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FREE AGENCY LITIGATION
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Jeffrey Pash
Covington & Burling

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INTRODUCTION: Although the issue of free agency has been litigated in both football and other sports over the past two decades, McNeil v. NFL is the first case in which these issues were tried to a jury. It is certainly one of the most important sports cases ever, although its significance is lessened somewhat because no appellate court will apparently ever review the case.

This paper is intended to outline the free agency issue in the National Football League and the key issues litigated in the McNeil case. Of necessity, it is summary in nature and does not explore in depth each of the legal and factual questions litigated over the past five years.

I. PRINCIPAL DEVELOPMENTS LEADING TO THE McNEIL LITIGATION

A. The Rozelle Rule, the Mackey Case, and Collective Bargaining in the 1970s

In 1963, NFL Commissioner Pete Rozelle introduced a system of free agent compensation which came to be known as the "Rozelle Rule." The purpose of the Rozelle Rule was not to prohibit or restrict free agent movement, but instead to ensure that teams losing free agents were fairly compensated by the team acquiring the player, thereby preserving the competitiveness of both teams and the overall competitive balance of the League. Under the Rozelle Rule, when a free agent moved to a new club, the club acquiring the player and the club losing the player were to attempt to agree on compensation, as in a trade. Only when the two clubs were unable to agree would the matter be referred to

the Commissioner, who would determine equitable compensation in the form of players, draft choices, or both.

In 1972, a group of players (led by John Mackey) brought an antitrust challenge to the Rozelle Rule. See Mackey v. NFL, 407 F. Supp. 1000 (D. Minn. 1975), aff'd, 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977). Although concluding that the Rozelle Rule violated Section 1 of the Sherman Act, 15 U.S.C. § 1 (1988), the appellate court ruling established several important legal principles that fostered a negotiated resolution of the free agency issue. Most significantly, the Eighth Circuit, recognizing "the unique nature of the business of professional football," rejected the per se rule of illegality in favor of the rule of reason and held that the issue of free agency was a mandatory subject of bargaining to be addressed in negotiations between labor and management. 543 F.2d at 615, 618-20. The Court of Appeals also confirmed that the NFL has a "strong and unique interest in maintaining competitive balance among its teams" and that collective bargaining is the best means for achieving a proper balance between competing interests of players and clubs. Id. at 620-23.

In the wake of the Mackey ruling, the parties negotiated a new collective bargaining agreement that replaced the Rozelle Rule with a system of free agent compensation known as the "first refusal/compensation

system." This system, which was twice agreed to by the NFL Players Association ("NFLPA") in collective bargaining, introduced the new requirement of "qualifying offers," under which NFL teams were required to offer contracts to players at salary levels agreed to by the Union in order to retain first refusal or compensation rights. If a qualifying offer was made, the player's old club had a right to match any offer made to the player by another team (the "first refusal" right). If the old club elected to match an offer, it would retain the player's services under the same terms as had been agreed upon by the player and the new team. If, on the other hand, the old club elected not to match it, it was entitled to "compensation" in the form of draft choices. The number and quality of the draft choices depended on several factors, the most important of which was the player's salary with the new team. The precise levels of compensation were determined in collective bargaining.

The new system was submitted to the District Court in Minnesota as part of a class action settlement in 1977. See Alexander v. NFL, 1977-1 Trade Cas. (CCH) ¶ 61,730 (D. Minn. 1977.) In approving the settlement, the Court noted that the new system "fundamentally modifie[d] the Rozelle Rule," that it "represent[ed] a new and unique approach to the transfer of 'veteran free agent' players within the NFL[,]" and that the "revised form of compensation rule meets the criticisms leveled at the [Rozelle Rule] by the

NFLPA and by the Eighth Circuit." 1977-1 Trade Cas. (CCH) ¶ 61,730 at pp. 72,997, 72,999 (Findings 3.27, 3.42, 3.43). The District Court's approval of the settlement was affirmed by the Eighth Circuit. Reynolds v. NFL, 584 F.2d 280 (8th Cir. 1978).[1/]

The players predicted -- correctly -- that the 1977 Agreement would significantly raise salaries for virtually all NFL players. The 1977 Agreement expired in 1982.

