SHOULD AMATEUR ATHLETES RESIST THE DRAFT?

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INTRODUCTION

In recent years sports pages have been dominated by reports of legal controversies as much as by coverage of championship contests. The central theme of the majority of these controversies has been the legality of various player control policies (e.g., the reserve and option clauses, the "Rozelle Rule," and the various veteran and amateur player draft rules) under the federal antitrust laws. Of these player control polices, the amateur draft rules have come under the least amount of scrutiny, as the lure[1] of professional sports has dramatically overshadowed the burdens[2] placed upon the prospective professional athlete.

Some form of the amateur player draft is presently employed by all professional sports leagues. In substance, the draft is an agreed upon mechanism for the division of the working force. It effectively prohibits talented newcomers from selling their services to any potential employer.[3] Teams normally choose eligible athletes from a player pool,[4] with the last place team choosing first, the next to last place team choosing second, and so on. League rules give each team the exclusive right to negotiate with and hire the players it selects,[5] thereby eliminating competitive bidding for their services. In the absence of a competing league, the player who cannot reach agreement with the team that drafts him, or does not want to play or live in that team's home city, has no alternative other than to enter another profession. In addition, under the present draft rules, most drafted players are virtually powerless to negotiate salaries commensurate with their skills. They are also powerless to negotiate "guaranteed" contract provisions which will adequately protect against loss of earnings in the event of sports related injury. Thus, the amateur player draft system strips the amateur athlete of any right to bargain with the team of his choice and, in most cases, to negotiate for an equitable salary even though he neither participated in nor was represented in the collective bargaining process that created the system.[6]

Although the courts have demonstrated a willingness to impose sanctions on professional sports leagues for violations of antitrust laws, a variety of practical considerations have thus far discouraged amateur athletes from

1. Despite the public acclaim accorded the professional athlete, professional sports is more than a game; it is a big business, carried on at great risks and for high stakes. *See generally*, DURSO, THE ALL-AMERICAN DOLLAR: THE BIG BUSINESS OF SPORTS (1971). *See also* Koppeth, *Sports and the Law: An Overview*, 18 New York Law Forum 815 (1973).

2. *See generally* Anderson, *The Sherman Act and Professional Sports Associations' Use of Eligibility Rules*, 47 Neb. L. Rev. 82 (1968); Comment, *Antitrust and Professional Sport: Does Anyone Play By the Rules of the Game?*, 22 Cath. U. L. Rev. 403 (1973).

Foremost among these concerns are: the amount of time the athlete will be required to spend away from his family; the constant fear and ever-present risk of suffering a disabling injury; the inability to attend college should he decide to turn professional before matriculating, and the delay of graduate school, professional school or a full time training program.

3. S. Gallner, *Pro Sports: The Contract Game* 1-33 (1974), (hereinafter cited as *Pro Sports: The Contract Game*).

4. The player pool is composed of top amateur athletes who have demonstrated (according to detailed professional team scouting reports) the potential to become professional athletes.

5. National Football League Collective Bargaining Agreement Article XIII, § 4 (1977). *See also* National Basketball Association Collective Bargaining Agreement Article XVI, § 1(a-d) (1976).

6. *See* notes 123-37 and accompanying text *infra*.

challenging the draft systems.[7] First, the judicial process is slow; it takes from four to five years for the average lawsuit to reach the United States Supreme Court. Since the athlete cannot play while this suit is pending, he would probably be forced to forego a professional athletic career. Second, even though an athlete might recover treble damages were he to prevail on an antitrust claim,[8] he might not be able to absorb the staggering costs of confronting an unregulated monopoly to begin with. Finally, as there can be few assurances that an athlete will succeed in professional sports, his claim for damages could be characterized as purely speculative, and consequently his suit might be subject to dismissal based on a successful motion for summary judgment. Nonetheless, antitrust attacks by prospective professional athletes against the new amateur player draft systems seem imminent.

The subject of this article is the legality of the amateur player draft systems provided for in both professional basketball's and professional football's current collective bargaining agreements. This article will initially focus on the structure of the various draft systems in professional sports, assess whether they achieve their stated goals, and examine the cases which have ruled on the legality of former draft systems. Next, this article will consider whether the current draft systems avoid the antitrust problems that the old systems suffered from and analyze whether the non-statutory labor exemption shields the new draft schemes from antitrust attack by amateur athletes.[9] Finally, this article will propose a solution that better complies with the reasonableness requirements of the antitrust laws, and protects the legitimate interests of amateur athletes, team owners and sports fans.[10]

I. BACKGROUND: AMATEUR PLAYER DRAFT RULES

Amateur player draft systems vary in detail and operation from sport to sport. The differences and the similarities of the draft systems, in theory and in practice, are outlined below to provide a basic understanding of the nature and significance of the different processes. This discussion will deal primarily with professional football and professional basketball, although the draft systems of professional hockey and organized professional baseball are also briefly mentioned.[11] As a threshold consideration, the old rookie

7. *See generally* PRO SPORTS: THE CONTRACT GAME, *supra* note 3, at 27. *See also* Comment, *National Football League Restrictions on Competitive Bidding for Players' Services*, 24 Buffalo L. Rev. 613 (1975).

There are few players who can afford to sit out a full year without being paid. This is particularly true of college seniors, because in most cases, as graduating collegians, they do not have much money saved or lucrative jobs in non-sports fields waiting.

These same economic pressures are felt by veteran athletes, as well. In fact, the professional football players' strike of 1974 ultimately collapsed because a majority of the players could not live without their pre-season salaries.

8. Were the amateur athlete to prevail on antitrust grounds, the court might, as further relief, award attorney's fees and allow reimbursement for the costs of suit.

9. *See* notes 53-157 and accompanying text *infra*.

10. *See* notes 158-164 and accompanying text *infra*.

11. Until recently the sports of baseball and hockey functioned without the use of an amateur player draft system. Major league teams in those sports would secure, through their own initiative and charisma, property rights to the services of athletes in, or just out of, high school. The athletes would then enter a period of apprenticeship in the minor leagues with teams owned by, or in working agreement with, the Major League team involved. Eventually baseball and hockey de-

player draft systems will be studied. Next, the rationale for the rookie player draft system will be examined. Finally, this section will conclude with a consideration of the player draft systems as provided for in the recently negotiated collective bargaining agreements.

A. *The Old Amateur Player Draft Systems*

Under the old amateur player draft systems, a drafted athlete became the exclusive property of the team that selected him. These arrangements allowed the drafting team to sign the player to a contract, or to sell or trade its rights to the player to another team as it desired. The drafted athlete, however, was not free to exercise similar rights or to move to the club of his choice.

If the drafted athlete for whatever reason, chose not to sign with the team that selected him, he was absolutely foreclosed from performing that professional sport unless the drafting team traded or sold the rights to him to another team. The drafting team, therefore, retained perpetual signing rights to the player whether or not he ever signed a contract with them.

Eventually, two significant cases held that the former National Football League (hereafter the NFL) and National Basketball Association (hereafter the NBA) draft systems violated Federal antitrust laws. In *Kapp v. National Football League*,[12] the NFL draft was held to be "patently unreasonable insofar as it permits virtually *perpetual* boycott of a draft prospect even when the drafting club refuses or fails within a reasonable time to reach a contract with the player."[13] In that case, Joe Kapp, an all-pro NFL quarterback, contended that the option, tampering, and Rozelle rules and the rules requiring players to sign standard league-drafted player contracts constituted group boycotts which were illegal *per se* under the antitrust laws. District Court Judge Sweigert observed:

> [H]owever broad may be exemptions from antitrust laws of collective bargaining agreements dealing with wages, hours and other conditions of employment, that exemption does not and should not go so far as to permit immunized combinations to enforce employer-employee agreements which, being unreasonable restrictions on an employee's right to freely seek and choose his employment, have been held illegal on grounds of *public policy* long before and entirely apart from the antitrust law.[14]

The old NBA draft was likewise held illegal in *Robertson v. National Basketball Association*,[15] because it amounted to a virtual group boycott by the league which eliminated competition in the hiring of amateur athletes

cided that this system was leading to competitive imbalance and excessive bonuses, so amateur player draft systems were adopted in both sports.

The major differences between organized professional baseball's draft and those conducted by the NFL and NBA is that baseball conducts two amateur drafts anually, one in January and the other in June *cf.* Professional Baseball Rule 4, Major League Baseball Blue Book, 1976. A player who does not sign with the team that drafts him, automatically returns to the pool of eligible prospective draftees. The player may then be drafted again by *another* team when the next draft meeting occurs.

12. 390 F. Supp. 73 (N.D. Cal. 1974).

13. *Id.* at 86.

14. *Id.* at 86.

15. 389 F. Supp. 867 (S.D.N.Y. 1975); see notes 152-53 *infra.*

and permitted teams to set their own prices for players' services.[16]

This brief overview of the old draft structure and the cases that held it to be illegal on antitrust grounds is meant to serve only as background; a more detailed discussion of the issues regarding the current draft system's legality appears later in this article.[17]

B. *A Critique of the Rationale for the Amateur Player Draft System*

Justification by team owners and league officials for holding an amateur player draft is grounded primarily on the premise that by permitting the last place team to select the top athlete in the country (assuming that it has not previously sold or traded away that right to another team), the comparative strength of the teams in the league will be balanced annually.[18] The argument is that, since the weak teams will get stronger[19] every year because of the draft, no one team can continue to dominate league play. Also, this higher degree of competition will stimulate fan interest. Despite this alleged equalization of team playing strengths,[20] the actual effects of the systems are quite different.

Basically, the draft system in both professional basketball and football operate in the following manner: each year teams select amateur athletes from a player pool in inverse order to the team's most recent position in regular season league standings. The team with the poorest winning percentage chooses first; the team with the second worst percentage chooses second, and so on until every team has chosen. At this point one round is completed, and the process then repeats itself. For example, in football, the team that wins the Super Bowl (the league championship game) chooses last, and the loser of the Super Bowl chooses next-to-last. There are twelve rounds in the NFL draft. There is no definite number in the NBA draft: selections continue until a majority votes to end the procedure.

In actuality then, the draft allows an advantage to the first round, because aside from the first and last rounds, the league champion generally selects directly before the last place team.[21] In effect, then, the first and last

16. *Id.* at 893.

17. *See* notes 138-56 and accompanying text *infra*.

18. Hearings on S.2373 before the Subcomm. on Antitrust and Monopoly of the Sen. Comm. on the Judiciary, 92d Cong., 2d Sess. 1066-68 (1972).

19. The draft is supposed to perform three functions: fill the voids left by retiring athletes; strengthen clubs at positions which are considered weak; and prevent league championship domination by giving weaker teams selection priority.

20. Team owners seem to agree that, without the draft, the wealthiest clubs would hire the most promising amateur talent, forcing competitively weaker and financially poorer teams out of business. *See* Carlson, *The Business of Pro Sports: A Re-examination in Progress*, 18 N.Y.L.F. 915 (1973). This argument is at best, equivocal. It assumes that franchise owners do not care how much money it costs them to buy up top player talent as long as they win games. In other words, professional sports is the only business in the United States in which profits are not management's primary objective. Also, it overlooks the possibility that factors other than money or playing field success influence an amateur athlete's desire to play in one city as opposed to another. Graduating collegians, no less than veteran athletes, often have ties to particular communities that they do not want to leave. Furthermore, many amateur athletes want to be employed by teams that will provide them with an immediate opportunity to play regularly. Thus, a team with an established veteran star manning the same position played by the amateur is not appealing.

