NORTH CAROLINA LAW REVIEW

Volume 88 | Number 1 Article 7

12-1-2009

Dusting off the AK-47: An Examination of NFL Players' Most Powerful Weapon in an Antitrust Lawsuit against the NFL

Sean W. L. Alford

Dusting Off the AK-47: An Examination of NFL Players' Most Powerful Weapon in an Antitrust Lawsuit Against the NFL*

INTRODUCTION

McNeil v. National Football League[1] marks one of the most significant victories for players in the history of professional sports.[2]

---

1. 790 F. Supp. 871 (D. Minn. 1992).

2. *See id.* at 875 (denying summary judgment motions and allowing antitrust claims brought by National Football League ("NFL") players against the NFL to proceed to a

In *McNeil*, eight football players served as plaintiffs in an action against the National Football League ("NFL" or "League") whereby the players alleged that certain NFL labor practices violated antitrust law.[3] This landmark case established the precedent that the NFL would be held accountable under antitrust law for the labor restraints it imposed on its players.[4] At the time of the verdict, Professor Peter Foley of the Franklin Pierce Law Center commented, "the McNeil verdict gives the players a rather menacing gun—the collective bargaining equivalent of an AK-47."[5] Since the 1992 decision, players have taken major strides both in terms of their bargaining rights as a collective union and in terms of their individual bargaining rights in negotiations with clubs. In 1992, prior to the decision, the average annual salary for NFL players was $551,000.[6] In the years subsequent to the *McNeil* decision, average salaries have skyrocketed.[7] The increases suggest a causal relationship between the *McNeil* decision and players' individual bargaining power. In 2005, NFL clubs reportedly paid players an average of $1.4 million a year, nearly $1 million more than the average immediately prior to the *McNeil* decision.[8] In 2008, NFL clubs spent over $4.5 billion on players, representing an estimated sixty percent of total revenues across the League.[9] In addition to these quantitative improvements, players have

---

jury trial).

3. *Id.*

4. *See id.* at 877–88 (allowing a jury to decide whether or not the NFL's labor system violated antitrust laws); McNeil v. NFL, Civ. No. 4-90-476, 1992 WL 315292, at *1 (D. Minn. Sept. 10, 1992) [hereinafter *McNeil Verdict*] (articulating the jury instructions and the voting outcome at trial).

5. Pete Foley, *A Sporting Chance for Professional Players: Football's Antitrust Weapon*, CONN. L. TRIB., Nov. 30, 1992, at 16.

6. MICHAEL LEEDS & PETER VON ALLMEN, THE ECONOMICS OF SPORTS 226 (2002).

7. *See* Richard Alm, *Smith Was Always a Commodity First*, DALLAS MORNING NEWS, Mar. 1, 2003, *available at* 2003 WLNR 13897246 (citing an average NFL salary of $1.1 million); *Big Blue and Even Bigger Green*, DAILY NEWS (N.Y.), Aug. 6, 2009, at 73 (summarizing average salaries for top NFL players); Rupert Cornwell, *The Ultimate Power Play: Did Black Sporting Heroes Pave the Way for Barack Obama*, INDEPENDENT (London), Oct. 18, 2008, *available at* http://www.independent.co.uk/sport/general/others/the-ultimate-power-play-did-black-sporting-heroes-pave-the-way-for-barack-obama-965325.html (citing the average NFL salary to be $1.25 million).

8. Larry Weisman, *NFL Salaries up 5%; Bigger $ to Come*, USA TODAY, July 7, 2006, at C1 ("NFL Players Association research says the average player salary rose 5% in 2005 to $1.4 million and the average starter earns $2.26 million. The median salary for starters was $1.7 million, an increase of 17%.").

9. Dan Pompei, *No Strike Fears—Yet: NFL Owners Opt Out of CBA; New Pact Needed by 2011*, CHI. TRIB., May 21, 2008, § 4, at 3 ("NFL owners knew they were giving players quite a harvest when they agreed to extend the CBA [collective bargaining agreement] through 2012 in March 2006. They didn't realize they also had thrown in most

taken major strides in less measurable areas like bonus forfeiture interpretation and revenue sharing among clubs.[10] Ever since the players won the monumental decision in *McNeil*, the League has not allowed a collective bargaining agreement with the players to expire without an extension.[11] The AK-47 that emerged from the *McNeil* decision has certainly benefited football players, who have enjoyed the longest running era of labor peace in professional sports and now receive the highest portion of league-wide revenue among the four major sports—basketball, baseball, hockey, and football.[12] Owners have also reaped benefits from the labor peace, notwithstanding the players' major gains. Labor peace has contributed to the goodwill among fans and has given owners the benefit of uninterrupted revenue streams year after year. The NFL's total revenue was $6.97 billion in 2006 and is expected to grow as high as $9 billion in the near future—making it the highest grossing league among the four major sports.[13]

Despite these gains, the NFL appears to be on the verge of its next major labor battle, which will challenge the longevity of the players' so-called AK-47. Since the *McNeil* decision, the NFL and the

---

of the farm. They have complained that assigning between 59 and 60 percent of league revenues to players (up from about 54 percent in the previous agreement) is too much. The NFL says it will spend almost $4.5 billion on player costs this year.").

10. Pursuant to the settlement that resulted from the *McNeil* decision, Minnesota's Fourth Division United States District Court maintains the exclusive authority to resolve disputes in the interpretation of the collective bargaining agreement between the NFL and the National Football League Players Association ("NFLPA"). *See* White v. NFL, 899 F. Supp. 410, 413 (D. Minn. 1995). Recently, the court has handed down a few decisions that heavily favor players with regard to whether clubs are entitled to repayment of bonuses paid to a player who violates the terms of his playing contract. *See generally* White v. NFL, 533 F. Supp. 2d 929 (D. Minn. 2008) (interpreting the collective bargaining agreement to mean that roster bonuses are not subject to forfeiture for a player's failure to comply with the terms of his playing contract); White v. NFL, Civ. No. 4-92-906, 2007 WL 939560, at *3 (D. Minn. Mar. 26, 2007) (interpreting the collective bargaining agreement to mean that option bonuses are not subject to forfeiture for a player's failure to comply with the terms of his playing contract). Since *McNeil*, the NFL has also expanded a revenue-sharing system among its clubs, which serves to enhance competition among clubs in the free agent market. *See* Judy Battista, *New Commissioner Faces a Fiery Baptism*, N.Y. TIMES, Aug. 22, 2006, at D6 (discussing the NFL's revenue-sharing system and its role in the free agent market).

11. *See* Aaron Kuriloff & Curtis Eichelberger, *NFL 2009 Season Signals End of Parity That Helped Build League*, BLOOMBERG.COM, Sept. 10, 2009, http://www.bloomberg.com/apps/news?pid=20601079&sid=a17GOPMiGywY.

12. *See* Liz Mullen, *Prime Cut Goes to NFL Players*, SPORTS BUS. J., Mar. 3, 2008, at 1, *available at* http://www.sportsbusinessjournal.com/article/58252.

13. Daniel Kaplan, *Court Filing: NFL Carrying $9B of Debt*, SPORTS BUS. J., Mar. 17, 2008, at 1, *available at* http://www.sportsbusinessjournal.com/article/58377 (discussing the NFL's financial position).

National Football League Players Association ("NFLPA")[14] have extended their collective bargaining agreement five times without any interruption or work stoppage.[15] However, in May of 2008, the NFL owners elected to exercise their contractual right to opt out of the final two years of the current agreement.[16] Thus, the current agreement will now expire at the conclusion of the 2010 season as opposed to the original expiration at the end of the 2012 season.[17] The owners exercised their opt-out right because, according to NFL Commissioner Roger Goodell, they believe that the current agreement "isn't working" and are looking for "a more fair and equitable deal."[18] This discontent poses a threat to the League's fifteen-year period of labor peace.[19] The hard stances taken by both sides magnify the potential for the start of a new era of labor strife and litigation. In January of 2008, "[a] defiant Gene Upshaw [then head of the NFLPA] said that if the NFL's owners opt out of the current labor agreement later this year, the players' union is ready for a strike or the decertification tactics it used to get free agency after the 1987 walkout."[20] Furthermore, Jeffrey Kessler, primary outside counsel for the NFLPA, has stated, "[i]f [the NFL] move[s] to open negotiations early we will ask for another increase [in the players' share of League revenues]."[21] The League did not back down in the face of this posturing and instead chose to accelerate the negotiation process by exercising the opt-out. The owners have justified this decision based on the belief that

> [t]he current labor agreement does not adequately recognize the cost of generating the revenues of which the players receive the largest shares; nor does the agreement recognize that those costs have increased substantially—and at an ever increasing

14. The NFLPA serves as a union for the players and negotiates on behalf of the players with regard to the collective bargaining agreement with the NFL. *See* HOWIE LONG & JOHN CZARNECKI, FOOTBALL FOR DUMMIES 295 (3d ed. 2007).

15. *Id.*

16. John Clayton, *NFL Owners Vote Unanimously to Opt Out of Labor Deal*, ESPN.COM, May 20, 2008, http://sports.espn.go.com/nfl/news/story?id=3404596.

17. *Id.*

18. *Id.*

19. *Id.* ("The NFL officially notified its players union on Tuesday that it will opt out of the current collective bargaining agreement, which could lead to a season without a salary cap in 2010 and a possible lockout in 2011.").

20. *Upshaw Ready for Strike if NFL Owners Opt Out of Labor Agreement*, ESPN.COM, Jan. 31, 2008, http://sports.espn.go.com/nfl/playoffs07/news/story?id=3224851.

21. Matthew Futterman, *NFL Players Seek Bigger Revenue Cut*, WALL ST. J., May 20, 2008, at B9.

> rate—in recent years during a difficult economic climate in our country.[22]

The League further demonstrated the seriousness of its discontent with the current labor environment when it retained Bob Batterman, a notoriously tough labor negotiator, as a counselor for upcoming negotiations.[23] Batterman, an attorney in the New York office of the law firm Proskauer Rose, is widely recognized for his role in obtaining a favorable agreement for the owners in the National Hockey League ("NHL") after a lockout that resulted in the historic loss of the 2004–2005 hockey season.[24]

While the current dynamic between the NFLPA and the League does not nearly match that of the aggressive and adversarial era leading up to the *McNeil* decision, it reveals a genuine and potentially irreconcilable tension that has not been a part of the NFL's labor environment for many years.[25] But what happens when this posturing and these insults come to blows? What are the alternatives to negotiating and just how powerful are the guns behind the rhetoric coming from both the League and the NFLPA? When the negotiations break down and the posturing turns into action, the

---

22. Clayton, *supra* note 16 (quoting a League statement).

23. *See* Liz Mullen & Daniel Kaplan, *NFL Brings in Veteran Labor Lawyer: Batterman Says He's Part of League's 'New Approach' to CBA Talks*, SPORTS BUS. J., Mar. 10, 2008, at 6, *available at* http://www.sportsbusinessjournal.com/article/58315 (recognizing the posturing that may be associated with the NFL's retention of labor attorney Bob Batterman). The *AmLaw Daily* also noted:

> Gene Upshaw, president of the NFL Players Association, told *SportsBusiness Journal* in April that his "concerns were heightened" when he heard Batterman had been retained, noting that NHL players crumbled before Batterman's hard line. The NFLPA's outside counsel, James Quinn of Weil, Gotshal & Manges, says that the owners "have this bizarre notion that they want to get tough, so they go get Bob Batterman."

Brian Baxter, *Proskauer's Bob Batterman Signals a Labor War in the NFL*, AMLAW DAILY, May 21, 2008, http://amlawdaily.typepad.com/amlawdaily/2008/05/smashmouth----p.html.

24. Baxter, *supra* note 23.

25. In the 1980s, the relationship between the NFL and the NFLPA turned into a very public and very hostile battle of words. Jack Donlan, who at the time served as the lead negotiator for the NFL, made cutting comments about the NFLPA's leader Ed Garvey, calling him "vituperative and vitriolic" and saying, "Garvey's full of it." Dave Kindred, *Revenue Sharing: NFL 'Unalterably Opposed' to Idea*, WASH. POST, Jan. 23, 1982, at G1. In return, Garvey publicly announced that Donlan was not a bargainer, but that he "wants to break the union." William Serrin, *N.F.L. Strike Recalls Old-Time Strife*, N.Y. TIMES, Nov. 14, 1982, § 5, at 1. Garvey further accused Donlan of practicing the union-busting technique known as "Boulwarism" whereby an employer unilaterally imposes its first offer on its employees. *Id.*

parties will almost certainly find themselves in the midst of another *McNeil*-like lawsuit.

A lot has changed since the *McNeil* decision, and the owners appear to believe that the AK-47 that the players once wielded does not have the same firepower in a litigation context that it once had.[26] This Comment tests the longevity of the *McNeil* verdict and discusses the potential outcome of a hypothetical antitrust lawsuit by the players against the League that will likely occur in the event that the current agreement is not extended. Ultimately, this Comment argues that the League has underestimated the staying power of the *McNeil* verdict and predicts that the players would win an antitrust lawsuit if the NFL allows the current agreement to expire.

Parts I and II of this Comment explore and summarize the application of antitrust laws in the labor context of the NFL. Part I examines the substance and effect of an application of antitrust liability. Part II discusses the nonstatutory labor exemption to antitrust liability and outlines the process the NFLPA will have to follow prior to effectively asserting an antitrust claim against the League. After building a framework for applying antitrust laws, Part III lays out a hypothetical antitrust complaint that the NFL players could file against the NFL in the event that the current collective bargaining agreement expires. Part IV outlines the NFL's most likely response, detailing both general and specific defenses to the players' allegations. Finally, Part V evaluates both sides' arguments and concludes that the League would be wise to maintain labor peace by extending the current agreement and not testing the firepower behind the players' threats of litigation.

I. "THE COLLECTIVE BARGAINING EQUIVALENT OF AN AK-47"[27]: ANTITRUST LIABILITY

In any industry, the prospect of facing the treble damages associated with an antitrust action will surely intimidate a defendant.[28] In the context of collective bargaining in professional football, however, this threat is so daunting that it has become the most significant source of leverage in negotiations.[29] Furthermore, the

26. *See* Foley, *supra* note 5 (discussing the *McNeil* decision's AK-47-like impact on the NFL's labor environment).

27. *Id.* ("[T]he McNeil verdict gives the players a rather menacing gun—the collective bargaining equivalent of an AK-47.").

28. *See* Clayton Act § 4, 15 U.S.C. § 15 (2006) (outlining threefold damages that accompany private antitrust actions).

29. *See* Foley, *supra* note 5.

prospect of antitrust liability can largely explain the NFL's decision to avoid litigation and peacefully extend the collective bargaining agreement time and again.[30] In 1992, the *McNeil* trial gave the League a glimpse of the impact of antitrust liability. The jury returned a verdict with total damages of $1,629,000 to be split among just four individuals.[31] The verdict set the foundation for an antitrust class action lawsuit that could have resulted in catastrophic liability. The League, however, avoided the impending catastrophe by settling a class action filed promptly after the *McNeil* decision and has continued to dodge potential antitrust liability by extending its collective bargaining agreement with the NFLPA.[32] In light of the current tension threatening labor peace, the League should revisit the application of antitrust laws to its labor practices. This Part examines the types of activities to which antitrust laws apply.[33] In addition, it discusses the court's application of antitrust laws in the *McNeil* trial and summarizes the standards courts have applied to professional football.

A. Antitrust Liability and the Rule of Reason

Unlike baseball, professional football does not enjoy an exemption from antitrust legislation.[34] As a result, players have the

---

30. *See* William B. Gould IV, *Labor Issues in Professional Sports: Reflections on Baseball, Labor, and Antitrust Law*, 15 STAN. L. & POL'Y REV. 61, 80 (2004) ("[A]ntitrust [becomes] the principal lever in collective bargaining [in professional football]."); Nathaniel Grow, *A Proper Analysis of the National Football League Under Section One of the Sherman Act*, 9 TEX. REV. ENT. & SPORTS L. 281, 288 (2008) ("[T]he possibility of an antitrust suit provides a significant deterrent to the NFL, discouraging the league from negotiating in bad faith or otherwise unilaterally imposing policies on its players."); Kieran M. Corcoran, Note, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports*, 94 COLUM. L. REV. 1045, 1068 (1994) ("The most significant economic weapon the union can use to break this impasse lies in the antitrust laws."); Derek D. Yu, Note, *The Reconciliation of Antitrust Laws and Labour Laws in Professional Sports*, 6 SPORTS LAW. J. 159, 159–88 (1999) (discussing the application of antitrust laws in the labor context of professional sports).

