University of Miami Law School
Institutional Repository

University of Miami Entertainment & Sports Law Review

7-1-1996

Labor Strife in the National Football League, Why the Reggie White Settlement Was Unfairly Settled for Those Involved and Why this Settlement Will Eventually Lead to More Problems

Steven W. Hays

Follow this and additional works at: http://repository.law.miami.edu/umeslr

Recommended Citation

Steven W. Hays, *Labor Strife in the National Football League, Why the Reggie White Settlement Was Unfairly Settled for Those Involved and Why this Settlement Will Eventually Lead to More Problems*, 13 U. Miami Ent. & Sports L. Rev. 195 (1996)
Available at: http://repository.law.miami.edu/umeslr/vol13/iss2/2

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Entertainment & Sports Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

LABOR STRIFE IN THE NATIONAL FOOTBALL LEAGUE, WHY THE REGGIE WHITE SETTLEMENT WAS UNFAIRLY SETTLED FOR THOSE INVOLVED AND WHY THIS SETTLEMENT WILL EVENTUALLY LEAD TO MORE PROBLEMS

STEVEN WAYNE HAYS*

I. INTRODUCTION

The game of Football has its roots in rugby, which began around 1840 in England.[1] Rugby's transformation to football occurred in the United States in the 1870's with a few games between colleges.[2] The new sport caught on, and in 1920 the first major professional league was formed in Canton, Ohio. Known as the American Professional Football Association, this new league consisted of a number of formerly industrial or semi-professional football teams.[3] Among these original franchises were the Akron Pros, the Canton Bulldogs, the Massillon Tigers, the Hammond Pros, the Muncie Flyers, the Racine Cardinals, the Rock Island Independents, the Decatur Staleys, and the Rochester Jeffersons.[4] The following year the league changed its name to the National Football League (NFL).[5] By 1926, the league had grown to twenty-two teams.[6] By 1931, it was down to ten.[7] In fact, 1936 was the first year since the League's founding that did not include a franchise shift of some sort- and also was the first season in which all teams played the same number of games.[8] From these

* B.S., The University of Michigan, 1988; J.D., Loyola University, New Orleans, 1995. I would like to thank J. Douglas Sunseri of Nicaud & Sunseri for his help in researching this article. I would also like to thank Edmund P. Edmonds, Dean of Library Services, Loyola University, New Orleans, for his help in writing this article.

1. PAUL D. STAUDOHAR, THE SPORTS INDUSTRY AND COLLECTIVE BARGAINING 55 (1986).
2. *Id.*
3. DAVID HARRIS, THE LEAGUE: THE RISE AND FALL OF THE NFL 12 (1986).
4. *Id.*
5. STAUDOHAR, *supra* note 1 at 55.
6. HARRIS, *supra* note 3 at 12.
7. *Id.*
8. *Id.*

humble beginnings, it is hard to imagine how over the next seventy-five years the NFL managed to achieve such enormous success in attracting an audience to watch and participate in the game of football.

Unfortunately, growth brings about other problems. Thus, a predictable result of the success of the NFL was the advent of labor disputes between management and the players. An underlying current throughout its history has been the success of the National Football League Establishment in retaining substantial power over its players. The same cannot be said about the National Football League Players Association(NFLPA). The NFLPA has a history of agreeing to implement measures which have had a negative impact on the very players it represents.

This paper attempts to show, from a player's perspective, how the labor disputes and alleged measures to remedy the anticompetitive effects have failed to give the players what they want and probably deserve: the right to shop their services in an open market. Two players, Maurice Hurst, of the New England Patriots, and John Fourcade[9], formerly of the New Orleans Saints, symbolize the frustration that players have felt throughout the course of these labor problems. Specifically, the anticompetitive effects of the implementation of "Plan B" in 1989 and subsequent settlement of all Plan B claims in the White v. National Football League[10] decision combine to demonstrate how Hurst and Fourcade were denied a fair and reasonable settlement of their particular complaints against the National Football League by being made a part of a class action in which they had no control.

This paper will tell the story of Maurice Hurst, John Fourcade, and the many players who were aggrieved by the implementation of Plan B. Part II will describe the events leading up to the implementation of Plan B, then describe the particulars of Plan B itself, and lawsuits which followed. Part III will show how far reaching the White decision was, what impact it has had on potential litigation based on the settlement, and how it has had a direct impact on the new collective bargaining agreement reached between the National Football League and the NFLPA in 1994.

9. Due to the recentness of the United States Supreme Court decision to refuse to hear the claims to nullify the $195 million settlement of the White case, certain documents could not be cited in normal law review form. However, each source may be confirmed by J. Douglas Sunseri, attorney for Maurice Hurst. These are footnote numbers 43-51, 63, 76, 86, 87, 106, 119-130, 135, 136, 155-58, 165-71, 173, and 174.

10. 41 F.3d 402 (8th Cir. 1994).

II. HISTORICAL PERSPECTIVE OF THE ANTICOMPETITIVE EFFECTS IN THE NATIONAL FOOTBALL LEAGUE

A. *Free Agency, the "Rozelle Rule," and Right of First Refusal / Compensation System*

Before 1976 professional football had the same kind of reserve system as other sports.[11] To enter the NFL, players were drafted by single teams.[12] Then, the players signed standard contracts that bound them to their teams for their careers.[13] The only significant player movement was accomplished through trades, waivers, or by being sold.[14] Players were not free to initiate movement on their own, and as such, were in a weak bargaining position with team owners.[15]

The first important legal case challenging the owners' control over players was Radovich v. National Football League.[16] William Radovich, an all-pro guard formerly with the Detroit Lions, contended that the NFL entered into a conspiracy to monopolize and control organized professional football in the United States, in violation of Sections 1 and 2 of the Sherman Act.[17] He claimed that part of the conspiracy was to destroy the All-America Conference, a competitive league in which he once played.[18] Radovich also alleged that the NFL had conspired to prevent him from coaching the San Francisco Clippers of the Pacific Coast League, an NFL affiliate, by threatening the club with serious penalties if they signed him in any position.[19] He claimed that the NFL's illegal conduct damaged him in the sum of $35,000, to be trebled as provided by the Act.[20]

Supreme Court, in a six-to-three decision, did not award damages to Radovich, but did establish that the antitrust laws of the Sherman Act apply to professional football. The Court's reasoning was based on the relatively high volume of interstate commerce involved in the sport.[21] The Court further noted that seemingly

11. STAUDOHAR, *supra* note 1 at 77.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. Radovich v. National Football League, 352 U.S. 445 (1957).
17. *Id.* at 448.
18. *Id.* at 458-59.
19. *Id.* at 459.
20. *Id.*
21. *Id.*

contrary cases such as Federal Baseball[22] and Toolson[23] did not control, as they were limited to the business of professional baseball.[24]

The Radovich decision stuck a major blow to the NFL. The dust had barely settled five years later when a player named R.C. Owens' came along to rub salt in the wounds. In 1962, Owens was able to play out his option with the San Francisco Forty-Niners and then sign with the Baltimore Colts without compensation to the former team. The NFL responded with the infamous "Rozelle Rule," adopted the following year.[25]

Coined after then-Commissioner of the NFL Pete Rozelle, the Rozelle Rule was an amendment to the organization's Constitution and By-Laws. It essentially provided that a team desiring the services of a veteran player whose contract had expired could not sign that player without providing some form of compensation to the player's former club.[26] If the clubs could not agree on the compensation, the Commissioner would assess the compensation after the fact.[27]

The Rozelle Rule restricted players' freedom of movement and denied them the right to sell their services in a free and open market.[28] Most clubs felt it was too risky to sign new players because it was uncertain what penalty would be imposed by the Commis-

22. Federal Baseball Club v. National League, 259 U.S. 200 (holding baseball to be primarily a local activity and therefore exempt from federal antitrust law).

23. Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953). The Toolson case is one of the more interesting Supreme Court decisions. The Court was asked to review whether or not baseball should be forced to conform to federal antitrust law since it had expanded to meet well more than the established criteria for interstate activities. The Court reasoned that while under the letter of the law it is true that baseball should be forced to comply with these pre-existing federal statutes, the baseball industry had been operating for over thirty years in reliance on Federal Baseball's permanence. The Court further noted that Congress had tacitly assented to Federal Baseball by failing to pass any new laws attempting to pull baseball within the grasp of these antitrust statutes. Therefore, the Court held that more harm would be done to society in overruling Federal Baseball than in allowing this 'dubious' decision to stand. However, the Court's opinion makes it clear that its decision applies only to baseball, due to the aforementioned unique circumstances. *See also* Radovich, 352 U.S. at 450.

24. Radovich, 352 U.S. at 450.

25. Mackey v. National Football League, 543 F.2d 606, 610 (8th Cir. 1976).

26. *Id.*

27. *Id.* at 611.

28. STAUDOHAR *supra*, note 1, at 78.

sioner.[29] The effect of the Rozelle Rule was to substantially restrain competition among NFL teams for players' services.[30]

In the 1972 case Mackey v. National Football League,[31] several players brought action challenging the legality of the Rozelle Rule under antitrust law.[32] The district court in Minnesota found the Rozelle Rule to be a *per se* violation of the antitrust laws as well as invalid under the 'rule of reason' standard.[33] The Court of Appeals for the Eighth Circuit affirmed on the basis of the rule of reason standard, holding the Rozelle Rule constituted an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.[34]

The court noted that the availability of the nonstatutory labor exemption for a particular agreement turns upon whether the relevant federal labor policy is deserving of preeminence over federal antitrust policy under the circumstances of the particular case.[35] The court further noted that certain principles can be deduced from those decisions governing the proper accommodations of the competing labor and antitrust interests involved.[36] According to the court:

> First, the labor policy favoring collective bargaining may potentially be given preeminence over the antitrust laws where the restraint of trade primarily effects only the parties to the collective bargaining relationship. . .[37] Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining . . .[38] 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 . . .[39]

---

29. For example, the New Orleans Saints' signing of all-pro receiver David Parks of the San Francisco Forty-Niners cost the Saints their first-round draft choices in 1968 and 1969. *Id.*

30. For instance, from 1963 to 1976, only four players (Pat Fischer, David Parks, Phil Olson, and Dick Gordon) actually played out their options and signed with new teams.

31. 407 F. Supp. 1000 (D. Minn. 1975).

32. Mackey, 543 F.2d at 606.

33. Mackey v. National Football League, 407 F. Supp. 1000 (D. Minn. 1975).

34. Mackey, 543 F.2d at 606.

35. *Id.* at 613.

36. *Id.* at 614.

37. *Id.*

38. *Id.*

39. *Id.*

Applying the principles to the facts in Mackey, the Court of Appeals found that the first two tests were met.[40] The alleged restraint of trade affected only the parties to the agreement and, further, the Rozelle Rule constituted a mandatory bargaining subject within the meaning of the National Labor Relations Act.[41] However, the Court of Appeals found substantial evidence to support the finding that there was no bona fide arm's-length bargaining over the Rozelle Rule preceding the execution of the 1968 and 1970 agreements.[42] As such, the court concluded that the agreements between the clubs and the players embodying the Rozelle Rule did not qualify for the labor exemption and were not exempt from the coverage of the antitrust laws.[43]

Thus, the Court of Appeals affirmed the rulings of the district court, with the exception of their finding of a *per se* violation of Section 1 of the Sherman Act, and remanded the case to the district court for further proceedings, including a determination of the damages.[44] A subsequent class action by the players for damages was settled with the payment of $13,675,000 to the NFL defendants.[45] This marked the first successful challenge to the Rozelle Rule under antitrust law.

It was not always so easy for players to gain a remedy for the NFL's's illegal conduct. One challenge to the Rozelle Rule was made by Joe Kapp, who alleged, inter alia, that the NFL violations of antitrust laws caused his unlawful expulsion from professional football in 1971.[46] The Ninth Circuit held that the mere fact that some of the rules of the NFL were violative of antitrust law did not automatically produce damages for Kapp; Kapp had to prove he was *injured* by reason of one of these unlawful practices.[47] Because the court held that Kapp did not prove damages under the Clayton Act, it did not decide whether the lower court was correct in its holding that the challenged rules violated antitrust laws.[48]

---

40. *Id.* at 615.
41. *Id.*
42. *Id.* at 616.
43. *Id.* at 622.
44. *Id.*
45. *See* Hurst v. National Football League Complaint at 11.
46. Kapp v. National Football League, 586 F.2d 644, 645 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979). In addition to the Rozelle Rule, Kapp attacked the draft rule, the tampering rule, the option rule, and the rule stating that each player must sign a standard player contract.
47. *Id.*
48. *Id.*

Not only did Kapp fail in his attempts to gain compensation from the NFL, but his case provided a light at the end of the tunnel for the NFL. The lower court made it clear that the Rule would have had to been formed as part of a labor negotiation in order to qualify for what is known as a 'labor exemption' to antitrust law.[49] The NFL was quick to react. In 1977 they entered into collective bargaining agreements with the NFLPA.[50] A new set of restraints, called the "First Refusal/Compensation" system, was formed.

This new system enabled each NFL team to prohibit a veteran free agent from moving to a competing team by matching that competing team's offer to the player.[51] Moreover, if the player's former team refused to match the offer, it was to receive substantial compensation from the signing team in the form of one or more college draft choices.[52] Most importantly, the NFL succeeded in gaining the limited "labor exemption" it sought from the antitrust laws, since the new rule was the result of these collectively bargained-for agreements.[53]

This First Refusal/Compensation system was substantially modified and incorporated into a successor agreement executed in 1982.[54] This new system proved to be even more restrictive to competition for services than the Rozelle Rule. In fact, only one of the over 1,400 players whose contract expired during the length of the 1977 and 1982 agreements ever received an offer from a competing team, and that offer was matched so the player was not permitted to switch teams.[55]

After the 1982 Agreement expired in August of 1987, the National Football League maintained the status quo on all mandatory subjects covered by the agreement, including the First Refusal/Compensation system.[56] In September of 1987, the players initiated a strike over veteran free agency and other issues. However, this strike proved unsuccessful.[57] Faced with the NFL's continued imposition of the First Refusal/Compensation system, on October 15, 1987, the NFLPA, along with several individual

---

49. *Id.* at 645.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 12.
56. *Id.* at 13.
57. *Id.*

players, filed a class action suit in district court in Minnesota.[58] The complaint alleged that the continued imposition of the First Refusal/Compensation system, without the union's consent, constituted an unreasonable restraint of trade in violation of antitrust laws. The district court found that the nonstatutory labor exemption only survived until such time as the parties had reached an impasse in their bargaining with respect to that issue.[59] On June 17, 1988, the district court ruled that impasse had in fact been reached as to the First Refusal/Compensation system, and, therefore, the system was subject to the antitrust laws.[60] Subsequently, on January 6, 1989, Judge Doty ruled that the labor exemption protected the NFL team owners from antitrust liability with respect to the college draft until expiration of the collective bargaining agreement which included the draft provision.[61]

These victories by the players were short lived, however, as the Eighth Circuit soon held that the antitrust laws under the circumstances of this case are inapplicable, because the nonstatutory labor exemption extends beyond impasse.[62] In so doing, the Eighth Circuit noted that "National labor policy sometimes override antitrust policy and this case presented just such an occasion."[63] The Eighth Circuit stated that the parties had several choices to consider, including further bargaining, resorting to economic force, or to present claims to the National Labor Relations Board.[64]

After Powell IV and the continued inability to obtain a new collectively bargaining agreement, the NFLPA, on November 6, 1989, notified the NFL of its decision to decertify as collective bargaining representative for the players, effective December 5, 1989.[65] On December 5, 1989, the NFLPA's player representatives unanimously adopted new bylaws that ended the organiza-

58. Powell v. National Football League, 678 F. Supp. 777 (D. Minn. 1988)(Powell I).

59. *Id.* at 789.

