CLARETT V. NATIONAL FOOTBALL LEAGUE

By Jocelyn Sum

Not all of professional sports' hotly contested moments have happened on the playing field. When Maurice Clarett, the star running back at Ohio State University (OSU), announced that he was ready to play in the National Football League (NFL) after only two college football seasons, the NFL eligibility rules ("eligibility rules") were the only obstacle standing in his way of declaring for the 2004 NFL draft. Clarett's lawsuit challenging the validity of the eligibility rules sparked controversies that cut right to the heart of the antitrust and labor laws.

Clarett claimed that the eligibility rules violated antitrust laws by forbidding him to practice and to profit from his calling. In its defense, the NFL claimed that since the labor market for NFL players is organized around a collective bargaining relationship that is provided for and promoted by the federal labor laws, the eligibility rules are immune from antitrust laws. The question, then, was whether a player's right to compete for a position in the NFL overrode the NFL's right to set the terms and conditions of players' employment so long as they arise out of a collective bargaining relationship with the players union. In other words, who wins when antitrust and labor laws collide on the playing field?

This year's *Clarett v. NFL*[1] marked a distinct split between the Second and Eighth Circuits regarding the relationship between antitrust and labor laws as they apply to the eligibility rules. At the district court level, Judge Shira Scheindlin followed an Eighth Circuit test for delineating when a practice falls outside of the labor laws and becomes subject to antitrust scrutiny. Applying this test, she upheld Clarett's claim that the eligibility rules violated the antitrust laws and declared him eligible to participate in the 2004 NFL draft. Given the Second Circuit's strong preference for the application of federal labor law over antitrust law, Judge Scheindlin's ruling was a bold move.

On appeal, however, the appellate court reversed the district court's judgment. Based on its own precedent and the Supreme Court's ruling in *Brown v. Pro Football, Inc.*, the Second Circuit concluded that the antitrust laws should invariably yield to the labor laws in the context of collective bargaining.[2] The NFL, therefore, could impose an eligibility restric-

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1. 369 F.3d 124 (2d Cir. 2004) [hereinafter *Clarett II*].
2. 518 U.S. 231 (1996).

tion on players without the risk of antitrust liability because it arose out of a collective bargaining relationship between the NFL and its players. This disagreement between the district and appellate courts in the *Clarett* case underscores the current split between the Eighth and Second Circuits and the different policy choices they have made in deciding when—if ever—the antitrust laws apply to the labor laws.

This Note explores the dispute over the legality of the eligibility rules in the *Clarett* case in the broader context of the conflict between the Second and Eighth Circuits. Part I reviews the legal background of the case vis-à-vis the antitrust and labor laws, their intersection at the nonstatutory labor exemption, and the evolution of the split between the Second and Eighth Circuits. In Part II, the Note describes the facts and procedural background of the *Clarett* case. Finally, Part III examines the validity of the Second and Eighth Circuit approaches to the scope of the nonstatutory labor exemption in professional sports in light of recent Supreme Court precedent, and argues that the narrower standard espoused by the Eighth Circuit should prevail for policy reasons.

I. LEGAL BACKGROUND

Over the past few decades, federal labor and antitrust laws have frequently clashed in the courts. As a result, the Supreme Court has created a nonstatutory labor exemption that protects certain collective bargaining agreements from antitrust scrutiny. The ongoing questions are when does the exemption apply and for which agreements?

A. Antitrust Law: A Potential Limitation on the Collective Bargaining Relationship

The purpose of federal antitrust law is to prohibit unreasonable restraints on competition.[3] Since section 1 of the Sherman Act, if read literally, would condemn many legitimate and essential business practices,[4] the Supreme Court has interpreted section 1 as prohibiting only unreasonable restraints of trade.[5] Under this "rule of reason" approach, courts addressing antitrust claims have had to expend extensive judicial time and resources in order to determine the reasonableness of an alleged restraint

3. *See* Standard Oil Co. v. United States, 221 U.S. 1, 58-60 (1911).

4. *See* 15 U.S.C. § 1 (2000) (providing that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."); *see also* LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 165-166 (1977) (virtually any type of contract will restrain trade in some way).

5. *See Standard Oil*, 221 U.S. at 58-60.

of trade.[6] The exhaustive analysis requires the court to consider the history, purpose and effect of the restraint;[7] the existence of less restrictive alternatives to achieve legitimate, pro-competitive objectives;[8] and the balance of procompetitive and anticompetitive effects.[9]

Though the rule of reason generally governs antitrust claims, the Supreme Court has recognized that some practices are so unreasonable and anticompetitive that they can be deemed illegal per se, without an elaborate inquiry into their justifications.[10] These business practices may include price fixing,[11] market allocation,[12] group boycotts,[13] and tying arrangements.[14] Many labor practices, however, fall into the rule of reason realm, and among them are agreements reached through collective bargaining.

B. Labor Law: A Potential for Expansion of the Collective Bargaining Relationship

Congress enacted the National Labor Relations Act (NLRA) in 1935 to aid and encourage the collective bargaining process, a policy goal it deemed important to promote the free flow of commerce by quelling industrial strife.[15] The NLRA obligates the union and employer to bargain in good faith with respect to "wages, hours, and other terms and conditions of employment," commonly referred to as the mandatory subjects of collective bargaining.[16] Thus the union, acting as the exclusive representative of all employees, secures the standardization of employment terms for employees. Although some will be better off as a result, such standardization of terms will hinder others from acquiring a better individual bargain.[17] The NLRA, however, requires that the individual sacrifice for the good of the whole.[18] By pooling their economic strength and acting solely

6. *See* Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

7. *See id.*

8. *See* Smith v. Pro Football, Inc., 593 F.2d 1173, 1187-89 (D.C. Cir. 1978).

