RECENT DEVELOPMENT

NOTE C: C AS IN CASH, COUGH IT UP, AND CHANGES—NFL PLAYERS SCORE WITH FREE AGENCY FOLLOWING FREEMAN McNEIL'S BIG GAIN

The biggest event of the National Football League's 1992-93 season occurred shortly after the new year; however, it did not occur on a football field. It occurred in a Minnesota courtroom when United States District Court Judge David S. Doty accepted a new collective bargaining agreement between the National Football League's (NFL or League) owners and players.[1] The new agreement specifies the extent of free agency in the NFL,[2] free agent eligibility requirements, and the compensation given to each player harmed[3] by the NFL's restrictive player policies that violated federal antitrust laws.[4]

The impact of Judge Doty's decision will be profound.[5] The League's owners (Owners) have long claimed that a more liberal form of free agency, like the one approved by Judge Doty, would be destructive to the League's balance, order, and ultimately, its viability.[6] The Owners

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1. Judge Doty has been involved in the wave of NFL antitrust suits that have occurred during the past few years. *See* Ira Miller, *NFL Free Agency A Matter of Time*, S.F. CHRON., Oct. 21, 1992, at C5.

2. A "free agent" is a player who no longer has a contract with one of the League's twenty-eight teams. Generally, a player becomes a free agent when the player and his team fail to successfully negotiate a new contract before the existing one expires. A player also becomes a free agent when his team relinquishes its rights to that player. Whatever the cause, the restrictive mechanisms in the League's Constitution and Bylaws, the player's own contract, or the League's Collective Bargaining Agreement define free agency.

3. A player is not assured monetary damages simply because Plan B has harmed him. In *McNeil v. National Football League*, all eight plaintiffs were harmed, but only four received monetary damages. McNeil v. National Football League, 790 F. Supp. 871 (D. Minn. 1992) [hereinafter *McNeil II*]. "Monetarily, the harm just wasn't there" for Freeman McNeil, Tim McDonald, Dan Majkowski, and Niko Noga. Bob Oates, *NFL's Free Agency System Tossed Out in Antitrust Suit: Football: Jury Award to Hit $1.63 Million. League Says it Will Appeal to Keep Limits on Players' Team Changes*, L.A. TIMES, Sept. 11, 1992, at A1. The awards varied significantly among those receiving them. For example, Dave Richards received $240,000 while Frank Minnifield received just $50,000.

4. *McNeil II*, 790 F. Supp. at 877-78, 897.

5. *McNeil II* is a landmark decision that will alter greatly the way the NFL does business. *See* Oates, *supra* note 3, at A1.

6. *See infra* notes 71-74 and accompanying text. The Owners have consistently made this argument. *See McNeil II*, 790 F. Supp. at 895-96.

maintain that the previously existing player restrictions were not only reasonable but also necessary. The League's players (Players) assert that the new agreement will secure the freedom to sell their services in an open and competitive market and to play for the club of their choice. Moreover, the Players argue that a more equitable owner-player agreement will strengthen the League[7] and enrich both the Owners and the Players.[8]

This Recent Development examines the substance of the settlement's new collective bargaining agreement and its likely impact on the League, the Players, and the NFL antitrust issues addressed in *McNeil v. National Football League*.[9] It concludes that the settlement agreement represents substantial progress for the Players but at an immediate cost to the League's most inexperienced players. The agreement also precludes the resolution of issues central to NFL antitrust litigation and, therefore, clouds the significance of the new collective bargaining agreement's final cost.

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7. *See infra* text accompanying note 75. The Players assert that a liberalized free agency system would stabilize the League's competitive and economic balance. They point out that Major League Baseball and the National Basketball Association have enjoyed phenomenal growth and success while utilizing very liberal free agency systems.

8. Clearly, many players would enjoy greater wealth. Superstars would benefit as teams competed for their unique skills and drawing power. However, Major League Baseball demonstrates that riches are not limited to superstars. The average player also may enjoy increased compensation. The following chart shows the growth of the average player's salary in Major League Baseball, the National Basketball Association, and the National Football League:

Year	MLB	NBA	NFL
1980	143,756	175,000	80,000
1985	371,157		
1990	597,537	950,000	360,000
1992	900,000	1,000,000	+430,000

For the 1990 figures see Landis Cox, Note, *Targeting Sports Agents With the Mail Fraud Statute:* United States v. Norby Walters & Lloyd Bloom, 41 DUKE L.J. 1157, 1168-69 n.58 (1992) (citing Tom Farrey, *Agents Share the Wealth-As Athletes Make More Money, Their Advisors Cut off Bigger Slice*, SEATTLE TIMES, Dec. 11, 1990, at D1); *see also* Michael S. Jacobs, *Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo*, 67 IND. L.J. 25 n.4 (1991) (discussing the increases in players' salaries and the increases in the leagues' revenues). In 1987, the average Major League Baseball player's salary actually decreased, but 1987 was the year of collusion. *See* Gerald W. Scully, THE BUSINESS OF MAJOR LEAGUE BASEBALL 153 (1989).

9. *McNeil II*, 790 F.Supp. at 878-79.

I. ANTITRUST, FREE AGENCY AND THE NFL

A. Mackey, *the Nonstatutory Labor Exemption and Unreasonable Restraints*

Major professional sports leagues[10] that unreasonably restrain competition are subject to antitrust scrutiny.[11] Professional sports leagues have developed three basic tools to restrict player movement and contain salary escalation:[12] an annual amateur draft that allows teams to select new players and secure exclusive rights to new players;[13] a standard player's contract (SPC) that each player must sign to be eligible to compete in the

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10. The major professional sports leagues include Major League Baseball, the National Hockey League, the National Basketball Association, and the National Football League.