60. Powell v. National Football League, 690 F. Supp. 812, 814 (D. Minn. 1988) (Powell II).

61. Powell v. National Football League, 711 F. Supp. 959 (D. Minn. 1989) (Powell III).

62. Powell v. National Football League, 930 F.2d 1293, 1304 (8th Cir. 1989)(Powell IV).

63. *Id.* at 1303.

64. *Id.* at 1303.

65. Powell v. National Football League, 764 F. Supp 1351, 1356 (D. Minn. 1991) (Powell V).

tion's status as a collective bargaining representative.[66] The decertification was needed, the Players Association felt, in order to allow players' antitrust suits to go forward.[67] This strategy worked, to a certain extent, as Judge Doty subsequently ruled that an ongoing collective bargaining agreement had ceased, foreclosing reliance on the labor exemption defense.[68] However, because there was no bargaining representative to deal with, the NFL unilaterally changed insurance benefits and lengthened the season without notifying the association.[69]

B. *The Implementation of Developmental Squads and "Plan B"*

After the 1987 collective bargaining agreement expired, the NFL and the NFLPA began negotiations on a new agreement.[70] In 1989, with the two sides making little progress towards an agreement, the owners unilaterally adopted two important measures, Resolution G-2 and "Plan B."[71]

The first, called Resolution G-2, allowed each club to maintain a developmental squad of as many as six rookie or "first-year" practice and replacement players in addition to its usual 47-player squad.[72] In addition, a salary of $1000 per week was proposed.[73] Despite rejection of the fixed salary component of the Developmental Squad proposal by Gene Upshaw, NFLPA Executive Director, Resolution G-2 along with the salary scale were unilaterally implemented.[74]

On May 9, 1990, Antony Brown and eight other Developmental Squad players filed a class action antitrust lawsuit against the clubs and the NFL, alleging that the fixed salary constituted an unreasonable restraint of trade in violation of the Sherman Act.[75] The United States District Court for the District of Columbia held that the NFL's agreement on a fixed salary violated the Sherman

66. *Id.*

67. The players relied on Judge Heaney's dissent in Powell v. National Football League, 888 F.2d 559, 570 (8th Cir. 1990), which stated that "once a union agrees to a package of player restraints, it will be bound to the package forever unless the union forfeits its bargaining rights."

68. Powell V, 764 F. Supp. at 1351.

69. *See* Hurst Complaint to U.S. District Court at 15.

70. Brown v. National Football League, 1995 WL 115729 *1, *2 (D.C. Cir. 1995).

71. *Id.*

72. *Id.*

73. *Id.* at *3.

74. *Id.*

75. *Id.*

Act, and, after a trial to determine damages, entered a judgment in the amount of $30,349,642, and enjoined the NFL from ever setting a uniform salary for any class of players.[76] However, the D.C. Circuit reversed, holding that the NFL was shielded from liability due to the nonstatutory labor exemption.[77] As such, the NFL acted lawfully within the framework of the collective bargaining process when it unilaterally imposed a fixed salary for practice squad players.[78] The Court further noted that:

> Although there has been much debate over the years regarding the scope of the exemption, at least one principle seems clear: restraints on competition lawfully imposed through the collective bargaining process are exempted from antitrust liability so long as such restraints primarily affect only the labor market organized around the collective bargaining arrangement. Thus, employees confronted with actions imposed lawfully through the collective bargaining process must respond not with a lawsuit brought under the Sherman Act, but rather with weapons provided by the federal labor laws.[79]

Thus, the Court reasoned that "the NFL was free to take unilateral action after impasse (just as the NFLPA was free to strike), because the action was a legitimate economic weapon available to be used in an attempt to force a settlement."[80]

"Plan B," on the other hand, was a measure directed against veteran players in the NFL. Under one provision of "Plan B," the NFL proposed to eliminate all individual contract negotiations with players as of February 1, 1993, and to establish a wage scale setting the price for all NFL players' services.[81] Another provision allowed each NFL team to "protect" 37 out of 44 active roster players who were subject to the First Refusal/Compensation system, leaving only the few remaining active roster players and other "injured reserve" or non-active roster players on each team with a limited two month period of free agency.[82]

After the imposition of "Plan B," eight individual plaintiffs, led by Freeman McNeil, whose contracts expired on February 1, 1990, asserting various claims arising from the NFL's alleged vio-

---

76. *Id.* at *1.
77. *Id.* at *2.
78. *Id.*
79. *Id.*
80. *Id.*
81. McNeil v. National Football League, 790 F. Supp. 872, 876 (D. Minn. 1992).
82. *See* Hurst Complaint at 15.

lation of §1 of the Sherman Act.[83] On April 15, 1992, the United States District Court in Minnesota, Judge Doty presiding, held that (1) league and member clubs were capable of conspiring for purposes of federal antitrust law; (2) antitrust laws applied restraints operating solely within the labor market; (3) the rule striking labor exemption defense raised by team and owners as result of termination of collective bargaining relationship between players association could be applied retroactively; and (4) league and owners were not collaterally estopped from re-litigating existence of monopoly power by league and owners in the relevant market for services of major league professional football player services in the United States.[84] After this ruling, a jury trial was held to determine the amount of damages suffered by each of the litigants. On September 10, 1992, the jury awarded $543,000 in actual damages before trebling, distributed to the named plaintiffs as follows:[85]

1. Mark Collins	$178,000
2. Don Majkowski	0
3. Tim McDonald	0
4. Freeman McNeil	0
5. Frank Minnifield	50,000
6. Dave Richards	240,000
7. Niko Noga	0
8. Lee Rouson	75,000

Four days after McNeil was decided, another class action was brought by ten plaintiffs whose contracts expired as of February 1, 1992.[86] Perhaps due to the fact that the McNeil plaintiffs received such a small settlement on their claims, the Jackson plaintiffs, whose contracts expired as of February 1, 1992, sought only a temporary restraining order and injunction to prohibit the NFL from restricting the plaintiffs as a result of Plan B.[87] Here, Judge Doty ruled that (1) the players demonstrated a probability of success on the merits, with or without the application of collateral estoppel; (2) factors also favored players despite contention that requested relief would harm competitive balance between teams; and (3) relief was not precluded by the Norris-LaGuardia Act.[88] Judge

83. McNeil, 790 F. Supp. at 872.
84. Id. at 872.
85. McNeil v. National Football League, 1992 WL 315292 (D. Minn.).
86. Jackson v. National Football League, 802 F. Supp. 226 (D. Minn. 1992).
87. *Id.* at 228.
88. *Id.* at 226.

