The University of New Hampshire Law Review

Volume 4
Number 1 *Pierce Law Review*

Article 8

December 2005

Clarett v. National Football League: Defining the Non-Statutory Labor Exception to Antitrust Law as it pertains to Restraints primarily focused in Labor Markets and Restraints primarily focused in Business Markets

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I. INTRODUCTION

Federal antitrust law and national labor law set forth two conflicting policies that have created a periodic drama for sports fans concerned that their favorite sports will suffer a cataclysmic court room battle impairing the quality of the game.[1] The Supreme Court interpreted federal antitrust and labor law to implicitly exclude antitrust liability for certain collective bargaining labor related activities under the non-statutory labor exception to antitrust law.[2] This absence of explicit guidance has led to a split in the circuits where courts have formulated their own interpretations of these colliding national policies. In 1996, the Supreme Court in *Brown v. Pro Football, Inc.*,[3] attempted to further clarify the scope of this exemption and ultimately held that national antitrust and labor policies favored the application of the exception when the alleged restraints were in labor markets defined by collective bargaining. In 2004, the United States Court of Appeals for the Second Circuit held in *Clarett v. National Football League*[4] that *Brown* reaffirmed the Second Circuit position that restraints resulting from the collective bargaining process and primarily impacting the labor market were subject to the non-statutory labor exception to antitrust law.

In 2003, Maurice Clarett, a sophomore collegiate running back for Ohio State University ("OSU") announced that he intended to enter the

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1. *See e.g. Brown v. Pro Football, Inc.*, 518 U.S. 231, 233-34 (1996).

2. *Id*. (noting that earlier decisions by the same court set forth this exception, but declined to set forth a clear bright line rule by which to apply the exemption).

3. 518 U.S. at 250 (holding that the non-statutory labor exemption applied beyond impasse and until the collective bargaining process was terminated or completed but declining to explicitly state how that is triggered).

4. 369 F.3d 124, 130-31, 135 (2d Cir. 2004).

2004 National Football League ("NFL") draft. The NFL declared that Clarett was ineligible for the rookie draft stating that the NFL player Eligibility Rules required all players to have exceeded a three year post-high school graduation requirement. Clarett subsequently sued the NFL, claiming that the Eligibility Rules worked as a violation of antitrust law by unreasonably restraining him from pursuing a career in the NFL.[5]

The National Football League Management Committee ("NFLMC") and the National Football League Players Association ("NFLPA") are contractually obligated to the terms and conditions of the current collective bargaining agreement ("CBA").[6] The CBA references the NFL Constitution and Bylaws, which requires all draft applicants to meet a minimum of having exhausted at least three football seasons after their high school graduation (the "Eligibility Rules").[7] Clarett's case went to trial in the United States District Court for the Southern District of New York, resulting in a finding of an antitrust violation and an injunction ordering the NFL to instate Clarett for the draft.[8]

On appeal, the Second Circuit reversed and remanded the district court holding that the Eligibility Rules violated antitrust law.[9] Notably, the court interpreted the non-statutory labor exemption to antitrust law to require deference to the labor law remedies and policy where the alleged injury is primarily focused in a labor market.[10]

Clarett's desire to enter professional organized labor is indicative of the ongoing desire by many younger athletes to forego formal post-secondary education and to enter the world of professional sports.[11] Over the past several decades, there has been a general relaxing of age-based player eligibility rules in many professional sports (including the 1993 NFL Collective Bargaining Agreement, a move from a four year post-high school requirement to the current three year requirement).[12] Commentators

5. *Id*. at 129.
6. *Id.* at 126-27.
7. *Id*. at 128.
8. *Clarett v. National Football League*, 306 F. Supp. 2d 379, 410-11 (S.D.N.Y. 2004).
9. *Clarett*, 369 F.3d at 143.
10. *Id*. at 142-43.
11. *See infra* pt. II(A) and accompanying text (briefly discussing the increasing success of younger rookies becoming all-star athletes in various professional sports for example, the NBA drafts of high school players including Kobe Bryant and LeBron James).
12. *See generally Haywood v. NBA*, 401 U.S. 1204, 1204-05, 1207 (1971) (finding that NBA eligibility rule as a *per se* violation of antitrust law); Robert D. Koch, *4th and Goal: Maurice Clarett Tackles the NFL Eligibility Rule*, 24 Loy. L.A. Ent. L.J. 291, 294 (2004) (discussing NFL eligibility rules going from a four year to three year requirement); Robert A. McCormick & Matthew C. MacKinnon, *Professional Football's Draft Eligibility Rule: The Labor Exception and the Antitrust Laws*, 33 Emory L.J. 375, 376-77 (1984) (analyzing the now dissolved U.S. Football League's signing of Herschel Walker in 1983, as an exception to its own eligibility rules).

continue to opine that the NFL Eligibility Rules should be abolished.[13] Had this happened, Clarett would have likely entered the NFL in the 2004 draft and not spent over a year away from organized football; instead Clarett remained depressed by the Second Circuit decision and prepared himself for the 2005 draft.[14] Still, the policies behind the national antitrust and labor laws have set forth principles which have been interpreted by the courts to exempt certain labor issues from federal antitrust law.

Clarett noted the distinction between its own circuit law (as supported by the 1996 *Brown* decision) which interpreted labor laws as "waiv[ing] antitrust liability for restraints on competition imposed through the collective bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining" and differing interpretations as set forth by Eighth Circuit law."[15] *Clarett* noted the distinction between its own circuit law (as supported by the 1996 *Brown* decision) and differing interpretations as set forth by the Eighth Circuit.[16] *Clarett* held that the Eligibility Rules were a mandatory subject of bargaining and a restraint created by the collective bargaining agreement; the court further found that this restraint operated primarily in a labor market, not a business market.[17] Accordingly, *Clarett* interpreted national antitrust and labor policy to dictate that the issue was exempt from antitrust violation and under the jurisdiction of labor law and the National Labor Relations Board ("NLRB").[18]

This note will analyze the Second Circuit's ruling and rationale in light of the relevant governing law and national policies between antitrust law and labor law. Part II will discuss the general trend of player-raised antitrust challenges to restraint cases in professional sports, setting the stage for an aspiring football player like Clarett to challenge the NFL Eligibility Rules. In Part III, this note will discuss the facts, procedural history and outcome of *Clarett*. Part IV will discuss the historical background under

13. *See* Shuana Itri, *Maurice Clarett v. National Football League, Inc.: An Analysis of Clarett's Challenge to the Legality of the NFL's Draft Eligibility Rule Under Antitrust Law*, 11 Vill. Sports & Ent. L.J. 303, 304 (2004); Koch, *supra* n. 12, at 347-48.

14. *See e.g.* Tom Friend & Ryan Hockensmith, *Clarett claims cash, cars among benefits*, ESPN, http://sports.espn.go.com/ncf/news/story?id=1919059 (Nov. 9, 2004, 5:51 p.m. EDT) (discussing Clarett's status a year following the Second Circuit ruling); Andrew Mason, *Final Pick, Fresh Start: Shanahan gives Clarett "Clean State" after Selection*, http://www.denverbroncos.com/page.php?id=334&storyID=4094 (April 23, 2005) (discussing the two years Clarett spent away from organized football and his potential as the Denver Bronco's notorious 101st 2005 Draft Pick).

15. 369 F.3d at 137-38 (quoting *Brown*, 518 U.S. at 235).

16. *Id*. at 134 (declining to follow the law set forth in *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976) as this case had not been adopted by the Supreme Court, or earlier Second Circuit cases); *see infra* pt. VI and accompanying text (discussing *Clarett's* recognition of binding precedent set forth by the Supreme Court and relevant Second Circuit law).

17. *Clarett*, 369 F.3d at 139, 141.

18. *Id*. at 134, 139-41.

which *Clarett* was ruled. Part V will analyze how courts have distinguished between restraints created through the collective bargaining process which primarily impact the labor market as opposed to those that primarily impact business markets. In Part VI, this note will analyze *Clarett's* interpretation of *Brown* in distinguishing labor and business markets, and discuss how the non-statutory labor exception should be applied to labor market restraints as compared to business market restraints. Finally, it will outline the legacy that *Clarett* provides for future player-raised challenges in similar situations.

II. HISTORY REGARDING PLAYER ELIGIBILITY RULES

Contemporary sports have seen an influx of young talent opting for a chance at playing in the big leagues earlier at the expense of obtaining higher education.[19] Many dream of playing professional sports—dreams often prohibited by player eligibility rules. In situations where the restraints are not argued to have been protected by non-statutory labor exception, antitrust law has been seen to set its talons into eligibility rules.[20]

A. *National Basketball Association*

In 1971, the Supreme Court decided *Haywood v. National Basketball Association*,[21] the first successful player antitrust case regarding eligibility rules in the National Basketball Association ("NBA"). A professional basketball team signed Haywood before his college class graduated. At the time, the NBA eligibility rules required players to have surpassed the graduation date of their college class and the NBA Commissioner moved to block Haywood's ability to join the team.[22] Haywood won his district court antitrust claim by showing that the restraint was a group boycott and

19. All-star celebrity athletes like Kobe Bryant and LeBron James are known for bypassing college and jumping directly from high school into multi-million dollar professional contracts and lucrative sponsorship deals, bypassing college. *See* ESPN, *The List: Most Hyped Phenoms*, http://espn.go.com/page2/s/list/hypedphenoms.html (accessed Sept. 29, 2005). And the players keep getting younger, "InterMilan offered Adu a $750,000-a-year deal just to build a relationship. Oh, and Adu was offered the contract and [sic] the age of 10!" Ben Shlesinger, *Adu Plays First Pro Game*, http://www.thesentinel.com/print/284310758319126.php (accessed Sept. 29, 2005).

20. *See infra* pt. II(A) and accompanying text (discussing cases where leagues and employers either failed or declined to raise labor related defenses despite the presence of collective bargaining agreements).

21. 401 U.S. at 1205.

22. *Id.*

therefore a *per se* antitrust violation.[23] The Supreme Court granted *certiorari* and reinstated the district court injunction, temporarily forbidding the league from taking sanctions against Haywood's team for signing him.[24]

In the aftermath of *Haywood*, several district courts found federal antitrust violations in player eligibility rules that were considered bars to entry into the market. These violations were only found where the facts demonstrated that the rules were not reached through the collective bargaining process.[25]

Following *Haywood's* reinstatment of the district court order granting injunctive relief in favor of the player, the district court ruled *Denver Rockets v. All-Pro Management*[26] in favor of Haywood and the union. The district court held that the NBA Bylaws were a group boycott and therefore illegal *per se*.[27] Section 2.05 of the NBA Bylaws prohibited any qualified players from negotiating with any NBA team until four years after his high school class graduation.[28] The court ruled that the restraint, absent any option for appeal, constituted a group boycott within antitrust laws, which is a primary concerted refusal to deal wherein actors at one level (NBA teams) refused to deal with actors at another level (those ineligible under four year rule).[29]

B. *Unites States Football League*

In another district court case, *Boris v. United States Football League*, [30] Boris, an aspiring football player, was prevented from playing in the United States Football League ("USFL") because he failed to meet any of the three requirements of the league rule. The court found as a matter of uncontested fact that the USFL teams were economic competitors and granted partial summary judgment to Boris's allegation that the rule

23. *Id.* at 1204-05.