21. By virtue of finishing last in professional football, a team makes selections one, twenty-nine, fifty-seven, eighty-five, and so forth. The Super Bowl winner makes selections twenty-eight,

place teams have virtually the same drafting power except for the addition of just one high choice for the last place team. Thus, whether the draft achieves competitive balance depends on the extent to which the addition of a single top draft can truly improve the competitiveness of poorer teams. Perhaps some improvement may occur in professional basketball, but unfortunately, the other factors that affect competitive balance are unaffected by the draft system and prevent the system from achieving its goal.[22]

The player draft system has no significant effect on whether teams are "evenly matched" as evidenced by the fact that competitive balance has long been absent from professional sports. As the history of single team sports domination indicates,[23] a team's success depends more on its management exercising good judgment in trading veteran players and in assembling quality coaching and scouting staffs than on one or two top draft choices. After all, many current professional stars were relatively unknown as amateurs, and certainly weak teams had the same opportunity as strong teams to scout these players for draft purposes.

Another reason for the draft system's failure to insure balanced competition is the intense pressure on weaker teams to trade top-draft choices to stronger teams for veteran players or to improve financial reserves. Such circumstances permit strong teams to profit from the draft because they can afford to let a new player develop slowly, building a nucleus for the future, and trade their aging players to weaker teams in return for draft selections.

Despite the fundamental uncertainties about the ability of the draft to achieve its stated goals, pressure[24] to continue this type of selection system[25] appears to be strong.

C. *The New Draft Systems in Professional Football and Professional Basketball*

In response to the successful antitrust challenges,[26] professional football and basketball have collective bargaining agreements that provide for,

fifty-six, eighty-four, and so forth. This assumes that the particular team retains all its draft choices and has not previously traded one or more of its selections for veteran players (e.g. prior to the 1977 NFL draft, the Seattle Seahawks traded their rights to draft the second amateur athlete who would be selected in the draft to the Dallas Cowboys for several veteran players and some future, lower draft selections).

22. Hearings on S.2373 before the Subcomm. on Antitrust and Monopoly of the Sen. Comm. on the Judiciary, 92d Cong., 2d Sess. 1296 (1971-1972).

23. *See*, Shapiro, *Professional Athletes: Liberty or Peonage?*, 13 Alberta L. Rev. 212, 233-34 (1975).

24. *See* U.S. NEWS AND WORLD REPORT, July 5, 1971, at 56.

The reality of the situation is that team owners have not conducted themselves, in many cases, as reasonable businessmen in determining the amount they should pay untested amateur athletes. But this fact alone should not allow them to place a ceiling on players' salaries nor cause Congress to pass special legislation immunizing the draft from the scope of the antitrust law.

25. *See* Comment, *Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws*, 81 Harv. L. Rev. 418, 425 (1967).

Other devices besides the player draft are available to promote equalization of team strengths. Two such devices are hockey's draft of players from other major league clubs and a prohibition of trades for a given period before a "cut down" date. These devices enable a weaker team to acquire players released from better clubs without the better clubs being able to demand compensation, e.g. a player or draft choice, shortly before the release date. Under each arrangement a talent pool is generated without the cost of unduly or unfairly restricting the marketing of any athlete's skills.

26. *See* notes 138-56 & accompanying text *infra*.

among other things, drafting of amateur players. Although the new draft systems are in many ways similar to their predecessors, those who agreed to them assert that they will withstand antitrust attack because they are less restrictive and were arrived at through collective bargaining negotiations.[27] These parties claim that this latter fact affords the current draft systems a nonstatutory labor exemption to, or immunization against, the impact of antitrust laws.[28] Whether this claim can be supported is assessed in a subsequent section of this article.

The current agreements provide for amateur player drafts to be held during the late spring of each year through at least 1986. One of the significant features of the new amateur player draft systems is that teams are prohibited from negotiating[29] prior to the draft, with any eligible player[30]; nor may a team negotiate with, or sign, any player selected by another team in the draft, unless it first acquires the other team's "one year" exclusive right to sign[31] the player.

In the NBA, for example, if a player does not contract with the team

27. *See, e.g.*, Maher, *The Final Days: Pro Football's Countdown to Peace*, LOS ANGELES TIMES, Mar. 9, 1977, § 3, at 1, cols. 4-6.

28. *See* notes 91-112 and accompanying text *infra*.

29. *Los Angeles Times*, June 6, 1977, § 1 III at 1, col. 4.

It appears that the prohibition against a team's negotiating with a player prior to his actual selection by that team in the draft was ignored in 1977 by the NBA's Milwaukee Bucks. The Bucks appear to have contacted and negotiated agreements with their top picks, Kent Benson and Marques Johnson, prior to the NBA draft. More recently, in 1979, the Los Angeles Lakers reached an agreement with Magic Johnson even before they made him their first selection in the rookie player draft. NBA Commissioner Lawrence O'Brien did not impose sanctions against either the Bucks or the Lakers for their conduct. One must wonder, though, whether a similar lack of reaction would have occurred had the athletes involved approached teams of their choice and attempted to negotiate contracts with them prior to their selection in the draft.

30. NBA By-Law § 2.05. *See also*, *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D.Cal. 1971) [hereinafter cited as the *Spencer Haywood Case*].

Prior to the *Spencer Haywood Case*, the only players who were eligible to be drafted by the NBA were (1) those college students whose classes were to be graduated during the June immediately following the draft; (2) college students whose classes had already graduated; and (3) non-college students who had graduated from high school four years before. *See* Note, *NBA's Four Year Rule: A Technical Foul?*, 1972 L. and Soc. Ord. 489 (1972). As a result of the *Haywood* decision, the NBA adopted a "hardship exemption" to the afore mentioned draft eligibility requirements.

The current NBA Collective Bargaining Agreement relaxes draft eligibility standards still further. Now, any player whose high school class has graduated may become eligible for selection in the NBA draft simply by giving the League written notice at least 45 days in advance renouncing his or her collegiate eligibility; Article XVI, § 1(a)(2)(f) of the NBA Collective Bargaining Agreement of 1977.

Unlike the previously mentioned draft eligibility requirements that exist in professional football, basketball and baseball, professional hockey does not condition entry into its draft pool upon graduation from either high school or college. The absence of an eligibility requirement in the NHL may be explained by the fact that most amateur hockey is played in leagues which are financially supported by and affiliated with the NHL.

31. Prior to the NFL Collective Bargaining Agreement of 1977, the drafting team's exclusive right to sign the amateur athlete was unlimited in duration. In analyzing the old exclusive signing right in *Kapp v. National Football League*, 390 F. Supp. 73, 82 (N.D. Cal. 1974), Judge Sweigert concluded:

> [A] rule imposing restraint virtually unlimited in time and extent, goes far beyond any possible need for fair protection of the interests of the club-employers or the purposes of the NFL in that it imposes upon the player-employees such undue hardship as to be an unreasonable restraint and such a rule is not susceptible of different inferences concerning its reasonableness; it is unreasonable under any test. . . .

that drafts him, he is boycotted and cannot obtain professional employment in that sport during that year.[32] The player may still be drafted again the following year, either by the same team that originally drafted him or by another team.[33] If the player is selected in the subsequent draft and again does not sign with the team that drafts him, rejects that team's "required tender"[34] offer, and sits out that year, then he becomes a true "free" agent. In theory, the player can, at this point, deal freely with any professional team.[35]

In most cases, however, the drafted player and the team reach agreement.[36] The player must then sign a Standard Player's Contract,[37] with

Judge Sweigert went on to hold the "tampering rule" and the "standard player contract rule" patently unreasonable insofar as they are used to enforce other NFL rules in that area.

It is arguable that the current NFL and NBA collective bargaining agreements are, in effect, as perpetual in scope as their predecessors. This becomes more obvious when one considers that the average playing career in both the NFL and the NBA is about four years. Almost any limitation on the ability of the amateur athlete to freely negotiate with any team that seeks his services or that he desires to play for tends to be unreasonably burdensome. An amateur athlete should not be required to play for a team against his wishes and thereby subject himself to the risk of injury unless he is able to negotiate a contract that adequately and fairly compensates him. The continuing exclusivity of the signing rights of the drafting team, despite the revised duration of such rights, still impede the drafted athlete's ability to negotiate such a contract. *See*, notes 128-131 & accompanying text *infra*.

32. *See* notes 152-55 and accompanying text *infra*.

33. This presupposes that: (1) the team that originally drafted the athlete and made him a "required tender" offer pursuant to Article XVI, § 1(a) (2) (a-d) of the NBA Collective Bargaining Agreement; (2) the draftee rejected it; and (3) the draftee did not thereafter play professional basketball elsewhere that year. The following hypothetical situation helps illustrate the plight of the athlete who must sit out a year if he rejects the drafting team's negotiated offer and then, ultimately, its "required tender" offer.

Suppose that the Rochester Basketball Indians make three time All-American Abdul All-Star their number one draft choice. If the Indians and All-Star do not agree to a player contract by September 15, then the Indians must offer All-Star a "required tender" contract for a duration from one to five years. If All-Star rejects the "required tender." offer, he still cannot negotiate with any team other than the Indians until the next college draft. He must sit out the year. At the next college draft All-Star's rights are again subject to exclusive assignment for another one year period to any team that drafts him. At that point, the Indians may again draft All-Star and All-Star will be forced to miss another year, if again he and the Indians cannot reach agreement on a contract and the "required tender" is again offered and rejected by All-Star. Even if All-Star does not want to sign with Rochester because perhaps he dislikes the city, he must wait two years from the date he was initially drafted before he can, as a free agent, negotiate to play in the city of his choice, if his services, by then, are still marketable. Some solace, however, flows to All-Star, because once the second year of forced idleness expires, he becomes a "true" free agent, able to contract with the team of his choice without the first two teams having to be compensated.

34. Article XIII § 3(a-d) and 4 of the NFL Collective Bargaining Agreement of 1977, provides that if the draftee and the club do not reach agreement by June 7, then the club must offer the player one of the alternative "required tender" contracts specified in the collective bargaining agreement. The offers range from a two year deal (a one year contract term with a mandatory option year) at $20,000 per year ($22,000 per year in 1980 through 1982), to a four year contract that pays the player $65,000 in the fourth year ($70,000 in 1980 through 1982). If the draftee rejects the required tender, then he becomes eligible for the next year's draft.

35. *See* text accompanying note 54 *infra*.

36. *See*, L. SOBEL, PROFESSIONAL SPORTS AND THE LAW 261 (1971) (hereinafter cited as PROFESSIONAL SPORTS AND THE LAW).

Because amateur athletes are, typically, eager to play professional sports, few, if any, are prepared to defer their careers to litigate the legality of the amateur player draft.

37. *See, e.g.*, Article XII § 1 and 2 of the NFL Collective Bargaining Agreement of 1977.

To date, the old NFL standard player contract has not been revised to conform, as required, to the terms of the current Collective Bargaining Agreement.

terms that are uniform except, perhaps, as to provisions dealing with contract duration and compensation. In most cases, the contract binds the athlete to the employ of the team with which he signs for at least two years. For example, the minimum term in the NFL is one year with a mandatory option year which the team may unilaterally exercise.[38] The minimum two year employment term and exclusive signing rights are the most important aspects in which the new draft differs from the old.

In fact, many owners would probably suggest that the current two year minimum contract period is more than a reasonable reduction of the once perpetual restraint on the drafted athlete's freedom to contract. While the current system may reduce the duration of the restraint characteristic of past amateur player draft systems, it still requires the amateur athlete to play against his will or sit out for up to two years in order to earn the freedom to contract with the team of his choice.[39] Regardless of his status or liability, the drafted athlete still cannot play where he wishes, nor can he always bargain for a salary that is commensurate with his skill. Thus, in substance the effects of both the old draft system's perpetual restraint and the current draft system's possible two year restraint are very similar. Moreover, few draftable athletes can afford to risk the possible dissipation of their athletic skills[40] during two years of forced inactivity.[41]

Both the NBA and NFL drafts offer strong possibilities, if not incentives, for teams to conspire not to subsequently draft athletes who refuse to sign with the team that drafted them initially. Since franchise makers, such as Kareem Abdul-Jabbar and Earl Campbell, are the exceptions rather than the rule in professional sports, rarely will a team risk offending another member of the joint venture by subsequently drafting and attempting to sign

38. Article XIII § 3(a) of the NFL Collective Bargaining Agreement of 1977.

39. The National Hockey League conducts an annual draft of amateur players who will reach twenty years of age by January 1 of the following NHL season. Once signed by the drafting team the athlete becomes the exclusive property of that team so long as it offers him employment, either in the NHL or as a member of one of its affiliated minor league teams. NHL By-Laws § 16(b)(5). It is worth noting that a similar restriction on the movement of veteran hockey players was found to violate the antitrust laws. *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972), *discussed* at notes 109-12 *infra.*

Compared to the NBA and NFL draft systems, major league baseball's arrangement is fairer to the drafted athlete, because he is not so drastically compelled to reach agreement with the teams that draft him. The drawback to baseball's arrangement is that if the recently graduated player fails to contract with the team that drafted him and instead enrolls and plays baseball in college, then he must wait until his 21st birthday to be drafted again. This rule obviously encourages the high school graduate not to enroll in college.