9. *See id.* at 1188-89.

10. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

11. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

12. *See* United States v. Topco Assocs., Inc., 405 U.S. 596 (1972).

13. *See* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941).

14. *See* Int'l Salt Co. v. United States, 332 U.S. 392 (1947).

15. 29 U.S.C. § 151 (2000).

16. *Id.* § 158(d); Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 685 (1965).

17. Michael S. Jacobs & Ralph K. Winter, Jr., *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 9 (1971).

18. *Id.*

through a labor organization freely chosen by the majority, employees will exact greater benefits as a group.[19]

Another important cornerstone of national labor policy is the freedom of contract.[20] According to the NLRA, "[the duty to bargain] does not compel either party to agree to a proposal or require the making of a concession."[21] A related principle to the freedom of contract is government noninterference in the collective bargaining process. The NLRA specifically authorizes the courts to ensure that the parties abide by the rules by not engaging in unfair labor practices.[22] Aside from this limited role, the government is prohibited from interfering in the substance of the negotiations or in writing contract terms.[23]

C. The Labor Exemption: Where Labor Law Meets Antitrust Law

The Supreme Court created the nonstatutory labor exemption in *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*[24] in an attempt to accommodate the conflicting policies behind antitrust law, which favors unfettered economic competition in the labor market, and federal labor law, which favors organization of labor to eliminate competition.[25] Designed to recognize the primacy of collective bargaining in the workplace, the exemption fully shields otherwise anticompetitive conduct from antitrust scrutiny when an employee representative and an employer collectively bargain in good faith over the conduct. The exemption is based on the premise that since those who are affected by the agreement have consented to such restraints, the antitrust laws should not subvert their intentions. Still, those restraints that are unreasonable will not be exempt

19. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967).

20. *See generally* HARRY H. WELLINGTON, LABOR AND THE LEGAL PROCESS 49-90 (1968).

21. 29 U.S.C. § 158(d).

22. For the exclusive list of what constitutes an unfair labor practice, see 29 U.S.C. § 158.

23. *See* H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970).

24. 381 U.S. 676, 689 (1965) (applying the exemption to a collective bargaining agreement to "accommodat[e] the coverage of the Sherman Act to the policy of the labor laws").

25. *See* 15 U.S.C § 1-2 (2000); 29 U.S.C § 151; N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."); Archibald Cox, *Labor and the Antitrust Laws—A Preliminary Analysis,* 104 U. PA. L. REV. 252, 254 (1955) ("The purpose and effect of every labor organization is to eliminate competition in the labor market."); Bernard D. Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws*, 32 U. CHI. L. REV. 659, 659 (1965).

from antitrust scrutiny.[26] For example, in *Jewel Tea*, the Supreme Court noted that it was illegal to contractually force employers to charge a certain price for their products, despite being collectively bargained for with the intent of increasing wages of union members.[27]

While the Supreme Court has considered the labor exemption on many occasions, its decisions do not provide a clear statement of the proper scope of the exemption.[28] Since there are no congressional guidelines to direct the interpretations of courts, courts exercise considerable discretion in defining the limits of the exemption.

D. The Circuit Split

When the Eighth Circuit took the lead in determining the precise boundaries of the nonstatutory labor exemption by crafting a three-part test, the majority of courts facing player restraint claims also followed the same test. However, the Second Circuit, disfavoring application of the antitrust laws to any agreements arising from a collective bargaining relationship, rejected such an approach and split from the majority of courts. Instead of resolving the current split, the Supreme Court, in its most recent treatment of the scope of the nonstatutory labor exemption, again avoided the task of drawing that boundary.

1. *Evolution of the Eighth Circuit Standard: The* Mackey *Test*

Beginning in the mid-1970s, *Mackey v. NFL*[29] became the standard used by most courts to decide labor exemption issues in professional sports cases involving player restraint claims.[30] The Eighth Circuit fashioned the three-pronged *Mackey* test from Supreme Court precedent to determine the situations in which the federal labor policy would prevail over antitrust laws, and when, therefore, an agreement restraining trade would be exempt from antitrust scrutiny. The first factor required that the restraint on trade primarily affect only the parties to the collective bargaining relationship.[31] Second, the agreement sought to be exempted had to

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26. *See Jewel Tea*, 381 U.S. at 693.

27. *See id.* at 688-89.

28. JOHN C. WEISTART & CYM H. LOWELL, THE LAW OF SPORTS 525 (1979).

29. 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

30. *See, e.g.*, Powell v. NFL, 930 F.2d 1293 (8th Cir. 1989); Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 962 n. 6 (2d Cir. 1987) (arriving at a similar conclusion although on somewhat different grounds than *Mackey*); Zimmerman v. NFL, 632 F. Supp. 398, 403-04 (D.D.C. 1986); McCourt v. Cal. Sports, Inc., 600 F.2d 1193, 1197-98 (6th Cir. 1979).

31. *See Jewel Tea*, 381 U.S. at 688-89 (finding that an agreement which affected only the employer and its union was exempt from antitrust scrutiny); United Mine

concern a mandatory subject of collective bargaining, such as wages, hours, and other conditions of employment.[32] Finally, the agreement sought to be exempted had to be the product of bona fide arm's-length bargaining.[33]

