

NOT AT THE BEHEST OF NONLABOR GROUPS: A REVISED PROGNOSIS FOR A MATURING SPORTS INDUSTRY†

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For over 100 years, Americans have willingly paid to watch sporting events. Professional athletics — led by baseball — began with teams composed of an area's best players staging local exhibitions for hometown crowds. These squads gradually developed into touring groups of professionals and then a collective group of teams based in different cities, regularly playing each other.¹ Team owners found that concerted action in this league format enabled them to market nationally their players' skills. Stimulated by increased attention from the media and public, professional sports evolved from a group of individuals staging exhibitions into a major entertainment industry possessing significant economic power.² As the wealth and publicity associated with sports has grown, the components of the new sports industry, seeking to share some portion of that influence, also have changed. For much of its history, professional sports were controlled by team owners operating collectively as a league. Players were individually employed by these owners and rarely acted collectively. Over the past fifteen years, however, this infrastructure has been altered significantly. Owners and their leagues are now counterbalanced by players, their agents, and the players' collective associations, unions. This development has gradually limited the unilateral ability of the owners to control professional sports and forced a sharing of power among the industry's various members. The change was partially induced by the broadcast industry which, reflecting

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¹ The National League of Baseball, the first organized sports league, was formed in 1876. For a further discussion, see Berry and Gould, *A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls and Strikes*, 31 CASE W. RES. L. REV. 685, 695 (1981) [hereinafter cited as Berry and Gould].

² Although figures on league income are difficult to ascertain, the National Football League Players Association ("NFLPA") contends that in 1980 the National Football League ("NFL") alone had gross revenues of \$400,680,000. NFLPA PAMPHLET, *Why a Percentage of the Gross? Because We Are the Game*, at 9 (Sept. 1981) (available at Boston College Law School Library) [hereinafter cited as NFLPA PAMPHLET]. The Green Bay Packers, a public corporation which reports its income, noted a pre-tax 1980 profit figure of \$2,110,283 on a total income of \$11,276,814. The Packers' balance sheet for that year also reveals \$10,462,276 in short term investments. See Christl, *Packer profits down, but still top \$1 million*, Green Bay Press-Gazette, May 5, 1981, § c, at 1. For a more detailed discussion on the total economic picture of professional sports, see Berry and Gould, *supra* note 1, at 691-710.

the continuing public fascination with sports, has been increasingly interested in additional sports programming. The dramatically increased revenues engendered by nationwide media exposure has altered the monetary positions and expectations of both owners and players.³ In addition, access to the courtroom and a changing judicial perception of the legal status of sports have effectuated the change in the structure of sports and influenced the shift in its internal balance of power.

Judicial attitudes toward professional athletics can be divided analytically into two distinct time periods. The initial attitude of the courts, influential from the late 1800's until 1972, characterized sports as games, performed for the amusement of the country. Professional leagues were therefore not subject to the same degree of legal scrutiny and liability applicable to commercial endeavors.⁴ Due to its position as the country's first national sports league, the sport of baseball was the chief beneficiary of this judicial posture of benign neglect. In an early decision, *Federal Baseball Club of Baltimore, Inc. v. National League*,⁵ the United States Supreme Court established the foundation for this reasoning by deciding that baseball, as played in the early 1920's, was not interstate commerce.⁶ The game was therefore entitled to an immunity from the proscriptions of the Sherman Act.⁷ *Flood v. Kuhn*⁸ was the last major opinion to accept this interpretation of sports' legal status. The Supreme Court there ruled that baseball retained the antitrust immunity granted it by *Federal Baseball*. In addition to the apparent incongruity of continuing the application of such reasoning to baseball in the 1970's, the tone of the *Flood* opinion

³ The broadcast industry reflects the country's apparently insatiable interest in watching sports. The NFL's current television contract will provide the league with \$2,000,000,000 over the five year period from 1982-1987. See Eskenazi, *N.F.L. TV Pact \$2 Billion*, N.Y. Times, March 23, 1982, at D23. The expanding cable television market assures greater media revenues in the future for sports. A new professional football league, the United States Football League, achieved instant credibility by signing a reported two-year, \$20,000,000 contract with the ABC-TV network and augmented that revenue by signing an additional broadcast contract with a cable network. See Castle, *Pact with USFL "A Winner" for ESPN*, 16 PRO FOOTBALL WEEKLY, No. 1, at 54 (Aug. 1982).

⁴ See, e.g., *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); *American League Baseball Club of Chicago v. Chase*, 86 Misc. 441, 149 N.Y.S. 6 (Sup. Ct. 1914); *Philadelphia Base-Ball Club, Ltd. v. Lajoie*, 10 Pa. Dist. Rpts. 309 (1901), *rev'd*, 202 Pa. 210, 51 A. 973 (1902).

⁵ 259 U.S. 200 (1922).

⁶ *Id.* at 208-09.

⁷ Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), states, in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . ." A violation of this section requires an agreement between two or more entities. *United States v. Addyston Pipe and Steel Co.*, 85 F. 271 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899). Section 2 of the Sherman Act, 15 U.S.C. § 2 (1976), states, in relevant part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States. . . ." See *infra* notes 433-36 and accompanying text.

⁸ 407 U.S. 258 (1972).

reflected a judicial willingness to treat baseball as something other than a profit oriented business.⁹ The continuing validity of the *Flood* holding immunized baseball from both the antitrust laws and a changing judicial perception of the legal posture of sports which would fully blossom in the 1970's.¹⁰ The treatment accorded sports during this period created a legal environment in which team owners were to a large extent free to control unilaterally the sports industry and shape its destiny.

As the sports industry grew in wealth and national influence, however, the Supreme Court became dissatisfied with the legal characterization of professional athletics embodied in baseball's antitrust immunity. The Court therefore refused to extend baseball's Sherman Act exemption to other professional sports.¹¹ The judicial system subsequently began subjecting non-baseball sports to the full extent of the laws regulating economic ventures. In the mid-1970's, a newly formed league in hockey¹² and nascent players unions in both basketball¹³ and football¹⁴ initiated lawsuits against the established leagues which shattered prior relationships and created new legal and economic environments for everyone associated with the sports industry.¹⁵ These cases held that a number of league practices, which had been used by the owners to bind players to one team and to restrict open bidding on their services, were violations of the Sherman Act.¹⁶ After these decisions, players

⁹ The *Flood* opinion begins with a tribute to baseball and its past stars. *Id.* at 260-64. The Court also quotes, with seeming approval, the district court's statement that "The game is on higher ground; it behooves every one to keep it there." *Id.* at 267. Finally, the decision affirms baseball's federal antitrust immunity based on the *Federal Baseball* holding, but then denies the applicability of state antitrust statutes because baseball is interstate commerce. *Id.* at 284.

¹⁰ Baseball is the only sport where the players have obtained substantial monetary gain without the benefit of direct judicial intervention. The Major League Baseball Players Association (MLBPA), through the collective bargaining process, gained the right to arbitrate contractual disputes between a player and his club. The union then procured an arbitration decision that the standard baseball contract did not incorporate a perpetual reserve clause. Players were therefore free of any inter-club movement restrictions upon the expiration of the term of their individual contracts (including the one year option clause contained therein). *Professional Baseball Clubs, 66 LAB. ARB. & DISP. SETTL.* 101 (1975) (Seitz, Arb.), *aff'd sub nom. Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n*, 409 F. Supp. 233 (W.D. Mo. 1976), *aff'd*, 532 F.2d 615 (8th Cir. 1976).

Because of its continuing antitrust immunity, baseball is not subject to the same legal considerations as other professional sports. Baseball, therefore, is not one of the sports within the central focus of this article. Although the labor law principles discussed herein would apply to baseball, the antitrust concepts would be precluded by the sport's immunity.

¹¹ See *Radovich v. National Football League*, 352 U.S. 445 (1957) (professional football); *United States v. International Boxing Club of N.Y.*, 348 U.S. 236 (1955) (professional boxing).

¹² *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972).

¹³ *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975).

¹⁴ *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

¹⁵ The baseball arbitration, discussed *supra* note 10, should also be considered part of this legal revolution.

¹⁶ *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F.

unions in each of the major professional sports were able to negotiate meaningful collective bargaining agreements with their respective leagues. These decisions and the agreements they engendered provided the impetus for the vastly increased salaries and benefits players currently enjoy as compared to their counterparts of a few years before.¹⁷

The change in judicial attitude towards sports helped create a restructuring of the power relationships in the industry. The older perception, typified by the baseball cases, rarely subjected the decisions of owners and the workings of the leagues to serious judicial scrutiny or legal liability. The more recent reasoning, delineated in the revolutionary cases of the 1970's, discarded league rules and practices in the player restraint area as violations of federal antitrust law. The courts in these cases used their "new" interpretation of sports' legal status to provide struggling players unions with the economic power they were unable to seize at the bargaining table.¹⁸ This balancing of power between management and labor, combined with the ever-increasing source of revenue available to owners through the broadcast industry,¹⁹ has transformed professional sports into a mature commercial industry, an acknowledged national business. As such, professional sports will experience all the legal problems inherent in the distribution of wealth and power in any large-scale, profit-making enterprise. In the legal climate created by the landmark decisions of the 1970's, the future of the sports industry will be shaped by the joint action of owners and players.

The uniqueness of both the sports business itself and its past treatment by the courts indicates that special considerations exist which will shape the guidelines for future legal activity relating to the industry. Many of the league rules and structures in existence today were formed during the period when sports enjoyed its old legal status, when it was not yet a true business in the eyes of the law. The owners, at that time, did not have viable unions to counter-balance their desires and believed that they were exempt from the Sherman Act.²⁰ Management therefore unilaterally imposed a system which served its own interests in ways which tended to restrain trade. Although many

Supp. 462 (E.D. Pa. 1972), dealt with hockey's reserve clause; *Robertson v. National Basketball Ass'n*, 389 F. Supp. 86 (S.D.N.Y. 1975), concerned basketball's reserve clause, uniform player contract and collegiate draft; *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977), examined football's Rozelle Rule. For further discussion of these cases, see *infra* notes 161-90 and 213-34 and accompanying text.

¹⁷ See Berry and Gould, *supra* note 1, at 692. See also Kennedy & Williamson, *Money: The Monster Threatening Sports* (pts. 1-3), *SPORTS ILLUSTRATED*, July 17, 1978, at 29, July 24, 1978, at 34 and July 31, 1978, at 34.

¹⁸ See J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* § 5.06, at 579-80 (1979) [hereinafter cited as J. WEISTART & C. LOWELL]; Berry and Gould, *supra* note 1, at 744.

¹⁹ See *supra* note 3 and accompanying text.

²⁰ See Blecher and Daniels, *Professional Sports and the "Single Entity" Defense Under Section One of The Sherman Act*, 4, *WHITTIER L. REV.* 217, 218 n.7 (1982) [hereinafter cited as Blecher and Daniels]. The first Supreme Court cases to subject professional sports to the antitrust laws, cited *supra* note 11, were decided as late as 1955 and 1957, respectively.

of these practices have been modified by current collective bargaining agreements, an underlying management attitude and some unchallenged practices remain unchanged.²¹ In assessing the future legality of any sports rule, a factor in the evaluation should be that the judicial system for years allowed and encouraged such an attitude by sports owners. This history, combined with the business need for intraleague cooperation to produce an on-the-field product, mandates that, in any context subject to Section 1 of the Sherman Act, a finding of liability must be predicated on a full judicial inquiry into the reasonableness of the practice and its effects and the history of its origin and implementation.²² Such a result can be achieved in sports cases by avoiding a *per se* analysis and insisting on a mandatory rule of reason standard.²³

The sports industry also differs from conventional businesses in that it contains a relatively small number of highly visible employees. Most industries contain both a labor and a product market. The labor force is employed by management to manufacture, sell or promote an article, the product, for purchase by a consumer. The purchaser has an interest in the thing bought, not in observing the process whereby the item is made. In sports, the labor market is the product market. Consumers do not purchase a thing, but they pay to watch the employees work.²⁴ Restraints imposed by management on the labor force therefore are also restraints imposed on the product market.²⁵ To a certain extent, this identity of markets merges the labor and antitrust interests relevant to

²¹ See, e.g., National Basketball Players Association Agreement, article XXII (collegiate draft and free agent compensation system) (1980-1982); Collective Bargaining Agreement between the National Football League Management Council and the NFLPA, Article XIII (collegiate draft) and Article XV (free agent compensation) (1977-1982) (both contracts available at Boston College Law School Library).

²² In imposing antitrust liability under § 1 of the Sherman Act, *supra* note 7, the statute seems to condemn all agreements in restraint of trade. In *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911), the Supreme Court ruled that only unreasonable restraints are proscribed by the statute. Courts were therefore required to conduct a lengthy analysis, pursuant to this rule of reason logic, to determine if the challenged practice unreasonably restrained trade in its particular business context. As antitrust law developed, however, certain practices were found to be inherently unreasonable and, therefore, an exhaustive inquiry on their reasonableness was no longer required. Typical examples of such categories of *per se* liability under § 1 of the Sherman Act are: price-fixing, division of market's tying arrangements and concerted refusals to deal. See SULLIVAN, ANTITRUST §§ 63-72 (1977); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867, 893 (S.D.N.Y. 1975).

²³ This approach has been adopted by both circuit courts which have decided the issue, each reversing a district court opinion imposing liability on a *per se* basis. *Mackey v. National Football League*, 407 F. Supp. 1000 (D. Minn. 1975), *aff'd on other grounds*, 543 F.2d 606 (8th Cir. 1976); *Smith v. Pro-Football, Inc.*, 420 F. Supp. 738 (D.D.C. 1976), *aff'd in part, rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978). See Comment, *Application of the Labor Exemption After the Expiration of Collective Bargaining Agreements In Professional Sports*, 57 N.Y.U. L. REV. 164, 166 (1982) [hereinafter cited as Comment, N.Y.U. L. REV.].

²⁴ Roberts and Powers, *Defining the Relationship between Antitrust Law and Labor Law: Professional Sports and the Current Legal Battleground*, 19 WM. & MARY L. REV. 395, 460 (1978) [hereinafter cited as Roberts and Powers]; Comment, *The Battle of the Superstars: Player Restraints in Professional Team Sports*, 32 FLA. L. REV. 669, 699 (1980).

²⁵ Roberts and Powers, *supra* note 24, at 462.

professional sports and mandates a special balancing in applying the rules of either area of law and in determining the proper interaction between them.

High visibility employees introduce an additional disparity to any traditional legal analysis. In sports, as in other facets of the entertainment business, tradition dictates that each player individually negotiates his yearly salary and signs an individual employment contract with his respective team.²⁶ Players unions are thus distinguished from conventional labor unions in that sports associations collectively bargain for benefits and control of working and contractual provisions, but, through a waiver in the collective bargaining agreement, allow for salaries to be individually negotiated.²⁷ In the historic sports setting, owners therefore face dual levels of negotiations: collective dealings with the union every three to five years to produce a collective bargaining agreement, and yearly talks with rookies and some unsigned veterans to establish their individual salaries. Federal labor law principles would appear to control both types of negotiations.²⁸

Although the above considerations are essential to a general understanding of the special legal problems facing the sports industry in the future, the resolution of any particular issue will depend on the nature of the parties to the litigation. The relative importance of labor and antitrust principles will change depending on the identity of the party challenging the legality of a certain procedure. Future litigation in sports is therefore best analyzed by concentrating on the competing interests of different members of the industry and focusing on the resolution of issues in the context of specified parties.

²⁶ See, e.g., the National Basketball Association's Uniform Player Contract and the National Football League's Player Contract (available in Boston College Law School Library).

²⁷ See, e.g., Basic Agreement between the American and National Leagues of Baseball Clubs and the MLBPA, Art. V (1980-1983). The Collective Bargaining Agreement between the NFL and the NFLPA, which expired July 15, 1982, contained a similar waiver in Art. XXII, §§ 8 and 9 (references available at Boston College Law School Library). In bargaining on a new agreement, the NFLPA attempted to eliminate individual negotiations and implement a league wide wage scale based on a percentage of the league's gross income. NFLPA PAMPHLET, *supra* note 2, at 48-50. The institution of such a scale, based on seniority, would be unique in professional sports. In order to obtain that goal, the union refused to allow clubs to negotiate with individual players after the July 15, 1982, deadline. See Stellino, *Top Draft Picks, Agents Feel Trapped*, THE SPORTING NEWS, July 26, 1982, at 50, col. 1. The NFLPA, however, in exchange for increased fringe benefits, settled for an agreement which continued the former system of individual bargaining over salaries. See Stellino, *Major Points in New Agreement*, THE SPORTING NEWS, November 29, 1982, at 41, col. 1. See also *infra* notes 341-44 and accompanying text.

²⁸ See *infra* notes 335-58 and accompanying text. Although these principles generally apply to all professional sports, some other considerations regarding specific sports remain. As explained more fully *supra* at note 10, antitrust principles are still inapplicable to baseball. In addition, the likelihood for future legal confrontation seems greatest in professional football. Since its revenue is, to a greater extent than other sports, associated with television, its potential revenue growth is the greatest of the sports industry. In addition, football players feel increasingly underpaid in comparison to their baseball, basketball and hockey counterparts. See Berry and Gould, *supra* note 1, at 704 n.41. The NFLPA is also more controversial in the positions its advocates and the results it has produced. See NFLPA PAMPHLET, *supra* note 2; Roberts and Powers, *supra* note 24, at 465-66; Ray, *Players Ask: Was Long Walkout Worth It?*, THE SPORTING NEWS, November

The future relationship between sports and the judicial system, therefore, will center on the application of the traditional business principles of antitrust and labor law to the newly balanced sports industry.²⁹ This article will examine these interests in four different contexts:

1. Labor-Management. Future legal disputes between unions/players and league/owners will involve antitrust law, labor law and the interaction of these two legal systems. As the sports industry matures, disagreement between these parties should increasingly be resolved by labor law principles. The current test, however, for deciding when labor law precepts preclude the application of the antitrust statutes appears to interpret incorrectly Supreme Court precedent and gives improper weight to the balancing of legal interests required in the sports context. The resolution of future conflicts requires a different standard which fully incorporates the pro-union origin of the labor law exemption.³⁰
2. Labor-Labor. The players' unions have only recently acquired real strength within the industry. This new power is accompanied by increased responsibility to union members. The union's duty of fair representation and its regulation of players' agents are scrutinized in this section of the article.³¹
3. Management-Management. The article proposes the appropriate application of antitrust and labor law principles as new leagues and dissatisfied owners sue the established leagues for a different distribution of the industry's wealth.³²
4. Government-Industry. The article finally considers consumer interest in the industry and explores the efforts of the non-judicial branches of government to regulate professional sports, particularly in the areas of franchise movement and player agents' qualifications.³³

The changes wrought in professional sports mandate a normalization of the

29, 1982, at 41, cols. 1-3. Finally, the issues presented and the scope of this article are generally limited to team sports rather than individual sports such as golf, tennis and boxing.

²⁹ In addition to these topics, other substantive areas will be implicated in future legal problems of sports. For example, contract principles regarding the interpretation of individual clauses in a player's yearly agreement or of a collective bargaining agreement may be relevant. Berry and Gould, *supra* note 1, at 712. Federal income tax also has significant impact upon the financial interests of individual owners and players. See Lowell, *Planning Contractual Deferred Compensation Arrangements for Professional Athletes*, 10 TAX ADVISER 68 (Feb. 1979); Ambrose, *Recent Tax Developments Regarding Purchases of Sports Franchises - The Game Isn't Over Yet*, 59 TAXES 739 (Nov. 1981). Antitrust and labor law, however, appear to be the major disciplines which will shape the future of the sports industry as a whole. The scope of this article is consequently focused primarily on those two areas.

³⁰ See *infra* notes 34-358 and accompanying text.

³¹ See *infra* notes 359-408 and accompanying text.

³² See *infra* notes 409-34 and accompanying text.

legal treatment given to the industry. The proper application of antitrust and labor law principles, therefore, will merely constitute a recognition by courts and legislatures of the true business character of the professional sports industry in America.

I. LABOR-MANAGEMENT

Labor and management have been the most frequent participants in past sports litigation.³⁴ The judicial system, through its decisions in the cases of the 1970's, eliminated the harshest aspects of sports' player restraint system and established a union-league equilibrium somewhat akin to the labor-management balance in non-sports industries of a similar national stature.³⁵ Antitrust concepts were the principal tools employed by the courts to achieve this parity.³⁶ As the player-owner balance stabilizes, the continuing role, if any, of antitrust law must be defined and the increasing importance of labor law policies emphasized.

A. *The Proper Role of the Labor Law Exemption from Antitrust Liability*

The threshold question regarding the future function of antitrust law is the propriety of applying the Sherman Act's antitrust principles in the sports context at all. As labor unions mature and collectively create bargaining agreements with management, the proper initial inquiry is into the nature and scope of the judicially created labor exemption from antitrust liability for practices embodied in such agreements.

1. The Exemption as Defined in Non-Sports Precedent

The relationship between antitrust and labor law began in the early Twentieth Century. Federal courts at that time used the Sherman Act to limit severely the formation and growth of American labor unions.³⁷ Toward this end, antitrust law served as a tool to frustrate nascent labor law principles and to preserve the imbalance which then existed between management and labor.³⁸ To eliminate such use of antitrust law and to allow labor unions to achieve economic parity with management, Congress passed the Clayton Act.³⁹ The Clayton Act provided, in relevant part, that labor unions are not il-

³⁴ See *infra* notes 435-60 and accompanying text.

