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Out of Bounds Under the Sherman Act? Player Restraints in Professional Team Sports

SETH M. GOLDSTEIN*

Professional sports is a unique industry. For many adults who grew up playing ball, reading about and watching their heroes on the athletic fields, it is hard to consider sports as a business.¹ However, as player salaries have shattered the six-figure barrier² and team franchises, which provide an excellent tax write-off³ sell for more than ten million dollars⁴, no one can seriously

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1. Even members of the United States Supreme Court are not immune from such sentimentality. In *Flood v. Kuhn*, 407 U.S. 258 (1974), a suit alleging that baseball was in violation of the Sherman Act, the early part of Justice Blackmun's opinion was flavored with references to ninety-one former stars of the diamond, as well as citations to "Casey at the Bat" and other baseball verse.

2. According to Dick Young, Sports Editor at the New York Daily News, the average National Basketball Association player's salary is \$109,000. In 1975, some thirty major league baseball players earned \$100,000 or more. New York Daily News, Nov. 23, 1975.

3. When a franchise is purchased the price must be apportioned between the value of the players and the actual cost of the franchise alone. Since the player contracts are considered capital assets they may be depreciated. When one considers that the average career span is only five years and that about 90% of the purchase price is allocated for the player contracts, the short term tax savings are apparent. Also, assuming the owner is involved in other business activities outside of sports, he may charge any operating losses against his profits elsewhere.

doubt that pro sports is indeed big business, albeit an unusual one.

In almost any other business enterprise imaginable, a firm is only too happy to see one of its competitors go out of business. Not so in professional team sports where it is considered a disaster if another club in the same league folds its tents. In one sense the firm is really the league, not the individual team. This view has been adopted by at least two courts.⁵ Thus, while National Football League clubs were no doubt overjoyed when the rival World Football League went out of existence, there would have been no such cheering had one of their own teams gone under.

In the long run crowds are larger as the competition increases. The more uncertainty that exists about the results the sharper the fan interest, the more tickets sold, the greater the television revenues and the more impressive the bottom line. While each club certainly tries to win every game, if any team ever approached that pinnacle of perfection the league as a whole would suffer because of the absence of competition and the consequent decline in fan interest.⁶ Thus, in pro sports it is in the league's best economic interest to maintain some sort of competitive parity among its teams.

To prevent any team from being "too successful" and corner-

4. Two new franchises were granted by the National Football League for 1976 at a price of sixteen million. For this sum each new team was allowed to select thirty-nine mediocre players from the rosters of the existing twenty-six clubs. *New York Times*, April 1, 1976, at 39, col. 1. An 80% interest in baseball's Chicago White Sox was purchased for \$9.75 million. *New York Times*, Dec. 10, 1975, at 35, col. 5.

5. This theory was accepted in *San Francisco Seals v. National Hockey League*, 370 F. Supp. 966 (C.D. Cal. 1974), a suit filed under Section 4 of the Clayton Act, 15 U.S.C. § 15, by a NHL franchise holder who was denied league permission to move his team to another city. While affirming that the sport is indeed subject to the antitrust laws, the court held that the various teams are *not* competitors in the economic sense. Rather, they are members of a single unit in competition with other leagues. In *Levin v. National Basketball Association*, 385 F. Supp. 149 (S.D.N.Y. 1974), plaintiff alleged an antitrust violation when his application to purchase the Boston Celtics franchise was denied. The contention was rejected because Levin was not being barred from competing with the defendants, but from *joining with them* to become partners in the operation of a sports league for profit. One economist has theorized that when two teams meet for a contest on the field they are like two firms producing a single product—a ball game. See, Rottenberg, *The Baseball Players' Labor Market*, 64 J. OF POLITICAL ECON. 242, 255 (1956).

6. One reason advanced for the death of the All American Football Conference which rivaled the National Football League from 1946 to 1949 was the overwhelming dominance of the Cleveland Browns who went through two of the four seasons without a loss.

ing the market on athletic talent and to avoid the specter of a team so bad that no one wants to play for it (or so poor that it cannot afford good players) with the resulting imbalance in competition, the four major team sports (baseball, basketball, football and hockey) have evolved a system of interwoven restraints to limit the free movement of players from team to team.

THE DRAFT:

When an athlete enters the labor pool, the fear is that unless there are some restrictions the most talented players will sign with the best teams or richest ones, with those located in cities with excellent media exposure,⁷ or with teams which play in a favorable climate.⁸ These categories are, of course, by no means mutually exclusive.

Rather than allow open competition for signing new recruits, with the possibility that one club may sign a disproportionate share of the best players, the league permits teams to select, or "draft", the exclusive rights to negotiate with individual players. Unless a rival league exists, the player is afforded only one buyer for his services rather than an array of potential bidders. Until recently, baseball was the only sport that limited the length of time a drafting team could retain the signing rights. The unsophisticated athlete is often told in effect that if he doesn't agree to the drafting club's terms he can forget about playing in the league. On the other hand, in management's defense, if a club cannot come to an agreement with a draft choice, it will often trade the rights to another team.

The draft is designed to be a positive force for improving playing competition in another way, by requiring that the clubs select players in reverse order to their end-of-season league standings. Thus, the weaker teams get to pick before the

7. For an insight into what playing in New York means to some high-salaried ballplayers, see "For Star Athletes New York is at the End of the Rainbow," *New York Times*, Aug. 29, 1975, at 29, col. 1.

8. If O.J. Simpson, the most highly acclaimed running back in football, had had his way, he would be playing in sunny California, a desire which he openly expressed while in college. However, as a result of the draft, he was only allowed to sign with the Buffalo Bills, despite his undisguised distaste at the prospect of playing in the cold northeast.

stronger clubs in each round of the draft.⁹ Whether this procedure actually does improve league balance is debatable, but as leagues expand the draft's efficacy as a leveller is bound to diminish. For example, with twenty-eight teams in the National Football League, the franchise with the worst record may get the first choice of collegiate gridiron talent (assuming it hasn't traded away that right), but its next selection will not arrive until the twenty-ninth player is chosen. When the league had only twelve clubs the weakest team picked first, thirteenth, etc. Thus, while the draft may prevent the rich clubs and those at the top of the standings from cornering the talent market, the sword cuts both ways and also bars teams at the bottom of the league from signing more than one or two blue chip prospects in a given year.

Proponents of the draft cite the baseball experience of the New York Yankees to buttress their argument that the draft promotes competition and prevents monopolization of talent. From 1921 through 1964 the Yankees captured the American League title twenty-nine times. However, after baseball adopted the draft in 1965, it took the New Yorkers eleven years to win their next pennant. In fact, no new baseball dynasty has arisen. Instead, five different teams have broken the Yankee monopoly in the past eleven years. Opponents of the draft claim that this argument is merely an example of *post hoc ergo propter hoc* reasoning and point to other factors, such as poor off-the-field management, to explain the change in league balance. Meanwhile, the basketball's Boston Celtics and ice hockey's Montreal Canadians have continued to dominate their respective leagues over the past twenty years despite the existence of the annual draft in these sports.