31. *See generally McNeil Verdict*, *supra* note 4 (summarizing the damages awarded by a jury to four of the eight plaintiffs in the lawsuit); *see also* White v. NFL, 822 F. Supp. 1389, 1398 (D. Minn. 1993) (summarizing the *McNeil* verdict), *aff'd*, 41 F.3d 402 (8th Cir. 1994).

32. *White*, 822 F. Supp. at 1389 (approving the class action settlement between the NFL and NFL players).

33. The analysis in this Part regarding the types of activities to which antitrust liability will apply ignores the nonstatutory labor exemption for antitrust liability. However, this is addressed at length in the next Part. *See infra* text accompanying notes 60–72.

34. *See, e.g.*, Radovich v. NFL, 352 U.S. 445, 451–52 (1957) (" 'Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.'... [But] the volume of interstate business involved in organized professional football places it within the provisions of the [Sherman] Act." (citations omitted)).

opportunity to subject the NFL to the daunting scrutiny of antitrust laws. Most labor-related antitrust complaints rely on the authority of § 1 of the Sherman Act, which outlaws "[e]very contract, combination . . . or conspiracy, in restraint of trade."[35] Section 4 of the Clayton Act enhances the severity of an antitrust complaint in a private action by providing for treble damages.[36] In a strict sense, § 1 of the Sherman Act outlaws any form of collective bargaining, which means that collective bargaining could constitute a per se violation of antitrust regulations.[37] But, in *Copperweld Corp. v. Independence Tube Corp.*,[38] the United States Supreme Court recognized that certain combinations that might otherwise constitute antitrust violations "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Accordingly, such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect."[39] The NFL falls within the purview of combinations the Court had in mind in *Copperweld*.[40] As a result, courts apply the rule of reason analysis to antitrust challenges in the context of professional football.[41]

A rule of reason analysis "weighs the procompetitive benefits and the anticompetitive effects of an agreement in order to determine whether it should survive antitrust scrutiny."[42] In the context of NFL labor disputes, courts have focused the inquiry on "whether the restraint imposed is justified by legitimate business purposes."[43] In

35. Sherman Antitrust Act § 1, 15 U.S.C. § 1 (2006).

36. Clayton Act § 4, 15 U.S.C. § 15 (2006) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.").

37. *See* Grow, *supra* note 30, at 289 ("Read literally, the Sherman Act's broad proscription of '[e]very contract, combination . . . or conspiracy, in restraint of trade' would outlaw collective bargaining." (alteration in original) (quoting 15 U.S.C. § 1)); *see also* NBA v. Williams (*Williams I*), 857 F. Supp. 1069, 1078 (S.D.N.Y. 1994) ("It has often been recognized that any contract between an employer and employee is a restraint of trade." (citing Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918))), *aff'd*, 45 F.3d 684 (2d Cir. 1995).

38. 467 U.S. 752 (1984).

39. *Id.* at 768.

40. *See* N. Am. Soccer League v. NFL, 670 F.2d 1249, 1258–59 (2d Cir. 1982) (subjecting the NFL to antitrust scrutiny under the rule of reason standard); *see also* Smith v. Pro Football, Inc., 593 F.2d 1173, 1179 (D.C. Cir. 1978) ("The [NFL] clubs operate basically as a joint venture in producing an entertainment product." (footnote omitted)).

41. *See N. Am. Soccer League*, 670 F.2d at 1258–59 (applying rule of reason analysis in the context of professional football).

42. Jonathan B. Goldberg, *Player Mobility in Professional Sports: From the Reserve System to Free Agency*, 15 SPORTS LAW. J. 21, 28 (2008) (citing NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 86–87 (1984)).

43. Mackey v. NFL (*Mackey II*), 543 F.2d 606, 620 (8th Cir. 1976).

order for a plaintiff to succeed in an antitrust action against the NFL for restraints imposed in a labor context, the plaintiff must show that the detriment of the restraint imposed (e.g., salary cap or restricted free agency) outweighs the potential legitimate business benefits of that restraint (i.e., competitive balance).[44] This determination is ultimately up to the finder of fact, absent overwhelming evidence that would support summary judgment.[45]

The uncertainty of this balancing test alone provides a major disincentive for the League to enter into litigation. Unlike a per se antitrust analysis, in which courts use strict legal precedent and legislative history to determine whether an activity violates antitrust laws, the rule of reason analysis opens the door to more individualized scrutiny and therefore unpredictable outcomes.[46] The *McNeil* case represents one of the few times in history when questions addressing whether labor restraints in professional sports violate antitrust law, under a rule of reason analysis, have been submitted to a jury.

B. Clearing the Summary Judgment Hurdle

Because it is one of the few cases in which labor-related antitrust questions have been submitted to a jury for consideration in the context of professional sports, the *McNeil* case established unique legal hurdles that the players must clear prior to jury submission. The district court judge's rulings on both sides' motions for summary judgment highlight a few of these hurdles. Judge David Doty, of Minnesota's Fourth Division District Court, denied all of the motions for summary judgment in *McNeil*.[47] Two of the denials of summary judgment in particular, however, represent significant and lasting precedent in the analysis of antitrust liability in the labor context of the NFL.

First, the NFL sought summary judgment based on the premise that antitrust liability does not apply to single entities.[48] Under the

---

44. *Id.*

45. *See generally McNeil Verdict*, *supra* note 4 (jury instructions and verdict).

46. *See, e.g.*, Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49–59 (1977); Carlson Mach. Tools, Inc. v. Am. Tool, Inc., 678 F.2d 1253, 1259 (5th Cir. 1982).

47. McNeil v. NFL, 790 F. Supp. 871, 874–75 (D. Minn. 1992) (listing the motions for summary judgment and the court's orders with regard to these motions). Judge Doty granted a partial summary judgment motion for plaintiffs concerning defendant's monopoly power in relevant markets. *Id.* at 875. Regarding the market for professional football player services, however, the summary judgment order only stated that a relevant market existed for antitrust purposes. *Id.* at 892–93. The court did not determine whether the NFL had monopoly power in this market. *Id.* at 896.

48. *Id.* at 878–80.

single-entity defense, the League argued that its twenty-eight member clubs "function as a single economic entity and thus are incapable of conspiring within the meaning of § 1 of the Sherman Act."[49] The court, however, declined to acknowledge the NFL as a single entity for antitrust purposes and instead recognized NFL member clubs as "separate economic entities engaged in a joint venture . . . subject to the Sherman Act."[50] Second, the NFL sought summary judgment based on an argument that "plaintiffs' claims [should] fail because the challenged restraints operate solely in a labor market and are therefore outside the scope of the antitrust laws."[51] The court also denied this motion, pointing out that precedent supports the application of antitrust laws "to restraints that operate solely within a labor market."[52]

As a result of these summary judgment rulings, the court established that the NFL and its member clubs had exhausted their legal protections against antitrust exposure and that their only means of avoiding the wrath of treble-damage liability would be to persuade a finder of fact that they should not be held liable. A jury trial began on June 17, 1992.[53] After nearly three months of arguments, the jury returned a verdict on behalf of four of the eight players.[54] While the jury's verdict is certainly important in the context of a complete analysis of the NFL's potential exposure to future antitrust liability, it

---

49. *Id.* at 878 (citing N. Am. Soccer League v. NFL, 670 F.2d 1249, 1251 (2d Cir. 1982)).

50. *Id.* at 880. The Supreme Court granted a writ of certiorari in a case challenging the viability of a single-entity defense to an antitrust action brought against the NFL in a licensing context. Am. Needle, Inc. v. NFL, 538 F.3d 736 (7th Cir. 2008), *cert. granted*, 129 S. Ct. 2859 (2009). The Supreme Court's ruling on this issue, however, is highly unlikely to affect the single-entity analysis in a labor context. In *American Needle*, the appellate court stated:

> [T]he question of whether a professional sports league is a single entity should be addressed not only "one league at a time," but also "one facet of a league at a time." Thus, in reviewing the district court's decision, we will limit our review to (1) the actions of the NFL, its member teams, and NFL Properties; and (2) the actions of the NFL and its member teams as they pertain to the teams' agreement to license their intellectual property collectively via NFL Properties.

Id. at 742 (internal citations omitted). Therefore, any Supreme Court decision should be limited to the context of intellectual property.

51. *McNeil*, 790 F. Supp. at 880–81.

52. *Id.* at 881 (citing Fed. Trade Comm'n v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 430–36 (1990)).

53. Mike Freeman, *McNeil Trial Opens with Battle of Words*, WASH. POST, June 17, 1992, at D2.

54. *McNeil Verdict*, *supra* note 4, at *1; Richard Sandomir, *Judge Holds Key to NFL's Future*, HOUSTON CHRON., Sept. 11, 1992, at 5.

is the jury instructions in the *McNeil* case that provide the best template for future antitrust analysis.

In the instructions, the judge explained to the jury that it must apply the rule of reason standard in determining whether or not the NFL's labor system violated § 1 of the Sherman Act.[55] With regard to the burden on the plaintiffs, the instructions explained that the labor system would not be a violation of the Sherman Act under the rule of reason unless the plaintiffs proved by a preponderance of the evidence: (1) that the labor system had a "substantially harmful effect" on the competition for player services, and (2) that any harmful effects on this market "outweigh[ed] any beneficial effects on that competition."[56] With regard to the burden on the defendants, the instructions explained that if the jury found that the labor system had substantially harmed competition, then defendants should be found liable unless they could demonstrate that the system was "justified by a legitimate business purpose" and that the system was "reasonably necessary to achieve that purpose."[57] Furthermore, the instructions recognized the competitive balance of the League as a legitimate business purpose.[58]

Overall, the *McNeil* case establishes that the NFL is not safe from the grips of antitrust scrutiny. It also reveals that a jury will not necessarily empathize with the League's need to maintain a competitive balance.[59] But, the outcome in the *McNeil* case should not paint the NFL as an open target for antitrust assault. The League has a major safeguard against antitrust liability in the form of a nonstatutory labor exemption that the players must overcome before they can ever subject the League to a *McNeil*-like verdict again.

---

55. *McNeil Verdict*, *supra* note 4, at *2 ("To determine whether defendants have violated Section 1 of the Sherman Act you must apply what is known as the 'Rule of Reason.' ").

56. *Id.* at *3.

57. *Id.* at *4.

58. *Id.* ("Defendants contend that the First Refusal/Compensation Rules in Plan B are justified by the legitimate business purpose of 'competitive balance.' Competitive balance means that all of the NFL teams are of sufficiently comparable playing strength that football fans will be in enough doubt about the probable outcome of each game and of the various division races that they will be interested in watching the games.").

59. *See id.* at *1. The jury's determination that the NFL's labor practices violate antitrust laws implicitly rejected the League's argument that the benefits of competitive balance outweighed the labor system's restraints. *See id.*

II. LOADING THE GUN: OVERCOMING THE NONSTATUTORY LABOR EXEMPTION FROM FEDERAL ANTITRUST LAWS

Before the players can subject the NFL to antitrust scrutiny and fire their so-called AK-47, they must execute a number of steps to overcome a nonstatutory antitrust exemption that protects matters of collective bargaining from antitrust scrutiny. In broad terms, this exemption ceases to apply when the collective bargaining relationship between the players and the League terminates. However, establishing the termination of a collective bargaining relationship presents a task in and of itself.

There is an inherent conflict between labor laws and antitrust laws.[60] On the one hand, labor laws seek to advance uninterrupted bargaining between unions and multi-employer bargaining units.[61] Because multi-employer bargaining units ordinarily consist of the full set of employers for a certain class of workers, the bargaining necessarily restrains the free market for individual employee services.[62] On the other hand, antitrust laws seek to outlaw and punish such restraints.[63] Courts and legislatures have recognized this conflict and deferred to labor policy by limiting the application of antitrust laws in the labor context.[64] This deferral has resulted in the nonstatutory labor exemption.[65] The nonstatutory labor exemption prevents courts from applying antitrust laws to bargaining relationships between employers and unions.[66]

With regard to professional football, courts have used a three-part test to determine whether the nonstatutory labor exemption will

---

60. *See, e.g.*, Yu, *supra* note 30, at 185 ("The professional sports industry is a unique arena in which the conflict between antitrust laws and labour laws is magnified.").

61. *See generally* National Labor Relations Act, 29 U.S.C §§ 151–169 (2006) (codifying national labor policy with regard to unions and private sector labor).

62. Mackey v. NFL (*Mackey II*), 543 F.2d 606, 614 n.12 (8th Cir. 1976) ("[T]he very nature of a collective-bargaining agreement mandates that the parties be able to 'restrain' trade to a greater degree than management could do unilaterally." (citations omitted)).

63. *See generally* Sherman Act, 15 U.S.C. § 1 (2006) (making restraints on free trade illegal).

64. For an example of a statutory limitation on the application of antitrust liability in the labor context, see Clayton Act § 6, 15 U.S.C. § 17 (2006) ("The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations."). For an example of judicial limitations on the application of antitrust liability, see Powell v. NFL (*Powell II*), 930 F.2d 1293, 1301 (8th Cir. 1989) ("The Supreme Court has recognized that disputes over employment terms and conditions are not the central focus of the Sherman Act.").

65. *See, e.g.*, Brown v. Pro Football, Inc. (*Brown II*), 518 U.S. 231, 235–37 (1996) (discussing the history and reasoning behind the nonstatutory labor exemption).

66. *Powell II*, 930 F.2d at 1301.

apply and preclude the application of antitrust scrutiny. For the exemption to apply, the restraint in question must (1) "primarily affect[] only the parties to the collective bargaining relationship,"[67] (2) "concern[] a mandatory subject of collective bargaining,"[68] and (3) be a part of "arm's-length bargaining."[69] The players have not successfully overcome the exemption by pointing to a violation of either of the first two elements.[70] However, *Mackey v. NFL* (*Mackey II*)[71] plainly reveals that the players can use the third element, arm's length bargaining, to overcome the nonstatutory labor exemption.[72] Broadly speaking, the third element is satisfied as long as a collective bargaining relationship exists between the parties to a suit. Therefore, this element will only cease to exist when the collective bargaining relationship between the League and the players terminates, which in turn destroys the nonstatutory labor exemption.

A. *The* Powell *Precedent*

The most extensive judicial analysis of the point at which the collective bargaining relationship ceases to exist in professional football comes from the Eighth Circuit's decision in *Powell v. National Football League* (*Powell II*).[73] In this case, nine football players and the NFLPA brought an antitrust action against the NFL and its member clubs challenging the unilateral imposition of the League's "first refusal/compensation system," which substantially limited the extent to which players could obtain playing contracts on the free market.[74] The NFL and its clubs asserted that they could not

---

67. *Mackey II*, 543 F.2d at 614; *see* Yu, *supra* note 30, at 167–68 (summarizing the requirements of the nonstatutory labor exemption outlined in *Mackey II*).

68. *Mackey II*, 543 F.2d at 614.

69. *Id. But see Brown II*, 518 U.S. at 243 (explaining that the exemption applies to more than just "agreements" as articulated in *Mackey II*; rather, the exemption applies to any matters that are or have been the subject of the collective bargaining process).

70. *See, e.g.*, *Brown II*, 518 U.S. at 231–32.

71. 543 F.2d 606 (8th Cir. 1976).

72. *Id.* at 623 (holding that, based on a lack of "arm's-length bargaining," the nonstatutory labor exemption did not apply to a policy limiting free agents' ability to sign with another team).

73. 930 F.2d 1293 (8th Cir. 1989).

