

Notes

LESS RESTRICTIVE ALTERNATIVES FOR ACHIEVING AND MAINTAINING COMPETITIVE BALANCE IN PROFESSIONAL SPORTS

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Team owners in professional sports leagues, including the National Football League (NFL), the National Basketball Association (NBA), the National Hockey League (NHL) and Major League Baseball, place highly restrictive restraints on players. These restraints include the player draft, restrictions on tampering, reserve and option rules, and mandatory free agent compensation requirements.¹ The owners justify these restrictions as methods of equalizing competitiveness among the teams.² Additionally, team owners argue that the restraints preserve economic balance within the leagues.³ Players, as well as an increasing number of courts⁴ and legal scholars,⁵ maintain that the restraints on the athletes' economic value⁶ and mobil-

1. See *infra* notes 19-38 and accompanying text.

2. Professional teams rely on revenues from spectators to remain economically viable. These revenues come directly from fan attendance at games and indirectly from television and radio broadcasting contracts. More closely-matched games, theoretically, lead to increased revenues. Most fans' interest in games tends to be highly dependent on the level of competitiveness and the probability of an unexpected outcome associated with the game. A closely played game is more likely to attract and maintain spectator interest. Similarly, with more equalized teams competing in games, there is a greater likelihood that a spectator will want to attend a game. This translates to income from fans buying a ticket, paying parking fees, and, perhaps, buying refreshments and souvenirs. Closer games also indirectly lead to increased broadcasting revenues. The size of media contracts is proportional to the amount of money the networks receive from their sponsors. Network sponsors conduct surveys to determine the viewing audience size and what people are watching to ensure that their commercials will reach the largest number of listeners/viewers. More competitive games attract a larger advertising audience. Sponsors, therefore, will be more willing to pay high advertising costs during well-attended broadcasts. The leagues, in turn, can demand more money to broadcast their games.

3. The owners feel that player restraints are necessary to maintain a competitive balance. See *Mackey v. National Football League*, 543 F.2d 606, 621 (8th Cir. 1976). As described in note 2, *supra*, more competitive contests increase revenues.

4. See, e.g., *Smith v. Pro-Football, Inc.*, 420 F. Supp. 738 (D.D.C. 1976), *aff'd in part*, 593 F.2d 1173 (D.C. Cir. 1978); *Mackey v. National Football League*, 407 F. Supp. 1000 (D. Minn. 1975), *aff'd in part*, 543 F.2d 606 (8th Cir. 1978); *Kapp v. National Football League*, 390 F. Supp. 73 (N.D. Cal. 1974).

5. See, e.g., Canes, *The Social Benefits of Restrictions on Team Quality*, in *THE GOVERNMENT AND SPORTS BUSINESS* 81 (R. Noll ed. 1974); Lock & Gratz, *A Legal and Statistical Analysis of the*

ity⁷ are unreasonably restrictive⁸ and amount to restraints of trade violating federal antitrust laws.⁹

Since early June 1987, the NBA and the National Basketball Players' Association (NBPA) have been without a collective bargaining agreement. There has been no progress in the negotiations for a new agreement.¹⁰ The NBPA, as the players' union, hopes to abolish the college draft¹¹ and move toward a free market for employing new players.¹² The owners are, of course, against such a change.¹³ The NBPA filed suit on behalf of the players in federal court in early October 1987, challenging the player restraints.¹⁴

Similarly, the NFL players went on strike September 22, 1987, seeking a more lenient system of free agency after their collective bargaining agreement with the owners expired on August 31, 1987.¹⁵ Although the strike ended on October 15, 1987 without a new agreement,¹⁶ the NFL Players' Association and individual players filed an antitrust suit against the NFL in federal court the day the strike ended.¹⁷ It is not unlikely that other professional sports unions and players will make similar antitrust claims in the future. Obviously, some changes in the system of player-owner relations are

National Football League Player Draft: Chicago, New York, Detroit, It's All the Same Pick, 2 LOY. ENT. L.J. 47 (1982); Morris, *Keeping the Game Fair and Square - Antitrust Laws and Professional Sports in America*, 59 AUSTL. L.J. 476 (Aug. 1985).

6. Player restraints such as the draft, option rule, reserve clause, right of first refusal, and compensation (Rozelle) rule have the effect of limiting a player's ability to play for the team of his choice. Unlike employees in other fields, a player is not freely able to market his services to the highest bidder because his mobility is restricted. Restraints, therefore, depress a player's economic value.

