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A Long Deep Drive to Collective Bargaining: Of Players, Owners, Brawls, and Strikes†

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*William B. Gould***

The professional team sports which began as organized clubs have evolved into multimillion dollar industries. In this Article, Professors Berry and Gould examine the origin and development of these industries. As part of their examination, the authors trace the influence of national labor law on the nascent industrial models applicable to sports. The authors then note that the advent of collective bargaining in the realm of professional sports signals progress in the development of sports industrial models and also highlights the depth of the player-management rift which traditional labor law principles seem unable to resolve. Finally, Professors Berry and Gould conclude with prospects for resolving the intense infighting within the sports industries that promises to unfold in the next decade.

THE ELYSIAN FIELDS, Canton's mud patch, the peach basket in Springfield, and ice ponds across Canada produced the beginnings of organized team sports in baseball, football, basketball, and hockey. These early teams evolved into professional sports

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Several notes in this Article are not capable of verification through published sources. These notes are based on the knowledge of the authors concerning the workings of the sports industries, and their accuracy is thus the responsibility of the authors. The authors wish to express their appreciation to a substantial number of people connected with professional sports who were most helpful in providing insights about the industries through interviews and other discussions. These individuals include Donald Fehr, Edward Garvey, Lawrence Fleischer, Elliot Azoff, Leonard Koppett, Raymond Grebey, David Stern, Jan

leagues which are major industries today. Other teams await their evolution—notably soccer. Individual performer sports such as tennis, golf, and bowling also have begun to coalesce as sports industries. Multimillion dollar businesses are the result; multimillion dollar problems are the inevitability.

The development of business and legal approaches to professional sports industries has proceeded rather traditionally. This development is not surprising in light of the limited models available and the constraints of existing laws. Nonetheless, special problems are created by traditional approaches, and doubts exist as to their optimality. Sports industries are an anomaly—their product is ephemeral, seen in a moment, perhaps remembered, but generally not used by the hand or physically consumed. Their product is entertainment—amusement of a special variety. A victor is declared and a loser identified, but this dichotomy is, in one sense, an illusion, since most participants may be winners where it counts—in the pocketbook.

Professional sports leagues are not identical in either the history of their foundation or the problems they face. The nature of the sport, its potential appeal to an audience, and the personalities involved in the development of the business are factors which may distinguish one professional sport from another.¹

Volk, and Robert Woolf. The factual depictions, however, are the work of the authors and not those of the named individuals.

The authors also would like to acknowledge the research assistance of Kren Snell, Stanford Law School '81; Barbara Booth, Stanford Law School '83; and James Berry.

1. Numerous factors influence the creation and operation of sports leagues. These factors include the number of teams in each league, the number of players on each team, the location and size of the arena to be used, the national marketability of the sport, the number of games in a season, and the adaptability of the game to the broadcast media. Factors such as these demonstrate that sports leagues are individual entities and should not be regarded as having identical interests or problems. While some commonality exists, it is likely to be outweighed by the differences.

Significant disparities exist, therefore, among the major sports leagues. In the summer of 1981, the Wrigley family sold the Chicago Cubs for a reported \$20.5 million. *Chicago's Fans in a Whirl of Expectations*, N.Y. Times, June 18, 1981, § B, at 18, col. 1. This price is comparable to the earlier sales price of their cross-town compatriot, the Chicago White Sox. *Id.* These figures can be contrasted with a \$12 million price set for the Philadelphia 76'ers of the National Basketball Association (NBA). Rogers, *Katz Says He Paid \$12 Million for 76ers*, N.Y. Times, July 10, 1981, § A, at 17, col. 1. This price included the buyer's assumption of outstanding future indebtedness, particularly deferred compensation to be paid players in future years. The actual price realized by the seller was substantially less than \$12 million.

Although the 76'ers recently have been one of the more powerful teams in the NBA, drawing moderately well at the gate, apparently the team is worth substantially less than weaker baseball franchises, like the Cubs and White Sox. See note 28 *infra*. The above

In the sports industries, however, certain factors create the facade of a common front. The potential for fame and wealth transforms pastime into passion. This potential also breeds conflict as the component parts of the industry fight over prospective riches. This process is highlighted by the increasing tensions in management-player relations and the consequent upsurge of organized and aggressive player associations. Once uncertain in their nature, these associations now can be characterized as labor unions.² Previously, the common assertion was that sports profes-

mentioned factors affect the market value of franchises in the various leagues such that the leagues have differing economic bases.

As an example of the radical change in the economic structure of one league, in 1920 a National Football League (NFL) team cost \$100 (lowered to \$50 in 1921). F. MENKE, THE ENCYCLOPEDIA OF SPORTS 460 (6th ed. 1977). Even as late as 1961, the new American Football League sold its franchises for \$25,000. An estimate of the cost of a top NFL franchise today would be \$50 million.

Discussions of the peculiarities of sports leagues have emanated from various legal decisions. Of particular note is *NASL v. NFL*, 505 F. Supp. 659 (S.D.N.Y. 1980), *modifying* 465 F. Supp. 665 (S.D.N.Y. 1979). The opinion compares the well-established and well-financed NFL to the North American Soccer League (NASL), a struggling newcomer. See also *Philadelphia World Hockey Club, Inc., v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 466-67 (E.D. Pa. 1972) (discusses the relative positions and strengths of the old National Hockey League (NHL) and the new World Hockey Association (WHA)). A good basic factual analysis of professional basketball leagues can be found in *Robertson v. NBA*, 389 F. Supp. 867, 873-75 (S.D.N.Y. 1975).

According to Jay Moyer, counsel to the NFL Commissioner, a case can be made for each sports league being *sui generis*. Moyer, Book Review, 79 COLUM. L. REV. 1590, 1592 (1979).

2. See notes 180-86 *infra* and accompanying text. Although players associations are recognized now as unions, this achievement took a struggle. In the late 1950's, sports leagues other than baseball still had some hope of obtaining an exemption from the anti-trust laws. To improve its bargaining position, the NFL Commissioner, Bert Bell, made the following statement to a House Subcommittee:

Accordingly, in keeping with my assurance that we would do whatever you gentlemen consider to be in the best interest of the public, on behalf of the National Football League, I hereby recognize the National Football League Players Association and I am prepared to negotiate immediately with the representatives of that association concerning any differences between the players and the clubs that may exist. This will include the provisions of our bylaws and standard players' contract which have been questioned by members of this committee.

Organized Professional Team Sports: Hearings on H.R. 5307, H.R. 5319, H.R. 6877, H.R. 8023, and H.R. 8124 Before the Subcomm. on Antitrust of the House Comm. on the Judiciary, 85th Cong., 1st Sess. 2691-92 (1957-1958) (statement of Bert Bell). George Halas, Chicago Bears owner and a founder of the NFL, concurred, with reservations, in this recognition. See *id.* at 2694-2701 (statement of George Halas).

Despite the assurances given to a congressional subcommittee in 1958, it was over 10 years before the first collective bargaining agreement was effectuated in the NFL. See note 192 *infra*. The players and their lawyers were responsible, in part, for this delay. These individuals were afraid to declare that their organizations were unions. Creighton Miller, long-time counsel for the NFL Players Association (NFLPA), generally resisted labelling the NFLPA as a union. See Krasnow & Levy, *Unionization and Professional Sports*, 51

sionals would not unionize, but the influence of our nation's labor laws was too strong for the players to resist.³ Unions are, and will continue to be, integral to professional sports. The unions' ultimate potential, however, is more uncertain. The transformation of players associations into unions may have been predictable, but only future developments will define the scope of their effectiveness.

Any industrial equation is shaped by variables. Current wealth, growth potential, market conditions, and the overall economy provide initial input. The sports industry equation has additional variables:

(1) Sports combines are embryonic. These associations are overgrown small businesses, traditionally managed as such, now thrust into larger industrial settings.⁴

GEO. L.J. 749, 763 (1963). The authors cite correspondence they had with Miller in which he was extremely reluctant to talk in terms of the NFLPA as a union. *Id.* at 773 n.72.

The same phenomenon occurred in baseball. The original and persisting position by baseball players was that their organization was not a union. The first president of the association, Bob Feller, stated: "You cannot carry collective bargaining into baseball." *American League Changes Rule on Play-Off of Tie for Pennant*, N.Y. Times, Dec. 11, 1956, at 52, col. 2. His successor, Bob Friend, was even more explicit: "I firmly believe a union, in the fullest sense of the word, simply would not fit the situation in baseball." Brady, *Player Rep Friend Raps Proposal that Athletes Form Labor Union*, The Sporting News, Aug. 3, 1963, at 4. For a fuller account of these positions, see J. DWORKIN, OWNERS VERSUS PLAYERS 28-29 (1981).

An early study of the growth of players associations concluded that the baseball association was "definitely not a union." P. GREGORY, THE BASEBALL PLAYER: AN ECONOMIC STUDY 204 (1956).

3. In Krasnow & Levy, *supra* note 2, the authors urged that the players direct their associations to seek union status. The authors did express doubts, however, that associations as unions could be effective without affiliating with larger established unions. *Id.* at 774-76. This proposal has not died completely. Over the last few years, the NFL and NASL players associations have affiliated with the AFL-CIO. Even so, other players associations have been able to bargain collectively without union affiliation.

4. Today's sports industries generate less revenue than the public perceives. The media tends to overemphasize the salaries paid players, the profits from the sale of franchises, and the revenues to the leagues and clubs from television contracts with the networks and local stations. While it is true that salaries are high and profits are substantial compared to capital investment, it must be remembered that the sports industries are not comparable in terms of sheer dollar volume to the oil, automobile, or insurance industries.

Profits, nevertheless, are high. Precise figures sometimes are difficult to obtain since most clubs are either partnerships or closely held corporations and need not divulge income figures. Economic and other relevant data, however, are becoming more available and reveal that sports leagues are growth industries. Because of the relatively few people involved, the stakes are substantial, and the potential for personal gain is great.

Studies of the sports industries, concentrating on salary figures, are outdated quickly as inflation and other fluctuations make the figures insignificant. A few analyses, however, are timeless. See, e.g., J. MARKHAM & P. TEPLITZ, BASEBALL ECONOMICS AND PUBLIC POLICY (1981); GOVERNMENT AND THE SPORTS BUSINESS (R. Noll ed. 1974); Neale, *The*

(2) People in the industries still are experimenting. The existent industrial models are unclear, unappreciated, or arguably inapplicable. Many people still refuse to accept the modern sports league model.⁵

(3) There are relatively few participants in the professional sports business.⁶ This absence of participation may cause domination or disruption by a small number of people. The human factor can tilt any equation; in the sports industries, this factor is magnified.

This Article evaluates the combined legal and business aspects of the sports industries, focusing on their history and future. The Article also highlights the often fractious relationships in professional sports, particularly between labor (the players) and management (the clubs and leagues), because this area of labor relations is developing rapidly. The industrial models applicable to the sports industry are nascent, however, and the construction of theories to clarify and strengthen those models is a central pur-

Peculiar Economies of Professional Sports, 78 Q.J. ECON. 1 (1964); Quirk, *An Economic Analysis of Team Movements in Professional Sports*, 38 LAW & CONTEMP. PROB. 42 (1973); Scully, *Pay and Performance in Major League Baseball*, 64 AM. ECON. REV. 915 (1974).

Although, they are less reliable because of author biases. See, e.g., Kennedy & Williamson, *Money: The Monster Threatening Sports* (pts. 1-3), SPORTS ILLUSTRATED, July 17, 1978, at 29, July 24, 1978, at 34, July 31, 1978, at 34.

5. Commonplace are stories of errors made by team owners, general managers, and coaches who were unfamiliar with the basic working agreements—the collective bargaining agreement, the standard player contract, or even the league bylaws which govern relationships with their players. The Carlton Fisk free agency agreement, discussed *infra* at notes 520-23 and accompanying text, is illustrative. A similar incident occurred when John Y. Brown, a former owner of the Boston Celtics, renegotiated a contract with the uniquely talented and hopelessly uncontrollable Marvin Barnes. Neither party had counsel present. In the process, most of the guarantees in Barnes' contract were removed. This could have precipitated lengthy litigation when Barnes later was released. McDonough, *Celtics Ax Barnes; will they pay him?*, Boston Globe, Feb. 8, 1979, at 41, col. 1; Van Handle, *Players Assn. Backs Barnes*, Boston Globe, Feb. 9, 1979, at 46, col. 4. For other related tales, see D. KOWET, *THE RICH WHO OWN SPORTS* (1977), which contrasts old style owners such as Phil Wrigley and Art Rooney with the new breed, such as Lamar Hunt and Clint Murchison. Included in the book are the battles of the ever-volatile Charlie Finley and those of Ray Kroc, who once took over the public address system at his ballpark to castigate both his players and the visiting team for their sloppy performance. *Id.* at 97, 119-36, 147. See also Briner, *Making Sport of Us All*, SPORTS ILLUSTRATED, Dec. 10, 1973, at 36; McGraw, *Memo to Dilettante Owners: Sports Are Not a Joke*, N.Y. Times, Jan. 22, 1978, § 5, at 2, col. 1; Smith, *Charlie I and His Subjects*, N.Y. Times, Oct. 17, 1973, at 37, col. 1.

6. Including NASL soccer as a major league sport, there are still no more than 3,000 professional athletes on the team rosters in all the major professional leagues. There are perhaps 500 additional touring professionals in individual sports such as golf, tennis, and bowling. Race car drivers, boxers, jockeys, and others make up the balance. Club and teaching professionals also are included in the figures, but only a few thousand athletes receive the large sums of money associated with sports.

pose of this analysis. Labor law and labor relations are important, but other developments interweave the industrial fabric and must be examined. Any industry is complex; the sports industries are deceptively complicated, since they are, in part, a product of their seeming simplicity.

In the mid-1970's, as a reflection of this complexity, full-blown, arm's-length bargaining emerged, resulting in collective bargaining agreements in the major sports. As a result, a widespread view emerged that peace had come to the industries after a decade of litigation, abortive strikes, and constant wranglings. This view was myopic. In many respects, despite progress toward resolving some long-standing disputes, the actual depth of the player-management rift was just being discovered.

Baseball exemplifies the continuing tension between major factions in the sports industries. The negotiations in baseball over a new collective bargaining agreement began in late 1979. A compromise agreement, incomplete in several respects,⁷ was reached in May, 1980. A dispute during the following season, however, resulted in a prolonged baseball strike from mid-June to August, 1981. It is doubtful that anything of lasting significance was gained through the strike in exchange for the millions of dollars lost. The tensions, likewise, have not abated, even though the strike was settled.

The labor situation in other sports basically parallels that in baseball. The National Basketball Association (NBA) recently has switched its procedure governing a player whose contract has ended with one team who wants to contract with another team. The right of first refusal, in its initial usage in that league, has produced fascinating contrasts. Some players have been made instant millionaires while others have found only frustration. In addition, the National Football League Players' Association (NFLPA) will be battling with management over a new collective agreement, scheduled to be completed before the start of the 1982 season. The NFLPA, already a most troubled sports association, will be challenged greatly in trying to exact an agreement that raises its players' salaries nearer to the average salary enjoyed by the players of other major team sports. Finally, although hockey's labor-management relations seem more placid, issues crucial to the continued vitality of that industry also must be resolved. All

7. See note 377 *infra* and accompanying text.

of this debate underscores the turbulence among the principal interests that constitute the heart of professional team sports.

The trends in these sports are examined in the analysis which follows. It is evident that there will be continued and intense infighting in the 1980's. While this analysis concludes with an examination of future prospects of the sports industries, the Article concentrates primarily on the origins and progress of these industries. To begin this examination of the sports industries and their internal workings, it is necessary to analyze the components that make them tick—and at times explode.

I. COMPONENTS OF THE INDUSTRIES

Professional sports draw their economic lifeblood primarily from fans in the stadium and those viewing television and listening to radio.⁸ The advertisers who dole out millions of dollars are merely conduits in this economic chain. These advertisers are in business only because they can reach people with their message. The consumer in the stands thus pays directly while everyone using the advertiser's products, whether sports viewers or not, pays indirectly. Cumulatively, therefore, consumers pay billions of dollars to sports and related industries.⁹ A portion of the purchase

8. Whether spectator interest in sports is measured by attendance figures or the size of the television or radio audience, its growth has been steady, but fluctuating. A survey on attendance at major sports events, contrasting 1974 with 1965, showed a 33% increase in attendance. When attendance figures for the four team sports (baseball, football, hockey, and basketball) were combined with horse, dog, and auto racing, the total was 206 million in 1956 and over 273 million in 1974. During 1974, the attendance for professional hockey (325% increase) and professional basketball (249% increase) showed the most significant gains. See HOUSE SELECT COMM. ON PROFESSIONAL SPORTS, INQUIRY INTO PROFESSIONAL SPORTS, H.R. REP. NO. 94-1786, 94th Cong., 2d Sess. 177 (1977).

Television audiences and accompanying revenues are another aspect of the growth of the sports industries which is not fathomed completely. Each new contract between a network and a league, with the notable exception of hockey's demise on national television, showers additional dollars on the leagues and clubs. Estimates of 1981 television and radio revenues are \$3.45 million per team in baseball (combining national and local contracts), \$1.1 million in basketball (national and local), and \$5.8 million in football (national only, with some additional local revenues received for preseason games). Hockey, with no national network coverage in the United States, must rely on local contracts, where the revenues fluctuate widely. See Vecsey, *In Sports, Money Is the Main Issue*, N.Y. Times, March 16, 1981, § C, at 6, col. 2. For additional television revenue figures, see J. MARKHAM & P. TEPLITZ, *supra* note 4, at 64-65; *Baseball 1981*, BROADCASTING, March 2, 1981, at 43. For a historical perspective, see Horowitz, *Sports Broadcasting*, in GOVERNMENT AND THE SPORTS BUSINESS, *supra* note 4, at 275-323.

9. The relatively limited economic characteristics of the sports industries have been discussed previously. See note 4 *supra*. The statement that sports generate billions of dollars in revenue is not contradictory. Constant comparisons must be made between individual clubs, which are relatively modest business ventures, and other corporations that dwarf

price for these products is funneled through the manufacturer to the network or station and the league or club. This funneling translates into millions of people paying for the livelihood of a few thousand. These few usually profit handsomely by the arrangement.¹⁰

The recipients of this wealth require scrutiny. These recipients are the components of the sports industries, and the *relative suc-*

the sports franchise. On the other hand, as some of the figures in note 8 *supra* suggest, the total dollar amounts accruing to professional sports, in general, influence the sports industries. In addition to sources cited in notes 4 & 8 *supra*, see J. DURSO, *THE ALL-AMERICAN DOLLAR: THE BIG BUSINESS IN SPORTS* (1971). The author details the growth of sports after World War I and the resultant increase in revenues. *Id.* at 47-66. On growth in attendance figures from 1936 to 1978, see J. MARKHAM & P. TEPLITZ, *supra* note 4, at 61.

10. There are three major categories of beneficiaries: the players, the owners, and the broadcast industries. Precise profit figures on the latter can only be estimated since they are part of the overall profit and loss statements of the networks and stations. Some contend that sports are "loss-leaders" for the networks. Such protestations, however, are suspect because the rights figures keep climbing.

The economic gains by players, so much in the limelight, are easily documented. See note 41 *infra* for a comparison of 1980 average salaries in the four major leagues with the minimum salaries established by the collective bargaining agreements. Also of interest are the increases in average salaries by leagues over the past 10 years:

Year	1970	1975	1976	1977	1978	1979	1980
<i>Sport</i>							
Baseball	\$29,303	\$44,676	\$ 51,501	\$ 76,066	\$ 99,876	\$113,558	\$143,756
Basketball	40,000	93,000	109,000	125,000	145,000	160,000	190,000
Football	34,600	—	—	55,288	62,585	68,893	78,657
Hockey	25,000	74,000	86,000	96,000	92,000	101,000	108,000

A comparison between 1970 salaries, in 1980 dollars, and actual 1980 salaries, demonstrates that all sports except football show significant "real" dollar gains. Football players, on the average, actually lost \$1,735 per year in real earnings. Baseball players gained \$45,595; basketball players gained \$57,017; and hockey players benefitted by an increase of \$31,317 per year. It also should be noted that average salaries for engineers, accountants, lawyers, and doctors declined in real value terms. *INSIDE SPORTS*, Aug. 31, 1981, at 58, 69. For further information on average player salaries, see *INSIDE SPORTS*, July 31, 1980, at 19.

The outlook is not as optimistic for new and struggling leagues. Figures released by the NASL show a far different financial picture in comparison to the four major team sports. By extrapolation, the following averages can be determined according to position played and whether the players are from the United States or elsewhere:

Country	Americans	Foreigners
Position		
Defender	\$ 18,900	\$ 30,400
Forward	27,900	37,000
Goalie	20,800	34,000
Midfielder	20,200	35,000

In addition to average salaries, the salaries paid to top players deserve mention. As players in baseball and basketball start commanding annual salaries near or above \$1 million, the impact of free agency becomes apparent. For detailed discussions and information on such salaries, see J. DWORKIN, *supra* note 2, at 100, 113-17; Eskenazi, *Athlete's*

cess or failure of each component depends on its vitality and aggressiveness within its particular industry. Absolute failures, at least by components of the major sports industries, are few.¹¹

Salaries: How High Will the Bidding Go, N.Y. Times, Aug. 16, 1981, § 5, at 1, col. 1; Fimrite, *Richest Kid on the Block*, SPORTS ILLUSTRATED, Jan. 5, 1981, at 22.

The owners' profits are harder to document. The NFL franchises generally are considered the most profitable, but such assertions are made cautiously. See Block, *So, You Want to Own a Ball Club*, FORBES, April 1, 1977, at 37; Maher, *NFL Teams Net Under \$1 Million*, *Court Told*, L.A. Times, July 21, 1981, § I, at 3, col. 1.

Other reports dispute this assertion about the profitability of NFL franchises, including Kennedy & Williamson, *supra* note 4. The Green Bay Packers, one of the few publicly held clubs, reported an increase in profits from \$395,000 in 1977 to \$2.7 million in 1978. The new NFL television contract with the three networks largely was responsible for this increase. See Stellino, *Packer 'Windfall Profits' Up 700 Percent*, The Sporting News, June 9, 1979, at 51. Even in the waning days of Charles Finley's ownership of the Oakland A's, he managed to turn a profit despite record low attendance. Koppett, *Let's Not Weep for Finley—He's in No Bind*, The Sporting News, Aug. 18, 1979, at 15. Nor was there any real showing, despite low attendance, that the A's adversely affected the rest of the league. Koppett, *Are A's a Drag on Rest of A.L.?*, The Sporting News, Aug. 25, 1979, at 10.

11. As to failing franchises and the attendant losses owners suffer, there have been numerous instances where rival leagues were formed. Only a few of these teams survived by merging later with an established league. Several clubs in the American Basketball Association (ABA) and World Hockey Association (WHA), to cite only recent examples, failed. The situation in the four major leagues (NFL, NBA, National Hockey League (NHL), and Major League Baseball) has been quite different, at least in the last 30 years.

Since 1950, only one NFL franchise, the Dallas Texans, has failed. This team should not be confused with the Dallas Texans of the early American Football League (AFL) who later became the Kansas City Chiefs. These NFL Texans were the Boston Yanks from 1944 to 1948, the New York Bulldogs in 1949, the New York Yanks from 1950 to 1951 and, finally, the Dallas Texans in 1952. The Texans' move to Texas largely was unheralded, and the episode is noteworthy only because it was the last failing NFL franchise not rescued by another buyer. See T. BENNETT, D. BOSS, J. CAMPBELL, S. SIWOFF, R. SMITH & J. WIEBUSCH, *THE NFL'S OFFICIAL ENCYCLOPEDIA HISTORY OF PROFESSIONAL FOOTBALL* 241 (1977) [hereinafter cited as *OFFICIAL ENCYCLOPEDIA HISTORY OF PROFESSIONAL FOOTBALL*].

Major league baseball may have several franchises that are marginally successful. The team that came closest to failing was the Seattle Pilots, an expansion franchise that lasted only the 1969 season. Underfinanced and garnering almost no support from its fans, the club faced bankruptcy, and a court ordered the franchise moved to Milwaukee only four days before the 1970 season started. As the Milwaukee Brewers, the team has prospered, both on the field and in the box office.

Lack of success on the playing field was only part of what led to the Pilots' demise. Though its 64-98 (.395) record in 1969 hardly was impressive, Seattle far exceeded the 52-110 (.321) performances of two other expansion clubs—the Montreal Expos and the San Diego Padres. As low as it was, Seattle's 1969 record was not as low as that held by the Cleveland Indians, one of the oldest American League franchises, who occupied the American League cellar with a 62-99 (.385) record. For a general discussion of the Seattle Pilots, see *Pilots Move to Milwaukee is Cleared by Court Decision*, N.Y. Times, April 1, 1970, at 59, col. 2; *Moving of Pilots is a Step Closer*, N.Y. Times, March 25, 1970, at 57, col. 2; Koppett, *New Seattle Group is Offered Chance to Buy Pilots for \$9-Million*, N.Y. Times, Jan. 28, 1970, at 33, col. 1; *Injunction Asked to Bar Pilot Shift*, N.Y. Times, Jan. 24, 1970, at 36, col. 8.

Basketball franchise failures have occurred more often. In addition to the failure of

Five integral interests exist within the infrastructure of professional sports leagues. Two of the interests (leagues and clubs) are aligned on the side of management while three of the interests (players associations, individual players, and the agents and attorneys for the players) are aligned opposite management. No solidarity exists on either side. An individual club owner may identify certain league actions as inimical to his or her best interests.¹² The three-way split on the side of labor is equally severe.¹³ By limiting the analysis to these five interests, several forces are

several ABA clubs, there were also a string of disasters in the NBA's early years. The merger of the Basketball Association of America and the National Basketball League (NBL) in 1949, *see* note 142 *infra*, brought several teams from the old NBL into the newly formed NBA. Six of these teams comprised the Western Division during the 1949-50 season, and only one team, the Tri-Cities, now the Atlanta Hawks, still exists. *See generally* Sporting News, NBA Guide (1981).

In the NHL, both the WHA teams that died when the WHA merged with the NHL and the Golden Seals, one of the six expansion clubs added to the NHL in 1967, have failed. In the case of the Seals, the NHL had to purchase the club and manage it until the Seals disbanded. *See Finley's Franchise on Coast Bought by NHL*, N.Y. Times, Feb. 15, 1974, at 27, col. 1.

12. The conflicts between an owner and a league, usually represented by the commissioner, sometimes reach the courts and spur bitter infighting. The most recent and perhaps most notable example is Al Davis' bid to move his Oakland Raiders to Los Angeles. Early skirmishing has produced mixed results. *See* Los Angeles Memorial Coliseum Comm'n v. NFL, 468 F. Supp. 154 (C.D. Cal. 1979), *modified*, 484 F. Supp. 1274 (C.D. Cal. 1980). These preliminary rulings kept the Raiders in Oakland, and a long and vociferous trial began in the summer of 1981. After 55 days of trial and two weeks of deliberation, the jury was unable to reach a unanimous decision, and a mistrial was declared. Much rancor and name-calling, particularly from the Oakland Raiders, resulted. The Raiders accused the NFL of planting a person on the jury. For contemporary accounts of this trial, *see* Lindsey, *Raiders Trial Could Affect N.F.L. Power*, N.Y. Times, May 10, 1981, § 5, at 9, col. 4; Maher, *A Replay of Raiders vs. NFL*, L.A. Times, July 6, 1981, § I, at 3, col. 4; *Judge Crushes Major NFL Line of Defense*, L.A. Times, July 25, 1981, § II, at 1, col. 5; *NFL Tries to Refute Raiders Profit Claim*, L.A. Times, July 22, 1981, § I, at 3, col. 2; *Some Notice Shifting in Raider Trial*, L.A. Times, July 20, 1981, § II, at 1, col. 6; *Raiders: Davis Makes Points*, L.A. Times, June 15, 1981, § II, at 3, col. 1; *NFL Assailed as Trial Opens*, N.Y. Times, May 20, 1981, § B, at 4, col. 4.

Other notable cases include *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527 (7th Cir.), *cert. denied*, 439 U.S. 876 (1978); *Atlanta Nat'l League Baseball Club, Inc. v. Kuhn*, 432 F. Supp. 213 (N.D. Ga. 1977).

13. On more than one occasion, contracts drafted by the club and a player's agent have incurred the wrath of that sport's players association. Such was the case in 1977 concerning contracts entered into between the Boston Red Sox and star players Fred Lynn, Carlton Fisk, and Rick Burleson. According to the Major League Baseball Players Association (MLBPA), the players' agent had agreed to a clause giving the Red Sox a right of first refusal at the end of the contract periods. The MLBPA filed a grievance, charging that this clause contravened the collective bargaining agreement. *See* notes 518-19 *infra* and accompanying text.

For another notable instance of strife between the union and player agents, *see* note 55 *infra*, which discusses events involving the NFL Players Association.

ignored.¹⁴ This narrowed focus is logical, however, since these five interests are the dominant operatives in the infrastructure of professional sports leagues.

A. Leagues

The concept of an organized professional sports league began with the formation of the National League of Baseball in 1876. Several principles behind that league's formation have guided the course of professional sports.¹⁵ These league principles have forced individual clubs to cooperate in their decisions regarding both the market supply of talent that "manufactures" the product and the consumers who pay the bills and provide the profits.

In many respects, sports leagues are not merely joint ventures. These leagues are cartels, existing to allocate and control the production and distribution markets and to eliminate competition

14. Multiple interests involved in the sports industries, although not discussed at length in this Article, may be identified. Non-playing personnel who are nonmanagement officials, such as umpires and referees, are of crucial importance. See notes 180-86 *infra* for a discussion of the umpires' associations and the labor laws. The broadcast industries also affect the sports industries. See note 8 *supra*. In addition, owners of stadiums and arenas, including municipalities, have significant influence. Furthermore, minor leagues, where they exist, should be noted. This list does not exhaust the possibilities. See J. MARKHAM & P. TEPLITZ, *supra* note 4, at 45, for a particularly informative diagram showing various interests which provide or receive revenue from professional baseball. This data can be extrapolated easily, with modifications, to make it applicable to other sports.

15. Still extant are the Constitution and Playing Rules of the National League of Professional Base Ball Clubs (1876), reprinted in SPALDING'S OFFICIAL BASEBALL GUIDE (1881). Some of the articles are a model for modern sports leagues. Article III, § 1, for example, after naming the original clubs and their cities, stipulates that in no event shall there be more than one club from any city. Article V, § 2 buttresses the notion of territorial exclusivity by providing that each league club shall have "exclusive control of the city in which it is located . . ." As to other controls over the clubs, art. VII allows for expulsion of a club, by two-thirds vote, for reasons such as the failure to abide by the league's constitution and rules.

In one respect, the 1876 Constitution is quite different from later procedures. Article XI, § 1 is the antithesis of a reserve clause because it expressly allows for players to enter into contracts with other clubs for the players' future services.

Although the league's business structure has not changed drastically, its playing rules have changed considerably. Some interesting playing rules from an earlier era include having to pitch in a motion where the arm stays below hip level; otherwise, a "foul balk" was called. Rule IV, §§ 2-3. A batter who struck out also had to be thrown out at first base. Rule V, § 15. A batter could call for a high, low, or fair pitch, a fair pitch being a combination of a high and low pitch. Rule V, §§ 5-6. The umpire, a solitary soul in those days, was prohibited from going into fair territory, Rule VII, § 8, but could enlist the spectators' help in making difficult calls, relying on the best testimony available. Rule VII, § 5.

For general sources concerning the formation of the National League, see L. LOWENFISH & T. LUPIEN, *THE IMPERFECT DIAMOND* (1980); H. SEYMOUR, *BASEBALL: THE EARLY YEARS* (1980).

over producers (players) and consumers (fans) within the cartel.¹⁶ Modern clubs compete only when the legal and political power plays force them to compete. Change toward competition, therefore, has not been voluntary; but the clubs should not be judged harshly for their resistance to such change. Clubs, acting collectively through a league, are entitled to maximize their income and profits if they proceed within the appropriate legal strictures.

Even today, a sports league acts as a cartel as it attempts to eliminate competition within the league for the sports consumer's dollar by allocating its territorial markets.¹⁷ A sports league also spreads itself across an expansive geographical complex, becoming a "natural" monopoly, to discourage effectively the establishment of rival leagues. As a league enters prime markets and establishes viable properties, it gains substantial advantages. The opportunity for new leagues to form *and* to succeed thus diminishes.¹⁸

Sports leagues, to varying degrees, force a redistribution of revenue among the clubs. This redistribution is evident with broadcast income because league-wide contracts with one or more of the three major commercial networks yield millions of dollars

16. Several sources discuss professional sports leagues as cartels. See Davis, *Self-Regulation in Baseball 1909-71*, in GOVERNMENT AND THE SPORTS BUSINESS, *supra* note 4, at 349-86. In discussing the congressional maneuverings leading to the 1966 NFL-AFL merger, James Michener notes that, after the bill slipped through Congress via a conference committee report, "a cartel could (once again) be established." J. MICHENER, SPORTS IN AMERICA 390 (1976). The dictionary definition of a cartel seems applicable to the activities of most professional sports leagues, as it describes a "combination of individual private enterprises supplying like commodities or services that agree to limit their competitive activities (as by allocating customers or markets, negotiating quantity or quality of output, pooling returns or profits, fixing prices or terms of sale . . .)" WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 344 (1971).

17. Although various authorities would dispute the sweeping tone of the district court's second decision in *NASL v. NFL*, 505 F. Supp. 659 (S.D.N.Y. 1980), *modifying* 465 F. Supp. 665 (S.D.N.Y. 1979), its description of a sports league and its component parts as cooperators rather than competitors cannot be ignored. Whether, or to what extent, this characterization removes a league's activities from antitrust scrutiny is debatable. The NFL advocated a "single business entity" concept in claiming the Oakland Raiders' proposed move to Los Angeles was exempt from the antitrust laws. Although this argument largely was accepted in *NASL*, Judge Pregerson rejected it in the Los Angeles case. *Los Angeles Memorial Coliseum Comm'n v. NFL*, 468 F. Supp. 154 (C.D. Cal. 1979), *modified*, 484 F. Supp. 1274 (C.D. Cal. 1980). See Maher, *Judge Crushes Major NFL Line of Defense*, L.A. Times, July 25, 1981, § II, at 1, col. 5.

18. The history of professional sports is marked by the departure of many leagues, although not all the teams have disappeared. In baseball, for example, the Union Association, Players League, Federal League, and Mexican League are all defunct. In football, the World Football League lasted only one year. The American Basketball League also survived from 1961 to 1963.

that are divided equally among the clubs. While clubs also contract separately with local broadcasters and do not share that revenue with other clubs, the national contracts, at least for baseball, football, and basketball, provide a strong equal financial base from which the league and its clubs launch their operations.¹⁹

In some leagues, there is a division of gate receipts. The National Football League (NFL) mandates that the visiting team receive forty percent of the gate revenues for regular season games and fifty percent for preseason games. In baseball, the visitors receive twenty percent of the gate revenues. Basketball and hockey teams do not split gate revenues. It is noteworthy that the NFL, which maintains the lowest average salary per player among the four major team sports, operates with the greatest degree of revenue sharing.²⁰ This phenomenon is not coincidental, and the reasons behind it will be examined more thoroughly in subsequent discussion.²¹

Finally, there is the division of resources necessary to stage the game. The talent pool of players is distributed approximately equally to all clubs in the league. This equality is accomplished through a number of devices, including the initial allocations through a draft of known and available talent, restrictions on player movement to new clubs, and compensation to a player's former club for that player's move to a new club. These devices operate in the name of competitive balance, but they also have other effects. The devices restrict, to varying degrees, the competitive bidding for players' services, either by outright prohibition or by indirect persuasion. These restrictions greatly concern the players, who maintain that such strictures illegally suppress the market for their services—a concern which also will be examined more thoroughly in subsequent discussion.²²

19. The NFL is "more equal" than the others. Since every team in the NFL receives in excess of \$5 million each year from the national television contracts, with only relatively small additional amounts being realized from local preseason telecasts and radio contracts, equality as to television revenues exists among the NFL teams. This equality is not evident in basketball and baseball. In those sports, league-wide contracts net each team approximately \$1 million annually. Certain clubs may make more from local contracts while others, because of locale and the limited potentials for television penetration, fare poorly. Local television revenues in baseball, for example, might range from \$5 million per year for the New York Yankees to well under \$1 million for the Kansas City Royals. For figures on television revenues, see note 7 *supra*.

20. *Id.* See also note 10 *supra*.

21. See notes 413–28 *infra* and accompanying text.

22. See notes 354–529 *infra* and accompanying text.

B. Clubs

The individual clubs in a league enjoy dual status as independent legal entities and members of a cartel. As independent legal entities, the clubs act freely, reaping rewards for their individual successes and answering for their failures. As members of a cartel, their actions are circumscribed legally by mutual agreement. In certain respects, the clubs are equal partners in the cartel, each contributing to and sharing in the whole. In other respects, the whole is greater than the sum of its parts, and the clubs are mere franchises, subject to the rules of the whole, including severe disciplinary action or expulsion for serious violations of those rules.²³ Unlike other industries in which one component may separate and seek its own market, this independence is largely impossible for the sports franchise. The club cannot sever its ties with the league. Unless there is a rival league or the possibility that one will be formed, a professional sports team must stay in the league to survive.²⁴

23. The first team expelled from a league for abrogation of its rules was probably in baseball's National League. The first fully professional team, the Cincinnati Red Stockings, was formed in 1869. The team promoted baseball by touring the country, playing any team that came to play, and winning a great percentage of its games. The Cincinnati club, therefore, was naturally included in the newly formed National League of 1876. Three years later, however, it was expelled for playing games on Sunday and for allowing liquor to be consumed in the stands. This action backfired on the National League owners, as Cincinnati became a leader in pressing for the formation of the American Association in 1882—the first in a long line of challengers to the National League monopoly.

The bylaws and rules of the various leagues provide disciplinary action, including expulsion, against a miscreant team. The Constitution and By-Laws of the National Football League, for example, define the commissioner's powers regarding disciplinary action. NFL, NFL Constitution and By-Laws, art. VIII, § 8.13 (1976 & 1981 Supp.) (on file at Case Western Reserve Law Review). When these powers do not allow the commissioner to act, specifically in instances such as the cancellation or forfeiture of a franchise, the matter is referred to the league's executive committee for appropriate action. *Id.* § 8.13(B)(1). The powers of the executive committee are further delineated in the constitution and bylaws. *Id.* art. VI, § 6.5(b).

In actions that are not severe enough to require expulsion from a league, the commissioner or a league executive board has imposed sanctions against the clubs or the owners. An example of such an action requiring sanction is the attempt to lure away another club's player. *See, e.g., Atlanta Nat'l League Baseball Club, Inc. v. Kuhn*, 432 F. Supp. 1213 (N.D. Ga. 1977); *Kroc, Citing \$100,000 Fine, Gives Up Control of Padres*, N.Y. Times, Aug. 25, 1979, at 11, col. 4. Other infractions involve an owner or general manager speaking out of turn concerning the progress of the collective bargaining negotiations. Milwaukee Brewers executive Harry Dalton was sanctioned for this reason after he broke a league-imposed gag rule concerning progress in reaching a new baseball agreement in 1981. *Owners Fine Executive \$50,000*, N.Y. Times, May 6, 1981, § B, at 9, col. 1.

24. Very few professional sports clubs can survive without league affiliation. Those unaffiliated clubs that do survive engage more in entertainment than sports competition. Examples of such unaffiliated clubs include the Harlem Globetrotters and several of its

It generally is assumed that a club will always strive to field the best team possible to win and finish high in the league standings. It is also assumed that striving for this goal produces maximum current earnings and ensures potential earnings. There are fallacies, however, in these assumptions. First, some clubs may be only marginally profitable. A club in this category may determine that, while it could afford to enter the free agent market, this move would not improve the team significantly. Perhaps, for example, the move might result in a mere increase in standing from fifth to fourth or third place. Unless gate receipts compensate for the extra expenditures, there is no incentive to diminish the existing profits without a consequent return on the investment. Several basketball and hockey clubs and a few baseball clubs have had this experience of operating a marginally profitable business.²⁵

Second, for clubs that currently approach peak earnings, there is a disincentive to spend additional sums to improve. This disincentive increases as the club achieves its peak earning potential. Spending may lead to improvement and glory through winning, but it will reduce profits. If only a few thousand dollars are needed to reach the top rung, it may be worth the expenditure, but to spend and merely come close to that goal is unrewarding. In addition, winning often requires more than the expenditure of a few thousand dollars, and there are no guarantees of success. This scenario is most applicable to clubs in the NFL,²⁶ although it ar-

imitators, the old House of David baseball team, and the current team of women basketball professionals who tour the country taking on pickup teams composed of older males who were once high school or college players. More typical, however, are the clubs that struggle to survive when their league is threatened with extinction. Unless these clubs can be admitted into another established league, the chances of survival are slim. The plight of the Memphis Grizzlies, as compared with the old ABA clubs such as the New York Nets and Denver Nuggets, is illustrative of this inability to survive. See note 173 *infra*.

