

10-1-1987

The Nonstatutory Labor Exemption and Player Restraints in Professional Sports: The Promised Land or a Return to Bondage?

Stephen R. McAllister

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



Part of the [Entertainment and Sports Law Commons](#)

Recommended Citation

Stephen R. McAllister, *The Nonstatutory Labor Exemption and Player Restraints in Professional Sports: The Promised Land or a Return to Bondage?*, 4 U. Miami Ent. & Sports L. Rev. 283 (1987)

Available at: <http://repository.law.miami.edu/umeslr/vol4/iss2/4>

This Notes and Comments 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.

THE NONSTATUTORY LABOR EXEMPTION AND PLAYER RESTRAINTS IN PROFESSIONAL SPORTS: THE PROMISED LAND OR A RETURN TO BONDAGE?

I. INTRODUCTION	283
II. THE NONSTATUTORY LABOR EXEMPTION	288
A. <i>Origin</i>	288
B. <i>Modern Development</i>	291
C. <i>Player Restraint Cases</i>	296
D. <i>Wood v. National Basketball Association</i>	306
III. LEGAL ANALYSIS OF THE NONSTATUTORY LABOR EXEMPTION	311
A. <i>Parties Protected</i>	311
B. <i>The Nonstatutory Labor Exemption Test</i>	314
1. PRIMARY EFFECT	315
2. MANDATORY BARGAINING SUBJECT	319
3. FORMAL AGREEMENT - BONA FIDE BARGAINING	323
a. Formal Collective Bargaining Agreement	324
b. Bona Fide, Arm's Length Bargaining	326
IV. CONCLUSION	329

I. INTRODUCTION

Few sports law issues attract fan interest like disputes over player restraints in professional sports. In the past fifteen years, player-club conflicts concerning reserve systems, free agency, and salary arbitration have drawn considerable attention.¹ Players manifest an increased willingness to carry their grievances to the judicial arena.² Many of the traditional restraints have been significantly altered or fallen by the wayside,³ often the targets of player antitrust suits.⁴

1. See J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* 500 n.154 (1979 and 1985 supplement at 82 n.154)(cases and law review articles cited therein). See also Maisel, *Ball Park Figures? Better Believe It*, SP. ILLUSTRATED, Mar. 4, 1985, at 22.

2. See *NFL Players Return to Court*, N.Y. Times, Dec. 30, 1987, at 39, col. 1; Goldpaper, *Players' Union Calls for Talks to End NBA Labor Impasse*, N.Y. Times, Jan. 20, 1988, at 52, col. 1; Goldpaper, *NBA Players Sue League*, N.Y. Times, Oct. 2, 1987, at 43, col. 4.

3. See *infra* notes 91-192 and accompanying text.

4. The antitrust laws are codified at 15 U.S.C. §§ 1-7 (1982)(the Sherman Act) and 15 U.S.C. §§ 12-27 (1982)(the Clayton Act). Section one of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be

Athletes such as Curt Flood,⁵ Leon Wood⁶ and baseball players alleging owner collusion in the free agent market⁷ have sought or threatened to seek judicial relief from their traditional bondage. Since the formation of player unions in the late 1960s and early 1970s, the players have taken an active role in seeking the promised land of competitive bidding for their services.⁸ The most recent player restraint case, *Wood v. National Basketball Associa-*

illegal Section two states that [e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony" Under the Sherman Act, the focus is on agreement between those charged with a violation. In baseball, for example, players could prove that the owners had an agreement to restrain bidding for player services, they might prevail under section one of the Sherman Act.

Language throughout *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), implies that the antitrust statutes are directed solely at business combinations and trusts and not labor market restraints. *See id.* at 492, 493 n.15, 494, 497. Some commentators argue that Congress intended the Sherman Act to apply only to product market restraints (restraints on the quantity or price of the final product). *See Jerry & Knebel, Antitrust and Employer Restraints in Labor Markets*, 6 INDUSTRIAL RELATIONS L.J. 173 (1984).

Restraints on player mobility and freedom of contract are input market restraints because player labor is an input that goes into producing the final product—a sports event. Therefore, agreements that directly restrict players' ability to market their services may not be actionable under the antitrust laws. *But cf. Scheinholtz & Kettering, Exemption Under the Antitrust Laws for Joint Employer Activity*, 21 DUQ. L. REV. 347 (1983); Altman, *Antitrust: A New Tool for Organized Labor?* 131 U. PA. L. REV. 127 (1982). Although the players and the decided professional sports cases apparently assume that player restraints fall within the antitrust laws' ambit, that conclusion is not beyond challenge.

5. *Flood v. Kuhn*, 407 U.S. 258 (1972), *aff'g* 443 F.2d 264 (2d Cir. 1971), *aff'g* 316 F. Supp. 271 (S.D.N.Y. 1970). The plaintiff, Curtis Flood, was an outstanding center fielder for the St. Louis Cardinals for 12 years when he was traded to the Philadelphia Phillies in 1969 without being consulted. Flood complained to the Commissioner of Baseball and asked to be made a free agent. When the Commissioner denied his request, Flood instituted an antitrust suit in federal court against the Commissioner, the league presidents, and the 24 baseball clubs. He alleged that the reserve system and other player restraints violated the antitrust laws and constituted a form of involuntary servitude. *Id.* at 264-66. The trial court found for the defendants based on *Federal Baseball Club v. National League of Prof. Baseball Clubs*, 259 U.S. 200 (1922) and *Toolson v. New York Yankees*, 346 U.S. 356 (1953).

6. *See Wood v. NBA*, 809 F.2d 954 (2d Cir. 1987). *See also infra* notes 153-192 and accompanying text.

7. *See Baseball Players, Owners Gear Up For New Fight Over Free Agency*, Wall St. J., Oct. 20, 1986 at 29, col. 4; Chass, *Steinbrenner Rejects Morris's Proposals*, N.Y. Times, Dec. 20, 1986, at 16, col. 2; Kram, *Agents Say Evidence Mounts That Owners Act in Collusion*, K.C. Star, Dec. 21, 1986, at 13, col. 1. On September 22, 1987, an arbitrator ruled that the baseball club owners had conspired to destroy free agency after the 1985 season. *See Lancaster, Baseball Owners Conspired to Shut Down Market for Free Agents*, Wall St. J., Sept. 22, 1987, at 38, col. 3; Goodwin, *Opposing Sides in Dispute Await Remedies*, N.Y. Times, Sept. 22, 1987, at 53, col. 5.

8. Competitive bidding with total free agency should maximize player salaries. When a player is restricted to bargaining with only one club, the club has greater bargaining power and can limit player salaries. *See Mackey v. NFL*, 407 F. Supp. 1000, 1007 (D. Minn. 1975).

tion,⁹ however, may herald a new era in player restraint cases. In *Wood*, the Second Circuit summarily rejected a player antitrust challenge to the NBA's college draft and salary cap. The court held that, as a matter of labor policy, employees can never challenge collective bargaining agreements on antitrust grounds.

Prior to *Wood*, the major legal battles concerning player restraints focused on the application of the labor exemptions to antitrust law.¹⁰ Most courts actually reaching the merits of player restraint cases have rather easily found them violative of the antitrust laws.¹¹ Leagues thus have concentrated their labor relations efforts on shielding player restraints from antitrust scrutiny. There are two distinct but related labor exemptions to the antitrust laws. First, section six of the Clayton Act provides that "[t]he labor of a human being is not a commodity or an article of commerce."¹² As interpreted by the Supreme Court, this statutory exemption protects union organization and union conduct in furtherance of legitimate labor goals.¹³ Using this exemption, the leagues could argue that player services are not within the scope of the antitrust laws because such services are not a commodity or article of commerce.

The Supreme Court also has devised a judicially created non-statutory labor exemption from the antitrust laws.¹⁴ The nonstatu-

9. 809 F.2d 954 (2d Cir. 1987).

10. See *supra* note 3.

11. See, e.g., *Robertson v. NBA*, 389 F. Supp. 867, 893 (S.D.N.Y. 1975); *Kapp v. NFL*, 390 F. Supp. 73, 82 (N.D. Cal. 1974); *Smith v. Pro Football, Inc.*, 420 F. Supp. 738, 744-45 (D.D.C. 1976).

12. 15 U.S.C. § 17 (1982). See also Clayton Act § 20, 29 U.S.C. § 52 (1982). Congress also has created a statutory labor exemption to protect certain union activity from antitrust scrutiny. See Clayton Act § 6, 15 U.S.C. § 17 (1982) ("the labor of a human being is not a commodity or article of commerce"). See also Clayton Act § 20, 29 U.S.C. § 52 (1982) (limits the granting of injunctions against union activity); Norris-LaGuardia Act §§ 4, 5, 13; 29 U.S.C. § 104, 105, 113 (1982) (exempting specific union activities from the antitrust laws and declaring that labor unions are not combinations or conspiracies in restraint of trade). There is uncertainty, however, as to whether the statutory exemption protects only unilateral union activity or bilateral agreements between unions and employers. The words of the statute seem directed only at unilateral union behavior although at least one commentator argues that the statutory exemption could protect anticompetitive terms in a collective bargaining agreement. For a discussion of the statutory exemption, see *Roberts*, *infra* note 17. Because the statutory exemption issue is rarely raised in professional sports litigation (probably with good reason), this article will devote little discussion to it.

13. See *infra* notes 24-43 and accompanying text.

14. The Supreme Court established the nonstatutory labor exemption in *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676 (1965) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). See generally Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws*, 32 U. CHI. L. REV. 659 (1965); Cox, *Labor and the Antitrust Laws: Pennington and Jewel Tea*, 46 B.U.L. REV. 317

tory exemption is an attempt by the Court to harmonize labor policy favoring collective bargaining with antitrust policy condemning anticompetitive agreements.¹⁵ As a result, the nonstatutory exemption focuses not on union organization or unilateral conduct, but on the collective bargaining process. It serves to protect certain collective bargaining agreements from antitrust attack.

One or both of the two labor exemptions have been the focal point of almost every player restraint case of the past two decades. The nonstatutory exemption has often been the key point of contention. It has been important because, by the early 1970s, almost all player restraints were embodied in collective bargaining agreements between the players' unions and the leagues. Consequently, the leagues have repeatedly sought resort to the nonstatutory exemption's protection, largely ignoring the statutory exemption.

The two labor exemptions frequently have been applied in confusing and inconsistent ways. Some courts have hopelessly confused the two exemptions, failing to explain clearly what they were considering or to justify adequately their conclusions.¹⁶ These difficulties are in part the result of a lack of Supreme Court guidance on the nonstatutory exemption's scope and application. In fact, some commentators argue that the nonstatutory exemption's development in the professional sports context has been less than appropriate.¹⁷

Applying the nonstatutory exemption to player restraint cases raises two primary questions. First, is the exemption appropriate for dealing with *employee* antitrust challenges to collective bargaining agreements? The Supreme Court cases creating and considering the exemption all involved employer or product market competitor challenges to union activity in the bargaining context.¹⁸ The *Wood* court is the first to suggest that the nonstatutory exemption is not applicable to player challenges.¹⁹ Second, if the nonstatutory exemption is appropriate, by what standards should a

(1966); Handler, *Labor and Antitrust: A Bit of History*, 40 ANTITRUST L.J. 233 (1971); St. Antoine, *Connell: Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603 (1976); Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1 (1971).

15. See *infra* notes 44-90 and accompanying text.

16. See *infra* notes 91-97, 103-05 and accompanying text.

17. See J. WEISTART & C. LOWELL, *supra* note 1, at 581-82, 584-88; Roberts, *Sports League Restraints on the Labor Market: The Failure of Stare Decisis*, 47 U. PITT. L. REV. 337, 403-05 (1986).

18. See *infra* notes 227, 229 and accompanying text.

19. See *Wood v. NBA*, 809 F.2d 954 (2d Cir. 1987). See also *infra* notes 152-92 and accompanying text.

court evaluate it? The Supreme Court splintered into three groups of three justices in creating the exemption. That fragmentation, coupled with the Court's subsequent silence on the subject,²⁰ has left the lower courts largely to their own devices.

The underlying problem in answering both questions in player restraint cases is how to reconcile notions of fairness with the promotion of collective bargaining. Judicial deference to the collective bargaining process may allow leagues with relatively greater bargaining power to unilaterally impose restraints on players' unions. Judicial intervention may wreak havoc on the bargaining process in contravention of Congressional labor policy. The courts manifested a willingness to intervene in the early sports cases.²¹ Later cases, however, demonstrate a marked reluctance to interfere in the bargaining process.²² This trend appears to culminate in the recent *Wood* decision.

Because the nonstatutory exemption has been the most commonly litigated of the two, this article undertakes a comprehensive treatment of the nonstatutory exemption's development in player restraint cases. First, it examines the nonstatutory exemption's origins, including attempts to point out the distinctions between the nonstatutory and statutory exemptions. The article will then survey the player restraint cases up to and including *Wood v. NBA*.²³ Following that survey, the article will endeavor to evaluate the nonstatutory exemption's development and demonstrate the weaknesses of the exemption as developed in the player restraint cases.

The author concludes that the *Wood* decision is consistent

20. The only other time the Court has considered the nonstatutory exemption was in *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975). The Court did very little to clarify the nonstatutory exemption in *Connell*. See *infra* notes 79-90 and accompanying text.

21. See, e.g., *Robertson v. NBA*, 389 F. Supp. 867 (S.D.N.Y. 1975); *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976).

22. In fact, all sports cases since *Mackey* have demonstrated a reluctance to inquire into the adequacy of the bargaining process. *McCourt v. California Sports, Inc.*, 600 F.2d 1193, *Wood v. NBA*, 602 F. Supp. 525, and *Zimmerman v. NFL*, 632 F. Supp. 398, have all applied the nonstatutory exemption, finding that bona fide bargaining had occurred. See 600 F.2d at 1198-1203; 602 F. Supp. at 528; 632 F. Supp. at 406-08. The *Wood* court summarily found bona fide bargaining while the *McCourt* and *Zimmerman* courts discussed the issue more fully; however, their doing so does not imply that they agreed with the requirement. *McCourt* was decided on the heels of *Mackey*; therefore, the court may have found it necessary to carefully distinguish the case from *Mackey*. Because *Zimmerman*, like *Mackey*, involved the NFL and its players, the *Zimmerman* court also had a motive for making a detailed distinction between the case before it and *Mackey*. There should be a strong presumption that any formal collective bargaining agreement was reached as a result of bona fide bargaining. The courts in these three cases properly deferred to the bargaining process.