40. *See*, PRO SPORTS: THE CONTRACT GAME, *supra* note 3 at 2-3:

> The athlete who is considering turning professional must recognize the sacrifices which he is being asked to make along with the obvious benefits that will accrue when he turns professional. For example, the average NFL player will last approximately 4.6 years, and the average NBA player will play for only 7 years. So, while comparatively speaking the athlete will be earning a great deal of money early in his life, he is still being asked to postpone entering his ultimate vocation, which will put him behind those of his own age in the same business.

See also Internal Revenue Service, Audit Coordination Digest No. 65 (Jan. 2, 1973).

41. *See* PROFESSIONAL SPORTS AND THE LAW, *supra* note 37, at 64. While Curt Flood's case was pending before the Supreme Court, an agreement was reached allowing Flood to play the 1971 season for the Washington Senators. Unfortunately, the consequences of the year lay-off from baseball were severe. Flood played for two months without distinction, and then suddenly retired.

an "untested and unproven," though admittedly promising, high draft choice who did not sign with the team that drafted him the year before.[42]

Professional sports teams normally pursue profits or tax beneficial losses for wealthy owners as their primary considerations. Thus punishment of the "fractious" first year athlete could readily become a secondary objective. Teams seek every opportunity to control or limit player salary costs and will attempt to sign a drafted athlete only to the extent that the "budget," "balance sheet," or owners' tax plan[43] permits.[44] In this type of market situation, absolutely devoid of competition, the incentives and pressures on a team to sign a drafted athlete, even a first or second round draft choice, are greatly diminished and the athlete's ability to negotiate effectively suffers badly because of it. Most notably, there are almost no incentives or pressures to sign middle and low round draft choices.

In a similar vein, some of the disasterous experiences of "veteran" free agents demonstrate the potential for illicit agreements among team owners under the current Collective Bargining Agreements.[45] For instance, it appears that the NFL Players' Association may have surrendered or diminished the freedom of contract rights of most veteran free agents when they agreed to the "right of first refusal"[46] and the "right to resign"[47] provisions.

42. Because of league rules and fear of retaliation, club owners refrain from actively seeking to sign players drafted by rival teams and are reluctant to sign draftable athletes who contact them. For example, when the Seattle Supersonics of the NBA signed the undrafted Spencer Haywood, then Commissioner Walter Kennedy issued an order to the effect that if the Sonics made use of Haywood's services in any game, they would forfeit the game. *See generally* Comment, *Super Bowl and the Sherman Act: Professional Team Sports and The Antitrust Laws*, 81 Harv. L. Rev. 418 (1967).

43. For excellent discussions of the relationship between professional sports and the tax laws see Jones, *Amortization and Nonamortization of Intangibles in the Sports World*, 53 Taxes 777 (1975); Weil, *Depreciation of Player Contracts - The Government is Ahead at the Half*, 53 Taxes 581 (1975); Klinger, *Tax Aspects of Buying, Selling and Owning Professional Sports Teams*, 48 L.A. Bar Bull. 162, 39 J. of Tax 276 (1973); Note, *Professional Sports Team As a Tax Shelter - A Case Study: The Utah Stars*, 1974 Utah L. Rev. 556 (1974).

44. This seems to be especially true of the most successful franchises, like the Pittsburgh Steelers and Dallas Cowboys, whose draft philosophies seem to be to select the best athlete available, regardless of the position he played in college and to not spend more than they have to acquire new talent. This is evidenced by the number of players on such teams from "little" or "lesser known" schools and lower overall player payroll figures.

45. *See* text accompanying note 5 *infra*.

It is conceivable that a team might offer a drafted athlete a "required tender" contract, instead of engaging in good faith arms-length negotiations with him. Under those circumstances, a court may view this as a contract that lacks mutuality and as such is void as a contract of adhesion. For the classic American article on the subject of contracts of adhesion, see Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 Colum. L. Rev. 629 (1943).

46. Article XV §§ 3, 4, 9 & 10 of the NFL Collective Bargaining Agreement of 1977 provides that if a veteran athlete plays out his option year and signs with a new team for an average annual salary of $50,000 or more, his old club is automatically awarded the new team's third round pick in the next amateur player draft. A second round draft choice is awarded for new contract that provides for an average annual salary of from $65,000 to $70,000. The old club is sent a first round pick if the contract calls for a salary between $75,000 and $125,000. A contract for more than $125,000 is worth a first and second round pick. However, under the right of first refusal the old team can match the new club's offer and keep the player. Competitive bidding is thereby eliminated.

47. Article XV, § 17 of the NFL Collective Bargaining Agreement of 1977 provides:

> Section 17. *Re-Signing*: If a veteran free agent receives no offer to sign a contract or contracts with a new NFL club . . . and his old club advises him in writing by June 1 that it desires to re-sign him, the player may, at his option within 15 days, sign either (a) a

These provisions probably restrict verteran player movement even more than the new illegal reserve or option clauses[48] or the "Rozelle Rule."[49]

The actions of the NFL Players' Association were prompted, in part at least, by guarantees of union recognition and financial security.[50] But like the nonmember first year athletes, veteran athletes[51] have essentially, re-

contract or contracts with his old club at its last best written offer given on or before February 1 of that year, or (b) a one-year contract (with no option year) with his old club at 110% of the salary provided in his contract for the last preceding year (if the player has just played out the option year, the rate will be 120%). If the player's old club does not advise him in writing by June 1 that it desires to re-sign him, the player will be free on June 2 to negotiate and sign a contract or contracts with any NFL club, and any NFL club will be free to negotiate and sign a contract or contracts with such player, without any compensation between clubs or first refusal rights of any kind.

48. The reserve and option systems grant each team the exclusive right to negotiate with and employ, year after year, all of the players assigned to it. Players are prohibited by these systems from negotiating with or playing for any team other than the one to which they have been assigned, without regard to any personal, professional or financial reasons that they may have for wanting to switch.

For a general discussion of the systems see Allison, *Professional Sports and the Antitrust Laws: Status of the Reserve System*, 25 Baylor L. Rev. 1 (1973); *see also* Note, *Reserve Clauses in Athletic Contracts*, 2 Rut.-Cam. L.J. 302 (1970).

49. The old NFL Constitution and By-laws provided at Section 12.1(h):

Any player, whose contract with a league club has expired, shall thereupon become a free agent and shall no longer be considered a member of the team of that club following the expiration date of such contract. Whenever a player, becoming a free agent in such manner, thereafter signs a contract with a different club in the League, then, unless mutually satisfactory arrangements have been concluded between the two League clubs, the Commissioner [Pete Rozelle] may name and then award to the former club one or more players, from the active, reserve, or selection lists (including future selection choices) of the acquiring club as the Commissioner, in his sole discretion, deems fair and equitable; any such decision by the Commissioner shall be final and conclusive.

50. *See* the Memorandum of Understanding contained in the appendix to the NFL Collective Bargaining Agreement of 1977.

The method by which amateur athletes enter professional sports has an enormous impact on veteran athletes already represented by the collective bargaining unit. It has, therefore, been argued that controls on the method by which amateur athletes enter professional sports are justifiable because:

(1) Revenue spent to acquire the services of amateur athletes is not available for uses that veteran athletes might otherwise prefer;

(2) Employers in the industry must bargain about sub-contracting, or its effect on the unit. And this is bargaining over the extent to which persons outside the unit will do the work of the unit and reduce revenues available to those in it;

(3) Exclusive hiring hall agreements, in effect, require those seeking employment to gain entry into the union hiring hall before gaining employment; and

(4) Almost all wage agreements stipulate the wage at which new entrants may enter into the unit.

Hearings on H.R. 1206, et al, before the Antitrust Subcomm. of the House Comm. on the Judiciary, 92d Cong., 2d Sess. 194 (1972).

Many veteran athletes are envious of the large signing bonuses and salaries some first year athletes have received in the past. There is no evidence, however, that a substantial number of veteran athletes accept the owners' contentions that the amateur player draft system operates to "free up" money to pay higher veteran salaries. It would seem, then, that many of the dollars supposedly "freed up" by the amateur player draft system probably find their way back into the paychecks of front office personnel and into shareholders' dividends.

51. The oppressive characteristics of the right of first refusal and the re-signing provisions of the NFL Collective Bargaining Agreement were experienced by forty-three veteran free agents who attempted to negotiate contracts pursuant to its terms between March 1 and April 15, 1977. Only one of those forty-three athletes, Norm Thompson, changed teams. The other forty-two had their contractual rights renewed by the teams for which they played the previous season.

In the event that these same individuals desire to play for another team next season, it is unlikely that they will fare any better. Unless a player is a franchise maker, like O.J. Simpson, it is

ceived very little at a very great cost.[52]

II. THE ANTITRUST ATTACK AGAINST THE AMATEUR PLAYER DRAFT SYSTEMS

A. *Antitrust Policy*

The Sherman Act regulates monopolistic business practices, including combinations in restraint of trade; the Clayton Act provides a civil remedy for a party injured by a violation of the Sherman Act, by allowing the injured party to recover treble damages and/or receive injunctive relief. The enactment of the antitrust laws[53] was an expression of the national belief that free enterprise and competition are the most effective and productive methods of regulating economic activity. It was decided that the classic concept of "supply and demand" should determine the price and quantity of goods available.[54] Strict interpretation of the antitrust laws dictate that every contract or combination, whether reasonable or unreasonable, which directly and unduly restrains or which necessarily operates in restraint of trade or commerce among the states, is illegal.[55]

The express language of the antitrust laws, and of the Sherman Act[56] in particular, is broad enough to render illegal virtually every type of business arrangement or agreement. Indeed, this interpretation prevailed in the early years of antitrust enforcement.[57] As the United States Supreme Court

unlikely that a team will risk giving up "valuable" future draft choices to sign him. Since each team has comparable talent at the same position, a team would just re-sign a player at a 10% increase in salary before they would attempt to sign another player at a free market salary figure and thereby have to compensate his old team with top draft choices.

See also, Pileggi, *Bare Market*, *Sports Illustrated*, August 22, 1977, at 10.

The experience of NBA veteran free agents reflects this fact also. Under the terms of the NBA Collective Bargaining Agreement of 1976, if a player's contract had expired by the end of the 1976-77 season, he could become a free agent if he chose to, and about 35 players did, but none have received contract offers from other teams. It should be noted that at the end of the 1981 season, the right of compensation in the NBA expires.

52. This conclusion calls to mind the adage: "All that glitters is not gold."

53. 15 U.S.C. § 1 et. seq. (1970).

54. The antitrust laws express a national policy that competition is the most appropriate and efficient regulator of economic activity and that the demands of the market should determine the price and quantity of goods and services. *See*, *Super Bowl and the Sherman Act: Professional Sports and the Antitrust Laws*, *supra* note 45, at 418-19.