Doty further ruled that the NFL and the clubs were temporarily enjoined, for a period of five days, from enforcing the Right of First Refusal/Compensation rules of "Plan B" or from enjoining against plaintiffs Keith Jackson, Webster Slaughter, D.J. Dozier, and Garin Veris (the only four players still restricted in the class as of the date of the order) from freely negotiating and entering into contracts with any NFL club for the 1992 season.[89] This created a limited period of free agency for these four players. Keith Jackson took advantage of this period to sign a new contract with the Miami Dolphins on September 28, 1992.[90]

Taken together, the McNeil decision and the Jackson decision were very important victories for the National Football League Players Association. These cases showed a likelihood of success for other NFL players who were restricted due to the implementation of "Plan B." These cases had a tremendous effect on the decision in the matter involving Reggie White, Maurice Hurst, John Fourcade, and many other NFL veterans.

C. *The Effect of the Reggie White Case*

On September 21, 1992, less than two weeks after the decision in the McNeil case and one week after the filing of the Jackson case, four named plaintiffs[91] filed an action in United States District Court for the District of Minnesota seeking injunctive relief on behalf of a limited class of veteran players whose contracts expired on February 1, 1993, and who had, likewise, been subjected to antitrust and restraint of trade violations as a result of "Plan B."[92] On October 5, 1993, the complaint was amended[93] to seek both antitrust injunctive relief and damages stemming from "Plan B," and added Vann McElroy as a named plaintiff.[94] It was also amended to include "all players who have been, are now, or will be under contract with an NFL club at any time from August 31, 1987, until the date of the final judgment, as well as all college and other players who will be eligible by the date of the

89. *Id.* at 235.

90. *Free Agent Jackson Signs With Dolphins*, HOU. CHRON., Sept. 30, 1992, at Sports 2.

91. The four named plaintiffs were Reggie White, Michael Buck, Hardy Nickerson, and Dave Duerson.

92. *See* Opposition to Defendants' Motion for an Order to Show Cause, White v. National Football League, at 2.

93. Please note that the stipulations entered into on January 8, 1993, state otherwise as to what was included in the second amended complaint and also state that Vann McElroy was added at this point.

94. White v. National Football League, 822 F. Supp. 1389, 1395 (D. Minn. 1993).

proposed judgment."[95] The second amended complaint also alleged that the NFL illegally fixed players' medical insurance benefits and tortiously interfered with players' prospective contracts.[96]

All motions concerning preliminary injunctive relief were still pending when all parties, with the assistance of the court, reached tentative agreement to settle the action on January 6, 1993.[97] The district court further assisted in the settlement process by conditionally certifying a non-opt-out class pursuant to Fed. R. Civ. P. 23(b)(1).[98] In addition, there were related lawsuits filed which were consolidated or enjoined.[99] After the preliminary settlement was reached, seventy-three objections, out of a total class of over 5,000, were filed to the proposed settlement by the April 2, 1992, deadline.[100][101] However, these objections were subsequently overruled and the settlement approved.[102]

The Stipulation and Settlement Agreement ("Settlement"), entered into by the District Court and affirmed by the Eighth Cir-

95. *Id.*
96. *Id.*
97. *Id.*
98. White, 41 F.3d at 406.
99. Those cases are: (a) Hurst v. NFL, No. 92-3263 (E.D. La.); (b) Dusbabek v. NFL, No. 4-93-126 (D. Minn.); (c) Lee v. NFL, No. 4-93-125 (D. Minn.); (d) McMillan v. NFL, No. 4-93-99 (D. Minn); (e) Wright v. NFL, No. 4-93-124 (D. Minn.); (f) Jones v. NFL, No. 92-2512 (C.D. Cal.); (g) Sanders v. NFL, No. 92-4365 (C.D. Cal.); (h) Matthews v. NFL, No. 92-4370 (C.D. Cal.); (i) Hunter v. NFL, No. 92-4373 (C.D. Cal.); (j) O'Neal v. NFL, No. 92-4368 (C.D. Cal); (k) Allen v. NFL, 92-7536 (C.D. Cal); (l) Norton v. NFL, No. 93-0029 (C.D. Cal.); (m) Hurst & Fourcade v. NFL, No. 93-0766 (E.D. La.); (n) Harper v. NFL, No. 4-93-314 (D. Minn.); (o) Risen v. NFL, No. 4-93-182 (D. Minn.); (p) Duncan v. NFL, No. 93-1481 (C.D. Cal); and (q) Evans v. NFL, Civ. No. 92-878 (D. Ariz).
100. The following active or former NFL players had filed objections by April 2, 1992: Wilbur Marshall, Paul Gruber, Brian Washington, Carl Lee, Mark Dusbabek, Audray McMillian, Felix Wright, Cody Risien, Mark Harper, Sammy Martin, Mike Farr, Pepper Johnson, Don Beebe, Gregory Scales, Gregory J. Baty, Barry Sanders, Luis Sharpe, Steve Atwater, Horatio Bennie Blades, James Hasty, Byron Evans, Michael C. Johnson, Reggie Langhorne, Maurice Hurst, John Fourcade, Sean Jones, Eric Allen, Leslie O'Neal, Eric Sanders, Ken Norton, Jr., Curtis Duncan, Patrick Hunter, William C. Matthews, Cris Dishman, Lomas Brown, Neil Smith, Van Waiters, Broderick Thompson, Terry Orr, Shane Collins, Ron Middleton, Mark Schlereth, Kelly Goodburn, David Gulledge, Ed Simmons, Matt Elliott, Joe Jacoby, Sidney Johnson, Kurt Gouveia, Ravin Caldwell, Mark Rypien, James Jenkins, Johnny Thomas, Eric Williams, Don Warren, John Elliott, Duane Bickett and Steve Young.
101. Since April 2, 1993, additional objections were filed on behalf of Brian Blades, Roland James, Pat Carter, Kenneth F. Ruettgers, Jerry Ball, Jeff Bostic, Todd Bowles, Ray Brown, Jason Buck, Earnest A. Byner, Desmond Howard, Anthony Johnson, Brian Mitchell, Ricky Sanders and Paul Siever.
102. White, 822 F. Supp at 1437.

cuit on December 6, 1994, contained a laundry list of provisions pertaining to structural relief, monetary relief, and other provisions relating to settling related litigation. Each of these is summarized in detail below:[103]

1. Structural Relief

First, the Settlement provided that, except for the few "franchise" or "transition" players, to whom special rules apply, all players with at least five years of NFL experience whose contracts expired were unrestricted free agents from contract expiration (on or about March 1) through approximately July 15 of each year. If the salary cap was put into place, the free agency period would drop from five to four years. Also, players with three or four years of NFL experience may be subject to the right of first refusal provisions, but only after a new team tendered a contract offer. Finally, players with less than three years of NFL experience were subject to their former teams' exclusive negotiating rights, providing that they were offered salaries of $100,000 for first year players, $125,000 for more than one year of NFL experience, and $150,000 for players with two years experience. These minimum figures were to be adjusted upward based on formula concerning total league revenues and player costs.[104]

