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# Plan B's Inevitable Demise: The Consequence of *Powell v. National Football League*

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# PLAN B's INEVITABLE DEMISE: THE CONSEQUENCE OF *POWELL v.* *NATIONAL FOOTBALL LEAGUE*

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## I. INTRODUCTION

With the exception of professional baseball, most professional sports are not immune from antitrust scrutiny by virtue of their popularity.<sup>1</sup> The unique nature of professional sports, however, justifies different treatment under these laws from that of other industries.<sup>2</sup> To the extent that an alleged anti-competitive practice is a product of the collective bargaining process, the relationship

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1. The Supreme Court originally granted professional baseball antitrust immunity in *Federal Baseball Club of Baltimore v. National League of Professional Baseball*, 259 U.S. 200 (1922) (Baseball does not operate in interstate commerce and therefore is not subject to the antitrust laws). Even though the courts now view baseball as operating in interstate commerce, its exemption has survived because *stare decisis* requires this curious result to be corrected by Congress. *Flood v. Kuhn*, 407 U.S. 258 (1972). See also *Professional Baseball Schools & Clubs, Inc. v. Kuhn*, 693 F.2d 1085 (11th Cir. 1982) (affirming baseball's exemption). The baseball exemption is an anomaly. See, e.g., *Radovich v. National Football League*, 352 U.S. 445 (1957) (football); *Washington Professional Basketball Corp. v. National Basketball Ass'n*, 147 F. Supp. 154 (S.D.N.Y. 1956) (basketball); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club*, 351 F. Supp. 462 (E.D. Pa. 1972) (hockey); *United States v. International Boxing Club of N.Y., Inc.*, 348 U.S. 236 (1955) (professional boxing); *Blalock v. Ladies Professional Golf Ass'n*, 359 F. Supp. 1260 (N.D. Ga. 1973) (golf); *Gunter Harz Sports, Inc. v. United States Tennis Ass'n*, 665 F.2d 222 (8th Cir. 1981) (tennis); *National Wrestling Alliance v. Myers*, 325 F.2d 371 (9th Cir. 1963) (wrestling); *Washington State Bowling Proprietor's Ass'n v. Pacific Lanes, Inc.*, 356 F.2d 371 (9th Cir.), *cert. denied*, 384 U.S. 963 (1966) (bowling); *STP Corp. v. United States Auto Club, Inc.*, 286 F. Supp. 146 (S.D. Ind. 1968) (auto racing).

2. See, e.g., *Smith v. Pro Football, Inc.*, 420 F. Supp. 738 (D.D.C. 1976), *aff'd in part, rev'd in part*, 593 F.2d 1173, 1187 (D.C. Cir. 1978) (The nature of competition "for player talent may vary from an absolute 'free market' norm"; thus, practices which might otherwise be unlawful *per se* are analyzed under the antitrust law's Rule of Reason.).

between labor law and antitrust law must be clarified,<sup>3</sup> particularly in the context of an expired agreement.<sup>4</sup>

The non-statutory labor exemption is a judicial creation, specifically designed to accommodate competing labor and antitrust interests.<sup>5</sup> The exemption generally protects concerted management and union activity from the reach of the antitrust laws.<sup>6</sup>

As originally intended, the exemption favors the collective bargaining process as a means of resolving labor disputes. In sports litigation, courts evince a preference for labor law and policy over antitrust concerns when: (1) the trade restraints affect only the parties to the collective bargaining agreement; (2) the agreement concerns mandatory subjects of collective bargaining; and (3) the agreement is the product of bona fide, arms-length negotiations.<sup>7</sup> This analysis, which courts have relied upon in subsequent cases,<sup>8</sup> originated in *Mackey v. National Football League*.<sup>9</sup>

In *Mackey*, the Eighth Circuit Court of Appeals limited its holding to current agreements, stating that it "need not decide whether the effect of an agreement extends beyond its formal expiration date for purposes of the labor exemption."<sup>10</sup> Courts later determined that this analytic framework was relevant in determining the applicability of the labor exemption after the termination of an agreement.<sup>11</sup> Because the results in subsequent cases have been inconsistent, the issue is whether courts are properly applying these standards in either situation. These varying outcomes can be ex-

3. See *infra* text accompanying notes 33-64.

4. See *infra* text accompanying notes 65-98.

5. See *Connell Const. Co. v. Plumbers Local 100*, 421 U.S. 616 (1975); *Local 189 Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Allen Bradley Co. v. Local Union No. 3 Int'l Bd. of Elec. Workers*, 325 U.S. 797 (1945); *United States v. Hutcheson*, 312 U.S. 219 (1941).

6. Several statutory exemptions also exist. The Clayton Act, 15 U.S.C. § 17 (1990) and 29 U.S.C. § 52 (1990), and the Norris-LaGuardia Act, 29 U.S.C. §§ 105-15 (1990), grant antitrust immunity to labor union activities, not to employer-imposed restraints. The statutory exemptions are beyond the scope of this Article.

7. *Mackey v. National Football League*, 543 F.2d 606, 616 (8th Cir. 1976) *cert. dismissed*, 434 U.S. 801 (1977) (player restraint rules affect only parties to the agreement and are mandatory subjects of collective bargaining within the National Labor Relations Act).

8. See, e.g., *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *McCourt v. California Sports, Inc.*, 600 F.2d 1193 (6th Cir. 1979); *Zimmerman v. National Football League*, 632 F. Supp. 398 (D.D.C. 1986). But see *Wood v. National Basketball Ass'n*, 809 F.2d 954, 962 n.6 (2d Cir. 1987).

9. 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

10. *Id.* at 616 n.18.

11. See, e.g., *Powell v. National Football League*, 888 F.2d 559 (8th Cir. 1989), *cert. denied*, 111 S. Ct. 711 (1991); *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960 (D.N.J. 1988).

plained, in part, by differing interpretations of the third criterion, which requires that there be bona fide, arms-length bargaining between the parties.<sup>12</sup>

The current malaise in professional football contracts involves the scope of the exemption after the collective bargaining agreement expires. Since 1987,<sup>13</sup> the National Football League (NFL) and the National Football League Players' Association (NFLPA) have not reached a new agreement. The free agency issue, which concerns a player's unrestricted right to sell his or her services to the highest bidder, has been the principal cause of the stalemate.<sup>14</sup> This disagreement led to the twenty-seven day players' strike of 1987.<sup>15</sup> The strike failed to resolve the issue, frustrated in large part by the success of replacement games.<sup>16</sup> The players' insistence on greater free agency led to their attempts at redress in the courts.<sup>17</sup>