B. Collective Bargaining in the 1980s

In 1982, the NFL and the NFLPA sought to negotiate a new collective bargaining agreement to take effect upon the expiration of the 1977 CBA. The players sought not free agency, but instead a guaranteed percentage of the clubs' gross revenues for player salaries and benefits. The Union leadership believed that free agency would primarily benefit the top NFL players and would do little to improve salaries or working conditions for most players. Indeed, Union president Gene Upshaw testified in 1981 that baseball-style free agency would "never be a goal" of the NFLPA."

[1/] In the McNeil trial, plaintiffs' witnesses testified that the NFLPA accepted the first refusal/compensation system in 1977 because the Union was virtually bankrupt and therefore unable to bargain effectively. This contention cannot be reconciled with the representations made by NFLPA counsel in 1977 that the NFLPA bargained for the final agreement from a "position of legal, financial, and economic strength and solidarity." Brief of Appellees Kermit Alexander, et al. in Reynolds v. NFL, Eighth Cir. Nos. 77-1753, 77-1758, and 77-1821 at 8.

Following a strike that shut down the NFL for seven weeks, the parties reached agreement on a new CBA. The 1982 Agreement included a revised and liberalized first refusal/compensation system, improved benefits and, for the first time, a guarantee that the clubs would spend at least a particular amount ($1.28 billion) on player salaries and benefits over the term of the Agreement. The 1982 Agreement expired immediately prior to the 1987 season.

Efforts in 1987 to negotiate a new collective bargaining agreement were unsuccessful, and the Union again called a strike. Unlike in 1982, the clubs in 1987 did not suspend operations but instead fielded replacement teams. The strike lasted just over three weeks, with the players returning to work without a new agreement.

C. <u>The Powell Litigation</u>

Immediately following the end of the players' strike, the NFLPA and a group of players filed a class action suit in the District of Minnesota called <u>Powell</u> v. <u>NFL</u>. <u>Powell</u> was a broad-based antitrust attack on virtually every aspect of the NFL's player-employment system, including the college draft, the first refusal/compensation system, and the standard player contract.

A threshold issue in <u>Powell</u> was the scope and applicability of the non-statutory labor exemption to the antitrust laws. In <u>Mackey</u>, the Eighth Circuit had set forth

the essential prerequisites for the labor exemption, holding that the employment terms sought to be exempted must

> (i) affect only the parties to the employment relationship (i.e., the restraint must be limited to the labor market);
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> (ii) involve a mandatory subject of bargaining (i.e., wages, hours, or other terms and conditions of employment); and
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> (iii) have been reached after bona fide, arms'-length bargaining.

543 F.2d at 614. The Mackey court specifically reserved the question of when the labor exemption expired (id. at 616, n.18), and it was this question that the District Court first addressed in Powell.

At the outset, the District Court held that the terms and conditions of employment in the NFL qualified for the exemption from antitrust scrutiny because the 1982 CBA satisfied each of the Mackey tests. 678 F. Supp. 777, 784 (D. Minn. 1988). It went on to hold that the labor exemption survived the expiration of the bargaining agreement. The Court based its holding at least in part on the recognition that employers are required to maintain the status quo following the expiration of a bargaining agreement. Powell, 678 F. Supp. at 785, citing NLRB v. Cone Mills Corp., 373 F.2d 595, 598 (4th Cir. 1967); Hinson v. NLRB, 428 F.2d 133, 137-38 (8th Cir. 1970). The Powell court held that the exemption instead expired as to a particular issue when the parties reached a bargaining

impasse as to that issue. 678 F. Supp. at 788. Thus, once the clubs and the Union were at impasse over the issue of free agency, the labor exemption would end and the clubs would be subject to treble damages liability.[2/]

There were many difficulties with the District Court's impasse decision, not the least of which being that it penalized employers for bargaining to impasse, an entirely lawful act under the labor laws.[3/] On interlocutory appeal, the Eighth Circuit in 1989 reversed the District Court's holding and instead held that the labor exemption protected terms and conditions of employment "conceived in an ongoing collective bargaining relationship." 930 F.2d at 1303. This holding not only exempted the clubs' continued adherence to the first

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[2/] Two other district courts have addressed the question of when the exemption expires and have reached different conclusions. In Bridgeman v. National Basketball Association, 675 F. Supp. 960 (D.N.J. 1987), the District Court rejected an impasse standard and held that the labor exemption continued so long as the employer "reasonably believes that the practice or a close variant of it will be incorporated in the next collective bargaining agreement." 675 F. Supp. at 967. In Brown v. Pro Football, 782 F. Supp. 125, 131-32 (D.D.C. 1991), the District Court adopted the standard urged by the plaintiffs in that case and in Powell, and held that the labor exemption expired immediately upon expiration of the relevant collective bargaining agreement.