Second, a team could designate one "franchise" player in any year by tendering a one year contract that was either a twenty percent increase over his previous year's salary or the average of the five highest paid players in the NFL at that position, whichever was greater. By designating a player a "franchise" player, a team obtained exclusive negotiating rights with that player. In addition, a team could designate two "transition" players for the first year of the Settlement and one for the second year and the final year of the Settlement by tendering an offer of a one year contract at a salary amounting to the greater of the average of the ten highest paid salaries at that position or a twenty percent increase over the previous year's salary, whichever was greater. Also, a team retained a right of first refusal with respect to "transition" players.[105]

Third, in years where no salary cap is in place, the four teams in the previous conference championship games were not permitted to sign unrestricted free agents from other teams. The next

103. *Id.* at 1412-16.
104. *Id.* at 1412-13.
105. *Id.* at 1413.

four runner-up teams in the playoffs could sign one unrestricted free agent from another team at a salary of $1.5 million or more per year, and an unlimited number of unrestricted free agents at less than $1 million per year. These figures were subject to increase based on league revenues and player costs in relation to league revenues each year.[106]

Fourth, with respect to the college draft, the Settlement provided that the NFL college player draft would consist of eight rounds the first year of implementation and seven rounds thereafter, substantially fewer than the prior twelve round draft. In addition, as many as twenty-eight "compensatory" picks per year could be added for teams losing certain free agents. Also, teams obtained exclusive negotiating rights with their rookie draftees through a tender at the minimum active-list salary. Any draft eligible player not chosen in the draft was free to negotiate with any team.[107]

Fifth, a salary cap would be implemented if the league-wide total of player costs rose to sixty-seven percent of Defined Gross Revenues (DGR). Once triggered, the salary cap would be subject to upward adjustments based on the DGR, but the cap itself could not go down from one year to the next. The Settlement also contained minimum league and team guarantees with respect to the cap. Finally, the Settlement provided that there would be no cap in 1999, the last year of the Settlement agreement.[108]

Sixth, the Settlement contained various anti-collusion provisions prohibiting the NFL and NFL members from making secret agreements concerning negotiating with players, submitting offers to restricted free agents, exercising the right of first refusal, offering a contract, or altering the individual terms of a contract. The Settlement contained provisions for an expedited and comprehensive mechanism to deter and punish any collusion violations.[109]

2. Monetary Relief

The Settlement also provided monetary relief to the plaintiff class. Specifically, the NFL and NFL members were ordered to pay $115 million for distribution to class members plus an addi-

106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 1414.

tional $80 million paid to the NFLPA and the players in settlement of this and other related litigation.[110]

First, the $115 million settlement was allocated according to a point system. Players who entered new contracts after being protected under "Plan B" in 1990, 1991, or 1992 received one point for each year in which they were restricted while playing under such a contract. Players who renegotiated and/or extended contracts prior to being protected under "Plan B" in 1990, 1991, or 1992 received 1/2 point for each year in which they continue to be restricted under such a contract. Players who entered new contracts being protected under "Plan B" in 1989 received 1/2 point for each year in which they continue to be restricted while playing under such a contract. Finally, players who renegotiated and/or extended contracts prior to being protected under "Plan B" in 1989 received 1/4 point for each year they continue to be restricted while playing under such a contract.[111] As it turned out, each point was assigned the value of $71,000.[112]

Second, the named plaintiffs in White did not receive any points while protected in 1990, 1991, and 1992, but received the following amounts before trebling using the Glassman methodology:[113]

1. Michael Buck	$134,805
2. Vann McElroy	470,194
3. Hardy Nickerson	494,836
4. Reggie White	0

In addition, Reggie White received 1 1/2 points because he entered into a three year contract extension in 1990, and Hardy Nickerson received 1 point because he entered a two year contract extension in 1990 before being protected in that year.[114] Third, the named plaintiffs in the Lewis[115] case (consolidated with White) did not receive any points for contracts entered into in 1989, but instead received the following amounts for their damage claims before trebling:[116]

110. *Id.*

111. *Id.* at 1414-15.

112. Interview with J. Douglas Sunseri, agent for Maurice Hurst (Feb. 1, 1995).

113. White, 822 F. Supp. at 1415. The methodology for estimating damages was developed by Michael Glassman, the plaintiff's expert economist.

114. *Id.*

115. Lewis v. National Football League, 813 F. Supp. 1 (D.D.C. 1992). The Lewis case is a class action that claimed damages under the antitrust laws arising out of "Plan B" for the 1989 season.

116. *Id.*

1. Albert Lewis	$711,600
2. Wayne Radlof	$214,115

Fourth, individual plaintiffs in the related player lawsuits that were being settled concurrently with the class action were not to receive any points for claims in those cases that were coextensive with any claims that they may have had in the White class action.[117]

Fifth, class members with claims for deprivation of preseason pay received 1/10 of a preseason pay point for every one hundred dollars, or fraction thereof, of their claims. The total number of points was divided equally into $5 million as settlement for preseason pay loss.[118]

Finally, Dave Duerson did not receive any preseason pay points but instead received the sum of $98,302, before trebling, for what would have been received using the Glassman methodology.[119]

3. Settlement of Related Litigation

Other ancillary matters were incorporated into the White settlement. For instance, the back pay case, NFLPA v. NFL Management Council,[120] filed shortly before the 1987 strike asking for back pay for the weeks' salary lost as a result of the lockout, was settled for approximately $30 million. Also, the licensing litigation, NFLPA v. NFL Properties, Inc.,[121] asserting various tortious interference and antitrust violations in existing NFLPA licensing authorizations, was settled for approximately $10 million in cash and agreements to back-license certain agreements to the NFLPA and manufacturers.[122]

Also, any preexisting individual lawsuits funded by the NFLPA, such as McNeil, would not receive any points for portions already settled. The total consideration to be paid by the NFL defendants to the preexisting cases was approximately $19,028,628.[123]

---

117. *Id.*

118. *Id.*

119. *Id.*

120. *NFL Players Share in Record Settlement; Labor Relations: $30-Million Judgment Arising from 1987 Strike Will be Divided Among 1,300*, L.A. TIMES, September 13, 1994, at C5.

121. NFLPA v. NFL Properties, Inc., No. 90-CV-4244 (S.D.N.Y. 1990).

122. White, 822 F. Supp. at 1415-16.

123. *Id.* at 1416.

Finally, no legal costs are to be paid out of the settlement fund. However, the NFL defendants reimbursed the NFLPA $18,847,520 for attorneys' fees, costs, and disbursements in relation to the White class action and other lawsuits concurrently settled.[124]

On Monday, June 12, 1995, the Supreme Court refused to hear the claims of 18 present and ex NFL players who sought to nullify the $195 million settlement reached in White.[125]

As it turned out, the decision in the White case was important for many reasons. First, it purportedly solved an extremely complicated class action involving complex legal issues and multijurisdictional demands in as efficient a manner as possible. Second, it addressed and tried to cure all of the ills created by the implementation of "Plan B," so that no other litigation would result after the settlement. Finally, and perhaps most importantly, it served as the catalyst with which a collective bargaining agreement was reached between the NFL and the players.

However, the settlement was not without problems. While the method for solving the complaints was sound, the way the settlement was reached and the effects of the settlement created a brand new set of problems. Many questions were raised as a result of the settlement. For instance, how come the party litigants in White had their damages trebled, while the rest of the aggrieved were left to whatever was implemented according to the Glassman Methodology? Also, as there was a relatively small number of players who filed grievances, why did the court deny all of these players party litigant status? In addition, what effect did the NFLPA and NFL owners have in the settlement? Finally, was Minnesota the proper venue for the litigation to take place, or was there some other place that was more proper? These were just some of the concerns of the White settlement.