24. *Id*. at 1206-07 (noting that a quick resolution was required due to the immediate need to determine if Haywood could play for a Seattle NBA team in the ongoing playoffs).

25. *See infra* pts. II(A)-(B) and accompanying text (discussing district court cases which found player eligibility restraints to be antitrust violations where labor law exceptions were not raised in defense).

26. 325 F. Supp. 1049, 1066-67 (C.D. Cal. 1971).

27. *Id.* at 1067 (recognizing a group boycott as a violation of antitrust laws).

28. *Id.* at 1055.

29. *Id.* at 1058, 1066.

30. 1984 U.S. Dist. LEXIS 19061, 3, 7 (C.D. Cal. 1984) (requiring "1) all college football eligibility of such player has expired, or 2) at least five (5) years shall have elapsed since the player first entered or attended a recognized junior college, college or university or 3) such player received a diploma from a recognized college or university").

constituted a group boycott and was therefore a *per* se violation of the Sherman Act.[31]

C. *World Hockey Association*

In 1977, a district court heard a similar antitrust claim, this time with professional hockey, *Linseman v. World Hockey Association*,[32] and held that the eligibility rules were a group boycott and therefore illegal *per se*. Linseman, a 19-year-old amateur, was prevented from playing by the World Hockey Association ("WHA") eligibility rules, and he subsequently challenged them as an unreasonable restraint of trade in violation of the Sherman Act.[33] The WHA regulation prohibited persons under the age of twenty from playing professional hockey for any team within the WHA.[34] The district court ruled in favor of Linseman, finding a "great likelihood" that the regulation would qualify as a classic case of a *per se* illegal concerted boycott without redemption by either an act of state doctrine or an economic compulsion argument.[35]

D. *New Era of Interpretation*

Although the judicial system has been able to find antitrust violations in player eligibility rules that acted to restrain player eligibility, these cases were ruled in an era considered by many to have a judicial system, fueled with an antedated interpretation of antitrust law.[36] Further, the leagues in the above cases either failed or declined to rely on their collective bargaining agreements to receive protection under national labor laws. In more recent cases, the leagues (and players) have relied on the labor exceptions to antitrust law in order to deflect many of these antitrust charges. As will be discussed later in the analysis of the legal background, the Supreme Court has interpreted relevant antitrust and labor statutes to require a non-statutory labor exception to antitrust cases where certain conditions are met.[37] This interpretation, lacking clear delineation upon its pronouncement, has led to a split in the circuits and many highly controversial deci-

31. *Id.* at 5, 8.
32. 439 F. Supp. 1315, 1320, 1323 (D. Conn. 1977).
33. *Id*. at 1317.
34. *Id*. at 1318.
35. *Id.* at 1325.
36. *See e.g.* Paul C. Weiler & Gary R. Roberts, *Sports and the Law: Text, Cases, Problems* 234, 200-01 (3d ed., West 2004) (stating that the federal judges who decided the above three cases applied "rather strange versions of the *per se* antitrust ban on group boycotts . . . an approach clearly incompatible with the Rule of Reason now used in all appellate sports cases").
37. *See infra* pt. IV(B) and accompanying text.

sions impacting the nature of professional sports and the labor industry in general.[38]

In the landmark labor antitrust case of *Brown v. Pro Football, Inc.*, the Supreme Court attempted to clarify the intersection between antitrust and labor law by setting forth the non-statutory labor exemption to antitrust law. *Brown* prohibits the blind application of antitrust law to the results of the collective bargaining processes and instead requires courts to determine whether the restraints should fall under the jurisdiction of the NLRB.[39]

III. CLARETT'S CASE AGAINST THE NFL

A. *Facts*

Former OSU star running back Maurice Clarett has accomplished an impressive resume in the amateur football arena.[40] Unfortunately, prior to the start of the 2004 college football season Clarett was suspended from collegiate football, resulting in his attempt to turn professional by entering the 2004 NFL draft.[41] Clarett faced the NFL Eligibility Rules, which are referenced in the current NFL CBA and effectively prohibit any players from entering into the annual draft unless they have exhausted a period of three years (or three full football seasons) after their high school graduation.[42]

The NFL is the premier professional football league in North America and has, since 1925, required all would-be players to wait a "sufficient period of time after graduating high school to accommodate and encourage college attendance before entering the NFL draft."[43] The current CBA was agreed upon by the NFL and the players union, NFLPA, in 1993 and is in force until 2007.[44] Within the terms of the CBA are three separate provisions which reference the NFL Constitution and Bylaws (containing the Eligibility Rules), most notably Article III Section 1, stating:

38. *See infra* pt. IV(C) and accompanying text (discussing the differing interpretations of the non-statutory labor exception as recognized by the Eighth Circuit and the Second Circuit).

39. *See e.g.* Steven D. Buchholz, *Run, Kick, and (Im)passe: Expanding Employers' Ability to Unilaterally Impose Conditions of Employment after Impasse in Brown v. Pro Football*, 81 Minn. L. Rev. 1201, 1226-27 (1997) (stating that the Supreme Court recognized the congressional intent of labor law and policy and by averring that issues of unfair labor practice properly fall under the jurisdiction of the NLRB).

40. *Clarett*, 369 F.3d at 125-26 (noting Clarett's accomplishments to include Big Ten Freshman of the Year, being a freshman starting running back in a league known for its prolific running backs, and leading his team to victory at a national championship at the 2003 Fiesta Bowl).

41. *Id*. (the reasons for Clarett's suspension controversial but irrelevant to the legal issue at hand).

42. *Id*. at 126, 128.

43. *Id*. at 126.

44. *Id*. at 127.

> [T]here will be no change in the terms and conditions of this Agreement without mutual consent . . . if any proposed change in the NFL Constitution and Bylaws during the term of this Agreement could significantly affect the terms and conditions of employment of NFL players, then the NFLMC will give the NFLPA notice of and negotiate the proposed change in good faith.[45]

In 1993, the Bylaws included Article XII, entitled "Eligibility of Players," which prohibited teams from drafting any players who had not exhausted their college football eligibility, graduated college, or been out of high school for five football seasons.[46] In May of 1993, representatives of the NFL and NFLPA signed a letter confirming acceptance of the then current Constitution and Bylaws.[47] The Special Eligibility Rules were accepted into the Constitution and Bylaws and effectively into the CBA with no apparent contention by the NFLPA.[48] Notably, after the Constitution and Bylaws were revised, evidence was submitted to show that the terms were accepted by the NFLPA through the collective bargaining process.[49] Nearly ten years into the CBA, Article XII was amended to (1) require that all potential players have exceeded four seasons prior to being eligible for draft selection, with a right to appeal to the Commissioner for special eligibility and (2) reference a 1990 memorandum by the Commissioner, defining applications for special eligibility as being "accepted only from college players as to whom three full *college* seasons have elapsed since their high school graduation."[50]

B. *Procedural History*

On September 23, 2003, Maurice Clarett challenged the Eligibility Rules as an unreasonable restraint on his entry into the professional football market and, therefore, subject to antitrust violation. The NFL responded by arguing that the Eligibility Rules were agreed upon through

45. *Id*. at 127-28 (stating the references as (1) within the Scope of Agreement - providing the NFLPA notice of any proposed changes to the Constitution and Bylaws with the ability to good faith negotiations; (2) that neither party will be involved in suit related to existing provisions of the Constitution and Bylaws; and (3) any grievances arising under the Constitution or Bylaws pertaining to terms and conditions of employment are subject to the grievance procedures detailed in the CBA).

46. *Id.* at 127.

47. *Id*. at 128 (citing declaration by Peter Ruocco, Senior V.P. of Labor Relations at NFLMC, that leading "to the [collective bargaining agreement], the [challenged] eligibility rule itself was the subject of collective bargaining").

48. *Id*.

49. *Id*. (noting that the declaration of Mr. Ruocco, averred that the Eligibility Rules themselves were the subject of collective bargaining).

50. *Id*. (citing to 1990 memorandum, emphasis in original).

collective bargaining and therefore protected by the antitrust non-statutory exemption and that Clarett lacked standing to bring the suit.[51]

The court rejected the defenses raised by the NFL.[52] First, the district court applied the *Mackey* Factors, a three-part test set forth by the Eighth Circuit in 1976, and did not find a non-statutory exemption.[53] The court held that the Eligibility Rules were (1) not a mandatory subject of collective bargaining; (2) only impacted potential players who were strangers to the bargaining agreement; and (3) were not shown to be the product of arm's-length negotiations.[54] Next the district court rejected the standing defense, holding that a restraint on a NFL player's ability to work is a sufficient injury for antitrust purposes.[55]

Proceeding to the merits of Clarett's claim, the district court applied the Rule of Reason,[56] and found that the Eligibility Rules were so blatantly anticompetitive that they warranted only a "quick look," resulting in a finding that the restraint was unreasonable because of the availability of less restrictive alternative means.[57] On February 5, 2004, the district court granted summary judgment in favor of Clarett and ordered the NFL to instate Clarett for the 2004 draft.[58] The NFL appealed and on March 30, 2004 the United States Court of Appeals for the Second Circuit agreed to hear the appeal less than one week before the NFL draft.[59]

C. *Second Circuit's Ruling*

The issue before the Second Circuit was whether federal labor laws favoring and governing the collective bargaining process precluded the application of the antitrust laws to the NFL Eligibility Rules.[60] The Second

51. *Id*. at 129.

52. *Clarett*, 306 F. Supp. 2d at 382.

53. *Id*. at 391. The *Mackey* Factors being an inquiry as to (1) whether the parties involved were parties to collective bargaining agreements; (2) whether the agreements were pertaining to mandatory subjects of bargaining; and (3) whether the agreement was product of bona fide arm's-length negotiations. If the three factors are answered in the affirmative, the restraint would be subject to the non-statutory labor exception. *Mackey*, 543 F.2d at 614-15; *see also infra* pt. IV(C) and accompanying text regarding *Mackey*.

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

55. *Id*. at 398.

56. *Id*. at 405. Further, the Rule of Reason is a merit based test weighing anticompetitive effects against procompetitive effects related to an alleged antitrust violation. Where anticompetitive effects outweigh any procompetitive effects, the court must find an antitrust violation. *Natl. Socy. of Prof. Engrs. v. U.S.*, 435 U.S. 679, 691 (1978) [hereinafter *Prof. Engrs.*].

57. *Clarett*, 306 F. Supp. 2d at. 408-10 (explaining that certain anticompetitive effects were so strong that the court need perform only a cursory and brief inquiry into the Rule of Reason balance before finding an antitrust violation).

58. *Clarett*, 369 F.3d at 129.

59. *Id.*

60. *Id*. at 130, 138.