Antitrust liability is usually imposed where unions enter into collective bargaining agreements with employers which are designed to eliminate competitors. *See* notes 85-94 and accompanying text *supra*. Thus, if individual players, including amateur athletes, challenge restrictive clauses negotiated by the players' associations and the club owners, the agreement will constitute a violation of the antitrust laws if some competitor is damaged by the trade agreement. *See also* Report of the Attorney General's National Committee to Study the Antitrust Laws 1 (March 1, 1955).

55. 15 U.S.C. § 1 and 2 (1970).

56. §§ 1 and 2 of the Sherman Antitrust Act provide:

§ 1. Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . .

§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person, or persons, to monopolize any part of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor . . . .

57. The basic judicial view as to the scope and purpose of the antitrust laws was succinctly stated by the Supreme Court in *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4-5 (1958):

"The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at

gained experience in dealing with problems arising under the antitrust laws, however, the viewpoint that emerged most often in their decisions was that only those agreements which unreasonably restrained trade were proscribed.[58]

In *Standard Oil Co. v. United States*,[59] the Supreme Court formulated the *rule of reason* test.[60] Under this approach a challenged practice or agreement is declared reasonable and lawful if (1) it is supported by clear economic necessity; and (2) its dominant purpose is not to restrain trade.

Nothwithstanding this reasonableness test, the Court has also labeled certain types of agreements as being so unredeeming, unreasonable, and contrary to the public policies supporting the antitrust laws as to be deemed illegal *per se* without inquiry into their purported justifications.[61] Activities such as division of markets,[62] group boycotts,[63] and concerted refusals to deal[64] have been held to be per se violations of the antitrust laws.

The antitrust policy attempts to foster competition within a defined market by creating economically independent units. Professional sports, by its very nature, apparently requires and encourages a certain amount of cooperation among competitors. This section will examine whether the degree of cooperation engendered by a NBA or NFL player draft is legal. Accordingly, the discussion will analyze whether management's rationale for the draft is so compelling or the nature of professional sports so unique that it excuses the restraints on trade that result from the system's operation. Other related issues include: the standing of amateur athletes to challenge the draft; the applicability of the nonstatutory labor exemption as a shield to antitrust scrutiny of the draft; and the possible presence of antitrust violations in the current Collective Bargaining Agreements.

B. *Amateur Athlete's Standing to Sue Under the Antitrust Laws*

Section 4 of the Clayton Act[65] grants standing to sue to any "person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."[66] Courts have interpreted Section 4 to mean that a person is within the "target area" if he is active in an area of the economy which is endangered by such a violation of the antitrust laws.[67]

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preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment condusive to the preservation of our democratic political and social institutions."

58. *See also*, *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

59. Id. 221 U.S. 1.

60. The underpinnings of the *rule of reason* analysis is to inquire as to the reasonableness of the restraints on competition alleged in light of the circumstances that prevail in the particular industry in question.

61. *See generally* Kalinowski, *The Per Se Doctrine - An Emerging Philosophy of Antitrust Law*, 11 U.C.L.A. L. Rev. 569 (1964).

62. *See, e.g., Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951).

63. *See e.g., Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

64. *See, e.g., United States v. General Motors Corp.*, 384 U.S. 127 (1966).

65. 15 U.S.C. § 15 (1970).

66. *Id.*

67. *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 126, 129-30 (9th Cir. 1973).

In the sports area, the standing of veteran players to assert antitrust violations similar to those that amateur athletes might allege against the player draft, has generally not been questioned. Standing has been found to exist for a basketball player challenging the NBA college draft system;[68] for a golfer challenging the effects of a LPGA group boycott;[69] for a football player challenging NFL blacklisting, the reserve clause, and other intra-league restraints;[70] and for hockey players challenging the reserve system.[71]

In further support of the amateur athlete's right to challenge employment practices which may violate the antitrust laws, an analagous case is *Nichols v. Spencer International Press, Inc.*[72]

In that case, an encyclopedia salesman sued his former employer and another publisher who had refused to hire him claiming as illegal a "no-switching" agreement whereby each defendant promised not to hire any former employees of the other for six months after termination of the employment. The court reversed the grant of summary judgment and the entry of an order with respect to antitrust issues in favor of defendants employers. The Seventh Circuit said:

> one who has been damaged by loss of employment as a result of a violation of the antitrust laws is 'injured in his business or property' and thus entitled to recovery under 15 U.S.C.A. §15. . . . [T]he interest invaded by a wrongful act resulting in loss of employment is so closely akin to the interest invaded by impairment of one's business as to be indistinguishable in this context.[73]

Another aspect of the issue of whether an amateur athlete has standing to assert an antitrust violation is whether the nonstatutory labor exemption absolutely shields the draft mechanisms agreed to by the Players' Associa-

68. *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D.Cal. 1971). *See also*, notes 149-50 and accompanying text *supra*.

69. *Blalock v. Ladies Professional Golf Association*, 359 F. Supp. 1260 (N.D. Ga. 1973).

In *Blalock*, a professional woman golfer, Jane Blalock, was suspended from tour play by the Ladies Professional Golf Association for allegedly cheating during the second round of a tournament in Louisville, Kentucky in May, 1972. Blalock filed suit against the LPGA, its Executive Board Members, and its tournament director seeking damages and an injunction against her continued suspension. A temporary injunction against the suspension was granted allowing Blalock to play, provided however that whatever prize monies was earned by her would be deposited with the Court pending the outcome of her suit. Nearly a year later, the District Court in Atlanta, through Judge Moye, ruled Blalock's suspension was an illegal group boycott in violation of the Sherman Act.

70. *Radovich v. National Football League*, 352 U.S. 445 (1957). Radovich, an all-pro guard with the Detroit Lions of the National Football League, asked to be traded to the Los Angeles Rams after the 1945 season so that he could be nearer to his ailing father. The Lions refused; Radovich signed a contract with the Los Angeles Dons of the then new and rival All-America Football Conference for whom he played until 1947. The NFL responded to Radovich's signing by blacklisting him for five years. Radovich was affected by the blacklisting in 1948 when another team in the All-America Conference, the San Franciso Clippers, withdrew an offer of employment previously made to him, rather than risk suffering the imposition of punitive sanctions against it by the NFL. In 1949, the All-America Conference folded; because of the blacklist Radovich could not find employment in professional football. Radovich filed suit claiming that the blacklisting constituted a violation of the antitrust laws; although his action was unsuccessful, the Court held that Radovich had standing to sue.

71. *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972). See note 109 and accompanying text *infra*.

72. 371 F. 2d 332 (7th Cir. 1967).

73. *Id.* at 334.

tions and the team owners, from legal attack. Therefore, the policies underlying the exemption must be considered.

C. *The Labor Exemption*

Certain acts of Congress have declared and certain decisions of the United States Supreme Court[74] have held that restrictive practices which are the product of a collective bargaining agreement are sometimes exempt from the requirements of the antitrust laws.[75] The concept of a labor exemption from the antitrust laws derives itself from Sections 6 and 20 of the Clayton Act[76] and the Norris-La Guardia Act.[77] The purpose and rationale of such an exemption is to insulate legitimate labor activities unilaterally undertaken by a union in furtherance of its own interests.[78] Accordingly, the nonstatutory exemption does not extend to concerted action or to illicit agreements between unions and management groups. Despite the broad protection those acts intended to afford labor, it was not until *United States v. Hutcheson*[79] that the Supreme Court held that union activity was removed from the application of the antitrust laws with one important exception: where labor groups conspire with management groups to restrain trade.[80]

1. *Exceptions to the Exemption*

The exception precluding conspiracy with management groups was first applied in *Allen Bradley v. Local Union 3, IBEW*[81] The action was brought under the Sherman and Clayton Acts, and the Supreme Court held that a union had forfeited its antitrust exemption because it had combined with a group of employers to restrict competition involving the employers' products, even though the union's objective was to obtain full employment and higher wages for its members.[82] In that case, Local 3 conspired with manufacturers and installation contractors in the electric equipment industry in order to provide employers a monopoly in the industry in the New York area and the union a monopoly of work opportunity by the exclusion of all non-union laborers from the field. The fact that the conspiracy was embodied and reflected in collective bargaining agreements did not exempt the union's conduct from the antitrust laws.[83]

The Supreme Court was forced to reconcile the conflicting policies of the antitrust laws (preservation of competition) with the labor law (the right of labor to bargain collectively). The Court's approach was to balance the interests of both policies so that only "legitimate" collective bargaining objectives would be outside the scope of antitrust laws.[84] Accordingly, the

74. *See* notes 81-91 and accompanying text, *infra.*
75. For a recent and comprehensive discussion of the subject see Comment, *The Antitrust Exemption for Labor Magna Carta or Carte Blanche*, 13 Duq. L. Rev. 411 (1975).
76. 15 U.S.C. § 17 (1970); 29 U.S.C. § 52 (1970).
77. 29 U.S.C. §§ 101-15 (1970).
78. *See generally* MORRIS, THE DEVELOPING LABOR LAW (1971).
79. 312 U.S. 219 (1941).
80. *Id.* at 231-32.
81. 325 U.S. 797 (1945).
82. *Id.* at 801.
83. *Id.* at 809.
84. *Id.* at 805.

Court held that labor's nonstatutory exemption from the antitrust laws existed so long as the economic pressures were exerted from within the labor movement, but was forfeited when the union aided management groups to create business monopolies and to control the marketing of goods and services.[85]

In *United Mine Workers v. Pennington*,[86] and *Amalgamated Meat Cutters Local #189 v. Jewel Tea Co.*,[87] the Supreme Court reemphasized that unions remain subject to federal antitrust law to the extent that (1) they conspire with a group of employers to eliminate industry competitors and (2) they agree with one set of employers to impose certain wage scales on other employer bargaining units. Both cases involved actions by employers against labor unions under Sections 1 and 2 of the Sherman Act.

Pennington arose out of the National Bituminous Coal Wage Agreement of 1950, entered into by the United Mine Workers and the larger operating companies. Both management and labor agreed that the basic problems in the industry were the result of over-production. In return for higher wages and fringe benefits, the union agreed not to oppose automation in the industry and to impose uniform industry wage scales on operators outside the bargaining unit, regardless of their ability to pay. In holding that a cause of action under the Sherman Act had been stated, the Court ruled that the union had lost its labor exemption because it had combined with management to eliminate competition from the market. "One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employer if it becomes a party to the conspiracy."[88] "A collective bargaining agreement resulting from union-employer negotiations is not automatically exempt from Sherman Act scrutiny simply because the negotiations involve a compulsory subject of bargaining, regardless of the subject or the form and content of the agreement."[89] "[T]here are limits to what a union or employer may offer or extract in the name of wages and because they must bargain does not mean that the agreement may disregard other laws."[90]

In *Jewel Tea*, the Meat Cutters union, which represented virtually all butchers working in the Chicago area, entered into identical collective barganing agreements with retail employers in the meat industry. Under duress of a strike vote, *Jewel Tea Co.*, signed an agreement which contained a sales and marketing hours restriction. The company subsequently sued the meat cutters' union seeking invalidation of the restrictive provision. It alleged that the agreement constituted an illegal conspiracy between the meat cutters union and the food stores to prevent night meat market operations by large self-service chains.

As in *Pennington*, the fundamental question[91] was whether the nonstatutory labor exemption barred the collective bargaining agreement from anti-

85. *Id.* at 807.
86. 381 U.S. 657 (1965).
87. 381 U.S. 676 (1965).
88. Id. at 656-7.
89. Id. at 664.
90. Id. at 665.
91. *Jewel Tea, supra* at 676.

trust attack by an outside party whose trade had been restrained by the agreement. However, as presented to the Supreme Court, the facts in *Jewel Tea* were held distinguishable from *Pennington* because the union had acted in its own self interest and had not combined with management groups at the expense of unrepresented third parties.

Jewel Tea seems to mandate that a collective bargaining agreement provision is exempt from the antitrust laws where it relates to wages, hours and working conditions, and its purpose is to effectuate a beneficial policy of the union and not the employer. The facts of *Jewel Tea* are distinguishable from the circumstances on which an amateur athlete's challenge to the draft would rest. While it is true that an amateur player draft mechanism benefits both the union and employers, a court could not ignore the fact that the system burdens unrepresented draftable athletes.