In *Powell v. National Football League*,<sup>18</sup> the players challenged the First Refusal/Compensation system, as implemented under the NFL-NFLPA 1982 Collective Bargaining Agreement (CBA), as a violation of the antitrust laws.<sup>19</sup> This system provided that "a team could retain a veteran free agent by exercising a right of first refusal and by matching a competing club's offer."<sup>20</sup> Furthermore, "[i]f the old team decided not to match the offer, the old team would receive compensation from the new team in the form of additional draft choices"<sup>21</sup> based on the player's "qualifying offer" and number of years in the League.<sup>22</sup>

12. See *supra* text accompanying note 7.

13. NFL-NFLPA 1982 Collective Bargaining Agreement, art. XXXVIII (expired August 31, 1987) [hereinafter 1982 CBA].

14. Holford, *Punt, Impasse or Kick: The 1987 NFLPA Antitrust Action*, 22 AKRON L. REV. 61, 67 (1988). See Singman, *Free Agency and the National Football League*, 8 LOY. ENT. L.J. 259, 268-270 (1988).

15. Holford, *supra* note 14, at 68.

16. *Id.* See also *Powell*, 888 F.2d at 570 n.8 (Heaney, J., dissenting) (strike unsuccessful because many players' futures are seldom secure beyond their short careers).

17. The district court in *Powell* did not believe that the plaintiffs were "demanding unrestricted free agency, but only that a player be free to move, without substantial restriction, at some point in his career." *Powell v. National Football League*, 687 F. Supp. 777, 789 n.22 (D. Minn. 1988) (emphasis in original) [hereinafter *Powell I*].

18. 888 F.2d 559 (8th Cir. 1989).

19. *Id.* at 561.

20. *Id.* Not one of the 1415 eligible veteran free agents changed teams during the term of the 1982 agreement.

21. *Id.*

22. 1982 CBA, *supra* note 13, at art. XV. The First Refusal/Compensation system resulted in less movement between teams than occurred under the Rozelle Rule. *Powell I*, 678 F. Supp. at 781 n.6. See also *Powell v. National Football League*, 690 F. Supp. 812, 813 (D.

The district court found it "probable that the players [would] prevail at trial and that at least some of the players [would] suffer irreparable harm. . . ." <sup>23</sup> Additionally, the district court held that the labor exemption expires when the parties reach an impasse in bargaining over the issue of free agency, thereby "allowing [the] players' antitrust suit to move forward. . . ." <sup>24</sup> In an attempt to protect the collective bargaining process from the threat of antitrust litigation, however, the court refused to issue a preliminary injunction on the ground that it would "offend the central purpose of the Norris-LaGuardia Act," which is to limit the use of injunctive relief in labor disputes. <sup>25</sup>

On February 1, 1989, pending an appeal to the Eighth Circuit, the NFL unilaterally implemented a new free agency system, Plan B, which allows teams to protect thirty-seven players. <sup>26</sup> A protected player can seek offers from new teams provided he is not under contract for the next season. <sup>27</sup> In this situation, Plan B classifies these players as conditional or restricted free agents subject to a revised First Refusal/Compensation system. <sup>28</sup> The players left unprotected, whether or not under contract, enjoy unrestricted movement between teams and become free agents each year. <sup>29</sup>

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Minn. 1988) (two players changed teams during 1988, when the draft choice compensation system was extended without player approval) [hereinafter *Powell II*]. The Rozelle Rule postulates:

[W]hen 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.

*Powell*, 888 F.2d at 562 (quoting *Mackey v. National Football League*, 543 F.2d 606, 609 n.1 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977)). In *Mackey*, the Eighth Circuit determined that the Rozelle Rule was an unlawful restraint on trade. In that case, four players changed teams "under circumstances in which Commissioner Rozelle awarded compensation to the old team." Brief for Appellee at 8, *Powell v. National Football League*, 888 F.2d 559 (8th Cir. 1989) (No. 89-5091) (citing *Mackey*, 543 F.2d at 611).

23. *Powell II*, 690 F. Supp. at 818.

24. *Id.* at 818 n.10. One scholar argues that the First Refusal/Compensation system "is another example of a rule limiting mobility with no effect on competitive balance." Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 676 n.154 (1989). Moreover, "[t]he ability to sell or buy goods or services as long as one merely equals offers from rivals long has been recognized as anti-competitive." *Id.* (citations omitted).

25. *Powell II*, 690 F. Supp. at 814. But see *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975), aff'd, 556 F.2d 682 (2d Cir. 1977) (Norris-LaGuardia Act does not apply in an antitrust suit even if it involves a labor dispute).

26. NFL-NFLPA 1982 Collective Bargaining Agreement, as amended by Plan B.

27. *Id.*

28. *Id.*

29. The NFL defendants in *Powell* claimed that more than one-third of the NFL players would be eligible each year as unconditional free agents. See Brief for Appellant at 12-13

The *Powell* district court would have allowed the antitrust case to proceed after the parties had reached a bargaining impasse, but because the Eighth Circuit reversed, the legality of the First Refusal/Compensation system remains unresolved.<sup>30</sup> On denial of petition for rehearing en banc, Judge Lay, dissenting, argued that the Eighth Circuit's holding provides a "Shangri-la of everlasting immunity from the antitrust laws," thereby delaying any meaningful resolution to this problem.<sup>31</sup>

This Article reviews the relevant case law interpreting the application of the non-statutory labor exemption in professional sports. The exemption effectively bars courts from reviewing league rules that restrain player mobility. Although the exemption is limited by the standards announced in *Mackey*,<sup>32</sup> the circumstances surrounding its expiration are frequently contested. Even if this limited exemption is extended to the end of the collective bargaining relationship, as proposed by the Eighth Circuit in *Powell*,<sup>33</sup> antitrust suits challenging Plan B are likely to emerge.<sup>34</sup> Because the NFLPA is intent upon terminating this labor-management relationship, courts will undoubtedly confront this issue. Indeed, this possibility could eventually produce a settlement and a new collective bargaining agreement materially different from Plan B.<sup>35</sup>

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n.6, *Powell v. National Football League*, 888 F.2d 559 (8th Cir. 1989) (No. 89-5091). Plaintiffs argued, however, that "the new system simply allows teams to release expendable players." Brief for Appellee at 16. Commentators seemingly agree with the players: "Some of these players will probably achieve success as free agents, but most are too old, injured, or unskilled to have a major impact." Staudohar & McAtee, *Free Agency in Sports: Plum or Prune?*, 40 LAB. L.J. 228, 231 (1989).

30. *Powell*, 888 F.2d at 568 (court stated that it "need not decide the issues left unresolved by th[e] opinion").