11. Major League Baseball is completely exempt from antitrust scrutiny. In Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922), the Supreme Court recognized that baseball was played among the several states, but nonetheless held that baseball was not part of interstate commerce. The Court has affirmed baseball's exemption device. *See* Toolson v. New York Yankees, 346 U.S. 356 (1953); Flood v. Kuhn, 407 U.S. 258 (1972). Baseball's exemption was challenged again earlier this year. *See* Piazza v. Major League Baseball, No. CIV. A. 92-7173, 1993 WL 325696, (E.D. Pa. Aug. 21, 1993). *Id.* at 208-09. *But cf.*, Philadelphia World Hockey Club v. Philadelphia Hockey Club, 351 F. Supp. 462, 466 (E.D. Pa. 1972) (holding that professional hockey is a multistate, bi-national business which is subject to antitrust scrutiny). *See* Radovich v. National Football League, 352 U.S. 445, 451 (1957) (noting that Congress continues to acquiesce in the *Toolson* and *Federal Baseball* interpretations of the Clayton Act).

Groups outside of baseball, rather than the MLBPA, are now questioning the validity of baseball's exemption. Congress began an examination of baseball's antitrust exemption on December 10, 1992. One argument for retaining baseball's exemption cited the presence of a independent Commissioner who looked out for the best interests of baseball. Because the Commissioner performed his duties independent from the owners and players, it was argued that the need for judicial intervention and antitrust scrutiny was obviated. However, the argument lost much of its force when Fay Vincent begrudgingly resigned on September 7, 1992, and the owners began looking for a "CEO for the owners." The Senate Antitrust Subcommittee has held hearings on whether baseball has abused its blanket antitrust exemption. In addition, three lawsuits have been filed in connection with the failed attempts to move the San Francisco Giants baseball club to the Tampa-St. Petersburg area in Florida. One suit alleges that investors were assured that their offer would be treated fairly and that the region would receive a franchise. The investors assert that they were misled. The investors also allege that the relationship which San Francisco groups enjoyed with major league executives violated antitrust laws. Florida Attorney General Bob Butterworth has vowed to use every legal tool available to reveal why Florida's attempts were unsuccessful. Rick Lawes, *Owner's Move Shakes Antitrust*, USA TODAY BASEBALL WEEKLY, Nov. 19-Dec. 1, 1992, at 3.

12. Bradley R. Cahoon, Note, *Powell v. National Football League: Modified Impasse Standard Determines Scope of Labor Exemption*, 1990 UTAH L. REV. 381, 383.

13. *See, e.g.*, Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960, 961 (D.N.J. 1987).

league;[14] and a system of free agent restraints that allows teams to retain exclusive, but limited, rights to a player after the SPC expires.[15]

Historically, players have challenged these restraints under section 1 of the Sherman Act,[16] which prohibits contracts or conspiracies that restrain or monopolize trade in interstate commerce.[17] However, owners have protected or removed themselves from antitrust scrutiny through several methods. First, the owners may enjoy antitrust immunity under a non-statutory labor exemption. Second, the owners may be deemed a single actor whose unilateral conduct cannot violate the Sherman Act. Both the non-statutory labor exemption and the single entity defense eliminate section 1 scrutiny.[18] Third, the owners may establish that their restrictive mechanisms are necessary and "procompetitive" rather than unreasonable.[19]

For four decades, the NFL controlled player mobility through a reserve system.[20] Every player who signed a contract with an NFL club was

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14. *See, e.g.*, Powell v. National Football League, 678 F. Supp. 777, 778 (D. Minn. 1988) [hereinafter *Powell I*]. See *infra* text accompanying note 45 for a discussion of *Powell I*.

15. *See* Cahoon, *supra* note 12, at 383.

16. *See* Daniel C. Nester, Comment, *Labor Exemption to Antitrust Scrutiny in Professional Sports*, 15 S. ILL. U. L.J. 123 (1990).

17. Congress enacted the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-69 (1988), to promote industrial peace. Collective bargaining is at the core of the NLRA and our national labor policy. Through the identification of an appropriate bargaining unit and the election of a bargaining representative, a group of employees may more effectively bargain for wages, hours and other conditions of employment. DOUGLAS L. LESLIE, LABOR LAW IN A NUTSHELL, 26-27 (3d. ed. 1992).

Congress enacted the Sherman Act to promote competition. Sections 1 and 2 of the Sherman Act prohibit contracts or conspiracies in restraint of trade in interstate commerce and monopolizations of or conspiracies to monopolize trade in interstate commerce. 15 U.S.C. §§ 1-2 (1988). Because many union activities are inherently anti-competitive, Congress created a statutory exemption by enacting provisions in the Clayton Act, 15 U.S.C. §§ 12-27 (1988) (enacted in 1914), and in the Norris-LaGuardia Act, 15 U.S.C. §§ 101-15 (1988) (enacted in 1932), to protect unions from antitrust liability and to address the tension between these competing national concerns.

18. *See infra* notes 30-36, 66-70 and accompanying text.

19. *See infra* notes 71-74 and accompanying text.

20. Mackey v. National Football League, 543 F.2d 606, 610-11 (8th Cir. 1976). Historically, the major professional sports leagues have enjoyed an uncompromising and generally inequitable labor relationship with their players. Perpetual reserve systems permitted teams to bind players to them for the length of their careers. The primary mechanism for restraining player mobility was the reserve system. Ian C. Pulver, *A Face Off Between the Nat'l Hockey League and the NHLAA: The Goal A More Competitively Balanced League*, 2 MARQ. SPORTS L.J. 39 (1991); *In re* Twelve Clubs Comprising National League of Professional Baseball Clubs, 66 Lab. Arb. (BNA) 101 (1975) (Seitz, Arb.) (ruling MLB's reserve clause invalid); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 518 (E.D. Pa. 1972) (invalidating the NHL's perpetual reserve clause).

bound to that club for the contract's term plus an additional "option" year.[21] A player became a free agent by "playing out his option."[22] Until 1963, NFL rules and regulations did not compensate a club that lost a player through free agency. In 1963, the League unilaterally adopted the Rozelle Rule which created a free agent compensatory scheme that remained unchanged for a decade.[23]

The Rozelle Rule[24] essentially provided that when a club signed a free agent, it had to compensate that player's former team.[25] If the two teams could not agree on the compensation package, the Commissioner would award the former team compensation that he deemed fair and equitable.[26] The potentially high price of the compensatory scheme inhibited player mobility through free agency.[27] The Players were dissatisfied with the Rozelle Rule but were unable to eliminate it through collective bargaining.[28] Subsequently, the Players successfully challenged the Rozelle

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21. The NFL Constitution and Bylaws required that all club-player contracts be in conformity with the Standard Player Contract which incorporated the option clause. Thus, after a player signed with a club, the SPC bound him to that team for at least two years. *Mackey*, 543 F.2d at 610.