2. *Applicability of the Nonstatutory Labor Exemption to the Current Collective Bargaining Agreements in Professional Sports*

The application of the labor exemption to the area of professional sports, and in particular, to the feature of the current Collective Bargaining Agreements—the rookie athlete draft systems—turns upon two threshold considerations: 1) the impact of collective bargaining on the rights of undrafted or rookie athletes to seek judicial relief relative to the draft systems and 2) the applicability of the nonstatutory labor exemption as a shield against attacks on those systems.

a. The Impact of Collective Bargaining on the Rights of Undrafted or Amateur Athletes To Seek Judicial Relief

Two of the foremost proponents of the theory that professional sports leagues collective bargaining agreements or features thereof are exempt from antitrust attacks by professional athletes are Ralph K. Winter, Jr. and attorney Michael S. Jacobs.[92] Jacobs and Winter suggest that matters which are the subject of collective bargaining agreements should never be open to antitrust challenges by disappointed members of the bargaining units, because such challenges whether or not successful or right, would effectively destroy the collective bargaining process by undermining the authority of the bargaining representative.[93] Proponents of this view argue that, if players are not satisfied with a particular league practice, their relief must be sought at the bargaining table, once the agreement expires, or under the procedures made available by the National Labor Relations Act.[94] This the-

92. Jacobs and Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 Yale L.J. 1 (1971). For an expansion upon Jacobs' and Winter's thesis see Lowell, *Collective Bargaining and the Professional Team Sports Industry*, 38 L. and Contemp. Prob. 3 (1973).

Jacobs and Winter relied, in part, on *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944) to support their view. However, *J.I. Case* should not control the situation of rookie athletes because rookie athletes, unlike the idividuals in *J.I. Case*, are not employees and are not able to vote on unionization, collective bargaining, and representation proposals.

93. *Id.* at 27.

94. In 1975 the United States Supreme Court decided, *Connell Constr. Co., Inc., v. Plumbers and Steamfitters, Local 100*, 421 U.S. 616 (1975) which may be read as supporting the proposition that federal courts may consider and determine matters within the special expertise of the National

sis rests on the proposition that the labor laws, not the antitrust laws, offer the only relief to one who seeks to challenge any part or all of a collective bargaining agreement.

In the antitrust area, however, agreements reached by collective bargaining have not been held to be *ipso facto* immune from review. There is a genuine issue as to whether or not potential draftees and amateur athletes were members of or even represented by the bargaining unit which participated in the collective bargaining negotiation proccess in the NBA and NFL. In *Paramount Famous Lasky Corp. v. United States*,[95] the Supreme Court held that an agreement which effected a concerted refusal to deal, except by a standard form contract which was unreasonably restrictive, constituted an unreasonable restraint on trade even though the agreement was the product of six years of bargaining and discussion.[96] The Court observed that when parties, under guise arbitration, enter into unusual arrangements which unreasonably suppress normal competition, their action becomes illegal.[97] *Paramount Famous* appears, then, to render immaterial Jacobs and Winter's proposition that collective bargaining should prevent antitrust enforcement.

Careful study of the article by Jacobs and Winter reveals other reasons judges should not be persuaded to decide the issues in the professional sports industry in the manner it proposes.[98] First, the article treats the nonstatutory labor exemption cases too narrowly. *Allen Bradley*,[99] *Jewel Tea*,[100] and *Pennington*[101] all involved accusations that unions and employers had conspired together to injure the employers' competitors. But the cases did not hold, as Jacobs and Winter argue,[102] that employers may bargain collectively with impunity if the targets of their conspiracy are their current or potential employees, including amateur athletes not yet drafted, rather than their competitors.

Moreover, to the extent that Jacobs and Winter argue that the labor exemption is absolute, they overlook the fact that little in the way of the law,

Labor Relations Board when they are raised in the context of a federal antitrust suit. In *Connell*, the Court held that a contract, obtained by the union from a general contractor, which obligated the general contractor to subcontract work only to those firms having a current collective bargaining agreement with the union, was not entitled to the labor exemption from federal antitrust law because it imposed direct restraints on competition among subcontractors. The Court also determined that the agreement violated Section 8(e) of the Act because the union sought to impose the agreement on a general contractor with which it did not possess a collective bargaining relationship and the agreement was not restricted to a particular job site. Furthermore, the Court held that the agreement could be challenged in a federal court as violative of antitrust laws even if it was also illegal under Section 8(e), because the "federal courts may decide labor law questions that emerge as collateral issues in suits brought under the independent federal remedies, including the antitrust laws." 421 U.S. at 626.

95. 282 U.S. 30 (1930).

96. *Id.* at 43.

97. *Id.*

98. PROFESSIONAL SPORTS AND THE LAW, *supra* note 36, at 323-28.

99. *Allen Bradley Co. v. Local Union 3, IBEW*, 325 U.S. 797 (1945), *discussed at* notes 82-86 *supra*.

100. *Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965), *discussed at* notes 87 and 91 *supra*.

101. *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), *discussed at* notes 86 and 88-90 *infra*.

102. Jacobs and Winter, *supra* notes 92 at 26-27.

or for that matter life, is absolute. Even constitutional rights and liberties, such as freedom of speech,[103] or the right to be free from unreasonable searches and seizures,[104] must bow to other, equally important, competitive interests in qualified and specific situations. The labor exemption is not different. Thus, the labor exemption does not provide absolute immunity from the antitrust laws to any aspect of a professional sports collective bargaining agreement.[105]

Finally, insofar as the article suggests that professional athletes lack standing to challenge practices which violate antitrust laws, it ignores the fact that any contract, including a collective bargaining agreement, that has as its object an illegal end is unenforceable, irrespective of performance by either or both parties pursuant to its terms.[106]

b. Availability of the Nonstatutory Labor Exemption to Management

While generally it is true that the labor exemption applies to unions rather than employers, the United States Supreme Court has held that separate employers in the same industry may bargain together as a unit and present common proposals, just as individual employees can bargain together in a union.[107] The rationale supporting this position in professional sports is that it would be unfair to permit Player's Associations to give the appearance of accepting certain proposals made by team owners in exchange to concessions by team owners on other issues, and then subsequently allow Player's Associations to challenge the legality of the proposals team owners thought had been accepted. Thus, it has been suggested[108] that collective bargaining agreements are exempt from antitrust challenge, regardless of which side initiates the challenge.[109]

Because the antitrust laws are silent as to whether the labor exemption extends to the acts of team owners, the courts, for the most part, have had to deal with this issue on a case by case basis. To the extent that guiding principles have emerged from the decisional law in this area, the *Philadelphia Hockey Case*[110] states them most clearly.

In that case, Judge Higgenbotham followed the rationale of *Allen Bradley*[111] and rejected the National Hockey League's attempt to employ the labor exemption to immunize league practices, including its reserve system, from antitrust scrutiny. The nonstatutory labor exemption was held to immunize from the scope of the antitrust scrutiny only challenged league practices which were the direct by-product of good faith, collective bargaining

103. U.S. CONST. amend I.
104. U.S. CONST. amend IV.
105. *See, Philadelphia World Hockey Club, Inc., v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972), *discussed at* notes 109-12 *infra*.
106. 14, 15 Williston, Contracts § 1628-1664, 1747-1792 (3d ed. 1957); 6A Corbin, Contracts § 1373-1378, 1397-1403, 1414-1420 (2d ed. 1962).
107. NLRB v. TRUCK DRIVER'S UNION, 353 U.S. 87 (1957).
108. *See*, Jacobs & Winter, *supra* note 92, at 27.
109. *Cf.* notes 110-13 & accompanying text *infra*.
110. *Philadelphia World Hockey Club v. Philadelphia Hockey Club*, 351 F. Supp. 462 (E.D. Pa. 1972).
111. *Id.* at 499.

negotiations between union and management representatives.[112] Accordingly, the NHL could not wield the labor exemption sword to engage in monopolistices or other anticompetitive conduct.[113] As the Court stated in United States v. Women's Sportswear Mfg. Ass'n., "The shield cannot be transmuted into a sword and still permit the beneficiary to invoke the narrowly carved out labor exemption from the antitrust laws."[114]

Indeed, *Philadelphia Hockey* suggests that the labor exemption is not applicable to either the NFL or NBA draft systems, because in both cases player associations aided non-labor groups, (management and team owners), to create business monopolies to control the marketing of undrafted or drafted rookie athletes. The protection offered by the nonstatutory labor exemption may be collaterally or derivatively afforded to management or employers only (if at all) where they act jointly with labor organizations during bona fide collective bargaining negotiations and where those negotiations relate to wages, hours, and other terms and conditions of employment. Of course, this means little to a draftee or potential, since he is neither an employee nor a union member.

3. *Agreements that Violate the Antitrust Laws*

Certain principles can be deduced from the foregoing decisions seeking to accomodate the competing interests of the labor and antitrust laws. First, "benefits to organized labor cannot be used as a cat's paw to pull employer's chestnuts out of the antitrust fires."[115] In other words, just because certain matters are products of the collective bargaining process does not necessarily render the antitrust laws inapplicable. Second, it is highly doubtful whether an illegal agreement can be protected merely because it is negotiated into a collective bargaining agreement.[116] Finally, there are limits on what labor and management can agree to.[117]

The preceding section raises serious doubts as to whether the nonstatutory labor exemption is available to shield the current draft systems from tenable antitrust attacks. The issue becomes, then, to what extent the nonstatutory labor exemption applies and the extent to which Player Associations and team owners can, as to third parties, permissably agree to circumvent the antitrust laws. In attempting to resolve this matter,[118] the Court held, in *Mackey v. National Football League*,[119] that a collective bargaining agreement might be immunized from antitrust attack where the party claiming the exemption demonstrated (1) that the challenged practice was a mandatory subject of collective bargaining,[120] (2) that the agreement

112. *Id.* at 500.
113. *Id.*
114. *United States v. Women's Sportswear Mfg. Ass'n.*, 336 U.S. 460, 464 (1949).
115. *Id.*
116. *See* notes 81-91 and accompanying text *supra*.
117. *See, e.g.*, 543 F.2d 606 (1976).
118. Mandatory subjects of collective bargaining are those that relate "to wages, hours and other terms and conditions of employment." *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958). The subjects which are mandatory are chronicled and discussed in C. MORRIS, THE DEVELOPING LABOR LAW, 389-424 (1970).
119. 543 F.2d at 606, 614.
120. The lack of clear cut standards for the courts to follow in the area of antitrust law is itself a reflection of the continuing tension between the *rule of reason* approach to case analysis and the

was the product of bona fide arm's-length negotiations, and (3) that the restraints on trade affected only the parties to the collective bargaining relationship.[121] In the absence of new case law, legality of the current player draft systems must be examined *vis-a-vis* this three-pronged standard.[122]

a. The Three-Pronged Test

Section 8(d) of the National Labor Relations Act requires "the employer and the representative of the employees to . . . confer in good faith with respect to wages, hours, and other terms and conditions of employment."[123] Those specified items are mandatory subjects of collective bargaining. A party who refuses to negotiate regarding those matters commits an "unfair labor practice."[124]

There is no consensus about whether the amateur player draft is a mandatory subject of collective bargaining. Clearly though, unions and employers cannot bargain as to every issue that might potentially interest them under the guise that it relates to the "terms and conditions of employment."[125] In fact, practices or provisions which vitally affect the terms and conditions of present workers' employment are not necessarily mandatory subjects of bargaining.[126] Admittedly, the player draft can directly affect the wages, hours and terms and conditions of employment of the drafted athlete. Accordingly, the real issue is whether it is proper for parties that do not represent the interests of potential professional athletes and draftees to negotiage an agreement which includes a system limiting where and how they can work.