[3/] In addition, the ruling threatened further collective bargaining in that it encouraged the Union to declare an impasse and to decline to bargain thereafter. The NFLPA first claimed that a bargaining impasse existed the first business day following the District Court's initial decision. The District Court subsequently found a bargaining impasse in mid-June 1988, but denied a preliminary injunction. Powell v. NFL, 690 F.2d 812, 818-19 (D. Minn. 1988).

refusal/compensation system, but also their implementation in 1989 of a new free agency system known as "Plan B." The Supreme Court denied a petition for certiorari in January 1991. 111 S. Ct. 711 (1991).

D. The Implementation of Plan B

In the Fall of 1988, the clubs made two alternative proposals to the NFLPA to settle the ongoing labor dispute. The first, "Proposal A," involved significant increases in benefits and maintenance of a revised first refusal/compensation system. The second, "Proposal B," granted unrestricted free agency to a significant number of players each year while freezing benefit levels in place. The Union rejected both proposals in order to preserve its litigation position that there existed a bargaining impasse, and on February 1, 1989, the NFL clubs implemented a modified form of Proposal B.

As implemented, each club would be able to "protect" 37 of its approximately 55 players. The remaining players, regardless of their contractual status, were complete free agents who were eligible to sign a contract with any other NFL club, with the old club holding no rights of first refusal or compensation. Most of the 37 protected players were already under contract for the following year, so their status as protected players was essentially irrelevant. Approximately 10 players per team were protected free agents, and those players were subject to the

first refusal/compensation system. Thus, Plan B restricted significantly fewer players than did the first refusal/compensation system. (NFL Ex. 908.) A motion by the players to enjoin Plan B was denied by the District Court in March 1989. Powell v. NFL, slip opinion of March 24, 1989.

During the 1989-92 seasons, over 1800 NFL players became unrestricted free agents under Plan B, hundreds of whom changed teams. This is by far the most extensive free agent movement in any sport. (NFL Ex. 912.)

II. THE McNEIL LITIGATION

The McNeil suit was filed in federal district court in New Jersey in April 1990. The case was subsequently transferred to Minnesota. It was not a class action but was instead brought by eight individual players.[4/] Unlike Powell, McNeil was not a broad-scale attack on the NFL player system, but was instead limited to the Plan B first refusal/compensation system. Each of the McNeil plaintiffs had been a protected free agent in 1990 and was therefore subject to that system. None had moved to a new team, and each testified that he had received no offers from other teams.

[4/] The plaintiffs were Mark Collins, Irv Eatman, Don Majkowski, Tim McDonald, Freeman McNeil, Niko Noga, David Richards and Lee Rouson. Shortly after the complaint was filed, Mr. Eatman dismissed his claim and was later replaced by Frank Minnifield.

The McNeil case was tried during the Summer of 1992. Responding on a special verdict form, the jury held both that the Plan B first refusal/compensation significantly restricted competition for players services and significantly contributed to competitive balance within the NFL.

The jury went on to hold that the procompetitive benefits attributable to the Plan B system could be achieved by less restrictive means and that at least some of the plaintiffs had been injured by the system. The jury awarded damages to four of the eight plaintiffs: Messrs. Collins, Minnifield, Richards and Rouson. No damages were awarded to Messrs. Majkowski, McDonald, McNeil and Noga. (See Special Verdict Form.)