22. A player "plays out his option" by playing his option year under a renewed contract rather than a new one. By playing out his option year a player subjected himself to a 10% salary cut. *Id.* at 610 n.5.

23. *Id.* at 610-11.

24. The Rozelle Rule was named after Alvin Ray "Pete" Rozelle, NFL Commissioner from 1960-90. *Id.* at 610.

25. The signing team gave players that could be taken from the active, reserve, or selected (draft) lists as compensation to the free agent's former team. *Id.* at 611.

26. *Id.* at 609 n.1.

27. The National Hockey League has a similar compensation scheme. *See* Pulver, *supra* note 20, at 49-51 & n.61 (citing Scott Morrison, *No Justice for St. Louis*, TORONTO SUN, Sept. 4, 1991, at 73). The NHL's free agency system primarily restrains player mobility through an equalization payment schedule. All players are free to sign with a new team after playing out the one year option. However, the players' freedom is substantially retarded by the potentially onerous equalization rights that are held by their former clubs.

For example, in July 1991 the St. Louis Blues signed twenty-two year old Brendan Shanahan, a fourth-year forward, as a free agent. The Blues and the New Jersey Devils failed to agree on an equalization payment within seventy-two hours. As a result, they submitted their respective proposals to final offer arbitration. Arbitrator, Judge Edward Houston, awarded the Devils the Blues' all-star defenseman Scott Stevens. The Blues paid an onerous price for the promising young forward: an all-star defenseman to the Devils and a multi-year, multi-million dollar deal to their new player. The potentially onerous equalization payments have chilled free agent transactions in the NHL.

Generally clubs will pay only an amount equal to what they may lose. But a club's need for a position player may force them into the market. However, the nature of the existing equalization structure and awards will keep salaries in check. *Id.* at 48-51.

28. The Players consented to the Rozelle Rule in the 1968 and 1970 collective bargaining agreements with the League. Beginning in 1974, however, the Players adamantly resisted the Rule's inclusion in any subsequent agreements.

Rule's restraints in *Mackey v. National Football League*.[29]

In *Mackey*, the Eighth Circuit outlined a test to determine whether a player restraint system is within the non-statutory labor exemption and therefore outside the federal antitrust law's purview.[30] The court concluded that the Players could agree to unreasonable restraints.[31] In other words, the court would extend the non-statutory labor exemption to otherwise unlawful restraints and immunize the Owners from antitrust liability in order to foster collective bargaining and to further national labor policy.[32] However, the court predicated the exemption's extension on three factors. First, the court had to determine whether the restraint affects third parties not within the bargaining relationship. Antitrust law absolutely precludes any agreement between employers and unions restraining the trade or commerce of a party not within the bargaining relationship.[33] Second, the test limits the exemption's scope to the agreement's terms that are mandatory subjects of bargaining.[34] Third, the exemption extends only to agreements resulting from bona fide arm's length bargaining.[35]

The Eighth Circuit held that the non-statutory labor exemption did not apply to the NFL and that the Rozelle Rule violated the Sherman Act because it was an unreasonable restraint.[36] Because the Owners had unilaterally adopted the restriction, it was not a product of bona fide arm's length bargaining. Under *Mackey's* three-pronged test, the Rozelle Rule failed the third prong, and the NFL lost the exemption.

B. Powell*: The Non-Statutory Labor Exemption and Decertification*

In 1977, the National Football League Players Association (NFLPA) bargained away the *Mackey* victory by agreeing to a right of first refusal compensation system in article XV of the new collective bargaining

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29. 543 F.2d 606 (8th Cir. 1976).

30. *Id.*

31. *Id.* at 613-14.

32. *Id.*

33. *Id.* at 614. "[L]abor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship." *Id.*

34. *Id.* A mandatory subject of bargaining includes any term concerning wages, hours, and other terms and conditions of employment. Those items must be bargained for upon demand of either party and may be continued until impasse. *See* NLRA, 29 U.S.C. § 158(d) (1988).

35. *Mackey*, 543 F.2d at 616.

36. *Id.*

agreement.[37] Under the agreement, Owners retained their non-statutory exemption and secured a new player restraint system that would dramatically impact NFL veterans for over a decade. The system retarded the growth of NFL salaries, excluding rookies,[38] in comparison to other sports,[39] and virtually eliminated any real movement within the League.[40] Under the right of first refusal compensation system, a player was permitted to receive offers from other teams for a three month period,[41] but he could not sign with any of these teams. Rather, the player's club had the right either to match the offer and retain the player, or not to match the offer, lose the player to the other club, and receive draft choice compensation[42] in return.[43] Between 1977, the year that article XV's right of first refusal compensation system became effective, and 1988, only two players changed

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37. The NFLPA has been frequently criticized for bargaining away the Players' *Mackey* victory in the League's 1977 and 1982 collective bargaining agreements. *See, e.g.*, Oates, *supra* note 3, at A1. The Players' attempt to eliminate the right of first refusal compensation system was rebuffed by the Owners in 1987. Neither collective bargaining nor economic weapons were successful. The Players went on strike in 1987 but returned having accomplished nothing. The Owners refused to make any concessions in a collective bargaining agreement following *Powell III*. *Id.*