31. *Id.* at 573 (Lay, C.J., dissenting).

32. See *supra* notes 7-9 and accompanying text.

33. See *infra* text accompanying note 82.

34. Such a suit was filed in Newark, N.J. on April 10, 1990. Eight restricted NFL players did not receive offers to play for new teams, and alleged that Plan B is responsible. USA Today, Apr. 11, 1990, at 9C, col. 1. This case was removed to the District Court of Minnesota and has a trial date set for February 1992. Amended complaint, *McNeil v. National Football League* (Civ. No. 4-90-476) (D. Minn., filed April 30, 1991).

35. Another contributing factor likely to ease tensions between the two sides is the record four-year, \$3.56 billion television package the NFL recently negotiated with ABC, NBC, and CBS. Wall St. J., Mar. 12, 1990, at B5, col. 1. This agreement constitutes a 90% increase from the previous deal. *Id.* The League has yet to sell the rights to Super Bowl XXVIII in January 1994, which are worth an estimated \$40 million or more. *Id.* Consequently, "each team will get almost \$32 million a year in television payments, compared with \$17 million under the old setup. . . ." *Id.* This deal should allow the League to accommodate some form of free agency without the cuts or freezes in players' benefits currently imposed under Plan B. Presumably, the disagreement regarding money, benefits, and player mobility is ripe for a compromise.

## II. THE SCOPE OF THE NON-STATUTORY LABOR EXEMPTION

Although team owners argue that restrictions upon player mobility in professional sports<sup>36</sup> are designed to protect competitive balance,<sup>37</sup> the judiciary has not decided whether such restrictions are actually necessary.<sup>38</sup> Consequently, under the proper circumstances, certain restraints may violate the antitrust laws.<sup>39</sup> This situation necessarily requires consideration of the scope of the non-statutory labor exemption as applied in the context of current and expired agreements. Further, if a challenged practice is not exempt, courts must consider whether the restraint can be sustained under the antitrust law's Rule of Reason.<sup>40</sup>

### A. Current Agreements

When the Supreme Court decided *Mackey*, the players' union was "in a relatively weak bargaining position vis-a-vis the clubs. . . ."<sup>41</sup> The challenged anti-competitive practice had remained unchanged from the time it was first imposed on the players, prior to any collective bargaining relationship between the two sides.<sup>42</sup>

36. For a detailed discussion on the various types of player restraints in professional sports leagues, see J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* § 5.03 (1979).

37. There are at least three views regarding the effectiveness of player restraints in maintaining competitive balance. See generally Canes, *The Social Benefits of Restrictions on Team Quality*, in *GOVERNMENT AND THE SPORTS BUSINESS* 81 (R. Noll ed. 1974) (ineffective); J. WEISTART & C. LOWELL, *supra* note 36, § 5.07, at 624 (some restraint necessary); Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 *YALE L.J.* 1, 5-6 (1971) (important to the success of a sports league). The prevailing view appears to be that generalized restraint is necessary if the League is to exist as it does today. See Ross, *supra* note 24, at 670-90 (some restraint is a "public good").

38. See *Mackey v. National Football League*, 543 F.2d 606, 622 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

39. See, e.g., *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976) (NFL's compensation rule), *cert. dismissed*, 434 U.S. 801 (1977); *Smith v. Pro-Football, Inc.*, 420 F. Supp. 738 (D.D.C. 1976) (NFL's player selection draft), *aff'd in part, rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978); *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975) (NBA's reserve clause, uniform player contract, and player selection draft), *aff'd*, 556 F.2d 682 (2nd Cir. 1977); *Kapp v. National Football League*, 390 F. Supp. 73 (N.D. Cal. 1974) (NFL's compensation rule, player selection draft, and no-tampering rule), *aff'd in part, cross-appeal dismissed in part*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979); *Boston Professional Hockey Ass'n v. Cheevers*, 348 F. Supp. 261 (D. Mass. 1972) (NHL's reserve clause), *remanded*, 472 F.2d 127 (1st Cir. 1972); *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971) (NBA's four-year college rule).

40. See *infra* notes 99-149 and accompanying text.

41. *Mackey*, 543 F.2d at 615-16.

42. *Id.* Cf. *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club*, 351 F. Supp. 462 (E.D. Pa. 1972) (The NHL Players' Association is not recognized under labor law as an approved collective bargaining organization and, therefore, the labor exemption does not apply; even if it could qualify as a certified union, the labor exemption would not apply

Moreover, because the rule imposed significant restrictions, the *Mackey* court believed that legitimate bargaining would have included some kind of negotiation over its terms.<sup>43</sup> That players received increased benefits in other areas was not, in and of itself, indicative of a quid pro quo.<sup>44</sup>

The *Mackey* holding does not decide whether a particular quid pro quo must be proven to avoid antitrust liability. It does require a sports league to at least negotiate the terms and conditions of open restraints of trade with players' associations. In *McCourt v. California Sports, Inc.*,<sup>45</sup> for example, a player challenged the National Hockey League's (NHL) reserve system as violative of antitrust laws.<sup>46</sup> The collective bargaining agreement, however, contained provisions indicating that bargaining had taken place. These provisions stated that the Standard Player's Contract and the reserve system were "fair and reasonable terms of employment,"<sup>47</sup> that "the Standard Player's Contract required [the players] to accept all the bylaws adopted by the NHL,"<sup>48</sup> and that "the entire agreement could be voided if the NHL and the World Hockey Association should merge[,] or "should the reserve system be invalidated by the courts."<sup>49</sup>

Nonetheless, the plaintiff in *McCourt* insisted, and the district court agreed, that the reserve rule had not been the subject of good faith bargaining.<sup>50</sup> This position did not survive appeal.<sup>51</sup> The Sixth Circuit noted that "what the trial court saw as a failure to negotiate was, in fact, simply the failure to succeed, . . ."<sup>52</sup> and concluded that the players' loss at the bargaining table was totally irrelevant because labor law principles establish that good faith

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because, as a new union, it was subject to influence by the League.).

43. *Mackey*, 543 F.2d at 616.

44. *Id.*

45. 600 F.2d 1193 (6th Cir. 1979).

46. *Id.* at 1194.

47. *Id.* at 1200 (quoting *McCourt v. California Sports, Inc.*, 460 F. Supp. 904, 910-11 (E.D. Mich. 1978)). The Sixth Circuit agreed with the district court that this provision in the agreement did not shield it from antitrust liability, but it did support the fact that the agreement was bargained for in good faith. *Id.* at 1203.

48. *Id.* (quoting *McCourt*, 460 F.Supp. at 911).