A. The Labor Issue In McNeil

As in Powell, the applicability of the non-statutory labor exemption was a threshold issue in McNeil. Following the Eighth Circuit's decision in Powell, the NFLPA decided to "abandon" collective bargaining and "begin the decertification process." The purpose of doing so was to attempt to avoid the Eighth Circuit's opinion by terminating the collective bargaining relationship. Following the transfer of the McNeil case to Minneapolis, the McNeil plaintiffs sought summary judgment on this issue, arguing that the NFLPA's conduct had effectively ended the labor relationship and thereby terminated the labor exemption.

The District Court granted summary judgment in May 1991, Powell v. NFL, 764 F. Supp. 1351 (D. Minn. 1991), and the Eighth Circuit declined the NFL's petition for interlocutory appeal a short time later.

In ruling on plaintiffs' summary judgment motion, the District Court had before it conflicting evidence concerning the intent of the Union in abandoning its bargaining rights. This issue of intent is important because federal labor law establishes that a union's mere statement or disclaimer of bargaining rights is not sufficient by itself to end the bargaining relationship. Instead, what is requested is a detailed fact-based inquiry into the Union's motives and the facts and circumstances surrounding the disclaimer. Only when a disclaimer is "unequivocal and . . . made in good faith" will it be deemed effective. Retail Associates, Inc., 120 N.L.R.B. 388, 391-92 (1958). In numerous cases, the NLRB has found a disclaimer ineffective after conducting the required inquiry. See, e.g., Rochelle's Restaurant, 152 N.L.R.B. 1401, 1402-03 (1965); Retail Associates, 120 N.L.R.B. at 392-93.

In McNeil, there were significant factual disputes concerning the NFLPA's alleged disclaimer which were recognized by the District Court, but improperly resolved on summary judgment. The evidence presented by the NFL showed that the disclaimer at least arguably was a sham and that

the Union had engaged in conduct inconsistent with the alleged disclaimer. For example

- The NFLPA never decertified and has at all times remained the exclusive bargaining agent for NFL players. More importantly, Union officials acknowledged that the decision not to decertify was intentional and was motivated by the recognition that not formally decertifying would allow the NFLPA to more easily resume formal collective bargaining at a later time. (Depositions of NFLPA Player Directors Warren Moon and Brian Noble.)

- The NFLPA's newly-enacted bylaws, which purported to preclude it from engaging in collective bargaining, provided for amendment of its provisions -- including the ban on bargaining -- by a simple majority vote of the 28 Player Directors. (Deposition of NFLPA President Michael Kenn.)

- Several NFLPA Player Directors, as well as NFL players, testified that the decision to decertify the Union was a tactic designed to improve the players' leverage in bargaining for a new collective bargaining agreement. (Depositions of Steve Bono, Tunch Ilkin, Warren Moon; Declarations of Dean Hamel, Reggie Williams.)

- Although the Union collected player signatures on petitions that supposedly sought an end to the NFLPA's collective bargaining role, those petitions were never filed with the NLRB. In addition, NFL players were advised that NBA players had engaged in a similar tactic in 1987-88 in an effort to secure improved terms in collective bargaining with the NBA. (Depositions of Player Directors Warren Moon, Gary Reasons.)

- The NFLPA continued to take an active role in player salary negotiations and, through retained counsel, in grievance arbitration

proceedings. (Depositions of Michael Duberstein, Gary Reasons.) In other respects, NFLPA activity before and after the alleged disclaimer was virtually indistinguishable. (Depositions of Michael Kenn, Karl Mecklenburg.)

- Top Union executives confirmed that the litigation settlement they sought "could mirror a collective bargaining agreement" and would address such issues as "pension, severance, . . . meal money, days off, all the things that pertain to the previous collective bargaining agreement." (Depositions of Gene Upshaw, Gary Reasons.) Similar statements were made by Mr. Upshaw following the McNeil verdict.

Faced with this and other evidence rebutting the Union's alleged disclaimer, the District Court nonetheless granted summary judgment in favor of the McNeil plaintiffs and struck the NFL's labor exemption defense. At the same time, recognizing the "substantial ground for difference of opinion," the Court certified the issue for interlocutory review. 764 F. Supp. at 1360.

B. The Antitrust Issues

1. The Nature of the League Relationship.

The McNeil and Powell cases were brought under Section 1 of the Sherman Act, which prohibits combinations in restraint of trade. One important issue that was really not addressed in McNeil is the extent to which the conspiracy provisions of Section 1 are applicable to sports leagues. The District Court in McNeil declined to submit this issue to the jury, holding as a matter of law that the

NFL clubs "are not a single economic entity." McNeil v. NFL, 790 F. Supp. 871, 880 (D. Minn. 1992).