23. 809 F.2d 954 (2d Cir. 1987).

with the nonstatutory exemption's purpose and probably achieves the appropriate result. It merely simplifies the inquiry. As an alternative, the article proposes a test for the nonstatutory exemption's application which is appropriate for all professional sports antitrust cases.

II. THE NONSTATUTORY LABOR EXEMPTION

A. *Origin*

The nonstatutory labor exemption's origins can be traced to the early statutory exemption cases. These cases made it clear that the statutory exemption was designed to protect union conduct taken in pursuance of valid union goals. The Supreme Court, however, did not make it clear whether the statutory exemption's protection extended to collective bargaining agreements. Consequently, although strikes and boycotts were protected from antitrust attack, the status of collective bargaining agreements was uncertain.

The nonstatutory labor exemption was born from the Supreme Court's efforts to interpret the statutory exemption and promote the Congressionally mandated collective bargaining process. The early statutory exemption cases, therefore, provide the logical starting point for an examination of the nonstatutory exemption's development. The nonstatutory labor exemption cannot be fully comprehended without an understanding of the statutory exemption's limitations.

The first important statutory exemption case for purposes of this discussion was *Apex Hosiery Co. v. Leader*.²⁴ In *Apex*, the Supreme Court reversed an award of antitrust damages to a company whose unionized employees had gone on strike. The employer had sued the union, contending that the strike's anticompetitive effect on the product market violated the antitrust laws.

In reversing the verdict, the Supreme Court did not deny the strike's anticompetitive effect but, instead, found that the union's sole purpose had been organization, a legitimate goal.²⁵ The court emphasized that the union's actions were necessary for effective organization.²⁶ It concluded that strikes conducted solely for unioni-

24. 310 U.S. 469 (1940).

25. *Id.* at 501.

26. The court's conclusion is interesting because the only reasonable way to harmonize union strikes with the Sherman Act's prohibitions is to assert that the antitrust laws were not directed at labor market restraints. Language throughout *Apex Hosiery* implies that the antitrust statutes are directed solely at business combinations and trusts and not labor mar-

zation purposes were compatible with the Sherman Act.²⁷ Although the *Apex* decision was an interpretation of the Clayton Act's statutory labor exemption, it foreshadowed broader judicial deference to labor relations. *Apex* gave the first hint that the Supreme Court might provide unions with an effective shield against the Sherman Act. No longer would the antitrust laws exist as an unchecked threat in an employer's hands.

The following year, in *United States v. Hutcheson*,²⁸ the Supreme Court again addressed union status under the antitrust laws. The four defendants in *Hutcheson*, leaders of a carpenters union, were charged with criminal combination and conspiracy in violation of the Sherman Act. They organized and participated in a secondary boycott.²⁹ The district court sustained the defendants' demurrers to the charges³⁰ and the Supreme Court affirmed.³¹

The outcome of the case depended on the relationship between the newly passed Norris-LaGuardia Act³² and the anti-injunction provision of the Clayton Act.³³ Courts had previously interpreted the anti-injunction provision narrowly, leaving much union activity subject to injunction on antitrust grounds. The Court set out to determine whether Congress intended the Norris-LaGuardia Act to amend the Clayton Act. After extensively reviewing the Norris-LaGuardia Act's legislative history, Justice Frankfurter concluded that the anti-injunction provision in section

ket restraints. See *id.* at 492, 493 n.15, 494, 497. See also *supra* note 4.

27. *Id.*

28. 312 U.S. 219 (1941).

29. *Id.* at 227-28. Anheuser-Busch, Inc. had agreements with a machinists union and a carpenters union to erect and dismantle machinery at its breweries. As a result of a dispute between the two unions concerning which one would perform particular work, the defendants, leaders of the carpenters union, called a strike against Anheuser-Busch and requested that union members and their friends refrain from purchasing Anheuser-Busch beer. The defendants were convicted for criminal antitrust violations. The case went directly to the Supreme Court under the Criminal Appeals Act, 18 U.S.C. § 682.

30. *United States v. Hutcheson*, 32 F. Supp. 600 (E.D. Mo. 1940).

31. 312 U.S. at 237.

32. 29 U.S.C. §§ 101-10, 113-15 (1982). Section 1 of the Norris-LaGuardia Act, 29 U.S.C. § 101 (1982), denies federal courts jurisdiction "to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this Act [citations omitted]; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act [citations omitted]." The Norris-LaGuardia Act was designed to restrict courts' ability to interfere with union activities, particularly in granting injunctions to employers against union practices. Congress passed the act at a time when courts had been limiting union activity by reading the Clayton Act narrowly. Whether Congress actually intended the Norris-LaGuardia Act to amend the Clayton Act is unclear. See *Hutcheson*, 312 U.S. at 231-36.

33. 29 U.S.C. § 52 (1982).

20 of the Clayton Act³⁴ protected the union leaders' actions from prosecution under the Sherman Act.³⁵

Justice Frankfurter construed section 20 of the Clayton Act in light of the Norris-LaGuardia Act's definition of labor dispute.³⁶ He articulated the labor exemption as follows:

So long as a union acts in its self-interest and does not combine with nonlabor groups, the licit and illicit under section 20 [of the Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, [or] the selfishness or unselfishness of the end of which the particular union activities are the means.³⁷

Justice Frankfurter emphasized that the focus should be on the union's objective rather than on its conduct.³⁸

Hutcheson provided protection for many union activities that were anticompetitive. Unions were protected from the antitrust laws unless they combined with nonlabor groups to influence the product market or acted beyond the scope of their own interests. Although *Hutcheson*, like *Apex*, interpreted the statutory labor exemption, it nevertheless revealed the Supreme Court's willingness to broaden organized labor's antitrust exemption.

The Court next considered organized labor's antitrust status in *Allen Bradley Co. v. Local 3, IBEW*.³⁹ In *Allen Bradley*, the Court held that an agreement between a New York City electrical workers union, New York City electrical contractors, and New York electrical equipment manufacturers violated the Sherman Act.⁴⁰ The agreement constituted an antitrust violation because it attempted to monopolize the market for electrical work in New York City.⁴¹ The Court refused to exempt the union from antitrust liability and held that labor unions violate the Sherman Act when they "aid nonlabor groups to create business monopolies and to control the marketing of goods and services."⁴²

The Court reasoned that "[o]ur holding means that the same

34. *Id.*

35. *Hutcheson*, 312 U.S. at 233.

36. 29 U.S.C. § 113(c) (1982).

37. 312 U.S. at 232.

38. *Id.* Cf. *Apex Hosiery v. Leader*, 310 U.S. 469, 501 (1940) (when union's purpose is not to restrain trade or suppress competition, union actions are not violations of the Sherman Act).

39. 325 U.S. 797 (1945).

40. *Id.* at 808.

41. *Id.*

42. *Id.* at 809.

labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups."⁴³ *Allen Bradley* emphasized the consequences of union combination with nonlabor groups. Although *Allen Bradley* was a statutory exemption case, it established the outer limits to which any labor exemption would be extended.

B. Modern Development

For the next twenty years, the Supreme Court was silent on the labor exemption issue. Then, in 1965, the Court decided two companion cases⁴⁴ involving the antitrust status of labor unions. In doing so, the Court created the nonstatutory labor exemption.

In the first case, *United Mine Workers v. Pennington*,⁴⁵ a small coal company brought an action against the United Mine Workers union, alleging that the union had collectively bargained with several large coal companies for wages too high for small companies to pay.⁴⁶ The company asserted that the agreement constituted a conspiracy to drive small competitors out of the coal industry. A jury returned a verdict for the company and the Court of Appeals affirmed.⁴⁷

In the second case, *Local Union No. 189 v. Jewel Tea Co.*,⁴⁸ a butchers' union negotiated a collective bargaining agreement with a multi-employer bargaining unit. The agreement limited the hours during which an employer store could sell meat.⁴⁹ An employer who was not a member of the original bargaining group was later forced into the same agreement. It challenged the sales restraint as an antitrust violation.⁵⁰

The trial court dismissed the complaint. It held that the statutory labor exemption applied because the union had acted in its own self-interest.⁵¹ The Court of Appeals reversed, finding that

43. *Id.* at 810.

44. Once again, the author wishes to emphasize that *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), *United States v. Hutcheson*, 312 U.S. 219 (1941), and *Allen Bradley Co. v. Local Union No. 3, IBEW*, 325 U.S. 797 (1945) were all statutory labor exemption (§§ 6 and 20 of the Clayton Act) cases. They did, however, lay the groundwork for the nonstatutory labor exemption.

45. 381 U.S. 657 (1965).

46. *Id.* at 659-60.

47. 325 F.2d 804 (6th Cir. 1963).

48. 381 U.S. 676 (1965).

49. *Id.* at 680.

50. *Id.* at 680-81.

51. *Jewel Tea Co. v. Local Union No. 189*, 215 F. Supp. 839 (N.D. Ill. 1963).

"any agreement by a labor union, acting in concert with business competitors of the employer, designed to interfere with his operation of a retail business . . . is a violation of the Sherman Act" ⁵²

The Supreme Court reversed both cases. Justice White, writing for a three justice plurality in both cases, discussed the fundamental conflict between national labor policy and the antitrust laws.⁵³ He reasoned that because national labor policy seeks to encourage collective bargaining by limiting judicial interference in the bargaining process, it often fosters anticompetitive agreements.⁵⁴ This creates a conflict with the antitrust laws which attempt to limit anticompetitive agreements.⁵⁵ In an effort to reconcile the two policies, the court went beyond the bounds of the statutory exemption and created a nonstatutory labor exemption from the antitrust laws.⁵⁶

Justice White's opinion can be read to outline the following three part test for the exemption:⁵⁷ (1) Does the labor agreement concern a "mandatory subject" of bargaining?⁵⁸ (2) Is the challenged term reasonable (i.e. does the restraint primarily create anticompetitive product market effects)?⁵⁹ (3) Is the agreement or term a result of the collective bargaining process?⁶⁰ If all three questions are answered in the affirmative, the nonstatutory exemption will protect a labor agreement from antitrust challenge.

In applying this test to the *Pennington* case, Justice White noted that the UMW's agreement concerned wages, a mandatory subject, and was part of a collective bargaining agreement.⁶¹ He

52. *Jewel Tea Co. v. Local Union No. 189*, 331 F.2d 547, 549 (7th Cir. 1964).

53. See 381 U.S. 657, 668; 381 U.S. 676, 689. Justice White's recognition of a conflict between labor and antitrust policies may indicate rejection of *Apex Hosiery's* suggestion that the antitrust laws do not reach labor market restraints. See *supra* note 4.

54. 381 U.S. at 668, 689.

55. *Id.*

56. See 381 U.S. at 689-97.

57. Weistart argues that *Jewel Tea* created a balancing test for the nonstatutory exemption. According to his interpretation, a court must weigh the degree of restraint on the business market against the type of employee interest at stake. See J. WEISTART & C. LOWELL, *supra* note 1, at 536 n.370. That interpretation is actually similar to the interpretation adopted by this article. The three part test is merely a more focused inquiry for achieving the same results.

58. 381 U.S. at 664, 689-90, 692. Section 8(d) of the National Labor Relations Act makes it a mutual obligation of the employer and the union to bargain collectively "with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d) (1982).

59. 381 U.S. at 665-66, 692.

60. *Id.* at 664, 689.

61. *Id.* at 668.

found that the agreement failed the test's reasonableness requirement because the union was not acting in its own self-interest.⁶² Instead, it was helping employers achieve an anticompetitive purpose in the product market.⁶³ Justice White concluded that even an employer-union agreement on a mandatory subject could not be exempt from antitrust challenges if it functioned solely to drive competitors out of the industry.⁶⁴ He then reversed the jury verdict on other grounds⁶⁵ and remanded the case.

In *Jewel Tea*, Justice White held that the agreement restricting marketing hours fell under the exemption's protection.⁶⁶ He first determined that the agreement resulted from bona fide collective bargaining.⁶⁷ Next, he concluded that the restriction was so intimately related to butchers' working hours and conditions as to constitute a mandatory bargaining subject.⁶⁸ Relying on the trial court's findings that the restrictions were reasonable, Justice White decided that the nonstatutory exemption applied and reversed the Court of Appeals' decision.⁶⁹

Justice Goldberg wrote for a three justice concurrence in both cases. He disagreed with two aspects of the plurality's opinion. Justice Goldberg doubted the wisdom of having judges determine (1) the reasonableness of collectively bargained-for provisions⁷⁰ and (2) whether an agreement was reached as a result of bona fide bargaining.⁷¹

Justice Goldberg argued that Congress never intended for courts to intervene in collective bargaining via the antitrust laws.⁷² He feared that allowing judges to determine whether a union acted unilaterally or in concert with employers would seriously impede the freedom and effectiveness of collective bargaining.⁷³ Therefore, as a matter of national labor policy, Justice Goldberg urged great

62. *Id.*

63. *Id.*

64. *Id.* at 664-65.

65. Justice White noted that both the trial court and court of appeals overlooked an important Supreme Court case, *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), which found that efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. The jury, which was not instructed of this fact, was also improperly instructed on the issue of damages. *Id.* at 669-72.

66. 381 U.S. at 690.

67. *Id.* at 689-90, 694-95.

68. *Id.*

69. *Id.* at 689-90.

70. *Id.* at 697, 700, 709-18.

71. *Id.*

72. *Id.* at 709, 719.