³⁵ See, e.g., *Smith v. Pro-Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975); *Kapp v. National Football League*, 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978); *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971).

³⁶ See *supra* notes 12-19 and accompanying text.

³⁷ See *infra* notes 161-250 and accompanying text.

³⁸ *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921); *Loewe v. Lawlor*, 208 U.S. 274 (1908).

³⁹ See R. GORMAN, *LABOR LAW*, ch. 1, at 1-4 (1976).

⁴⁰ Clayton Act of 1914 §§ 1-26, 15 U.S.C. §§ 12-27 (1976).

legal combinations in restraint of trade under the antitrust laws and that federal courts are limited in their injunctive powers in the labor area.⁴⁰ Subsequently, the Norris-LaGuardia Act⁴¹ further restricted the equity jurisdiction of federal courts in matters involving a "labor dispute."⁴² These provisions constitute the statutory exemption from antitrust liability granted to labor unions by Congress. In two early cases applying this statutory exemption, *Apex Hosiery Co. v. Leader*⁴³ and *United States v. Hutcheson*,⁴⁴ the Supreme Court expanded the applicability of this legislative grant.

Apex Hosiery involved a sit-down strike conducted against the company for the purpose of organizing its workers.⁴⁵ The corporation sued the union under the Sherman Act for damages to its business and property during the strike. The Court denied the factory's claim for antitrust damages.⁴⁶ The Court justified its conclusion by holding that the strike was not a restraint directed at the product market of Apex's business and therefore did not produce effects which the Sherman Act proscribed.⁴⁷ The union was not being used by other combinations as the means of fixing the price of hosiery.⁴⁸ The Sherman Act, by its nature, was therefore not intended to be used against a union for practices which primarily influenced the labor market. The statutory exemption further evidenced Congressional intent that the antitrust laws, by design, were not applicable in this context.⁴⁹

Hutcheson involved a criminal charge of Sherman Act violation against a carpenters' union and its officials.⁵⁰ The indictment was based on nationwide picketing and boycotting performed by the labor group against Anheuser-Busch and its products.⁵¹ The union's actions resulted from a jurisdictional dispute between it and a machinists' union performing work for Busch.⁵² The *Hutcheson* Court focused on the exempt nature of the labor activities conducted by the defendants.⁵³ The Court declared that the statutory exemption im-

⁴⁰ Clayton Act of 1914 § 6, 15 U.S.C. §§ 17, 20; 29 U.S.C. § 52 (1976).

⁴¹ Norris-LaGuardia Act of 1932 §§ 1-15, 29 U.S.C. §§ 101-115 (1976).

⁴² Norris-LaGuardia Act of 1932 §§ 4, 5 and 13, 29 U.S.C. §§ 104, 105 and 113 (1976). For a review of the history of these provisions, see Comment, N.Y.U. L. REV., *supra* note 23, at 172 n.23.

⁴³ 310 U.S. 469 (1940).

⁴⁴ 312 U.S. 219 (1941).

⁴⁵ *Apex Hosiery v. Leader*, 310 U.S. 469, 480-81 (1940).

⁴⁶ *Id.* at 503.

⁴⁷ *Id.* at 501, 512.

⁴⁸ *Consolidated Express, Inc. v. New York Shipping Ass'n, Inc.*, 602 F.2d 494, 514 (3d Cir. 1979), *vacated and remanded on other grounds*, 448 U.S. 902 (1980), *reh'g*, 641 F.2d 90 (3d Cir. 1981).

⁴⁹ See Handler and Zifchak, *Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption*, 81 COLUM. L. REV. 459, 479-81 (1981) [hereinafter cited as Handler and Zifchak].

⁵⁰ *United States v. Hutcheson*, 312 U.S. 219, 227-28 (1941).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 231-37.

munizes union activity from Sherman Act sanction if "a union acts in its self-interest and does not combine with non-labor groups. . . ."⁵⁴ The Court deemed immaterial the fact that the underlying controversy was with another union, rather than the product of an employer-employee dispute.⁵⁵ The Court, therefore, interpreted the statutory exemption to preclude Sherman Act liability for unilateral labor activity, even when those actions produced effects in the product market.⁵⁶

These two cases and the statutes they interpret represent the core of the labor exemption from the antitrust laws. *Apex Hosiery* and *Hutcheson* provide two different rationales, both supported by the legislative immunity, for the insulation of independent union activity: (1) if the union's actions have negligible product market effects, the restraints are not within the ambit of Sherman Act proscription,⁵⁷ and (2) if the union activity at issue has significant product market effects, labor principles mandate that a direct exemption from antitrust liability be granted.⁵⁸ The exemption was formulated to protect legitimate union activity and the economic weapons which labor law allows a labor force to employ in its bargaining with management — strikes, picketing and boycotts.⁵⁹ The statutory exemption (as interpreted in these two cases) therefore precludes antitrust liability for unilateral union conduct. The immunity described in *Apex Hosiery* and *Hutcheson*, however, did not include within its scope the provisions of collective bargaining agreements negotiated by unions with management.⁶⁰

The Supreme Court's first decision delineating the expansion of this unilateral statutory exemption to include joint management-labor agreements was *Allen Bradley Co. v. Local Union No. 13, IBEW*.⁶¹ The defendant union in *Allen Bradley* had entered into collective bargaining agreements with electrical equipment manufacturers and contractors in the New York City area.⁶² These agreements contained closed-shop provisions which obligated contractors to purchase equipment only from manufacturers employing union members and also obligated manufacturers to sell equipment only to contractors using union employees.⁶³ The contractual terms precluded the plaintiff manufacturer from

⁵⁴ *Id.* at 232.

⁵⁵ *Id.*

⁵⁶ For an assertion that the proscription of combination with non-labor groups means that *Hutcheson* protects more than unilateral union activity, see Handler and Zifchak, *supra* note 49, at 478.

⁵⁷ *Apex Hosiery v. Leader*, 310 U.S. 469, 485-515 (1940).

⁵⁸ *United States v. Hutcheson*, 312 U.S. 219, 233-37 (1941). See Handler and Zifchak, *supra* note 49, at 481.

⁵⁹ See Roberts and Powers, *supra* note 24, at 431.

⁶⁰ *Id.* See also *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 662 (1965).

⁶¹ 325 U.S. 797 (1945). The movement from protection of unilateral union activity marks the beginning of the non-statutory labor law exemption.

⁶² *Id.* at 799-800.

⁶³ *Id.* at 799.

selling his electrical equipment in the area⁶⁴ and enabled a union-manufacturer-contractor committee to fix prices and control the lucrative New York City market.⁶⁵ As the price of electrical equipment rose, the participating companies achieved increased profits and the union obtained higher wages and shorter hours for its members.⁶⁶ Writing for the Court, Justice Black noted that the case required a balancing of the Congressional policy of preserving a competitive business economy with the equally important goal of preserving the right of labor to organize and gain better conditions through collective bargaining.⁶⁷ Conducting the required balancing, Justice Black indicated that a collective bargaining agreement provision for a closed shop, if standing alone, would be entitled to an exemption from the Sherman Act.⁶⁸ The agreement in the case at bar did not stand alone, however, but was merely one element in a much larger management-union conspiracy to monopolize the New York City electrical equipment market.⁶⁹ Justice Black concluded that the union forfeited its exemption not because it entered into a collective bargaining agreement with a non-labor group, but because it participated in management activities which, in total, the Court could characterize as a conspiracy to monopolize.⁷⁰

Thus, the *Allen Bradley* Court did not extend to the bilateral collective bargaining process the same absolute exemption previously granted unilateral union activity. The Court did not hold that every provision obtained from an employer as a result of good faith bargaining was exempt from the antitrust laws.⁷¹ The non-statutory exemption was instead founded upon a weighing of

⁶⁴ *Id.* The plaintiff was a non-New York City company. *Id.* The local therefore was jurisdictionally precluded by its union from entering into a collective bargaining agreement with the plaintiff. *Id.*

⁶⁵ *Id.* at 800.

⁶⁶ *Id.*

⁶⁷ *Id.* at 806. As stated by Theodore St. Antoine, "The antitrust laws are designed to promote competition, and unions, avowedly and unabashedly, are designed to limit it. According to classical trade union theory, the objective is the elimination of wage competition among all employees doing the same job in the same industry." St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603, 604 (1976) [hereinafter cited as St. Antoine].

⁶⁸ *Allen Bradley Co. v. Local Union No. 13, IBEW*, 325 U.S. 797, 809 (1945).

⁶⁹ *Id.* The Court also noted:

But when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts. . . . finding no purpose of Congress to immunize labor unions who aid and abet manufacturers and traders in violating the Sherman Act, we hold that the district court correctly concluded that the respondents had violated the act.

Id. at 809, 810.

⁷⁰ *Id.* at 811. The Court stated: "We know that Congress feared the concentrated power of business organizations to dominate markets and prices. It intended to outlaw business monopolies. A business monopoly is no less such because a union participates, and such participation is a violation of the Act." *Id.*

⁷¹ *Consolidated Express, Inc. v. New York Shipping Ass'n, Inc.*, 602 F.2d 494, 514 (3d Cir. 1979), *vacated and remanded on other grounds*, 448 U.S. 902 (1980), *reh'g*, 641 F.2d 90 (3d Cir. 1981).

the competing policies of antitrust and labor law. In the process of striking such a balance, a union is liable for Sherman Act damages if it participates in a management conspiracy to monopolize. This liability attaches even if the product market restraint produces benefits for the labor force.⁷² While unilateral union activity affecting a product market is therefore protected from Sherman Act sanction pursuant to *Hutcheson*, management-labor agreements which restrain a product market will not be included within the non-statutory exemption if, as will normally be the case, the agreement can be characterized as an *Allen Bradley* conspiracy. *Allen Bradley*, however, did clarify the expansion of the labor law exemption by indicating that some collective bargaining agreements, if not part of such a conspiracy, would be immune from the purview of the anti-trust statutes.⁷³

The Supreme Court's next explanation of the exemption's meaning occurred in the companion cases of *UMW v. Pennington*⁷⁴ and *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*⁷⁵ In both cases the Court split into three groups of three justices each, with separate opinions by Justices White, Douglas and Goldberg.⁷⁶ Justice White wrote the opinion of the Court in *Pennington*,⁷⁷ as his reasoning was joined by the Douglas group.⁷⁸ The White and Goldberg groups could only agree on the judgment in *Jewel Tea* and, as such, there was no opinion of the Court. The fractionated nature of these opinions

⁷² Justice Goldberg later summarized the core of *Allen Bradley*'s holding as follows: Thus *Allen Bradley* involved two elements (1) union participation in price fixing and market allocation, with the only union interest being the indirect prospect that these anticompetitive devices might increase employers' profits which might then trickle down to the employees, (2) accomplished by the union's joining a combination or conspiracy of the employers.

Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 707 (1965).

⁷³ See Casey and Cozzillio, *Labor-Antitrust: The Problems of Connell and a Remedy That Follows Naturally*, 1980 DUKE L.J. 235, 242. The state of the exemption following these three cases has been described as follows:

Together this trilogy of hallmark opinions teaches that the availability of the labor exemption turns on the answers to three questions: First, is the challenged conduct exempt under Norris-LaGuardia from the issuance of a labor injunction? Second, does the conduct substantially affect market competition? Third, is it unilaterally motivated? Thus, if union conduct is embraced by the permissive provisions of Norris-LaGuardia, or if it does not have the effect of restraining commercial competition (as opposed to competition based on differences in labor standards), and if it is pursued by the union solely in its own self-interest, it is exempt from antitrust liability. Conversely, if the challenged conduct is outside the protective ambit of Norris-LaGuardia, and if it directly affects market competition, or if it is the product of conspiracy with employer groups, then it is subject to the antitrust laws.

Handler and Zifchak, *supra* note 49, at 482-83.

⁷⁴ 381 U.S. 657 (1965).

⁷⁵ 381 U.S. 676 (1965).

⁷⁶ Justice White was joined by Chief Justice Warren and Justice Brennan. Justice Douglas was joined by Justices Black and Clark. Justice Goldberg was joined by Justices Harlan and Stewart.

⁷⁷ *United Mine Workers v. Pennington*, 381 U.S. 657, 659-72 (1965).

⁷⁸ *Id.* at 672-75.

has served to confuse rather than clarify the true nature of the exemption in the collective bargaining context.⁷⁹

The labor exemption in *Pennington* arose from a cross-claim filed by Phillips Brothers Coal Company against the union for violation of the Sherman Act.⁸⁰ The claim alleged that the union had conspired with large coal companies to solve the problem of overproduction in the coal industry by eliminating small producers.⁸¹ The unions agreed to accept mechanization of the mines and to impose the wage and benefit terms of a prior agreement with the large companies on all operators regardless of their ability to pay.⁸² The union in return received increased wages, greater royalty payments for its welfare fund and production and marketing restrictions on the sale of nonunion coal.⁸³ The larger companies then waged a price cutting campaign against small operators and engaged in other activities, allegedly with union assistance, to drive smaller companies, now tied to higher wages and costs, out of business.⁸⁴ Justice White's opinion in *Pennington* noted that price-fixing in the product market, even at union behest, or collusive bidding in the coal market, even with union participation, would clearly not be immune from the antitrust laws merely because of union involvement.⁸⁵

The White opinion then focused on whether the union's agreement with the large operators to impose the wage and royalty scales found in their bargaining agreement upon smaller coal operators qualified for the exemption.⁸⁶ Wages lie at the core of management-labor relations and are of essential interest to the union and the labor force. Management-labor confrontation over wages is also a mandatory subject of collective bargaining dictated by the National Labor Relations Act.⁸⁷ Recognizing the importance of labor considerations regarding the subject of wages, White noted that it was "beyond question" that a union, as a matter of its own policy and not in agreement with any employer, could determine an appropriate wage scale with one set of employers and seek that scale from all other employers with which it dealt.⁸⁸ Such activity would be immune from antitrust liability.

White then explained, however, that this statement did not imply that all management-labor agreements were automatically entitled to immunity if they

⁷⁹ Handler and Zifchak, *supra* note 49, at 483.

⁸⁰ *United Mine Workers v. Pennington*, 381 U.S. 657, 659 (1965).

⁸¹ *Id.*

⁸² *Id.* at 660.

⁸³ *Id.*

⁸⁴ *Id.* at 661.

⁸⁵ *Id.* at 662-63.

⁸⁶ *Id.* at 664-69.

⁸⁷ 29 U.S.C. §§ 151-168 (1976) [hereinafter cited as NLRA]. Section 8(d) of the NLRA requires "the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . ." *Id.* § 158(d). Failure to bargain in good faith on these mandatory subjects is an unfair labor practice for management, *id.* § 158(a)(5), and labor. *Id.* § 158(b)(3).

⁸⁸ *United Mine Workers v. Pennington*, 381 U.S. 657, 664 (1965).

related to mandatory subjects of bargaining.⁸⁹ According to White, the union's conduct at issue — agreement "with one set of employers to impose a certain wage scale on other bargaining units"⁹⁰ — exceeded the limits of protected activity. The immunity would not apply because the union participated in the employers' competitive interest in the activities of non-unit employers.⁹¹ This standard appears to entail union complicity in a predatory intent to harm the employer's business competitors.⁹² A separate reason for not granting the immunity was the union's decision to forfeit its bargaining freedom with other units.⁹³ White concluded that such an abnegation of discretion was, by itself, a restraint suitable for proscription by the antitrust laws.⁹⁴

⁸⁹ *Id.* at 664-65. The Court stated:

This is not to say that an agreement resulting from union-employer negotiations is automatically exempt from Sherman Act scrutiny simply because the negotiations involve a compulsory subject of bargaining, regardless of the subject or the form and content of the agreement. Unquestionably, the Board's demarcation of the bounds of the duty to bargain has great relevance to any consideration of the sweep of labor's antitrust immunity. . . . But there are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws.

Id. This conclusion directly conflicts with the position of Justice Goldberg. See *infra* notes 111-16 and accompanying text.

⁹⁰ *United Mine Workers v. Pennington*, 381 U.S. 657, 664 (1965). An important and initial labor law determination is the delineation of an appropriate bargaining unit. 29 U.S.C. § 159(a) (1976). The unit is composed of a certain group of jobs and, therefore, employees. Workers vote, on a majority of the unit basis, to elect their exclusive representative. That representative, typically a union, then bargains with management on behalf of the unit. See R. GORMAN, *LABOR LAW*, ch. 5, § 1, at 66 (1976). In the sports industry, each league as a whole (the Major League for baseball) has been treated as the appropriate unit. This has been generally true of sports despite the existence of strong arguments that each club should be its own unit. See Berry and Gould, *supra* note 1, 796-98. Players unions therefore are elected and negotiate league-wide. This unit size may partially explain the pro-management power tilt in the early years of bargaining discussed *infra* at note 9 and accompanying text.

⁹¹ *United Mine Workers v. Pennington*, 381 U.S. 657, 665-66 (1965). The Court stated:

One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry.

Id.

⁹² *Consolidated Express, Inc. v. New York Shipping Ass'n, Inc.*, 602 F.2d 494, 515 (3d Cir. 1979), *vacated and remanded on other grounds*, 448 U.S. 902 (1980), *reh'g*, 641 F.2d 90 (3d Cir. 1981).

⁹³ *United Mine Workers v. Pennington*, 381 U.S. 657, 668 (1965). The Court stated:

From the viewpoint of antitrust policy, moreover, all such agreements between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit suffer from a more basic defect, without regard to predatory intention or effect in the particular case. For the salient characteristic of such agreements is that the union surrenders its freedom of action with respect to its bargaining policy.

Id.

⁹⁴ *Id.* at 669.

Jewel Tea involved a collective bargaining agreement between a butchers' union and food stores selling meat.⁹⁵ The agreement, which expired in 1957, contained a provision 'which forbade the sale of meat before 9 a.m. and after 6 p.m. in both service and self-service markets.'⁹⁶ The stores, in the negotiations for a new agreement, tried to entice the union to relax this marketing hours restriction, but the union rejected all proposals increasing the hours during which meat could be sold.⁹⁷ After long bargaining sessions, all but Jewel and another store agreed to continue the same marketing restrictions.⁹⁸ Jewel, wishing to expand its self-service meat counter into nightly hours, refused to accede and the union membership authorized a strike against it.⁹⁹ Responding to the pressure of the labor stoppage threat, Jewel reserved its rights, signed the agreement and then initiated action against the union claiming that the marketing hours restriction violated the Sherman Act.¹⁰⁰

Justice White began his analysis of the immunity's applicability in *Jewel Tea* by noting that the complaint did not allege a union-employer conspiracy against Jewel.¹⁰¹ White also noted preliminarily that immunity was not required to be applied simply because the parties to the agreement and the lawsuit were an employer and the unions representing his employees; the Court was still required to balance antitrust and labor law policies.¹⁰² White concluded that the required weighing of policies indicated that the union's activities did fall within the exemption.

Thus the issue in this case is whether the marketing-hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protections of the national labor policy and is therefore exempt from the Sherman Act. We think that it is.¹⁰³

White's opinion then noted that the marketing hours restrictions were mandatory subjects of bargaining within the direct and immediate concern of the interests of the union's members.¹⁰⁴ The opinion impliedly defined the phrase

⁹⁵ Local Union No. 189, *Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 679-80 (1965).

⁹⁶ *Id.* at 680.

⁹⁷ *Id.* at 681.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 688. This statement implies that the fact pattern is distinguishable from the allegations in *Pennington*.

¹⁰² *Id.* at 689.

¹⁰³ *Id.* at 689-90.

¹⁰⁴ *Id.* at 691. Justice White perceived that even the opening of self-service counters had an impact on the job security and working hours of the butchers. The restriction at issue was

"not at the behest of . . . nonlabor groups: by detailing the union's long-standing concern with marketing hours and the history of its bargaining efforts to reduce the hours of operation. White thereby indicated that the resistance to longer hours was part of the union's own policy."¹⁰⁵

Justice Douglas' opinions in both *Pennington* and *Jewel Tea* relied on the participation in a conspiracy analysis contained in *Allen Bradley*.¹⁰⁶ Pursuant to the dictates of that reasoning, the union was not entitled to an exemption in either case. The UMW in *Pennington* had combined in a classic *Allen Bradley* conspiracy to impose terms on third parties.¹⁰⁷ Such activity was beyond the exemption and subjected the union to potential antitrust liability. The *Jewel Tea* collective bargaining agreement was evidence of a conspiracy between the butchers union and the other stores to impose marketing hour restrictions on Jewel.¹⁰⁸ Douglas concluded, therefore, that since the employers could not unilaterally impose such a limitation without violating antitrust precepts, the union's participation in the restraint could not insulate prohibited conduct.¹⁰⁹

Justice Goldberg's opinion, dissenting from the opinion but concurring in the reversal in *Pennington* and concurring in the judgment in *Jewel Tea*, is predicated on the assumption that judicial and legislative history indicates that Congress did not want courts to interfere in the collective bargaining process through the imposition of antitrust liability on either management or labor.¹¹⁰ Abuses by either party within the bargaining process should be regulated according to the provisions of the federal labor statutes.¹¹¹ That premise led Goldberg to conclude that "collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act is not subject to the antitrust laws."¹¹² Goldberg perceived an inherent inconsistency in requiring labor and management to bargain over certain topics and then penalizing them for reaching an agreement on those same issues.¹¹³ Goldberg also interpreted White's *Jewel Tea* opinion as distinguishing between types of mandatory subjects depending on their importance to the labor force.¹¹⁴ This reasoning allowed the judicial system to review the substantive concessions of the bargaining process, a result contrary to labor policy.¹¹⁵ The opinion finally noted that

therefore a mandatory subject of bargaining under § 9(a) of the NLRA. 29 U.S.C. § 159(a). White implies that, within the group of mandatory subjects, some mandatory subjects are more important to labor because of their direct and immediate concern to employees. *Id.*

¹⁰⁵ Local Union No. 189, *Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 696-97 (1965).