In *Mackey*, a group of both active and retired NFL players alleged that the Rozelle Rule ("Rule"), which gave the commissioner discretionary power to award compensation to a team who lost a free agent if the agent's new and old teams could not agree on compensation, was an illegal restraint of trade denying professional football players the right to market their services freely.[34] The NFL defended on the ground that since the Rule was part of a collective bargaining contract with the players union, the nonstatutory labor exemption required that the agreement be immunized from antitrust scrutiny.[35] Applying the three-factored test to the facts in the case, the Eight Circuit found that the Rozelle Rule primarily affected the parties to the collective bargaining relationship and concerned a mandatory subject of bargaining, thus satisfying the first two prongs of the test.[36] The court nonetheless declined to apply the labor exemption after determining that the Rule was not the product of bona fide arm's-length bargaining.[37] The appellate court's review of the record revealed that there was insufficient evidence that the players received some quid pro quo in exchange for including the Rule in the collective bargaining agreement with the NFL club owners.[38] Thus, based on this third factor, the Eight Circuit concluded that the Rozelle Rule failed to qualify for the nonstatutory labor exemption, and invalidated the Rule on antitrust grounds.[39]

Since the inception of the three-part *Mackey* standard, the majority of courts have applied the *Mackey* test in subsequent sports litigation cases

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Workers v. Pennington, 381 U.S. 657, 665 (1965) (finding that a union forfeited its exemption when it agreed with employers to impose a wage scale on other bargaining units).

32. *See Jewel Tea*, 381 U.S. at 689-90 (exempting an agreement involving a marketing-hours restriction from antitrust scrutiny because marketing hours are so intimately related to wages, hours, and working conditions); *Pennington*, 381 U.S. at 664 (recognizing that a wage agreement dealt with a subject about which employers and union are required to bargain);

33. *See Jewel Tea*, 381 U.S. at 689-90.

34. *Mackey*, 543 F.2d at 609.

35. *Id.* at 612.

36. *Id.* at 615.

37. *Id.* at 615-16.

38. *Id.* at 616.

39. *Id.* at 621-22.

involving challenges to player restraint rules on antitrust grounds.[40] With *Clarett*, however, the Second Circuit completed a break from the majority of courts begun three decades before.

2. *Evolution of the Second Circuit Standard: The* Laborers' International Union *Test*

Whereas the Eighth Circuit test draws out the boundaries delineating where the antitrust laws can override the labor laws, the Second Circuit view stresses the irrelevancy of the antitrust dilemma altogether.[41] The beginnings of the Second Circuit approach were formulated in an influential 1971 *Yale Law Journal* article, which asserted that the advent of collective bargaining between professional sports leagues and players signaled an important change in the legal landscape: Now federal labor policy, rather than antitrust law, would be the primary and preeminent legal force shaping employment relationships in professional sports.[42] Simply because certain agreements operate as a restraint of trade does not justify interference by the courts and repudiation of the preference for collective bargaining.[43] Thus, the players, who have elected to invoke a labor law remedy through collective bargaining, should not be allowed the benefit of the antitrust law as well.[44]

Despite the article's recognition nationwide, courts nonetheless ignored the arguments presented in the article for over a decade.[45] It was not until the Second Circuit decisions in *Wood v. National Basketball Ass'n*,[46] *National Basketball Ass'n v. Williams*,[47] and *Caldwell v. American Basketball Ass'n*[48] that the article's views were adopted by any court. These three Second Circuit cases all involved players' claims that the concerted

40. *See, e.g.*, Powell v. NFL, 930 F.2d 1293, 1298-99 (8th Cir. 1989); Zimmerman v. NFL, 632 F. Supp. 398, 403-04 (D.D.C. 1986); McCourt v. California Sports, Inc., 600 F.2d 1193, 1197-98 (6th Cir. 1979).

41. Jacobs & Winter, *supra* note 17, at 1 (noting that the antitrust dilemma in professional sports league practices is "an issue whose time has come and gone, an issue which has suffered that modern fate worse than death: irrelevancy").

42. *See id.* at 6.

43. *See id.* at 10-13.

44. *See id.* at 13.

45. *See* Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 GEO. L.J. 19, 89 n.321 (1986) (noting that although the article was cited generally in several player restraint cases, it was either for other propositions or to acknowledge its position without commenting on or evaluating its merits).

46. 809 F.2d 954 (2d Cir. 1987).

47. 45 F.3d 684 (2d Cir. 1995).

48. 66 F.3d 523 (2d Cir. 1995).

action of a professional sports league imposed a restraint upon the labor market for players' services in violation of antitrust laws.[49] In reaching its conclusion that the nonstatutory labor exemption overcame the players' claims in each case, the Second Circuit relied on federal labor law, which governed the collective bargaining relationship between the players and the leagues.[50] To permit the players to challenge the restraints on antitrust grounds, the court reasoned, would seriously undermine the various policies contained in the labor laws, including the congressional policy favoring collective bargaining, bargaining parties' freedom of contract, and the use of multi-employer bargaining units.[51]

The Second Circuit formally laid out its test for the application of the nonstatutory labor exemption to collective bargaining agreements in 1988 in *Laborers' International Union*:[52]

> First, the agreement at issue must further goals that are protected by national labor law and that are within the scope of traditionally mandatory subjects of collective bargaining. Second, the agreement must not impose a "direct restraint on the business market [that] has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions [that results from collective bargaining agreements]."[53]

Though the Second Circuit's test had long differed from that used by the majority of federal courts, the distinction was not sufficiently pronounced to be termed a circuit split until the decision in *Clarett*.

3. Brown v. Pro Football: *The Supreme Court's Most Recent Examination of the Scope of the Nonstatutory Labor Exemption*

The Supreme Court once again took on the issue of the scope of the nonstatutory labor exemption in *Brown v. Pro Football, Inc.* in 1996.[54]

49. *Clarett II*, 369 F.3d 124, 134-35 (2d Cir. 2004) (summarizing the Second Circuit's prior decisions in *Wood*, *Williams*, and *Caldwell*).

50. *Id.* at 135.

51. *Id.*

52. Local 210, Laborers' Int'l Union v. Labor Relations Div. Associated Gen. Contractors, 844 F.2d 69 (2d Cir. 1988).

53. *Id.* at 79-80 (citations omitted). The Second Circuit's test is an elaboration of the *Jewel Tea* balancing test weighing the "interests of union members" served by the restraint against "its relative impact on the product market." *See Clarett II*, 369 F.3d at 132 (quoting Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 690 n.5 (1965)).