A sports league is a unique form of business enterprise. Although composed of a number of separately-owned teams, it is much more akin to a partnership or joint venture. The NFL member clubs jointly produce a single entertainment product, NFL football. The production and sale of this product -- which requires joint action -- is the sole business of the clubs and the only reason for their existence.[5] In producing their common entertainment product, the clubs do not act as ordinary business competitors, as every appellate court to consider the question has found. See, e.g., Los Angeles Memorial Coliseum Comm'n v. NFL, 726 F.2d 1381, 1391 (9th Cir.) ("[T]he NFL clubs are not true competitors, nor can they be."), cert. denied, 469 U.S. 990 (1984); Smith v. Pro Football, Inc., 593 F.2d 1173, 1178-79 (D.C. Cir. 1978) ("NFL clubs . . . are not competitors in any economic sense."); North American Soccer League, 670 F.2d 1249, 1251 (2d Cir.) ("there is a great deal of economic interdependence among the clubs comprising a league"), cert. denied, 459 U.S. 1074 (1982); see also Levin v. National Basketball Ass'n, 385 F. Supp. 149, 152 (S.D.N.Y. 1974) (referring to the NBA as a "partnership" or "co-partnership").

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[5] Robert H. Bork, The Antitrust Paradox, 278-79 (1978) (a sports league is best viewed as a single firm since its activities can only be carried out jointly).

The clubs vigorously compete on the football field, but such athletic competition is very different from business competition. In a business sense, the clubs collectively generate revenues -- more than 90 percent of which are shared.[6] The purpose of such extensive revenue sharing is to reduce the financial disparities experienced by the clubs and thereby partially to offset the disadvantage some clubs experience by being in a smaller market. J. Weistart & C. Lowell, The Law of Sports, § 5.11 at 700-01 (1979).

Properly viewed, the member clubs of a sports league are not horizontal business competitors to whom the conspiracy principles of Section 1 should be applied. As one court explained nearly 30 years ago,

> Professional teams in a league . . . must not compete too well with each other in a business way. On the playing field, of course, they must compete as hard as they can all the time. But it is not necessary and indeed it is unwise for all the teams to compete as hard as they can against each other in a business way. If all the teams should compete as hard as they can in a business way, the stronger teams would be likely to drive the weaker ones into financial failure. If this should happen not only would the weaker teams

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[6] The NFL negotiates league-wide television contracts, and the teams share equally the revenues derived from the sale of television rights. Gate receipts are shared on a 60/40 basis between the two competing teams, with the home team receiving a slightly larger portion to defray game expenses and provide an incentive to promote the game in the local area. Revenues from the sale of licensed merchandise and films are also shared equally.

> fail, but eventually the whole league, both the weaker and the stronger teams, would fail, because without a league no team can operate profitably.[7/]

United States v. NFL, 116 F. Supp. 319, 323 (E.D. Pa. 1953).

Although courts have in the past rejected the contention that a sports league is akin to a partnership or single entity, no court has considered the issue since the Supreme Court's decision in Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

In Copperweld, the Supreme Court articulated a single enterprise analysis that focused on economic realities and the substance of business relationships as distinct from pure questions of corporate form. That decision cast aside discredited "intra-enterprise conspiracy" concepts in the context of a parent company and its wholly-owned subsidiary. But the Court's analytical approach was really much more far-reaching, as the Eighth Circuit has explained:

> [T]he logic of Copperweld reaches beyond its bare result, and it is the reasoning of the Court, not just the particular facts before it, that must guide our determination . . . . The thrust of the [Copperweld] holding is that economic reality, not corporate form, should

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7/ See generally M. Grauer, The Use and Misuse of the Term "Consumer Welfare": Once More to the Mat on the Issue of Single Entity Status for Sports Leagues Under § 1 of the Sherman Act, 64 Tul. L. Rev. 71, 79-91 (1989); M. Grauer, Recognition of the NFL as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model, 82 Mich. L. Rev. 1, 19, 23-25 (1983).

control the decision of whether related entities can conspire.