¹⁰⁶ *Id.* at 735-38; *United Mine Workers v. Pennington*, 381 U.S. 657, 673-75 (1965).

¹⁰⁷ *United Mine Workers v. Pennington*, 381 U.S. at 673-74 (1965).

¹⁰⁸ Local Union No. 189, *Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 736 (1965).

¹⁰⁹ *Id.* at 736-37.

¹¹⁰ *Id.* at 709.

¹¹¹ *Id.*

¹¹² *Id.* at 710.

¹¹³ *Id.* at 712.

¹¹⁴ *Id.* at 727.

¹¹⁵ *Id.* at 716-19.

the distinction between unilateral union activity and a management-labor conspiracy was ineffectual in analyzing a collective bargaining agreement. According to Goldberg, unilateral union activity will not produce agreement and mandatory bargaining will always require joint action.¹¹⁶

The interaction of the three positions in *Jewel Tea* and *Pennington* elucidate some of the exemption's parameters in the collective bargaining context. The reasoning in *Allen Bradley* that provisions of collective bargaining agreements were not automatically entitled to the exemption was reaffirmed. This position is implicit in the majority's rejection of Justice Goldberg's plea for an automatic immunity for negotiation and agreement regarding mandatory subjects of bargaining. The process of balancing antitrust and labor law interests in each specific case precludes any *per se* rule of immunity.¹¹⁷ The Court was explicit in its holding that the obligation to bargain imposed on the parties by federal labor law does not necessarily include the freedom to disregard other laws.¹¹⁸ *Pennington* also reinforces the *Allen Bradley* notion of conspiracy. In denying the application of the exemption, the Court intimated that a union which adopted the competitive interests of management participated in an *Allen Bradley* conspiracy. A union forfeits its immunity when it asserts those interests outside of its unit, regardless of whether the assertion takes the form of active pressure or passive restriction of bargaining freedom.¹¹⁹

Jewel Tea contains a number of insights to the exemption particularly relevant for the sports industry. Unlike the other cases, *Jewel Tea* presented one party to a collective bargaining agreement suing another party to the same agreement for antitrust violations.¹²⁰ The Court implied that suits brought by either management or labor in that position would not be automatically entitled to the exemption.¹²¹ *Jewel Tea* also involved a restraint which affected both the labor and product markets.¹²² The Court decided that such provisions are exempt when they are found to be "intimately related" to both mandatory subjects of bargaining and important interests of the union and its membership.¹²³ This position seems to include a judicial evaluation of which mandatory subjects are at the heart of labor's interest. The rejection of a required exemption for all mandatory subjects of bargaining implies that there are some mandatory subjects which are less important to labor than others for purposes of the exemption analysis.¹²⁴ Apparently, only mandatory subjects

¹¹⁶ *Id.* at 721.

¹¹⁷ *See* *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 622 (1975).

¹¹⁸ *See supra* note 89 and accompanying text.

¹¹⁹ *See supra* notes 92-93 and accompanying text.

¹²⁰ *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 680-81 (1965).

¹²¹ *See supra* notes 102-09 and accompanying text.

¹²² *See St. Antoine, supra* note 67, at 615.

¹²³ *Id.* at 621; *see also supra* notes 103-04 and accompanying text.

¹²⁴ *See supra* note 114 and accompanying text.

which are also important to a union will qualify for the exemption. A union's prior positions, as indicated by the parties' bargaining history, provides an indication of the importance of a particular provision to the union. Finally, agreements which reflect management's competitive interests will not qualify for the exemption.¹²⁵ The *Jewel Tea* opinion, in the course of granting the exemption, described in detail the history of the union's unilateral effort to restrict marketing hours on the sale of meat.¹²⁶ The exemption applies to provisions initiated by labor and advanced by a union pursuing the heart of its members' interests, "not at the behest of any employer group."¹²⁷ The exemption as applied to collective bargaining agreements was therefore interpreted in a manner consistent with the basis of the statutory exemption delineated in *Apex Hosiery and Hutcheson* — protection of unilateral labor interests.¹²⁸

The Supreme Court most recently dealt with the exemption in *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100*.¹²⁹ *Connell* did not directly involve a restraint in a collective bargaining agreement, but concerned an agreement between a union and a general contractor that the latter would only subcontract mechanical work to firms which were parties to the union's current collective bargaining agreement.¹³⁰ The union had no interest in organizing or representing employees of the general contractor.¹³¹ The contractor signed the subcontracting agreement only after picketing and a work stoppage at one of its construction sites.¹³²

¹²⁵ See *supra* note 91 and accompanying text.

¹²⁶ See *supra* note 105 and accompanying text.

¹²⁷ Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 688 (1965). See also *supra* note 103 and accompanying text; Handler and Zifchak, *supra* note 49, at 484-85; and J. WEINSTART & C. LOWELL, *supra* note 18, at 330.

¹²⁸ The appropriate test after *Pennington* and *Jewel Tea* has been formulated as follows:

Synthesizing Justice White's opinion in *Pennington* and *Jewel Tea*, it is apparent that a collectively bargained agreement will enjoy antitrust immunity only if *first*, the circumstances of its negotiation are such that it can be said that the union acted unilaterally, that is, it pursued the agreement in its own self-interest, rather than "at the behest of or in combination with non-labor groups"; *second*, the subject of the agreement is "intimately related" to matters of "immediate and direct" union concern — conditions of employment — and not matters, such as prices, that at best are of only indirect concern and serve to restrain the product market in "direct and immediate" fashion; and *third*, the agreement does not impair the freedom of contract of the parties to the collective bargaining agreement in their relations with third parties.

Handler and Zifchak, *supra* note 49, at 485.

¹²⁹ 421 U.S. 616 (1975).

¹³⁰ *Id.* at 618-19.

¹³¹ *Id.* at 619.

¹³² *Id.* at 620. The underlying collective bargaining agreements between the union and an association of subcontractors contained a "most favored nation" clause. *Id.* at 619. Pursuant to that provision, the union agreed that, if it extended more favorable terms to any subcontractor it would subsequently organize, it would offer those same terms to association members. *Id.* The union therefore agreed that it would not give a non-association subcontractor an advantage over association members. The association thereby benefitted from the union's future organizational efforts and was sheltered from outside competition in the market covered by agreements of the Connell variety. *Id.* at 623-24. This "most favored nation" clause was not, however, relied on by

Justice Powell, writing for the Court, began by noting that, although the statutory exemption did not apply to concerted action or agreements between management and labor, the Court had created a "limited nonstatutory exemption" for some such agreements based on the "proper accommodation" between the competing policies favoring collective bargaining and free competition in business markets.¹³³ The majority then reaffirmed the nature of the exemption.

The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws. The Court therefore acknowledged that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions.¹³⁴

The Court, however, in applying the "proper accommodation" test in *Connell*, concluded that the agreement at bar forfeited any claim of antitrust immunity because it restrained the business market to an extent not justified by the elimination of wage and working condition competition.¹³⁵

The *Connell* Court therefore held that a product market restraint which will qualify for the exemption must flow from the basic labor activity which a

Connell to assert a union-unionized subcontractor conspiracy. *Connell* simply used it as a factor indicating the restraint implicit in its agreement with the union. *Id.* at 625 n.2.

¹³³ *Id.* at 622.

¹³⁴ *Id.*

¹³⁵ *Id.* at 625-26.

This record contains no evidence that the union's goal was anything other than organizing as many subcontractors as possible. This goal was legal, even though a successful organizing campaign ultimately would reduce the competition that unionized employers face from non-union firms. But the methods the unions chose are not immune from antitrust sanctions simply because the goal is legal. Here Local 100, by agreement with several contractors, made nonunion subcontractors ineligible to compete for a portion of the available work. This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions. It contravenes antitrust policies to a degree not justified by congressional labor policy, and therefore cannot claim a nonstatutory exemption from the antitrust laws.

There can be no argument in this case, whatever its force in other contexts, that a restraint of this magnitude might be entitled to an antitrust exemption if it were included in a lawful collective-bargaining agreement.

Id. Powell also concluded that the agreement was not allowed by the construction-industry proviso of § 8(e) of the NLRA, 29 U.S.C. § 158(e) (1976), because it was not in the context of a collective bargaining relationship and it was not limited to a particular jobsite. *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. at 626. Although the agreement was therefore found to be an unfair labor practice, the Court concluded that the remedies of the NLRA were not exclusive and exposure to potential antitrust liability was appropriate. *Id.* at 634-35. For a criticism of this aspect of the decision, see Handler and Zifchak, *supra* note 49, at 486-87.

union conducts — the elimination of competition among employees regarding their salaries and employment conditions. In addition, the restraint must be no broader than needed to accomplish that goal.¹³⁶ *Connell* has been interpreted as limiting the availability of the exemption and requiring a narrower interpretation of wages and working conditions in the exemption, as opposed to the bargaining, context.¹³⁷ This reading of *Connell* has been strengthened by a subsequent Supreme Court statement that all antitrust exemptions are to be narrowly construed.¹³⁸ The denial of exemption in *Connell* is particularly significant since the agreement was initiated by the union and appeared to be only at the union's behest.¹³⁹ The agreement was therefore arguably analogous to the unilateral union activity protected by *Hutcheson*'s interpretation of the statutory exemption.¹⁴⁰ According to the *Connell* Court, however, the joint agreement's restraint on the product market was too extensive to be justified by relevant labor considerations.¹⁴¹ *Connell* therefore suggests that antitrust interests — the extent of product market restraint — must be given increased emphasis in the balancing process. *Connell* also implies that a union's own evaluation of what is a proper or important labor interest is open to judicial scrutiny in the immunity analysis. The labor interest seems likely to prevail when the agreement is directly related to union proposals regarding wages, working hours or job preservation — traditionally important employee concerns — and the restraint on the product market is not excessive.¹⁴² The possibility of exemption also appears to increase when the union initiates the restraint and persuades a non-willing employer to agree to it.¹⁴³ *Connell*'s denial of exemption to a labor initiated proposal casts severe doubt upon the availability of the exemption for

¹³⁶ See *Consolidated Express, Inc. v. New York Shipping Ass'n, Inc.*, 602 F.2d 494, 517-18 (3d Cir. 1979) *vacated and remanded on other grounds*, 448 U.S. 902 (1980), *reh'g*, 641 F.2d 90 (3d Cir. 1981); *Larry V. Muko, Inc. v. Southwestern Pa. Building and Constr. Trades Council*, 609 F.2d 1368, 1373 (3d Cir. 1979); *Commerce Tankers Corp. v. National Maritime Union of America*, 553 F.2d 793, 801 (2d Cir. 1977).

¹³⁷ *St. Antoine*, *supra* note 67, at 630; *Roberts and Powers*, *supra* note 24, at 454.

¹³⁸ *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979).

¹³⁹ See *Handler and Zifchak*, *supra* note 49, at 486.

¹⁴⁰ *Id.* at 492-93.

¹⁴¹ *Connell Const. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 624 (1975). The Court noted that the agreement at issue, in combination, gave the union control over the mechanical subcontracting market. *Id.* Contravailing labor law interest was lessened since the union had no desire to organize collectively *Connell*'s own employers. *Id.* at 626.

¹⁴² See *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 695-97 (1965). See also *Suburban Beverages, Inc. v. Pabst Brewing Co.*, 462 F. Supp. 1301, 1307-10 (E.D. Wis. 1978).

¹⁴³ See, e.g., *Intercontinental Container Transport Corp. v. New York Shipping Ass'n, Inc.*, 426 F.2d 884 (2d Cir. 1970). The court stated:

Thus it appears that, far from aiding and abetting a violation of the Sherman Act by a group of business men, the union here, acting solely in its own self-interest, forced reluctant employers to yield to certain of its demands. Under these circumstances the resulting agreement is within the protection of the labor exemption to the antitrust laws. *Amalgamated Meat Cutters v. Jewel Tea Co.*, *supra*.

Id. at 888.

restraints conceived by management. *Connell* in this sense reinforces the *Pennington* holding that a union could not adopt the "competitive interests" of management. Immunity will not be granted if the union's activity can be characterized as evincing an intent to aid management in dominating its product market.¹⁴⁴

While focusing on the substantive scope of the exemption, the Supreme Court cases do not address whether a management defendant can derivatively assert the non-statutory exemption in an appropriate lawsuit.¹⁴⁵ The Goldberg opinion in *Jewel Tea*, in the course of arguing for an exemption for all mandatory bargaining, noted the unfairness of penalizing an employer for complying with a required duty to bargain.¹⁴⁶ Aside from this reference, the Supreme Court has only considered the issue in the context of a union's antitrust liability and the union's invocation of immunity.¹⁴⁷ A limited number of lower courts have allowed a management defendant to assert derivatively the non-statutory exemption.¹⁴⁸ For the most part these cases have involved professional sports.¹⁴⁹

Employer assertion of the immunity raises a question regarding the primary purpose of the exemption: Is it designed to protect unions or the col-

¹⁴⁴ See *Lucas v. Bechtel Corp.*, 633 F.2d 757 (9th Cir. 1980).

¹⁴⁵ Management could be sued over the antitrust implications of a collective bargaining provision by another employer or by labor. The ability of a union to bring suit, however, may be contractually limited by the language of a collective bargaining agreement. See, e.g., NFL-NFLPA Collective Bargaining Agreement, Art. III, § 2 (1977-1982) (available in Boston College Law School Library).

¹⁴⁶ *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 730-31 (1965).

¹⁴⁷ See *J. WEISTART & C. LOWELL*, *supra* note 18, § 5.05, at 551. See also *supra* notes 43-116 and accompanying text.

¹⁴⁸ *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 847 n.14 (3d Cir. 1974). This particular case, however, relied heavily on a prior case involving Scooper Dooper and the union which was a party to Kraftco's bargaining agreement. *Id.* at 844-50. In the prior decision, the union had successfully asserted the exemption against Scooper Dooper. *Id.* at 843. That decision collaterally estopped Scooper Dooper in the Kraftco case. *Id.* at 850.

Suburban Beverages, Inc. v. Pabst Brewing Co., 462 F. Supp. 1301 (E.D. Wis. 1978), was a suit by a distributor against a beer manufacturer. The court allowed the exemption and held the brewer immune from antitrust liability for a restraint contained in a brewer-union bargaining agreement. *Id.* at 1312. The opinion analyzed the propriety of the exemption, but did not mention or, apparently, consider that an employer (as opposed to a union) was asserting it. *Id.* at 1308-10. Both *Kraftco* and *Suburban Beverages* involved territorial work restrictions on an employer which were related to the union's interest in job preservation for its members.

Grandad Bread, Inc. v. Continental Baking Co., 612 F.2d 1105 (9th Cir. 1979), involved a suit against a baking company regarding its agreement with a union that only union drivers would pick up and deliver its baked goods to its customers. In a suit by a non-union distributor denied service at defendant's plant, the court allowed the employer to assert the exemption. *Id.* at 1109-11. The union had been a party to the litigation, but had settled with the distributor and had been dropped from the lawsuit. *Id.* at 1107. Aside from the implicit recognition of an employer's ability to assert the exemption contained in its conclusion, the court did not specifically deal with the issue.

¹⁴⁹ See *Mackey v. National Football League*, 543 F.2d 606, 612 (8th Cir. 1976); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462,

lective bargaining process itself?¹⁵⁰ The bargaining process must necessarily be the object of some protection since the non-statutory exemption immunizes provisions of collective bargaining agreements. Some protection of employers seems implicit in this judicial expansion of the statutory exemption. Given the antitrust policies at issue and the Supreme Court's explanation of the exemption, however, some form of union involvement with a challenged bargaining provision seems essential. An employer should receive immunity if he agrees to a term which, in some fashion, originates with the union or involves union participation to such a degree that the union's integrity as employee representative is entwined with the provision.¹⁵¹ The non-sports precedent, however, does not support granting the exemption to an employer when the provision at bar was imposed by management (either unilaterally or in the bargaining context) or embodies employer interests which are competitive or restrictive of the product market.¹⁵² The obligation to bargain cannot, by itself, be utilized by employers to immunize conduct from the reach of antitrust laws.¹⁵³

2. The Exemption as Applied in Professional Sports Cases

The professional sports setting provides a unique context for application of the exemption. The identity of the labor market and the product market implies that any restraint upon the labor force affects the product market and arguably involves management's competitive interests.¹⁵⁴ The non-sports precedent, usually based on a differential between labor and product restraints, must therefore be specially adapted to the particular needs of the sports industry.¹⁵⁵ The inherently monopolistic nature of sports leagues also makes it

499 (E.D. Pa. 1972). See also *infra* notes 167-76, 220 and accompanying text.

¹⁵⁰ See J. WEISTART & C. LOWELL, *supra* note 18, § 5.04, at 526-27 for the view that, although the exemption originated as a device to protect unions, the maturity of the modern labor movement dictates that the doctrine should now protect the bargaining process. The exemption should therefore be available to employers who bargain in good faith. This application further validates labor law principles by lessening judicial scrutiny of substantive bargaining terms. The parties are therefore free to shape their own contractual relationship. See also Comment, N.Y.U. L. REV., *supra* note 23, at 188.

¹⁵¹ See *infra* notes 270-73 and accompanying text.

¹⁵² See *supra* notes 71-94 and accompanying text.

¹⁵³ See *supra* notes 89, 118 and accompanying text.

¹⁵⁴ See *supra* notes 24-25 and accompanying text. This is also the reason why, in the rule of reason analysis, the league is able to argue that a labor restraint has actual, pro-competitive effects on the product market — the game involved. See, e.g., *Mackey v. National Football League*, 543 F.2d 606, 621 (8th Cir. 1976).

¹⁵⁵ *Jewel Tea* appears to be the decision most directly relevant to the sports context. The opinion analyzes a restraint involving both the labor and product markets of the retail meat industry. The case possessed an additional dimension, however, in that the suit was initiated by a recalcitrant member of a multi-employer bargaining unit who alleged, in effect, that he was being forced to accept the working hours restraint at issue. *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 680-81 (1965). The case therefore has overtones of the traditional third party effect rather than simply being limited to labor and management in a bargaining context. See *supra* notes 121-22 and accompanying text.

difficult for competitors to exist.¹⁵⁶ A capitalist wishing to own a team will usually find his/her path blocked by a series of restrictive intraleague rules, including approval by a specified number of existing team owners (usually unanimous or three-fourths) and exclusive territorial rights of existing teams to their geographic area.¹⁵⁷ This fact diminishes entry-level competition because a potential owner seeking to enter a certain market must establish an entirely new league in addition to his own team. Thus, the competitive realities of professional sports differ from those of non-sports industries. Potential individual competitors are subject to greater pressure to either cooperate with the existing league or abandon their interest in team ownership. Consequently, sports litigation has heretofore involved a league against a league or management against labor, but rarely an individual owner or potential owner against a league or union.¹⁵⁸ Finally, prior to the 1970's, sports unions were relatively ineffective in obtaining meaningful collective bargaining agreements which would benefit their members.¹⁵⁹ The courts assisted the unions in eliminating this power imbalance by applying antitrust law to the labor-restrictive practices previously imposed by management.¹⁶⁰ The purpose and application of the exemption therefore could differ after unions have attained bargaining parity and have engaged in true good faith bargaining.

*Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*¹⁶¹ and *Robertson v. National Basketball Association*¹⁶² are two of the first cases to consider extensively the exemption's application in the professional sports context. *Philadelphia Hockey* was a lawsuit initiated by teams of a new hockey league, the World Hockey Association, against the established National Hockey League (NHL).¹⁶³ The new league claimed that the NHL, primarily through its reserve clause and contractual arrangements with minor league teams, restrained and monopolized the professional hockey market.¹⁶⁴ The defendant NHL sought to avoid antitrust liability by arguing, among other points, that, because the reserve clause was embodied within a collective bargaining agree-

¹⁵⁶ See Berry and Gould, *supra* note 1, at 695-96; Note, *Professional Sports and the Non-Statutory Labor Exemption to Federal Antitrust Law: McCourt v. California Sports, Inc.*, 11 U. TOL. L. REV. 633, 650 (1980); Kennedy and Williamson, *supra* note 17, § pt. 1.

¹⁵⁷ See, e.g., NFL Constitution and By-Laws §§ 3.1(b), 4.1 and 4.2. An NFL team's geographic exclusivity extends "seventy-five miles in every direction from the exterior corporate limits" of the city in which the club is located. *Id.*

¹⁵⁸ This trend may be ending as individual team owners, desirous of a different distribution of a sport's wealth, begin to challenge league practices restrictive of their ability to control their own franchises. See *infra* notes 409-10 and accompanying text.