The White settlement is generally perceived as a victory for the players against the NFL ownership. But was it really a victory for the players, or was it a victory for a few players, most notably Reggie White?

124. *Id.*

125. *NFL Players Lose Appeal on Settlement*, DET. NEWS, June 13, 1995, at 2F.

III. The Reggie White Case from Maurice Hurst and John Fourcade's Perspective.

A. *Background*

To fully understand the impact of the White decision on the potential party litigants, and especially Maurice Hurst and John Fourcade, a better understanding of the procedural history of White and Hurst is needed.

On September 21, 1992, two weeks after the McNeil decision, Reggie White, Dave Duerson, Michael Buck, and Hardy Nickerson filed suit in the District Court of Minnesota as a class action. This suit, in its original form, sought injunctive relief *only* on behalf of veteran players whose contracts expired on February 1, 1993, and who had, likewise, been subjected to antitrust and restraint of trade violations as a result of being placed on "Plan B."[126] The claims that were filed in this original suit mirrored those that were present in the *McNeil* and had been found to be a violation of antitrust laws.[127]

On October 1, 1992, Maurice Hurst and John Fourcade filed a class action suit in the Eastern District of Louisiana.[128] The *Hurst* suit addressed antitrust and restraint of trade violations by virtue of a scheme where players in the class were placed on "Plan B" for the years 1989, 1990, 1991, and 1992.[129] It sought both injunctive relief and damage relief on behalf of the class.[130]

On October 5, 1992, the White suit was amended to add Vann McElroy as a plaintiff and asserted, for the first time, a damage claim on behalf of veteran free agents for 1990-92 seasons.[131] The White suit now mimicked the Hurst suit in many respects, but still did not encompass a claim for the 1989 year. Also, the White suit still was not amended to allege damages for the 1993 season. On January 8, 1993, a stipulation was entered into in the White matter where the parties, for the first time, described the class as a damaged class consisting of all professional players under contract to an NFL club at any time from August 31, 1987 to the date of the final approval of the settlement of this action.[132]

126. *See* stipulation of January 8, 1993.

127. *Id.*

128. *See* Opposition to Defendant's Motion For An Order Show Cause at 2.

129. *Id.* at 3.

130. *Id.*

131. *See* stipulation of January 8, 1993.

132. *Id.*

This stipulation was entered into without the knowledge of the presiding judge in the Eastern District of Louisiana, nor were pleadings asserting "lis pendens" filed in the Eastern District of Louisiana.[133] Objections to the stipulation were to be filed in the District Court in Minnesota by April 2, 1993.[134]

Next, on March 5, 1993, Maurice Hurst and John Fourcade filed a lawsuit in the Eastern District of Louisiana, alleging antitrust and restraint of trade litigation due to the present conduct and actions taken by the NFL in implementing, without proper authority, a so-called "free agency" system distinct from "Plan B."[135] This litigation involved separate and distinct issues than those encompassed in the White litigation. The thrust of the argument in this cause of action was that Maurice Hurst was now labeled a "restricted" free agent at the expiration of his contract on February 1, 1992, (due to the fact that he had only four years in the league at that time and due to the unapproved agreement by the NFL and White counsel), while, technically, Maurice Hurst should have been treated as an unrestricted free agent since no collective bargaining agreement was in effect.[136] The Hurst plaintiffs also filed timely objections to the stipulation in the District Court in Minnesota.[137]

On April 30, 1993, the District Court in Minnesota held that the class action certification was appropriate, the proposed settlement offer was reasonable and adequate, and objections to the settlement did not warrant disapproval.[138] In addition, under the All-Writs Act[139], all related suits, including both suits filed by the Hurst plaintiffs, were enjoined.[140] On August 20, 1993, the Application and Order for Judgment was approved.[141] As a result of the settlement, Maurice Hurst was awarded two points according the Glassman methodology and received $142,000, while John Fourcade was awarded one point and received $71,000.[142] These damage awards were not trebled.[143]

---

133. *Id.*
134. *Id.*
135. *See* Complaint filed March 5, 1993.
136. *Id.*
137. *See* Opposition Motion.
138. White, 822 F. Supp. at 1395,1432.
139. 28 U.S.C. §1651 (1988).
140. White, 822 F. Supp. at 1434.
141. *Id.*
142. Interview with J. Douglas Sunseri, attorney for Maurice Hurst (Feb. 1, 1995).
143. *Id.*

On June 12, 1995, the Supreme Court refused to hear the claims of the Hurst suits and ended all litigation resulting from the NFL's antitrust violations. It also ended the litigation concerning the alleged violations as a result of the White settlement.

B. *Maurice Hurst and John Fourcade's Arguments to the White Settlement.*

Maurice Hurst and John Fourcade had many problems with the way the White settlement was handled. Specifically, the Hurst plaintiffs objected to White on four grounds. First, an injunction should have been issued in the White matter, as the Hurst suit was the first suit filed asserting damages to the class as the result of antitrust and restraint of trade violations arising out of the "Plan B" scheme for the years 1989-92. Second, if no injunction were issued, due process required that Hurst be allowed to opt-out of the White class settlement. Third, if no injunction was issued, the Hurst litigation should have been consolidated with the White litigation, allowing the Hurst plaintiffs to have the status of party litigants to participate fully in any action taken by the court. Finally, there was no authority to enjoin the March 5, 1993, lawsuit, as this matter contained none of the allegations present in the White litigation. Each of these arguments will be dealt with below in more detail:

First, an injunction should have been issued in the Minnesota litigation (White), not the Louisiana litigation (Hurst), since the Hurst action was the first suit filed asserting damages to the class as a result of antitrust and restraint of trade violations arising out of the "Plan B" scheme for the years 1989, 1990, 1991, and 1992. Judge Doty specifically rejected the contention that the Hurst class action was filed before the White class action and also ruled that subsequent amendments did not initiate new lawsuits, noting Fed. R. Civ. P. 15(c).[144] However, this ruling was in error, because the amendments allowed under 15(c) did not include the type of changes the White class made, thus, these amendments made the White suit second in line to Hurst.

When two actions involving the same parties and the same issues are pending before two federal courts, it has been held that the court in which the second proceeding is initiated will normally, in the absence of countervailing factors, stay the proceeding pending the outcome of the prior similar suit between the

144. White, 822 F. Supp. at 1434, n.77.

same parties in the other federal court.[145] This is done in order to prevent possible conflict between the two courts, to prevent unnecessary duplication of litigation, and to prevent annoyance and harassment of the defendant.[146]

In addition, Fed. R. Civ. P. 15(c)(2), which is vital to Judge Doty's reasoning, sets out when an amendment of a pleading will relate back to the date of the original pleading. It states an amendment will relate back to the date of the original pleading when "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleadings."[147]

Under the foregoing authorities, an injunction should have been issued in the White matter since the suit in the Eastern District of Louisiana, filed October 1, 1992, was the first suit asserting damages to a class of professional football players as a consequence of restraint of trade violations arising out of the "Plan B" scheme over the years 1989, 1990, 1991, and 1992. The White suit, at that time, sought only injunctive relief on behalf of "Plan B" players for the year 1993. Thus the suits, as originally filed, involved different class members and different legal issues. When White subsequently amended his suit to include an injunction and damages on behalf of the class for the years 1990-92, that suit became second in line in asserting those claims, and as such should have been consolidated into the Hurst suit in Louisiana. As such, as held in Culbertson and reiterated in Nelson v. Grooms[148], a stay should have been issued in the White matter pending the outcome of the Hurst action. Rule 15(c) was inapplicable in this case, since the amendments to the original pleading in White did not cause it to relate back, as Judge Doty concluded.