49. *Id.* at 1202. This provision best supports the conclusion that the players agreed to the contract in good faith. Otherwise, "the reserve system would be rendered too onerous because the players would, by the merger, lose the competitive advantage of threatening to move to the WHA." *Id.*

50. *McCourt*, 460 F. Supp. at 910.

51. *McCourt*, 600 F.2d at 1203 (The evidence "compels the conclusion that the reserve system was incorporated in the agreement as a result of good faith, arm's-length bargaining between the parties.").

52. *Id.*



bargaining does not compel "either party negotiating over mandatory subjects of collective bargaining to yield on its initial bargaining position."<sup>53</sup>

*Zimmerman v. National Football League*<sup>54</sup> best illustrates the proper comparison of bargaining circumstances in antitrust sports cases to justify use of the labor exemption. In *Zimmerman*, the court noted that, in these types of cases, a particular quid pro quo offered some proof "that the bargaining took place and that it was done at arm's length."<sup>55</sup> The parties in *Zimmerman* presented such proof, and that showing formed the basis for the court's decision to apply the labor exemption.<sup>56</sup> The court accepted that, after extensive bargaining over the terms of the supplemental draft, the parties reached an agreement "based on the concessions received from the NFL."<sup>57</sup>

Even though a particular quid pro quo is ascertainable, a court will apply the labor exemption without discussion. The Second Circuit adopted this position in *Wood v. National Basketball Ass'n*.<sup>58</sup> In *Wood*, Judge Winter<sup>59</sup> characterized a collective bargaining agreement as a "unique bundle of compromises,"<sup>60</sup> suggesting that it is next to impossible or unnecessary to find separate

53. *Id.* at 1200. In reaching its conclusion, the Sixth Circuit referred to the National Labor Relations Act, which provides in relevant part:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but *such proposal does not compel either party to agree to a proposal or require the making of a concession.* . . .

29 U.S.C. § 158(d)(8)(d) (1990) (emphasis added).

54. 632 F. Supp. 398 (D.D.C. 1986).

55. *Id.* at 407. It did not matter that the team owners conceded issues that they were prepared to give up. Good faith bargaining can occur outside the agreement. *Id.* at 407 n.9. See also *Alexander v. National Football League*, 1977-2 Trade Cas. (CCH) P 61,730, at 73,001 (D. Minn. 1977) (Restrictions on player movement have "been agreed to by the union as a . . . quid pro quo . . . in return for numerous other direct benefits to the employees it represented."), *aff'd sub nom.*, *Reynolds v. National Football League*, 584 F.2d 280 (8th Cir. 1978).

56. *Zimmerman*, 632 F. Supp. at 408.

57. *Id.* at 406.

58. 809 F.2d 954 (2d Cir. 1987).

59. Before his appointment to the federal bench, Judge Winter co-authored an article in the Yale Law Journal. See *supra* note 37. Although Judge Winter favors federal labor law and policy, *Wood* is expressly limited to current agreements: "We need not enter this debate or probe the exact contours of the so-called statutory or non-statutory 'labor exemptions.' . . ." *Wood*, 809 F.2d at 959.

60. *Id.* at 961.

and adequate consideration for a particular provision in the contract.<sup>61</sup> Thus, the court concluded, judicial interference with the collective bargaining process is altogether improper.<sup>62</sup> The availability of labor law remedies is exclusive.<sup>63</sup>

As an interpretation of the law, this position is generally unsupported—in the preceding cases, the courts were willing to review the bargaining behavior of the parties to decide the application of the exemption, expressly relying on a quid pro quo as some evidence that bona fide bargaining took place. Although the *Wood* court acknowledged that *Zimmerman*, *McCourt*, and *Mackey* were indeed decided “on somewhat different grounds,”<sup>64</sup> it did little to reconcile them. To presume good faith bargaining not only ignores precedent, but also designates all existing agreements as unavoidably binding.

### B. Expired Agreements

Though the scope of the labor exemption remains unresolved after *Wood*, it is more acceptable to apply the exemption if the agreement is still effective than to do so if the agreement has expired, at least when a court and sometimes even the parties themselves<sup>65</sup> find the agreement to be a product of good faith bargaining. In this situation, however, formulating a workable test is more difficult because other labor law principles must be considered.<sup>66</sup> For example, once an agreement expires, management has the duty to “maintain the status quo as to wages and working conditions.”<sup>67</sup> If the parties reach a bargaining impasse, management enjoys the authority to unilaterally change these terms of employment.<sup>68</sup> It is unclear whether management is restrained by other laws after im-

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61. *Id.*

62. *Id.* at 962.

63. *Id.* at 962 n.5 (“Any claim of unreasonable bargaining behavior must be pursued in an unfair labor practice proceeding charging a refusal to bargain in good faith, 29 U.S.C. § 158(a)(5), not in an action under the Sherman Act.”).

64. *Id.* at 962 n.6.

65. See, e.g., *Bridgeman v. National Basketball Ass’n*, 675 F. Supp. 960, 964 (D.N.J. 1987) (if collective bargaining agreement had still been in effect, there would have been no dispute that the restrictions were covered by the labor exemption); *Powell v. National Football League*, 888 F.2d 559, 564 (8th Cir. 1989), *cert. denied*, 111 S. Ct. 711 (1991) (same).

66. *Powell*, 888 F.2d at 565.

67. *Id.* (quoting *Producers Dairy Delivery Co. v. Western Conference of Teamsters Trust Fund*, 654 F.2d 625, 627 (9th Cir. 1981) (quoting *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 736 (9th Cir. 1981))).

68. *Id.* (citing *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988)).

passee<sup>69</sup> and, if not, under what circumstances there is an impasse which would justify unilateral action by management.<sup>70</sup> What remains clear, however, is that the collective bargaining process must fail in actuality for the exemption to expire.

In *Bridgeman v. National Basketball Ass'n*,<sup>71</sup> the court held that "the exemption for a particular practice survives only as long as the employer continues to impose that restriction unchanged, and reasonably believes that the practice or a close variant of it will be incorporated in the next collective bargaining agreement."<sup>72</sup> If, during this time, the employer changes a practice previously agreed upon without the players' consent, a court will not regard the change as having been negotiated at arm's-length.<sup>73</sup> Consequently, the exemption is lost "whether or not the employer reasonably believes that [the change] will survive in the next agreement."<sup>74</sup> This test prompted the NBA players to decertify their union in order to discredit the owners' "reasonable belief" in negotiations.<sup>75</sup> This behavior has been criticized as an "erosion of the collective bargaining process,"<sup>76</sup> even though the two sides resumed bargaining and negotiated a new agreement.<sup>77</sup>

In *Powell*, the Eighth Circuit rejected the district court's impasse test, as it encouraged the avoidance of collective bargaining so as to give rise to antitrust liability,<sup>78</sup> and because it did not con-

69. "One such legal restraint would certainly be the antitrust laws." *Powell*, 888 F.2d at 573 n.4 (Lay, C.J., dissenting).