In view of the potential draftee or draftee's conspicuous absence from the bargaining table, neither the Player Associations nor the team owners can contend that the player draft affects only the parties to the agreement. The fact that the draft affects individuals who were not party to the collective bargaining negotiations indicates that the new agreements do not meet the third component of the *Mackey* test. In addition, since the Player Associations cannot negotiate on behalf of parties that they do not represent, the second element of the *Mackey* test also is not met.

b. Duty of Fair Representation

Even if a court were to find that the new collective bargaining agreements meet the *Mackey* test as to draftees and potential draftees, it is still

expanding *per se* concept. The amateur player draft seems readily susceptible to condemnation as a group boycott based on the concerted refusal of teams owners with amateur athletes, except through uniform restrictive practices. As a control mechanism, the amateur player draft seems analogous to price-fixing devices condemned as *per se* violations of the antitrust laws because it allows competing teams to eliminate competition in the hiring of players and invariably lowers the cost of doing business.

121. 29 U.S.C. § 158(d) (1970).

122. *Id.*

123. *See, e.g., Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964).

124. In *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), the bargaining unit for current employees had sought to negotiate certain insurance benefits for retired workers. The Court held that former employees' benefits were not "terms and conditions" of present workers' employment. *Id.* at 180-82.

125. *Steele v. Louisville and Nashville Railroad Co.*, 323 U.S. 192, 202 (1944).

126. 386 U.S. 171 (1967).

possible that the agreements would be subject to attack on the grounds that the Player Associations failed to fulfill their duty of fair representation. The duty of fair representation requires that a labor organization represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents.[127]

The United States Supreme Court has defined breach of the duty of fair representation as "a union's conduct toward a member of the collective bargaining unit [which] is arbitrary, discriminatory, or in bad faith."[128] The duty requires unions to act with "complete good faith and honesty"[129] and without "hostility, discrimination, arbitrariness or capriciousness toward any."[130] But even a union which acts "without any hostile motive and in complete good faith"[131] may still breach its duty by pursuing a "course of action or inaction which is so unreasonable or arbitrary" as to constitute a violation.[132]

The duty also includes an obligation of "honest disclosure" especially when the union is the exclusive agent of two or more groups with potentially, if not inevitably, conflicting interests.[133] A union's attempt to reconcile the interests of two competing groups of employees concerning a single contract issue may lead to a breach of the duty because the union's motives in reaching a particular settlement were political (i.e., with an eye toward

127. *Id.* at 203.

128. *See, Local 1367, Int'l Longshoremen's Ass'n (Galveston Maritime Ass'n)*, 148 NLRB 897, 899-900, 57 LRRM 1083 (1964), *enforced*, 368 F. 2d 1010, 63 LRRM 2559 (5th Cir. 1966):

> Because collective bargaining agreements which discriminate invidiously are not lawful under the Act, the good faith requirements of Section 8(d) necessarily protect employees from infringement of their rights; and both unions and employers are enjoined by the Act from entering into contractual terms which offend such rights . . . . Section 8(d) cannot mean that a union can be exercising good faith toward an employer while simultaneously acting in bad faith toward employees in regard to the same matters. . .

129. *See, Meat Cutters Union (Great Atlantic & Pac. Tea Co.)*, 81 NLRB 1052, 1061, 23 LRRM 1464 (1949), where the Board declared:

> [T]he duty to bargain, which rests alike upon the employer and the representative of the employees, involves the obligation to bargain in good faith concerning terms and conditions of employment which are permitted by law. Neither party may require that the other agree to contract provisions which are unlawful. And when . . . one of the parties creates a bargaining impasse by insisting, not in good faith, that the other agree to an unlawful condition of employment, that party has violated its statutory duty to bargain.

130. *Bond v. Teamsters Local 823*, 521 F. 2d 5 (8th Cir. 1975) (union must act "in good faith, earnestly and not perfunctorily, without arbitrary or unreasonable discrimination").

131. *Griffin v. Automobile Workers*, 469 F. 2d 181 (4th Cir. 1972) (duty may be breached by actions which are merely arbitrary, and without bad faith, deceitful or dishonest conduct); *Ruzicka v. General Motors Corp.*, 523 F. 2d 306 (6th Cir. 1975) ("Union action which is arbitrary or discriminatory need not be motivated by bad faith to amount to unfair representation").

132. *Knoll v. Phoenix Steel Corp.*, 325 F. Supp. 666 (E.D. Pa. 1971), *affirmed*, 465 F.2d 1128, *cert. denied* 409 U.S. 1126 (1973). Failure to keep the membership informed regarding negotiations and failure to obtain settlement desired by members is a breach of the duty of fair representation.

133. *Barton Brands Ltd.*, 213 NLRB No. 71, 87 LRRM 1231 (1974) (finding that union's action was politically motivated to aid union offical and not an attempt to reconcile competing employee interests), *reversed in part and remanded*, 91 LRRM 2241 (7th Cir. 1976) (although Board incorrectly found that union's action was to advance career of union official, "the Board should consider that in order to be absolved of liability, the Union must show some objective justification for its conduct beyond that of placating the desires of the majority of the unit employees at the expense of the minority"). The Seventh Circuit held that even if the union acted in good faith it may still have breached its duty by siding with one group of employees. *Contra, Brauer v. IBEW, Local 45*, 86 LRRM 2390 (C.D. Cal. 1973).

maintaining intra-union power and vested employee benefits, or merely to satisfy the majority of the affected employees).[134] At those times, the most prudent course for the union to follow is one of neutrality between the two competing groups of its members.[135]

Analyzing the current NFL and NBA Collective Bargaining Agreements according to these standards (i.e., duties of fair representation and full disclosure), it is doubtful whether potential or actual draftees were, or could be, adequately and fairly represented by the Player Associations. Of primary import is the fact that such persons had no voice in the determination or election of the collective bargaining unit representatives who negotiated the NFL and NBA agreements. National labor policy demands that the collective bargaining representatives negotiate only for those parties they in fact represent.[136] Accordingly, neither the owners nor the Player Associations are empowered to automatically bind non-parties in their collective bargaining agreements.[137]

Assuming *arguendo*, though, that the Player Associations do in fact represent[138] past, present and prospective employees, the unions would still have to prove that they bargained in good faith on behalf of and fairly represented the interests of potential or actual draftees during all stages of negotiations with the owners. This would be a hard burden of proof for the Associations to meet in view of the fact that potential or actual draftees benefited little from what was negotiated, they did not receive the employment and pension guarantees or the individual settlement payments in satisfaction of past antitrust violations that the veteran athletes did under the current NFL and NBA agreements.[139] Such unfairness should not be surprising because, neither the team owners nor the veteran players represented by the Player Associations could allow potential or actual draftees a voice or a vote when they represented the major bargaining power at each side's disposal.

The real nature of the Player Associations' violation is not simply that potential or actual draftees were not allowed to share in any of the substantial settlement benefits received by veteran professional athletes. Rather, the major crux of the probable breach is that the Player Associations, in spite of

134. *Morris v. Werner - Continental, Inc.*, 78 LRRM 2654 (S.D. Ohio, 1971).

135. *Minnesota Mining and Manufacturing Co. v. NLRB*, 415 F.2d 174, 176 (8th Cir. 1969).

136. *NLRB v. Local 19, International Brotherhood of Longshoremen*, 286 F.2d 661, 664 (7th Cir.), *cert. denied* 368 U.S. 920 (1961).

137. Of professional sports Players' Associations, only the NFL Player's Association (NFLPA) has been officially certified by the National Labor Relations Board to act as an exclusive bargaining representative in negotiations with management.

138. *See, e.g.*, the Stipulation and Settlement Agreement to the NFL Collective Bargaining Agreement of 1977.

During the three years that it took to reach the current NFL Collective Bargaining Agreements, membership in the NFLPA fell dramatically. With a shortage of both members and funds, the union was in imminent danger of failure. *See*, Chass, *The Struggle For Freedom, Peterson's 17th Pro Football Annual 1977*, at 9. *See also*, Maher, *The Final Days: Pro Football's Countdown to Peace, Los Angeles Times*, March 9, 1977 § 3 at 1, cols. 4-6. Article IV of the collective bargaining agreement rescued the NFLPA from the brink of failure. *See, Article IV, § 1-4 of the NFL Collective Bargaining Agreement of 1977*. Entitled "Union Security" the article created an "agency slop" for professional football. The article requires all NFL players to pay union dues, even if they choose not to join the NFLPA. This assures the NFLPA's financial security regardless of how many active members it actually has.

139. *See* note 7 and accompanying text *supra*.

an inevitable conflict, discriminated against the new work forces by sacrificing their right to freedom of contract. They also failed to provide identifiable representatives of amateur athletes advance notice and opportunity for input concerning the applicable subjects of negotiation, including an opportunity to opt in or out of the draft schemes. The Player Associations agreed with the team owners to limit the drafting team's exclusive control over the draft choice to a period of at least twelve months in return for increased pension benefits and job security for veteran athletes. Regardless of the Player Associations' motives in reaching the current agreements, they obviously breached any duty which they owed to draftees by not maintaining a neutral posture throughout with respect to those subjects that affect them.

D. *The Presence of an Antitrust Violation*

Given the position that there is nothing to immunize the draft from antitrust attack, the ultimate matter to consider is whether the current draft systems, in fact, violate the antitrust laws.

1. The Nature of the Substantive Violation

The legality of the amateur player draft has been challenged in actual litigation far less often than the legality of the reserve clause and option systems. This fact is explained in several ways. First, the draft's impact is felt only once in the average athlete's professional career, at the moment of transition from amateur to professional. Second, the point in an athlete's career where the draft has impact is the point at which an athlete is likely to object because he is so eager to begin his professional career and may not be sophisticated enough to understand the draft's adverse economic and freedom ramifications. Finally, considering the costs and years a lawsuit could take, a potential or actual draftee who chooses to litigate would probably have to forego altogether his professional athletic career.[140]

Despite a lack of direct case authority, analogous cases indicate that the current player draft systems like the reserve clause and option rules,[141] are illegal. In *Anderson v. Shipowners Association of the Pacific Coast*,[142] the Supreme Court decided that a union hiring system, substantially similar to the current NFL and NBA amateur player draft systems, violated the antitrust laws.[143] Members of a shipowners association, owned, operated and controlled substantially all merchant vessels registered in the United States engaged in interstate and foreign commerce from Pacific Coast ports. The association maintained offices in San Francisco and San Pedro where every seaman who sought employment on ships that belonged to members was required to register. Upon registration, the seamen were given numbers which established the order in which they were to be offered employment. Association regulations required each seaman to accept the employment he

140. *See* note 48 and accompanying text *supra*.
141. 272 U.S. 359 (1926).
142. *See, e.g., Local 357, International Brotherhood of Teamsters v. NLRB*, 365 U.S. 667 (1961).
143. 272 U.S. at 363. The Court observed:
"A restraint on interstate commerce cannot be justified by the fact that the object of the participants in the combination was to benefit themselves in a way which might have been unobjectionable in the absence of some restraint."

was offered, or none at all, without regard to whether or not the particular assignment was suited to his qualifications, and without regard to whether or not the seaman desired to work on the particular ship offered. A seaman brought suit to enjoin the continued use of this hiring system and the United States Supreme Court ruled that the effect of this system was precisely that which the Sherman Act condemned.[144]

While it is true that the precedential strength of the holding in *Anderson* has been eroded by subsequent cases which have generally upheld the use of the hiring hall precedures, still the reasoning of the Court in *Anderson* disputes the analogy that some have made between apprentices and first-year professional athletes.[145] In a hiring hall, theoretically all union members, possess equal skills and potential and therefore receive equal pay. But, while union employees may perform identical functions for an extended period during their working careers, the same is not true of uniquely skilled professional athletes.[146] Can one really imagine a defensive lineman successfully switching to quarterback or O.J. Simpson's playing fullback in the NFL until age 65? The nature of professional sports draft systems is therefore, somewhat incompatible with uniform employee hiring standards. As a result, a more appropriate hiring analogy might be drawn between the uniquely talented entertainer and the uniquely skilled athlete.[147] The Screen Actors' Guild has, in fact, negotiated collective bargaining agreements embodying these unique work skill features with each of the major studios and production companies. In contast to the current NFL and NBA collective bargaining agreements, the actors' agreements leave both new and experienced actors, free to seek and accept employment from whomever

144. *See, e.g., Local 357, International Brotherhood of Teamsters v. NLRB*, 365 U.S. 667 (1961).

