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# A Player's View of the NFL Reserve System

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## A PLAYER'S VIEW OF THE NFL RESERVE SYSTEM

*The author of this Comment provides a unique perspective. Prior to and during his first year at the University of Miami School of Law, the author was a four-time All-Pro guard with the Miami Dolphins of the National Football League. During his career, the author played on the Dolphins' 1974 Super Bowl Champion team as well as serving as National Football League Players Association (NFLPA) Player Representative for the team. This Comment reflects the author's views both as a former player and law student. Accordingly, many of the author's comments are based on personal observations and experiences during his career. It should be further noted that as this issue went to press, the 1982 Collective Bargaining Agreement expired and the 1987 NFLPA strike had been unsuccessfully concluded. Eds.*

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“Only the totalitarian minded will believe that high pay excuses virtual slavery.”<sup>1</sup>

## I. INTRODUCTION

Football is America's sport. Some of America's best athletes hope that football will give them the opportunity to become rich and famous. But the National Football League (the “NFL” or “League”) is also big business. The owner of an NFL team has interests inherently adverse to those of the team's athletes. This comment addresses the business aspect of NFL football. The focus is on the labor relationship between owners and players. Team owners collectively adhere to a set of rules regulating their conduct. While there is no question that “system” has generally benefitted football, is the system unreasonably detrimental to players' rights? If so, can the system be made less restrictive and still remain beneficial to all?

Players seek a market that will maximize the financial return for their services. The players' objectives are limited, because league rules<sup>2</sup> forbid contracting, or attempts at contracting, with players whose services are already reserved<sup>3</sup> by another club. Accordingly, this system undermines a player's power to maximize a return for his services, and deprives the player of his right to choose a fair employer (“fair” in the player's view). Why should other employees enjoy this freedom of choice while professional football players do not?

A player whose services are reserved represents the promise of success on the playing field. This reservation is valuable. Each club reserves its pro-rata claim to the pool of available talent so that efficient utilization of player resources will improve each team's chance of victory. Winning creates goodwill and is an economic asset for both the teams and league alike.

Although players are compensated for services rendered, they involuntarily share the value<sup>4</sup> of those services. Is it fair for the league to share in the value of a player's services in the manner it

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1. *Gardella v. Chandler*, 172 F.2d 402, 410 (2d Cir. 1949).

2. See generally CONSTITUTION AND BYLAWS OF THE NATIONAL FOOTBALL LEAGUE [hereinafter NFL CONST.].

3. “Reservation” refers to the exclusive right, in favor of the claiming club, to retain the services of a specified player. “Claim” refers to the process of securing a reservation in a player.

4. A man's labor can be considered his property which he tenders for a fee. See *infra* note 134 and accompanying text.

does? A club's power to restrain player movement deprives the player employee of his meaningful choice in choosing an employer. It also curtails the player's power to negotiate his contract. The club's power essentially reduces the player's contract right to being applicable to only one employer.<sup>5</sup> The player, as a person, is dropped out of the equation. His right to control his destiny is infringed upon.

This comment asks the important question of whether the system causes an unreasonable detriment to the rights of players. Certain effects of the system must be explored. Some say that the lost potential of a player's earning power is the detriment. That is, the reserve system is a restraint on the player's ability to command a top wage.<sup>6</sup> Other players feel that the system causes a loss of their dignity.<sup>7</sup> The latter premise is that a team which controls a player's destiny will use that power to manipulate the player in abusive ways. The process of contract negotiations in the NFL illustrates the point. In order to improve its bargaining position, the club emphasizes the player's shortcomings. The player, however, cannot prove his claim of merit because there is no market in which he can prove his claim.

The federal courts have addressed aspects of the reserve system. The plaintiffs in *Mackey v. National Football League*<sup>8</sup> successfully challenged the "Rozelle Rule" then in force. Under the "Rozelle Rule," Commissioner Alvin Ray "Pete" Rozelle was given the power to determine and award appropriate compensation to redress a club that lost the services of a reserved player to another member of the league. The system operated in the following fashion: A player would complete the term of the contract with his old club and then negotiate a new contract. If the player was unable to get a satisfactory offer, however, he could get one from a new club. The old club and new club would then try to reach agreement for compensation so that the old club would transfer its reserved right to contract with the player. If the clubs failed to agree, Commissioner Rozelle would intercede. He would award draft selections or players from the new club so as to maintain an equitable distribu-

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5. A market where there is only one purchaser of a commodity is known as a monopsony. BLACK'S LAW DICTIONARY 908 (5th ed. 1979). See also *infra* note 99 and accompanying text.

6. These players put emphasis on what their wages would be in a competitive market.

7. The reserve system allows a club to treat the team's players as commodities rather than as human beings. It is clear that a reservation upon a player gives the club a contract right that will be manipulated in any way possible to maximize profits.

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

tion of talent across the league.<sup>9</sup> In *Mackey*, the court agreed with the players that the uncertainty of the Commissioner's award chilled offers that might be coming<sup>10</sup> and held that the practice was unreasonably restrictive of trade<sup>11</sup> in violation of the Sherman Antitrust Act.<sup>12</sup> The decision led to the present system of First Refusal/Compensation.<sup>13</sup>

The mechanism of the NFL college draft was addressed in *Smith v. Pro Football, Inc.*<sup>14</sup> The plaintiff successfully claimed that the draft restrained him from negotiating the highest possible contract. A disabling neck injury caused the plaintiff to prematurely retire and the measure of damages was the amount of income he would have earned but for the draft.<sup>15</sup>

Both *Mackey* and *Smith* exposed the League to antitrust liability. The League looked to the Clayton Act and the Norris-LaGuardia Act<sup>16</sup> for the needed "labor exemption" from the proscriptions of the Sherman Act. Pursuant to its interest, the player's collective bargaining agent, the National Football Players Association ("NFLPA"), had the ability to lawfully adopt and ratify the terms of the NFL system by bargaining for benefits, in quid pro fashion.<sup>17</sup> The League's antitrust exposure would be sanitized in this manner under an umbrella of immunity granted to labor associations. This immunization is embodied in the *1982 Collective Bargaining Agreement* (the "1982 Agreement").<sup>18</sup>

The expiration of the 1982 Agreement on August 31, 1987,<sup>19</sup> renews the question of NFL antitrust liability. Although NFL exposure to antitrust law may theoretically pose greater liability for the NFL than a potential strike action would, it would be overly

9. NFL CONST. art. XII, § 12.1(H).

10. *Mackey*, 543 F.2d at 620.

11. *Id.* at 622.

12. 15 U.S.C. § 1 (West 1973 & Supp. 1987).

13. See *infra* note 89 and accompanying text.

14. 593 F.2d 1173 (D.C. Cir. 1978).

15. *Id.* at 1191.

16. *Mackey*, 543 F.2d at 611. The concept of a labor exemption from the antitrust laws finds its basic source in sections 6 and 20 of the Clayton Act, 15 § 17 U.S.C. (West 1973), and 29 U.S.C. § 52 (West 1973) and the Norris-LaGuardia Act, 29 U.S.C. §§ 104-05, 113 (West 1973). Those provisions declare that labor unions are neither combinations nor conspiracies in restraint of trade, and specifically exempt certain union activities such as secondary picketing and group boycotts from the coverage of the antitrust laws.

17. See *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Local 189, Amalgamated Meat Cutters v. Jewel Tea Company*, 381 U.S. 676 (1965).

18. See 1982 COLLECTIVE BARGAINING AGREEMENT, art. III, XII-XVI [hereinafter 1982 AGREEMENT].

19. *Id.* art. XXXVIII (duration of agreement).

ambitious to suggest that the NFLPA obtain relief from the NFL's restrictive system in the courts without resort to strike. In any event, both sides must use good faith to reach a new collective bargaining agreement. A collective bargaining agreement may be created either as a settlement to a labor dispute or as a settlement to an antitrust action.

It is this writer's opinion that the NFL's potential antitrust liability presents the NFLPA with a bargaining position that may allow it to negotiate less restrictive unemployment rules. Many of the provisions of the system are unreasonably restrictive. The legitimate purposes of the system would be better served with less restrictive alternatives. The players would do well to preserve aspects of the system that have generally benefitted football, but also have the NFLPA eliminate aspects of the system that tend to deprive the players of a free market. Although it is difficult to reach an ideal balance when the parties have such opposite interests, a compromise should be agreed upon where alternatives support each adversary's position.

## II. OBSERVATIONS ON THE SYSTEM

### A. *The NFL Draft*

The system begins with the annual NFL Draft.<sup>20</sup> Students who have played college football will become eligible to enter the National Football league.<sup>21</sup> The professional teams carefully scout the college ranks. NFL clubs evaluate the talent pool in preparation for the NFL Draft. The promising athletes are carefully reviewed. The objective is to determine which prospects are most likely to succeed in the NFL.

Each club, using its own criteria, ranks prospective players. The draft is an orderly distribution of the college talent pool. Each club will draw a limited number of athletes from this pool.<sup>22</sup> Understandably, the very best players are selected first. For that reason, the clubs must determine their needs before the draft. Although the clubs may have a dilemma of whether to select the very best available athlete, or to select the most needed athlete, a choice must be made within a short period of time or it is lost.<sup>23</sup>

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20. See NFL CONST., *supra* note 2, art. XIV (selection meeting).

21. See *id.* art. XII (eligibility of players).

22. Each club ordinarily has 12 selections to make annually in the NFL College Draft. That number can change if reserved veteran players are exchanged for another club's future draft selections.

23. Special rules are established to move the selection process along. The selecting

The club's draft selection is intrinsically valuable. Theoretically, the clubs with the best athletes have the best chances of winning consistently. Veteran athletes whose careers are declining or ending must be replaced. New talent can mean the difference between a winning or a losing season. Likewise, the eligible players anticipate the draft. They know that their best efforts will enhance their chances of being drafted in the NFL and train to be their best on the playing field. Every game is filmed and made available for scouting purposes. The hopeful players even submit to additional testing requested by the talent scouts. The effort of these players results from their dream of playing for an NFL team.

The draft occurs each year in late April or early May.<sup>24</sup> Athletes nervously await news of their selection. Sometimes a friend or family member will call on the phone with the good news, but it is the official call from the drafting club that settles the issue. A representative from the drafting club congratulates the player for his being selected and invites him to a "Mini Camp" scheduled the next week.<sup>25</sup>

"Mini Camp" is a three day period where the club brings to its training camp its veterans, draftees, and "free agents" who are trying out for the team. The club uses the Mini Camp to evaluate these athletes and how well they are doing in their off-season conditioning programs. The draftees, in turn, have the opportunity to assess their competition for the limited number of roster spots. The draftees and free agents also begin to learn a new and often complicated football system.

Mini Camp also marks the beginning of club negotiation tactics. The club inquires whether the player has retained the services of a player agent. If the player has an agent, then a meeting will be scheduled with that agent. If the player is unrepresented, he is informed that a signed standard player contract<sup>26</sup> is a precondition to reporting to the preseason training camp. The player must then begin to think about the terms of his contract and his negotiation strategy with that particular club.

The NFLPA maintains that players should have the right to shop their services among the twenty-eight NFL clubs. The NFL argues to the contrary, contending that the NFL reserve system

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club has a prescribed time to make its choice or it waives its turn to draft for that round.

24. 1982 AGREEMENT, *supra* note 18, art. XIII, § 1.

25. *Id.* art. XX, § 1 (Off-Season Training Camps).

26. *Id.* art. XII, § 1 (NFL player contract). *But cf.* Kapp v. NFL, 390 F. Supp. 73 (N.D. Calif. 1974).

converts the League's twenty-eight clubs into a single entity and that players are free to shop their services to any other league.<sup>27</sup>

In reality the players are powerless about when they were selected and to which team they will report. Every player would prefer to be selected in the first round of the draft but that obviously is impossible. Many players also have a preference for the team they would like to work for but this also cannot be accommodated.

Because the players want to play professional football and the draft provides the opportunity, it seems unlikely that a player chosen would challenge the draft's legality. Whether or not a player is happy with his selection, his choice is lost. The choice is to report to the team that has selected him or not to play professional football. Almost all of the players view the draft as an opportunity to make the club and accept the draft for what it is. The next step in the system is the negotiation of a contract.

### B. Negotiations

Most players will retain player agents to help negotiate the terms and conditions of the players' respective contracts with the drafting team. Players generally feel that because of agents' familiarity with the process, a better contract can be negotiated with the services of an agent than without.

The task of the agent (or player) is to convince the club that the player compares favorably to other athletes of similar ability. The comparison may be to a current draft selection who has already signed a contract or to a previous year's selection. The comparison is usually to a player selected in the same period.

In the process of negotiating, the club, on the other hand, will resist comparisons to other highly-paid athletes. The club may either dispute that the player is as good as he makes himself out to be or claim that the player compared to is himself overpriced. Because the risk of losing the player to another NFL club is remote,<sup>28</sup> the negotiating club can be quite stubborn if it feels that the

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27. Due to the collapse of the United States Football League (USFL) the only alternative league is the Canadian Football League.

28. Players who choose not to sign a contract with the drafting NFL team have limited options available to them. A player may hold out for a year and be eligible to sign with any team selecting him in the following draft. 1982 AGREEMENT, *supra* note 18, art. XIII, § 3, at 29. If the player fails to sign within the year following the subsequent draft he may obtain unconditional free agent status. *Id.* § 4, 29-30. However, if a player performs in a rival football league the drafting club will retain its claim upon the player for four years. A player returning to the NFL after four years is free to negotiate with any team but the initial drafting team has a right of first refusal. *Id.* § 7, at 30.



player's proposal is too steep. The club is in a superior bargaining position and ultimately prevails by waiting until the player reduces his demands, because waiting often forces a player needing a contract to play and earn a living to accede to the club's demand.

Because this negotiation method utilizes a process of comparison to comparable players, it forces a stratification of player wages dependent on the draft round in which that player entered the league. An unofficial wage scale results, predicated upon the round in which that player was drafted.

Having a contract is a prerequisite for reporting to the drafting club.<sup>29</sup> Therefore, the beginning of training camp represents a deadline for executing players' contracts. Moreover, clubs have three interests in signing their athletes. First, the player has intrinsic value because he was chosen to help the club win more games; his absence will undermine the clubs' effort to win. If the club fails to reach agreement that intrinsic value is lost and may not be recovered. Second, draftees have been trained in a college system, which is often different from that used by most NFL clubs. The draftees' fundamental skills must be enhanced and they also need to be indoctrinated into a new "pro" system. For example, new terminology and techniques must be learned. Finally, the team must be sensitive to public opinion. The public, as the consumer, must be satisfied that their team is doing everything possible to ensure victory. Unsigned draftees cause fans to grumble. A fan will rationalize that when he pays top dollar for a game ticket he should expect the club to field the very best roster possible. In summary, the club's interest in the player's merit, his development, and the club's public relations and marketing of tickets to fans.