7. Player mobility refers to the athlete's ability to move to and play with other teams.

8. Courts interpreting federal antitrust laws require that the least restrictive alternative be used when restricting player movement. See *infra* notes 47-97 and accompanying text.

9. See *infra* notes 47-99 and accompanying text for descriptions of the antitrust statutes at issue and their application to professional sports.

10. Telephone conversation with Larry Fleisher, General Counsel, National Basketball Players' Association (July 17, 1987). Additionally, the NBA players recently filed suit against the owners further evidencing their position. On February 5, 1988, the player representatives of the NBPA voted to de-certify the union in order to remove owner activity from the protection of the labor exemption recognized under antitrust laws. See Goldaper, *Stern Hopes for Talks Despite New Union Move*, N.Y. Times, Feb. 7, 1988, at S8, col. 1. See also *infra* notes 99-104 and accompanying text.

11. See *infra* notes 19-22.

12. See *infra* notes 19-22.

13. The owners argue that abolishing player restraints drives up player salaries and suppresses competitive balance. See *Smith*, 420 F. Supp. at 745-46. This, in turn, leads to less interesting games and decreased spectator interest, resulting in an overall decrease in league profitability. See *supra* note 2.

14. See Lancaster, *Football Fallout: End of Strike Isn't End of Sports-Labor Turmoil*, Wall St. J., Oct. 19, 1987, at 29, col. 4. On April 26, 1988, the NBA and NBPA reached agreement on a new six-year collective bargaining agreement. See Thomas, *NBA in 6-Year Pact with Players' Union*, N.Y. Times, Apr. 27, 1988, at 48, col. 4. As part of the agreement, the NBPA agreed to drop its antitrust suit against the league. *Id.* Most importantly, the agreement provides for a three-round draft in 1988 and two rounds thereafter. *Id.* See *infra* notes 19-22 and accompanying text concerning the player draft. The salary cap will be continued, but the teams' right of first refusal was modified. See *infra* notes 141-54 and accompanying text for a discussion of salary caps. See *infra* note 37 and accompanying text regarding the right of first refusal.

15. For a discussion of the players' demands and the strike generally, see Lancaster & Barnes, *Delay of Game: Big Stakes in NFL Strike*, Wall St. J., Sept. 23, 1987, at 37, col. 3.

16. See Janofsky, *NFL Players End Strike but Can't Play Sunday; No Bargaining Accord—Antitrust Suit Filed Against Club Owners*, N.Y. Times, Oct. 16, 1987, at A1, col. 1.

17. *Id.*

needed to solve the current labor-management problems and prevent future antitrust challenges.

This Note will evaluate player restraints currently in use in professional sports and discuss their legality under the antitrust laws. Other less restrictive means of maintaining a competitive balance will be highlighted. Finally, an ideal combination of factors for maintaining competitive balance and assuring players their economic worth will be delineated.

THE PLAYER RESTRAINTS

The mechanisms employed by sports leagues to restrict player mobility between teams and between rival leagues include the player draft, antitampering rules, the reserve and option rules, the free agent compensation requirement, and standard player contracts.¹⁸ These restraints are used in tandem to prevent players from moving freely and obtaining their economic worth.

Descriptions of the Player Restraints

The player draft

All four major men's sports leagues¹⁹ use some form of draft to select amateur players. The classic form of selection is for the teams to choose in reverse order of the previous year's final standings.²⁰ Under this scheme, the last place team selects first and the reigning champion chooses last. Because there are far more prospective players than there are teams, the selection process has many rounds.²¹ Once a team selects a player, that team has an exclusive right to negotiate with and sign that individual, although the leagues differ as to the amount of time a team retains this power.²²

18. See *infra* notes 19-38 and accompanying text.

19. This Note deals only with the National Football League (NFL), the National Basketball Association (NBA), the National Hockey League (NHL), and Major League Baseball.

20. See, e.g., CONSTITUTION AND BY-LAWS FOR THE NATIONAL FOOTBALL LEAGUE art. 14 (1972). The NBA conducts a lottery each year to determine the selection order of the first eight draft choices. Theoretically, the eight teams with the worst records in the previous year participate in the lottery. However, in practice, those teams in the past have often traded their rights to draft the top college players to other, more successful teams in exchange for current NBA players, future draft choices or cash.

