SUMMARY OF LEGAL ISSUES ARISING IN THE CURRENT NFL LABOR DISPUTE

A White Paper from the Penn State Institute for Sports Law, Policy and Research

Prepared by Stephen F. Ross, Professor of Law and Institute Director

The current forum for resolution of the dispute between the NFL owners and players is the United States District Court for the District of Minnesota, where a class action has been filed by Tom Brady, Peyton Manning, Drew Bress, and others alleging that the NFL owners' conduct constitutes a violation of §1 of the Sherman Act. Most immediately, the players seek injunctive relief against the lockout being imposed by the owners. The complaint also alleges that the Sherman Act prohibits the owners from continuing to operate a variety of labor market rules that had been part of the now-expired collective bargaining agreement between the league and the now-defunct union.

To understand the current dispute requires a basic familiarity with foundational principles of antitrust law as well as a host of precedents that affect the application of the Sherman Act to labor markets generally and to sports leagues in particular. This White Paper focuses on the plaintiffs' desired lockout-banning injunction.

EXECUTIVE SUMMARY

This White Paper elaborates on the following points:

1. The Sherman Act bars unreasonable restraints of trade.
2. The Sherman Act applies to agreements among employers to restrain trade in labor markets.
3. The Rule of Reason is a Workable General Standard that Applies in a Straight-forward Way to Sports League Restraints
4. The Sherman Act's Rule of Reason Applies to Sports Leagues.
5. The Labor Exemption Does Not Continue to Protect Otherwise Unreasonable Restraints of Trade When Workers Choose to Forego Collective Bargaining.
6. An Agreement Among NFL Owners to Lockout Players Constitutes an Unreasonable Restraint of Trade
7. Allowing owners to lock out players will constitute irreparable harm and should be enjoined.

1. The Sherman Act bars unreasonable restraints of trade.

By its terms, the Sherman Act proscribes "every contract, combination ... or conspiracy, in restraint of trade or commerce among the several states." But the Supreme Court has recognized that Congress did not intend this prohibition literally, for any "agreement concerning trade, every regulation of trade, restrains." *Chicago Bd. of Trade v. United States*, 246 U.s. 231, 238 (1918). Rather, the presumptive standard that courts use is the "Rule of Reason" which examines "whether the restrain imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Ibid.*

The Supreme Court has been almost completely steadfast in rejecting arguments that certain industries should not be scrutinized under §1, or that the Rule of Reason needs to be modified to meet the characteristics and needs of particular industries. For example, in *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940), rival oil companies had all agreed to purchase "distress" oil sold by small refiners; the agreement had the purpose and effect of propping up the price of gasoline. The defendants claimed that their conduct was "reasonable" in the broad sense of an appropriate way to deal with the need to deal with conditions during the Great Depression, the lack of adequate storage facilities that resulted in sales below the cost of production, and other concerns. Directly confronting the defendants claims that the agreements were necessary to avoid "ruinous competition," the Court unequivocally stated: "Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price-fixing." *Ibid.* at 221. Congress "has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive" but the Sherman Act was "applicable to all industries alike." *Ibid.* at 222.

2. The Sherman Act applies to agreements among employers to restrain trade in labor markets.

The Court has also unequivocally rejected arguments that the Sherman Act does not apply to competitor agreements as buyers, or with regard to labor markets. It wrote that the Act "is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1947). Two decades earlier, the Court had readily applied the Sherman Act to condemn a system of employment registration employed by virtually all Pacific Coast shipowners. *Anderson v. Shipowners Ass'n*, 272 U.S. 359 (1926).

An argument to the contrary could be based on the literal language of §6 of the Clayton Act, which provides that "the labor of a human being is not a commodity or article of commerce." Because §1 of the Sherman Act only applies to restraints of trade in interstate commerce, this language could be read to remove labor market restraints from Sherman Act scrutiny. The court of appeals in the landmark case of *Mackey v NFL*, 543 F. 2d 606, 617-18 (8th Cir. 1976) rejected this argument:

> On the surface, the language relied on by defendants lends merit to the defense. However, we cannot overlook the context in which the language arose. Section 6 of the Clayton Act was enacted for the benefit of unions to exempt certain of their activities from the antitrust laws after courts had applied the Sherman Act to legitimate labor activities.... In [*Apex Hosiery v. Leader*, 310 U.S. 469 (1940)], the Court condoned restrictions on competition for employee services imposed by the employees themselves, not by employers.
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> In other cases concerning professional sports, courts have not hesitated to apply the Sherman Act to club owner imposed restraints on competition for players' services.... In other contexts, courts have subjected similar employer imposed restraints to the scrutiny of the antitrust laws. We hold that restraints on competition within the market for players' services fall within the ambit of the Sherman Act.