¹⁵⁹ See Berry and Gould, *supra* note 1, at 707, 741-53.

¹⁶⁰ See *supra* notes 17-19 and accompanying text.

¹⁶¹ 351 F. Supp. 462 (E.D. Pa. 1972). The defendant, the National Hockey League, is hereinafter referred to as the "NHL."

¹⁶² 389 F. Supp. 867 (S.D.N.Y. 1975).

¹⁶³ *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 468 (E.D. Pa. 1972).

¹⁶⁴ *Id.* at 466-67.

ment with the National Hockey League Players' Association, the practices challenged were protected by the labor law exemption.¹⁶⁵ Following a review of applicable Supreme Court precedent,¹⁶⁶ Judge Higginbotham of the federal district court for eastern Philadelphia fashioned three conclusions regarding the application of the exemption in the sports context:

1. The Supreme Court decisions were cases in which "the union had been sued for its active, conspiratorial role in restraining competition of a product market, and the union, not the employer, sought to invoke the labor exemptions."¹⁶⁷ The hockey case did not contain any evidence of a management-labor conspiracy; in fact, the union had repeatedly sought to eliminate the restrictions at issue.¹⁶⁸
2. The non-sports precedent "pertained to issues which furthered the interests of union members and on which there had been extensive collective bargaining."¹⁶⁹ The current record disclosed an absence of good faith bargaining regarding the unilaterally imposed reserve clause.¹⁷⁰
3. Assuming there had been good faith bargaining, "those negotiations would not shield the National Hockey League from liability in a suit by outside competitors who sought access to players under the control of the National Hockey League."¹⁷¹ Such an agreement would be the equivalent of the management-labor conspiracy proscribed in *Allen Bradley*.¹⁷²

¹⁶⁵ *Id.* at 496.

¹⁶⁶ *Id.* at 497-98.

¹⁶⁷ *Id.* at 498.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 498-99.

¹⁷⁰ *Id.* at 499.

¹⁷¹ *Id.*

¹⁷² *Id.* at 499-500. The district court stated:

In providing a special exemption from Sherman Act regulations for labor unions and employers who in good faith negotiated with those unions, Congress attempted to accommodate what frequently were conflicting public policies: the fostering and preservation of competitive business conditions in a free enterprise system on one hand, counter-balanced by a legitimate concern in improving and bettering the working conditions of laborers and the reduction of industrial strife through vigorous union organization and collective bargaining. The labor exemption which could be defensively utilized by the union and employer as a shield against Sherman Act proceedings when there was bona fide collective bargaining, could not be seized upon by either party and destructively wielded as a sword by engaging in monopolistic or other anti-competitive conduct. The shield cannot be transmuted into a sword and still permit the beneficiary to invoke the narrowly carved out labor exemption from the anti-trust laws. To allow and condone such conduct would frustrate Congress' carefully orchestrated efforts to harmoniously blend together two opposing public policies.

Philadelphia Hockey appears to be fully consistent with non-sports case law in denying the NHL its exemption claim. Although the court implicitly allowed employers to raise the exemption through their participation in the collective bargaining process, the grant of immunity was subject to stricter scrutiny when it is not a union seeking the exemption.¹⁷³ In addition to requiring good faith bargaining regarding the restraint, the opinion also implied that an appropriate subject of immunity should further the interests of the union members.¹⁷⁴ This language indicates that, in addition to proper collective talks and concessions, the substantive nature of the restraint — its pro-labor effect — is a significant factor in the decision to provide an agreement with antitrust insulation. Finally, *Philadelphia Hockey* applied *Allen Bradley's* denial of immunity for a management-labor conspiracy which significantly affects the product market interests of the employer's competitors.¹⁷⁵ The NHL's reserve clause was therefore subject to a complete antitrust analysis.¹⁷⁶

Robertson was a class action filed on behalf of all professional basketball players against the National Basketball Association (NBA) and the American Basketball Association (ABA).¹⁷⁷ The lawsuit was initiated after the two leagues began merger discussions.¹⁷⁸ The players contended that a variety of league practices violated the Sherman Act,¹⁷⁹ that the older NBA had engaged in predatory conduct regarding the newer ABA and that the proposed merger violated the antitrust laws.¹⁸⁰ The opinion was written in response to the players' motion for class action determination and the league's motion for summary judgment.¹⁸¹ In this context, Judge Carter of the southern district court of New York evaluated the NBA's claim that all the practices at issue were protected from antitrust liability by the labor law exemption. His opinion began by noting that, although the exemption was created to benefit unions, employers could assert derivatively the immunity when they have participated in bargaining and are sued for provisions based on union activity.¹⁸² The

¹⁷³ *Id.* at 500.

¹⁷⁴ *Id.* at 498.

¹⁷⁵ *Id.* at 500.

¹⁷⁶ Judge Higginbotham in *Philadelphia Hockey* concluded that a preliminary injunction should issue against the NHL based on the likelihood that the league's system of player restraints constituted an exercise of monopoly power in violation of § 2 of the Sherman Act. *Id.* at 517-18. The court also ruled that a decision on whether § 1 of the Sherman Act had been violated would be inappropriate in the preliminary injunction setting. *Id.* at 504.

¹⁷⁷ *Robertson v. National Basketball Ass'n*, 398 F. Supp. 867, 872-73 (S.D.N.Y. 1975).

¹⁷⁸ *Id.* at 873.

¹⁷⁹ *Id.* at 874. The practices attacked were the college draft, the uniform reserve clause and related compensation plan and various boycott and blacklisting techniques. *Id.* The National Basketball Association and the American Basketball Association are hereinafter referred to, respectively, as the "NBA" and the "ABA."

¹⁸⁰ *Id.* at 875-76.

¹⁸¹ *Id.* at 876.

¹⁸² *Id.* at 885-86. Judge Carter stated:

Allen Bradley made clear that the "labor exemption" was created for the benefit of unions. While later cases revealed the possibility of a circumscribed exemption for

leagues, having been accorded at least the right to claim the exemption, proposed a two part analysis for employer assertion of the immunity:

The Test for applicability of the labor exemption which emerges from *Jewel Tea* and *Pennington* is twofold: 1) Are the challenged practices directed against non-parties to the relationship; if they are not, then 2) are they mandatory subjects of collective bargaining? If the answer to No. 1 is no, and to No. 2 yes, the practices are immune. . . . NBA Memorandum at 28.¹⁸³

Judge Carter in *Robertson* rejected this formulation of the exemption and denied the NBA the immunity it sought.¹⁸⁴ The proposed test embodied the Goldberg position in *Pennington* and *Jewel Tea*. The *Robertson* decision recognized that the premise for the NBA's suggested criteria — automatic exemption for mandatory topics of bargaining — had been rejected by the *Pennington* and *Jewel Tea* majority.¹⁸⁵ The opinion noted that, even under the league's proposed test, the exemption should not be permitted because the restraints noted in the plaintiffs' complaint were not mandatory subjects of bargaining.¹⁸⁶ Even assuming such topics were mandatory subjects, however, the court reasoned that an appropriate exemption inquiry must focus on whether the provision at issue was a result of union self-interest.¹⁸⁷ Judge Carter then declared the requirement of union self-interest could not be easily satisfied with regard to these practices.¹⁸⁸ The plaintiff's complaint therefore survived summary judg-

employers, which might arise derivatively, and become effective when employers are sued by third parties for the activities of unions, the protection of the exemption is afforded only to employers who have acted jointly with the labor organization in connection with or in preparation for collective bargaining negotiations. *See, e.g., Cordova v. Bache & Co.*, [321 F. Supp. 600, 607 (S.D.N.Y. 1970)].

Id. at 886.

¹⁸³ *Robertson v. National Basketball Association*, 398 F. Supp. 867, 886 (S.D.N.Y. 1975).

¹⁸⁴ *Id.* at 887-89.

¹⁸⁵ *Id.* at 888.

¹⁸⁶ *Id.* at 889. The validity of this conclusion, at least regarding the collegiate draft and the reserve clause, seems suspect considering later case law development. *Contra McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1198 (6th Cir. 1979); *Mackey v. National Football League*, 543 F.2d 606, 615 (8th Cir. 1976); *Smith v. Pro-Football, Inc.*, 420 F. Supp. 738, 743 (D.D.C. 1976), *aff'd in part, rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978). *See also Berry and Gould, supra* note 1, at 793; J. WEISTART & C. LOWELL, *supra* note 18, § 6.08, at 813-23.

¹⁸⁷ *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867, 889 (S.D.N.Y. 1975). *Robertson*, 389 F. Supp. 867, 889, employs the standard set by the Second Circuit in *Intercontinental Container Transp. Corp. v. New York Shipping Ass'n*, 426 F.2d 884 (2d Cir. 1970):

The test of whether labor union action is or is not within the prohibitions of the Sherman Act is (1) whether the action is in the union's self-interest in an area which is a proper subject of union concern and (2) whether the union is acting in combination with a group of employers. *United States v. Hutcheson*, 312 U.S. 219, 61 S. Ct. 463, 85 L.Ed. 788 (1941); *Allen Bradley Co. v. Local 3* [325 U.S. 797 (1945)].

Intercontinental Container Transp. Corp. v. New York Shipping Ass'n, 426 F.2d at 887.

¹⁸⁸ *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975). Judge Carter declared:

ment and a plaintiff class was certified.¹⁸⁹ This ruling provided the impetus for meaningful bargaining between the parties and, within a reasonable period, a settlement agreement, including a new collective bargaining agreement, received judicial approval.¹⁹⁰

Philadelphia Hockey and *Robertson* established the framework for the application of the exemption to professional sports. Three subsequent cases — *Smith v. Pro-Football, Inc.*,¹⁹¹ *Mackey v. National Football League*,¹⁹² and *McCourt v. California Sports, Inc.*¹⁹³ — delineate the current exemption standards employed by courts in this context. *Smith* was a lawsuit commenced by an individual player, former first-round selection James Smith, against the Washington Redskins and the National Football League.¹⁹⁴ The case only concerned the legality of the NFL college player draft.¹⁹⁵ Smith had negotiated a one-year contract with the Redskins.¹⁹⁶ During the last game of his rookie season, he received a neck injury which terminated his career.¹⁹⁷ His complaint alleged that the player draft system had restrained his ability to freely market his skills and therefore had prevented him from obtaining a multi-year, guaranteed contract.¹⁹⁸ The draft in practice when Smith entered the league was embodied in the NFL's Constitution and By-Laws, and not in a collective bargaining agreement.¹⁹⁹

The district court in *Smith* examined the nature of the exemption prior to conducting its substantive, antitrust analysis of the draft.²⁰⁰ The opinion initially rejected the NFL's contention that mandatory subjects of bargaining,

Conceivably, if the restrictions were part of the union policy deemed by the Players Association to be in the players' best interest, they could be exempt from the reach of the antitrust laws. . . . The proper inquiry in respect of this controversy is whether the challenged restraints were ever the subject of serious, intensive, arm's-length collective bargaining I must confess that it is difficult for me to conceive of any theory or set of circumstances pursuant to which the college draft, blacklisting, boycotts and refusals to deal could be saved from Sherman Act condemnation, even if defendants were able to prove at trial their highly dubious contention that these restraints were adopted at the behest of the Players Association.

Id. at 895.

¹⁸⁹ *Id.* at 896-903.

¹⁹⁰ *Robertson v. National Basketball Ass'n*, 72 F.R.D. 64 (S.D.N.Y. 1976). This approval was subsequently affirmed by the Second Circuit. *Robertson v. National Basketball Ass'n*, 556 F.2d 682 (2d Cir. 1977). The appellate court noted that the agreement, including a modified draft and compensation procedure, did not contain any provisions which were "clearly illegal." *Id.* at 686.

¹⁹¹ 420 F. Supp. 738 (D.D.C. 1976), *aff'd in part, rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978).

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

¹⁹³ 600 F.2d 1193 (6th Cir. 1979).

¹⁹⁴ *Smith v. Pro-Football, Inc.*, 420 F. Supp. 738, 740 (D.D.C. 1976).

¹⁹⁵ *Id.* at 741.

¹⁹⁶ *Id.* at 740.

¹⁹⁷ *Id.* at 740-41.

¹⁹⁸ *Id.* at 741.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

prior to their inclusion within a collective agreement, are proper subjects for immunity.²⁰¹ The court held that an employer practice "cannot under any circumstances come within the exemption unless and until it becomes part of a collective bargaining agreement negotiated by a union in its own self-interest."²⁰² Since the Redskins drafted Smith prior to the first labor-management football agreement, the player's claim could not be precluded by the exemption.²⁰³

After rendering this holding for the case at bar, however, the district court in *Smith* speculated upon the appropriateness of the exemption if the draft had been embodied in a collective agreement.²⁰⁴ The court commenced its examination by noting that, considering labor law precedent regarding bargaining over hiring halls²⁰⁵ and seniority benefits, the draft would be considered a term or condition of employment and therefore a mandatory subject of bargaining.²⁰⁶ The mandatory nature of the draft would thus ensure the presence of adequate labor interests to justify a claim for exemption. Nonetheless, the court reasoned that to qualify for immunity, the actual agreement must also be the product of "genuine, arm's-length bargaining."²⁰⁷ The opinion further noted that the agreement cannot be an employer conspiracy to restrain a product market in which the union either participates or acquiesces, but must represent the union's own efforts in furtherance of its own self-interest.²⁰⁸ The court concluded by observing that a player draft differs from traditional restraints in that the draft produced a detrimental effect, not on the employer's competitors, but on potential employees, "persons neither party to the agreement nor members of a union which is party to the agreement."²⁰⁹ Protection of such a

²⁰¹ *Id.* at 741-44.

²⁰² *Id.* at 742.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ For a discussion of the nature of hiring halls and their relation to the draft, see *infra* notes 290-96 and accompanying text.

²⁰⁶ *Id.* at 743.

²⁰⁷ *Id.*

²⁰⁸ *Id.* The district court stated:

The doctrine of those cases is to the effect that even when an agreement is related to mandatory subjects, it must be examined to determine if it is: (1) An employers' combination/conspiracy, in which the union has acquiesced, whose purpose is to fix prices, allocate markets, or drive competitors from the market (i.e., an attempt to monopolize). Such an agreement does not fall within the exemption, see *Allen Bradley, supra*. (2) A joint management-union combination/conspiracy to accomplish those objectives, in which the union and management interests appear to coincide. Such an agreement must be scrutinized for its relative impact on the product market and the interests of union members, in light of national labor and antitrust policies. (3) The result of the union's own efforts in its self-interest, free of any agreement with or among the employers to attempt to accomplish those objectives. Only the third kind of collective bargaining agreement on mandatory subjects has been given an unqualified exemption from the antitrust laws subsequent to *Jewel Tea* and *Pennington*.

Id.

²⁰⁹ *Id.*

group is less central to the purposes of antitrust law than the prohibition of product market restraints.²¹⁰ On the other hand, since labor law is deeply concerned with allowing unions to freely negotiate bargains they consider best for their members, the district court concluded that, if a union in pursuit of its own interests agreed to a player draft, the procedure should be immune from antitrust liability.²¹¹ The court then ruled that the draft, as then constituted, was a substantive violation of the antitrust laws.²¹²

Mackey was a lawsuit brought by players against the NFL challenging the validity of the league's free agent compensation system.²¹³ In 1963, management had unilaterally imposed a procedure whereby a player who had completed the term of his contract was free to reach an agreement with any other club in the league, but a new club acquiring a free agent was required to compensate the old club for the loss of its player.²¹⁴ If the two clubs could not agree on appropriate compensation, the commissioner of the league, Pete Rozelle, would, in his sole discretion, determine fair and equitable compensation (hence the name "Rozelle Rule").²¹⁵ The rule was contained in the NFL Constitution and By-Laws effective at that time.²¹⁶ The 1970 collective bargaining agreement did not expressly refer to the Rozelle Rule nor did it explicitly incorporate the NFL Constitution and By-Laws. The agreement, however, required all players to sign the Standard Player Contract, and that individual agreement bound each player to comply with the Constitution and By-Laws.²¹⁷ The Court of Appeals for the Eighth Circuit ruled that this reference was sufficient to include the Rozelle Rule within the ambit of the collective bargaining agreement.²¹⁸ The *Mackey* court first rejected the players' contention that only employee groups could assert the exemption.²¹⁹ Since the exemption attached to the collective agreement, either party could derive such a benefit from its terms.²²⁰ This holding, combined with the characterization of

²¹⁰ *Id.* at 744.

²¹¹ *Id.*

²¹² *Id.* at 744-47. The district court concluded that the draft was a *per se* violation of § 1 of the Sherman Act and, in the alternative, a violation of the rule of reason standard. *Id.* at 745-47. On appeal, the United States Court of Appeals for the District of Columbia Circuit ruled that the *per se* analysis was inappropriate for the football business, but affirmed the rule of reason violation. *Smith v. Pro-Football, Inc.*, 593 F.2d 1173, 1183-89 (D.C. Cir. 1978). The appellate court also reversed on the standard of damages sustained. *Id.* at 1189-91.

²¹³ *Mackey v. National Football League*, 543 F.2d 606, 609 (8th Cir. 1976).

²¹⁴ *Id.* at 610-11.

²¹⁵ *Id.*

²¹⁶ *Id.* Section 12.1(H) of the NFL Constitution and By-Laws (quoted in *Mackey v. National Football League*, 543 F.2d at 610-11). The circuit court noted that between 1963 and 1974, 176 players played out their options. *Id.* at 611. Of that group, 34 signed with other teams. *Id.* In three cases, the former club waived compensation. *Id.* In 27 cases, the clubs involved agreed on compensation. *Id.* In four cases, the Commissioner awarded compensation. *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 612.

²²⁰ *Id.*

the Rule as being within the agreement, meant that the league had a viable claim to immunity.²²¹ The decision in *Mackey* therefore subtly expanded the scope of the exemption by concluding that the Rozelle Rule, although not specifically mentioned, referred to or incorporated, was a part of the collective agreement and thus a candidate for exempt status.²²²

The Eighth Circuit in *Mackey* then analyzed the principles underlying the exemption cases and formulated a widely influential, three-part test for granting immunity:²²³

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.²²⁴

The Rozelle Rule clearly affected only the parties to the bargaining agreement, and the circuit court found the Rule to be a mandatory subject of bargaining because it restricted a player's team-to-team movement and depressed salaries.²²⁵ The district court record, however, did not reveal any good faith bargaining concerning the Rule.²²⁶ The compensation provision was unilaterally promulgated by the league and then imposed by the league on a weak union in the first two bargaining agreements.²²⁷ The circuit court therefore used its interpretation of good faith bargaining to fortify the union and give it increased bargaining leverage through the imposition of antitrust liability. The Eighth Circuit, however, again expanded the exemption by suggesting that evidence of a quid pro quo — union agreement to the unmodified rule in exchange for other benefits — might satisfy this requirement.²²⁸ Since no such give and take had been found by the district court in the parties' bargaining history,²²⁹ however, the *Mackey* court denied exempt status and found the

²²¹ *Id.* at 615.

²²² See *infra* notes 260, 301-13 and accompanying text. The 1970 NFL agreement also contained a "zipper clause" which read as follows: "[T]his Agreement represents a complete and final understanding of all bargainable subjects of negotiation among the parties during the term of this Agreement. . . ." *Mackey v. National Football League*, 543 F.2d 606, 613 (8th Cir. 1976). This agreement had expired in 1974 and the union, seeking the elimination of the Rozelle Rule, had been unable to produce an agreement with the league. *Id.*

²²³ See, e.g., Berry and Gould, *supra* note 1, at 769; Comment, *Sport in Court: The Legality of Professional Football's System of Reserve and Compensation*, 28 UCLA L. REV. 252, 283 (1980).

²²⁴ *Mackey v. National Football League*, 543 F.2d 606, 614 (8th Cir. 1976).

²²⁵ *Id.* at 615.

²²⁶ *Id.* at 615-16.

²²⁷ *Id.*

²²⁸ *Id.* at 616.

²²⁹ *Id.*

Rozelle Rule to violate Section 1 of the Sherman Act, pursuant to the rule of reason analysis.²³⁰ The Eighth Circuit's position, therefore, is that the exemption precludes an antitrust suit by a union or its members after legitimate good faith bargaining has occurred regarding the challenged provision.²³¹

McCourt is the last major sports case to deal with the exemption issue.²³² Suit was instituted by a Detroit Red Wings player, Dale McCourt, against the National Hockey League, the Players' Association and the Los Angeles and Detroit teams.²³³ The Detroit Red Wings had previously signed a free agent goal-tender who had played out his option from Los Angeles.²³⁴ According to NHL By-Law 9A, the Red Wings were obligated to provide an equalization payment to the Los Angeles Kings.²³⁵ When the two clubs could not reach agreement on compensation, they both submitted a compensation proposal to an independent arbitrator as required by the By-Law.²³⁶ The arbitrator selected the Los Angeles proposal and assigned McCourt, the only player the Los Angeles Kings requested, to the California team.²³⁷ McCourt refused to report and filed suit challenging the compensation procedure.²³⁸ The compensation By-Law was specifically referred to and incorporated in the latest collective bargaining agreement and compliance with the league By-Laws was incorporated into each individual player contract.²³⁹

On appeal from a district court decision holding By-Law 9A to constitute an antitrust violation and enjoining its enforcement against the plaintiff,²⁴⁰ the Sixth Circuit began its exemption analysis in *McCourt* by specifically adopting the three part test established by the Eighth Circuit in *Mackey*.²⁴¹ As in the earlier football case, the court quickly noted that the first two aspects of the test — restraint primarily affecting only the parties and a mandatory subject of bargaining — were both satisfied here.²⁴² A compensation plan only affected veteran players and clearly involved the terms and conditions of their employ-

²³⁰ *Id.* at 622. The Eighth Circuit ruled that a finding of *per se* violation of § 1 of the Sherman Act was not warranted in this context. *Id.* at 619-20.