Circuit answered in the affirmative, and reversed and remanded, vacating the district court order that made Clarett eligible for the 2004 NFL draft.[61]

In analyzing this issue, the Second Circuit reiterated the position that this area of law is at the crossroads of antitrust and labor law, "an area of law marked more by controversy than by clarity."[62] In addressing the issue on appeal (whether the non-statutory exemption applied to the Eligibility Rules), Judge Sotomayor provided a clarification of the relevant antitrust and labor laws, precedent and policies.[63]

The Second Circuit reviewed Supreme Court precedent which posited, but never precisely delineated, the boundaries of the non-statutory exception. In doing so, the unanimous opinion by the three-judge panel declined to follow the *Mackey* Factors set forth by the Eighth Circuit and instead relied on its own binding precedent to clarify the groundwork set forth by the Supreme Court over the past half century.[64] Judge Sotomayor distinguished *Clarett* from *Mackey* (which has never been adopted by the Second Circuit) and Supreme Court cases – involving antitrust claims raised by employers in the presence of labor-management relations governed by collective bargaining agreements[65] – by noting that unlike those cases, *Clarett* involved a claim by an employee (albeit a potential employee) and not a competing employer.[66] *Clarett* noted that "to permit antitrust suits against sports leagues on the ground that their concerted action imposed a restraint upon the labor market would seriously undermine many of the policies embodied by these labor laws."[67] Further, *Clarett* interpreted the 1996 Supreme Court decision in *Brown*, relying on earlier Second Circuit cases, setting forth a rule that the non-statutory labor exception applied where professional athletes brought antitrust claims against their employers for any restraints resulting from the collective bargaining process concerning mandatory subjects of collective bargaining.[68]

Clarett ruled that the non-statutory exception shielded the Eligibility Rules from antitrust violation and declined to venture further into an analysis on the merits of antitrust law. The court dismissed Clarett's claim of a

61. *Id*. at 130, 138, 143.

62. *Id*. at 130 (quoting itself in *Wood*, 809 F.2d at 959, from 17 years earlier).

63. *See id*. at 131 (inferring the definition of the non-statutory exemption from *Brown*).

64. *Id*. at 134 (stating that *Mackey* "does not comport with the Supreme Court's most recent treatment of the non-statutory labor exemption in *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996)").

65. *Infra* pt. IV(B) discussing Supreme Court precedent in detail.

66. *Clarett*, 369 F.3d at 134 (explaining through footnote 14 that other jurisdictions have followed the same pre-*Brown* interpretation that non-statutory labor exceptions require stronger deferral to labor law for restraints felt predominantly in labor markets).

67. *Id*. at 135.

68. *Id*. at 138 (concluding that "our prior decisions in *Caldwell*, *Williams*, and *Wood* . . . fully comport – in approach and result – with the Supreme Court's decision in *Brown*, we regard them as controlling authority").

per se antitrust violation by noting that Clarett's ineligibility was the result of the NFL CBA which invoked the application of federal labor laws and policies. The court proceeded to address the NFL appeal according to judicial interpretation of the non-statutory labor exception to antitrust law.[69]

Further, the Second Circuit disagreed with the district court's failure to classify the Eligibility Rules as a mandatory subject of bargaining, reasoning that precedent supported a finding that terms of employment are mandatory subjects and the direct relationship that employee competition had on wages and working conditions for all employees.[70] Next, the court held that the Eligibility Rules were mandatory subjects of bargaining because they influenced terms of initial employment, wages and working conditions and were a part of the CBA.[71] Lastly, the court addressed the relationship between the CBA and the Eligibility Rules and concluded that Eligibility Rules were a mandatory bargaining subject and therefore exempt from antitrust law; the court explained that the NFLPA acquiescence to the 2003 amendment served as an acceptance in accordance with the collective bargaining process.[72]

Clarett observed that to allow an antitrust suit would not violate *stare decisis* by departing from Supreme Court and circuit law. Therefore, *Clarett* held that the non-statutory exception applied to the Eligibility Rules and reversed the lower court injunction order to permit Clarett to enter the draft.[73]

IV. LEGAL BACKGROUND

A. *Antitrust Labor Exemptions*

In 1890, Congress enacted the Sherman Act to generally promote free competition and prohibit any restraints on trade and commerce.[74] In 1914, Congress passed the Clayton Act as a statutory exception, protecting cer-

69. *Id*. at 138-39 (noting that the collective bargaining process may lead to some disfavored employees, but seeks the best deal for the players overall).

70. *Id*. at 139-40 (explaining that entrance of competing employees would affect wages and work standards for new and old employees).

71. *Id*. at 139-41, 143 (holding that the terms were terms of the NFL CBA and therefore shielded from antitrust scrutiny and declining to address whether the Eligibility Rules were as a matter of law incorporated by reference into the CBA through the Constitution and Bylaws).

72. *Id*. at 142.

73. *Id*. at 143.

74. The Sherman Act states in part that "[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 (2004); s*ee Northern Pac. Ry. v. U.S.*, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.").

tain labor activities from antitrust violations.[75] To further shield organized labor activities from antitrust violation, Congress passed the Norris-LaGuardia Act of 1932.[76] Shortly thereafter, Congress passed the Wagner Act, or National Labor Relations Act of 1935 ("NLRA"), which embodies the core of U.S. labor relations policy.[77] Within these four statutes, Congress established a general prohibition on anti-competitive acts that would restrain trade and commerce and then clarified a national policy promoting and protecting unionized labor.[78] The fundamental conflict between the antitrust prohibition on anticompetitive collusion and labor policies promoting unionization and collective bargaining has led to nearly a century of litigation.[79] This long running friction has recently found professional sports as the focal arena of contention between labor and employers.[80]

In addition to the statutory exemption expressed in the Clayton Act, the Supreme Court has interpreted 15 U.S.C. to allow for certain non-statutory exemptions from antitrust violations.[81] The antitrust labor exemptions (statutory and non-statutory) have led to much confusion and litigation.[82] National labor policy clearly promotes the benefits of equal powered bargaining during contractual negotiations to allow employers and employees to reach a mutually beneficial contract.[83] The goal of collective bargaining is to allow for parity during negotiations, and this collusion of actors, among employers (horizontal consumers competing for labor) and among employees (horizontal suppliers competing to provide

75. *See Clarett*, 369 F.3d at 130 (giving examples of statutory exception to include boycotts and picketing).

76. *U.S. v. Hutcheson*, 312 U.S. 219, 231 (1941) (holding that the Norris-LaGuardia Act immunized certain labor activities from antitrust action, protecting strikes, picketing, and other forms of employee self help).

77. John J. Baroni, *Brown v. Pro Football, Inc.: Labor's Antitrust Touchdown Called Back; United States Supreme Court Reinforces Nonstatutory Labor Exemption from Antitrust Laws* 33 Tulsa L.J. 401, 403 (1997).

78. *Id*. at 403-04; Shawn Treadwell, *An Examination of the Nonstatutory Labor Exemption from the Antitrust Laws, in the Context of Professional Sports*, 23 Fordham Urb. L.J. 955, 960 (1996).

79. Jonathan P. Heyl, *Brown v. Pro Football, Inc.: Pulling a Tarp of Antitrust Immunity over the Entire Playing Field and Leaving the Game* 75 N.C. L. Rev. 1030, 1030 (1997); *See* National Labor Relations Act § 1, 29 U.S.C. § 151 (1982) (stating purpose of Act). Section 7 of the Act guarantees that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." 29 U.S.C. § 157 (1982).

80. Weiler & Roberts, *supra* n. 36, at 222.

81. *Connell Construction Co. v. Plumbers & Steamfitters Loc. Union No. 100*, 421 U.S. 616, 622 (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").

82. *Wood*, 809 F.2d at 959 (stating in part "[t]he interaction of the [antitrust laws] and federal labor legislation is an area of law marked more by controversy than by clarity").

83. Baroni, *supra* n. 77, at 403 (discussing Congress' creation of a system of countervailing powers through collective bargaining).

labor) runs a direct course into antitrust violation.[84] Litigation in the area defined by the collision of these two federal policies has raised many unanswered questions regarding the scope and the effectiveness of the non-statutory labor exemption.[85]

Where the alleged antitrust violation does not fall under a labor exemption (where courts have found that neither the statutory nor the non-statutory labor exception wards the alleged restraint from antitrust violation), courts have proceeded to determine if the violation is *per se* illegal.[86] The *Silver Exception* precludes a *per se* antitrust violation where the facts show support for the restraint.[87] In situations where the *Silver Exception* applied, the analysis would proceed to determine if the alleged restraint was permitted under the Rule of Reason (the restraint being unreasonable based either on (1) the nature or character of the restraint, or (2) on surrounding circumstances leading to a presumption of intended restraint of trade or enhanced prices).[88] The Supreme Court has held that this reasonableness test should only include consideration of economic factors and not policy considerations that may have been considered in the *per se* analysis.[89]

B. *Historic Supreme Court Law Regarding Non-Statutory Exemption*

Over the past half century, the Supreme Court has heard a handful of cases addressing the interplay between national labor policy (under the Clayton Act, Norris-LaGuardia Act and NLRA) and federal antitrust law (under the Sherman Act). The following Supreme Court cases leading up to *Brown* set forth that to claim the non-statutory exemption, parties exclusive to a bargaining relationship must bargain in good faith when negotiat-

84. *Id*. at 403-04.

85. *See infra* pts. III(C), IV(C) and V (regarding differing rationale from Second and Eighth Circuits).

86. *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 364-67 (1963); *see U.S. Trotting Assn. v. Chicago Downs Assn.*, 665 F.2d 781, 789-90 (7th Cir. 1981) (recognizing acceptance of *Silver* based exception to antitrust cases particularly in organized sports).

87. *See Denver Rockets*, 325 F. Supp. at 1064-65; *see also* Itri, *supra* n. 13, at 307-08 (interpreting the *Silver* Exception to avoid per se illegality if (1) the industry requires self-regulation; "(2) the collective action is intended to (a) accomplish an end consistent with a policy justifying self-regulation, (b) is reasonably related to that goal, and (c) is no more extensive than necessary; and (3) the association provides procedural safeguards which ensure that the restraint is not arbitrary and which furnish a basis for judicial review").

88. *Prof. Engrs*., 435 U.S. at 690, 694-95 (finding the Society's restraint on competition unreasonable because the restraint on competitive bidding, although not price fixing on its face, prevented all customers from making price comparisons).

