tryouts and team-sponsored off-season games. *Id.* It also prohibited all contract negotiations and signings, terminated all player benefits and shut down team training facilities. *Id.*

168. *A Thrill Ride of Ups and Downs, supra* note 164.

169. *Court Gesture*, USA TODAY, April 26, 1996. The NBA has brought suit in the United States District Court for the District of New Jersey charging that the NBA players are attempting to renege on the previously accepted terms of the new six-year collective bargaining agreement. *Id.* The NBPA has countersued, alleging that the league artificially reduced the salary cap for the 1994-95 season and failed to make required benefit payments. *Id.*

given the aftermath of the *Powell II* decision. Had the court limited its holding to the facts of *Williams*, perhaps it would not have taken a year to sign a new CBA.

The *Williams* decision has been widely praised by scholars as a "return to normalcy."[170] Judge Winter's unbending adherence to classic labor law principles in the professional sports context has been hailed as preserving a level playing field and promoting collective bargaining. However, despite the court of appeals' worthwhile intentions, the practical effects of *Williams'* broad holding abandoning *Mackey's* consent requirement speak for themselves. As Circuit Judge Patricia Wald pointed out in her dissenting opinion in *Brown II*, the reality is that extending the nonstatutory labor exemption beyond the formal expiration of a collective bargaining agreement, "tilts the playing field in the employer's favor, and because of that, will erode the vitality of collective bargaining itself."[171]

Williams provides the multi-employer unit comprised of the NBA teams with an irresistible incentive to bargain hard and force impasse so that they may impose whatever terms of employment they wish on the NBA players. As a result, *Williams* will undoubtedly continue to push the NBA players toward the extreme option of decertification. This is necessarily so because high caliber NBA players will be increasingly apt to forego the benefits of unionization in order to eliminate the risk of having the terms of their employment unilaterally imposed by NBA teams after impasse.

Now that *Brown v. Pro Football, Inc.* has been granted certiorari by the United States Supreme Court, perhaps there is still a possibility that an appellate court will adopt an impasse standard so that the salary cap, college draft and right of first refusal may finally be subjected to antitrust scrutiny. Only when a court issues a definitive ruling on the viability of these restraints under the antitrust laws will there be labor peace in the NBA and in sports in general.

David J. Stagg

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170. *See* Shepard Goldstein and William L. Daly, *The Elimination of the "Antitrust Lever" from Collective Bargaining Negotiations in Professional Sports Is a "Return to Normalcy"*, 10 ANTITRUST 35 (Fall 1995) (asserting that the antitrust laws have no application in the collective bargaining process and that an exception to this rule for collective bargaining in professional sports is unwarranted).

171. *Brown*, 50 F.3d at 1059 (Wald, J., dissenting).