City of Mount Pleasant v. Associated Electric Coop., Inc., 838 F.2d 268, 274 (8th Cir. 1988); see also Pink Supply Corp. v. Hiebert, 788 F.2d 1313, 1317 (8th Cir. 1986).

2. The Per Se or Rule of Reason Standard

If Section 1 is found to apply to a sports league's operations, a decision must be made as to the legal standard under which league operations will be evaluated. The McNeil plaintiffs argued for a per se rule that would have precluded defendants from making any showing of the procompetitive effects of the rule. No appellate court has approved use of such a per se standard in the context of sports leagues, and the District Court properly rejected plaintiffs' effort in favor of a rule of reason test. McNeil, 790 F. Supp. at 896-97.

C. Plan B and the Rule of Reason

1. The Issue of Competitive Balance

The NFL's principal rule of reason defense was that Plan B promoted competitive balance within the NFL and thereby improved the quality and attractiveness of the League's entertainment product. The jury in McNeil found that the first refusal/compensation system significantly contributed to competitive balance in the NFL. Under the District Court's instructions, the defendants had the burden of proof on this issue.

The relevance of competitive balance has been frequently recognized by courts, as has the relationship of competitive balance and player movement. In Mackey, the Eighth Circuit plainly accepted competitive balance as a legitimate basis for a system to govern veteran player movement, but simply held that the Rozelle Rule was too restrictive. Two years later, in Reynolds, 584 F.2d at 287, the Court held that

> [C]omplete, unrestricted movement from club to club, [with players] offering their services to the highest bidder . . . ignores the structured nature of any sport based on league competition . . . . While some freedom of movement after playing out a contract is in order, complete freedom of movement would result in the best franchises acquiring most of the top players. Some leveling and balancing rules appear necessary to keep the various teams on a competitive basis, without which public interest in any sport quickly fades.

Several years later, in Nat'l Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 117 (1984), the Supreme Court squarely recognized the legitimacy of competitive balance considerations under the rule of reason.[8/] Many of the plaintiffs' witnesses, including

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[8/] See also VII P. Areeda, Antitrust Law ¶ 1504 (Supreme Court in NCAA "apparently accepted in principle the value of a balance of skill as enhancing the consumer appeal of football contests"). Other courts have similarly recognized that some form of player reservation system may be necessary to maintain competitive balance in professional sports leagues. See e.g., United States v. NFL, 116 F. Supp. 319, 323-24 (E.D. Pa. 1953) (the cooperative nature of the NFL made it "both wise and essential" for the league to develop rules "to keep its teams (continued...)

their expert, Prof. Noll, testified to the importance of competitive balance in making a league's product attractive to fans -- both at the stadium and watching on television at home.

The evidence at trial showed that, by virtually any measure, NFL football is competitively balanced. Approximately half of all NFL games are decided by seven points or less, and divisional races are not decided until late in the season. (NFL Ex. 909, 911A.) Although it is difficult to compare sports, statistical tests employed by plaintiffs' experts confirmed that the NFL is the most competitively balanced of the major sports. And NFL football is clearly more balanced than college football. (NFL Ex. 922.) Other evidence, including the testimony of Hall of Fame players and coaches, like Joe Greene and Chuck Noll, and leading NFL General Managers, like Ernie Accorsi and George Young, demonstrated that the NFL's player rules,

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[8/] (...continued)
at approximately equal strength"; otherwise, the result will be "greater and greater inequality in the strength of the teams," the weaker teams being driven out of business and the destruction of the entire League), Smith v. Pro Football, Inc., 593 F.2d 1173, 1179 (D.C. Cir. 1978) ("if the teams are 'competitively balanced' spectator interest will be maintained"); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 504 (E.D. Pa. 1972) ("some type of intra-league reserve clause may be desirable and in fact necessary"); Flood v. Kuhn, 309 F. Supp. 793, 801 n.26 (S.D.N.Y. 1970) ("it is generally conceded that some form of reserve system is essential to the very maintenance of the 'joint venture' of organized professional baseball").

in particular the draft and the first refusal/compensation system, promote competitive balance and give weaker teams an opportunity to build and improve their squads. Without these rules, certain teams would have inherent advantages in obtaining and retaining outstanding players.[9]

In addition to a loss of competitive balance, widespread player movement would have an adverse effect on the quality of the game. As lead plaintiff Freeman McNeil testified, football is the "ultimate" team sport. It requires coordinated effort much more than individual skill, and coaches and general managers testified to the importance of keeping squads together so that they could improve as a unit.