25. The disparity in spending on free agents by baseball clubs is striking. As of 1980, the New York Yankees had signed free agents to contracts in amounts totaling \$17.3 million, the California Angels had contracts in total amounts of \$10.5 million, and the San Diego Padres' commitments stood at \$9.8 million. At the opposite end of the spending spectrum were the St. Louis Cardinals at \$240,000, the Detroit Tigers at \$90,000, the Oakland A's at \$50,000, the Toronto Blue Jays at \$36,000, and the Cincinnati Reds, with a grand total of zero dollars. These figures, however, do not reveal the abilities of players in the farm system and the clubs' efforts to retain their own players rather than resorting to the free agent market. For other figures on baseball clubs' spending on free agents, see INSIDE SPORTS, June 30, 1980, at 14.

26. The Washington Redskins and New York Giants of the NFL often are mentioned as clubs with no incentive to enter the free agent market because sellouts maximize their yearly profits. This observation is not completely accurate since both clubs occasionally have entered the free agent market, albeit gingerly. In this respect, these clubs are no different than most other NFL clubs. There has been speculation, therefore, about the

guably may apply to other professional team sports as well.²⁷

This scenario also should be compared with nonsports industries. A manufacturer of goods, for example, determines the quality and price range of its product. This manufacturer also seeks to maximize both the quantity produced and the price charged for its product. There probably will be other manufacturers seeking the same market, many of whom will produce similar goods at different quality and price levels. The critical factors, therefore, are the total cost of manufacturing a certain quality good as contrasted with the gross income (price \times quantity) that can be realized from such efforts.

There is only one supposed difference between the regular industrial model and the sports model—the result of a false assumption. In the regular industrial model, it generally is accepted that businesses will sacrifice quality to widen the difference between costs and price realized, thus increasing profits. The assumption, however, is that this sacrifice of quality should not occur in sports because each club should strive to field the best team possible. Nonetheless, clubs in all sports, whether through ineptness or by design, often market products of inferior quality.²⁸ Unfortu-

reasons for the NFL clubs' reluctance or outright refusal to pursue free agents which causes the NFLPA great consternation. Garvey, *NFL Snubs Free Agents*, N.Y. Times, Aug. 12, 1979, § 5, at 2, col. 1.

27. The attitude that it is not necessary to sign free agents or take other steps to improve a club is shortsighted, particularly in team sports other than professional football. There are numerous instances in baseball, basketball, and hockey where clubs enjoy phenomenal but relatively short-lived success at the gate. For a few years, a club may be forced to turn people away because the franchise is a gold mine and the waiting list for season tickets is long. After a couple of losing seasons, however, combined with other management mistakes such as excessive ticket hikes, this pattern of refusal may change. The NHL's Boston Bruins experienced such short-lived success in the mid-1970's. The gate receipts were high with a healthy Bobby Orr and a winning atmosphere, but after some bad breaks, the team's fortune shifted.

For the 1981-82 season, the Boston Celtics sold 12,000 season tickets and could have sold out the Boston Garden had it so chosen. The team obviously is riding the crest of a wave with a 1981 NBA championship, Larry Bird, and a great supporting cast—but this success may not last. Experience has shown that some clubs appreciate this uncertainty and prepare (the Celtics have proven to be among the best in this regard), but others fail to anticipate and regret it later.

28. In describing both perennial winners and losers, this Article does not examine the reasons for clubs' respective successes or failures. The emphasis is simply that certain teams continually occupy the same end of the spectrum in almost all of the major team sports. One or two clubs seem to dominate in each NFL division, in the NBA, and in baseball's American and National Leagues. In all divisions in the three sports in the past ten years, either one team has finished first more than half the time or two teams have turned the competition into a private grudge match, taking first place 80% of the time. In the NBA's four divisions, for example, the Boston Celtics have won the Atlantic Division

nately, professional sports industries have their cut-rate dealers just as the appliance, tire, clothing, and aluminum siding industries have theirs.

The presence of cut-rate dealers in the sports industries does not mean that every club owner strives to discount for profit. Many owners are concerned with quality and are skillful at providing for such quality in their profit-making equations. There are always a few owners, however, who could increase their profits by spending less in the short run without sacrificing quality—fewer still are the owners who are willing to win at all costs.²⁹

C. *Players*

From Tinker, to Evers, to Chance

This rhyme may be responsible for three players being admitted to the Baseball Hall of Fame. While some would dispute the worthiness of the selection of one or even two of the three players,³⁰ the selection underscores a truth. The name of the game is

six of the past ten years, the Washington Bullets have won five out of the last ten years in the Central Division, the Milwaukee Bucks are six for ten in the Midwest Division, and in the Pacific Division, the Los Angeles Lakers are six for ten. A similar phenomenon occurs in the football and baseball leagues.

There are also clubs that seem to be continually out of contention. In 14 divisions of the three sports mentioned above, there is not one division in any sport where all the teams in the division have won at least once over the past 10 to 12 years. In football, the New Orleans Saints never have had a winning season in their 11 year history. In basketball, the Detroit Pistons, after their shift from Fort Wayne, have had a winning record only three times in 22 years. In baseball, neither the Cleveland Indians nor the Chicago Cubs have won a pennant since 1954 and 1945, respectively. An expansion team in 1969, the San Diego Padres finished last in their division the first six years of their existence and did not have a record over .500 until 1978. See Z. HOLLANDER, *THE MODERN ENCYCLOPEDIA OF BASEBALL* 336-57 (1979); *THE BASEBALL ENCYCLOPEDIA* 474-598 (J. Reichler ed. 1979); *Sporting News, NBA Guide* (1981); *Sporting News, NFL Guide* (1981).

29. See note 5 *supra* for a review of owners and their spending habits.

30. There are always disagreements as to who merits entrance into the Hall of Fame. The lament is raised generally about those who are ignored. "Wahoo" Sam Crawford, who is in the Hall of Fame, recounted the great players of his time and decried the fact that William "Dummy" Hoy and Tommy Leach had been ignored. L. RITTER, *THE GLORY OF THEIR TIMES* 53 (1966). Sam Jones criticized the exclusion of Tony Lazzeri, the old Yankees second baseman, who anchored the right side with Lou Gehrig for several years. *Id.* at 229.

The statistics do not reflect the intangible contributions that Joe Tinker, John "Crab" Evers, and Frank Chance (the "Peerless Leader") made to baseball. Only Chance hit for percentage, and none of the three players were overwhelming in career hits or runs batted in. In terms of raw statistics, the trio is at or near the bottom in many categories in comparison to other Hall of Famers. Among shortstops, for example, Tinker's career .263 mark exceeds only that of Rabbit Maranville. Johnny Evers' .270 average is the lowest average among the second basemen. Frank Chance, at .297, is tied with George Kelly for lowest average among first basemen, and has substantially lower total hits (only 1,273) than any

"show biz," and the players are the entertainers.

*And Williams belts another . . .*³¹

Justice Blackmun's strained analysis in *Flood v. Kuhn*³² was not the proudest moment in jurisprudence; his opening litany was probably more revealing:

Then there are the many names, celebrated for one reason or another, that have sparked the diamond and its environs and that have provided tinder for recaptured thrills, and for reminiscence and comparisons, and for conversation and anticipation in-season and off-season: Ty Cobb, Babe Ruth, Tris Speaker, Walter Johnson, Henry Chadwick, Eddie Collins, Lou Gehrig, Grover Cleveland Alexander, Rogers Hornsby, Harry Hooper, Goose Gusline, Jackie Robinson . . . Nap Lajoie . . . Old Hoss Radburne, Moe Berg, Rabbitt Maranville, Jimmie Foxx, Lefty Grove. The list seems endless.³³

*That long poke to the wall puts Lynn on second, and that brings up Jim Rice . . .*³⁴

Today, the sports phenomenon is comparable only to the other entertainment industries. Players, as actors, are both the machinery and the product of this industry. Fans fill the stadiums to see the Lakers play the "Sixers," but they also pay to see Kareem, "Magic," and "Dr. J" "do their thing." Athletes are not merely part of the game; they are the game. The thought, therefore, that these demigods are mere employees is blasphemous.

*Say it ain't so, Joe . . .*³⁵

other first baseman. Even so, they are still "Tinker to Evers to Chance," fittingly elected together to the Hall in 1946. See generally National Baseball Hall of Fame and Museum Yearbook (1981).

31. Williams was "Ted," "The Kid," "Thumper," and most of all "The Splendid Splinter." When Theodore Samuel Williams is compared to the trio in note 30 *supra*, even conceding that they played in the deadball era and he did not, the full weight of his accomplishments becomes apparent.

The Hall of Fame literature remembers Williams:

The Red Sox' TED WILLIAMS was one of baseball's greatest hitters and the last player to bat .400. Combining keen vision with quick wrists and a scientific approach to hitting, he set numerous batting records despite missing nearly five full seasons due to military service and two major injuries. His accomplishments include a .406 season in 1941, two Triple Crowns, two MVP's, six A.L. batting championships, 521 home runs, a lifetime average of .344, and 18 All-Star games.

Id. at 18.

32. 407 U.S. 261 (1972).

33. *Id.* at 262.

34. The magic that is sports is fast fleeting. This ode to Fred Lynn and Jim Rice was penned while *both* were still with the Boston Red Sox. Only Rice remains, as the Red Sox, responding to many of the major themes of this Article, traded Lynn to the California Angeles before he could become a free agent and part company with them. Gammons, *Lynn, Fisk could be free—this season*, Boston Globe, Dec. 31, 1980, at 29, col. 1.

35. Putting aside the Black Sox scandal, the greatest career misfortune for "Shoeless

Despite the awesome talents of players in the professional ranks today, only a select few have enduring qualities. Tomorrow, new players will emerge with fresh images. The professional life is short, and heroes fade quickly. Except in name, the player's state is transitory, glorified today, practically forgotten tomorrow.³⁶ Employee, independent contractor, folk-hero, statistic—the players are “fusions.” This ephemeral observation makes analysis in the legal and business contexts more difficult.

*Slaughter's racing home! Pesky hesitates with the ball! It's all over! The Cards have defeated the Red Sox in seven games. . . .*³⁷

D. Agent/Attorneys

Individuals who market the talent of professional athletes have descended on sports industries in the last fifteen years. Neither the leagues nor their franchises were prepared adequately for this onslaught.³⁸ The primary qualification for sports agents, many of

Joe" Jackson may have been to play at the same time as Ty Cobb. As Jackson once said to Cobb, "What a hell of a league that is. Ah hit .387, .408, and .395 the last three years and Ah ain't won nothin' yet!" Even so, Walter Johnson called him the greatest natural hitter he had ever seen. See D. WALLOP, *BASEBALL* 169 (1969).

Although the evidence was strong, not everyone believed Jackson was guilty of rigging the games in the 1919 World Series. D. GROPMAN, *SAY IT AIN'T SO, JOE!* (1979). This account defends Jackson and notes the attempts by the South Carolina General Assembly to persuade baseball owners to exonerate Jackson. Commissioner Happy Chandler ignored a petition for this purpose in 1951. *Id.* at 225–27. Jackson's .356 lifetime average is third on the all time list. *Id.* at xiv.

36. Except for the most devoted baseball buffs, Justice Blackmun's list of venerable ballplayers is only vaguely familiar. See note 33 *supra* and accompanying text. The fleeting nature of sports fame is evident. H. SEYMOUR, *supra* note 15, at 281–333. Nevertheless, Lawrence Ritter's quote taken from *Ecclesiasticus* 44:7 is fitting: "All these were honored in their generation, And were the glory of their times." L. RITTER, *supra* note 30, at v.

37. Knowledgeable baseball fans will easily identify the inaccuracy in this quote. It was *not* all over when Slaughter raced home. The Red Sox had another chance in the top of the ninth but failed to score when Tom McBride grounded out to Red Schoendienst to end it. D. NEFT, R. JOHNSON, R. COHEN & J. DEUTSCH, *THE SPORTS ENCYCLOPEDIA: BASEBALL* 278, 281 (1974).

38. Agents were present before the late 1960's, but they tended to be promoters, in contrast to today's personal representatives. A notable example of the old style was C.C. (Cash and Carry) Pyle. Originally a theatrical promoter, Pyle represented Red Grange when the latter turned pro in 1925. Pyle exacted \$3,000 a game and an additional \$300,000 for movie rights and endorsements for his client. See P. GARDNER, *NICE GUYS FINISH LAST* 102 (1975). Pyle also helped popularize professional tennis when he enticed the French tennis star, Suzanne Lenglen, to embark on a tour of the United States in 1926. His \$50,000 guarantee to Ms. Lenglen startled people at the time, but at the conclusion of the tour, everyone involved had benefitted handsomely. See F. MENKE, *supra* note 1, at 959–60.

In the modern era, Bob Woolf is considered the first of the big time sports attorneys.

whom are not attorneys, is the ability to articulate the demands of the athletes they represent. For too many agents, this duty of representation knows no ethical bounds. There are, however, credible agents who have advanced their clients' causes.³⁹ Overall,

Woolf chronicles his early problems of gaining credibility and being able to negotiate directly with the clubs. R. WOOLF, *BEHIND CLOSED DOORS* (1976).

39. The player-agent relationship is open to serious abuses. These abuses include misappropriating clients' funds, dealing with athletes with remaining college eligibility, violating federal securities laws, overcharging clients while taking their fees up-front on the gross contract amount, and renegotiating player contracts without prior authority and in abuse of prior oral agreements.

Richard Sorkin's 1978 conviction for grand larceny is an example of an agent misappropriating client funds. Sorkin allegedly misappropriated more than \$1.2 million from approximately 50 professional athletes he represented. Sorkin's easy access to the athletes' funds led him to squander the money, either through mob gambling or bad personal investments. Montgomery, *The Spectacular Rise and Ignoble Fall of Richard Sorkin, Pros' Agent*, N.Y. Times, Oct. 9, 1977, § 5, at 1, col. 1. See also Agent: 'Duped Clients,' N.Y. Times, Feb. 2, 1978, § 4, at 15, col. 3.

Agents often provide funds to athletes still eligible to play college sports. Some agents sign college athletes before the end of their senior year playing season. The National Collegiate Athletic Association (NCAA) rules prohibit these activities. Ruby, *What Agents Do For Clients*, INSIDE SPORTS, June 30, 1980, at 106. Other agents develop legal devices that may violate the NCAA rules. Mike Trope, a successful agent, has provided the college athlete striving for the professional leagues an open-ended contract to be signed before the end of his senior year playing season. At the season's end and after the NCAA dictated waiting period has expired, Trope then signs the "offer," notarizes it, and concludes the contract. In this way, Trope believes he serves both his clients and the NCAA rules. Johnson & Reid, *Some Offers They Couldn't Refuse*, SPORTS ILLUSTRATED, May 21, 1979, at 28. Agents also have provided college athletes with loans to induce them to sign. A small loan may yield a highly profitable client for the agent. See Florence, *Jeans-Clad Trope Hardly A Penny Ante Agent*, The Sporting News, March 19, 1977, at 13. See generally Berry, *The NCAA, the Agent and the Athlete*, in CURRENT ISSUES IN PROFESSIONAL SPORTS 31-54 (M. Jones ed. 1980).

Courts have held player-agent contracts void because of securities regulation violations. In *Zinn v. Parrish*, 644 F.2d 360 (7th Cir. 1981), the court held that the contract between agent and player was unenforceable because the contract provided that the agent recommend securities to the player for investment purposes.

Agents have abused their clients by taking percentage payments upon the signing of the contract. Although the player's contract may be shortened if he is injured or eliminated from the roster, the agent takes his percentage receipt immediately, irrespective of the player fulfilling the contract. Kirkman, *Convicted Agent Sorkin Witness as 'Rep' Probe*, N.Y. Daily News, Feb. 1, 1978, § C, at 24.

An agent's conduct in renegotiating a player's contract during its term is questionable and may cause difficulties for management. Many agents claim that this tactic is a business necessity because a player's value may change quickly, and this change must be reflected immediately in the player's salary since injury may shorten his career. Weiner, *Erving's Manager Says Nets Reneged*, N.Y. Times, Nov. 11, 1976, at 51, col. 1. Others in the field, notably Bob Woolf, strongly disagree. Woolf contends that the contract should be binding equally on both parties, according to the agreed terms. Woolf finds the industry practice of condoning renegotiation contrary to law and dangerous for sports. Woolf, *His Ex-Manager Talks of Commitment*, N.Y. Times, Nov. 1, 1976, at 51, col. 1. See also Woolf, *Contract Renegotiating Feared As Fire for Cooking the Goose*, Nat'l L.J., Aug. 7, 1978, at 27, col. 1.

sports agents have helped players increase their salaries and secure additional financial and fringe benefits.

Sports agents perform several tasks. While best known for their role in the negotiation of player contracts, these agents also may counsel the athlete, manage the athlete's finances, market the athlete's name and image, and represent the athlete in the appropriate legal forum when disputes arise. A sports agent thus may be quite valuable to an accomplished player where business affairs are complex. For the marginal ballplayer, the return received from the services of an agent is more suspect. This observation does not suggest that the marginal player should attempt to bargain with a club without an agent. Instead, the individual should be able to enlist the services of an equally effective, less expensive collective agent rather than an agent who represents only one player.⁴⁰

Collective agents are not, however, part of the custom and usage in professional team sports today. Bargaining is a bifurcated process whereby the players association establishes minimum contract terms through collective bargaining and the agent negotiates the individual player's contract with the club.⁴¹ The important

Renegotiating player contracts can have a multiplier effect in that once one player decides to renegotiate, others will follow. Buck, *Argovitz, Herzeg Cross Swords Over Fairness to Campbell*, Houston Post, Feb. 6, 1981, § C, at 1, col. 1.

Even a congressional committee has expressed its concerns about player-agent abuses. The Select Committee on Professional Sports noted "the possible widespread abuses of the player agent-athlete relationships" and urged future inquiry into the matter. FINAL REPORT OF THE SELECT COMM. ON PROFESSIONAL SPORTS, H.R. DOC. NO. 94-1786, 94th Cong., 2d Sess. 177 (1977).

40. A lower round draft choice or a player not drafted at all, for example, has limited bargaining power. Aside from a small signing bonus, not much can be exacted in the negotiation process. After signing contracts, such players typically do not make the team. Surely the offices of the players associations could provide whatever legal advice is needed at a minimal cost. Better still, a standard wage and signing bonus for the rookie year could be established by collective bargaining. Someone should represent these players' interests, though perhaps not the single player agent.

41. To illustrate the respective importance of the collective bargaining agreement guarantees and the individual agent's efforts, the contract between minimum salaries established by collective bargaining and the reported average salaries in a league is instructive. The figures below are accurate, although they vary slightly in different published accounts. INSIDE SPORTS, Aug. 31, 1981, at 69. Much depends on whether the players or owners release the figures and whether deferred salaries are discounted or included at full face amount.

	<u>Minimum</u>	<u>Average</u>
Baseball	\$32,500	\$143,765
Football	17,000*	78,657
Basketball	40,000	190,000
Hockey	12,500	108,000

*In the NFL, the minimum salary automatically increases from \$17,000 to \$22,000 if the player makes the active roster. This minimum then increases for each year of service,

issues of salary, length of contract, bonuses, and guarantees are left primarily for individual negotiations.⁴²

The rationale for this bifurcation is largely historical and arguably inappropriate today. Such bifurcation is, nevertheless, the prevailing state of the art. Consequently, agents and attorneys play an active, influential role in negotiations. The prominence of these agents and attorneys is underscored in this Article by their placement within the five basic interests that shape the infrastructure of professional team sports. Agents and attorneys are thus a visible force with whom the other sports interests must bargain.⁴³

E. *Players Associations*

The evolution of leagues, clubs, players, and agents revealed in the foregoing discussion foreshadows the emergence of players

reaching a ceiling of \$32,000 for players with five or more years of NFL experience, although it is unlikely that any five-year veteran earns only the minimum salary. *Id.*

42. Whether contracts are guaranteed depends on the particular league. In the NFL, it is likely that no more than 3% of all contracts are guaranteed. In baseball and basketball, this figure is over 50%.

The bonus arrangements also vary among the different sports. Certain types of bonuses are prohibited. In baseball, bonuses can be awarded for time played, innings pitched, games played, and at bats, but not for the statistical quality of play (*e.g.*, wins by a pitcher, batting average, and home runs). The NBA prohibits bonuses based on the outcome of a particular game or series. NBA, Uniform Player Contract, para. 13, *reprinted in* PRACTICING LAW INSTITUTE, REPRESENTING THE PROFESSIONAL ATHLETE 1978, at 52 (Patents, Copyrights, Trademarks and Literary Property Course Handbook No. 97, 1978) [hereinafter cited as REPRESENTING THE PROFESSIONAL ATHLETE]. Most other types of bonuses, however, are allowed.

The NFL probably uses bonuses more than any other league. A typical contract might contain provisions suggesting eight or ten ways a player can earn additional money by achieving certain performance or recognition standards. For a list of possible football bonuses, see BERRY, SPORTS IN THE 80'S: LEGAL AND BUSINESS CHALLENGES (ABA 1980), in particular, Ch. VIII, "Contract Negotiations."

43. An agent's power is measured by whom he or she represents and how many professional athletes are among that agent's clientele. Each sport has several dominant agents. Bob Woolf is highly regarded in many sports as an agent, but his influence in basketball is particularly extensive. Woolf recently has represented several first round draft choices, thus influencing the market price for all NBA athletes. *See* Ryan, *Woolf's The Key*, Boston Globe, Sept. 4, 1980, at 47, col. 5.

Jerry Kapstein is well known in professional baseball. Kapstein once represented five pitchers from the World Champion Cincinnati Reds. Owners admit that agents who represent so many sports stars influence the industry. *Kapstein, Could This Agent Be Too Powerful?*, Boston Globe, March 21, 1976, at 90, col. 5.

Art Kaminsky reportedly represents one-third of all NHL players. Kaminsky's concentration in this one sport allows him to make decisions that influence that sport. Eskenazi, *How One Man Dominates Agents' Game*, N.Y. Times, March 23, 1980, § 5, at 2, col. 1. *See generally* Gammons, *The Restraint of Trade*, Boston Globe, Dec. 14, 1980, at 49, col. 2.

collectives. Although these collectives are called associations, they are actually unions. The metamorphosis of these associations into viable bargaining units coincides roughly with the ascendancy of agents and attorneys. The historical development of these player groups, however, reveals their uncertain role.⁴⁴ Although the triumphs of these associations in the late 1960's and 1970's seem to indicate a defined, successful role for the player groups, their failures, which were overshadowed by these triumphs, reveal substantial problems in making a players union a vital force.⁴⁵ Some of these problems, which stem largely from the nature of sports industries, persist and thus merit discussion.

A players union is not an ordinary trade association. It bargains with a special kind of management and attempts to serve a select group of workers. Although it is questionable whether professional ballplayers should be classified with doctors, lawyers, engineers, and other academically trained professionals, this elite group of athletes is highly trained, though not academically, and exceptionally skilled.⁴⁶ Multitudes seek to enter the athletic profession; a relative handful succeed.⁴⁷ The monetary rewards for

44. Several accounts relate the history of attempts to establish players associations or unions. These attempts are particularly evidenced by baseball's associations, beginning with the Brotherhood in 1885 and several other unsuccessful attempts before the Major League Baseball Players Association finally emerged.

In particular, see J. DWORKIN, *supra* note 2, at 8-21 (baseball), 25-39 (baseball), 231 (basketball), 243-46 (football), 261 (hockey); P. GREGORY, *supra* note 2, at 182-207; L. LOWENFISH & T. LUPIEN, *supra* note 15, at 27-53, 56-95, 139-53, 183-205.

The chronology of baseball associations is as follows: National Brotherhood of Baseball Players (1885-90), The League Protective Association (1899-1902), The Fraternity of Professional Baseball Players of America (1912-18), The American Baseball Guild (1946), and the Major League Baseball Players Association (1954 to present).

The NBA Players Association started as an informal group in the 1950's and became a union in 1962. The NFL Players Association was formed in 1956. Hockey saw a players group formed in the mid-1950's that became the NHL Players Association in 1957.

45. See J. DWORKIN, *supra* note 2, at 8-21 (baseball), 25-39 (baseball), 231 (basketball), 243-46 (football), 261 (hockey); P. GREGORY, *supra* note 2, at 182-207; L. LOWENFISH & T. LUPIEN, *supra* note 15, at 27-53, 56-95, 139-53, 183-205.

46. See note 6 *supra*.

47. The NFL holds 17 rounds to draft eligible college players. In addition to those 17 players, the typical club may sign another 20 to 30 free agents. These players often have just completed college eligibility and were not drafted or had signed with a professional club in earlier years but failed to make the team. Of the new recruits, probably no more than five from each club will make the active roster. The odds are better than seven to one against making a club among those considered good enough to be signed initially.

Basketball is equally elitist, and perhaps more so. It has been noted that of the 570,000 boys who play high school basketball each year, perhaps 50 will play in the NBA—0.009 percent or 9/1000 of 1%. See Underwood, *A Game Plan for America*, SPORTS ILLUSTRATED, Feb. 23, 1981, at 64. The NBA has 10 draft rounds. Normally, anyone below the second round does not make the 12 man squad. Many lower round choices do not even

athletes, though often of short duration, are substantial and potentially overwhelming. Each of these aspects of the athletic profession threaten the cohesiveness of a union effort. Nonsports unions may experience some of these problems, but sports unions wrestle with them on a larger scale.

The membership of a players association is extremely diverse. Whether because of varying skill levels, amount of star appeal, differing crafts, or attained salary, the players have different outlooks and different interests to protect. Nonetheless, the union includes both the superstar who earns \$800,000 a year and the rookie who earns \$30,000 a year. The athlete who has started every game for the past six years is paired with the newcomer who may survive the preseason, make the active roster and then be benched. The pitcher, quarterback, goalie, or dominant NBA center is allied with the utility man, the member of the kickoff and punt-return squads, the skater on the fourth line, or the twelfth man "garbage time" sixth guard. To suggest, therefore, that all players' interests are equal and the solutions to their problems are the same, or even compatible, ignores reality.⁴⁸ There may be ways to reconcile the differences, such as the union abrogating any role in the individual salary negotiations beyond a league minimum, but for each temporary solution, there is likely to be an onset of new problems.

The varying salary levels of the union members, especially in the upper salary range, create special problems. A player earning several hundred thousand dollars per year may not be committed to striking over meal money, other travel allowances, or even pensions and the volatile freedom issues.⁴⁹ It is remarkable that many players in the upper salary stratosphere identify with those in the lower ranks. This identification, however, may not continue and thus may become worrisome to association officials.

The professional athlete's relatively short career span is perhaps the greatest problem to unions because it results in a con-

sign with the clubs which draft them. These individuals travel to Europe, attend graduate school, or pursue another career.

48. The players recognize the divisions in their ranks. In preparing for the next round of collective bargaining negotiations in the NFL, the players' representative for the union, Gene Upshaw of the Oakland Raiders, states that it will be his job to communicate with all players and convince them that the union proposal is fair and equitable. Upshaw thinks that the problems to be addressed are with both the union and management. *See* Wallace, *N.F.L. Players Set Sales Pitch*, N.Y. Times, Sept. 20, 1981, § 5, at 5, col. 2.

49. See notes 354 & 442 *infra* and accompanying text for a discussion of the freedom issues.

stantly shifting union membership.⁵⁰ By the time a protest is pursued or collective bargaining concluded, a new majority among the union membership may have emerged.⁵¹ In addition, given the shortness of the athlete's professional career, the concerns of the sports professional inevitably must be weighted toward the present.

Aside from the athlete's short career span, there is a floating membership of players composed of those who are on a major team one day, released the next day, and then reinstated to be signed by another club. Players are waived, not claimed, released, and signed by other clubs. In addition, in baseball and hockey, there is the shuffle by a certain cadre of players between the minor and major league rosters. It is difficult, therefore, at any given time, to identify the union membership—a substantial problem in labor relations.⁵²

Although nonunion members may have interests in the union activities of nonathletic organizations, the interest of manifold nonunion members in sports union activities is particularly strong. This latter group of nonunion members includes prospective professional athletes, such as college players who will be drafted or signed as free agents, other players who were not selected in the first round but still want to be considered, foreign league players looking to move, and ex-league players who want another chance. There are also the retired players, a relatively larger group than is found in the usual union. These retired players may range in age from their mid-twenties to the normal retirement age. In time, these retirees will become a larger and more vocal constituency.⁵³

Finally, there are the agents and attorneys whose intimate

50. The average professional life of a ballplayer is between four and five years, depending on the sport and the position played.

51. If a player's professional career averages four years, there will be a 50% turnover in league personnel and union membership every two years. If the average professional life is five years, the majority will be replaced in three years.

52. See notes 463-71 *infra* and accompanying text for a discussion of the unit.

53. One of the most vocal groups among the retired players is former NFL players. After threatened litigation, players who retired before the pension plan became a reality received some benefits. Every former NFL player with a disability, for example, who played five or more seasons, is now assured of an income of \$10,000 a year. The NFL, under the Bert Bell pension plan, provides needed assistance to both disabled and needy former professional players. Because of the increased veteran benefits, it is expected that the NFL Alumni Association will grow and become more vocal in its demands and concerns. See Anderson, *The Silent \$28 Million*, N.Y. Times, March 7, 1976, § 5, at 5, col. 1; *NFL Old-Timers Get Bigger Benefits*, N.Y. Times, Feb. 20, 1977, § 5, at 3, col. 1. But see *Allied Chemical-Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971) which held that an employer is not obligated to bargain with the union about retiree's

dealings with the individual players make the union's role more delicate. A good union should monitor the activities of the agents.⁵⁴ This monitoring may cause difficulties, however, if the agents feel threatened sufficiently to retaliate.⁵⁵ Another source of friction between the agents and the union is more basic. The agents and the union are in natural conflict since, in many respects, they are doing the same job—representing the athlete. Moreover, it is possible that either the agents or the union could totally supplant the other. The two entities are vying for the same economic unit—the player—and the more they vie, the more likely it is that conflicts will ensue.

A union exists for the representation of all workers in its organization. This premise seems simple, but in sports it is complex. A player who views himself or herself as special likely will feel loyalties to his or her perceived best interests or to the persons or entities that can best satisfy these interests, such as an agent, other counselors, or even the club owners. These loyalties may supplant this player's allegiance to the union, thereby impeding the union from fulfilling its representative function.

benefits because they are not "employees" within the meaning of the National Labor Relations Act.

54. At least some of the players associations have undertaken monitoring functions. See, e.g., *Baseball Players' Union Takes Aim at 'Gouging' Agents*; Miller Raps Kapstein, Boston Globe, Jan. 27, 1977, at 29, col. 1. The NFL Players Association undertook an ambitious project in this regard by aligning itself with a group of agents to form the Association of Representatives of Professional Athletes (ARPA). Among ARPA's early functions, it drafted a code of ethics for its members and to distributed a directory that listed "approved" agents. See *N.F.L. Players Organize A Group to List Agents*, N.Y. Times, Jan. 15, 1978, § 5, at 6, col. 5; *College Seniors Getting Directory of Pro Agents*, N.Y. Times, Dec. 17, 1978, § 5, at 13, col. 4. Eventually, however, for reasons hotly disputed by both sides, the NFLPA and ARPA parted ways, and a meaningful monitoring system still is not a reality.

55. In what became known as the "Trope Revolt," agent Mike Trope and others announced in May 1980, that they would form a labor organization to rival the NFLPA and move for decertification of the incumbent union. See *Sins, Mortal and Venial*, N.Y. Times, May 14, 1980, at 22, col. 2. The coalition of agents joining together to launch this effort was viewed, from the beginning, as a group unlikely to continue to cooperate. See, e.g., Visser, *It's Trope vs. Argovitz . . . and Both vs. Garvey*, Boston Globe, June 22, 1980, at 61, col. 2; McDonough, *Trope's New Union 'a Joke'*, Boston Globe, June 8, 1980, at 94, col. 1. Although this cooperation did cease, the NFLPA was concerned sufficiently about the new organization's threat to initiate legal action, that the NFLPA claimed a conspiracy among the agents in violation of the antitrust laws. *Upshaw v. Trope*, No. 80-03680 (C.D. Cal., filed Aug. 20, 1980). See *Move to Form New Union Attacked by NFLPA*, SPORTS L. REP., Aug. 1980, at 2. Reports from August, 1981, indicate that all is not peaceful in the NFLPA. The player representatives in the union affirmed their confidence in Ed Garvey's leadership but did so with seven negative votes. Gene Upshaw's comments about his mission as NFLPA president suggest that the cohesiveness of the union still needs improvement. See note 48 *supra*.

II. THE LEGAL OVERLAY

As the various personae in the sports industries contemplate how they can best further their interests, laws and legal procedures become important weapons. Legal skirmishes in the sports industries are almost as old as the leagues themselves.⁵⁶ Disputes often arise when parties join in profit-seeking ventures. Whether unintentionally or by design, people in such ventures often fail to honor their obligations or agree on the meaning of those obligations. As such deals are broken, the parties seek judicial resolution of their differences.

This Article has analogized the sports industries to other entertainment industries to highlight the similarities between the two industries. Moreover, a legal analogy can be drawn between the two industries because the operative legal principles in the entertainment industries parallel the legal principles now governing the sports world. Many early sports cases relied on entertainment law precedent,⁵⁷ and the legal happenings in the other entertain-

56. As noted earlier in the text accompanying note 15 *supra*, the National League was formed in 1876, soon after the practical demise of the National Association of Professional Baseball Players. This loose alliance of ballclubs was beset constantly by a multitude of organizational woes. The National League, in its early years, suffered from some of the same ills but nevertheless advanced professional baseball to the state where rival leagues were formed to emulate the success of the National League. With the formation of the leagues came contract-jumping and the inevitable lawsuits. According to H. SEYMOUR, *supra* note 15, at 141, 154-56, litigation began as early as 1882 when Cincinnati, of the newly formed American Association, sued Samuel Washington Wise for not honoring his contract. Furthermore, in 1884, one of the better known pitchers in the early years of baseball, Tony Mullane, was sued by the ill-fated and short-lived Union Association.

Other early examples of litigation include: Metropolitan Exhibition Co. v. Ewing, 42 F. 198 (C.C.S.D.N.Y. 1890); Allegheny Base-Ball Club v. Bennett, 14 F. 257 (C.C.W.D. Pa. 1882); Baltimore Baseball Club & Exhibition Co. v. Pickett, 78 Md. 375, 28 A. 279 (1894); Metropolitan Exhibition Co. v. Ward, 9 N.Y.S. 779 (Sup. Ct. 1890); Columbus Base-Ball Club v. Reiley, 11 Ohio Dec. 272 (1891); Harrisburg Base-Ball Club v. Athletic Ass'n, 8 Pa. County Ct. 337 (1890); Philadelphia Ball Club, Ltd. v. Hallman, 8 Pa. County Ct. 57 (1890). All of these cases predated the wave of litigation that attended the formation of the American League.

57. See, e.g., Philadelphia Ball Club, Ltd. v. Hallman, 8 Pa. County Ct. at 59, which regarded Lumley v. Wagner, 42 Eng. Rep. 687 (1852), as having established precedent in this country and in England. In Harrisburg Base-Ball Club v. Athletic Ass'n, 8 Pa. County Ct. at 338-41, the court cited several other precedents criticizing *Lumley* and accordingly refused to follow its rationale.

In Metropolitan Exhibition Co. v. Ward, 9 N.Y.S. at 780-81, the court cited *Lumley*, then turned to American cases involving entertainers, such as Daly v. Smith, 38 N.Y. Sup. Ct. 158 (1874) and Mapleson v. Del Puente, 13 Abb. N. Cas. 144 (N.Y. 1883).

See also Philadelphia Base-Ball Club, Ltd. v. Lajoie, 10 Pa. Dist. Rpts. 309, 310-13 (1901), *rev'd*, 202 Pa. 210, 51 A. 973 (1902). This case discusses *Lumley* and *Daley* and adds English entertainment cases such as Webster v. Dillon, 30 L.T.R.(n.s.) 71 (1857) and

ment fields greatly influenced the development of sports law for much of this century. Sports cases now form an independent body of precedent which testifies to the economic growth of professional sports. It is evident that this economic success invited legal fights over the spoils.

Three distinct legal principles have shaped the legal framework of sports,⁵⁸ although it is the confluence of these principles that ultimately matters. Each principle has had its day; first contracts, then antitrust, and today, arguably, labor.⁵⁹ The following analysis examines the three areas individually, denoting where each is incomplete and needs reinforcement.

Montague v. Flockton, L.R. 16 Eq. 189 (1873). *Lajoie* analogizes these cases to the 1890's sports cases cited in this note and note 56 *supra*.

58. In addition to contracts, antitrust, and labor concepts, tort and property concepts, although peripheral, have also been significant in shaping the legal framework of sports law. Tax law, perhaps less on the periphery than tort and property law, also has been influential. The extent to which owners could depreciate player contracts and defer compensation ameliorated some of the devastating effects of the maximum tax rates on earned income and also shaped the economic structure of professional clubs and leagues, particularly before the 1976 Internal Revenue Code revisions. The tax laws' impact, however, is somewhat separate from the interaction of contracts, antitrust, and labor law discussed in this Article. For that reason, tax is not considered in tandem with the other areas of law.

For a thorough discussion of the interface of tax law and professional sports, particularly in light of the 1976 revisions, see, e.g., Blum, *Valuing Intangibles: What Are the Choices for Valuing Professional Sports Teams?*, 45 J. TAX. 286 (1976); Horvitz & Hoffman, *New Tax Developments in the Syndication of Sports Franchises*, 54 TAXES 175 (1976); Jones, *Amortization and Nonamortization of Intangibles in the Sports World*, 53 TAXES 777 (1975); Lowell, *Deferred Compensation for Athletes*, 10 TAX ADVISOR 68 (1979); Raabe, *Professional Sports Franchises and the Treatment of League Expansion Proceeds*, 57 TAXES 427 (1979); Strandell, *The Impact of the 1976 Tax Reform Act on the Owners of Professional Sports Teams*, 4 J. CONTEMP. L. 219 (1978); Weill, *Depreciation of Player Contracts—The Government Is Ahead at the Half*, 53 TAXES 581 (1975); Zaritsky, *Taxation of Professional Sports Teams After 1976: A Whole New Ballgame*, 18 WM. & MARY L. REV. 679 (1977).

59. Labor principles will not preempt the sports law field completely. Problems beyond the scope of labor relations or labor law are common. See text accompanying notes 172-76 *infra*. Depending on the nature of the problem, certain circumstances may arise which are of great importance to the legal framework of sports, but which have a limited impact on labor law. One such occurrence is the current legal dispute over the attempted move of the Oakland Raiders to Los Angeles. The NFL's action to block this move has resulted in antitrust litigation by those with financial interest in the Los Angeles Coliseum and the Raiders. For preliminary actions in this litigation, see Los Angeles Memorial Coliseum Comm'n v. NFL, 468 F. Supp. 154 (C.D. Cal. 1979), *modified*, 484 F. Supp. 1274 (C.D. Cal. 1980). See also Hecht v. Pro-Football, Inc., 570 F.2d 982 (D.C. Cir. 1977) (denial of stadium lease to prospective owner in one league because club owners in a rival league exercised control over the facility); AFL v. NFL, 323 F.2d 124 (4th Cir. 1963) (assorted monopolistic practices engaged in by one league to the detriment of the other); NASL v. NFL, 505 F. Supp. 659 (S.D.N.Y. 1980), *modifying* 465 F. Supp. 665 (S.D.N.Y. 1979) (restrictions on cross-ownership among sports leagues); note 12 *supra*.

A. *The One-on-One: Contracts*

The salvos first began over principles of contract law and its remedies in the entertainment fields, although it was not long before the battleground changed to the sports industries. Much of the early litigation centered around an employer's right to prevent an entertainer from performing elsewhere.⁶⁰ The most famous of these cases involved a young opera singer, Johanna Wagner, and her attempts to abandon Her Majesty's Theatre of London and join a rival troupe.⁶¹ The court held that it could not order Johanna Wagner to perform for her first employer, but it could prevent her from performing elsewhere in the same geographical area.⁶² This negative injunction became a standard for the industry.