89. *See id*. at 692 (noting that the Rule of Reason analysis only requires accounting for economic considerations).

ing hours, wages, and working conditions (mandatory subjects of collective bargaining).[90]

1. *Allen Bradley Co. v. Local No. 3, Intl. Brotherhood of Electrical Workers*

The Supreme Court first addressed the non-statutory labor exception in 1945 when it decided a case brought by a non-local employer of electrical workers against the union for allegedly colluding with local employers to "monopolize all the business in New York City."[91] The Court, recognizing that the union sought the agreements with local employers in order to obtain desirable wages and conditions, held that the non-statutory labor exception did not apply in cases such as this, where the union colluded with "employers and manufacturers of goods to restrain competition, in, and to monopolize the marketing of, *such goods*."[92]

2. *United Mine Workers v. Pennington*

Twenty years later, in 1965, the Supreme Court heard *United Mine Workers v. Pennington*[93] and declined to find an exception to the Sherman Act based on actions by a union to promote the monopoly power of certain employers. A small coal mine operator alleged that the coal mining industry had been trapped by a collective bargaining agreement, where employers colluded with the mine workers union to set wages at a level where certain operators would be financially unable to compete and thereby forced out of business.[94] The Court recognized that § 20 of the Clayton Act and § 4 of the Norris-LaGuardia Act specifically removed the existence of labor unions from the grasps of antitrust laws.[95] Still, the Court iterated a limitation to the extent of the exception, stating "a union forfeits its exemption from antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units."[96] *Pennington* went on to set forth that the labor excep-

90. Treadwell, *supra* n. 78, at 961.
91. *Allen Bradley Co. v. Loc. No. 3, Intl. Bhd. of Elec. Workers*, 325 U.S. 797, 798-800, 809 (1945).
92. *Id*. at 798, 810 (emphasis added). Notably, the Court recognized the restraint to be a direct impact on the goods, therefore being an impact on the business of the marketing and supply of these goods to the public.
93. 381 U.S. 657, 661 (1965).
94. *Id*. at 659-61.
95. *Id.* at 661-62.
96. *Id*. at 665.

tion existed as a means to allow the Sherman Act and the NLRA to harmonize and co-exist.[97]

3. *Amalgamated Meat Cutters v. Jewel Tea*

Amalgamated Meat Cutters v. Jewel Tea[98] decided the same day as *Pennington*, involved a claim by a meat seller that a butchers union in Chicago had agreed with a meat sellers trade association to limit the hours of operation in order to stifle competition with certain sellers. The Supreme Court noted that the "hours restriction" was to control the hours in the workday and also to restrict nighttime competition by non-unionized laborers. One of the sellers, Jewel Tea Company, signed the agreement under threat of an employee strike and subsequently brought suit against the union and the association under § 1 of the Sherman Act.

Jewel Tea was the first time the Supreme Court identified and recognized a non-statutory labor exception to antitrust law.[99] A plurality held that the "hours restriction" was protected by the non-statutory exemption, but for differing reasons.[100] Justice White, writing for himself and two other justices, balanced the interests of the unionized workers against any anti-competitive impact on the market.[101] White found no antitrust violation, because the marketing-hours restriction was "so intimately related to wages, hours, and working conditions that the . . . bona fide, arm's-length bargaining in pursuit of their own labor union policies . . . [is] exempt from the Sherman Act."[102] Goldberg, concurring in the judgment but under different reasoning, agreed in the application of the exemption but stated that no balancing was needed because all collective bargaining activity concerning mandatory subjects of bargaining under the NLRA is outside the grasp of antitrust laws.[103] Justice Douglas and the two other remaining

97. *Id.*; Baroni, *supra* n. 77, at 414.

98. 381 U.S. 676, 680-81 (1965) (setting forth a notably split decision showing the disagreement amongst the court as to the boundaries of the non-statutory exemption).

99. *See id.* at 689-90 (recognizing that marketing-hours restrictions are so "intimately related to wages, hours and working conditions" that they are similarly exempt from the Sherman Act even though not statutorily exempt).

100. *Id.* at 698 (Goldberg, J., dissenting in part, concurring in part).

101. *Id.* at 689, 691.

102. *Id.* at 689-90 (also stating that "national labor policy expressed in the National Labor Relations Act places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work. An agreement on these subjects between the union and the employers in a bargaining unit is not illegal under the Sherman Act, nor is the union's unilateral demand for the same contract of other employers in the industry").

103. *Id.* at 711-12 (stating that the NLRA "declares it to be the policy of the United States to promote the establishment of wages, hours, and other terms and conditions of employment by free collective bargaining between employers and unions. . . This national scheme would be virtually destroyed by the imposition of Sherman Act criminal and civil penalties upon employers and unions engaged in such

justices dissented on the grounds that the agreement was subject to antitrust laws and not exempted.[104]

4. *Connell Construction Co. v. Plumber & Steamfitters Loc. No. 100*

A decade after *Jewel Tea*, the Supreme Court again addressed the non-statutory exemption in *Connell Construction Co., Inc. v. Plumber & Steamfitters Local Union No. 100*.[105] This case involved a labor union's requirement that contractors hire subcontractors which employed union members. Connell, a contractor, sued the union arguing that the union's efforts to compel contractors to only hire work from certain subcontractors violated antitrust law.[106] The six-justice majority refused to apply the antitrust non-statutory labor exception, and remanded, holding that the agreement was not protected by any labor exemptions.[107] *Connell* held that the non-statutory exception applied only to agreements achieved through a collective bargaining relationship.[108] Notably, the court recognized that certain union activities (although in the presence of collective bargaining) would cause "significant adverse effects on the *market* and on *consumers* – effects unrelated to the union's legitimate goals" and could be outside of the non-statutory labor exception shield.[109]

These four cases set the relevant case law precedent for the circuits to interpret and apply the non-statutory labor exception. The limited extent of case law has been a particularly troubling point of contention between the circuits (particularly between the Second Circuit and Eighth Circuit's interpretations of how employee-raised claims are to be handled in situations governed by the collective bargaining process).[110] A critical point of departure in the interpretation of the non-statutory labor exception has developed when determining whether the exception has a different standard when applied to employer and employee raised claims, business and labor market claims, respectively.[111]

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collective bargaining. To tell the parties that they must bargain about a point but may be subject to antitrust penalties if they reach an agreement is to stultify the congressional scheme").

104. *Id.* at 697.

105. 421 U.S. at 619.

106. *Id.* at 618-19, 620-21.

107. *Id*. at 625.

108. *Id.* at 635.

109. *Id*. at 624 (emphasis added, meaning consumer market and not the labor market *per se*); *see* Daralyn J. Durie & Mark A. Lemley, *The Antitrust Liability of Labor Unions for Anticompetitive Litigation*, 80 Cal. L. Rev. 757, 785-86 (1992) (recognizing *Connell* found the union activity outside of the labor exception because by properly distinguishing anticompetitive restraints on business markets from restraints in labor markets, here the restraints on business were substantially anticompetitive to the degree beyond any non-statutory labor exemption).

110. *See infra* pt. IV(C) (Eighth and Second Circuit interpretations) and accompanying text.

111. *See id*. (*Brown* discussion) and accompanying text.

C. *Regional Application of Non-Statutory Labor Exception*

1. *The Eighth Circuit Interpretation*

In 1976, the Eighth Circuit decided *Mackey*, where a group of NFL players brought an antitrust action against the NFL *Rozelle* Rule, which allows the league commissioner to require any club acquiring a free agent to compensate the player's former club.[112] The Eighth Circuit relied heavily on Supreme Court precedent,[113] in averring that a non-statutory exception would apply if the three following inquiries were answered in the affirmative: (1) whether the parties involved were parties to collective bargaining agreements; (2) whether the agreements were pertaining to mandatory subjects of bargaining; and (3) whether the agreement was product of bona fide arm's-length negotiations.[114]

Mackey answered the first two prongs in the affirmative, but held that the *Rozelle* Rule was not the product of bona fide arm's-length negotiations.[115] *Mackey* found sufficient evidence to support a holding that the restraint was not the product of bona-fide arm's-length negotiations because it was unilaterally imposed by the NFL without a *quid pro quo*, or mutual consideration.[116] Proceeding to a merit based analysis under antitrust principles, the court found that despite there being an issue between players against their employer, it was still a business or product market restraint and subject to antitrust analysis.[117] First, the court addressed the rule under a *per se* violation analysis and found that restraint would be better analyzed under the Rule of Reason.[118] Ultimately, *Mackey* found that the *Rozelle* Rule violated the Rule of Reason because it was an unreasonable restraint on labor conditions.[119] Having found the restraint unrea-

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

113. *Id.* at 613-15 (relying heavily on *Connell*, *Jewel Tea*, and *Pennington* for interpretation of governing principles behind the non-statutory labor exception to require a three question analysis).

114. *Id.* at 614-15; *see* Gary R. Roberts, *Sports League Restraints on the Labor Market: the Failure of Stare Decisis*, 47 U. Pitt. L. Rev. 337, 392-94 (1996) (arguing that the court's requirement of bona-fide arm's-length negotiations to lack any principled justification because it would undermine the NLRA mandate against government interference in private labor issues).

115. 543 F.2d at 615-16.

116. *Id.*

117. *Id.* at 616-22 (rejecting the NFL's argument that the restraint on players' services was a restraint on labor and not a product market, the latter being prohibited by antitrust law and the former being exempted by the Clayton Act).

118. *Id.* at 619-20 (finding (1) traditional *per se* violations were for claims between business competitors, not between union and employers, and (2) that the goal of minimizing the need for intensive inquiries into the market, was not applicable because of the lower court's exhaustive analysis).

119. *Id.* at 620-21 (finding substantial evidence that player mobility and salaries were unreasonably restrained because the rule was more restrictive than necessary to protect any interests of the NFL).

sonably anticompetitive, the court held that the *Rozelle* Rule was an antitrust violation.[120]

About a decade after *Mackey*, the Eighth Circuit decided *Powell v. National Football League*.[121] *Powell* involved an antitrust claim that the post-impasse NFL imposition of the college draft and uniform players' contract terms constituted unlawful restraints of competition.[122] *Powell* ultimately held that the present case was subject to the non-statutory labor exception because the alleged restraint was a product of an ongoing collective bargaining process and therefore shielded by the non-statutory labor exception.[123] *Powell* has been interpreted to set forth a rule (which was notably not followed by the Supreme Court in *Brown v. Pro Football*)[124] that antitrust law did not apply to any situations which involved labor law (where a union represented employees in a collective bargaining process).[125]

2. *The Second Circuit Law*

In contrast to *Mackey*, the Second Circuit has declined to follow a specific three-part test to determine the extent of the non-statutory exemption.[126] In 1984, 12 years before *Brown*, the Second Circuit decided *Wood v. National Basketball Association*[127]; *Wood* held that the NBA's rules regarding College Draft, Right of First Refusal, and Revenue Sharing/Salary Cap System were part of the NBA CBA and were mandatory subjects of bargaining. Wood was drafted into the NBA and later challenged the draft process and salary caps as limiting competition for college players.[128] The court appreciated that rules prohibiting Wood from becoming a free agent were to his detriment, but went on to explain the union was under no obligation to please everyone; rather, the union had properly sought the best

120. *Id*. at 622-23.

121. 930 F.2d 1293 (8th Cir. 1989) (the author notes that this case was not followed by the Supreme Court in *Brown*, but is being discussed as a useful reference to understand Eighth Circuit application of the non-statutory labor exception).

122. *Id*. at 1295.

123. *Id.* at 1304. *Powell* stated that "as long as there is a possibility that proceedings may be commenced before the Board, or until final resolution of Board proceedings and appeals there from, the labor relationship continues and the labor exemption applies." *Id*. at 1303-04.

124. *See infra* pts. IV(2)-(3) and accompanying text (*Brown* declined to follow the Eighth Circuit's blanket application of the non-statutory labor exception to all situations that were found to be part of the collective bargaining process.).