73. *Id.* at 716-17.

deference to the collective bargaining process. Contrary to Justice White, he concluded that any collective bargaining agreement which concerns a mandatory subject of bargaining should be exempt from antitrust scrutiny.⁷⁴

Justice Douglas wrote for a three justice concurrence in *Pennington*. He wrote for the same three in dissent in *Jewel Tea*. Justice Douglas took the position that any collective bargaining agreement that has an anticompetitive product market effect represents prima facie evidence of an illegal conspiracy.⁷⁵ He agreed, therefore, that the UMW's agreement in *Pennington* was not exempt.⁷⁶ But he would not have exempted the butchers agreement in *Jewel Tea*.⁷⁷ Justice Douglas construed *Allen Bradley* to permit no deference to collective bargaining agreements having a primary anticompetitive impact on the business market.⁷⁸

Jewel Tea and *Pennington* firmly established the nonstatutory labor exemption. The court's fragmentation on the issue, however, failed to produce a single clear test for the exemption's application. The creation of the nonstatutory exemption shifted the judicial focus from unilateral union conduct or union objectives to the collective bargaining process and agreement. The earlier cases' concern for combination with nonlabor groups, although still present, is less predominant. While the statutory exemption was designed to promote union organization, the nonstatutory exemption aims (at least implicitly) at encouraging both sides to collectively bargain.

The Supreme Court has addressed the nonstatutory labor exemption only once since *Pennington* and *Jewel Tea*. But the Court declined to enunciate a more specific or particular test for the exemption. In *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*,⁷⁹ the Supreme Court refused to apply the exemption to protect a union's attempts to organize nonunion subcontractors. The defendant union in *Connell* had selectively picketed the plaintiff, a general building contractor. It had done so to secure a contract in which the contractor agreed to subcontract plumbing and mechanical work only to firms having a current contract with the union. The contractor had no employees that the union wished to represent. The contractor signed the contract under protest and

74. *Id.* at 732, 735.

75. 381 U.S. 672, 673; 381 U.S. 735, 736.

76. *See* 381 U.S. at 674.

77. *See* 381 U.S. at 736.

78. *See* 381 U.S. at 672; 381 U.S. at 735-36.

79. 421 U.S. 616 (1975).

immediately brought suit claiming that the agreement violated the Sherman Act. The district court held that the agreement was exempt from attack⁸⁰ and the Court of Appeals affirmed.⁸¹

The Supreme Court refused to apply the nonstatutory labor exemption's protection to the agreement. It found the nonstatutory exemption inapplicable because the agreement imposed direct restraints on competition among subcontractors. Such restraints were not the natural result of the elimination of competition based on differences in wages and working conditions.⁸² The Court pointed out that the nonstatutory exemption arises from the "strong labor policy favoring the association of employees to eliminate competition over wages and working conditions"⁸³ but does not offer protection "when a union and a nonlabor party agree to restrain competition in the business market."⁸⁴

The Court concluded that the agreement was outside the collective bargaining relationship because the defendant had no interest in representing the plaintiff's employees.⁸⁵ The union's methods were "not immune from antitrust sanctions simply because the goal [was] legal."⁸⁶ The Court also noted that "a restraint of this magnitude might be entitled to an antitrust exemption if it were included in a lawful collective bargaining agreement."⁸⁷

The *Connell* decision combines inquiries into union objectives and the collective bargaining process, demonstrating that the Supreme Court dealt with issues beyond the statutory labor exemption. The statutory exemption apparently is limited to an inquiry into a union's objectives.

In considering the nonstatutory exemption, however, the Court looked beyond union objectives. It inquired into the challenged agreement's relationship to the collective bargaining process. No matter how legitimate the union's goal, the nonstatutory labor exemption will not apply if a challenged agreement is not the result of collective bargaining.

The Supreme Court has interpreted the statutory exemption primarily as a shield to protect union organization.⁸⁸ The nonstatu-

80. *Id.*

81. *Id.* at 625-26.

82. *See supra* notes 56, 59 & 60.

83. 421 U.S. at 622.

84. *Id.* at 622-23.

85. *Id.* at 635.

86. *Id.* at 625.

87. *Id.* at 625-26.

88. *See, e.g., Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940); *United States v. Hutcheson*, 312 U.S. 219 (1941).

tory exemption, however, apparently is designed to promote collective bargaining after a union has organized. The Court's interpretations of the two exemptions might be viewed as an attempt to protect different stages of organized labor's evolution.

Early in its history, organized labor needed assistance just to survive. Congress then passed and the Court interpreted the statutory labor exemption. Once organized labor established itself, the Court created the nonstatutory exemption to encourage employers to come to the bargaining table. Both exemptions, however, share one limitation: the Court will not employ them to sanction agreements having primarily anticompetitive product market consequences.

Although *Jewel Tea* and *Pennington* firmly established the nonstatutory exemption, the Supreme Court has never fully defined its boundaries. The failure of any more than three justices to approve any particular formulation creates imprecise guidelines. Nevertheless, six justices in each case did agree on two points. First, only an agreement concerning mandatory subjects of bargaining could be exempt.⁸⁹ Second, to merit exemption, an agreement must be the result of collective bargaining.⁹⁰

In *Connell*, the Court again focused on whether the challenged agreement resulted from the collective bargaining process. But it failed to specify whether a restraint must be embodied in a formal collective bargaining agreement to be exempt. The Court's conclusion that the challenged agreement in *Connell* fell outside the bargaining relationship did not require it to clarify two questions raised by *Pennington* and *Jewel Tea*. These questions are: (1) to what extent should a court inquire into the bargaining process to determine whether a restraint is reasonable? and (2) to what extent should a court question whether an agreement is the result of bona fide good faith collective bargaining?

C. Player Restraint Cases

The nonstatutory labor exemption became prominent in professional sports litigation with the development of player unions in the late 1960s and early 1970s. With the advent of unions, sports leagues' labor practices became subject to the federal labor laws. During that time, all the major professional leagues negotiated collective bargaining agreements with their respective players' unions.

89. See 381 U.S. at 664-66, 689-97.

90. *Id.*

Most, if not all, of the leagues' prior practices were incorporated into these agreements. Young and weak players' unions lacked the leverage necessary to obtain a relaxation of player restraints. Consequently, dissatisfied players, and on at least one occasion a rival league, began to challenge league rules restricting player mobility as antitrust violations. Because the alleged practices were no longer simply league rules but elements of collective bargaining agreements, the leagues and clubs raised the nonstatutory labor exemption as a defense. This forced courts to address the nonstatutory exemption's applicability to professional sports.

The first major case to address the exemption issue was *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*⁹¹ The newly formed World Hockey Association (WHA) alleged that the National Hockey League's (NHL) reserve clause, affiliation agreements, and other devices controlling the supply of hockey players violated the antitrust laws.⁹² The court, on a motion for summary judgment and a request for a preliminary injunction, held that the labor exemption was inapplicable and would not protect the NHL.⁹³ The court purportedly based its inquiry on the statutory exemption, but its references to nonstatutory exemption cases and its emphasis on collective bargaining belie that assertion.

In order to resolve the labor exemption issue, the court inquired whether the NHL's player restraints were the result of "serious, intensive, arm's length collective bargaining."⁹⁴ It concluded that they were not. The court noted that the reserve clause had been imposed on the players prior to the union's existence and, although the evidence demonstrated that both sides had discussed the reserve clause, the court found that the parties had never collectively bargained over the restraint.⁹⁵

The court distinguished *Hutcheson* and *Jewel Tea* as cases in which the union played an active role in creating and enforcing the alleged restraint and extensive collective bargaining had occurred.⁹⁶ In the case before it, the court determined that management had unilaterally imposed player restraints in the face of consistent union opposition and that little collective bargaining had occurred. The court also suggested that because the complaining party was an economic competitor of the defendant, the NHL's

91. 351 F. Supp. 462 (E.D. Pa. 1972).

92. *See id.*

93. *Id.* at 517-19.

94. *Id.* at 499.

95. *Id.* at 485.

96. *Id.* at 498-99.

player restraints had the anticompetitive characteristics and effects condemned in *Allen Bradley* and *Pennington*.⁹⁷ The restraints acted to injure product market competitors of the defendant.

Philadelphia World Hockey Club's emphasis on the lack of collective bargaining set the tone for future player restraint cases. Subsequent cases were brought almost exclusively by players, not rival leagues. Thus, *Philadelphia World Hockey Club's* primary contribution to the nonstatutory labor exemption issue in professional sports was its focus on the existence of actual and extensive collective bargaining. Even though the court purported to rely on the statutory exemption, its analysis is more consistent with an examination of the nonstatutory exemption.

The next sports case to consider the labor exemption issue was *Kapp v. NFL*.⁹⁸ In *Kapp*, a veteran quarterback brought suit alleging that the draft, the "Rozelle Rule,"⁹⁹ and mandatory standard form contracts unreasonably restrained his ability to market his services. The NFL raised the nonstatutory labor exemption as a defense. The league asserted that the challenged practices were incorporated, either specifically or by reference, in the league's collective bargaining agreement, making them subject to collective bargaining.¹⁰⁰ In its view, matters subject to union-employer bargaining should not be open to challenge by disgruntled individual employees.¹⁰¹

The *Kapp* court refused to apply the nonstatutory exemption. It doubted that the restraints were the product of collective bargaining.¹⁰² The court suggested that even if bargaining had been present, the exemption would not apply. It decided that public policy weighed against extending the exemption to immunize direct restraints on an employee's right to freely seek and choose em-

97. *Id.*

98. 390 F. Supp. 73 (N.D. Cal. 1974).

99. Under the NFL's reserve system, a player became a free agent at the expiration of his contractual obligations to one NFL club. However, the Rozelle Rule required any club that signed a free agent to compensate the player's old team. If the teams could not agree on compensation, the NFL commissioner would determine the appropriate compensation in terms of current players or future draft choices. The commissioner's intervention had been invoked only four times since the rule's adoption in 1963. In each case, the commissioner awarded substantial compensation. The result deterred clubs from signing free agents. See *Mackey v. NFL*, 407 F. Supp. 1000, 1006 (D. Minn. 1975).

100. *Kapp v. NFL*, 390 F. Supp. at 78-79.

101. *Id.* The *Wood* court adopted this point of view in its decision. See *infra* notes 153-92 and accompanying text.

102. *Kapp v. NFL*, 390 F. Supp. at 85-86.

ployment.¹⁰³ No other court before or since has applied such a rationale for either labor exemption.

Subsequent cases have not relied on *Kapp* because the court provided scant support for its rather perplexing rationale. The *Kapp* court's reasoning would invalidate virtually all player restraints regardless of their origin. The *Kapp* court appears to have been assessing the reasonableness of the challenged restraints without any consideration for the bargaining process. It failed to even attempt to strike a balance between competing antitrust and federal labor policies. Consequently, *Kapp* contributes little to nonstatutory exemption analysis in professional sports.

The year following *Kapp*, another sports case involving the nonstatutory labor exemption arose. In *Robertson v. NBA*,¹⁰⁴ a group of professional basketball players challenged various player restraints such as the college draft and the league's reserve system. The league responded by claiming immunity under the statutory and nonstatutory labor exemptions.

On the league's motion for summary judgment, the court concluded that the labor exemption was intended to protect only unions and was not available to the league.¹⁰⁵ The court first stated that the NBA's claimed exemption was to be "found in Sections 6 and 20 of the Clayton Act."¹⁰⁶ But the court then proceeded to discuss the exemption issue by reference to *Pennington* and *Jewel Tea*. This reliance on the Supreme Court's nonstatutory exemption cases makes it apparent that the court was probably considering the nonstatutory exemption. The result was that the *Robertson* court hopelessly confused the statutory and nonstatutory labor exemptions. This case, therefore, like *Kapp*, contributed little to labor exemption analysis in professional sports.

The nonstatutory labor exemption's status in professional sports was clarified considerably in *Mackey v. NFL*.¹⁰⁷ In *Mackey*, nine NFL players filed suit alleging that the NFL's reserve system constituted a concerted refusal to deal in violation of the antitrust laws. The labor exemption was a major component of the NFL's defense. After a fifty-five day bench trial, the trial court held that the Rozelle Rule was a per se antitrust violation and that neither

103. *Id.* at 86.

104. 389 F. Supp. 867 (S.D.N.Y. 1975).

105. *Id.* at 884-86.

106. *Id.* at 884.

107. 407 F. Supp. 1000 (D. Minn. 1975), *modified*, 543 F.2d 606 (8th Cir. 1976), *cert dismissed*, 434 U.S. 801 (1977).

the statutory or nonstatutory labor exemption applied.¹⁰⁸

The court gave three reasons for rejecting the exemption. First, like the *Robertson* court, it concluded that the exemption extended only to unions, not employers. That conclusion is clearly incorrect with respect to the nonstatutory exemption because its purpose is to encourage *both* sides to collectively bargain.¹⁰⁹ Second, the court observed that because the Rozelle Rule was an anti-trust violation, it could not be a mandatory bargaining subject.¹¹⁰ Therefore, it could not be exempt. The court probably was correct in asserting that only agreements on mandatory subjects could be exempt. But by determining legality first and exemption second, the court's standard protects only those practices which need no protection.

The district court's third reason was legitimate. As in *Philadelphia World Hockey Club*, the court held that the Rozelle Rule was not the result of serious collective bargaining. Instead, the league had unilaterally imposed it on the union.¹¹¹

On appeal, the Eighth Circuit affirmed the trial court's exemption result. The appellate court, however, rejected the trial court's first two reasons for finding neither labor exemption applicable.¹¹² The court went on to clearly articulate a three-part test for applying the nonstatutory exemption. The court drew its test from the Supreme Court's *Pennington* and *Jewel Tea* decisions. The test is as follows: (1) Does the challenged agreement primarily affect only the parties to the collective bargaining agreement?¹¹³ (2) Does the agreement relate to a mandatory subject of collective bargaining?¹¹⁴ (3) Is the agreement embodied in a formal collective bargaining agreement that is the product of bona fide, arm's-length bargaining?¹¹⁵ If all three questions are answered affirmatively, the exemption applies.

108. 407 F. Supp. at 1007-10.

109. See *Roberts*, *supra* note 17, at 385 n.190 (discussing nonstatutory exemption's purpose).

110. 407 F. Supp. at 1009-10.