Two later nineteenth century English cases expanded on the Wagner theme. The first case, *Webster v. Dillon*,⁶³ held that it was not necessary that the written contract include a specific clause designating the injunction an appropriate remedy. It was sufficient that it appear, from the face of the contract, that the services were to be exclusive and unique.⁶⁴ This latter criterion of uniqueness later became substantially important in similar cases in the sports field.⁶⁵ The second case, *Grimston v. Cunningham*,⁶⁶ concerned an actor who signed with an English road company touring the United States. After a dispute over the roles assigned to him, the actor returned to England and contracted with another employer. An English court again enjoined the entertainer, although he now wanted to act in England rather than in the United States. Although it was evident that the new employment was not a competitive threat to the old employer, injunctive relief never-

60. The early entertainment cases dealing with injunctive and other forms of relief are discussed strictly from the entertainment perspective in Tannenbaum, *Enforcement of Personal Service Contracts in the Entertainment Industry*, 42 CAL. L. REV. 18 (1954).

61. *Lumley v. Wagner*, 42 Eng. Rep. 687 (1852). This case also spawned actions against the rival employer who attempted to induce Johanna Wagner to break her contract—an early example of interference with a contractual relationship. *Lumley v. Gye*, 118 Eng. Rep. 749 (1853). This approach, particularly when injunctive relief against the defecting employee might be unobtainable or ineffective, has served occasionally as an effective alternative in the sports industries. See *New England Patriots Football Club, Inc. v. University of Colo.*, 592 F.2d 1196 (1st Cir. 1979); *American League Baseball Club of New York, Inc. v. Pasquel*, 63 N.Y.S.2d 537 (Sup. Ct. 1946).

62. *Lumley v. Wagner*, 42 Eng. Rep. at 699.

63. 30 L.T.R.(n.s.) 71 (1857).

64. *Id.* See also *Montague v. Flockton*, L.R. 16 Eq. 189 (1873).

65. See notes 104–06 *infra* and accompanying text.

66. [1894] 1 Q.B. 125.

theless was granted.⁶⁷ These cases, particularly the latter case, helped to establish that the services of entertainers are sufficiently unique to allow pressure, in the form of a negative injunction, to be applied simply because the employer has lost the entertainer's services. It is not necessary to establish further losses because of competitive harm.⁶⁸

This precedent influenced a case involving actress Bette Davis.⁶⁹ Ms. Davis' employer lifted the suspension earlier imposed on her to make it appear that her contract was still in force. The employer later enjoined her from making films or appearing on stage for the remainder of her contract or three years, whichever was shorter. Despite the court's refusal to bar Ms. Davis from any other work whatsoever, the length and scope of the injunction which it upheld were formidable.⁷⁰ To the extent that these companion entertainment cases have influenced sports injunctions, the problems which Ms. Davis encountered and the results of her litigation do not bode well for a potentially defecting ballplayer.

The promulgation of sports cases added a new dimension to the earlier entertainment cases. Sports leagues have been characterized as cartels, internalizing rules that reduce, if not eliminate, competition for players services.⁷¹ Until the advent of various forms of free agency, there was no bidding for players services once these players had signed with their first team. The advent of the draft system in various sports has eliminated even that form of competition. There was, therefore, no competition until the emergence of a rival league. Consequently, the chronology of sports cases involving contract jumping is also a tale of efforts, mainly failures, of new leagues to establish themselves and challenge the entrenched order.⁷²

67. 30 L.T.R.(n.s.) 71 (1857).

68. See also *Marco Prod., Ltd. v. Pagola*, [1945] 1 K.B. 111.

69. *Warner Bros. Pictures, Inc. v. Nelson*, [1937] 1 K.B. 209. Note also the discussion of this case in Tannenbaum, *supra* note 60, at 25.

70. The length of the injunction allowed in the Bette Davis case can be contrasted with a much more limited approach, under admittedly different facts, in *Machen v. Johanson*, 174 F. Supp. 522 (S.D.N.Y. 1959) (injunction denied) and *Lemat Corp. v. Barry*, 275 Cal. App. 2d 671, 80 Cal. Rptr. 240 (1969) (two year injunction granted).

71. See notes 15-22 *supra* and accompanying text.

72. Until the advent of the litigious age of the 1960's and 1970's, most of the reported sports cases focused on the legal problems erupting when rival leagues were formed and the owners of such leagues went to war concerning rights to players, territories, and other valuable requisites of professional sports teams. The cases resulted from such events as the formation of the Players League (1890), the American League (1900), the Federal League (1914), the Mexican League (1948), the American Football League, American Basketball League, American Basketball Association (1960's), and the World Hockey Association and

The "opening shots" in the sports world were fired in 1890⁷³ in a case involving the National Brotherhood of Professional Baseball Players' abortive attempts to start its own league. Leaders in the association, many of whom were considered among the best in the National League, led the defections to the Players League and were, not surprisingly, among those first sued. The old clubs sought restraining orders against the defectors' participation in the new league.⁷⁴ These initial cases can be distinguished from the entertainment precedent described above because the basic enforceability of the contracts was at issue, not just the appropriateness of the remedy. The reserve clauses in the players' contracts raised issues not confronted in the entertainment analogues.⁷⁵

The early contract litigation focused on the reserve clause, which was later adjudicated in both antitrust and labor contexts. Specifically, the courts questioned the legal enforceability of the reserve clauses in light of the five prerequisites of injunctive relief.⁷⁶ Initial judicial inquiries resulted in victories for the players. *Metropolitan Exhibition Co. v. Ewing*⁷⁷ involved Buck Ewing, an established National League star who was contracted as player-

World Football Leagues (1970's). There were other causes for litigation: contracts terminated due to injuries, players suspended and blacklisted, and owners disciplined. Until the advent of grievance arbitration and the individual's increased awareness of his supposed legal rights, however, the history of the legal problems in sports and of new leagues challenging the established order were practically synonymous.

73. As stated in note 56 *supra*, a few cases were decided before 1890, but most of these cases had limited precedential value. See, e.g., *Allegheny Base-Ball Club v. Bennett*, 14 F. 257 (C.C.W.D. Pa. 1882).

74. See notes 81, 84 *supra*.

75. The reserve clause, as a baseball institution, is almost as old as the National League. It is reported to have been used as early as 1879. See R. SMITH, *BASEBALL* (1947). The term of the contract at issue in most entertainment cases was for a definite time. The alleged breach occurred during the running of that time. In contrast, many sports cases involve the club's right to hold the player to an additional term by invoking the reserve clause in the old contract. Although this situation did not always exist, there are sufficient cases of this type to serve as a distinction from the entertainment cases. See *Metropolitan Exhibition Co. v. Ewing*, 42 F. 198 (C.C.S.D.N.Y. 1890), *Metropolitan Exhibition Co. v. Ward*, 9 N.Y.S. 779 (Sup. Ct. 1890).

76. As outlined in *Metropolitan Exhibition Co. v. Ewing*, 42 F. at 202 (C.C.S.D.N.Y. 1890) the five elements considered in granting or denying injunctive relief are:

- 1) The breach must be one for which damages at law would be inadequate compensation;
- 2) The party seeking the injunction must have "clean hands";
- 3) The injunction sought must not be unduly oppressive to the defendant;
- 4) The contract must have mutuality or be founded on adequate consideration; and
- 5) The terms of the contract must be definite.

77. *Id.*

manager of the New York entry in the Players League.⁷⁸ A United States district court, however, found that the reserve clause in Ewing's contract did not define adequately the terms that would appear in a new contract if the club invoked that clause. In addition, the court held that reference to trade, custom, and usage did not resolve that indefiniteness, and it refused to grant injunctive relief or damages.⁷⁹

In a companion case, *Metropolitan Exhibition Co. v. Ward*,⁸⁰ John Montgomery Ward, one of the Brotherhood organizers, successfully defeated his National League club's request for an injunction on the grounds that the contract clause was indefinite. Ward further maintained that the contract lacked mutuality since he could be released on ten days' notice but also could be bound, at the club's option, for an indefinite period of time.⁸¹ After its

78. It is ironic that William B. "Buck" Ewing was one of the players singled out in the litigation over the Players League. Although he was one of the original organizers of the Brotherhood in 1885, he had expressed sympathy for his National League owner, John B. Day of New York, just before the formation of the Players League was announced. According to reports, he almost was convinced to forsake the new league and announce his support for the National League, but reneged when he found no other renegade players ready to recant. His credibility with the Players League, therefore, was temporarily damaged. See H. SEYMOUR, *supra* note 15, at 234.

On the other hand, since Ewing was a leading baseball star at that time, a legal victory against him would have led to widespread publicity and a significant boost for the National League. In all, Ewing spent 18 years in the majors. Ewing's election to the Hall of Fame in 1939 earned him a plaque at Cooperstown which reads: "Greatest 19th Century Catcher. Giant in Stature and Giant Captain of New York's First National League Champions 1888 and 1889. Was Genius as Field Leader, Unsurpassed in Throwing to Bases, Great Long-Range Hitter. National League Career 1881 to 1899. Troy, N.Y. Giants and Cleveland; Cincinnati Manager." This information includes Ewing's stint as a manager in 1898 and 1899. Ewing was the first catcher elected to the Hall of Fame, although contemporary accounts also attest to his abilities at first base and in the outfield. National Baseball Hall of Fame and Museum Yearbook 27 (1976).

79. *Metropolitan Exhibition Co. v. Ewing*, 42 F. at 204. According to the court: The law implies that the option of reservation is to be exercised within a reasonable time; but when this has been done the right to reserve the player becomes the privilege, and the exclusive privilege, as between the reserving club and the other clubs, to obtain his services for another year if the parties can agree upon the terms. As a coercive condition which places the player practically, or at least measurably, in a situation where he must contract with the club that has reserved him, or face the probability of losing any engagement for the ensuing season, it is operative and valuable to the club. But, as the basis for an action for damages if the player fails to contract, or for an action to enforce specific performance, it is wholly nugatory. In a legal sense, it is merely a contract to make a contract if the parties can agree.

Id.

80. 9 N.Y.S. 779 (Sup. Ct. 1890).

81. *Id.* Although this analysis concentrates on *Ewing* and *Ward* from the Players League era, numerous other lawsuits were filed against players leaving the National League and American Association to join the Players League. Most attempts to retain the

loss in *Ewing*, the club in *Ward* tried to argue that the reserve clause was a right to reserve the ballplayer for only the ensuing season at not less than the present season's salary. The court, however, found that the clause did not define any of the terms of the subsequent contract and thus rejected the club's attempts to explain the ambiguities. On the mutuality issue, the court stated that the concentration of power in one party to a contract, where a club could either bind a player in perpetuity or release him on ten days' notice, could lead to great inequities. The club, for example, might hold a player until the time had passed when he reasonably could join another club, then release him with no further obligations. The unequal bargaining power of the parties allowed equity courts to find a lack of mutuality and deny claims for injunctive relief.⁸²

For *Ewing*, *Ward*, and the other Players League defectors, these substantial court victories were hollow ones. By the time the legal dust had cleared, the Players League had disappeared. The league lasted only a year, largely undermined by the new group of owners,⁸³ recruited to help finance the operation. This new group found that it had more in common with the National League owners than with its own players. Although the tale is somewhat more complicated,⁸⁴ it does underscore the proposition that more is nec-

players were unsuccessful. See, e.g., *Philadelphia Ball Club, Ltd. v. Hallman*, 9 Pa. County Ct. 57 (1890). The club was successful in only one case. John Pickett, who had been playing for the American Association's Kansas City club, was ordered not to play for any other team. See *American Ass'n of Base-Ball of Kansas City v. Pickett*, 20 Phila. Rep. 298 (1890). Pickett, however, evidently was able to ignore the injunction because he is reported to have played second base for the Philadelphia Players League Club. See H. SEYMOUR, *supra* note 15, at 237.

82. In the reported *Ward* decision, the court only considered whether a preliminary injunction should issue. Evidently, there was never a full trial on the issue of whether the contract lacked mutuality. The decision does express great doubts that plaintiff ball club would have succeeded on the merits. 9 N.Y.S. at 784.

As is so often true in these cases, the preliminary injunction stage is often indicative of the ultimate decision on the merits. This observation is particularly true when, as in *Ward*, there is no jury and the full trial may be before the same judge. Accordingly, many of the injunction cases were settled after the hearing on the preliminary injunction and before the trial on the merits.

83. In terms of accuracy, it should be noted that the term "owners" was avoided in the Players League. Those supplying the capital were called "contributors." Both players and contributors were stockholders and shared in administrative functions. See H. SEYMOUR, *supra* note 15, at 228-29. As matters developed, however, most of the contributors became owners, but not in the Players League. These new owners merged their interests with club owners in the established leagues and earned handsome profits from baseball during the 1890's without the threat of other rival leagues. *Id.* at 244-48.

84. See *id.* at 240-50. See also L. LOWENFISH & T. LUPIEN, *supra* note 15, at 39-53. The Players League, ironically, might have prevailed had the contributors been more per-

essary to ultimate victory in the business context than merely having the law on one's side. Ewing and Ward returned to the National League, played out their careers in brilliant fashion, and are now in the Hall of Fame as two early stalwarts of the national pastime. These players' great dream was defeated, not by the law, but by business maneuvering.⁸⁵

The next round of litigation came ten years after *Ewing and Ward*. After the Players League failed, the two remaining leagues, which had operated in relative harmony since 1884 under a national agreement, began to dispute. As a result, the American Association withdrew from the agreement and attempted to succeed on its own. This shortsighted move, compounded by a number of economic mistakes and fostered in part by National League actions, led to the association's demise in 1891.⁸⁶ For a few years, the National League was in control, but professional baseball was a young and growing sport, and several investors were eager to participate in its expansion. This eagerness led to

severing. The league had the better players, having lured away almost all of the National League stars and the great majority of its players. By one estimate, all but 38 National League players defected. In addition, although attendance figures announced by all the leagues were undoubtedly inflated, it is fairly certain that the Players League outdrew both the National League and the American Association. Nonetheless, all owners (contributors) lost significant amounts of money. The National League was not in a better bargaining position, but a solution to the above problem was needed, and the National League maneuvered itself into a position where it could dictate the terms of that solution. In the process, the players suffered—largely deserted by their erstwhile colleagues, the contributors.

85. Along with Buck Ewing, John Montgomery Ward was one of the organizers of the Brotherhood in 1885. Ward soon assumed the chief leadership role in the organization and worked toward the formation of the Players League, after his playing days ended. Ward and the players were defeated in 1890, but Ward continued to persevere. Ward retained baseball connections throughout his life and was seriously considered once for the presidency of the National League. Ward was defeated in this bid, however, by American League president Ban Johnson, who opposed Ward because earlier he had represented another player, George Davis, in a dispute that involved one of Johnson's American League clubs, the Chicago White Sox. See L. LOWENFISH & T. LUPIEN, *supra* note 15, at 51.

Nonetheless, Ward stayed involved in baseball, serving briefly as president of the National League's Boston Braves. Later, Ward was general manager of the Brooklyn club in the Federal League, showing that his willingness to unsettle the established order never died. Ward continued to write and speak about the abuses he saw in the business of baseball.

Monte Ward was a consummate player in the pre-1900 era. In his early years, he was a pitcher, hurling one of the first perfect games. There have been only nine such games in baseball's history, the latest Cleveland's Len Barker in the abbreviated 1981 season. *Len Barker Pitches Perfect Game Against Toronto*, N.Y. Times, May 10, 1981, at 17, col. 4.

86. See H. SEYMOUR, *supra* note 15, at 251-62.

the birth of the American League in 1900,⁸⁷ and under the usual formula, this new league began to lure established players away from their National League teams.⁸⁸ The National League teams retaliated by filing lawsuits against the fleeing players.

The case of Napoleon Lajoie became a legal standard in the early years of sports litigation. By 1900, Lajoie was a leading National League second baseman for the Philadelphia Nationals⁸⁹ who was forced to accept the \$2,400 maximum salary imposed by National League rules. Dissatisfied with this salary, Lajoie moved across town to the new Philadelphia club of the equally new American League. The National League club brought suit, and battle ensued.

The initial victory went to Lajoie.⁹⁰ The trial court, relying heavily on English and American precedent, found that Lajoie's services as a baseball player were not irreplaceable. Lajoie's work at second base and home plate was not sufficiently unique. The court also dismissed the complaint on the grounds that the contract was unenforceable due to lack of mutuality.⁹¹

87. Although the American League was "born" in 1900, it actually evolved out of a minor league, the Western. Under the leadership of Ban Johnson, it became a major league and changed its name in October 1899 to give itself a more national image. See L. ALLEN, *THE AMERICAN LEAGUE STORY* (1962); R. SMITH, *supra* note 73.

88. For the 1900 season, Ban Johnson and his American League engaged in few player raids on the National League. Johnson, in fact, promised to abide by the National Agreement and its provisions against raiding. That promise lasted for only one year. In late 1900, looking forward to expansion of his league into eastern cities for the 1901 season, Johnson did not renew his application for protection under the national agreement. The war over the players began shortly thereafter. Of the 185 players on American League rosters in 1901, 111 were former National Leaguers. L. ALLEN, *supra* note 87, at 18. According to another estimate, 74 players deserted the National League for the American League during the two year span from 1901 to 1902. See H. SEYMOUR, *supra* note 15, at 314.

89. Team nicknames are puzzling. It was not always apparent, at least prior to 1900, when a team had an individual nickname and when it simply took the league name, as evidenced by the Philadelphia Nationals. This team already may have been referred to as the Phillies in everyday parlance. Seymour refers to the Philadelphia National League entry in 1883 as the Phillies. H. SEYMOUR, *supra* note 15, at 207. To be conservative, the team is called the Nationals in this Article, just as many of their counterparts of the day were similarly designated.

The league that went the furthest in this regard was the Federal League. Its teams all bore a contraction of the city where they played and the name of the league. The Chicago team, for example, was the Chifeds. The Buffalofeds was the most striking example of this rather absurd technique. Perhaps there was a natural reluctance to contract that name any further; the Buffeds might have been mistaken too easily for pushovers.

90. Philadelphia Base-Ball Club, Ltd. v. Lajoie, 10 Pa. Dist. Rpts. 309 (1901), *rev'd*, 202 Pa. 210, 51 A. 973 (1902).

91. *Id.* at 317.

As in *Ewing* and *Ward*, the court noted that the club could terminate the contract any time after ten days notice. At the same time, the club could extend the agreement periodically for a total of three years. In light of the earlier sports cases, albeit in other jurisdictions, the trial court's holding was neither irrational nor particularly surprising. The case, nevertheless, was appealed. In the interim, Lajoie played the 1901 season and batted .422—still an American League single season record.⁹²

The Supreme Court of Pennsylvania did not note Lajoie's record, but it did view the case substantially differently than the trial judge. The Supreme Court's opinion of April 21, 1902, contains much analysis that became indelibly impressed on professional sports industries.⁹³ The court thought that the evidence warranted a stronger finding as to Lajoie's baseball acumen. The court concluded, with a touch of sensationalism, "[H]e may not be the sun in the baseball firmament, but he is certainly a bright particular star."⁹⁴ The court, however, had more difficulty resolving the mutuality issue and noted several pertinent considerations. First, it was not necessary for both parties to a contract to have identical rights or remedies. Second, in examining Lajoie's contract, it was noted that his "large salary" was, in part, consideration received for the ten day termination power given the club. The court thus attempted to neutralize the termination powers through the salary, leaving the possible length of the contract reasonable for both par-

92. In the post-1900 baseball era, Lajoie's .422 mark is exceeded only by the efforts of another second baseman, Rogers Hornsby. The "Rajah's" .424 in 1924, one of the three seasons in which he exceeded .400, is the best in the National League, as Lajoie's record is unsurpassed in the American League. Hornsby's mark is second in the National League if Hugh Duffy's .438 in 1894 is counted. All three players richly deserve their respective places in the Baseball Hall of Fame.

Napoleon Lajoie, called Larry, had a long career in baseball. Lajoie's undoubted abilities in the field were accompanied by the honor of having a team named after him. Cleveland's American League entry was managed by Lajoie, and it was called the Cleveland Naps. Lajoie was not referred to as the "little second-sacker," an appellation often applied to the gritty, undersized players filling that position. At six feet two inches, Lajoie was the "Big Frenchman," one of the taller players during that era.

Lajoie's on-field achievements rank him among the game's greatest players. Over the course of 21 years in the majors, Lajoie came to bat 9,589 times, had 3,251 hits, and compiled an enviable career batting average of .339. Lajoie was elected to the Hall of Fame in 1938, the second year of its existence, and was the first second-baseman so honored. Only the big five—Ty Cobb, Babe Ruth, Walter Johnson, Christy Mathewson, and Honus Wagner—preceded him into the Hall. See Hall of Fame Yearbook, *supra* note 78, at 22; D. NEFT, R. JOHNSON, R. COHEN & J. DEUTSCH, *supra* note 37, at 109.

93. Philadelphia Ball Club, Ltd. v. Lajoie, 202 Pa. 210, 51 A. 973 (1902).

94. *Id.* at 217, 51 A. at 974.

ties.⁹⁵ Since plaintiff had exercised its right to renew the contract for the 1902 season, the defendant was enjoined from playing for any other club during that time.

In this case, however, the league's victory was hollow. Lajoie did not return meekly to the Nationals, nor did the American League admit defeat. Instead, Lajoie was traded to Cleveland, where he was safe from the impact of the Pennsylvania injunction since the Ohio courts refused to adhere to the Pennsylvania decree.⁹⁶ Lajoie was inconvenienced only because he could not travel with his club to Philadelphia. This arrangement lasted only until the two leagues came to a new national agreement a year later.⁹⁷ It is ironic, but fitting, that Ewing, Ward, and their new league "won" in court, but "lost" where it counted, while Lajoie and the American League "lost" in court but "won" from a business standpoint.

There is also the larger impact of these cases. Given the litigation that arose after these cases, the *Lajoie* doctrine prevailed. In most cases, ballplayers have been considered unique and can be

95. In comparing the club's right to terminate the contract with the bargained for salary which Lajoie was to receive, the court noted:

The term mutuality or lack of mutuality does not always convey a clear and definite meaning. . . .

In the contract now before us, the defendant agreed to furnish his skilled professional services to the plaintiff for a period which might be extended over three years by proper notice given before the close of each current year. On the other hand, the plaintiff retained the right to terminate the contract upon ten days' notice, and the payment of salary for that time, and the expenses of defendant in getting to his home. But the fact of this concession to the plaintiff is distinctly pointed out as part of the consideration for the large salary paid to the defendant, and is emphasized as such. And owing to the peculiar nature of the services demanded by the business, and the high degree of efficiency which must be maintained, the stipulation is not unreasonable. Particularly is this true when it is remembered that the plaintiff has played for years under substantially the same regulations.

Id. at 219, 51 A. at 974-75.

As noted in the text, Lajoie's "large salary" was \$2,400, the league-imposed maximum, and one of the selling points that the new American League used to induce players to forsake the National League. It is evident, however, that the court also was influenced by the fact that the contract was partially executed and that the club had paid Lajoie substantial sums of money under what is alleged to be an unenforceable agreement.

96. *See Philadelphia Baseball Club Co. v. Lajoie*, 13 Ohio Dec. 504 (1902).

97. It was, of course, in 1903 that the first of the modern World Series was held, arising out of the new national agreement between the National and American Leagues. It was somewhat fitting that one of the participant clubs was the Pittsburgh Pirates, since that team earned its nickname in the 1890's for allegedly pirating away a player that should have been returned to the American Association after the demise of the Players League. Pittsburgh was not as fortunate this time. In a major upset, the Boston Pilgrims, later the Red Sox, swept the first World Series championship, five games to three. D. NEFT, R. JOHNSON, R. COHEN & J. DEUTSCH, *supra* note 37, at 28.

held to somewhat one-sided contracts that might have enforceability problems in other settings.⁹⁸ There is more to these cases, however, than the narrow aspects of their holdings.

The central motive of these cases was to challenge the operation of sports leagues as cartels. An important aspect of a league's operations is an allocation system of player resources. The cases of the 1890's and 1900's challenged this system. The challenge was partially successful in *Ewing* and *Ward* but lost due to other circumstances. The challenge was totally unsuccessful in *Lajoie*. Although some later cases, under contract analysis, questioned the system,⁹⁹ none of them made serious inroads. Thus, the net effect of these cases did not prevent the leagues from evolving into cartels. Players and rival leagues would have to look elsewhere for legal assistance.

In addition to this hesitant affirmation of the system, the development of the contract cases had other effects. Restraints were imposed on owners, both in the old and new leagues, from engaging in outrageous conduct. The courts gave new application to the equitable clean hands doctrine.¹⁰⁰ Leagues could thus bind play-

98. Well into this century, courts looked with great skepticism on contracts that contained one-sided cancellation clauses. These contracts often were found to be lacking in mutuality of obligation and were voided, as in the leading case of *Miami Coca-Cola Bottling Co. v. Orange Crush Co.*, 296 F. 693 (5th Cir. 1924). For 25 years after *Lajoie*, therefore, courts applied the mutuality doctrine more vigorously in other industrial settings. This discrepancy has eroded slowly, so that the *Lajoie* approach for sports contracts differs minimally from other problems. This development occurred over a long period of time. See Gellhorn, *Limitations on Contract Termination Rights—Franchise Cancellations*, 1967 DUKE L.J. 465.

99. See, e.g., *Weeghan v. Killefer*, 215 F. 168 (W.D. Mich.), *aff'd*, 215 F. 289 (6th Cir. 1914); *Brooklyn Baseball Club v. McGuire*, 116 F. 782 (E.D. Pa. 1902); *Connecticut Professional Sports Corp. v. Heyman*, 276 F. Supp. 618 (S.D.N.Y. 1967); *American League Baseball Club of Chicago v. Chase*, 86 Misc. 441, 149 N.Y.S. 6 (Sup. Ct. 1914). But see *Cincinnati Exhibition Co. v. Marsans*, 216 F. 269 (E.D. Mo. 1914); *Long Island Am. Ass'n Football Club, Inc. v. Manrodt*, 23 N.Y.S.2d 858 (Sup. Ct. 1940).

100. The clean hands doctrine was thoroughly reviewed in *Weeghan v. Killefer*, 215 F. 168 (W.D. Mich.), *aff'd*, 215 F. 289 (6th Cir. 1914). Although the court thought that the player's contract with his original club was unenforceable due to a lack of mutuality, it nevertheless held that the player was under some moral obligation to the club. When the new club attempted to sign the player, with knowledge of the old "contract," it was engaging in questionable conduct. The new club's later attempt to enforce its contract was frustrated because it did not come into court with "clean hands."

For other applications of the clean hands doctrine, see *New York Football Giants v. Los Angeles Chargers Football Club, Inc.*, 291 F.2d 471 (5th Cir. 1961); *Minnesota Muskies, Inc. v. Hudson*, 294 F. Supp. 979 (M.D.N.C. 1969). For cases where the court considered the doctrine but held that it did not bar plaintiffs' suits, see *Washington Capitols Basketball Club v. Barry*, 419 F.2d 472 (9th Cir.), *aff'g* 304 F. Supp. 1193 (N.D. Cal. 1969); *Houston Oilers, Inc. v. Neely*, 361 F.2d 36 (10th Cir.), *cert. denied*, 385 U.S. 840 (1966).

ers internally, but bidding by competing leagues and owners was subject to certain structured, if primitive, rules. Although it is difficult to conclude that the courts gave either the old or new leagues an advantage on the "clean hands" issue, there is a temptation to declare that the new leagues, seen as underdogs, have been favored slightly. The established leagues, already possessing substantial advantages, were regarded with hostility when their conduct was questionable.¹⁰¹ These decisions represented the courts' imperfect attempts to prevent a league from becoming too dominant. There were limits to relying on a contract to enforce all the desires of a club or league, but the courts did not, in any sense, reorder the system.

Since these early cases, other efforts to circumscribe the indiscriminate granting of contract and equitable remedies that perpetuate league dominance have had only limited success. One court refused to extend an injunction against basketball player Rick Barry beyond the one year option in his contract. Thus, the fact that Barry did not play that year and refused to honor his contract was not grounds for prohibiting him from joining the new American Basketball Association when the year elapsed.¹⁰²

A football player of less repute did not play one year, with minimal effect. In *Dallas Cowboys v. Harris*,¹⁰³ Jimmy Harris found that his year of "retirement" merely caused his contract to be tolled, and he faced continuing obligations under that contract for at least one additional year. The *Harris* case also raised another unsettled issue. Harris' attorneys claimed he was not sufficiently unique to allow a club to obtain a negative injunction against him. The Texas courts did not reject this argument, but the appellate court was not convinced that sufficient evidence was adduced at trial to support Harris' contentions.¹⁰⁴ Some jurisdic-

101. Compare *New York Football Giants v. Los Angeles Chargers Football Club, Inc.*, 291 F.2d 471 (5th Cir. 1961) with *Houston Oilers, Inc. v. Neely*, 361 F.2d 36 (10th Cir.), cert. denied, 385 U.S. 840 (1960). In analyzing conduct that was arguably indistinguishable for legal purposes, these two courts reached different results. In the process, the new American Football League prevailed in both instances. In the *Giants* case, the New York NFL club was held to have unclean hands; as to the Oilers, the Houston AFL club was held to be free of taint. *Contra Minnesota Muskies, Inc. v. Hudson*, 294 F. Supp. 979 (M.D.N.C. 1969) (established league favored).

102. *Lemat Corp. v. Barry*, 275 Cal. App. 2d 671, 80 Cal. Rptr. 240 (1969).

103. 348 S.W.2d 37 (Tex. Ct. App. 1961).

104. Jimmy Harris came to professional football hoping, if anything, to be a defensive back. Harris' role as quarterback on some of Oklahoma University's greatest teams in the mid-1950's is largely forgotten. Harris was not a passing quarterback of much note in college, however, and this lack of notoriety undoubtedly caused his shift when he turned

tions have kept the uniqueness issue at least nominally open,¹⁰⁵ while other jurisdictions seem to hold that at least for the major professional team sports, the presumption of uniqueness is almost irrebuttable.¹⁰⁶

The *Harris* case, however, is probably more important for the issues it left unresolved. The case did not settle the question of the appropriate duration of such injunctions nor did it allow a frontal attack on the NFL's tolling provisions, which are still embedded in that league's standard player contract.¹⁰⁷ In general, the case sidestepped several issues that Harris attempted to raise, such as an antitrust complaint that went beyond the strict contract complaint.¹⁰⁸ Instead, the court limited its inquiry to the question of

professional. On the other hand, Harris did not have to pass for Oklahoma. The rest of the Oklahoma backfield consisted of Tommy McDonald, Clendon Thomas, and Billy Pricer, all of whom enjoyed successful professional careers as running backs. *Id.*

105. *See, e.g.,* Matuszak v. Houston Oilers, Inc., 515 S.W.2d 725, 728 (Tex. Ct. App. 1974).

106. *Central N.Y. Basketball, Inc. v. Barnett*, 19 Ohio Op. 2d 130, 181 N.E.2d 506 (1961). On the problems of uniqueness, the court noted:

The increase of salary from \$8,500 to \$11,500 agreed to by plaintiff, the Cleveland Basketball Club's willingness to pay \$13,000, and the latter's eagerness to secure his services, all point to a high regard for his playing abilities. Whether Barnett ranks with the top basketball players or not, the evidence shows that he is an outstanding professional basketball player of unusual attainments and exceptional skill and ability, and that he is of peculiar and particular value to plaintiff.

Id. at 137, 181 N.E.2d at 514. Furthermore, the court stated: "Professional players in the major baseball, football, and basketball leagues have unusual talents and skills or they would not be so employed. Such players, the defendant Barnett included, are not easily replaced." *Id.* at 139, 181 N.E.2d at 517.

107. The following provisions appear under the "Extension" clause of the NFL Player Contract:

If Player becomes a member of the Armed Forces of the United States or any other country, or retires from professional football as an active player, or otherwise fails or refuses to perform his services under this contract, then this contract will be tolled between the date of Player's induction into the Armed Forces, or his retirement, or his failure or refusal to perform, and the later date of his return to professional football. During the period this contract is tolled, Player will not be entitled to any compensation or benefits. On Player's return to professional football, the term of this contract will be extended for a period of time equal to the number of seasons (to the nearest multiple of one) remaining at the time the contract was tolled. The right of renewal, if any, contained in this contract will remain in effect until the end of any such extended term.

NFL Team Player Contract para. 16, *reprinted in* REPRESENTING THE PROFESSIONAL ATHLETE, *supra* note 42, at 29.

108. The court's treatment of Harris' antitrust claim was dismissed in the following summary fashion:

The contract sued on here does not violate the anti-trust laws of the State of Texas and of the United States. . . . Harris is not being black-listed or boycotted. Quite the contrary, at least two professional football teams are eager to employ his services. His trouble is that he has personally signed contracts with both of them and the only difficulty is to determine under which of them Harris is obligated.

which of two contracts should prevail and noted that an injunction, were it to issue, would not be unduly harsh and oppressive to Jimmy Harris or, by implication, to other players similarly situated.¹⁰⁹

The initial contract cases gave limited victories to the players. The leagues rewrote their contracts, but with the advent of the *Lajoie* decision, even this rewriting became largely unnecessary. The injunction, though theoretically an extraordinary weapon, became the usual remedy in practice and a significant roadblock for most professional ballplayers and any new leagues that wanted to tap the talent pools of the established leagues. Although the courts enunciated some limitations on the indiscriminate use of injunctions, these limits were only temporary setbacks because ways were found to avoid them. For those who sought to loosen the hold of established leagues on professional sports, it was obvious that new legal plans of attack would have to be devised. When it came to the one-on-one contract, the players were over-matched and undersized.

B. *The Slam Dunk: Antitrust*

Congress passed the Sherman Antitrust Act in 1890¹¹⁰ to address the emergence of the huge industrial monopolies that threatened to consume the nation's economy. There is no legislative history, however, to indicate that this enactment evidenced congressional concern with professional baseball and its monopolistic tendencies. The other professional team sports were not yet in existence.¹¹¹ Although the Players League was born and died in the year of the bill's passage and the American League arrived amidst bitter feuding with the National League ten years later, there is no record of antitrust litigation concerning those two leagues and their complaints against the established order. It was only with the attempt to create the Federal League in 1914¹¹² that

Dallas Cowboys v. Harris, 348 S.W.2d at 47.

109. For a different reaction to the harshness contention, see Connecticut Professional Sports Corp. v. Heyman, 276 F. Supp. 618 (S.D.N.Y. 1967).

110. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1-7 (1976)).

111. See notes 140-42 *infra* and accompanying text.

112. The Federal League organizers obviously learned much from their American League predecessors of the previous decade. The Federal League in 1913 styled itself as a minor league. It did not immediately attempt to lure players away from the established leagues. It concentrated instead on securing a solid base of both players and franchises before launching into expansion. In August 1913, plans were announced for the addition

the resulting problems were approached legally and the antitrust laws became potentially applicable.

The first sports antitrust case, *American League Baseball Club of Chicago v. Chase*,¹¹³ was cast in much the same posture as *Ward*,¹¹⁴ *Ewing*,¹¹⁵ and *Lajoie*.¹¹⁶ A well-known first baseman, Hal Chase,¹¹⁷ signed with Buffalo of the new Federal League while under contract with the American League team in Chicago. Although the court initially held that Chase's services were sufficiently unique to suggest the appropriateness of injunctive relief, the court further held that the contract evidenced an "absolute lack of mutuality" and would not be enforced.¹¹⁸ As in *Ward*, the court focused on the club's right to exercise both a ten day termination clause that could end the player's contractual rights and an option clause that could extend such rights. In this respect, the case was in agreement with *Ward* and departed from *Lajoie*. The court went further, however, and examined both the federal and state antitrust implications of the system under which the established baseball leagues operated. The court thought that baseball could not be construed as interstate commerce under the Sherman Antitrust Act and, therefore, no violations occurred. The court

of new clubs. The established major leagues were somewhat in disfavor with players, particularly because of a holdout by Ty Cobb at the beginning of the 1913 season over his contract. Salaries were low. The players attempted again to unionize through the Players Fraternity. Moreover, there were owners in the Federal League willing to spend some money. The time to challenge had arrived. See L. LOWENFISH & T. LUPIEN, *supra* note 15, at 73-100.

113. 86 Misc. 441, 149 N.Y.S. 6 (Sup. Ct. 1914).

114. See text accompanying notes 78-79 *supra*.

115. See text accompanying notes 80-81 *supra*.

116. See text accompanying notes 89-97 *supra*.

117. Harold "Prince Hal" Chase was known for his adventures outside the ballpark. In contemporary accounts, he is described as an "incorrigible gambler." L. LOWENFISH & T. LUPIEN, *supra* note 15, at 88. Chase was thought capable of fixing games, though he was never caught. *Id.* Chase was also a superb ballplayer and briefly managed the young and struggling New York Highlanders, today's New York Yankees. D. NEFT, R. JOHNSON, R. COHEN & J. DEUTSCH, *supra* note 37, at 56, 61.

118. *American League Baseball Club of Chicago v. Chase*, 86 Misc. 441, 149 N.Y.S. 6 (Sup. Ct. 1914). The court's discussion focused on the contract's absolute lack of mutuality, the former national agreement for the governance of professional baseball, and the rules and regulations of the national commission. The court left no doubt about its objections to such sweeping terms favoring one side of the agreement. The court summarily denied the request for an injunction against Chase. *Id.* at 456, 149 N.Y.S. at 14. Other litigation arising from Federal League efforts to raid players from the National and American Leagues, brought differing results. *Chase* was supported in *Weegham v. Killefer*, 215 F. 168 (W.D. Mich.), *aff'd*, 215 F. 289 (6th Cir. 1914); *Cincinnati Exhibition Co. v. Johnson*, 190 Ill. App. 630 (1914). But see *Cincinnati Exhibition Co. v. Marsans*, 216 F. 269 (E.D. Mo. 1914).

determined, however, that "organized baseball" was an illegal combination "in contravention of the common law." It was "as complete a monopoly . . . as any monopoly can be made" and it invaded the "right to labor as a property right" and the "right to contract as a property right" and was the result of a combination illegally restraining the rights to exercise one's profession.¹¹⁹

This judicial constraint, provided by the application of state law restraint of trade concepts, was nevertheless inadequate. The constraint depended on each jurisdiction's interpretation of the common law aspects of trade restraints and was directed mainly at the contracts of individual players. The Federal League, in fact, did not last much longer than the Players League had in 1890.¹²⁰ The Federal League folded amidst allegations that the established leagues engaged in activities beyond holding players to allegedly improper contracts. One Federal League owner thought he was undercut in numerous ways, but his primary grievance was that fellow owners sold out to the established leagues. Ned Hanlon, owner of the Baltimore Terrapins, brought suit against each of the sixteen teams in the National and American Leagues, the two league presidents, a third person who, with the league presidents, comprised the National Commission,¹²¹ and three persons having

119. 86 Misc. at 461, 149 N.Y.S. at 17.

120. The Federal League lasted two seasons: 1914-1915. Unlike the short-lived Players League, few established stars in the American and National Leagues defected to the Federal League. A few notable players did defect, including Mordecai "Three Finger" Brown and Hal Chase. See note 30 *supra*. It is said that Walter Johnson was prepared to defect but was persuaded not to defect at the last moment. The Federal League also lacked the gate attendance of the defunct Players League. Perhaps, fear of pending litigation, see note 122 *infra*, rather than fear of gate competition, prompted owners in the established leagues to admit Federal League owners back into their ranks. There is no question, however, that the Federal League competition was proving costly to the National and American League owners. To keep their players, these owners were forced to pay significantly higher salaries. By some estimates—though few players actually moved to the Federal League—salaries in the existing leagues actually doubled for those players sought by rival leagues. See L. LOWENFISH & T. LUPIEN, *supra* note 15, at 86-91. For another account of baseball during this period, with particular emphasis on the rise and fall of the Federal League, see H. SEYMOUR, *BASEBALL: THE GOLDEN AGE* (1971).