3. The Rule of Reason is a Workable General Standard that Applies in a Straight-forward Way to Sports League Restraints

The Rule of Reason that is applied to agreements among competitors has remained remarkably constant for over a century. In perhaps the most cited antitrust opinion ever, Judge William Howard Taft (later President and Chief Justice) initially interpreted the language in §1 to make criminal and tortious (thus allowing victims to sue) those contracts in restraint of trade that the common law had rendered void and unenforceable as between the parties. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 278-79 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). Taft then held that the common law permitted parties to restrain trade if the agreement was ancillary to a legitimate purpose, and reasonably necessary to carry out that purpose. *Id.* at 283.

The Supreme Court has, in effect, applied the *Addyston Pipe* test in setting forth a three-part inquiry in applying the rule of reason to sports leagues. To establish a violation, the plaintiff must first establish that the restraint has significantly restrained competition, typically by showing that the restraint had affected price or output or that output is "unresponsive to consumer preference." *NCAA v. Board of Regents*, 468 U.S. 85, 107 (1984). Not all restraints are unreasonable: the defendant can justify a restraint by showing that the league's justification are (a) legitimate and (b) reasonably necessary to achieve the league's legitimate goals. *Id.* at 102-03.

This approach was actually tried in litigation the last time the NFL players chose to give up their labor law rights to collectively bargain and insist on free market competition regulated by the Sherman Act. *McNeil v. NFL*, 1992-2 Trad Cas. (CCH) ¶ 69, 982 (D. Minn. 1992), involved a challenge to an NFL rule that precluded competition for the services of 37 players for each team, while allowing other players to freely sign with other teams. Following the court's instructions, the jury determined first that the rule substantially harmed competition (lower salaries than would exist in a free market). Next, a special verdict found that the NFL could legitimately restrict trade to provide "sufficiently comparable player strength that football fans will be in enough doubt about the probable outcome of each game and of the various division races that they will be interested in watching the games." However, the specific rule was found illegal as being overly restrictive.

4. The Sherman Act's Rule of Reason Applies to Sports Leagues.

Notwithstanding *Socony-Vacuum*'s teaching that the Sherman Act applies to all industries, the Supreme Court in *Toolson v. New York Yankees*, 346 U.S. 356 (1953), held that the antitrust laws did not apply to baseball. The court had earlier found that baseball was not interstate commerce, but the concept of interstate commerce had significantly expanded in the intervening years. Nonetheless, the Court found that

> Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation.

Ibid. at 357.

However, in *Radovich v. National Football League*, 352 U.S. 445 (1957), the Court refused to extend the baseball exemption to any other sports. It concluded that if writing on a clean slate, the Court would not have continued the exemption, but refused to extend it further. Fifteen years later, the Court recognize that the baseball exemption was "an exception and an anomaly." *Flood v. Kuhn*, 407 U.S. 258, 282 (1973).

The notion that the rule of reason should not apply to sports has been taken quite seriously by government officials. After *Radovich*, the House Judiciary Committee sought to clarify the state of the law by enacting legislation that would have applied a special rule of reason to all professional sports. A majority of representatives, however, voted to replace this proposal with one effectively granting sports an immunity from antitrust scrutiny. The principal argument was that sports leagues should not be subject to the expense and uncertainty of testing their rules under a standard subject to private antitrust litigation. However, this bill was killed in the Senate. (A similar bill was enacted by the Senate in 1965 and killed in the House.)

Just recently, sports leagues argued that the inherent economic interdependence among sports leagues meant that §1 of the Sherman Act should not apply to them, because sports leagues were effectively "single entities", like corporations, incapable of restraining trade through agreement. This argument was unanimously rejected by the Supreme Court in *American Needle v. NFL*, 130 S.Ct. 2201 (2010). The Court observed that sports league rules were not adopted by a single decisionmaker, but rather by club owners pursuing their own independent goals. (For an economic analysis of the current labor dispute that suggests that this is precisely the problem today, see the accompanying White Paper.)

5. The Labor Exemption Does Not Continue to Protect Otherwise Unreasonable Restraints of Trade When Workers Choose to Forego Collective Bargaining.

Thus far, we have seen that the antitrust laws apply to all industries, including labor markets where players are 'sellers' of their athletic services and league owners are 'buyers.' Perceiving that in many industries, the scales of a free market would be unduly tipped toward management and against labor, Congress enacted several provisions to rebalance the scales. First, §6 of the Clayton Act declared that collective action on behalf of workers by unions was *not* actionable as a restraint of trade (even though otherwise the joint refusal to provide services to an employer is illegal. *See, e.g., FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990).) Second, the National Labor Relations Act granted workers the right to form unions and to collectively bargain with management free of coercion or unfair labor practices, rights

enforceable by an independent agency, the National Labor Relations Board. One of the options available to management and labor is to engage in "multi-employer bargaining," when many or all employers jointly agree with the union on industry-wide labor standards.