2. Comparisons to Other Sports

Much of plaintiffs' evidence -- particularly the testimony of their expert -- focused on the experiences of baseball and basketball, both of which plaintiffs claimed had more liberal free agency systems than did the NFL. Plaintiffs contended that, far from damaging competitive balance in baseball and basketball, those sports were more balanced because of free agency.

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[9] Evidence of this can be found in the movement of the top players who secured free agency after the McNeil verdict. None of those players went to a losing team or a cold-weather city. Instead, they moved to teams like Dallas, Houston, Miami, New Orleans, and San Francisco, and away from Cleveland, New England, Philadelphia, and Pittsburgh.

The evidence presented on other sports was mixed and at best inconclusive. For example, in discussing baseball, plaintiffs' principal witness was Don Fehr, head of the Major League Baseball Players Association. He testified (and statistics presented at the trial confirmed) that there was very little movement of top players in baseball during the 1980s due to alleged collusion and other factors. (NFL Ex. 428A.) Thus, whatever competitive balance baseball showed in the 1980s cannot be attributed to free agency since there was no significant player movement during that period. By contrast, when there was true free agency in baseball in the mid-to late 1970s, the New York Yankees and Los Angeles Dodgers, club from the two largest markets who had acquired most of the best free agent players, were clearly the dominant teams, with seven World Series appearances between them. (E.g., NFL Ex. 437.)

In the NBA, plaintiffs attempted to minimize the role of the salary cap, which places sharp limitations on the ability of clubs to sign free agents from other teams. By contrast, prior to the salary cap, the NBA's free agency system was contributing to a serious competitive imbalance in the League and several franchises were on the verge of collapse. (Deposition of Gary Bettman.) And, under the NBA's system, a handful of teams have dominated in recent years and repeat championships -- rare in the 1970s and 1980s -- are now the norm. (NFL Ex. 784.)

3. Less Restrictive Alternatives

An important issue in McNeil was whether the NFL could have advanced its legitimate interest in competitive balance and quality of play through any means that were significantly less restrictive than Plan B. It is not uncommon for juries to consider less restrictive alternatives in a rule of reason case. Here, however, the trial judge did not require the plaintiffs to identify any alternatives.[10/] Instead, the Court put the burden on defendants to prove that no significantly less restrictive alternative was available, thereby shifting the burden of proof on what became the key issue in the case.

The District Court acknowledged that it was "guessing" as to the correct allocation of the burden of proof, and other courts have held that this burden rests with the plaintiff in an antitrust case. See, e.g., Bhan v. NME Hospitals, Inc., 929 F.2d 1404, 1413 (9th Cir.), cert. denied, 112 S. Ct. 617 (1991); Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368, 371 (5th Cir. 1977). See also VII P. Areeda and D. Turner, Antitrust Law ¶ 1502, at 371-72 (1986). It appears from these authorities that the District Court may have confused the issues of legitimate business justification and less restrictive

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[10/] While the plaintiffs frequently pointed to baseball and basketball, their key witnesses, including Mr. Upshaw and Prof. Noll, said that those systems were unacceptable for football and that they were anti-competitive. Plaintiffs in McNeil sought complete, unrestricted free agency.

alternatives. While the defendant bears the burden of coming forward with evidence on the former, it is the plaintiff who must show "that any legitimate objectives can be achieved in a substantially less restrictive manner." Bhan, 929 F.2d at 1413.