Notwithstanding the opening of training camp, a small number of players will fail to reach agreement. The gambit is to "hold out", or to withhold services, until the club will relent and acquiesce to the player's demands. It may be unreasonable, however, for the player to expect the club to improve its offer to a point where the increase will result in the recovery of wages lost during the holdout period. The teams offer will generally cover lost earnings only in extreme circumstances such as a shortage at the player's position due to injury.

Only a handful of players will fail to contract. The fact that players generally acquiesce to contract terms can be explained on economic grounds. Very few players are so financially independent

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29. NFL CONST., *supra* note 2, art. XV, § 15.6(a) (player contracts-prerequisite to play and practice).

that they can afford to hold out. Alternatively, only a few athletes are so gifted as to attract offers from other professional sports such as baseball or basketball. Similarly, some athletes simply decide to attend graduate school as opposed to playing professional football. Absent these alternatives, however, the player must negotiate his contract from an inferior bargaining position. This inferior bargaining position may be exacerbated where the drafting club is a relatively low paying team within the NFL scheme, or the club just does not see the value in the player to justify the player's wage demand. A final and familiar tactic often employed by NFL teams is simply to not negotiate in a meaningful way. After all, if the player fails to accept the club's offer he will not play. In most circumstances the hold out is a desperate strategy and the club understands the relative risks involved. From the club's perspective, despite incentives to negotiate, it enjoys a superior negotiating position because of its relative financial strength and its right to the player's services for up to one year (until the subsequent draft) at no further cost. The team can stonewall the player when he is restrained from playing elsewhere in the league because the club always has the option to improve its offer to the player if it later chooses to.

The player usually makes the only realistic business decision he can; he acquiesces to the best contract proposal he can get. The terms are set forth in a standard form contract.<sup>30</sup> The scope of negotiation in an NFL contract is limited to the following nine items:

1. Length of contract (including options);
2. Basic salary per year (or season);
3. Signing bonus (perhaps a reporting bonus as well);
4. Incentive or performance bonuses;
5. Guarantees;
6. Trade provisions (contract assignment);
7. Additional injury protection;
8. Fringes and special benefits; and
9. Personal conduct provisions.<sup>31</sup>

Due to the imbalance in bargaining power created by the reserve system, only the very best players are in a position to demand certain contract features. For example, very few players can obtain a guarantee in their contract.<sup>32</sup> The player often does not

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30. See *infra* Appendix A-NFL Standard Player Contract [hereinafter Contract].

31. 1 R. BERRY & G. WONG, *LAW AND BUSINESS OF THE SPORTS INDUSTRIES* 232 (1986).

32. Only 4% of total NFL player contracts are guaranteed, compared to 50% in baseball and 95% in basketball. Availability of guaranteed contracts is an issue after the expira-

have the leverage to force the issue and the clubs resist giving guarantees. Terms giving players power to control which teams they may play for in the event of a trade are even more difficult to negotiate.

Most clubs negotiate through their director of player personnel. The director often meets with the coach and the owner to determine how valuable the athlete is. Based upon this determination, an upper contract limit is approved. The director has no authority to exceed that limit. He does have an incentive to negotiate a contract for less than the limit. A low contract will save the owner money and accordingly put the director in a more favorable position with his employer, the club owner.

The player's proposal is typically very much higher than the club's. The difference must be narrowed to come to agreement. Where the difference is large, the player is often told to come back with a more realistic proposal in order for negotiations to be meaningful. The player's question is what is a meaningful proposal? The player asks the team to please make one for his consideration. Both sides expect to make concessions at each negotiation meeting. Both sides hope to wrap up the process before preseason camp opens in late July. It is at this stage that the imbalance in the bargaining process becomes apparent. From the club's perspective, the season will go on notwithstanding a failure of the parties to come to agreement. The player's situation is different. He may lose a full season's earnings if a contract is not consummated. Because of its superior bargaining position, the club intentionally stalls up to the preseason reporting deadline. Due to the player's inferior position, he is forced into larger concessions. The contract is then consummated.

The negotiation process is one of frustration for the player. Without an objective way of proving his worth and without a free market to sell his services, the player signs a contract because he has no other alternatives. This process of individual negotiation

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tion of the 1982 Agreement in August of 1987.

Guaranteed contracts come in multiple forms, including 1) a guarantee of payment of present and future executed contracts in case of injury (this benefit is otherwise contractable with a disability policy thru Lloyds of London); 2) guarantee against loss of skill (also known as a "no cut" contract); and 3) the functional guarantee of receiving either a signing bonus or a reporting bonus. Generally draft choices receive signing bonuses upon signing their first NFL player contract. Others may get a reporting bonus.

In the author's thirteen years as a player with the Miami Dolphins he was aware of only a handful of players having the clout to force a skill guarantee, and those were during the years of the World Football League. Since that time, players are routinely told that Dolphin policy is not to give "no cut" contracts.

translates to a wage scale.<sup>33</sup> The parties merely approximate that standard for determination of wage in their agreement. But the standard is rigged; gross wages given for the entire pool of athletes is restrained by the reserve system, as shown by salary surveys taken over periods where competitive leagues (such as the World Football League or the United States Football League) vied for available talent.<sup>34</sup>

### C. *The NFL Player Contract*<sup>35</sup>

The standard NFL Player Contract, which all players must sign,<sup>36</sup> serves the following purposes:

1. Obligates the player to render services that he represents are superior.
2. Obligates the team to pay a specified amount for those services.
3. Obligates the player not to engage in activities outside of football that will subject him to physical danger.
4. To bind the player to the following:
  - a. Use for team publicity purposes;
  - b. Deduction of advance payments or fines from the player's salary.
  - c. Refraining from conduct which is detrimental to the integrity of the game of football.
  - d. Bringing any disputes arising out of the contract to an arbitrator prescribed by the 1982 Agreement. This will include disputed issues of injury.
5. To make the player promise to report any football related injury to the team doctor. If those injuries are deemed debilitating, the club will remain obligated to compensate the player for the year of contract. The club may terminate any subsequent contract if in the opinion of the team doctor the player is physically unable to perform in the upcoming season.
6. To establish that either party has the right to terminate the contract at will upon written notice.
7. To obligate the player to abide by club rules not in conflict with the contract. The player's attention is drawn to the fact

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33. See *infra* Appendix B—1985 Average Salary by Entry Round.

34. See Appendix C—Historical Salary Trends: 1970-1985. Of particular note the increase in the average salary in years 1974 thru 1977 inclusive and in years 1983 thru 1985 inclusive. The accelerating rate of increase correlates roughly to the periods that the WFL and the USFL existed.

35. A copy of the author's standard NFL Player Contract is printed in its entirety in Appendix A.

36. 1982 AGREEMENT, *supra* note 18, art. XII, § 1, at 28.

that the League operates as a Joint Venture and rules among the clubs may affect the relationship of the club with the player.

8. If the player refuses to perform during the term of the contract then the term of the contract will toll.

9. To provide the club with an automatic renewal option at the expiration of the existing contract. Said subsequent contract must provide compensation in an amount not less than 110% of the prior contract.

10. To secure player agreement that his services can be assigned to another club and that the player will report promptly to the assignee club upon being informed of the assignment.

11. To serve as notice to the rest of the clubs that the signing club retains its reserved right in the player.

12. To obligate the parties for one year's duration. A series of consecutive one year contracts may be executed at the close of contract negotiations.

Players usually do not attempt to negotiate out of the standard terms of the contract. This results, in part, from the NFL Commissioner's power to void any deviation from the standard player contract.<sup>37</sup> Without the ability to negotiate terms, players necessarily employ a short-term perspective and seek to negotiate as large a salary and as favorable bonus terms as possible.

The player's signature secures his consent to the reserve system, binding the player to the same rules that constrain the individual clubs. His contract incorporates and ratifies the agreement that his collective bargaining representative, the NFLPA, has negotiated on his behalf in the Collective Bargaining Agreement. In essence, the player is locked into the system.

#### D. *The Player Reports*

After signing their contracts, draftees are required to report to their drafting club.<sup>38</sup> The reporting date is usually set for the third

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37. NFL CONST., *supra* note 2, art. XV, § 15.4. "An executed copy of each player contract must be filed with the Commissioner within ten (10) days after the execution thereof. . . ." *Id.* at § 15.3.

The Commissioner shall have the power, without a hearing, to disapprove contracts between a player and a club, if such a contract has been executed in violation of or contrary to the Constitution and By-Laws of the League, or, if either or both of the parties to such contract have been or are guilty of an act or conduct which is or may be detrimental to the League or to the sport of professional football.

*Id.* at § 8.14(A).

38. Contract, *supra* note 30, para. 2.

week of July.<sup>39</sup> The first condition of employment is to take a physical given by the team physician.<sup>40</sup> Any prior medical history is noted. If, in the opinion of the doctor, the player will be unable to perform in the NFL, his contract may be summarily terminated.<sup>41</sup> This rule holds for all players.<sup>42</sup>

Next, the player must survive the mandatory roster reductions.<sup>43</sup> League rules require these reductions.<sup>44</sup> Camps typically open with about 100 reserved athletes reporting. Halfway into the preseason the mandatory reduction dates begin. A prescribed number of athletes will remain. The rest are "waived."

"Waiver" refers to the club's release of its reserved right in the specified player.<sup>45</sup> The waived player is no longer claimed by the former club, and his name is listed in the league's central office where he may be claimed by any other club. If the player is claimed, the former club will receive \$100.00 from the claiming club to consummate the assignment.<sup>46</sup> Claims are made over the "waiver wire."

The "waiver wire" refers to a network of telex communications where the status of all players is made known to all of the clubs. The clubs can make their claims over the waiver wire.<sup>47</sup> If more than one club claims the waived player, the Commissioner will award the player to the team with the lower league standing at the time, except where less than three regular season games have been played at the time of the waiver claims. In that situation, the player will be awarded to the team with the lower league standing in the prior season.<sup>48</sup>

Picking up a player from the waiver wire constitutes an assignment to the claiming club of the contract that the waiving team has terminated,<sup>49</sup> and the player is obligated to report to the club which has claimed him.<sup>50</sup> A player cannot refuse to report because that will toll the period of the present and future contracts held by the claiming club, leaving the player in limbo, without pay, until

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39. 1982 AGREEMENT, art. XXI, § 5 (pre-season training camps).

40. Contract, *supra* note 30, para. 8.

41. NFL CONST., *supra* note 2, art. XII, § 12.3(E).

42. Contract, *supra* note 30, para. 8.

43. *Id.* para. 11.

44. See generally NFL CONST., *supra* note 2, art. XVII (player limits and eligibility).

45. *Id.* art. XVIII, § 18.1.

46. *Id.* § 18.6.

47. *Id.* § 18.1(B)(2).

48. *Id.* § 18.5.

49. *Id.* § 18.6.

50. Contract, *supra* note 30, para. 18.

he reports.<sup>51</sup> Therefore, the player has no control over where he will go. His choices are to report or to retire.

A waived player with four or more credited years of NFL service may, within 24 hours of notification, give the waiving club written notice of his desire to have an unconditional release of any obligations that he has in present or future contracts. This will result in the player becoming a "free agent."<sup>52</sup> The player may now move to any club that he can contract with. Free agency status is desirable, but it also comes at the time that the former club believes there to be little remaining intrinsic value left in the waived player. A free agent usually has too weak a position to market his services and very few teams will want him. A request for free agent status will afford little leverage in obtaining a better contract.

The cutover and player limit schedule prescribed by the NFL<sup>53</sup> will result in the waiver of approximately half of the players who reported at the beginning of preseason.<sup>54</sup> Knowing this, the competition for the roster spots is fierce.

The clubs will reserve rights to those players whom they predict can most help the club. Forty-five men make a full active roster.<sup>55</sup> The league office must be provided a listing of players<sup>56</sup> on the active roster before they are permitted to suit up and play. The reserve status of these players is known as the "active reserve."

The waiver system causes an inefficient use of talent. Few clubs wish to add players at the time when they are required to reduce their roster numbers. Waived players are usually of marginal utility. The earlier the waiver, the greater the likelihood of being claimed by another team, because the claiming team has more time to evaluate the player and teach him the club's unique system. As preseason progresses and the cutover dates arrive,<sup>57</sup> the decisions of who to keep and who to release become increasingly more difficult to make. The weaker players are spotted and released earlier. This results in a paradox—the weaker players are waived early and then claimed, while the better are waived later and are often lost to the league.

51. *Id.* para. 16.

52. 1982 AGREEMENT, *supra* note 18, art. XVI, § 1, at 44.

53. *See* note 46.

54. *See* NFL CONST., *supra* note 2, art. XVII (player limits and eligibility; cutovers and player limit).

55. 1982 AGREEMENT, *supra* note 18, art. XIX, § 1, at 47 (squad size). Forty-five is the lower limit. *Id.*

56. NFL CONST., *supra* note 2, art. XVII (cutovers and player limit).

57. *See supra* note 45.

Players are often traded<sup>58</sup> during preseason because this is the logical time to obtain the best combination of players. Some trades are made for future draft choices. Trading for future selections preserves a club's intrinsic value in its pool of reserved players, while reducing the club's roster at the same time.

A player can demand a trade. If his relationship with the club is amicable, it may consider a trade, especially if the team perceives it can get a good return for the player's value. This accommodation, however, is a matter of grace. Few players will be traded to a team of their choice. If the player is not traded, he will either stay with the team that has the reserved right in him, be waived, or retire. One thing is certain—at no time will the player have the freedom to contract with the highest bidder for his services.

As some players get older, they begin considering alternative careers.<sup>59</sup> They may choose retirement instead of accepting a lower salary. Sadly, the threat of retirement is often used as leverage in renegotiating a contract. If a player who is unhappy with his contract renegotiation decides to retire, the club may decide to lure the player back with a satisfactory offer. Such an offer, however, is only used for key players. In retiring, the player runs the risk that the club will not renegotiate. The reservation for a specified player's services remains for life.<sup>60</sup> The retiree is put on an inactive list known as "Retired Reserve"<sup>61</sup> and no NFL club, save the reserving club, can utilize his services.<sup>62</sup> This creates another market inefficiency because some retirees, who still have productive football years remaining, are lost as the club claiming his rights will not give the player the increase of salary that he finds acceptable to play. It may be that a different club would have been willing to pay the player's asking price. The logic appears to be if the team

58. Contract, *supra* note 30, para. 18. "Trade" is synonymous with an assignment of contract.

59. Prior injuries and the risk of future, more debilitating injury caused the author to consider alternative careers. After due consideration, the author enrolled in law school during his final season with the Miami Dolphins.