Second, in the alternative, the Hurst plaintiffs contended that minimal due process required that they be allowed to opt-out of the White class settlement. Thus, the Hurst plaintiffs argued that the settlement agreement in White should not be considered res judicata when they were not allowed to opt out.

There are many differences between the classic class action suit and a normal civil suit. Civil suits usually involve plaintiffs from the same state, while class actions involve plaintiffs from many different forum states. In addition, due process concerns

145. Culbertson v. Mid-West Uranium Co., 132 F. Supp. 678 (D. Utah 1955).
146. *Id.* at 681.
147. FED. R. CIV. P. 15(c)(2).
148. 307 F.2d 76 (5th Cir. 1962).

escalate in class action suits due to the fact that not all of the potential plaintiffs are allowed to participate in the litigation or settlements. Thus, special rules have been developed in order to try to protect the rights of all potential class action plaintiffs, whether party litigants or otherwise. Minimal due process guarantees require that an absent class member with a claim for monetary damages must be afforded the opportunity to opt out or otherwise remove himself from the class.[149] The Hurst plaintiffs were denied minimal due process when they were precluded from opting out of the White class and settlement, or when they were not conferred party litigant status. The facts in Ticor are remarkably similar to the situation in Hurst and White. In Ticor, twelve separate class action lawsuits were brought by title insurance holders against Ticor, alleging price fixing for title search and examination services.[150] These suits were filed in five federal district courts in four states.[151] The suits sought monetary and injunctive relief.[152] Several cases were consolidated as Multi-District Litigation (MDL), and the District Court certified a mandatory class under Fed. R. Civ. P. 23(b)(1) and (b)(2).[153] Thereafter, a global settlement was reached between the parties and was approved by the District Court.[154]

After the District Court granted preliminary approval of the settlement in the MDL class action, the Arizona Attorney General and an individual plaintiff, who represented a class of plaintiffs in two other states, filed separate actions against the same defendants. Like the defendants in White, defendants in the MDL litigation moved to enjoin those plaintiffs from prosecuting their cases.[155] The District Court granted the injunction.[156]

149. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811, (1985), *cert. denied*, 487 U.S. 1223 (1988); Brown v. Ticor Title Insurance, 982 F.2d 386, 393 (9th Cir. 1992), *cert. granted in part*, 114 S.Ct. 56 (1993), *cert. dismissed as improvidently granted*, 114 S.Ct. 1359 (1994).

150. Ticor, 982 F.2d at 387-88.

151. *Id.*

152. *Id.*

153. *Id.* at 388-89.

154. *Id.* at 388.

155. *Id.*

156. In addition to the post-settlement case brought by the Arizona Attorney General, Arizona and Wisconsin title holders also brought a separate antitrust action against the Ticor defendants. *Id.* at 389-90. Again, defendants moved for summary judgment on the ground that the new plaintiffs were parties to and bound by the Ticor class settlement. Therefore, defendants argued, res judicata barred the new claims. *Id.* at 390. As discussed in the text above, the Ninth Circuit rejected these arguments.

The Ninth Circuit vacated the injunction, and it held it would violate minimal due process guarantees if the absent class member's damages claims in the MDL litigation were held barred, because that absent class member was never given the opportunity to opt-out or otherwise remove himself from the class.[157] The Court of Appeals held:[158]

> (M)inimal due process requires that "an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court, *if monetary claims are involved.* Because Brown, (the absent class member) had no opportunity to opt out of the MDL 633 litigation, we hold there would be a violation of minimal due process if Brown's damage claim were held barred by *res judicata.* Brown will be bound by injunctive relief provided by the settlement in MDL 633, and foreclosed from seeking other or further injunctive relief in this case, but *res judicata* will not bar Brown's claims for monetary damages against Ticor.

The Supreme Court's directive in Shutts (relied upon by the Ninth Circuit in Ticor) could not be more plain:

> If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. . . . Additionally, we hold that *due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court.*[159] (emphasis added).

This is precisely the right the Hurst plaintiffs sought to preserve, since they were not conferred party litigant status. It is precisely those rights that the defendants undercut when they were allowed to enjoin both of the Hurst class actions. Thus, the Hurst plaintiffs should not be bound by the judgments and determinations in the White settlement. They should have had the right to pursue their own individual claims and remedies. This was their right under the Constitution since they were not allowed to opt-out under Fed. R. Civ. P. 23(b)(1) and (b)(2) and since there

157. Ticor, 982 F.2d at 392, (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 (1985)).

158. Ticor, 982 F.2d at 392.

159. Shutts, 472 U.S. at 812.

was no conclusive determination at the date of filing that the Hurst class fit within these Federal Rules.[160] The Hurst case was procedurally distinct from Ticor, as the Hurst plaintiffs have not given up their right to litigate Judge Doty's class determination as the Ticor respondents did when they did not bring this issue up on appeal.[161]

Third, since Judge Doty did not allow the Hurst plaintiffs to opt out of the White settlement, due process rights granted under the Constitution mandated that they be treated as party litigants in the Minnesota litigation.

In the Notice of Class Action Settlement filed in White, Section III C stated in pertinent part:

> The class representative in this action will receive payment of their *actual* alleged damages in recognition of their efforts on behalf of the class initiating this action and the risk to their job security in doing so.[162] (emphasis added).

The Hurst plaintiffs did not receive compensation, as dictated in Section III C, for their actual alleged damages. Instead, they were lumped in with all other NFL players who in no way exercised their rights through legal proceedings and made to accept what the party litigants agreed to on their behalf, even though the Hurst plaintiffs have furthered the cause in the same manner as stated above, as the White plaintiffs. Thus, the proper remedy would have been to either allow the Hurst plaintiffs to opt-out of the White settlement, or to grant party litigant status to the Hurst plaintiffs so they could receive a proper award based on their contributions to the class members. The Hurst plaintiffs have been denied their right to proceed as a party litigant in both Minnesota and Louisiana. They have also been relegated to the rights of all other NFL players who failed to exercise their rights. A good example of what was lost by not being named party litigants was the fact that party litigants received treble damages for their claims, while class members, which included Maurice Hurst and John Fourcade, did not.

Finally, the Hurst plaintiffs contend that there was no authority with which to enjoin their March 5, 1993 lawsuit, as this contained an entirely separate cause of action than what was settled in White.

160. Ticor, 114 S.Ct. at 1361.

161. *Id.*

162. *See* Notice to Class Action Settlement.