38. NFL veterans were victimized by long-term contract agreements during the early 1980s in two ways. First, the 1982 collective bargaining agreement significantly raised the minimum salary figure above the level established by the 1977 collective bargaining agreement. Players whose contracts were expiring benefitted from the general escalation in the salary structure which accompanied the increased minimum. Second, and more significantly, the creation of the United States Football League (the USFL) also inflated salaries. The USFL was starved for stars and paid exorbitant salaries to attract quality players. Rookies, such as Herschel Walker and Steve Young, could choose to spurn the established NFL for the fledgling but financially free-wheeling USFL. A larger percentage of rookies availed themselves of the threat of turning to the new league and enjoyed rapid and lucrative signings. The Chicago Bears signed rookie Wilbur Marshall to a four-year $2.8 million deal within four days of the amateur draft driven in large part by fear of a competing offer from the USFL's Tampa Bay Bandits.

39. *See supra* note 8.

40. Players change teams under the free agency system not only to receive the maximum compensation currently available, but also to be on a team for whom they will play regularly. The economic benefits from changing teams are more long-term and hence risky in the typically brief career of an NFL player. Nonetheless, the economic benefits are very tangible. The development and exhibition of the player's skills are necessary to achieve the recognition and attention that players desire.

41. NFL players' contracts, SPCs, expire on February 1st, of any given year. Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 370. The window of opportunity for these players begins upon the expiration of their existing contract on February 1st, and concludes on May 1st of that same year. *See Mackey*, 543 F.2d at 610 n.5.

42. The player's former team's compensation is based upon the new club's offer and the player's NFL experience. *See* Ethan Lock, Powell v. National Football League: *The Eighth Circuit Sacks the National Football League Players Association*, DENV. U. L.R. 135, 137 (1990).

43. *See supra* notes 24-30 (discussing the NHL's compensatory scheme and the Rozelle Rule).

teams under article XV.[44]

In *Powell v. National Football League (Powell I)*,[45] the district court held that the non-statutory labor exemption insulated the NFL's player restraint system from antitrust scrutiny until the parties reached an impasse as to that issue. The non-statutory labor exemption required the court not to review the Players' motions challenging the right of first refusal system's validity because an impasse had not clearly been reached.

Subsequently, in *Powell v. National Football League (Powell II)*[46], the district court held that the non-statutory labor exemption also extended to the NFL's annual college draft as incorporated into the last collective bargaining agreement. The Players contended that the college draft failed *Mackey's* three part non-statutory labor exemption test because it affected parties outside the bargaining relationship and was not a product of bona fide arm's length negotiating.[47] The court rejected both assertions, but again it did not decide whether an impasse had been reached that would eliminate the non-statutory labor exemption.

Just a month later, on February 1, 1989, the Owners unilaterally modified the right of first refusal system.[48] The League had operated for two years without a collective bargaining agreement when the specter of impasse, the *Mackey* decision, and pending litigation created an impetus for change.[49] The new system, Plan B, was primarily an effort to create a more identifiably reasonable player restraint system and to pre-empt an adverse legal decision.[50] Plan B permitted each team to protect thirty-seven of the forty-five players on its roster.[51] The same right of

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44. *See* Lock, *supra* note 41, at 339, 348-49 n.57.

45. 678 F. Supp. 777 (D. Minn. 1988)

46. 711 F. Supp. 959 (D. Minn. 1989)

47. *Mackey*, 543 F.2d at 614 ("[T]he policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's length bargaining.").

48. *McNeil II*, 790 F.Supp. 871, 876 n.4 (D. Minn. 1992).

49. The League continued to operate without a new collective bargaining agreement after the last agreement expired in 1987. The League has played without interruption since 1987. Until *McNeil I*, the owners had no incentive to agree to anything because they were exempt from antitrust scrutiny. *See*, Oates, *supra* note 3, at A1.

50. The NLRA requires each party to a representation relationship to bargain in good faith. 29 U.S.C. § 158(d) (1988). A series of Supreme Court decisions outlines the contours of the duty to bargain in good faith. *See*, NLRB v. Insurance Agents, 361 U.S. 477 (1960); NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956); NLRB v. American Ins. Co., 343 U.S. 395 (1952).

51. Plan B was supposed to resolve the NFL's labor difficulties rather than postpone them as other provisions had. Paul Tagliabue, the NFL's new commissioner and a former antitrust lawyer, authored Plan B. In selecting Rozelle's successor, the Owners emphasized the candidate's legal rather than

first refusal compensation system that had been in effect since 1977 applied to the thirty-seven protected players. The change affected the eight unprotected players. The eight unprotected players became unrestricted free agents regardless of their contract status.[52] In 1989, two hundred and twenty-nine of these free agents signed with new clubs, but none of the protected players changed teams under Plan B.[53]

The Players did not immediately challenge the reasonableness of Plan B as a player restraint mechanism. Instead, the Eighth Circuit reversed *Powell I* and held that the non-statutory labor exemption extends beyond a bargaining impasse.[54] In *Powell v. National Football League (Powell III)*,[55] the Eighth Circuit agreed with Judge Doty that the non-statutory labor exemption extends beyond a collective bargaining agreement's expiration. The court concluded that labor law rather than antitrust law governed the matter as presented.[56] Consequently, the fact that the League had been operating under an expired collective bargaining agreement did not affect the League's antitrust exemption because the parties had an ongoing bargaining relationship.[57] The decision was a tremendous victory for the Owners who then could seemingly operate indefinitely under the expired agreement without calling into question the reasonableness of the League's player restraint system. But the Owner's victory in *Powell III* was a short-lived, Pyrrhic victory because again the merits of the Players' claims challenging free agency restraints had not been resolved and *Powell III's* impact could be remedied easily.

