RECENT DEVELOPMENTS

SKATING ON THIN ICE: NHL OWNERS AND PLAYERS CLASH OVER FREE AGENCY

Once regarded as a weak sister to the other major sports leagues—baseball, basketball, and football—hockey is taking steps to join the others' million-dollar-plus salaries and star-studded promotions. In recent seasons, the National Hockey League's (NHL)[1] free agent system allowed a few key players to catapult into salary ranges closer to those regularly realized in other major league sports.[2] However, salary escalation[3] and the bargaining abilities of free agents resulted in growing labor disputes, and the once cordial relationship between players and management lapsed into the first players' strike in NHL history on April 1, 1992.[4] While players may choose to challenge their contracts or threaten management, the collective bargaining agreement (CBA) terms are, once bargained for, difficult, if not impossible, to flex.

This Recent Development sets forth that national labor policy and rules governing labor union members severely restrict the avenues by

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1. The NHL is a non-profit corporation governed by a Board of Governors and a president elected by that Board. Each of the 24 member clubs of the NHL has a representative vote on the Board of Governors. *See* McCourt v. California Sports, Inc., 460 F. Supp. 904, 905 (E.D. Mich. 1978), *vacated*, 600 F.2d 1193 (6th Cir. 1979).

2. Average salaries in other major league professional team sports: National Basketball Association, 1991-92, Aug. '91 estimate—$1.04 million; Major League Baseball, 1991—$891,188; National Football League, 1991—$422,149; National Hockey League, 1991-92 estimate—$350,000. Jim Smith, *Playoffs Strike Target; Players: New Pact or Stanley Cup Will Be Put on Ice*, NEWSDAY, Mar. 6, 1992, at 176.

3. Salary escalation during the life of the NHL/NHLPA Collective Bargaining Agreement which expired September 15, 1991:

Year	*Average Salary*
1986-87	$159,000
1987-88	$172,000
1988-89	$188,000
1989-90	$220,000
1990-91	$276,000
1991-92	$350,000 (estimate)

Id.

For a comparison to other major league team sport salaries, see *supra* note 2. The April 1992 CBA increased the minimum NHL salary from $25,000 to $100,000. David Elfin, *Caps Are Back and Raring To Go*, WASH. TIMES, Apr. 12, 1992, at C1.

4. Elfin, *supra* note 3. *See infra* note 12.

which a player may challenge league by-laws once they are agreed to by the NHL and the National Hockey League Players' Association (NHLPA). As previous sports cases indicate, absent extenuating circumstances, a free agent player remains at the mercy of the negotiated CBA. Consequently, hockey players must recognize the importance of exercising their strength when their CBA comes up for renewal—as it was in 1991, and will again in 1993—or else abide by the rules agreed to by their peers. Part I reviews the current atmosphere in the NHL and the league's free agent system. Part II outlines attempts to bring antitrust challenges to free agency and compensation systems in major league sports. Part III concludes that the most forceful weapon in the NHL players' arsenal remains the power to effectively negotiate a more flexible free agent system.

I. THE NHL FREE AGENT SYSTEM

A. Current Discontent

1. The NHL—A League Plagued with Troubles

When the NHL opened its diamond anniversary 75th season in October, 1991, the league entered a season of discontent. Among its problems, the NHL lacked a national television contract,[5] faced litigation initiated by former players alleging misallocation of pension funds,[6] ex-

5. In 1988, the NHL ended its relationship with ESPN, a cable television network with 50 million subscribers, and entered into a deal with SportsChannel America. Although a more lucrative deal ($51 million over three years), SportsChannel reached only four million subscribers and failed to substantially increase its subscriptions over the term of the contract. (SportsChannel now reaches about 15 million homes). SportsChannel's 1991 renewal proposal was for far less money than its initial contract, but other networks failed to make similar offers. The NHL initially balked at the decreased revenue, and as a result, opened its banner 75th anniversary season on October 3, 1991, without a U.S. national television contract. Jay Greenberg, *Greed, Indeed; In its Expansion Strategy, As In Too Many Other Matters, the NHL Has Shown a Passion For Fool's Gold*, SPORTS ILLUSTRATED, Oct. 7, 1991, at 60. The NHL and SportsChannel eventually entered into a new one-year agreement for $5.5 million, down from $17 million per year under the previous contract. William C. Symonds, *When the TV Lights Start to Dim*, BUS. WK., Mar. 16, 1992, at 126.

6. Legendary hockey players Gordie Howe and Bobby Hull were among the nearly 200 former players that sued the NHL for misallocation of pension funds. In what has been called a "poor public relations move," the NHL sued Hall of Famer Bobby Orr for speaking out on the matter. Jim Smith, *In Its Diamond Season, The NHL Has Some Flaws*, NEWSDAY, Oct. 1, 1991, at 137.

Former NHL players sued both the league and the players' union for misuse of $25 million of the players' pension fund during the mid-1980s. The suit prompted an investigation by the Federal Bureau of Investigation (FBI) and the Royal Canadian Mounted Police (RCMP). Jim Byers, *Controversies Tarnish NHL's 75th Anniversary*, TORONTO STAR, Jan. 11, 1992, at B3. This marks the first time in the history of major professional sports that the league president, club owners, and

perienced skyrocketing ticket prices, watched Eric Lindros—the first overall draft pick in 1991—refuse to enter the league partially due to restrictive draft rules,[7] and encountered numerous snags and reams of criticism regarding its proposed expansion plan.[8]

However, the expiration of the NHL's CBA with the NHLPA ranked

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players' union have been involved simultaneously in a U.S. government investigation. *NHL Notes*, CHI. TRIB., Dec. 28, 1991, at 5. The former NHL players commended the FBI and RCMP investigations. Joey Matthews, *Former Players Applaud NHL Investigation*, WASH. TIMES, Dec. 30, 1991, at C2.

As an example of the poor management of the pension plan, 63 year-old former Detroit Red Wings star Gordie Howe, who played 26 seasons, longer than anyone else in the league, earns an annual pension of less than $19,000. Former Toronto Maple Leafs star Andy Bathgate, who retired in 1971 after playing 17 seasons, earns $10,200 annually. *Id.*

7. At 20 years-old, 6-foot-5 inches, and 228 pounds, Eric Lindros is considered one of the most talented players ever to play the sport of hockey. Under the NHL's amateur draft, the last-place Quebec Nordiques drafted Lindros, who subsequently refused to sign with the team because he had no desire to struggle with a poor team located far from the media centers of North America. Steve Springer, *NHL 1991-92; There's a Lot Not to Watch; Hockey: There Is No National TV, No Collective Bargaining Agreement and No Eric Lindros. But There Are Sharks*, L.A. TIMES, Oct. 3, 1991, at C1. Lindros argued that playing in Quebec City would hurt his earning potential, especially regarding product endorsements. Consequently, he chose to passively challenge the NHL rule, and a longstanding sports tradition, which dictates that a player must go to the team that drafts him. Lindros wanted the same opportunity as non-athletes to choose his workplace. Team owners who support the draft argued that, without the system, the league would encounter competitive chaos, and franchises in smaller markets, such as Quebec, would certainly face extinction. Kevin Allen, *Best, Worst of Times For the NHL*, USA TODAY, Oct. 2, 1991, at C1.