74. *Id.* at 1295. The League imposed the first refusal/compensation system after the expiration of the 1982 collective bargaining agreement, but without a subsequent agreement. *Id.* at 1295–96. Therefore, this labor system was unilaterally imposed during a period in which there was no effective collective bargaining agreement. The court defined the first refusal/compensation system as follows:

> The First Refusal/Compensation system provided that a team could retain a veteran free agent by exercising a right of first refusal and by matching a competing club's offer. If the old team decided not to match the offer, the old

be subject to the antitrust challenge because the nonstatutory labor exemption prevented such a challenge.[75] The players, however, argued that the exemption expired when the parties came to an impasse in their negotiations and that any restraint that the League subsequently imposed on the labor market was, therefore, subject to antitrust scrutiny.[76] The district court ruled in favor of the players, holding that the nonstatutory labor exemption expires upon an impasse in negotiations following the conclusion of a collective bargaining agreement.[77] However, the court of appeals reversed and allowed the nonstatutory labor exemption to extend beyond the point of impasse after the expiration of a collective bargaining agreement.[78] In support of this ruling, Judge John R. Gibson wrote:

> The labor arena is one with well established rules which are intended to foster negotiated settlements rather than intervention by the courts. The League and the Players have accepted this "level playing field" as the basis for their often tempestuous relationship, and we believe that there is substantial justification for requiring the parties to continue to fight on it, so that bargaining and the exertion of economic force may be used to bring about legitimate compromise .... We therefore hold that the present lawsuit cannot be maintained under the Sherman Act. Importantly, this does not entail that once a union and management enter into collective bargaining, management is forever exempt from the antitrust laws, and we do not hold that restraints on player services can never offend the Sherman Act. We believe, however, that the nonstatutory labor exemption protects agreements conceived in an ongoing collective bargaining relationship from challenges under the antitrust laws.[79]

The Eighth Circuit recognized that impasse was a "recurring feature in the bargaining process" and that it cannot necessarily end a bargaining relationship.[80] While the *Powell II* case did not explicitly state a triggering event that would terminate a bargaining

---

team would receive compensation from the new team in the form of additional draft choices.

Id.

75. *Id.* at 1295.

76. *Id.*

77. *See* Powell v. NFL (*Powell I*), 678 F. Supp. 777, 788 (D. Minn. 1988), *rev'd*, 930 F.2d 1293 (8th Cir. 1989).

78. *Powell II*, 930 F.2d at 1304.

79. *Id.* at 1303.

80. *Id.* at 1299 (citing Charles D. Bonanno Linen Serv., Inc. v. NLRB, 454 U.S. 404, 412–14 (1982)).

relationship, it held that "as long as there is a possibility that proceedings may be commenced before the [National Labor Relations] Board ... the labor relationship continues and the labor exemption applies."[81] This ruling has since served as the applicable standard with regard to the expiration of the nonstatutory labor exemption in professional sports.[82]

The crux of the existence of a collective bargaining relationship, and thus the applicability of the nonstatutory labor exemption, ultimately turns on whether the players have an active bargaining representative.[83] So long as the players have an active bargaining representative, the League and its member clubs will enjoy the protection of the nonstatutory labor exemption.[84] In effect, precedent suggests that the NFLPA must withdraw from its position as the bargaining representative for the players before the players can bring an antitrust action against the League. Furthermore, the *Powell II* ruling's specific discussion of the National Labor Relations Board ("NLRB") implies that the NFLPA must decertify as a union in order to overcome the nonstatutory labor exemption.[85]

B. Powell *to* McNeil

Prior to the *McNeil* case, the players followed *Powell II*'s guidance for overcoming the nonstatutory labor exemption and decertified the union.[86] Gene Upshaw, then executive director of the NFLPA, recognized the need to decertify in a letter to the NFL after the *Powell II* decision. In his letter he stated: "The NFLPA Executive Committee has voted to abandon bargaining rights and begin the decertification process. This action was made necessary by the Eighth Circuit's decision, which purports to extend the NFLPA's labor exemption to [the NFL's] illegal activities."[87]

It may appear that loading the players' so-called AK-47 merely requires a facial statement and certification that a collective bargaining relationship has terminated. However, it is important to

81. *Id.* at 1303–04.

82. *See* NBA v. Williams (*Williams II*), 45 F.3d 684, 686 (2d Cir. 1995) (affirming a district court decision that relied on *Powell II* in its determination that the nonstatutory labor exemption exists as long as there is a collective bargaining relationship); McNeil v. NFL, 790 F. Supp. 871, 883 (D. Minn. 1992) (recognizing the *Powell II* standard in determining the termination of the nonstatutory labor exemption).

83. *Powell II*, 930 F.2d at 1303–04 (discussing the continuity of the nonstatutory labor exemption so long as an active bargaining relationship is possible).

84. *See id.*

85. *See id.*

86. *McNeil*, 790 F. Supp at 883 n.14.

87. Will McDonough, *NFLPA Set to Disband?*, BOSTON GLOBE, Nov. 7, 1989, at 69.

consider that decertification[88] and the abandonment of the bargaining process "brings with it other consequences, namely the elimination of many federal labor remedies."[89] In the absence of a union that serves as the collective bargaining representative, players also abandon their unified front with regard to benefits, pension plans, and many other issues. In addition, players must act as individual contractors in their negotiations with teams, which can create a tremendous imbalance of power. In actuality, decertification requires a true gut-check by the players and exposes them to a potentially unfavorable labor environment.[90]

If the players are able to overcome the intimidating prospect of decertification and decide to abandon the collective bargaining relationship with the League, they will effectively overcome the nonstatutory labor exemption and load a powerful legal weapon that they can then use to expose the NFL to antitrust scrutiny.

III. PULLING THE TRIGGER: DRAFTING THE PLAYERS' COMPLAINT AND LEGAL ARGUMENT

After the players have overcome the nonstatutory labor exemption, they will be able to challenge several specific aspects of the NFL's labor system in an antitrust complaint. This Part outlines these specific allegations and evaluates the strengths and weaknesses of each.

A. Assumptions

The allegations in an antitrust complaint by the players will largely depend on the landscape of the labor environment at the time of its drafting. Therefore, this Comment addresses the most likely

88. *See* Pioneer Natural Res. USA, Inc. v. Paper, Allied Indus., Chem. & Energy Workers Int'l Union Local 4-487, 338 F.3d 440, 441–42 (5th Cir. 2003) (discussing the effect of National Labor Relations Board ("NLRB") decertification); *see also* PROCEDURES GUIDE, NATIONAL LABOR RELATIONS BOARD (2009), http://www.nlrb.gov/publications/Procedures_Guide.htm (describing the NLRB's certification and decertification of a recognized bargaining representative).

89. NBA v. Williams (*Williams I*), 857 F. Supp. 1069, 1078 (S.D.N.Y. 1994), *aff'd*, 45 F.3d 684 (2d Cir. 1995).

90. These intimidating circumstances surrounding decertification led players in the National Basketball Association ("NBA") to vote against decertification during the basketball strike of 1994. Motion of the National Hockey League Players Ass'n et al. for Leave to File Brief as Amici Curiae and Brief Amici Curiae in Support of Petitioners, Brown v. Pro Football, Inc. (*Brown II*), 518 U.S. 231 (1996) (No. 95-388), 1996 WL 27682, at *14 [hereinafter Motion & Brief Amici Curiae of National Hockey League Players Ass'n et al.] (discussing the NBA players' decision not to decertify the players union to overcome the nonstatutory labor exemption).

scenario under which the players would bring a complaint. While the following assumptions apply specifically to the current landscape, they also represent the most likely scenario under which an antitrust lawsuit will be brought in the event that *any* collective bargaining agreement expires in the future.[91]

The discussion of this hypothetical complaint is based on the following substantive assumptions: (1) the NFL and the NFLPA will not extend the current collective bargaining agreement before it expires at the end of the 2010 league year, making the League go through an "uncapped year";[92] (2) the League will unilaterally implement a labor system substantially similar to that of the capped years of the expired collective bargaining agreement;[93] and (3) the NFLPA and the League will come to an impasse in their negotiations and the NFLPA will decertify and withdraw as the collective bargaining representative for the players. This Comment also makes a number of technical assumptions, including: (1) the players will file suit in the Fourth Division of Minnesota's United States District Court, Judge David S. Doty presiding;[94] (2) the players will file suit

91. In other words, if the NFL and the NFLPA avoid litigation by extending the current agreement, this Comment's analysis will remain relevant to the potential expiration of the next agreement. The only way that an extension could affect the relevancy of this Comment would be if a new agreement eliminated the salary cap, free agency, the NFL draft, and the entering player pool, which is highly unlikely to happen absent the type of litigation that this Comment examines.

92. *See* NFL COLLECTIVE BARGAINING AGREEMENT 2006–2012, art. LVI, § 1, at 237 (2006) [hereinafter CBA], *available at* http://www.nflplayers.com/images/fck/NFL%20COLLECTIVE%20BARGAINING%20AGREEMENT%202006%20-%202012.pdf ("No Salary Cap shall be in effect during the Final League Year.").

93. *See* Powell v. NFL (*Powell II*), 930 F.2d 1293, 1300 (8th Cir. 1989) ("Before the parties reach impasse in negotiations, employers are obligated to 'maintain the status quo as to wages and working conditions.'" (quoting Producers Dairy Delivery Co. v. W. Conference of Teamsters Trust Fund, 654 F.2d 625, 627 (9th Cir. 1981) (citation omitted))). Absent an impasse, the League could not implement a salary cap because the final year of the current agreement is uncapped. However, once an impasse is reached, employers have four options: "(1) maintain the status quo, (2) implement their last offer, (3) lock out their workers (and either shut down or hire temporary replacements), or (4) negotiate separate interim agreements with the union." Brown v. Pro Football, Inc. (*Brown II*), 518 U.S. 231, 245 (1996). In making the assumption that the League will implement a system similar to that of the uncapped years of the expired agreement, this Comment implicitly assumes that the League made offers prior to impasse to create such a system. In *Powell II*, the court held that "[a]fter impasse, an employer may make unilateral changes that are reasonably comprehended within its pre-impasse proposals." 930 F.2d at 1302 (citing Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 544 n.5 (1988) (citation omitted)).

94. White v. NFL, No. 4-92-906 (DSD), 2008 WL 1827423, at *1 (D. Minn. Apr. 22, 2008) (noting that the Fourth Division of the Minnesota United States District Court (David Doty's court) retains express jurisdiction to "effectuate and enforce" the *White* settlement, which produced the modern collective bargaining agreement between the NFL

shortly after the end of the 2010 season; and (3) this suit will be a class action and the court will certify the class action prior to the commencement of an adjudication of the merits of the complaint, pursuant to the requirements delineated in Rule 23 of the Federal Rules of Civil Procedure.[95]

Under these assumptions, Part II.B of this Comment addresses the nature and substance of the players' antitrust complaint with regard to specific elements of the League's current labor system—namely, the League-wide salary cap, free agency, the entering player pool, and the college draft.[96]

---

and the NFLPA). While it is not "required" that this hypothetical lawsuit be brought before Judge Doty—since the current agreement will have expired—Judge Doty's expertise on these matters and historically favorable rulings for the players on interpretive issues relating to prior collective bargaining agreements make him an appealing adjudicator for the plaintiffs in the case (the players). Doty's player bias recently became so apparent that the League challenged Doty's ongoing authority over collective bargaining matters, alleging bias and prejudice. *See id.* at *6 (denying NFL's motion for Doty's court to vacate a prior judgment and remove itself from the case or terminate its continuing jurisdiction over collective bargaining issues, under the allegation that the court has demonstrated bias and prejudice). Therefore, as a practical matter, the players will almost certainly file before Judge Doty, and the League will have a very limited ability to transfer the case to another venue.

95. *See* FED. R. CIV. P. 23. This class action assumption represents an important distinction between this hypothetical suit and the *McNeil* case. The *McNeil* case was not a class action lawsuit, but rather an individual suit brought on behalf of eight players. McNeil v. NFL, 790 F. Supp. 871, 875 (D. Minn. 1992) ("Plaintiffs, eight individual football players whose contracts with their NFL employers expired on February 1, 1990, assert various claims . . . ."). However, the *McNeil* case was almost immediately followed by the class action *White v. NFL*. *See* White v. NFL, 822 F. Supp. 1389, 1394 (D. Minn. 1993) ("Plaintiffs filed the present antitrust class action on September 21, 1992, less than two weeks after a jury rendered its verdict in *McNeil v. National Football League*."). The hypothetical lawsuit in this Comment assumes that the court will certify a class almost identical to the one certified in the *White* case and is intended to encompass past, present, and future NFL players. In *White* the court certified a class consisting of:

> (i) all players who have been, are now, or will be under contract to play professional football for an NFL club at any time from August 31, 1987 to the date of final judgment in this action and determination of any appeal therefrom, and (ii) all college and other football players who, [during the same time period], have been, are now, or will be eligible to play football as a rookie for an NFL team.

Id. at 1395 n.4.

96. The allegations in the hypothetical complaint that follows address a few specific systems within the current collective bargaining agreement: the League-wide salary cap, restricted free agency, franchise and transition tags, the entering player pool, and the college draft. While each of these topics is discussed in much greater detail later, it is important to note that these systems are analyzed assuming that the League unilaterally implements them *exactly* as they have been defined and as they operate under the current agreement.

B. *Specific Allegations*

1. Salary Cap

The NFL operates under what many people refer to as a "hard" salary cap.[97] This means that a team's total player salary cannot exceed the salary cap under any circumstances.[98] Unlike other major sports leagues in which a tax or fine is levied against teams that go over a prescribed amount of total team compensation,[99] the NFL will not approve transactions which put a team's salary above that team's salary cap number.[100] Along the same lines, the NFL has the right to cut players from a club's roster in the event that the club does not comply with the salary cap.[101]

Table 1: Salary Cap Values[102]

Year	Salary Cap
2006	$102 million
2007	$109 million
2008	"57.5% of Projected Total Revenues, less League-wide Projected Benefits, divided by the number of Teams [in the League]"
2009	"57.5% of Projected Total Revenues, less League-wide Projected Benefits, divided by the number of Teams [in the League]"
2010	No Salary Cap

97. *See* Alexander A. Jeglic, *Can the New Collective Bargaining Agreement Save the NHL?*, 23 ENT. & SPORTS LAW. 1, 26 (2005) (discussing the NFL's hard cap in comparison to salary caps in other sports leagues).

98. Ryan T. Dryer, Comment, *Beyond the Box Score: A Look at Collective Bargaining Agreements in Professional Sports and Their Effect on Competition*, 2008 J. DISP. RESOL. 267, 282 (2008).

99. *See* Robert Holo & Jonathan Talansky, *Taxing the Business of Sports*, 9 FLA. TAX REV. 161, 204 n.158 (2008) (discussing the luxury tax associated with NBA's salary cap in comparison with the NFL's salary cap); *see also* John C. Graves, *Controlling Athletes with the Draft and the Salary Cap: Are Both Necessary?*, 5 SPORTS LAW. J. 185, 195–96 (1998) (summarizing salary cap schemes in the NBA, MLB, and NFL). *But see* Stephen M. Yoost, Note, *The National Hockey League and Salary Arbitration: Time for a Line Change*, 21 OHIO ST. J. ON DISP. RESOL. 485, 530 ("The NHL's new hard cap is even more restrictive than the MLB's soft cap; the new CBA prohibits NHL teams from exceeding the cap by paying a luxury tax, as the rich teams in baseball do.").

100. *See* CBA, *supra* note 92, art. XXV, § 4, at 145–46.

101. *Id.* art. XXV, § 6, at 146.

102. *Id.* art. XXIV, § 4(a), at 96 (defining the salary cap for the years covered by the current collective bargaining agreement). This chart also takes the owners' recent opt-out into account, which could result in an uncapped year in 2010. Clayton, *supra* note 16.

Table 1 summarizes salary cap values for the 2006– 2010 seasons, as defined by the current collective bargaining agreement.

These salary cap amounts apply to each NFL team, with a few adjustments.[103] Notice that in 2008 and 2009, the salary cap is determined as a function of projected total revenue for the NFL as a whole.[104] At the end of every League year, the NFL announces the salary cap for the League year after the following League year.[105] For example, the NFL announced the 2008 salary cap prior to the end of the 2006 League year.[106] The 2008 and 2009 salary cap numbers were announced at $116 million and $123 million, respectively.[107]

The NFLPA has expressed its displeasure with the salary cap system and its intention to eliminate such a system. In the spring of 2008, the late Gene Upshaw stated, "I never wanted a cap in the first place. And I never will try to sell the players on one again."[108] In their complaint, the players will want to allege that the League's unilateral imposition of a salary cap is an unreasonable restraint on free trade. The allegation might read as follows:

> The National Football League's unilateral imposition of a salary cap that strictly limits the amount that each member club may spend on player services violates § 1 of the Sherman Act as an unreasonable restraint on the relevant market for services of major league professional football players in the United States. 15 U.S.C. § 1.

To make this allegation successful, the players will have to make arguments according to the rule of reason.[109] The *McNeil* case provides the best template for the proof that they will need to offer.[110] A successful argument will establish, by a preponderance of the

---

103. CBA, *supra* note 92, art. XXIV, § 4, at 96–101. Technically speaking, each team may have a different salary cap number depending on adjustments for cash spent over the salary cap in prior years. *See id.* art. XXIV, § 4(a)(ii), at 96. The Cap Adjustment Mechanism ("CAM") is a new and fairly complicated system which discourages significant discrepancies between the cash a team pays its players in a League year and the salary cap for that League year. *See id.* art. XXIV, § 4(d), at 97.