On December 5, 1989, just six months after *Powell III*, the NFLPA

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football background. Lester Munson, *Plan B, As In Bogus*, SPORTS ILLUSTRATED, Sept. 21, 1992, at 7.

52. These players were free to sign with a new club absent the compensation requirements which restricted players' freedom of movement and contract. Miller, *supra* note 1, at C5.

53. Peter King, *Inside the NFL*, SPORTS ILLUSTRATED, Sept. 18, 1989, at 68.

54. Powell v. National Football League, 888 F.2d 559, *corrected at* 930 F.2d 1293 (8th Cir. 1989).

55. 930 F.2d 1293 (8th Cir. 1989).

56. *Id.*

57. *Id.* at 1303. However, the opinion's rationale has been questioned and criticized severely. *See* Cahoon, *supra* note 12, at 397-401. Cahoon concluded that the Eighth Circuit's extension of the labor exemption to the Owners advanced neither labor nor antitrust policy. First, the court failed to determine the NFLPA's bargaining power before extending the labor exemption. As a result, the court could not accurately determine the existence of bona fide arm's length negotiating. Second, the court effectively permitted the Owners to restrain unreasonably free agency without the Players' consent because the parties had reached an impasse. Implicit in an impasse is the notion that the parties have exhausted the prospects of reaching an agreement.

withdrew as the collective bargaining representative of the Players.[58] The Players thereby successfully aligned themselves with the Eighth Circuit's application of Supreme Court doctrine in *Mackey* and *Powell* and set the stage for Freeman McNeil.[59]

C. McNeil: *Free Agency and the NFL*

In *McNeil v. National Football League (McNeil I)*,[60] the United States District Court for the District of Minnesota held that the non-statutory labor exemption no longer protected the NFL from antitrust scrutiny. The court reasoned that, as of the date of the NFLPA's decertification, the Player's no longer had an "ongoing collective bargaining relationship" with the NFL. In accordance with *Powell III*, the court then applied the *Mackey* test to determine whether the non-statutory labor exemption applied. The court found that because the suit involved players whose contracts had expired after the NFLPA's decertification, Plan B's imposition on those players affected parties outside of the bargaining relationship. Consequently, Plan B failed *Mackey's* first prong. The court removed the NFL's prized non-statutory labor exemption and opened its player restraint system, Plan B, to antitrust scrutiny.

In *McNeil v. National Football League (McNeil II)*,[61] eight NFL players brought antitrust claims against the NFL. The Owners raised three defenses to antitrust liability. The first two, the non-statutory labor exemption and the single entity defense, would eliminate antitrust scrutiny altogether. In the alternative, the Owners argued that Plan B withstood antitrust scrutiny because it was a reasonable restraint. The court rejected the first two defenses on motion and the jury rejected the third.

The Owners contended that the NFLPA's withdrawal was unlawful, that the union had not been legally decertified, and that the union, as the Players' bargaining representative, was refusing to bargain in good faith. The court rejected the Owners' arguments again, noting that the Owners had acknowledged the NFLPA's abandonment of its role as the Players'

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58. The NFLPA re-drafted its charter to become a trade association for the players and their agents. *See* Gary R. Roberts, *McNeil Opened NFL Antitrust Door*, NAT'L L.J., Feb. 22, 1993, at 25.

59. By abandoning their collective bargaining relationship, the former members of the NFLPA removed the Owners from the non-statutory labor exemption's protection, subjected the player restraint practices to judicial scrutiny under the federal antitrust laws, and exposed the Owners to injunctive relief and treble damages.

60. 764 F. Supp. 1351 (D. Minn. 1991)

61. 790 F. Supp. 871 (D.Minn. 1992)

bargaining representative.[62] Moreover, the NFLPA's decertification[63] became effective when the Players voted to renounce its representation and not only after judicial recognition of that event as the Owners claimed. Therefore, Plan B, as applied to these plaintiffs, necessarily failed the first and third prongs of the Eighth Circuit's *Mackey* test.[64] The restriction failed the first prong because the players were no longer represented by the NFLPA and thus were not within the bargaining relationship. Nonetheless, Plan B's restraint purported to affect them directly. The restriction also failed the third prong because Plan B was not a product of bona fide arm's length negotiating. The Owners had implemented Plan B without seeking the approval of the Players or NFLPA. Consequently, the court held that the non-statutory labor exemption did not apply to the NFL and that Plan B was subject to antitrust scrutiny.[65]

The Owners, however, also claimed immunity from antitrust scrutiny on the grounds that the NFL is a single entity, a defense based on the language of the Sherman Act. Section 1 does not apply to the unilateral conduct of a single actor because it only prohibits "[e]very contract, combination . . . or conspiracy in restraint of trade."[66] Therefore, section 1 does not apply to a business' purely internal, unilateral conduct because such an agreement is within a single business involving a single actor. Consequently, the main antitrust issue for professional sports leagues is whether the teams comprise a single business which is not governed by antitrust laws or a joint action by separate entities which is governed by antitrust laws.

The Owners noted that they share a core purpose: the continued viability and financial success of the NFL and its member teams. They asserted that NFL clubs have economic power only as a single unit.[67] As separate and independent entities the NFL clubs would have nominal economic power.

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62. *McNeil II*, 790 F. Supp. at 886.

63. The court observed that on May 23, 1991, the United States District Court for the District of Minnesota determined that the NFLPA was no longer the Players collective bargaining representative. *Id.* at 875 n.2.

64. *Id.*

65. *Id.*

66. Section 2 of the Sherman Act governs the conduct of a single actor by prohibiting any attempt "to monopolize . . . or conspire . . . to monopolize any part of . . . trade or commerce . . ." 15 U.S.C. § 2 (1988). Because section 1 only applies to concerted action, a single actor cannot violate section 1's proscription against restraint of trade. A single actor can only violate section 2's proscription against monopolization. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 n.13 (1983) ("Monopolization without conspiracy is unlawful under § 2, but restraint of trade without a conspiracy or combination is not unlawful under § 1.").