Lindros' response evidenced players' general discontent with a restrictive draft system that hinders the ability of a player to sell his talents to the highest bidder. As a player restraint mechanism, the draft system controls the movement of new players by allocating to a particular team the exclusive right to contract with an athlete leaving the amateur ranks. *See* Michael S. Hobel, Note, *Application of the Labor Exemption After the Expiration of Collective Bargaining Agreements in Professional Sports*, 57 N.Y.U. L. REV. 164, 165 (1982).

Lindros split the 1991-92 season playing for the Oshawa Generals of the Ontario Hockey League, a major junior league, and the Canadian Olympic team, winning a silver medal in the Olympic games at Albertville, France. On June 20, 1992, Lindros was traded—twice—by the Quebec Nordiques. Quebec made deals with both the Philadelphia Flyers and New York Rangers. On June 30, 1992, arbitrator Larry Bertruzzi awarded Lindros' rights to Philadelphia. Quebec received $15 million, five players, and two future draft picks in exchange for Lindros. Dave Luecking, *Arbitrator Says Flyers Get Lindros*, ST. LOUIS POST-DISPATCH, July 1, 1992, at C1.

8. Since 1979 when the NHL absorbed four World Hockey Association clubs, the league has consisted of 21 teams. Its "vision of the nineties" expansion plan proposes 28 teams by the year 2000. The first of these expansion teams, the San Jose Sharks, began play in the 1991-92 season. The Ottawa Senators and Tampa Bay Lightning will begin play in the 1992-93 season.

Many criticize the expansion plan. The $50 million per team expansion fee is viewed as excessive ($18.5 million more than the NBA charged during its 1987 expansion), increasing the possibility of undercapitalized teams, scaring away responsible potential owners, and artificially inflating the value of the league's existing teams. Furthermore, the league refused to compromise with potential buyers to restructure the stringent payment terms.

as the most troublesome issue.[9] Central in the dispute over a new collective bargaining agreement stood the current free agent system.[10] Negotiations between team management and the NHLPA proved so unsuccessful that the league played the entire season without a collective bargaining agreement.[11] Unlike their counterparts in the football and baseball leagues, hockey players and management have historically maintained a friendly relationship, never resorting to a work stoppage in the form of a strike or a lockout.[12] This auspicious record ended on April 1, 1992, when players went on strike for ten days, resulting in the postponement of thirty games and the delay of the Stanley Cup playoffs.[13]

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9. The NHL/NHLPA collective bargaining agreement expired on September 15, 1991. Kevin McGran, *NHL Talks Break Off Early*, OTTAWA CITIZEN, Sept. 26, 1991, at C7.

10. In the collective bargaining negotiations, the NHLPA sought: (1) an improved pension plan; (2) coverage of all medical insurance benefits; (3) a dramatic increase in the players' shares of playoff revenues; (4) less-restrictive free agency; (5) amendments to waiver rules and regulations and reduction of entry draft from twelve rounds to six; (6) a larger share of league endorsements and licensing; and (7) a decrease in the power and influence of the NHL president in settling CBA disputes. Bob McKenzie, *Can NHL Players Risk Playoff Strike?*, TORONTO STAR, Feb. 8, 1992, at B6. *See infra* notes 11-13.

11. Initial attempts between the NHL and the NHLPA to negotiate a new CBA failed when the two groups walked away from the bargaining table on September 26, 1991. McGran, *supra* note 9, at C7. Negotiations resumed in February 1992, and continued until April 1992, without resolution. David Elfin, *Caps Enjoy Romp In Garden; NHL Strike Likely Monday*, WASH. TIMES, Mar. 10, 1992, at D1, D5. A ten day strike began April 1, 1992. Interestingly, the strike was the first strike in NHL history. The CBA reached on April 11, 1992, is effective for two years (retroactive to September 15, 1991), expiring September 15, 1993. Jon Scher, *A Last-Second Save*, SPORTS ILLUSTRATED, Apr. 20, 1992, at 11.

12. Rick Sadowski, *Hockey; NHL Strike Possibly Looms As Owners, Players Deadlocked*, OTTAWA CITIZEN, Sept. 15, 1991, at C9. Work stoppages in the form of a strike or lockout have occurred seven times in baseball and four times in football. Elfin, *supra* note 11, at D1, D5.

Hockey's history of collective bargaining has been similar to professional basketball, where owners and players act as partners and cooperate with each other. However, basketball has realized far more profit due, in part, to more aggressive marketing, salary plans, and a lucrative U.S. television contract. *See infra* notes 77-82. The demise of the amiable relationship between hockey players and management has been partially blamed on NHL President John Ziegler. While Ziegler claims that more than half of the NHL teams will lose money in the 1991-92 season and that the business is too fragile to increase the mobility of free agents, he is attempting to sell additional expansion franchises for $50 million each. Such inconsistencies leave players skeptical. Joe LaPointe, *Tick, Tick, Tick Goes N.H.L.'s Clock*, N.Y. TIMES, Mar. 12, 1992, at B14. Amidst criticism, Ziegler resigned as NHL President in June 1992. *See infra* note 83. Also, in 1991, the NHLPA replaced longtime leader Alan Eagleson with Bob Goodenow. Eagleson was often criticized for his too cozy relationship with NHL management leaders. The players' chose Goodenow, a former player agent, for his reputation as a tough labor representative. Smith, *supra* note 6, at 137. *See also* Byers, *supra* note 6, at B3.

13. Scher, *supra* note 11, at 11. A strike near the end of the regular season seemed to be to the players' best advantage. By this point, players had received the bulk of their compensation, since players receive relatively little in the way of post-season pay. In contrast, a post-regular-season

2. *Inadequacies of the Free Agent System*

From the players' standpoint, the situation of former St. Louis Blues player Scott Stevens best illustrates a major problem with the NHL's current free agent system. In July 1990, Stevens became the first top player under age thirty-one to change teams as a free agent, signing a $5.2 million, four-year contract with the St. Louis Blues.[14] A year later, St. Louis signed free agent Brendan Shanahan of the New Jersey Devils. The free agent system entitled New Jersey to player compensation for St. Louis' signing of Shanahan.[15] Unable to come to an agreement within the requisite time period,[16] arbitrator Edward J. Houston awarded Stevens to New Jersey as compensation.[17]

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strike poses a considerable threat to owners, who benefit substantially from post-season play. Thirteen percent of club revenue is generated from post-season play. Elfin, *supra* note 11, at D1, D5. According to former NHL President John Ziegler, each team earns an average of $400,000 in post-season revenues. Joe LaPointe, *Progress in NHL Negotiations? Maybe. Talks Move North*, N.Y. TIMES, Mar. 13, 1992, at B7. As for the players' share, playoff bonuses under the old CBA peaked at $25,000 per player for the team winning the Stanley Cup. Joe LaPointe, *Puck Versus Picket: NHL Fears a Strike*, N.Y. TIMES, Mar. 9, 1992, at C4. Under the April 1992 CBA, the owners agreed to contribute playoff money of $7.5 million in 1992 and $8 million in 1993. For comparison, the owners contributed only $3.2 million in 1991. Elfin, *supra* note 3, at C1.

14. Because Stevens was under the age of 30, he qualified as a Group II free agent, a status which restricted his bargaining ability. *See infra* note 30.

In October, 1982, Stevens, then 18, began his professional hockey career with the Washington Capitals as the team's top draft pick (fifth overall). David Elfin, *Stevens' Life Is Disarray, But His Game Fits N.J. Fine*, WASH. TIMES, Oct. 17, 1991, at D1.