104. *Id.* art. XXIV, § 4(a), at 96. For more information on calculating projected total revenue, see *id.* art. XXIV, § 1(a)(i), at 82.

105. *Id.* art. XXIV, § (4)(b)(ii), at 96.

106. Len Pasquarelli, *NFL Salary Cap Rising by $7 Million for 2008 Season*, ESPN.COM, Dec. 7, 2006, http://sports.espn.go.com/nfl/news/story?id=2689784 ("Salary cap managers for several NFL teams say they were apprised this week that the league spending limit will rise to $116 million per franchise for the 2008 season.").

107. Daniel Kaplan & Liz Mullen, *Owners: Cap Not Absolutely Necessary*, SPORTS BUS. J., Apr. 7, 2008, at 1, *available at* http://www.sportsbusinessjournal.com/article/58586.

108. *Id.*

109. *See supra* text accompanying notes 34–46, 55–58.

110. *See infra* text accompanying notes 148–54.

evidence, that: (1) the salary cap has a "substantially harmful effect" on the competition for player services, and (2) the harmful effects on this market "outweigh any beneficial effects on that competition."[111]

The salary cap will likely present a difficult legal battle for the players because they will not have the benefit of precedent on their side. Salary caps in sports leagues have rarely been considered under antitrust scrutiny due to courts' rigorous application of the nonstatutory labor exemption.[112] The only time a court has scrutinized a salary cap under the merits of antitrust law was at the district court level in *NBA v. Williams* (*Williams I*).[113] However, the court's discussion of the merits of an antitrust challenge in that case was merely dicta because the holding of the case—that antitrust liability would not apply to the league—was based on the application of the nonstatutory labor exemption.[114] Furthermore, the *Williams I* court noted that a salary cap was a reasonable restraint, finding that it would not violate antitrust laws even if the nonstatutory labor exemption did not apply.[115]

---

111. *McNeil Verdict*, *supra* note 4, at *3.

112. *See, e.g.*, Brown v. Pro Football, Inc. (*Brown II*), 518 U.S. 231, 250 (1996) (refusing to apply antitrust laws to the NFL's wage system due to the nonstatutory labor exemption); Wood v. NBA, 809 F.2d 954, 959 (2d Cir. 1987) (denying the application of antitrust laws to a challenge of the National Basketball League's ("NBA") salary cap in part because of the nonstatutory labor exemption); NBA v. Williams (*Williams I*), 857 F. Supp. 1069, 1078 (S.D.N.Y. 1994) (holding that the NBA salary cap does not violate antitrust laws because of the nonstatutory labor exemption), *aff'd*, 45 F.3d 684 (2d Cir. 1995).

113. 857 F. Supp. at 1078–79.

114. *Id.* at 1078 ("Antitrust immunity exists as long as a collective bargaining relationship exists. Accordingly, the NBA is granted the declaration it seeks—the continued implementation of these challenged measures by the NBA do not violate the antitrust laws as long as the collective bargaining relationship exists." (citation omitted)). On appeal, the Second Circuit affirmed the district court's ruling and declined to comment on the merits of the salary cap under an antitrust analysis. NBA v. Williams (*Williams II*), 45 F.3d 684, 688 (2d Cir. 1995) ("Because the Players' position appears to be inconsistent with the approach taken under the antitrust laws regardless of labor law and, in any event, collides head-on with the labor laws' endorsement of multiemployer collective bargaining, we conclude that the Players' claim must fail. We need not, therefore, address the various arguments pro and con regarding the Rule of Reason.").

115. *Williams I*, 857 F. Supp. at 1078 ("It appears that even if the nonstatutory exemption did not apply, the Players' charge of a *per se* violation of § 1 of the Sherman Act, 15 U.S.C. § 1, is insufficient to carry the day."). The court went on to say:

> Even under a rule of reason analysis, however, it appears that the Players have failed to show that the alleged restraints of trade are on balance unreasonably anti-competitive. The pro-competitive effects of these practices, in particular the maintenance of competitive balance, may outweigh their restrictive consequences. Indeed, the Salary Cap seems to operate as a mechanism to distribute 53 per cent defined gross revenue to the Players.

Despite unfavorable precedent, the players can still form a sound argument against the salary cap. To combat the dicta in *Williams I*, the players can point to a few distinguishing factors. First, *Williams I* dealt with professional basketball, which involves a different business model than professional football.[116] As a result, the players may argue that any discussion of the harmful effect of a salary cap in professional basketball is irrelevant to the harmful effect of a salary cap in professional football. Second, the NFL will have gone through a year without a salary cap before the League unilaterally implements the salary cap that the players will challenge.[117] In *Williams I*, on the other hand, the National Basketball Association ("NBA") had continuously operated under a salary cap.[118] Therefore, the NFL players will have the benefit of pointing to the competitive environment of the League without a salary cap, whereas the NBA players in *Williams I* had no such benefit. Absent any catastrophic imbalance, the experience of the uncapped year will help the players argue against the salary cap's beneficial effect on competition. Specifically, the players will argue that the salary cap imposes a harmful effect on competition for players' services. This argument should not be difficult to prove. A salary cap implicitly reduces price competition among the clubs with regard to player services.[119] In terms of measurable harm, it reduces the amount of compensation that the players receive.[120]

To attack the benefit of the NFL's salary cap, the players will want to point to the competitive balance of other sports leagues that do not operate under the hard cap to which the NFL adheres.[121] Furthermore, the players may want to introduce evidence as to how those leagues decided on their labor systems. For example, the NHL

Id. at 1079.

116. *See, e.g.*, Dryer, *supra* note 98, at 286 (discussing the differences between different sports leagues).

117. *See supra* text accompanying notes 16, 102. The current collective bargaining agreement's requirement that the final year of the agreement be an uncapped year reflects commendable preemptive legal strategy by the NFLPA because it implicitly creates a favorable argument against a salary cap for the players in an antitrust lawsuit, thus enhancing the players' leverage in negotiations for an extension as the expiration date approaches.

118. *Williams I*, 857 F. Supp. at 1072–73.

119. Thomas A. Piraino, Jr., *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U. L. REV. 889, 937 (1999).

120. *Id.*

121. *See* Jeglic, *supra* note 97, at 25–27; Piraino, *supra* note 119, at 937 ("With respect to salary caps, less restrictive alternatives are available to promote competitive balance."). Competitive balance refers to the ability of teams of roughly equal size and strength to compete meaningfully with each other. *See* Piraino, *supra* note 119, at 893 n.14.

union argued that its owners avoided unilaterally imposing a salary cap for fear of the antitrust implications.[122]

2. Free Agency System

Unlike the salary cap allegation, the players will enjoy an abundance of favorable precedent with regard to their allegation that the free agency system violates antitrust laws.[123] The NFL's current free agency system has several components that directly align with prior systems which courts ruled were unreasonable restraints on trade. The *Mackey* and *McNeil* cases, in particular, will provide the players with significant ammunition in their arguments against the NFL's free agency system.

Before applying precedent to the antitrust analysis of the current system, it is first important to understand how the system works. Articles XVIII, XIX, and XX of the current collective bargaining agreement summarize the NFL's free agency system.[124] Free agency currently operates under a three-tiered system. The tiers are determined by the number of seasons a player has accrued in the League.[125] While "accrued seasons" has a very technical definition,[126] it can be summarized as the number of seasons a player has played in the NFL.

Players with fewer than three accrued seasons will fall into the first tier of the system, referred to as an "exclusive rights free

---

122. Motion & Brief Amici Curiae of National Hockey League Players Ass'n et al., *supra* note 90, at *15 ("The NHL clubs, however, did not unilaterally impose a salary cap or tax—even after an impasse in the negotiations had been reached—because of their belief that the antitrust laws would apply.").

123. The free agency system designates the freedom particular players have to negotiate or sign contracts with other teams. *See* CBA, *supra* note 92, art. I, § 2 (defining "Free Agent").

124. *Id.* art. XVIII ("Veterans with Less than Three Accrued Seasons"); *id.* art. XIX ("Veteran Free Agency"); *id.* art. XX ("Franchise and Transition Players"). It is important to note that this Comment assumes that the NFL will implement a free agency system as if the League were in a capped year. *See supra* text accompanying notes 91–95. This will be significant with regard to the number of accrued seasons required to trigger restricted and unrestricted free agency. In an uncapped year, the accrued season requirements increase for both of these categories. *See* CBA, *supra* note 92, art. LVI (outlining the changes in accrued season requirements for free agency in an uncapped year).

125. *See* CBA, *supra* note 92, arts. XVII–XIX.

126. *See id.* art. XVIII, § 1(a), at 56 ("For the purposes of calculating Accrued Seasons under this Agreement, a player shall receive one Accrued Season for each season during which he was on, or should have been on, full pay status for a total of six (6) or more regular season games, but which, irrespective of the player's pay status, shall not include games for which the player was on: (i) the Exempt Commissioner Permission List, (ii) the Reserve PUP List as a result of a nonfootball injury, or (iii) a Club's Practice or Development Squad.").

agent."[127] Upon the expiration of their playing contracts, these players may negotiate or sign a new contract only with their prior club, so long as the club tenders the player a one-year minimum salary contract.[128] Only if no such tender is made may these players test the free agent market.[129] As a result, exclusive rights free agents, whose value to a club might surpass that of a minimum salary player, rarely have an opportunity to test the free agent market.

The second tier of the system consists of players who have achieved three accrued seasons. These players are referred to as "restricted free agents."[130] A restricted free agent's prior club may protect its rights to such a player after the expiration of that player's contract by subscribing to a list of specific contract offers known as "qualifying offers."[131] Each qualifying offer corresponds with a right of first refusal and/or draft choice compensation to the tendering club in the event that the player negotiates and signs a new contract with another club.[132] For example, say a player accrues three seasons in the NFL and his contract expires with his prior club. The prior club then tenders this player a qualifying offer for a right of first refusal and one first round draft selection.[133] If this player then negotiates and signs a contract with another club, the contract will not become effective unless the prior club declines to exercise its right of first refusal and the new club tenders a first round draft choice to the prior club.

The third tier of the system consists of players who have accrued at least four seasons in the NFL. These players are referred to as "unrestricted free agents" and, upon the expiration of their playing contracts, they may negotiate and sign with any club with very few limitations.[134] The most significant limitation on unrestricted free agency is the potential for a team to designate an unrestricted free

127. *See, e.g.*, Scott E. Backman, *NFL Players Fight for Their Freedom: The History of Free Agency in the NFL*, 9 SPORTS LAW. J. 1, 46 (2002) (discussing exclusive rights free agents).

128. CBA, *supra* note 92, art. XVIII, § 2, at 56 ("Any Veteran with less than three Accrued Seasons whose contract has expired may negotiate or sign a Player Contract only with his Prior Club, if on or before March 1 his Prior Club tenders the player a one-year Player Contract with a Paragraph 5 Salary of at least the Minimum Active/Inactive List Salary applicable to that player.").

129. Backman, *supra* note 127, at 46–47.

130. CBA, *supra* note 92, art. XIX, § 2, at 58.

131. *Id.*

132. *Id.* art. XIX, § 2, at 58–62.

133. The qualifying offer for these rights ("Right of First Refusal and One First Round Draft Selection") in 2009 would be for a one-year contract of $2,198,000. *See id.* art. XIX, § 2(b)(i)(4), at 59.

134. *See id.* art. XIX, § 1, at 57–58 ("Unrestricted Free Agents").

agent as a "franchise" or "transition" player.[135] The current agreement allows each team to designate one franchise player and one transition player.[136] To designate a franchise player, a team must make one of two qualifying tender offers to the player.[137] The club may choose to offer the exclusive franchise tender, which prevents the player from negotiating or signing a contract with any other club.[138] Alternatively, the club may choose to offer the nonexclusive franchise tender, which grants the club a right of first refusal on contracts negotiated with other clubs in addition to compensation of two first-round draft picks from the signing club.[139] From a technical standpoint, there is a difference between the two offers; from a practical standpoint, however, both the exclusive and nonexclusive franchise tenders almost always yield the same result—the player will not sign with another club.[140] The current system also gives clubs the ability to designate up to two players as transition players[141] by tendering each player a one-year contract for the greater of the "average of the ten Largest Prior Year salaries" at his position or 120 percent of his prior year salary.[142] This designation allows for clubs to obtain a right of first refusal on players who would otherwise become unrestricted free agents.[143]

These elements of NFL free agency—the three-tiered system and franchise/transition designations—contain significant similarities to systems that the players have successfully challenged in the past.

135. *Id.* art. XX, §§ 1, 3, at 68, 70–71. Teams may also use franchise and transition designations on restricted free agents. *Id.*

136. *See id.*

137. *Id.*

138. The exclusive franchise designation requires a tender offer for either 120 percent of the player's prior year salary or "the average of the five largest Salaries . . . *for that League Year as of the end of the Restricted Free Agent Signing Period*" for players at his position, whichever is greater. *Id.* art. XX, § 2(a)(ii), at 68 (emphasis added).

139. The nonexclusive franchise designation requires a tender offer for either 120 percent of the player's prior year salary or the "average of the five largest *Prior Year* Salaries" at the player's position. *Id.* art. XX, § 2(a)(i), at 68 (emphasis added). Notice that the difference between the exclusive and nonexclusive tenders lies in the use of prior year salaries and current year salaries used to compute the average of the five largest salaries.

140. For additional commentary on the franchise and transition designations, see Dryer, *supra* note 98, at 283–85 (summarizing the franchise and transition designations).

141. Clubs may designate only one transition player if they have designated a franchise player. CBA, *supra* note 92, art. XX, § 3(a), at 70–71. However, clubs may designate two transition players if they have not used the franchise player—one of the transition designations may be made "in lieu of designating a Franchise Player." *Id.*

142. *See id.* art. XX, § 4(a), at 71 (describing the "Required Tender for Transition Players").

143. *Id.* art. XX, § 3(b), at 71 ("Any Transition Player shall be completely free to negotiate and sign a Player Contract with any Club . . . subject only to the Prior Club's Right of First Refusal . . . .").

More specifically, these elements of the free agency system are comparable to the "Rozelle Rule," which was found to have violated antitrust laws in *Mackey II*,[144] and "Plan B Free Agency," which was found to have violated antitrust laws in the *McNeil* verdict.[145] In *Mackey II*, the Eighth Circuit addressed the NFL's unilaterally-imposed Rozelle Rule, which stated:

> Whenever a player, becoming a free agent . . . signed a contract with a different club in the League, then, unless mutually satisfactory arrangements have been concluded between the two League clubs, the Commissioner may name and then award to the former club one or more players, from the Active, Reserve, or Selection List (including future selection choices) of the acquiring club as the Commissioner in his sole discretion deems fair and equitable . . . .[146]

The court applied the rule of reason standard and upheld a bench trial ruling that the Rozelle Rule violated antitrust laws as an unreasonable restraint on the market for player services.[147]

The *McNeil* decisions, on the other hand, addressed the antitrust ramifications of Plan B Free Agency, which allowed for each team to—at its discretion—restrict the movement of thirty-seven of its forty-seven players via a right of first refusal/compensation system.[148] District court Judge David Doty described the right of first refusal/compensation system in *Powell v. National Football League* (*Powell I*)[149]:

> Under the Right of First Refusal/Compensation system, every NFL club retains rights to "its players" even though, in the case of veteran free agents, contractual rights to a player no longer exist. When a veteran player's contract has expired and a competing NFL club makes an offer to that player, the player's

144. Mackey v. NFL (*Mackey II*), 543 F.2d 606, 622 (8th Cir. 1976).

145. *McNeil Verdict*, *supra* note 4, at *1–2.

146. *Mackey II*, 543 F.2d at 610–11.

147. *Id.* at 620–22 (applying the rule of reason to the Rozelle Rule); *see also* Mackey v. NFL (*Mackey I*), 407 F. Supp. 1000, 1003–11 (D. Minn. 1975) (discussing the findings of fact and issuing a bench trial judgment), *aff'd in part and rev'd in part*, 543 F.2d 606 (8th Cir. 1976).

148. McNeil v. NFL, 790 F. Supp. 871, 875–78 (D. Minn. 1992); Powell v. NFL (*McNeil I*), 764 F. Supp. 1351, 1354–59 (D. Minn. 1991). Although captioned as *Powell v. NFL*, 764 F. Supp. 1351 (D. Minn. 1991), this case is a consolidated case involving the *McNeil* plaintiffs and focused primarily on the issues ultimately decided in *McNeil v. NFL*, 790 F. Supp. 871 (D. Minn. 1992). As such, all short form references to this *Powell v. NFL* disposition will use *McNeil I*.