125. Student Author, *Releasing Superstars from Peonage: Union Consent and the Nonstatutory Labor Exception*, 104 Harv. L. Rev. 874, 874-75 (1991).

126. *See infra* pt. IV(C)(2) (finding support to not follow *Mackey* from the U.S. Supreme Court's lack of mention of the *Mackey* Factors when deciding *Brown*).

127. 809 F.2d at 954.

128. *Id*. at 958.

overall deal for the players through the collective bargaining process.[129] The court noted that where union representatives negotiate and deal on behalf of labor suppliers, the good of the many would unavoidably lead to some laborers having undesirable treatment.[130] Here, Wood's ability to become a free agent at his own initiative was not a right that the union had secured during the collective bargaining process.[131] The court therefore held that the terms were negotiated in good faith during the collective bargaining process and therefore were shielded from federal antitrust law.[132]

Wood interpreted then current Supreme Court precedent to mandate that in collective bargaining situations, employee representatives have the power to negotiate terms that could likely be undesirable to many employees (including employees not in the bargaining unit).[133] Further, the court importantly noted that the Supreme Court prohibited courts from measuring the value of terms and tactics used during collective bargaining negotiations.[134] "We need not determine the precise limits of the rules laid down by the cases cited or consider fine distinctions going to whether product- or labor-market activities are in issue. Wood's claim . . . implicates the labor market and subverts federal labor policy."[135] *Wood* declined to precisely lay out the differences between labor and product market impacts, but left the door open for further explanation.

Two years before *Brown*, the Second Circuit decided *National Basketball Association v. Williams*.[136] In *Williams*, the NBA sought a court declaration that the continued imposition of certain disputed provisions of the then expired CBA were not in violation of antitrust laws, and that disputed provisions were lawful even if antitrust laws applied. The players' union counterclaimed, asserting that continued imposition of the terms from the expired CBA were antitrust violation.[137] The Second Circuit held that the non-statutory labor exemption shielded the imposition of terms agreed upon from a CBA even after its expiration and into impasse.[138]

Later that same year, *Caldwell v. American Basketball Association*[139] ruled that a CBA between a league and players' union barred a player from

129. *Id*. at 960.
130. *Id*. at 961.
131. *See id*. at 962 (noting that no special judicial exception should allow courts to intervene to strike down collective bargaining terms, otherwise the entire process would unravel).
132. *Id*. at 962-63.
133. *Id*. at 960.
134. *Id* at 962 n.5 (stating that courts are not to attempt to measure a *quid pro quo* in determining if a negotiation resulted in even terms).
135. *Id*. at 963.
136. 45 F.3d 684, 685-86 (2d Cir. 1995).
137. *Id*.
138. *Id*. at 693.
139. 66 F.3d 523 (2d Cir. 1995).

bringing an otherwise plausible antitrust claim against the league. A professional basketball player brought antitrust and tort action against the American Basketball Association ("ABA") and others, alleging that he was blacklisted and prevented from playing professional basketball as a result of his activities as president of the players' union.[140] The Second Circuit held that the non-statutory labor exemption barred an antitrust claim, in that allowing player's claims to proceed under the Sherman Act would subvert fundamental principles of federal labor policy.[141] The court then noted that labor policy required the NLRB to handle disputes such as whether discharge is the result of union activities or for cause.[142]

Pre-*Brown* Second Circuit case law interpreted the non-statutory labor exception in labor markets to be highly deferential to national labor law and considered that the NLRB had jurisdiction, and not the antitrust courts.[143] In cases where the alleged violation was raised between a supplier of labor and a consumer of labor, the court interpreted that congress specifically desired to shield the results of the collective bargaining process from antitrust review. These Second Circuit cases were further strengthened by the Supreme Court in 1996 when it found that an antitrust claim by development squad players was exempted by the non-statutory labor exception despite the NFL and NFLPA being in impasse.[144]

3. *Brown v. Pro Football, Inc.*

In 1996, in the midst of this split in the circuits, the Supreme Court granted *certiorari* to again address the "intersection of the Nation's labor and antitrust laws."[145] Justice Breyer's opinion set out to clarify the conflict between otherwise opposing policies and provided a guide by which the non-statutory labor exception could be applied in all labor markets.[146] In *Brown*, the NFL and NFLPA had reached an impasse after negotiations to renew the CBA had failed. A group of NFL players claimed that the collective bargaining process had expired and that NFL had violated antitrust law by unilaterally setting policy for negotiations with development squad players for wages, hours and so forth.[147] The issue was whether the NFL salary arrangement was protected from antitrust liability by federal labor

140. *Id*. at 526.
141. *Id*. at 527, 530.
142. *Id*. at 530 (noting that the NLRA had governed labor disputes for over 50 years in every labor market except that of professional sports).
143. *See supra* pt. IV(C)(2) and accompanying text (discussing relevant Second Circuit case law).
144. *See Clarett*, 369 F.3d at 135.
145. *Brown*, 518 U.S. at 233.
146. *See* Baroni, *supra* n. 77, at 401.
147. *Brown*, 518 U.S. at 233-35.

laws despite the NFL and NFLPA having reached an impasse.[148] The Court relied on case law precedent and interpretations of antitrust and labor law and policy and thereby declined to follow the Eighth Circuit opinions from nearly a decade earlier.[149]

Brown found that non-statutory exemption applied because to find otherwise would open the flood gates for litigation about much labor law, and would allow courts to step into the shoes traditionally occupied by NLRB with respect to collective bargaining agreements.[150] Justice Breyer noted a particular concern raised by the Court in *Jewel Tea* "about antitrust judges 'roaming at large' through the bargaining process."[151]

Brown noted that all restraints, agreed upon by the parties to the collective bargaining negotiations, can be considered to be part of the CBA and therefore subject to the non-statutory exception.[152] By considering the impasse still part of the collective bargaining process, *Brown* recognized the scope of the non-statutory exemption to encompass issues external but concerning a written collective bargaining agreement.[153] Further, the Court declined to make a special ruling specific to professional football players (although noting that these players do possess some unique characteristics) and instead defined the non-statutory labor exemption for all labor markets that involve collective bargaining as a means of labor negotiations.[154] *Brown's* deference to the NLRB when deciding this employer-raised antitrust case was a highly controversial seminal case because it clarified the Supreme Court's position that the non-statutory labor exception strongly favored the labor process to address claims raised in a labor market governed by the collective bargaining process.[155]

148. *Id*.

149. *Id*. at 231-50 (*Brown* declined to mention or follow the *Mackey* factors and the *Powell* interpretation, which favored blanket exemption in cases that involved collective bargaining.); *see* Weiler & Roberts, *supra* n. 36 and accompanying text (discussing the differing approaches by the Eighth and Second Circuits); *supra* pt. IV(C)(2) and accompanying text (Second Circuit cases which were decided in the aftermath of *Mackey* still declined to follow the *Mackey* factors and instead provided its own interpretations.).

150. *Id*. at 247-48, 250.

151. *Id*. at 248 (noting the opinion of Justice Goldberg in *Jewel Tea*, and stating that antitrust courts are not well equipped to address motives used during tactical negotiations in the collective bargaining process).

152. *Id*. at 243-44, 250 (stating that *Pennington*, *Jewel Tea*, and *Connell* only dealt with agreements because of the specific fact patterns, but that the exception was broader).

153. *Id*. at 250 (stating that the conduct at issue took place during and immediately after a collective bargaining negotiation, growing out of and directly relating to the bargaining process).

154. *See id*. at 249-50; Baroni, *supra* n. 77, at 401.

155. *See e.g.* Baroni, *supra* n. 77, at 402.

V. RESTRAINTS ON LABOR MARKETS VS. RESTRAINTS ON BUSINESS MARKETS

Brown clarified a subtle yet important and long standing principle that antitrust laws have long treated labor impacts and business impacts differently. In light of the scant Supreme Court cases dealing with the intricacies of the antitrust law non-statutory labor exception, the Second Circuit and other circuits have interpreted the few available Supreme Court cases to inherently distinguish labor market related cases from business (product) market cases which more directly impacted consumers.[156]

In *Wood*, the Second Circuit held that Wood's arguments that the restraints were subject to antitrust law were without valid legal grounds.[157] The court noted that:

> Each of the decisions involved injuries to *employers* who asserted that they were being excluded from competition in the product market. Wood cites no case in which an employee or potential employee was able to invalidate a collective agreement on antitrust grounds because he or she might have been able to extract more favorable terms through individual bargaining.[158]

The Second Circuit further stated that it need not specifically delineate the different circumstances that would fall into either a product (business) market or a labor market analysis under the non-statutory labor exception.[159] Instead, the court explained that these two situations were governed by separate areas of law, antitrust law and labor law, respectfully; the court further opened the door for a later case(s) to provide the proper detailed guidance to distinguish how to handle antitrust claims raised by employees or employers in collective bargaining defined situations.[160] *Wood* and commentators set the stage for a court to further delineate the application of the non-statutory labor exception in antitrust allegations raised by suppliers of labor – *Brown* answered the call.[161]

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156. *See supra* pt. IV(C)(2) (Second Circuit Law) and accompanying text.
157. 809 F.2d at 963.
158. *Id.* (emphasis in original).
159. *Id.*
160. *See id.*; *see generally* Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 Geo. L.J. 19, 20-21 (1986) (noting that in situations where employees have elected to unionize and participate in the collective bargaining process, any resulting restraints – if purely impacting labor markets – would be shielded from antitrust violation; implying that cases which fell between the extremes of pure labor market impacts and pure business market impacts would require further guidance by courts).
161. By distinguishing the immediate claim by Wood, a player employee, from the employer raised issues in *Pennington*, *Jewel Tea*, and *Connell*, *Wood* implicitly interpreted employee raised antitrust claims which had primary impacts on labor markets as being highly deferential to NLRA and NLRB

In 1980, the Third Circuit set forth that "[t]he term nonstatutory exemption . . . is a shorthand description of an interpretation of the Sherman Act, making that statute inapplicable to restraints imposed in the interest of lawful union monopoly power in the labor market."[162] *Consolidated Express v. New York Shipping Association*[163] interpreted the non-statutory labor exception to require deferral to restraints created through collective bargaining process if the impact was inflicted primarily in the labor market and only peripherally in the business market.

Two years later, in 1982, the Seventh Circuit decided *Mid-America Regional Bargaining Association v. Will County Carpenters District Council.*[164] In this case, suppliers of labor brought antitrust claims against the union, contractors and the local utility claiming that the defendants had conspired together to set wages outside of the collective bargaining process.[165] The court held that the non-statutory labor exemption applies where the alleged restraint "is not a 'direct restraint on the business market' but rather a direct restraint on the labor market, with only tangential effects on the business market."[166] The actions by the defendants were found to be within the boundaries of both the non-statutory and statutory labor exceptions to antitrust law because of the indirect business market restraints.[167]

VI. *CLARETT* – AN ANALYSIS

Many sports fans and commentators were shocked and surprised when the Second Circuit reversed the antitrust violation found by the U.S. District Court for the Southern District of New York.[168] Although many of

jurisdiction and effectively removed from the grasps of antitrust courts. Legal scholars and commentators have addressed the periphery of this issue and affirmed the position that some degree of "lessening of business competition would have to be tolerated in order to achieve labor policy goals." Eleanor R. Hoffman, *Labor and Antitrust Policy: Drawing a Line of Demarcation,* 50 Brook. L. Rev. 1, 34 (1983). Further, only restraints that involved the marketing of goods and services would be subject to antitrust law, and where the restraint did not deal with marketing to consumers (business and/or product markets), the Sherman Act would not apply. *Id*. at 48.