70. On petition for rehearing en banc in *Powell*, Judge Lay accused the court of having impliedly overruled *Mackey*: "I base my views regarding the panel majority's misinterpretation of *Mackey* only upon the majority's apparent but wrongful assumption that impasse between the union and the owners has been reached." *Powell*, 888 F.2d at 572 n.1. The National Labor Relations Board had found impasse on the single issue of the free agency rule, and the district and Eighth Circuit courts agreed. *Id.* at 570. Judge Lay, who authored the *Mackey* opinion, argued that "[i]mpasse on overall negotiations of the contract ha[d] not been reached by the parties and, therefore, summary judgment [was] not ripe at th[e] time." *Id.* (emphasis added). But see *Powell*, 888 F.2d at 574 (Gibson, C.J., concurring) ("[D]ivisibility or indivisibility of impasse" was not raised and, therefore, it would be improper for the court to decide that there was no impasse.).

71. 675 F. Supp. 960 (D.N.J. 1987).

72. *Id.* at 967.

73. *Id.*

74. *Id.* at 967 n.6.

75. Gould, *Players & Owners Mix It Up*, 8 CALIF. LAW. 56, 103 (August 1988).

76. *Id.*

77. According to Lawrence Fleisher, the NBA Players' Association General Counsel, "only because the players took that position and filed the antitrust suit do we have the agreement that we have." Annual Judicial Conference: Second Circuit of the United States, 125 F.R.D. 293, 310 (1989) (referring to the 1987 Collective Bargaining Agreement in professional basketball).

78. *Powell*, 888 F.2d at 564. The Eighth Circuit characterized the district court's im-

sider the full extent of labor law remedies.<sup>79</sup> "After impasse, an employer may make unilateral changes that are reasonably comprehended within its pre-impasse proposals."<sup>80</sup> As in *Wood*, the *Powell* court opposed an action for treble damages under the Sherman Act when it conflicted with federal labor law.<sup>81</sup> This exclusive reliance on labor law was the basis for the Eighth Circuit's conclusion "that the nonstatutory labor exemption protects agreements conceived in an *ongoing collective bargaining relationship* from challenges under the antitrust laws."<sup>82</sup>

This approach, however, does little more to encourage bargaining—the intended purpose of the labor exemption—than *Bridgeman's* reasonable belief test<sup>83</sup> or *Powell I's* impasse test.<sup>84</sup> It merely extends the coverage of the exemption until the players cease collective bargaining representation,<sup>85</sup> or until the players exhaust all possible labor law remedies.<sup>86</sup>

The *Powell* opinion resulted in two responses other than the one urged by the court, which proposed that the two sides bargain further.<sup>87</sup> First, *Powell*, which was already a protracted litigation, was appealed to the United States Supreme Court.<sup>88</sup> Second, the NFLPA has taken steps to terminate their labor union status in order to establish antitrust jurisdiction. The NFLPA represents itself as a voluntary trade association, not as an official bargaining representative for the players.<sup>89</sup> The NFLPA's action makes the

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passee test in the following manner:

The district court adopted 'impasse' as the point in which the nonstatutory labor exemption expires, holding that 'once the parties reach impasse concerning player restraint provisions, those provisions will lose their immunity and further imposition of those conditions may result in antitrust liability.' The [district] court reasoned that its impasse standard 'respects the labor law obligation to bargain in good faith over mandatory bargaining subjects following expiration of a collective bargaining agreement,' and that it 'promotes the collective bargaining relationship and enhances prospects that the parties will reach compromise on the issue.'

*Powell*, 888 F.2d at 564 (citation omitted).

79. *Id.* at 566.

80. *Id.* at 567 (citations omitted).

81. *Id.* at 568.

82. *Id.* (emphasis added).

83. See *supra* text accompanying note 72.

84. See *supra* text accompanying note 78.

85. *Powell*, 888 F.2d at 568 n.12 ("The League concedes that the Sherman Act could be found applicable . . . if the affected employees ceased to be represented by a certified union.").

86. *Id.* at 568.

87. *Id.*

88. The petition for certiorari, however, was denied in 1991.

89. *The NFL's Union Could Win by Committing Suicide*, *Bus. Wk.*, November 27,

League vulnerable to subsequent antitrust suits challenging Plan B because the League is imposing itself on the players without their consent.

The Supreme Court, by denying certiorari, skirted the issue of whether "[u]nion decertification is . . . a worthy goal to pursue in balancing labor policy with the antitrust laws."<sup>90</sup> The evidence seems to indicate that it is not. According to at least one commentator, "the law becomes an ass" when courts fashion tests that abrogate the collective bargaining process.<sup>91</sup> Although directed at the district court's holding in *Bridgeman* and *Powell*, the comment is equally applicable to the Eighth Circuit when it impliedly directed union decertification to acquire antitrust jurisdiction. When subsequent steps toward decertification are taken, the NFL Management Council dismisses this behavior as a "bargaining ploy."<sup>92</sup>

The League contends, in a suit for declaratory relief, that "the NFLPA's purported decertification and abandonment of bargaining rights is ineffective to terminate the labor exemption recognized by the Eighth Circuit."<sup>93</sup> The issue of antitrust immunity

1989, at 84.

90. *Powell*, 888 F.2d at 574 (Lay, C.J., dissenting).

91. Gould, *supra* note 75, at 103. The author proposed:

[T]he labor union exception survives for a reasonable period of time after the point at which bargaining is not, as an objective matter, likely to be achieved. This would mean that the factors such as the decimation of the NFLPA, which could no longer function through the collection of dues after the strike, would weigh heavily against the availability of the labor exemption.

*Id.*

92. Telephone interview with John Jones, Director of Public Relations for the NFL Management Council (March 28, 1990). The basis for this remark is two-fold: First, "72% of the players chose benefits as their top bargaining priority, while 19% picked free agency." News release by NFL Management Council, Q&A on NFLPA Decertification at 2 (SPORTS ILLUSTRATED survey of over 600 veteran players) [hereinafter News Release on NFLPA Decertification]. Second, the comments of Warren Moon, NFLPA Vice President and Houston Oilers' Players Representative, on the NFLPA decertification are revealing: "Hopefully, this will spur some type of negotiations process because right now[,] without any leverage because of the antitrust lawsuit[,] we pretty much would have to take anything the owners have to offer us." Warren Moon Interview on NFLPA Decertification, KHOU-TV Houston (Nov. 7, 1989) (transcript provided by the NFL Management Council). See also *The Five Smiths v. NFLPA*, No. 3-90-CZ177, at 14 ("The purpose of such actions or threats is to enhance the NFLPA's leverage in subsequent bargaining with the NFL clubs.") (emphasis added).