60. In *Kapp v. NFL*, 390 F. Supp. 73 (N.D. Cal. 1974), District Judge Sweigert commented, "A conceivable effect of this [Rozelle] rule would be to perpetually restrain a player from pursuing his occupation among the clubs of a league that holds a virtual monopoly of professional football employment in the United States." *Id.* at 82.

The question of whether a club has the power to perpetually renew its power to renew was addressed in *In the Matter of Arbitration Between National Football League Players Association and National Football League Management Council* (1980) (Luskin, Arb.). The arbitrator found that the clubs did have the power to perpetually reserve a claim upon services of specified players.

61. NFL CONST., *supra* note 2, art. XVII, § 17.6(A).

62. *Id.* § 17.10.



reserving the right to the services cannot retain the intrinsic value of the reserved player, then no one will. The question then arises, what is wrong with letting such a player freely market his skills to obtain the best contract he can without the restraint of the reserve system?

Some players will not report to camp<sup>63</sup> and others quit after reporting.<sup>64</sup> Either action will not affect the club's retained reservation in the player. The club's power to reserve the services of the player is perpetual. Unless these players possess sufficient leverage to prompt a renegotiation, the same harsh choice remains—report or retire.

Some players will not have signed a contract before the other players have reported to camp.<sup>65</sup> Draftees and veteran players with expired contracts are not permitted to report unless they have an executed NFL Player Contract.<sup>66</sup> The player may be holding out for a better contract, but this strategy works only where the player's services are unique and indispensable to a winning team. There is a significant likelihood that the player will lose training time, money and ultimately be forced back to camp because of the reserve upon him with little to show for his gambit.

A player injured in the prior season, like other players, will take a physical upon reporting to camp. If the team doctor determines that the injury was football related and that the injury will prevent the player from performing, that player will be assigned to an inactive reserve status known as "Physically Unable to Perform" ("PUP").<sup>67</sup>

A collectively bargained benefit protects PUP players who report under a current contract. Such a player is entitled to receive the lesser of \$65,000 or one half of his current contract base salary.<sup>68</sup> Because clubs are obligated to pay this benefit, they will likely retain their reservation at no additional cost. A player can later be "activated"<sup>69</sup> if he rehabilitates; if he does not, he may then be waived.<sup>70</sup> Once the player is waived, the club's liability is limited to workmen's compensation.<sup>71</sup>

63. *Id.* § 17.6(B).

64. *Id.* § 17.6(C).

65. *Id.* § 17.6(H).

66. *Id.* § 15.6.

67. See generally NFL CONST., *supra* note 2, art. XVII (player limits and eligibility-reserved/injured); *Id.* § 17.6(E).

68. 1982 AGREEMENT, *supra* note 18, art. X, § 12 at 26 (injury protection).

69. See *supra* note 51.

70. NFL CONST., *supra* note 2, art. XVIII, § 18.4 (players waived while injured).

71. 1982 AGREEMENT, *supra* note 18, art. XXXVI, § 1, at 67 (worker's compensation).

A player may incur an injury unrelated to football. Regardless of how the injury occurred, the club has the right to terminate a player's contract for failing to report in physical condition to play football. If the team doctor determines that the player can overcome his injury and the coach judges the player to be worth keeping, then the club may utilize another type of reserve. A player on "Non-football Injured Reserve"<sup>72</sup> receives payment under contract for the period that he is reserved. The rationale behind the inactive reserve status is to protect the team from losing its claim upon temporarily disabled players.

There is an inactive reserve status for players who are called into military service.<sup>73</sup> The last contract in force is tolled until the player returns for employment in the NFL.

Finally, there is a reserve upon a player suspended or expelled by the Commissioner or the team.<sup>74</sup> A player may have violated club rules or a league prohibition and is punished by removal from the active roster. Drug use, gambling or undue use of violence are examples of cause for this sanction. The club may retain its reserve by placing the player on its inactive list. "Suspended Reserve" frees the team of its obligation to pay the player.<sup>75</sup> Due process is ensured by an impartial arbitrator.<sup>76</sup>

### E. Future Years

A player would be wise to consider his future marketability when deciding the term of his multi-year contract. The player may feel that he was underrated in his initial evaluation by the drafting club and hence poorly paid. If he feels that he can prove his worth, he will do better to negotiate a short term, multi-year contract. Negotiating as a first string player will enhance his bargaining position later.

Note that this strategy requires patience. A player capable of starting for another team may find himself trapped behind teammates who are better players at his position. The reserve system deprives this player of years of opportunity. In the NFL, players can expect short careers, and there are not many years to show what talent the players have. Accordingly, the system deprives the

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72. See generally NFL CONST., *supra* note 2, art. XVII (player limits and eligibility-reserved/injured); 1982 AGREEMENT, *supra* note 18, § 17.6(F).

73. 1982 AGREEMENT, *supra* note 18 §§ 17.6(G), 17.11.

74. *Id.* §§ 17.6(I), 17.12.

75. *Id.* § 17.12.

76. *Id.*

would-be starter of the chance to earn a starter's salary.

### F. *Expiration of Contracts*

The athlete who plays until to the end of his contract must renegotiate a new one. It is a precondition that all players have an executed contract before they may report to camp.<sup>77</sup> If the club is interested in renewing a player's contract, it must notify the player before his contract expires.<sup>78</sup> Notice of a claim on the specified player is given to the league even though the player is not obligated by a written contract.

The parties most often reach an agreement and execute a new series of one-year contracts. If the parties fail to agree, then the renewal term of the last contract controls. The club has a perpetual option, without further negotiation or the player's consent, to renew the previous contract at a ten percent raise.<sup>79</sup> The renewal clause revives itself ad infinitum with the exercise of each such option.<sup>80</sup>

The round that the player was drafted at is the most significant factor in determining the salary range that he will be compensated at for the term of his multi-year contract. The draft will come back to haunt the player who wishes to renegotiate a new series of contracts.<sup>81</sup> A 10% raise is the starting point of renegotiation. For example, a first round player who receives \$500,000 in base salary in the final year of his contract will be offered a minimum \$550,000 renewal contract. A ninth-round selection drafted the same year receives \$100,000 base salary but his renewal option is at \$110,000. The ninth round player may have proven his ability to be superior to that of the first round player, but because of the draft he will not be able to reach salary parity with the inferior player.

The renegotiating player is thus faced with a familiar business decision—accept a minimum ten percent raise or hold out. The usual decision is to accept the offer made by the club for lack of better alternatives.

Again the question arises how the player is to determine what a fair wage for his services should be? The reserve system disrupts natural market forces. Comparison to comparable salaries is the

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77. See *supra* note 26.

78. Contract, *supra* note 30, para. 17.

79. *Id.*

80. See *supra* note 36.

81. See *infra* Appendix B-1985 Average Salary by Entry Round.

only standard available, but it is arguable that the entire reference group of salaries is artificially low due to the reserve system. Players find the method frustrating and undignified because their labor, as a property right, is shared with owners under the reserve system. This is what makes free agency so attractive—it would give the player the opportunity to test the market and determine his true market wage.

The club owners have drafted rules that have effectively restricted player movement. One of these rules, the Rozelle Rule,<sup>82</sup> has not withstood legal scrutiny. The Rozelle Rule was a former mechanism for compensating a club which lost a reserved player to another NFL team. The Rozelle Rule was held violative of the Sherman Act in *Mackey v. National Football League*,<sup>83</sup> which established NFL liability for unilaterally imposed restraints on player movement. *Alexander v. National Football League*<sup>84</sup> was the companion case which was ultimately settled for \$13 million. The settlement was distributed by a court approved formula to the damaged class of players.

The Rozelle Rule was replaced by Article XV of the 1982 Agreement.<sup>85</sup> Article XV permits an athlete who plays out the term of his contract (a "Veteran Free Agent")<sup>86</sup> to test the market while at the same time allowing the club to recover the reserved intrinsic value in the free agent. In this context, "free agency" refers to the veteran free agent's ability to seek offers from any of the other NFL clubs. The veteran free agent, however, is not free of his club's reserved claim of value and, therefore, is not free to move unless the club elects to let him do so.

Despite its outward attractiveness, an analysis of the dynamics of Article XV free agency reveals that it is subject to the strong-arm of the very reserve system it seeks to circumvent. The no tampering proscription which prevented clubs from contacting reserved players is relaxed from February 1 until April 15 for players whose contracts have expired. Any club may propose salary terms to the players during this period.<sup>87</sup> Should a player decide to accept these terms, he will commit the new club to its offer on a

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82. NFL CONST., *supra* note 2, art. XII, § 12.1(H). The rule was supplanted by the 1982 Collective Bargaining Agreement. See generally 1982 AGREEMENT, *supra* note 18, art. XV, § 15.1, at 32-39 (Right of First Refusal/Compensation).

83. 543 F.2d 606 (8th Cir. 1976).

84. 4-76 Civ. 123 (D. Minn. May 2, 1977).

85. 1982 AGREEMENT, *supra* note 18, art. XV, § 15.1, at 32-39.

86. 1982 AGREEMENT, *supra* note 18, art. XV, § 15.1, at 32.

87. *Id.* § 15.2.

written instrument known as an "offer sheet"<sup>88</sup> and deliver it to the reserving club on or before April 15.

When the reserving club receives the offer sheet it has a choice. It can obligate itself to the terms of the offer sheet, preventing the player from moving<sup>89</sup> or it can receive compensation in the form of draft selection(s) that would have otherwise gone to the new club in the upcoming college draft.<sup>90</sup> The new club now knows what acquiring a reserved player will cost in terms of draft selections that it will have to forfeit. This cost is based on the offer made by the new club.<sup>91</sup>

The value of the reserved player is correlated to the salary offered.<sup>92</sup> A ten year veteran in the NFL who submits an offer of \$250,000 obtained from a new club will entitle the old club to the new club's first and third round draft selections in the next draft. The old club is obligated for the new club's contract, for all offers above the threshold amount. As a result, the player would not be able to move. Almost all players are at salary levels that will entitle the old club to receive compensation for the lost talent. Higher offers entitle the reserving club to receive higher draft compensation. The reserving club always has the choice to exercise its right to first refusal.

If no offer sheet is produced, then the club must notify the player that it still desires to renew his contract. Notification must occur on or before June 1, or the player becomes totally free without restraint.<sup>93</sup> After notification, the player has fifteen days to execute the renewal contract. He must elect either the last best offer or a ten percent raise over the last contract.<sup>94</sup> If he delays after June 16, the ten percent raise is withdrawn. The reserve upon the player, however, remains.

The reserve system was purportedly designed to preserve an equitable distribution of players from the talent pool. Although the right of first refusal/compensation is supposedly consistent with

88. Only one offer sheet signed by both a club and a veteran free agent is permitted to be outstanding at any one time. 1982 AGREEMENT, *supra* note 18, art. XV, § 15.6, at 33.1.

89. The reserving club can enter a binding contract with the veteran free agent simply by providing the NFLPA a First Refusal Exercise Notice, which in essence permits the reserving club to match the new club's offer. 1982 AGREEMENT, *supra* note 18, art. XV, § 15.4, at 32.

90. *Id.* §§ 11, 12.

91. *Id.* § 12.

92. See Appendix E.

93. *Id.* § 17.

94. *Id.* If the player does not take the ten percent raise by June 15 the club can offer any amount of salary it chooses.

that goal, the result to the players seems anything but equitable.

The emergence of a new upstart league, the United States Football League ("USFL") created a new source of better wages to proven athletes. This forced the NFL teams to compete by bidding for player services or otherwise losing them. The USFL was a boon to free agent players as a bidding war ensued. As a result, player's average salaries dramatically increased.<sup>95</sup>

Ironically, the USFL caused Article XV to become obsolete before the ink of the Collective Bargaining Agreement was dry. The mechanism failed because the compensation award was not adjusted for rapidly increasing player salaries. The theory of the compensation system was that where a salary offered to a player was high, the fair value of the reserve in the player was also high. It was expected that the clubs would trade their future draft choice(s) for a veteran player of known ability. The salary that a new club would be willing to offer was evidence of value that the old club placed in reserving that player's services. The new system permitted player movement while preserving the value of having a captured pool of talented athletes. Unfortunately, the practice did not follow the theory. USFL competitive bidding caused average NFL players to receive higher salaries. Paradoxically, NFL clubs were willing to pay higher salaries to average players but not willing to give up high draft choices as return compensation. Few teams could justify the compensation they would owe if their offer was accepted and simply stopped making offers. Although the system was supposed to compensate the old club for its lost right of reserve in the player and the player was to gain the freedom to test his market value, neither result followed. Where the clubs valued the power to win through the draft more than that offered by the free agent, then there was no incentive for clubs to make offers. The right of first refusal/compensation failed because it overcharged clubs who would have been willing to make competitive bids.

The compensation system is inadequate for reasons other than its failure to achieve its purpose. Players, as people, are still not included in the equation. They may want to move for reasons other than money. Perhaps they have off-season opportunities in another location, or maybe they want to play for a winning club. A player may want the opportunity to start with another team that has a need for his services. Maybe he does not get along with his

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95. See *infra* Appendix C-Historical Salary Trends: 1970-1985.

coach. Consider the plight of a player who is forced to play for the most unreasonable coach imaginable; that coach knows that there is no way for the player to escape his authority. The coach remains abusive because players do not have the ability to move. This type of employee abuse is common in the league.

When viewed from a free market perspective, the employer must be competitive with his salary offers or he will lose better workers to higher paying employers. This is the penalty for not paying workers a competitive wage. Additionally, recruiting becomes difficult and turnover is high. The end result is that the employer's product goes down in quality where inferior employees are used.

In the NFL reserve system, a club escapes penalties for making subpar salary offers. If the player produces a qualifying offer under First Refusal/Compensation, the old club either exercises its right of first refusal or it takes the compensation for the lost veteran free agent. Either way, the club suffers no loss for making bad faith offers. The presence of the USFL forced NFL clubs to make competitive salary offers or suffer the penalty of losing reserved talent. The USFL, however, no longer exists. Without an alternative league, there is no incentive for making offers the player's would consider appropriate.

The reserve system encourages NFL clubs to exercise bad faith in its negotiations with players. Proof of this can be seen on a team by team analysis of player salaries. For example, the Denver Broncos had an estimated payroll expense of \$7.6 million in 1985 while the N.Y. Jets had one of \$12.9 million.<sup>96</sup> This translates into an average salary of \$137,300 for a Denver Bronco and \$226,100 for a New York Jet, an \$88,000 per player discrepancy. Denver players had no recourse for being claimed by the Broncos and the team had no incentive for eliminating the salary discrepancy.