THE OPTION CLAUSE AND RESERVE SYSTEM

Just as management claims that the exigency of preserving competition requires the draft system to deal with athletes entering the labor pool, it also makes a parallel argument that restrictions on the player's freedom of contract are necessary when an athlete's contract expires. Management contends that the beneficial effects of a draft in equalizing distribution of talent would be wiped out if players were totally free to move to the team of their choice at the expiration of their initial contract.¹⁰ What would be the value of a top draft choice if the

9. Clubs often trade drafting rights for veteran players, an exchange based on the theory that a bird in the hand is worth two draft choices in the bush.

10. In a rare happenstance, Jim "Catfish" Hunter, the best pitcher in the

player were able to leave the drafting team after only one season?

To avert this latter problem baseball has developed what it calls the reserve clause, while the other sports maintain an "option clause" which is inserted in the standard player contract. Essentially, such clauses provide that if the player and his club cannot agree to a new contract before the start of the next season, the team has the option of unilaterally renewing the contract for another year at a minimum of 80% of the player's previous salary.

Until recently it had been uncertain in baseball whether the renewed contract was considered to contain another such reserve clause, thus creating a self-perpetuating contract. Hockey had considered the new contract to contain a new option clause until such an application was found to violate Sections 1 and 2 of the Sherman Act¹¹ in *Philadelphia World Hockey Club Inc. v. Philadelphia Hockey Club Inc.*¹² Since baseball had been declared exempt from the reaches of antitrust law by the Supreme Court on three separate occasions,¹³ team owners had confidently assumed the standard player contract to be self-

American League in 1974, was declared a free agent by an arbitrator who found that his club had breached his contract. Each of the 24 teams was allowed to try to sign Hunter, and when the bidding war ended, he had come to terms with the Yankees for a reported \$3.75 million long-term contract. Owners cite this example to substantiate their fear of a mass migration of superstars to the mecca of New York unless some sort of limitation is placed on the individual's ability to switch teams.

11. 15 U.S.C. §§ 1, 2.

12. 351 F. Supp. 462 (E.D. Pa. 1972).

13. *Federal Baseball v. National League*, 259 U.S. 200 (1922), a suit by a team in a rival league, was the first case in which the Court granted immunity, stating simply that the sport was not engaged in interstate commerce. In *Toolson v. New York*, 346 U.S. 356 (1953), a disgruntled minor leaguer in the Yankee organization claimed that the reserve system prevented him from reaching the major leagues with some other team. In a brief opinion, the Court applied *stare decisis* to an extreme, reasoning that since organized baseball had relied on the exemption for thirty years, and since Congress had done nothing to remove this Court-granted immunity, the exemption should continue despite the fact that no one could deny that baseball was now indeed interstate commerce. Finally a divided United States Supreme Court affirmed baseball's status in *Flood v. Kuhn*, 407 U.S. 258 (1974), a suit by a star player of the St. Louis Cardinals who refused to report to the Philadelphia Phillies when he was traded. The majority conceded that the decision was anomalous, especially since none of the other three major sports enjoyed such a privilege, but felt boxed in by its past "mistake."

perpetuating with the reserve clause continued in each renewed contract. However, this contention had never been tested and it was struck down in an unpublished opinion by an arbitrator who ruled on the basis of contract construction—rather than antitrust principles—that the pact could only be renewed for one year.¹⁴

In football, which has no such antitrust immunity,¹⁵ paragraph ten of the standard player contract states that “after such renewal the contract shall not include a further option to the club to renew the contract.”

The basketball option clause came under judicial scrutiny in *Central N.Y. Basketball Inc. v. Barnett*.¹⁶ Dick Barnett, a player with the Syracuse Nationals of the National Basketball Association, had signed a contract with the Cleveland Pipers of the rival American Basketball League and Syracuse sought an injunction based on the option clause. Ironically, Barnett argued for a self-perpetuating interpretation which, he pleaded, would be unconscionable and therefore unenforceable. Construing the contract to affirm its validity, the court held that the option clause only applied for one year.

Thus, in each of the four major professional sports, the option clause may presently be invoked only once before a player becomes a “free agent” and under no further obligation to deal with any particular franchise.

THE PROBLEM

The player-management conflict over the option clause arises primarily when an athlete desires to change teams. If he wants to “shop around” for a new employer (a privilege which was denied to him when he entered the labor market by virtue of the draft), he must first refuse to sign a new contract, thus, forcing his club to invoke the option clause for the coming season. After he “plays out his option” the athlete theoretically becomes a free agent, eligible to sign with any other team that wants him.¹⁷ This new status is conferred several months after the close of the season.

14. See New York Times, Dec. 24, 1975, at 1, col. 7.

15. The issue was decided in *Radovich v. National Football League*, 352 U.S. 445 (1957).

16. 88 Ohio L. Abs. 40, 181 N.E.2d 506 (C.P. 1961).

17. Such a decision involves a significant gamble by the player. He is probably foregoing a raise in the option year, and a major injury, or even a mediocre performance, could destroy his market value. Moreover, he is “sacrificing” one year in a career which averages only about five seasons.

If there is a rival league, as in hockey, and until recently in basketball and football, the player is free to sign with any organization in the rival circuit and his old team has no recourse. However, if the athlete enlists with another club in the same league his new employer is obligated to compensate the former team with draft choice(s) and/or player(s) of comparable quality.¹⁸ Objective criteria are now used to determine the compensation in baseball (the former team's standing in the league) and football (the departing player's salary level). If the two teams involved cannot agree on the terms of this forced trade, the commissioner (in basketball) or an outside arbitrator (in hockey) has the power to determine the compensation.¹⁹

The rationale for this restriction sounds familiar. If players were free to leave their teams after giving what amounts to one year's notice, the result would tend to upset the competitive balance as players would gravitate towards the more attractive teams. However, by insisting that the old club be compensated for the loss, each league insulates that team from suffering severe competitive damage. The rule also discourages the "raiding" of economically disadvantaged clubs and establishes a cost to the team signing a free agent at the same level as if it had "traded" for the services of the player. Thus, there is no incentive for a rival owner to conspire with a player in encouraging him to play out his option and to sign with the owner's team. At the same time, no club will feel compelled to trade athletes who are playing out the option year in order to get full value for them before they become free agents.

From management's point of view these devices are simply

18. Basketball and football now award only draft choices. Before football limited the "compensation" to draft choices, a "compensation player" found it very easy to obtain an order restraining enforcement of this rule. *See* New York Times, August 2, 1975, at 16, col. 1.

19. In football, until February, 1977, this obligation to compensate vested final authority in the commissioner and was embodied in the by-laws. It was labelled the Rozelle Rule, in honor of that league's commissioner. Basketball never formalized such a rule, but in testifying in *Robertson v. National Basketball Association*, 389 F. Supp. 867, 891 (S.D.N.Y. 1975) the then commissioner Walter Kennedy conceded that while a free agent may sign with another club it "becomes the obligation of the player's new team to compensate his old team for the loss of the player." In hockey this principle has been acknowledged in a recent collective bargaining compact between the National Hockey League Players Association and the League.

reasonable restraints which are necessary for the economic survival of the league.²⁰ In a sense, they are merely attempts at self-regulation within the league, actually helping to maintain balance. They are not aimed at restricting potential competitors from entering the market. For example, in *Deesen v. Professional Golfers Association*²¹ the court upheld a ban on a golfer who failed to play in a minimum number of tournaments as required by PGA standards. The regulation was found to be reasonable because its purpose was to foster competition and not to eliminate it.