²³¹ After the appellate decision in *Mackey*, the case was remanded to the district court. There, the lawsuit was certified as a class action and a settlement agreement, referring to a newly negotiated collective bargaining agreement, was approved by the court. *Alexander v. National Football League, 1977-2 Trade Cases (CCH), ¶ 61,730 (D. Minn. 1977)*. On appeal, the approval of the settlement was affirmed and the Eighth Circuit noted that, since true good faith bargaining had occurred, practices embodied in the agreement were protected by the exemption. *Reynolds v. National Football League, 584 F.2d 280, 288 (8th Cir. 1978)*.

²³² *McCourt v. California Sports, Inc., 600 F.2d 1193, 1195-96 (6th Cir. 1979)*.

²³³ *Id.*

²³⁴ *Id.* at 1196.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* at 1194-95.

²⁴⁰ *Id.* at 1196.

²⁴¹ *Id.* at 1197-98.

²⁴² *Id.* at 1198.

ment.²⁴³ The issue in the case, therefore, was narrowed to the question of good faith bargaining.²⁴⁴ After reviewing the bargaining history of the league in detail,²⁴⁵ the Sixth Circuit disagreed with the district court's conclusion and held that good faith bargaining had occurred.²⁴⁶ The circuit court cited traditional labor law principles in the non-exemption context to support its two-part analysis of the bargaining obligation. The inclusion of the By-Law in the exact form of management's previously imposed rule did not evidence a lack of bargaining, but rather the union's failure, after intense negotiations, to keep "an unwanted provision out of the contract."²⁴⁷ Good faith bargaining does not require either side to make a concession or yield on a particular point.²⁴⁸ Labor law does not mandate substantive terms of agreement and the duty to bargain in good faith permits a party to stand firmly on a proposal if its "insistence is genuinely and sincerely held."²⁴⁹ Second, the opinion noted that the union had applied bargaining pressure to keep the compensation plan out and, when unsuccessful in that effort, obtained considerable benefits from the league as the price of inclusion.²⁵⁰ The incorporated By-Law was therefore entitled to the exemption and judgment was entered for the defendants.

3. A Proposal for Future Sports Cases

Mackey and *McCourt* expand the labor exemption from antitrust liability to a point not justified by exemption precedent. This expansion seems particularly inappropriate in light of the restrictive interpretation given the exemption by the Supreme Court in *Connell*.²⁵¹ Moreover, the *Mackey* test, coupled with the *McCourt* interpretation of good faith bargaining, is somewhat illusory. The second and third parts of the test — mandatory subject and good faith bargaining — are actually one requirement. If a topic is a mandatory subject, the NLRA makes it an unfair labor practice for either management or labor to refuse to bargain in good faith.²⁵² Assuming sports unions have achieved an appropriate amount of bargaining power,²⁵³ future application of the *Mackey* test, in a suit brought by one of the parties to the agreement, will reduce itself to the issue of

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 1199-1200.

²⁴⁶ *Id.* at 1203.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 1200-02.

²⁴⁹ *Id.* at 1201.

²⁵⁰ *Id.* at 1202 n.12. The trial court had specifically found that the increased benefits and rights contained in the agreement were not a *quid pro quo* for inclusion of Bylaw 9A and were not directly related to collective bargaining on that subject. *McCourt v. California Sports, Inc.*, 460 F. Supp. 904, 911 (E.D. Mich. 1978). See Weistart, *Judicial Review of Labor Agreements: Lessons From the Sports Industry*, 44 LAW & CONTEMP. PROBS. 109, 125 (1981) [hereinafter cited as Weistart].

²⁵¹ See *supra* notes 136-38 and accompanying text.

²⁵² See *supra* note 87.

²⁵³ See *supra* notes 16-17 and accompanying text.

whether the challenged restraint was a mandatory subject of bargaining. In this sense, the *Mackey-McCourt* test is equivalent to the inquiry proposed by the NBA and rejected in *Robertson*.²⁵⁴ Such an application embodies the Goldberg position in *Pennington* and *Jewel Tea* that mandatory subjects are entitled to an automatic exemption because management and labor must bargain about them.²⁵⁵ This interpretation was rejected by a majority of the Supreme Court in those cases. The White opinion in *Jewel Tea*, a suit between parties to a collective bargaining relationship, emphasized that the mandatory nature of the topic, and implicitly the good faith bargaining required of mandatory topics, were not, by themselves, sufficient to justify the granting of the exemption.²⁵⁶ The challenged restriction must be of direct and immediate concern to the union's members and the restriction must be at the behest of a non-labor group.²⁵⁷ The *Mackey-McCourt* test, therefore, does not sufficiently embody the holdings of *Jewel Tea* and *Pennington*.

The *Mackey-McCourt* test places undue emphasis on protecting the bargaining process while giving insufficient attention to the labor-oriented source of the exemption.²⁵⁸ *Jewel Tea*, *Pennington*, *Philadelphia Hockey* and *Robertson* all emphasize that an immunized restraint should, in some respect, further the interests of the labor force and not be at the behest of employers.²⁵⁹ Bargaining agreements are granted the exemption because they embody this labor interest, and employers' assertion of the immunity should only be derived from management conduct consistent with the labor interest. *Mackey's* expansion of the concept of an incorporated term, combined with the first part of the *McCourt* interpretation of good-faith bargaining, implies that management can unilaterally formulate a rule, insist (sincerely) on a reference to it in the collective agreement and retain antitrust immunity. However desirable such a system might be in theory,²⁶⁰ such a result does not appear justified by the non-*Mackey-McCourt* cases.²⁶¹ Undue emphasis on the traditional concept of good-faith bargaining, wholly appropriate in a normal bargaining or unfair labor practice

²⁵⁴ See *supra* note 183 and accompanying text.

²⁵⁵ See *supra* notes 112-16 and accompanying text.

²⁵⁶ See *supra* notes 103-05, 123-28 and accompanying text.

²⁵⁷ *Id.*

²⁵⁸ See Casenote, *Labor Exemption to the Antitrust Laws, Shielding an Anticompetitive Provision Devised by an Employer Group in its Own Interest: McCourt v. California Sports, Inc.*, 21 B.C. L. REV. 680, 711-13 (1980).

²⁵⁹ See *supra* notes 169, 188 and accompanying text. The *Mackey-McCourt* test appears to address this concern by looking for a *quid pro quo* — some benefits to labor in exchange for inclusion of the restraint — in this bargaining history. That inquiry, however, does not appear to be required by the three point test. The appropriate weight to be given such a consideration is discussed *infra* at notes 272-73 and accompanying text.

²⁶⁰ See, e.g., Berry and Gould, *supra* note 1, at 766-69; J. WEISTART & C. LOWELL, *supra* note 18, § 5.04, at 527; and Comment, N.Y.U. L. REV., *supra* note 23, at 184-85.

²⁶¹ The possibility of improper application of the exemption appears higher considering the expansive interpretation given to the concept of mandatory subject of bargaining in traditional labor law decisions. See *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958); R. GORMAN, *supra* note 90, at ch. 11, §§ 1-9.

context, does not seem warranted in the assessment of whether or not to grant the exemption.²⁶² The union oriented source of the immunity and the balancing of antitrust concerns noted in *Connell* indicate that a different test would better serve exemption purposes.

The first prong of the *Mackey-McCourt* test — the restraint primarily affects only parties to the collective bargaining relationship — should continue as the initial inquiry regarding the exemption and the sports industry. The denial of immunity to restraints with non-unit effects sustains the *Allen Bradley* concept of conspiracy and the *Pennington* disavowal of exemption for practices which further the competitive interests of management.²⁶³ This requirement further acknowledges that, in sports, restraints on the labor market are restraints on the product market.²⁶⁴ With the notable exception of the college draft and rules relating to player entry,²⁶⁵ this requirement should be easily satisfied for most bargaining agreement provisions.

The second requirement of the test — the provision should be a mandatory subject of bargaining — should also be retained. Labor law interest in non-mandatory subjects is not sufficient to justify overriding antitrust interests. The danger of unilateral imposition by management of terms and provisions in fact directed at the owners' competitors increases as those provisions stray from mandatory subjects.²⁶⁶ This requirement, however, will easily be satisfied in most instances, since courts and the National Labor Relations Board continue to give the mandatory subject area an expansive interpretation.²⁶⁷ Assuming that the labor-management relationship has matured in most sports leagues, this requirement will include the concept of good-faith bargaining. Failure to bargain in good faith should increasingly be a labor law/unfair labor practice question while the bargaining process is continuing.²⁶⁸ These first two requirements, however, are indeed separate and distinct: a practice can be properly characterized as mandatory and still affect parties outside the bargaining relationship.²⁶⁹

If these two requirements of the proposed test are satisfied, the granting of the exemption should turn on the source of the restraint and its treatment by

²⁶² *Pennington* clearly held that, simply because parties must bargain, they are not free to disregard other laws. *United Mine Workers v. Pennington*, 318 U.S. 657, 664-65 (1965). *Mackey* may have emphasized good faith bargaining in an effort to support a weak players union and encourage the parties actually to bargain. See *supra* notes 16-17, and accompanying text. Future application of such a test, as evidenced by *McCourt*, distorts the origin and proper use of the exemption.

²⁶³ See *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 499-500 (E.D. Pa. 1972); Weistart, *supra* note 250, at 112.

²⁶⁴ See *supra* notes 24-25 and accompanying text.

²⁶⁵ See *infra* notes 289-300 and accompanying text.

²⁶⁶ See R. GORMAN, *supra* note 90, ch. 11, § 7; *contra* Berry and Gould, *supra* note 1, at 766.

²⁶⁷ See *supra* note 261; Berry and Gould, *supra* note 1, at 793-94.

²⁶⁸ See *infra* notes 344-48 and accompanying text.

²⁶⁹ For example, see the discussion regarding the draft, *infra* notes 289-300 and accompanying text.

the parties in their bargaining. Although labor law rules should dominate the conduct of a mature management-labor relationship,²⁷⁰ this inquiry is required to recognize the pro-union orientation of the exemption and to give antitrust concerns their proper weight in the *Connell* balancing process.²⁷¹ If the questioned provision was initiated by the union in substantially the form finally adopted, employer acquiescence to the union demand should also be protected by the exemption. If, however, the term at issue was initiated by management or significantly embodies management interests, the exemption should be granted only if there has been adequate union participation in the structuring of the finally agreed upon proposal. Adequate union participation in this sense means that the management proposal has undergone some significant modification by the union prior to acceptance or that the union has received a specific, significant quid pro quo in exchange for inclusion of the term. The judicial inquiry, in the case of non-labor initiated proposals, would thereby be focused on the integrity of the union as exclusive employee representative. The exemption should be granted when labor law considerations indicate that an individual employee should not be allowed to "second guess" the wisdom of the union in making concessions or modifications.²⁷² The integrity of the bargaining process also dictates that a union should not be free to second guess itself regarding a provision which the bargaining history indicates it had a hand in shaping or which it "sold." In such situations, the derived employer immunity can be justified by the need, to this extent, to preserve the integrity of the union and the bargaining process and by management's reliance upon the exclusive nature of the union's collective representation. Courts can police application of this aspect of the test by searching for a specific quid pro quo for unmodified management proposals.²⁷³

The proposed test gives due consideration to the Supreme Court's concern that immunized provisions not result from the behest of non-labor groups but

²⁷⁰ See *infra* notes 335-40 and accompanying text. If a claim of damages results from use of an economic weapon specifically sanctioned by federal labor law (e.g., strike or lockout), the exemption should immunize the practice from antitrust liability. See, e.g., *Amalgamated Meat Cutters & Butchers Workmen of N. Am., Local Union No. 576 v. Wetterau Foods, Inc.*, 597 F.2d 133 (8th Cir. 1979) (union alleging harm from replacement workers brought in while union was on strike); *Plumbers and Steamfitters Local 598 v. Morris*, 511 F. Supp. 1298 (E.D. Wash. 1981) (union alleging harm from employer lockout — employer granted immunity).

²⁷¹ See St. Antoine, *supra* note 67, at 614-15, for an expression of the fear that courts will not be able to distinguish between union motivated and employer motivated provisions. The principles analyzed in this article hopefully will obviate that concern in the sports context.

²⁷² Such employee-union disputes are best settled through the union election process or through enforcement of the union's duty of fair representation. See *infra* notes 385-417 and accompanying text.

²⁷³ This proposal would influence the conduct of the parties at the bargaining table and the bargaining ritual to a limited extent. For example, if management wished to open a bargaining session with a compromise or "reasonable" proposal, it should indicate for the bargaining record the specific labor interests which it took into account in formulating the compromise it is suggesting. The union would then be free to note its acceptance or rejection of the proposal and,

rather be the direct product of a union's self-interest.²⁷⁴ It also balances the pro-union origin of the exemption with the labor law interest in protecting the bargaining process by allowing an employer to assert the exemption for any collective bargaining provision which evidences union participation.²⁷⁵ Although courts, as a matter of labor policy, should avoid interference with the substantive terms and concessions of parties to the collective bargaining process in the non-exemption context, the rejection of the Goldberg position in *Jewel Tea* and the nature of the exemption as promulgated by the Supreme Court justify the limited intrusion included within the proposed analysis.²⁷⁶ Finally, the *McCourt* result can still be supported by this reasoning. Under the proposed test, the Sixth Circuit should eliminate its initial emphasis on the non-exemption interpretation of good faith bargaining and the unilateral insistence of management permitted thereby. The circuit court should accept the standard of the district court and clearly focus upon the degree of union participation in the structuring of By-Law 9A as evidenced by the labor group's acceptance of financial benefits specifically offered by the league as quid pro quo for the inclusion of the compensation system.²⁷⁷ If the benefits granted by management

impliedly, its agreement or disagreement with the weight management accorded the specified labor interests.

²⁷⁴ See *supra* note 103 and accompanying text.

²⁷⁵ Professor Weistart has recently proposed a "presumption of consent" test for the application of the exemption. He cites *Mackey* for the proposition that, if bargaining exists at a requisite level, the union can fend for itself and it is unnecessary to ask if employee interests are advanced by an agreement. Weistart, *supra* note 250, at 119. He then suggests that respect for the bargaining process dictates that employees be presumed to have consented to any term in an agreement (and such a provision should be entitled to the exemption) unless the bargaining relationship has been newly formed or there is evidence that the strength of an established union has eroded. *Id.* at 128-29.

The proposed test appears to protect excessively the bargaining process at the expense of the pro-labor source of the exemption noted in this article. In addition, the presumption frequently can be incorrect. Unions in existence for years are not necessarily strong unions (*e.g.*, the NFLPA in the years prior to the *Mackey* decision) and new relationships may favor the union (*e.g.*, the potential bargaining of the NFLPA with the new United States Football League). Finally, the question of the eroded strength of a union would appear to involve a court in a difficult examination of internal union politics. In sum, the principles underlying the presumption can only be effectuated by analyzing the agreement obtained by a union and the bargaining which produced it. A proper accommodation of the varied interests relevant to the exemption issue would appear to require the case by case analysis proposed in this article.

²⁷⁶ A reviewing court, therefore, would not be dictating substantive terms to the parties. The court would simply be stating that, if sufficient union participation in the proposal has not occurred, the union or individual employees retain the option of antitrust litigation. While this contains coercive elements, management is free to decide what concessions justify the risk of antitrust liability. A similar examination of bargaining history occurred pursuant to the *Mackey-McCourt* test. *But see* Weistart, *supra* note 250, at 126-28. Professor Weistart, however, does note that limited inquiries into the bargaining history of affected parties have occurred under the *Mackey-McCourt* test and in other labor law contexts. *Id.* at 127 n.92. The nature of the exemption justifies such an inquiry. See *supra* note 273. Such an inquiry would also seem likely pursuant to the "presumption of consent" test proposed by Professor Weistart. See *supra* note 275. See also the examination of bargaining contained in an arbitration hearing, *NFLPA v. NFL Management Council* (Dutton) (May 14, 1980) (available at Boston College Law School Library).

²⁷⁷ See *supra* notes 247-50 and accompanying text.

were directly related to the acceptance of By-Law 9A, the exemption should apply.²⁷⁸

4. Application of the Proposal: The Continuing Function of the Exemption

In the near future, courts will be required to apply the exemption to a variety of league practices. Restrictions on players' movement, procedures for drafting high school or college athletes, provisions in league charters and by-laws and practices enforced by management in the absence of an effective agreement are likely candidates for challenge.²⁷⁹ Applying the exemption principles, player challenges to free agent compensation systems should normally qualify for exempt status. As in *Mackey* and *McCourt*, such provisions affect members of the union and are generally considered mandatory subjects of bargaining.²⁸⁰ The compensation provisions of most professional leagues appear to reflect significant union participation in the rules as finally adopted.²⁸¹

Football presents an interesting subissue in the exemption's application. In an arbitration hearing, the National Football League Players' Association (NFLPA) contended that the compensation rule being enforced by the NFL was not what it had bargained for and attained in its agreement.²⁸² The agreement stated that, if a player did not receive an offer from a new club, he could sign again with his old club (1) at the old club's last best written offer or (2) at a 10% raise for one year.²⁸³ The owners interpreted the agreement to mean that, if a player exercised option (2) for one year, he would, at the end of that period, again be subject to the compensation rules of Article XV.²⁸⁴ The union contended that, once a player had gone through the compensation procedure and then played another year with his old club under option (2), he was truly free and not subject to the agreement's compensation provisions.²⁸⁵ The agreement itself was silent on the point.²⁸⁶ The arbitrator, after reviewing the bargaining history of the parties, accepted management's interpretation.²⁸⁷ Cases in which

²⁷⁸ *Id.*

²⁷⁹ Due to player dissatisfaction and rapidly increasing media revenue, professional football seems to be the most likely sport to be involved in future labor-management litigation. See *supra* note 28. This discussion accordingly emphasizes professional football considerations.

²⁸⁰ See *supra* notes 44, 54 and accompanying text.

²⁸¹ See National Basketball Players Association Agreement, Art. XXII (1980-1982), Basic Agreement between the American and National Leagues of Professional Baseball Clubs and MLBPA, Art. XVIII (1980-1983) (available at Boston College Law School Library). Due to the restrictive nature of the football compensation provisions, the union has been accused of undermining player interests in exchange for union security provisions. See Roberts and Powers, *supra* note 24, at 465-66. Such charges are best considered in an evaluation of the union's breach of its duty of fair representation rather than an antitrust suit against the league.

²⁸² NFLPA v. NFL Management Council (Dutton) (May 14, 1980), *supra* note 276.

²⁸³ NFL-NFLPA Collective Bargaining Agreement, Art. XV, § 17 (available at Boston College Law School Library).

²⁸⁴ Dutton, *supra* note 276, at 31.

²⁸⁵ Dutton, *supra* note 276, at 30.

²⁸⁶ Dutton, *supra* note 276, at 40-41.

the union does not actually receive what it believes it bargained for should be treated as issues of contract interpretation rather than questions of antitrust law. If the collective agreement accepted by the union contains a procedure for arbitration of disputes, labor, in a real sense, bargained for the arbitrator's interpretation of ambiguous language.²⁸⁸ If no arbitration procedure exists, a court should perform the function of an arbitrator and interpret the contractual language and, if necessary, the bargaining history to effectuate the good-faith intent of the parties. In either case, labor law interests inherent in any such situation would clearly seem to preclude the imposition of antitrust liability.

The relationship between the player draft system and the exemption poses a different problem of application. Assuming that the draft is a mandatory subject of bargaining²⁸⁹ and that unions have participated to some extent in forming the drafting rules, a question remains as to whether prospective players are parties to the bargaining relationship. The primary issue in a challenge to the draft would therefore be the first requirement of both the *Mackey* and the proposed tests: does the restraint primarily affect only parties to the bargaining relationship? Players are not members of the league until they have gone through the drafting process, signed contracts and made the team. If a collegiate athlete brought suit against a league challenging its draft on antitrust grounds, a court would have difficulty characterizing the player as a party to even the bargaining "relationship" prior to his signing a contract. The arguments supporting the inclusion of prospective union members as parties to the relationship have frequently been based on an analogy to non-sports cases holding that union hiring halls are a mandatory subject of bargaining.²⁹⁰ Although such a comparison seems relevant for the determination that the draft is a mandatory subject of bargaining, the argument does not apply with equal force to the non-unit effects of the restraint. Usage of the analogy in both contexts implies that the first two requirements of *Mackey* are actually one — whether the draft is a mandatory subject of bargaining. As noted above, this single issue analysis has been rejected by the Supreme Court.²⁹¹

The hiring hall analogy is a particularly inappropriate vehicle for extending the exemption beyond the parties to the bargaining agreement. Hiring halls

²⁸⁷ *Dutton*, *supra* note 276, at 45.