149. 678 F. Supp. 777 (D. Minn. 1988), *rev'd on other grounds*, 930 F.2d 1293 (8th Cir. 1989).

> old team may keep the player simply by matching the competing offer; the player's old club therefore is said to have a "right of first refusal" as to the player's services. If the competing offer is large enough, and the club to which the player was previously under contract does not choose to match a competing offer, the old club will receive draft choice "compensation" which may be extremely costly to the acquiring club. Plaintiffs allege that in addition to restraining player movement, this system has effectively eliminated competition among NFL clubs for player services.[150]

The jury granting the *McNeil* verdict found that this system had a "substantially harmful effect on competition" for player services and that it was "more restrictive than reasonably necessary."[151] These findings led to the conclusion that Plan B Free Agency did, in fact, violate antitrust laws under a rule of reason analysis.

Players quickly tested the *McNeil* decision's credibility. In *Jackson v. NFL*,[152] filed just four days after the *McNeil* verdict, four players sought to enjoin the League from restricting them under Plan B Free Agency on the basis of a collateral estoppel argument in connection with the *McNeil* outcome.[153] The court found in favor of the plaintiffs and denied the League an opportunity to relitigate the issue as to whether Plan B Free Agency violated antitrust laws.[154]

These three cases—*Mackey II*, *McNeil*, and *Jackson*—provide the players with persuasive precedent that supports an allegation that the League's three-tiered free agency system and franchise/transition designations violate antitrust laws. The current system operates on the same foundation as systems that the court found were illegal in *Mackey II* and *McNeil*. The current system, like the Rozelle Rule and Plan B Free Agency, grants teams the opportunity to restrict player movement via a right of first refusal and compensation.[155] The players will want to draw as many parallels as possible to the Rozelle Rule and Plan B Free Agency and might even argue that the similarities are so substantial that collateral estoppel should apply and deny the

---

150. *Id.* at 779.

151. *McNeil Verdict*, *supra* note 4, at *1.

152. 802 F. Supp. 226 (D. Minn. 1992).

153. *Id.* at 228–29 ("Relying on the jury's findings in the *McNeil* case as the basis for the application of the doctrine of collateral estoppel, plaintiffs also contend that they demonstrate a substantial likelihood of success on the merits of their claims . . . .").

154. *Id.* at 229–30 (granting the use of offensive collateral estoppel with regard to the legality of Plan B Free Agency).

155. *See supra* notes 144–51 and accompanying text (discussing the Rozelle Rule and Plan B Free Agency).

League the opportunity to relitigate the question of whether the current system violates antitrust laws.

Challenging the legality of exclusive rights free agency, on its own, should be easy for the players to do. This system explicitly prevents players from testing the market for their services. An example can best illustrate the damages associated with such a system. Suppose an undrafted rookie offensive lineman signed a two-year free agent contract with the Carolina Panthers in 2006. Furthermore, suppose that player accrues two seasons and starts for the National Football Conference ("NFC") at offensive guard in both seasons' Pro Bowls. After the completion of the 2007 season, the Panthers would be able to keep this player and prevent him from testing the free agent market by offering him a one-year contract for the League minimum of $445,000.[156] In contrast, Alan Faneca—who started at offensive guard for the American Football Conference ("AFC") during the same two Pro Bowls—obtained a five-year free agent contract from the New York Jets worth $40 million, $21 million of which is guaranteed.[157] This example shows the substantial disparity that can occur between two arguably comparable players due to the restraints of exclusive rights free agency.

Similar arguments to the one set forth above could be made with regard to restricted free agents.[158] As a continuation of the example discussed above, suppose the same player accrues a third season under his exclusive rights contract and is voted to the Pro Bowl again. The Panthers could essentially prevent the player from testing the free market by tendering him a one-year contract of $3.043 million, which represents the qualifying tender offer for right of first refusal, a first round draft pick, and a third round draft pick.[159] By limiting the player's ability to test the free agent market, the club has again deprived him of potentially earning the type of money that Faneca earned the year before. Furthermore, this example goes to show how the tiered system suppresses the franchise and transition designations. Keeping this star-caliber offensive lineman out of the free agent market means that there will be one less contract to pull up the

156. *See* CBA, *supra* note 92, art. XXXVIII, § 6, at 179 (charting minimum salaries for specific years according to accrued seasons).

157. Rich Cimini, *Jets Sign Alan Faneca to Richest Free-Agent Deal in Team History*, N.Y. DAILY NEWS, Mar. 1, 2008, http://www.nydailynews.com/sports/football/jets/2008/03/01/2008-0301_jets_sign_alan_faneca_to_richest_freeage.html (describing Alan Faneca's contract with the New York Jets).

158. *See supra* notes 130–33 and accompanying text.

159. *See* CBA, *supra* note 92, art. XIX, § 2(b)(i)(5), at 59.

average of the top-five player salaries that teams have to tender to designate a franchise player.

While the players will want to itemize their complaint to address each of the elements of the free agency system individually, they will also want to argue at trial that the system as a whole creates a self-perpetuating harm, as evidenced in the example above. The players will want to argue that the limitations directly prevent top-tiered players from achieving their true market value due to the absence of price competition between clubs. In addition, the players will want to argue that the effect on top-tiered players creates a trickle-down effect that suppresses the market for all other players.

To satisfy their burden under the rule of reason, the players will need to rebut the League's argument that exclusive rights, restricted free agency, and the franchise/transition designations create competitive benefits. In making this argument, the players will have to prove that the restraints are more restrictive than reasonably necessary to maintain competitive balance in the NFL because the League will argue that the benefit of competitive balance outweighs any harm cause by the labor restraints. The outcomes in *Mackey II* and *McNeil* suggest that first refusal/compensation-based systems are not necessary to maintain competitive balance in the League.[160] For this reason, these cases will provide a strong platform on which the players should base their arguments.

The players should take a piecemeal approach in their complaint, addressing each of the individual components of the current system as a separate and distinct violation of antitrust laws, as opposed to a broad and singular challenge to the free agency system as a whole. By taking this approach, the players can achieve incremental victories, even if a court agrees with the League on certain issues.

3. Entering Player Pool

Prior to submitting the case to the jury, the court in *McNeil* ruled on several issues presented for summary judgment. One of these issues surrounded the potential threat of a unilaterally imposed wage scale, which would have eliminated all individual player contract negotiations.[161] The court held that "a wage scale would likely injure plaintiffs by eliminating their ability to engage in individual salary negotiations with their NFL employers and that the injury is of the

160. *See* Mackey v. NFL (*Mackey II*), 543 F.2d 606, 621–22 (8th Cir. 1976); McNeil v. NFL, 790 F. Supp. 871, 877 (D. Minn. 1992).

161. *McNeil*, 790 F. Supp. at 878 (describing one bargaining proposal with a wage scale that prohibited individual contract negotiations after 1993).

type that the Sherman Act was designed to prevent."[162] The court declined to grant summary judgment on the plaintiffs' claim concerning the wage scale because the wage scale had not been implemented and was merely a part of a proposal in the negotiations between the NFLPA and the NFL.[163] However, in its rejection of the motion for summary judgment, the court left the door open for future intervention relating to wage scales: "[D]efendants concede: '[t]his court's refusal to enter a permanent injunction against a League-wide wage scale here would not preclude a challenge should the League implement such a system—or take concrete steps to do so—at a later time.' "[164]

In its complaint against the NFL, the players might turn to the above-quoted language and challenge the League's "entering player pool" as a de facto wage scale.[165] The entering player pool effectively serves as a rookie salary cap within the larger salary cap. The pool imposes a constraint only on the first year salary cap numbers of drafted rookies.[166] All salary cap values for the years beyond the rookie season are limited only by the team's total salary cap.[167] The League-wide entering player pool increases from year to year by the same percentage as the projected total League-wide revenue and, similar to the larger salary cap, the League treats the entering player pool as a hard cap that teams may not exceed.[168] Each team then receives an allocation of this pool "based on the number, round, and position of the club's selection choices in the draft."[169] When the League notifies a team of its rookie allocation, team officials receive the total entering player pool number for the team but are not given any suggested values for the individual rookies.[170]

While the entering player pool does not necessarily conform with the strict wage scale that the court addressed in *McNeil*—in which the League proposed to completely abandon all individual player contract negotiations—it arguably represents a "concrete step"

---

162. *Id.* at 877.

163. *Id.* (declining to grant summary judgment due in part to plaintiffs' failure to show the "immediacy concerning the implementation of the wage scale").

164. *Id.* (second alteration in original) (internal citation omitted).

165. *See generally* CBA, *supra* note 92, art. XVII (describing the "entering player pool").

166. *Id.* art. XVII, § 1, at 51 (defining "entering player pool").

167. *See generally id.* art. XXIV ("Guaranteed League-Wide Salary, Salary Cap, & Minimum Team Salary").

168. *Id.* art. XVII, § 3, at 51–52.

169. *Id.* art. XVII, § 3(b), at 51–52 (discussing entering player pool calculation).

170. *See id.* art. XVII, § 3(d), at 52.

toward the implementation of a strict wage scale.[171] The *McNeil* decision does not suggest that a wage scale needs to exist in its strictest form to represent a violation of antitrust law. Instead, it suggests that a step to implement a wage-scale-like system might be challenged under antitrust analysis.[172] The players should argue that a unilaterally imposed entering player pool represents the exact "concrete step" that the court discussed in *McNeil*. In their complaint, the players should allege that the pool is narrowly tailored toward a specific group of players and that its calculation essentially assigns a contract value to each individual player.

To allow for flexibility in their argument regarding the entering player pool, the players should present alternative arguments. First, they should suggest that the entering player pool is a per se violation of antitrust laws as "horizontal price-fixing."[173] A stronger argument, however, is that even if the pool were evaluated under a rule of reason test, it would violate antitrust laws. Under the rule of reason test, the players must establish that the pool creates a substantially harmful effect on the competition for their services and that this is not outweighed by a pro-competitive justification. The players should argue that the entering player pool unnecessarily limits rookies' ability to negotiate a fair market value. This argument will be more persuasive for lower round draft picks (i.e., rounds three through seven) than higher round draft picks (i.e., rounds one and two).[174] The players should argue that the entering player pool has the effect of squeezing value out of the lower rounds in favor of the higher rounds. In other words, teams budget an unfair portion of their entering player pool toward first and second round draft picks who have greater leverage in negotiations. This leaves the draft picks in the third through seventh rounds with less room to negotiate. From this perspective, the entering player pool substantially harms the earning

171. *See* McNeil v. NFL, 790 F. Supp. 871, 877 (D. Minn 1992); *see also supra* text accompanying note 164 (discussing that players could challenge the implementation of a more "concrete" wage scale than was evidenced in *McNeil*).

172. *See McNeil*, 790 F. Supp. at 877.

173. *See* Texaco, Inc. v. Dagher, 547 U.S. 1, 5–6 (2006) (defining horizontal price-fixing as "[p]rice-fixing agreements between two or more competitors"); *see also* ANTITRUST RESOURCE MANUAL § 8 (1997), http://www.usdoj.gov/usao/eousa/foia_reading_room /usam/title7/ant00008.htm (discussing per se violations of the Sherman Act, including horizontal price-fixing).

174. LONG & CZARNECKI, *supra* note 14, at 298 ("The draft consists of seven rounds, and each team is allotted one pick in each round. The team with the worst record in the preceding season selects first. The team with the second worst record selects second, and so on . . . .").

potential of lower round draft picks that would otherwise earn higher salaries in a free market.

4. College Draft

The final piece of the labor system that the players will want to challenge in their complaint is the NFL's college draft system. The draft system grants each team exclusive negotiating rights for the players it selects in the annual NFL draft.[175] These exclusive rights extend for a period of one year.[176] When a team selects a player in the NFL draft, the team is "deemed to have automatically tendered the player a one year NFL Player Contract for the Minimum Active/Inactive List Salary then applicable to the player."[177] The player, however, is not required to accept the tender offer and has the opportunity to negotiate a separate deal with the drafting club (or a club to which the player's rights are traded).[178] If the player and the drafting club cannot come to terms on a deal and the player refuses to accept the tender offer by the thirtieth day prior to the first Sunday of the regular season, then the exclusive rights to the drafted player may not be traded to another club, and the player must enter into a contract with the drafting club or wait until the following year's draft, at which point he may be drafted by any club, except the club that drafted him in the initial draft.[179] If the player opts to forgo the season in which he was initially drafted, he will be subject to the same limitations discussed above with regard to the team that drafts him in a subsequent draft.[180] If the player then fails to sign a contract with the subsequently drafting club, then he will become a "rookie free agent"[181] on the day of the annual college draft following the subsequent draft.[182]

The contract limitations imposed by the college draft certainly restrict competition between teams in the market for player services—specifically for the services of entering players. One economic analysis, focused on players' ability to capture the marginal

175. CBA, *supra* note 92, art. XVI.
176. *See id.*
177. *Id.* art. XVI, § 3, at 46.
178. *Id.* art. XVI, § 4, at 46–47.
179. *Id.*
180. *Id.*
181. A "rookie free agent" is a player who has never signed an NFL player contract, but is free to negotiate and sign a player contract with any NFL club, without "draft choice compensation" or any right of first refusal. *Compare id.* art. I, § 2(t), at 5 (defining "free agent") *with id.* art. I, § 2(af), at 6 (defining "rookie").
182. *Id.* art. XVI, § 8, at 49.

revenue they create for teams, suggests that the exclusive rights created by the draft system deny players the ability to capture their true market value and effectively builds in profit margins for clubs.[183]

The *McNeil* case provides little guidance for the players in terms of challenging the college draft. In *McNeil*, the players presented testimony with regard to the college draft, but the court declined to allow the jury to consider whether or not the draft itself violated antitrust laws.[184] As a result, *McNeil* will not serve the players as a persuasive precedent in their challenge of the college draft.

However, a separate case—*Smith v. Pro Football, Inc.*[185]—decided almost fifteen years prior to *McNeil*, supports the players' challenge of the college draft.[186] In *Smith*, the court applied the rule of reason test en route to its determination that the draft constituted an unreasonable restraint on free trade and thus violated antitrust laws.[187] In terms of its harmful effect, the court in *Smith* recognized that the draft "inescapably forces each seller of football services to deal with one, and only one buyer, robbing the seller, as in any monopsonistic market, of any real bargaining power."[188] The court

183. *See* Stephen G. Bronars, Bargaining in Professional Football: Why NFL Superstars are Underpaid 22 (Sept. 7, 2004) (unpublished article, on file with the University of Texas at Austin Department of Economics), *available at* http://econweb.tamu.edu/workshops/PERC%20Applied%20Microeconomics/Stephen%20G.%20Bronars.pdf ("The monopsony power inherent in a player draft system transforms draft selections into valuable assets. If draft rights were traded for cash, their value would be directly revealed by their market price.... NFL teams generate much of their excess profits by paying superstars considerably less than their marginal revenue product.... The exclusive right to negotiate a contract with a superstar player is a valuable asset; I estimate that the right to negotiate exclusively with the top player in the 1994 draft was worth about $38 million (in 2003 dollars). By 2004, when revenues per team and the salary cap were 82 percent higher than they were in 1994, the monopsony rents from the first selection in the draft were valued at $70 million.").

184. *McNeil Verdict*, *supra* note 4, at *4 ("You have heard testimony about other NFL rules, including the annual NFL college draft .... Because those other rules are not challenged here, you are not being asked to decide whether those rules are an unreasonable restraint of trade under the antitrust laws.").

185. 593 F.2d 1173 (D.C. Cir. 1978).

186. *Id.* at 1175 (affirming the district court's ruling that the NFL draft system violated antitrust laws under a rule of reason analysis).

187. *Id.* at 1183–85 ("After undertaking the analysis mandated by the rule of reason, the District Court concluded that the NFL draft as it existed in 1968 had a severely anticompetitive impact on the market for players' services, and that it went beyond the level of restraint reasonably necessary to accomplish whatever legitimate business purposes might be asserted for it. We have no basis for disturbing the District Court's findings of fact; and while our legal analysis differs slightly from that of the trial judge, having benefited from intervening guidance from the Supreme Court, we agree with the District Court's conclusion that the NFL draft as it existed in 1968 constituted an unreasonable restraint of trade.").