111. *Id.*

112. See *Mackey*, 543 F.2d at 615 (rejecting trial court's findings at 407 F. Supp. at 1009-10).

113. The court formulated this requirement from language in *Connell*, 421 U.S. 616, *Jewel Tea*, 381 U.S. 676, and *Pennington*, 381 U.S. 657. See 543 F.2d at 614.

114. The court drew this aspect of the test from *Jewel Tea*, 381 U.S. 676, and *Pennington*, 381 U.S. 657. See 543 F.2d at 614.

115. The *Mackey* court derived this requirement from *Jewel Tea*, 381 U.S. 676, and also referred to several sports cases, including *Smith v. Pro Football*, 420 F. Supp. 738 (D.D.C. 1976). See 543 F.2d at 614.

In applying this test to the facts before it, the court easily found that the first element was satisfied. It concluded that the Rozelle Rule affected "only the parties to the agreement sought to be exempted."¹¹⁶ The court also held that the mandatory subject requirement was satisfied because the rule had a definite impact on player mobility and salaries.¹¹⁷ But the court held that the NFL failed to satisfy the exemption test's third point. Relying on the trial court's findings that there had been no bargaining over the Rozelle Rule, the *Mackey* court concluded that the rule had been unilaterally imposed. The rule, therefore, was undeserving of protection.¹¹⁸

Mackey is a landmark decision in professional sports litigation. In every subsequent sports case in which the nonstatutory exemption issue has been raised, courts have applied the *Mackey* test. Even outside the sports context, courts have approved the *Mackey* formulation. The *Wood* case is the first sports case in which a court has refused to specifically apply *Mackey*. Both the propriety of the *Mackey* test and the *Wood* decision's implications are discussed in subsequent sections of this article.

The National Football League again attempted to claim the protection of the labor exemption in *Smith v. Pro Football, Inc.*¹¹⁹ The district court's decision in *Smith* was rendered while the *Mackey* appeal was pending. The league once again came up short. The *Smith* court also refused to apply the exemption. The *Smith* court's standards for applying the nonstatutory exemption are almost identical to those articulated in the *Mackey* appellate court decision.

In *Smith*, the plaintiff was a first round draft pick of the Washington Redskins in the 1968 player draft. Smith's career ended prematurely when he suffered a severe neck injury in the final game of his rookie season. Smith sued the NFL and the Redskins, alleging that the college draft resulted in a group boycott which violated the antitrust laws. He further alleged that had he not been forced to deal with only one club, he could have negotiated a higher salary and adequate guarantees against loss of earnings in the event of injury.¹²⁰ The defendants raised the statutory and nonstatutory labor exemptions as defenses.

116. *Mackey*, 543 F.2d at 615.

117. *Id.* at 615-16.

118. *Id.* at 616.

119. 420 F. Supp. 738 (D.D.C. 1976), *aff'd in part & rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978).

120. 420 F. Supp. at 740-41.

The trial court ignored the statutory exemption but specifically rejected the nonstatutory labor exemption defense. The court rejected the defense because no collective bargaining agreement existed, nor had ever existed, between the players' union and the NFL at the time Smith signed his contract.¹²¹ The court noted that the 1968 draft occurred before the players' union even received certification as the players' exclusive bargaining agent. The court concluded that not even the potential for bargaining had existed at the time Smith was drafted. Therefore, the nonstatutory labor exemption could not possibly apply.¹²²

Surprisingly, after reaching this conclusion, the court went on to discuss the potential application of the nonstatutory labor exemption in player cases. The court based its discussion on *Pennington*, *Jewel Tea*, *Allen Bradley*, and *Hutcheson*.¹²³ It indicated that four requirements were necessary to exempt a player restraint. First, the restraint must be embodied in a collective bargaining agreement.¹²⁴ Second, the restraint must concern a mandatory subject of bargaining within the meaning of the federal labor laws.¹²⁵ Third, the restraint must be the result of genuine arm's-length bargaining and not unilateral imposition on the union.¹²⁶ Finally, the restraint must not have a direct anticompetitive impact on the employer's product market competitors.

The *Smith* court's proposed test is, in somewhat restated form, the *Mackey* test (or perhaps vice versa). Although the proposed standards in *Smith* are virtually identical to the *Mackey* standards, only *Mackey* qualifies as binding precedent because the *Smith* court's discussion was largely dicta. The NFL's decision not to appeal the nonstatutory exemption issue prevented the D.C. Circuit from considering the issue on appeal.¹²⁷

The nonstatutory labor exemption issue was soon to reach the appellate court level again. In 1978, an arbitrator assigned a Detroit Red Wings (NHL) player's contract to the Los Angeles Kings as compensation for a free agent the Red Wings had signed from the Kings. This free agent compensation scheme was provided for in the first collective bargaining agreement between the NHL and the players' union. In this case, the assigned player refused to re-

121. *Id.* at 742.

122. *Id.* at 741-42.

123. *Id.* at 742.

124. *Id.*

125. *Id.* at 743.

126. *Id.*

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

port to Los Angeles and filed suit. In *McCourt v. California Sports, Inc.*,¹²⁸ Dale McCourt, the assigned player, alleged that the free agent compensation system violated the Sherman Act because his contract could be assigned without his or his club's consent.

The trial court rejected the NHL's nonstatutory exemption defense and granted McCourt a preliminary injunction. The court followed the *Mackey* test and reasoned that the compensation scheme (in effect a reserve system) was not the result of good faith, arm's-length bargaining.¹²⁹ The court based its conclusion on several considerations. First, the collective bargaining agreement was the first between the league and its players. Second, the players' union was relatively weak when the agreement was reached. Third, the court decided that the system was unilaterally imposed. Finally, the court perceived no quid pro quo that the union received for its acquiescence.¹³⁰

On appeal, a divided panel of the Sixth Circuit determined that the nonstatutory exemption applied and reversed the preliminary injunction.¹³¹ The Sixth Circuit, like the district court, also applied the *Mackey* test, but disagreed with the district court's application of the bona fide bargaining requirement. The court of appeals pointed to the union's vigorous opposition to the reserve system prior to capitulating as evidence of bona fide bargaining.¹³² Consequently, the court distinguished the case from *Mackey* and applied the exemption.

The *Mackey* test was firmly established after *McCourt*. Two subsequent district court decisions have applied the *Mackey* test as a matter of course. Both found the nonstatutory exemption applicable to collectively bargained for player restraints. One of those cases, *Wood v. NBA*,¹³³ is discussed in this article's following section. The other decision, *Zimmerman v. NFL*,¹³⁴ was decided in 1986.

In *Zimmerman*, a former United States Football League player challenged the NFL's "supplemental draft"¹³⁵ of USFL

128. 460 F. Supp. 904 (E.D. Mich. 1978), *rev'd*, 600 F.2d 1193 (6th Cir. 1979).

129. 460 F. Supp. at 910-11.

130. *Id.* at 911.

131. 600 F.2d at 1198.

132. *Id.* at 1203.

133. 602 F. Supp. 525 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954 (2d Cir. 1987).

134. 632 F. Supp. 398 (D.D.C. 1986).

135. In response to the USFL's rapid emergence as a viable competitor to the NFL for college player services, the NFL and the players' union created a "supplemental draft." Its purpose was to allow NFL teams to draft players already under contract with the USFL without risking regular draft choices on players they might never sign. If the selected USFL

players as an antitrust violation. The "supplemental draft" was provided for in an amendment to the league's collective bargaining agreement. Zimmerman wished to play in the NFL. After the supplemental draft, Zimmerman was apparently unable to come to terms with the NFL club that drafted him. He wanted to market his services as a free agent, but the NFL refused to permit him to do so. When Zimmerman sued, the NFL raised the nonstatutory labor exemption as a defense.

In summary fashion, the district court laid out the *Mackey* test and found that the mandatory subject requirement was satisfied.¹³⁶ The court then briefly discussed the "primary effect" question. It concluded that the supplemental draft primarily affected the NFL and its players and not any product market competitors. Interestingly, the court dropped part of the *Mackey* test's third requirement. The court departed from *Mackey* in that it refused to require that the restraint be embodied in a formal agreement.¹³⁷

Zimmerman asserted that the supplemental draft was void because the union failed to follow proper procedure in the amending process.¹³⁸ Rather than address that issue, the court avoided it. It did so by reading *Connell*¹³⁹ as implying that a challenged provision need not be contained in a formal collective bargaining agreement to merit exemption.¹⁴⁰

The court also addressed Zimmerman's assertion that the collective bargaining agreement did not bind him because he was not a party to it when it was adopted.¹⁴¹ The court easily dismissed that contention relying on the district court opinion in *Wood v. NBA*.¹⁴² The court concluded that even potential NFL players are bound by the league's collective bargaining agreement.¹⁴³

Finally, the court examined the question of whether the supplemental draft was the result of bona fide, arm's-length bargaining. Adopting a deferential approach reflective of the *McCourt* opinion, the court surveyed the evidence. It determined that the union received quid pro quo for the supplemental draft as a result of bona fide bargaining. Zimmerman asserted that the letter agree-

players wished to enter the NFL, they were permitted to negotiate with only the team that drafted them. See 632 F. Supp. at 401.

136. 632 F. Supp. at 403-04.

137. *Id.* at 404.

138. *Id.*

139. See *supra* notes 79-87 and accompanying text.

140. 632 F. Supp. at 404-05.

141. *Id.* at 405.

142. 602 F. Supp. 525 (S.D.N.Y. 1984).

143. 632 F. Supp. at 405-06.

ment in which the union agreed to the draft reflected no quid pro quo¹⁴⁴ and the NFL's concessions in exchange for the draft were meaningless.¹⁴⁵ In response to Zimmerman's first contention, the court observed, both in the text of its opinion¹⁴⁶ and in a footnote,¹⁴⁷ that evidence of quid pro quo need not be contained in the agreement under consideration. It reasoned that other agreements outside the written record could constitute quid pro quo.

The court then proceeded to overcome both of Zimmerman's arguments. Zimmerman contended that because the owners had already decided upon a 49-man roster, their promise to that effect in exchange for the draft provision meant nothing. The court, however, rejected that argument. It pointed to evidence that the union valued, and actively sought, the guarantee.¹⁴⁸ The court noted that the owners also agreed to resume providing player contracts (apparently the owners had refused to for some time), under Article XII of the 1982 collective bargaining agreement.¹⁴⁹ The court deemed that concession important even though the owners already had an obligation to provide the contracts. In the eyes of the court, the concession had value because it avoided the costly delay of a union grievance proceeding.¹⁵⁰ In short, the court deferred to "the relative bargaining prowess and strategy of the parties"¹⁵¹ in determining if quid pro quo was exchanged. Thus, the court held that the supplemental draft agreement satisfied all aspects of the *Mackey* test. Consequently, it applied the nonstatutory labor exemption to shield the agreement.

McCourt, *Zimmerman*, and (as will be seen) *Wood* all appear to indicate a trend in player restraint cases. As player unions have become stronger and more established, the courts have moved toward greater deference to the collective bargaining process. Although the early cases used the lack of bona fide bargaining to deny the exemption's protection, more recent decisions indicate an increasing reluctance to interfere.¹⁵² The Second Circuit's recent

144. *Id.* at 407.

145. *Id.*

146. *Id.*

147. *Id.* n.9.

148. *Id.* at 408.

149. *Id.*

150. *Id.*

151. *Id.*

152. At least one commentator has argued that preliminary rulings in the pending NBA and NFL cases indicate a new judicial willingness to intervene in the collective bargaining process. See Roberts, *Courts End Run the Law in NBA, NFL Cases*, Wall St. J., Feb. 25, 1988, at 20, col. 3.

decision in *Wood* is the epitome of non-interference.

D. *Wood v. National Basketball Association*¹⁵³

On September 13, 1984, O. Leon Wood, a talented point guard and member of the 1984 gold medal-winning United States Olympic basketball team, filed an antitrust suit in federal district court in New York.¹⁵⁴ Wood challenged several provisions of the National Basketball Association's (NBA) collective bargaining agreement with the National Basketball Players Association (NBPA). Wood alleged that the salary cap, college draft, and ban on player corporations violated the Sherman Act. He also contended that the nonstatutory labor exemption did not protect the collective bargaining agreement.

The challenged provisions were in part the result of an earlier antitrust dispute between players and the NBA. In *Robertson v. NBA*,¹⁵⁵ the NBA players challenged both the NBA's merger with the American Basketball Association and certain NBA employment practices such as the college draft. After extensive pretrial proceedings,¹⁵⁶ the parties settled on April 29, 1976. The Settlement Agreement provided for substantial modifications of the NBA's employment practices.

The Settlement Agreement was effective through the 1986-87 season.¹⁵⁷ It modified the college draft system by limiting the teams' exclusive right to sign a player to only one year. If a team fails to sign a draft choice, he may re-enter the draft the following year. The Settlement Agreement also created a system of free agency that permits veterans to sell their services to the highest bidder. The free agency scheme is limited only in that it allows a player's current team the right of first refusal by matching his best offer.

In 1980, the NBA and NBPA signed a collective bargaining agreement that incorporated the Settlement Agreement provisions. The agreement expired in 1982 and a new collective bargaining agreement was reached, in principle, in the spring of 1983. The

153. 602 F. Supp. 525 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954 (2d Cir. 1987).

154. The facts of this case are detailed in 809 F.2d at 956-57.

155. 389 F. Supp. 867 (S.D.N.Y. 1975).

156. *See id.*

157. The collective bargaining agreement expired in June 1987 and a new one has not yet been negotiated. The players have filed an antitrust suit, and the league has countered with an unfair labor practice claim. The players have even temporarily decertified their union and all become free agents in an attempt to avoid application of the exemption. *See* Goldpaper, *supra* note 2; Roberts, *supra* note 152.

new agreement was memorialized in a Memorandum of Understanding.

The Memorandum continued the college draft and free agency provisions. It also established a minimum for player salaries and a maximum for aggregate team salaries. The latter provision is known as the "salary cap." Under the salary cap, a team that has reached its maximum permissible team salary may sign first-round draft choices like Wood to only a one-year, \$75,000 contract.