93. Complaint, *The Five Smiths v. NFLPA*, at 15 (No. 3-90-CZ177) (D. Minn. filed March 30, 1990). The League is also seeking similar equitable relief for the following restrictive practices:

(1) [purported decertification];

(2) That the terms and conditions of employment governing compensation and movement of veteran free agent players, known as Plan B, as they have operated and are to operate in 1990, are immune from antitrust attack under the nonstat-

was decided in favor of the players, however, in summary judgment proceedings in another case.<sup>94</sup> The result of this action will accelerate Plan B's inevitable demise now that a court has determined that the bargaining relationship between the NFL and the NFLPA has effectively terminated any "ongoing collective bargaining relationship."<sup>95</sup> Apparently, the NFLPA does not need to initiate formal proceedings with the National Labor Relations Board.<sup>96</sup>

The goal of greater free agency has required the members of the NFLPA to hold out until final resolution of this issue. Players' careers are short and, therefore, anything other than an expeditious settlement is not in their best interest. Indeed, it is this practical reality which prompted the League to seek a declaratory judgment in federal court.<sup>97</sup> With an overwhelming advantage in resources, the League will attempt to achieve dissention among the players. Despite the various views regarding the scope of the non-statutory labor exemption,<sup>98</sup> antitrust review of Plan B is not foreclosed. Consequently, absent a new arm's-length agreement, the League will be forced to defend these practices in court.<sup>99</sup>

### III. ANTITRUST'S RULE OF REASON

Section 1 of the Sherman Act condemns agreements that restrain trade.<sup>100</sup> The Act characterizes violations as per se illegal, or requires their evaluation under the Rule of Reason. Price fixing,<sup>101</sup>

utory labor exemption;

(3) That the terms and conditions of employment governing compensation and movement of veteran free agent players, known as Plan B, are, as they have operated and are to operate in 1990, reasonable and lawful under the antitrust laws;

(4) That the college draft, as it is to operate in 1990, is immune from antitrust attack under the nonstatutory labor exemption;

(5) That the college draft, as it is to operate in 1990, is reasonable and lawful under the antitrust laws; and

(6) That this Court grant such other relief as it deems just and proper.

*Id.* at 19-20.

94. Order, *McNeil v. National Football League* (Civ. No. 4-90-476) (D. Minn., filed May 23, 1991). The court issued an immediate appeal to help expedite these proceedings, but was denied on June 12, 1991.

95. *Powell*, 888 F.2d at 596.

96. In this situation, Plan B may be immune from antitrust attack by 1989, 1990, and 1991 Plan B players.

97. See *supra* note 93 and accompanying text.

98. See Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339 (1989) (suggesting that the exemption expires at the death of the agreement).

99. See *supra* note 34 and accompanying text.

100. 15 U.S.C. § 1 (1970).

101. See, e.g., *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940); *United*  
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diversions of markets between competitors,<sup>102</sup> tying arrangements,<sup>103</sup> and group boycotts<sup>104</sup> constitute per se violations "because of their pernicious effect on competition and lack of redeeming virtue. . . ."<sup>105</sup> Lower courts have held that player restraints in professional sports constitute group boycotts and were therefore per se illegal—these decisions, however, have been routinely overruled in favor of an inquiry into the reasonableness of the restraint under the circumstances<sup>106</sup> because, admittedly, the success of professional sports depends on some internal controls (*i.e.*, revenue sharing and league-wide TV contracts)<sup>107</sup> and, perhaps, some generalized restraints on player mobility.<sup>108</sup>

A reasonable restraint must be responsive to the purported justification for the rule, and "no more restrictive than necessary."<sup>109</sup> This standard requires a court "to form a judgment about the competitive significance of the restraint."<sup>110</sup> It does not matter whether the restraint is within "the realm of reason."<sup>111</sup> Consequently, whether, as the League suggests, "Plan B represents a reasonable accommodation between the interest of the players in freedom of movement and the interest of the clubs in preserving and promoting competitive balance"<sup>112</sup> is not the issue. Instead, the pro-competitive virtues of the challenged practice must outweigh the anti-competitive evils of the restraint in order to survive a Rule of Reason analysis.<sup>113</sup>

Courts are generally perplexed when applying balancing tests.

*States v. Trenton Potteries Co.*, 273 U.S. 397 (1927).

102. *See, e.g.*, *United States v. Topco Assoc., Inc.* 405 U.S. 596 (1972); *Timken Roller Bearing Co. v. United States*, 356 U.S. 593 (1951).

103. *See, e.g.*, *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495 (1969); *Northern Pacific Ry. v. United States*, 356 U.S. 1 (1958).

104. *See, e.g.*, *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959); *Fashion Originator's Guild of America v. FTC*, 321 U.S. 457 (1941).

105. *Mackey v. National Football League*, 543 F.2d 606, 618 (8th Cir. 1976) *cert. dismissed*, 434 U.S. 801 (1977) (quoting *Northern Pac. R.R. Co. v. United States*, 356 U.S. 1, 5 (1958)).

106. *See, e.g.*, *Mackey*, 543 F.2d at 619; *Smith v. Pro Football, Inc.*, 420 F. Supp. 738 (D.D.C. 1976), *aff'd in part, rev'd in part*, 593 F.2d 1173, 1182 (D.C. Cir. 1979).

107. *See* 15 U.S.C. § 1291 (1982).

108. *See Canes, The Social Benefits of Restrictions on Team Quality*, in *GOVERNMENT AND THE SPORTS BUSINESS* 81 (R. Noll ed. 1974). *See also supra* note 37 and accompanying text.

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

110. *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85 (1984) (quoting *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679 (1978)).

111. *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978).

112. *The Five Smiths, supra* note 93, at 17.

113. *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1182 (D.C. Cir. 1978).