Litigation challenging multi-employer collective bargains as unreasonable restraints of trade among competing employers posed a conflict between the antitrust and labor laws, because §6 has been construed to only exempt unions and their workers. A sharply divided Supreme Court wrestled with this issue in *Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.,* 381 U.S. 676 (1966), involving a challenge to a bargain that barred the sale of meat after 6:00 p.m. in Chicagoland supermarkets. Three justices, in an opinion by Justice Douglas, would have found the bargain to be illegal under the antitrust laws, holding that antitrust concerns trumped labor concerns. Three justices, in an opinion by Justice Goldberg, would have found any agreement between union and management on terms about which the parties were required to bargain under the NLRA to be exempt from antitrust scrutiny. (Justice Goldberg, formerly counsel to the Steelworkers' Union and President Kennedy's Secretary of Labor, detailed the historical use of antitrust laws to harm unions and workers.) Justice White's decisive opinion (for himself and two other Justices) took a middle ground. This oft cited passage explains the plurality's view on the scope of the exemption:

> Thus the issue in this case is whether the marketing hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions [mandatory subjects of collective bargaining under the NLRA] that the union's successful attempt to obtain that provision through bona fide, arms' length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with non labor groups, falls within the protection of the National Labor Policy and is therefore exempt from the Sherman Act.

381 U.S. at 689-90.

Because of the inherent give-and-take of collective bargaining, courts in sports contexts have held that the specific provision at issue need not be sought by the union; rather, as long as the entire bargain was agreed upon, all of it was protected by the so-called "non-statutory labor exemption." *See McCourt v. California Sports, Inc.,* 600 F.2d 1193 (6th Cir. 1979); *Wood v. NBA*, 809 F.2d 954 (2d Cir. 1987). (Note: the Supreme Court has made it clear that the exemption does NOT protect labor-management agreements where the anticompetitive effect is not in the labor market but rather in excluding other rivals to management. This has been applied in the sports context in *Philadelphia World Hockey Club v. Philadelphia Hockey Club,* 351 F.Supp. 462 (E.D.Pa.1972), where a provision in the NHL collective bargaining agreement barring players from jumping to a rival league for three years was struck down.)

In general, and certainly in the sporting context, the *Jewel Tea* accommodation between antitrust and labor law seems sensible, because consumers (sports fans) prize industrial peace and the lack of disrupted seasons far more than any particular labor term and its affect on fan interest. Thus, even if players and owners agree on a scheme that actually makes the competition

less attractive,[*] fans prefer a somewhat less-attractive season to no season at all.

In *Brown v. Pro-Football, Inc.*, 518 U.S. 231 (1996), the Supreme Court reasoned that to full protect society's interest in collective bargains, it was necessary to extend the *Jewel Tea* accommodation further, to cover any management agreement entered into in the context of collective bargaining, including those in expired agreements or those imposed by management under NLRB guidelines after a contract had expired and the parties had negotiated in good faith to impasse. As labor law expert and Circuit Judge Harry Edwards explained in the decision below that was affirmed in *Brown*,

> Thus, once collective bargaining begins, the Sherman Act paradigm of a perfectly competitive market necessarily is replaced by the NLRA paradigm of organized negotiation--a paradigm that itself contemplates collusive activity on the parts of both employees and employers. Stubborn adherence to antitrust principles in such a market can only result in "a wholesale subversion" of federal labor policy.

50 F.3d at 1055.

> In our view, the nonstatutory labor exemption requires employees involved in a labor dispute to choose whether to invoke the protections of the NLRA or the Sherman Act. If employees wish to seek the protections of the Sherman Act, they may forego unionization or even decertify their unions. We note that the NFL players took exactly this latter step after the Eighth Circuit's *Powell* decision. Decertification also occurs when newly organized unions are unable to negotiate their first contract. We do not mean to encourage this practice, but we believe that employees, like all other economic actors, must make choices. If they choose to avail themselves of the advantages of the collective bargaining process, their protections are as defined by the federal labor laws. The system established by those statutes offers employees many benefits: recognition of organized workers as a bargaining unit, thereby giving them bargaining strength; establishment of mandatory subjects of bargaining; protection of the right to strike; allowance for the possibility of negotiated grievance procedures and pooled benefit plans; and judicial enforcement of collective bargaining agreements. Further, it establishes a significant list of employer actions that, if taken, constitute unfair labor practices for which employees and unions may seek redress before the NLRB. However, under the system established by the federal labor laws, employees win concessions not by filing antitrust lawsuits, but with shrewd bargaining, favorable grievance settlements, victories in arbitration, and, when necessary, by striking.

Id. at 1057.