The Memorandum also prohibited the "player corporations" which some players had been forming to enter into contracts. The league wanted to eliminate administrative and accounting difficulties and potential tax liability. Changes in the tax laws had also apparently made this device less attractive to the players. Because the Memorandum altered portions of the Settlement Agreement the NBA and the NBPA requested district court approval of the modifications. The court approved the modifications on June 13, 1983.

Against this backdrop, the Philadelphia 76ers drafted Wood in the 1984 college draft's first round. At the time, the 76ers team payroll exceeded the salary cap. Therefore, they could only offer Wood a one year contract for \$75,000. That offer was necessary for Philadelphia to retain exclusive rights to Wood. In fact, Philadelphia intended to adjust its roster so it could later sign Wood for substantially more money. Wood, however, refused to sign the one-year contract.

In September of 1984, Wood filed suit against the NBA. He sought a preliminary injunction against enforcement of the college draft, salary cap, and ban on player corporations. The district court, per Judge Carter,¹⁵⁸ denied Wood's motion. Judge Carter applied the *Mackey*¹⁵⁹ test for the nonstatutory labor exemption to the college draft and the salary cap. He found that both "affect only the parties to the collective bargaining agreement - the NBA and the players - involve mandatory subjects of bargaining as defined by federal labor laws, and are the result of bona fide arm's-length negotiations."¹⁶⁰ Judge Carter held that "these provisions come under the protective shield of our national labor policy and are exempt from the reach of the Sherman Act."¹⁶¹

158. Judge Carter retained jurisdiction over cases involving the NBA and its players after deciding *Robertson*, 389 F. Supp. 867, in 1975.

159. See *supra* notes 113-15.

160. 602 F. Supp. at 528.

161. *Id.*

Judge Carter also rejected Wood's claim concerning the ban on player corporations. He noted that the provision was probably a mandatory bargaining subject but, even if it were not, it implicated no antitrust concerns.¹⁶² Finally, Judge Carter dismissed Wood's contention that the draft failed *Mackey's* first requirement because its primary effect was to restrict the options of future players.¹⁶³ Judge Carter implicitly read *Mackey's* primary effect requirement to focus on a team's or league's competitors, not on future players.¹⁶⁴ He concluded that a contrary conclusion would destroy all leagues' draft systems and "turn federal labor policy on its head."¹⁶⁵

Meanwhile, Wood signed a four-year contract with the 76ers for \$1.02 million. He was later traded. In January 1986, the parties submitted evidence to Judge Carter for a decision on the merits. On February 5, 1986, Judge Carter granted judgment for the NBA and Wood appealed.¹⁶⁶

On appeal, the Second Circuit, in an opinion by Judge Winter,¹⁶⁷ flatly rejected Wood's claims. The court first assumed that the college draft and salary cap would be antitrust violations in the absence of a collective bargaining agreement.¹⁶⁸ It then noted the strength of federal labor policy when collective bargaining is involved.¹⁶⁹ The court surprisingly refused to "debate or probe the exact contours of the so-called statutory or nonstatutory 'labor exemptions,' because "no one seriously contends that the antitrust laws may be used to subvert fundamental principles of our federal labor policy"¹⁷⁰

The Second Circuit viewed Wood's claims as a "wholesale sub-

162. *Id.* at 529.

163. *Id.*

164. *Id.*

165. *Id.*

166. Why Wood appealed is an intriguing question. *McCourt v. California Sports, Inc.*, 600 F.2d 1193 (6th Cir. 1979), and Judge Carter's decision in *Robertson* offered little hope of penetrating the nonstatutory exemption's shield. Even *Mackey*, 543 F.2d 606, offered little support. The *Mackey* court's reliance on the lack of bargaining due to the players' relatively weak bargaining power probably is not a valid concern a decade later. One commentator suggests that the players in the current NBA and NFL suits may be counting on judicial sympathy and intervention. See Roberts, *supra* note 152.

167. While a Yale Law School professor in 1971, Judge Winter proposed the *Wood* result as the proper solution in player restraint cases. See Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1 (1971). Judge Winter acknowledged his previous treatment of the subject in a footnote at the beginning of the *Wood* opinion. See 809 F.2d 954, 958 n.1.

168. 809 F.2d at 959.

169. *Id.*

170. *Id.*

version" of federal labor policy and rejected them "out of hand."¹⁷¹ The court observed that although the sports industries are unique, they are still subject to the same federal labor policies as other industries.¹⁷² It discussed the rationale for collective bargaining and recognized that it might actually be detrimental to particular, highly skilled employees. But the court reasoned that allowing such employees to challenge a completed collective bargaining agreement would undermine the entire collective bargaining process.¹⁷³ The court dismissed the high public visibility of professional sports as a reason for ignoring federal labor legislation.¹⁷⁴

The Second Circuit pointed out that other industries "routinely set standard wages for employees with differing responsibilities, skills, and levels of efficiency" through collective bargaining.¹⁷⁵ Observing that other industries' collective agreements often provide for the "exclusive referral of workers . . . to particular employers,"¹⁷⁶ the court concluded that the college draft was "functionally indistinguishable."¹⁷⁶ Addressing Wood's contention that new players were unfairly restricted, the court replied that collective agreements commonly include seniority provisions.¹⁷⁷ Judge Winter pointed out that collective agreements almost always affect employees outside the bargaining unit.¹⁷⁸ If Wood's claim were to succeed, he concluded, "federal labor policy would essentially collapse."¹⁷⁹

Judge Winter also cautioned against judicial meddling in the bargaining process. He stated that "courts cannot hope to fashion contract terms more efficient than those arrived at by the parties"¹⁸¹ Second, he warned that "[t]o the extent that courts prohibit particular solutions for particular problems, they reduce the number and quality of compromises available to unions and employers for resolving their differences."¹⁸² Judge Winter noted that the professional sports industry, in particular, may reach "seem-

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 960.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 961.

181. *Id.*

182. *Id.*

ingly unfamiliar or strange agreements"¹⁸³ with which courts should not interfere.

Finally, the court determined that the ban on player corporations was also a mandatory bargaining subject and immune from attack.¹⁸⁴ The court did so because player corporations affect player wages and team costs and are a bona fide subject of collective bargaining.¹⁸⁵ The court speculated that if Wood was to have any claim based on discrimination against new players, he would have to rely on a breach of the duty of fair representation by the union rather than on antitrust grounds.¹⁸⁶

The court concluded its opinion by distinguishing the Supreme Court's nonstatutory exemption cases from Wood's claims. It viewed the Supreme Court decisions as involving injuries to employers in the product market.¹⁸⁷ The court dismissed any considerations of "fine distinctions going to whether product or labor-market activities are in issue."¹⁸⁸ It rejected Wood's claims simply because they would subvert federal labor policy.¹⁸⁹

The *Wood* court may have written the final chapter on player restraint cases, at least when challenges are based on antitrust grounds.¹⁹⁰ Whether the court would permit challenges on grounds other than the union's duty of fair representation is an open and intriguing question. In effect, the *Wood* decision holds that no employee can challenge, on antitrust grounds, any provision in a collective bargaining agreement that his union has negotiated. The *Wood* court's decision focuses on who is challenging the collective bargaining agreement. This approach is full circle from the early sports' cases focus on the bargaining process.

Whether the *Wood* decision is inconsistent with the Supreme Court's nonstatutory exemption cases is another question. Perhaps the *Wood* court is simply trying to discourage player antitrust suits against the leagues. Because player unions are no longer so weak,¹⁹¹

183. *Id.*

184. *Id.* at 962.

185. *Id.*

186. *Id.*

187. *Id.* at 963.

188. *Id.*

189. *Id.* The court noted that virtually all other courts addressing player restraint issues had reached a similar conclusion but on different grounds. See 809 F.2d at 962 n.6 (citing *McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1197-98 (6th Cir. 1979); *Mackey v. NFL*, 543 F.2d 606, 614 (8th Cir. 1976); and *Zimmerman v. NFL*, 632 F. Supp. 398, 403-04 (D.D.C. 1986)).

190. Recent developments may undercut this conclusion. See *supra* notes 2, 150.

191. Cf. Comment, *A Player's View of the NFL Reserve System*, 4 ENT. & SP. L.J. 129

extensive collective bargaining does occur. Consequently, *Wood* could be read as a recognition that players no longer need judicial protection. Such a reading is probably an oversimplification, however. Judge Winter has announced a legal theory that, as a matter of federal labor policy, employees (in any industry) cannot challenge collective bargaining agreements on antitrust grounds.¹⁹² This article's next section will evaluate the nonstatutory exemption's role in professional sports. This evaluation will include an exploration of the implications of the *Wood* decision. Finally, the author will propose a nonstatutory labor exemption test appropriate for sports cases.

III. LEGAL ANALYSIS OF THE NONSTATUTORY LABOR EXEMPTION

A. *Parties Protected*

An initial question in analyzing the nonstatutory labor exemption is whether it protects only unions, or both unions and employers. The Supreme Court has never addressed this issue. The nonstatutory exemption cases it has decided have all involved employer or third party challenges to union activity.¹⁹³

In typical professional sports cases, an individual player usually challenges an employer practice.¹⁹⁴ Some lower courts have held that the nonstatutory labor exemption protects only unions. They have done so by drawing an analogy between the statutory

(1987).

192. Judge Winter sees the issue as a broad question of labor policy. *Wood's* holding does not appear limited to player restraint cases. Judge Winter first proposed the solution announced in *Wood* over 16 years ago. See Jacobs & Winter, *supra* note 164.

193. See, e.g., *Allen Bradley v. Local Union No. 3, IBEW*, 325 U.S. 797 (1945) (business market competitors sued union); *UMW v. Pennington*, 381 U.S. 657 (1965) (competing employer sued union); *Local Union No. 189 v. Jewel Tea Co.*, 381 U.S. 676 (1965) (competing employer sued union); *Connell Constr. Co v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975) (employer sued union). In his *Jewel Tea* concurrence, however, Justice Goldberg concluded that "unions and employers are exempt from the operations of the antitrust laws for activities involving subjects of mandatory bargaining . . ." 381 U.S. at 735 (emphasis supplied). In *Flood v. Kuhn*, 407 U.S. 258 (1972), a player challenged labor market restraints but the Supreme Court never reached the nonstatutory exemption question. The Court simply refused to remove baseball's general antitrust exemption in light of Congressional acquiescence. 407 U.S. at 294.

194. See, e.g., *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) (challenge to NFL's "Rozelle Rule (free agent system)"); *McCourt*, 600 F.2d 1193 (challenge to hockey's free agent compensation system); *Wood v. NBA*, 602 F. Supp. 525 (S.D.N.Y. 1984) (challenges to the player draft, team salary cap, and the ban on player corporations); *Zimmerman v. NFL*, 632 F. Supp. 398 (D.D.C. 1986) (challenge to the NFL's supplemental draft of USFL players).

and nonstatutory exemptions.¹⁹⁵ The statutory exemption, with its focus on union organization, arguably is intended to protect only unions.¹⁹⁶ But as noted previously, the statutory and nonstatutory exemptions are different. They apparently serve distinct, although related, aspects of national labor policy.

Most courts properly assume that the nonstatutory labor exemption is available to both employers and unions.¹⁹⁷ Because the nonstatutory exemption issue commonly arises when employers sue unions, courts have rarely been required to address the problem. Most courts that have addressed the issue have extended protection to employers.¹⁹⁸

The exemption would not serve its purpose of promoting collective bargaining if it was only available to unions. Such a result would leave employers at risk for entering into collective bargaining agreements.¹⁹⁹ The nonstatutory labor exemption is designed to encourage both sides to engage in the bargaining process. It can do so effectively only if it protects both parties.

The *Wood* decision's holding that employees cannot challenge collective bargaining agreements on antitrust grounds reverses the issue. Instead of determining who is protected, the court focuses on who may challenge an agreement. The court's conclusion that employees cannot challenge collective bargaining agreements on antitrust grounds is not inconsistent with Supreme Court precedent. *Pennington*, *Jewel Tea*, and *Connell* all involved employer or product market competitor antitrust challenges to a union-employer agreement. Consequently, the Supreme Court never considered whether employees who are also party to an agreement may challenge it.

195. One circuit court held, with neither citation nor explanation, that the nonstatutory exemption is for the benefit of employees only and is not available to protect acts of employers except, perhaps, incidentally. See *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 530 (5th Cir. 1982).

196. See *Roberts*, *supra* note 17, at 390-91, nn.217-20.

197. See, e.g., *Amalgamated Meat Cutters & Butcher Workmen v. Wetterau Foods, Inc.*, 597 F.2d 133 (8th Cir. 1979).

198. See, e.g., *A.L. Adams Constr. Co. v. Georgia Power Co.*, 557 F. Supp. 168, 172 n.4 (S.D. Ga. 1983) (holding that an employer may assert the nonstatutory labor exemption only if the exemption would have been available to the corresponding union); *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 847 n.14 (3d Cir. 1974); *Mid America Regional Bargaining Assoc. v. Will County Carpenters District Council*, 675 F.2d 881, 890 n.22 (7th Cir.), *cert. denied*, 459 U.S. 860, (1982).

199. Although the Supreme Court has instructed that exemptions from the antitrust laws are to be narrowly construed, see *Group Life & Health Ins. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979), allowing the nonstatutory exemption to protect only unions would defeat the exemption's purpose of encouraging collective bargaining.

If federal labor policy is to be effective, the *Wood* decision is probably appropriate. Its argument could be extended further to also prohibit antitrust challenges by employers who are party to the agreement. Such a result would be appropriate absent circumstances such as those in *Jewel Tea*, where the challenged terms were agreed to by the employer because a bargaining unit got the union to seek the same terms from the complaining employer. Employers party to an agreement should also be prohibited from making antitrust challenges. Collective bargaining incentives are undermined if parties on either side of an agreement are permitted to subsequently attack it. Providing the exemption's protection to both employers and unions will encourage collective bargaining.