When Stevens signed with the Blues in 1990, hockey observers symbolized the deal as the beginning of a new age of salary escalation and player movement. As compensation for signing Stevens, the Blues surrendered five first round draft picks to the Capitals. *See infra* note 30. The Blues named Stevens team captain, and he played one season with the Blues. Incidentally, that season was the Blue's best season in the last 10 years. Gary Loewen, *BackTalk; There Is Nothing Free About N.H.L. Free-Agency*, N.Y. TIMES, Sept. 22, 1991, § 8, at 11.

For an in-depth discussion of free agent equalization payments see *infra* notes 15, 30.

15. The NHL free agent system entitles a team whose player is signed by another team to "equalization payments." Depending upon the classification of the player in the league's three-tier system, *see infra* note 30, the payment may take the form of future draft picks, assignment of player contracts or, as a last resort, cash. JOHN C. WEISTART & CYM H. LOWELL, THE LAW OF SPORTS, § 5.03, at 87 (Supp. 1985) [hereinafter SPORTS—Supp. 1985].

16. According to NHL By-Law § 9A(8)(a), the teams must reach an agreement within three business days of the acquiring team's signing of the free agent. If the teams fail to agree, they have two business days to submit proposals to a neutral arbitrator. The arbitrator then has two business days to determine which of the two proposals, unchanged, will govern. *See* McCourt v. California Sports, Inc., 460 F. Supp. 904, 906 (E.D. Mich. 1978), *vacated*, 600 F.2d 1193 (6th Cir. 1979).

17. After the announcement of his assignment to the New Jersey Devils, Stevens initially refused to report to the team. Stevens and his attorney, Rick Bennett, hoped that New Jersey would trade him back to St. Louis. When a trade failed to materialize, Stevens reported to New Jersey's training camp on September 26, 1991. Stevens decided not to challenge the free agent compensation

Houston's decision rocked the NHL. Players questioned the incentive a team would have in signing a free agent, knowing that an arbitrator could assign the player to another team in the event of a future dispute.[18] Even some members of team management, traditionally supporters of the free agent compensation system, declared that Houston's award amounted to punitive treatment of the Blues for their recent aggressive efforts in using the free agent route to build a winning team.[19] At the

system in court. Any litigation would likely have resulted in Stevens sitting out a season of play and forfeiting his $875,000 salary. Elfin, *supra* note 14, at D1.

A clause in Stevens' contract with St. Louis remains in dispute. The contract provided for a $500,000 payment to Stevens by the Blues in the event Stevens was traded. Still unresolved is the issue whether the arbitration ruling was a "trade," and, if so, who is responsible for compensating Stevens under this clause. Dave Sell, *Stevens, Itching to Play, Will Report to Devils; Defenseman Decides Against Court Action*, WASH. POST, Sept. 25, 1991, at F2.

18. The same argument was made fourteen years ago in McCourt v. California Sports, Inc. (*McCourt I*), 460 F. Supp. 904 (E.D. Mich. 1978), *vacated*, 600 F.2d 1193 (6th Cir. 1979) (*McCourt II*). Dale McCourt signed a three year contract to play with the Detroit Red Wings. *McCourt II*, 600 F.2d at 1195. When the Red Wings signed free agent Rogatien Vachon to a five year, $1.9 million contract, the team was obliged to make an equalization payment to Vachon's previous team, the Los Angeles Kings. *Id.* at 1196. The Red Wings and Kings failed to reach an agreement, and subsequently submitted proposals to the neutral arbitrator, Edward J. Houston. (Ironically, Houston was the same arbitrator in the Scott Stevens' situation over ten years later). Houston awarded McCourt to the Kings. *Id.* McCourt refused to report to the Kings and brought suit in the United States District Court for the Eastern District of Michigan seeking a preliminary injunction against the equalization system. *McCourt I*, 460 F. Supp. at 904.

Sidney Abel, a former hockey player, general manager, and current hockey analyst, testified in the McCourt litigation that arbitration decisions awarding star players to other teams as compensation would make general managers reluctant to sign free agents and afraid to a gamble on potential compensation. *Id.* at 908. Further testimony indicated that free agent players would have received larger contracts had it not been for the equalization payment imposed on teams signing free agents. *Id.* The district court issued an injunction barring the Kings from forcing McCourt to report to the new team. *Id.* at 912.

The Court of Appeals for the Sixth Circuit vacated judgment. *McCourt II*, 600 F.2d at 1193. The court found that the collective bargaining agreement met the three-part *Mackey* test. *Id.* at 1198-1202. Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977), *see infra* part II.B. In addition, the court concluded that McCourt's situation was exempt from antitrust litigation. *Id.* at 1203. Subsequently, the parties settled. Sell, *supra* note 17, at F2.

19. Loewen, *supra* note 14, at 11. St. Louis Blues general manager Ron Caron, who many in the sport consider a renegade, attempted to build a league contender via the free agent route. Although his aggressive efforts unnerved most in the NHL, some considered Caron's lucrative offers to players as a means of pulling the league out of its second-class reputation. *Id.* Caron's efforts appeared to have been paying off when the Blues finished the 1990-91 regular season as one of the top two teams. *Id.*

Others in the league regarded the award of Stevens to the Devils as fair, noting that Blues management failed to offer the Devils adequate compensation when the two were at the bargaining table. The Blues had offered players Rod Brind'Amour and Curtis Joseph, plus two draft picks. Kevin Paul Dupont, *Free Agents Shackled by Compensation*, BOSTON GLOBE, Sept. 8, 1991, at 62.

Many NHL managers still believe that stringent controls on player movement and salaries are

collective bargaining table, the need to restructure the free agent provisions took on heightened importance.[20]

B. By-law 9A—Restrictions on Free Agents

Beginning in the 1960s, management of sports teams watched as their once powerful reign over players diminished with the advent of competing leagues.[21] In the early 1970s, the NHL faced a rival league, the World Hockey Association (WHA), and players realized an increase in their bargaining power. With a viable alternative, players could negotiate with the other league if dissatisfied with their status in the NHL.[22] As a result, in 1973, the players collectively bargained for a right of free agency, allowing an experienced NHL player to negotiate his services with another NHL team once his current contract expired.[23]

When the WHA merged with the NHL in 1979, the free agent system remained in place.[24] However, teams retained rather stringent control over their players because of the inflexibility of the free agent system. John Ziegler, then NHL President, argued that the rigid system served to maintain economic solvency and competitive balance among the member teams because less affluent clubs in less desirable locations would not be

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necessary, noting that teams in smaller markets cannot raise the revenues required to pay the salaries which teams in larger markets can afford. Winnepeg Jets general manager, Mark Smith, half-seriously commented that he envisioned the NHL becoming two leagues: one for the six richest teams with the best players, and one for the remaining teams and players. David Elfin, *In 75th Year, NHL Collects Much Interest But Not Funds*, WASH. TIMES, Oct. 2, 1991, at D1.

20. Dave Sell, *Stevens Case Underscores Free-Agency Dilemma; Players Likely Will Press For Radical Changes in New Collective Bargaining Agreement*, WASH. POST, Sept. 5, 1991, at B2. See *supra* note 14.

21. GEORGE W. SCHUBERT ET AL., SPORTS LAW § 5.1, at 124 (1986). In football, in the 1960s, the American Football League challenged the NFL, resulting in the eventual merger of the two leagues. Subsequent challenges from the World Football League in the 1970s and the United States Football League in the 1980s were less successful. In basketball, the upstart American Basketball Association merged with the NBA in the 1970s.