121. The National Commission arose from peacemaking efforts between the National and American Leagues that resulted in the new national agreement in 1903. Its duties were described in the court of appeals' decision in *National League of Professional Baseball Clubs v. Federal Baseball Club of Baltimore, Inc.*, 269 F. 681 (D.C. Cir. 1920):

The National Commission . . . is an unincorporated body composed of the presidents of the two leagues and a third person, selected by them. It is an administrative body, and is not a profit-making concern. The club which wins the championship pennant in any year in one major league competes for the world's championship in that year with the winner of the pennant in the other. It is one

powers in the Federal League.¹²² The complaint alleged that a conspiracy among the defendants, in violation of the Sherman Antitrust Act, had damaged the plaintiff severely in its attempts to create a viable baseball team. The plaintiff prevailed at the trial level, winning a verdict for \$80,000, which was trebled under the provisions of the Act.¹²³ The Court of Appeals held, however, that the defendants' activities were not within the scope of the Act.¹²⁴ The Supreme Court then considered the matter.

Mr. Justice Holmes, in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*,¹²⁵ wrote for a unanimous Court. Justice Holmes concluded that baseball, while a business, was a state concern and did not involve interstate commerce within the meaning of the Sherman Antitrust Act:

championship in that year with the winner of the pennant in the other. It is one of the functions of the National Commission to regulate these contests

The National Commission exists by virtue of the national agreement

Id. at 683.

One of the National Commission's functions was to oversee the World Series. The "Black Sox" World Series scandal of 1919 did not speak well for the commission's success and was a leading cause of its demise. By all accounts, the commission operated loosely and ineffectively. Baseball owners thought that an authority figure was needed. The owners chose Judge Kennesaw Mountain Landis, who had already gained their admiration through his sympathetic treatment of their cause in the early stages of the Federal League litigation. See note 122 *infra*. In 1920, the National Commission ceased to exist, and the Commissioner of Baseball became a fixture. For a particularly good account of this era, see E. ASINOF, *EIGHT MEN OUT: THE BLACK SOX AND THE 1919 WORLD SERIES* (1963). See also B. VEECK & E. LINN, *THE HUSTLER'S HANDBOOK* 252-99 (1965).

122. This suit was not the first antitrust litigation arising out of attempts to found the Federal League. The Federal League owners, named as defendants in the Baltimore Terrapins lawsuit, were plaintiffs in an earlier action filed against the National and American Leagues. L. LOWENFISH & T. LUPIEN, *supra* note 15, at 91. This earlier suit was important in two respects: First, it provided leverage for the federal owners to settle with the established leagues, resulting in the Federal League's demise; and second, Ned Hanlon and Baltimore, however, were excluded from the settlement benefits, thus motivating their precedent-setting lawsuit. The settlement resulted from the dilatory tactics of the district court judge hearing the case. This judge, Kennesaw Mountain Landis, later became baseball's first commissioner. See note 121 *supra*.

Throughout the hearings, Judge Landis often expressed sympathy for the established baseball owners and their attempts to keep the players they previously had under contract. The judge then took the matter under advisement. It eventually became evident to both sides that the judge was giving them an opportunity to settle. Settle they did, to the satisfaction of everyone but the Baltimore interests. See L. LOWENFISH & T. LUPIEN, *supra* note 15, at 89-91.

123. The lower court awarded treble damages pursuant to § 7 of the original Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1976). This provision eventually was repealed by Act of July 7, 1955, ch. 283, § 3, 69 Stat. 283, because § 5 of the Clayton Act, 15 U.S.C. § 15 (1976), a provision almost identical to § 7 of the Sherman Act, superseded the original Act. Today, an action similar to that in *Federal Baseball* would be brought under the Clayton Act.

124. 269 F. at 688.

125. 259 U.S. 200 (1922).

The business is giving exhibitions of baseball, which are purely state affairs [T]he fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business [T]he transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of those words. As it is put by the defendants, personal effort, not related to production, is not a subject of commerce.¹²⁶

Major league baseball's immunity from the federal antitrust laws continues today despite dramatically expanded definitions given to interstate commerce by a host of landmark cases in the last several decades.¹²⁷ To many critics, the Court's inaction regarding baseball is *stare decisis* run amuck.¹²⁸ Shortly after World War II, in a case involving a ballplayer blacklisted from the Major Leagues because of his defection to the short-lived Mexican League, the Court of Appeals for the Second Circuit examined the changed nature of professional baseball and ruled that

126. *Id.* at 208-09.

127. Article I, § 8 of the Constitution grants Congress the power to regulate trade "among the several States." In early cases, this provision was interpreted to exempt intrastate activity from congressional regulation unless it had a "direct effect" on interstate commerce. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). The Supreme Court departed from this strict standard in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), where it applied a more lenient "practical effect" test in upholding the constitutionality of the National Labor Relations Act. Subsequent cases further expanded Congress' regulatory power to include all activities which have a "substantial effect" on interstate commerce. *See United States v. Sullivan*, 332 U.S. 689 (1948); *United States v. Darby*, 312 U.S. 100 (1941).

128. Typical of quotes concerning the courts' reliance on *stare decisis* to continue baseball's antitrust exemption are the following: "To hold that the Court must protect business interests built in reliance on prior decision could dangerously limit the adaptability and growth of the law, to say nothing of the one-sided nature of this approach when considering the interests of the other parties involved." Note, *Antitrust and Professional Sport: Does Anyone Play by the Rules of the Game?*, 22 CATH. L. REV. 403, 424 (1973).

"[W]hen notions of a *stare decisis* lock judicial thinking into a 1922, or even a 1953, legal framework, the law not only appears inconsistent, but periodically the courts are again confronted with either compounding the error or reversing a long-standing precedent." Note, *Baseball's Antitrust Exemption: The Limits of Stare Decisis*, 12 B.C. INDUS. & COM. L. REV. 737, 746 (1971).

See also Rogers, *Judicial Reinterpretation of Statutes: The Example of Baseball and the Antitrust Laws*, 14 HOUS. L. REV. 611 (1977); Note, *Applicability of the Antitrust Laws to Professional Baseball*, 2 MEM. ST. L. REV. 299 (1972); Note, *Baseball—An Exemption to the Antitrust Laws*, 18 PITT. L. REV. 131 (1956); Note, *Curt Flood at Bat Against Baseball's Reserve Clause*, 8 SAN DIEGO L. REV. 92 (1971); Note, *Baseball's Antitrust Exemption and the Reserve System: Reappraisal of an Anachronism*, 12 WM. & MARY L. REV. 859 (1971); Note, *Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 YALE L.J. 576 (1953).

baseball's activities were covered by the Sherman and Clayton Antitrust Acts.¹²⁹ The case was settled, however, before the Supreme Court had an opportunity to rule. Other cases arising from the same general set of circumstances were decided contrary to the Second Circuit's opinion,¹³⁰ and the matter remained unresolved. In 1953, however, the Supreme Court ignored the logic of the second circuit opinion and in *Toolson v. New York Yankees, Inc.*,¹³¹ affirmed that baseball was exempt from federal antitrust laws. The principal theme was that Congress, aware of *Federal Baseball*, had not taken the initiative to reverse what had become the accepted statutory interpretation.¹³²

129. *Gardella v. Chandler*, 172 F.2d 402 (2d Cir. 1949), *rev'g* 79 F. Supp. 260 (S.D.N.Y. 1948). A divided court held that the advent of radio and television broadcasting of baseball games was sufficient to distinguish the instant case from *Federal Baseball*, thus stating a valid claim under the Sherman and Clayton Antitrust Acts. In a subsequent proceeding, the court refused to issue an injunction *pendente lite* in favor of plaintiff. *Gardella v. Chandler*, 174 F.2d 919 (2d Cir. 1949).

The *Gardella* decision, nevertheless, was adhered to in *Martin v. National League Baseball Club*, 174 F.2d 917 (2d Cir.), *aff'g* *Martin v. Chandler*, 1948-1949 Trade Cas. 63,125 (S.D.N.Y. 1949).

At least one ballplayer believed these decisions to be decisive. Max Lanier, Fred Martin (party in the above mentioned case), and Lou Klein switched from the St. Louis Cardinals to the Mexican League. Lanier's remembrances about the affair are enlightening, even if a bit inaccurate. Below are excerpts from D. HONIG, *BASEBALL WHEN THE GRASS WAS REAL* (1975).

"Of course, everybody who went to Mexico was suspended from the big leagues for five years. I thought that was a little stiff. Heck, we didn't go down there to hurt anybody. We just didn't think we were making enough money." *Id.* at 219.

"We were supposed to be suspended for five years, but in '48 we started a lawsuit against baseball, and that's how we got back. We had them by the tail then because the suspension was illegal." *Id.* at 221.

130. In *Kowalski v. Chandler*, 202 F.2d 413 (6th Cir. 1953), the court sided with the dissent in *Gardella*, quoting the dissenting language with approval. *Id.* at 414.

131. 346 U.S. 356 (1953).

132. In a *per curiam* opinion, the Court said:

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.

Id. at 357.

Although *per curiam*, the *Toolson* decision had two dissenters. Justice Burton, joined by Justice Reed, highlighted the changed business of baseball over the years since the *Federal Baseball* decision, as substantiated by testimony elicited in congressional hearings. Consequently, these justices would have disregarded *Federal Baseball* and applied the antitrust laws *unless* there was congressional action specifically granting baseball an exemption. *Id.* at 364-65.

In 1972, in *Flood v. Kuhn*,¹³³ the Court again affirmed its hands-off posture, and candidly admitted that the application of the antitrust laws to all other sports made baseball “[w]ith its reserve system enjoying exemption from the federal antitrust law . . . an exception and an anomaly.”¹³⁴ In acknowledging that other professional sports leagues and clubs were covered by the antitrust laws, the Court had difficulty distinguishing baseball:

It is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis*, and one that has survived the Court’s expanding concept of interstate commerce. It rests on a recognition and an acceptance of baseball’s unique characteristics and needs.¹³⁵

Justice Blackmun insisted, accordingly, that the Court adhere to its previous decisions. Justice Blackmun maintained that if there were any “inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court.”¹³⁶ Justice Marshall, however, may have had the final word in his dissent when he stated that the Court was depriving the baseball players of “needed” muscle and that an accommodation between labor and antitrust law was required in sports. The Justice’s view was that the players had not agreed to the reserve clause, and thus, if the antitrust laws applied to baseball, the labor exemption would not be applicable, since the reserve clause was not the product of collective bargaining but was management imposed.¹³⁷

The recounting of baseball’s antitrust immunity is an illustration of the wave theory of legal development. Applying contract principles to baseball was no great aid to those challenging the established order, especially in light of *Lajoie* and its progeny. Antitrust held limited promise because prior opinions focused on whether the matter was covered under the interstate rubric. The Supreme Court’s adherence to a rigid concept of *stare decisis* exacerbated the problem. After *Flood* in 1972, therefore, it was evident that a third wave of legal theory was needed.¹³⁸ The

133. 407 U.S. 258 (1972).

134. *Id.* at 282.

135. *Id.*

136. *Id.* at 284.

137. *Id.* at 295–96.

138. As noted by district court Judge Cooper in his opinion in *Flood v. Kuhn*, 316 F. Supp. 271 (S.D.N.Y. 1970), *aff’d*, 443 F.2d 264 (2d Cir. 1971), *aff’d*, 407 U.S. 258 (1972), there are alternatives to antitrust:

In such matters as labor relations and family disputes, to name just two, Congress (in the case of collective bargaining) and the courts have determined that

emergence of this wave is remarkable because the impetus for its development came principally from one man, sitting as a labor arbitrator.¹³⁹ Before examining the ensuing legal developments in baseball, however, it is necessary to focus on other sports industries and recount their treatment under antitrust law.

Between the time of *Federal Baseball* and the subsequent challenges to sports leagues' practices under the antitrust laws, many changes occurred in both the law and the sports businesses. The most dramatic change was the growth of other professional sports. The forerunner of the NFL was founded in 1920.¹⁴⁰ The NHL

such disputes as do arise therein are best resolved by the parties without outside interference and that resort to a court-imposed solution should be a matter of last resort. This is almost invariably the case whenever two parties must continue to work together amicably toward a common end after the dispute is settled. . . . Nevertheless, we believe that here, as well, the parties themselves are best able to reach a satisfactory accord, and that all avenues toward such an approach certainly have not yet been fully exhausted.

. . . .
Far more complicated matters accompanied by an exclusive self-centered concern and by seemingly hostile and irreconcilable attitudes, frequently find their way to amicable adjustment and the abandonment of court claims. Why not here—with the parties positive and reasonable men who are equally watchful over a common objective, the best interests of baseball?

Id. at 284.

139. Considering the number of times baseball's possible control by the antitrust laws has been raised and the failure to succeed on that issue, the ingenuity of Marvin Miller of the MLBPA must be admired. Similarly, the persistence of players such as Andy Messersmith and Dave McNally in using alternative strategies to reach their objectives must be respected. The merits of the disposition of the Messersmith and McNally arbitration and subsequent court proceedings, see text accompanying notes 189-99 *infra*, and the process of deciding the issues is a testimonial to the dispute resolution process.

Some people are not convinced that the antitrust battle is over. There have been repeated, unsuccessful court challenges to the baseball antitrust exemption. See, e.g., *Boise Baseball Club, Inc. v. Kuhn*, 636 F.2d 1226 (9th Cir. 1980), *cert. denied*, 101 S. Ct. 2049 (1981); *Portland Baseball Club, Inc. v. Kuhn*, 491 F.2d 1101 (8th Cir. 1974). Ironically, where a baseball club asserted antitrust violations against another business that held the concession franchise at the club's ballpark, the concessionaire was unable to raise the antitrust exemption. See *Twin City Sportservice, Inc. v. Charles O. Finley Co.*, 512 F.2d 1264 (9th Cir. 1975).

It is apparent that congressional efforts to remove the exemption will continue, although the chances of success are not great. The summer of 1981 marked another attempt to remove the exemption, with such notables as Howard Cosell and baseball team owner Ted Turner asserting in testimony before a congressional committee that there were no solid reasons to exempt baseball. See *L.A. Times*, July 17, 1981, § III, at 4, col. 1; *id.*, July 16, 1981, § III, at 4, col. 1; Justice Department Official Says Pro Sports are Just Businesses, *L.A. Times*, July 15, 1981, § III, at 5, col. 1.

140. The loosely organized American Professional Football Association was established in 1920, with Jim Thorpe as president. Joe Carr, of Columbus, Ohio, was named president in 1921, and the league name was changed to National Football League the next year. The first signs of vitality for the new enterprise, however, came only when the Chi-

emerged in 1917.¹⁴¹ Basketball, after several unsuccessful attempts at attaining professional status, finally gained a foothold when the Basketball Association of America, the forerunner of the NBA, was established in 1946.¹⁴² The increasing number of professional sports, coupled with the advent of electronic media exposure, catapulted sports contests from major league stadiums into peoples' living rooms. Attendance, which had declined in the 1930's, increased markedly.¹⁴³

Other entertainment industries such as motion pictures, and

Chicago Bears signed University of Illinois star Red Grange in 1925. OFFICIAL ENCYCLOPEDIA OF PROFESSIONAL FOOTBALL, *supra* note 11, at 18-21.

Elements of professionalism had crept into football as early as 1892, when Pudge Heflinger received \$500 to play for a Pittsburgh team. In addition, in the first two decades of this century, spirited league play flourished in Ohio, especially in the Akron-Canton area. *Id.* at 12-15.

The NFL had a rocky beginning. Between 1926 and 1932 the number of teams in the league decreased from twenty-two to eight. The 1930's saw significant changes, however, both in the game rules and in the league organization, and the seeds were planted for the NFL to become the monolith it is today. For brief accounts of the early history of professional football, see *id.* at 10-33.

141. Professional hockey reportedly originated in the 1900's. Shortly thereafter, the Stanley Cup, the top prize among the amateur hockey teams of Canada, became the symbol of supremacy in professional hockey. The NHL had some predecessors, including the Pacific Coast League, the Eastern League, and the National Hockey Association. All of these leagues lasted for a reasonable time, but the expiration of the association in 1917 led to the creation of the National Hockey League. By 1926, all of its rivals were defunct and the NHL remained alone. The NHL was Canadian initially but admitted the Boston Bruins in 1924. The clubs which composed the league varied for a few years, but by 1942 a six team league was firmly established, with two Canadian clubs (Montreal and Toronto) and four United States teams (Boston, New York, Chicago, and Detroit). The league's boldest venture came in 1967 when it doubled its size by expanding into six new cities. See F. MENKE, *supra* note 1, at 637-39.

142. The first professional basketball game may have occurred as early as 1896, in Trenton, New Jersey, with each player getting \$15 and the captain of the teams receiving the princely sum of \$16. Less substantiated is a claim of a game involving paid players in Herkimer, New York in 1893. Z. HOLLANDER, THE MODERN ENCYCLOPEDIA OF BASKETBALL 271 (1979). Regardless of which game was played first, it is obvious there was a substantial lag between those early games and the emergence of the NBA in 1946. There was, however, no absence of attempts to establish that association. There was a National Basketball League (1893-1903), a Philadelphia League in 1904, expanded later to include clubs from New York and New Jersey, a Central League that joined the Philadelphia connection, a New York State League in 1911, and the American Basketball League (1926-1931), featuring the original Celtics (operating out of New York, not Boston) and the Cleveland Rosenblums. The National Basketball League was born in 1937; although it eventually merged with the Basketball Association of America to form the modern NBA, it never gained recognition as a major league. General background on these leagues can be found in *id.* at 271-90 and F. MENKE, *supra* note 1, at 172-73. See also THE ENCYCLOPEDIA OF SPORTS TALK 75 (Z. Hollander ed. 1976).

143. Attendance figures for sports events are illustrated best by those of baseball, the only fully established professional sport during the 1930's. In 1930, attendance was 10 million, dropping to 6 million by 1933, a significant but not horrendous drop considering

later television, also were expanding.¹⁴⁴ The machinations of the powerful in these industries came under scrutiny. With Supreme Court decisions widening the scope of congressional regulatory authority under the interstate commerce clause,¹⁴⁵ it was not long before antitrust cases involving the entertainment fields reached the courts. Beginning in the 1930's and continuing with great momentum into the 1940's, antitrust actions in the theatre, motion picture, and other entertainment industries were litigated. With minor exceptions, these industries were held subject to antitrust constraints.¹⁴⁶

With this precedent on one hand and *Federal Baseball* and *Toolson* isolated on the other, the Court faced the question of the applicability of antitrust law to professional boxing. In the end, the Court held that boxing was subject to the Sherman and Clayton Acts.¹⁴⁷ Thereafter, with the reticence of only a small minority of the Court, football, hockey, basketball, and other sports,

the depression. By 1937, however, attendance had increased again to 9.5 million. By 1948, the figure more than doubled to 21 million. See P. GARDNER, *supra* note 38, at 12, 20.

144. Numerous sources chronicle the growth of the motion picture and television industries. Several general works of these industries also discuss the ensuing legal problems. See, e.g., J. FELL, *A HISTORY OF FILMS* (1979); M. HUETTIG, *ECONOMIC CONTROL OF THE MOTION PICTURE INDUSTRY* (1944); *THE AMERICAN FILM INDUSTRY* (T. Balio ed. 1976). In several informative passages, Fell describes the industrial consolidation of the film industry in the United States as the industry's center shifted from New York City to Hollywood. J. FELL, *supra*, at 82-83. Fell also notes the attending phenomenon of an industry based on a "star" system. Mary Pickford's salary, circa 1915, went from \$500 to \$2,000 per week. When Charlie Chaplin secured a new contract in 1916 at \$13,000 a week, Pickford responded by renegotiating with her studio for a new contract at \$10,000 per week, plus a bonus of \$300,000 against profits. *Id.* at 87.

For the historical developments of the television industry, see L. BROWN, *TELEVISION: THE BUSINESS BEHIND THE BOX* (1971); S. HEAD, *BROADCASTING IN AMERICA* (2d ed. 1972); L. LICHTY & M. TOPPING, *AMERICAN BROADCASTING: A SOURCE BOOK ON THE HISTORY OF RADIO AND TELEVISION* (1975); R. NOLL, M. PECK & J. MCGOWAN, *ECONOMIC ASPECTS OF TELEVISION REGULATION* (1973).

145. *American Medical Ass'n v. U.S.*, 317 U.S. 519 (1943), *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

146. See, e.g., *United States v. Paramount Pictures*, 334 U.S. 131 (1948); *United States v. Griffith*, 334 U.S. 100 (1948); *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944); *Interstate Circuit v. United States*, 306 U.S. 208 (1939); *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930); *Binderup v. Pathe Exch.*, 263 U.S. 291 (1923). For an early article discussing the implications of the decisions before *Griffith* and *Paramount*, see Reich, *The Entertainment Industry and the Federal Antitrust Laws*, 20 S. CAL. L. REV. 1 (1946).

147. *United States v. International Boxing Club*, 348 U.S. 236 (1955). See also *United States v. Shubert*, 348 U.S. 222 (1955), which held that federal antitrust laws extended to the production and operation of legitimate theatrical productions throughout the United States. Both cases considered and rejected arguments that the *Federal Baseball* and *Toolson* rationales should be adopted.

likewise were subjected to scrutiny under the antitrust laws.¹⁴⁸ Lawyers for various leagues continued, unsuccessfully, in the early 1970's to press the courts for antitrust immunity.¹⁴⁹ Professional sports leagues also made several unsuccessful attempts to convince Congress to grant their leagues the same sweeping immunity that baseball enjoyed.¹⁵⁰ These efforts failed, but certain exemptions, particularly those relating to league-wide television contracts¹⁵¹ and the NFL-AFL merger, became law.¹⁵² The ef-

148. See *Radovich v. NFL*, 352 U.S. 445 (1957) (football); *Robertson v. NBA*, 389 F. Supp. 867 (S.D.N.Y. 1975) (basketball); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972) (hockey); *Nassau Sports v. Hampson*, 355 F. Supp. 733 (D. Minn. 1972) (hockey); *Boston Professional Hockey Ass'n, Inc. v. Cheevers*, 348 F. Supp. 261 (D. Mass. 1972), *rev'd*, 472 F.2d 127 (1st Cir. 1972) (hockey); *Nassau Sports v. Peters*, 352 F. Supp. 870 (E.D.N.Y. 1972) (hockey).

149. See *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 466 (E.D. Pa. 1972); *Boston Professional Hockey Ass'n, Inc. v. Cheevers*, 348 F. Supp. 261, 265 (D. Mass. 1972), *rev'd*, 472 F.2d 127 (1st Cir. 1972); *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049, 1060 (C.D. Cal. 1971). After decisions in these cases, the owners shifted the bases of their challenges. In *Kapp v. NFL*, 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979), the applicability of the antitrust laws was conceded. Attempts to distinguish the general applicability of antitrust laws from the facts in the particular case followed thereafter. See *Robertson v. NBA*, 389 F. Supp. 867 (S.D.N.Y. 1975). Attempts also were made to argue for a labor exemption under the antitrust laws. See notes 239-519 *infra* and accompanying text.

150. The Court in *Flood v. Kuhn*, 407 U.S. at 258, acknowledged several unsuccessful efforts in Congress to change or modify the antitrust laws. Justice Blackmun noted that, rather than stripping baseball of its immunity, most proposals would have expanded antitrust exemptions to other sports leagues. *Id.* at 282-83.

151. See 15 U.S.C. §§ 1291-1295 (1976).

152. The authorization for the NFL-AFL merger appears in language now contained in 15 U.S.C. § 1291 (1976). Originally part of the Act of Nov. 8, 1966, Pub. L. No. 89-800, § 6(b)(1), 80 Stat. 1515, it reads in pertinent part:

In addition, such laws shall not apply to a joint agreement by which the member clubs of two or more professional football leagues, which are exempt from income tax under section 501(c)(6) of the Internal Revenue Code of 1954 [26 U.S.C. 501(c)(6)] combine their operations in expanded single league so exempt from income tax, if such agreement increases rather than decreases the number of professional football clubs so operating, and the provisions of which are directly relevant thereto.

15 U.S.C. § 1291 (1976).

When it appeared this authorization might founder if introduced through normal legislative channels, it was appended to an Income Tax Investment Credit bill and presented to Congress through a Conference Committee report. Under this procedure, Congress was forced either to accept the entire bill without amendment or reject it. Despite opposition to the merger by certain influential members of Congress, the bill passed. H.R. REP. NO. 2308, 89th Cong., 2d Sess. 4, *reprinted in* [1966] U.S. CODE CONG. & AD. NEWS 4372, 4377-78.

The circumstances under which the merger authorization cleared Congress have been criticized by many commentators. See, e.g., J. MICHENER, *supra* note 16, at 390.

fects of congressional action perhaps still are not fully appreciated or resolved.

Once it was evident that antitrust laws applied to professional sports other than baseball, the litigation increased, peaking in the mid-1970's.¹⁵³ This litigation included actions by players and owners against management both within and across leagues.

The antitrust actions by players fall into two broad categories. The first category relates to actions by leagues to exclude a player from the league. These actions include exclusions for failure to meet league eligibility requirements¹⁵⁴ and exclusions such as blacklists or suspensions for alleged misconduct or for transferring to a new league.¹⁵⁵ The second category concerns restraints on a player's freedom of movement from one team to another, whether from the minor league to the major league,¹⁵⁶ from a team in one league to a team in a rival league,¹⁵⁷ from one team to another team in the same league,¹⁵⁸ or through the league's draft system which restricts the player to dealing with only one club in a

153. See, e.g., *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Kapp v. NFL*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979); *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *Robertson v. NBA*, 389 F. Supp. 867 (S.D.N.Y. 1975); *Nassau Sports v. Hampson*, 355 F. Supp. 733 (D. Minn. 1972); *Nassau Sports v. Peters*, 352 F. Supp. 870 (E.D.N.Y. 1972); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972); *Boston Professional Hockey Ass'n, Inc. v. Cheevers*, 348 F. Supp. 261 (D. Mass. 1972).

154. See, e.g., *Neeld v. NHL*, 594 F.2d 1297 (9th Cir. 1979); *Deesen v. PGA*, 358 F.2d 165 (9th Cir. 1966); *Linseman v. WHA*, 439 F. Supp. 1315 (D. Conn. 1977); *Bowman v. NFL*, 402 F. Supp. 754 (D. Minn. 1975); *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971).

155. See *Radovich v. NFL*, 352 U.S. 445 (1957); *Kowalski v. Chandler*, 202 F.2d 413 (6th Cir. 1953); *Martin v. National League Baseball Club*, 174 F.2d 917 (2d Cir. 1949); *Gardella v. Chandler*, 172 F.2d 402 (2d Cir. 1949).

For cases discussing discipline for player misconduct, see *Blalock v. LPGA*, 359 F. Supp. 1260 (N.D. Ga. 1973); *Manok v. Southeast Dist. Bowling Ass'n*, 306 F. Supp. 1215 (C.D. Cal. 1969); *Molinas v. NBA*, 190 F. Supp. 241 (S.D.N.Y. 1961); *Molinas v. Podoloff*, 133 N.Y.S.2d 743 (Sup. Ct. 1954). A case that might have been significant, given the allegations of misconduct and the terms of the suspension, was *Rentzel v. Rozelle*, No. C-63828 (Cal. Super. Ct. 1973). A preliminary order by the court denied the player's request for injunctive relief. The case, however, was settled before trial on the merits.

For an excellent discussion of these issues, see Weistart, *Player Discipline in Professional Sports: The Antitrust Issues*, 18 WM. & MARY L. REV. 703 (1977).

156. See, e.g., *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953).

157. See, e.g., *Nassau Sports v. Hampson*, 355 F. Supp. 733 (D. Minn. 1972); *Nassau Sports v. Peters*, 352 F. Supp. 870 (E.D.N.Y. 1972); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972); *Boston Professional Hockey Ass'n, Inc. v. Cheevers*, 348 F. Supp. 261 (D. Mass.), *rev'd*, 472 F.2d 127 (1st Cir. 1972).

158. See, e.g., *Flood v. Kuhn*, 407 U.S. 258 (1972); *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976).

league.¹⁵⁹

For purposes of this analysis, it is unnecessary to probe each case. It is more important to concentrate on the problems that remain after the decisions by various courts. Courts apparently have been receptive to the general argument that sports leagues are special.¹⁶⁰ One problem is that leagues must set certain minimum standards; not everyone who strives to be a professional player can be accommodated. Exclusion of players from sports leagues, however, must meet a reasonableness test, and arbitrary exclusions will be overturned.¹⁶¹ The rule, for example, that a player could not join the NBA before his college class graduated was held to be an arbitrary exclusion.¹⁶² When the World Foot-

159. See, e.g., *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Kapp v. NFL*, 586 F.2d 644 (9th Cir. 1978); *Drysdale v. Florida Team Tennis, Inc.*, 410 F. Supp. 843 (W.D. Pa. 1976). The challenges to the various leagues' draft systems still occur, even when the draft is made part of the collective bargaining agreement. Basketball player Howard Wood was drafted by the Utah Jazz as the 27th player taken in the 1981 draft. Wood's attorney announced he was filing an antitrust complaint contesting the NBA system of player allocation. Since the draft is part of the league's collective bargaining agreement and was approved in the 1976 *Robertson* settlement, see note 1 *supra*, Wood's chances for success appear to be minimal. The basic issue of a nonunion player being bound by the union agreement with the league is an important one, discussed at notes 475-529 *infra* and accompanying text. As to the *Wood* litigation, see Vecsey, *Testing the Pro Basketball Draft*, N.Y. Times, Aug. 25, 1981, at 20, col. 1.

160. As the court stated in *NASL v. NFL*, 505 F. Supp. 659 (S.D.N.Y. 1980): "There is a substantial degree of judicial recognition, in antitrust cases, that the business structure of league team sports is unique." *Id.* at 674.

This attitude has pervaded the legal literature for several decades. In *United States v. NFL*, 116 F. Supp. 319 (E.D. Pa. 1953), the court stated:

Professional football is a unique type of business. Like other professional sports which are organized on a league basis it has problems which no other business has. The ordinary business makes every effort to sell as much of its product or services as it can. In the course of doing this it may and often does put many of its competitors out of the business. The ordinary businessman is not troubled by the knowledge that he is doing so well that his competitors are being driven out of business.

Professional teams in a league, however, must not compete too well with 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 fail, but eventually the whole league, both the weaker and the stronger teams, would fail, because without a league no team can operate profitably.

Id. at 323.

For other judicial expressions concerning the unique nature of sports leagues, see *Kapp v. NFL*, 390 F. Supp. 73, 79-81, 88-89 (N.D. Cal. 1974); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 503-04 (E.D. Pa. 1972); *Molinas v. NBA*, 190 F. Supp. 241, 243-44 (S.D.N.Y. 1961).

161. See, e.g., *Bowman v. NFL*, 402 F. Supp. 754 (D. Minn. 1975); *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971).

162. See, e.g., *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971).

ball League (WFL) failed, Commissioner Rozelle's edict that no NFL club could sign WFL players during the remainder of that NFL season was similarly held to exclude illegally an entire class.¹⁶³ The outright blacklisting of players simply for joining another league is probably illegal.¹⁶⁴ On the other hand, suspensions of players for infractions of reasonable rules, particularly those involving practices that threaten the sport's integrity, are upheld¹⁶⁵ unless the procedures for determining the grounds for suspension are arbitrary or unduly discriminatory.¹⁶⁶

The freedom of movement cases are harder to summarize, although a pattern emerges. Many trial court opinions have held the draft, the reserve and options systems, player compensation, and other restrictive devices to be illegal per se.¹⁶⁷ The appellate courts, however, noting the special features of sports leagues, have held that the restraints are more properly subject to a "rule of reason" analysis.¹⁶⁸ This shift in analysis is important. Even when no reasonable justification has been found for a particular restraint, courts have not held all such restraints per se unreasonable. Such practices, if properly designed, might continue, and the leagues have been encouraged to use collective bargaining to ar-

163. *See, e.g.,* *Bowman v. NFL*, 402 F. Supp. 754 (D. Minn. 1975).

164. The argument can be made that this result might have occurred in *Radovich v. NFL*, 322 U.S. 445 (1975), had the case not been settled after the Supreme Court's pronouncement that professional football was, indeed, subject to antitrust laws.

165. *See* *Molinas v. NBA*, 190 F. Supp. 241 (S.D.N.Y. 1961); *Molinas v. Podoloff*, 133 N.Y.S.2d 743 (Sup. Ct. 1954). *See also* *Manok v. Southeast Dist. Bowling Ass'n*, 306 F. Supp. 1215 (C.D. Cal. 1969).

166. The courts seem to be willing to scrutinize closely the procedures used when the player's peers, and thus his other competitors, sit in judgment. In *Blalock v. LPGA*, 359 F. Supp. 1260 (W.D. Ga. 1973), suspension was ruled illegal largely because the procedure used had the player's competitors determine the proposed action against her. In contrast, in *Molinas v. Podoloff*, 133 N.Y.S.2d 743 (Sup. Ct. 1954), when the league commissioner suspended the player, the court disallowed the player's allegations of procedural inadequacies. In *Molinas*, however, there was no serious factual doubt as to the player's involvement in gambling.

167. *See, e.g.,* *Smith v. Pro Football, Inc.*, 420 F. Supp. 738 (D.D.C. 1976), *modified*, 593 F.2d 1173 (D.C. Cir. 1978); *Mackey v. NFL*, 407 F. Supp. 1000 (D.D.C. 1975), *modified*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

168. *See, e.g.,* *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). *See also* *Kapp v. NFL*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979). Although the courts' preference for a rule of reason as opposed to a per se approach undoubtedly has been influenced by their concern for the unique nature of sports leagues, *see* note 160 *supra*, another reason may be an increasing judicial reluctance to adopt a per se analysis except in the most narrow of circumstances. Recent pronouncements by the Supreme Court raise serious questions about the continued viability of a per se approach. *See* *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).

rive at acceptable structures.¹⁶⁹ If the restraints were illegal per se, it is doubtful that even collective bargaining could save them, since the restraints probably would be held illegal subjects of bargaining. In fact, certain players associations took this position while many of these cases were pending.¹⁷⁰ The net effect of subjecting such restraints to a rule of reason is to allow management to impose these restrictions, either by unilateral edict,¹⁷¹ which is risky, or through collective bargaining. The player antitrust cases, therefore, did not determine conclusively the types of restraints that could be imposed, but merely set the stage for the next wave of cases.

The ultimate effects of owner disputes resulting in antitrust litigation are less defined. Suits by owners in one league against their rivals usually focus on the alleged monopolistic tendency of the other league to sequester markets, players, facilities, or even prospective owners.¹⁷² Other suits have been brought by "outsid-

169. In *Flood v. Kuhn*, 316 F. Supp. 271 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972), the court stated:

Far more complicated matters accompanied by an exclusive self-centered concern and by seemingly hostile and irreconcilable attitudes frequently find their way to amicable adjustment and the abandonment of court claims. Why not here—with the parties positive and reasonable men who are equally watchful over a common objective, the best interests of baseball?

Id. at 284.

In *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977), the court stated: "We encourage the parties to resolve this question (whether restrictions on player transfer are necessary) through collective bargaining. The parties are far more situated to agreeably resolve what rules governing player transfers are best suited for their mutual interests than are the courts." *Id.* at 623.

170. Most notable among the unions that refused to bargain during the pendency of antitrust actions was the NFLPA whose collective bargaining agreement had expired. The 1974 strike was a bitter disappointment to the association since the owners made no concessions. Nonetheless, while the *Mackey* litigation was pending, *see* note 153 *supra* and text accompanying notes 276–95 *infra*, the association maintained that the Rozelle Rule and other restraints were per se illegal and could not be the subject of bargaining. *See* Koppett, *Labor Talks Constant Part of Conversation by Athletes*, N.Y. Times, Feb. 1, 1976, § 5, at 3, col. 1.

171. There are currently no provisions in either the 1980 Baseball Basic Agreement or the 1976 NHL Agreement relating to the drafting of amateurs. The absence of these provisions means that the amateur draft continues to be a management prerogative in these two sports. In light of baseball's continuing immunity from the antitrust laws, the risks are minimal. The risks, however, are not so low with hockey. The draft has been attacked successfully in other sports. *See* *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Drysdale v. Florida Team Tennis, Inc.*, 410 F. Supp. 843 (W.D. Pa. 1976). There is evidently a current challenge of the NBA draft, despite its insulation within that league's collective bargaining agreement and the consent agreement arising from the *Robertson* litigation. *See* note 159 *supra*. The absence of any similar insulation for NHL owners through a collective bargaining provision is therefore a puzzle.

172. For noteworthy cases relating to various alleged monopolistic league tendencies,

ers," who are denied the opportunity to be owners.¹⁷³ There also have been internecine fights, either among owners¹⁷⁴ or by an owner challenging a commissioner's powers.¹⁷⁵ Only a few general conclusions can be made about these disputes. First, these fights will continue while the economics make challenge alluring. Second, the battleground will continue to be in the antitrust area because these cases fall mainly outside either labor concerns or labor protections. Finally, the antitrust route is arduous, uncertain, and unreliable as an effective protector of the underdog.¹⁷⁶

see *Hecht v. Pro Football, Inc.*, 570 F.2d 982 (4th Cir. 1977) (sequestering of facilities); *AFL v. NFL*, 323 F.2d 124 (4th Cir. 1963) (sequestering of markets); *NASL v. NFL*, 505 F. Supp. 659 (S.D.N.Y. 1980), *modifying* 465 F. Supp. 665 (S.D.N.Y. 1979) (sequestering of owners); *ABA Players Ass'n v. NBA*, 404 F. Supp. 832 (S.D.N.Y. 1975) (sequestering of players); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972) (sequestering of players).

173. Courts generally have recognized a league's right to control who will be accepted as an owner. See *Levin v. NBA*, 385 F. Supp. 149 (S.D.N.Y. 1975). The court in *Levin* held that plaintiffs were actually seeking to become partners, not competitors, with those who excluded them. The court thus distinguished this situation from exclusions such as the four-year rule, deemed illegal in *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971). In that case, the player, Spencer Haywood, wanted to be a competitor, not a partner, in the league with other players.

Levin involved those who sought to become owners by buying an existing franchise. Different considerations exist when owners of clubs outside the league apply for a new franchise. This application process was engaged in by several teams in the ABA during the year prior to its merger with the NBA. The Denver Nuggets and the New York Nets applied for NBA franchises. See *ABA Player Union Opposed*, N.Y. Times, Sept. 26, 1975, at 43, col. 6. Later, the rest of the ABA teams also filed applications. *A.B.A. Clubs Apply to N.B.A.*, N.Y. Times, Oct. 21, 1975, § 12, at 31, col. 1. The NBA owners successfully forestalled action on the entire matter until the terms of the merger could be settled. Such was not the case with the Memphis Grizzlies of the short-lived WFL. When that league folded, only the Grizzlies and two other franchises had somewhat viable operating capabilities. The three teams combined to form one team on paper. The owners applied for admission to the NFL, but the application was denied. Suit was then filed, citing the NFL's refusal to deal as an antitrust claim. See *Mid-South Grizzlies v. NFL*, No. 79-4373 (E.D. Pa. filed Dec. 3, 1979). For a report on the complaint, see *Former WFL Franchise Owners Bring Antitrust Action Against NFL*, SPORTS L. REP., Jan. 1980, at 1. This suit is still pending.

174. The dispute between the Los Angeles Coliseum and the NFL is actually a fight between Al Davis of the Oakland Raiders and the other owners of NFL teams. See note 69 *supra*. See also *San Francisco Seals, Ltd. v. NHL*, 379 F. Supp. 966 (C.D. Cal. 1974) (refusal by NFL Board of Governors to permit Seals to transfer from San Francisco to Vancouver, B.C. precipitated unsuccessful antitrust challenge by the Seals' owners).

175. *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527 (7th Cir.), *cert. denied*, 439 U.S. 876 (1978); *Atlanta Nat'l League Baseball Club, Inc. v. Kuhn*, 432 F. Supp. 1213 (N.D. Ga. 1977).

176. Even when the antitrust suit is successful, and most have not been, the plaintiff's expectations may not be met. Joe Kapp's case is a classic example. See notes 149 & 153 *supra*. Kapp won the battle but lost the war. The court found that the various league rules imposed on player dealings were antitrust violations, but the jury awarded Kapp no damages. The memories still must haunt Kapp, and although he says he would sue again, one wonders. *Kapp Victory Seems Empty*, N.Y. Times, Aug. 4, 1981, § C, at 11, col. 1.

If greater aid is to be found, it may emerge through yet unarticulated legal devices. This hope, however, is faint. It is more likely that changes in consumer tastes and advances in technologies may force professional sports leagues to be truly competitive enterprises.¹⁷⁷

C. *The Pick-and-Roll: Labor*

From the previous discussion of the contracts and antitrust cases, it is obvious that, even with victories in hand, the players perceived the need for a more comprehensive legal solution. Certain restrictive practices, long embedded in professional sports, had been eliminated, but their replacement was undefined. The critical time period was from 1974 through 1976 when it became imperative for labor law and labor relations to assume a central role in shaping the structure of modern professional sports.¹⁷⁸ Such a role represented a significant departure from the role of unionism in sports only a few years earlier.