At least one court has even extended the exemption to protect a nonlabor, nonemployer group. In *Burt v. Blue Shield*,²⁰⁰ General Motors (GM) and its employees made a nationwide collective bargaining agreement. The agreement provided for uniform health insurance benefits and put Blue Cross/Blue Shield (BC/BS) of Michigan in control of implementation. BC/BS of Michigan did not actually insure GM workers outside of Michigan. Instead, it entered into agreements with other health insurance companies across the nation to provide uniform benefits.²⁰¹ A doctor sued BC/BS of Michigan when two insurance companies who were party to the plan refused to pay for a certain procedure. He alleged that the uniform benefits agreement was an antitrust violation.²⁰² The court rejected his claim, holding that the nonstatutory labor exemption protected the insurance companies and the agreement.²⁰³

The Supreme Court has not discussed the possibility that the nonstatutory labor exemption might protect litigants other than an employer or union.²⁰⁴ However, protection of third parties like insurance companies may exceed the exemption's proper scope. The nonstatutory exemption's only purpose is to encourage collective bargaining between employers and organized labor. Accordingly, it should be tailored narrowly to achieve only that purpose.

To extend the exemption to parties whose participation in the collective bargaining process is minor or insignificant would be inconsistent with its purpose. Antitrust concerns often may outweigh

200. 591 F. Supp. 755 (S.D. Ohio 1984).

201. See *id.* at 759, 760-61.

202. 591 F. Supp. 755.

203. *Id.* at 762-63.

204. The Supreme Court has indicated that union combinations with nonlabor groups are subject to greater scrutiny. See, e.g., *Allen Bradley v. Local Union No. 3, IBEW*, 325 U.S. 797 (1945); *United States v. Hutcheson*, 312 U.S. 219 (1941).

labor policy when agreements include nonlabor, nonemployer parties. The Supreme Court did not intend the nonstatutory labor exemption to protect product market restraints which would not be protected by the statutory exemption.

In *Hutcheson*²⁰⁵ and *Allen Bradley*²⁰⁶ the court plainly articulated its apprehension and mistrust of union agreements involving outside, nonlabor groups.²⁰⁷ Any court, therefore, should approach nonunion, nonemployer claims to the nonstatutory labor exemption's protection with a critical eye.

Third parties might appropriately claim the exemption's protection when their participation substantially promotes and facilitates collective bargaining. Such a determination would have to be made on a case-by-case basis. The participation of insurance companies and possibly unions not party to the collective bargaining agreement (but whose interests are to an extent promoted by the bargaining union)²⁰⁸ may sometimes facilitate bargaining. At other times, such involvement may not deserve protection.

The nonstatutory labor exemption should be available to both unions and employers. Outside participants in the bargaining process should be permitted to avail themselves of the exemption's protection only in limited circumstances. The nonstatutory exemption should not protect them unless their participation significantly promotes collective bargaining and no unreasonable product market restrictions result.

B. *The Nonstatutory Labor Exemption Test*

The courts struggled with the nonstatutory exemption in early player restraint cases, commonly confusing it with the statutory exemption.²⁰⁹ In subsequent professional sports cases, however, the courts have articulated a clear test to determine when to apply the nonstatutory labor exemption.

The elements of the test were first set forth in dicta in *Smith v. Pro Football, Inc.*²¹⁰ Later, in *Mackey v. NFL*,²¹¹ the *Smith* ele-

205. 312 U.S. 219 (1941).

206. 325 U.S. 797 (1945).

207. See *supra* note 196.

208. See *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975).

209. See, e.g., the discussions of *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, *supra* notes 89-95 and accompanying text, and *Robertson v. NBA*, *supra* notes 103-105 and accompanying text.

210. 420 F. Supp. 738 (D.D.C. 1976), *aff'd in part & rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978). In *Smith*, a former NFL player whose career was shortened by a severe neck injury sued the NFL and his former team. He alleged that the college draft was an illegal conspiracy in restraint of trade.

211. 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). In this case,

ments were condensed and reorganized. The *Mackey* test is probably the clearest articulation of the nonstatutory exemption that any court in any context has made. Every subsequent sports case²¹² and several nonsports cases²¹³ have applied the *Mackey* test.

The *Mackey* test is a solid starting point for analyzing the exemption's application to any collective bargaining situation because it is a clear and accepted articulation of the nonstatutory exemption. The *Mackey* test asks: (1) Does the challenged agreement primarily affect only the parties to the collective bargaining agreement?²¹⁴ (2) Does the agreement relate to a mandatory subject of collective bargaining?²¹⁵ (3) Is the agreement embodied in a formal collective bargaining agreement that is the product of bona fide, arm's length bargaining?²¹⁶ The exemption applies if all three questions are answered positively.

1. PRIMARY EFFECT

The *Mackey* test's first requirement is merely a statement of the antitrust policy disfavoring labor agreements intended to strike at employers' product market competitors.²¹⁷ This initial inquiry denies protection to collusive agreements that aim to restrict product market competition.²¹⁸ Courts have generally determined that

football players sued the NFL, alleging that the "Rozelle rule" concerning compensation for teams losing players to free agency violated the antitrust laws. The parties eventually settled this case. See *Reynolds v. NFL*, 584 F.2d 280 (8th Cir. 1978).

212. See *McCourt v. California Sports Inc.*, 600 F.2d 1193 (6th Cir. 1979); *Wood v. NBA*, 602 F. Supp. 525 (S.D.N.Y. 1984); *Zimmerman v. NFL*, 632 F. Supp. 398 (D.D.C. 1986).

213. See, e.g., *Burt v. Blue Shield*, 591 F. Supp. 755 (S.D. Ohio 1984).

214. The court formulated this requirement from language in *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), *Local Union No. 189 Jewel Tea Co.*, 381 U.S. 676 (1965), and *UMW v. Pennington*, 381 U.S. 657 (1965). *Mackey*, 543 F.2d at 614.

215. The court drew this aspect of the test from *Jewel Tea*, 381 U.S. 676 and *Pennington*, 381 U.S. 657. See 543 F.2d at 614.

216. The *Mackey* court derived this requirement from *Jewel Tea*, 381 U.S. 676, and also referred to several sports cases, including *Smith v. Pro Football*, 420 F. Supp. 738 (D.D.C. 1976). See 543 F.2d at 614.

217. See, e.g., *Apex Hosiery v. Leader*, 310 U.S. 469 (1940); *United States v. Hutcheson*, 312 U.S. 219 (1941); *Allen Bradley v. Local Union No. 3, IBEW*, 325 U.S. 797 (1945).

218. In *Connell*, the Supreme Court noted that a "direct restraint on the business market has substantial anticompetitive effects. . . . It contravenes antitrust policy, and therefore cannot claim a nonstatutory exemption from the antitrust laws." 421 U.S. at 625. Cf. *Pennington*, 381 U.S. at 664-65; *Jewel Tea*, 381 U.S. at 689-90 (opinion of White, J.); *id.* at 709-13, 732-33 (opinion of Goldberg, J.).

restraints on players' freedom of contract satisfy *Mackey's* first requirement.²¹⁹ This characterization of the effect of player restraints is accurate so long as no one outside the multi-employer bargaining unit is competing for the players' services.²²⁰ Two other groups merit discussion in the exemption context. Neither group, however, should be permitted to penetrate the exemption's shield.

Consumers (spectators in sports cases) are one group typically affected by labor agreements. In *Jewel Tea*,²²¹ the Supreme Court protected an agreement which had a substantial impact on consumers' ability to purchase fresh meat. One commentator has argued that the Supreme Court's tolerance for adverse consumer effects undermines *Mackey's* "primary effect" requirement.²²² Such a contention is a misapprehension of the primary effect analysis.

Consumers will always suffer when unions succeed in negotiating fewer hours, higher wages, or better conditions. Prices will rise because all three increase employer costs. Consumers, as well as or sometimes instead of employers, will pay for higher union wages.

The exemption would rarely apply if effects on consumers were considered. Only if an agreement restricted player wages or mobility are consumers likely to benefit by an increase in consumer surplus. *Allen Bradley* and *Pennington* made it clear that the Supreme Court's concern was union participation in schemes to destroy product market competition. *Mackey's* "primary effect" requirement, therefore, if focused on product market competitors, is consistent with Supreme Court precedent. The requirement serves to weed out labor agreements that exceed legitimate union objectives.

Future employees (players) are also affected by labor agreements. The district court in *Wood* held that *Mackey's* "primary

219. Each professional league collectively bargains as a whole with all its players as a whole. Consequently, collective bargaining agreements cannot easily be wielded by a club or clubs to obtain an advantage over others. It is doubtful that clubs within a league, unless within the same city, have any incentive to injure fellow clubs. The situation is drastically altered when competing leagues arise.

220. Although some of the sports cases have involved suits brought by competing leagues, *see, e.g.*, *USFL v. NFL*, 644 F. Supp. 1040 (S.D.N.Y. 1986) and *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972), most have involved player challenges to club practices or league restrictions. In all leagues the amount of product produced (sports exhibitions) is fixed. Major league baseball plays a 162 game schedule; the NBA plays an 82 game schedule; the NFL plays a 16 game schedule; and the NHL plays a 75 game schedule. The number of games played is unaffected by changes in player restraints. The clubs assert that player restraints are designed to improve product quality by maintaining competitive balance.

221. 381 U.S. 676 (1965).

222. *See J. WEISTART & C. LOWELL, supra* note 1, at 581.

effect" requirement is not concerned with effects on future players.²²³ Quite correctly, the court reasoned that its inquiry was limited to effects on an employer's (the league's) competitors.²²⁴ A contrary conclusion could destroy the professional sports leagues' college drafts. The *Wood* district court properly concluded that considering future players would "turn federal labor policy on its head."²²⁵

The preceding discussion suggests that Mackey's "primary effect" requirement should be limited to a consideration of effects on product market competitors. That suggestion is consistent with the Supreme Court's exemption cases. The employer's product market competitors are the group most vulnerable to direct and substantial injury by labor agreements.

The foregoing analysis also suggests that the exemption of a player restraint agreement may depend upon the existence or non-existence of rival leagues (product market competitors). Such a result is entirely consistent with the antitrust policy of promoting product market competition. In a sense, the Second Circuit's recent decision in *Wood* writes an even broader exemption.

In *Wood*, the Second Circuit endorsed the proposition that current and future players cannot challenge collectively bargained-for player restraints on antitrust grounds, regardless of product market effects. The preceding "primary effect" analysis is consistent with *Wood* because *Wood* in no way restricts antitrust chal-

223. See *Zimmerman v. NFL*, 632 F. Supp. 398 (D.D.C. 1986). In *Zimmerman*, the court rejected the player's argument that the exemption was not available to protect the league's supplemental draft because the player was not part of the union when the draft was negotiated. Accord *Wood v. NBA*, 602 F. Supp. 525 (S.D.N.Y. 1984). In *Wood*, the court rejected a similar claim by an NBA player that the college draft primarily affected future players not party to the bargaining process and therefore, was not entitled to the exemption. The court quoted from two other cases in rejecting the player's argument. "When an employee is hired after the collective bargaining agreement has been made, the terms of [his] employment already have been traded out." 602 F. Supp. at 528 (quoting *J.I. Case Co. v. NLRB*, 321 U.S. 332, 335 (1944)). "The duty to bargain is a continuing one, and a union may legitimately bargain over wages and conditions of employment which will affect employees who are to be hired in the future." 602 F. Supp. at 528 (quoting *NLRB v. Laney and Duke Storage Warehouse Co.*, 369 F.2d 859, 866 (5th Cir. 1966)). The *Wood* court concluded that "[a]t the time an agreement is signed between the owners and the players' exclusive bargaining representative, all players within the bargaining unit and those who enter the bargaining unit are bound by its terms." 602 F. Supp. at 529. Cf. *Smith v. Pro Football Inc.*, 420 F. Supp. 738, 744 (D.D.C. 1976) ("With regard to the fact that the boycott's impact is on potential employees rather than on competitors of the employer, however, the court believes that the policies of the labor laws require that such an agreement be found to be within the scope of the exemption to the antitrust laws.").

224. 602 F. Supp. at 529.

225. *Id.*

lenges by rival leagues.

Primary effect analysis does not ordinarily present a serious issue in player restraint cases. It could become more difficult, however, if a court were confronted with a collective bargaining agreement that contained provisions concerning television rights, minor leagues, player endorsements, ticket prices, club relocation, or similar topics. Agreements on such subjects will impact on groups besides the players and the clubs. Ticket price and club relocation restrictions may create direct product market effects. Agreements concerning television rights and minor leagues, although less directly implicating the product market, may also affect a league's actual or potential competitors.

Restrictions on player endorsements raise an interesting issue. Such agreements would not affect a league's competitors but would affect companies willing to hire players for promotional purposes. Whether the nonstatutory exemption should protect agreements affecting competitors in a product market different than the league's has never been addressed.²²⁶

From an economic perspective, there is no valid reason to automatically exempt or reject agreements impacting on other product markets. In a sense, advertisers and promoters are competitors with sports leagues for players' non-athletic services. Primary effect analysis need not be limited to the immediate product market. Incidental effects on other product markets should be ignored or the exemption could never apply. But as the magnitude of such effects increases, the justification for exemption decreases. The question is one of degree. Courts should refrain from making bright line characterizations of which product market effects merit exemption.

If a collective bargaining agreement restricting player endorsements or other pursuits is fundamental to insuring quality player performance on the field (e.g., decreasing the risk of off-the-field injuries), then courts should tolerate adverse effects on other product markets. But a restriction that is merely incidental to player performance or has no valid relationship to performance is in a different class. Agreements of that nature serve only to regulate player conduct in furtherance of some antiquated notion of pro-

226. *But see* *Fleer Corp. v. Topps Chewing Gum, Inc.*, 501 F. Supp. 485 (E.D. Pa. 1980), *rev'd*, 658 F.2d 139 (3d Cir. 1981) (holding Topps' individual licensing agreements with each minor and major league baseball player, commercial authorization contracts between the players' union and the individual players, and renegotiation of the player's earlier contracts with Topps neither unreasonable restraints of trade nor a conspiracy to attempt to monopolize the baseball card market).

protecting a sport's "integrity." They may unfairly restrict access to players' non-athletic services, a subject of debatable concern to employer clubs.