22. *Id.*

23. *See* SPORTS—Supp. 1985, *supra* note 15, § 5.03, at 87. *See also* SCHUBERT ET AL., *supra* note 21, § 5.1, at 124-25. The free agent plan included compensation payments, requiring the acquiring team to surrender draft picks, players' contracts, or cash to the free agents' previous team. SPORTS—Supp. 1985, *supra* note 15, § 5.03 at 87. Fearful of losing key players, teams extended the duration of player contracts and increased salaries. SCHUBERT ET AL., *supra* note 21, § 5.1, at 125.

24. Without the alternative of the WHA, players sought to eliminate the free agent compensation system. After a stalemate in negotiations, in 1982, the players exercised their option to terminate the equalization payments. Before taking effect, however, a new collective bargaining agreement was executed incorporating a revised compensation system. SPORTS—Supp. 1985, *supra* note 15, § 5.03 at 87. The new system divided players into three classes and placed no limits on the number of free agents a team could sign. *Id.* at 87-88. *See infra* note 30.

able to maintain good players without such a system.[25]

NHL by-law section 9A embodies the crux of the league's free agent system. Adopted in 1973[26] and amended in subsequent years,[27] including the April 1992 CBA, section 9A spells out the determination of equalization payments. Generally, a team signing another team's free agent player must compensate the player's former team. For the signing of a player such as Brendan Shanahan, the new team is obligated to compensate the former team with a combination of (1) player contracts, (2) draft choices, or (3) cash.[28] If the teams are unable to negotiate an equalization payment agreement within three business days, they must submit final proposals to a neutral arbitrator who will select, without change, one of the proposals within two business days.[29] To further complicate matters, the free agent system divides players into three groups, each with different equalization methods.[30]

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25. McCourt v. California Sports, Inc., 460 F. Supp. 904, 909 (E.D. Mich. 1978) (*McCourt I*). Ziegler testified that by-law § 9A was also necessary to maintain employment opportunities for players since a "competitive balance is essential to generate sufficient gate receipts which in turn will assure the economic solvency of every team in the league." *Id.* at 909 n.6. *See also supra* note 19. Ziegler further testified that by-law § 9A was less restrictive than the now-banned "Rozelle Rule," which once applied to free agents in the NFL because, in the event of a dispute, the decision is made by a neutral third party arbitrator rather than the league president. *McCourt I*, 460 F. Supp. at 909. *See* Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976), *cert dismissed*, 434 U.S. 801 (1977). Unlike the NHL rule which designates a neutral arbitrator to resolve disputes, the Rozelle Rule assigned the Commissioner of Football to award compensation. *See infra* note 44. The court rejected the NHL's arguments. *McCourt I*, 460 F. Supp. at 909.

26. *McCourt I*, 460 F. Supp. at 910.

27. SPORTS—Supp. 1985, *supra* note 15, § 5.03, at 87. The original free agent system has been amended in each successive CBA.

28. *See McCourt I*, 460 F. Supp. at 906.

29. *Id. See supra* notes 15-16 and accompanying text.

30. As modified by the April 1992 CBA, free agent players are divided into three classes based upon their age and tenure.

Group I includes players age 24 and under who have not played five years as a professional (including professional minor leagues). To maintain its equalization rights, the player's current club must offer the player a new contract prior to July 1 of the year the player becomes a free agent. The contract must offer at least a 15% increase and provide for salary arbitration if the player accepts the contract except for its salary terms. John J. Chapman, *National Hockey League Contract Negotiations*, *in* LAW OF PROFESSIONAL AND AMATEUR SPORTS 8-1, 8-19 to 8-20 (Gary A. Uberstine ed., rev. 1991). At the player's option, the player's former team is entitled either to player equalization or draft pick compensation. Equalization is determined by the teams involved or by a neutral arbitrator if no agreement is reached. *See supra* notes 15-17. Draft pick compensation is determined by a schedule based on salary. *See infra* discussion of Group II. The former team has a right to match the new club's offer if the player chooses draft pick compensation, but not if he chooses player equalization. *Here's What the NHL, NHLPA Agreed Upon*, HOCKEY NEWS, Apr. 24, 1992, at 4.

Group II includes players aged 24-29 or who have played professionally for five years. Similar to

II. ANTITRUST CHALLENGES & THE "LABOR EXEMPTION"

A. Statutory v. Nonstatutory Exemption

Players, such as Scott Stevens, who become unwilling participants in the compensation system, have attempted to challenge restrictive free agent schemes and reserve clauses under federal antitrust statutes.[31] One form of attack relies upon section 1 of the Sherman Act, which provides that "[e]very contract, *combination* . . . or conspiracy in restraint of trade

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Group I players, the current team must meet the July 1 deadline and minimum salary offer to maintain its right to equalization payments. Chapman, *supra* at 8-21 to 8-22. The minimum salary offer must be at least $351,000 or the team forfeits the right to match the new offer. *Here's What the NHL, NHLPA Agreed Upon*, *supra*. Equalization payments are set in a formula of draft choices, arranged on a sliding scale. For example, the April 1992 CBA schedule is arranged as follows:

Salary Category	*Equalization Payment*
under $200,000	none
$201,000—250,000	3rd round pick
$251,000—350,000	2nd round pick
$351,000—500,000	1st round pick
$501,000—1,000,000	Two 1st round picks
Each additional million or portion thereof	One additional 1st round pick

Id.

Group III includes players over 30 years old. *Id.* Like Groups I and II, a club must make an offer by July 1 to retain the right to equalization payments. The player has the option to choose his team's equalization rights—either a right of first refusal or mandatory equalization arbitration similar to that used in Group I, but with equalization limited to draft choices. Most players choose the right of first refusal option, restricting the club to matching the competing offer or receiving nothing for the player. This allows a player to bargain with other teams that now run no risk of further equalization payments. Chapman, *supra* at 8-22.

Additionally, any player with 10 years of service in the NHL who earns less than the average salary can become a free agent without compensation or equalization. *Here's What the NHL, NHLPA Agreed Upon*, *supra*.

31. Football: Mackey v. NFL, 407 F. Supp. 1000 (D. Minn. 1975), *aff'd in part, rev'd in part*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); Powell v. NFL, 678 F. Supp. 777 (D. Minn. 1988), *rev'd*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 111 S. Ct. 711 (1991); on other related motions: 764 F. Supp 1351 (D. Minn. 1991).

Hockey: Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972) (involving an interleague dispute rather than individual players versus their own league); McCourt v. California Sports, Inc., 460 F. Supp. 904 (E.D. Mich. 1978), *vacated*, 600 F.2d 1193 (6th Cir. 1979).

Basketball: Bridgeman v. NBA, 675 F. Supp. 960 (D.N.J. 1987).

Baseball: Player restrictions in baseball are distinguishable from those in other sports because of baseball's unique exemption from antitrust laws established in Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922). For a full discussion of baseball's exemption and lists of cases, authorities, and congressional materials, see JOHN C. WEISTART & CYM H. LOWELL, THE LAW OF SPORTS § 5.02 (1979).

or commerce . . . is declared to be illegal."[32] Players challenging the league attempt to classify sports leagues as "combinations," thereby falling within the proscriptions of section 1. A second form of attack is grounded upon section 2 of the Sherman Act, which states that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of [antitrust violations]."[33] Additionally, players may attempt to challenge teams on the basis of section 2(a) of the Clayton Act, which provides that "[i]t shall be unlawful for any person engaged in commerce . . . to discriminate in price . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly. . . ."[34]

Even if challengers could define league or team activity as a contract, combination, conspiracy or monopoly, antitrust challenges to free agent provisions invariably meet a road block—the labor exemptions.[35] There are two forms of labor exemptions—statutory and nonstatutory. Section 6 of the Clayton Act embodies the statutory exemption,[36] stating in perti-

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32. 15 U.S.C. § 1 (1988) (emphasis added).