In finding League rules violative of antitrust law's Rule of Reason, courts have held that there is nothing pro-competitive about them in an economic sense.<sup>114</sup> Assuming some pro-competitive effect, their contributions to competitive balance are of little<sup>115</sup> or no importance.<sup>116</sup> In any event, a court would be wrong if it did not attempt a balance, though taken literally, a net economic pro-competitive effect could not be shown.<sup>117</sup> Some form of player restraint should be viewed as pro-competitive if it is necessary in producing the "NFL" product.<sup>118</sup>

In *National Collegiate Athletic Association v. Board of Regents*,<sup>119</sup> the Supreme Court rejected the argument that the NCAA's television plan, which limited the amount of television coverage of individual teams, was necessary to preserve college football as a distinctive product. Writing for the Court, Justice Stevens concluded that the plan was not necessary to protect live attendance at non-televised games,<sup>120</sup> maintain competitive balance<sup>121</sup> or increase the game's marketability as a form of entertainment.<sup>122</sup> Because the plan could not be defended as pro-competi-

114. *Id.* at 1186 (The college draft rule "does not increase competition in the economic sense of encouraging others to enter the market and to offer the product at a lower cost. Because the draft's 'anti-competitive' and 'pro-competitive' effects are not comparable, it is impossible to 'net them out' in the usual rule of reason balancing.").

115. *Id.* at 1184 n.46. "[W]e think that two other factors contribute at least as much as the player draft to producing and maintaining a competitive balance in the league—television revenues and coaching changes." *Id.*

116. *Mackey*, 543 F.2d at 621 ("Even assuming the Rule did foster competitive balance . . . there were other legal means available to achieve that end— e.g., the competition committee, multiple year contracts, and special incentives. The court further concluded that elimination of the [Rule] would have no significant disruptive effects, either immediate or long term, on professional football.").

117. *See National Soc'y of Professional Engineers v. United States*, 435 U.S. 679 (1978).

118. *Cf. National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 102 (1984) (Some NCAA rules preserve the character of college sports, "and as a result enables a product to be marketed which might otherwise be unavailable."). *See also Powell II*, 690 F. Supp. at 816 ("Some leveling and balancing rules appear necessary to keep the various teams on a competitive basis, without which public interest in any sport quickly fades.") (quoting *Reynolds v. National Football League*, 584 F.2d 280, 287 (8th Cir. 1978)).

119. 468 U.S. 85 (1984).

120. This argument presupposes that competition between live and televised games is disruptive. Accordingly, the Court reaffirmed a truism of antitrust law: "[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *Id.* at 117 (quoting *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 696 (1978)).

121. *Id.* at 119. "The television plan is not even arguably tailored to serve such an interest[.]" in that there was no evidence of any intent to equalize the strength of the teams financially or otherwise. *Id.*

122. *Id.* at 114. "NCAA football could be marketed just as effectively without" such



tive in terms of responsiveness to institutional concerns, it was an unreasonable restraint of trade.<sup>123</sup>

Plan B, however, is responsive to the concerns of the League. Many players are designated unconditional free agents each year.<sup>124</sup> Of the eleven teams who signed the most Plan B players in 1989, two teams won their division and seven improved their records from the previous year.<sup>125</sup> As the League contends, Plan B allows teams to build for the future by protecting "the nucleus of the ball clubs."<sup>126</sup> The remaining players can test the market without diminishing the quality of professional football.<sup>127</sup> This evidence supports only the view that a court should at least attempt to balance between these pro-competitive justifications and the anti-competitive effects of the restraint. Whether there is enough evidence to conclude that Plan B "is no more restrictive than necessary"<sup>128</sup> is, at best, speculative. The opposite may be true, primarily if greater movement makes teams more competitive.

The League is likely to argue that its efforts deserve the benefit of the doubt. As some commentators reason, "For an entity offering a true league competition, as opposed to coordinated promo-

controls. *Id.*

123. *Id.* at 120.

124. In 1989, 229 of the 619 eligible players changed teams. Of these players, almost half are eventually released. See also New Release by NFL Management Council, Q&A on Plan B for 1990, at 1 [hereinafter News Release on Plan B for 1990] ("Of the 229 unconditional free agents who changed teams [in 1989], 133 were under contract through the season, including 115 active players."). The figures for 1990 and 1991 Plan B players were 184 of 490 and 139 out of 518, respectively. These figures were released by the National Football League Management Council.

125. The Denver Broncos were the AFC West Champion at 11-5, and the Cleveland Browns were the AFC Central Champion at 9-6-1. News Release on Plan B for 1990, *supra* note 124, at 1.

126. Telephone interview with John Jones, Public Relations Director for the NFL Management Council (Mar. 29, 1990).

127. When asked whether full free agency would be better, the League answered in the negative:

Plan B is no microcosm of unrestricted free agency. It is a system designed to protect competitive balance. Total free agency jeopardizes competitive balance because teams with economic advantages could outbid other clubs for top players. Economic imbalance would lead to competitive imbalance on the field. Plan B responded to the interests of the teams, the NFLPA and the fans. Teams wanted to build for the future, and Plan B allowed clubs to protect 37 players. The NFLPA wanted player movement, and more NFL free agents moved under Plan B than the combined total of free agents moving in the NBA and baseball since 1982. Fans want competitive games, and Plan B protected competitive balance, which this season helped the NFL set all-time records for attendance and teams in playoff contention on the final weekend.

News Release on Plan B for 1990, *supra* note 124, at 4.

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

tion of a sports activity, equalization of competition is not a discretionary choice."<sup>129</sup> Thus, "[i]n any balance of competitive effects, such considerations are surely entitled to extra weight."<sup>130</sup> Courts, however, are not necessarily persuaded by this logic because restraints can be characterized as necessary as a matter of law. In *Mackey*, for example, the court claimed that the old free agency rule was "significantly more restrictive than necessary."<sup>131</sup> Further, in *Smith v. Pro Football, Inc.*,<sup>132</sup> the district court regarded the college draft as "the most restrictive one imaginable."<sup>133</sup> On appeal, the appellate court also held without reservation "that the effect of the draft . . . was to 'suppress or even destroy competition' in the market for players' services."<sup>134</sup>

Because Plan B was seemingly "designed to withstand legal attack,"<sup>135</sup> a court may consider this fact for purposes of balancing. Restrictions on player movement under Plan B, for example, no longer apply to all players irrespective of "status or ability."<sup>136</sup> They only "operate[] as [] perpetual restriction[s]" with respect to those who are protected by their teams.<sup>137</sup> Although Plan B has responded to these concerns, it has failed in others. For example, it does not allow players' input as to the amount of compensation

129. J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* § 5.07 (Supp. 1985).

130. *Id.*

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

132. 420 F. Supp 738 (D.D.C. 1976), *aff'd in part, rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978).

133. *Id.* at 746. The court held the college draft was per se illegal and, therefore, the analysis under the Rule of Reason was dicta.