Until 1969, however, it was unclear that the National Labor Relations Board (the Board) would take jurisdiction over professional sports. The Board had characterized horse racing as a local activity beyond its purview.¹⁷⁹ Baseball umpires then began

177. See notes 531-33 *infra* and accompanying text.

178. In the mid-1970's, the collective bargaining agreements in all four major team sports were ending. Owners and players were largely at an impasse. Though the baseball owners had prevailed in *Flood v. Kuhn*, 407 U.S. 258 (1972), the players were determined to successfully challenge the restraints on their movement. It appeared for awhile that Bobby Tolan of the San Diego Padres would be a successful vehicle for this challenge. Chass, *Tolan's Case Rated Serious*, N.Y. Times, Jan. 3, 1975, at 21, col. 2. Tolan's grievance, however, was withdrawn before the arbitrators could determine his fate. *Tolan's Case Is Withdrawn*, N.Y. Times, Jan. 14, 1975, § 3, at 39, col. 7. The task was left to Andy Messersmith and Dave McNally. See notes 216-37 *infra* and accompanying text. Of equally crucial impact in the mid-1970's were the *Kapp*, *Mackey*, and *Smith* cases in football. See note 153 *supra* & notes 276-324 *infra* and accompanying text. In basketball, the concern was over the future of the NBA and its rival, the ABA. This rivalry precipitated the *Robertson* litigation. See note 1 *supra*.

Hockey also was involved in litigation. Much of this litigation occurred in 1972 on the heels of the WHA's formation, and the mid-1970's found the two leagues still wrestling with some of the problems spawned by that circumstance. By 1974, there was no major litigation in hockey, but the issues between rival leagues remained and had to be addressed during the difficult collective bargaining of the mid-1970's.

179. Centennial Turf Club, Inc., 192 N.L.R.B. 698 (1971); Walter A. Kelley, 139 N.L.R.B. 744 (1962); Los Angeles Turf Club, Inc., 90 N.L.R.B. 20 (1950). *But see* Celebrity Sports Center, 169 N.L.R.B. 183 (1968); Harrah's Club, 150 N.L.R.B. 1702 (1965), *enforced*, 362 F.2d 425 (9th Cir. 1966), *cert. denied*, 386 U.S. 915 (1967); Aspen Skiing Corp., 143 N.L.R.B. 707 (1963).

pressing for Board recognition.¹⁸⁰ Baseball was not the best sport to advance the cause of sports unions, since the umpires faced the *Federal Baseball*¹⁸¹ precedent and Justice Holmes' declaration that baseball was not interstate activity.¹⁸² As expected, the baseball leagues relied on Holmes' declaration, urging that the Board's jurisdiction under the federal labor law be limited to businesses engaged in interstate commerce and controlled by the employers. The leagues argued further that, without Board regulation, the industry would be subject to many different labor laws depending on the locality in which the dispute arose. The Board, however, accepted the union's argument:¹⁸³

The system appears to have been designed almost entirely by employers and owners, and the final arbiter of internal disputes does not appear to be a neutral third party freely chosen by both sides, but rather an individual appointed solely by the member club owners themselves. We do not believe that such a system is either likely to prevent labor disputes from arising in the future, or, having once arisen, to resolve them in a manner susceptible or conducive to voluntary compliance by all parties involved. Moreover, it is patently contrary to the letter and spirit of the Act for the Board to defer its undoubted jurisdiction to decide unfair labor practices to a dispute settlement system established unilaterally by an employer or group of employers.¹⁸⁴

The Board also observed that many employees—other than those involved in the petition for representation filed in the case—were not involved in any kind of self-regulation system.¹⁸⁵ If the Board declined jurisdiction over the industry, such employees would be deprived of any representation or dispute settlement machinery. The Board, examining the legislative history, found no intent to exclude sports when Congress refused to include baseball under the antitrust laws:

Nowhere in Congress' deliberations is there any indication that these basic rights [freedom of association, self-organization, and selection of representatives of their own choosing] are not to be extended to employees employed in professional baseball

180. The American League of Professional Baseball Clubs, 180 N.L.R.B. 190 (1969).

181. 259 U.S. 200 (1922).

182. *Id.* at 208-09. See text accompanying note 126 *supra* for Justice Holmes' statement.

183. 180 N.L.R.B. at 191.

184. *Id.* Major League Rodeo, Inc., 246 N.L.R.B. 113 (1979); North Am. Soccer League, 236 N.L.R.B. 1317 (1978); North Am. Soccer League, 236 N.L.R.B. 1280 (1975); Volusia Jai Alai, Inc., 221 N.L.R.B. 1280 (1975).

185. 180 N.L.R.B. at 191.

or any other professional sport. We do not agree that Congress, by refusing to pass legislation subjecting the sport to the anti-trust laws when it considered the regulation of baseball and other sports under the antitrust statutes, sanctioned a governmentwide policy of 'non-involvement' in all matters pertaining to baseball. Indeed, to the extent that Congressional deliberation on the antitrust question has reference to the issue before us, it indicates agreement that players' rights to bargain collectively and engage in concerted activities ought to be protected rather than limited.¹⁸⁶

This decision coincided roughly with the first collective bargaining agreements forged between the nascent players union¹⁸⁷ and the various major league teams. According to Larry Fleischer, director of the NBPA in 1962, it was not until 1966 that the owners were willing to talk with him. In 1967, however, the players and NBA owners entered into the first collective bargaining agreement in professional sports history.¹⁸⁸ Agreements in baseball and football followed shortly thereafter. The MLBPA reached an agreement with the owners in 1968, shortly after the arrival of the influential Marvin Miller as director of the MLBPA.¹⁸⁹ The agreement was modest compared to those made subsequently, but it provided some significant gains for the players. The agreement raised the minimum salary to \$10,000, provided for arbitration of grievances, and demanded a study committee to examine the reserve clause.¹⁹⁰ Both the NFL and the about-to-be merged AFL, completed similarly significant, yet rudimentary, agreements a few months later.¹⁹¹ With collective

186. *Id.* at 192.

187. There have been players groups at various times since the 1880's in baseball. To label these organizations unions, however, ignores the players' attempts to disavow that their players groups were unions. Consequently, it is still safe to characterize their union activities as "nascent" in the late 1960's. See notes 2 & 44 *supra* and accompanying text.

188. *Proposed Amendments to the National Labor Relations Act: Hearings on H.R. 7152 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 2d Sess. 65-67 (1972) (statement of Lawrence Fleisher) [hereinafter cited as 1972 Hearings].

189. For an account of the enormous impact Marvin Miller has had on labor relations in baseball, see L. LOWENFISH & T. LUPIEN, *supra* note 15, at 195-205.

190. *Id.* at 203. The \$10,000 minimum salary may seem low compared to today's baseball minimum of \$32,500, but it was an increase of almost 50% from the \$7,000 base that existed before the 1968 agreement. The committee appointed to study the reserve clause merely established the principle that restraints on player mobility were proper topics for collective bargaining.

191. Although the players associations in football obtained agreements with the owners in 1968, the association did not establish with finality that their groups were the recognized bargaining agents. After the NFL-AFL merger and the consequent merging of the two players associations, the owners initially refused to recognize the combined bargaining

bargaining agreements in these three sports and agreements in hockey soon to follow, the union movement in professional team sports was a pervasive reality, although the strength of these associations had not been tested fully.¹⁹² All leagues showed a similar pattern; their early agreements skirted many tough issues and each succeeding agreement weakened traditional management prerogatives. Powers and rights slowly shifted away from the owners to include the players as well.

The ascendancy of players associations and the advent of collective agreements were based, in part, on a growing sentiment among the players that their grievances were being ignored and that unanimity was needed. Fortunately for the players, there were people available from whom they could seek advice on resolving these grievances.¹⁹³

In addition to a growing awareness of the possible strengths of collective efforts, three types of concerted action helped develop the potency of collective bargaining in sports. The first type of concerted action was the strike weapon. The second, noted earlier, was antitrust litigation. Finally, the third, an outgrowth of collective bargaining, was the arbitration of grievances and salary disputes arising under the collective agreement (rights disputes). While the second and third approaches, particularly baseball salary arbitration, have achieved the most obvious gains, strikes and threats to strike should not be underestimated.

The first indication players would strike for their rights surfaced in the NBA in early 1964. Upset over the owners' position regarding contributions to be made to the newly established player pension fund, the players threatened a boycott at the league's All-Star game. The players delayed the start of the contest for several minutes until, in a locker room confrontation, they received guarantees that the owners would take positive action.¹⁹⁴

unit. This nonrecognition served to complicate the 1970 negotiations over a new agreement. See 1972 Hearings, *supra* note 188, at 13-15 (statement of Ed Garvey).

192. *Id.*

193. The individuals giving advice to players were not uniformly in favor of a strong and cohesive union. Creighton Miller, director of the NFLPA, largely favored a conciliatory posture. See note 2 *supra*. Some players who were especially critical of Miller's stance started a movement to form a rival group, the American Federation of Professional Athletes, which considered affiliation with the Teamsters. A leader in this movement was ex-Cleveland Browns player Bernie Parrish. See J. DWORKIN, *supra* note 2, at 244-45. For Parrish's own account of the problems with Miller and the attempts to form another association, see B. PARRISH, *THEY CALL IT A GAME* 237-61, 271 (1971).

194. *NBA Players Threaten Strike in Dispute Over Pension Plan*, N.Y. Times, Jan. 15, 1964, at 34, col. 3.

The first full-scale, league-wide strike occurred in the NFL in the fall of 1968. As with the NBA dispute four years earlier, the bone of contention was the owners' contribution to the pension fund. This contribution was the sole issue preventing the first collective agreement in football, and negotiations became difficult and heated. After reaching an impasse in negotiations, the players boycotted the preseason training camps. The owners then retaliated with a lockout. Only then, with the battle lines firmly drawn, did the sides agree to talk. Within a few days, the parties reached an agreement.¹⁹⁵ It was not a long or bitter strike, but the boycott and resulting lockout influenced the parties' willingness to resume talks and reach an agreement.

Baseball has seen numerous threats of strikes and, particularly in light of the 1981 strike, more than its share of actual ones. The first threat was in 1969 when the parties disagreed on the percentage of receipts the players' pension fund should receive from the leagues' national television contract. A shortlived training camp boycott resulted.¹⁹⁶ Again in 1972, pension issues led to a walkout that delayed the start of the baseball season for several days. Games were cancelled and, under the agreement that was eventually reached, were never rescheduled. This episode was followed by a lockout during spring training in 1976¹⁹⁷ and by a walkout in the waning stages of the baseball preseason in 1980, with the threat of a full-scale strike in May of that year. The proposed 1980 strike was narrowly averted by a new collective bargaining agreement that granted several additional benefits to players but postponed a decision on the thorny free-agent question.¹⁹⁸ When the members of the joint player-owner committee appointed to study the question could not agree, the owners announced that they would implement their proposal for a free agent system which had been included provisionally in the 1980 accord. The players responded by declaring a strike. Although delayed by legal maneuvering,¹⁹⁹ the strike was called in June, 1981 and continued into August, setting a new record for sports strikes. The success of the strike and the declaration of winners and losers will

195. See J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* § 6.01, at 779 (1979). The NFL also experienced a three day strike and subsequent seventeen day lockout in 1970. *Id.* § 6.09, at 828.

196. *Id.* § 6.01, at 779.

197. See J. DWORKIN, *supra* note 2, at 34-35.

198. *Id.* at 35-37.

199. See, e.g., *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 516 F. Supp. 588 (S.D.N.Y. 1981).

continue to be debated. It is evident, however, that the strike succeeded in stimulating awareness that a labor dispute could threaten a league's existence or, at a minimum, the conclusion of a playing season. Thus, while neither the player boycotts nor lock-outs by owners have been unqualified successes, they have prodded the two sides toward reaching new agreements, as evidenced by the 1981 baseball agreement and the agreements in years past.

In 1974, however, a football strike was definitely a failure—and nearly a disaster. The collective bargaining agreement at issue that year had expired, and the owners and players were far from agreement, particularly over any changes in player mobility rules. The players voted to strike, and most of them did strike. Rookies were urged not to report to training camps, but many reported. Other aspiring professional players arrived on the scene and were labelled “scabs” by the striking players. Public sentiment was assuredly against the players. The players' position weakened daily as more of them relinquished the fight and reported to preseason camp. After forty-four days, the strike ended in a whimper, with all players returning to camp under a fourteen-day moratorium that became moot when the players decided not to resume the strike at the end of the period.²⁰⁰

If the players had not initiated a second line of attack, the union movement in football might have died. Although dissension racked the players association, there was still the antitrust weapon. The decision in *Kapp v. NFL*²⁰¹ held early promise, but it was so diffuse that its ultimate effects were uncertain. This diffusion did not exist in *Mackey v. NFL*²⁰² and its companion case, *Alexander v. NFL*.²⁰³ After an extended trial, the players scored an important triumph in *Mackey* and scored again in *Alexander*. The direct result of these cases was a multimillion dollar cash settlement²⁰⁴ and the owners' promise to negotiate a new collective

200. See J. WEISTART & C. LOWELL, *supra* note 195, § 6.01, at 782-83. See also *N.F.L. Owner Offer Rejected by Players*, N.Y. Times, Aug. 28, 1974, at 21, col. 1; *Players Halt Strike 14 Days; Report to Camps Wednesday*, N.Y. Times, Aug. 12, 1974, at 31, col. 1.

201. 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979).

202. *Mackey v. NFL*, 407 F. Supp. 1000 (D. Minn. 1975), *modified*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). For a discussion of *Mackey*, see notes 276-95 *infra* and accompanying text.

203. [1977-2 TRADE CASES ¶ 72,983], D. Ct. Minn. (1977).

204. Defendants in this section will make settlement payments totaling \$13,675 million in full satisfaction and release of all claims, costs, and attorneys' fees in the section. Defendants will also make settlement payments totaling \$2.2 million in full satisfaction and release of all claims, costs, attorneys' fees, and reimbursement of all costs incurred by the

pact. It has been suggested that the players had the owners' backs to the wall and yet did not exact a sufficient settlement in their 1977 collective bargaining agreement.²⁰⁵ At this point, it is important only to note that antitrust was a direct, powerful, and most influential force in moving sports management and labor toward collective bargaining. In addition to football, this force has affected basketball and hockey.²⁰⁶

Baseball, of course, was different, particularly with *Federal Baseball*²⁰⁷ and *Flood*²⁰⁸ casting lengthy shadows over its business methods. Since antitrust was not available in this sport, the viable alternative was arbitration. In 1973, the players association and the owners negotiated several arbitration provisions in the new collective bargaining agreement.²⁰⁹ These provisions were the portent of change for the national pastime.

In 1974, Oakland pitcher Jim "Catfish" Hunter and Oakland's owner, Charles O. Finley, had a confrontation. Hunter had finished the previous season with an impressive 25-13 win-loss record. The twenty-eight-year-old pitcher had been a twenty game winner for four consecutive seasons and had compiled a total of eighty-eight wins during his four years with the Oakland A's. The A's and Hunter had agreed on a two year contract whereby \$50,000 of Hunter's salary would be paid to him directly and the remaining \$50,000 would be paid to a deferment plan of Hunter's choice. Hunter had requested a specific deferred payment provision which would enable him to avoid immediate tax liability. Finley agreed to the provision but later discovered that he, personally, would incur resultant tax liability. Finley insisted that the contract clause did not require him to assume this burden. During the 1974 season, consequently, Hunter routinely received

NFLPA in connection with the *Mackey* case. Notice to Persons Who Are Now or Have Been Under Contract to a Member Club of the National Football League At Any Time From September 17, 1972 to March 1, 1977, reprinted in *The Sporting News*, May 21, 1977, at 17, col. 2. Several football players, both active and retired, responded to the notice and challenged the terms of the settlement. The courts, however, upheld the settlement agreement. See note 342 *infra* and accompanying text.

205. See notes 413-28 *infra* and accompanying text.

206. See *Robertson v. NBA*, 389 F. Supp. 867 (S.D.N.Y. 1975); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972).

207. 259 U.S. 200 (1922). See notes 122-26 *supra* and accompanying text.

208. 407 U.S. 258 (1972). For a discussion of *Flood*, see notes 133-37 *supra* and accompanying text.

209. Basic Agreement Between the American League of Professional Baseball Clubs and the National League of Professional Baseball Clubs and Major League Baseball Players Association art. V, D(6)-(8); art. X (Jan. 1, 1973) [hereinafter cited as 1973 Baseball Basic Agreement].

the portion of his salary that was to be paid directly to him, but the deferred payments were not made to the designated investment company. The season ended with the deferred payments still not made, despite Hunter's repeated requests. Hunter claimed that Finley's failure to make payments constituted a breach of contract, thus enabling the pitcher to exercise his right to terminate the contract. Hunter then announced that since he had no contract, he was a free agent. Finley insisted that no free agent question was involved, that the only dispute concerned the method of payment, and that the dispute was merely a matter of contract interpretation. Finley offered the other \$50,000 to Hunter as direct payment, but Hunter rejected this offer as contrary to his contractual rights.

The case was submitted under the applicable collective bargaining procedures to Arbitrator Peter Seitz. Seitz ruled in Hunter's favor, finding no ambiguity in the contract language outlining the club's obligations. According to Seitz, the club failed to perform, thus enabling Hunter rightfully to terminate. The arbitrator rejected Finley's contention that no breach could occur until the arbitration established whether the club was obligated to meet Hunter's demands. Seitz further ruled that Hunter no longer had a valid contract with the A's. Hunter was, therefore, a free agent and could entertain offers from any other major league club.²¹⁰

On December 31, 1974, the "Catfish"²¹¹ accepted an offer from

210. The Hunter free agency saga captured the media's attention since baseball was a sport historically immune from antitrust. The following chronological reports highlight the unfolding of the drama: Koppett, *A's Hunter Ruled Free Agent*, N.Y. Times, Dec. 16, 1974, at 51, col. 5; Koppett, *Real Hunter Fuss Is On Bidding*, N.Y. Times, Dec. 17, 1974, at 45, col. 5; Anderson, *Catfish and His Country Lawyer*, N.Y. Times, Dec. 19, 1974, at 63, col. 5; Koppett, *Finley Hope Hangs By a Legal Thread*, N.Y. Times, Dec. 20, 1974, at 47, col. 1; *Finley Accused of Perjury*, N.Y. Times, Dec. 24, 1974, at 13, col. 6; Smith, *Dred Scott and Some Other Guys*, N.Y. Times, Dec. 27, 1974, at 41, col. 2; Chass, *Yankees Sign Up Catfish Hunter In Estimated \$3.75-Million Deal*, N.Y. Times, Jan. 1, 1975, at 1, col. 5; Chass, *Hunter Salary Is 'Only' \$150,000*, N.Y. Times, Jan. 9, 1975, at 43, col. 1. For an account of the established procedure to allow the clubs to bid for Hunter's services, see B. LIBBY, *CATFISH: THE THREE MILLION DOLLAR PITCHER* 7-41 (1976).

211. Great speculation centered around the origin of James Augustus Hunter's famous nickname "Catfish." The popular theory is that the owner of the Oakland A's, and Hunter's eventual adversary, Charles O. Finley, revived the name given Hunter as a child to make his star pitcher more colorful. The childhood story supposedly relates that Hunter had been gone from home several hours, and his parents were worried and looking for him. Hunter wandered home on his own, carrying two catfish. His parents thus called him Catfish. See H. FROMMER, *SPORTS ROOTS* 35 (1979); *THE ENCYCLOPEDIA OF SPORTS TALK*, *supra* note 123, at 51. Doubt, however, is cast on this story by a conflicting account in a Hunter biography. Hunter contends that the appellation was a complete invention. Finley was looking for a nickname for Hunter and mentioned it in casual conversation to Hunter's

the New York Yankees for an unprecedented salary package. Hunter received a \$1 million signing bonus, \$150,000 salary per year for five years, life insurance benefits worth \$1 million, and a substantial amount of deferred compensation.²¹² Only later was it learned that the bidding for Hunter had exceeded the Yankees' offer. At trial in the Joe Kapp case, evidence disclosed that Hunter rejected a \$3.8 million offer from the Kansas City Royals. This testimony, by Hunter's lawyers, was admitted for the limited purpose of showing how open competition for players might affect salaries.²¹³ This evidence apparently did not impress the *Kapp* jury, since it awarded no damages to Kapp even though he had been forced to deal in something less than a free market.²¹⁴ Later events, however, have demonstrated the value of free agency to players. Perhaps the Hunter situation was a harbinger, but it involved special circumstances. An obstinate owner materially breached a contract, thus freeing his star player. These circumstances are rare.²¹⁵

The players needed to mount a frontal attack on baseball's reserve system. This attack came, at length, through the grievances of pitchers Andy Messersmith of the Los Angeles Dodgers and Dave McNally of the Montreal Expos.²¹⁶ These players claimed to be free agents, contending that the sacred reserve clause was only a one-year option. When their request to be declared free agents was denied, a grievance was filed.

The leagues and clubs asserted that the contract had not ex-

brother, Pete, who recounted that Jim liked to fish and, as a boy, would eat only catfish. "That's it," Charlie said, "We'll call you Catfish. Catfish Hunter." B. LIBBY, *supra* note 210, at 52.

212. B. LIBBY, *supra* note 210, at 157.

213. *Hunter Bids Told to Kapp Jury*, S.F. Chronicle, March 19, 1976, at 55, col. 5.

214. *Kapp v. NFL*, 586 F.2d 644, 648 (9th Cir. 1978).

215. The case involving Ken Harrelson is another example of Finley's ability to generate conflict. Finley had been at war with members of the Kansas City A's, making statements and imposing restrictions. Harrelson, a first baseman, on the team, was quoted in the newspapers as calling Finley "a menace to baseball." The "Hawk's" account is that Charley Finley's actions in the last few days have been bad for baseball. I think they have been detrimental to the game." K. HARRELSON & A. HIRSHBERG, *HAWK* 187 (1969). Whatever the case, Finley announced he was terminating Harrelson's contract and that Harrelson was on longer with the A's. For Harrelson, although initially stunned, the timing could not have been better.

The episode occurred in August 1967. The American League had a four-way fight for the pennant, involving Minnesota, Chicago, Detroit, and Boston. Harrelson, a promising, young, hard-hitting outfielder was available, and the bidding began. When it was over, Harrelson's \$12,000 a year salary had increased over \$100,000 per year. *Id.* at 200-04.

216. Professional Baseball Clubs, 66 Lab. Arb. & Disp. Settl. 101 (1975) (Seitz, Arb.).

pired because, under the option clause, the contract created a new option.²¹⁷ As long as the clubs duly "reserved" their players each year, new options would be created perpetually. The owners not only contested the grievance on the merits but also contended that the matter was not properly the subject of arbitration.²¹⁸ To support this contention, the owners referred to the 1973 Basic Agreement, article XV, which stipulated that the agreement "does not deal with the reserve system."²¹⁹ The agreement further stated that contractual language should not prejudice the position of either side. The owners' position was that article XV deprived the arbitrator of power to arbitrate on the core of the reserve system.²²⁰ As the arbitrator noted: "This system of reservation of exclusive control is historic in baseball and is traceable to the early days of the organized sport in the 19th century."²²¹ If the arbitrator accepted management's interpretation of article XV, he would be confronted with a paradox. On the one hand, the standard players contract was incorporated in the basic agreement and part of the core of the reserve system, as characterized by the league, was in that contract. On the other hand, the owners relied on the language of article XV to mean that the agreement did not "deal" with the reserve system.²²² Arbitrator Seitz noted that the legality of the reserve clause was at issue in *Flood*, that the parties had "agreed to disagree" about its continuation from the 1968 agreement onward, and that the reserve system remained, therefore, "untouched" and in existence.²²³ The arbitrator accordingly found that the contract provisions represented a type of "cease fire" over the issue while the matter was litigated. Since the basic agreement incorporated the players contract,²²⁴ and since the players contended they were free agents once their individual contracts expired, the arbitrator found that he did, in fact, have authority to resolve the dispute.²²⁵

The arbitrator interpreted the Uniform Players Contract language, which provided for renewal "for the period of one year," as a renewal clause which "does not warrant interpreting the section

217. *Id.* at 102.

218. *Id.* at 101-02.

219. 1973 Baseball Basic Agreement, *supra* note 209, art. XV.

220. 66 Lab. Arb. & Disp. Settl. at 102.

221. *Id.* at 104.

222. *Id.* at 106-07.

223. *Id.* at 107-08.

224. 1973 Baseball Basic Agreement, *supra* note 209, art. III.

225. 66 Lab. Arb. & Disp. Settl. at 110.

as providing for contract renewal beyond the contract year." "When that year comes to an end, the Player no longer has contractual duties that bind him to the Club."²²⁶ In light of the considerable impact the award would have on the parties, the arbitrator repeatedly urged them to negotiate a new system.²²⁷ Realistically, the owners were faced with two alternatives. The first alternative was to allow McNally and Messersmith to become free agents. This decision would have allowed the owners to argue that the principle of *stare decisis*, not being as embedded in the arbitration system as in the judiciary,²²⁸ would not bind another arbitrator to Arbitrator Seitz' interpretation of the collective bargaining agreement. This option would have created uncertainty, especially given the expiration of the collective agreement and the imminent expiration of numerous individual contracts. The owners' second option was to negotiate more vigorously with the association about changes in the reserve system—a process initiated in the summer of 1976.

The owners, however, chose to litigate. This choice was made

226. *Id.* at 116.

227. *Id.* at 117-18.

228. For a discussion of the use of precedent in the arbitration of labor-management disputes, see E. ELKOURI & F. ELKOURI, *HOW ARBITRATION WORKS* 365-68 (3d ed. 1973). In contrast to the judicial system, where the *stare decisis* concept renders prior decisions authoritative, prior arbitration awards are considered "helpful," but not binding. Arbitrators emphasize the unusual circumstances of each dispute they resolve.

A word as to arbitrators' opinions. Unlike judges who write opinions for the legal profession and people in general, arbitrators may write their opinions solely for the parties before them. The opinion may serve an independent educational purpose; and to serve that purpose, it must be adapted to the character of the particular parties. Accordingly, particular language, a simplification, an exaggeration, a sermon, a "wise-crack," an emphasis, or an ellipsis which may seem out of place or in bad taste for an article for general distribution may have been deliberately employed for the eyes of the particular parties; and conversely what may seem otherwise proper may be out of place or in bad taste in the particular situation. Such, at least, is the view of some umpires.

H. SHULMAN & N. CHAMBERLAIN, *CASES ON LABOR RELATIONS* 7 (1949).

Precedential value is greater in a permanent umpireship where one arbitrator resolves disputes for the duration of the agreement than under a relationship in which different arbitrators are selected on an ad hoc basis. See Shulman, *Reason, Contract Law in Labor Relations*, 68 HARV. L. REV. 999, 1019-21 (1955). The involvement of the judiciary in arbitration has meant the courts often are asked to determine whether an award applies to a particular controversy or whether a new dispute is presented by the facts, thus requiring invocation of an arbitration process in which precedent will not necessarily be followed. *Oil, Chemical and Atomic Workers, Local 4-16000 v. Ethyl Corp.*, 644 F.2d 1044 (5th Cir. 1981); *Boston Shipping Ass'n, Inc. v. Longshoreman's Ass'n*, 108 L.R.R.M. 2449 (1st Cir. 1981). "Absent a provision in the contract to the contrary, the arbitrator could reasonably conclude that strict adherence to *stare decisis* would impair the flexibility of the arbitral process contemplated by the parties." *Riverboat Casino, Inc. v. Local Joint Executive Board of Las Vegas*, 578 F.2d 250, 251 (9th Cir. 1978).

despite the arbitrator's indication that he would resolve the issue adversely to the owners and despite the Supreme Court's declaration in the *Steelworkers Trilogy*²²⁹ that the courts will not reverse a labor arbitration award in the absence of "clear infidelity" to the agreement. Not surprisingly, the courts, pursuant to the *Steelworkers* standards, affirmed the award. The Court of Appeals for the Eighth Circuit in *Kansas City Royals Baseball Corp. v. Major League Baseball Players Association*²³⁰ concluded that the arbitrator had jurisdiction to resolve the issue. *Steelworkers Trilogy* instructed that courts only should conclude that an issue cannot be arbitrated when there is explicit language or bargaining history excluding the issue from the arbitration clause.²³¹ Accordingly, arbitrability—one of the more difficult issues presented—was resolved against the owners.²³² The court noted that article XV and its predecessor, article 14, were adopted as both sides maneuvered in anticipation of the *Flood* case.²³³ The association was willing to negotiate language which indicated it had not addressed the free agent issue. The association was concerned that the players, unhappy with the handling of the reserve clause issue, might initiate litigation on the duty of fair representation. The association wanted to avoid this issue while *Flood* was pending. The owners wanted to utilize the labor exemption defense in the *Flood* litigation²³⁴ to establish that the agreement addressed the issue.²³⁵ The court concluded that "manifest infidelity," a prerequisite for finding that the arbitrator erroneously interpreted the agreement, was not present.

These rulings prompted new collective bargaining. Excluding

229. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

230. 532 F.2d 615 (8th Cir. 1976).

231. *Id.* at 620-21. According to the Eighth Circuit:

We cannot say that Article XV, on its face, constitutes a clear exclusionary provision. First, the precise thrust of the phrase "this Agreement does not deal with the reserve system" is unclear. The agreement incorporates the provisions which compromise the reserve system [the incorporation of the uniform Players Contract]. Also, the phrase is qualified by the words "except as adjusted or modified hereby." Second, the impact of the language "This Agreement shall in no way prejudice the position . . . of the Parties" is uncertain. Third, the "concerted action" which the parties agreed to forego does not clearly include bringing grievances.

Id. at 622-23.

232. *Id.* at 626.

233. *Id.*

234. *Id.* at 624.

235. *Id.* at 625.

those players bound by long term contracts, the owners faced the prospect that all players would become free agents at the end of the 1976 season, or soon thereafter, because of the Seitz award and its affirmance in *Kansas City Royals*. The Eighth Circuit, following *Mackey*,²³⁶ urged the parties to resolve their problems through collective bargaining:

[W]e intimate no views on the merits of the reserve system. We note, however, that club Owners and the Players Association's representatives agree that some form of a reserve system is needed if the integrity of the game is to be preserved and if public confidence in baseball is to be maintained. The disagreement lies over the degree of control necessary if these goals are to be achieved. Certainly, the parties are in a better position to negotiate their differences than to have them decided in a series of arbitrations and court decisions. We commend them to that process and suggest that the time for obfuscation has passed and the time for plain talk and clear language has arrived. Baseball fans everywhere expect nothing less.²³⁷

The call for collective bargaining was sounded over issues most critical to the lifeblood of professional sports. Free agency and resultant compensation, full arbitration of grievances, the draft of nonleague players, and even the rules of the games were all potential roadblocks to successful negotiation. Aided by concerted union activities, antitrust litigation, and an arbitrator who severed the reserve lock in baseball, labor law and labor relations moved to the forefront. Sports was no longer merely the business of giving exhibitions;²³⁸ it was a complex of industries, each with challenges to meet in the 1980's.

III. THE LABOR LAW OF SPORTS

The long drive to collective bargaining in professional sports has culminated in agreements of pervasive impact on the industries. These industries now address most issues of vital importance to both labor and management. The approaches taken by different leagues in their respective agreements reflect, to a degree, fundamental variations among the sports leagues themselves. As to some provisions, however, it is unclear whether they are responses to the exigencies of a particular sport or whether labor and management simply have recast old themes, without regard to future realities and needs. Nonetheless, labor law and labor rela-

236. See notes 281-88 *infra* and accompanying text.

237. 532 F.2d at 632.

238. See note 126 *supra* and accompanying text.

tions are at the forefront in influencing league operations. A labor law of sports is developing and is preeminent today as a legal catalyst for the industries.²³⁹

This section concentrates on the most significant developments. First, there is a growing body of case law encouraging both labor and management to opt for collective bargaining. These cases underscore the benefits attainable through the labor exemption of the antitrust laws, both as insulation for management and as bargaining leverage for the players.²⁴⁰ Second, there are major trends toward collective bargaining covering such issues as player mobility, the possible range of mandatory subjects of bargaining, and arbitration as a labor-management dispute resolution process. Finally, there are the unresolved issues, the most notable of which are continuing problems over definition and control of the bargaining unit and questions about exclusivity in sports labor dealings. These analyses describe the heart of the present situation and foreshadow the discussion in the Article's final section concerning the future of labor law in the sports industries.

A. *Collective Bargaining and the Antitrust Labor Exemption*

As in American labor management relations law generally, labor litigation in the sports industry must refer to the antitrust litigation which preceded it. The historical context for antitrust litigation is considerably different for sports than for other industries. In industrial relations, the courts utilized the antitrust laws as a repressive weapon and attempted to thwart trade union organizations and their collective bargaining goals.²⁴¹ In contrast, trade unions or players associations in professional sports have benefitted from the modern labor-antitrust cases. Despite the legal restraints otherwise imposed on the union, the courts have provided athletes an advantage in their battle to gain credibility at the bargaining table and to negotiate effectively over player mobility issues.

239. Despite the preeminence of labor law in the sports industries today, it should be repeated that there are still legal areas vital to sports which are relatively untouched by labor considerations. *See* notes 59 & 172-75 *supra*.

240. *See* note 169 *supra*.

241. *See, e.g.*, *Coronado Coal Co. v. UMW*, 268 U.S. 295 (1925); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921); *Loewe v. Lawlor*, 208 U.S. 274 (1908).

1. *Background Cases*

The antitrust cases begin with *United States v. Hutcheson*²⁴² in which the Court held that if a union acts in its own "self-interest" and does not combine with nonlabor groups, its conduct is immunized from antitrust liability.²⁴³ This provision is the so-called statutory exemption to antitrust liability. Under this exemption, the Court invoked the policies of other modern labor legislation, such as the Clayton Antitrust Act²⁴⁴ and the Norris-LaGuardia Act²⁴⁵ to interpret antitrust legislation in a manner compatible with some aspects of contemporary trade union behavior.²⁴⁶ The Court thought the *Hutcheson* rule would harmonize and reconcile the competing policies of the statutes involved. The Court concentrated on the antitrust laws, which prohibit practices designed to suppress or eliminate competition between firms, and the labor laws, which promote freedom of association among workers to foster the collective bargaining process and to remove labor cost competition between firms.²⁴⁷

In *Allen Bradley Co. v. Local 3, IBEW*,²⁴⁸ the Court held that union-employer agreements aimed at boycotting unorganized local contractors and manufacturers and barring the importation of equipment manufactured outside of the local area,²⁴⁹ were a combination which constituted a conspiracy to monopolize the trade. The Court noted that the labor and antitrust statutes sometimes promoted separate and competing policies. The policy of preserving a competitive business economy, for example, may conflict

242. 312 U.S. 219 (1941).

243. *Id.* at 232.

244. Clayton Act of 1914, §§ 1-26, 15 U.S.C. §§ 12-27 (1976).

245. Norris-LaGuardia Act §§ 1-15, 29 U.S.C. §§ 101-115 (1976).

246. 312 U.S. at 234-36.

247. *See, e.g., Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), where the Court stated:

A combination of employees necessarily restrains competition among themselves in the sale of their services to the employer; yet such a combination was not considered an illegal restraint of trade at common law when the Sherman Act was adopted, either because it was not thought to be unreasonable or because it was not deemed a "restraint of trade." Since the enactment of the declaration in § 6 of the Clayton Act that "the labor of a human being is not a commodity or article of commerce . . . nor shall such [labor] organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in the restraint of trade under the antitrust laws," it would seem plain that restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act.

Id. at 502-03 (citation omitted).

248. 325 U.S. 797 (1945).

249. *Id.* at 799-800.

with the policy of preserving "the rights of labor to organize to better its conditions through the agency of collective bargaining."²⁵⁰ In *Allen Bradley*, the unlawful conspiracy was between labor and nonlabor groups and was aimed at controlling the marketing of goods and services.²⁵¹ Justice Black, writing for the Court, stated: "A business monopoly is no less such because a union participates, and such participation is a violation of the Act."²⁵²

The next two major decisions were made in 1965. These cases represent the so-called nonstatutory exemption of antitrust liability where the union, through an agreement with an employer group, attempts to promote its interests and, in so doing, induces restraints in a product market. The first case was *UMW v. Pennington*²⁵³ in which a coal company cross-claimed in a suit by the trustees of the Welfare and Retirement Fund to recover royalty payments owed under the agreement. The cross-claim alleged an unlawful conspiracy between the UMW Welfare and Retirement Fund trustees and the large coal operators to violate the antitrust laws. The argument, essentially, was that the union agreed with the large coal operators to abandon its established stand against mechanized equipment and technological innovation in the mines in exchange for higher wages and royalty payments.²⁵⁴ The union allegedly imposed a wage and benefit package that smaller operators could not meet. It was further alleged that the union engaged in a collusive bidding agreement designed to drive such operators from the market.²⁵⁵

Justice White, writing for two other Justices,²⁵⁶ noted that national labor law sanctioned multiemployer bargaining. Such bargaining was held not to violate the antitrust laws in that a union might "as a matter of its own policy and not by agreement with all or part of the employers of that unit, seek the same wages from other employers."²⁵⁷ Justice White, in contrast to Justice

250. *Id.* at 811.

251. *Id.* at 806.

252. *Id.* at 811.

253. 381 U.S. 657 (1965).

254. *Id.* at 656-60.

255. *Id.* at 660-61.

256. Chief Justice Warren and Justice Brennan joined Justice White. Justices Black, Douglas, and Clark joined in a concurring opinion. Justices Harlan, Stewart, and Goldberg dissented from the opinion, but concurred in the judgment.

257. 381 U.S. at 664.

Goldberg's position in his separate opinion,²⁵⁸ rejected the view that an agreement was immunized because its subject matter constituted a mandatory subject of bargaining for labor and management under the National Labor Relations Act (NLRA).²⁵⁹ Despite the mandatory nature of the issues, the nonstatutory exemption would not prevail where the resulting agreement imposed terms on small employers that revealed the "predatory" intent of unions and large employers to injure the small employers. Additionally, if the agreement interfered with the union's ability to act in its self-interest,²⁶⁰ it was unlawful. The *Allen Bradley* and *Pennington* cases dramatize a single, recurrent theme in sports cases. There is great judicial concern about possible injury to a third party not immediately involved in the union-employer relationship. This concern was for nonunion and nonlocal manufacturers and contractors in *Allen Bradley*;²⁶¹ in *Pennington*, it was for the small coal operators.²⁶²

The second 1965 Supreme Court decision, *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*,²⁶³ indicated that public injury due to product restraints could give rise to antitrust liability when trade unions negotiated such restraints. In *Jewel Tea*, an employer refused to sign a multiemployer collective bargaining agreement which litigated the hours for the sale of meat. The Court's plurality opinion²⁶⁴ initially rejected the argument that the subject matter involved in the union's demand was a mandatory bargaining subject within the meaning of the NLRA. Second, the Supreme Court declared that courts should not defer to the primary jurisdiction of the Board²⁶⁵ because courts are not "without experience in classifying bargaining subjects as terms of conditions of employment."²⁶⁶ The Court also found deference to the Board particularly inappropriate where the "controlling legal issue" was "wholly unrelated" to determinations in which the Board normally engages, such as unfair labor practice orders. Fi-

258. *Id.* at 697.

259. *Id.* at 664-65. *But see id.* at 710 (Goldberg, J., dissenting).

260. *Id.* at 666.

261. *See* notes 248-52 *supra* and accompanying text.

262. *See* notes 253-60 *supra* and accompanying text.

263. 381 U.S. 676 (1965).

264. Justice White delivered the Court's opinion in which Chief Justice Warren and Justice Brennan joined. Justices Harlan, Stewart, and Goldberg dissented from the opinion but concurred in the reversal of the Seventh Circuit. Justices Black, Douglas, and Clark dissented.

265. 381 U.S. at 686.