162. *Consol. Express, Inc. v. N.Y. Shipping Assn.*, 602 F.2d 494, 513 (3d Cir. 1979), *vacated on other grounds*, *Intl. Longshoremen's Assn. v. Consol. Express, Inc.*, 448 U.S. 902 (1980).

163. *Id*. (citing to *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 503-04, 512 (1940) where Justice Stone succinctly explained that where a union's imposition of wage setting terms were focused on labor market and not intended or shown to have a direct impact on the product market).

164. 675 F.2d 881 (7th Cir. 1982).

165. *Id*. at 883.

166. *Id*. at 893.

167. *Id*.

168. *Compare e.g.* DraftClarett.org, http://www.draftclarett.org/index.html (July 8, 2005) (arguing that the NFL's motives for keeping players out are unreasonable and cost potential players their livelihoods) *with e.g.* Rick Harrow, *The NFL at Draft Time – Business is Great*, http://web.archive.org/web/20040607014405/http://www.sportsbusinessnews.com/index.asp?story_id=35349 (June 6, 2004)

these commentators may have extensive knowledge of the game and business of football, *Clarett* properly recognizes that the non-statutory labor exemption applies to the NFL Eligibility Rules. Ultimately, labor laws governing the collective bargaining process prevailed over the cries of antitrust violation, and the Second Circuit properly applied the non-statutory labor exception to the Eligibility Rules.[169]

The Second Circuit's decision is a proper interpretation and application of the guiding principles behind federal antitrust law and national labor law, and its respective policies. Supreme Court decisions and earlier Second Circuit and other circuit case law set a precedent that courts must defer to the NLRB in situations where the restraint primarily impacts the labor market (such as where an employee claims that they are being restrained in their ability to provide labor) which is defined by the collective bargaining process.[170] The decision was supported by strong rationale based heavily on the Supreme Court's ruling in *Brown*, and with relevant circuit law.[171] In particular, *Clarett* declined to openly denounce the Eighth Circuit's *Mackey* factors, and instead reaffirmed its own earlier interpretations of the non-statutory labor exception.[172] *Clarett* reaffirmed the interpretation that the exception shields restraints primarily directed to labor markets when the restraints are generated through the collective bargaining process.[173]

Generally, where the restraint is primarily in a labor market (which is focused on the production of human labor) and the result of a mandatory subject of bargaining, the non-statutory labor exemption should apply; conversely, where the impact of the restraint is primarily focused in a business market (which impacts competition and consumer prices) a court should look to the *Mackey* factors as a plausible standard.[174] Further, the non-statutory labor exception to antitrust law should be understood not as a deviation from antitrust law, but rather as coalescence between antitrust

(stating that the court was right to keep Clarett ineligible, not because of antitrust or labor policy but merely because "pro football is a tougher mental and physical game than any other sport").

169. *See supra* pt. III (discussing the outcome of the *Clarett* case).

170. *Compare Wood*, 809 F.2d at 962-63 (distinguishing cases brought by employers and those brought by employees) *with Pennington*, 381 U.S. at 657 (where the claim was brought by an employer against a union that had allegedly colluded with the other employers in the multi-employer bargaining unit to impact the business).

171. *See supra* pt. III(C) and accompanying text (discussing the Second Circuit's rationale.).

172. *See Clarett*, 369 F.3d at 134 n. 14.

173. *Id.*

174. *See generally Brown*, 518 U.S. at 240-41, 251 (explaining that the restraint, a mandatory subject of bargaining in a setting dominated by collective bargaining, was highly protected by labor law and that since the restraint concerned only the parties at issue – the labor relationship between employer and employee – the post-impasse development squad wages were protected from antitrust review; *Clarett*, 369 F.3d at 134 n. 14 (citing to support from other jurisdictions in noting the labor market restraint where employees raise antitrust claims).

and labor laws.[175] Under *Brown*, where the restraint is a mandatory subject of bargaining, generated as the result of the collective bargaining process, the non-statutory labor exemption to antitrust law more heavily favors labor policy and requires courts to defer to labor law remedies under the authority of the NLRB.[176] Conversely, earlier Supreme Court analysis of employer-raised antitrust claims alleging collusive behavior between the union and competing employers have resulted in a more demanding standard – favoring antitrust law where restraints focus on business competition.[177]

In light of the post-*Brown* dual standard approach to the exemption, *Clarett* tackles the question of whether an employee eligibility restraint, generated through the collective bargaining process, can be shielded by the non-statutory labor exemption to antitrust law. Antitrust law prohibits unreasonably anticompetitive restraints in the business market[178] and labor law promotes the use of collective bargaining as a means to balance the power between employees and employers.[179] *Clarett* explains in footnote fourteen that antitrust and labor law, although seeming to directly collide, can be considered reconciled by the non-statutory labor exemption to dictate distinct legal standards where restraints either primarily impact the business or the labor markets.[180]

Clarett aptly recognized binding precedent to show that the non-statutory labor exception shields collective bargaining related restraints in cases where the impact is focused primarily on labor markets,[181] noting that the non-statutory exemption applies "where needed to make the collective

175. *See Clarett*, 369 F.3d at 130, 135.

176. *Id.* at 134-35 (interpreting the rationale set forth by *Brown* regarding favoring resolution through NRLB action and congressional labor policy of exempting courts from usurping the role of the NLRB).

177. *See supra* pt. IV(B) and accompanying text (discussing historical Supreme Court precedent before *Brown*).

178. The Sherman Act was limited by the Clayton and Norris-LaGuardia Acts to apply to unreasonable restraints in the commerce, with human labor and collective bargaining being considered outside of the definition of commerce.

179. This note posits that the infamous intersection between antitrust law and labor law can be viewed as a spectrum of coalescing laws where the non-statutory labor exemption can be viewed as gray area between antitrust and labor. The non-statutory labor exception accordingly would lean towards labor policy and deference to NLRA and NLRB in cases which involved restraints more heavily related to labor relations (i.e. labor related claims brought by employees against employers or union representatives). Accordingly, the exception would require courts to do a more stringent analysis in cases (in accordance with *Jewel Tea* and related employer raised cases) where the impact was predominantly focused on the products and business market, and where the collusive activity by the union with employer(s) would result in direct anticompetitive impacts on consumers.

180. *Id.* at 134.

181. *Clarett*, 369 F.3d at 134-35 (Accordingly, the court supports its interpretation of the law as set forth by earlier cases such as *Wood*, by noting that *Brown* shared very similar rationale, when it was decided over a decade after *Mackey*.).

bargaining process work."[182] Further, *Clarett's* holding is proper because the Eligibility Rules dictate who is eligible to work, concern which amounts to mandatory subjects of collective bargaining.[183] Commentators have, however, voiced disapproval of the Second Circuit ruling.[184] These opinions fail to recognize the distinct focuses of antitrust law in the business market; labor law in the labor market; and the statutory and non-statutory labor exception to antitrust law to provide a continuum in the interplay between these two markets.[185]

This note asserts that *Clarett* properly distinguishes between restraints primarily focused in labor markets from those primarily focused in business markets by viewing earlier Supreme Court precedent in light of the more recent *Brown* decision.[186] This analysis will attempt to shed some light on how the non-statutory labor exemption has developed into a dual standard system which is flexible to adjust to the seemingly conflicting policies of antitrust law and national labor law.

A. *Non-Statutory Labor Exemptions: Labor Market vs. Business Market*

Commentators have noted that non-statutory labor exemptions to antitrust violations apply to restraints generated from collective bargaining, where alleged anticompetitive impacts of a restraint are felt only in the labor market.[187] *Clarett* interprets *Brown* (which declined to endorse or mention the *Mackey* factors) to support the pre-*Brown* governing Second Circuit law, that restraints which primarily focus on labor markets are exempted from antitrust law if the restraints deal with mandatory subjects of

182. *Brown*, 518 U.S. at 234.

183. *See supra* pt. III(C) and accompanying text (discussing the *Clarett* court's rationale).

184. *See e.g.* Scott A. Freeman, Student Author, *An End Run Around Antitrust Law: The Second Circuit's Blanket Application of the Non-Statutory Labor Exemption in Clarett v. NFL*, 45 Santa Clara L. Rev. 155, 190-91 (2004) (providing an unconvincing proposition that the *Clarett* three judge panel interpretation of the *Brown* Supreme Court eight judge majority opinion – setting forth that collective bargaining produced restraints which primarily impact labor markets are subject to the non-statutory labor exception – fails to provide clarity and therefore favors the Eight Circuit interpretations).

185. *See generally* Weiler & Roberts, *supra* n. 36, at 176-78 (averring that anticompetitive restraints are usually considered to operate in the product market, whereas player restraints in professional sports – and other employer/employee situations – typically involve labor related concerns and do not primarily impact consumer welfare).

186. *Antitrust Law – Nonstatutory Labor Exemption – Second Circuit Exempts NFL Eligibility Rules from Antitrust Scrutiny – Clarett v. National Football League, 369 F.3d 124 (2d Cir. 2004)*, 118 Harv. L. Rev. 1379, 1379 (2005) (stating that "[t]his new standard wisely allows for more flexibility in non-statutory exemption analysis, particularly because it avoids a paramount weakness of the Mackey framework: namely, the Eighth Circuit's formulation making determinative the bona fide arm's-length negotiations requirement") [hereinafter Harv. *Antitrust*].

187. *See e.g.* Roberts, *supra* n. 114, at 338-39.

bargaining. [188] Here, Clarett's antitrust claim that the Eligibility Rules barred him from offering his services should be considered to be a restraint focused primarily in a labor market because he is complaining of an injury suffered as a supplier of labor.

Employee raised complaints regarding labor practices and employer-raised complaints regarding anticompetitive business practices differ because the labor practices are governed primarily by labor law, whereas the anticompetitive business practices are governed primarily by antitrust law.[189] Furthermore, restraints primarily focused in labor markets, ("labor restraints") have been considered to be exempt where the restraints have actually created lower prices and monopoly power (where the anticompetitive power is held by the buyer and not the seller).[190] As such, Clarett's claim should be considered to be a labor restraint and not a business market restraint because it involves a restraint where employers and employees have agreed to limit the supply of labor.

Prior to *Brown*, courts applied the non-statutory labor exemption with limited Supreme Court guidance.[191] *Mackey* addressed an employee raised claim under a similar analysis as provided in *Jewel Tea*, *Pennington*, and *Connell*, all of which addressed employer-raised claims. Other jurisdictions, including the Second Circuit, however, distinguished employee raised claims from employer-raised claims.[192] This recognition is ultimately an appreciation for the difference between labor markets (which have been deemed by Congress to be primarily governed by National Labor Law and policy) and business markets (which are primarily governed, *inter alia*, by antitrust law).[193]

There is a tempting but misled tendency to treat both the labor and product markets in a similar fashion; after all, both markets ultimately impact the end consumers (indirectly and directly, respectively). Further, both markets involve consumers and suppliers. Reading the Sherman Act

188. *See supra* pt. V and accompanying text (discussing the Second Circuit's interpretation that there is a distinction in labor market related restraints, as supported by *Brown*).