145. *See* Lowell, *Collective Bargaining and the Professional Team Sports Industry*, 38 L. and Contemp. Prob. 3 (1973).

The basic function of the hiring hall is to eliminate wasteful, time-consuming, and repetitive scouting for jobs by individual workmen, as well as haphazard and uneconomical searches by employers, by performing what amounts to a clearing house function for a particular labor market. The rules which presently cover such arrangements were first set out in Local 357, International Brotherhood of Teamsters v. NLRB, 365 U.S. 667 (1961), where the Court held that hiring hall arrangements were improper only where they operated in a discriminatory manner at the expense of non-union members.

Like the amateur player draft systems, the hiring hall is simply one means of accomplishing the desired result of allocating employees at the least cost and effort to the employer. The hiring hall is, of course, distinguishable from the player draft to the extent that in the hiring hall the employee may accept or reject the job to which he is referred, whereas the amateur player draft is a "mandatory arrangement" in which the player has no choice.

146. Typical of the "Player Representation of Ability" clauses is the one contained in § 4(a) of the National League of Professional Baseball Clubs Uniform Player's Contract:

> The Player represents and agrees that he has exceptional and unique skill and ability as a baseball player; that his services to be rendered hereunder are of a special, unusual and extraordinary character which gives them peculiar value which cannot be reasonably or adequately compensated for in damages at law, and that the Player's breach of this contract will cause the Club great and irreparable injury and damage. The Player agrees that, in addition to other remedies, the Club shall be entitled to injunctive and other equitable relief to prevent a breach of this contract by the Player, including, among others, the right to enjoin the Player from playing baseball for any other person or organization during the term of his contract.

147. *See* K. MACGOWAN, BEHIND THE SCREEN: THE HISTORY AND TECHNIQUE OF THE MOTION PICTURE (1965).

they choose.[148]

The first judicial discussion of the amateur player draft system in professional sports occurred in a preliminary phase of the celebrated *Spencer Haywood Case*.[149] In that case, Spencer Haywood challenged the NBA's four year eligibility rule, as well as its player draft procedure in general. In granting Haywood motion for a preliminary injunction, the Court stated that there was a substantial probability that the so-called college draft system constituted a violation of the antitrust laws, because it eliminated all competition among teams for players and imposed arbitrary and unreasonable restraints upon the rights of potential NBA players to negotiate freely for their services with NBA teams.[150]

Because the *Spencer Haywood Case* was settled out of court, it did not produce a final decision on the legality of the NBA's draft system. Subsequently, though, both the NFL and NBA player draft systems were held illegal in *Robertson v. National Basketball Association*,[151] and *Smith v. Pro-Football*.[152]

In *Robertson*, the player representatives of each NBA team filed a class action suit on behalf of all NBA players to block the threat of Congressional

148. For an excellent discussion of the subject see Johnson, *Law of Sports: The Unique Performer's Contract and the Antitrust Laws*, 2 Antitrust Bull. 251 (1957).

149. Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971).

Since Spencer Haywood's college class at the University of Detroit had not yet graduated, he was not, according to the NBA draft eligibility requirements, qualified to be selected to play in that league. From early in the ABA inception, it had conducted a hardship draft; and it was under the aegis of that provision that Haywood signed a contract to play with the Denver Rockets in 1969 at the conclusion of his sophomore year in college. His successful first season led to a renegotiation of his contract. Much of the promised compensation in the newly negotiated contract, however, ultimately proved to be illusory. When the Rockets refused to guarantee payment of the $1.9 million that Haywood though he was entitled to receive under the contract, he sought to break the contract in court, arguing that the Rockets had misrepresented the terms and conditions of the contract to him.

After successfully breaking the contract with the Rockets, Haywood signed a six year contract with the Seattle Super-Sonics of the NBA for $1.5 million in cash. Haywood's signing precipitated problems, though, because the NBA By-laws required that the Commissioner approve each player contract. Walter Kennedy, then the Commissioner of the NBA, refused to approve Haywood's contract because, under the NBA By-laws, Haywood was ineligible to play in the NBA until four years had elpased since his graduation from high school and because the NBA's four-year rule did not contain a hardship exemption. Kennedy's refusal caused Haywood to seek a preliminary injunction barring the NBA from interfering with his employment by the Super-Sonics.

150. *Id.* at 1056.

In reaching his decision, Judge Ferguson noted that the four-year rule prevented professional quality basketball players from entering into contracts with NBA teams until four years after their graduation from high school, even though they may not have wanted to attend college, may not have been eligible to attend college, may not have wanted to participate in inter-collegiate sports and may not have been eligible to participate in them. The rule thus constituted a concerted refusal by all NBA teams to deal with a certain group of basketball players, and was tantamount to a group boycott prohibited by the Sherman Act.

For detailed discussions of the *Spencer Haywood Case* see W. LIBBY and S. HAYWOOD, STAND UP FOR SOMETHING: THE SPENCER HAYWOOD STORY (1972); Simon, *The First Great Leap: Some Reflections on the Spencer Haywood Case*, 48 L.A. B. Bull. 149 (1973); Note, *Procedural Safeguard Requirements in Concerted Refusals to Deal: An Application to Professional Sports*, 10 S.D. L. Rev. 413 (1973).

151. 389 F. Supp. 867 (S.D.N.Y. 1975).

152. 420 F. Supp. 738 (D.D.C. 1976).

approval of the Basketball Merger Bill.[153] The suit alleged that a merger would create a monopoly in violation of the Sherman Act. The action also sought to bar the continued use of the player draft system and reserve clause or option system on the ground that they served to restrain trade in violation of the antitrust laws. In February of 1975, District Judge Carter denied the NBA's motion for summary judgment which sought, in effect, judicial approval of the league's restrictive practices, stating:

> Among the practices which have been declared *per se* violations of the Sherman Act are horizontal price fixing at the same level of competition . . . ; territorial divisions of markets . . . ; and secondary or group boycotts . . . . The player draft and perpetual reserve system are readily susceptible to condemnation as group boycotts based on the NBA's concerted refusal to deal with the players save through these uniform restrictive practices . . . . The two control mechanisms are also analogous to price fixing devices condemned as *per se* violative of the Sherman Act, for the draft and a perpetual reserve system allow competing teams to eliminate competition in the hiring of players and invariably lower the cost of doing business . . . . In addition, the player draft and a perpetual reserve system can be viewed as devices creating illegal horizontal territorial allocations and product market divisions.[154]

In *Smith v. Pro-Football*[155] the NFL amateur player draft in which the plaintiff was selected was held to constitute a *per se* violation of the antitrust laws.[156] In addition to his contention that the amateur player draft system constituted a group boycott under the antitrust laws, Smith alleged that it precluded him from negotiating a contract that reflected the free market value of his services or that contained adequate guarantees against loss of earnings in the event of his injury. In holding that Smith's contentions must prevail, District Court Judge Bryant stated:

> [T]he owners of the teams have agreed among themselves that the right to negotiage with each top quality graduating college athlete will be allocated to one team and that no other team will deal with that person. This outright, undisguised refusal to deal constitutes a group boycott in its classic and most pernicious form, a device which has long been condemned as a *per se* violation of the antitrust laws.[157]

Smith and *Robertson* make it clear that the old amateur player draft systems were more restrictive than necessary. As a result, the overall salaries paid by each club to first-year amateur athletes tended to be significantly lower than if less restrictive and more reasonable competitive bidding arrangements had prevailed. In addition, because the exclusive signing rights provided by the old player draft systems were unlimited in duration, the

153. *Hearings on* S.2373 *Before the Subcomm. on Antitrust and Monopoly of the Sen. Comm. on the Judiciary*, 92d Cong., 1st Sess. 12 (1971).

154. Robertson v. National Basketball Ass'n, 389 F. Supp. 867, 893 (S.D.N.Y. 1975).

155. Smith v. Pro-Football, 420 F. Supp. 738, 744 (D.D.C. 1976).

156. *Id.* at 744.

The plaintiff, James McCoy (Yazoo) Smith, was the first round draft choice of the Washington Redskins and the twelfth player selected overall in the league's annual amateur player draft in January 1968. It was expected that Smith would be one of the finest defensive backs ever to play professional football. *Id.* at 740. Unfortunately, Smith's career was abruptly terminated when he suffered a serious neck injury in the final regular season game in 1968.

157. *Id.* at 744.

ability of draftable athletes to sell their services to the employer of their choice was perpetually restricted.

As to the latter point, it is clear that it is not enough for the courts to focus opinions solely on the longevity of the transgression, while ignoring or excusing the unconscionable result of such selection systems—the continuing unduly restrictive limitations on the free market rights of potential professional athletes.

2. *The Legality of the Current Amateur Player Draft Systems*

Analyzing the current NBA and NFL player draft systems under the principles of the foregoing cases, it is probable that neither system would survive a prospective professional athlete's antitrust challenge. Each is still designed to restrain unduly the athlete's freedom to negotiate and is designed to stabilize the salary of such athletes at a level unquestionably lower than that which would exist in a free market. Viewed strictly in terms of harmony with the antitrust laws, the current player draft systems like a group boycott, constitute an unreasonable restraint of trade because they limit the right of the potential professional athlete to engage freely in his occupation. The systems substantially force the athlete to accept the contract of employment and the salary offered by the team that drafts him, if he hopes to play immediately. The new systems result from agreements among the competitive units in (the individual teams) the league not to compete in a specified market (new players). Each team is now given the exclusive right, for at least one year, to negotiate with and sign the players it drafts. The current systems are laudible in that, because the perpetual nature of the past systems is reduced to one year, the systems still eliminate competition among team owners for the services of the new talent and effectively destroy whatever bargaining power the athlete might have wielded. Thus, the prospective professional athlete is still faced with concerted refusal to deal for his services, unless he tends to deal in the manner prescribed by league rules, rules he did not propose or vote for and which do not represent his interests.

For the potential or actual draftee, the current systems possess the same infirmities as the old, which were held to violate the antitrust laws. Notwithstanding the "bootstrap" contentions of team owners and some Player Association officials to the contrary, the mere fact that the current drafts were fashioned through the collective bargaining process does not suffice to cure them of their inherent illegality.

III. A Modest Proposal

A. Introduction

Both in theory and in practice, the player draft system and the mandatory option year clause, still perpetuated by various provisions of the current Collective Bargaining Agreements in professional football and basketball, unreasonably deprive the draftee of the right to sell his unique skills and talents in a free market. Therefore, in proposing a player draft system that should survive antitrust and constitutional attacks, two paramount considerations must be weighed and respected: first, professional sports organizations want and need to acquire new talent in a systematic way; second,

draftees want to perform in a substantially stable and rewarding environment. Whatever process is used to integrate new talent into professional sports must simultaneously promote significant contractual freedom for the draftee and provide procedural security for the employers who draft and attempt to sign new talents.

The first step toward this end is the creation of a permanent bargaining unit which represents only the rights and interests of the potential draftees.[158] As previously noted, the current draft systems remain offensive to potential draftees and amateur athletes because each system resulted from collective bargaining regulations in which there was no entity representing their interests, nor did they have any opportunity to be heard during the negotiations. The formation of a separate bargaining representative for potential draftees would solve the lack of representation problem.

