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Clarett v. National Football League and the Nonstatutory Labor Exemption in Antitrust Suits

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Summary

On May 24, 2004, the United States Court of Appeals for the Second Circuit delivered its opinion in *Clarett v. National Football League*. In that case, a former college running back challenged on antitrust grounds the NFL's so-called "three-year rule," which prohibits players from entering the NFL Draft unless they are three years removed from high school. The Second Circuit ruled that the three-year rule is protected from antitrust challenges by the nonstatutory labor exemption, which shields the collective bargaining process from antitrust scrutiny in deference to federal labor laws. This report will be updated as events warrant.

Introduction. Maurice Clarett starred as a running back for the Ohio State Buckeyes in 2002, helping his team to the national championship and earning Big Ten Freshman of the Year honors. The next season, however, he was suspended from the football team after the University found that he had accepted thousands of dollars worth of improper benefits and lied to investigators. Rather than return to Ohio State for his junior year, Clarett elected to declare for the National Football League (NFL) Draft. The NFL would not allow Clarett to enter the draft, however, citing League rules requiring players entering the draft to be three years removed from high school.

Clarett filed suit against the NFL, arguing that the three-year rule acts as an unreasonable restraint on trade in violation of sections one and two of the Sherman Antitrust Act[1] and the Clayton Act.[2] The NFL argued that its three-year rule is shielded from antitrust scrutiny by the non-statutory labor exemption. The district court found for Clarett,[3] making him eligible for the 2004 NFL Draft. As the Draft was quickly

[1] 15 U.S.C. §§ 1, 2.

[2] 15 U.S.C. §§ 12-27.

[3] *Clarett v. National Football League*, 306 F.Supp.2d 379 (S.D.N.Y. 2004) [hereinafter *Clarett*
(continued...)

approaching, the NFL requested that the United States Court of Appeals for the Second Circuit hear its motion for a stay pending appeal on an expedited basis. On April 19, the Second Circuit issued a stay of the lower court's ruling, citing the NFL's likelihood of success on the merits. The Supreme Court subsequently refused to lift the stay, and so Clarett was not eligible to participate in the Draft. Following the Draft, the Second Circuit issued its opinion on the merits of the case, ruling that the NFL's three-year rule is protected from antitrust scrutiny by the non-statutory labor exemption.[4]

Background. In response to America's Gilded Age industrialization of the late 19th century, Congress passed sections one and two of the Sherman Act, which made monopolies and trusts in restraint of trade illegal.[5] The Sherman Act became the foundation upon which courts over the next century constructed a complex framework of antitrust jurisprudence. Initially, the courts focused on actions — such as price fixing and territorial exclusion arrangements — so flagrantly anti-competitive that they were deemed *per se* illegal. In 1911, however, the Supreme Court refined its analysis in finding that some restraints on competition are not violative of antitrust restrictions; rather, only *unreasonable* restraints on trade violate the Sherman Act.[6] The courts have thus created two standards of antitrust liability: 1) *per se* illegality; and 2) unreasonable restraints on trade. This second standard has become known as the "Rule of Reason," which is violated if a practice's anti-competitive injury outweighs its benefits to competition.[7]

In 1922, the Supreme Court delivered an opinion that has effectively become an antitrust exemption for Major League Baseball. In *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*,[8] the Court held that "exhibitions of baseball" are merely state affairs that do not affect interstate commerce, and so are not subject to federal antitrust laws.[9] The Supreme Court has not extended this exemption to any other sport, and has refused in later cases to invalidate baseball's exemption, holding that it is only for Congress to do so.[10]

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[3] (...continued)
I].

[4] *Clarett v. National Football League*, __ F.3d __ , No. 04-0943 (2nd Cir. 2004) [hereinafter *Clarett II*]

[5] 15 U.S.C. §§ 1, 2. For a discussion of the origins of federal antitrust laws, *see* Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports Leagues Labor Market Restraints*, 75 Geo. L.J. 19 (1986).

[6] *Standard Oil Co. v. United States*, 221 U.S. 1, 32-43 (1911).

[7] *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978).

[8] *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922).

[9] *Id.* at 208-209.

[10] *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953). For a more detailed discussion of baseball's antitrust exemption and Congress's attempt to shape it, *see* CRS Report 98-820A, *'Curt Flood Act of 1998:' Application of Federal Antitrust Laws to Major League Baseball Players*, by Janice Rubin.