189. Roberts, *supra*, n. 114, at 338-40 (discussing the impact of the non-statutory labor exception to labor markets and how there has been some case law support even outside of professional sports).

190. *See Kartell v. Blue Shield of Mass. Inc.*, 749 F.2d 922, 930-31 (1st Cir. 1984) (Breyer, J.) (noting that the lower prices resulting from the health service consumer should not be scrutinized by the antitrust court). Here, the buyer of labor is the NFL and the supplier of labor is Clarett.

191. *Clarett*, 369 F.3d at 131; John Gerba, Student Author, *Instant Reply: A Review of the Case of Maurice Clarett, the Application of the Nonstatutory Labor Exemption, and its Protection of the NFL Draft Eligibility Rules*, 73 Fordham L. Rev. 2383, 2414-15 (2005).

192. *See supra* pt. V and accompanying text (where claims raised by employees in the context of suppliers of labor are typically directed towards restraints which are primarily focused on labor markets, and where claims raised by employers are typically raised as claims regarding competition and business markets).

193. *See supra* pt. IV(A) and accompanying text.

in isolation, all anticompetitive activities would be subject to violation.[194] Looking at labor policy, however, it is clear that in labor markets, Congress clearly wanted to promote collective bargaining to be beyond the reach of antitrust courts.[195]

The inevitable collision of these two national policies resulted in the statutory and non-statutory exceptions. To reconcile these policies, one must read the laws together and understand that the antitrust and labor laws and policies create a continuum where antitrust and labor work together through the non-statutory labor exemption.[196] Although the Supreme Court has been reserved in the amount of guidance to provide, *Brown* shows that the non-statutory exceptions clearly distinguish between business market anticompetitive activity and labor market anticompetitive activity.[197] Notably, *Clarett* reads *Brown* and additional Second Circuit precedent to dictate that the courts should defer to NLRB jurisdiction where the alleged restraint impacts the labor market and is a mandatory subject of collective bargaining.[198]

Where an allegation of antitrust violation is particularly focused on labor concerns, the statutory labor exemptions (as defined *inter alia* by the Clayton Act) and non-statutory labor exemptions (as defined by Supreme Court precedent) dictate that jurisdiction belongs to the NLRB and not the antitrust courts.[199] In employee raised situations, the employee is arguing that the impact is upon them as a labor supplier. The consuming public may ultimately be impacted, but Congress has expressly (through national labor policy) stated its desire to remove these types of claims from antitrust charged courts and place it into the jurisdiction of labor law and the NLRB.[200] As a result, *Clarett* recognized that Maurice Clarett's claims involved a restraint which was brought to the court in the context of a labor

194. *See* 15 U.S.C. § 1 (setting forth the policy goals of Sherman Act as prohibiting unreasonable anticompetitive restraints and failing to distinguish between anticompetitive behavior by consumers or suppliers).

195. Daniel H. Weintraub, *1994-1995 Annual Survey of Labor and Employment Law: Labor Law: Collective Bargaining*, 37 B.C. L. Rev. 303, 305-07 (1996). Further, the policy of labor law is to allow for workers and employers to be on equal bargaining strength to allow for the best possible labor terms.

196. *See supra* n. 178.

197. *See* Weiler & Roberts, *supra* n. 36, at 223-24 (noting that the Supreme Court has *not* issued a blanket antitrust exemption, but has looked into the affected markets impacted by the alleged anticompetitive impacts to determine if the exemption should apply); Weintraub, *supra* n. 195, at 305-07 (noting Congress' purpose in enacting the NLRA was to allow certain collective bargaining restraints to persist and even those that may impact business markets).

198. *Clarett*, 369 F.3d at 143; *see infra* pt. (VI)(D) and accompanying text (discussing why *Clarett* was right in finding that the Eligibility Rules are mandatory subjects of collective bargaining).

199. *Id.*

200. *Id.*

market restraint, and properly ruled that the Eligibility Rules were exempted because of the non-statutory labor exception.[201]

Having determined which type of market the antitrust claim resides, the next step is to perform a detailed analysis of whether the non-statutory labor exemption applies. Again, this note asserts that under *Brown*, a continuum exists between the Second and Eighth Circuit interpretations of the non-statutory labor exemption.[202] For restraints primarily focused in labor markets, this note asserts that *Clarett* properly interprets *Brown* to recognize a stronger deference to labor law.[203] For restraints primarily focused in business markets, this note asserts that the underlying analysis set forth by *Mackey*, interpreting pre-*Brown* Supreme Court law, properly sets a standard that the exemption should apply for claims raised by parties to the restraint, where the restraint is a mandatory subject of bargaining, and the result of bona fide arm's-length negotiations.[204]

B. *Non-Statutory Labor Exemption in the Labor Market*

Understanding that labor market restraints impact the relationship between labor and employers, the presence of a collective bargaining dictates that the alleged antitrust claim should be quashed for an adjudication by the NLRB under an unfair labor practice claim. *Clarett* insightfully recognizes that the non-statutory labor exemption waives antitrust liability for any "restraints on competition imposed through the collective bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining."[205] *Brown* set forth that the non-statutory labor exemption applies to all mandatory subjects of bargaining (even a post-impasse salary restraint) where a CBA is present. Here the question turns on whether player eligibility is a mandatory subject of bargaining.[206] *Clarett* correctly finds that the Eligibility Rules were mandatory

201. *Wood* and progeny accurately foresaw the direction that the Supreme Court would take and did take in *Brown.*

202. *Compare e.g.* Jocelyn Sum, *Clarett v. National Football League*, 20 Berkeley Tech. L.J. 807, 808, 822-24 (2005) (averring that the Second Circuit law should be trumped for Eighth Circuit law) *with e.g. supra* pt. III(C) and accompanying text (discussing how *Clarett* declined to follow or reject the *Mackey* factors, and instead set out its own interpretation because the factual situations between *Clarett* and *Mackey* differed).

203. *See supra* pt. V and accompanying text; *see generally Clarett*, 369 F.3d 134 (declining to reject *Mackey*, and instead noting that the Second Circuit and other Circuits have interpreted *Brown* and other Supreme Court precedent to recognize a stronger deference to labor law for restraints primarily focused in labor markets).

204. *See supra* pt. V and accompanying text; *see generally Mackey*, 543 F.2d at 613-16 (discussing Supreme Court precedent relied upon in determining the three pronged *Mackey* factors).

205. *Clarett*, 369 F.3d at 138 (citing to *Brown*, 518 U.S. at 235).

206. *See infra* pt. VI(D) and accompanying text (discussing whether the Eligibility Rules are Mandatory Subject of Bargaining or Incorporated by Reference).

subjects of bargaining because of the immediate impact that draft eligibility has on the working conditions of current and future employees.[207]

Commentators have questioned whether professional athletes deserve a different standard to determine whether player eligibility rules qualify as mandatory subjects of bargaining (noting that in traditional collective bargaining wages are set by group and not made specific to certain employees). All labor markets defined by collective bargaining are within the safeguard of the non-statutory exemption.[208] To allow otherwise would jeopardize the balance between labor and antitrust law and would "subvert fundamental principles of our federal labor policy."[209] *Clarett* further explained that the rights of individual players to negotiate specific salaries in no way demonstrated a departure from collective bargaining, and instead was an example of agreements made through that very process.[210] Therefore, *Clarett* was correct in finding that the Eligibility Rules were a part of the CBA because restraint directly influenced terms of initial employment, wages and working conditions, which are all mandatory subjects of bargaining agreed to in the presence of the CBA.

Where a CBA governs the relationship between employers and employees, increased deference is accorded to national labor policy for antitrust claims raised in labor markets (those raised by employees against their employers or their unions). Accordingly, lessened deference is accorded to national labor policy where the claims involve anticompetitive restraints which are raised in business markets (by competing employers against either the multi-employer bargaining unit or an alleged colluding union). This lessened deference can be generally characterized by the relevant principles behind the *Mackey* factors; where the non-statutory labor exemption applies if the agreement involves mandatory subjects of negotiations, and where the agreement was reached through bona fide arm's-length negotiations.[211]

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207. *See supra* n. 70 and accompanying text; *supra* pt. III(C) and accompanying text (disussing the Second Circuit analysis of the *Clarett* case and finding that draft eligibility impact terms of initial employment, wages and working conditions).

208. *Brown*, 518 U.S. at 249. "Petitioners also say that irrespective of how the labor exemption applies elsewhere to multiemployer collective bargaining, professional sports is 'special.' We can understand how professional sports may be special in terms of, say, interest, excitement, or concern. But we do not understand how they are special in respect to labor law's antitrust exemption." *Id.* at 248.

209. *Clarett*, 369 F.3d at 138 (citing to *Wood*, 809 F.2d at 959). Notably, *Brown*, *Clarett*, and *Wood* do overrule or conflict with Supreme Court precedent set forth from *Pennington*, *Jewel Tea*, and *Connell*. Instead, *Clarett* and company provide further insight as to *how* the non-statutory labor exception is to be applied in cases raised by suppliers of labor whose antitrust allegations are restraints that primarily operate in the labor market and not the business market.

210. *Id.* at 139 (discussing rationale from *Caldwell* as being permitted as a right derived from collective bargaining).

211. *See supra* pt. V(B)(1) and accompanying text (discussing Eighth Circuit law from *Mackey* and *Powell*).

C. *Non-Statutory Labor Exemption in the Business Market*

Jewel Tea, *Pennington*, and *Connell*, all address multi-employer collective bargaining situations where employers raised claims that union activity with other employers was anticompetitive.[212] Employer-raised claims fall under business market analysis because the claim is that the CBA causes an injury to the employer's business, which is to supply either goods or services to the consuming public. There is a subtle reason for recognizing employer claims against fellow employers and/or unions. In these situations employers compete with the other members of the multi-employer bargaining unit and antitrust claims raised by these employers are typically related to marketing, competition in terms of product sales, and other business related concerns.[213] These business market restraints restrict competition, directly impacting consumer prices.

The business market restraint analysis applies the exemption only where the restraint impacts a party to the CBA and is the product of collective bargaining (being a mandatory subject of bargaining, agreed upon through bona fide arm's-length negotiations).[214] The Eighth Circuit, in *Mackey*, has properly interpreted these principles to interpret a three pronged test which can be applied to business market restraints.

Under a *Mackey* type analysis, the first step is to determine whether Clarett is a party to the CBA; the answer is in the affirmative. Clarett as a potential player, is a party to the CBA because he was attempting to offer his services under an employer-employee arrangement defined by the CBA.[215] The real issue for Clarett's claim (assuming an analysis based on business market) is whether the Eligibility Rules are a part of the CBA.[216] This can be resolved by determining whether the Eligibility Rules are mandatory subjects of bargaining[217] or if they were the product of bona fide arm's-length negotiations (being properly incorporated by reference into the CBA).[218]

212. *See supra* pt. IV(B) and accompanying text.