However, as seen from the player's side of the field, these restraints are all flagrant violations of the Sherman Act. The restrictions outlined above, say the athletes, constitute attempts at group boycotts,²² price fixing²³ and division of markets,²⁴ all of which are usually considered illegal *per se*, regardless of whatever social justification may be advanced to rationalize these practices.

To the athlete the draft is a naked restraint on trade. He is told in effect, to "sign with the organization that drafts you or pick another profession." Only in hockey does the presence of a second major league provide a possible alternative for the draftee, and new leagues are generally not too secure. Within a span of nine months both the fledgling World Football League and the nine-year old American Basketball Association went out of business.

If the young athlete tries to sign with the team of his choice, rather than with the one that chose him, he discovers that he is the object of a group boycott. Should a franchise even attempt to sign an athlete who was drafted by another team in the same league, harsh sanctions will be imposed on it for "tampering." In 1975 George McGinness, one of the top players in the American Basketball Association, won a release from his contract and tried to sign with the New York Knicks of the National Basketball Association.²⁵ However, since the National Basketball Association's Philadelphia 76ers had selected McGinness in the

20. See *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918).

21. 358 F.2d 165 (9th Cir. 1966).

22. See *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) and *Fashion Originator's Guild v. Federal Trade Commission*, 312 U.S. 457 (1941).

23. See *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940).

24. See *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951) and *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972).

25. The fact that McGinness chose the Knicks tends to confirm the fears of those who argue that in the absence of restraints the best players would follow Catfish Hunter's example and beat a path to New York.

draft several years earlier, Commissioner Lawrence O'Brien ruled that they were still the only team entitled to do business with McGinness. For their attempt to evade the league's draft laws, the Knicks were ordered to forfeit their first round selection in the next draft. A similar penalty was visited upon the Atlantic NBA franchise when it tried to sign Julius Erving away from the ABA in spite of the fact that NBA draft rights to him belonged to the Milwaukee Bucks.

As shown by *Deesen*, a concerted refusal to deal can be upheld in sports under particular circumstances. It must be demonstrated that the power was not exercised in an overly broad, harsh, arbitrary or vindictive manner. In *Molinas v. National Basketball Association*²⁶ the court sustained the NBA's rights to blacklist a player who had bet on games in which he played. This was deemed to be a reasonable exercise of discipline and power necessary for the survival of the league.²⁷

Not only does the draft constitute an illegal group boycott, say the players, but it also contains elements of price-fixing. As economic theory would predict, the highest average salaries are found in basketball and hockey, the sports in which a second league has served as a possible alternative market for the athlete's services.²⁸ In this regard, it should be noted that basketball's ABA merged into the NBA in the spring of 1976. However, the effect of the rivalry on that sport's salary structure will still be felt for many years.

THE CASE LAW

In *Robertson v. National Basketball Association*,²⁹ an anti-trust suit brought by the NBA Players Association to restrain a possible merger between the two leagues, the court found the

26. 190 F. Supp. 241 (S.D.N.Y. 1961).

27. For an example of how not to suspend an athlete, see *Gardella v. Chandler*, 172 F.2d 402 (2d Cir. 1949) and *Blalock v. Ladies' Professional Golfers Association*, 359 F. Supp. 1260 (N.D. Ga. 1973).

28. Before the basketball merger the mean annual salary in the professional leagues was as follows: National Basketball Association, \$118,000; American Basketball Association, \$95,000; National Hockey League, \$75,000; World Hockey Association, \$69,000; Major League Baseball, \$48,000; National Football League, \$43,000 (despite the pull of Joe Namath's \$500,000 yearly wages). *New York Post*, April 24, 1976, at 51, col. 1.

29. 389 F. Supp. 867 (S.D.N.Y. 1975).

draft and reserve systems analogous to price-fixing because competing teams are able to use these devices to eliminate competition in the hiring of ballplayers.³⁰

More recently, in *Smith v. Professional Football*,³¹ a district court judge declared the draft to be “an outright, undisguised refusal to deal [which] constitutes a group boycott in its classic and most pernicious form . . .”³² In 1968, James McCoy “Yazoo” Smith had been the first draft choice of the National Football League’s Washington Redskins. Certain stardom had been predicted for Smith, but the prophets did not envision a disabling neck injury which turned his rookie season into his last season. Smith’s contention was that had he not been confined to dealing only with the Redskins, he could have negotiated a much more lucrative contract, one which would have guaranteed payment in case of such an injury. Calling the draft a naked restraint of trade whose sole purpose is to stifle competition in the signing of players, the court further manifested its outrage by finding the selection process to be *per se* illegal. Although the NFL presented arguments similar to those outlined earlier in this article, it failed to persuade the court that there was sufficient justification to warrant an application of the “rule of reason” test in determining the legality of the draft. That test would have considered whether or not the draft is “reasonable.”³³

30. *Id.* at 893.

31. 420 F. Supp. 738 (D.D.C. 1976).

32. *Id.* at 744.

33. The NFL was unable to convince the court that there was any significant correlation between the opportunity to pick early in the draft and improvement in the team’s performance. Of particular significance to the court was the statistic that in the last three seasons nine teams have captured twenty-two of the twenty-four berths in the playoffs leading to the Super Bowl. *Smith v. Professional Football*, 420 F. Supp. 738, 746 (D.D.C. 1976). However, three years is an unduly short period of time on which to base a judgment. The draft becomes a factor when a top-notch team finds it has to replace its aging superstars, but that may take at least five years to happen.

A comprehensive analysis of the “rule of reason” as it relates to group boycotts in sports is contained in *Denver Rockets v. All Pro Management*, 325 F. Supp. 1049 (C.D. Cal. 1971), an attack on the “four year” rule of the basketball draft.

Until 1971 neither basketball nor football would draft a player directly out of high school, and once he entered college the athlete could not be signed until his class had graduated (four years later) even if he were to drop out of school. While the players whose careers were delayed may have considered this rule a concerted refusal to deal, the leagues defended the practice on the grounds that it would be unfair to the youngsters to tempt them to give up their education (and scholarship) in exchange for a mere opportunity to play professional ball, especially since a player who doesn’t succeed professionally will probably never go back to get his degree. They also did not want to create friction with the colleges by “raiding” the campuses and signing the best undergraduates before their college eligibility had expired. Cynics maintain that this *laissez faire* policy provides a continuous flow of fresh talent into the pro leagues. Additionally, the

Like the draft, the entire reserve system has come under attack in a series of recent cases. In *Robertson v. National Basketball Association*,³⁴ the NBA Players Association succeeded in obtaining an injunction barring negotiations between the NBA and ABA for a merger. The court held that the player draft and reserve systems are readily susceptible to condemnation as group boycotts based on the NBA's concerted refusal to deal

rule delays the player's pro debut only until his class has graduated, not until he has obtained a degree.