Consequently, courts should not ignore effects on product markets other than the immediate one when performing primary effect analysis. In light of the *Wood* decision, however, a challenge to restraints having such an impact might have to be made by advertisers or promoters. Players would not have standing to attack endorsement restrictions embodied in a collective bargaining agreement, regardless of product market effects.

In conclusion, whether any particular provision concerning a subject other than player restraints would satisfy the "primary effect" test depends on several considerations. Factors to consider should include the provision's exact nature, the presence or absence of rival product market competitors, the directness or indirectness of product market effects, and the type of product market or markets affected.

2. MANDATORY BARGAINING SUBJECT

The *Mackey* test's second requirement is derived from *Pennington*²²⁷ and *Jewel Tea*.²²⁸ Those decisions both explicitly discussed the nonstatutory labor exemption's applicability in terms of agreements concerning mandatory bargaining subjects. The Supreme Court made it clear, however, that an agreement is not exempt simply because it involves a mandatory subject.²²⁹ The fact that the agreement concerns a mandatory subject appears to be a necessary, but not a sufficient, condition for employing the exemption's protection.

Section 8(d) of the National Labor Relations Act denotes "wages, hours, and terms or conditions of employment" as mandatory bargaining subjects.²³⁰ The inclusion of "terms or conditions of employment" leaves the determination of what is a mandatory subject open to broad interpretation. In professional sports cases, the question typically has been whether college drafts, reserve systems and other player restraints constitute mandatory bargaining subjects. Most courts confronted with various limitations on player freedom of contract have held them to be

227. 381 U.S. 657.

228. 381 U.S. 676.

229. 381 U.S. at 664-65.

230. 29 U.S.C. § 158(d) (1982).

mandatory subjects.²³¹ A contrary conclusion is logically unsustainable.

A much more difficult characterization problem arises when a court considers whether television rights, player endorsements, exhibition games, minor leagues, ticket prices, club relocation, and similar topics are mandatory subjects of bargaining. Like primary effect analysis, the question is really one of degree. Because restrictions on player endorsements and exhibition games affect player earnings and working conditions, they probably also should be considered mandatory subjects.

Other topics are more difficult to characterize. Agreements concerning minor leagues could affect players' working conditions. Some players may spend time on both a minor league and a major league club during the same season. Club relocation could affect a player's working environment. However, because it has little effect on wages or hours, it is a weaker case for a mandatory subject. No court has ever had to characterize baseball's salary arbitration system.²³² However, because it plays an important role in determining player salaries, it probably should be considered a mandatory bargaining subject.

Ticket prices, television rights, and revenue distribution are probably not mandatory subjects. This is so even though television revenues and ticket prices may affect player salaries because these factors influence club income. They are not, however, ordinarily as closely related to wages, hours, and working conditions as the draft or reserve system.²³³ In *Jewel Tea*, Justice White stated:

231. See *Smith v. Pro Football, Inc.*, 420 F. Supp. 738 (D.D.C. 1976) (college draft is a mandatory subject); *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976) (free agent compensation system is a mandatory subject); *McCourt v. California Sports, Inc.*, 600 F.2d 1193 (6th Cir. 1979) (free agent compensation system is a mandatory subject); *Wood v. NBA*, 602 F. Supp. 525 (S.D.N.Y. 1984) (college draft, salary cap, and ban on player corporations are mandatory subjects); *Zimmerman v. NFL*, 632 F. Supp. 398 (D.D.C. 1986) (supplemental draft is a mandatory subject). See also *Jacob & Winter*, *supra* note 165. But cf. *Robertson v. NBA*, 389 F. Supp. 867 (S.D.N.Y. 1975) (basketball reserve system is not a mandatory subject). *Robertson* is the exception rather than the rule. Courts should follow the approach that restrictions on players' freedom of contract concern mandatory subjects and are properly resolved in the collective bargaining context. See *Reynolds v. NFL*, 584 F.2d 280 (8th Cir. 1978).

232. Baseball has used a salary arbitration system since 1974 for players and clubs who cannot agree on a salary for the coming season. Each side submits a final offer to an arbitrator approved by both sides. Each side then gets to present evidence and argue in favor of its offer at a hearing. The arbitrator must then choose one of the offers; he cannot split the difference or calculate a new salary. The offer he chooses is the player's salary for the next season. See *Basic Agreement*, *infra* note 265, at 9-13.

233. The NBA salary cap is an exception because it ties team salary levels to the NBA's gross revenues. See *Wood*, 809 F.2d at 957.

Jewel, for example, need not have bargained about or agreed to a schedule of prices at which its meat would be sold and the unions could not legally have insisted that it do so. . . . [I]f the unions had made such a demand, Jewel had agreed and . . . an injured party had challenged the agreement . . . we seriously doubt that either the unions or Jewel could claim immunity by reason of the labor exemption²³⁴

From an economic perspective, a union employer agreement to raise prices and an agreement to raise wages are similar in effect. Both cause prices to increase. One merely does so more directly and visibly than the other. For policy reasons, however, the distinction is relevant. Unions should not be allowed to manage an employer's business directly through price setting in a collective bargaining agreement.

Only those subjects essential to promoting collective bargaining should be considered mandatory subjects. It is not necessary to protect agreements on television revenue distribution or ticket prices to encourage collective bargaining between the players and clubs. Most restrictions on the players conceivably involve mandatory subjects of bargaining. The characterization, however, becomes more difficult as the subject more directly implicates the product market.

One rather illogical, but related, issue which has arisen is whether illegal agreements concerning mandatory subjects can be exempt. Some courts have held that an agreement which violates the antitrust laws cannot be considered a mandatory subject.²³⁵ Other courts have refused to acknowledge an agreement that constitutes an unfair labor practice as concerning a mandatory subject.²³⁶

In *Smith v. Pro Football, Inc.*,²³⁷ the district court declined to apply the nonstatutory labor exemption because it determined

234. 381 U.S. at 689.

235. See *Mackey*, 407 F. Supp. at 1009-10.

236. See *Consolidated Express, Inc. v. New York Shipping Assoc., Inc.*, 602 F.2d 494, 519 (3d Cir. 1979) (any clause in a collective bargaining agreement which violates section 8(e) (unfair labor practice) of the National Labor Relations Act cannot be protected by the nonstatutory labor exemption). The court created a limited defense to damages actions even if the agreement violated section 8(e). The court held that if a defendant could show that upon entering an agreement, it was not foreseeable that the agreement would later be held illegal, the defendant would be absolved of liability for money damages but remained subject to injunctive relief. 602 F.2d at 521. See also *Schnabel v. Building and Constr. Trades Council*, 563 F. Supp. 1030 (E.D. Pa. 1983) (following *Consolidated*).

237. 420 F. Supp. 738 (D.D.C. 1976), *aff'd in part & rev'd in part*, 593 F.2d 1173 (D.C. Cir. 1978).

that the agreement violated the antitrust laws.²³⁸ The *Mackey* court properly rejected that illogical and circular argument.²³⁹ The nonstatutory exemption's purpose is to promote collective bargaining by protecting some agreements that might otherwise be illegal under the antitrust laws. Thus, a court should first determine whether or not the nonstatutory exemption applies before examining a collective bargaining agreement's antitrust legality. It should not treat an agreement's antitrust legality as a preliminary question.

An agreement constituting an unfair labor practice, however, is on different footing. Because the National Labor Relations Act makes unfair labor practices illegal, they are contrary to national labor policy. The nonstatutory labor exemption is designed to promote federal labor policy. Allowing it to protect unfair labor practices would destroy the very policy it is intended to further.

Unions are unlikely to agree to an unfair labor practice unless a strong employer forces it upon them. In that situation, bona fide collective bargaining is not occurring. The nonstatutory labor exemption serves no legitimate purpose by protecting agreements reached under such circumstances. Therefore, agreements constituting unfair labor practices should not be held to concern mandatory bargaining subjects.

At least one commentator has suggested that *Mackey's* mandatory subject requirement is too restrictive.²⁴⁰ The argument for extension is that the expansion of protected subjects would encourage collective bargaining on more topics. For nonstatutory exemption purposes, the question is whether extending the exemption to agreements concerning non-mandatory subjects would serve national labor policy more than it would hinder antitrust policy.

Possible advantages from extending the exemption to non-mandatory subjects have largely been undermined by the *Wood* decision. First, *Wood* moots *Mackey's* mandatory subject requirement in player suits. Second, *Wood* protects collective bargaining agreements on all subjects, whether mandatory or not, from player (employee) challenge. The requirement's justification is further weakened when one realizes that a product market competitor is unlikely to bring suit unless an agreement would also fail *Mackey's*

238. See 420 F. Supp. 738. Because the NFL did not appeal the district court's non-statutory exemption conclusion, the D.C. Circuit had no reason to address the issue on appeal.

239. See *Mackey*, 543 F.2d at 615 (rejecting trial court's findings at 407 F. Supp. at 1009-10).

240. See J. WEISTART & C. LOWELL, *supra* note 1, at 581-82 nn.594-95.

primary effect requirement. A competitor is likely to sue only if it is injured. Consequently, anticompetitive agreements on nonmandatory subjects are unlikely to be insulated from product market competitor attacks, regardless of whether or not a mandatory subject requirement is adopted.

Possible justifications for the requirement do exist. For example, the mandatory subject requirement serves as an extra check on union or employer temptations to enter collusive agreements designed to unreasonably restrict product market competition. Also, by helping to insure that legitimate union interest in a matter exists, the requirement may minimize the frustration of antitrust policy. That result is consistent with Supreme Court precedent warning that antitrust exemptions should be narrowly construed.²⁴¹ Finally, the requirement may narrow the exemption without hindering labor policy. Exempting agreements on nonmandatory subjects would not with absolute certainty significantly increase incentives to collectively bargain.

The preceding discussion illustrates that *Wood* obviates the need for a mandatory subject requirement in protecting agreements from employee challenges. The requirement, however, may serve as notice to employers and unions not to stray too far afield in negotiations. At the very least, the presence of a mandatory subject demonstrates the strength of union-employer interests.

3. FORMAL AGREEMENT-BONA FIDE BARGAINING

The *Mackey* test's third line of inquiry may be split into two parts: first, the formal agreement requirement and second, the bona fide bargaining determination.

The two inquiries are related but distinct. The formal agreement requirement attempts to minimize the chance that a strong employer will unilaterally impose restrictions on a union. If restrictions or provisions embodied in a formal document are more likely the result of *actual* bargaining than those not formally memorialized, then the requirement arguably creates at least the *potential* for actual bargaining.

The bona fide bargaining requirement goes one step further. It extends the inquiry beyond what might have occurred to what actually did occur. Although courts have used the bona fide bargaining requirement to strike down player restraints, it is by far the

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

most controversial and criticized element of the *Mackey* test.²⁴²

The bona fide bargaining requirement serves two distinct purposes. First, courts have used it to guard against restrictions unilaterally imposed by the leagues in player restraint cases. Used in this way, the requirement protects weak unions with little bargaining power. Second, the requirement can be used to deny protection to collusive union-employer agreements designed to restrict product market competition. This is arguably the only manner in which the Supreme Court recognizes this requirement.²⁴³

a. Formal Collective Bargaining Agreement

The following discussion will expand upon the propriety of the two parts of *Mackey's* third element. The *Mackey* court held that the nonstatutory labor exemption could not apply unless the challenged agreement was embodied in a formal collective bargaining agreement.²⁴⁴ The court derived this limitation from language in *Pennington* and *Jewel Tea*. Those opinions, however, at most only hint that the exemption is limited to formal agreements. Likewise, in *Connell*, the Supreme Court did not specify whether the exemption only applied to formal agreements.²⁴⁵ The *Mackey* court's interpretation is not necessarily contrary to Supreme Court precedent because a formal agreement already existed the only time the Court applied the exemption.²⁴⁶

Other courts have not required a formal collective bargaining agreement. Instead, they required only that the challenged agreement or activity arise in the course of the bargaining relation-

242. See, e.g., *Roberts*, *supra* note 17, at 402-05.

243. In *Pennington*, the Supreme Court denied the exemption because the union had colluded with employers to inflict harm on product market competitors, not because the employers forced restrictions on the union. See *UMW v. Pennington*, 381 U.S. 657 (1965). Likewise, in *Jewel Tea*, the Court exempted the agreement because the union did not collude with employers but sought only to further its own interests. See *Local Union No. 189 Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965).

244. *Mackey*, 543 F.2d at 614. Several subsequent cases have followed this requirement. See, e.g., *Smith v. Pro Football, Inc.*, 420 F. Supp. 738 (D.D.C. 1976), *affirmed in part and reversed in part*, 593 F.2d 1173 (D.C. Cir. 1978); *McCourt v. California Sports Inc.*, 460 F. Supp. 904 (E.D. Mich. 1978), *rev'd*, 600 F.2d 1193 (6th Cir. 1979), *Wood v. NBA*, 602 F. Supp. 525 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954 (2d Cir. 1987); *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 530-31 (5th Cir. 1982); *Altemose Constr. Co. v. Atlantic, Cape May and Parts of Burlington, Ocean and Cumberland Counties Building Trades Council*, 493 F. Supp. 1181 (D.N.J. 1984), *rev'd and remanded*, 751 F.2d 653 (3d Cir. 1985).

245. 421 U.S. at 624-25.

246. *Jewel Tea*, 381 U.S. 676, is the only case in which the Supreme Court found the exemption applicable.

ship.²⁴⁷ Although language in *Connell* might support that position,²⁴⁸ the exemption's scope should be limited to formal collective bargaining agreements in the professional sports context. A formal agreement requirement increases the likelihood that the parties will actually bargain over an agreement's terms. Agreements limiting players' freedom of contract pose little danger of player-club collusion to achieve an unlawful product market restriction.