### III. THE LEGAL ISSUES

#### A. *The Owners' Perspective*

The draft is an administrative allocation of eligible college prospects. Distribution by reverse order of finish from the prior season for each of twelve rounds of selection is intended to insure that talent is fairly dispersed. If teams have equality of talent, then the clubs will be able to strike a competitive balance on the playing field.

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96. See *infra* Appendix D-1985 Salary Analysis By Club.

Player ability to move is considered dangerous to long-term NFL prosperity. The theory is that where freedom of movement exists, players will gravitate to those football franchises that (1) offer natural advantages such as mild weather or off-season promotional opportunities; (2) are traditionally winning teams; or (3) pay the highest salaries.

The compensation factor is complicated by the diverse resources and interests of the club owners. Some owners are millionaires while others are multi-millionaires. The latter group has an obvious advantage in purchasing power. Owners may also be divided into two classifications: sportsmen and businessmen. Sportsmen are intrigued by the game. They are satisfied to be central to and identified with sports entertainment in their city. Winning records and championships enhance their satisfaction. Businessmen, on the other hand, are concerned with fiscal rewards. If the sportsman also has strong purchasing power, he will sign better players in order to build a championship franchise. Wealthy sportsmen are perfectly willing to operate at a deficit to achieve this end.

Some fear that in a permissive (free movement) system salaries will escalate to a level where the businessmen will no longer compete. Teams without natural advantages will also fall behind. Ultimately, wealthy sportsmen in advantageous cities will attract the best talent and their teams will become dynasties.

Franchises depend upon local fans to purchase tickets and those fans expect a superior performance in exchange for the admission price they pay. Unless their team is one of the dynasty teams, the fans will lose interest and the weaker franchises will suffer as a result of lower ticket sales. The economic strength of the league as a whole will also suffer. Many weaker franchises will eventually find it unprofitable to remain in business. Eventually, even fans of the dynasty franchises will lose interest as the outcome of games will become increasingly predictable.

Owners argue their economic viability would be threatened if a system of free movement were foisted upon them. The argument continues that the public benefits from with a better product where rules prevent the free movement of players. The reserve system provides this safeguard. Players may suffer short-term economic detriment because of a restrictive system, but in the long run the fans benefit. The reserve system has worked to the economic benefit of the league, with gross income consistently increasing and providing an expanding resource from which a player's salary can be increased. In support of this contention, owners point



out that players' salaries have steadily increased in the modern era.

### B. *The Players' Arguments*

The NFL Constitution provides that each club will have exclusive rights to contract with a specified portion of the talent pool.<sup>97</sup> The NFL Constitution also provides for sanctions to be exercised against rogue teams that violate the spirit of the system.<sup>98</sup> All member teams cooperate as a single entity to that end. The NFL Constitution creates a classic cartel where individual players come into the league and then negotiate with the team that has reserved a right to the player's services. Admittedly, these rules enhance competition on the playing field, but they also deprive players of the power to market their services among several employers. This deprivation is effected by denying players the power to move freely within the league.

In the economic sense, players are sellers of their services, and the clubs are purchasers of those services. The NFL system, however, enables a player to market his services to only one employer. Such a market is known as a monopsony.<sup>99</sup>

A monopsony is perceived as exploitive because salaries are consistently less than what a competitive market would bear. Draftees have no choice but to play for the drafting club and reserved veterans have no choice but to renegotiate their respective contracts. A club with an exclusive reserve on the right to contract with a specific athlete may practice predatory bargaining tactics on that player and a player's power to command fair market wages is seriously impaired.

By artificially manipulating the conditions of the labor market, as the NFL Constitution does, the league satisfies its need for qualified labor. Players are forced to come to the team that reserved a right to his services because there are many more athletes desiring to play ball than there are openings available. Furthermore, the bulk of these players are interchangeable. Only the exceptional player offers a talent that cannot easily be replaced. The quality of service that one player can offer is easily replaced with the service that another player can provide. This permits clubs to select the best players and to negotiate lower than the free market wages.

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97. NFL CONST., *supra* note 2, art. XIV, § 14.5.

98. NFL CONST., *supra* note 2, art. XIII, § 8.13 (disciplinary powers of commissioner).

99. R. BERRY & G. WONG, *supra* note 31, at 45-48.

The NFL clubs, as monopsonists, understand the dilemma faced by the players. They understand that players are denied the benefit of top wages that a free market would otherwise bring, and that players will consider employment in alternative markets that will yield higher returns for their labor. If players find such markets, they will exit the NFL. Faced with a competing demand for player services, NFL clubs would be forced to stem the loss of talent by offering salaries that are attractive enough to keep reserved players in the system.

The players have been willing to adopt and ratify terms which generally benefit the league, notwithstanding the fact that the terms violate the Sherman Act.<sup>100</sup> Terms that enhance competitive balance arguably satisfy this standard. Some degree of restraint over player movement should be tolerated, because without a reserve system the league would suffer economically, which would ultimately be detrimental to the players. On the other hand, players argue that the primary effect of the reserve system is that it operates as a restraint upon player wages and is therefore illegitimate.

A free market permits players to move where they have better opportunity. A player selected by a team in a restrictive system is denied opportunity to achieve his potential. For example, a player who might start for most NFL clubs may ride the bench because he is trapped with a team that already has superior starters at his position. Under the reserve system, this player loses the opportunity to command a starter's wage and the public loses the entertainment value provided by a talented athlete who, were it not for the reserve system, would be starting for another team.

The players largely feel that the fans pay to see the players perform<sup>101</sup> and that this has led to the NFL's financial success. Admittedly, salaries have increased, but not to the degree that gross revenues have. The players argue that the reserve system permits the owners to keep too much of the increased gross revenues, in effect reducing the percentage of gross income allocated to player wages. With the reserve system, only the presence of a competitive league will cause NFL owners to increase their wage offers.<sup>102</sup> The

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100. See generally 1982 AGREEMENT, *supra* note 18. The labor exemption, in effect, causes the NFL cartel to become a legal association. See generally Campbell, *Labor Law and Economics*, 38 STAN. L. REV. 991 (1986).

101. An analogy can be made to a rock star or a prize fighter. The performer is entitled to the large share of the profits. The NFL owner is likened to a promoter who merely coordinates the details of putting on the show.

102. See Appendix C-Historical Salary Trends: 1970-1985. The only explanation for the increasing rate of rising salaries in the 1974-1977 and 1983-1985 periods is the existence

NFL reserve system adversely affects the individuals power to negotiate a fair wage—one that delivers a fair percentage of the gross.

Lastly, the NFL reserve system permits the owners to treat players as an intangible property right. A player's concerns about his place of employment are not considered. The result is that these human beings are treated like commodities.

### C. *Sherman and Clayton Acts*

Congress recognized the unfairness that monopolistic systems cause and proscribed their use in the Sherman Antitrust Act.<sup>103</sup> The Act codified common law principles designed to counter the concentration of power which characterizes a monopoly.

The Sherman Act provides in pertinent part that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .”<sup>104</sup>

The Clayton Act,<sup>105</sup> a companion to the Sherman Act, confers a private right of action with treble damages to “[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. . . .”<sup>106</sup> Furthermore “[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws. . . .”<sup>107</sup>

Early sports-related antitrust litigation involved professional baseball. In *American League Baseball Club of Chicago v. Chase*<sup>108</sup> the New York State Supreme Court refused to apply the Sherman Act even though baseball was found to operate as a monopoly. The court could not find that baseball involved interstate commerce or trade. The court noted that players contract for their services and are not treated as commodities or articles of merchandise. Because the Sherman Act was authorized under the Commerce Clause of the Constitution, the Supreme Court held the Act inapplicable

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of competitive leagues; the WFL and the USFL caused the NFL to start making competitive bids for player services.

103. 15 U.S.C. § 1 (West 1973 & Supp. 1987). This federal law has its constitutional authority under the commerce clause.

104. *Id.*

105. *Id.* § 12-27.

106. *Id.* § 15.

107. *Id.* § 26.

108. 149 N.Y.S. 6 (Sup. Ct. 1914).

under these facts.

Nonetheless, the court determined that professional baseball was an illegal combination in contravention of the common law. In support of its findings, the court stated "it invades the right to labor as a property right, in that it invades the right to contract as a property right, and in that it is a combination to restrain and control the exercise of a profession or calling."<sup>109</sup>

In *Federal Baseball Club of Baltimore, Inc. v. National League*,<sup>110</sup> the plaintiff, a member club of the upstart Federal League, complained that the more established National League acquired most of the teams of the fledgling Federal League, but not the plaintiff's team. These purchases allegedly caused the league to fold, resulting in injury to the plaintiff. The plaintiff claimed that the defendant's action was a monopolistic combination in violation of the Sherman Act. As in *American League Baseball Club of Chicago v. Chase*, the Court refused to apply the Sherman Act, holding that the business of professional baseball was purely an intrastate affair. Baseball was not interstate trade or commerce in the commonly accepted meaning of those words because personal effort not related to production was not a subject of commerce. The clubs' regular crossing of state lines to compete was considered merely incidental.

Although courts found it hard to distinguish baseball from other businesses within the scope of the Sherman Act, the rule of *Federal Baseball Club of Baltimore, Inc. v. National League* was consistently upheld.<sup>111</sup>

Thirty-one years later, in *Toolson v. New York Yankees*,<sup>112</sup> the Supreme Court declined to overrule *Federal Baseball Clubs of Baltimore, Inc. v. National League*, observing that baseball had grown and developed with the expectation that it was not subject to the federal antitrust laws and that holding otherwise would result in an unfair retrospective imposition of antitrust liability. The Court deferred to Congress' responsibility to pass a prospective law making antitrust proscriptions applicable to baseball.

The issue of whether major league baseball's antitrust exemption should be extended to professional football was addressed in *Radovich v. National Football League*.<sup>113</sup> In 1938, Radovich joined

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109. *Id.* at 17.

110. 259 U.S. 200 (1922).

111. *See, e.g., Gardella v. Chandler*, 172 F.2d 402 (2d Cir. 1949).

112. 346 U.S. 356 (1953).

113. 352 U.S. 445 (1957).

the Detroit Lions, a member club of the National Football League, and played for four years before entering the Navy. Radovich returned to the Lions after completing his tour of duty in 1945. In 1946, he requested a trade to Los Angeles in order to be with his father, who was in ill health. The Lions refused his request. Radovich subsequently broke his contract with the Lions and played the 1946 and 1947 seasons with the Los Angeles Dons, a member club in the rival All-American Conference. In 1948, the San Francisco Clippers (a member club of the Pacific Coast League which was affiliated with the National League) offered Radovich a player/coach position with the franchise. The NFL advised the Clippers that Radovich was "blacklisted" because of his earlier breach of contract with the Lions and further advised that any affiliated club which signed Radovich would be subject to severe penalties. The Clippers rescinded their offer.<sup>114</sup>

Radovich alleged that the blacklisting effectively ended his career in professional football. The blacklist amounted to a conspiracy to "control, regulate and dictate the terms upon which organized professional football shall be played in the United States."<sup>115</sup> It was also alleged that the conspiracy effected a boycott against the All-American Conference and strengthened the monopolistic position of the NFL and that the defendants violated the Sherman Act because exhibitions NFL games involved interstate commerce. Relying on *Federal Baseball Club of Baltimore, Inc. v. National League* and *Toolson v. New York Yankees*, the defendants argued that they were in the same position as baseball. Without elaborating on the distinction between baseball and football, the Court rejected the NFL's argument on the ground that professional football involved a higher degree of interstate activity than did baseball and that the antitrust exemption was limited to baseball.

In discussing its inability to reconcile its conclusion, the Court wrote:

If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer, aside from the distinctions between the businesses, that were we considering the question of baseball for the first time upon a clean slate we would have no doubts. But *Federal Baseball* held the business of baseball outside the scope of the [Sherman] Act. No other business claiming the coverage of those cases has such an adjudication. We, therefore, conclude that the orderly way

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114. *Id.* at 448.

115. *Id.*

to eliminate error or discrimination, if any there be, is by legislation and not by the court decision.<sup>116</sup>

The NFL also argued Radovich's complaint was insufficient because employees are not a favored class of plaintiffs under the Sherman Act. The Court rejected this proposition, holding that Radovich was permitted to prove that there were federal antitrust violations and prove damages for his claim. Specifically, the Court held that "Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public."<sup>117</sup>

In summary, *Radovich v. National Football League* limited the rule of *Federal Baseball Club of Baltimore, Inc. v. National League* and *Toolson v. New York Yankees* to professional baseball, and extended the application of the antitrust laws to professional football, even when it affected players as plaintiffs.

#### D. Arrival of the NFLPA

After the NFL's failure to persuade the courts that it was exempt from the proscriptions of the Sherman Act, it attempted to lobby the Congress for statutory immunity. Hearings were held the same year as *Radovich* was decided. Congress, in considering whether or not to grant such immunity, was concerned that the players' interests were not represented. Furthermore, antitrust exemptions were considered potential weapons to be used against the players' position. In an attempt to assuage congressional concerns, then Commissioner of Football Bert Belle stated to a House Subcommittee:

Accordingly, in keeping with my assurance that we would do whatever you gentlemen consider to be in the best interest of the public, on behalf of the National Football League, I hereby recognize the National Football League Players Association and I am prepared to negotiate immediately with the representatives of that association concerning any differences that may exist. This will include the provisions of our bylaws and standard players' contract which have been questioned by members of this committee.<sup>118</sup>

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116. *Id.* at 452.

117. *Id.* at 453-54.

118. R. BERRY & G. WONG, *supra* note 31, at 13.

Despite this assurance, it still took ten years for the National Football League Players Association ("NFLPA") to gain recognition as the exclusive bargaining representative of all NFL players. In 1968, the National Labor Relations Board recognized the NFLPA as a union entitled to the protections of the National Labor Relations Act.<sup>119</sup>

### E. *The Non-Statutory Labor Exemption*

The Clayton<sup>120</sup> and Norris-LaGuardia<sup>121</sup> Acts provide statutory exemptions for labor associations from the proscriptions of the Sherman Act. In addressing whether management can come within this statutory exemption, courts have put a gloss over the Sherman Act to reflect the federal policy in favor of collective bargaining. The reasoning is that without this exemption (which is known as the "nonstatutory labor exemption"), employers would have no incentive to enter into collective bargaining agreements.<sup>122</sup> The rule evolved that where a union found that where its best interest would be so served, it could adopt and ratify management conduct, and management would escape liability under the Sherman Act.<sup>123</sup> This exemption provided the players with a stronger bargaining position at the negotiating table.

Through collective bargaining, such topics as the college draft, the reserve system, and player movement have been brought to the negotiating table. Although these restrictive practices have some long-term benefit, the NFLPA protected players' interests by bargaining for less restrictive systems. From the players' perspective, the downside of the labor exemption is that once the union ratifies a provision, it cannot be later challenged on antitrust grounds.