67. *McNeil II*, 790 F. Supp. at 878.

In sum, the Owners argued that they are co-owners engaged in a common business enterprise and not independent competitors. The court rejected the Owners' claim, relying on Second and Ninth Circuit decisions which held that the Owners are not single actors and are subject to antitrust scrutiny.[68]

The Second and Ninth Circuits reasoned that the NFL is an unincorporated association of 28 independent corporations or partnerships. The clubs are managed independently and neither share nor account for expenses, profits and losses. Although League revenues are shared, the teams derive substantial revenue from independent sources such as local television and concessions. The clubs compete for players, management and even, to a varying degree, fan support.[69] Thus, as an assembly of independent entities acting together to magnify and secure their power, the Owners are open to antitrust scrutiny and are required to compete both in the market place and on the field.[70]

The court then turned to Plan B's reasonableness, a question of fact for the jury. The Owners asserted that without the current system of restraints, the League's economic and competitive balance would be completely disrupted, thus jeopardizing numerous small market franchises and eventually the entire League.[71] The Owners raised three arguments. First, a more liberal free agency system would upset the League's competitiveness because players would gravitate to certain teams.[72] Second, the uncontrolled escalation of salaries would destroy the financial viability of some franchises and ultimately the entire League.[73] Finally, unrestricted player mobility would decrease player continuity and the quality of play because football is a highly integrated team sport.[74]

The Players argued that the League's player restraint mechanisms were

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68. *McNeil II*, 790 F. Supp. at 878-79 (citing Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984), and North American Soccer League v. National Football League, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982)). Both cases dealt with franchise agreements in the professional sports context. In both cases the courts held that the league owners were not a single actor but rather separate entities acting together for antitrust purposes.

69. *McNeil II*, 790 F. Supp. at 879.

70. *See also* Roberts, *supra* note 58, at 25.

71. *See Mackey*, 543 F.2d at 621.

72. The Owners' concern that large markets and winning franchises would dominate the free agent market and eventually the entire league has considerable merit. Players probably would flock either to larger markets for the exposure and greater income or to winning franchises to end a distinguished but non-championship career with a league title. *Id.*

73. *Id.*

74. *Id.*

overly restrictive and unfair. They asserted that a more liberal free agency system would promote the League's competitive and economic balance. The Players argued that only under a more liberal free agency system could players attain their true market value and play for the team of their choice.[75]

The court held first that the rule of reason applied to Plan B restrictions to determine whether the player restraint mechanism was justified and no more restrictive than necessary.[76] Courts make two determinations when applying the rule of reason. The court must first determine whether legitimate business purposes justify the imposed restraint. Then the court must determine whether the restraint is no more restrictive than necessary.[77] Courts consider the history and purpose of the restraint, inquire into the existence of less restrictive alternatives, and then balance the restraint's pro-competitive goals[78] against the restraint's anti-competitive effects.[79]

The NFL argued that Plan B's player restraints contributed significantly to the League's competitive balance. The court directed the jury to find against the Players if the jury found that Plan B's pro-competitive effects outweighed its anti-competitive effects.[80] The jury concluded that the

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75. *Id.*

76. The Supreme Court has limited the Sherman Act's section 1 prohibition to agreements which unreasonably restrain trade. The Court has developed two methods for determining whether antitrust laws have been violated: the per se rule and the rule of reason. The per se rule is only applied when courts have sufficient knowledge of the challenged restraint to determine its reasonableness. The rule invalidates restraints which are inherently unreasonable and necessarily violate federal antitrust laws. Generally, the courts will determine that a challenged practice is inherently unreasonable if it has no redeeming competitive virtues. Because of the professional sports industries' unique characteristics and the judiciary's lack of expertise in the area, courts scrutinize professional sports leagues for antitrust violations through the rule of reason approach.

In *McNeil II*, the court declined to impose the per se rule despite the Players' argument for the rule. The court acknowledged that although the courts had heard a substantial number of sports exemption cases, it still believed that it lacked sufficient expertise in the area to warrant the imposition of the per se rule. 790 F. Supp. at 897.

77. *See* Chicago Bd. of Trade v. United States, 247 U.S. 231, 238-39 (1918).

78. The court's analysis of the restraint's pro-competitive goals considers whether the defendant producer is in fact more efficient because of the competitive restraint mechanism. The court measures the extent to which the restraint allows the production of more and better products at lower prices. *See* Roberts, *supra* note 55, at 25-26.

79. The court's analysis of the restraint's anti-competitive effects considers defendant producer's market power. Any increase in market power represents a corresponding ability to misallocate resources and charge monopoly prices. *Id.*

80. *See* Roberts, *supra* note 58, at 26-27. An example of a necessary and permissible business restraint in a professional sports league is the National Basketball Association's salary cap. However, the Eighth Circuit struck down the NFL's Rozelle Rule as an invalid restraint under the rule of reason

League's mechanism for restraining player mobility contributed to the NFL's competitive balance, but was more restrictive than necessary.[81] In other words, Plan B's anticompetitive effects were not clearly outweighed by its pro-competitive effects.[82] Free agency had come to the NFL.[83] Only its form remained to be determined.

II. THE NEW CBA: POINTS AND PROBLEMS

The new collective bargaining agreement consists of three major points. First, the new agreement establishes a salary cap equal to 67% of the club's annual revenues. The salary cap will take effect in the 1995-96 season[84] and will restrict a club's signing of free agents when the aggregate players' salaries reach a pre-determined level. A team may exceed the salary cap only when re-signing its own free agent and not when signing a new one.[85]

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analysis. *Mackey*, 543 F.2d at 623.

81. *Further Rulings are issued in Football Players' Antitrust Actions Against NFL*, ENT. L.R., July 1993, *available in* LEXIS, Entert Library, Entrep File.