Professional sports clubs have a strong bargaining position because players often have no other market for their athletic skills. As a consequence, leagues have a history of unilaterally imposing restrictions on the players.²⁴⁹ Applying the exemption only to *formal* collective bargaining agreements better insures players the opportunity to actually bargain over any restrictions.²⁵⁰

Requiring a formal agreement encourages employers to bargain because restrictions not embodied in a collective bargaining agreement may be subject to antitrust attack. Although the *Wood* decision prohibits employee antitrust attacks on formal collective bargaining agreements, the court did not indicate that it would extend its holding to preclude *all* employee antitrust suits, including those against informal agreements.²⁵¹ In theory, such an extension would allow employers to unilaterally impose player restraints without fear of player lawsuits, even though it is unlikely that the leagues could do so today. The player unions are now stronger and not averse to going on strike. As a result, the formal agreement requirement may be of limited value in protecting employee interests. Nevertheless, the requirement still serves to protect an employer's product market competitors.

The requirement helps to insure that the exemption will be applied only when labor policy concerns are strong. It discourages

247. See *Zimmerman*, 632 F. Supp. at 404-05; *Amalgamated Meat Cutters v. Wetterau Foods, Inc.*, 597 F.2d 133 (8th Cir. 1979); *Plumbers & Steamfitters Local 598 v. Morris*, 511 F. Supp. 1298 (E.D. Wash. 1981) (nonstatutory labor exemption used to protect an employer "lockout" because it was part of the bargaining process).

248. See *Connell Constr. Co. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616, 626 (1975).

249. See J. WEISTART & C. LOWELL, *supra* note 1; J. DWORKIN, *OWNERS VERSUS PLAYERS* (1981).

250. Most restrictions on baseball players are embodied in the leagues' formal collective bargaining agreement. In baseball, the only restraints not embodied in the collective bargaining agreement are the Major League Rules which are unilaterally issued by the commissioner and govern many facets of player conduct. However, because these rules are incorporated by reference into the formal agreement, the players can apparently make the rules a bargaining issue, especially if the rules concern mandatory subjects.

251. See *Wood*, 809 F.2d at 962.

employers from trying to involve unions in informal agreements for the purpose of injuring the employer's competitors. The National Labor Relations Act²⁵² and the statutory exemption will protect most conduct that is not embodied in a formal agreement that occurs in the course of a bargaining relationship, making the nonstatutory exemption's protection unnecessary. The nonstatutory labor exemption's propriety wanes as its protection is stretched beyond formal agreements. Therefore, the exemption should be narrowly construed in order to encourage formal collective bargaining and to protect product market competitors.²⁵³

b. Bona Fide Arm's Length Bargaining

In addition to limiting the nonstatutory labor exemption to formal agreements, the *Mackey* court required that the agreement be the result of bona fide, arm's length bargaining.²⁵⁴ In player restraint cases, some courts rely on the bona fide bargaining inquiry to deny the nonstatutory exemption's protection to the leagues.²⁵⁵ These courts typically determine that the leagues unilaterally imposed restrictions on young and weak players' unions.²⁵⁶ Recent player restraint cases, however, demonstrate a reluctance to scrutinize the bargaining process by not stressing *Mackey's* final requirement. Instead, the courts have been satisfied with a determination that both sides received some quid pro quo in the bargaining

252. See generally 29 U.S.C. §§ 157, 158, 163 (1982) (protecting certain types of strikes, boycotts, picketing, and lockouts).

253. An agreement concerning subjects such as television revenues or ticket prices clearly must be embodied in a formal agreement to even merit consideration for exemption. If the nonstatutory labor exemption serves labor policy in protecting such agreements, it does so only to the extent that protecting them encourages the union and employer to participate in the formal bargaining process. Outside the professional sports context, a less restrictive application of the exemption may be appropriate. The exemption issue most frequently arises when a union-employer agreement impacts on the employer's competitors. One commentator managed to dig up only one non-sports case in which an agreement imposed restraints solely on the labor market. See *Roberts*, *supra* note 17, at 339 n.4. Therefore, restraints on players' freedom of contract present a unique situation. Union-employer collusion to effect anticompetitive goals is far more likely in a non-sports industry. Regardless, the *Mackey* primary effect analysis coupled with the formal collective bargaining agreement requirement may provide a workable standard for all industries, not just professional sports.

254. 543 F.2d at 614. This requirement is based on the plurality's opinions in *Pennington* and *Jewel Tea*.

255. See 543 F.2d at 615-16; *Philadelphia World Hockey Club v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972); *Boston Prof. Hockey Ass'n v. Cheevers*, 348 F. Supp. 261 (D. Mass. 1972), *remanded*, 472 F.2d 127 (1st Cir. 1972).

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

process.²⁵⁷

The bona fide bargaining aspect of the *Mackey* court's non-statutory labor exemption test is entirely inappropriate. The primary effect requirement eliminates pure product market restrictions from the exemption's coverage. Consequently, further inquiry into the bargaining process is an unreasonable judicial intrusion.

The Supreme Court cases establishing the exemption do not support *Mackey's* final requirement. For example, in *Pennington*, the Court's discussion of bona fide bargaining was understandable because factually, such bargaining had not occurred.²⁵⁸ Although in *Jewel Tea* the Court examined the trial court's findings on the parties' bargaining record, the decision ultimately turned on the agreement's reasonableness, not on whether it was the result of bona fide bargaining.²⁵⁹

Player unions are unlikely to collude with clubs to restrict their own freedom of contract. Nor are they likely to capitulate to league demands without extracting some reciprocal benefit. To do so would not be in their self interest. *Wood's* rejection of player challenges represents judicial recognition of the impropriety of probing into the bargaining process. Judicial inquiry into the bargaining process is simply an unwarranted intrusion.

Justice Goldberg, in both *Pennington* and *Jewel Tea*, recognized the implications of judicial inquiry into the bargaining process. He argued that "Congress intended to foreclose judges and juries from roaming at large in the area of collective bargaining . . . by inquiry into the purpose and motive of the employer and union bargaining on mandatory subjects" ²⁶⁰ He believed that any attempted inquiry into the parties' motives and purposes was "totally artificial."²⁶¹ Justice Goldberg warned that allowing courts to substitute their own strategies for those of the bargaining parties would have a counterproductive effect on collective bargaining.

As a practical matter, effectively and accurately ascertaining the bargaining parties' motives and purposes is nearly impossible. Frequently, the bargaining process does not provide much hard evidence concerning the parties' good faith. In fact, good faith bargaining is not equated with making concessions. The National Labor Relations Act does not require the parties to yield ground in

257. See *McCourt v. California Sports Inc.*, 600 F.2d at 1193, 1203 (6th Cir. 1979); *Zimmerman v. NFL*, 632 F. Supp. 398, 406-07 (D.D.C. 1976).

258. See *UMW v. Pennington*, 381 U.S. 657 (1965).

259. See *Local Union No. 189 v. Jewel Tea Co.*, 381 U.S. 676 (1965).

260. *Jewel Tea*, 381 U.S. at 716 (Goldberg, J. concurring).

261. *Id.* at 719-20.

collective bargaining.²⁶² As a result, courts should not hold employers hostage to union demands by requiring them to compromise or show evidence of "bona fide" bargaining.

Justice Goldberg predicted that a good faith requirement would force a union or employer to publicly resist their opponent's demands, even if approving of the terms.²⁶³ Such resistance would be necessary in order to have evidence of noncollusion. Without evidence of noncollusion, an agreement would be vulnerable. Justice Goldberg convincingly argued that courts should not be permitted to infer illegal motives whenever a collective bargaining agreement exists. He contended that allowing them to do so would only encourage noncooperation and hinder national labor policy.²⁶⁴

Justice Goldberg was correct. The primary effect requirement protects product market competitors against agreements intended to restrict product market competition. The formal agreement and mandatory subject requirements protect unions by insuring that only agreements over which a union has actually had an opportunity to bargain may be exempted. These requirements make the bona fide bargaining requirement unnecessary as a means of effectuating national labor policy.

In the professional sports context, the bona fide bargaining requirement is unnecessary to protect players. Player unions are no longer young nor so weak. They have negotiated substantial changes in their freedom to market their services in various leagues.²⁶⁵ Leagues no longer simply force restrictions on players. Although the *Wood* decision has broader ramifications, it stands, at least in part, as a recognition of the players' bargaining power.

The bona fide bargaining requirement is also unnecessary to protect product market competition. In the sports industries, the quantity of output (games) is strictly limited and all clubs bargain as a unit. Therefore, no club attempts to drive others out of its league. Players would gain nothing by helping to eliminate clubs or

262. 29 U.S.C. § 158(d) directs that "such obligation [to bargain collectively] does not compel either party to agree to a proposal or require the making of a concession. . . ."

263. Justice Goldberg articulated his fear as follows: "An employer will be forced to take a public stand against a union's wage demands, even if he is willing to accept them, lest a too ready acceptance be used by a jury to infer an agreement between the union and employer that the same wages will be sought from other employers." *Jewel Tea*, 381 U.S. at 720-21.

264. See *Jewel Tea*, 381 U.S. at 697.

265. All professional sports leagues now have some form of free agency. Baseball has both free agency and salary arbitration. See Basic Agreement Between the American League of Professional Baseball Clubs and the National League of Baseball Clubs and the Major League Baseball Players Association at 9-13, 42-47 (1985).

even competing leagues.²⁶⁶

The bona fide bargaining inquiry is not necessary to prevent the nonstatutory labor exemption from sheltering agreements on subjects such as television revenues or ticket prices. Agreements on those and similar subjects affect groups outside the bargaining relationship. As a result, the primary effect test would defeat their claims to the exemption. A bona fide bargaining inquiry is unjustifiable in the professional sports arena²⁶⁷ and may not be desirable in other contexts either.

IV. CONCLUSION

The nonstatutory labor exemption is necessary to and effective in harmonizing conflicting antitrust and labor policies. When properly formulated and applied, the exemption encourages collective bargaining without severely hindering the antitrust laws' effectiveness. The exemption, however, frequently has been misunderstood and misapplied. The Supreme Court, itself, has considered it on only three occasions. Even then, the Court reached only limited agreement on the exemption's boundaries. Consequently, lower courts have differed in determining the exemption's applicability. This has been particularly true in the professional sports player restraint cases.

The recent *Wood* decision, however, may eliminate the need for detailed analysis and complex inquiry in player restraint cases. In *Wood*, the court held that players can never challenge collective bargaining agreements on antitrust grounds. That holding, if followed by other circuits or upheld by the Supreme Court, will sound the death knell for player antitrust cases. The *Wood* result is consistent with the nonstatutory exemption's purpose of encouraging collective bargaining, but it obviates the need for judicial assessment of the nonstatutory exemption when players bring suit.

Wood does not foreclose the possibility that competing leagues or other competitors for player services may challenge player restraints on antitrust grounds. In those situations, the nonstatutory labor exemption remains relevant. Nor does *Wood* slam the door on player challenges based on grounds other than the antitrust laws. Players may, however, have to seek new legal theories or perhaps, turn against their union. For example, players might allege that their union failed its duty of fair representation by acquiesc-

266. More teams within a league and more competing leagues will increase competition for player services, increasing player salaries.

267. See *supra* note 23.

ing to player restraints. Regardless of the direction player restraint cases take following *Wood*, the nonstatutory exemption retains validity in the sports arena.

This article has attempted to assess the nonstatutory labor exemption as developed in the professional sports player restraint cases. That evaluation was guided by reference to the exemption's purpose and the Supreme Court cases that established it. The results of that assessment can be summarized in the following proposed three part test for the nonstatutory labor exemption's application: (1) Does the challenged agreement or term primarily affect only the parties to the collective bargaining relationship? (2) Does it concern a mandatory subject of bargaining? (3) Is the challenged provision embodied in a formal collective bargaining agreement?

The exemption's umbrella should shelter any agreement that satisfies all three standards. This proposed test was derived by assessing the weaknesses of the professional sports cases' analysis. It also reflects and is consistent with Supreme Court precedent on the nonstatutory labor exemption. The test serves the nonstatutory exemption's purpose of promoting collective bargaining while minimizing the frustration of antitrust policy. Although meeting the unique needs of the professional sports industries, it may also be appropriate for other industries as well. The proposed test is also consistent with *Wood*. Even if a court rejected *Wood* and continued to apply the exemption to cases brought by players, agreements concerning player restraints would nearly always satisfy the proposed test.

The primary effect requirement is supported by over forty years of Supreme Court precedent. It serves to protect against union-employer agreements solely intended to injure the employer's competitors. The mandatory subject requirement limits the exemption's protection to agreements over which national labor policy requires collective bargaining. It insures that the nonstatutory labor exemption may apply only when labor policy considerations are very strong.

The formal bargaining agreement requirement insures that the exemption is available only for agreements over which the parties have actually had an opportunity to bargain. No inquiry into the agreement's reasonableness or whether bona fide bargaining has occurred is necessary or desirable. Judicial inquiry into those areas serves only to create practical and legal problems while frustrating the exemption's purpose.

The nonstatutory labor exemption does serve a role in professional sports litigation. That role is changing, however, and should

change even more. Courts should rely on the exemption's primary effect and mandatory subject requirements to refuse protection to unworthy agreements. Courts should not inquire into the bargaining process.

This article also has occasionally considered the possibility that the nonstatutory labor exemption would protect collective bargaining agreements concerning topics other than player restraints. Agreements on topics such as player endorsements, minor leagues, and exhibition games probably concern mandatory bargaining subjects. However, they also have an impact on groups outside the bargaining relationship. The nonstatutory exemption's umbrella may not be expansive enough to protect them.

Agreements on topics such as television rights, ticket prices, revenue allocation, expansion clubs, club relocation, and resale rights for videotaped games are even less likely candidates for the exemption's protection. They impact directly on product markets. They are also likely to injure those not party to the collective bargaining agreement. Television rights and ticket prices may not even be mandatory bargaining subjects. Courts have not needed to address such situations but as professional sports become increasingly commercialized the possibilities increase.

Due to the player cases of the early 1970's and the increasing strength of players' unions, professional athletes are no longer the slaves of their employers. Perhaps player unions have not yet reached the promised land, but they can see it on the horizon.

Accordingly, the nonstatutory labor exemption should not be contorted and mangled to serve notions of fairness that are no longer consistent with reality. The courts should stop trying to call every "ball" and "strike" and let the leagues and players 'play ball'!

Stephen R. McAllister