The court found the NBA's motives quite commendable, but not sufficient to override the objective of fostering economic competition. Spencer Haywood, an outstanding college player from a poor background, had dropped out of school during his second year in order to sign with the Denver Rockets of the ABA, which did not have a four-year rule. The following season, alleging fraud by the Denver management, he breached his contract in order to play with the Seattle SuperSonics of the NBA. By the older league's standards, Haywood was ineligible because his college class still had not yet graduated.

Relying on *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), which suggested that perhaps some group boycotts may be reasonable, the Court concluded that while concerted refusals to deal are generally illegal *per se* there may be some exceptions. *Denver Rockets v. All Pro Management*, 325 F. Supp. 1049, 1064-65 (C.D. Cal. 1971).

A group boycott may be justified by a "rule of reason" standard if an affirmative answer can be given to three questions:

1) Was the action intended to accomplish an end within a governmental policy of justifying self-regulation or consistent with the necessities of the industry structure?

2) Was the restraint reasonably related to achieving this goal and no more extensive than necessary? Or, put another way, are there any less restrictive alternatives?

3) Were there procedural safeguards which assured that the restraint was not arbitrary and which furnished a basis for judicial review? *Denver Rockets v. All Pro Management*, 325 F. Supp. 1049, 1054 (C.D. Cal. 1971).

While the draft might arguably satisfy the first standard, it failed dismally on the third when applied to a player such as Haywood. The court found that there were no "procedures or safeguards" for a hearing or petition by the individual player who wished to enter the league ahead of his graduation year. As a result, Haywood was allowed to play with Seattle, and the NBA instituted a "hardship draft" allowing players from under-privileged backgrounds to petition to be drafted before graduation. There have even been three players selected directly from high school. Still, left unanswered is the question of the status of the middle class star who wishes to forgo his degree.

It is clear that the NFL draft, as structured at the time of *Smith*, did not measure up to the third criterion. The practice of allowing only one club to maintain the exclusive rights to deal with a player in perpetuity made the restraint much more extensive than necessary. "Because significantly less restrictive alternatives are available, the current system cannot be held to be protected by the Rule of Reason." *Denver Rockets v. All Pro Management*, 325 F. Supp. 1049, 1064 (C.D. Cal. 1971).

34. 389 F. Supp. 867 (S.D.N.Y. 1975).

with the players, except through these uniform restrictive devices.³⁵ The restraints are also analogous to price-fixing, said the court, because they allow competing teams to eliminate competition in the hiring of players and invariably lower the cost of doing business.

In arriving at this conclusion the court did not apply a *per se* rule.³⁶ In fact, it clearly recognized what even the most militant of superstars probably concedes, that some restraints are necessary for the survival of the league. However, that exigency does not imply that "insulation from the antitrust laws must follow. *Less drastic preventive measures may follow.*"³⁷ (emphasis added) In other words, are there less restrictive alternatives?

In *Kapp v. National Football League*,³⁸ Joe Kapp, a former NFL quarterback, argued that he had been blacklisted for failing to sign a standard player contract. Instead, Kapp had inked a memorandum agreement with his team, the New England Patriots, which agreement did not contain an option clause. This constituted a violation of articles 17.5(B) and 15.6 of the National Football League constitution and by-laws which dictate that no player may participate in a game or even a practice unless he has executed a standard player contract which is on file with the commissioner.³⁹ In the confrontation with the league regulations Kapp lost and was not allowed to play in the NFL.

35. *Id.* at 893.

36. "There are certain agreements or practices which because of their pernicious effect on competition and lack of redeeming virtue are conclusively presumed to be unreasonable and therefore elaborate inquiry as to the precise harm they have caused or the business excuse for their use . . . [is not made]" (Citations omitted) 389 F. Supp. 867, 893 n. 47 (S.D.N.Y. 1975).

37. *Id.* at 892.

38. 390 F. Supp. 73 (N.D. Cal. 1976).

39. Such a restriction seems to fly in the face of *Paramount Famous Lasky Corp. v. United States*, 292 U.S. 30 (1930), in which the United States Supreme Court found a Section 1 Sherman Act violation when a group of movie distributors aggregating 60% of the market refused to deal with exhibitors except under a standard contract. In the American professional football market the NFL arguably constitutes 100% of the market as the only major pro league south of Canada.

In *Smith v. Professional Football*, 420 F. Supp. 738, 742 n. 1 (D.D.C. 1976), the court found as a fact that "the Canadian Football League in 1968 did not offer significant competition for the services of outstanding American college football players also selected in the NFL draft, due to the limits on number of Americans permitted on CFL teams, its lack of attraction or glamour for the athletes and the differences in the nature and rules of the football played there. The same is true in 1977.

In *Paramount* it did not matter that the contract had evolved after six years of discussion. Thus, even if the NFL standard player contract had developed after years of experimentation, insistence on using only that form seems to be a suppression of competition.

In discussing the various restraints imposed by the NFL, the court declined to take the *per se* route to illegality, noting the unique nature of sports. To determine the reasonableness of the restrictions, the court drew upon common law concepts used in dealing with ordinary employment contracts. The test simply involves taking into account all circumstances bearing on whether the restrictions afford fair protection to the employer without imposing an undue hardship on the employee or interfering with the public interest. There is a balancing of the equities.

After considering all the circumstances the court still found the devices unreasonable and particularly condemned the duration of the restraints. For example, it called the draft "patently unreasonable insofar as it permits virtually *perpetual* boycott of a draft prospect even when the drafting club refuses or fails within a reasonable time to reach a contract with a player."⁴⁰ Similarly, the court found that the possible effect of the Rozelle Rule, which it re-christened the "Ransom Rule," would be to indefinitely restrain a player from pursuing his occupation among the clubs of a league which holds a monopoly on professional football employment in the United States.

In explaining why it was possible to award summary judgment, the court concluded that:

such a rule imposing restraint virtually unlimited in time and extent goes far beyond any possible need for fair protection of the interests of the club-employers or the purposes of the National Football League and that it imposes upon the player-employees such undue hardship as to be an unreasonable restraint, and such a rule is not susceptible of different inferences concerning its reasonableness; it is unreasonable under any legal test, and there is no genuine issue about it to require or justify trial.⁴¹

The concept of compensation was dealt another blow in *Mackey v. National Football League*.⁴² Eight free agents, twenty-three player representatives and John Mackey, a retired player, attacked the Rozelle Rule and charged that the owners had formed a practice among themselves of boycotting and refusing to deal or negotiate with any player who had become free agent

40. *Kapp v. National Football League*, 390 F. Supp. 76, 82 (N.D. Cal. 1976).