54. 518 U.S. 231 (1996).

However, rather than resolving the burgeoning circuit split, the Court's failure to acknowledge either the Second or Eighth Circuit tests only served to deepen the divide.

Brown involved the issue of whether the NFL could claim that the nonstatutory labor exemption shielded its unilateral implementation of a wage scale on a class of professional football players from antitrust attack.[55] At the district court level, the judge rejected the NFL's claim of exemption from the antitrust laws and awarded the players over $30 million.[56] On appeal, however, the D.C. Circuit reversed, interpreting the labor laws as "waiving antitrust liability for restraints on competition imposed through the collective bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining."[57] The Supreme Court affirmed the appellate court's conclusion that the nonstatutory labor exemption applied to the NFL's wage implementation and thereby immunized its conduct from antitrust scrutiny.[58]

Although the Supreme Court came to the same conclusion as the appellate court, it disagreed with how broadly the lower court interpreted the scope of the nonstatutory labor exemption.[59] Whereas the appellate court expanded the scope of the exemption to include any restraints on competition imposed through collective bargaining process, the Supreme Court was much more reluctant to insulate from antitrust review every employer's joint imposition of terms made in the so-called collective bargaining context.[60] The Court noted, for example, that the labor exemption should not shield those agreements among employers that are "sufficiently distant in time and in circumstances from the collective bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process."[61] Although the Supreme Court refused to specify exactly where that line should be drawn, it seemed to narrow the appellate court's broad reading of the scope of the exemption to those instances where the restraints "constitute an integral part of the bargaining process."[62]

55. *Id.* at 234.
56. *Id.* at 235.
57. *Id.* (quoting Brown v. Pro Football, Inc., 50 F.3d 1041, 1056 (D.C. Cir. 1995)).
58. *Id.*
59. *Id.*
60. *See id.* at 250.
61. *See id.*
62. *See id.* at 239, 250.

II. THE *CLARETT* CASE

A. Factual Background

1. *Maurice Clarett: The Freshman Phenom*

In his debut as a true freshman[63] football player at OSU, Maurice Clarett made notable headlines in the sports media. During the 2002-2003 collegiate football season, Clarett became the first college freshman to open as starter at running back for OSU since 1943.[64] He led the team to an undefeated season, and scored the winning touchdown in a thrilling, double-overtime victory in the 2003 Fiesta Bowl to claim OSU's first national championship in thirty-four years.[65] As a result of Clarett's outstanding performance, he was named Big Ten Freshman of the Year and voted the best running back in college football by *The Sporting News*.[66]

However, Clarett did not return to play at OSU for a second year. Following a scandal in which he accepted thousands of dollars in improper benefits and then lied to National Collegiate Athletic Association (NCAA) and school investigators, OSU and the NCAA suspended Clarett prior to the start of the 2003-2004 football season.[67] At the end of the season, Clarett declared his interest in turning professional by entering the 2004 NFL draft.[68] Standing at six feet tall and weighing 230 pounds,[69] and

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63. A "true freshman" describes an athlete who plays at the varsity level in his or her first year of college. Many players are redshirted, or held out of games, during their first year to allow for further development. Justin M. Ganderson, *With the First Pick in the 2004 NFL Draft, the San Diego Chargers Select . . . ?: A Rule of Reason Analysis of What the National Football League Should Have Argued in Regards to a Challenge of its Special Draft Eligibility Rules Under Section 1 of the Sherman Act*, 12 U. MIAMI BUS. L. REV. 1, 2 n.3 (2004).

64. Clarett v. NFL, 306 F. Supp. 2d 379, 387 (S.D.N.Y 2004) [hereinafter *Clarett I*] (citing Affidavit of Maurice Clarett ("Clarett Affidavit") ¶ 4).

65. *Id.* (citing Clarett Aff. ¶ 10).

66. *Id.* at 387-88 (citing Clarett Aff. ¶ 11).

67. Associated Press, *That's a Wrap: Clarett Suspended for the Entire Season*, Sept. 10, 2003, *at* http://sportsillustrated.cnn.com/2003/football/ncaa/09/10/bc.fbc.ohiost.clarett.ap.

68. Clarett claimed that he wanted to declare for the 2003 NFL draft after his strong freshman season, *Clarett I*, 306 F. Supp. 2d at 388 (citing Clarett Aff. ¶ 12), but offered no reasons why he did not challenge the eligibility rules at that time. *Id.* (citing Clarett Aff. ¶ 12). Since it was unclear at the end of his suspended 2003-2004 season whether the NCAA would allow him to play during the next season, Clarett's suspension may have led, in part, to his decision to seek eligibility for the 2004 draft. *See id.* (citing Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment at 9, *Clarett I*, 306 F. Supp. 2d 379 (S.D.N.Y. 2004) (No. 03 Civ. 7441 (SAS))).