33. 15 U.S.C. § 2 (1988). Challengers cite § 2 of the Sherman Act because sports are frequently national or international in scope, thereby meeting the statutory requirement of "trade or commerce among several States, or with foreign nations." *Id.*

34. 15 U.S.C. § 13(a) (1988).

35. Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 GEO. L.J. 19, 21-22 (1986). Roberts' article is the third in a series exploring the application of § 1 of the Sherman Act to sports leagues' rules and practices. The first article addressed the economic nature of a sports league and its indivisible entertainment product. *See* Gary R. Roberts, *Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry*, 32 UCLA L. REV. 219 (1984). The second article analyzed the § 1 decisions involving league employment practices that restrained only the labor market. *See* Gary R. Roberts, *Sports League Restraints on the Labor Market: The Failure of Stare Decisis*, 47 U. PITT. L. REV. 337 (1986).

36. Powell v. NFL, 678 F. Supp. 777, 782 (D. Minn. 1988). The *Powell* court explained the origin of the two labor exemptions. The statutory labor exemption removes from antitrust scrutiny certain legitimate, albeit anticompetitive, union activities because they are favored by national labor policy. *Id.* at 782.

> The concept of a [statutory] labor exemption finds its source in sections 6 and 20 of the Clayton Act, [15 U.S.C. § 17 and 29 U.S.C. § 52], and the Norris-LaGuardia Act, [29 U.S.C. §§ 104, 105, 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. This statutory exemption insulates inherently anticompetitive collective activities by employees because they are favored by federal labor policy.
>
> The statutory exemption extends to legitimate labor activities unilaterally undertaken by a union in furtherance of its own interests. It does not extend to concerted action or agree-

nent part that "[t]he labor of a human being is not a commodity or article of commerce,"[37] thereby excluding labor from the "restraint of commerce" language of section 1 of the Sherman Act.[38] The nonstatutory exemption arises implicitly from the need to avoid antitrust interference with subsequently established policies of the National Labor Relations Act (NLRA).[39] Once players choose to unionize and thereby obligate themselves to abide by the NLRA, antitrust rules no longer govern the resolution of labor disputes involving subjects of mandatory bargaining.[40]

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ments between unions and non-labor groups. This is where the nonstatutory exemption comes into play.

Id. at 782 n.12 (quoting Bridgeman v. NBA, 675 F. Supp. 960, 963-64 (D.N.J. 1987)).

37. Section 6 of the Clayton Act provides in full:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

15 U.S.C. § 17 (1988).

Roberts concluded that "[w]hile the lengthy and convoluted second sentence of this section deals only with the lawfulness of labor organizations, . . . the largely overlooked first sentence of the section appears to apply to sports league player practices." Roberts, *Reconciling Labor and Antitrust Policy*, *supra* note 35, at 26. After analyzing the language, legislative history, and application of § 6, Roberts determined that there is an "unequivocal statutory ground for excluding from antitrust purview cases based on restraints of competition in the labor market." *Id.* at 58. For a full analysis, see *id.* at part II.

38. *See supra* text accompanying note 32. *See supra* note 37.

39. The nonstatutory exemption removes anticompetitive union-employer activities from antitrust sanctions. *Powell*, 678 F. Supp. at 782. In order to balance antitrust policies of the Sherman and Clayton Acts favoring free competition with labor policies of the NLRA favoring collective bargaining, the Supreme Court has recognized that "certain union-employer agreements must be accorded a limited nonstatutory exemption from antitrust sanctions." *Id.* (citing Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 621-22 (1975), Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689 (1965)). Application of the nonstatutory labor exemption turns on whether the relevant federal labor policy is deserving of preeminence over federal antitrust policy under the circumstances of the particular case. *Id.*

The National Labor Relations Act (NLRA), 29 U.S.C. §§ 141-87 (1988), was preceded by the Wagner Act of 1935, 49 Stat. 449 (1935). NLRA policy mandates that labor and management "confer in good faith with respect to wages, hours, and other terms and conditions of employment," 29 U.S.C. § 158(d) (1988), commonly referred to as mandatory subjects of bargaining, without government interference. *See* Roberts, *supra* note 35, at 22.

40. Roberts, *Reconciling Labor and Antitrust Policy*, *supra* note 35, at 22. For a full analysis of Roberts' conclusion, see *id.* at part III.

The statutory exemption for employers in the first sentence of § 6 of the Clayton Act, *see supra* note 37, only exempts pure labor market restraints. Roberts, *Reconciling Labor and Antitrust Policy*, *supra* note 35, at 58 n.192. Nonstatutory exemptions can remove employer actions from the scope of

B. The Mackey *Test*

In *Mackey v. National Football League*,[41] the Eighth Circuit set forth a three-part test for determining whether the nonstatutory labor exemption applies to sports leagues and players' unions.[42] The test requires: (1) that the restraint on trade primarily affect only the parties to the collective bargaining relationship; (2) that the agreement sought to be exempted concern a mandatory subject of collective bargaining; and (3) that the agreement sought to be exempted is the product of bona fide arm's-length bargaining.[43]

Mackey itself dealt with the NFL's "Rozelle Rule," which provided for compensation to a free agent's former team by his new team.[44] Ap-

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antitrust laws if the restraint is agreed upon by the union and is included in the collective bargaining agreement, and the party claiming injury is a member of the union. *Id.* Roberts concludes that "for all practical purposes, the nonstatutory exemption, as it applies to employer leagues, has no broader reach than the statutory exemption—they both apply only to restraints having direct impact on only the labor market." *Id.* at 59.

The Supreme Court first recognized the nonstatutory labor exemption in Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965), and a companion case, United Mine Workers v. Pennington, 381 U.S. 657 (1965).

41. 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

42. *Id.* at 614.

43. The court provided:

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

Mackey, 543 F.2d at 614 (citing Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975); Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965); United Mine Workers v. Pennington, 381 U.S. 657 (1965)). *See supra* notes 39-40.

44. *Id.* *Mackey* involved a challenge by present and former NFL players to the league's "Rozelle Rule," which stated:

> Any player, whose contract with a League club has expired, shall thereupon become a free agent and shall no longer be considered a member of the team of that club following the expiration date of such contract. Whenever a player, becoming a free agent in such manner, thereafter signed a contract with a different club in the League, then, unless mutually satisfactory arrangements have been concluded between the two League clubs, the Commissioner may name and then award to the former club one or more players, from the Active, Reserve, or Selection List (including future selection choices) of the acquiring club as the Commissioner in his sole discretion deems fair and equitable; any such decision by the Commissioner shall be final and conclusive.

543 F.2d at 610-11 (quoting Article 12.1(H) of the NFL Constitution and By-laws). The Rozelle Rule is similar to the NHL's equalization procedure for Group I free agents. *See supra* notes 15-16, 30.