41. *Id.*

42. 407 F. Supp. 1000 (D. Minn. 1975).

by playing out his option.⁴³ The court found the Rozelle Rule “so clearly contrary to public policy” as to constitute a *per se* violation of the antitrust laws as a concerted refusal to deal.⁴⁴ For good measure, Judge Larson declared the restraint to be invalid under a “rule of reason” standard as well.⁴⁵

While apparently conceding that the rule might be a necessary restraint when applied to superstars in order to maintain league balance, the court found the Rozelle Rule to be unreasonably broad when forced on every player in the league “no matter how marginal his status or ability.”⁴⁶ Its scope was also held to be too great in terms of time because the rule was unlimited in duration, restricting the player throughout his career. “He is at no time truly free to negotiate for his services with any NFL club.”⁴⁷

Although the court did not discuss the legality of other restraints on the players (such as the draft and the standard player contract), it did venture the opinion that the Rozelle Rule was especially unreasonable “when viewed in conjunction with the other anti-competitive practices of defendants.”⁴⁸

The court rejected the NFL’s argument that the rule was really a necessary evil. For example, the claim that the Rozelle Rule was needed to maintain competitive balance was countered by the assertion that less restrictive means were available. In response to the league’s plea that the restraint was necessary to protect the player development investment costs, Judge Larson commented that pro football’s expenses in that area are similar to those faced by other businesses which incur hiring and training costs and that there was no right to compensation for such expenses.⁴⁹ One wonders whether his views would be

43. From January 29, 1963, when the option rule came into being, to October 7, 1975, one hundred seventy-six NFL’ers played out their options: forty-three signing with other clubs, sixty-two re-signing with the original team and seventy-one not playing in the league at all the following season. The statistics, provided by the NFL Management Council, are open to a variety of interpretations. Unfortunately, it was not clear how many of the seventy-one simply jumped to the WFL and how many were forced out of football.

44. Mackey v. National Football League, 407 F. Supp. 1000, 1007 (D. Minn. 1975).

45. *Id.* at 1007-08. The court declared the Rozelle Rule invalid because it was unreasonably broad in its application, it lacked procedural safeguards with respect to its employment, it was unlimited in its duration and it was unfair when viewed in conjunction with other anti-competitive practices of the National Football League.

46. *Id.* at 1007.

47. *Id.*

48. *Id.* at 1008.

49. *Id.*

different with respect to baseball with its network of minor league franchises which the big leagues subsidize as a proving ground for future prospects.

LABOR LAW ASPECTS

Perhaps sensing that they were fighting a losing battle in the courtroom, owners have tried to shift the arena to the bargaining table in an effort to salvage as much of the status quo as possible.

In basketball, rather than go through any more legal skirmishes, management reached an out of court settlement of the *Robertson* suit with the players' association. The accord included the following features:⁵⁰

1) The option clause will be eliminated after the 1976-77 season.

2) Beginning in 1980 the old club is guaranteed a right of first refusal, *i.e.*, the right to match any competing contract offer for the services of any athlete playing out his option. If the team fails to meet the offer and the player leaves the team there will be no compensation.

3) Draft rights to a basketball player may be retained for only one year. If the selecting team cannot sign him within that time, the player once again becomes part of the draft pool.

Thus for a few years, at least, the antitrust battles in the NBA have halted. Interestingly, a similar agreement had been hammered out in 1974, but the owners ultimately rejected the package. Of course, that was before *Robertson v. National Basketball Association*.

The National Hockey League Players Association reached an accord with that league's owners⁵¹ which recognizes a right to compensation when a skater plays out his option. If the teams cannot agree on the terms of a trade, the decision will be submitted to an outside arbitrator (as contrasted with the commissioner who performs this function in football). While this agreement does not favor the athletes as much as the basketball settlement, the skaters retain the right to terminate the contract in the event of a merger between the leagues.

50. See New York Times, Feb. 8, 1976, at 25, col. 6.

51. For details see New York Times, Oct. 7, 1975, at 27, col. 5.

Because of their sport's court-granted immunity from the antitrust laws, baseball players are in the weakest bargaining position. Nevertheless, they pulled off a minor coup when an arbitrator ruled that the baseball renewal clause is only valid for one year, thus in effect giving baseball players the right to become free agents after playing out their options.⁵² After management's court challenges to the decision predictably failed, six months of periodic negotiations resulted in a collective bargaining agreement containing several significant provisions:⁵³

1) All players under current contracts may play out their option and become free agents. In the future, players with six years of major league experience may become free agents simply by notifying the club in writing after the season in which they make their decision.

2) A draft of free agents will be held in the off-season. Each player may be selected by a maximum of twelve clubs in addition to his former team. Limits based on the number of players in the pool will be placed on the number of free agents one team may sign. For example, with twenty-eight players available no team may sign more than two. However, a club may always sign as many men as it loses.

3) Compensation will be awarded in the form of draft choices in the regular agent draft of players coming out of high school and college.

4) A player must wait five years before he may become a free agent a second time.

In football where management had lost three major battles in the courts (*Kapp*, *Mackey* and *Smith*), negotiations dragged on for twenty years as the owners attempted to force the players to agree to at least some version of the Rozelle Rule at the bargaining table. Management's theory seemed to be that if it could get the league's players' association to accept the restrictive practices as part of a collective bargaining agreement, then neither the union nor individual gridiron stars could claim that such restraints violate the antitrust laws.

Giving major support to this view of antitrust exemption based on a negotiated contract (a doctrine growing out of Section 20 of the Clayton Act⁵⁴ which removes simple labor dis-

52. The football option clause had evolved as a result of the holding in *Radovich* that football, unlike baseball, was indeed subject to the Sherman Act. See New York Times, Dec. 31, 1975, at 28, col. 1.

53. New York Times, Sept. 25, 1976, Section 5, at 4, col. 3.

54. 29 U.S.C. § 52.

puts from the scope of the antitrust laws and Section 6⁵⁵ which declares that unions themselves are not combinations in restraint of trade) is *Amalgamated Meat Cutters and Butcher Workmen of North America v. Jewel Tea*.⁵⁶ Under threat of a strike, Jewel Tea supermarket signed a collective bargaining agreement which forbade the sale of meat between 6:00 p.m. and 9:00 a.m. The union's aim was to save jobs by preventing the sale of previously packaged meats. Jewel Tea complained that this contract was an unreasonable restraint of trade, but the Court found it to be outside the sanctions of the Sherman Act.

However, before jumping to the conclusion that *Jewel Tea* stands for the proposition that a clause in a collective bargaining agreement is automatically immune from antitrust action, it should be noted that a closer reading of the case suggests limitations on this doctrine of immunity. In the 6-3 decision, Justices White and Goldberg each wrote opinions in which two of their brothers concurred. Weighing the interests involved, Justice White found that the union had an immediate and direct concern in trying to save jobs, a factor which tipped the scales in favor of immunity. According to Justice White, the test is whether the restriction is

so intimately related to wages, hours and conditions of employment that the union's successful attempt to obtain that provision through bona fide arm's length bargaining *in pursuit of their own labor union policies*, and not at the behest of, or in combination with non-labor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act.⁵⁷ (emphasis added)

However, Justice White cautioned that if Jewel could have shown that the absence of that restrictive clause would have had no deleterious effect on any direct union interest, his conclusion might have been different.