*Mackey v. National Football League*<sup>124</sup> identified the uncertainty that results when the federal policy in favor of collective bargaining is in conflict with the policy against monopolistic practices. In evaluating whether federal labor policy should prevail over federal antitrust policy, Judge Lay articulated a three-prong test:

We find the proper accommodation to be: First, the labor policy favoring collective bargaining may potentially be given pre-emi-

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119. *Mackey v. NFL*, 543 F.2d 606, 610 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977).

120. 15 U.S.C. § 17 (West 1973), 29 U.S.C. § 52 (West 1973).

121. 29 U.S.C. §§ 104-05, 113 (1973).

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

123. See, e.g., *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 503 (1940).

124. 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977).

nence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship. Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining.<sup>125</sup>

#### F. Mackey and the Rozelle Rule

*Mackey v. National Football League* was an action initiated by present and former NFL players who challenged the "Rozelle Rule."<sup>126</sup>

The Rozelle Rule essentially provides that when a player's contractual obligation to a team expires and he signs with a different club, the signing club must provide compensation to the player's former team. If the two clubs are unable to conclude mutually satisfactory arrangements, the Commissioner may award compensation in the form of one or more players and/or draft choices as he deems fair and equitable.<sup>127</sup>

The district court found that "the Rozelle Rule constituted a concerted refusal to deal and a group boycott, and was therefore a *per se* violation of the Sherman Act."<sup>128</sup> Clubs were willing to entertain contract talks with veteran free agents only where the clubs were willing to risk the loss of reserved talent that the Commissioner would award as compensation to the reserve club.

The league rules were intended to maintain an equitable distribution of player talent to be achieved through the college draft and a compensation system such as the Rozelle Rule. The players could move but the reserve club would be compensated, usually with future draft selections. Compensation protects "the [reserving] club's investment in scouting, selecting and developing [its] players."<sup>129</sup>

In *Mackey*, the plaintiffs alleged that NFL member clubs were often unable to agree on inter-club compensation. In lieu of agreement, the commissioner would determine the compensation

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125. *Mackey*, 543 F.2d at 614 (citations omitted).

126. *Id.* at 609.

127. *Id.* n.1.

128. *Id.* at 609.

129. *Id.* at 611.



awarded to maintain competitive balance.<sup>130</sup> The new club's uncertainty of the commissioner's award chilled the player's chances of receiving offers.<sup>131</sup> The players complained that the effect of the compensation system was to restrain their right to freely market their services and enforcement of the Rozelle Rule was effected by an alleged combination and conspiracy. Plaintiffs asked that the Rozelle Rule be found illegal under the Sherman Act.<sup>132</sup>

Relying on Section 6 of the Clayton Act that "[t]he labor of a human being is not a commodity or article of commerce,"<sup>133</sup> the clubs and the commissioner argued "that the restriction of competition for players' services is not a type of restraint proscribed by the Sherman Act."<sup>134</sup> The court rejected this argument on the ground that "courts have not hesitated to apply the Sherman Act to club owner imposed restraints on competition for players' services."<sup>135</sup>

The clubs and the Commissioner also contended that the Rozelle Rule was "necessary to the successful operation of the NFL,"<sup>136</sup> and that the Rule had been a subject of the 1968 and 1970 Collective Bargaining Agreements.<sup>137</sup> Therefore, the Rule was immune from attack under the Sherman Act<sup>138</sup> by authority of the labor exemption.

The trial court found sufficient evidence to prove that the Rozelle Rule was not necessary and that the effects of the Rozelle Rule were unreasonable in light of the League's other anticompetitive practices.<sup>139</sup> The record revealed the Rozelle Rule was not negotiated during the bargaining sessions preceding the 1968 and the 1970 Agreements and that the NFLPA never agreed to a Rozelle Rule term. Although there had been an incorporation of the NFL

130. *Id.* at 611-12 (citing NFL CONST. art. 12, § 12.1(H)).

131. *Id.* at 618.

132. *Id.* at 609 n.2. The suit was initiated as a class action with plaintiffs seeking injunctive relief and treble damages. The issue of damages was later severed to be determined after appeal of the trial court's rulings. *Mackey v. NFL*, 407 F. Supp. 1000 (D. Minn. 1975).

133. *Mackey*, 543 F.2d at 617.

134. *Id.* at 616.

135. *Id.* at 617 (citing *Kapp v. NFL*, 390 F. Supp. 73 (N.D. Cal. 1974); *Robertson v. NBA*, 339 F. Supp. 867 (S.D.N.Y. 1975); *Radovich v. NFL*, 352 U.S. 445 (1957); *Smith v. Pro Football, Inc.*, 542 F. Supp. 462 (D.D.C. 1976); *Boston Prof. Hockey Ass'n v. Cheevers*, 348 F. Supp. 261 (D. Mass.), *remanded on other grounds*, 472 F.2d 127 (1st Cir. 1972); *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal.), *stay vacated*, 401 U.S. 1024 (1971)).

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

137. *Id.* at 610.

138. *Id.* at 609.

139. *Mackey v. NFL*, 407 F. Supp. 1000 (D. Minn. 1975).

Constitution and Bylaws in the 1968 Agreement, of which the Rozelle Rule was part, no such incorporation terms were utilized in the 1970 Agreement.<sup>140</sup> The 1970 Agreement, however, did require that all players sign a Standard Players Contract, which in turn provided that all players agree to comply with the NFL Constitution and Bylaws.<sup>141</sup>

The Court of Appeals for the Eighth Circuit formulated principles<sup>142</sup> that would clarify when evidence of bargaining particular terms would qualify those terms for exemption from the Sherman Act. In balancing the labor policy which favors collective bargaining and the antitrust laws, the court concluded that the Rozelle Rule would be covered by the non-statutory labor exemption only if the rule was a mandatory subject of collective bargaining and the agreements thereto were the result of bona fide arm's length negotiations.<sup>143</sup> Mandatory subjects of bargaining under the National Labor Relations Act include "wages, hours, and other terms and conditions of employment."<sup>144</sup> The district court, however, held that the Rozelle Rule was "violative of the antitrust laws under the Rule of Reason standard, [and could not], because of its illegality, constitute a mandatory subject of bargaining as that phrase is used in labor law."<sup>145</sup> Nonetheless, the district court held that the Rozelle Rule operates to restrict the player salaries. Based upon the indirect effect of depressing player's wages, however, the Eighth Circuit overruled the district court and held that the Rozelle Rule

140. *Id.* at 1008-10.

141. *Mackey*, 543 F.2d at 613.

142. *Id.* at 614.

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

*Mackey*, 543 F.2d at 614 (citations omitted).

143. *Id.* at 615-16.

144. 29 U.S.C. § 158(d) (West 1973 & Supp. 1987).

145. *Mackey v. NFL*, 407 F. Supp. at 1009. The Rule of Reason standard focuses on "whether the restraint imposed is justified by legitimate business purposes and is no more restrictive than necessary." *Mackey*, 543 F.2d at 620. The Rozelle Rule was found unreasonable under the Rule of Reason standard because it was unreasonably broad in its application (covering all players regardless of how marginal their status or ability), there were no procedural safeguards with respect to its employment (the free agent may never know other clubs are interested in him), it was of an unlimited duration (it is a perpetual restriction on a player), and because of the other anticompetitive practices of the League (the draft, standard players contract, and tampering rule). *Mackey v. NFL*, 407 F. Supp. at 1007-08.

was a mandatory subject of bargaining.<sup>146</sup>

The Eighth Circuit found that the bona fide bargaining requirement of the labor exemption test remained unsatisfied because the parties never negotiated the Rozelle Rule. Due to the recent formation of the NFLPA and its inadequate finances, "the NFLPA, at least prior to 1974, stood in a relatively weak bargaining position vis-a-vis the clubs and 'the Rozelle Rule was unilaterally imposed by the NFL . . . upon the players in 1963 and has been imposed on the players . . . through the present date.'" <sup>147</sup> Therefore, the labor exemption was held to be inapposite and the Rozelle Rule was subject to scrutiny under the Sherman Act.

The remaining issue was whether the Sherman Act would be applied to the Rozelle Rule in a per se or rule of reason analysis. In addressing the former, the court noted that if the Sherman Act were to be strictly construed, virtually all agreements made between businessmen could theoretically be considered violative of the Act.<sup>148</sup>

Only those agreements which 'unreasonably' restrain trade come within the proscription of the Act. Antitrust analysis identifies certain types of agreements as "so consistently unreasonable that they may be considered illegal per se, without inquiry into their purported justifications."<sup>149</sup> For example, in *Northern Pacific Ry. Co. v. United States*,<sup>150</sup> the Supreme Court stated that "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."<sup>151</sup>

The Eighth Circuit, however, did not find the Rozelle Rule illegal per se because this finding has typically been restricted to "agreements between competitors in the traditional sense,"<sup>152</sup> whereas the NFL was characterized as "a joint venture in that

146. *Mackey*, 543 F.2d at 615. "To hold that a subject relating to wages, hours, and working conditions becomes nonmandatory by virtue of its illegality under the antitrust laws deviates the labor exemption. [W]hether the agreements here in question relate to a mandatory subject of collective bargaining should be determined solely under federal labor law." *Id.*

147. *Id.* at 615-16.

148. *Id.* at 618.

149. *Id.* (citation omitted).

150. 356 U.S. 1 (1958).

151. *Id.* at 5.

152. *Id.* at 619 (citing *Northern Bank & Trust Co. v. National BankAmericard Inc.*, 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974)).

each member has a stake in the success of the other teams."<sup>153</sup> The Rozelle Rule was also found not to "completely eliminate competition for players' services,"<sup>154</sup> and that "when faced with a unique . . . business situation, courts have eschewed a *per se* analysis in favor of an inquiry into the reasonableness of the restraint under the circumstances."<sup>155</sup> Accordingly, the court analyzed the legality of the Rozelle Rule within the context of the Rule of Reason standard.<sup>156</sup>

The league articulated several reasons why the restraints effected by the Rozelle Rule were not unreasonable.<sup>157</sup> The league argued that without the Rozelle Rule: (1) players would flock to cities that had natural advantages in terms of economic base, media opportunity, and climate, which would eliminate the competitive balance throughout the league and diminish fan interest, ultimately leading to franchise failures and a weaker NFL; (2) teams would be unable to recoup their investment in scouting expenses and player development; and (3) player continuity on the teams would decline, therefore prompting a decline in the quality of play and reducing fan interest.<sup>158</sup>

Notwithstanding these contentions, the Eighth Circuit agreed with the district court and found the justifications for the Rozelle

153. *Id.* (citing *United States v. NFL*, 116 F. Supp. 319 (E.D. Pa. 1953)).

154. *Id.* (citing *Kapp v. NFL*, 390 F. Supp. 73 (N.D. Cal. 1974); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978)).

155. *Id.* (citing *White Motor Co. v. United States*, 372 U.S. 253 (1963); *Northern Bank & Trust Co. v. National BankAmericard, Inc.* 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974)).

156. For a brief description of the analytical framework employed under the Rule of Reason standard, see *supra* note 103. The analysis, however, is not without its disadvantages. "The primary disadvantages . . . are that it requires difficult and lengthy factual inquiries and very subjective policy decisions which are in many ways essentially legislative and ill-suited to the judicial process." *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049, 1063 (C.D. Cal. 1971) (NBA by-law prohibiting the signing of players until four years from their respective high school graduation dates found to violate the antitrust laws under Rule of Reasons analysis).

157. According to Judge Wilkey, writing in *Smith v. Pro Football, Inc.*,

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

593 F.2d at 1183 (footnotes omitted).

158. *Mackey*, 543 F.2d at 621.

Rule unpersuasive. With regard to the latter two justifications, the district court held that

the clubs' investment in player development costs . . . are similar to those incurred by other businesses, and there is no right to compensation for this type of investment[,] . . . [and] [w]ith respect to player continuity . . . elimination of the Rozelle Rule would affect all teams equally . . . [and] that it would not lead to a reduction in the quality of play [and] that even assuming that it would, that fact would not justify the Rozelle Rule's anticompetitive effects.<sup>159</sup>

In effect, the courts are saying that the clubs can no longer rely on the Rozelle Rule to minimize their respective salary expenditures and preclude a true free agent's market. Rather, a club must pay a player his worth in order to keep the player from selling his services to another franchise.

With regard to the NFL's competitive balance justification, the Eighth Circuit agreed with the district court's holding that the Rozelle Rule, even if it did foster competitive balance, was too broad in its application. "The key issue is . . . whether the Rozelle Rule is essential to the maintenance of competitive balance, and is no more restrictive than necessary."<sup>160</sup> In light of the NFL's concern with the movement of only the better players as being detrimental to football, the Rozelle Rule was found to be more restrictive than necessary because it was applicable to every player regardless of his ability. Furthermore, the Rule operated as a perpetual restriction on a player's capacity to sell his talents in an open market, and lastly, was too restrictive because there were no procedural safeguards providing for the determination of fair compensation.<sup>161</sup> Therefore, the Rozelle Rule was found to constitute an unreasonable restraint of trade in violation of the Sherman Act.

It is critical to understand, however, that the labor exemption to antitrust liability is still available to the league. In its conclusion, the Eighth Circuit stated that "since the Rozelle Rule, as implemented, concerns a mandatory subject of collective bargaining, any agreement as to interteam compensation for free agents moving to other teams, reached through good faith collective bargaining, might very well be immune from antitrust liability under the nonstatutory labor exemption."<sup>162</sup>

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159. *Id.*

160. *Id.*

161. *Id.* at 622.

162. *Id.* at 623.

Although the financial resources of the league make it significantly more powerful than the NFLPA, it is clear that the league's ability to enjoy the benefit of the labor exemption is entirely within the control of the NFLPA. In other words, the NFLPA should utilize this leverage to negotiate a restriction of the Rozelle Rule, and not give it away cheaply.

### G. *The NFL Draft*

In *Smith v. Pro Football, Inc.*<sup>163</sup> plaintiff James "Yazoo" Smith successfully challenged the NFL college draft on antitrust grounds. Smith, a first round draft choice of the Washington Redskins, signed a contract with the team and played for one year until an injury forced him to retire prematurely from the NFL.<sup>164</sup> Smith alleged that, but for the draft, he would have negotiated a far more lucrative contract.<sup>165</sup> The court agreed, holding that the draft effected "a 'group boycott' and was a *per se* violation of the Sherman Act."<sup>166</sup> Alternatively, analysis under the Rule of Reason sustained the finding of illegality because the draft was " 'significantly more restrictive than necessary' to accomplish whatever legitimate goals the NFL had."<sup>167</sup>

On appeal, the Redskins and the league contended that the draft should not be summarily determined on a *per se* basis, that the draft could survive the proscriptions of the Sherman Act when analyzed under the Rule of Reason, and that the measure of damages adopted by the trial court was erroneous.