266. *Id.*

nally, the Court noted that if the parties were remitted to the Board's primary jurisdiction, there was a "substantial probability" that the plaintiff might be left without jurisdiction, either because the statute of limitations expired²⁶⁷ or because no unfair labor practice existed.²⁶⁸

The Court, in finding no antitrust liability, weighed the legitimacy of the union's claim that the impact of the subject matter on employment opportunities significantly affected its members against the argument that the union's demands restrained product consumption and thus injured a third party. Because the union's interest in protecting its members' employment opportunities was "immediate" and "legitimate," the labor exemption²⁶⁹ was deemed applicable and immunized the union from antitrust liability. The third party in *Jewel Tea* was the consuming public, which could not purchase goods at convenient hours. In the sports case, the injured party is either the player, a competing league which is injured in its ability to attract players, or the consuming public. The peculiar relevance of *Jewel Tea* to the sports cases is best seen by reference to leading cases involving league-imposed restraints on player mobility.²⁷⁰ Another important theme in *Pennington*, *Jewel Tea*, and their antecedents²⁷¹ is the statutory exemp-

267. *Id.* at 687. Section 10(b) of the NLRA imposes a six-month limitation period. 29 U.S.C. § 160(b) (1976). Jewel's complaint was filed more than six months after it signed the 1957 collective bargaining agreement.

268. Justice White stated:

Finally, we must reject the unions' primary-jurisdiction contention because of the absence of an available procedure for obtaining a Board determination. The Board does not classify bargaining subjects in the abstract but only in connection with unfair labor practice charges of refusal to bargain. The typical antitrust suit, however, is brought by a stranger to the bargaining relationship, and the complaint is not that the parties have refused to bargain but, quite the contrary, that they have agreed. Jewel's conspiracy allegation in the present case was just such a complaint. Agreement is of course not a refusal to bargain, and in such cases the Board affords no mechanism for obtaining a classification of the subject matter of the agreement. Moreover, even in the few instances when the antitrust action could be framed as a refusal to bargain charge, there is no guarantee of Board action. It is the function of the Board's General Counsel rather than the Board or a private litigant to determine whether an unfair labor practice complaint will ultimately issue. . . . And the six-month limitation period of § 10(b) of the Act . . . would preclude many litigants from even filing a charge with the General Counsel. Indeed, Jewel's complaint in this very case was filed more than six months after it signed the 1957 collective bargaining agreement.

381 U.S. at 687.

269. See text accompanying note 2 *supra*.

270. See, e.g., notes 156, 162-63 & 230 *supra*. See also *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971) (basketball); *Nassau Sports v. Hampson*, 355 F. Supp. 733 (D. Minn. 1972) (hockey); text accompanying notes 276 & 296 *infra*.

271. It is unclear whether this constitutes a distinction between the sports cases and

tion²⁷² which concerns a union's self-interest as a prerequisite to antitrust immunity. In *Jewel Tea*, the Court attempted to define self-interest. When the agreement is "intimately related to wages, hours, and working conditions"²⁷³ and the union members' concern is "immediate and direct,"²⁷⁴ an agreement "pursuant to what the labor unions deemed to be in their own labor union interests"²⁷⁵ is appropriate.

2. *The Sports Cases*

The most important of the modern sport-labor cases is *Mackey v. NFL*.²⁷⁶ Judge Larson, the trial judge in that case, concluded that the Rozelle Rule was an illegal combination or conspiracy and restraint of trade in violation of antitrust law and thus denied professional football players the right to contract freely for their services.²⁷⁷ The Rozelle Rule permitted a player whose contractual obligation to a team expired to sign with a different club. The signing club was required, however, to compensate the player's former team. If the two clubs did not reach a satisfactory agreement, the commissioner had discretion to award compensation in the form of players or draft choices.²⁷⁸ The gravamen of the *Mackey* complaint was that the unbridled discretion of the commissioner thwarted the free movement of players between teams in the NFL.

The district judge held that the Rozelle Rule constituted a form of group boycott or a refusal by teams to deal with players—a per se violation of the antitrust laws.²⁷⁹ The court also focused on the NFL's contention that the Rozelle Rule was a part of the collective bargaining agreement and thus a labor exemption to the antitrust laws. In rejecting this contention, Judge Larson stated that the labor exemption was aimed at the collective bargaining process which had not operated with regard to the Rozelle

those in which it is alleged that employers violate antitrust law where they boycott unionized employers. *Carpenters v. Associated Gen. Contractors*, 105 L.R.R.M. 3311 (9th Cir. 1980). *Cf. Connell Constr. Co. v. Plumbers & Steamfitters, Local Union 100*, 421 U.S. 616 (1975).

272. See note 242 *supra* and accompanying text.

273. 381 U.S. at 689.

274. *Id.* at 691.

275. *Id.* at 688.

276. 407 F. Supp. 1000 (D. Minn. 1975), *modified*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

277. *Id.* at 1007.

278. *Id.* at 1004.

279. *Id.* at 1009-10.

Rule. Stressing this point, Judge Larson noted that the NFL was a "weak union" when the first collective bargaining agreements were negotiated, and consequently, no genuine collective bargaining had occurred.²⁸⁰

The Eighth Circuit Court of Appeals took a slightly different approach. That court rejected the NFLPA's argument that only employee groups were entitled to the labor exemption and that the defendant-owners, therefore, could not use the exemption to shield their behavior.²⁸¹ The court stated:

Since the basis of the non-statutory exemption is the national policy favoring collective bargaining, and since the exemption extends to agreements, the benefits of the exemption logically extend to both parties to the agreement. Accordingly, under appropriate circumstances, we find that a non-labor group may avail itself of a labor exemption.²⁸²

With regard to the labor exemption, the court noted that the parties bargained collectively over the Rozelle Rule. The owners relied on this fact to assert their immunity from antitrust liability. On the other hand, the plaintiff-players association contended that the Rozelle Rule resulted from the clubs' unilateral action and, therefore, defendants could not assert a "colorable claim of exemption." The court noted that there had been "little discussion" concerning the Rozelle Rule and that both sides failed to assert "concrete proposals."²⁸³

The players' bargaining representative attributed the failure to pursue modification of the negotiations to the fact that "negotiations have bogged down on other issues and the union was not strong enough to persist."²⁸⁴ Nonetheless, the 1968 agreement incorporated by reference the NFL constitution and bylaws of which the Rozelle Rule was a part. The agreement also explicitly provided that free agent rules were not to be amended during its term. In the negotiations prior to the 1970 agreement, the players association deliberately determined not to make the Rozelle Rule an issue. As noted above, there was limited discussion regarding the Rozelle Rule, although the agreement contained a "zipper" or "integration" clause which stated: "[This] Agreement represents a complete and final understanding on all bargainable subjects

280. *Id.* at 1009-11. Inadequate finances and the organization's recent formation contributed to economic weakness and an inability to conduct a strike.

281. 543 F.2d at 612.

282. *Id.*

283. *Id.* at 612-13.

284. *Id.* at 613.

of negotiation among the parties during the term of this Agreement."²⁸⁵

By the commencement of the *Mackey* litigation, the 1970 Agreement had expired. The Eighth Circuit noted that the players association, "[s]ince the beginning of the 1974 negotiations . . . , [had] consistently supported the elimination of the Rozelle Rule. The NFLPA and the clubs have engaged in substantial bargaining over that issue but have not reached an accord."²⁸⁶ The court reduced certain principles governing the "proper accommodation of the competing labor and antitrust interests involved here."²⁸⁷ The court stated:

We find the proper accommodation to be: First, the labor policy favoring collective eminence over the antitrust laws where the restraint on trade primarily only affects the parties to the collective bargaining relationship. . . . Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of bargaining. . . . Finally, the policy favoring collective bargaining is furthered to the necessary degree to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining.²⁸⁸

The court rejected the district court's conclusion that the Rozelle Rule was a nonmandatory and illegal subject of bargaining.²⁸⁹ The court noted that although the rule concerned interteam compensation, rather than "wages, hours, and other terms or conditions of employment," the district court found that the rule's effect was "to restrict the player's ability to move from one team to another and [to depress] player salaries."²⁹⁰ The court concluded: "Accordingly, we hold that the Rozelle Rule constitutes a mandatory bargaining subject within the meaning of the National Labor Relations Act."²⁹¹

The court observed that the collective bargaining agreement not only referred to the issues in dispute but also contained a zipper (integration) clause, which presumably precluded any further bargaining during the contract period. The court further observed that there was no bona fide arm's-length bargaining; the provisions of the Rozelle Rule, unchanged since their unilateral pro-

285. *Id.* at 612.

286. *Id.*

287. *Id.* at 614.

288. *Id.* (citations omitted).

289. *Id.* at 615.

290. *Id.*

291. *Id.*

mulgation, did not "inure to the benefit of the players or the union,"²⁹² and finally, no "indirect benefit" could be found on the ground that the Rozelle Rule was a quid pro quo for pension benefits and the right to negotiate salaries individually.²⁹³

The circuit court, changing direction slightly, rejected the district court's conclusion that such a group boycott constituted a per se violation and adopted the rule of reason liability test. In so doing, the court expressed its view that the parties could avail themselves of the nonstatutory labor exemption when their collective bargaining agreement covered the controverted mandatory subjects of bargaining. The agreement was not the product of "bona fide arms-length negotiations" and thus the nonstatutory exemption protection was not available.²⁹⁴ The court stated:

It may be that some reasonable restrictions relating to player transfers are necessary to the successful operation of the NFL. The protection of mutual interest of both the players and the clubs may indeed require this. We encourage the parties to resolve this question through collective bargaining. The parties are far better situated to agreeably resolve what rules governing player transfers are best suited for their mutual interests out of court. . . . However, no mutual resolution of this issue appears within the present record. Therefore, the Rozelle Rule, as it is presently implemented, must be set aside as an unreasonable restraint of trade.²⁹⁵

Prior to the Eighth Circuit's *Mackey* decision, the District Court for the District of Columbia, in *Smith v. Pro-Football*,²⁹⁶ held that the draft system of allocating prospective professional football players to the clubs violated the antitrust laws and was not protected by the labor exemption. At the time this case was decided, the mechanics of the NFL draft provided that the team with the worst winning percentage chose first. Every team had one choice in each of the seventeen rounds of the annual draft. No team could negotiate with a player drafted by another team. As the court found in *Smith*, the "net result" was a series of restraints contained in the NFL constitution and bylaws which suggested that "if the player [could] not reach a satisfactory agreement with the team holding the rights to his services he [could] not

292. *Id.* at 616.

293. *Id.*

294. "We find substantial evidence to support the finding that there was no bona fide arm's-length bargaining over the Rozelle Rule preceding the execution of the 1968 and 1970 agreements." *Id.* at 616.

295. *Id.* at 623 (citations omitted).

296. 420 F. Supp. 738 (D.D.C. 1976), *modified*, 593 F.2d 1173 (D.C. Cir. 1978).

play in the NFL"²⁹⁷

In *Smith*, the district court noted the defendant's argument that the NFL draft was a mandatory subject of bargaining between the parties and, therefore, was immune from antitrust liability. The court correctly analyzed the labor-antitrust cases as providing "no support whatever for the league's argument that arrangements related to mandatory subjects of collective bargaining, prior to their embodiment in an agreement, fall within the exemption merely because they related to mandatory subjects."²⁹⁸ Indeed, as demonstrated earlier, the cases do not support this view, even when the subject matter is outlined in a collective agreement.²⁹⁹ The court also concluded that the "unfettered" operation of the collective bargaining process is a prerequisite to the labor exemption. "[A] scheme advantageous to employers and otherwise in violation of the antitrust laws cannot under any circumstances come within the exemption unless and until it becomes part of a collective bargaining agreement negotiated by a union in its own self-interest."³⁰⁰ The court noted that the draft was instituted prior to the time the association entered into a collective bargaining agreement. Since the plaintiff was drafted before the union's recognition agreement was in effect, the plaintiff's cause of action accrued before any exemption could dispose of his case.³⁰¹

Despite the narrowness of the *Smith* holding, the court's discussion of the labor exemption, though dictum, is important. The court's position was that the subject matter must constitute a mandatory bargaining subject within the meaning of the NLRA.³⁰² The court referred to a Supreme Court case which established the propriety of mechanisms such as the hiring hall³⁰³ for allocating employment opportunities among bargaining unit employees. The court also examined the similar role that seniority plays in collective bargaining agreements for industrial unions.³⁰⁴ The court concluded that "each feature" of the draft would be considered a term or condition of employment. "It is clear that the union and the teams could collectively bargain in monetary compensation, benefits, incentives, and guarantees to be paid to

297. *Id.* at 741.

298. *Id.* at 742.

299. See notes 264-65 *supra* and accompanying text.

300. See note 298 *supra*.

301. *Id.*

302. *Id.* at 743.

303. *Id.* at 743 (citing *Teamsters Local v. NLRB*, 365 U.S. 667 (1961)).

304. 420 F. Supp. at 743.

first year players as mandatory subjects."³⁰⁵ The test, according to Judge Bryant, was whether the decision implemented with regard to mandatory bargaining subjects was "arrived at as a result of genuine, arms length bargaining and not . . . 'thrust upon' a weak players union by the owners."³⁰⁶ The court complicated the analysis by stating that the agreement not be at the "behest" of nonlabor groups.³⁰⁷ The court thought that the agreements at issue, unlike those in the major Supreme Court cases, operated solely to the employees' disadvantage. In the court's view, the employees were not "parties" to the agreement.

In declaring the draft a violation of antitrust law, the court also addressed the owners' arguments that competitive balance could not be obtained without the draft system and with a free market for player talent, the current balance would be "irretrievably destroyed" as players migrated to the richest teams and most glamorous cities.³⁰⁸ The court found the evidence on this point "equivocal." On the one hand, a free market might indeed allow the wealthiest owners to purchase most of the player talent and cause the glamour of a particular city to attract a player to that city's team.³⁰⁹ On the other hand, the court noted that there was "abundant convincing testimony" that many other factors were involved in a player's choice of location. The court stated:

[The defendants] were unable to produce any credible evidence of a significant correlation between the opportunity to draft early in the draft . . . and improvement in team performance. In fact, the defendant's evidence in this regard indicates a correlation too low to be regarded as supporting their claim that the draft is essential to the survival of the league. For example, despite the existence of all the league's restraints on player movement, in the last three seasons, nine teams have captured 22 of the 24 spots available in the playoffs leading to the Super Bowl. This shows neither competitive balance in division races nor effectiveness of drafting by early-selecting teams.³¹⁰

The court also declared that no "experiential" evidence existed, to substantiate the owner's claim that in the absence of player movement restriction the best players would move to the small group of teams offering money, glamour, and success. Indeed, the little empirical evidence available with regard to the move-

305. *Id.*

306. *Id.* at 743.

307. *Id.* at 744.

308. *Id.* at 745-46.

309. *Id.* at 746.

310. *Id.*

ment of free agents and former World Football League players since the 1975 season ended does not show any such trend.³¹¹

The court concluded that the current system could not be protected by the rule of reason since there were "significantly" fewer restrictive alternatives available. The court noted that testimony indicated the draft's purpose was to identify and distribute the top player talent. A possible solution, therefore, might be to reduce substantially the number of rounds in the draft. Another "possible acceptable method of player distribution" would allow several teams to draft a particular player while limiting the total number of players a team could sign. While the court noted several variations of this plan, it did not intend "that these examples be regarded as necessarily being within the rule of reason; they are, rather, examples of less restrictive alternatives to the present system, and meant to show that the present draft is not a reasonable system."³¹²

The Court of Appeals for the District of Columbia affirmed, with one member of the panel dissenting.³¹³ The appellate court, however, did not adopt all of the lower court's rationale. The appellate court concluded that the draft differed from a classic group boycott in that the plaintiff, an injured NFL draftee, was not a competitor or potential competitor for the NFL clubs' product market.³¹⁴ Accordingly, the draft could not be regarded as a *per se* antitrust violation.³¹⁵ The belief that the factors involved in the draft's formulation were beyond judicial expertise buttressed the court's view that the rule of reason should govern when considering the draft's compatibility with antitrust law.

On this basis, the court ruled that the trial judge's findings of fact should not be disturbed.³¹⁶ Judge Wilkey, writing for the majority, maintained that the draft had an anticompetitive effect which stripped college players of the opportunity to market their talents.³¹⁷ The NFL's contention that the need for competitive balance among the teams justified the draft was rejected on the

311. *Id.*

312. *Id.* at 747 n.6.

313. 593 F.2d 1173 (D.C. Cir. 1978). Judge McKinnon dissented in part and concurred in part. Judge McKinnon agreed with the majority's conclusion that the district court should not have found the draft to be a *per se* violation of the antitrust laws; he disagreed with the majority's holding that the draft was a violation of the rule of reason.

314. *Id.* at 1178-79.

315. *Id.* at 1182.

316. *Id.* at 1183.

317. *Id.* at 1185.

ground that it affected not only the best players but also average players "who were, in a sense, fungible commodities."³¹⁸ The players, however, still could negotiate with only one team and might not play if they failed to reach agreement. Judge Wilkey expressed no view on the labor exemption issue, which was not central to the outcome of the case.

The *Mackey* and *Smith* cases are of more than historical interest. The collective impact of these cases has been vital to the structure and processes of labor-management relations in the sports industries. While sports leagues have not seen the last of antitrust litigation involving the labor exemption, the players can no longer expect to achieve uniformly favorable results in such cases.³¹⁹ The *Mackey* and *Smith* courts were willing to invoke the labor exemption because the cases involved mandatory subjects of bargaining within the meaning of the NLRA. This characterization of the issues is appropriate given the ultimate relationship between the reserve and option clauses on one side and the wages and other income provisions of the players on the other. The more restrictive the clauses, the more depressed the players' salary market. The proposition that a mandatory subject is a prerequisite to the labor exemption, however, seems to be ill-founded. The Supreme Court has considered this issue relevant to the exemption question but has left open the possibility that legal nonmandatory subjects, which would have only a remote impact on the product market, might also qualify for antitrust immunity under the exception.³²⁰

In any event, whether the drafting of college or amateur players is a mandatory bargaining subject is a more difficult problem because the individuals affected are outside the bargaining units. These individuals are, at the time of the bargain, applicants or potential applicants rather than members of the association or union. The economic impact of such players on the salary structure of veteran players is considerable. Rules increasing the bargaining power of draftees necessarily create upward pressure on the salaries for all players in the bargaining unit.³²¹ As others

318. *Id.* at 1187.

319. See notes 329 & 342 *infra* and accompanying text.

320. See *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965). Cf. *Dolly Madison Indus.*, 182 N.L.R.B. 1037 (1970).

321. See, e.g., Anderson, *The NFL's Dangerous Trend*, N.Y. Times, April 29, 1981, at 21, col. 1 (impact of Johnny Johnson's \$1 million contract upon veteran members of the Los Angeles Rams).

have suggested, bargaining on these issues is analogous to bargaining about a hiring hall,³²² inasmuch as the procedure controls who enters the bargaining unit.

In this context, it is possible to analogize to the Supreme Court's holding that an employer may be refusing unlawfully to bargain by not discussing the contracting out of work from a bargaining unit. The rationale is that an intimate relationship exists between the contracting out of work and the conditions of employment in the bargaining unit. As two commentators have noted:

The fact that bargaining over the subject directly affected a group of employees outside the unit was not a sufficient reason for the employer to act unilaterally. Indeed, the very fact that the two bargaining units were in direct competition for the same work was critical to the decision.

But for the fact that the employees benefit, and the employers suffer from the competition, rather than the other way around, the common draft proposal seems to raise the precise question answered [in the subcontracting case]. . . . The method by which players are allocated between bargaining units bears an extremely close relationship to the terms and conditions in those units (common draft case), just as the method by which work is allocated between units bears an extremely close relationship to the terms and conditions of employment in the original unit (contracting out). The difference is only that two employers are in direct competition for the same athletic services rather than two groups of employees being in competition for the same work.³²³

The problems of the duty of fair representation, while more complex for unions negotiating for nonunit employees, apparently can be solved. Justice Brennan, speaking for the Court in *Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*,³²⁴ stated that federal labor law "does not require a union affirmatively to represent non-bargaining unit members or to take into account their interests in making bona fide economic decisions on behalf of those whom it does represent."³²⁵ The Court concluded, however, that the relationship between incumbent employees and those individuals who had retired permanently from the bargaining unit was not sufficiently intimate to render pension

322. Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 8 (1971).

323. *Id.* at 15-16.

324. 404 U.S. 157 (1971).

325. *Id.* at 181 n.20.

and other retiree benefits a mandatory subject of bargaining within the NLRA's meaning. The Court refused to create any "affirmative" obligation.³²⁶ In the draft case, no question of the duty to bargain is likely to arise because professional sports owners will now have a substantial incentive to negotiate with the associations. By virtue of their need to grasp firmly the labor exemption to avoid antitrust liability, negotiation on the subject would be a *sine qua non* for any collective bargaining agreement.

The troublesome part of the *Mackey* and *Smith* rationale is the so-called "arm's-length or bona fide" bargaining requirement. Judge Bryant and Judge Larson, the trial judges who presided in the two cases, attempted to measure the strength of the union which negotiated the contract. While the proposition that the clause in question was "thrust" upon a "weak union" was avoided studiously by the Eighth Circuit, both courts adopted similar approaches.³²⁷ All of these approaches are predicated on a misunderstanding of federal labor law policy and the realities of the collective bargaining process.

The failure of a union or employer to discuss, bargain, or do more than acquiesce to an established practice concerning a mandatory subject of bargaining generally has limited practical or legal significance. In *Mackey*, the parties negotiated a zipper clause as part of the collective bargaining agreement. This clause waived the union's right to bargain over any negotiable item.³²⁸ To be sure, such clauses do not waive the right to bargain when management engages in unilateral conduct which alters existing employment conditions during the term of an agreement.³²⁹ A

326. *Id. Cf. W. GOULD, BLACK WORKERS IN WHITE UNIONS: JOB DISCRIMINATION IN THE UNITED STATES* 191-200 (1977).

327. *See Smith v. Pro Football, Inc.*, 420 F. Supp. 738 (D.D.C. 1976), *modified*, 593 F.2d 1173 (D.C. Cir. 1978); *Mackay v. NFL*, 407 F. Supp. 1000 (D.D.C. 1975), *modified*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

328. 543 F.2d 606 n.13.

329. *See GTE Automatic Elec. Inc.*, 240 N.L.R.B. 297 (1979) (employer unlawfully refused to negotiate with union regarding the implementation of a savings plan for unionized employees when plan was not available to nonunion employees and had not been conceived at the time the union signed the waiver clause); *Western Foundries, Inc.*, 233 N.L.R.B. 1033 (1977) (Board held that when employer unilaterally implemented an employee profit-sharing plan which excluded from its coverage those employees who were represented by a union Board, despite the existence of a zipper clause, the employer violated sections 8(a)(5) and (1) by refusing to bargain about this exclusion); *Unit Drop Forge Div. Eaton Yale Towne, Inc.*, 171 N.L.R.B. 600 (1968), *modified*, 412 F.2d 108 (7th Cir. 1969) (where contract provided that parties agree upon changes in incentive plans, job change resulting in employee being transferred from incentive pay plan to hourly wage rate was subject to bargaining, despite general waiver clause). *See generally, Cox & Dunlop*,

more particularized waiver aimed at the precise subject matter under dispute is required under such circumstances. This particularized waiver requirement contrasts with *Mackey* where the employer adhered to the status quo and the players sought the changes. Quite clearly, the union in *Mackey* waived its rights to bargain over the Rozelle Rule. The union's ability to extract concessions was limited so severely that it was willing to waive its right on all issues which it was not able to effectively address at the bargaining table.³³⁰ The search for an arm's-length or bona fide bargain—or indeed an inquiry aimed at determining whether the union actually received its quid pro quo for the concession of the player mobility issues—ignores the reality that the quid pro quo exists only in the general sense expressed in the zipper clause. If the union had not negotiated the zipper clause and relinquished bargaining rights, it might not have had a collective bargaining agreement at all.

The heart of this phenomenon is obviously union restraint. Any rule which requires a bona fide or arm's-length bargain different from that which the players association achieved in *Mackey* is a rescue mission aimed at propping up a weak union (which has contractual provisions thrust upon it that it does not view to be in its self-interest). A quid pro quo for a concession on a particular issue or group of issues is not a prerequisite to good faith bargaining under the NLRA. The Eighth Circuit adopted, in effect, a test which considered the strength or weakness of the labor organization involved. Under established labor law principles, *Mackey* seems to have been decided wrongly. As noted earlier,³³¹ the case gave needed muscle to the football players' efforts to establish collective bargaining, particularly in the wake of the abortive 1974 strike and subsequent events. The theme, however, that "hard cases made bad law" cannot be ignored.

Emanations of *Mackey* were quite evident in the proceedings in *McCourt v. California Sports, Inc.*³³² *McCourt* had the added distinction of being the first major sports case to confront the labor exemption when the clause in controversy was specifically incorporated into the league's collective bargaining agreement. At issue was what the Sixth Circuit characterized as a "modified Ro-

The Duty to Bargain Collectively During the Term of the Existing Agreement, 63 HARV. L. REV. 1097 (1950).

330. See note 328 *supra*.

331. See notes 202-05 *supra* and accompanying text.

332. 600 F.2d 1193 (6th Cir. 1978).

zelle Rule," this time for professional ice hockey.³³³

The plaintiff, Dale McCourt, signed an NHL Standard Players Contract to play for three years with the Detroit Redwings, for which he was to be paid \$325,000. In his rookie year with the team, McCourt was the leading scorer. Rogatian Vachon had been the Los Angeles Kings' star goaltender for six years when he became a free agent. After rejecting a substantial offer from the Kings, Vachon signed a contract with the Redwings. This contract subjected the Redwings to a so-called equalization payment under the NHL bylaws as incorporated in the collective bargaining agreement. This compensation procedure is a "final offer" mechanism under which each team places a final offer before an impartial arbitrator who must select one of the parties' positions. The arbitrator cannot modify the offers or compromise.³³⁴

The Sixth Circuit accepted the *Mackey* criteria as the applicable law in deciding whether the arbitration procedure violated antitrust law as an impediment to player mobility. The court also accepted the proposition that the restraint "primarily affected" hockey players and that the subject matter was a mandatory bargaining subject under the NLRB.³³⁵ The Sixth Circuit in *McCourt* stated:

The court in *Mackey* held under the circumstances before it that such arm's-length bargaining was missing. So did the district court here. The underlying facts in the two cases, however, are quite different.

In *Mackey* it was shown that the National Football League Players Association, at least prior to 1974, had stood in a relatively weak position with respect to the clubs. The Rozelle Rule had remained unchanged in form since it was unilaterally promulgated in 1963, even before the Players Association was formed. The Eighth Circuit specifically found that the Rozelle Rule was not bargained over in the negotiations leading to the 1968 or 1970 collective bargaining agreements. . . .³³⁶

The court noted that the NHL and the players association had signed their first collective bargaining agreement that provided

333. *Id.* at 1194.

334. *Id.* at 1195-97. Collective Bargaining Agreement Between NHL Member Clubs & NHL Players' Association, By-Law § 9A (Nov. 27, 1973) [hereinafter cited as NHL Agreement], reprinted in PRACTICING LAW INSTITUTE, REPRESENTING PROFESSIONAL AND COLLEGE SPORTS TEAMS AND LEAGUES 283-95 (Patents, Copyrights, Trademarks and Literary Property Course Handbook No. 84, 1977) [hereinafter cited as REPRESENTING PROFESSIONAL SPORTS].

335. *Id.* at 1197-98.

336. 600 F.2d at 1198.

that the Standard Player Contract and bylaws were "fair and reasonable terms of employment." The court stated that the district court, which found no quid pro quo for the relinquishment of free agent status for the players, had failed to take into account,

the well established principle that nothing in the labor law compels either party negotiating over mandatory subjects or collective bargaining to yield on its initial bargaining position. Good faith bargaining is all that is required. That the position of one party on an issue remains unchanged does not mandate the conclusion that there was no collective bargaining over the other issues.³³⁷

The court recognized that the players association exerted great pressure at the collective bargaining table in presenting proposals for an alternate reserve system. The association also threatened to strike and to commence antitrust litigation. The NHL agreed that the entire collective bargaining agreement could be voided if the NHL merged with the WHA. Such nullification might be necessary if the merger would depress the salary market and make the reserve system "too onerous" because of the players' loss of competitive advantage.³³⁸ The trial court found that the players association had received new benefits that were not "directly related" to the negotiation of the reserve clause.³³⁹ The Sixth Circuit concluded, however, that the players association satisfied the arm's-length, bona fide requirement articulated in *Mackey* since they vigorously opposed or "bargained against" the reserve system.

The essential difference between the compensation procedure in *McCourt* and that which was declared unlawful in *Mackey* was that a neutral third party, and not the commissioner, determined the compensation. The court's judgment about the procedure was appropriate because the parties focused on that procedure in their negotiations. It was not necessary that the association achieve a specific quid pro quo. The Sixth Circuit correctly viewed self-interest as not simply gaining or extracting specific concessions from the other party at the bargaining table. *Mackey* should have reached the same conclusion.

The disputed matter in *Mackey* was addressed in the collective bargaining agreement and a zipper clause was negotiated which waived the union's right to bargain in the future on this subject as well as others. This waiver is compatible with modern collective

337. *Id.* at 1200.

338. *Id.* at 1202.

339. *Id.* at 1202-03.

bargaining and reflects a policy and practice which is recognized and promoted in these kinds of labor exemption antitrust cases.³⁴⁰ A more stringent and narrow interpretation of self-interest and furtherance of the collective bargaining process is not in step with the contemporary trade union movement which negotiates collective bargaining agreements in the context of numerous established relationships.³⁴¹

The matter is not yet entirely resolved. The Eighth Circuit opinion in *Reynolds v. NFL*³⁴² indicates there still may be a need for the judicial examination of player mobility under collective agreements. In *Reynolds*, the court considered the allegation that the post-*Mackey* agreement was "more restrictive" than the Rozelle rule. It was noted, however, that almost as many players had played out their options in two years under the collective agreement's provisions as during eleven years under the Rozelle Rule.³⁴³ *Reynolds* indicates a preference for bestowing the labor exemption upon agreements negotiated in the wake of antitrust

340. Casenote, *Labor Exemption to the Antitrust Laws, Shielding an Anticompetitive Provision Devised by an Employer Group in its Own Interest*: *McCourt v. California Sports Inc.*, 21 B.C.L. REV. 680 (1980). The author observed:

In the Sixth Circuit's view, a union's failure to advance its interests because of the employers' hard bargaining does not mean that the labor exemption must be disallowed. Such a failure, the court notes, is "a part of and not apart from the collective bargaining process," the "ultimate objective" of which is an agreement accepted by the parties. Thus, examining the tenor of the *McCourt* opinion, the court's reluctance to accept the NHL's argument that the union interest, as well as the collective bargaining policy, had been advanced, and its interpretation of the significance of the new player benefits, it is submitted that, at least as far as the labor exemption issue is concerned, the Sixth Circuit views the integrity of the collective bargaining process as more important than the labor interests which a union may seek to further via that process.

Id. at 711.

341. *Id.* The author discussed the change in the labor movement and the way rational labor policy should shift to accommodate that change:

The Court should respond to . . . changes in congressional labor concerns by ascribing greater weight to the national policy favoring collective bargaining and correspondingly less weight to that of advancing the interests of organized labor. This could result in a balancing test very similar to Justice Goldberg's, under which collective bargaining policy would be viewed as important enough to allow the labor exemption to protect any market restraint which results from bona fide, arm's length collective bargaining on mandatory subjects. If the Court were to view unions and employers as bargaining equals, neither the origin of an anticompetitive provision, nor its effect on union interests would be relevant to the nonstatutory exemption issue. In addition, the *Mackey-McCourt* distinction between different types of market restraints would be unnecessary, since the Court would not require two labor policies to be advanced to protect a restriction which affects business competitors, but only one where no third party is affected.

Id. at 713.

342. 584 F.2d 280 (8th Cir. 1978).

343. *Id.* at 287.

litigation,³⁴⁴ but it leaves the door ajar for a case-by-case examination of the nature and effects of certain practices and procedures.

An even more formidable problem can arise in connection with negotiations the second or third time around, particularly when the parties are unable to resolve their differences and agree on a new collective bargaining pact. This delay is hardly an unlikely prospect in football, for example, where the NFLPA is seeking a substantial increase in salary percentage of total revenues³⁴⁵ and promoting the novelty of wage seniority.³⁴⁶ There is no obligation to reach a collective bargaining agreement, but only an obligation to intend, in good faith, to consummate such an agreement. The distinction has caused endless litigation and agony for labor law scholars.³⁴⁷ The philosophy of the statute is at war with the view that collective bargaining agreements or any portion thereof may be imposed on private parties. While contract terms frequently survive the agreement's expiration,³⁴⁸ generally the terms may not last if the parties reach an impasse in their bargaining. At that point, the employer may unilaterally, over the union's objection, institute an offer not inconsistent with its last position.³⁴⁹ The issue then would become whether failure

344. The court stated in its conclusion:

We emphasize today, as we did in *Mackey* . . . that the subject of player movement restrictions is a proper one for resolution in the collective bargaining context. When so resolved, as it appears to have been in the current collective bargaining agreement, the labor exemption to antitrust attack applies, and the merits of the bargaining agreement are not an issue for court determination.

Id. at 289.

345. See Forbes, *Garvey, Players Want More When NFL Contract Expires*, Miami Herald, March 1, 1981, § C, at 8, col. 1.

346. See Oates, *Is NFL Ready for Equal Pay for All?*, L.A. Times, July 22, 1979, § III, at 1, col. 3.

347. See *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970) (exemplifies tension between "good faith bargaining" and the exercise of bargaining strength in "free collective bargaining"); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952) ("the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position. And it is equally clear that the Board may not, either directly or indirectly, compel concessions"); *NLRB v. General Elec. Co.*, 418 F.2d 736, 758 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970) ("while the absence of concessions would not prove bad faith, their presence would . . . raise a strong inference of good faith"). See also Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

348. See, e.g., *Nolde Bros. Inc. v. Local 358, Bakery & Confectionary Workers*, 430 U.S. 243 (1977).

349. See, e.g., *American Fed'n of Television & Radio Artists v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968); *NLRB v. United States Sonics Corp.*, 312 F.2d 610 (1st Cir. 1963); Schatzki, *The Employer's Unilateral Act—A Per Se Violation—Sometimes*, 44 TEX. L. REV. 470 (1966).

to agree waives the employer's protection from antitrust liability. The Eighth Circuit in *Mackey* was careful to note the following: "In view of our holding, we need not decide whether the effect of an agreement extends beyond its formal expiration date for purposes of a labor exemption."³⁵⁰

A rule withdrawing immunity because the previous contract expired before a new agreement was reached is contrary to national labor law. The parties would be forced to enter into a collective bargaining agreement to avoid antitrust sanctions, when labor law is opposed to any such requirement. On the other hand, the employer cannot alter its stance subsequent to an impasse in negotiations and unilaterally impose a package different from that which has been on the bargaining table. Such action would be a refusal to bargain and an unfair labor practice by the employer.³⁵¹ Weistart and Lowell have stated:

[W]hile the absence of union acceptance might normally foreclose application of the exemption, it is not clear that this result should obtain where the unilateral action follows an honest attempt to secure agreement through collective bargaining. Some of the existing cases suggest that the availability of the labor exemption will be determined by a variable standard which takes account of the extent of bargaining which has actually occurred. Future impasse cases on this point will likely present situations which differ markedly in the degree to which the substance of the employer's unilateral action has been influenced by the give and take of prior bargaining. In some situations, a court might well conclude that the union has had a sufficient impact in shaping the content of the employer's offers and that the matter ought to be resolved free of intervention by the courts.³⁵²

While it might be fair to say that the union should "shape" the employer's unilateral imposition of employment conditions, to fashion a requirement that the employer's positions adopt some of the substantive content of the union's proposals would be inconsistent with federal labor law policy. What seems appropriate is that the employer's position emerged from the collective bargaining process. Good faith bargaining must occur, even to the point of impasse, regardless of the lack of substantive influence of the union's proposals in the negotiations. If an impasse occurs and the employer's unilateral terms were offered to the union, the employer should be deemed not to have violated any labor law. A

350. 543 F.2d at 616 n.18.

351. See *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217 (1949).

352. J. WEISTART & C. LOWELL, *supra* note 195, § 5.06, at 590.

union acceptance is not required to satisfy either the self-interest, bona fide, or arm's-length requirements in the collective agreement. To hold that the labor exemption is not available when the parties fail to renegotiate a contract after good faith bargaining is inconsistent with these principles.

Finally, there remains the situation where two leagues are competing for the same players. If new leagues appeared, a possible though not imminent occurrence, a new round of competition for players' services would ensue. Since player restraints affect parties other than the consuming public, the relevance of *Jewel Tea*³⁵³ is limited in this context. In a one league sport, the players or the public are assumed to be the product market, but the labor exemption antitrust cases indicate that the agreement will be scrutinized more carefully when third parties are involved. Nonetheless, problems affecting sports leagues' business practices remain, and further litigation is certain.

B. *Current Trends in Collective Bargaining*

Comprehensive labor agreements have been negotiated in all major team sports. The early, rudimentary agreements emphasized security for the professional athlete. The foregoing section concentrated on the existing possibilities for agreements under the antitrust labor exemption. Both the courts and parties have urged the use of collective bargaining on most issues. From this pressure, certain patterns emerge.

Since the first priority of the players associations in their early agreements was to ensure security for the professional athlete, the negotiations centered around pension plans, minimum salaries, fringe benefits such as life and medical insurance, and other accoutrements. With such stability now assured, the main concerns today are the unsettled player mobility issues and the proposed mandatory bargaining subjects which might afford players greater control over the rules of the games. These are the table setters for what may be done on the road.

1. *The Player Mobility Issues*

Players often have argued that the key to their security is free agency—the freedom to bargain with and join another club when their old contracts expire. The owners have countered with numerous devices binding a player to a given club unless the owner

353. 381 U.S. 676 (1965).

decides to trade the player or release him after he is no longer useful. Drafting of eligible amateurs, contracts with options and reserve clauses, and procedures providing compensation to a player's former team if that player moves to a new club have impeded a free and open player market. The current collective bargaining agreements, spurred by concerted union activity and favorable antitrust and arbitration decisions, have moved significantly away from these traditional restraints. Most leagues, however, still impose restrictions on the player's ability to market himself freely. The stringency of these restrictions, however, varies from one league to another, such that an examination of specific provisions is warranted.

The modified free market has escalated players' salaries considerably. This trend may decrease as owners realize that their particular sport cannot support such salaries. Collective bargaining provisions have shaped the parameters of free agency, but the economics and dynamics of each sport may be other shaping forces. Baseball and basketball players generally have benefitted more from free agency than football and hockey players. This discrepancy is due, in part, to differences in the collective bargaining agreements of each sport and the nature of the particular sport. The following discussion, therefore, examines the structure of baseball, basketball, football, and hockey and then briefly examines developments in soccer.

a. *Baseball.* The 1973 agreement, negotiated soon after the *Flood* decision, provided the first method of resolving salary disputes through arbitration. Baseball also has negotiated collective bargaining agreements, instituting so-called grievance-arbitration machinery. This procedure provides for dispute resolution through the interpretation of the collective bargaining agreement or disputes where a third party makes a final, binding decision.

The 1973 agreement mandates that "[a]ny Club, or any Player with both a total of two years of Major League service in at least three different championship seasons" could submit a salary dispute to "final and binding" arbitration.³⁵⁴ In the 1976 agreement, eligibility was both broadened and narrowed. Any player's salary dispute could proceed to arbitration if both sides consented. Salary arbitration could be obtained as a contract right with the same minimum service eligibility as contained in the 1973 agreement,

354. 1973 Baseball Basic Agreement, *supra* note 209, art. V, § D(6).

but the player must have had less than six years service.³⁵⁵

The procedure established by the Basic Agreement of 1976 is called final offer arbitration. The parties propose salary figures which need not have been submitted during prior negotiations. The arbitrator, pursuant to criteria established by the contract between the association and the clubs,³⁵⁶ must select one of the party's positions as his award.

Salary arbitration has produced major gains for players.³⁵⁷ The 1980 provisions, which give players with six or more years of service free agent status if the team does not consent to arbitration of the salary dispute,³⁵⁸ also promise to be significant.³⁵⁹ These provisions, in conjunction with the important 1976 contract clauses in the collective agreement regarding the free agent draft, have altered significantly the market value of players' services.³⁶⁰

In the wake of the *Messersmith* award,³⁶¹ baseball owners were confronted with the ominous possibility that all players without contracts would become free agents after the expiration of the option year provided in the Uniform Players Contract. The 1976 agreement accordingly provided that player contracts entered into before August 9, 1976 were renewable through an option clause for one year beyond the contract's term. At the end of the option year, the player could exercise free agent rights. Players who entered into contracts on or after August 9, 1976 could become free agents after six years of major league service.³⁶² A reentry procedure was devised to select players on the eligible list. A player may be selected by a maximum of thirteen teams, exclusive of his former team which also could negotiate with the player. If less than two teams select a player, that individual may negotiate with

355. Basic Agreement Between the American League of Professional Baseball Clubs and the National League of Professional Baseball Clubs and Major League Baseball Players Association art. V, § E (Jan. 1, 1976), reprinted in REPRESENTING PROFESSIONAL SPORTS, *supra* note 334, at 125-29 [hereinafter cited as 1976 Baseball Basic Agreement].