If it were true that self-service markets could actually operate without butchers at least for a few hours after 6:00 P.M., that no encroachment on butchers' work would result, and that the workload of butchers during normal working hours would not be substantially increased, Jewel's position would have considerable merit.⁵⁸

Justice Goldberg's support of the labor exemption went fur-

55. 15 U.S.C. § 17.

56. 381 U.S. 676 (1965).

57. *Id.* at 690.

58. *Id.* at 692.

ther than did Justice White's. He would have upheld almost any kind of collective bargaining agreement restriction so long as they advanced even an indirect union interest. In *Jewel Tea*, Justice Goldberg favored immunizing the restriction if only because it would help keep the non-self-service markets in business, thereby saving jobs.

Regardless of whether one favors the White view or the Goldberg analysis, it is foolish to read *Jewel Tea* as holding that a collective bargaining agreement which authorizes price setting, market allocation and group boycotts, though forced on the union and unfavorable to most of its members, should be immune from scrutiny under the Sherman Act. Moreover, several other cases have clearly limited the scope of this antitrust exemption, indicating that there is definitely no *per se* immunity for labor contracts. In *Allan Bradley v. Local Union No. 3*⁵⁹ local contractors agreed to purchase equipment only from area manufacturers who had a closed shop agreement with the union. The Court reasoned that "if business groups, by combining with labor unions, can fix prices and divide up markets it was little more than a futile gesture for Congress to prohibit price fixing by business groups themselves."⁶⁰

In *United Mine Workers v. Pennington*,⁶¹ decided the same day as *Jewel Tea*, the union sought to impose a wage scale on all coal mines in the area. Certain employers co-operated because such an agreement would drive many small miners out of business. The Court refused to grant immunity to the pact, saying that an agreement resulting from union-employer bargaining is not automatically exempt from Sherman Act scrutiny merely because negotiations covered wage standards or any other compulsory subject of bargaining.

Finally, in *United States v. Women's Sportswear Manufacturers Association*⁶² clothing jobbers forced a deal with contractors providing that unless prices elsewhere were better, all work must go to jobbers belonging to the association and members in good standing with the International Ladies Garment Workers Union. Although the pact made reference to that union, the Court was unwilling to overlook the blatant restraint on trade. In fact, the tribunal was emphatic in its refusal to apply the labor exemption. It found no evidence that the union had participated in making the agreement; even if it had, "benefits to

59. 325 U.S. 797 (1974).

60. *Id.* at 809-10.

61. 381 U.S. 657 (1965).

62. 336 U.S. 460 (1949).

organized labor cannot be utilized as a cat's paw to pull the employer's chestnuts out of the fire."⁶³

Several guidelines appear to emerge from this discussion of the antitrust immunity granted under the Clayton Act and expanded by the judiciary:

- 1) The exemption may be used as a defensive shield by labor when it is being sued for its active and conspiratorial role in restraining competition;
- 2) The union must be acting in its own self-interest, and the agreement must confer some real benefit upon its members;
- 3) The contract must result from bona fide arm's length negotiations between labor and management; and
- 4) Even if all the above conditions are met, the court should still examine the reasonableness of the agreement, using the classic antitrust test of weighing the benefits as well as considering the "necessity" of the restraint.⁶⁴

In several major sports cases management has tried to defend its restrictive practices by arguing that they were the fruits of collective bargaining, in spite of the fact that the athletes have scrupulously tried to avoid explicitly sanctioning such rules at the negotiating table. Thus far the tactic has been uniformly unsuccessful.

In *Robertson v. National Basketball Association* there was conflicting testimony as to whether the restrictions were imposed unilaterally or as the result of arm's length bargaining. The court held that only if the restraints were part of a union policy, *deemed by the players' association to be in their best interests* could the restrictions be exempted from the antitrust laws. Moreover, it seemed highly doubtful to the trial judge that these restraints could have been adopted at the behest of the NBA players.⁶⁵

*Philadelphia World Hockey v. Philadelphia Hockey Club*⁶⁶

63. *Id.* at 464.

64. Such a procedure can especially help us to see the distinction between *Amalgamated Meat Cutters and Butcher Workmen of North America v. Jewel Tea*, 381 U.S. 676 (1965) and *Allan Bradley v. Local Union No. 3*, 325 U.S. 797 (1974).

65. 389 F. Supp. 867, 887-90 (S.D.N.Y. 1975).

66. 351 F. Supp. 462 (E.D. Pa. 1972).

was a suit by a World Hockey Association club charging that the National Hockey League was in violation of Section 2 of the Sherman Act because its reserve system enabled the senior circuit to maintain a monopoly on quality hockey talent, thereby excluding potential competitors. The NHL argued that the reserve clause had been discussed with the players' association and therefore should be removed from antitrust consideration.

Initially the court found that, while the reserve clause had indeed been discussed, the owners had not shown any willingness to modify it, and thus that there had not really been any serious arm's length collective bargaining on the subject. Moreover, even assuming the truth of the owners' contention, the court indignantly refused to allow what is intended as a "shield for labor" to be turned into a sword for management.⁶⁷

The National Football League tried to score with the argument presented in *Kapp v. National Football League*⁶⁸ by pointing out that Article III, Section 1 of the labor-management agreement stated "all players in the National Football League shall sign the standard player contract which shall be known as the National Football League standard player contract." Since, argued management, this uniform contract contained a clause binding the individual gridder to accept the NFL's constitution, by-laws and rules, all the restrictions had been "accepted" by the athletes through their players' association as a result of collective bargaining and, therefore, the restraints were exempt from antitrust litigation. While the argument turned out to be irrelevant because Kapp had signed his conforming contract before the collective bargaining accord had been reached, the court nevertheless offered its opinion of such a theory.

The exemption does not and should not go so far as to permit immunized combinations to enforce employer-employee agreements which, being unreasonable restrictions on an employee's right to freely seek and choose his employment, have been held illegal on grounds of *public policy* long before and entirely apart from the antitrust laws.⁶⁹ (court's emphasis)

The labor contract exemption argument was thrown for a loss again in *Smith v. Professional Football*, on the technical ground that the labor pact which allegedly authorized the draft had not yet been inked when Smith was selected. However, even assuming the existence of a labor pact, the court suggested that defendants would still be required to show that the draft had been agreed to as a result of bona fide negotiations and not

67. *Id.* at 499-500.

68. 390 F. Supp. 73 (N.D. Cal. 1976).

69. *Id.* at 86.

“thrust upon a weak players union by the owners.”⁷⁰

In *Flood v. Kuhn*,⁷¹ the most recent challenge to baseball's antitrust immunity, the court never reached management's contention that the reserve system had been accepted by the players' union. The majority never discussed this point, but in his dissent Justice Marshall seriously questioned such a theory.⁷² He found that in the cases upholding labor's exemption the restrictions had operated to the detriment of management's competitors, not the union members. He doubted whether there would be any antitrust immunity if the players' contention that the “agreements” were foisted upon them was true.