188. *Id.* at 1185.

also recognized less restrictive alternatives to a draft that granted exclusive rights to a single team.[189] For example, the League might implement a system in which multiple teams could draft a player and compete for his contract rights.[190] Alternatively, a second draft could be held prior to the season in which unsigned draft picks could be drafted by different teams.[191] In addition, the court offered that fewer rounds might mitigate the harmful effects of the draft to the point that it would not violate the antitrust laws.[192]

To fully satisfy the rule of reason requirements for establishing an antitrust violation, the players will need to attack the League's potential argument that the draft creates a benefit that outweighs the harm. The League will undoubtedly point to competitive balance as its saving grace. However, the players might argue that courts are split as to whether or not competitive balance will be relevant with regard to the NFL draft.[193] In *Smith*, the court declined to recognize competitive balance as a procompetitive counterpoint to the restraint on trade.[194] However, more recently in *Brown v. Pro Football, Inc. (Brown I)*,[195] a dissenting judge in the same court suggested that competitive balance should play a role in a rule of reason analysis.[196] Furthermore, *McNeil* allowed for competitive balance to rebut the restraints on player movement.[197]

With this precedent in mind, the players will want to distinguish *McNeil* and the dissent in *Brown I* from the current allegations as they relate specifically to the college draft.[198] The players will argue that *Smith* acts as the guiding precedent on the unilateral imposition of a draft system and that neither *McNeil* nor *Brown I* dealt with the

189. *Id.* at 1187–88.

190. *Id.* at 1188.

191. *Id.*

192. *Id.*

193. *Compare id.* at 1186 (declaring that competitive balance was irrelevant to the rule of reason analysis of the draft), *with* Brown v. Pro Football, Inc. (*Brown I*), 50 F.3d 1041, 1059–60 n.3 (D.C. Cir. 1995) (Wald, J., dissenting) (implying that competitive balance is a relevant procompetitive benefit that should be considered in a rule of reason analysis), *aff'd*, 518 U.S. 231 (1996).

194. *Smith*, 593 F.2d at 1186.

195. 50 F.3d 1041 (D.C. Cir. 1995), *aff'd*, 518 U.S. 231 (1996).

196. *Id.* at 1059–60 n.3 (Wald, J., dissenting) (questioning the use of the *Smith* precedent that competitive balance will be irrelevant in a rule of reason analysis regarding restraints on rookie players). The D.C. Circuit majority did not explicitly address the issue of competitive balance as a counterpoint to restraints on free trade. *Id.*

197. *McNeil Verdict*, *supra* note 4, at *4.

198. *See* McNeil v. NFL, 790 F. Supp. 871, 897 (D. Minn. 1992). To distinguish the analysis in *McNeil* from *Smith*, the court noted that "*Smith* involved a challenge to the college draft as it existed before collective bargaining in 1968, and thus had nothing to do with any restraints concerning the movement of veteran players." *Id.*

draft issue specifically. The players might also turn to other cases, such as *Robertson v. NBA*,[199] in which a court specifically addressed potential antitrust problems that arise from draft systems in professional sports.[200] The use of the *Smith* case and other precedent will enhance the likelihood of success of the players' allegation that the NFL draft violates antitrust laws.

IV. DODGING A BULLET: THE LEAGUE'S RESPONSE TO THE COMPLAINT

In response to the players' complaint, the League should argue two points. First, the League will want to assert a general defense to antitrust liability on the ground that the League's nonstatutory labor exemption has not expired despite the NFLPA's decertification. Second, the League will want to specifically address each of the allegations made in the players' complaint. This Part sets forth each of these potential responses and identifies what it will take for the League to dodge the antitrust bullets fired by the players' complaint.

A. General Defense

By negotiating to the point of impasse and decertifying the NFLPA, the players would follow the precedent set by *McNeil* for overcoming the nonstatutory labor exemption. Despite these actions, the League may still argue that the exemption continues to apply because the players would still have a de facto bargaining representative. In effect, this argument would contend that a collective bargaining relationship continues to exist between the players and the League and that the players' act of decertifying the NFLPA and withdrawing from negotiations is merely an act of posturing. Based on such an argument, the court might find that a de facto bargaining relationship continues to exist, which would mean that the nonstatutory labor exemption continues to apply.

In order for the nonstatutory labor exemption to expire, the parties must make good faith efforts to bargain to impasse and beyond.[201] In *Powell II*, the court recognized the Supreme Court's characterization of impasse as "a recurring feature in the bargaining process and one which is not sufficiently destructive of group bargaining to justify unilateral withdrawal."[202] The court went on to

199. 389 F. Supp. 867 (S.D.N.Y. 1975).

200. *Id.* at 893–96 (suggesting in dicta that the NBA player draft and reserve clause may violate antitrust laws).

201. Powell v. NFL (*Powell II*), 930 F.2d 1293, 1304 (8th Cir. 1989).

202. *Id.* at 1299 (citing Charles D. Bonanno Linen Serv., Inc. v. NLRB, 454 U.S. 404,

hold that "a dispute such as the one before us 'ought to be resolved free of intervention by the courts' where 'the union has had a sufficient impact in shaping the content of the employer's offers' and where the challenged restraint is 'clothed with union approval.' "[203] Generally, the League unilaterally implements restraints taken from a previous collective bargaining agreement that is certainly "clothed with union approval."[204] The elements that the players will challenge in this lawsuit are the same elements to which the NFLPA consented in the prior collective bargaining agreement. Therefore, the League will want to respond to the complaint by pointing to the aforementioned language from the *Powell II* ruling which suggests that courts should refrain from intervening on antitrust grounds in cases like the one at hand. While the *Powell II* case did not directly deal with a situation in which the NFLPA had decertified, its holding implies that courts should look past posturing in labor relationships. Therefore, the court should extend the nonstatutory labor exemption beyond decertification if the League can establish that the decertification was merely undertaken as a bargaining chip (or scare tactic) to encourage the League to concede to the NFLPA's demands with regard to a new deal.

The League made a similar argument in its pretrial motions in *McNeil*.[205] However, the court ultimately rejected the argument that the decertification was not sufficient to terminate the collective bargaining agreement.[206] In the course of its ruling, the court determined that, "the termination of the collective bargaining relationship . . . does not depend on either a judicial determination or NLRB decertification: 'but rather depends on whether a majority of the employees in a bargaining unit support a particular union as their bargaining representative.' "[207] In the pretrial determinations, the *McNeil* court recognized that the players had voted to abandon the NFLPA as their bargaining representative.[208] As a result, the collective bargaining relationship had terminated.[209]

---

412 (1982)).

203. *Id.* at 1302 (quoting JOHN C. WEISTART & CYM H. LOWELL, THE LAW OF SPORTS § 5.06, at 590 (1979)).

204. JOHN C. WEISTART & CYM H. LOWELL, THE LAW OF SPORTS § 5.06, at 590 (1979); *see supra* Part III.A.

205. Powell v. NFL (*McNeil I*), 764 F. Supp. 1351, 1358–59 (D. Minn. 1991) ("The NFL defendants further argue that even if the NLRB decertified the NFLPA, this procedure would be insufficient to end the labor exemption.").

206. *See* McNeil v. NFL, 790 F. Supp. 871, 884–86 (D. Minn. 1992).

207. *Id.* at 884 (quoting *McNeil I*, 764 F. Supp. at 1367).

208. *McNeil I*, 764 F. Supp. at 1358–59.

209. *Id.*

The United States Supreme Court's decision in *Brown v. Pro Football, Inc.* (*Brown II*),[210] however, might have reopened a door that the *McNeil* rulings appeared to close.[211] Without directly citing the *Powell II* or *McNeil* decisions, the Supreme Court discussed the outer limits of the nonstatutory labor exemption.[212] The *Brown II* decision recognized flexibility with regard to the nonstatutory labor exemption's limits. In the Court's majority opinion, Justice Breyer acknowledged the need for flexibility and case-by-case analysis of the nonstatutory labor exemption when he wrote, "[w]e need not decide in this case whether, or where, within these extreme outer boundaries to draw the line. Nor would it be appropriate for us to do so without the detailed views of the [National Labor Relations] Board . . . ."[213]

The League should argue, in its defense against the players' complaint, that the *Brown II* decision stands for the proposition that no single triggering event leads to the expiration of the nonstatutory labor exemption. In effect, this argument will contend that *Brown II* overrules the *McNeil* court's pretrial determination that decertification of a union terminates the collective bargaining relationship. It follows that neither the decertification of the union, nor a recorded vote by players to abandon representation by the union, will by itself suffice to overcome the exemption. Instead, a court will need to independently analyze the totality of the circumstances surrounding the bargaining process between the players and the League—and consult the NLRB—in making a determination as to whether or not a collective bargaining relationship exists between the players and the League. To buttress its argument, the League should not completely abandon the guidance of the *McNeil* ruling. In *McNeil*, the court held that "despite [the NFL's] insistence that the NFLPA continues to function as a union, defendants neglected to file a charge, pursuant to 29 U.S.C. § 160(b), with the NLRB asserting that the NFLPA engaged in an unfair labor practice by unlawfully refusing to bargain with defendants."[214] The League should, therefore, file the appropriate charge with the NLRB as soon as the NFLPA decertifies. By using the Supreme Court's ruling in *Brown II*, and following a portion of the court's guidance in *McNeil*, the League will be able to put

210. 518 U.S. 231 (1996).

211. *See id.* at 250.

212. *See id.* ("[F]or these reasons, we hold that the implicit antitrust exemption applies to the employer . . . .").

213. *Id.*

214. McNeil v. NFL, 790 F. Supp. 871, 886 (D. Minn. 1992).

together a strong argument that the labor exemption has not expired. Overall, if the League can prove that the decertification and player vote to abandon representation by the NFLPA are merely bargaining tactics intended to pressure the League in a broader negotiation context, then the court should continue to apply the nonstatutory labor exemption. If the court applies this exemption, then the League's labor system would not be subject to antitrust scrutiny.

B. Specific Defenses

In addition to its general defense against a collective antitrust action, the League should tailor individual defenses to each of the allegations included in the players' complaint. Assuming that the court will address each of the allegations under a rule of reason analysis,[215] the League will be required to prove by a preponderance of the evidence that each of the restraints is "justified by a legitimate business purpose" and is "reasonably necessary to achieve that purpose."[216] In response to each allegation, the League should point to competitive balance as the legitimate business purpose that the challenged restraint seeks to advance.[217] Courts have been inconsistent in their recognition of competitive balance as a justifiable business purpose in the context of restraints on the market for players' services.[218] The court in *Mackey II* approved competitive balance as a legitimate business purpose that justifies restraints on

---

215. *See supra* Part I.A.

216. *McNeil Verdict*, *supra* note 4, at *4.

217. *See supra* note 58 and accompanying text.

218. *See* White v. NFL, 822 F. Supp. 1389, 1408 (D. Minn. 1993) ("The near certainty of such inconsistency [in the court's recognition of competitive balance as a legitimate business purpose] is borne out by the history of litigation between players and the NFL. For example, in *Mackey II*, the Eighth Circuit determined that the NFL's interest in maintaining competitive balance between teams should be considered under the rule of reason for purposes of determining whether a veteran player restraint violated the Sherman Act. However, in *Smith v. Pro Football, Inc.*, the Court of Appeals for the District of Columbia rejected the competitive balance justification as a matter of law, finding that under the rule of reason, the NFL's interest in maintaining competitive balance, which the NFL argued was a procompetitive effect, could not be balanced against the anticompetitive effects of the college draft." (internal citations omitted)), *aff'd*, 41 F.3d 402 (8th Cir. 1994); *see also* Brown v. Pro Football, Inc., Civ. No. 90-1071, slip op. at 19–23, 1992 WL 88039, at *9–10 (D.D.C. Mar. 10, 1992) (refusing consideration of competitive balance in the context of using uniform salary provisions for "prospective Developmental Squad players"), *rev'd*, 50 F.3d 1041 (D.C. Cir. 1995), *aff'd*, 518 U.S. 231 (1996). *Compare* Mackey v. NFL (*Mackey II*), 543 F.2d 606, 619–20 (8th Cir. 1976) (accepting the competitive balance consideration under the rule of reason analysis), *with* Smith v. Pro Football, Inc., 593 F.2d 1173, 1186 (D.C. Cir. 1978) (rejecting the competitive balance consideration under the rule of reason analysis).

trade,[219] while the court in *Smith* did not recognize competitive balance as a legitimate business purpose.[220] This inconsistency will likely create problems for the League as it attempts to justify the restraints it imposes.

Based on the assumption that the case will be filed in the Minnesota district court, the League should turn to the *McNeil* case as the persuasive authority on the issue of competitive balance as a justifiable business purpose.[221] In its instructions to the jury, the *McNeil* court expressly recognized competitive balance as a legitimate business purpose that could justify the restraints imposed by Plan B Free Agency.[222] The court went on to state, "[C]ompetitive balance means that all of the NFL teams are of sufficiently comparable playing strength that football fans will be in enough doubt about the probable outcome of each game and of the various division races that they will be interested in watching the games."[223] The League should argue *McNeil* set the precedent that competitive balance can justify restraints in the context of the NFL's labor system.

The League may turn to a few additional sources to support its proposition that competitive balance serves as a legitimate business purpose under the rule of reason analysis. Outside of professional football, the Supreme Court has identified the proper use of competitive balance in a rule of reason analysis. In *NCAA v. Board of Regents of the University of Oklahoma*,[224] Justice Stevens wrote, "The hypothesis that legitimates the maintenance of competitive balance as a procompetitive justification under the Rule of Reason is that equal competition will maximize consumer demand for the product."[225] This supports the proposition set forth in the *McNeil* jury instructions—that the maintenance of competitive balance can serve as a legitimate business purpose.[226] By applying the Court's holding in *Board of Regents* to the NFL, the League need only establish that the competitive balance among teams in the NFL will increase consumer

219. *See Mackey II*, 543 F.2d at 621.

220. *See Smith*, 593 F.2d at 1186; *see also* Brown v. Pro Football, Inc. (*Brown I*), 50 F.3d 1041, 1059 n.3 (D.C. Cir. 1995) (Wald, J., dissenting) (noting that the district court found irrelevant an analysis of "procompetitive effects," and the circuit court majority did not reach the question of competitive balance at all), *aff'd*, 518 U.S. 231 (1996).

221. The *McNeil* trial was heard in Minnesota United States District Court's Fourth Division, which is the forum in which the hypothetical lawsuit will be filed. *See* McNeil v. NFL, 790 F. Supp. 871, 871 (D. Minn. 1992).

222. *McNeil Verdict*, *supra* note 4, at *4 (instruction no. 27).

223. *Id.*

224. 468 U.S. 85 (1984).

225. *Id.* at 119–20.

226. *See McNeil Verdict*, *supra* note 4, at *5.

demand for football in order to properly establish that competitive balance can serve as a legitimate business purpose under the rule of reason.[227]

The League should also point to *Williams I*, in which Judge Kevin T. Duffy of the Southern District of New York denied basketball players' complaints alleging that a salary cap, college draft, and first refusal system violated antitrust laws under rule of reason analysis.[228] Judge Duffy recognized in his decision that the "pro-competitive effects of these practices, in particular the maintenance of the *competitive balance*, may outweigh their restrictive consequences."[229]

The League will need to make the argument that competitive balance serves as a legitimate business justification with regard to *each* of the alleged restraints. However, the argument advancing the legitimacy of competitive balance will not change from allegation to allegation. As a result, the League can make one broad argument relating to competitive balance and the court's determination with regard to whether the argument should apply to all of the League's specifically tailored defenses. What will change from allegation to allegation will be the extent to which the specific restraint imposed is reasonably necessary to achieve competitive balance.

The remainder of this Part explains how the League can defend each of the restraints—salary cap, free agency system, entering player pool, and college draft—as a justifiable measure to maintain competitive balance in the League.

1. Salary Cap

The NFL will have a strong argument that its salary cap has served as the League's most significant asset in terms of maintaining competitive balance. The hard cap system comes as close as possible to ensuring that every team operates under the same constraints when attracting and retaining talent. Other major U.S. sports leagues, with the exception of the NHL, have labor systems that allow for teams to spend more on players by paying luxury taxes or penalties for surpassing certain compensation levels.[230] This has the effect of

227. *See id.* at *4.

228. *See* NBA v. Williams (*Williams I*), 857 F. Supp. 1069, 1071 (S.D.N.Y. 1994) (discussing players' counterclaims in a declaratory judgment action), *aff'd*, 45 F.3d 684 (2d Cir. 1995). The players alleged that the college draft, the right of first refusal, and salary cap were "unreasonable restraints of trade not exempt from antitrust law and thereby violate the Sherman Act." *Id.*

229. *Id.* at 1079 (emphasis added).