213. These concerns are arguably primarily related to restraints in the business market and not specifically related to restraints on the labor market (which typically include wage determination, employee eligibility and so forth).

214. *See supra* pt. IV(B) and accompanying text (discussing Supreme Court precedent).

215. Itri, *supra* n. 13, at 331-32.

216. Effectively the purpose of the second and third prongs of the *Mackey* factors.

217. *See supra* pt. II(A) and accompanying text (discussing *Haywood* where the league declined to bring an argument that the non-statutory labor exemption applied due to collective bargaining). Notably, in either labor market or business market, the dispositive issue is whether the Eligibility Rules were truly mandatory subjects of bargaining. If yes, then the Eligibility Rules are a part of the CBA and shielded from antitrust analysis; if no, the Eligibility Rules would not be subject to non-statutory labor exception.

218. Worth mentioning is the fact that *Brown* specifically declined to mention the three pronged test laid out in *Mackey*. The Supreme Court rather than endorse the *Mackey* factors, gave deference to

D. *Mandatory Subjects of Bargaining or Incorporated by Reference?*

The requirements of a mandatory subject of bargaining and whether the restraint was the product of bona fide arm's-length negotiations (by being incorporated by reference in the *Clarett* fact pattern) both address the same concept of whether the restraint is expressly or implicitly agreed to by the parties to the collective bargaining process. *Clarett* properly answers both of these concepts in the affirmative by noting that the Eligibility Rules were of such importance to the relationship between the union and the league that they were effectively incorporated into the CBA. Mandatory subjects of bargaining are the conditions of employment which are mandatory and therefore key to the collective bargaining process. Likewise, for a restraint to be the product of bona fide arms-length negotiations, the restraint must be agreed upon by the parties during the CBA process. Where a restraint is incorporated into the CBA by reference, it will be considered a product of bona fide arm's-length negotiations.

Under both the labor market restraint analysis and the business market restraint analysis, the question to determine whether a restraint is a mandatory subject of bargaining is the same, whether the restraint involves the terms of initial employment, wages and working conditions, or immediately impacts these factors. Where the restraint is a mandatory subject of bargaining and a CBA exists, *Brown* mandates that the CBA and non-statutory labor exemption protect these mandatory subjects of bargaining from antitrust analysis.[219] The arguments that the NFL Eligibility Rules are not mandatory either because the rules do not specifically fall into the "wages, hours, or terms of employment" language, or were not the product of express negotiations fails to convince. Learned commentators have argued that the NFL Eligibility Rules are mandatory, "I have not talked to anybody who is a labor lawyer – who would agree that entry requirements are not a mandatory subject of bargaining."[220] Further, *Clarett's* conclusion that the NFL Eligibility Rules are a mandatory subject of bargaining due to the immediate impact they have on terms of employment is a better

national labor law because the claim raised by Brown was a labor market restraint. The *Mackey* factors, however, are still relevant law and have been followed in several jurisdictions. This note endorses the principles set out by the Eighth Circuit but rather than following the specific three part test, prefers a more flexible analysis which looks to determine if the restraint was either a mandatory subject of bargaining, or a part of the terms and conditions of the collective bargaining agreement.

219. *See* 518 U.S. at 250 (discussing why development squad salary restraints, albeit unilaterally imposed post impasse, are still terms which the parties to a collective bargaining process are required to negotiate even though they exist immediately after expiration of the CBA).

220. Jay Moyer, et al., *Panel II: Maurice Clarett's Challenge*, 15 Fordham Intell. Prop. Media & Ent. L.J. 391, 402 (2005) (statement made by Professor Gary Roberts in answering whether he believed the Eligibility Rules were mandatory subjects of bargaining).

understanding of the principles behind national labor policy.[221] As such, viewing the Eligibility Rules in either the labor or business market analyses, they would likely stand.[222]

Further, *Clarett's* holding that the Eligibility Rules were mandatory subjects of bargaining were properly supported by its reading of *Brown*, which set forth a governing principle that in the presence of a collective bargaining situation, all mandatory subjects of bargaining (such as salary caps unilaterally imposed post impasse) were exempted from antitrust claims raised in predominant labor market settings. By finding that the Eligibility Rules directly impacted employment conditions of potential players and current players (for example impacting veteran employment and overall player salaries from increased labor competition), *Clarett* deemed this restraint to be of equivalent importance as commonly recognized mandatory subjects such as player salary.

In determining whether the Eligibility Rules should be considered the product of bona fide arm's-length negotiations, if this restraint can be considered to have been incorporated by reference into the CBA, then the fact that the NFLPA and the NFLMC both agreed to terms and conditions of the CBA mandate that they are the product of bona fide arm's-length negotiations. A court would be correct in determining that the Eligibility Rules were incorporated into the CBA because the NFL CBA expressly incorporated the NFL Constitution and By-laws. Moreover, the current CBA was signed and renewed in a labor market where these rules pervaded.[223] Like *Brown*, where the impasse was considered to be within the collective bargaining process even though the CBA had expired,[224] the court is required to see the collective bargaining process as a multifaceted practice that includes negotiating strategies, terms and tactics. These tactics are often

221. Wherein national labor law promotes the collective bargaining process and attempts to provide labor with a more equal footing in negotiation power as compared to employers.

222. Having established that Clarett's claim is within the jurisdiction of the NLRB, the next question is what would happen if the NLRB found that there was an unfair labor practice. The NLRB could likely find (had Clarett continued to pursue his clause according to the decision as set forth by the Second Circuit) that the Eligibility Rules, as incorporated in the NFL Constitution and Bylaws, were not properly bargained for and are outside of the collective bargaining process and agreement. A finding by the NLRB that the Eligibility Rules are not part of the CBA could result in Clarett continuing to bring his claim in the "antitrust" courts with the non-statutory labor exemption not applying.

223. *Clarett*, 369 F.3d at 139-43. Notably, commentators have posited that the unanimous opinion by the Second Circuit in *Clarett* incorrectly interpreted the NFL Eligibility Rules as mandatory subjects of bargaining. *See e.g.* Gerba, *supra* n. 191, at 2414-17. These commentators fail to appreciate the meaning of the concept of "wages, hours, and other terms and conditions of employment" as described in the NLRB as described in *First Natl. Maint. Corp. v. NLRB*, 452 U.S. 666, 674 (1981). *Clarett* properly finds that the NFL Eligibility Rules are mandatory subjects of bargaining because it "[has] tangible effects on the wages and working conditions of current NFL players." *Clarett*, 369 F.3d at 140.

224. Since they were still in the process of negotiations, the NFL's unilateral act was considered to be shielded from antitrust law.

beyond the ability of antitrust courts to comprehend without truly appreciating the environment of the labor negotiations; a position that is best left for the NLRB.[225] In light of this, the court would have to defer to basic freedom of contract principles and find that the union's incorporation of the Eligibility Rules was a willing acquiescence.[226] Therefore, the Eligibility Rules can be considered incorporated into the CBA by reference based on (1) the CBA's express incorporation of the Constitution and By-Laws, and (2) the fact that NFLMC and the NFLPA had been operating under one form or another of the Eligibility Rules when the CBA was signed and later renewed.

Furthermore, the Second Circuit clearly points out the fact that the union had the ability to renegotiate the change to the terms of the Constitution and Bylaws made in 2000.[227] Explaining that the option not to renegotiate could be considered to be a valid negotiation tactic, *Clarett* was right not to read the unions acquiescence of the change as failure of the collective bargaining process.[228] Therefore, in addition to being mandatory subjects of bargaining, the Eligibility Rules should be incorporated by reference.

VII. CONCLUSION

In May of 2004, the Second Circuit Court of Appeals decided *Clarett v. National Football League*. The court found that the antitrust nonstatutory labor exception applied to the NFL Eligibility Rules. Clarett was subsequently unable to enter the 2004 draft. The decision by the Second Circuit was a proper understanding of the law, but was based on a standard different from that pronounced by the Eighth Circuit in *Mackey v. National Football League.* Relying on *Brown,* the Second Circuit clarified its long

225. *See generally Kansas City Royals Baseball Corp. v. Major League Baseball Players Assn.*, 532 F.2d 615 (8th Cir. 1976) (providing a judicial hands-off approach to claims which are found to be captured and addressed in alternative dispute resolutions as provided for by the industry's collective bargaining agreement).

226. *Batsakis v. Demotsis*, 226 S.W.2d 673 (Tex. Civ. App. 1949) (finding a legal contract where an exchange of $25 for a debt of $2000 can be consideration because the amorphous value the offer may have for the acceptor). Silence can be action sufficient to qualify as acceptance. *Cole-McIntyre-Norfleet Co. v. Holloway*, 141 Tenn. 679 (1919) (articulating long held principle that a binding contract is formed if reasonable for the offeree to infer acceptance from the offeror's silence and stating that a noisy and contested negotiation is not the only way for bargaining to occur).

227. *See generally* Roberts, *supra* n. 114, at 397-98, 403 (questioning *Mackey's* rationale and application regarding the inquiry into bona fide arm's-length negotiations). The suggestion that there were no explicit negotiations regarding the Eligibility Rules fails to equate to a negative finding regarding a bona-fide arm's- length negotiation.

228. *See e.g. id*. at 396-97 (stating that courts should not substitute their judgment of fairness for what parties to a collective bargaining agreement may find to be legitimate).

held position interpreting national antitrust and labor law and policies and case precedent to require antitrust courts to defer to the jurisdiction of national labor policies and the NLRB when addressing restraints that exist in labor markets defined around collective bargaining.

The non-statutory labor exemption to antitrust law, considered by the Supreme Court to be an area of law to be populated more by confusion than clarity, is properly explained and applied by the Second Circuit. *Clarett* provides a sound explanation of the exemption and properly holds the NFL Eligibility Rules to be beyond the grasp of Maurice Clarett's antitrust claims because of the non-statutory labor exemption.[229] By interpreting the guidelines from *Brown* and other Supreme Court precedent, a dual standard legal regime can exist where antitrust claims which are primarily focused on labor market are governed by *Clarett* (applying the non-statutory labor exemption where the restraint relates to mandatory subject of bargaining) and where antitrust claims which are primarily focused on business markets are governed by the three pronged *Mackey* factors. This regime will prove to be a useful guide for business and labor of professional sports and other industries on how the non-statutory labor exemption should be applied.

229. Notably, after being a surprise third round draft pick in the 2005 NFL draft, Clarett participated in preseason practice before sustaining a groin injury which limited his ability to practice, resulting in his being released from the Broncos team roster on August 30, 2005. Associated Press, *Shanahan, Broncos moving on after Clarett "mistake"*, http://sports.espn.go.com/nfl/news/story?id=2146319 (updated Aug. 30, 2005); Associated Press, *Clarett Cut Made Official as Broncos Release 14*, http://sports.espn.go.com/espn/wire?section=nfl&id=2147226 (updated Aug. 30, 2005).