356. *Id.*, reprinted in REPRESENTING PROFESSIONAL SPORTS, *supra* note 334, at 125-29.

357. One of the most publicized gains from salary arbitration was the \$700,000 award received by Chicago Cubs relief ace, Bruce Sutter. *Sutter of Cubs Is Awarded \$700,000 Pact by Arbitrator*, N.Y. Times, Feb. 26, 1980, § C, at 11, col. 4. See also Chass, *Arbitration Victory Gives Kemp \$600,000*, N.Y. Times, Feb. 24, 1981, § C, at 13, col. 5.

358. Memorandum of 1980 Baseball Agreement (May 23, 1980).

359. See Durso, *Rich Getting Richer? High Cost of Survival*, Sporting News, July 26, 1980, at 8, col. 1.

360. See Moore, *Crisis in the Grand Old Game*, S.F. Examiner & Chronicle, March 8, 1981, § C, at 1, col. 3.

361. See note 216 *supra* and accompanying text.

362. 1976 Baseball Basic Agreement, *supra* note 355, art. XVII, § B(2), reprinted in REPRESENTING PROFESSIONAL SPORTS, *supra* note 334, at 152-53.

any club.³⁶³ The clubs may sign only a limited number of players. The quota constitutes a ratio to the number of players on the eligible list. Clubs which sign players who have entered into contracts prior to August 9, 1976 need not compensate the player's former team. All other teams, however, must be compensated through an amateur draft selection.³⁶⁴ Since players selected through the amateur draft in baseball normally enter the minor leagues, often with only marginal chances of making the major leagues, the amateur draft selections are not as important as in other sports. The threat of losing a draft selection, therefore, is no deterrent to signing a free agent.

Baseball players' salaries have increased dramatically since 1976. According to the owners, the average salary in 1980 was \$149,000—a twenty-three percent increase from 1979.³⁶⁵ The average free agent earned \$228,300 in 1980. The bidding war has escalated since 1976. Outfielder Dave Winfield, for instance, having toiled eight years with the San Diego Padres, signed a ten-year contract with the more financially secure New York Yankees at approximately 1.5 million dollars per year.³⁶⁶ The Boston Red Sox, faced with the possibility of losing Fred Lynn to free agency, traded him below value to the California Angels. The Angels previously had made a deal with Lynn's agent for a four year contract at 1.4 million dollars a year.³⁶⁷ Even players falling well below the superstar category have realized enormous rewards through free agency.³⁶⁸

Nonetheless, the game has prospered, although this phenomenon may be transitory.³⁶⁹ Leonard Koppet has noted the following increases between the 1978 and 1979 seasons: attendance increased 30%; gross income increased 31%; the average ticket price increased 20%; radio and television income increased 8%;

363. *Id.* § C, reprinted in REPRESENTING PROFESSIONAL SPORTS, *supra* note 334, at 153-58.

364. *Id.*, reprinted in REPRESENTING PROFESSIONAL SPORTS, *supra* note 334, at 153-58.

365. *Grebey: Pay Averaging \$149,000, Why Strike?*, Sporting News, May 17, 1980, at 38, col. 1.

366. *Yanks Sign Winfield for Up to \$25 Million*, N.Y. Times, Dec. 16, 1980, § A, at 1, col. 2.

367. *Angels Obtain Lynn From the Red Sox for Tanana, Rudi*, N.Y. Times, Jan. 24, 1981, at 19, col. 5; Anderson, *With Lynn, Burlison and Hobson, Angels Have Red Sox Look*, N.Y. Times, March 7, 1981, at 29, col. 1.

368. Boswell, *Free Agency: Ceiling Unlimited, Officials Grumble About Huge Salaries for 'Mediocrity'*, L.A. Times, Dec. 18, 1979, § III, at 3, col. 2.

369. See Atkin, *'Safe,' the Umpire Called, as Baseball Puts Surprise Finish To Strike Talks*, Christian Sci. Monitor, May 27, 1980, at 22, col. 1.

and the top price for a team sold increased 75%.³⁷⁰ Since it was postulated that free agency would destroy the competitive balance necessary to maintain loyalty and enthusiasm, and thus, adversely affect attendance and income, it is particularly noteworthy that the number of teams within five games of first place increased during this period by thirty-three percent.³⁷¹ Despite the New York Yankees primacy in the free agent market, they have not yet equalled their dominance of the days before collective agreements and free agency. Between 1921 and 1964, the Yankees won twenty-nine of forty-four American League pennants and twenty world championships.³⁷² Between 1976 and 1980, however, two-thirds of the clubs have not been in championship series, only fourteen of the twenty-six clubs finished first or second, and between eight to ten teams "are consistently excluded by Players from trade considerations."³⁷³ These statistics support the view that competitive balance has not "benefitted" during this period, but it does not prove its deterioration. Moreover, turnover among baseball players has decreased during the period of free agency as compared to the 1960's.³⁷⁴ A possible explanation for this decrease is that trade between clubs resulted in more player mobility than under the 1976 agreement. The difference is that the players did not benefit necessarily.

The new system's impact on player performance or morale is difficult to assess. Most of the highly paid players appear to have performed well, although injuries have hampered some of these players.³⁷⁵ In contrast, the performance of some players undoubtedly has declined out of fear that an injury might diminish their marketability.³⁷⁶ Nonetheless, the owners have sought revisions

370. Koppett, *Wailing Owners Are Distorting the Facts*, Sporting News, May 17, 1980, at 38, col. 1. See also Klein, *Shuffled Lineups: Baseball Is Prospering Despite Shifts Caused by New 'Free Agents'*, Wall St. J., Apr. 4, 1979, at 1, col. 1.

371. Koppett, *supra* note 370.

372. *Id.*

373. Player Selection Rights Study Committee, Management Representatives Report 2, (Feb. 17, 1981).

374. See Koppett, *Baseball "Stability" Claim a Sham*, Sporting News, July 4, 1981, at 11, col. 1.

375. Bill Campbell, a Boston Red Sox relief pitcher, is a classic example of the latter, but his excessive four and five inning relief stints on consecutive days may have been the culprit. There was never any doubt that Campbell was willing to earn his well-publicized salary. Elderkin, *Baseball's Free Agents Pay Off, Except Sometimes When They Don't*, Christian Sci. Monitor, July 2, 1980, at 14, col. 1.

376. Outfielder Dave Winfield supposedly has admitted that he would not go to the wall on long drives and fly balls because an injury might diminish his marketability. Cf. *Yanks Sign Winfield for Up to \$25 Million*, N.Y. Times, Dec. 16, 1980, § A, at 1, col. 2. In

of the 1976 agreement since early 1980. A players strike almost resulted. A temporary solution was the alternative.

The 1980 agreement established a study committee composed of two players selected by the players association and two representatives selected by the clubs.³⁷⁷ The committee issued a report on February 20, 1981. Meanwhile, in 1980, the parties continued with the previous draft system. By February 20, 1981, the clubs put into effect a proposal that was not "less favorable" than the proposal advanced in the spring of 1980. This agreement provided that the association could reopen negotiations by March 1 and strike no later than June 1.³⁷⁸ The owner proposals provide compensation in the form of a professional player comparable in skill and ability to the player lost through free agency. No compensation would be given for a player selected by three or fewer teams. The amateur draft choice would continue when a player was drafted by four to seven teams. When a player was drafted by eight to thirteen teams, compensation would be an amateur draft choice plus an "unprotected professional player of performance if performance criteria are satisfied."³⁷⁹ A club signing the free agent may protect either fifteen or eighteen players in its entire system from being chosen as compensation depending upon the free agent's previous performance.

The clubs have noted that only five of the forty-two players in the 1980 draft were drafted by enough teams to raise the compensation issue under this proposal.³⁸⁰ It seems, curiously, that compensation will not dampen the bidding war for the superstars who are most likely to be drafted by eight to thirteen teams. As noted in the Owner's Study Committee Report, many outstanding players have signed lucrative contracts even though the acquiring team

contrast, Carlton Fisk, whose contract expired in 1980, risked injuring his throwing arm during the closely fought pennant race of 1978 and also on a cold April day in Milwaukee when he substituted for floundering Boston catchers. *See Fisk Takes Risk and Wins*, *Sporting News*, June 19, 1980, at 20, col. 1. *See generally Fisk Going to Whitesox*, *N.Y. Times*, March 10, 1981, § B, at 13, col. 4; Durso, *Fisk Declared Free Agent; Cerone Wins Salary Case*, *N.Y. Times*, Feb. 13, 1981, § A, at 19, col. 4; Durso, *Case of Unsigned Fisk Goes to Arbitration*, *N.Y. Times*, Jan. 25, 1981, § 5, at 7, col. 1.

377. Memorandum of 1980 Baseball Agreement, *supra* note 358.

378. Chass, *Player's Union Sets May 29 Deadline*, *N.Y. Times*, Feb. 26, 1981, § D, at 21, col. 5.

379. For a discussion of the issues involved in the 1981 contract dispute, see Newhan, *Baseball Closes In on a Strike Again: The Issue Remains Compensation for Signing Free Agents*, *L.A. Times*, Feb. 7, 1981, § III, at 1, col. 1.

380. Interview by William B. Gould with Raymond Grebey, Chief Negotiator for owners, in San Francisco (Sept., 1980).

had to compensate the previous team. This signing has occurred even when the team which acquired the player knew that his contract was about to expire and that contract terms would have to be negotiated if the player were not to become a free agent.³⁸¹

The likelihood of financial gain for other players is more difficult to foresee. The players association had voiced adamant opposition to any compensation proposal beyond the amateur draft because it thought the clubs would draft outside the superstar category deliberately to undermine the free agency of average players.³⁸² If this deliberate drafting occurred, teams might not sign a mediocre player to lucrative contracts because of the free agent compensation required. A possible solution to this problem might involve negotiating exceptions or limits on the number of times certain players in defined ability classifications could be drafted.

In 1981, after a two month strike arising over the parties' inability to agree on a new compensation provision, a rather complicated agreement was reached. The replacement player compensation provision of the Memorandum of Agreement entered into on July 31, 1981 essentially defines a "Type A" ranking player as one for whose loss a team may be compensated. The players are ranked, in part, according to statistics on total plate appearances, batting average, base percentage, total home runs, and total runs batted in for two seasons.³⁸³ Players in the top 20% are Type A. The top 20% to 30% are Type B. The number of players that can be included in the Type A ranking category during the period of the Basic Agreement—from 1981 to 1983—ranges from seven to nine.³⁸⁴

The other important disputed issue relates to the number of

381. Vida Blue and Rod Carew were early examples of this phenomenon. See Management Representative Report, *supra* note 373, at 3. More recently, the California Angels were willing to release Frank Tanana and two other players to sign Fred Lynn to a four-year contract worth \$5.25 million. See also note 367 *supra*. Lynn was about to become a free agent and could literally dictate the terms of his financial package and transfer to the Angels. Similar circumstances surrounded the trade of Bruce Sutter from the Cubs to the Cardinals. See Management Representative Report, *supra* note 373, at 3.

382. See, e.g., Smith, *Baseball Turns Back*, N.Y. Times, Jan. 25, 1980, § B, at 4, col. 5.

383. Players who have been free agents through the reentry system and completed their repeater rights under the provision and those with twelve or more years of credited service are not covered by the agreement. See note 384 *infra*.

384. Memorandum of Agreement Between the Major League Clubs—Player Relations Committee and the Major League Baseball Players Association 3 (July 31, 1981) [hereinafter cited as 1981 Memorandum of Agreement]. See generally Koppett, *How the New Free Agent System Works for Baseball Re-entry Draft*, Peninsula Times Tribune, Nov. 10, 1981, at 1, col. 4.

"Only three Type A players, or pitchers [went into the 1981] . . . selection process: Ron

players that a club may protect against compensation. The owners initially insisted on protecting only 15 to 18.³⁸⁵ The agreement provides that clubs may protect 24 to 26. Teams not signing the Type A ranking player may protect 26. A maximum of five clubs may be excluded altogether from the compensation provision. "All players with no-trade clauses and those whose consent is required by the Basic Agreement to the assignment of their contract must be included in a club's protected list."³⁸⁶

Type B ranking players will require compensation in the form of an amateur draft choice and an "added Amateur Draft Choice, which shall be a special choice awarded immediately after the first complete round of the draft and preceding the commencement of the second round."³⁸⁷ The 1976 agreement provided an amateur draft selection for any player lost through the reentry procedure. A payment of \$150,000 was to be made to a club losing a player from the pool for the first time. No further payments would be made in connection with losses during the next two years.³⁸⁸

The agreement reflects a compromise. Since the players association accepted the idea of compensation in excess of an amateur draft choice in early 1981, and in light of the owners' position referred to above, it would seem that the agreement more nearly reflects the players association position.³⁸⁹ Moreover, players who received this compensation are drawn from a pool of participating clubs, an approach proposed by the players.³⁹⁰ It took a strike of more than two months, however, to achieve this agreement—a factor which may not be lost on the players association in future

Guidry of the New York Yankees, Dick Tidrow of the Chicago Cubs and Ed Farmer of the Chicago White Sox." *Id.*

385. See *Free Agent Proposal Modified by Owners*, N.Y. Times, June 25, 1981, § D, at 19, col. 4.

386. 1981 Memorandum of Agreement, *supra* note 384, at 7.

387. *Id.* at 8.

388. *Id.* at 10.

389. Indeed, it would seem as though the Red Sox, through obtaining Carney Lansford, Mark Clear, and Rick Miller for Rick Burleson (about to become a free agent) and Butch Hobson, received more than the 1981 agreement compensation provisions require. Moreover, only players in 1981 are Type A players who may require major league player compensation. Koppett, *supra* note 384. Also, the salaries negotiated by players who could have become free agents are in excess of what was negotiated in 1980. Chass, *Free Agents Rewarded*, The New York Times, Nov. 12, 1981, at 26, col. 3.

390. Smith, *Sneezing in The Draft*, The New York Times, Nov. 15, 1981, at 26, col. 1: "Some teams can dicker with Type A men with impunity. The Chicago Cubs, for instance, can be pretty sure that a team losing a Type A free agent would choose somebody else as compensation rather than the Cub's 25th player."

bargaining sessions.³⁹¹

b. *Basketball*. This sport maintains a lower profile than baseball but has a higher salary structure (an approximate annual average of \$180,000) and more free agent flexibility—at least as of 1981.

The 1981 collective bargaining agreement between the players association and the NBA encompasses both the college draft³⁹² and free agency for “veteran” players after their rookie year. A team which drafts a player is the only team with which the player may negotiate, provided the club makes a tender offer before the fifth of September immediately following the initial draft. The player contract may extend for no more than one year, must provide at least the minimum salary, and must contain a one year option clause, exercisable once, for at least the same salary. If the contract offered is for longer than one year, it must be a four to five year contract with an annual salary of \$75,000 to \$165,000.³⁹³ If no offer is extended, the player may negotiate and sign with any team on the sixth of September following the draft. If a drafted player signs with a non-NBA team, the NBA team retains exclusive rights to negotiate with that player in the future.³⁹⁴

Compensation problems relating to veteran free agents have created most of the controversy between the players association and the NBA. Problems arise under the 1976 collective bargaining agreement and the settlement in *Robertson*³⁹⁵—an antitrust action brought to invalidate restrictions on player mobility and alleged illegal league activity. The United States district court, utilizing the services of a master, retained jurisdiction over the parties to enforce the terms of the settlement and the consent judgment. The settlement provided that the district court accept the Special Master’s findings of fact, unless found clearly erroneous, and the master’s recommendations for relief, unless based on clearly erroneous factfindings, an incorrect application of law, or

391. See Koppett, *Owners’ Goal is Obvious: Soften the Union*, The Peninsula Times Tribune, July 13, 1981, § D, at 1, col. 1.

392. NBA-NBPA Collective Bargaining Agreement, art. XXII, § 1(a), at 21-24 (October 10, 1980) (on file at Case Western Reserve Law Review) [hereinafter cited as NBA Agreement].

393. *Id.* at 21-22. Compensation must begin at \$75,000 with an upper range of \$110,000 to \$165,000.

394. *Id.* at 23.

395. *Robertson v. NBA*, 389 F. Supp. 867 (S.D.N.Y. 1975).

an abuse of discretion.³⁹⁶

After 1981, the clubs have a right of first refusal for any free agent who wants to sign with another club. The player's old club may match the player's best offer and thus retain him.³⁹⁷ If the old club does not match the offer, however, the player goes to the new club, and the old club is not compensated. In addition, after 1987, there will be no restrictions on the signing of free agents unless the league and association choose to renegotiate their agreement.³⁹⁸

From 1976 to 1981, the NBA has operated under a compensation arrangement which provides that a team signing a free agent whose individual contract has expired must compensate his former team in one or more of three ways: draft choices, current NBA players, or cash.³⁹⁹ The leading case testing this compensation arrangement is the Marvin Webster litigation.⁴⁰⁰ Webster, a center with the Seattle Supersonics, signed with the New York Knickerbockers after completing his contract obligations with the Sonics. The Sonics and the Knicks were unable to agree on compensation. The commissioner awarded a compensation package to the Sonics consisting of the contract for New York player Lonnie Shelton, a New York first round draft choice, and \$450,000.⁴⁰¹ The players association attacked the commissioner's adjudication as a "penalty," thus violating the agreement. The Knicks also protested the award.⁴⁰²

The Special Master observed that the commissioner's award was, in fact, "excessive" but concluded that it could not be set aside without a showing of intent by the commissioner to make the old team more than whole or a showing that the award was so "clearly excessive" as to either demonstrate such intent or "gross error of judgment."⁴⁰³ The master accordingly denied plaintiffs' petition to set aside the award. The master also ruled that in future proceedings, the players association could not present evidence that was not previously presented to the commissioner.⁴⁰⁴

396. *Id.*

397. NBA Agreement, *supra* note 392, art. XXII, § 1(d), at 28-32.

398. *Id.* § 2(a), at 33.

399. *Id.* § 1(c), at 26-27.

400. *In re Robertson Class Plaintiffs*, 479 F. Supp. 657 (S.D.N.Y. 1979), *aff'd in part*, 625 F.2d 407 (2d Cir. 1980).

401. *Id.* at 661.

402. *Id.* at 662.

403. *Id.* at 663.

404. *Id.* at 662.

The master further ruled that both teams—the one which had signed and the one which had lost the player—were proper parties in the proceedings before him.

District Judge Carter reversed the master's rulings. Judge Carter granted the player's petition and set aside the award as a penalty. Judge Carter also concluded that an award which was "excessive" was a penalty, and, despite the commissioner's broad discretion in fashioning a "final" award, the master and ultimately the court were mandated to set aside an excessive award as a penalty.⁴⁰⁵ Judge Carter's ruling was appealed to the Court of Appeals for the Second Circuit which upheld the district court's basic view that it had "virtually plenary authority to determine whether the substantive standards of the agreement have been observed."⁴⁰⁶ The court, however, speaking through Judge Newman, adopted an intermediate standard between that of the district court and the master and rejected Judge Carter's view that any compensation which exceeded the worth of a player beyond an "insignificant" amount was a penalty. According to Judge Newman, Judge Carter's view would leave the commissioner with no discretion and would be inconsistent, therefore, with the settlement agreement. Judge Newman stated: "While we do not wish to inject mathematical certainty into an area that requires some flexibility, we would not think the Special Master would be unwarranted in concluding that an award becomes a penalty when it exceeds the fair value of the player by approximately 20% to 25%."⁴⁰⁷

The court opined that it would not have been "displeased" if the parties had determined that the compensation issue were to be immunized from judicial scrutiny. While the "nuances" of basketball skills are not problems which are handled by the federal judiciary with regularity, the court noted that it often resolved disputes relating to the value of property and personal services. The court thus recognized that the commissioner was not impartial in player-club disputes. This recognition undoubtedly influenced its decision to proceed.⁴⁰⁸

The wisdom of this decision may be questionable, particularly in light of the complex issues in the *Bill Walton* compensation

405. *Id.* at 668.

406. *Robertson Class Plaintiffs v. NBA*, 625 F.2d at 412.

407. *Id.* at 413.

408. *Id.* at 414.

award.⁴⁰⁹ This problem is largely mooted by the shift to the right of first refusal. It is difficult to determine whether the right of first refusal will impede player mobility or limit salaries. It must be noted, however, that the team losing a free agent under the old system apparently always was willing to meet the offer of the team negotiating the new contract. The player usually moved because of a desire to join a new club and not primarily for the money. The new system may change this decisionmaking. If owners have no obligation to compensate the club losing the player, they may not be able to resist raising the stakes. Players and their agents know of this possibility and undoubtedly will "test the waters."

Since the 1981 Right of First Refusal Agreement has been in effect, a limited number of free agents have been benefiting from an escalating salary war.⁴¹⁰ A club faced with the loss of a player frequently matches the competing club's offer and then trades the player against draft choices or before it must match the offer.⁴¹¹ This procedure does not seem to violate the agreement since the player benefits from the offer which prompted his team to make the deal.

Basketball owners initially entered into the collective agreements which provided compensation on a transitional basis and the right of first refusal. These agreements were signed for three reasons: the threat of more severe liability, as was imposed in the *Robertson* case; an erroneous belief that the elimination of the ABA would depress rookie salaries; and, the view that the compensation procedure would deter player mobility and thus limit salary increases.⁴¹² To some extent, the owners' strategy assumes that the compensation procedure has given them the latitude to enter into long term individual contracts and to stagger such contracts so that a common expiration date does not cause excessive pressure. The advent of cable television and its revenue potential also might lessen the burden of increased player salaries.

409. *In re* Portland Trailblazers, Opinion and Award of the Commissioner (Sept. 18, 1979); *Robertson Class Plaintiffs*, Report of Special Master (S.D.N.Y. July 7, 1980); Modified Opinion and Award of the Commissioner (Aug. 15, 1980); *Walton and Webster* (S.D.N.Y. Sept. 17, 1980).

410. Littwin, *NBA Owners: They're Taking a Second Look at First Refusal*, L.A. Times, July 10, 1981, at 1, col. 1.

411. Elderkin, *Its a New Salary Game in the NBA*, Christian Sci. Monitor, July 17, 1981, at 16, col. 1.

412. Interview by William B. Gould with Lawrence Fleisher, General Counsel, National Basketball Players Association, in New York City (Oct. 31, 1980).

c. *Football*. Although the antitrust cases in football have discouraged restrictions on player mobility, the 1977 NFL Collective Bargaining Agreement is, ironically, one of the least effective agreements in professional sports on the issue of player mobility. This ineffectiveness begins with draft provisions of the agreement. Football's collective agreement provides that there will be 336 selections with special numbers for expansion teams.⁴¹³ This provision attempts to accommodate those players who are not in the superstar category and who can negotiate freely with any team without affecting the competitive balance in the league. The 336 selections, however, funnel most of the viable candidates through the draft procedure and not through free agency. A player who is not signed with the club drafting him may be drafted by another team in an extra round. The only way to escape this provision is to play outside the United States.⁴¹⁴ If a player does not sign after the second round, he then may negotiate with any team without restriction. If a player has signed with a non-NFL team and wants to enter the NFL after two years, the NFL club which originally drafted him has a right of first refusal. Despite the *Yazoo Smith*⁴¹⁵ decision declaring the old draft illegal, the new draft, apparently insulated by the antitrust labor exemption, is far from an open one.

Option years are required for rookie one-year contracts and are permissible in all other instances. Despite the fact that the agreement seems to address a one-year option—the player is to receive 110% of the “salary provided in his contract for the previous year . . . ,”⁴¹⁶—an arbitration award has held that players do not become free agents at the expiration of the option year.⁴¹⁷ The NFLPA contended that the one-year-option interpretation would provide the clubs with a “perpetual option” on the player's service—the same position that was rejected in the *Messersmith* baseball award.⁴¹⁸ The clubs argued successfully that approval of

413. Collective Bargaining Agreement Between NFL Players Association and NFL Management Council, art. XIII, § 2 (March 1, 1977) [hereinafter cited as NFL Agreement], reprinted in REPRESENTING PROFESSIONAL SPORTS, *supra* note 334, at 52.

414. Wallace, *How Canada Provides a Lure for Many N.F.L. Prospects*, N.Y. Times, May 18, 1981, at 30, col. 1. Cf. Eskenazi, *Ferragamo Gets Warm Welcome from Alouette Fans*, N.Y. Times, June 7, 1981, at 26, col. 1.

415. See note 296 *supra* and accompanying text.

416. NFL Agreement, *supra*, note 413, art. XIV, § 3, reprinted in REPRESENTING PROFESSIONAL SPORTS, *supra* note 334, at 59.

417. NFL Players Ass'n v. NFL Management Council (Dutton) (May 14, 1980).

418. For a discussion of *Messersmith*, see notes 216–27 *supra* and accompanying text.

the players' position ignored the detailed contractual language, referred to below, providing for both a right of first refusal and compensation in free agent situations. The arbitrator noted that the players were willing to agree to "restrictions and compensation" as part of an "overall procedure."⁴¹⁹ The arbitrator also noted that the parties had been careful to articulate contractual exceptions to the general rule that teams have both the right of first refusal and compensation if a player seeks to become a free agent.⁴²⁰

The most effective NFLPA argument was that the agreement's failure to enumerate in the agreement the compensation available to a player after his option year indicated that the parties did not intend for the team to retain his services. Moreover, with the invalidation of the Rozelle Rule in *Mackey*,⁴²¹ an appropriate approach to contract interpretation assumes that any limitations on free agency should be articulated clearly. Since the courts have held these player restrictions invalid absent the antitrust labor exemptions, any ambiguity should be construed in favor of the players. Indeed, in some respects, the association's position in the football option arbitration is more attractive than the baseball players' position in the *Messersmith* case.⁴²² At the same time, however, the bargaining history of football did not reflect any explicit intention by the parties to confer free agent status on players whose option year had expired, and the arbitrator refused to assume this duty absent an explicit provision to that effect.

Unlike baseball, any NFL player whose contract expires or who has played out an option year may seek free agency. The player's team, however, may match another team's offer through a right of first refusal. If a team matches the "principal terms" of the offer, a "binding agreement" with the player is created under the collective agreement.⁴²³ If the right of first refusal is not exercised, the losing team receives draft selections as compensation. The desirability of the draft choice is related to the amount of the free agent's offer.

Football players rarely move to new teams under the contractual free agency procedures. The compensation deters most clubs

419. NFL Players Ass'n v. NFL Management Council, at 36.

420. *Id.* at 39-41.

421. See notes 276-95 *supra* and accompanying text.

422. See note 216 *supra* and accompanying text.

423. NFL Agreement, *supra* note 413, art. XV, § 4, reprinted in REPRESENTING PROFESSIONAL SPORTS, *supra* note 334, at 61.

from entering into serious bidding. As a result, average salaries, approximately \$80,000 per year, are considerably lower than those in baseball or basketball.⁴²⁴ It is difficult, however, to assess the reasons for this differential. A greater number of football players are, in fact, fungible. Football differs from baseball in that a single player is less likely to affect a game's outcome because football is a more team-oriented sport. Moreover, there may not be an adequate economic incentive to sign free agents in football. Unlike baseball and perhaps basketball, it is doubtful that free agency boosts a football club's ticket sales. Even most losing teams are guaranteed a capacity crowd.⁴²⁵ Consumer demand has made lucrative television and radio contracts available regardless of the presence of free agents and victories. Football enjoys full houses and an equal pay formula national television contract. Free agents in football, therefore, unlike the free agents in baseball, are an expensive and not necessarily attractive commodity.⁴²⁶

All of these considerations have led the NFLPA to emphasize demands based on a salary scale and a percentage of gross revenue rather than to address the free agent issue in connection with the 1982 negotiations.⁴²⁷ The high salaries paid to rookies apparently have increased the discontent among the rank and file.⁴²⁸

d. *Hockey*. Earlier discussion has focused on the *McCourt* case⁴²⁹ and the NHL's approach to free agency compensation. This system of compensation is unique to hockey and is somewhat analogous to salary arbitration in baseball. When a player be-

424. See note 41 *supra*.

425. See Miller, *The Not-So-Free Agents*, S.F. Chronicle, Feb. 20, 1981, at 64, col. 1.

426. When the Philadelphia Phillies signed Pete Rose, the team's income from ticket sales and television contracts exceeded Rose's salary. Garvey, *Why the NFL Snubs Free Agents*, N.Y. Times, Aug. 12, 1979, § S, at 2, col. 1. In 1981, the Red Sox traded Rick Burleson and Butch Hobson. The team then suffered losses of television contracts which exceeded the anticipated salary expenditures for Fred Lynn and Carlton Fisk. Newhan, *One Way to Avoid a \$2 Million Tab*, L.A. Times, Jan. 10, 1981, § III, at 1, col. 2. The same dynamics are not operative in football.

427. See *NFL Players Ask for Salary Scale*, S.F. Chronicle, June 12, 1981, at 83, col. 6; *The Coming Fight Over NFL Riches*, S.F. Chronicle, Apr. 21, 1981, at 47, col. 1. The players, however, seem to be divided on this issue. See, e.g., Dickey, *Disunity in the NFL's Player Union*, S.F. Chronicle, Aug. 19, 1981, at 61, col. 1; Miller, *How the 49ers View the Next NFL Contract*, S.F. Chronicle, Aug. 14, 1981, at 71, col. 1. One virtue of a salary scale is that players would be compensated more adequately and without the need for free agency and consequent disruption of fan morale. Koppett, *Fixed Pay Scale Might Benefit Fan*, Sporting News, Nov. 28, 1981, at 12, col. 1.

428. Anderson, *The NFL's Dangerous Trend*, N.Y. Times, April 29, 1981, § B, at 11, col. 4.

429. 600 F.2d 1193 (6th Cir. 1978). See notes 332-39 *supra* and accompanying text.

comes a free agent and signs with another club, the equalization process begins. If the old and new clubs cannot agree on the compensation, the dispute is submitted to an arbitrator. Each club submits its opinion of the appropriate compensation level. The submitted figures need not have been subject to discussion or negotiation between the clubs. The arbitrator, after a hearing, must choose one of the two proposals without amendment.⁴³⁰

The above procedure occurs after the expiration of a hockey player's contract, including any options that may have been exercised. Hockey's option system is unique in its use of a "dual option." The procedure is somewhat complex but is designed to aid the player and the club.⁴³¹ First, no later than the tenth of August in a year when the regular term of a player's contract has ended, a club may request that a player sign a termination contract. If that player signs, his contract is extended for one year, but the player becomes a free agent the following June first. If the player does not sign, he is unconditionally released the tenth of September before the season begins. If the club does not tender the termination contract, it must tender a standard player contract with the same terms as the previous contract, including paragraph seventeen which allows this procedure to occur again.⁴³² Second, the player may exercise certain rights regardless of the club's actions. The player, before September tenth, may request the club to tender an option contract. Although this contract is new, the terms remain the same, except the contract is extended until June first of the year following when the player becomes a free agent.⁴³³ Thus, after the club offers the player either a termination or standard player contract, the player essentially may refuse these new contracts by requesting a one-year extension of the old contract. If neither party exercises its rights, the parties shall enter into a new agreement under a standard player contract, with the same terms, except that salary shall be determined by arbitration.⁴³⁴

Hockey and baseball are the only sports that do not provide for the drafting of players in their collective bargaining agreement, who are initially entering the system. Since baseball is ex-

430. NHL Agreement, *supra* note 334, By-Law § 9A, ¶ 8(b), *reprinted in* REPRESENTING PROFESSIONAL SPORTS, *supra* note 334, at 294.

431. *Id.*, art. IX, *reprinted in* REPRESENTING PROFESSIONAL SPORTS, *supra* note 334, at 273-77.

432. National Hockey League Standard Player's Contract, para. 17 (1974), *reprinted in* REPRESENTING PROFESSIONAL SPORTS, *supra* note 334, at 292.

433. *Id.*, *reprinted in* REPRESENTING PROFESSIONAL SPORTS, *supra* note 334, at 292.

434. *Id.*, *reprinted in* REPRESENTING PROFESSIONAL SPORTS, *supra* note 334, at 292.

empt from the antitrust laws, there is almost no risk in management retaining the draft as its exclusive prerogative. For hockey, however, litigation is foreseeable in light of the *Yazoo Smith* case.⁴³⁵ Management may avoid this possibility by adding the draft provision to the agreement, thus creating the grounds for claiming antitrust immunity under the labor exemption.

e. *Soccer*. The newest of the collective bargaining agreements in sports has been negotiated in soccer. Although there are both indoor and outdoor soccer leagues, the Major Indoor Soccer League (MISL) has gone further in experimenting with free agency than any other soccer league in the United States. The collective agreement begins: "The parties agree to encourage free movement of players between the NASL, MISL, and the ASL and veteran free agents within the MISL."⁴³⁶ The agreement provides that the standard contract will include a one year option, exercisable by the club, but it then stipulates: "At the end of the option year, the player is completely free to seek employment from other teams without any restriction. The clubs agree to deal with free agents in good faith."⁴³⁷ Except for the option, therefore, complete free agency is a reality only in the MISL. It also should be noted that the collective agreement provides for a draft of only amateur players, not professionals from other leagues.⁴³⁸

The North American Soccer League (NASL) also recently negotiated a collective bargaining agreement, but only after a long and bitter fight by the owners to avoid agreement.⁴³⁹ The agreement contains other variations on the option and right of first refusal mechanisms and it concentrates on players as they first enter the league. Rookies entering into their first agreement with a club must negotiate a contract in duration from six to twelve months. The contract "shall also contain a double option permitting the Club to renew the contract for two successive twelve month periods following the expiration of the initial term."⁴⁴⁰ The club then

435. See note 296 *supra* and accompanying text.

436. Collective Bargaining Agreement Between Major Indoor Soccer League Players Association and Major League Indoor Soccer League, art. XVIII (Oct. 8, 1979) (on file at Case Western Reserve Law Review).

437. *Id.*, art. XIV.

438. *Id.*, art. XV. "Veterans with NASL or ASL are not subject to the draft." *Id.*

439. See *Morio v. NASL*, 632 F.2d 217 (2d Cir. 1980). See also text accompanying notes 490-500 *infra*.

440. NASL Players Agreement, art. XLIII (1980) (on file at Case Western Reserve Law Review) [hereinafter cited as NASL Agreement].

has the right of first refusal if another team offers a contract. This right expires one year after the second option has expired. If a player plays out the second option and signs with a team outside the United States and Canada, the club losing the player is entitled to compensation.⁴⁴¹

The NASL draft is also innovative. The agreement does not specify the mechanics of the annual draft, but many general provisions appear. In addition, a reentry draft is held for college and high school players not signing within a year and a half of the original draft. If a drafted player signs outside the NASL, the team with draft rights holds him for one year and has a right of first refusal for two years. The same holds true of players not signing after the reentry draft.⁴⁴²

In conclusion, basketball, of all the sports discussed above, seems to provide the greatest benefits for players. Given the individual contract no-trade prohibition in the collective agreement, trading may be the chief avenue for player mobility if old teams match their rivals' bids. Declining gate revenue is ominous and could undermine player expectations. While the salary escalation in baseball seems to continue, compensation may slow the increased demand for mediocre players. Hockey's idiosyncratic practices and bargaining structure hamper clear analysis. Trends are also difficult to discern in soccer, a young sport. In addition, for the reasons stated, football seems headed for a showdown when the players agreement expires in 1982.

2. *Mandatory Subjects of Bargaining*

The subject matter negotiated between players and owners relates to more than player mobility. Collective bargaining agreements negotiated by players associations and teams cover a wide spectrum. Some items such as medical benefits, termination pay, meal money, moving expenses, life insurance, and pensions appear in many labor contracts. Other provisions are relatively peculiar to sports in general or one sport in particular. These provisions range from the most basic, such as allowing an individual player to negotiate for a salary above the minimum, to the very specialized, such as basketball's provision requiring extra-large beds for players on roadtrips.⁴⁴³ Basketball has included

441. *Id.*, art. XLIV.

442. *Id.*, art. XXVII.

443. NBA Agreement, *supra* note 392, art. V, § 1(c), at 9.

clauses in its agreements prohibiting no-trade clauses in individual contracts,⁴⁴⁴ and most major sports include clauses establishing the playing season schedule.⁴⁴⁵ Problems have arisen in baseball, however, because a number of players during the past few years have announced their demands for renegotiation of their individual contracts.⁴⁴⁶

Controversy inevitably has arisen concerning what issues in sports constitute a mandatory subject of bargaining under the NLRA, which would oblige the parties to bargain to a point of impasse.⁴⁴⁷ Section 8(d) of the NLRA imposes an obligation on labor and management to "confer in good faith with respect to wages, hours and other terms and conditions of employment"⁴⁴⁸ The essential question is what subject matter this definition covers. While it is usually the players who urge that some issue is a mandatory subject of bargaining, there are exceptions.

Over the last few years, several star players have threatened not to play during the season unless contracts were renegotiated.⁴⁴⁹ The basketball agreement, however, states that both the NBA and the players association,

agree that a Player who publicly demands a renegotiation of his Player Contract, and who threatens to withhold the services he has agreed to render under the Player Contract or to perform at a level below his full capabilities unless such recognition takes place, shall be considered to have engaged in conduct impairing the faithful and thorough discharge of the duties incumbent upon the Player within the meaning of paragraph 4 of the Uniform Player Contract.⁴⁵⁰

444. *Id.*, art. XIV, at 13.

445. See, e.g., NBA Agreement, *supra* note 392, art. X, at 12; NASL Agreement, *supra* note 440, art. XXXVII, at 35-36; NHL Agreement, *supra* note 334, art. XXIII, reprinted in REPRESENTING PROFESSIONAL SPORTS, *supra* note 334, at 287-88; 1976 Baseball Basic Agreement, *supra* note 355, art. IV, reprinted in REPRESENTING PROFESSIONAL SPORTS, *supra* note 334, at 120-24.

446. Smith, *Luis and His Agent*, N.Y. Times, March 6, 1977, § 5, at 3, col. 5.

447. See, e.g., NFL Management Council, 203 N.L.R.B. 958 (1973), *remanded*, 503 F.2d 12 (8th Cir. 1974), Supplemental Decision and Order, 216 N.L.R.B. 423 (1975) (artificial turf and bench fines found to be mandatory subjects of bargaining).

448. NLRA § 8(d), 29 U.S.C. § 158(d) (1976).

449. A brief discussion of the renegotiation question appears in note 39 *supra*. In addition to the case where a player is simply dissatisfied with his contract and wants it changed, there are cases where the player asserts he was promised an opportunity to renegotiate if certain events occurred. This assertion obviously presents complications, and definitive responses are not always easy to formulate. In one NBA case, the arbitrator essentially held that, for a promise to renegotiate to be enforceable, it had to be in writing. *NBA (Chicago Bulls) v. NBA Players Ass'n (Robert E. Love)* (Feb. 6, 1975) (Seitz, Arb.).

450. NBA Agreement, *supra* note 392, art. XX, § 4.

The Uniform Player Contract provides for suspensions and fines against the player in the event such conduct occurs.⁴⁵¹

The question is whether the owners in other leagues could demand bargaining over a similar clause. This question seems to be answered in the affirmative since a no-strike clause is a mandatory subject of bargaining,⁴⁵² and these clauses are essentially no-strike clauses. It thus may be concluded that owners in leagues other than basketball could insist on an NBA-type clause to the point of impasse.

The players have other perspectives. Clubs frequently have taken the position that a unilateral change is a management prerogative. Such a change is supposedly within the commissioner's authority or entrepreneurial judgment of how to sell the game to the fans⁴⁵³ and, therefore, inappropriate for bargaining.⁴⁵⁴ The General Counsel of the Board has ruled that the size of basketball rosters, for instance, is a mandatory subject because of its obvious impact on employment opportunities.⁴⁵⁵ The owners might argue, supposedly in response to consumers, that the impact on the players' employment is overriding.

In other significant cases, the Board has held that imposing fines on players is a bargainable subject under the Act because fines reduce compensation.⁴⁵⁶ In response to the argument that artificial turf was more conducive to football injuries, the Board found that the issue immediately related to employment and thus the subject was bargainable.⁴⁵⁷ In another case, not appealed to the Board because of a strike settlement, an Administrative Law Judge considered whether changes in football punt rules and sudden death overtime rules were negotiable.⁴⁵⁸ The owners argued that these changes made the product more appealing to fans.