²⁸⁸ See *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960).

²⁸⁹ See *supra* note 186 and accompanying text.

²⁹⁰ See *Smith v. Pro-Football, Inc.*, 420 F. Supp. 738, 743-44 (D.D.C. 1976), *aff'd in part, rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978); J. WEISTART & C. LOWELL, *supra* note 18, § 5.05, at 552-54; Comment, N.Y.U. L. REV., *supra* note 23, at 181 n.65; Jacobs and Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 16 (1971) [hereinafter referred to as Jacobs and Winter]. Hiring halls are, in effect, a job referral service provided by unions. In certain industries (usually maritime and construction), employers have short-lived and irregular employment needs. In these areas, prospective employees register with a union hall. The employer, when the need for employees arises, goes to the hall and obtains a qualified and available labor force. The union supplies workers based on "neutral" or "objective" criteria. See R. GORMAN, *supra* note 90, at Chap. 28, § 9.

²⁹¹ See *supra* notes 117-18 and accompanying text.

are perceived as enhancing union security and increasing employee salaries.²⁹² The hiring hall is limited to unique occupations and an employee is free to reject any assignment he obtains from the hall.²⁹³ Since these job assignments tend to be short-term, there are no long-term prejudicial effects of the procedure.²⁹⁴ Hiring halls therefore have been characterized as mandatory subjects because, like the exemption, they concern the integrity of the union itself.²⁹⁵ Conversely, drafts depress player salaries and frequently force the individual player to sign a long-term contract with a club not of his choosing.²⁹⁶ A series of decisions meant to enhance union status and employee interests should not be used to extend the insulation of an anti-labor practice.

Requiring the union to bargain over terms of entry should not imply that future employees are parties to the bargaining relationship. This is particularly true in sports, where the union is frequently hostile to the interests of draftees and their ability to command large salaries.²⁹⁷ The union therefore may not be truly representing the interests of draftees and prospective players.²⁹⁸ Prospective players may not have standing to sue a union for breach of its duty of fair representation.²⁹⁹ Draftees therefore would be left with no legal recourse if they were to be considered parties to the bargaining relationship for exemption purposes but not members of the unit for the fair representation obligation. This legal incongruity can be best avoided by denying the exemption in the draftee-initiated lawsuit.³⁰⁰

In addition, players could challenge provisions affecting them which are found in a league's Constitution and By-Laws. The granting of exemption should not focus on whether the By-Laws were incorporated in the agreement or whether the bargaining agreement contains a "zipper clause," but rather upon whether the union participated in the structuring of the rule as constituted.³⁰¹ Football provides a convenient context for examining problems in this

²⁹² See Local 357, International Bhd. of Teamsters v. National Labor Relations Board, 365 U.S. 667, 675 (1961); Handler and Zifchak, *supra* note 49, at 506. In deciding that hiring halls were mandatory subjects of bargaining, the Fifth Circuit has held that hiring halls are at the essence of employee security in those industries where it is used. National Labor Relations Board v. Associated Gen. Contractors of America, Inc., 349 F.2d 449, 452 (5th Cir. 1965).

²⁹³ R. GORMAN, *supra* note 90, Ch. 28, § 9, at 664-65.

²⁹⁴ *Id.*

²⁹⁵ Handler and Zifchak, *supra* note 49, at 506.

²⁹⁶ Smith v. Pro-Football, Inc., 593 F.2d 1173, 1185-87 (D.C. Cir. 1978).

²⁹⁷ This is particularly true in football where veteran salaries are low and college football gives some rookies the market power to achieve high salaries. See NFLPA PAMPHLET, *supra* note 2, at 38-39; Roberts and Powers, *supra* note 24, at 459.

²⁹⁸ It is interesting to note that the NFL-NFLPA Collective Bargaining Agreement expired on July 15, 1982, except for the restrictive provisions of the college draft, the "principles" of which apply "through at least 1986." NFL-NFLPA Collective Bargaining Agreement, Art. XIII, § 1 (1977-1982) (available at Boston College Law School Library).

²⁹⁹ See *infra* notes 389-93 and accompanying text.

³⁰⁰ There are many practical reasons why amateur athletes may have no incentive to challenge the draft. See, e.g., Burkow & Slaughter, *Should Amateur Athletes Resist the Draft?*, 7 BLACK L.J. 314, 315-16 (1980).

³⁰¹ See *supra* note 222 and accompanying text.

area. The football collective bargaining agreement states that any terms of the NFL Constitution and By-Laws which are not inconsistent with the agreement are to remain in full force and effect and all parties agree to be bound by such terms.³⁰² This reference, combined with management's assertion that general economic benefits (*e.g.*, pension payments, minimum salaries) to labor were the quid pro quo for its inclusion, should not, by itself, be sufficient to justify granting the exemption. Courts should require a specific quid pro quo for inclusion of a practice or direct evidence of union participation in the shaping of the rule.

A By-Law provision likely to be challenged in the future is the term regulating eligibility for the draft.³⁰³ NFL teams cannot draft or sign a player unless (1) all college eligibility of the player has expired or (2) five years have passed since the player would have entered college or (3) the player receives a diploma from a recognized university or college.³⁰⁴ The rule keeps underclassmen from playing professional football, but it also means that, if a player does not go to college or drops out of school, he must wait *five* years from the date of his high school graduation before he can play. Unless he plays four seasons of college football, therefore, a player must wait an extra year or receive his diploma in order to play professional football. This eligibility system is now limited to football. Baseball and hockey have traditionally drafted athletes prior to collegiate competition.³⁰⁵ Basketball had eligibility provisions similar to football. Those restrictions were declared violative of the antitrust laws in a suit brought against the league by a college superstar, Spencer Haywood.³⁰⁶ Following the Haywood litigation, the NBA modified its eligibility requirements to permit the drafting of underclassmen through the hardship process.³⁰⁷ Significantly, the opinion in the Haywood case did not consider the applicability

³⁰² NFL-NFLPA Collective Bargaining Agreement, Art. I, § 2.

³⁰³ A college star could challenge the rule in order to enter professional football sooner than the rules allow him. See Davidson, *Mom's Advice Keeps Herschel at Georgia*, (Herschel Walker), THE SPORTING NEWS, April 3, 1982, at 7, cols. 1-3.

³⁰⁴ NFL Constitution and By-Laws, § 12.1(A).

³⁰⁵ Baseball traditionally drafts players after their senior year of high school or their junior year of college. Hockey traditionally drafts players of post-high school years from the junior hockey leagues. Neither baseball nor hockey provide for their draft in a collective bargaining agreement. Berry and Gould, *supra* note 1, at 790-91.

³⁰⁶ *Denver-Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971). Haywood was signed by the Denver Rockets Club, then of the ABA, after his sophomore season. *Id.* at 1052.

The ABA, at the time, did not have any draft eligibility restrictions. After playing for Denver for one year and undergoing a series of contractual signings and misunderstandings, Haywood signed to play with the Seattle Supersonics of the then rival NBA. *Id.* at 1054. When the NBA refused to allow Haywood to play because his high school class had not yet graduated college, he initiated suit against the league. *Id.* The court granted Haywood a preliminary injunction based on the substantial probability that the NBA's eligibility By-Law was a group boycott and a *per se* violation of § 1 of the Sherman Act. *Id.* at 1066-67.

³⁰⁷ National Basketball Players Association Agreement, Art. XXII, § 1(f) (1980-1982) (available at Boston College Law School Library).

ty of the exemption. This type of lawsuit, therefore, would not appear to qualify for the exemption. In addition to the question of an underclassmen being a party to the bargaining relationship,³⁰⁸ the union has not meaningfully participated in the adoption of this rule. The suit therefore should proceed to the issue of substantive antitrust violations.³⁰⁹

Other provisions in the Constitution and By-Laws directly affect player movement and salaries. If a veteran player performs his contract obligation to an NFL team and then signs with a different league, the collective bargaining agreement does not deal with the issue of the old team's player rights if the player returns to the NFL following the termination of the other league's contract. NFL teams have maintained that the former club retains the exclusive rights to such a player because, on his departure from the NFL, the old club placed the player's name on a reserve or retired status list provided for by the By-Laws.³¹⁰ A player in such a position should be able to litigate the antitrust validity of the rule restricting his freedom if, in fact, it has been unilaterally imposed by management. Additionally, NFL owners split television revenues equally.³¹¹ This method of revenue sharing allegedly allows the owners to control player salaries and eliminates the economic incentive for owners to bid on free agents.³¹² Players or the union should be free to challenge this practice and its price/salary fixing effects if, in fact, the system has not been the product of active union participation.³¹³

Finally, future application of the exemption may arise when there is no collective bargaining agreement in force in any particular league. If this situation occurs during the formative stage of a new league, the practices imposed by the new owners would not appear to qualify for the exemption under either the *Mackey-McCourt* test or the one proposed in this article. This result does not appear unduly harsh because, unlike the legal principles applicable to owners when the traditional leagues were formed,³¹⁴ newly created owners should be

³⁰⁸ See *supra* notes 289-300 and accompanying text.

³⁰⁹ Suits of this nature arguably would not qualify for the exemption even under the *Mackey-McCourt* good faith bargaining standard.

³¹⁰ NFL Constitution and By-Laws, § 17.6. A quarterback for the Los Angeles Rams, Vince Ferragamo, recently played out his option with the team and signed with the former Montreal Alouettes of the Canadian Football League. After playing one season in Canada, the Alouettes went bankrupt and Ferragamo was released from his Canadian contract. The Rams claimed exclusive rights to Ferragamo and he re-signed with them. Didinger, *Can Ferragamo Win Job?*, THE SPORTING NEWS, August 16, 1982, at 2, cols. 1-3.

³¹¹ NFL Constitution and By-Laws, § 10.3.

³¹² NFLPA PAMPHLET, *supra* note 2, at 30-31. This perceived fact of economic life in professional football inspired the NFLPA to reject seeking no-compensation free agency and to request instead a specified percentage of the owners' gross income to be paid as player salaries. See *supra* note 27.

³¹³ The federal statute granting NFL teams an antitrust exemption for the purpose of bargaining as a single group with the broadcast industry does not appear to immunize the method by which the fruits of such negotiations are distributed. See Sports Broadcasting Act, 15 U.S.C. § 1291 (1976). For a possible challenge to this shared revenue system by an NFL owner, see *infra* note 436 and accompanying text.

³¹⁴ See *supra* notes 20-21 and accompanying text.

aware of their potential antitrust liability and should shape their rules accordingly.³¹⁵ The lack of a bargaining agreement, however, can also occur after a current agreement expires and before a new one can be negotiated.³¹⁶ If management continues to enforce player restrictions during such an interval, the issue becomes whether such practices should receive immunity from the antitrust laws.

The answer to whether such immunity should apply during the interval between expiration of an old contract and negotiation of a new one should focus on the source of the restraint and the extent of the union's participation in shaping it. The clearest case for granting immunity would be that in which management simply continued the exact practices contained in the now expired agreement. If the restraints are identical, the same principles governing the exemption during the life of the agreement should control the impasse period. If the union participated in the creation of the rule, protection of the bargaining process and labor law interests dictate that the exemption should continue during impasse.³¹⁷ If, however, an employer significantly modifies a rule and then seeks to impose it during an impasse period, courts should be reluctant to grant the exemption. Some commentators have argued that, if the employer proposes the modified rule to the union and an impasse is produced, unilateral employer change consistent with past offers to the union satisfies the employer's duty to bargain in good faith and should receive the exemption.³¹⁸ As noted in the prior discussion, the application of good faith bargaining principles to the granting of immunity distorts the origin and purposes of the exemption.³¹⁹ Unilaterally imposed employer restraints should not derive benefit from a labor oriented exemption. If the union has participated in the molding of the modified practice, the exemption should be granted; if the union has not, the employer's unilateral imposition should run the risk of antitrust liability.³²⁰

³¹⁵ A new football league, the United States Football League, is set to begin play in March 1983. See Balzer, *USFL: You've Gotta Know the Territory*, THE SPORTING NEWS, August 23, 1982, at 44, cols. 1-3.

³¹⁶ The NFL-NFLPA Collective Bargaining Agreement expired on July 15, 1982. When the last agreement expired in 1974, management and labor could not conclude a new agreement until the settlement of the *Alexander* case in August of 1977. *Alexander v. National Football League*, 1977-2 Trade Cases (CCH), ¶ 61,730 (D. Minn. 1977).

³¹⁷ A contrary rule would give the players' unions unwarranted bargaining power in that management could not run its business without fear of antitrust liability unless it produced an agreement with the union. This might unduly force employers to make substantive concessions. Comment, N.Y.U. L. REV., *supra* note 23, at 197.

³¹⁸ See Berry and Gould, *supra* note 1, at 774-75; Comment, N.Y.U. L. REV., *supra* note 23, at 198-99.

³¹⁹ See *supra* notes 260-62 and accompanying text.

³²⁰ See J. WEISTART & C. LOWELL, *supra* note 18, § 5.06, at 588-90. In addition to the situations discussed herein, the management of professional football could face antitrust liability if it unilaterally establishes rules limiting the return of players from the new United States Football League back to the NFL. See *Bowman v. National Football League*, 402 F. Supp. 754 (D. Minn. 1975).

B. *The Application of Substantive Antitrust Principles*

A court's refusal to grant the exemption should not imply that any particular contract term or market restraint is a violation of antitrust laws. If a labor plaintiff has successfully rebuffed management's defense of immunity, he must still litigate and win the separate and distinct issue of antitrust liability prior to recovery. The sports cases of the 1970's held that a number of league practices could not survive antitrust scrutiny.³²¹ Most player restraints, however, have been modified since that time through union participation in the collective bargaining process. The exemption, therefore, will preclude antitrust analysis of most modified practices. Consequently, a detailed antitrust evaluation of all league practices is beyond the scope of this article.³²² But, for those practices which do not qualify for the exemption,³²³ the examination of a few general antitrust principles seems in order.

The unique nature of the sports industry makes the per se rule of liability of Section 1 of the Sherman Act inappropriate for the imposition of antitrust damages. The defendant should be entitled to a full rule of reason inquiry prior to a finding of violation.³²⁴ Aside from the sports context, the rule of reason inquiry is always appropriate when the exemption and the labor law interests inherent therein are at issue in a case.³²⁵ The rule of reason requires the court to evaluate the reasonableness of the restraint within the context of the industry in which the alleged antitrust violation occurs.³²⁶ As explained by the District of Columbia Court of Appeals:

Under the rule of reason, a restraint must be evaluated to determine whether it is significantly anticompetitive in purpose or effect. In making this evaluation, a court generally will be required to analyze "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." If, on analysis, the restraint is found to have legitimate business purposes whose realization serves to promote competition, the "anticompetitive evils" of the challenged practice must be carefully balanced against its "procompetitive virtues" to ascertain whether the former outweigh the latter. A

³²¹ See, e.g., *Smith v. Pro-Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972); *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971).

³²² For a full antitrust examination of many of the significant player restraints embodied in the NFL-NFLPA Collective Bargaining Agreement executed in 1977, see Comment, *UCLA L. REV.*, *supra* note 223, at 262-68.

³²³ See *supra* notes 264-73 and accompanying text.

³²⁴ See *supra* notes 22-23 and accompanying text. But see *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867, 892-94 (S.D.N.Y. 1975); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 503 (E.D. Pa. 1972); *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049, 1064-66 (C.D. Cal. 1971).

³²⁵ *Handler and Zifchak, supra* note 49, at 510-13.

³²⁶ See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 63-70 (1911).

restraint is unreasonable if it has the "net effect" of substantially impeding competition. (footnotes eliminated)³²⁷

The Eighth Circuit employs a slightly different formulation of the required analysis: "The focus of an inquiry under the Rule of Reason is whether the restraint imposed is justified by legitimate business purposes, and is no more restrictive than necessary."³²⁸

In the sports context, management frequently has tried to justify player restraints by claiming they were necessary to maintain competitive balance on the field.³²⁹ This argument has been consistently rejected as support for the anticompetitive effect of most restraints.³³⁰ Competitive equality among teams — even with significant player restraints — appears illusory, since the same teams have historically dominated their respective leagues.³³¹ At minimum, most restraints therefore have been found to be broader than necessary.³³² A sports league, however, could reasonably contain some player restraints so that arguable parity of talent would exist within the league, and those franchises in geographically disadvantageous locations would receive assistance in fielding teams.³³³ Therefore, although some carefully drawn player restraints could satisfy the reasonableness standard, practices which have the effect of unduly depressing player salaries, restricting player freedom of movement for a significant period of time or vesting unrestricted control over a player to management, seem suspect under the rule of reason.³³⁴ Management would be well advised to ensure union participation in the formulation of any rules or practices which arguably produce such effects. Union involvement would greatly enhance the possibility of exemption and, by tempering the effect of the restraint, increase its reasonableness within the industry.

C. *The Future Role of Labor Law*

As management and labor in the sports industry mature and establish some equality of power, resort to antitrust law should diminish and the traditional principles of labor law should provide the pre-eminent method for resolving disputes. The structure of federal labor law, including the full implementation of unfair labor practices and mandatory subjects of bargaining,³³⁵ should

³²⁷ *Smith v. Pro-Football, Inc.*, 593 F.2d 1173, 1183 (D.C. Cir. 1978).

³²⁸ *Mackey v. National Football League*, 543 F.2d 606, 620 (8th Cir. 1976).

³²⁹ *See, e.g., id.* at 621-22; *Smith v. Pro-Football, Inc.*, 593 F.2d 1173, 1186-87 (D.C. Cir. 1978); and *Kapp v. National Football League*, 390 F. Supp. 73, 79-80 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978).

³³⁰ *See, e.g.,* cases cited *supra* note 329.

³³¹ *See Burkow & Slaughter, supra* note 300, at 318.

³³² *See* cases cited *supra* note 329.

³³³ *See, e.g., Smith v. Pro-Football, Inc.*, 593 F.2d 1173, 1187 (D.C. Cir. 1978); *Reynolds v. National Football League*, 584 F.2d 280, 286-87 (8th Cir. 1978); *Robertson v. National Basketball Association*, 556 F.2d 682, 686 (2d Cir. 1977).

³³⁴ *See J. WEISTART & C. LOWELL, supra* note 18, § 5.07(e), at 621-29.

³³⁵ 29 U.S.C. §§ 158(a), (b), (d) (1976). For a more detailed discussion, see *supra* notes

be applied to sports with the same force they possess in the non-athletic business world.³³⁶ This process has already occurred to a large extent in the sports industry.³³⁷ In addition to the statutory labor law remedies, most collective bargaining agreements provide for the arbitration of grievances.³³⁸ The growing number of sports arbitration decisions indicates that many members of the sports community are seeking redress through this proven labor law device.³³⁹ Thus, administrative law judges and arbitrators should replace the judicial system as the most significant force in resolving management-labor disputes in the future.³⁴⁰

The sports industry contains a potential for the application of traditional labor law concepts in some unusual settings. Sports leagues bargain collectively for fringe benefits and conditions of employment, but, unlike most businesses, allow the individual player to bargain his own salary directly with management. Players' unions, because of the principle of exclusivity,³⁴¹ could eliminate this individual bargaining and insist on league wide wage scales. In the wake of the football union's failure to gain such a scale in bargaining with management,³⁴² however, professional sports unions apparently will continue to waive exclusivity in their bargaining agreements and allow salaries to be individually negotiated.³⁴³

This dual system of negotiation means that management potentially faces a double obligation of good faith bargaining — collectively with the union

87, 261 and accompanying text.

³³⁶ See Jacobs and Winter, *supra* note 290, at 1-2.

³³⁷ Management and labor have begun to call on federal mediators for bargaining assistance and have also begun, with increasing frequency, to file unfair labor practices with the NLRB against each other. See, e.g., *Silverman v. Major League Baseball Player Relations Comm.*, 516 F. Supp. 588 (S.D.N.Y. 1981); Janofsky, *Privacy Invaded, Players Charge*, THE SPORTING NEWS, April 26, 1982, at 50, cols. 2-3 (football).

³³⁸ See, e.g., NFL-NFLPA Collective Bargaining Agreement, Art. VII (Non-Injury Grievance) and Art. IX (Injury Grievance) (1977-1982) (available at Boston College Law School Library).

³³⁹ PRAC. L. INST., REPRESENTING PROFESSIONAL ATHLETES AND TEAMS 1981 (PATENTS, COPYRIGHTS, TRADEMARKS AND LITERARY PROPERTY COURSE HANDBOOK SERIES NO. 135), at 383-85 (1981). Unfortunately, most of these decisions are unreported.

³⁴⁰ The Basic Agreement between the American and National League of Professional Baseball Clubs and the MLBPA even provides for arbitration of salary disputes for some players in Art. V, § F (available at Boston College Law School Library).

³⁴¹ Section 9(a) of the NLRA makes the union the exclusive representative of the unit's employees. 29 U.S.C. § 159(a) (1976). Section 8(a)(5) makes it an unfair labor practice for the employer to refuse to bargain with the employee representative. *Id.* § 158(a)(5). The union can even invalidate pre-existing individual employment contracts. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 339 (1944). See R. GORMAN, *supra* note 90, at 374-78; Berry and Gould, *supra* note 1, at 799.