Despite having suffered consistent defeats on the labor contract exemption issue, the football owners continued to plug away. The collective bargaining agreement expired after the 1974 season and until February, 1977, talks were stalled over the owners' desire that the players accept some version of the Rozelle Rule as part of the next pact. Ultimately, an agreement was ratified in which the players accepted a modified form of the Rozelle Rule and the draft.⁷³ The owners' insistence was, most likely, due to the fact that in previous cases the courts thought the restrictive practices had been unilaterally imposed upon the players' union. Thus, in an attempt to dispel that sentiment, management had been trying to gain explicit approval by the association.

The National Hockey League owners have been successful in getting their players' union to sign a five-year agreement which includes a clause accepting the “right to equalization or compensation” when a man plays out his option.⁷⁴ However, the union president has explained that acceptance of the clause was contingent upon the continued existence of the World Hockey Association which provides the skaters with added bargaining power. Should the WHA either fold or merge with the NHL, the

70. *Smith v. Professional Football*, 420 F. Supp. 738, 742 (D.D.C. 1976).

71. 407 U.S. 258 (1974).

72. *Id.* at 289.

73. The principle of compensation survives, but only draft choices—not veterans—will be awarded. The amount of compensation will be determined by the salary of the departing player, not by the commissioner. On the other hand, the original club is granted the right of first refusal and can retain the player by matching the new club's offer. *New York Post*, Feb. 18, 1977, at 88, col. 1.

74. See *supra* note 52.

players retain the power to terminate the contract and re-open negotiations on the subject.

Nevertheless, it is still questionable whether such an agreement as the NHL magnates had sought could withstand anti-trust attack. A court still ought to inquire into whether the union was actually pursuing its self-interest in accepting the stipulation or whether the pact was penned under duress.

A different view is offered by Professor Ralph Winter of Yale University.⁷⁵ Drawing on his extensive labor law background, he asserts that reserve or option clauses are mandatory subjects of collective bargaining under the National Labor Relations Act. Since there is an exclusive bargaining representative in each of the four major sports, the power of the employee to order his own relations with his employer is extinguished according to *NLRB v. Allis Chalmers Mfg. Criteria*.⁷⁶ Moreover, following *J.I. Case v. NLRB*,⁷⁷ individual contracts (such as Joe Kapp's) cannot be exempted from the operation of collective bargaining agreements because some may be more advantageous. Professor Winter seems to conclude that the only remedy for the players is the bargaining table.

However, Professor Winter ignores the fact that both *Chalmers* and *Case* were seeking to protect union strength, solidarity and cohesiveness. *Chalmers* dealt with an employee who crossed a union picket line during an economic strike, and the court upheld the right of the union to fine the worker. *Case* involved an employer who refused to bargain with a union and who pleaded that the individual contracts pre-empted the possibility of collective bargaining. Unlike these two fact patterns, the interests of the individual and of the union are not at odds. All are united in trying to remove certain restrictive clauses from the uniform contract. No one is attempting to make an end run around the union's authority as the collective bargaining representative.

A practical problem with Professor Winter's theory is that although the draft, option system and compensation (Rozelle) rule had never been agreed to by the union and every court which has examined the network of player restraints has found them to be patently unreasonable, he would nevertheless close the door to the courthouse because the proper forum is the negotiating table. However, if not for the athletes' unbroken

75. Jacobs & Winter, Jr., *Anti-trust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1 (1971).

76. 388 U.S. 175, 180 (1967).

77. 321 U.S. 332, 339 (1944).

string of victories in court, it is doubtful if management would ever agree to discussions to modify these restraints. Recall that the *Robertson* settlement had been rejected once by basketball owners before the trial court's decision. Thus, this theory results in a "Catch 22" dilemma for the players who would soon find themselves without any remedy.

Another possible approach sometimes suggested would be for Congress to address the matter as it did when it authorized an antitrust exemption to permit NFL teams to sell the rights to televise their games as a league-wide package, rather than on a team-by-team basis.⁷⁸ However, it is doubtful whether any legislation to come out of Congress at this time will be quite what the owners have in mind. After hearing testimony about the effect of a possible NBA - ABA merger, the Senate Judiciary Committee concluded that "present use of option clauses, reserve clauses and other devices designed to tie a player to a team deny him fundamental rights and constitute a violation of the anti-trust laws."⁷⁹ While the senators would sanction an option clause for rookies and would allow an individual player to grant one as part of the bargaining process, they came out very strongly against institutionalizing the provision in the standard player contract. As for the concept of compensation, ". . . in order for such a player to actually be free there may not be any requirement that compensation be received by his former team."⁸⁰

In the other chamber, a recent House of Representatives bill⁸¹ would make an option clause or any similar restriction upon termination of the athlete's contract unenforceable. Violation of the law would be a misdemeanor. Such a measure had also been included in the Senate Report.

REASONABLE ALTERNATIVES?

When applying the rule of reason in antitrust analysis, in addition to weighing the benefits against the harms, a court should consider the availability of less restrictive alternatives to accomplish the same goals.

78. 15 U.S.C. § 1291-94.

79. S. Rep. No. 92-1151. 92d Cong., 2d Sess. 8 (1972).

80. *Id.* at 9.

81. H.R. Rep. No. 2355, 94th Cong., 1st Sess. (1975).

Starting with the draft which brings the athlete into professional sports one can easily see a host of possibilities which would minimize restrictions on player freedom without impairing the competitive balance.

1) *Limit the draft to only a few rounds.* Realistically, because any player selected after about the fifth round has very little bargaining power, he should not be forced to deal with only one club. Being drafted in a lower round is especially harmful to an athlete who is selected by a club which is well-stocked at his position.⁸² Even if he is lucky enough to make the team, his skills will probably rust as he sits on the bench waiting for a star to break a leg.

2) *Allow more than one club to draft a player.* Even if only two teams are permitted to negotiate with a draftee, it would still introduce an element of bidding into the competition. Unlike the arrangement in basketball or baseball, an athlete need not wait until the next draft to entertain a second offer. When a major league baseball player plays out his option he may be “drafted” by up to twelve clubs in addition to his original team.

3) *Eliminate the option clause in the standard player contract, but allow it to be bargained for.* Perhaps many players would not object to the inclusion of the clause in exchange for a higher salary or fringe benefits.⁸³ Teams could also offer long term contracts, thus minimizing the absence of the option.

4) *Allow the option clause only for players with fewer than five years' experience in the league.* It is arguable that a team has a capital investment in newly-signed ballplayers due to scouting and player development costs,⁸⁴ and that therefore forbidding the option might be unfair to a club which discovers an

82. It is alleged that Hank Greenberg, a Hall of Fame baseball player who grew up in the Bronx, rejected an offer from the neighboring Yankees because his position (first base) was manned by Lou Gehrig who was then well on his way to a streak of 2130 consecutive games played.

83. Veteran players with superior bargaining ability have been known to obtain a contractual stipulation prohibiting a trade without their consent.