451. NBA Uniform Player Contract, para. 20, *reprinted in* REPRESENTING THE PROFESSIONAL ATHLETE, *supra* note 42, at 54-56.

452. Shell Oil Co., 77 N.L.R.B. 1306 (1948).

453. *See* note 461 *infra*.

454. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958) (court held nonmandatory issues in bargaining may not be insisted upon to point of impasse but may be discussed).

455. The case proceeded to arbitration and was resolved against the National Basketball Players Association. National Basketball Association (Nov. 1977) (Seitz, Arb.) (unpublished).

456. *See* note 447 *supra*.

457. *Id.*

458. National Football League Management Council v. National Football League Players Ass'n, No. 2-CA-13379 (June 30, 1976) (Schneider, ALJ), *reprinted in* REPRESENTING PROFESSIONAL SPORTS, *supra* note 334, at 299.

Such modifications were analogous to automobile design changes and, the argument continued, though managerial or entrepreneurial judgment may affect employment opportunities, it is not bargainable. The Administrative Law Judge rejected this argument on the ground that both rules increased the possibility of player injury. The overtime "prolonged the period of time they [players] are exposed to injury. . . . Overtime games lengthened the player's hours of work, *pro tanto* reducing his pay for time expended, and increased his exposure to injury."⁴⁵⁹

Employees in other industries may insist on bargaining to reduce workweeks inasmuch as both wages and employment conditions are at issue. If baseball players, for example, were to bargain for a seven inning game, they would be demanding a shorter work day. The players already have set the number of games in their collective agreement. The clubs would argue that this interest is exclusively entrepreneurial and beyond the scope of bargaining—in part, because fans identify nine innings as integral to the product.

The owners' argument is weakened, however, in light of their record of alterations of baseball's structure. The owners, for instance, instituted the designated hitter rule (DH) in the American League—much to the consternation of baseball aficionados who delighted in late inning pinch hit strategy, inevitably linked to managerial judgments about the strength of the bull pen.⁴⁶⁰ The rule altered key elements in the game—as did the lowering of the pitching mound to improve the hitter's chances. The players associations argue that these rules affect both player performance, salaries, and longevity. In essence, aspects of the game which directly affect playing conditions, once immutable, now are being questioned. In the pitching mound example, where sore arms and shoulders can be the price of change, the argument for characterizing such matters as mandatory subjects of bargaining within the

459. *Id.*, reprinted in REPRESENTING PROFESSIONAL SPORTS, *supra* note 334, at 321–22.

460. Red Sox and Yankee fans, for example, vividly recall the final game of the 1949 regular season. The two teams entered the game tied for the league lead. Behind 1–0 after seven innings, Boston manager Joe McCarthy had to decide whether to allow his pitcher, Ellis Kinder, to bat. Kinder had limited the Yankees to four hits and the single run. McCarthy sent in a pinch-hitter, and the choice proved disastrous. The Red Sox failed to score in their half of the eighth, and Kinder's first replacement, Mel Parnell, who had pitched the previous day, promptly allowed a Yankee home run. The second Red Sox replacement, Tex Hughson, allowed two more runs. Although Boston scored three times in the top of the ninth, that was not enough to win. The Yankees won the game 5–3, and the pennant. *Yanks Whip Red Sox in Season Finale to Win 16th American League Pennant*, N.Y. Times, Oct. 3, 1949, at 21, col. 1.

meaning of the NLRA is even more persuasive.⁴⁶¹

3. *Unresolved Issues for Players and Their Associations*

a. *The unit.* Employees of any "labor organization" may file a petition calling for a vote to select their representatives in the collective bargaining process. If the employees are petitioning for representation and an election concerning a "labor organization" within the NLRA's meaning, and if thirty percent of the employees in the appropriate unit vote to have a Board conducted election, the Board must hold an election for workers in an appropriate unit or grouping.⁴⁶²

If a majority of players in the unit who vote in the Board conducted election cast their ballots in favor of the union or association, the Board certifies the union as the exclusive bargaining agent for the unit. Sometimes craft or skilled workers may sever themselves from the unit.⁴⁶³ It has been suggested that superstars or players representing an occupational minority in sports, such as pitchers in baseball, quarterbacks in football, and goalies in hockey, ought to separate from the broader unit and bargain collectively for themselves. The Board is not likely to allow this separation. While most players in these positions have maintained a separate sense of identity—a criterion which the Board considers in determining whether an occupational group should become its own unit⁴⁶⁴—other criteria, such as the integration of their tasks with the functions of the enterprise and the qualifications of a union experienced in representing them, make severance seem unwise.

Another persistent issue is whether the appropriate unit or grouping of players for collective bargaining purposes should be defined according to club or league. This classification is particularly important since many decisions are made on a league-wide

461. The Court, during the past year in *First Nat'l Maintenance v. NLRB*, 49 U.S.L.W. 4769 (June 22, 1981), has adopted what was previously only a concurring opinion of Justice Stewart that the design of the product is clearly a management prerogative. Cf. *Fiberboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964). The issue in baseball then is whether the game is the product in the sense that it cannot be bargained over except where safety issues are involved. See Gould, *The Supreme Court's Labor and Employment Docket in the October 1980 Term: Justice Brennan's Term*, 53 U. COLO. L. REV. 1 (1981).

462. 29 C.F.R. § 101.18a (1975).

463. NLRA § 9(b)(2), 29 U.S.C. § 159(b)(2) (1976).

464. In *Mallinckrodt Chemical Works*, 162 N.L.R.B. 387, 397 (1966), the Board lists maintenance of separate identity as one of six criteria to be considered in determining the propriety of allowing craft unit severance.

basis, specifically through the commissioner's office. When the NFLPA petitioned the Board for a league-wide unit, naming the commissioner as the employer's representative, the NFL was induced to negotiate a consent agreement. This agreement provided that a newly created entity, the NFL Management Council, would serve as employer, thus eliminating any reference to the commissioner.⁴⁶⁵

The issue is important for two basic reasons. First, the commissioner purportedly acts as a neutral arbitrator. This position as an impartial protector of the game's integrity would be seriously undermined if he were regarded as a representative of the employer. It would be impossible for the NFLPA to negotiate regarding player mobility, in the form of reserve and option provisions, because these decisions are made by the league or commissioner. The same rationale applies to the draft and rules relating to circumstances under which players may be waived and traded. Approval of the standard player contract often comes from the commissioner's office, which is often involved in disciplinary matters.⁴⁶⁶

*North American Soccer League*⁴⁶⁷ was the first sports case to

465. Ed Garvey, executive director of the NFLPA, testified before a congressional special subcommittee that the 16-club NFL had been the only employer signatory to the first collective bargaining agreement in 1968. In 1970, however, the owners refused to negotiate unless the NFLPA agreed to amend its certification petition by deleting the league as a joint employer. This refusal eventually resulted in the creation of the National Football League Management Council. See 1972 Hearings, *supra* note 188, at 13-15.

466. As to approval of the Standard Player Contract, see, for example, NBA Uniform Player Contract, para. 14:

This contract shall be valid and binding upon the Club and the Player immediately If, pursuant to the Constitution and By-Laws of the Association, the Commissioner disapproves this contract within ten (10) days after the filing thereof in his office, this contract shall thereupon terminate and be of no further force or effect

Id., reprinted in REPRESENTING THE PROFESSIONAL ATHLETE, *supra* note 42, at 52-53. The requirements of the player contract have similar effect. NFL Player Contract, para. 19, reprinted in REPRESENTING THE PROFESSIONAL ATHLETE, *supra* note 42, at 27. This approach seems to ignore two cases where players were not held to contracts entered into by them but repudiated before the commissioner's approval. See *Detroit Football Club v. Robinson*, 186 F. Supp. 933 (E.D. La.), *aff'd*, 283 F.2d 657 (5th Cir. 1960); *Los Angeles Rams v. Cannon*, 185 F. Supp. 717 (S.D. Cal. 1960).

The commissioner's disciplinary powers are accorded to him in the constitution and bylaws of all leagues, though recent collective bargaining agreements have modified these powers. Certain disciplinary powers often are alluded to in the player contract itself or attached as addenda. See, e.g., NBA Uniform Player Contract, Excerpt from Constitution of the Association, para. 35, reprinted in REPRESENTING THE PROFESSIONAL ATHLETE, *supra* note 42, at 56-58.

467. 236 N.L.R.B. 1317 (1978), *aff'd*, 501 F. Supp. 633 (S.D.N.Y.) *aff'd*, 632 F.2d 217 (2d Cir. 1980).

confront the unit issue. The Board held that the league and the clubs constituted a joint employer. Although the individual clubs also might be deemed an appropriate unit on a club-by-club basis, the joint employers were an appropriate unit within the meaning of the NLRA. The Board particularly was influenced by the following factors: The commissioner conducts the annual college draft and establishes the conditions under which a college player may be signed to a professional contract; the commissioner may disapprove the assignment of a player to another club if, in his opinion, the agreement contains terms not in the league's best interest⁴⁶⁸ or if either part is guilty of conduct detrimental to the league or the sport; the commissioner's approval must be obtained for any player's waiver, and the commissioner will not approve the contract termination if he determines that the league's interests will suffer; and, under the standard player contract, the player must comply with the applicable provisions of the league constitution, regulations, and bylaws.⁴⁶⁹ In addition, the Board found that the clubs had considerable autonomy in certain aspects of their employment relationships because numerous modifications were allowable under the standard player contract. The clubs and the league, therefore, were regarded justifiably as joint employers.

Whether the NSPA could be regarded as a "labor organization" within the NLRA's meaning also was addressed. The owners contended that the NSPA did not intend to act as an exclusive bargaining representative since individual salaries still were negotiable. The Board concluded that simply because agents bargain on important salary items, a players association is not deprived necessarily of labor organization status.⁴⁷⁰

b. *Exclusivity.* Over a thirty-seven year period, the courts and the Board followed the Supreme Court's lead in a series of cases. These decisions established the union's preeminence as exclusive bargaining representative and have collectivized practically all portions of the employment relationship where a union has been selected by a majority of the employees. The Court, fashioning a corollary to the broad authority given the union as exclusive agent, has held that the union has a duty of fair representation to all workers in the bargaining unit—whether union or nonunion. The union must bargain and negotiate on behalf of its

468. *Id.* at 1318.

469. *Id.* at 1318-19.

470. *Id.* at 1320.

players without hostility, bad faith, or discrimination.⁴⁷¹ Although the meaning of these words is ambiguous,⁴⁷² the union apparently has broad discretion in negotiating collective bargaining agreements and may recognize legitimate differences between different occupational groups.⁴⁷³ Just as a union may negotiate a hiring hall or seniority provision in the collective bargaining agreement without violating its duty of fair representation, it also may negotiate maximum and minimum salary levels. Baseball and basketball owners have had a particular interest in this approach.⁴⁷⁴ Although this policy seems to have been abandoned, the NFLPA has been advocating wage and occupational seniority—provided that the percentage of football revenues allocated to player incomes is at least doubled.⁴⁷⁵ The extent to which high salaried quarterbacks, for instance, would accede to such limitations is highly problematic.

Issues arising out of the newly formed NASL have posed unusual labor issues to professional sports. In *J.I. Case v. NLRB*,⁴⁷⁶ the leading decision relating to the exclusivity doctrine, the employer executed individual contracts with approximately 75% of his work force. The employer initially relied on these contracts as a bar to a representation proceeding, but the Board directed an election which the union won. The union then was certified as the exclusive bargaining representative for all the employees in the appropriate unit. When the union sought to bargain with the employer, management offered to negotiate on matters not affecting any rights under the individual contracts. All other matters would be open for negotiation as the contracts expired. The union alleged that this refusal to bargain collectively constituted an unfair labor practice under the NLRA. The Board agreed and ordered the company to cease and desist from giving effect to or extending the contracts in question and from entering into new contracts. The Board further ordered the company to bargain on the subject

471. See, e.g., *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976); *Vaca v. Sipes*, 386 U.S. 171 (1967); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953); *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944).

472. See, e.g., *Rusicka v. General Motors Corp.*, 523 F.2d 306 (6th Cir. 1975).

473. "A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co. v. Huffman*, 345 U.S. at 338.

474. See *Players Want Easier Route to Gain Free-Agent Status*, N.Y. Times, Dec. 8, 1979, at 17, col. 2.

475. See notes 346 & 425 *supra*.

476. 321 U.S. 332 (1944).

matter of the individual contracts. The Circuit Court of Appeals enforced this order, and the Supreme Court affirmed.⁴⁷⁷ The Court's rationale bears on some of the problems faced in the sports cases.

The Court noted that the negotiation of the collective agreement did not constitute an employment contract since no individual was employed under its terms. The labor contract created no obligation to employ particular individuals. The Court stated:

The employer, except as restricted by the collective agreement itself and except that it must engage in no unfair labor practice or discrimination, is free to select those he will employ or discharge. But the terms of the employment already have been traded out. There is little left to individual agreement except the act of hiring. This hiring may be by writing or by word of mouth or may be implied from conduct. In the sense of contracts of hiring, individual contracts between the employer and employee are not forbidden, but indeed are necessitated by the collective bargaining procedure.⁴⁷⁸

The Court believed that the individual hiring contract was "subsidiary" to the terms of the collective agreement and workers could not waive its benefits. The Court reasoned that once the majority selected a union as exclusive bargaining representative, advantages or disadvantages provided in individual contracts would disrupt industrial peace and become a "fruitful way" of interfering with the organization of workers.⁴⁷⁹

If, however, a union is designated as majority representative in a professional sport with a tradition of individual contracts addressing salary and other compensation matters, the union might seek to negotiate a collective bargaining agreement covering all aspects of wages, hours, and working conditions. The union might also negotiate a comprehensive agreement ultimately limiting, but not necessarily eliminating, individual salary and compensation negotiations.

The unions and associations in sports have taken a variety of approaches to the relationship between the collective and individual agreement, especially as to compensation. Baseball, for instance, has two provisions in the agreement on this subject. In article II, the clubs recognize the association as bargaining representative, but provide that "Special Covenants . . . [may] . . . be included in individual Uniform Player's Contracts, which actually

477. *Id.*

478. *Id.* at 335-36.

479. *Id.* at 336, 338.

or potentially provide additional benefits to the Player."⁴⁸⁰ The basketball agreement provides that individual contracts may not "provide for the waiver by a Player of any benefits or the sacrifice of any rights to which the Player is entitled by virtue of . . . this Agreement."⁴⁸¹ Basketball has attempted to preclude amendments to individual contracts.⁴⁸²

The soccer agreement is more ambitious and specific. The association may "disapprove" an individual contract for any of the following reasons: uncertainty or incompleteness in expression of its terms; "any conflict" between its terms and the collective agreement; the club, or one of its officials has "made or agreed to make payment or convey anything of value to any firm or person for legal or representational services provided to a player in connection with the negotiation of a contract;" and finally, failure to disclose to the union the identity of an agent, attorney, or other representative.⁴⁸³ The union is thus empowered to address abuses of agents, such as payments to agents by clubs when the clubs supposedly are representing the player's interests in an adversary context.

The collective agreement also states: "[A]bsent an express waiver by the Union, they [the League and clubs] could not negotiate or execute agreements with individual players."⁴⁸⁴ The labor contract further states that when a club learns that a player or prospective player is to be represented by an agent "it shall promptly notify the Union."⁴⁸⁵ The union has an "absolute right" to attend all individual contract negotiations but no right to thwart or delay these negotiations. The subject matter that may be addressed in individual-club bargaining is specifically enumerated.⁴⁸⁶ The Standard Player Contract may not be amended.

The union's concerns in this area are threefold. First, there are the problems with agents alluded to above. Second, conflicts or inconsistencies with the collective agreement may arise. Finally, there may be an undermining of union goals through individual negotiations. An example of the first and the third problems is the increased use of deferred compensation, which may deflect player

480. 1976 Baseball Basic Agreement, art. II, *reprinted in* REPRESENTING PROFESSIONAL SPORTS, *supra* note 334, at 119.

481. NBA Agreement, *supra* note 392, art. I, § 3.

482. *See id.* § 1(b).

483. NASL Agreement, *supra* note 440, art. XXIII, § 8.

484. *Id.* § 1.

485. *Id.* § 2.

486. *Id.* § 4.

concern from pensions. Unless the union is able to control or influence such negotiations, it may be left with few subjects on which to bargain. Agents frequently do not defer *their* fees after negotiating such an agreement—a practice which seems particularly inequitable when the deferred compensation is not guaranteed.

With regard to agents, it is quite probable that players associations, particularly in football and soccer, will attempt to regulate the conduct of agents. The allegation that a “spurious” labor organization of agents has conspired to “undermine the NFL players’ ability to improve their incomes” by a wage schedule which would adversely affect the agents’ “profits,”⁴⁸⁷ has inspired anti-trust litigation by the NFLPA against some of the agents. The theory of the litigation, ironically, is predicated on the view that the agents are entrepreneurs. If the associations are successful in regulating agents through licensing fees, limitations on agents’ fees, and union member boycotts against agents who refuse to comply, the associations then must contend that agents are *not* a nonlabor group of businessmen to avoid antitrust liability.⁴⁸⁸ This argument is highlighted by the Court’s decisions in *American Federation of Musicians v. Carroll*⁴⁸⁹ and *H. A. Artists & Associates v. Actor’s Equity Association*,⁴⁹⁰ where franchising arrangements and the boycotts of nonmembers were held to be within the labor exemption because unregulated agent fees would intensify wage competition among union members. It is contended that in this situation, “job hungry” athletes are prone to exploitation. Problems will continue while the agents play an active role in this process.

An important issue is whether an employer may retain and honor individual employment contracts and enter into new contracts with athletes who are being recruited while such negotiations continue. The *North American Soccer League* litigation, which preceded the agreement referred to above, addressed this problem.⁴⁹¹ In that case, the Board and the union took the position that adherence to or negotiation of such individual contracts was an unfair labor practice under the *J.I. Case* theory.⁴⁹² The

487. *Upshaw v. Trope*, Civil Action No. 80-03680 (C.D. Cal., Aug. 20, 1980).

488. *United States v. Hutcheson*, 312 U.S. 219 (1941).

489. 391 U.S. 99 (1968).

490. 449 U.S. 991 (1981).

491. See note 166 *supra*.

492. See note 476 *supra*.

Board's position was that the employer could not act unilaterally as to wages, hours, and working conditions until the parties bargained to an impasse. This restriction would apply irrespective of the union's intent to contract collectively or individually. At the point of impasse, the employer could rely on individual contracts and relationships.⁴⁹³

In the context of temporary injunction proceedings⁴⁹⁴ instituted by the Board, the court in *North American Soccer League*⁴⁹⁵ adopted the above position. The injunction prevented future negotiation of individual contracts, and the court also ordered additional relief.⁴⁹⁶ The Second Circuit affirmed.⁴⁹⁷

In *North American Soccer League*, the clubs litigated the appropriate unit issue through unfair labor practice proceedings,⁴⁹⁸ entered into individual contracts with players, and committed several unfair labor practices⁴⁹⁹ subsequent to a secret ballot election

493. 321 U.S. 332 (1944).

494. Section 10(j) of the NRLA provides:

The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

29 U.S.C. § 160(j) (1976).

495. 501 F. Supp. 633 (S.D.N.Y. 1979), *aff'd*, 632 F.2d 217 (2d Cir. 1980).

496. Judge Motley also enjoined the league "[f]rom giving effect to these individual contracts of employment or any modification, continuation, extension or renewal thereof 'to forestall collective bargaining'" which were entered into prior to Sept. 1, 1978. *Id.* at 640.

497. 632 F.2d 217 (2d Cir. 1980).

498. *Morio v. NASL*, 501 F. Supp. at 635. Certification of unions as exclusive bargaining agents may be reviewed by virtue of an employer's refusal to bargain. *American Fed'n of Labor v. NLRB*, 308 U.S. 401 (1940).

499. Judge Motley sets forth the unfair labor practices the North American Soccer League had engaged in:

Respondents conceded that they have unilaterally changed the conditions of employment by requiring employees to obtain permission from their respective clubs before wearing a particular brand of footwear other than that selected by each Respondent Club; that they have changed the conditions of employment by initiating plans for a new winter indoor soccer season which began in November, 1979 and ended in March, 1980; that they unilaterally changed conditions of employment by requiring employees to play or otherwise participate in the winter indoor soccer season; that they unilaterally changed conditions of employment by initiating plans to increase the 1980 summer outdoor soccer season by two games and two weeks over the 1979 format, which is presently in operation; and that they unilaterally changed employment conditions by initiating plans to reduce the maximum roster of all the Respondent Clubs during the regular summer outdoor

in which the union obtained a majority vote and the Board certified the union as exclusive bargaining agent. The unit issue eventually was resolved against the clubs. Meanwhile, 96.8% of the individual player contracts were negotiated and entered into subsequent to the union certification. The Board sought a remedy which would render the individual contracts voidable at the union's option. Judge Motley stated:

Respondents' claim that such power in the hands of the Union . . . would result in chaos in the industry and subject Respondents to severe economic loss and hardship since these individual contracts are the only real property of Respondents.

It should be noted . . . that the relief requested by Petitioner is not a request to have all individual contracts declared null and void. It should be emphasized that Petitioner is not requesting that the "exclusive rights" provision of the individual contracts, which bind the players to their respective teams for a certain time, be rendered voidable.⁵⁰⁰

Judge Motley further ordered that contracts entered into before the certification be rendered voidable. The purpose of this remedy was to allow the collective bargaining process to function effectively. It is important to note that the remedy was limited to the portion of the agreement that did not affect the team's exclusive right to a player and thus the reserve system.

The situation in *North American Soccer League* differs from *J.I. Case* in that the employer in the former case did not consider the individual contract as a bar to collective bargaining over the subject matter which was previously negotiated. The crux of the employer's argument was that individual contracts may be entered into during continuous negotiations. The Board's contention was that Supreme Court authority precludes an employer from making unilateral changes in conditions of employment until an impasse or deadlock develops.⁵⁰¹ To permit the employer to negotiate with the individual would undermine the union's status as exclusive bargaining representative and erode its support among the players in the unit. The subtle message to the players is that the association is largely irrelevant and more likely a hindrance to their interests.

season from 30 players to 26 players beginning on or about October 16, 1979, and continuing to the present.

501 F. Supp. at 637-38.

500. *Id.* at 693.

501. In *NRLB v. Katz*, 369 U.S. 736 (1962), the Supreme Court held that unilateral action by an employer without prior discussion with the union may constitute an unfair labor practice in violation of § 8(a)(5) of the NLRA.

Since there is no legal demarcation between the subject matter covered by the individual agreement as opposed to the collective agreement, a major concern is whether all the subjects discussed at the bargaining table would be superseded by the individual contract. The employer, in its dealings with some players, might negotiate some terms which would constitute an incursion into that area which might be within the domain of the exclusive bargaining agent in its collective bargaining.

If individual negotiations with players are an unfair labor practice, notwithstanding its customary usage in the sports industry, the remedy raises troublesome problems. The remedy, even with the exclusive rights limitations, means that the union is in a position to utilize the most effective economic pressure to coerce the employer to accept its position. It raises problems somewhat analogous to other labor law issues which have been resolved, perhaps erroneously, against the unions.

For the past forty-three years, the Court has taken the position that an employer may not only hire strikebreakers in the course of the strike but also may replace strikers permanently with these individuals.⁵⁰² The rationale is that the employer may show a business justification in keeping production optimal. This justification, under certain circumstances, outweighs the statutory policies supporting workers' rights to engage in strikes and other forms of economic pressure to further their self-interest. The employer, therefore, may enter into individual contracts, notwithstanding exclusivity considerations. If the employer's interest in production outweighs the right to strike, then there can be significant difficulties in reaching an accord with the union because the union can bring the industry to a grinding halt until impasse by voiding and refusing to enter into contracts involving both incumbents and applicants, until the dispute is resolved. The union has an interest in protecting itself as an institution from infringement through contracts embracing the same subject matter as the collective bargaining agreements. It is difficult, however, to view this interest as more significant than the strike weapon itself, which was made subordinate by the Court in *NLRB v. Mackay Radio & Telegraph Co.*⁵⁰³ The impact of *North American Soccer League* in sports may signal the employer's inability to hire strikebreakers unless the case is limited carefully to its facts. Hiring strikebreak-

502. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938).

503. *Id.*

ers should exist only as a remedy for unfair labor practices which are likely to stultify future collective bargaining.

c. *Individual v. Collective Interests.* The case law of labor arbitration addresses a number of important issues as it explores the inner workings of a league. Cases which confront the tensions between the individual and the collective interest of the players are of particular importance to this analysis. Individuals may not always be served best by collective action. The individual may be able to obtain advantages for himself that run counter to agreements forged between the union and management. These individual advantages often must be curtailed, as the earlier discussions on the unit⁵⁰⁴ and exclusivity⁵⁰⁵ have revealed. An examination of some of these problems in the baseball context sharpens the focus.

The *Moore*⁵⁰⁶ decision arose out of a special covenant between Alvin Moore and the Atlanta Braves. The National League President disapproved of this arrangement on the ground that the covenant was "inconsistent" with the basic agreement.⁵⁰⁷ The covenant stated that Moore could not be traded without his consent and could become a free agent at the end of the 1977 championship season "if he so desires."⁵⁰⁸ The players association challenged the disapproval of the contract in a grievance.

The players association argued that the individual contract could not be regarded as "inconsistent" with the collective agreement since it accorded benefits not available under the basic agreement. The clubs contended that the covenant struck "at the very heart" of the negotiated reserve system. The argument was that the Braves, by providing free agency for Moore without reference to the contractual scheme contained in the collective agreement, ignored the other clubs' interest in maintaining a competitive balance—the very objective of the negotiated reserve system.⁵⁰⁹

At the time the grievance was filed, Moore did not have six years service in the major leagues—a prerequisite to free agency under the labor contract between the parties. The covenant,

504. See notes 462-70 *supra* and accompanying text.

505. See notes 471-503 *supra* and accompanying text.

506. Major Leagues of Professional Baseball Clubs v. Major League Baseball Players Ass'n (Moore), No. 77-18 (Sept. 7, 1977) (on file at Case Western Reserve Law Review).

507. *Id.* at 2.

508. *Id.*

509. *Id.* at 8.

moreover, made no reference to the quota and compensation provisions of the basic agreement. In response, the association noted that the agreement contemplated free agency through methods other than the reentry draft. By way of rejoinder, the clubs maintained that these other avenues were designed for players whose careers were ending, younger players, players of marginal skills or a default by the club.⁵¹⁰ With regard to the former category, the clubs contended that “[i]t was never contemplated that promises of outright release or termination would or could be used by individual Clubs and Players as a negotiating device or bargaining chip in order to evade the reentry procedure and other aspects of the reserve system.”⁵¹¹

The arbitration panel held there was no reason that Moore could not negotiate conditional rights either to be traded or to become a free agent. The opinion stated:

There is clear merit in the Association’s argument that the words ‘additional benefits to the Player’ should be liberally construed to support a wide variety of benefits to a player over and above the benefits accorded to him by the Basic Agreement. Though covenants containing such benefits may be ‘inconsistent’ with a particular provision of the Agreement dealing with the same subject matter, there is logic in the Association’s argument that they are not, in fact, ‘inconsistent’ because Article II authorizes such inconsistencies where they provide additional benefits to the Player. The evidence . . . suggests the League Presidents have approved a number of special covenants in this light, where the ‘additional benefits to the Player’ were within the Club’s power to bestow.⁵¹²

Inasmuch as the Braves were not terminating Moore for lack of playing skill, the arbitrator decided that Moore could not escape the reentry draft provided for in the collective bargaining agreement. The procedure and “its related quota provisions protect the interests of all 26 Clubs and cannot be waived by the Atlanta Club in the circumstances of this case.”⁵¹³ The fact is, however, that the modification of the length of service provisions negotiated between Atlanta and Moore, and circumvention of the reentry draft procedures, may affect the competitive balance in the league so as to promote the interests of some other clubs. If, for example, certain superstars became available earlier than pro-

510. *Id.* at 11–12.

511. *Id.* at 12.

512. *Id.* at 14–15.

513. *Id.* at 17.

vided for in the collective agreement, the resulting bidding wars would benefit wealthier teams such as the Yankees, Angels, and Braves. If, in contrast, the number of talented free agents available depressed the market, the impact could be immediate and substantial. In some instances, the players rather than the owners would be adversely affected. It is thus difficult to establish a clearly logical demarcation between length of service and other aspects of the reentry draft since one element protects the clubs in the league and the other does not. The *Moore* decision is probably the correct one. The additional benefits secured by individual players must be reconciled with the overriding procedures established by the collective agreement's reentry draft.

The second important case involved Mike Marshall, the 1974 Cy Young Award winner and erstwhile relief pitcher for the Minnesota Twins, among others.⁵¹⁴ Marshall negotiated a special covenant with the Twins which permitted him to become a free agent after the 1978 season but "without regard to the compensation provisions therein."⁵¹⁵ The arbitrator, following *Moore*, concluded that the compensation provisions were designed for the benefit of all clubs and not merely the individual club which lost the player to free agency. While the arbitrator conceded that the club losing the player might waive its right to compensation, it would not waive the "detriment" or "cost" that the signing club would incur in the normal reentry draft procedure.⁵¹⁶

The recent Dave Winfield free agency episode created another problem. The Yankees, fearful that they would not be one of the thirteen teams able to draft Winfield, reportedly negotiated with the Padres to provide for an agreement between the Yankees and Winfield and a trade between the Padres and the Yankees based on that deal.⁵¹⁷ This alleged agreement circumvented the reentry draft procedure and compensation and, in theory, imposed a cost on the signing club. The players association, however, accepted this procedure as compatible with the agreement because Winfield was able to use the prospect of free agency, limited only by the

514. *Major Leagues of Professional Baseball Clubs v. Major League Baseball Players Ass'n (Marshall v. Minnesota Twins)*, No. 78-15 (Oct. 25, 1978) (unpublished) (on file at Case Western Reserve Law Review).

515. *Id.* at 2.

516. *Id.* at 13-14.

517. *See Yanks Seek to Land Winfield Before He is a Free Agent*, N.Y. Times, Oct. 22, 1980, § 2, at 5, col. 1; *Winfield Opts for Free Agency, Stalling Deal to Become Yankee*, N.Y. Times, Oct. 23, 1981, § 4, at 19, col. 4.

amateur draft compensation, as a vehicle to bargain for acceptable contract terms.

The final group of baseball-related cases involve option clauses and right of refusal clauses in special covenants. In 1976, Carlton Fisk, Rick Burleson, and Gary Maddox negotiated provisions giving their respective clubs the right of first refusal at the end of their contracts. Their theory was that a player could reap the financial benefits of a bidding war while remaining with the club in cities like Boston and New York where there are many fringe benefits to being a famous ballplayer. The association objected to these covenants on the theory that they inevitably depress the bidding between clubs. An arbitrator took the position that a right of first refusal "could not possibly produce anything better than free agency."⁵¹⁸ This position seems flawed given the advantages that players might reap from such a provision. To take an extreme example, players cannot waive their right to be part of the free agent draft after six years, although they may do so indirectly by entering into a long-term contract. The grievance thus was settled in favor of the association⁵¹⁹—a further step toward collectivizing the relationship.

Another important variation on this theme of individual-collective tension involves negotiated option clauses. The *Carlton Fisk* award⁵²⁰ decided that substantial performance by the Red Sox was not adequate to meet the option tender date of December 20 established under the collective agreement.⁵²¹ The arbitrator rejected the club's reliance on extreme forfeiture as an excuse of the condition since the Red Sox already had received Fisk's performance for salary paid between 1976 and 1980. This rationale is questionable in light of Fisk's inability to play during most of 1979—although Fisk played in 1980 under adverse circumstances. The arbitrator's comment that free agency status for Fisk was an "unfortunate consequence for the Club in comparison to the minor inconvenience to him flowing from the related contract

518. Decision of the Arbitration Panel, Major League Baseball Players Ass'n v. Chicago Cubs (Tidrow), No. 80-18 (Nov. 4, 1980) (on file at Case Western Reserve Law Review) [hereinafter cited as Tidrow].

519. "The league presidents who originally approved the contracts [Lynn, Burleson, Fisk, and Maddox] since have stricken those clauses." Chass, *Miller Sees A Ripoff in Agents' Acts*, N.Y. Times, Jan. 27, 1977, § C, at 25, col. 1.

520. Major League Baseball Players Ass'n (Fisk), No. 80-35, (Feb. 12, 1981) (unpublished) [hereinafter cited as Fisk].

521. See note 378 *supra*.

tender"⁵²² understates the matter.

Another option clause case, the *Tidrow* arbitration,⁵²³ was of more precedential value. Tidrow, prior to joining the Chicago Cubs, signed a contract with the Yankees for 1977 to 1979 and then in 1978 negotiated an extension for 1980. The contract provided for compensation, some of it deferred, and stated that the club reserved the right to exercise an option on Tidrow's services at a salary of \$200,000 for 1981 by notifying Tidrow before December 20, 1980.⁵²⁴ The renewal option was exercised by a letter dated August 28, 1980. The players association objected to the renewal which purportedly blocked Tidrow's access to the reentry draft on the ground that the special covenant containing the option did not constitute an actual or potential benefit to the player.⁵²⁵ The club contended that Tidrow had executed a contract for the succeeding season which was a contractual limitation on free agency rights.

The arbitrator, however, held that the individual contract's special covenants referred to the 1980 season.⁵²⁶ Tidrow thus could not be deemed to have executed a contract for 1981. The arbitrator also concluded that the agreement extracted from Tidrow all irrevocable offers to enter into a future contract. Moreover, since the players association successfully resisted incorporation of an option year in the collective agreement as a prerequisite to free agency—except for players like Fisk who had contracted prior to August 9, 1976⁵²⁷—the arbitrator found the bargaining history to be "strong evidence" of an intent not to eliminate free agency through an option clause.⁵²⁸

Since *Moore* held that a contract could be inconsistent and yet acceptable if it provided an actual or potential benefit, further arbitral inquiry was requested. The arbitrator discussed the contention that Tidrow had benefitted through the economic "package" that he received with a guaranteed contract rather than the standard contract. Any detriment, reasoned the arbitrator, could be offset by a potential benefit. The option clause, however, must provide its own benefit. Tidrow, experienced in negotiations and

522. Fisk, *supra* note 520, at 20.

523. See Tidrow, *supra* note 518 and accompanying text.

524. Clubs' Memorandum, Major League Baseball Players Ass'n v. Chicago Cubs 3 (Tidrow), No. 80-18 (Nov. 4, 1980) (on file at Case Western Reserve Law Review).

525. *Id.* at 14-15.

526. See Tidrow, *supra* note 518 and accompanying text.

527. See Tidrow, *supra* note 518, at 19.

528. See Tidrow, *supra* note 518, at 16.

aware of free agency's benefits, could have perceived an option clause as being more advantageous.

In making his determination, the arbitrator found the following to be conclusive: "By remaining silent until the latter part of 1979 and retaining \$100,000 in bonuses for signing the contract he now seeks to overturn, Tidrow led the Cubs—who acquired his contract in apparent good faith—to act in reliance on his evident acceptance of all of its terms."⁵²⁹ Tidrow accordingly was estopped because of his tardy disavowal, his actual or constructive knowledge that he was losing free agency, and detrimental reliance by the Cubs. While the arbitrator stated that clubs might attempt to circumvent the collective agreement through such covenants as making optional renewal clauses a condition precedent to all contracts, such was not the case in *Tidrow*. *Tidrow* is thus a "narrow holding" which again emphasizes the tension between collective and individual interests.

IV. THE 1980'S AND "HIT 'EM WHERE THEY AIN'T"

"History teaches no lesson but change" said H.A.L. Fisher.⁵³⁰ Assuredly, change has been the key element in the professional sports industries in the past few years. Visions of a straw-hatted owner sitting contentedly in his first base box behind the dugout and the players "aw shuckin'" it between chaws are fast fading. The boys of summer—and of fall, winter, and spring—may come to play, but they also come to be paid. These players bring with them their agents and union representatives to back their demands. Professional sports always have been considered commerce, Justice Holmes notwithstanding, but that commerce has now been transformed into industry. In these industries, labor relations are the focus, and the changes wrought by collective bargaining are deep and decisive.

Nonetheless, collective bargaining is not the totality but is today's catalyst. This bargaining makes the system work better than any other tool now available, but there are also problems. The manageability of the collective unit and its long term cohesiveness still must be tested. The union may attempt to assert exclusive control over the player-club relationship, but these attempts will be challenged. The collective is not a monolith and may be dis-

529. *Id.*

530. See Wyzanski, *History and Law*, 26 U. CHI. L. REV. 237, 243 (1959).

rupted by individual preferences. When these factors are combined with other foreseeable impacts, more change is inevitable.

The developing technologies of cable television, satellite transmission, videodiscs, and cassettes may alter the basic economics of existing leagues and encourage the growth of rival leagues and new sports. Leagues may form their own networks,⁵³¹ just as a host of other companies are invading the cable market and single stations are turning themselves into superstations of national transmission. Group efforts outside the sports structure may intensify. Consumer interests may trigger governmental intervention as a vehicle for change. Within the sports themselves, players may demand a more direct share of the revenues while disagreeing over the division of those revenues. In some sports, the union-agent dichotomy may accelerate and the very roots of the process, now springing from collective bargaining, may be altered perceptibly. These observations are not meant to assert that all will come to be, but, as judges have intoned in assessing consequential damages issues, it is "not unlikely," it is a "serious possibility," it "may well occur."⁵³²

Wee Willie Keeler's axiom was "hit 'em where they ain't."⁵³³

531. These formations already are occurring, at least at the club level in leagues, where the individual franchise is allowed to pursue wide-based marketing of its product via cable or other new technological advances. The Seattle Supersonics and the Boston Celtics are two of the clubs clearly moving in this direction. See Craig, *Celtics, Whalers Hope Cable Will Pay*, Boston Globe, May 30, 1981, at 28, col. 1; Craig, *Celtics Cable TV Plan Has Huge Potential*, Boston Globe, May 27, 1981, at 37, col. 1; Craig, *Sonic Cable Idea Could Boom*, Boston Globe, Feb. 28, 1981, at 28, col. 1. See generally Eskenazi, *Cable TV Begins to Make Big Changes in Professional Sports*, N.Y. Times, April 19, 1981, § 5, at 1, col. 1. These ventures into cable are not always met with enthusiasm, particularly where the cable system does not substantially service an area. See Craig, *Realty of Cable a Jolt to Chicago Fans*, Boston Globe, Dec. 7, 1980, at 82, col. 1.

532. For expressions contained in the text above, plus other attempts at defining foreseeable consequential damages, see *Hadley v. Baxendale*, 156 Eng. Rep. 145, 151 (Ex. 1854); *Victoria Laundry (Windsor), Ltd. v. Newman Indus., Ltd.*, [1949] 2 K.B. 528, 540; and *The Heron II (Koufos v. Czarnikow, Ltd.)*, [1967] 3 All E.R. 686.

533. It is fitting to conclude with a note about William Henry Keeler. Like the players associations, Keeler seemed to have a propensity toward overcoming obstacles. At five-foot-four, Keeler had to rely on skills—other than those attributable to physical size—namely, speed, brains, and ability to make contact with the ball. Starting as a professional in 1892, Keeler, a left-handed third baseman, hardly had a propitious beginning. Nevertheless, he eventually developed into one of the all-time great right fielders. With John McGraw, Keeler led the old Baltimore Orioles to championships in the 1890's with aggressive play and the development of two great additions to the game—the hit-and-run and the "Baltimore chop." Wee Willie still holds the record for most singles in a season, 202 in 1898. Overall, Keeler collected 2,955 career hits and a .345 career average. "Keeler was perhaps the most accurate placehitter in the history of the game . . ." D. WALLOP, *supra* note 35, at 73. He hit 'em where they weren't.

This axiom has been an inspiration for today's players as well—if not on the field, at least at the negotiating table, before the arbitrator, in court, or on the picket line. Where the owners have said, "they can't be serious about striking," the players have been. Where the owners have said, "a judge (or an arbitrator) would never decide it that way," the players have pressed the issues and have won more than they have lost. Where the owners have said, "we'll never agree to that term," the combined leverages of persistence, litigation, arbitration, and walkouts have forced agreement. The intriguing question is how long this leverage will persist. Will the 1980's continue to be the era of the players hitting 'em where they ain't? Or will the owners finally find a reliever from their bullpen who can come in and put out the fire. Whatever, there will be another game tomorrow—at least until the next strike.