69. *Id.* at 388.

given his numerous accomplishments as a freshman at OSU, no one doubted Clarett's ability to play in the NFL.[70] The only obstacle standing in his way was the NFL eligibility rules,[71] from which he found himself one season shy of the three necessary to declare for the NFL draft.[72]

2. *The NFL's Collective Bargaining Relationship with the Players Union*

Founded in 1920, the NFL today is composed of thirty-two member clubs and is the most successful professional sports league in the United States.[73] Representatives of each of the thirty-two teams comprise the National Football League Management Council (NFLMC), the exclusive bargaining representative of the NFL.[74] The NFL players are exclusively represented by the National Football League Players Association (NFLPA), a union that negotiates on behalf of the players to protect their rights under the Collective Bargaining Agreement (CBA).[75] The current CBA between the NFLMC and the NFLPA, which took effect on May 6, 1993 and governs through 2007, does not include the eligibility rules for the draft.[76]

The original eligibility rules were adopted in 1925 and precluded a player from joining the NFL unless four seasons had elapsed since his high school graduation.[77] In 1990, by a separate memorandum issued by the Commissioner of the NFL, the eligibility rules were relaxed to permit a player to enter the draft three full seasons after his high school graduation.[78] While the eligibility rules did not appear in the text of the current

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70. *See* David Kindred, *Let Clarett and Every Other Virtuoso Play*, SPORTING NEWS, Feb. 16, 2004, at 88; *Only Rare are Ready, According to Brown*, TIMES UNION, Feb. 6, 2004, at C7; A Conversation with Jim Brown, NFL.com, Nov. 19, 2003 (interview by Rich Eisen, Seth Joyner, and Terrell Davis with Jim Brown, Hall of Fame running back), *at* http://www.nfl.com/nflnetwork/story/6849446.

71. Every professional sports league has some form of eligibility requirements that prospective players must meet in order to enter the league. Eligibility requirements generally serve two purposes: (1) to reduce the number of athletes who may participate in any particular league to a manageable size while ensuring the highest level of play possible, and (2) to protect the health and integrity of high school and college athletic programs, which perform the important roles of developing the skills and national reputation of amateur players. *See* LIONEL S. SOBEL, PROFESSIONAL SPORTS AND THE LAW 418-20 (1977).

72. *Clarett I*, 306 F. Supp. 2d at 388.

73. *Id.* at 382-83.

74. *See id.* at 384.

75. *See id.*

76. *Clarett II*, 369 F.3d 124, 127 (2d Cir. 2004).

77. *Id.* at 126.

78. *Id.*

CBA, on May 6, 1993—the same day that the current CBA took effect—the NFLPA and the NFLMC executed a side letter acknowledging that the Constitution and Bylaws attached to the letter were referenced in the CBA.[79] These Bylaws cite to the version of the eligibility rules established in the Commissioner's 1990 memorandum.[80] It is this version of the eligibility rules that Clarett challenged.[81]

B. Procedural History

1. *The District Court's Ruling for Clarett Under the* Mackey *Test*

Clarett filed suit against the NFL in September 2003, and after limited discovery, both parties moved for summary judgment.[82] Clarett sought summary judgment on the merits of his antitrust claim.[83] The NFL, in turn, asked for summary judgment on its defenses that (1) Clarett lacked antitrust standing and (2) the eligibility rules were protected from antitrust scrutiny by the nonstatutory labor exemption.[84]

In February 2004, the district court granted summary judgment in favor of Clarett and ordered him eligible to enter the 2004 NFL draft.[85] First, Judge Scheindlin found that Clarett had sufficient standing to sue for antitrust purposes because his injury flowed from a policy that excluded all players in his position from selling their services to the NFL.[86] Next, relying on the Eighth Circuit's *Mackey* test, the district court rejected the NFL's argument that the eligibility rules were immune from antitrust scrutiny.[87] Judge Scheindlin found that the first prong of the *Mackey* test was not satisfied because Clarett could not be considered a party to the collective bargaining relationship when the eligibility rule requirements served to exclude him from the bargaining unit.[88] Second, she found that the eligibility rules did not concern a mandatory subject of collective bargaining because they did not make any reference to wages, hours, or conditions.[89] Judge Scheindlin then determined that the eligibility rules did not meet the third requirement because they did not clearly result from arm's-length

79. *Id.* at 128.
80. *Id.*
81. *Id.* at 128-29.
82. *Clarett I*, 306 F. Supp. 2d 379, 389 (S.D.N.Y. 2004).
83. *Id.*
84. *Id.*
85. *Id.* at 410-11.
86. *Id.* at 403.
87. *See id.* at 391-97.
88. *Id.* at 395.
89. *Id.* at 393-95.

negotiations between the NFL and its players union.[90] She noted that the current text of the CBA did not mention the eligibility rules and the NFL failed to submit any evidence that the rules evolved from the collective bargaining process.[91] Thus, based on the *Mackey* factors, Judge Scheindlin concluded that the nonstatutory labor exemption was not available to shield the eligibility rules from antitrust scrutiny.[92]

Lastly, the district court held that absent any shield, the eligibility rules were an unreasonable restraint of trade.[93] Since the NFL failed to offer any procompetitive justifications for the rules, Judge Scheindlin held that they violated the antitrust laws and, as such, could not preclude Clarett from entering the 2004 NFL draft.[94]

2. *The Appellate Court's Reversal*

On appeal, the Second Circuit reversed the district court's judgment and remanded the case with instructions to enter judgment in favor of the NFL, and vacated the district court's order designating Clarett eligible to enter the 2004 NFL draft.[95]

In reversing the district court's decision, the Second Circuit underscored the split with the Eighth Circuit by stating that it has never regarded the *Mackey* test as defining the appropriate boundaries of the nonstatutory labor exemption.[96] Instead, it relied on its own decisions in *Caldwell*, *Williams*, and *Wood*, which all rejected players' claims that a professional sports league had imposed an illegal restraint of trade on the labor market for players' services in violation of antitrust laws.[97] In each case the Second Circuit found that the nonstatutory labor exemption protected the league's player restraint rules from antitrust attack because the defendant leagues and their players were involved in a collective bargaining relationship.[98] In contrast to the *Mackey* test, which allowed for antitrust review of a collective bargaining relationship if all three elements of the test were not met, the appellate court reasoned in each case that subjecting such a relationship to antitrust scrutiny would subvert the federal