134. *Smith v. Pro Football*, 593 F.2d 1173, 1186 (D.C. Cir. 1978) (quoting *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918)).

135. News Release on Plan B for 1990, *supra* note 124, at 4.

136. *Mackey*, 543 F.2d at 622 (quantities which influenced the court in deciding that the Rozelle Rule was a violation of antitrust law's Rule of Reason).

137. Unrestricted free agents may be subject to the First Refusal/Compensation system if a player is not signed between February 2 and April 1. Consequently, if the old club matches an offer, the player is restrained indefinitely, as would be the case if a restricted free agent's offer is matched. In both situations, however, without an offer, a player has no chance of moving or making a team if released.

According to sports agent Bob Woolf, Plan B has been so successful that owners will be "less aggressive this year. . . . It has elevated salaries and allowed players to test the market. And teams that signed players did better." *The Oregonian*, Feb. 2, 1990, at E2, col. 1. Referring to the largest sports TV package ever negotiated, however, sports agent Leigh Steinberg commented: "The rights fees fueled a salary explosion in baseball . . . . Now things will explode in the N.F.L. If the teams have money, they'll spend it." *Zoglin, The Great TV Takeover*, *Time*, Mar. 26, 1990, at 68. This spending spree should hopefully create a demand for restricted Plan B players. It is likely, however, that should a restricted free agent receive an offer, it will be matched so as to deny a player from playing for a team of his choice.

paid to the old club<sup>138</sup> and is still administered "in conjunction with other anti-competitive practices,"<sup>139</sup> such as the Standard Player's Contract and the college draft.<sup>140</sup>

It remains unclear how a court will balance and weigh these respective interests. The evidence suggests that the Rule of Reason standard is, perhaps, insurmountable in this situation. First, the judiciary is historically opposed to anti-competitive restraints.<sup>141</sup> Second, greater free agency is successfully promoted in other professional sports.<sup>142</sup> Third, the League did not collapse during a limited period of full free agency.<sup>143</sup> Finally, there is nothing "magical" about protecting thirty-seven players.<sup>144</sup>

If a court were to decide that the protection of thirty-seven is necessary to maintain competitive balance, the League would apparently only negotiate "some reasonable variant"<sup>145</sup> to be in-

138. *Mackey*, 543 F.2d at 622 (procedural protection relevant to rule of reason analysis). See also *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1397-98 (9th Cir. 1984), which suggested that an NFL rule which restrained team movement "was not reasonably necessary to the production and sale of the NFL product [absent] [s]ome sort of procedural mechanism." Thus, some form of salary arbitration and appeals process may be required.

139. *Mackey*, 543 F.2d at 621 (Standard Player's Contract, draft, and no-tampering rules operate as additional restraints on player mobility).

140. In *Powell*, the plaintiffs claim these league practices constitute unlawful player restraints. *Powell*, 888 F.2d at 561. Under the district court's impasse test, until there is an impasse in bargaining as to these issues, the labor exemption applies. See *supra* note 24 and accompanying text. Consequently, only the Right of First Refusal/Compensation system was subject to review on appeal. *Powell*, 888 F.2d at 561. Antitrust review of these practices is likely to proceed, however, under the same theory advanced with respect to Plan B—union decertification.

141. See *supra* note 37 and accompanying text.

142. Presumably, only some generalized restraint is necessary to maintain competitive balance. A court should look to other professional sports as guidelines. In baseball, for example, unrestricted free agency is available for six-year veteran players, and in basketball, the number of years to qualify for free agency diminishes over time. See generally *Staudohar and McAtee, supra* note 29, at 231. The authors argue that free agency in football is not as meaningful because one free agent has less of an impact on the team's success, revenue sharing is anti-competitive in that there is little incentive to bid on players, and that an average player's career lasts 3.2 years. *Id.* at 230. But see *Singman, supra* note 14, at 271 (free agency system would work in football if draft choice compensation were eliminated).

143. This period existed between the 1976 *Mackey* decision and the 1977 settlement and new collective bargaining agreement. During this period, one player was re-signed by the Los Angeles Rams, two left the defending Super Bowl champion the Dallas Cowboys to reside in the Washington area, one left the Miami Dolphins to play for the Cleveland Browns, and the Kansas City Chiefs signed no free agents, despite rumors to the contrary. *Ross, supra* note 24, at 681-82 n.167 (citations omitted).

144. Telephone interview with Luc Terhaar, Co-counsel for Plaintiffs in *Powell* (Apr. 11, 1990).

145. News Release on Plan B for 1990, *supra* note 124, at 4.

cluded in a new collective bargaining agreement. In other words, the courts will be directing the conditions by which free agency is established, contrary to their expressed beliefs that "the subject of player movement restrictions is a proper one for resolution in the collective bargaining context."<sup>146</sup>

This fact alone may prevent a court from ruling in favor of Plan B. Although no one knows for certain what the likely outcome will be, if history repeats itself, a new collective bargaining agreement will be negotiated and impending antitrust suits, because of high costs, litigation uncertainties, and the threat of treble damages, will be settled.<sup>147</sup> Whether this collective bargaining/class action settlement approach is desirable is a question of policy for Congress. If Congress remains silent, this trend is likely to continue. Federal legislation offering similar incentives to eventually negotiate a new agreement under the labor laws may be preferable, if only to restrict courts from concluding that a particular player restraint is "no more restrictive than necessary."<sup>148</sup>

#### IV. CONCLUSION

The Supreme Court seems content on letting case law develop regarding the scope of the non-statutory labor exemption. By denying certiorari, however, the Court left *Powell* as the law in the Eighth Circuit, thereby significantly expanding the coverage of the exemption. This result has settled *Powell*, but opens the door to future Plan B litigation. Plan B suits are not seriously impaired by the labor exemption now that the NFLPA has effectively decertified. The players have, until now, failed at every other level,<sup>149</sup> but because Plan B is arguably anti-competitive, union decertification should bring about a material change in the agency system. Admittedly, union decertification may be undesirable policy. *Powell*, however, makes this behavior necessary if the players are going to sell their services in a more fair and competitive market.

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146. *Reynolds v. National Football League*, 584 F.2d 280, 289 (8th Cir. 1978).

147. See e.g., *Alexander v. National Football League*, 1977-2 Trade Cas. (CCH) P 61,730 (D. Minn. 1977) (class action settlement); *Robertson v. National Basketball Ass'n.*, 389 F. Supp. 867 (S.D.N.Y. 1975) (class action settlement). See also *supra* notes 71-77 (referring to the *Bridgeman* case).

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

149. These unsuccessful steps included failed negotiations, an unsuccessful strike, and a prolonged court battle.