On March 5, 1993, the Hurst plaintiffs asserted new antitrust and restraint of trade violations based on the NFL and its members implementation of the White settlement and a so-called "free agency" system.[163] Under this new system, Maurice Hurst, whose contract expired on February 1, 1993, was considered a "restricted" free agent despite the fact that no collective bargaining agreement was in place and due to the fact that the White settlement had not been agreed to at the time by the NFL and the White counsel as of the filing of the lawsuit.[164] Any action precluding Maurice Hurst from marketing his services without restriction should have been considered a restraint of trade in violation of the antitrust laws.[165] Minnesota District Court Judge David S. Doty cited two independent bases for enjoining the other suits, those being personal jurisdiction over the objectors and the All-Writs Act.[166] The Eighth Circuit noted "while the All-Writs Act is not an independent grant of jurisdiction, the ability to facilitate the present settlement by enjoining related suits of absent class members is ancillary to jurisdiction over the class itself."[167] The Eighth Circuit also noted that "if the district court were to approve the settlement without enjoining at least related claims, the agreement would be inadequate to end litigation relating to the labor dispute," and, therefore, affirmed the district court's enjoinder of both Hurst suits.[168]

First, there was no personal jurisdiction with which to enjoin the March 5, 1993, lawsuit. For a court to exercise personal jurisdiction, the party must have "minimum contacts" with the forum such that the maintenance of the suit does not violate "traditional notions of fair play and substantial justice."[169] The Eighth Circuit held that the objectors to the White settlement, including the Hurst plaintiffs, had submitted themselves to the personal jurisdiction, citing In re Real Estate Title and Settlement Services Antitrust Litigation,[170] when they appeared through counsel to

163. Hurst & Fourcade v. National Football League, No. 93-0766 (E.D. La. filed March 5, 1993).

164. *Id.*

165. *Id.*

166. White, 41 F.3d at 409, (citing 28 U.S.C. §1651 (1988)).

167. *Id.*

168. *Id.*

169. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), citing Milliken v. Meyer, 311 U.S. 457, 463 (1940).

170. White, 41 F.3d at 407-08, citing In re Real Estate Title and Settlement Servs. Antitrust Litig., 869 F.2d 760, 770-71 (3rd Cir. 1989), *cert den.*, 493 U.S. 821 (1989).

contest the merits of the settlement, offering testimony, cross-examining witnesses, and filing numerous memoranda of law regarding the settlement.[171] However, in the March 5, 1993, lawsuit, the Hurst plaintiffs were not contesting the merits of the White settlement. They could not contest the merits at this time, as no final settlement had been reached at the time of the filing of the suit. Therefore, the District Court misapplied the holding in In re Real Estate to conclude that they had personal jurisdiction with which to enjoin the suit. In addition, the March 5, 1993, lawsuit alleged antitrust and restraint of trade violations outside of the scope of the White settlement, and as such an independent bases must be established for personal jurisdiction. Since there were no "minimum contacts," the District Court erred in finding personal jurisdiction and the Eighth Circuit erred in affirming their ruling.

Second, the application of the All-Writs rule was incorrect. The claims in the March 5, 1993, lawsuit are not related in any way to the claims settled in White. The settlement in White purported to encompass all claims under "Plan B." The March 5 lawsuit does not arise out of "Plan B," but instead arises out of the settlement of the White lawsuit. As such, the Eighth Circuit's reliance on the All-Writs Act was in error. Therefore, it was improper for the district court in White to exercise its jurisdiction by enjoining the March 5, 1993, action, which in no way were related to the White settlement.

Thus, because the District Court did not have personal jurisdiction over the Hurst plaintiffs and because the All-Writs Act did not apply to the March 5 lawsuit, it was improper for the District Court to enjoin the March 5, 1993 lawsuit. As such, the Hurst plaintiffs should have been allowed to proceed with their lawsuit in the Eastern District of Louisiana for antitrust and restraint of trade violations.

IV. Conclusion

The White decision, on its face, was an important decision in settling much of the labor strife that was present in the National Football League in the early 1990's. It purported to end all litigation as a result of the owner's unilateral implementation of "Plan B" in 1989 in a fair and equitable manner to all parties involved. It also was the cornerstone to the subsequent collective bargaining

171. White, 41 F.3d at 408.

agreement between the NFL owners and the NFLPA in 1993. As this paper indicates, however, the White decision stands for much more than that.

Maurice Hurst and John Fourcade are just two of the many aggrieved NFL players who have shown that the White settlement was not as fair or just as many parties, including the NFL Owners and NFLPA, would lead you to believe. In fact, the White settlement should never have been approved by Judge Doty in Minnesota. The proper forum for hearing the claims concerning the alleged antitrust violations and restraint of trade claims as a result of "Plan B" was the Eastern District of Louisiana.

It is interesting to note how this settlement and the subsequent collective bargaining agreement have affected the careers of Maurice Hurst and John Fourcade. Maurice Hurst was made a restricted free agent as a result of the White settlement and subsequent collective bargaining agreement. Thus, in order to become an unrestricted free agent in 1994, Maurice Hurst signed a one-year agreement with the New England Patriots in 1993 for $470,000, the minimum offer New England was allowed to give.[172] After playing out the 1994 season, New England designated Maurice Hurst a "Transition" player.[173] The effect of being designated a "Transition" player was that Maurice Hurst was once again subject to the First Refusal/Compensation system. When negotiations broke down, Maurice Hurst notified the New England Patriots that he would accept, as per the new collective bargaining agreement, the mandatory one year offer of 1.9 million dollars for cornerbacks designated as "Transition" players.[174] In response, Bill Parcells, head coach of New England, notified Mr. Hurst that he would release him approximately one week before the season started, and lose the non-guaranteed contract.[175] Realizing that the result of this would be that he would be out of the League or would have to re-sign for substantially less money, Maurice Hurst accepted a three-year deal for 5.1 million dollars, with an $800,000 signing bonus.[176] Ironically, this was the offer that Maurice Hurst had rejected the previous week.[177] Subsequently, in the second year of the three year contract, Maurice Hurst suf-

172. Interview with J. Douglas Sunseri, attorney for Maurice Hurst (Feb. 1, 1995).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

fered a disk injury to his back and neck region. As a result of this injury, in November of 1995, the New England Patriots terminated his contract. Hurst then filed an injury grievance to recover lost compensation for the rest of the 1995 season, a suit that was later settled.[178] After surgery, Maurice Hurst attempted a comeback for the 1996 season with the St. Louis Rams, signing a $1.1 million, 1 year contract with a $275,000 signing bonus.[179] However, this comeback attempt proved unsuccessful, as Maurice Hurst was cut in the final preseason cuts. Currently, Maurice Hurst is retired from the National Football League.

John Fourcade, on the other hand, has not been so fortunate. He did not receive a new contract offer from the New Orleans Saints after his contract expired in 1990.[180] Today, he is out of football. Perhaps John Fourcade suffered a similar fate as Kermit Alexander, Sam McCullum and John Mackey had before him, allegedly losing their jobs in retaliation for bringing lawsuits.[181]

Finally, it is interesting to note how the White settlement had affected the business of professional football. The hard cap that was instituted as a result of the settlement has had a great impact on how individual players have been treated. Many veteran players have been released or asked to take a substantial pay cuts in order to remain in the league. The key factor in contract negotiations now centers around the signing bonus, rather than the average salary or number of years within the contract, as this is the only money that is truly guaranteed. The hard cap itself is forever manipulated by teams varying incentives around those that are "likely to be achieved," which count against the cap, and incentives that are not, which do not count.

The bottom line seems to be that, once again, the NFL Players Association, led by Gene Upshaw, have sabotaged the very players they were elected to represent in pushing for this deal. One can only imagine the labor strife that will occur when this collective bargaining agreement ends in 1999. Hopefully, for the sake of the game and the fans, things can be worked out peacefully and without a work stoppage. Don't hold your breath.

---

178. *Id.* Under the terms of the collective bargaining agreement, an injured player, subsequently cut, is entitled to compensation for the season in which he is injured, but is not entitled to compensation beyond that point for any subsequent season in which the player is under contract. Thus, Maurice Hurst was not entitled to compensation for the final year of the three year contract.

179. *Id.*

180. *Id.*

181. White, 822 F. Supp. at 1423, n.45.