90. *Id.* at 396-97.
91. *Id.*
92. *See id.* at 393-97.
93. *See id.* at 404-08.
94. *See id.* at 409, 411.
95. *Clarett II*, 369 F.3d 124, 143 (2d Cir. 2004).
96. *See id.* at 133 (citing Local 210, Laborers' Int'l Union v. Labor Relations Div. Associated Gen. Contractors, 844 F.2d 69, 80 (2d Cir. 1988), and U.S. Football League v. NFL, 842 F.2d 1335, 1372 (2d Cir. 1988)).
97. *Id.* at 134-35.
98. *Id.* at 135.

labor laws that governed collective bargaining.[99] Finding that the Supreme Court also used a similar analysis to arrive at the same result in *Brown*, the Second Circuit regarded its own precedent as consistent with *Brown*, while concluding that the *Mackey* test was not.[100]

The central issue, then, facing the Second Circuit was whether subjecting the eligibility rules to antitrust scrutiny would undermine fundamental principles of federal labor policy.[101] The court began its analysis by emphasizing that once a collective bargaining relationship was established between the NFLPA and the NFLMC, federal labor law implemented a set of rules, tribunals, and remedies to govern throughout the duration of the collective bargaining process.[102] It then evaluated each of Clarett's arguments to determine whether antitrust law should allow him to override this scheme established by federal labor law.

First, contrary to the district court, the Second Circuit found that the eligibility rules were mandatory bargaining subjects because they tangibly affected the wages and working conditions of current NFL players.[103] Second, although Clarett contended that the NFL clubs acted in an anti-competitive manner by agreeing among themselves to impose an arbitrary three-season criteria on all prospective players, the appellate court stated that in the context of collective bargaining federal labor law permitted multi-employer bargaining units to set the conditions for player employment.[104] Finally, the court addressed Clarett's claim that the absence of the eligibility rules from the CBA indicated that the rules were not the subject of collective bargaining.[105] Observing that the labor law policies "are not limited to protecting only terms contained in collective bargaining agreements,"[106] the Second Circuit stated that holding that a particular quid pro quo had to be proven in order to escape antitrust liability would completely disregard those policies. Based on the foregoing reasons, the Sec-

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99. *See id.*

100. *See id.* at 134, 138.

101. *Id.* at 138.

102. *Id.* at 139. *See generally* 29 U.S.C. § 160 (2000).

103. *Clarett II*, 369 F.3d at 140 (recognizing that the draft is part of a mix of market restraints by which leagues and players unions set individual salaries in professional sports and that the draft's effect of reducing competition in the market for entering players preserves the job security of veteran players).

104. *Id.* at 141. "Such concerted action is encouraged as a matter of labor policy and tolerated as a matter of antitrust law." *Id.* (construing Nat'l Basketball Ass'n v. Williams, 45 F.3d 684, 693 (2d Cir. 1995)).

105. *Id.* at 142.

106. *Id.* (citing Brown v. Pro Football, Inc., 518 U.S. 231, 243-44 (1996), and Caldwell v. Am. Basketball Ass'n, 66 F.3d 523, 528-29 (2d Cir. 1995)).

ond Circuit concluded that allowing Clarett's antitrust suit to proceed would subvert fundamental federal labor laws.[107]

III. DISCUSSION

The NFL eligibility rules, like most player restraints in professional sports, are anticompetitive in nature and thus subject to antitrust laws. However, the Supreme Court created the nonstatutory labor exemption in *Jewel Tea*, and further developed it in *Brown*, to shield those agreements from antitrust scrutiny that comprise an integral part of the collective bargaining process. Since the Supreme Court left the precise boundaries of the exemption undefined, the majority of courts have followed the Eighth Circuit's three-part test set out in *Mackey*. But in *Clarett*, the Second Circuit marked a distinct split from the majority of courts.

The Second Circuit's core conflict with other circuits, however, does not seem to arise from their application of the first two prongs of the *Mackey* test to the context of collective bargaining over player restraint issues. Rather, the focus of the Second Circuit's opinion in *Clarett* was the third prong of the *Mackey* test, which requires that an agreement be the bona fide product of arm's-length bargaining in order to be exempt from the antitrust laws. The Second Circuit favored a broader labor exemption that is not limited to protecting only the terms contained in collective bargaining agreements, but also includes anything that the employers or the union *could have* brought to the table during the collective bargaining process.[108] In essence, the *Clarett* court established a "could-have-bargained-for" element to replace the third prong of the *Mackey* test.

In the professional sports context, the *Mackey* test should be adopted because leagues such as the NFL already enjoy unequal bargaining power over the players union, and this should serve to narrow, not enlarge the scope of the nonstatutory labor exemption. Moreover, *Clarett*'s broad exemption encourages players to decertify their unions in order to place their player restraint claims in the realm of antitrust laws—a result that subverts the very federal labor policies the exemption purportedly upholds.

A. The Circuit Split in Comparison to the Supreme Court Precedent in *Brown*

In keeping with its preference for the labor laws over the antitrust laws, the Second Circuit Court of Appeals applied a broad labor exemption when evaluating the legality of the NFL eligibility rules in *Clarett*.

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107. *Id.* at 143.
108. *See id.* at 142-43.