³⁴² See *supra* note 312 and accompanying text. The NFLPA is reportedly pursuing an unfair labor practice charge against the NFL for conducting individual negotiations with players after the July 15, 1982, expiration of the collective bargaining agreement. Balzer, *A New Can of Worms*, THE SPORTING NEWS, August 23, 1982, at 39, col. 1.

³⁴³ See *supra* note 27 and accompanying text. In addition to the waiver, most collective agreements provide that a player may be represented in salary negotiations. These clauses solidify the status of player agents. A league-wide wage scale would eliminate, to a large extent, a

when the underlying agreement expires every four or five years, and individually with some players every year. The NLRA makes it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees.³⁴⁴ Does this obligation attach to individual negotiations when they are authorized by the union or is the conduct of a team in individual bargaining controlled by the terms of the bargaining agreement?³⁴⁵ The answer to this question determines whether a team possesses the good faith bargaining obligation regardless of the collective agreement's wording and whether an individual player's remedy for a perceived violation of such a duty is an unfair labor practice charge or an arbitration proceeding pursuant to the agreement's grievance procedure.³⁴⁶ In addition, the meaning of the obligation, regardless of the proper remedy, has not been clearly defined. A team may be violating good faith bargaining in the individual context if it offers a player a benefit for firing his individual agent³⁴⁷ or colludes with another league to limit a player's mobility or conspires with other teams to establish a league-wide salary scale rather than negotiating the individual merits of the player.³⁴⁸ Any of these practices possibly could subject a club to a grievance or an unfair labor practice charge based on a failure to individually negotiate in good faith.

Labor law remedies may also assist players in breaking the wall of secrecy management traditionally has erected regarding financial matters of the league. Good faith bargaining requires that an employer substantiate representations made to a union, particularly when the representation is a claim of financial inability to pay the union's requested package.³⁴⁹ This idea has been somewhat expanded to include claims that a proposed wage or benefit is fair.³⁵⁰ The union may also obtain access to documents needed to possess a grievance or to effectively function as an exclusive bargaining representative.³⁵¹ A players' union may therefore be increasingly able to obtain information regarding the true financial structure of the league.³⁵² In addition, if the Section

player's need for an individual agent.

³⁴⁴ 29 U.S.C. § 158(a)(5) (1976).

³⁴⁵ Most sports industry collective bargaining agreements state that teams will bargain individually with players "in good faith." See, e.g., NFL-NFLPA Collective Bargaining Agreement, Art. XXII, § 9 (1977-1982) (available at Boston College Law School Library).

³⁴⁶ Courts will often favor the grievance arbitration as the appropriate remedy. *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960).

³⁴⁷ This circumstance reportedly occurred between the Buffalo Bills football club and one of their linebackers, Jim Haslett. Balzer, *Let's Make a Deal*, THE SPORTING NEWS, September 5, 1981, at 56, cols. 1-3.

³⁴⁸ The NFL owners allegedly set a league-wide wage scale for rookies. See NFLPA PAMPHLET, *supra* note 2, at 28-9.

³⁴⁹ *National Labor Relations Board v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). See *Silverman v. Major League Baseball Player Relations Committee*, 516 F. Supp. 588 (S.D.N.Y. 1981).

³⁵⁰ *General Elec. Co. v. National Labor Relations Board*, 466 F.2d 1177, 1184 (6th Cir. 1972).

³⁵¹ *Minnesota Mining and Mfg. Co. and Oil, Chem. and Atomic Workers Local No. 6-418*, 261 NLRB No. 2 (April 9, 1982).

³⁵² The NFLPA is attempting to obtain financial information regarding the NFL,

8(a)(5) obligation extends to individual negotiations, a player may be able to force a team to document its claimed inability to pay a certain wage or to reveal contracts of its current players if it claims a salary demand would disrupt its present salary structure.³⁵³

Finally, the expansive interpretation being given to mandatory subjects of bargaining may influence sports negotiations.³⁵⁴ As players seek greater control over the rules of the game or the surfaces on which they are played,³⁵⁵ the extension of the mandatory area to include such topics would force management to negotiate with the unions regarding changes the union seeks.³⁵⁶ A union may be able to compel management to bargain over the manner in which the teams share their TV revenue if the union can demonstrate the requisite impact upon wages in the league.³⁵⁷ Union participation in the molding of such rules would also enhance the possibility of exemption and limit management's antitrust liability regarding such practices. Both parties therefore may be forced to adjust their conduct as the increasing pre-eminence of labor law adjusts the rules of the game.³⁵⁸

II. LABOR - LABOR

Emerging sports unions, with the power to negotiate meaningfully with management to produce bargaining agreements which reflect collective negotiation, occupy a position whereby their decisions and operations can seriously affect the economic well-being of players. This increased union status is accompanied by an increased potential for liability from lawsuits by players charging the union with a breach of its duty to represent fairly all of its members. Indeed, the possibility of such litigation appears even greater in the sports industry than the non-sports setting because a significant number of individual players, possessing financial resources sufficient to support a lawsuit, listen to the advice of people who can be anti-union in their sentiments — the agents.³⁵⁹

especially the details of its contracts with the broadcast industry, through the unfair labor practice mechanism. See Balzer, *A Victory for the Players*, THE SPORTING NEWS, April 24, 1982, at 50, col. 1.

³⁵³ See Closius, *Early signers set salary structure*, 25 PRO FOOTBALL WEEKLY, No. 29, June 1982, at 45-46.

³⁵⁴ See Handler and Zifchak, *supra* note 49, at 502.

³⁵⁵ See, e.g., the NFLPA Proposed Collective Bargaining Demands, 1982, at 13-14 (demanding player participation in rules affecting safety and the use of artificial turf) (available at Boston College Law School Library).

³⁵⁶ See Berry and Gould, *supra* note 1, at 794.

³⁵⁷ See *supra* notes 311-12 and accompanying text. Management might be able to avoid bargaining by contending that revenue distribution is an appropriate incident of entrepreneurial control and, hence, not a subject for bargaining with labor. *Fibreboard Paper Prod., Corp. v. National Labor Relations Board*, 379 U.S. 203, 217-26 (1964) (Stewart, J., concurring).

³⁵⁸ An increased labor law emphasis will likely lessen the paternalistic attitude characteristic of earlier sports management and hasten the treatment of the sports industry as a traditional, profit-oriented enterprise. See *supra* notes 9-17 and accompanying text.

³⁵⁹ Football again seems to possess the greatest antagonism between players union and

The existence of this agent-player relationship may, in the future, lead to another area of intra-labor strife — the union's regulation of player agents.³⁶⁰

A. *The Duty of Fair Representation*

The union is the exclusive labor representative for all members of the bargaining unit, including non-union employees.³⁶¹ In conjunction with this status, labor law imposes on the union the duty to represent fairly all of the members of its unit.³⁶² This obligation is imposed on the union in its negotiation of the bargaining agreement and its administration of the provisions (especially grievance and arbitration proceedings) of the agreement during its term.³⁶³ The Supreme Court first defined this duty in *Steele, v. Louisville & Nashville Railroad Company*.³⁶⁴ In *Steele*, the union, elected pursuant to the Railway Labor Act, did not allow blacks to be members and bargained for terms which would exclude blacks from jobs as firemen.³⁶⁵ The Court noted that the union must represent all members of the unit, not just the majority which elected it.³⁶⁶ In exercising this function, the *Steele* Court held the union could not discriminate among employees based solely on racial considerations; such conditions were deemed invidious and irrelevant to economic or labor distinctions.³⁶⁷ The Court, in a subsequent case, imposed a similar duty on unions subject to the NLRA.³⁶⁸

*Vaca v. Sipes*³⁶⁹ provided the Supreme Court with an opportunity to further explain the scope of a union's duty to represent all unit members. Sipes, the administrator of a deceased employee's estate, pursued a claim against the union based on the union's failure to process a grievance.³⁷⁰ Sipe's decedent was allegedly fired improperly by Swift & Co.³⁷¹ The union went through four levels of arbitration but declined to process a fifth level and dismissed the grievance, based on a determination of insufficient medical evidence.³⁷² The

agents. A group of agents were sued by the union because of their efforts to establish a rival union. *Upshaw v. Trope*, Civil Action No. 80-03680 (C.D. Cal., Aug. 20, 1980). The NFLPA's current bargaining proposal would have eliminated the need for football agents. See *supra* notes 341-43 and accompanying text.

³⁶⁰ Aside from these two areas of liability, a players union may also be named as a defendant in an antitrust action by a player, league or owner. Liability in that context would involve the exemption principles discussed in detail in part I of this article.

³⁶¹ 29 U.S.C. § 159(a) (1976). See also, Roberts and Powers, *supra* note 29, at 457.

³⁶² See J. WEISTART & C. LOWELL, *supra* note 18, § 5.05(b), at 545.

³⁶³ *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

³⁶⁴ 323 U.S. 192 (1944).

³⁶⁵ *Id.* at 194-95.

³⁶⁶ *Id.* at 203.

³⁶⁷ *Id.* Unions were there held to have an equal protection duty similar to that which the Constitution imposes on the states. *Id.*

³⁶⁸ *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953).

³⁶⁹ 386 U.S. 171 (1967).

³⁷⁰ *Id.* at 173-74.

³⁷¹ *Id.*

³⁷² *Id.* at 175.

Vaca Court decided that the exclusive representative status given the union "includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct."³⁷³ The Court declared that a union breached this standard when its conduct towards a member of the bargaining unit was "arbitrary, discriminatory, or in bad faith."³⁷⁴ The Court therefore held that a union "may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion. . . ."³⁷⁵ This characterization of the duty broadened the union's liability from the equal protection notion of *Steele*. The *Vaca* Court, however, also noted the need to protect the integrity of the grievance procedure and to allow the union discretion to refuse to process frivolous claims.³⁷⁶ The failure of Sipes to prove arbitrary or bad faith conduct on the union's part dictated the conclusion that the union had not breached its duty.³⁷⁷

The standard envisioned by the Supreme Court vests much discretion in the union regarding substantive representation decisions.³⁷⁸ A union inevitably must resolve issues about which members of the unit disagree. The union can side with one group of employees when that group's interests conflicts with those of another group,³⁷⁹ but it must make decisions between conflicting employee interests based upon reasons related to legitimate industrial considerations.³⁸⁰ Subject to the limits of good faith and honesty of purpose, the

³⁷³ The Court also noted that in *Miranda-Fuel Co.*, 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963), the NLRB held that a union's breach of its fair representation duty was an unfair labor practice. *Id.* The *Vaca* opinion, however, rejected the argument that *Miranda* meant that the NLRB had exclusive jurisdiction over such suits. *Id.* at 176-77.

³⁷⁴ *Id.* at 190. See Berry and Gould, *supra* note 1, at 799.

³⁷⁵ *Vaca v. Sipes*, 386 U.S. 171, 191 (1967). See Cheit, *Competing Models of Fair Representation: The Perfunctory Processing Cases*, 24 B.C. L. REV. 1 (1982).

³⁷⁶ *Id.*

³⁷⁷ *Id.* at 193-95. The Court indicated that a breach could have occurred if, when presented with relevant medical evidence, the union had ignored the complaint or processed it perfunctorily. *Id.* at 194. In addition, a breach may have occurred if a union officer was personally hostile to an employee and that individual animus influenced union decisions. *Id.*

³⁷⁸ See J. WEISTART & C. LOWELL, *supra* note 18, § 5.05(b), at 546.

³⁷⁹ *Humphrey v. Moore*, 375 U.S. 335, 349-50. The *Humphrey* Court declared: "[W]e are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes.

Id.

³⁸⁰ *Id.* at 338-39. The Court reasoned:

Variations acceptable in the discretion of bargaining representatives, however, may well include differences based upon such matters as the unit within such seniority is

union is to be given a "wide range of reasonableness" in fulfilling its statutory duty.³⁸¹ The authority to negotiate permits the union to make concessions and conclude agreements which it feels will best serve the majority of the unit's members.³⁸²

Individual athletes are therefore limited in their ability to challenge a union's decision to grant management a substantive concession which works to the economic disadvantage of a particular group of athletes.³⁸³ The good faith standard would appear to insulate the union even when the concession works to the disadvantage of the entire unit.³⁸⁴ The duty may be violated, however, if the union arbitrarily favors the interests of one group of players over those of another.³⁸⁵ This duty may be an increasing problem for unions as manage-

to be computed; the privileges to which it shall relate, the nature of the work, the time at which it is done, the fitness, ability or age of the employees, their family responsibilities, injuries received in course of service, and time or labor devoted to related public service, whether civil or military, voluntary or involuntary.

Id. See also Jacobs and Winter, *supra* note 290, at 18.

³⁸¹ *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). In *Huffman*, the Court stated:

Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Id.

³⁸² *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-338 (1953). The Court concluded: Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantage as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals. A bargaining representative, under the National Labor Relations Act, as amended, often is a labor organization but it is not essential that it be such. The employees represented often are members of the labor organization which represents them at the bargaining table, but it is not essential that they be such. The bargaining representative, whoever it may be, is responsible to, and owes complete loyalty to, the interests of whom it represents.

Id.

³⁸³ J. WEISTART & C. LOWELL, *supra* note 18, § 5.05(b), at 547.

³⁸⁴ *Id.* (citing the employees' interest in the long term health of the sports industry as supporting union concessions favoring management).

³⁸⁵ See *Vaca v. Sipes*, 386 U.S. 171, 193 (1967); see also *infra* note 387 and accompanying text. The NFLPA may be approaching a violation of this type in its treatment of draftees and its refusal to bargain for certain players after it precluded individual negotiation. After the July 15 expiration date had passed, the union took the position that unsigned veterans could accept a team's pre-July 15 best offer at any time and report to training camp. Unsigned draftees, however, were told that they could not accept the club's last offer, but had to wait until a new collective agreement was negotiated before they could sign individual contracts. The few draftees unsigned before July 15 were therefore, as a group, the only persons prevented from playing. See Stellino, *Top Draft Picks, Agents Feel Trapped*, THE SPORTING NEWS, July 26, 1982, at 50. Such action could be characterized as arbitrary. Despite the union's ban, two first round picks, Marcus Allen of the Raiders and Darrin Nelson of the Vikings, accepted the club's last pre-July 15 offer

ment, experiencing hard times or anticipating future economic adversity, presses for substantive concessions which would reduce or limit player salaries.³⁸⁶ Unions may also face increased liability as lower courts interpret the "arbitrary" portion of the *Vaca* enunciation to include union activity which borders on a finding of negligence.³⁸⁷ This broadening of the union's duty could allow a dissatisfied group of athletes to challenge the reasonableness of a union concession or settlement.³⁸⁸

A final issue regarding the duty of fair representation concerns a draftee's standing to allege its breach. The available labor law precedent is split on the issue of whether a union owes a duty to individuals who are not within its unit.³⁸⁹ Prior to execution of a league player contract, the draftee arguably is not a member of the unit.³⁹⁰ He therefore could be prohibited from suing the union for breach of its duty regarding the negotiation or enforcement of terms and provisions which affect his economic interests.³⁹¹ Although this conclusion is supportable considering available precedent,³⁹² a result stating that the union owes no duty to draftees must be harmonized with the draftees' status in

and signed after the expiration date. The union is filing unfair labor practice charges against the teams based on these signings. Balzer, *A New Can of Worms*, THE SPORTING NEWS, August 23, 1982, at 39, col. 1. A veteran Detroit Lions running back, Billy Sims, is also threatening litigation because he wants to extend his contract and the Lions claim they cannot negotiate with him. Sylvester, *Sims' new lawyer snarls at Lions*, DETROIT FREE PRESS, Aug. 13, 1982, § D. at 1, cols. 2-3. The general animus the union seems to have towards draftees may eventually be the basis of a lawsuit alleging breach of this duty. See *supra* note 298 for a discussion of the NFL-NFLPA Collective Bargaining Agreement's expiration on July 15, 1982, except for the collegiate draft, the principles of which continue until 1986. See Burkow and Slaughter, *supra* note 300, at 336-37.

³⁸⁶ The NBA, in its negotiations with the Players Association, is apparently asking the union to acknowledge the precarious financial posture of the league and accept limitations on player salaries and guaranteed contracts. Douchant, *Hoop Scoop*, THE SPORTING NEWS, August 16, 1982, at 54, col. 3.

³⁸⁷ See R. GORMAN, *supra* note 90, Ch. 30, § 7, at 719-21. Bad faith is not necessary for a finding of breach of duty if the union's activity appears to be unreasonable or irrational. *Jones v. Trans World Airlines, Inc.*, 495 F.2d 790, 798 (2d Cir. 1974); *Griffin v. International Union, United Automobile, A. & A.I.W.*, 469 F.2d 181, 183 (4th Cir. 1972).

³⁸⁸ The NFLPA again appears to be in the most precarious position of all players unions as salaries in arguably the most profitable league have not risen relative to those of players in other sports.

³⁸⁹ For cases implying such a duty, see *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952); *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177 (1941); *Bell & Howell Co. v. National Labor Relations Board*, 598 F.2d 136 (D.C. Cir. 1979); *Jones v. Trans World Airlines, Inc.*, 495 F.2d 790 (2d Cir. 1974). For cases implying that only a member of the bargaining unit can institute such a suit, see *Chemical Workers & Alkaline Workers of Am. Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971); *Gray v. Heat and Int'l Ass'n of Frost Insulators and Asbestos Workers Local No. 51*, 416 F.2d 313 (6th Cir. 1969); *Schick v. National Labor Relations Board*, 409 F.2d 395 (7th Cir. 1969); *National Labor Relations Board v. Whiting Milk Co.*, 342 F.2d 8 (1st Cir. 1965).

³⁹⁰ See *supra* notes 289-300 and accompanying text regarding inclusion of draftees as parties to the bargaining relationship for exemption purposes.

³⁹¹ See *Roberts and Powers*, *supra* note 24, at 458-59; Burkow and Slaughter, *supra* note 300, at 336.

³⁹² See *supra* note 389.

connection with the exemption. Draftees could be characterized as outside the unit for purposes of the union's duty, but as a party to the bargaining relationship for purposes of the exemption. These inconsistent applications of law would leave the class of draftees without a remedy or a means of safeguarding their interests under either labor or antitrust law.³⁹³

B. Union Regulation of Agents

Agents of individual players, for the most part, are not subject to the regulation or control of any group or entity.³⁹⁴ Reports of unscrupulous or incompetent agents occasionally have led sports unions to consider licensing or policing agent practices and qualifications.³⁹⁵ For example, the recently concluded football bargaining agreement contains a provision that only agents certified by the union will be allowed to negotiate contracts for veteran players.³⁹⁶ Union control of agents' activities would apparently be immune from antitrust scrutiny due to the statutory labor exemption.³⁹⁷ The recent Supreme Court decision in *H.A. Artists & Associates, Inc. v. Actors' Equity Association*³⁹⁸ supports this conclusion. In *Actors' Equity*, the actors' union regulated the activities of theatrical agents in detail, including a limitation on commissions charged, the avoidance of conflicts of interests and the preservation of the actor's ability to terminate the relationship.³⁹⁹ The union also charged agents a franchise fee in order to obtain a license. Union members could only employ agents who had received the sanction of the union.⁴⁰⁰

A unanimous Court concluded that the agents were, in fact, a "labor group" as defined by federal law.⁴⁰¹ The disagreement between the agents and the union was therefore a "labor dispute" as defined by the Norris-LaGuardia Act and entitled to the statutory exemption.⁴⁰² The Court supported its conclusion by pointing to its prior opinion in *American Federation of Musicians v. Carroll*,⁴⁰³ wherein orchestra leaders were characterized as a "labor group."⁴⁰⁴ The test regarding the validity of any particular regulation was thus whether

³⁹³ Of course, a pro-draftee inconsistency could occur whereby the draftee was a member of the unit for breach of duty purposes, but not a party to the relationship for exemption purposes. This application of the inconsistency seems equally unappealing.

³⁹⁴ See *infra* notes 441-48 and accompanying text for a discussion of the State of California's new statute regulating agents.

³⁹⁵ See FINAL REPORT OF THE SELECT COMMITTEE ON PROFESSIONAL SPORTS, H.R. DOC. NO. 94-1786, 94th Cong., 2d Sess. 177 (1977); Montgomery, *The Spectacular Rise and Ignoble Fall of Richard Sorkin, Pros' Agent*, N.Y. TIMES, Oct. 9, 1977, § 5, at 1.

³⁹⁶ See *infra* note 408.

³⁹⁷ See Berry and Gould, *supra* note 1, at 803.

³⁹⁸ 451 U.S. 704 (1981).

³⁹⁹ *Id.* at 706-10.

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.* at 719-22.

⁴⁰² *Id.* at 731.

⁴⁰³ 391 U.S. 99 (1968).

⁴⁰⁴ *H.A. Artists & Ass'n, Inc. v. Actors' Equity Ass'n*, 451 U.S. 704, 717-22 (1981).

the rule furthers the union's legitimate labor interest.⁴⁰⁵ In light of *Actors' Equity*, therefore, player unions could engage in extensive regulation of agents for union members and not be subject to antitrust sanctions. Management's refusal to deal with agents who fail to comply with such union regulations would also appear to be immune from antitrust attack.⁴⁰⁶ Since, however, agents and first-year players ("rookies") contract prior to the player's becoming a member of the union,⁴⁰⁷ attempted regulation of agents for rookies may subject the teams or the union or both to antitrust liability.⁴⁰⁸ Therefore, the union's ability to enforce effectively its restrictions might be severely limited if potential antitrust liability forces the union to exempt agents for rookies from coverage.