The complaint in *Mackey* alleged that the Rozelle Rule clearly violated § 1 of the Shermann Act.

plying its three-part test, the court concluded that the first requirement, that the restraint on trade affects only the parties to the agreement, was clearly satisfied based on the facts of the case.[45] The second requirement, that the disputed matter be a mandatory subject of bargaining, was satisfied by showing that the agreement concerned subjects identified as "wages, hours and other terms and conditions of employment" as set forth under section 8(d) of the NLRA.[46] The *Mackey* court held that the "Rozelle Rule" constituted a mandatory subject of bargaining.[47] However, the court found that the "Rozelle Rule" failed the test's third requirement—bona fide arm's-length bargaining. Specifically, the court found that the NFL owners unilaterally imposed the Rule upon the players, and that the players' union subsequently had not agreed to the continued effect of the Rule as the *quid pro quo* for increased benefits.[48] Without the nonstatutory exemption, the court concluded that the "Rozelle Rule" violated section 1 of the Sherman Act as an unreasonable restraint of trade.[49]

In a 1979 challenge by a hockey player to the NHL's free agent and

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See supra note 32 and accompanying text. The NFL claimed the nonstatutory labor exemption covered the Rozelle Rule, and thus, the Sherman Act limitations were inapplicable. *Mackey*, 543 F.2d at 600.

45. The court determined that the Rozelle Rule clearly affected only the NFL and the players. 543 F.2d at 615. The court did not elaborate on this part of the test.

46. *Mackey*, 543 F.2d at 915. Section 8(d) of the NLRA is codified at 29 U.S.C. § 158(d) (1988).

47. *Mackey*, 543 F.2d at 615. While on its face the Rozelle Rule did not restrict wages, hours, and other terms or conditions of employment, the Rule operated to restrict a player's ability to move from one team to another and depressed player salaries. The Rule thereby constituted a mandatory subject of bargaining within the meaning of the NLRA.

48. The Rozelle Rule was unilaterally imposed on the players in 1963. *Id.* at 610. Subsequently, two collective bargaining agreements were negotiated in 1968 and 1970. The 1968 negotiations did not contain significant discussion of the Rule. *Id.* at 612-13. The Rule was incorporated into the CBA only by reference. *Id.* Similarly, the 1970 negotiations contained little discussion of the Rule. *Id.* at 613. The owners alleged that the Rule was the subject of bona fide arm's-length bargaining because the players received increased pension benefits and the right to individually negotiate their salaries. *Id.* at 616. The owners characterized the union's acceptance of the Rozelle Rule as a *quid pro quo* for the increased benefits. *Id.* The court refused to recognize the *quid pro quo* argument for two reasons: (1) the subjects of pension and individual salary negotiation were the topics of "side discussions," not a direct issue of negotiations; and (2) at the time, the clubs had already separately agreed to individual salary negotiations. *Id.* at 616 n.17.

49. *Id.* at 616-22. The court rejected the district court's finding of a per se antitrust violation, *id.* at 618-20, but agreed that the Rozelle Rule violated the "Rule of Reason" test. *Id.* at 620-22. The focus of the Rule of Reason inquiry is whether the restraint imposed is justified by legitimate business purposes, and is no more restrictive than necessary. *Id.* at 620. Assuming the Rozelle Rule had a legitimate business purpose, the court nevertheless concluded that it was too restrictive and violated federal antitrust laws. *Id.* at 622.

reserve clause systems, *McCourt v. California Sports, Inc.*,[50] the Sixth Circuit applied the three-part *Mackey* test and found that the player-league agreement fell within the nonstatutory labor exemption.[51] The court readily found that the restraint on trade primarily affected only the parties to the bargaining relationship, meeting the first requirement of the *Mackey* test.[52] The parties met the second requirement because the reserve system involved terms and conditions of employment in both form and practical effect.[53] Unlike *Mackey*, however, the Sixth Circuit in *McCourt* found that, although the NHL initially unilaterally imposed the reserve system rule, and the rule remained in effect without change after the CBA, the parties nevertheless had engaged in good faith bargaining, satisfying the third element of the *Mackey* test.[54] The court noted that nothing in labor law principles compels either party negotiating a mandatory subject of collective bargaining to yield on its initial bargaining position.[55]

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50. McCourt v. California Sports, Inc., 600 F.2d 1193 (6th Cir. 1979) (*McCourt II*). *See supra* note 18.

51. *McCourt II*, 600 F.2d at 1197-1203.

52. *Id.* at 1198. "It is the hockey players themselves who are primarily affected by any restraint, reasonable or not." *Id.*

53. The *McCourt II* court agreed with the Eighth Circuit's determination in *Mackey* that:

> [T]he restriction upon a player's ability to move from one team to another within the league, the financial interest which the hockey players have and their interest in the mechanics of the operation and enforcement of the rule strongly indicate that it is a mandatory bargaining subject within the meaning of the National Labor Relations Act, Section 8(d), 29 U.S.C. § 158(d) (1976).

Id. *See supra* note 47.

54. 600 F.2d at 1200. The court recounted the history of the reserve clause and free agent system embodied in by-law § 9A. *See supra* notes 21-30 and accompanying text. *See also* Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972). The *McCourt II* court termed the 1976 CBA "a classic case of collective bargaining in which the reserve system was a central issue." *McCourt II*, 600 F.2d at 1202. The NHLPA used every negotiating tactic available to it, but the owners did not budge on by-law § 9A. *Id.* The owners did, however, yield on other significant issues, such as pension benefits, bonus money, and receipts from international hockey games. *Id.* at 1202 & n.12.

55. *Id.* The court stated that, "[g]ood faith bargaining is all that is required. That the position of one party on an issue prevails unchanged does not mandate the conclusion that there was no collective bargaining over the issue." *Id.* (citing NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 404 (1952)).

> [T]he statutory right to decline to make a concession includes the right to firmly stand on a proposal previously made and not accepted. . . . It is not for the Board or the Court to determine what in their opinion the respondent should have agreed to, and, in effect, make the contract for the parties.

600 F.2d at 1201 (quoting NLRB v. United Clay Mines Corp., 219 F.2d 120, 125-26 (6th Cir. 1955)).

C. *Removing The "Labor Exemption"—Decertification*

A recent ruling illustrates a last resort measure that players could use to challenge the league under antitrust law. In May 1991, the United States District Court for the District of Minnesota held in *Powell v. National Football League*[56] that the football players' termination of their union served as sufficient grounds to declare that collective bargaining efforts between the union and the league were no longer possible.[57] Since the players were no longer part of an "ongoing collective bargaining ef-

56. Powell v. NFL, 764 F. Supp. 1351 (D. Minn. 1991). The original *Powell* action was brought by the National Football League Players Association (NFLPA) and several individual players. *Powell*, 678 F. Supp. 777 (D. Minn. 1988), *rev'd*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 2583 (1990). The players alleged that the Right of First Refusal/Compensation System (RFR/CS) of free agency violated antitrust laws. *Id.* at 778. Applying the *Mackey* test, *see supra* notes 42-43 and accompanying text, the court found that the nonstatutory exemption was applicable. *Id.* at 784. However, the court primarily addressed whether the exemption survived the expiration of the CBA. *Powell* concerned the owners' continuing application of the RFR/CS after expiration of the CBA. *Id.* The district court held that the exemption would survive until the parties reached an "impasse" as to the issue in dispute. *Id.* at 788.

The Eighth Circuit subsequently reversed. *Powell*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 110 S. Ct. 2583 (1990). The Eighth Circuit rejected the district court's "impasse" standard for the determination of the end of the nonstatutory exemption. *Id.* at 1299-1304. The court noted that even after impasse, the parties had several remedies under the labor laws.