84. The costs are greater in baseball and hockey, sports in which the major league clubs sponsor minor league franchises where the younger players sharpen their skills. On the other hand, basketball and football have some minor leagues, but there is no formal economic affiliation with the majors. Most players in these sports learn their trade in college, and the four-year rule prevents them from turning pro before the “apprenticeship” is up.

unpolished natural talent and nurses the player along slowly, only to see him "jump" to another club just as he is about to reach stardom. Five years is probably an equitable time for the original team to recoup its investment. The new baseball pact permits free agency after the sixth season in the major leagues.

5) *If an athlete plays out his option, allow the original club a right of first refusal.* Since many ballplayers seek to change teams simply to make more money, there is no reason not to let the athlete shop around for the best offer and permit his employer the opportunity to match it.⁸⁵ If management can't or won't meet such an offer, then the player would be free to leave; compensation would not have to be made to the old team. Such an arrangement is featured in both the NBA and the NFL agreements. The drawback of this arrangement is that it does not assist the player who plays out his option for non-financial reasons. He would still be hampered if there is a compensation clause.

6) *Establish a limit on the number of "option ballplayers" a team may sign a given year.* This device would assuage the fears of those who predict wholesale raiding by, or mass migration to, a particular club if compensation is not required. Not only does such a limitation prevent a team from "buying" a pennant, but it has the virtue of not unduly shrinking the market for an athlete who has played out his option.

Alternatively there could be a limited "draft" of the new free agents as in baseball where thirteen teams are permitted to bargain with any one free agent. If more than thirteen clubs want his signature on a contract, the rights go to those with the twelve worst records, plus his original team. Baseball also places a ceiling on the number of free-agents that a team may sign.

85. An interesting problem arises if players feel there is a gentlemen's agreement among the owners to avoid overly high bids to free agents, thus frustrating the player's desire to get the "market value" for his talents. While it is doubtful that such a tacit arrangement would survive in the face of the temptation to "steal" a superstar from a rival, the clubs would also be inviting an antitrust action for a concerted refusal to deal. However, since baseball is still immune from the reach of the Sherman Act, could that sport's owners escape punishment if they were to engage in such a group boycott? One solution to this hypothetical problem would be to hold that the exemption is limited to those activities directly related to the daily operations involved in maintaining a baseball league.

7) *Adopt a mandatory, but non-binding form of arbitration.* The World Hockey Association has an unusual type of compulsory non-binding arbitration coupled with the omission of an option clause. If the player and team cannot come to terms by July 4, each side may appoint a mediator. If the mediators cannot break the deadlock by July 15, a neutral arbitrator is selected who must render a decision by July 31. If either party rejects the finding to the third arbitrator the player goes into a special "secondary draft pool" where he may be selected by another club.⁸⁶

THE FINAL SCORE

On the one hand, management wails that the restrictions on player movement within the leagues are a *sine qua non* for the continued existence of professional team sports. Without them the competitive balance of the various leagues would be shattered. The rich would get richer, while the poor would have to drop out of the competition. Moreover, if players were free to jump teams every year, club payrolls would be astronomical.⁸⁷ Naturally, the costs would then be passed on to the paying fans who would voice their discontent by finding other ways to spend their recreational dollars. Potential investors would be scared off. Within nine months we have witnessed the demise of the World Football League, the American Basketball Association, and three World Hockey Association franchises, while two National Hockey League teams have survived only because new owners were found, and a third is staying afloat with the help of loans from the league and from the players' association. It is only a matter of time, the warning goes, until teams in the "established" leagues encounter difficulties in meeting payrolls which have dramatically escalated, particularly in basketball⁸⁸ and hockey.

On the other hand, the players accuse the owners of being Jeremiahs prophesying the doom of professional team sports.

86. Note, *The Professional Athlete: Liberty or Peonage?*, 13 ALTA. L. REV. 212, 240-41 (1975).

87. Fourteen baseball free agents who played out their option in 1976 signed contracts worth an aggregate of \$23,311,000 or \$1,665,071 per man. New York Times, Dec. 5, 1976, Section 5, at 1, col. 3.

88. In 1966, before creation of the rival ABA, the median salary in the NBA was only \$23,000. (See S. Rep. 92-1151 at 6.) Contrast this amount with the figures in note 29, *supra*. Football wages followed a similar pattern. In 1966 when the NFL and AFL merged, ending their competitive bidding, the average salary stood at \$23,600. After the 1973 season it rose only to \$27,500, less than the increase in the cost of living. However, after only two years of rivalry with the WFL, the mean salary jumped to \$43,000, a boost of almost 60%. New York Times, Jan. 27, 1974, at 33, col. 1.

They claim that the majority of players would rather not switch teams if given the choice. Like most people, they want to settle down in one city rather than establish a new address every season.⁸⁹ Only twenty-eight major league baseball players out of six hundred chose to play out their option in 1976, the first year such a tactic was available. Nevertheless, they want the freedom of choice and the opportunity to switch clubs, thereby strengthening their bargaining power at contract time. They argue that restrictions are not necessary for the maintenance of competition so much as they are for the preservation of profits and paternalistic power.

Obviously the truth lies somewhere between the two extremes. Perhaps the recently signed labor pacts will provide some empirical evidence as to what happens when play restraints are relaxed.

In recent years virtually all lower court decisions have gone against the sports establishment. The restrictions in question are indeed violations of Section 1 of the Sherman Act, but not simply because they would be violations in some other business context. Sports is truly a unique industry, and conventional antitrust standards are not warranted. It is unfair to compare the player draft, which aims at equalizing talent throughout the league, to an ordinary commercial boycott, which attempts to punish a competitor or a reluctant co-operator. One result of the draft is that the players do suffer because they bear the economic costs of sustaining competition. However, such a result is not the sole goal of the barons of big-time sports, nor is it enough to justify blanket condemnation. It is the presence of so many reasonable alternatives to the status quo which makes these restrictive rules unreasonable. The question of the existence of restraints is not an all or nothing proposition. Many compromises are available and the number of possibilities is limited only by the imagination and flexibility of the parties.

Should the issue reach the United States Supreme Court, the owners ought to lose based on legal principles, but such an outcome will not mean that the players have won. Without any

89. Baseball has a "five and ten rule" which mandates that a player who has been with one club for five years and in the major leagues for ten may not be traded without his consent. This rule manifests a desire by most players not to leave their clubs once they are "established".

restraints on player movement there would be a financial bonanza for those superstars with many bidders competing for their talents. However, the resultant increase in costs would probably drive some teams out of business and impair competition. Alternatively, management could compensate for the large salaries paid to some stars by slashing roster limits. The net result, however, would be fewer jobs for athletes in professional sports.

CONCLUSION

Labor pacts made possible by either competition from a second league or legal victories by the players have allowed a prognosis of labor peace on the professional team sports front for the next few years. If the spirit of compromise that made these out-of-court solutions possible survives the recent collective bargaining agreements, that peace may endure. If it does not, the only long run winners may be the lawyers.⁹⁰

90. According to an estimate by Commissioner Rozell, the NFL spent \$3.8 million on legal costs in 1975. *New York Times*, Jan. 18, 1976, Section 5, at 3, col. 5.