82. Unlawful restraints are immunized from antitrust scrutiny if their effect is limited and their agreement promotes collective bargaining. The Players may agree to unreasonable restraints; however, unreasonable restraints necessarily raise questions about whether the agreement was a product of bona fide arm's length bargaining. *Mackey*, 543 F.2d at 613-14. Moreover, unreasonable restraints are invalid if the exemption is inapplicable and the restraint either lacks a legitimate business justification or has a less restrictive alternative. *Id.* at 620. Finally, unreasonable restraints frequently are anti-competitive agreements serving neither national labor nor antitrust concerns. *Id.* at 621. Maintaining the reasonableness of a restraint has always been critical to the Owners.

83. Shortly after *McNeil II*, Jackson v. National Football League, 802 F. Supp. 226 (D. Minn. 1992), similarly made several NFL players free agents.

84. In the interim, the Rooney Rule governs free agency. The Rooney Rule will be in effect for the first two years of the agreement until the salary cap scheme is in effect. This Rule prevents any team that plays in a conference championship from signing a free agent unless they lose a free agent. The losing teams in the division championship games will be able to sign only one free agent and pay him an average of $1.5 million or less. They will be able to replace departed free agents but only at salaries of less than $1 million. The Rooney Rule ensures some degree of parity in the League. However, the Rooney Rule also means that the top eight teams in the League (or nearly 30% of the clubs) will not be in the free agent market in any meaningful sense and ensures a more controlled escalation of salaries.

85. The National Basketball Association's free agency system has a similar provision. In the NBA, any team may exceed its salary cap to match another team's offer to its own free agent. Moreover, an NBA team can limit the salary cap's effectiveness by signing its players in a particular order. An NBA team can maximize its salary scale by signing other team's free agents, coming close to the salary cap, and then exceeding the cap substantially in resigning its own free agents. Pulver, *supra* note 20, at 61-62 (citing the 1988 Collective Bargaining Agreement Between the National Basketball Association and the National Basketball Players Association (Nov. 1, 1988) (extending through the 1993-94 season)).

Second, the new agreement expands the availability of unrestricted free agency to all players with at least five years of League experience. Qualified free agents are eligible to negotiate and sign with any club between March 1st and July 15th in the year when their contract expires.[86] Once a club has reached its salary cap, the experience requirement decreases and allows a player to become a free agent after just four years. "Franchise" players are a special category within this group of experienced free agents. A "franchise" player is a player who is one of the League's five highest paid players at his position. Each club may protect one franchise player.

Third, the annual amateur draft is reduced from twelve rounds to seven plus an eighth round for teams that lose free agents. In addition, the total salaries of each club's draft picks is capped at roughly $2 million.[87]

The new agreement is a tremendous improvement for players' mobility, finances, and security.[88] But the new agreement has two significant shortcomings. First, it falls well-short of its espoused goals: unrestricted free agency and restructuring or eliminating the college draft. The new agreement's terms, the limited duration of NFL careers, and the Owners' conduct, indicate that the new agreement's benefits will inure largely to a few veterans and remain largely illusory for the rest of the Players. Furthermore, the salary cap may actually decrease both the number of buyers in the market at a given time and the amount of funds available to the buyers,[89] thereby inhibiting the growth of player salaries and player mobility. Similarly, a player's contract status and experience level may substantially restrict his access to a free market in the NFL. The relatively short length of an NFL career compounds this effect. Consequently, most players will never see free agency, others will enjoy it only briefly, and a

86. If a free agent fails to sign with a new club by July 15th, his rights revert to his old club. If the player fails to re-sign with his old club by the League's trading deadline, the sixth week of the season, he cannot play in the League that season.

87. The rookie class salary cap will obviously hurt NFL rookies. The rookie class salary cup most hurt those underclassmen who opted last year to remain in school and come out this year. For example, the new restriction may have cost Notre Dame quarterback Rick Mirer $5-6 million.

88. The new agreement also significantly increases pension benefits. Existing benefits provided medical coverage for one year after a debilitating injury and provided all retiring players with $150 per month for each year of experience after 1982.

89. For non-qualifying players, free agency and the salary cap combine to shrink the available payroll. The new agreement also limits the ability of individual players to negotiate independent licensing contracts. Under the new agreement the value controls player licensing contracts. Sally Jenkins, *The Mouth That Roars*, SPORTS ILLUSTRATED, Oct. 25, 1993, at 72, 76.

few will reach it only after their value has begun to decline.[90] In addition, the new agreement effectively eliminates the mobility of "franchise" players. The franchise player's financial success comes at the cost of his mobility or vice versa.[91] The free agency system has improved, but it remains unduly restrictive.

The annual amateur draft represents the backbone of the League's control over player mobility.[92] The draft precludes players from freely operating with clubs and secures clubs' rights to players through a standard player's contract. Yet, contrary to the NFLPA's professed intentions, the new agreement left the draft largely untouched. In fact, the addition of the rookie salary cap was the only change to the college draft.

The new agreement's other significant shortcoming is its preclusion of the resolution of the long-standing antitrust issues that *McNeil II* temporarily resolved. The Supreme Court has not recently reviewed the single entity defense in the professional sports league context.[93] Whether *McNeil II's* rejection of that defense would have withstood review is unclear.

Recently, however, the Supreme Court examined the single entity defense and established that a parent corporation and a wholly-owned subsidiary are a single actor whose conduct cannot violate section 1 of the Sherman Act. In *Copperweld Corp. v. Independence Tube Corp.*,[94] the Court noted that a parent corporation and its subsidiary will always be a single entity because of their complete unity of interest.[95] The Court expressly rejected the intra-enterprise conspiracy doctrine, which favors the form of an enterprise's structure over the enterprise's business reality.[96] The Court emphasized that the voluntary decision to adopt a decentralized structure, the existence of a formal agreement and the extent of the parent's control are irrelevant.[97] The Court considered these factors irrelevant to

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90. The average NFL career is only three years. Free agency is available after five.