While other sports leagues do not enjoy the antitrust exemption granted to baseball, they can avail themselves of two major antitrust exemptions available to everyone else: the statutory labor exemption and the non-statutory labor exemption. The statutory labor exemption was created by Congress in provisions of the Clayton Act[11] and Norris-LaGuardia Act,[12] and exempts certain activities by labor groups — such as boycotts and picketing — from antitrust scrutiny. The non-statutory labor exemption, on the other hand, was inferred by the courts from the federal labor laws to protect the collective bargaining process, even when a collective bargaining agreement (CBA) results in certain restraints on competition.[13] The exemption is intended to allow the federal labor laws — through the judgments of the National Labor Relations Board (NLRB) — to operate in situations where a CBA is in place, without interference from antitrust challenges. As the Supreme Court has said, "[The non-statutory labor exemption] thereby substitutes legislative and administrative labor-related determinations for judicial antitrust-related determinations as to the appropriate limits of industrial conflict."[14]

The courts have wrestled with the contours of the non-statutory labor exemption almost since its inception,[15] and the question of how the exemption applies to sports leagues (as multi-employer bargaining units) has often been a vehicle for this struggle. Recent cases suggest that once a CBA is in place, the non-statutory labor exemption protects a wide range of actions from antitrust scrutiny. In 1996, for example, in a dispute arising out of the NFL's unilateral imposition of a fixed salary for developmental players after negotiations with the National Football League Players Association (NFLPA) had broken down, the Supreme Court held that the NFL's actions were protected by the non-statutory labor exemption, even though the parties had reached impasse and had never agreed that the NFL could act unilaterally in the way it did.[16] In other words, the Court found that the protection afforded by the non-statutory labor exemption extends beyond the actual terms of the agreement itself.

Against this backdrop, Maurice Clarett brought his suit challenging the NFL's three year rule. While the NFL and the NFLPA have a solid CBA in place, the three-year rule was not negotiated by the parties, but rather was put in place by the NFL in 1925, decades before the NFLPA even came into existence. The major issue facing the courts in *Clarett*, therefore, was whether the non-statutory labor exemption protects a league rule in place well before any CBA was contemplated.

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[11] 15 U.S.C. § 17; 29 U.S.C. § 52.

[12] 29 U.S.C. §§ 104, 105, 113.

[13] *See Brown v. Pro Football, Inc.*, 518 U.S. 231, 237 (1996) ("As a matter of logic, it would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves or with each other *any* of the competition-restricting agreements potentially necessary to make the process work or its results mutually acceptable" [emphasis in original]).

[14] *Id.*

[15] For a discussion of the non-statutory labor exemption's history, *see* Jonathan C. Tyras, *Players Versus Owners: Collective Bargaining and Antitrust After Brown v. Pro Football, Inc.*, 1 U. Pa. J. Lab. & Emp. L. 297 (1998).

[16] *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996).

The District Court Ruling. In assessing the applicability of the non-statutory labor exemption, the district court seemed to apply the three-part "*Mackey* test," first promulgated by the Eighth Circuit[17] and subsequently adopted by the Sixth and Ninth Circuits. In formulating this test, the Eighth Circuit drew from the rationale expressed in a string of Supreme Court cases in which employers challenged collectively bargained labor agreements: *Allen Bradley Co. v. Local No. 3*,[18] *Local No. 189 v. Jewel Tea*,[19] and *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100*.[20] Under the resulting test, in order for the non-statutory labor exemption to apply: 1) the restraint on trade must primarily affect only the parties to the collective bargaining agreement; 2) the agreement must concern a mandatory subject of collective bargaining; and 3) the agreement must be the product of bona fide arm's-length bargaining.[21]

Applying the first part of this test, the court found that the labor exemption cannot shield agreements that only affect those who are not a part of the bargaining unit. While the court conceded that collectively bargained agreements will always affect prospective employees who do not have the opportunity to participate in negotiations, the court drew a distinction between provisions that affect current *and* prospective employees (e.g. wages, hours, conditions of employment) and those, such as the NFL's three-year rule, that affect *only* prospective employees. In the former case, it is right to hold the future employees to the terms of the collectively bargained agreement, according to the court, because "they step into the shoes of the players who did engage in collective bargaining."[22] In the latter case, however, the court concluded that "those who are categorically denied employment, even temporarily, cannot be bound by the terms of employment they cannot obtain."[23]

The district court also concluded that the three-year rule does not concern a mandatory subject of collective bargaining (i.e., wages, hours, or conditions of employment). As the court put it, "The Rule ... affects wages only in the sense that a player subject to the Rule will earn none. But the Rule itself ... does not concern wages, hours, or conditions of employment and is therefore not covered by the nonstatutory exemption."[24]

Applying the final part of the *Mackey* test, the district court found that the three year rule was not a result of arm's length negotiations. In fact, the court found that the rule was not a product of *any* negotiations, arm's length or otherwise, due to the fact that the NFL first instituted the three year rule in 1925, over thirty years before the formation of the NFLPA and over forty years before the first collective bargaining agreement. Because

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[17] *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976).

[18] 325 U.S. 797 (1945).

[19] 381 U.S. 657 (1965).

[20] 421 U.S. 616 (1975).

[21] *Id.* at 614.

[22] *Clarett I*, 303 F.Supp.2d at 395-396.

[23] *Id.* at 396.