The general rule that "classic" group boycotts were *per se* violations of the Sherman Act was reaffirmed but the Court of Appeal for the District of Columbia Circuit distinguished the "group boycott" label attached to the NFL draft, holding "that the NFL player draft is not properly characterized as a "group boycott"—at least not the type of boycott that traditionally has been held illegal *per se* . . . ."<sup>168</sup>

Two distinctions were drawn. First, in classic group boycotts, competitors attempt to " 'barricade themselves from competition at their own level.' "<sup>169</sup> Typically, the boycotting group seeks to ex-

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163. 593 F.2d 1173 (D.C. Cir. 1978).

164. *Id.* at 1176.

165. *Id.* at 1174-75.

166. *Id.* at 1175.

167. *Id.*

168. *Id.* at 1178.

169. *Id.* (quoting L. SULLIVAN, ANTITRUST 245 (1977)).

clude would-be competitors by persuading suppliers or customers not to do business with them. Judge Wilkey found that the NFL member clubs are "not *competitors* in any economic sense. The clubs operate basically as a joint venture in producing an entertainment product—football games and telecasts."<sup>170</sup> Therefore, the draft had no illegal effect on would-be competitors. Secondly, the draft was not found to be an attempt to "*exclude competitors or potential competitors*"<sup>171</sup> from competing at the boycotting group's level of play. On the contrary, the draft was designed to enhance the member clubs' competitive equality. Judge Wilkey thereby concluded that the draft was not the type of group boycott which ordinarily would be considered *per se* violative of the Sherman Act, relying on the rule that

[i]nvocation of a *per se* rule always risks sweeping reasonable, pro-competitive activity within a general condemnation, and a court will run this risk only when it can say, on the strength of unambiguous experience, that the challenged action is a "naked restraint[] of trade with no purpose except stifling of competition"<sup>172</sup>

Judge Wilkey agreed with the district court that the draft prevents competition among the teams for player services and therefore restrains the player-services market.

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. The draft . . . "leaves no room whatever for competition among the teams for the services of college players, and utterly strips them of any measure of control over the marketing of their talents." The predictable effect of the draft . . . was to lower the salary levels of the best college players.<sup>173</sup>

A player reserved under the draft is forced into a monopsonistic market. With negotiation limited to one employer, the predictable result is significantly lower benefits to the players.

The Redskins and the league attempted to justify the draft by showing the draft's legitimate purposes and claiming that the draft had a net procompetitive effect. They contended that the draft promoted a competitive balance among the member clubs, thereby

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170. *Id.* at 1179 (footnotes omitted) (citing *Mackey v. NFL*, 543 F.2d 606, 619 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977)).

171. *Id.*

172. *Id.* at 1181 (citing *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963)).

173. *Id.* at 1185-86 (footnotes omitted).

enhancing the entertainment value of the NFL and ultimately benefiting the players with larger salaries through larger gross revenues.<sup>174</sup>

Judge Wilkey rejected the defendants' justifications on the ground that any procompetitive effects among the clubs could not be balanced against the anticompetitive effects that the draft had upon the players. "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."<sup>175</sup> Furthermore, "[i]n strict economic terms, the draft's demonstrated procompetitive effects are nil."<sup>176</sup>

The circuit court relied on *National Society of Professional Engineers v. United States*<sup>177</sup> which confined analysis under the Rule of Reason test to consideration of how the restraint impacts on competitive conditions rather than opening the inquiry "to any argument in favor of a challenged restraint that may fall within the realm of reason."<sup>178</sup> As a consequence, the defendants' assertions that the draft was in the best interest of the public was irrelevant; it was Congress' place to address public policy considerations when it passed the Sherman Act in 1890.<sup>179</sup> Within this context in 1968, the NFL draft was found to be in violation of the Sherman Act.

#### H. *Developments After Mackey and Smith*

With the 1970 Collective Bargaining Agreement set to expire in 1974, the NFLPA was gearing up for a new round of negotiations with the owner's bargaining unit—the National Football League Management Council ("NFLMC"). The players' concerns centered on the so-called "freedom issues."<sup>180</sup> NFLPA President Bill Curry wanted a show of solidarity and asked if the players would be willing to not play football to secure their freedom objectives. There was an overwhelming affirmative response.<sup>181</sup> A strike authorization vote was taken and the NFLPA was ready for collec-

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174. *Id.* at 1186 (citation omitted).

175. *Id.*

176. *Id.*

177. 435 U.S. 679 (1978).

178. *Smith*, 593 F.2d at 1186 (citing *National Soc. of Prof. Engineers*, 435 U.S. at 688).

179. *Id.* at 1186-87 (citing *National Soc. of Prof. Engineers*, 435 U.S. at 690).

180. "Freedom issues" included the freedom to contract with, freedom to move, and freedom to play for a team of the player's choice. D. HARRIS, *THE LEAGUE: THE RISE AND DECLINE OF THE NFL* 167 (1986).

181. *Id.* at 166.



tive bargaining.

Negotiations began on March 16, 1974. NFLPA Executive Director Ed Garvey read the NFLMC a prepared statement which set the tone for the negotiations:

It has been four years since we looked across the bargaining table at one another. We have not forgotten the way you conducted yourself during the 1970 negotiations. . . . Your attitude for the past four years has been to disregard the union, to avoid compromise at any cost . . . and to continue to suppress the rights of individual players. . . . The players accuse you of taking freedom from the players with no justification. . . . You are guilty of indifference to societal changes which have occurred since the early '60s. You have perpetuated an unjust system of control over athletes headed by those who have demonstrated disdain for the constitutional rights of athletes.<sup>182</sup>

Fifty-eight player demands were put on the bargaining table, including elimination of the Rozelle Rule, allowing total free agency, and establishing a player's right to veto a trade.<sup>183</sup> The NFLMC formally rejected all demands on April 4, 1974.<sup>184</sup>

By June 26, 1974, the player's list had grown to ninety-one demands and the Rozelle Rule became the top priority for each side.<sup>185</sup> *Mackey v. National Football League* had been filed but was not yet decided. The owners offered to exchange a package of benefits for acceptance of the Rule, but the players would not budge. Negotiations broke off, and on July 1, 1974 a player strike was called.<sup>186</sup>

The strike theme was "No Freedom, No Football."<sup>187</sup> The strike did not prevent rookie players from reporting to training camp as they had not earned roster positions and were not members of the NFLPA. The union declared that its members were prepared to hold out for as long as it took to obtain freedom provisions; likewise, owners were prepared to hold out and enter the 1974 season with all-rookie rosters.<sup>188</sup>

As the strike continued, economic reality weakened the players' resolve. With the inherent uncertainty of the length of players' careers, the prospect of losing even part of a season's income was

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182. *Id.* at 166-67.

183. *Id.* at 167.

184. *Id.*

185. *Id.* at 181.

186. *Id.* at 182.

187. *Id.*

188. *Id.* at 182-83.

untenable for many. Great numbers of veterans lost their jobs in the 1970 strike, and the veterans of the 1974 strike were not willing to become martyrs for the cause. The trickle of players crossing the picket line became a stream. By July 29, over 248 players had reported to camp—over 20% of the union rank and file.<sup>189</sup>

In August, the stream became a flood and the NFLPA was forced back to the bargaining table. Both sides knew the union's solidarity was lost, and on August 11, Ed Garvey announced a "cooling-off period" which enabled players loyal to the union to return to work. The strike never resumed. The NFLMC sensed the union's weakened position and demanded that the freedom issues and *Mackey v. National Football League* be dropped before it returned to the bargaining table.<sup>190</sup> The NFLPA refused, and the athletes played ball under an expired collective bargaining agreement. It would be two years before a new agreement would be executed.

Shortly thereafter, *Mackey v. National Football League* was affirmed. Although initially perceived to be a resounding defeat for the league, careful analysis of the opinion by counsel to the NFLMC resulted in the latter's decision to "buy out" the NFLPA so that a collective bargaining agreement could be entered and the antitrust issue eliminated via the labor exemption. Given the precarious financial position of the union,<sup>191</sup> the NFLPA was receptive to the NFLMC's advance and returned to the bargaining table.

In exchange for NFLPA acceptance of the Rozelle Rule, the league settled the damages aspect<sup>192</sup> of *Mackey v. National Football League* for \$13.65 million; executed a five-year collective bargaining agreement that included a \$107 million benefits package for the players; replaced the Commissioner with an arbitrator to handle player grievances and relented on a number of the freedom issues.<sup>193</sup>

Although the NFLPA's giving up the right to bring another

189. *Id.* at 183-84.

190. *Id.* at 255-57.

191. The strike put the union heavily into debt, and without a collective bargaining agreement, voluntary dues collections tapered off. "Our membership was down to about three hundred," one union source told the *New York Times*. "You have no idea how close we were to going out of business." According to the NFLPA's Labor Department Annual Report for the period ending November 30, 1976, the union had assets of minus \$233,975, and a net loss of almost \$1 million since the 1974 strike. *Id.* at 256.

192. *Alexander v. NFL*, No. 4-76 Civ. 123 (D. Minn. May 2, 1977).

193. D. HARRIS, *supra* note 180, at 257. The freedom issues resolved in favor of the players were the termination of "'arbitrary hair or dress codes'" and the granting of permission for players "to have private phones at their own expense" during training camp. *Id.*

antitrust action like *Mackey v. National Football League* was unpopular, the realities of the day made it clear that the survival of the NFLPA was of paramount importance, because no organized front for the representation of the player's interests existed. Additionally, NFLPA Executive Director Ed Garvey promised there would be another day when greater gains would be achieved.

Garvey formulated a new strategy for 1982, when the 1977 Collective Bargaining Agreement would expire. Convincing the players that management would never yield on additional freedom issues, Garvey focused on the player's salaries, proposing that the NFLPA adopt the owners' reserve system only if the owners guarantee that 55% of the gross revenues generated by football be distributed to the players.<sup>194</sup> The 55% figure was chosen because it was what the NFL paid to the players during the years of the old AFL/NFL bidding wars.<sup>195</sup> At that time companies like General Motors were paying over 50% of their gross in wage expenses. Additionally, "the owners made an average gross profit of \$5 million, more than their average total expenditure on player salaries, making the owner more valuable than all his players put together."<sup>196</sup> The owners could have their competitive balance, but they would have to pay for it because the players saw figures that would double their salaries. Strike authorization was again obtained. The NFLPA and NFLMC entered negotiations with a percentage of the gross as their prime object. Negotiations again failed. On September 20, 1982, three weeks into the season, Garvey called a player strike.

The owners were intractable, locking out the players during the strike and demanding the protection of a collective bargaining agreement in exchange for a season of football. Additionally, the 55% of the gross was not negotiable because, "according to the NFLMC, "[t]he percentage of gross concept is alien to American business[.]"<sup>197</sup> Accordingly, further negotiations were meaningless.

The strike lasted fifty-seven days. Neither side wanted to lose the entire season, but without a compromise, that would have been the result. Again, the players backed down first.

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194. *Id.* at 543. According to NFLMC Negotiator Jack Donlan, "in 1981, some forty-eight percent of football's gross had been allocated to 'player costs, which includes salaries and other benefits,' but Garvey's fifty-five percent demand was for salaries alone, independent of 'pensions, insurance, deferred compensation, signing bonuses, and so forth.'" *Id.* at 544.

195. *Id.* at 543.

196. *Id.*

197. *Id.* at 544.

The players returned to camp under a tentative compromise dated November 17, 1982; the formal agreement was executed December 11, 1982. Ratified reserve issues included acceptance of the NFL Player Contract, the College Draft, the Option Clause, the Right of First Refusal/Compensation, and the Waiver System. A covenant not to sue clause effectively barred future antitrust litigation by taking standing to sue from the union and its rank and file.<sup>198</sup> Additionally, the agreement provided that after August 31, 1987, either the NFLPA or the NFLMC could send the other party written notice of termination of the 1982 Agreement to take effect sixty days after the notice was sent.<sup>199</sup>

#### IV. CONCLUSION

##### A. *What Happens After August 31, 1987?*

When the 1982 Collective Bargaining Agreement is terminated, the intriguing question will be whether the league's labor exemption from antitrust liability will similarly be terminated. *Mackey v. National Football League* and *Smith v. Pro-Football, Inc.* make it clear that absent an agreement with the NFLPA, the league's Rozelle Rule and player draft will subject the league to antitrust liability. In the event the labor exemption is terminated, the players should enter negotiations for a new agreement seeking to improve on the gains achieved in the 1977 and 1982 agreements. Although a strike is disastrous for both sides, the players should use the resulting adverse economic impact on the franchise communities to increase the union's bargaining position<sup>200</sup> if such an impasse is reached.

The key issue, however, will be whether the labor exemption remains in effect after termination of the underlying agreement. This will have a significant impact on future negotiations because of the potential shift in bargaining position.

Scholars indicate there is "a preference for bestowing the la-

198. See generally 1982 AGREEMENT, *supra* note 18.

199. *Id.*

200. As a result of the 1982 strike,

[t]he fifteen hundred players lost \$72 million in wages. Employees of football stadia lost \$4.5 million and concessionaires lost \$17 million. Overall business in NFL cities was down by \$110 million and surrounding municipalities lost some \$11 million in taxes and rent. The twenty-eight owners lost a total of \$240 million in television and gate revenues.

*Id.* at 548. Although deemed "a worthwhile investment that . . . 'preserved their way of life for half a decade,'" *id.*, it is clear that the owners' monopsonistic power impacts on a broader base than anyone may have anticipated.

bor exemption upon agreements negotiated in the wake of anti-trust litigation,"<sup>201</sup> but acknowledge that the problem becomes more complex "in connection with negotiations the second or third time around, particularly when the parties are unable to resolve their differences and agree on a new . . . pact."<sup>202</sup> Although they are not bound to execute an agreement, it is important to understand that the parties to a collective bargaining agreement are obligated "to intend, in good faith, to consummate such an agreement."<sup>203</sup>

What does this obligation entail? Some commentators claim that a party cannot be forced into a collective bargaining agreement simply to avoid antitrust sanctions, and that an employer "cannot alter its stance subsequent to an impasse . . . and unilaterally impose a package different from that which has been on the bargaining table."<sup>204</sup> These positions, however, are predicated on honest attempts to secure agreement and are a function of the extent to which an employer's offer is "influenced by the give and take of prior bargaining."<sup>205</sup>

The players' position throughout the past fifteen years has remained consistent—to attain a compensation level for each player that is commensurate with that player's worth in a free market for player services. The owners' position has also remained consistent—to maintain a monopsonistic market and its accompanying concentration of wealth and power. Bargaining from these polar extremes should have resulted in a collective bargaining agreement that resulted in a middle ground—either limited free agency and marginally higher salaries or the status quo and significantly higher salaries. This, however, has not occurred because there has been no effective bargaining due to the great disparity in wealth between the parties.