Despite the fact that the eligibility rules are omitted from the text of the current version of the CBA, the Second Circuit still concluded that the nonstatutory labor exemption shielded the eligibility rules from antitrust attack since they arose out of the collective bargaining process.[109] In support for its position, the appellate court cited the Supreme Court's recent decision in *Brown* for the proposition that the exemption is "not limited to protecting only terms contained in collective bargaining agreements."[110] Rather, as the Second Circuit stated in *Clarett*, the reach of the exemption "extends as far as is necessary to ensure the successful operation of the collective bargaining *process*."[111]

While *Brown* is certainly consistent with the view that the labor exemption can apply beyond the explicit text of a collective bargaining agreement,[112] nowhere did the Supreme Court permit a stretching of the exemption to the extent that it encompasses anything that could possibly be the subject of collective bargaining between the parties, but was not actually bargained for. In fact, the Supreme Court explicitly rejected such a broad interpretation of the exemption in *Brown* because it failed to take into account those instances where agreements among employers to jointly impose terms on employees were sufficiently distant in time and in circumstance so as to warrant antitrust scrutiny.[113] Instead, the Court favored an application of the exemption to only those anticompetitive restraints that "constitute *an integral part* of the bargaining process."[114] Therefore, the *Clarett* court's broadening of the exemption to apply to anything that could have been bargained for in the collective bargaining context is not supported by the *Brown* decision.

In addition, although the Second Circuit found some support for its position in *Brown*, this interpretation does not preclude the Eighth Circuit's *Mackey* test from also being consistent with *Brown*. The Second Circuit used *Brown* to dispose of the *Mackey* test by interpreting *Mackey* too narrowly.[115] The third prong of the *Mackey* test, which states that the labor exemption applies when the agreement is the product of bona fide arm's-length bargaining, does not have to be so narrowly construed to mean that the exemption only protects the explicit terms contained within the collective bargaining agreement itself. Although an agreement made between

109. *See id.*
110. *Id.* at 142 (citing *Brown*, 518 U.S. at 243-44).
111. *Id.* at 142-43.
112. *Brown*, 518 U.S. at 243.
113. *See id.* at 235, 250.
114. *Id.* at 239 (emphasis added).
115. *Clarett II*, 369 F.3d at 134.

bargaining parties that later becomes formalized as a term of a collective bargaining agreement is certainly proof of arm's-length bargaining, it is by no means the only evidence of such bargaining.

For example, the history of the parties' collective bargaining relationship can be evidence of bona fide arm's-length bargaining. Although Judge Scheindlin determined that the NFL and players union engaged in no such bargaining, she did not come to this conclusion by merely looking at the text of the CBA, which made no reference to the eligibility rules. Instead, she went further by examining the history of the parties' collective bargaining relationship.[116] Aside from the fact that the eligibility rules were indirectly mentioned in a side letter to the CBA, Judge Scheindlin concluded that that the NFL offered no definitive evidence[117] that the eligibility rules "arose from, or [were] agreed to during, the process of collective bargaining,"[118] let alone attempted to show, as required by *Brown*, that the eligibility rules were an integral part of the bargaining process. Thus, even after conducting a broader examination that went beyond the text of the CBA, Judge Scheindlin did not find that the nonstatutory labor exemption applied to the eligibility rules.[119]

B. The Advantages of the *Mackey* Test

As the foregoing discussion suggests, both the Second and Eighth Circuits may find support for their respective approaches in the Supreme Court's decision in *Brown* depending on how narrowly or broadly they view the scope of the nonstatutory labor exemption. However, as a matter of policy, the Eighth Circuit's *Mackey* test represents the better choice for two reasons: The Second Circuit approach (1) intensifies the unequal bargaining relationship between employers and labor unions and (2) discourages collective bargaining by encouraging union decertification.

Under *Clarett*, the Second Circuit's dramatic broadening of the scope of the nonstatutory labor exemption to include anything that the parties could have possibly bargained for will disrupt the national labor policy favoring free and private collective bargaining. First, such an approach tips the scales in favor of the employer, in this case the NFL, which al-

116. *See Clarett I*, 306 F. Supp. 2d 379, 396 (S.D.N.Y. 2004).

117. The NFL offered no evidence that the eligibility rules were addressed during any collective bargaining negotiations prior to 1993, which is when the current CBA went into effect. *Id.* The only proof that the eligibility rules, which were contained in the Bylaws, might have been addressed in 1993 is the reference in the CBA that the "NFLPA *waived* . . . its rights *to bargain* over any provision of the Constitution and Bylaws." *Id.* (emphasis added).

118. *Id.*

119. *See id.*

ready has the upper hand in negotiations with the players union.[120] The NFL possesses both monopoly and monopsony power.[121] Two other professional football leagues, the World Football League and the United States Football League, were unable to compete with the NFL and were driven from the professional football league market in 1975 and 1986, respectively.[122] While there are three other professional football leagues in North America in existence today—the Arena Football Leagues, the National Indoor Football League and the Canadian Football League—the NFL indisputably dominates in terms of both revenues and television ratings.[123] Not only does the NFL outperform all professional football leagues, it outperforms all other professional *sports* leagues as well.[124] Consequently, the NFL does not have any real competitors in the market for aspiring professional football players' skills, nor is there an equivalent substitute that exists for the league's product.[125] Furthermore, the inherently weak bargaining position of players, a consequence of their lack of job security and brief work-life, only enhances the NFL's superior bargaining power.[126]

Given the existing lopsided bargaining relationship between the NFL and the players, the Second Circuit's broadening of the nonstatutory labor exemption to encompass policies that were not actually bargained for further increases this disparity and allows the NFL to impose its terms on players unilaterally. The league has no incentive to bring player restraints

120. *See* Chris L. Dickerson, Note, Brown v. Pro Football, Inc.—*The Nonstatutory Exemption From Antitrust Liability Becomes a Management Weapon*, 1997 WIS. L. REV. 1047, 1074.

121. *Id.* at 1073; Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 356. Monopoly power is the "power to control prices or to exclude competition. The size of the market share is a primary determinant of whether monopoly power exists." BLACK'S LAW DICTIONARY 1028 (8th ed. 2004). A monopsony is defined as a "market situation in which one buyer controls the market." *Id.* Restraints on input markets (i.e., labor markets) where a monopsony exists violate antitrust laws because potential employees have no other options when deciding where to work. Dickerson, *supra* note 120, at 1072.