[24] *Id.* at 395.

the three-year rule is not the product of collective bargaining, the court concluded, the rule could not be protected by the non-statutory labor exemption.[25] After finding that the non-statutory labor exemption does insulate the NFL's three-year rule from antitrust challenges, the district court applied the standard Rule of Reason antitrust analysis to conclude that the three-year rule is an unreasonable restraint on trade.[26]

The Second Circuit Ruling. The Second Circuit rejected the district court's approach on two grounds. First, the Second Circuit pointed out that it had never adopted the *Mackey* test. Second, the court found the *Mackey* test's reliance on the rationale of the *Jewel Tea* line of cases inappropriate in a case like this one, where an athlete (i.e., an employee) challenges restraints on the market for professional sports players imposed through a collective bargaining process.[27] As mentioned above, the *Jewel Tea* line of cases concerned *employers* asserting claims that they were being excluded from competing in the product market. The Second Circuit found that this difference warrants a separate approach.

The Second Circuit held that its rationale from a line of its prior cases (*Wood v. National Basketball Association*,[28] *National Basketball Association v. Williams*,[29] and *Caldwell v. American Basketball Association*[30]) was controlling. The Second Circuit stated that those cases stand for the proposition that a collective bargaining agreement irrevocably alters the governing legal regime in cases like this one, such that labor laws, not antitrust laws, offer the proper remedies, if any are justified. The court concluded that "to permit antitrust suits against sports leagues on the ground that their concerted action imposed a restraint upon the labor market would seriously undermine many of the policies embodied by these labor laws, such as the congressional policy favoring collective bargaining, the bargaining parties' freedom of contract, and the widespread use of multi-employer bargaining units."[31]

The Second Circuit then applied this rationale to the facts of the case before it, and found that none of those facts would justify allowing Clarett to circumvent the scheme established by federal labor laws. First, the court rejected the district court's finding that the three year rule was not a mandatory subject of collective bargaining. The Second Circuit viewed the three-year rule together with the NFL's general eligibility rule, and held that these eligibility rules represent a condition of initial employment. For this reason alone, the court stated, the eligibility rules could be a mandatory subject of collective bargaining.[32] The court went further, however, and concluded that the unique economic realities of professional sports are such that "many of the agreements in

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[25] *Id.* at 396-397.

[26] *Clarett I*, 303 F.Supp.2d at 404.

[27] *Clarett II*, __ F.3d __ , No. 04-0943, slip op. at 18 (2nd Cir. 2004).

[28] 809 F.2d 954 (2nd Cir. 1987).

[29] 45 F.3d 684 (2nd Cir. 1995).

[30] 66 F.3d 523 (2nd Cir. 1995).

[31] *Clarett II*, __ F.3d __ , No. 04-0943, slip op. at 20 (2nd Cir. 2004).

[32] *Id.* at 28.

professional sports that, at first glance, might not appear to deal with wages or working conditions are indeed mandatory bargaining subjects."[33]

The Second Circuit also ruled that the non-statutory labor exemption applies despite the fact that the three year rule affects prospective players outside of the union. In this respect, the court compared the three-year rule to union-operated hiring halls, long recognized as a mandatory subject of collective bargaining. Hiring halls are placement centers where jobs from various employers are allotted to registered applicants according to a set order, usually based on rotation or seniority. "In such hiring hall arrangements," the Second Circuit stated, "the criteria for employment are set by the rules of the hiring hall rather than the employer alone."[34]

The court next addressed the district court's concern that the three year rule was put in place by the NFL before the collective bargaining agreement came into being. While the Second Circuit conceded this fact, the court focused on the point that the three year rule is clearly stated in the NFL's constitution and bylaws, a copy of which was presented to the union during CBA negotiations. Because, as discussed above, the court determined eligibility rules to be a mandatory subject of collective bargaining, "the union or the NFL could have forced the other to the bargaining table if either felt that a change was necessary."[35] As further proof that the union implicitly acquiesced in the operation of the three year rule, the court cited the union's waiver in the CBA of any challenges to the NFL's constitution and bylaws.[36] Building on this point, the Second Circuit cited the Supreme Court's aforementioned holding in *Brown* to support the proposition that the non-statutory labor exemption not only protects the *terms* of a CBA, but also the whole collective bargaining *process*.[37]

Conclusion. In the *Clarett* case, the Second Circuit explicitly drew a distinction in non-statutory labor exemption cases between suits where competing *employers* challenge a CBA provision and suits where *workers* (or prospective workers) challenge a CBA provision. According to the Second Circuit, the former case implicates the ills that the antitrust laws were enacted to prevent. The latter case, however, "reflects simply a prospective employee's disagreement with the criteria, established by the employer and the labor union, that he must meet in order to be considered for employment. Any remedies for such a claim are the province of labor law."[38] Clarett plans to appeal the Second Circuit's decision.

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[33] *Id.* at 29.

[34] *Id.* at 30.

[35] *Id.* at 32.

[36] *Id.*

[37] *Id.* at 34 (citing *Brown v. National Football League*, 518 U.S. 231, 243 (1996).

[38] *Id.* at 35 (citations omitted).