> In particular, the federal labor laws provide the opposing parties to a labor dispute with offsetting tools, both economic and legal, through which they may seek resolution of their dispute. A union may choose to strike the employer, and the employer may in turn opt to lock out its employees. Further, either side may petition the National Labor Relations Board and seek, for example, a cease-and-desist order prohibiting conduct constituting an unfair labor practice.

Id. at 1302 (citations omitted). The court concluded that the "nonstatutory labor exemption protects agreements conceived in an ongoing collective bargaining relationship from challenges under the antitrust laws." *Id.* at 1303. The court noted, however, that the exemption would be lost and antitrust laws found applicable "if the affected employees ceased to be represented by a certified union." *Id.* at 1303 n.12.

See Note, *Releasing Superstars From Peonage: Union Consent and the Nonstatutory Labor Exemption*, 104 HARV. L. REV. 874 (1991) (proposing that union consent must be a prerequisite to availability of the nonstatutory labor exemption and setting forth a standard for deciding when union consent to a particular labor market restraint begins and ends).

57. Taking a hint from the Eighth Circuit's decision in *Powell*, 930 F.2d at 1303 n.12, the players decertified the NFLPA as their collective bargaining representative on November 6, 1989. *Powell*, 764 F. Supp. at 1354. Subsequently, an additional lawsuit, *McNeil v. NFL*, was filed by individual players alleging antitrust violations occurring after decertification of the NFLPA. *Id.* at 1353-54. Without union representation, the nonstatutory exemption was unavailable to the owners as to these new individual plaintiffs. *Id.* at 1359.

> [T]he plaintiffs are no longer part of an "ongoing collective bargaining relationship" with the defendants. The NFLPA no longer engages in collective bargaining.... The NFLPA further has abandoned its role in all grievance arbitrations and has ceased to regulate agents, leaving them free to represent individual players without NFLPA approval. The plaintiffs have also paid a price for the loss of their collective bargaining representative

fort," the court declared that the labor exemption had ended.[58] The court reasoned that since the parties may no longer invoke any remedy under the labor laws—collective bargaining, lockout, or strike—they are no longer limited under the labor exemption policy,[59] and the antitrust issues must be decided.[60]

III. WEIGHING THE ALTERNATIVES—WHAT'S LEFT FOR DISSATISFIED PLAYERS?

While Scott Stevens ultimately chose to abide by the arbitrator's decision and move from the St. Louis Blues to the New Jersey Devils,[61] the compelling question looms—what alternatives remain for a player to challenge the free agent system?

A. The Mackey *Challenge*

The test developed in *Mackey* and applied in *McCourt* remains valid precedent.[62] In the case of free agent provisions developed by the NHL

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because the NFL defendants have unilaterally changed insurance benefits and lengthened the season without notifying the NFLPA.

Id. at 1358-59.

58. *Id.* at 1359.

59. *Id.* at 1355-59.

60. The original *Powell* action has been largely dismissed by the district court, at the request of the players. Powell v. NFL, 773 F. Supp. 1250 (D. Minn. 1991). The nonstatutory exemption still applied in *Powell* because the alleged antitrust violations occurred while the players were represented by the NFLPA in an ongoing collective bargaining relationship. The *McNeil* case, see *supra* note 57, in contrast, alleged violations occurring after decertification of the NFLPA as the collective bargaining representative.

61. *See* Sell, *supra* note 17, at F2.

62. The Supreme Court has not reached the issue of the labor exemption test as applied to sports. In addition to the Eighth Circuit in *Mackey* and the Sixth Circuit in *McCourt*, the Second Circuit adopted the three-prong nonstatutory exemption test in Wood v. NBA, 809 F.2d 954 (2d Cir. 1987) (applying the test to the NBA player draft authorized in the 1976 collective bargaining agreement). *See* D. Albert Daspin, Note, *Of Hoops, Labor Dupes and Antitrust Ally-Oops: Fouling Out the Salary Cap*, 62 IND. L.J. 95 (1986) (examining the application of the labor exemption to the NBA salary cap agreement). *See also* Zimmerman v. NFL, 632 F. Supp. 398 (D.D.C. 1986) (applying the *Mackey* test). "The *Mackey* test, with all of its troublesome implications, appears to be the law." Roberts, *supra* note 35, at 79. *See id.* at 79-96 (discussing the proper scope of the nonstatutory labor exemption). Roberts concluded that courts have applied the labor exemption too narrowly. "The judiciary should now remedy this error and allow the labor market and labor relations to be governed by economic forces, the pressures of public opinion, and the give and take of private collective bargaining, as Congress intended." *Id.* at 98.

Because the *Mackey* test finds it origins in national labor policy (the NLRA) and Supreme Court precedent (*Jewel Tea* and *Pennington*, *see supra* note 40), it is unlikely that a court that has yet to face a similar player restraint case could properly dismiss the validity of the test.

and players in collective bargaining negotiations, the three-part *Mackey* labor exemption test is difficult to overcome.[63] First, the agreement affects only the players and the league.[64] Second, due to the importance of free agent provisions to both players and team management, the subject matter falls readily within the "mandatory subject of bargaining" requirement.[65] Third, free agency provisions clearly have been negotiated by bona fide arm's-length bargaining, especially since the *McCourt* case.[66] Thus, the players remain constricted by the nonstatutory labor exemption and are unable to challenge league restraints under the federal antitrust laws.[67]

B. Decertification and the Powell *Challenge*

The recent *Powell* ruling may offer some hope for players to challenge the league under federal antitrust laws. However, the players must weigh the costs of the drastic measure of dissolving the players' union.[68] First, a risk exists that another district court may not be willing to follow the *Powell* court.[69] Second, decertification of the union would only operate prospectively. Consequently, players may only challenge league actions occurring after the date of decertification.[70] Finally, as a practical matter, in terminating their union, players lose a great deal of the bargaining power they enjoyed as a collective unit. For example, without a certified players' union, the league is free to unilaterally make changes regarding salaries and benefits.[71] NHL players are dissatisfied not only with the free agent system, but also the pension plan and post-season playoff compensation.[72] If the players chose to decertify their bargaining unit, any possibility of resolving other important issues is all but lost.

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63. *See supra* note 62.

64. *See supra* notes 43, 52 and accompanying text.

65. *See supra* notes 43, 46, 53 and accompanying text.

66. *See supra* notes 43, 54-55 and accompanying text.

67. *See supra* notes 39-40.

68. *See supra* note 57.

69. The Eighth Circuit would likely follow the district court's ruling, since the district court relied on a previous Eighth Circuit decision in the same case. Powell v. NFL, 930 F.2d 1293, 1303-04 (8th Cir. 1989). *See supra* notes 56-57.

70. *See Powell*, 764 F. Supp. 1351, 1359 (D. Minn. 1991).

71. For example, after decertification of the NFLPA, the NFL unilaterally changed insurance benefits and lengthened the playing season. *Id.* at 1358-59. *See supra* note 57.

72. *See supra* notes 6, 10, 13.

C. *Restructuring Player Compensation—Revenue Sharing Alternatives*

With the nonstatutory labor exemption standing strong, and decertification offering only an impractical alternative, the most effective solution for players rests in the collective bargaining process itself. However, the NHLPA appears to misplace the crucial areas of change. While tinkering with the free agent compensation system, as the parties did in the April 1992 CBA,[73] may initially alleviate some restrictions faced by free agents, the NHLPA must recognize the bottom line.