4. Injury and Damages to Players

Even if the first refusal/compensation system restricted a player's ability to move, it does not automatically follow that he was injured or that he was entitled to money damages. Any antitrust plaintiff must first prove injury to his business or property as a prerequisite for a finding of liability. See J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562 (1981); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

Arguably, four of the McNeil plaintiffs failed to prove that they had been injured. Don Majkowski, Tim McDonald, Freeman McNeil and Niko Noga were all awarded no damages by the jury, just as former Minnesota quarterback Joe Kapp was awarded no damages in his case during the 1970s. The jury's refusal to award damages may represent a finding that those players had not been injured. Because the special verdict form did not ask the jury to determine

injury on a plaintiff-by-plaintiff basis, as defendants had requested, the verdict is inherently ambiguous.[11]

A finding that these plaintiffs had been injured would seem difficult to sustain in light of the enormous salary increases some of them had received. For example, Mr. Majkowski's salary increased from $250,000 to $1.5 million while he was a "restricted" player. Mr. McDonald's salary more than tripled to over $700,000. And Mr. McNeil, who was no longer able to play full-time, was still being paid $850,000 per year. On the whole, protected players received <u>higher</u> salary increases than unprotected players even though the unprotected players were free to sign with any of the other 27 clubs. (NFL Ex. 921, 928.)

Alternatively, the jury may have found that the four plaintiffs who received no damages simply failed adequately to prove an amount to which they were entitled even under the relaxed standards governing proof of antitrust damages. It seems clear from the verdict that the jury rejected the estimates advanced by plaintiffs' damages expert. None of the four plaintiffs who was awarded damages received the amount urged in the expert's testimony. Instead, it appears that the jury compared the salaries of

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[11] The trial judge held that, notwithstanding the award of no damages, all eight players were in fact injured. He held that injury could result from more than salary suppression, for example, a lost opportunity to start, to play on natural turf, etc.

the protected players with the salaries of "comparable" unprotected players in arriving at its damage awards.

The overall extent to which player salaries were suppressed by the first refusal/compensation system was sharply contested at the trial. The evidence showed, for example, that the players historically have received all of the NFL's television revenue. (NFL Ex. 918.) During the Plan B years, the NFL clubs were paying a greater share of their revenues to players than they had paid during the USFL years, a period of supposed competition for player services. (NFL Ex. 919, 921.) The evidence also showed that the NFL players receive a greater share of the NFL's revenues than players in baseball or the NBA receive in those sports -- even though those leagues have supposedly less restrictive free agency systems. (NFL Ex. 925.)

Plaintiffs spent considerable time at trial on the profitability of NFL clubs. There was no dispute that the clubs have largely been profitable in the last few seasons as a result of a new television contract. The evidence showed, however, that as club revenues have increased, the players have received a far greater share of the increase than have the owners. (NFL Ex. 968, 971, 1285-86.) And despite the emphasis given by plaintiffs to club profits and franchise values, it turned out that owners in recent years have earned no greater return on their investments than they

would have earned had they put the money spent on buying their clubs into ordinary securities. (NFL Ex. 1306-07.)

III. NFL LABOR SETTLEMENT

The players in McNeil sought two outcomes: total free agency and a large damage award. They obtained neither. The jury found that the NFL's player rules promote competitive balance and it awarded the players only about 14 percent of the damages they sought. What the McNeil case did do was finally persuade both sides that there was more to be gained by working together than by spending several more years in court. Thus persuaded, the parties negotiated a settlement in early January, 1993, which should bring labor stability to professional football for the balance of this decade.

The settlement which took effect earlier this year both resolved a wide range of litigation between the players and the clubs and restructured the League's player allocation and retention system. The key elements of the settlement are as follows:

-- a continuation of the college draft through the year 2000, with the draft itself being reduced from twelve to eight rounds;

-- an entry level salary pool for rookies, within which rookies may individually negotiate their contracts;

-- in years when no salary cap is in effect, free agency for veteran players with five or more years of experience;

-- in years when a salary cap is in effect, free agency for veteran players with four or more years of experience;

-- a continuation in modified form of the first refusal/compensation system for free agents with fewer than five (or four) years of experience;

-- beginning as early as the 1994 season, a salary cap set at 64 percent of defined revenues, falling to 62 percent of defined revenues in the third year of the cap;

-- settlement payments of $195 million and dismissal of pending litigation involving free agency, the draft, preseason pay, unfair labor practice charges, and a wide range of other matters.

Following the agreement on a litigation settlement, the NFLPA resumed its collective bargaining role, and the clubs expect to reach a new collective bargaining agreement with the Union.