The disparity in wealth has allowed the owners to consistently reject players' demands that salaries be returned to the level enjoyed during the days of competitive bidding, with the owners holding out during negotiations, prompting strikes, and then dic-

201. Berry & Gould, *A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls, and Strikes*, 31 CASE W. RES. L. REV. 685, 772-73 (1981) (citing *Reynolds v. NFL*, 584 F.2d 289, 289 (8th Cir. 1978)).

202. *Id.* at 773.

203. *Id.* (emphasis added).

204. *Id.* at 774.

205. *Id.* (citing J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* § 5.06, at 590 (1979)). See also Note, *Application of Labor Exemption After the Expiration of Collective Bargaining Agreements in Professional Sports*, 57 N.Y.U. L. REV. 164, 195-202 (1982).

tating the terms of the "bargained for" agreements. There has been no good faith intention to consummate an agreement on the part of the league. Rather, the players are forced to relent their position.<sup>206</sup> Given this lack of good faith on the part of the league, true bargaining does not occur between the NFLMC and the NFLPA. Therefore, the league should not enjoy the benefit of the labor exemption when the 1982 Agreement is terminated.

It is also clear that the courts prefer that the parties resolve their differences via collective bargaining and not in the courtroom.<sup>207</sup> Should the league agree with the aforementioned proposition that the labor exemption will terminate with the 1982 Agreement, negotiations for a new agreement should result in reaching a middle position more favorable to the players.<sup>208</sup> Alternatively, continued recalcitrance on the part of the owners should subject the league to antitrust liability once again.

### B. *Less Restrictive Alternatives*

Although it has been recognized that the reserve system<sup>209</sup> and player draft<sup>210</sup> may have a beneficial effect on the league due to the "joint-venture status"<sup>211</sup> of NFL clubs, both restraints have been found unreasonably restrictive.<sup>212</sup> Given the courts' preference for resolution of labor disputes via good faith collective bargaining rather than litigation,<sup>213</sup> it is imperative that the owners and play-

206. Judge Sweigert, in *Kapp v. NFL*, citing to Justice Marshall's dissent in *Flood v. Kuhn*, wrote

the court [sic] had not dealt with a situation in which the collective bargaining agreement is claimed to work to the detriment of labor—as in our pending case; he raised the question whether there would be exemption from the antitrust laws if it were shown that collective bargaining acceptance of the reserve system had been "thrust upon," rather than freely accepted by, the players' union.

390 F. Supp. 73, 85 (N.D. Cal. 1974) (citing 407 U.S. 258, 294-295 (1971)). See also *Mackey*, 543 F.2d at 623 ("the [labor] exemption cannot be invoked where, as here, the agreement was not the product of bona fide arm's-length negotiations"); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 498-99 (E.D. Pa. 1972) (collective bargaining agreement will not provide for labor exemption to antitrust liability where agreement was devoid of arm's-length negotiation).

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

208. See generally NFL CONST., *supra* note 2, art. XV (compensation). Although a new club would otherwise be willing to pay the free agent the salary he demands, the club with the reserved right on the veteran player's services is over-compensated via draft choices even though the veteran will not play for much longer in the NFL.

209. *Mackey*, 543 F.2d at 622.

210. *Smith*, 593 F.2d at 1187-88.

211. *Id.* at 1187.

212. *Mackey*, 543 F.2d 606 (1976); *Smith*, 593 F.2d 1173 (1978).

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

ers negotiate the development of a system which, in contrast to the present one-sided relationship, will be mutually beneficial. Before negotiations can ever reach such a level, however, the parties must understand each other's needs.

The owners want their system to achieve five objectives:

1) *Administration*-an orderly distribution of the talent pool that remains precise enough to maintain claims upon specific players;

2) *Competitive balance*-an equitable distribution of the talent pool. Weak clubs must have preferences in the order of player disbursement to make the League more competitive;

3) *Continuity*-wholesale player movement is disfavored because fans identify players with the players' teams. The fans enjoy a stable roster. The teams also desire continuity because clubs foster a "team" concept that has a core of players who are trained to perform in concert resulting in success on the playing field;

4) *Return on investment*-owners initially spend great amounts of money gathering information on players in anticipation of the draft and later on coaching and training facilities to develop college athletes into seasoned professionals. If owners cannot earn a sufficient return on those investments they will have less incentive to make them; and

5) *Money*-without some restraints, free agents would be able to effectively extort their clubs for unreasonable contracts. A system must restrain runaway wage expenses so that the clubs may operate at a profit. Clubs operating at continuous deficits will ultimately fold to the detriment of the league.

The players, on the other hand, object to the current system and seek to achieve the following objectives:

1) *Fair market*-an objective market mechanism for determining a fair wage;

2) *Good faith offers*-an incentive for owners to make good faith offers;

3) *Mobility*-an opportunity to move from one team to another; and

4) *Player's property right*-as a player's career progresses, a declining team property right in his labor and a concomitant increase in his property right in his own labor.

The following less restrictive alternatives to the current reserve system are proffered in an attempt to more equitably balance the aforementioned interests.

## 1. THE DRAFT

The draft currently has twelve rounds with twenty-eight clubs given one selection per round. The clubs choose in reverse order of their respective won-loss standing the previous season, with 336 players drafted each year. Very high draft selections benefit from the draft because the draftee will use his round of selection as a point of reference from which to negotiate a lucrative salary. The opposite holds true for middle and lower-round selections.

The proposed system operates in the same manner as the existing draft rounds. After the 6th round, however, the top four teams in standing have no right to additional selections unless they trade for them. After the 7th round, the next four teams in standing have no right to additional selections unless they trade for them. The process continues so that only the last four teams in standing have a right to select in all twelve rounds.<sup>214</sup>

The advantage of this modified system is that it frees seventy-two eligible college players from the restraints of the traditional draft. Competitive balance is promoted at the same time by giving greater preferences to the clubs with lower league standing.<sup>215</sup>

Players drafted under this system would be even more valuable to their clubs, thus increasing the leverage of their position when negotiating individual contracts. The players not drafted would be unrestricted as to whom they may play for. Where several clubs have an interest in signing the free agent, he will benefit by the competitive bidding that a free market will bring.

## 2. THE RIGHT OF FIRST REFUSAL/COMPENSATION SYSTEM

Only an insignificant number of players have been able to move under the 1982 Agreement.<sup>216</sup> Competitive bidding with the USFL caused average salaries to escalate,<sup>217</sup> making the formulation for compensation under the Agreement unrealistic.

Where the 1982 Agreement awards superior compensation to

214. See *infra* Appendix E-Modified Draft System.

215. Cf. *Smith*, 593 F.2d at 1187-88, 1188 nn. 65-66:

[N]o draft can be justified merely by showing that it is a relatively less anticompetitive means of attaining sundry benefits for the football industry and society. Rather, . . . [it] can survive scrutiny . . . only if it is demonstrated to have positive, economically *procompetitive* benefits that offset its anticompetitive effects, or, at the least, if it is demonstrated to accomplish legitimate business purposes and to have a net anticompetitive effect that is *insubstantial*.

*Id.* at 1188-89 (citation and footnote omitted).

216. See generally 1982 AGREEMENT, *supra* note 18, art. XV.

217. See *infra* Appendix C-Historical Salary Trends: 1970-1985.



the reserved club even for the loss of average players, the author proposes that any future collective bargaining agreement limit compensation to "actual" rather than "punitive" damages. The 1982 Agreement makes it unrealistic for a non-reserved club to make offers to average players. The expenditure in signing a free agent is one thing, but the compensation of future draft choices worth more to the new club than the services of a veteran free agent is a tax on the offer which effectively prevents it. This system should be adjusted so that only movement of highly regarded athletes will entitle the old club to compensation.<sup>218</sup>

To illustrate, the average salary paid a third-round player in 1985 was \$204,000.<sup>219</sup> An adjusted compensation system would award the old club a third round selection if the player was offered more than \$204,000 by a new club. Offers over \$248,200 would entitle the old club to a second round selection. Offers over \$326,281 would entitle the old club to a first round selection.

Another modification would insure that the old club negotiates on a good faith basis. The offers from the old clubs should be commensurate with what the old club believes the player's value to be. I would propose that the compensation awarded be based on the last "best offer" that the old club committed itself to and not the offer of the new club. If the new club makes an offer significantly higher than that of the old club, then its exposure to forfeited

218. See *In the Matter of Arbitration Between National Football League Players Ass'n and National Football League Management Council*, Luskin, Arb., May 14, 1980. The NFLPA's Executive Director stated:

We have also suggested, as an alternative, that if there is a compensation plan, it should be limited to the superstars. After all, you should be most concerned about the Bradshaw, Griese, Simpson, Kilmer type players, not the medium-range players. The union, on the other hand, has to be concerned primarily about raising the salaries and providing protection of players earning between \$15,000 and \$75,000. The superstar takes care of himself. What then is wrong with saying that a player who is offered over \$75,000 would be worth a draft choice?

There are other solutions which we have suggested. My position is that you cannot unreasonably restrict player movement. . . .

*Id.*

The NFLPA position was that there must be a way for players of average ability to freely market their services. The current system does not allow that to occur.

See also Circuit Judge Lay's comment in *Mackey v. NFL*, 543 F.2d 606, 623 (8th Cir. 1976), that the Rozelle Rule is significantly more restrictive than necessary to serve any legitimate purposes it might have in this regard. First, little concern was manifested at trial over the free movement of average or below average players. Only the movement of the better players was noted as being detrimental to football. Yet the Rozelle Rule applies to every NFL player regardless of his status or ability. The increase in average salary has not facilitated player movement under Article XV as had been contemplated.

219. See *infra* Appendix B-1985 Average Salary by Entry Round.

draft selections would be based on what the old club offered. Such an accommodation will insure that the old clubs pay their athletes as much as a competitive market for player services would pay. The right of first refusal should not otherwise be interfered with.

Final modifications would be made on Article XV compensation. The current draft awards are based on an annual increase of average salary of 10% per day of service in the league. Currently, the average salary of players increases greater than 10% per year. The slopes of the compensation awards based on seniority should reflect that fact.

I would also propose increasing the slopes of the lines designating compensation awards so that as veteran players achieve longer careers the return of compensation to the old club reduces. It makes no sense to award high draft choices for veteran players who are very near retirement. It is a fair trade-off to allow the veteran player to enjoy a high salary with less restraint on his power to seek competitive bids as his seniority increases.

### 3. WAIVER

As the pre-season progresses, the better quality players are placed on waivers last. The clubs must reduce roster sizes late in preseason so some of the "last cut" players, even though they are of high quality, are left out of the league. This is inefficient for the league, but is a specific injury to the better players who miss time or lose the opportunity to play in the NFL.

I would not propose to modify the waiver system but I would propose that salary distributed to the players be increased as preseason progresses. This has the initial benefit of giving a more significant financial reward to players who have lasted longer in the preseason before being cut.

There will be a second benefit to players who are cut last. In general, preseason salaries are very low. The clubs can afford to keep marginal players on the roster as "insurance" in case one of the players expected to make the roster is injured. Club owners can thereby hold onto a player they have no intention of using who could play for another team if he had the opportunity. Obligation to pay higher preseason wages will cause the clubs to waive fringe players more quickly. Charging regular season rates for players services in preseason will be fairer to the players and cause more efficient distribution of talent around the league.

These modifications are administratively feasible and they enhance competitive balance. Continuity of team rosters is affected

only where the clubs fail to pay their players commensurate with what a competitive market would pay. Compensation for player movement protects any claim the old club may have for a fair return on their investment in the player. Wage expense, with such modifications, will admittedly increase, but in view of the federal antitrust laws, that is a cost of doing business that the owners must absorb. Fiscal responsibility is a burden all American businesses must shoulder and the NFL should be no exception.

*Edward Newman*

## Appendix A

## STANDARD NFL PLAYER CONTRACT

**THIS CONTRACT** is between ED NEWMAN, hereinafter "Player," and MIAMI DOLPHINS, LTD., a FLORIDA (limited partnership) hereinafter "Club," operating under the name of the MIAMI DOLPHINS as a member of the National Football League, hereinafter "League." In consideration of the promises made by each to the other, Player and Club agree as follows:

1. **TERM.** This contract covers one football season, and will begin on the date of execution or February 1, 1983, whichever is later, and end on February 1, 1984 unless extended, terminated, or renewed as specified elsewhere in this contract.

2. **EMPLOYMENT AND SERVICES.** Club employs Player as a skilled football player. Player accepts such employment. He agrees to give his best efforts and loyalty to the Club, and to conduct himself on and off the field with appropriate recognition of the fact that the success of professional football depends largely on public respect for and approval of those associated with the game. Player will report promptly for and participate fully in Club's official pre-season training camp, all Club meetings and practice sessions, and all pre-season, regular-season and post-season football games scheduled for or by Club. If invited, Player will practice for and play in any all-star football game sponsored by the League. Player will not participate in any football game not sponsored by the League unless the game is first approved by the League.

3. **OTHER ACTIVITIES.** Without prior written consent of Club, Player will not play football or engage in activities related to football otherwise than for Club or engage in any activity other than football which may involve a significant risk of personal injury. Player represents that he has special, exceptional and unique knowledge, skill, ability, and experience as a football player, the loss of which cannot be estimated with any certainty and cannot be fairly or adequately compensated by damages. Player therefore agrees that Club will have the right, in addition to any other right which Club may possess, to enjoin Player by appropriate proceedings from playing football or engaging in football-related activities other than for Club or from engaging in any activity other than football which may involve a significant risk of personal injury.

4. **PUBLICITY.** Player grants to Club and League, separately and together, the authority to use his name and picture for publicity and promotional purposes in newspapers, magazines, motion

pictures, game programs and roster manuals, broadcasts and telecasts, and all other publicity and advertising media, provided such publicity and promotion does not in itself constitute an endorsement by Player of a commercial product. Player will cooperate with the news media, and will participate upon request in reasonable promotional activities of Club and the League.

5. **COMPENSATION.** For performance of Player's services and all other promises of Player, Club will pay Player a yearly salary of \$225,000.00, payable as provided in Paragraph 6; such earned performance bonuses as may be called for in Paragraph 24 of any attachment to this contract; Player's necessary traveling expenses from his residence to training camp; Players' reasonable board and lodging expenses during pre-season training and in connection with playing pre-season, regular-season, and post-season football games outside Club's home city; Player's necessary traveling expenses to and from pre-season, regular-season, and post-season football games outside Club's home city; Player's necessary traveling expenses to his residence if this contract is terminated by Club; and such additional compensation, benefits and reimbursement of expenses as may be called for in any collective bargaining agreement in existence during the term of this contract. (For purposes of this contract, a collective bargaining agreement will be deemed to be "in existence" during its stated term or during any period for which the parties to that agreement agree to extend it.)