III. MANAGEMENT - MANAGEMENT

Management disputes can arise in two different contexts — a new league challenging the rules and practices of an established league, or an individual owner or small group of owners attacking the majority rules of their own league. The league-against-league lawsuit has been the most common form of past management strife,⁴⁰⁹ but litigation initiated by a dissatisfied owner appears to be an increasing possibility.⁴¹⁰ The battle in either situation is likely to involve principles of antitrust law since the exemption has been perceived as having little application in a purely management dispute.⁴¹¹ In both the inter-

⁴⁰⁵ The Court also concluded that, since the franchise fees did not serve a labor purpose, they were not exempt from antitrust scrutiny. Three members of the Court dissented from this holding. *Id.* at 722.

⁴⁰⁶ See *supra* notes 61-277 and accompanying text.

⁴⁰⁷ See *supra* notes 290-91 and accompanying text.

⁴⁰⁸ See *supra* notes 290-300 and accompanying text. The recently concluded NFL NFLPA Collective Bargaining Agreement limits union certification to agents of veteran players. Agents for rookies need not be certified. See Stellino, *Major Points in New Agreement*, THE SORTING NEWS, November 29, 1982, at 41, cols. 1-2.

⁴⁰⁹ See, e.g., *North Am. Soccer League v. National Football League*, 670 F.2d 1249 (2d Cir. 1982); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972).

⁴¹⁰ See, e.g., *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527 (7th Cir. 1978) (power of baseball Commissioner to void sales of players); *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 484 F. Supp. 1274 (C.D. Cal. 1980), *rev'd*, 634 F.2d 1197 (9th Cir. 1980) (court of appeals reversed granting of preliminary injunction which would have allowed the Oakland Raiders to move to Los Angeles). See also *Los Angeles Memorial Coliseum Comm. v. National Football League*, 519 F. Supp. 581 (C.D. Cal. 1981) (directed verdict for Raiders and Coliseum on NFL's single entity defense).

⁴¹¹ If a new league is affected by the restraint, the agreement has extra-unit effect and would not be protected by the exemption. See *supra* notes 263-65 and accompanying text. See also J. WEISTART & C. LOWELL, *supra* note 18, § 5.05(h), at 566-67. If a maverick owner is the plaintiff, the inapplicability of the exemption is less clear. Since most such challenges involve provisions within a league's Constitution and By-Laws rather than its collective bargaining agreement, the needed affiliation between a challenged term and either labor interests or the bargaining process may be missing. The exemption was not considered in the opinions regarding the Oakland Raiders cited *supra* note 410.

or intra-league suit, the complaint can allege violations of either Section 1 or 2 of the Sherman Act or both such provisions.⁴¹² If Section 2 is the focus of the litigation, the charge of monopolization mandates that the plaintiff demonstrate that the defendants possess monopoly power in a relevant market, and that they have willfully acquired and maintained such power.⁴¹³ If Section 1 is the central issue before the court, the rule of reason inquiry should be preferred over the per se rules.⁴¹⁴ The rule of reason principles to be employed are similar to those enunciated in the labor-management decisions.⁴¹⁵ Traditional antitrust principles will therefore govern lawsuits between management entities.

Recently, the National Football League has been subject to both types of management disputes. In *North American Soccer League v. National Football League*⁴¹⁶ and *Los Angeles Memorial Coliseum Commission v. National Football League*,⁴¹⁷ the football league, concerned about its potential antitrust exposure,⁴¹⁸ tried to insulate its rules from traditional Section 1 liability by arguing that the league was a single economic entity which, by definition, could not be guilty of the joint or conspiratorial restraint proscribed by the statute.⁴¹⁹ *North American Soccer League (NASL)* involved a suit in which the newer soccer league challenged an NFL Constitution and By-Law provision which prohibited NFL owners from owning a team in another professional sport.⁴²⁰ In *Los Angeles Coliseum*, a Los Angeles stadium and Al Davis, owner of the Oakland Raiders, challenged an NFL Constitution and By-Law provision which prohibited an owner from

⁴¹² See *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867, 872 (S.D.N.Y. 1975); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 402, 503 (E.D. Pa. 1972).

⁴¹³ *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. at 505. See also J. WEISTART & C. LOWELL, *supra* note 18, § 5.11, at 691.

⁴¹⁴ See *supra* notes 22-23 and accompanying text.

⁴¹⁵ See *supra* notes 327-28 and accompanying text.

⁴¹⁶ 670 F.2d 1249 (2d Cir. 1982).

⁴¹⁷ 519 F. Supp. 581 (C.D. Cal. 1981) (appeal pending).

⁴¹⁸ The NFL faces additional threats from its owners. The Raiders' move to Los Angeles was reportedly at least partly inspired by its desire to attack the NFL's rule requiring equal participation in broadcast revenue. The Raiders' ability to retain income from cable television football broadcasts in the Los Angeles area, if they occur in the future, would greatly profit the club. See *supra* notes 3, 311 and accompanying text. The NFL may face additional antitrust exposure from the new football league, the USFL. The first potential issue between the leagues, the ability of the NFL to prevent the USFL from playing in NFL stadiums, will apparently be avoided since most USFL teams are being allowed to lease NFL stadiums if they so desire. See *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert denied*, 436 U.S. 956 (1978).

⁴¹⁹ *North Am. Soccer League v. National Football League*, 670 F.2d 1249, 1256-58 (2d Cir. 1982); *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 519 F. Supp. 581, 582-85 (C.D. Cal. 1981). See also *Chicago Board of Trade v. United States*, 246 U.S. 281 (1918) and *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968). See *supra* notes 27-28 and accompanying text.

⁴²⁰ NFL Constitution and By-Laws, Art. IX, § 4, *quoted in* *North Am. Soccer League v. National Football League*, 670 F.2d 1249, 1255 (2d Cir. 1982). Certain NFL owners possessed majority interests in NASL teams and the soccer league was reluctant to lose their wealth and prestige. *Id.* at 1254-55.

relocating his franchise without the approval of three-fourths of the league's owners.⁴²¹

In both cases, the NFL lost on its "single entity" argument.⁴²² The district court in *NASL* agreed with the single entity analysis, but the Second Circuit reversed⁴²³ by noting that the Supreme Court has never favored a "joint venture" antitrust exemption.⁴²⁴ The circuit court looked to prior Supreme Court cases (involving a variety of factual settings) in which Section 1 had been applied to sports leagues, and concluded that the instant context was indistinguishable from that precedent.⁴²⁵ The cross-ownership ban not only protected the league from other league competition, but also shielded individual teams from home territory competition.⁴²⁶ The Second Circuit therefore reasoned that the individual nature of the restraint precluded any entity exemption.⁴²⁷ The District Court in *Los Angeles Coliseum* also rejected the NFL claim.⁴²⁸ The lower court granted the plaintiff's summary judgment motion on the single entity defense for three reasons: 1) indistinguishable sports precedent had applied Section 1 to sports leagues;⁴²⁹ 2) Supreme Court rejection of such claims where the organization's product was as unitary as the NFL's and required the same degree of cooperation from organization membership;⁴³⁰ and 3) individual team distinctions whereby each was a separate business entity with independent value,⁴³¹ although collectively operating within a league structure to produce a product. Subsequently, the jury in *Los Angeles Coliseum* found in favor of the plaintiffs regarding the substantive violation of the Sherman Act.⁴³²

The rejection of the "single entity" argument will have an important influence on pure management suits of the future. If the argument had been ac-

⁴²¹ NFL Constitution and By-Laws, Art. IV, § 3, *quoted in* Los Angeles Memorial Coliseum Comm'n v. National Football League, 634 F.2d 1197, 1199, n.1 (9th Cir. 1980).

⁴²² North Am. Soccer League v. National Football League, 670 F.2d 1249, 1256-58 (2d Cir. 1982); Los Angeles Memorial Coliseum Comm'n v. National Football League, 519 F. Supp. 581, 582-85 (C.D. Cal. 1981).

⁴²³ North Am. Soccer League v. National Football League, 505 F. Supp. 672, 688-89 (S.D.N.Y. 1980), *rev'd*, 670 F.2d 1249, 1256-58 (2d Cir. 1982).

⁴²⁴ *Id.* at 1257.

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ *Id.* at 1257-58. The court concluded that the provision violated the rule of reason because the alleged pro-competitive effects of the ban could not outweigh its obvious anticompetitive effects. *Id.* at 1261.

⁴²⁸ Los Angeles Memorial Coliseum Comm'n v. National Football League, 519 F. Supp. 581, 582-85 (C.D. Cal. 1981).

⁴²⁹ *Id.* at 583. The Court rejected the NFL's contention that the player restraint cases involved a different market and were therefore distinguishable. *Id.*

⁴³⁰ *Id.* at 583-84.

⁴³¹ *Id.* at 584. For additional discussion on the single entity issue and its complications, see Blecher and Daniels, *supra* note 20.

⁴³² Los Angeles Memorial Coliseum Comm'n v. National Football League, No. 78-3523-HP (C.D. Cal., May 7, 1982) [reported at 42 ANTITRUST & TRADE REG. REP. (BNA) 1160 (June 3, 1982)].

cepted, sports leagues would have been substantially immune from antitrust liability. The single entity defense could have precluded Section 1 suits by competitors and the exemption would have precluded most suits by labor entities.⁴³³ Thus, the rejection of the single entity defense in both of the recent football decisions indicates that the internal rules and procedures of the various leagues are subject to antitrust scrutiny when challenged by either a rival league or a maverick owner. The league's effort to avoid the imposition of traditional antitrust principles to sports has apparently been unsuccessful.⁴³⁴ The industry will therefore be subject to the same antitrust liability applicable to profit-oriented businesses of similar stature. The leagues receive some protection, however, from the possible satisfaction of the rule of reason standard. Liability should only be imposed upon an established league following a complete analysis of the reasonableness of a restraint, including its motivation, necessity and effect in a unique business environment.

IV. GOVERNMENT - THE SPORTS INDUSTRY

The consumers of professional sports — the fans — have few effective ways of influencing the decisions of the industry. Governmental regulation of the sports business, therefore, would arguably be the best method of safeguarding the interests of the public. The United States Congress, however, has traditionally viewed professional sports in a manner similar to that employed by the judicial system prior to the 1970's — as recreational amusements rather than a legitimate industry. Hence, federal sports legislation, although generally limited to the field of antitrust law, has frequently granted concessions to the leagues which the owners claimed were necessary for the good of the game.⁴³⁵ Most sports legislation adopted by Congress has granted certain sports activities specific exemption from federal antitrust laws, including the ability of sports teams to negotiate jointly league broadcast contracts and the right of two leagues to merge into one.⁴³⁶ Moreover, the Senate is currently considering a bill which would grant to certain league rules immunity from the workings of the antitrust laws.⁴³⁷ The proposed bill purports to protect the fans' interest in geographic stability and comparable economic opportunities for all teams.⁴³⁸ If the bill passes, the antitrust principles discussed earlier would no longer be ap-

⁴³³ See *supra*, part I of this article.

⁴³⁴ But see *infra* note 440 and accompanying text.

⁴³⁵ This does not include tax-related legislation. See *supra* note 28 and accompanying text.

⁴³⁶ Sports Broadcasting Act, and Merger Addition thereto, 15 U.S.C. §§ 1291-1295 (1976).

⁴³⁷ Sports Antitrust Bill, S 2784, 97th Cong., 2d Sess. (1982), 128 CONG. REC. S 9330-31 (daily ed. July 28, 1982). The core of the bill concerns restrictions on franchise movement.

⁴³⁸ Sports Antitrust Bill, S 2784, 97th Cong., 2d Sess. § 2 (1982), 128 CONG. REC. S 9330-31 (daily ed. July 28, 1982).

plicable to future disputes regarding those practices.⁴³⁹ The proposed statute is clearly inconsistent with the modern conception of sports adopted by other branches of the legal system. Such legislation countermands the treatment of sports as a business on an equal footing with other profit-making endeavors. The merits of such a bill should be evaluated not on the basis of the "good of the game" or the benefit to team owners but on the same consumer protection standard which Congress applies to any other industry or product. The Congressional perception of the legal posture of professional athletics should change to reflect the modern realities of the sports industry and to harmonize the legal status accorded sports. Such a transformation also is required if the interests of the fans are to receive any form of national protection.

Due to the interstate nature of the leagues, state legislatures have been reluctant to regulate athletic activities within their borders.⁴⁴⁰ California, however, has recently entered this field by passing the first statute to regulate comprehensively sports agents operating within that state.⁴⁴¹ The act requires an agent to file an application with the state Labor Commissioner accompanied by affidavits of two individuals that the applicant is a person of good moral character or, if the applicant is a corporation, that it has a reputation for fair dealing.⁴⁴² The agent must also submit a copy of his agency contract and fee schedules to the Commissioner for approval.⁴⁴³ The agent must maintain certain records and keep them available for inspection.⁴⁴⁴ A \$10,000 surety bond must also be filed with the Commissioner.⁴⁴⁵ Finally, the agent must file a copy of his registration certificate with a secondary or collegiate institution prior to contacting any student at that school.⁴⁴⁶ If a student signs with an agent, the agent must file a copy of the representation agreement with the school within five days of execution.⁴⁴⁷ The act clearly covers agents based in California, but it is uncertain whether agents located in other states, soliciting athletes in California schools or negotiating with California teams, must comply. In addition, the statute provides an exception for "any member of the State Bar of California when acting as legal counsel for any person."⁴⁴⁸ Attorneys admitted in other states should implicitly receive a similar exception, assuming the representation of athletes is included within the notion of "legal counsel." This type of legislation may evidence a willingness on the part of state government

⁴³⁹ See *supra* notes 409-34 and accompanying text.

⁴⁴⁰ State laws, particularly antitrust statutes, cannot burden the interstate commerce aspects of sports. *Flood v. Kuhn*, 407 U.S. 258, 284 (1972); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867, 880 (S.D.N.Y. 1975).

⁴⁴¹ California Labor Code, West's Annotated Calif. Codes, §§ 1500, 1510-1547 (1981 Supp., 1971 edition).

⁴⁴² *Id.* § 1511.

⁴⁴³ *Id.* §§ 1530, 1531.

⁴⁴⁴ *Id.* §§ 1532, 1533.

⁴⁴⁵ *Id.* § 1519.

⁴⁴⁶ *Id.* § 1545.

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.* § 1500(b).

to police, at least to a limited extent, the public interest aspect of the sports industry.

An alternative source for public regulation of the sports industry may come from the power of eminent domain. The power of eminent domain may allow local governments to influence the future conduct of their area team. The California Supreme Court recently ruled that a trial court erred in granting summary judgment to the Oakland Raiders in an eminent domain suit brought against the team by the City of Oakland.⁴⁴⁹ Oakland initiated the action in an effort to keep the team from moving to Los Angeles.⁴⁵⁰ The California Supreme Court noted that intangible property is a proper subject for the eminent domain power if the condemnation is for a valid "public use."⁴⁵¹ The court refused to find that the operation of a football team was an illegitimate public use as a matter of law.⁴⁵² The opinion noted that municipal recreational activities were legitimate public purposes.⁴⁵³ Pursuant to that rationale, counties and municipalities have frequently condemned land to build sports stadiums to be leased to teams.⁴⁵⁴ The property, the collection of rights which form the franchise, also had a clear situs within Oakland's city limits.⁴⁵⁵ The court concluded, therefore, that the city possessed a viable claim that the Raiders could be the subject of an eminent domain proceeding.⁴⁵⁶ The Supreme Court then remanded the case to the trial court for a determination on the issue of public use, with appropriate deference to be given to the city's decision.⁴⁵⁷

The California court's decision implies that a city, through its eminent domain power, can prevent a sports franchise from moving or can eliminate an owner which it deems irresponsible. This power appears particularly broad since the court also granted the city the ability to condemn the team and immediately sell it to another owner.⁴⁵⁸ Such a holding would appear to limit severely an owner's right to control his own property. However, most of the perceived restrictions on the incidents of ownership are, in reality, questions of fair and adequate compensation. Thus, the question not yet faced by the California courts is that of valuation. If the city were allowed to purchase the Raiders at a "bargain basement" price, the decision would have a disruptive effect on the sports capital market. Conversely, if the city pays the current fair market value of the franchise,⁴⁵⁹ the degree to which any particular owner is in-

⁴⁴⁹ *City of Oakland v. Oakland Raiders*, 31 Cal.3d 656 (Cal. Sup. Ct. 1982).

⁴⁵⁰ *Id.* at 659.

⁴⁵¹ *Id.* at 662-64.

⁴⁵² *Id.* at 665-68.

⁴⁵³ *Id.* at 666.

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.* at 670.

⁴⁵⁶ *Id.* at 670-71.

⁴⁵⁷ *Id.* at 671.

⁴⁵⁸ *Id.* at 669.

⁴⁵⁹ This evaluation should include some evaluation of future earnings potential.

jured is lessened considerably. Although the owner would be deprived of the psychic value of owning a sports team, the financial loss would be minimal. The owner's property, in the economic sense, would remain intact.

The Raiders case, therefore, may represent the beginning of a new relationship between a team and its home territory. The sports industry of the future may need to be much more sensitive to the organization's fans and the financial investment which the community has, even if indirectly, placed in the franchise. Although an expansion of the eminent domain power will lessen some of the joys of team ownership, a proper application of the public use doctrine and a fair valuation of the franchise's true worth should protect the owner from most potential abuses.⁴⁶⁰ Suits of this nature may provide the most direct method for the fans — the product's consumers — to share some of the leagues' power and shape the future structure of the industry.

CONCLUSION

For most of its history, professional athletics was governed by the unilateral decisions of team owners acting in a league format. In the last twelve years, however, a variety of sporting groups, through access to the judicial system and a changed perception of the legal status of sports, have forced the owners to share the power and wealth derived from the games. Players, unions, agents and rival leagues all now participate, in some form, in the decisions which will shape the future of sports. In the course of this growth, the sports industry has matured into a national business possessed of all the power and problems which adhere to that status. Future legal disputes between the components of the industry should be governed by the same general principles of antitrust and labor law which regulate other profit oriented enterprises of similar magnitude. The unique nature of professional athletics, however, dictates that certain traditional concepts be specially adapted to particular sporting contexts.

Mature labor-management relations should be primarily governed by federal labor law. Collective negotiations, unfair labor practice hearings and arbitration proceedings — the traditional incidents of labor law — will therefore replace the court system as the primary focus of future disputes between these parties. Antitrust law, however, should maintain a role in the regulation of some labor interests in sports. The current formulation of the labor exemption from antitrust sanctions, embodied in the *Mackey-McCourt* test, does not accurately reflect the Supreme Court's enunciation of the nature of the non-statutory exemption. Future grants of immunity should be based on the extra-unit effect of the practice, the mandatory nature of bargaining and union participation in the formulation of the restraint. This test acknowledges

⁴⁶⁰ Personal dislike of an owner or disagreement with a particular sports decision would not appear to satisfy the public use standard. The standard should be satisfied only if the team is leaving the jurisdiction or management is so inept that the economic value of the franchise is being damaged. See *City of Oakland v. Oakland Raiders*, 31 Cal.3d 656, 665 (Cal. Sup. Ct. 1982).

that the interests relevant to the granting of antitrust immunity differ from those applicable to policing good faith bargaining. The proposed standards, consistent with Supreme Court rulings, also limit the availability of immunity and allow for some continuing antitrust role in the regulation of labor-management relations. Under these standards, therefore, antitrust precepts will retain an appropriate function in lawsuits involving the rights of collegiate draftees and unmodified provisions of league Constitutions and By-Laws.

The applicable antitrust and labor principles change as the potential parties to a lawsuit shift. Disputes between labor entities — players, agents or unions — should be characterized as a labor dispute. Antitrust concepts therefore should have no role in the resolution of such disagreements. Relevant future inquiries will focus instead on the scope of a players' union's duty of fair representation and the extent to which union regulations further legitimate labor interests. Disputes between management entities — leagues and owners — will, on the other hand, be regulated by antitrust law. Labor principles will normally not be involved as such suits usually challenge restraints with extra-unit effects or league rules which have not been the subject of bargaining. The rejection of the NFL's single entity defense insures that, regarding allegations of a violation of Section 1 of the Sherman Act, the rule of reason remains the proper legal analysis. Lawsuits between these parties, therefore, will continue to be resolved by the application of traditional antitrust theory.

The destiny of the sports industry will continue to be shaped by interaction with the legal system. The increasing wealth generated by professional sports insures future disagreement among the components of the industry regarding the wealth's proper distribution. The accretion of economic strength by labor groups will also inspire additional battles with management regarding control over the industry itself, including such non-economic issues as the actual playing rules and injury related conditions of employment such as astroturf. Moreover, governmental desire to protect the interests of the fans (and win votes in the process) guarantees future clashes regarding attempted regulation of varying facets of the industry. The winners of these competitions, and the individuals and groups who will mold the future structure of the industry, will not be those who rely on Monday night wisdom regarding the love of the game; rather, they will be those who understand the rules and strategies of the real game — the one played in the courts and legislatures.

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