230. Tim Tucker, *The NHL Locks Out Players: Season on Ice*, ATLANTA J.-CONST.,

creating a system in which teams in bigger, higher-revenue markets have a greater ability to attract talent than teams in smaller, lower-revenue markets. In the long run, these systems create competitively imbalanced leagues with different tiers of talent. This imbalance then detracts from the excitement and unpredictability of both individual contests and competition for standings in a division or league.

Unlike these imbalanced systems, the NFL is considered by many as the United States' most competitively balanced sports league—a league in which all teams have nearly identical opportunities to succeed at the beginning of the season.[231] In its argument that a salary cap does not violate antitrust laws, the League should compare its competitive landscape with other sports leagues and point to the extent to which the NFL's financial success derives from the balance that the salary cap creates.

The League can buttress the connection between the salary cap and legitimate business purposes by pointing to analyses by independent debt-rating agencies. Specifically, the League should highlight that Fitch Ratings has directly linked the rating of the League's debt with the survival of the salary cap to suggest that the League would be a less credible borrower without the salary cap. In a May 2008 press release, Fitch Ratings stated:

> The salary cap has historically been a key factor incorporated in the NFL's credit rating given that it promotes both competitive balance among franchises and cost certainty. Fitch has often cited that a key to the long-term viability to a sports league is the competition between its clubs. There's a potential risk in the long run that without a salary cap the competitive balance of the NFL could be jeopardized. To the extent that the competition among franchises weakens as a result of large market teams and wealthy clubs opting to spend more money on player salaries as compared to small market teams and less wealthy clubs, there is the potential that the League could lose

---

Sept. 16, 2004, at D1 ("The only one of the four major pro sports leagues without a salary cap or a luxury tax on high payrolls, the NHL seeks a new system that would tie player costs to a predetermined percentage of revenues—a percentage that would be far smaller than the 76 percent the league says went to players last season.").

231. *See* Travis Lee, *Competitive Balance in the National Football League After the 1993 Collective Bargaining*, J. SPORTS ECON., June 2009, at 1, 10; Rick Maloney, *'Competitive Balance' Keeps Football on Top*, BUFFALO BUS. FIRST, Feb. 8, 2002, http://www.bizjournals.com/buffalo/stories/2002/02/11/newscolumn2.html (discussing the NFL's advantage over other professional sports leagues due to its competitive balance).

> its strong historical competitive nature and furthermore, its appeal to fans.[232]

Comments from independent agencies, like Fitch, provide powerful evidence to support the legitimate business purpose of the salary cap.

Comparison to other leagues will also serve the NFL well in its argument that the salary cap is important to the maintenance of competitive balance. The NHL provides perhaps the best example of the problems that can ensue without any salary restraints. Prior to the 2004–2005 labor dispute between hockey players and the NHL, hockey was the only major professional sport in the United States without any sort of luxury tax, salary cap, or revenue sharing system.[233] Beyond competitive imbalance, the NHL's labor system resulted in a league in which clubs spent about seventy-five percent of their revenues on player salaries.[234] Furthermore, these ballooning player costs contributed significantly to operating losses for more than two-thirds of the NHL's thirty franchises and a combined league-wide loss of nearly $300 million.[235] These devastating operating results and the National Hockey League Players Association's ("NHLPA") unwillingness to compromise on a salary cap system led to a lockout that terminated the 2004–2005 season. Ultimately, the NHL ended up with a salary cap system similar to that of the NFL; in each league, the salary cap is adjusted annually to equal a prescribed percentage of the league's revenue.[236] As a result, professional hockey provides a valuable analogy for the NFL in its argument in favor of a salary cap. The NFL should argue that the NHL's recent labor struggle shows the devastating effects of an unrestrained labor market in professional sports. Furthermore, the NHL's ultimate implementation of a salary cap strongly supports the notion that a salary cap system is the best means of righting the wrongs of an unchecked labor market.

The NFL might also turn to Major League Baseball ("MLB") as an example of the type of imbalance that can occur without a salary cap. In an amicus brief submitted to the Supreme Court in *Brown II*, MLB described the imbalance of its league:

---

232. *Fitch Actively Monitoring NFL's Collective Bargaining Agreement*, BUS. WIRE, May 20, 2008, http://findarticles.com/p/articles/mi_m0EIN/is_2008_May_20/ai_n25437930.

233. Tucker, *supra* note 230.

234. *Id.*

235. Jeglic, *supra* note 97, at 24.

236. Tim Tucker, *Season Lost to Hard-liners*, ATLANTA J.-CONST., July 17, 2005, at D2 (comparing the NHL salary cap to the NFL's salary cap).

> Baseball has certain unique economic characteristics that, when combined with its "wide open" system of free agency, have placed the smallest-market clubs in constant peril. Most important, there is great disparity in the revenues generated by the clubs.... Baseball has clubs that generate local revenues more than three times those of some of their competitors on the field.
>
> The wide revenue disparity among the clubs causes difficulties because there is a single market for Baseball players. In that single market, the clubs with the most revenue set the price for free agent players. Clubs with less revenue are faced with the difficult choice of paying the market rate or losing their talent.
>
> The combination of Baseball's player compensation system and the revenue disparity in the industry has created serious economic issues in the game.[237]

In its comparison to baseball, the League needs to highlight that it may overcome an antitrust challenge to the salary cap by showing that the salary cap *maintains* competitive balance.[238] Baseball's labor system did not create the type of catastrophic outcome that the NHL experienced prior to the salary cap. However, the competitive balance in baseball is not as evenly spread as in football.[239] Therefore,

---

237. Brief of Amici Curiae Office of the Commissioner of Baseball and Major League Baseball Player Relations Committee, Inc. in Support of Respondents, Brown v. Pro Football, Inc. (*Brown II*), 518 U.S. 231 (1996) (No. 95-388), 1996 WL 72350, at *9–10.

238. *McNeil Verdict*, *supra* note 4, at *4 ("In order to prove that the challenged Plan B rules are justified by a legitimate business purpose, defendants must first demonstrate, by a preponderance of the evidence, that the First Refusal/Compensation Rules in Plan B actually make a significant contribution to the establishment or *maintenance* of competitive balance in the NFL." (emphasis added)).

239. Ryan T. Dryer gave the following analysis of the NFL's advantage in competitive balance:

> In the NFL's 12-team playoff format, 25 of its current 32 teams (78.1%) became playoff eligible in the five year period. Of those teams that participated in the playoffs, only one was able to accomplish the feat in all five years, while 13 of those teams only made the playoffs two or fewer times. An examination of the NBA's 16-team playoff format over the same time period reveals that 25 of its 30 teams (83.3%), participated in the playoffs. Of those teams, five participated in the playoffs all five years, while just eight made the playoffs two or fewer years. And finally, in the MLB's eight-team playoff system, only 17 of its 30 teams (56.7%) attended the playoffs from 2001–2005. Two of those teams were in the playoffs in all five years and nine of those teams played in the playoffs in two or fewer years. Over the five sample years the NBA, NFL, and MLB had 80, 60, and 40 playoff positions available respectively. If the playoff positions occupied by the teams that made the playoffs in every year are removed, assuming that those teams were in fact superior to the rest of the teams in their league due to consistent performance,

if football were to experience the type of inequality that baseball has experienced in the absence of a salary cap, then it would not *maintain* the competitive balance that it currently enjoys. Instead, this would mean that the NFL's level of competitive balance would fall. The NFL should also argue that baseball provides an example of what occurs when a salary cap is not in place and that only the salary cap system can ensure that the League does not fall to the level of competitive imbalance which baseball has experienced.

The benefit of a full uncapped year prior to the litigation presents a fairly substantial—but not impossible—obstacle for the League to overcome in arguing that a salary cap is reasonably necessary to maintain its competitive balance, and therefore necessary to operate its business. The players will undoubtedly point to the uncapped year and—absent any catastrophic collapse of the NFL—suggest that it provides direct evidence that the League does not need a salary cap and that the competitive balance was not much different in an uncapped year than it was in a capped year.[240] The League may overcome the players' argument by asserting that a single uncapped year will not indicate the full extent of harm that the absence of a salary cap creates. Along these lines, the League should argue that the harmful effects and competitive imbalance will not come to fruition until all effective player contracts have been signed under an uncapped system. One free agency period in which only a small fraction of players are able to test the market cannot establish the full effect of an uncapped League. Under this argument, the League may suggest that it implemented the salary cap to avoid the greater harm that could ensue from another uncapped year. Overall, the NFL will have its strongest argument with regard to the validity of a unilaterally imposed salary cap challenged under antitrust scrutiny.

2. Free Agency System

To rebut the players' claim that the current free agency system violates antitrust law, the League would need to distinguish the

---

then what remains is the pool of playoff slots that the rest of the teams can realistically hope to obtain. Thus, from 2001–2005 in MLB there were 28 teams (93.3% of the league) competing for 30 (75%) of the playoffs spots. The NBA had 25 teams (83.3% of the league) competing for 55 (68.8%) playoff spots, and the NFL had 31 teams (96.9% of the league) competing for 55 (91.7%) of its playoff spots. These numbers suggest that the playoff races are more consistently "open" in the NFL than in the NBA or MLB.

Dryer, *supra* note 98, at 287–88 (footnotes omitted).

240. *See supra* notes 116–20 and accompanying text (discussing players' argument surrounding the uncapped year as evidence of the limited benefit of a salary cap).

current system from the systems challenged in *Mackey II* and *McNeil*, where prior restrictions on player movement were found to be violations of antitrust law.[241] Furthermore, the League would need to argue that the restraints imposed by the current free agency system are necessary to maintain the competitive balance among the teams in the League. A key factor distinguishing the current free agency system from the systems in *Mackey II* and *McNeil* relates to the nature by which the restraints were imposed in those cases. The restraints in those cases—the Rozelle Rule and Plan B Free Agency—were unilaterally imposed by the League without collective bargaining.[242] Unlike the current free agency system, which the players agreed to in a prior collective bargaining agreement, the restraints in *Mackey II* and *McNeil* were *never* agreed upon by the players.[243] This distinguishing factor will buttress the League's assertion that the three-tiered free agency system and the franchise and transition designations are not unreasonable as evidenced by the players' agreement to these terms in prior collective bargaining relationships. *Reynolds v. NFL*[244] will aid the League's argument that previously agreed-upon constraints should survive antitrust attack to a greater degree than unilaterally imposed restraints that did not exist in a prior collective bargaining agreement.[245]

The *Reynolds* decision approved a class action settlement stemming from the *Mackey II* trial.[246] In *Reynolds*, the Eighth Circuit stated:

> We emphasize today, as we did in *Mackey*, *supra*, that the subject of player movement restrictions is a proper one for resolution in the collective bargaining context. When so resolved, as it appears to have been in the current collective bargaining agreement, the labor exemption to antitrust attack applies, and the merits of the bargaining agreement are not an issue for court determination.[247]

This holding can be interpreted in two ways. First, it may be interpreted strictly within the confines of the nonstatutory labor

241. Mackey v. NFL (*Mackey II*), 543 F.2d 606, 622 (8th Cir. 1976); *McNeil Verdict*, *supra* note 4, at *1.

242. *See Mackey II*, 543 F.2d at 610; McNeil v. NFL, 790 F. Supp. 871, 876 (D. Minn. 1992).

243. *See Mackey II*, 543 F.2d at 610; *McNeil*, 790 F. Supp. at 876.

244. 584 F.2d 280 (8th Cir. 1978).

245. *See id.* at 282 (arguing that collectively bargained issues should withstand antitrust scrutiny).

246. *Id.* at 281.

247. *Id.* at 289.

exemption.[248] Alternatively, this statement may be interpreted to suggest that any restraints on player movement that stem from a collective bargaining agreement should not be subject to antitrust scrutiny. The League will want to focus on this latter interpretation, which derives largely from the first sentence of the excerpt cited above. In accordance with this interpretation, the League will argue that the player movement restraints that would be challenged by the players in the case at hand were the product of a prior agreement. This will be a tenuous argument that courts will likely see as an overextension of the nonstatutory labor exemption.

The League should also distinguish the current free agency system from the systems in *Mackey II* and *McNeil* and highlight the courts' recognition that not all restrictions on player movement violate antitrust laws. In *Mackey II*, the court recognized that "[i]t may be that some reasonable restrictions relating to player transfers are necessary for the successful operation of the NFL. The protection of mutual interests of both the players and the clubs may indeed require this."[249] The League cannot deny that the Rozelle Rule challenged in *Mackey II* was found to have violated the antitrust laws. However, the Rozelle Rule created far greater restraints than the current free agency system.[250] Under the system challenged in *Mackey II*, "only six of the more than 500 free agents actually changed teams" from one season to another.[251] In comparison, over 200 players changed teams from 2008 to 2009 via free agency.[252]

In distinguishing the current restraints from Plan B Free Agency and the *McNeil* verdict, the League will want to argue that the current system only allows for clubs to exclusively protect its first- and second-year players in addition to one or two franchise and transition players. This translates to the protection and restraint of approximately ten to fifteen players per team compared with the restraint of thirty-seven players per team under Plan B Free Agency.[253] As a result of these comparisons, the League should argue

248. When *Reynolds* is limited to the scope of the nonstatutory labor exemption, it only serves as reinforcement to the precedent that labor systems cannot be challenged by parties between whom there is an ongoing bargaining relationship.

249. Mackey v. NFL (*Mackey II*), 543 F.2d 606, 623 (8th Cir. 1976).

250. *See supra* text accompanying notes 144–47 (explaining the restraints imposed by the Rozelle Rule).

251. Goldberg, *supra* note 42, at 50.

252. NFL Events: Free Agency, http://www.nfl.com/freeagency (last visited Nov. 15, 2009).

253. *See, e.g.*, Carolina Panthers: Player Roster, http://prod.www.panthers.clubs.nfl.com/team/roster.html (last visited Nov. 15, 2009) (showing that the Carolina Panthers had eleven first- and second-year players in 2009 in addition to the ability to designate one

that the current restraints do not nearly equate to the same level of "harm" as prior constraints that were deemed violations of antitrust law.

With regard to the franchise and transition designations, the League will have a strong argument that these restraints do not violate antitrust laws because they do not create a substantial harm. A player receiving the franchise or transition designations is ensured to receive compensation that is at least the average of the top five to ten players at his position.[254] As a result, the League should argue that these restraints ensure fair compensation to franchise and transition players.

Overall, the League will have a difficult battle against the allegations challenging the current free agent system. This Comment suggests that in the defense of this system the League should focus on rebutting the players' proposition that the system creates substantial harmful effects, as opposed to focusing on the system's advancement of competitive balance. That said, it will be important for the League to argue that the current systems somehow aid in the maintenance of the League's competitive balance.

3. Entering Player Pool

In response to the players' allegations that the entering player pool violates antitrust laws, the League should take three positions. First, it should distinguish the entering player pool from what the court defined as a wage scale in *McNeil*.[255] Second, the League should argue that the ballooning values of rookie contracts rebut the players' argument that the entering player pool has harmful effects on the market for player services. Finally, the League should argue that the entering player pool helps the League maintain its competitive

---

franchise and one transition player).

254. *See supra* notes 135–43 and accompanying text (discussing the tender requirements for franchise and transition players).

255. *See* McNeil v. NFL, 790 F. Supp. 871, 875–76 (D. Minn. 1992) (discussing the wage scale elements of Plan B Free Agency). When addressing the wage-scale issue, the court stated:

> Under one provision of [Plan B], defendants proposed to eliminate all individual contract negotiations with players as of February 1, 1993 and to establish a wage scale setting the price for all NFL players' services. In [their] complaint, plaintiffs allege that the proposed Plan B wage scale is an agreement among competitors, the NFL member clubs, to fix the prices to be paid for plaintiffs' services as professional football players and as such constitutes a per se violation of § 1 of the Sherman Act, 15 U.S.C. § 1 (1988).

Id. at 876.

balance because it reduces drafted players' ability to strong-arm teams into contracts with huge salary cap implications that would cripple the teams' ability to attract talent in the free agent market.

To rebut the players' argument that the entering player pool creates a wage scale, the League can distinguish the wage scale concept that the court left open for challenge in *McNeil* from the entering player pool found in the current collective bargaining agreement.[256] In *McNeil*, the court addressed a proposal by the League to "eliminate all individual contract negotiation with players . . . and to establish a wage scale setting the price for all NFL players' services."[257] In contrast, the entering player pool does not eliminate *any* individual contract negotiations. Therefore, the League should argue that the entering player pool cannot fall under the court's analysis of a potential wage scale in *McNeil*.