6. **PAYMENT.** Unless this contract or any collective bargaining agreement in existence during the term of the contract specifically provides otherwise, Player will be paid as follows: If Player has not previously reported to any NFL club's official pre-season training camp in any year, he will be paid 100% of his yearly salary under this contract in equal weekly or bi-weekly installments over the course of the regular season period, commencing with the first regular season game played by the club. If Player has previously reported to any NFL club's official pre-season training camp in any year, he will be paid 10% of his yearly salary under this contract in equal weekly installments over the course of the pre-season period, commencing with the end of the first week of Club's official pre-season training camp as designated for Player and ending one week prior to the first regular season game played by Club, and 90% of his yearly salary in equal weekly or bi-weekly installments over the course of the regular season period, commencing with the first regular season game played by Club. If this contract is executed or Player is activated after the start of Club's official pre-season training camp, the yearly salary payable to Player will

be reduced proportionately and Player will be paid the weekly or bi-weekly portions of his yearly salary becoming due and payable after he is activated. If this contract is terminated after the start of Club's official pre-season training camp, the yearly salary payable to Player will be reduced proportionately and Player will be paid the weekly or bi-weekly portions of his yearly salary having become due and payable up to the time of termination (prorated daily if termination occurs before one week prior to the first regular season game played by Club).

7. DEDUCTIONS. Any advance made to Player will be repaid to Club, and any properly levied Club fine or Commissioner fine against Player will be paid, in cash on demand or by means of deductions from payments coming due to the Player under this contract, the amount of such deductions to be determined by Club unless this contract specifically provides otherwise.

8. PHYSICAL CONDITION. Player represents to Club that he is and will maintain himself in excellent physical condition. Player will undergo a complete physical examination by the Club physician upon Club request, during which physical examination Player agrees to make full and complete disclosure of any physical or mental condition known to him which might impair his performance under this contract and to respond fully and in good faith when questioned by the Club physician about such condition. If Player fails to establish or maintain his excellent physical condition to the satisfaction of the Club physician, or make the required full and complete disclosure and good faith responses to the Club physician, then Club may terminate this contract.

9. INJURY. If Player is injured in the performance of his services under this contract and promptly reports such injury to the Club physician or trainer, then Player will receive such medical and hospital care during the term of this contract as the Club physician may deem necessary, and, in accordance with Club's practice, will continue to receive his yearly salary for so long, during the season of injury only and for no subsequent period, as Player is physically unable to perform the services required of him by this contract because of such injury. If Player's injury in the performance of his services under this contract results in his death, the unpaid balance of his yearly salary for the season of injury will be paid to his stated beneficiary or, in the absence of a stated beneficiary, to his estate.

10. WORKMEN'S COMPENSATION. Any compensation paid to Player under this contract or under any collective bargaining agreement in existence during the term of this contract for a

period during which he is entitled to workmen's compensation benefits by reason of temporary total, permanent total, temporary partial, or permanent partial disability will be deemed an advance payment of workmen's compensation benefits due Player, and Club will be entitled to be reimbursed the amount of such payment out of any award of workmen's compensation.

11. **SKILL, PERFORMANCE AND CONDUCT.** Player understands that he is competing with other players for a position on Club's roster within the applicable player limits. If at any time, in the sole judgment of Club, Player's skill or performance has been unsatisfactory as compared with that of other players competing for positions on Club's roster, or if Player has engaged in personal conduct reasonably judged by Club to adversely affect or reflect on Club, then Club may terminate this contract.

12. **TERMINATION.** The rights of termination set forth in this contract will be in addition to any other rights of termination allowed either party by law. Termination will be effective upon the giving of written notice, except that Player's death, other than as a result of injury incurred in the performance of his services under this contract, will automatically terminate this contract. If this contract is terminated by Club and either Player or Club so requests, Player will promptly undergo a complete physical examination by the Club physician.

13. **INJURY GRIEVANCE.** Unless a collective bargaining agreement in existence at the time of termination of this contract by Club provides otherwise, the following injury grievance procedure will apply: If Player believes that at the time of termination of this contract by Club he was physically unable to perform the services required of him by this contract because of an injury incurred in the performance of his services under this contract. Player may within a reasonably brief time after examination by the Club physician, submit at his own expense to examination by a physician of his choice. If the opinion of Player's physician with respect to his physical ability to perform the services required of him by this contract is contrary to that of the Club's physician, the dispute will be submitted within a reasonable time to final and binding arbitration by an arbitrator selected by Club and Player or, if they are unable to agree, one selected by the League Commissioner on application by either party.

14. **RULES.** Player will comply with and be bound by all reasonable Club rules and regulations in effect during the term of this contract which are not inconsistent with the provisions of this contract or of any collective bargaining agreement in existence during

the term of this contract. Player's attention is also called to the fact that the League functions with certain rules and procedures expressive of its operation as a joint venture among its member clubs and that these rules and practices may affect Player's relationship to the League and its member clubs independently of the provisions of this contract.

15. **INTEGRITY OF GAME.** Player recognizes the detriment to the League and professional football that would result from impairment of public confidence in the honest and orderly conduct of NFL games or the integrity and good character of NFL players. Player therefore acknowledges his awareness that if he accepts a bribe or agrees to throw or fix an NFL game; fails to promptly report a bribe offer or an attempt to throw or fix an NFL game; bets on an NFL game; knowingly associates with gamblers or gambling activity; uses or provides other players with stimulants or other drugs for the purpose of attempting to enhance on-field performance; or is guilty of any other form of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football, the Commissioner will have the right, but only after giving Player the opportunity for a hearing at which he may be represented by counsel of his choice, to fine Player in a reasonable amount; to suspend Player for a period certain or indefinitely; and/or to terminate this contract.

16. **EXTENSION.** If Player becomes a member of the Armed Forces of the United States or any other country, or retires from professional football as an active player, or otherwise fails or refuses to perform his services under this contract, then this contract will be tolled between the date of Player's induction into the Armed Forces, or his retirement, or his failure or refusal to perform, and the later date of his return to professional football. During the period this contract is tolled, Player will not be entitled to any compensation or benefits. On Player's return to professional football, the term of this contract will be extended for a period of time equal to the number of seasons (to the nearest multiple of one) remaining at the time the contract was tolled. The right of renewal, if any, contained in this contract will remain in effect until the end of any such extended term.

17. **RENEWAL.** Unless this contract specifically provides otherwise, Club may, by sending written notice to Player on or before the February 1 expiration date referred to in Paragraph 1, renew this contract for a period of one year. The terms and conditions for the renewal year will be the same as those provided in this contract for the last preceding year, except that there will be no fur-



ther right of renewal in Club and, unless this contract specifically provides otherwise, the rate of compensation for the renewal year will be 110% of the rate of compensation provided in this contract for the last preceding year. The phrase "rate of compensation" as used above means yearly salary, including deferred compensation, and any performance bonus, but, excluding any signing or reporting bonus. In order for Player to receive 100% of any performance bonus under this contract he must meet the previously established conditions of that bonus during the renewal year.

18. ASSIGNMENT. Unless this contract specifically provides otherwise, Club may assign this contract and Player's services under this contract to any successor to Club's franchise or to any other Club in the League. Player will report to the assignee club promptly upon being informed of the assignment of this contract and will faithfully perform his services under this contract. The assignee club will pay Player's necessary traveling expenses in reporting to it and will faithfully perform this contract with Player.

19. FILING. This contract will be valid and binding upon Player and Club immediately upon execution. A copy of this contract, including any attachment to it, will be filed by Club with the League Commissioner within 10 days after execution. The Commissioner will have the right to disapprove this contract on reasonable grounds, including but not limited to an attempt by the parties to abridge or impair the rights of any other club, uncertainty or incompleteness in expression of the parties' respective rights and obligations, or conflict between the terms of this contract and any collective bargaining agreement then in existence. Approval will be automatic unless, within 10 days after receipt of this contract in his office, the Commissioner notifies the parties either of disapproval or of extension of this 10-day period for purposes of investigation or clarification pending his decision. On the receipt of notice of disapproval and termination, both parties will be relieved of their respective rights and obligations under this contract.

20. DISPUTES. Any dispute between Player and Club involving the interpretation or application of any provision of this contract will be submitted to final and binding arbitration in accordance with the procedure called for in any collective bargaining agreement in existence at the time the event giving rise to any such dispute occurs. If no collective bargaining agreement is in existence at such time, the dispute will be submitted within a reasonable time to the League Commissioner for final and binding arbitration by him, except as provided otherwise in Paragraph 13 of this contract.

21. **NOTICE.** Any notice, request, approval or consent under this contract will be sufficiently given if in writing and delivered in person or mailed (certified or first class) by one party to the other at the address set forth in this contract to such other address as the recipient may subsequently have furnished in writing to the sender.

22. **OTHER AGREEMENTS.** This contract, including any attachment to it, sets forth the entire agreement between Player and Club and cannot be modified or supplemented orally. Player and Club represent that no other agreement, oral or written, except as attached to or specifically incorporated in this contract, exists between them. The provisions of this contract will govern the relationship between Player and Club unless there are conflicting provisions in any collective bargaining agreement in existence during the term of this contract, in which case the provisions of the collective bargaining agreement will take precedence over conflicting provisions of this contract relating to the rights or obligations of either party.

23. **LAW.** This contract is made under and shall be governed by the laws of the State of FLORIDA.

24. **SPECIAL PROVISIONS.**  
See Addendum I attached hereto and made a part hereof as if fully set forth herein and which modifies this Agreement only to the extent provided therein. In the event of any conflict between the language in said Addendum and this Agreement, the language of said Addendum shall control and govern.

## Appendix B

1985 AVERAGE SALARY BY ENTRY ROUND

<u>Round</u>	<u>All Players</u>			<u>Starters</u>		
	<u>No.</u>	<u>Avg. Base</u>	<u>Avg. Salary</u>	<u>No.</u>	<u>Avg. Base</u>	<u>Avg. Salary</u>
1	234	\$258,630	\$326,281	157	\$277,965	\$331,865
2	192	203,230	248,220	96	232,980	256,570
3	162	184,005	204,000	82	216,090	209,875
4	122	159,865	174,560	44	196,495	208,920
5	95	147,570	154,045	39	166,925	162,040
6	77	140,495	152,880	23	199,520	206,905
7	81	125,320	138,725	30	158,915	168,465
8	68	131,830	144,480	25	165,440	177,620
9	52	119,855	129,730	12	168,750	186,500
10	52	117,260	131,260	18	179,305	198,775
11	36	131,345	142,300	8	145,625	158,125
12	37	150,445	172,695	19	199,475	224,800
12+	3	250,000	250,000	2	262,500	262,500
Free Agents	356	115,510	143,500	110	153,130	177,370

\* \* \*

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## Appendix C

HISTORICAL SALARY TRENDS: 1970-1985

<u>Year</u>	<u>Avg. Salary</u>	<u>% Increase</u>	<u>Median Base</u>	<u>% Increase</u>
1970	\$ 23,200		N/A	—
1971	24,600	6%	N/A	—
1972	26,100	6%	N/A	—
1973	27,500	6%	N/A	—
1974	33,000	19%	N/A	—
1975	39,600	19%	N/A	—
1976	47,500	19%	N/A	—
1977	55,300	19%	\$ 45,600	—
1978	62,600	13%	53,700	18%
1979	68,900	13%	57,000	6%
1980	78,700	13%	70,000	23%
1981	90,000	13%	75,000	7%
1982	102,250	12%	80,000	7%
1983	126,500	25%	90,000	12.5%
1984	157,810	25%	110,000	22%
1985	193,300	19%*	140,000	27%

Note: Pre-1977 data is based upon voluntary salary surveys conducted by the NFLPA. 1977-1981 data was compiled by the NFL Management Council. 1982-1985 data is based upon contracts provided to the NFLPA by the Management Council. Since the NFLPA and the Management Council employ different methods to measure average salary (the Management Council pro-rates signing bonuses by the number of years a player is under contract; the NFLPA defers money to the year it is received), and since pre-1979 salary surveys were by no means empirical, all this data should be treated as best estimates.

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**Appendix D**  
**1985 SALARY ANALYSIS BY CLUB**

Club	Estimated Payroll*	All Players		Starters	
		Avg. Base	Avg. Salary	Avg. Base	Avg. Salary
Atlanta	\$ 9,500,000	\$138,700	\$169,850	\$156,060	\$209,020
Buffalo	11,000,000	154,400	196,500	202,640	221,280
Chicago	9,700,000	160,550	176,500	218,865	214,555
Cincinnati	10,400,000	172,100	222,300	202,135	256,510
Cleveland	10,400,000	173,000	183,100	208,210	215,220
Dallas	10,200,000	168,100	188,400	236,565	228,195
Denver	7,600,000	169,400	137,300	222,200	138,060
Detroit	11,000,000	143,000	168,800	156,855	207,770
Green Bay	11,800,000	179,800	207,200	239,090	243,475
Houston	10,200,000	127,900	188,300	166,165	210,820
Indianapolis	9,700,000	126,100	183,300	153,960	209,415
Kansas City	10,900,000	157,900	188,000	199,390	218,320
L.A. Raiders	14,800,000	212,100	254,500	310,565	377,195
L.A. Rams	10,400,000	160,400	181,700	206,465	216,900
Miami	9,900,000	178,600	183,150	202,820	192,135
Minnesota	8,800,000	128,400	191,400	157,175	250,565
New England	12,600,000	193,900	228,500	245,825	263,180
New Orleans	12,000,000	158,300	200,200	178,800	189,220
N.Y. Giants	12,400,000	167,700	205,900	200,800	223,900
N.Y. Jets	12,900,000	199,100	226,100	303,415	331,240
Philadelphia	9,000,000	146,800	176,100	197,540	210,790
Pittsburgh	10,000,000	142,000	178,700	171,415	197,210
San Diego	12,000,000	155,300	188,150	209,770	243,105
San Francisco	12,200,000	212,700	221,700	283,110	293,545
St. Louis	10,800,000	183,300	211,400	242,710	274,040
Seattle	11,200,000	177,000	200,300	239,060	273,520
Tampa Bay	9,900,000	152,200	174,500	189,000	204,435
Washington	11,600,000	162,200	181,100	209,445	222,555

\*Estimated payroll based on average salary total for all players under contract at end of season; not included in the payroll total are collectively-negotiated benefits estimated at \$60,000 per player, an average of \$3.36 million per club. Also not included is an average of \$327,000 per club for signing bonuses for players who did not make the club.

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**Appendix E**

**MODIFIED DRAFT SYSTEM**