Justice Breyer's Supreme Court opinion echoes and cited Judge Edwards on this basis, although with language that could be read for either side of the dispute. The court concluded:

> Our holding is not intended to insulate from antitrust review every joint imposition of terms by employers, for an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process. *See, e.g.*, [Judge Edwards' decision], 50 F.3d, at 1057 (suggesting that exemption lasts until collapse of the collective-bargaining relationship, as evidenced by decertification of the union); *El Cerrito Mill & Lumber Co.*, 316 N. L. R. B., at

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[*] For an argument that the NHL salary cap, agreed to by the players after a lengthy lockout, hurts fans by actually harming competitive balance, see Stephen F. Ross, *The NHL Labour Dispute and the Common Law, the Competition Act, and Public Policy*, 37 U.B.C. L. Rev. 343 (2004)

> 1006-1007 (suggesting that "extremely long" impasse, accompanied by "instability" or "defunctness" of multiemployer unit, might justify union withdrawal from group bargaining). We need not decide in this case whether, or where, within these extreme outer boundaries to draw that line. Nor would it be appropriate for us to do so without the detailed views of the Board, to whose "specialized judgment" Congress "intended to leave" many of the "inevitable questions concerning multiemployer bargaining bound to arise in the future." *Buffalo Linen*, 353 U.S. at 96 (internal quotation marks omitted); see also *Jewel Tea*, 381 U.S. at 710, n. 18.

518 U.S. at 250.

An accommodation of antitrust and labor principles might well suggest that an NLRB-determined policy would require an "extremely long" impasse before allowing a union that started a negotiating cycle with management to decertify. Or the NLRB might find that the free choice principles that underlie the NLRA permit workers to choose, at any time in the process, that they would prefer the free market to collective bargaining. Short of an NLRB declaration that it is an unfair labor practice to begin negotiations and then decertify, antitrust courts have no reason not to insist that consumers be protected from the disruption and competition-deadening effects of employer agreements that no longer arise out of collective bargaining.

6. An Agreement Among NFL Owners to Lockout Players Constitutes an Unreasonable Restraint of Trade

As detailed in an accompanying White Paper, the dispute between players and owners centers around the owners desire to maintain the basic system of labor restraints that have prevailed since the mid-90s (draft, free agency limits on younger and star players, salary floor and cap), but with a lower salary cap and the cost savings invested in increased revenue sharing. The legality of this system under antitrust laws is beyond the scope of this White Paper. Whatever the merits or demerits of the underlying proposal, it seems clear that, if one accepts points ##1-5 above, an agreement to refuse to play football unless non-unionized players agree to these terms constitutes an unreasonable restraint of trade.[**]

By agreeing to shut down [***caveat:*** the situation would be different if the NFL owners agreed to shut down the "NFL" but owners were free to individually decide whether to form a new league or play other teams in a replacement season], the NFL owners have clearly agreed to a scheme that will significantly reduce output and render output unresponsive to consumer demand, which the Supreme Court has declared to be "hallmarks" of an antitrust violation. *NCAA v. Board of Regents*, 468 U.S. at 113. Years ago, the Court made clear that parties cannot agree to conspire to use their joint economic power to restrain trade, simply because the underlying goal might be legitimate and desirable. *United States v. Paramount Famous Lasky Corp.*, 282 U.S. 30 (1930) (agreement among motion picture distributors to insist that theater owners agree to commercial arbitration of disputes).

[**] As a separate matter enforceable by the NLRB, an effort to lockout players in order to force them to organize as a union, so that the labor exemption would then preclude antitrust scrutiny, is an unfair labor practice in violation of the NLRA.

7. Allowing owners to lock out players will constitute irreparable harm and should be enjoined.

Dating back to ancient England, the initial relief that injured parties could seek from the common law was a writ for money damages to compensate them for injuries. In many cases, justice was not served by the limited writs available to the common law, so the Lord Chancellor began to grant "equitable relief." This tradition continues today, in the principle that an injunction order a party to act or refrain from acting can only be issued upon a showing that the victim will suffer irreparable harm and cannot be adequately compensated by a jury verdict of money damages.

This is a fact-based inquiry, and the courts in Minnesota may well find that an injunction is not necessary, either currently (after all the season is several months away) or ever.

An interesting angle, which may or may not be considered in *Brady v. NFL*, is the public interest. Whether or not NFL players can be adequately compensated by a treble-damage jury verdict, sports fans will clearly suffer irreparable harm. There is no adequate way to provide money to compensate NFL fans for losing a significant part of the season. (Other consumers of NFL entertainment, like sports bars who pay special high prices for NFL Sunday Ticket, may or may not be able to establish sufficient money damages.) This suggests that, if the courts were to deny relief to Tom Brady and his class, a consumer group might file a companion suit and be able to prevail.