Even if the League succeeds in making this argument, it must still establish that the entering player pool either does not create a substantially harmful effect or that it is reasonably necessary to maintain competitive balance within the League. The ballooning of rookie compensation in the past ten years will provide significant support to the League's rebuttal of any harmful effect. In the past three years, NFL draft picks have signed some of the League's most lucrative contracts.[258] The League might argue that the entering player pool, in comparison to a stricter rookie wage-scale system like that of the NBA, allows for rookies to freely negotiate the terms and values of their deals.[259]

The League should also make an argument with regard to the competitive balance benefits of the entering player pool, in order to protect against a court decision that the pool does create a substantially harmful effect. The competitive balance argument will be a difficult one for the League to make with regard to the entering player pool, especially in light of the salary cap and the draft. It seems that the salary cap and the draft achieve the competitive objectives

256. *See supra* Part III.B.3.

257. *McNeil*, 790 F. Supp. at 876.

258. Matt Ryan signed a six-year $72 million contract as a rookie in 2008. *See* Rachel Cohen, *Ryan Respects Goodell's Point on Rookie Contracts*, BOSTON GLOBE, July 1, 2008, http://www.boston.com/sports/football/articles/2008/07/01/ryan_respects_goodells_point_on_rookie_contracts/. Jake Long received a five-year $57.75 million contract from the Miami Dolphins as a rookie in 2008. *See Goodell Decries Lucrative Rookie Contracts*, MIAMI HERALD, June 28, 2008, at 6D.

259. *See* Michael A. McCann, *The Reckless Pursuit of Dominion: A Situational Analysis of the NBA and Diminishing Player Autonomy*, 8 U. PA. J. LAB. & EMP. L. 819, 824–25 (2006) (discussing the NBA's rookie wage scale).

that the League might argue for with regard to the entering player pool. The salary cap limits teams' ability to hoard talent via overcompensation, and the draft allows for an even distribution of entering talent. However, the League might argue that the entering player pool is necessary to the function of both of these other restraints, which combine to support competitive balance in the League. Here, the League would assert that without the entering player pool, drafted rookies might consume disproportionate salary cap space because they have significant bargaining power with their drafting clubs. Drafted players have substantial bargaining power because their names have already attached to the team in the public eye and fans expect for their teams' drafted players to sign and play for the team. Added to the publicity dynamic is the amount of time and consideration that teams put into their draft picks. Teams often draft players for specific needs that they have foregone in the free agent market. Without the limitations imposed by the entering player pool, this bargaining power would likely lead to disproportionate consumption of the salary cap, which in turn would adversely affect the salary cap's utility as an instrument of competitive balance in veteran free agency.

Overall, the League will not have very compelling arguments with regard to the value of the entering player pool as it relates to competitive balance in the League. Its best argument with regard to this restraint will surround its rebuttal of the entering player pool's harmful effect on players.

4. College Draft

In addressing the players' allegation that the college draft violates antitrust laws, the League will have to directly address the D.C. Circuit's ruling in *Smith*. This 1978 ruling held that the NFL's college draft violated antitrust laws.[260] The League will need to dispute the application of the *Smith* ruling in its defense of the college draft allegation and may do so on a few grounds. First, the League can highlight the differences between the college draft at the time of *Smith* versus the college draft today. Second, the League can argue that the *Smith* court's analysis is outdated because it failed to acknowledge the competitive balance benefits of a draft, which should be considered in an antitrust analysis. Third, after attacking the persuasive authority of the holding in *Smith*, the League should

260. Smith v. Pro Football, Inc., 593 F.2d 1173, 1189 (D.C. Cir. 1978).

argue that the restraints imposed by the college draft are reasonably necessary for the maintenance of competitive balance in the League.

A lot has changed since the D.C. Circuit's 1978 ruling that the NFL's college draft violated antitrust laws. From a technical standpoint, today's college draft covers a substantially smaller group of players than the 1968 college draft challenged in the *Smith* case. The 1968 draft consisted of sixteen rounds for twenty-six teams, meaning that it affected over four hundred players.[261] Today's college draft consists of only seven rounds, and in 2008, 252 players were selected.[262] The drastic reduction in the size of the draft has resulted in a rookie free agent market in which teams compete based on price for the services of rookies. The 1968 draft also differs from today's draft because the 1968 draft was not a product of collective bargaining. Instead, the 1968 draft was imposed by the League's bylaws.[263] The draft system that the players would challenge in the hypothetical lawsuit, however, is a product of collective bargaining.[264] Most significantly, the court in *Smith* explicitly declined to make a ruling on the modified player draft system that the League adopted in the 1977 collective bargaining agreement between the NFL and the NFLPA. In a footnote, the court stated, "We express no views on the legality of the modified NFL player draft, confining our attention to the draft as it existed in 1968."[265] The modified player draft that the court declined to comment on has many more similarities to the current draft structure than the 1968 draft. The differences between the 1968 draft and today's draft, combined with the fact that the *Smith* court failed to address the modified 1977 draft, would support the League's argument that the *Smith* ruling does not provide a persuasive authority on the legality of the current draft system.

In addition to the technical differences between the 1968 draft and today's draft, the League should argue that the *Smith* case does not serve as a persuasive authority due to an important change in the legal landscape regarding the treatment of competitive balance as a

261. *Id.* at 1176 n.5.

262. NFL Events: Draft 2008 Tracker, http://www.nfl.com/draft/2008/tracker#dt-tab-set-1:dt-by-round/round-1 (last visited Nov. 15, 2009).

263. *Smith*, 593 F.2d at 1175.

264. *See* CBA, *supra* note 92, art. XVI.

265. *Smith*, 593 F.2d at 1176 n.6 ("The modified draft is far less restrictive than the one described in the text; it continues for fewer rounds (thus applying to fewer players), eliminates the selecting team's 'perpetual' right of negotiation with its players, facilitates players' becoming 'free agents,' and establishes minimum salary levels for 'rookies.' ... We express no views on the legality of the modified NFL player draft, confining our attention to the draft as it existed in 1968." (internal citation omitted)).

justification for restraints on trade in the sports industry. The *Smith* court declined to recognize competitive balance as a justification for the restraints imposed by the draft.[266] Since this ruling, however, some courts have taken a different approach and recognized competitive balance as a justification for restraints.[267] As a result, the League should argue that the *Smith* analysis of the draft system is unpersuasive in light of the current state of the law.

Once the NFL makes these arguments, it must turn to the importance of the college draft as it relates to the competitive balance of the League. More specifically, the League must establish that the college draft is not more restrictive than is necessary to maintain the League's competitive balance. There is little doubt that the draft contributes to parity in the League by granting the worst teams an opportunity to obtain the best incoming talent every year. However, a mere contribution to parity will not necessarily pass antitrust scrutiny.[268] Instead, the League would probably need to show that the full scope of the draft—all seven rounds and the nature of a club's rights to a drafted player—is necessary. This necessity will be difficult to prove, especially when it comes to the later rounds of the draft. However, this will become a question for the finder of fact at trial, and the League may be able to introduce data that supports its theory that a disruption of the current draft system would disturb the competitive balance in the League.

V. ASSESSING THE DAMAGE: WHY THE PLAYERS WILL EMERGE VICTORIOUS

It appears the League will face an uphill battle if the players pursue an antitrust action like the one described in this Comment. The players seem most likely to prevail. However, complex lawsuits,

---

266. *See id.* at 1186 ("The draft is 'procompetitive,' if at all, in a very different sense from that in which it is anticompetitive. The draft is anticompetitive in its effect on the market for players' services, because it virtually eliminates economic competition among buyers for the services of sellers.... Because the draft's 'anticompetitive' and 'procompetitive' effects are not comparable, it is impossible to 'net them out' in the usual rule-of-reason balancing. The draft's 'anticompetitive evils,' in other words, cannot be balanced against its 'procompetitive virtues,' and the draft be upheld if the latter outweigh the former. In strict economic terms, the draft's demonstrated procompetitive effects are nil.").

267. *See* NBA v. Williams (*Williams II*), 45 F.3d 684, 688–89 (2d Cir. 1995) (recognizing competitive balance as a procompetitive counterpart to economic restraint in the NBA); *McNeil Verdict*, *supra* note 4, at *4 (recognizing competitive balance as a legitimate business purpose that may overcome the harm created by Plan B Free Agency in the NFL).

268. *See Smith*, 593 F.2d at 1185.

like the one set forth in this Comment, make even the most resounding victories ambiguous. A more piecemeal evaluation of the lawsuit provides better insight into the legitimacy of the players' so-called AK-47.

Before advancing to the individual allegations, the reader should first recognize that the League will not likely succeed in its general defense that the nonstatutory labor exemption continues to apply.[269] This argument presents a question of law that must be decided by the judge, and the players will have a substantial advantage here because of the legal precedent set in *Brown II*. In *Brown II*, the Supreme Court recognized the power and competency of the NLRB when it comes to labor disputes.[270] Justice Breyer's majority opinion suggested that the NLRB was the proper venue for resolving these disputes and deferred to their expertise in this arena.[271] If a court were to rule that a collective bargaining relationship continued to exist between the players and the League, despite the decertification of the NFLPA, this would effectively diminish the credibility of the NLRB, conflict with Justice Breyer's opinion in *Brown II*, and undercut U.S. labor policy as a whole. Therefore, the League will not likely succeed in its argument that the nonstatutory labor exemption continues to apply because the collective bargaining relationship between the players and the League has not terminated. Instead, the court will most likely defer to the NLRB's acceptance of decertification en route to determining that the nonstatutory labor exemption has expired. Once the court ignores the League's general defense, the finder of fact will have the opportunity to decide whether the individual labor constraints imposed on the League—salary cap, free agency system, entering player pool, and college draft—violate antitrust laws.

The League will have the strongest argument against the allegation that the salary cap violates antitrust laws. This will likely be the only allegation on which a finder of fact decides in favor of the League. The NFL is widely recognized as a "the model of parity in professional sports," and the League can draw strong connections between this recognition and its unique implementation of a "hard

269. *See supra* Part IV.A.

270. *See* Brown v. Pro Football, Inc. (*Brown II*), 518 U.S. 231, 250 (1996) ("Nor would it be appropriate for us to [decide on the outer boundaries of the nonstatutory labor exemption] without the detailed views of the [National Labor Relations] Board, to whose 'specialized judgment' Congress 'intended to leave' many of the 'inevitable questions concerning multiemployer bargaining bound to arise in the future.' " (quoting NLRB v. Truck Drivers, 353 U.S. 87, 96 (1957))).

271. *Id.*

salary cap."[272] The League can persuasively argue that its "hard" salary cap has contributed substantially to the competitive balance of the NFL in comparison to other leagues that have not implemented such a salary cap. Furthermore, if the NFL were to eliminate its hard cap system in favor of a soft cap system like the NBA or a luxury tax system like MLB, then the NFL can logically argue that it would suffer from the same competitive inequalities of these other leagues. Such a change in the competitive landscape would equate to a decline in the competitive balance of the League, which antitrust precedent has upheld as a proper justification for the implementation of a restraint.[273] As a result, a finder of fact will likely find that the salary cap's competitive benefits justify and outweigh its harmful restraints and that the NFL's salary cap, therefore, does not violate antitrust laws.

The League will not likely achieve the same success with regard to the other allegations, partly because a strong argument that the salary cap plays a necessary role in achieving competitive balance weakens the argument for the necessity of the other restraints. In other words, a finder of fact who agrees that the salary cap is necessary to maintain the competitive parity in the League might also conclude that the salary cap is such a great equalizer that other restraints are unnecessary. Furthermore, the League's argument that the other restraints advance competitive balance is much more tenuous than the salary cap argument.

The players will likely emerge with a decisive victory with regard to the challenge of the free agency system. The fact finder will not be able to ignore the substantial similarities between today's free agency system and the Rozelle Rule and Plan B Free Agency, both of which were found to violate antitrust laws in previous lawsuits.[274] By highlighting the substantial similarities to these prior systems, the players can successfully argue that the three-tiered free agency system and the franchise and transition designations are merely extensions of systems that have already been established as antitrust violations. Furthermore, players can turn the League's own salary cap argument against it, by asserting that the salary cap adequately resolves the

272. *See* Dryer, *supra* note 98, at 286 ("The NFL is generally viewed as the model of parity in professional sports, while the MLB has come to represent professional sports in its most dynastic form.").

273. For a discussion of antitrust precedent surrounding competitive balance, see *supra* text accompanying notes 215–29.

274. *See* Mackey v. NFL (*Mackey II*), 543 F.2d 606, 614–23 (8th Cir. 1976) (finding that the Rozelle Rule violated antitrust laws); *McNeil Verdict*, *supra* note 4, at *1 (finding that Plan B Free Agency violated antitrust laws).

competitive balance issues that the free agency system arguably addresses.

Similarly, the players will probably emerge with a decisive victory with regard to the entering player pool. The connection between the entering player pool and League's competitive balance argument will be too disjointed for a finder of fact to determine that this restraint is reasonably necessary. The League might have a compelling argument that the entering player pool does not result in any requisite harm by pointing to the rising salaries of today's rookies.[275] However, the players can overcome this argument and can likely establish harm by pointing to the rookies who are drafted in the later rounds of the draft.[276] Furthermore, the League will have a difficult time connecting the entering player pool to a legitimate business purpose in light of the existence of a salary cap and the college draft.

The NFL will have stronger arguments against the players' college draft allegations than their allegations surrounding the entering player pool and the free agency system. While the draft system's restraints potentially contribute to the competitive balance of the League, a finder of fact would more likely find that the draft system is more restrictive than necessary and that it, therefore, violates antitrust laws. In its current form, the college draft essentially forces players to lose a year of earning potential if they do not agree to contract terms with their drafting team. It seems that the League could implement a less restrictive system that still contributes to competitive balance and if the fact finder agrees, then the college draft will be deemed to violate antitrust laws. *Smith* will provide persuasive authority on this outcome and the players can likely persuade jurors that an alternative, less restrictive, draft system could achieve the same competitive objectives as the current draft system.[277] Therefore, the players will likely win with regard to this allegation.

CONCLUSION

The last time the NFL lost a major antitrust suit against the players, it paid $195 million to settle the claims of all of the players.[278]

---

275. *See supra* text accompanying notes 258–59.

276. *See supra* text accompanying notes 165–69 (discussing the harmful effects of the entering player pool on the rookies drafted in later rounds).

277. *See* Smith v. Pro Football, Inc., 593 F.2d 1173, 1187–88 (D.C. Cir. 1978); *see also supra* text accompanying notes 189–92 (discussing examples of less restrictive draft systems that might not violate antitrust laws).

278. Goldberg, *supra* note 42, at 52.

This analysis suggests that the League could once again face similar, yet more substantial, liabilities if it does not extend the collective bargaining agreement with the NFLPA. Therefore, the League's early termination of the collective bargaining agreement could be accelerating a process that will be more detrimental to the League than an extension of the current agreement.

In a 2008 e-mail to the NFLPA, NFL Commissioner Roger Goodell listed three reasons for the early termination: high labor costs, problems with the entering player pool, and the "league's inability, through the interpretation of the courts, to recoup bonuses of players who subsequently breach their contract or refuse to perform."[279] A new collective bargaining agreement could resolve these issues, and an early opt-out certainly accelerates the prospect of a new agreement. However, the NFLPA's rhetoric thus far has suggested that the players will not appease the League's complaints in a new agreement.[280] Instead, the players expect for the next agreement to give them a bigger piece of the League's revenue pie and expect an increase in the League's labor costs. Furthermore, the players have made these demands with the full knowledge that the League will not fare well in an antitrust lawsuit that will likely ensue if the sides do not extend the current agreement. As a result, the League's posturing and opt-out have accelerated the potential for an antitrust lawsuit that could create severe consequences for the League. If NFL owners allow for the current agreement to expire, the issues that Goodell expressed in his e-mail will pale in comparison to the costs of an antitrust lawsuit and the potential for a completely revamped labor system. The *McNeil* verdict still has teeth and the players' AK-47 still has firepower. In the end, the League will make a grave mistake if it decides to test the players' fortitude by allowing the collective bargaining agreement to expire because the players will come fully armed for an antitrust fight that the NFL's current labor system cannot withstand.

SEAN W.L. ALFORD

279. Clayton, *supra* note 16.

280. *See supra* text accompanying notes 20–21 (discussing examples of the NFLPA's stance with regard to an extension).