The ability of a team to afford to pay the seven-figure salaries demanded by top players remains inextricably linked to overall team performance, gate receipts, team location, local media contracts, and promotions.[74] Despite discontent between players and management, as well as the current recession, the league continues to work its way toward achieving the status of other professional sports leagues.[75] Although national television coverage remains lacking, observers view the NHL as a pioneer in the use of "television subscriptions" in the near future.[76] Recognizing that television, ticket, and promotional revenues directly translate into the ability of a team to pay star salaries, the NHLPA should emphasize instituting "revenue-sharing" plans to supplement base salaries. The NHL should follow the National Basketball Association

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73. The April 1992 CBA did not result in the unrestricted free agency desired by the NHLPA. The new CBA modified the Group II compensation schedule, reduced the age for Group III players from 31 to 30, and provided for a one-time unrestricted free agency for a 10-year player with a below average salary. *See supra* note 30.

74. Liz Comte & Dave D'Allesandro, *Star Crossed; The NBA, Not the NHL, Emerged From Dark Days of the 1970s As the Prototype for Leagues to Follow*, SPORTING NEWS, Feb. 17, 1992, at 26. Business matters, community relations, public relations, and player personnel are all mandatory components of a successful professional sports league. *Id.*

Perhaps more teams should follow the lead of the Montreal Canadians, who maintain highly profitable seasons using a solid, tightly controlled formula. The Canadians own their own arena, increase concession sales by making the outlets user friendly, stay close to fans by opening practices to the public—free of charge, keep players in the public eye over the summer (including a traveling softball team), and staff their front office with retired players and Hall-of-Famers. Symonds, *supra* note 5, at 126.

75. Attendance in the 1990-91 season was 87% of capacity for regular season and 97% for playoff games, resulting in revenues of $400 million per year. The league is also successfully catering to a more affluent audience, young college-educated business persons. Allen, *supra* note 7, at C1.

76. Although a league-wide television subscription program is still several years away, the NHL envisions a system in which a subscriber could build hockey "packages" from a menu of available games (similar to a "pay-per-view" system). Minnesota North Stars owner, Norm Green, views the plan as a whole new industry, sponsored by national advertisers such as Coca-Cola. Green's management is also considering a tie-in with a pizza company.

(NBA),[77] which instituted a revenue-sharing agreement in the late 1970s and early 1980s. Modeling itself after the NBA, the NHL will improve its image,[78] marketability,[79] national presence,[80] television status,[81] and licensing position.[82]

Because increased revenues flow into the team's coffers when it is playing well, a revenue-sharing plan would directly compensate outstanding play. While management relies on players' performance for press recognition, league standing and fan attention, the players rely on management to develop licensing, television and promotional agreements. A revenue-sharing plan would encourage a mutually beneficial working relationship between management and players. With a long history of friendly co-existence, but a recent taste of hostility, the two sides should

77. Comte & D'Allesandro, *supra* note 74, at 26. In the late 1970s, the NBA was drowning in red ink. The league had grown too quickly (from 10 teams in 1967 to 23 teams in 1980) which diluted talent. The creation of a rival new league, the American Basketball Association, encouraged stars to leave the NBA and salaries to increase. Most importantly, television ratings began to slump. The league assumed an aggressive stance, instituting a player payroll limit, establishing a revolutionary anti-drug campaign, and launching a marketing frenzy. The payroll limit, in the form of a salary cap, guaranteed players 53% of gross revenues while preventing owners from spending themselves into oblivion. The anti-drug program mandated automatic expulsion from the league for drug-related offenses. In a smart marketing strategy, the league took advantage of two newly arrived stars, Larry Bird and Magic Johnson, and exploited their talents. *Id.*

Today, the NBA is one of the strongest leagues in professional sports. It has a solid television contract, star quality, global presence, excellent player-management relations, and superb marketing acumen. In 1991, the NBA earned $1 billion from licensing agreements, compared to $350 million earned by the NHL. *Id.*

78. In a 1991 poll conducted by the Sports Marketing Group, U.S. sports fans voted hockey the 40th most popular sport, ranking below fishing and tractor pulls. *Id.*

79. Illustrating the NHL's marketing and licensing potential, the San Jose Sharks, a 1991-92 season expansion team, ranked fourth in sales of licensed "logo" merchandise, behind the Los Angeles Raiders (football), the Chicago Bulls (basketball), and the Chicago White Sox (baseball). These tremendous sales are attributed to extensive market research. *Id.*

80. The NHL's lack of national exposure undermines the future of the sport. The league fails to reach children, who are tomorrow's fans, due to weak junior league systems and the expense of playing the sport. *Id.*

81. Most experts believe that the NHL's decision to leave ESPN in 1988, *see supra* note 5, was one of the most short-sighted decisions in the history of sports. *Id.* *See also supra* note 76.

82. The NHL is attempting to improve its licensing agreements and increase revenues. A first step was bringing merchandising operations in house, similar to other major leagues practices. Also, the league hired licensing whiz Bob Carey, former president and 18-year veteran of NFL Properties, to manage its merchandising ventures. Sports licensing is an $11 billion business. Comte & D'Allesandro, *supra* note 74, at 26.

In the April 1992 CBA, hockey players gained the rights to their likenesses. The agreement calls for players to allow owners to use player pictures to promote games. When commercial concerns are involved, a player will receive some of the money. Dave Sell, *NHL Players Sharpen Skates for Second Season, Vote to Approve Agreement Is 409-61*, WASH. POST, Apr. 12, 1992, at D1, D6.

embrace a relationship of mutual reliance. Whether the plan would be based upon individual or team performance, and whether revenues will be shared among the teams, are issues still to be studied and negotiated. In addition, a league-wide revenue-sharing plan would boost the status of teams in the more remote locations and would maintain a more competitive balance—and more profit-generating excitement—within the NHL.

Scott Stevens' situation may evoke sympathy or outrage, especially if he is viewed as a bystander player shuffled across the country because of an arbitrator's decision. However, the courts are unlikely to be persuaded by emotion in light of national labor policy and existing case law, not to mention the multi-million dollar salary of a Stevens-like player. NHL players, in particular those in the million-dollar-plus salary ranks, wield sufficient power to negotiate a more favorable CBA, especially concerning free-agent provisions. However, with the inextricable link between team performance and revenues, the NHLPA must recognize the restrictions faced by most teams to dedicate substantial sums of money to one player and, instead, focus future negotiations on instituting a revenue-sharing agreement.[83]

Sue Santa

83. The NHL took a step in the direction of revenue sharing in its April 1992 CBA. The parties agreed to increase the regular season from 80 to 84 games, playing two of the extra games in non-NHL cities and sharing revenues between owners and players. *Here's What the NHL, NHLPA Agreed Upon*, *supra* note 30, at 4. Additionally, in June, 1992, NHL owners replaced President John Ziegler and Board of Governor Chairman William Wirtz. Both Ziegler and Wirtz were perceived as hard-liners, giving the NHL a bad image. Gil Stein, NHL General Counsel, was appointed interim President, and Bruce McNall, owner of the Los Angeles Kings, was elected Chairman of the Board of Governors. Both Stein and McNall vowed to be more accessible and open than their predecessors. McNall's main task is to find a permanent replacement for Ziegler, who will hold the new title of NHL Commissioner, much like the other major sports leagues. The priority of the new commissioner will be to secure a U.S. network television contract. Dave Luecking, *New Guard Priority Is Openness*, ST. LOUIS POST-DISPATCH, June 28, 1992, at F16.