91. A franchise player's salary must be no less than an average of the salaries of the top five players of that position. *See European League to Begin in Spring of '95—Bennett Ends Holdout, Signs with Packers, NFL Notebook*, SAN JOSE MERCURY NEWS, Oct. 28, 1993, at 40.

92. A drafted player must sign with the drafting club or sit out a year and re-enter the draft.

93. The Supreme Court declined to review either of the decisions that the Eighth Circuit discussed in its *McNeil II* decision. *See supra* notes 68-70 and accompanying text. *See* Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1390 (9th Cir. 1984), *cert. denied*, 469 U.S. 990 (1984); North American Soccer League v. National Football League, 670 F.2d 1249, 1257 (2d Cir. 1982), *cert. denied*, 459 U.S. 1074 (1982).

94. 467 U.S. 752 (1984).

95. 467 U.S. at 777.

96. *Id.* at 771.

97. *Id.* at 772.

the competition concerns of antitrust law because economic and legal considerations may motivate these decisions.[98] The Owners plausibly could argue in line with *Copperweld's* analysis. Because of the new agreement, whether the Court or the Eighth Circuit would consider the Owners a single entity remains unresolved. The single entity issue is likely to reappear at the expiration of the League's new agreement.[99]

Similarly, the non-statutory labor exemption's scope in professional sports is uncertain.[100] The antitrust law exemptions balance the competing policies of federal labor and antitrust laws. Congress created the statutory exemption to protect unions from antitrust liability,[101] but it did not extend the exemption to concerted action by or agreements between union and non-union groups.[102] Congress encouraged collective bargaining by immunizing anti-competitive union tactics which otherwise would violate the federal antitrust laws.

The courts created the non-statutory labor exemption to fulfill the congressional intent of protecting union activity from antitrust scrutiny.[103] Without the non-statutory exemption the antitrust laws would apply to labor-management agreements. Judicial scrutiny would undermine the collective bargaining process and greatly diminish the statutory exemption's usefulness.[104] However, the Supreme Court has not defined the non-

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98. *Id.*

99. The Owners contended that the Eighth Circuit erred in relying on the Second and Ninth Circuit decisions which rejected single entity arguments. The Owners noted that both courts acknowledged that NFL clubs were engaged in a joint venture out of necessity. The Second and Ninth Circuit decisions are distinguishable because they preceded *Copperweld.* The strength of that argument is uncertain and untested in the wake of the new agreement.

100. Although the Supreme Court has not determined the scope of the nonstatutory exemption yet, the Court has established two criteria that must be satisfied for the agreement to be immune from federal antitrust laws. The first requirement is that the agreement must not include parties outside of the bargaining process. The second requirement is that the agreement must not affect parties outside of the immediate employment relationship. *See Mackey*, 543 F.2d at 614 n.13 (*citing* Connell Co. v. Plumbers & Steamfitters, 421 U.S. 616, 625-26 (1975)).

101. *Mackey*, 543 F.2d at 611-12.

102. Meat Cutters v. Jewel Tea, 381 U.S. 676, 689 (1965).

103. Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960, 964 (D.N.J. 1987). "The concept of a labor exemption finds its source in sections 6 and 20 of the Clayton Act, 15 U.S.C. section 17 and 29 U.S.C. section 52, and the Norris-LaGuardia Act, 29 U.S.C. sections 104, 105 and 113. Those provisions declare that labor unions are not combinations or conspiracies in restraint of trade, and specifically exempt certain union activities . . . from the coverage of the antitrust laws." *Id.* at 963-64 (citation omitted).

104. *Bridgeman*, 675 F. Supp. at 964. In *Mackey*, the Eighth Circuit construed the Supreme Court's holding in Connell Co. v. Plumbers & Steamfitters, 421 U.S. 616 (1975), as recognizing that "to properly accommodate the congressional policy favoring free competition in business markets with the

statutory labor exemption's precise scope. The Eighth Circuit, home of the non-statutory labor exemption in the professional sports league context, last spoke in *Powell III*. *Powell III* apparently left decertifying the NFLPA as the Players' representative as the only method to subject the Owners to federal antitrust laws.[105] The settlement of *McNeil II* prior to the Eighth Circuit's review leaves the strength of the *McNeil II* decision untested and the Players' antitrust victory incomplete. Whether the NFLPA's own re-formation and re-certification was lawful is currently unresolved.

III. CONCLUSION

The Players routed the Owners in *McNeil II*. The Commissioner authored Plan B to resolve the Owners' labor woes. But the jury sacked Plan B. *McNeil II* cost the Owners dearly because it eliminated their ability to unilaterally implement a modified free agent system that they considered reasonable. For the Players, *McNeil II* brought a new agreement, new freedom and new wealth. But the new agreement's effects are disparate. Veteran players and superstars reap huge benefits from the new agreement at the expense of younger players. The Players had requested total free agency.[106] In the alternative,[107] they had suggested a system restricted only by a four year limit.[108] The Players settled on an agreement that is rewarding but largely unattainable. The agreement fills the void that existed for years but does not settle the issues that have dominated the League for decades.

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congressional policy favoring collective bargaining under the NLRA . . . certain union-employer agreements must be accorded a limited non-statutory exemption from antitrust sanctions." *Mackey*, 543 F.2d at 611-12.

105. *See supra* notes 58-65 and accompanying text.

106. Under a total free agency system, any player who is not under contract is eligible for free agency. In addition, the system would not include any right of first refusal or compensation provisions.

107. Reggie White has brought class action suit on behalf of approximately 450 players. The suit seeks free agent status for these players whose contracts expire in February, 1993. White has stated that if Judge Doty feels that some free agent restrictions are necessary, the Players would propose a four year limit with no compensation or first refusal rights. Manny Topol, *New Wrinkle to NFL Suit*, NEWSDAY, Oct. 21, 1992 at 134.

108. Such a plan would not include any form of salary cap, right of first refusal, or compensation.