122. Lock, *supra* note 121, at 356; Peter Bonventre, *Thrown for a Loss*, NEWSWEEK, Nov. 3, 1975, at 56; The History of the USFL 1982-1986, *at* http://www.remember theusfl.8m.com/history.html (last visited Feb. 7, 2005).

123. *Clarett I*, 306 F. Supp. 2d at 383.

124. *Id.*

125. Dickerson, *supra* note 120, at 1073; Locke, *supra* note 121, at 357.

126. Locke, *supra* note 121, at 354-56. The average career for an NFL player is about three and one-half seasons. National Football League Players Association, How long do most NFL careers last?, *at* http://nflpa.org/aboutus/main.asp?faq=ALL&subPage=Info ForNFLHopefuls (last visited Jan. 23, 2005). Players generally leave the NFL because of injury, self-induced retirement, or being cut by the team. *Id.*

or other anticompetitive practices to the bargaining table if it knows that those policies will invariably be exempted by the courts, regardless of whether they were negotiated for or not. Players will thus have little choice but to accept any and all unfavorable terms that the NFL wishes to thrust upon them. Although the NFL may argue that requiring the parties to bargain over every little issue will make the collective bargaining process overly burdensome, it is important for parties to negotiate particularly for those policies that have the most anticompetitive effects on the labor market. Indeed, the Supreme Court has affirmed that there are limits to the collective bargaining process, and simply because an employer and the union must bargain does not mean that the agreement reached may disregard other laws.[127]

Second, as demonstrated by the series of events following the Eighth Circuit's *Powell v. NFL* decision,[128] the Second Circuit's broadening of the scope of the nonstatutory labor exemption may actually encourage the union to decertify rather than resort to the collective bargaining process. In *Powell*, a group of professional football players challenged various player restraint rules on antitrust grounds after the players union and the NFL had reached an impasse in negotiations.[129] Applying the *Mackey* test, the district court held that the nonstatutory labor exemption shielded the player restraints from antitrust attack, but only until the parties reached a bargaining impasse on those issues.[130] On appeal, however, the Eighth Circuit broadened the scope of the labor exemption to protect the player restraint rules even beyond an impasse in negotiations.[131] The Eighth Circuit's holding meant, therefore, that so long as the NFLPA and the NFLMC maintained some sort of an ongoing collective bargaining relationship, the labor exemption would always shelter any illegal restraints of trade from antitrust scrutiny.[132]

After the *Powell* decision, the players were left with two unsavory choices: to accept the NFL's anticompetitive league practices to which they never agreed, or to decertify the players union to allow players to invalidate the NFL's labor exemption defense and pursue their antitrust

127. United Mine Workers v. Pennington, 381 U.S. 657, 665 (1965) (holding that "a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units").

128. 930 F.2d 1293 (8th Cir. 1989).

129. *Id.* at 1295.

130. Powell v. NFL, 678 F. Supp. 777, 788-89 (D. Minn. 1988).

131. *Powell*, 930 F.2d at 1303.

132. *See id.* at 1303.

rights.[133] Unsurprisingly, the players chose the latter option—a move "invited by the *Powell* decision and . . . designed unabashedly to end the 'ongoing collective bargaining relationship' between the NFL and NFLPA."[134] After being released from the collective bargaining relationship, eight football players immediately filed an antitrust suit against the NFL for its first refusal/compensation system in *McNeil v. NFL*.[135] In the absence of the labor exemption defense, the court concluded that the NFL's system violated the antitrust laws and awarded the players damages of $1.63 million.[136]

The *Powell* and *McNeil* cases illustrate a crucial point: The most successful recourse professional football players have when courts apply a broad labor exemption is to decertify and abandon the collective bargaining process altogether rather than to give the NFL an endless right to circumvent the antitrust laws. Indeed, shielding anticompetitive restraints from antitrust review that merely could have been bargained for turns the labor exemption on its head and encourages it to be used against employees, rather than for their protection. While courts such as the Second Circuit in *Clarett* may claim that such a broad exemption is justified in order to protect the collective bargaining relationship, a look back at history demonstrates that it in fact only promotes the breakdown of relations between unions and employers.

IV. CONCLUSION

Although in *Clarett* the Second Circuit endorsed a broad application of the nonstatutory labor exemption, to hold that the NFL eligibility rules are protected from antitrust scrutiny simply because they arose out of the collective bargaining process between the NFL and the players does not comport with the goals of federal labor laws. Under the rule *Clarett* articulates, so long as players and prospective players alike are subject to a collective bargaining relationship with the more powerful NFL, the league can unfairly restrain them from successfully competing in the labor market for players' services. Players will then either be forced to submit to all of

133. *See* Powell v. NFL, 764 F. Supp. 1351, 1354 (D. Minn. 1991).

134. Robert A. McCormick, *Interference on Both Sides: The Case Against the NFL-NFLPA Contract*, 53 WASH. & LEE L. REV. 397, 415 (1996). "[T]he end result of the majority opinion is that once a union agrees to a package of player restraints, it will be bound to that package forever unless the union forfeits its bargaining rights." *Powell*, 930 F.2d at 1306 (Heaney, J., dissenting).

135. 790 F. Supp. 871 (D. Minn. 1992)

136. McNeil v. NFL, No. 4-90-476, 1992 U.S. Dist. LEXIS 21561 (D. Minn. Sept. 10, 1992).

the NFL's demands, even if unreasonably uncompetitive, or abandon the collective bargaining process that was supposed to aid them, all in the name of giving federal labor policy primacy over the antitrust laws. The *Clarett* case did not only represent a loss for prospective players who want to enter the NFL early, it signified an even greater loss for current NFL players. Perhaps Maurice Clarett will not be the only one sitting out this season.