The second step is the establishment of an amateur player draft system that significantly models itself, at least temporarily, after the selection patterns of professional baseball's amateur draft system. Under that system,[159] the amateur baseball player has the opportunity to be placed in two successive draft pools per year, assuming he does not sign a contract with the single team that drafts him in that particular year's initial draft. The initial team may not re-select that unsigned player in the subsequent draft which occurs approximately six months after the initial draft. Thus, a drafting team's exclusive signing right to a drafted player expires after approximately six months, and the player is then able to be drafted by another team. No compensation, i.e. money, draft choices or veteran players, would be available for the team whose exclusive signing right expires without it having signed the drafted player to a contract.[160]

B. *Draft Proposal In Operation—Professional Football*

An eight round[161] player draft would be conducted on or about February 1st each year. The normal draft rules regarding the right to select, order

158. Since amateur athletes are a group identifiably different from the veteran players, it is the authors' contention that they require separate bargaining representatives to ensure that their interests are adequately represented.

159. Cf. footnote 12, *supra*.

160. *See*, Klein, *Yankee Haters Awakening*, *Wall St. J.*, May 24, 1977, at 22, col. 5. With respect to this matter Klein observed:

> It's hard to quarrel with free-agentry on anything approaching rational grounds. The big salaries that some players have obtained as a result of it are comparable to those of other individuals who perform in public, and what American can object to the principle that a person can work for whomever he chooses? If any of us were told that we'd have to work for a company until it decided to release us or handed over our contract to another firm — the situation that used to exist in baseball — we'd be on the phone to our lawyers in a minute.

161. For the athlete who is drafted in the later rounds of the amateur player draft, there is little, if any, bargaining power. The reason for this lack of bargaining power is that the best amateur athletes are usually taken in the early rounds of the draft. Those players chosen later in the draft do not usually have the same reputation, and are those whom the teams hope will exhibit ability which was not so clearly shown in college level competition.

The professional team is in a position of being able to dictate terms to these later draftees. Under a more limited amateur player draft system these remaining players could become "free agents" and make their own bargains. Since the farther down the list a player is drafted, the less are his chances of remaining with the drafting team, a limited amateur player draft system would not represent a great loss to most teams. In addition, weaker teams would benefit by this rule

of choosing, and the transferability of draft rights as consideration for other intra-team transactions would continue in effect. The drafting team would maintain the exclusive right to sign each draftee until the following April 16th. If the team and draftee did not negotiate and reach agreement on a contract by midnight of that date, the drafting team would relinquish all rights it possessed relative to the drafted player and player's name would return to the pool of eligible players for the second draft. The second draft would be held on or about April 20th and any player selected in the second draft would be subject, through July 1st, to the exclusive signing rights of the team that drafts him on or about April 20th. If the player and second team that drafts him are unable to agree on a contract, the player would be required to sit out the next succeeding NFL season and at the conclusion of that season's Super Bowl Game, the player would become a free agent. Thereafter, he could deal with the NFL club or clubs of his choice. Neither of the two teams that drafted him in the preceding year would be entitled to any form of compensation as a result of the player's signing with any other club after having sat out the season.

C. *Draft Proposal In Operation—Professional Basketball*

The existing method of determining the cessation of the draft mechanism in professional basketball—once enough teams have resigned from participating in the process—would be retained. Also retained would be the rules regarding right to select, order of choosing, and the transferability of draft rights. The date of the initial draft would be on or about May 20th and the exclusive signing rights period resulting from drafting a player in the initial draft phase would last through and including July 10th each year. A subsequent draft would occur on or about July 15th and the rights obtained by drafting the player in the subsequent draft would expire on or about September 1st. A player selected in each phase of any year's amateur player drafts who did not agree to a contract with either of the teams drafting him would have to sit out the ensuing NBA season. At the conclusion of the playoff series for that NBA season, that player would become a free agent able to deal with the NBA clubs of his choice. Again, neither of the two teams that drafted him would be entitled to any form of compensation as a result of the player's signing with another club after having sat out the season.

D. *Amplification and Overview*

If an amateur player is not drafted in the initial draft or is drafted in the initial draft, but fails to execute a contract with the drafting team and is not drafted in the subsequent draft, that player would become a free agent able to deal with any professional sports clubs effective the first day following the date of the draft in which he was not selected. No team that had previously drafted the player would be entitled to any form of compensation on the occasion of the player's signing with another team.

Hand in hand with the "new" systems would be the establishment of a

because an undrafted player would most likely sign with a team which presents him with the best opportunity to make the team and play.

collective bargaining unit for the potential draftee and amateur athletes. This unit would assure for the first time the protection and representations of the interests of potential draftees during any collective bargaining sessions. It would also provide on an ongoing basis, important education and other services to potential draftees—e.g., at the high school and/or college level—services that are currently virtually nonexistent. Funding for the bargaining unit could be derived from the assessment of a reasonable amount which would be payable by the draftee during his first season in professional sports, as well as from annual grants from those entities which have benefited financially in the past from the athletic performances of these athletes—the respective universities or colleges attended by the athletes, the National Collegiate Athletic Association, and, to a lesser degree, the National Association of Intercollegiate Athletics.

The proposed draft systems retain most of those elements traditionally required by professional sports teams in the draft process: right to select, order of choice, exclusive signing rights, and transferability of draft rights. For the potential draftee, the proposed draft system would (1) guarantee that only the most reasonable restrictions are imposed on his ability to market his skills freely; (2) reduce to a reasonable figure, the amount of time during which his skills must remain dormant if he is unable to come to terms with the team or teams that draft him; and, (3) provide up to two, separate opportunities, if the athlete is selected in the initial and subsequent drafts, to negotiate with teams prior to the commencement of training camp for the professional season immediately preceding the athlete's becoming eligible to play his chosen sport professionally.

The proposed systems impose burdens on first year athletes and management, but do not impair either new talent or clubs to the extent that the draft systems currently operating in the NBA and NFL do. Therefore, the proposed systems, if examined judicially, would tend to best survive antitrust or constitutional attacks.

Finally, the proposed systems would encourage that team management and draftees pursue the business of contract negotiation sooner rather than later. Both the past and current draft systems have tended to involve needlessly protected, expensive, and often vituperative negotations. These factors do not lead to the development of a healthy employer-employee relationship and should therefore be reduced or eliminated. The draft systems proposed herein would eradicate such negative factors.

CONCLUSION

It has been demonstrated that the current player draft systems in the NFL and NBA remain subject to viable antitrust attacks. Moreover, serious constitutional objections can be raised.[162]

162. *See generally*, PRO SPORTS: THE CONTRACT GAME, *supra* note at 3:

> No one would begin to tell a doctor or a lawyer where he may work, but it happens every day to a pro-athlete. If an executive of a large company is asked to move to another city, he has the right to refuse or to seek similar employment with a competitor. The pro-athlete does not have the right of refusal. *See also*, Shapiro, *Professional Athletes: Liberty or Peonage?*, 13 Alberta L. Rev. 212 (1975). In any other situation such unconsented and compelled job placement, and perpetual restraints on job mobility would be regarded as

The solution proposed by the authors is not intended to so dramatically shift the bargaining power or relative negotiating positions and strengths of any party that chaos and panic result in the new talent segment of the professional sports market. Instead, the proposal seeks to give each party a fairer opportunity to pursue and protect vital interests and rights important to each.

The professional sports industry should be no different from any other business or industry.[163] Like other enterprises in our free enterprise system, professional sports organizations should not be unduly protected, indulged or pampered in the area of hiring and selecting a new work force. Nor should professional sports organizations be permitted unilaterally to impose unduly restrictive procedural guidelines, other than skill or talent, for admission into its industry.[164]

Yet some reasonable amount of protection must be accorded to the in-

unreasonable, and violative both of one's constitutional guarantees and the antitrust laws. *See* U.S. CONST. amends. V and XIV; 15 U.S.C. § 1 et. seq. (1970).

163. Freedom of choice is the foundation of American democracy. Among the liberties granted by the United States Constitution is freedom of contract and the guarantee that no person shall be deprived of life, liberty or property, without due process of law. Freedom of contract, constitutionally stated and as reflected in our capitalistic economic system, is the right of the individual to negotiate a contract with anyone who desires to purchase his services and, to sell his skills to the highest bidder in the free market.

In Allgeyer v. Louisiana, 165 U.S. 578 (1897), the Supreme Court comprehensively discussed the liberty of freedom of contract guaranteed by due process of law. Liberty, said the Court, included:

> . . . not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion, the purposes above mentioned. 165 U.S. at 589.

Not a single first year athlete in professional sports, regardless of the purportedly high salaries enjoyed by a few of them, currently enjoys these constitutional liberties.

164. In this regard, Senator Sam J. Ervin, Jr., (D-N.C.) during the hearings on the Basketball Merger Bill, said that the amateur player draft denies graduating collegians fundamental constitutional rights and is "comparable to the newspaper profession deciding that a college journalism graduate could either work for the newspaper in Anchorage, Alaska at the salary offered or not at all." *Hearings on S.2373 before the Subcomm. on Antitrust and Monopoly of the Sen. Comm. on the Judiciary*, 92d Cong., 1st Sess. 15 (1971).

At an earlier stage of the proceedings Senator Ervin observed:

> Many years ago the term chattel was used to denote the legal status of slaves. That is, they were considered a type of chattel which was owned as a piece of furniture or livestock was owned. This use of the term chattel applied to human beings and the condition it stands for are so abhorrent that we don't even like to acknowledge that they ever existed. Yet, in a real sense that is what these hearings are about today—modern peonage and the giant sports trusts.

Id. at 12.

Senator Ervin's remarks expanded upon the principles originally announced in *Gardella v. Chandler*, 172 F. 2d 402 (2d Cir. 1949). In that case, Judge Frank of the Court of Appeals noted that the effect of baseball's reserve clause:

> ". . . . possesses characteristics shockingly repugnant to moral principles, that at least since the War Between the States, have been basic in America, as shown by the Thirteenth Amendment to the Constitution, condemning 'involuntary servitude.'. . ."

Id. at 409.

Judge Frank, perhaps anticipating that few would feel sympathy for professional sports' "well paid slaves," went on to point out:

> ". . . If the players be regarded as quasi-peons, it is of no moment that they are well paid;

terests and rights of professional sports organizations relative to the orderly process of selecting new talent. The processes proposed above are designed to accord such a fair level of protection while better balancing the respective rights and interests of potential draftees as well as professional sports organizations.

Processes are needed which will ensure that the potential draftee is free to negotiate and not have to negotiage to be free.

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only the totalitarian-minded will believe that high pay excuses virtual slavery." *Id.* at 410.

The ordinary man expects that, with success in his occupation, he can gain an increasing measure of personal and economic freedom. The professional athlete can never realize that hope because he works in a system that temporarily employs, on the average, a labor force that is poorly compensated for the risks taken. Job security and a stable home life are things that few professional athletes will ever know and enjoy. *See generally*, R. BARRY and B. LIBBY, CONFESSIONS OF A BASKETBALL GYPSY: THE RICK BARRY STORY (1972) and D. WOLF, FOUL: THE CONNIE HAWKINS STORY (1972).

Indeed, one commentator after reviewing the cases and the methods by which leagues and owners "chattelize" its players, concluded that the professional athlete is a glaring example of a contemporary slave:

> Although we are willing enough to recognize that the professional athlete serves as a gladiator in modern society, we are reluctant to recognize the incidents of that gladiatorial status. The gladiator was a slave who, until exhaustion or death, was used parasitically by his audience for the excitement that his physical activity provided. Because he was well-fed (for strength), given ungents for his body (for beauty) and cheered as he fought in the arena, it became convenient to pretend that the life of the gladiator was a glorious one, and that a mere slave was fortunate indeed to be admitted into the gladiatorial ranks. Transliteration of the gladiatorial role into its contemporary context in professional athletics is accomplished with striking ease.

Schneiderman, *Professional Sport: Involuntary Servitude and the Popular Will*, 7 Gonz. L. Rev. 63, 81 (1971).