21. For example, the NFL draft has twelve rounds and the NBA uses an eight-round draft.

22. Under the recently expired NBA collective bargaining agreement, the selecting team had one year to negotiate exclusively with the selected player. COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NATIONAL BASKETBALL ASSOCIATION AND THE NATIONAL BASKETBALL PLAYERS' ASSOCIATION art. XXII, § (2)(a) (1976), as renewed by the MEMORANDUM OF UNDERSTANDING BETWEEN THE NATIONAL BASKETBALL ASSOCIATION AND THE NATIONAL BASKETBALL PLAYERS' ASSOCIATION (1983).

The NFL collective bargaining agreement, which expired on August 31, 1987, provided for the selecting team to retain an exclusive power to deal with its selected players for one year after the date of the draft. NATIONAL FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT art. XIII, § 3 (1982).

In the NHL, the league conducts an annual draft whereby an athlete, once signed by the drafting team, becomes the exclusive property of that team so long as it offers him employment in either the NHL or one of its affiliate minor league clubs. NATIONAL HOCKEY LEAGUE BY-LAWS 16 (b)(5).

Major League Baseball holds an amateur draft every six months. *Professional Baseball Rule 4, Major League Baseball Blue Book* (1976). If a chosen player does not sign with the selecting team within six months, he is eligible for the second draft that year. *Id.*

The effect of the draft is to preclude a drafted player from playing for any other team; that is, it restricts a player's ability to seek employment with the team of his choice. Further, because a player is negotiating only with one team, there is no competitive bidding, so the draft prevents a player from discovering and receiving the true value of his services.

The "no-tampering" rule

In addition to the draft,²³ some leagues employ a rule restricting tampering.²⁴ The rule is an agreement among team owners that during the exclusive negotiation period, no other team may begin to negotiate with the player without the consent of the selecting club.²⁵ The penalty for tampering in the NFL, for example, is the loss by the violating club of its draft choice for the next draft of the same round as the tampered-with player. Additionally, if the tampering is intentional, the commissioner imposes a fine, fifty percent of which goes to the offended club.²⁶ These penalties discourage teams from negotiating with another team's "property."²⁷

Accordingly, the no-tampering rule permits teams to negotiate exclusively with players they draft without interference. Like the draft, the no-tampering rule restricts a player to one team without allowing competition for the player's services.

Reserve and option rules

Under the reserve system, a player was perpetually tied to the club owning his contract.²⁸ While the player could not change teams or negotiate with any other club without his team's consent, his club was free to assign or sell his contract to another team without his consent. The player's only method of escape from the system was to retire from the sport or play outside of the United States.²⁹

The option clause replaced the highly restrictive reserve system. In fact, the option clause is little more than a modified version of the reserve system. As a prerequisite for league employment,³⁰ all athletes are required to sign a standard player contract containing a clause giving the employing

23. See *supra* notes 19-22 and accompanying text.

24. See, e.g., CONSTITUTION AND BY-LAWS OF THE NATIONAL FOOTBALL LEAGUE art. 9.2 (1972).

25. *Id.*

26. The amount of the fine was within the discretion of the commissioner. The fifty percent of the fine not awarded to the offended team went to the league. See *supra* note 22.

27. In the NFL, for example, in the ten years since the players first bargained for free agency, only one player left his former team and signed with another team as a free agent. See *NFL Labor Issues*, USA Today, Sept. 22, 1987, at 3C, col. 6.

28. The reserve system operated in the NFL from 1925 to 1976, in the NBA from 1949 to 1975, in the NHL from 1952 to 1972, and in Major League Baseball from 1887 to 1976.

29. For example, Major League Baseball players sometimes play in a Japanese league, and NBA players can play in Europe. These are not always justifiable alternatives since they require players to leave the United States and often play for less money.

30. All four leagues use a standard player contract that includes an option clause. See NFL Player Contract, National Football League (1982); National Basketball Association Uniform Player Contract (Rookie or Veteran—Two or More Seasons) (1983); National Hockey League Standard Player's Contract (1982); National Association of Professional Baseball Leagues Uniform Player's Contract (1984).

club an option to renew the contract for an additional year.³¹ If a team requires a player to remain for the additional year, often the terms of that player's contract require him to accept a reduced salary. The player then completes his contract and "plays out his option."³² After that year, the player has the right to become a free agent and to negotiate with other teams.³³

The option clause prevents players from freely accepting new employment. Because players are unwilling, not unexpectedly, to accept a reduced salary for their option year, they often renew their contracts before that year arrives. Again, this practice prevents free mobility and deprives players of the right to receive their economic worth.

The compensation rule

Once a player plays out his option³⁴ and becomes a free agent, any team signing the free agent must compensate the club losing the player. Most often, compensation is paid by either future draft choices or current team members.³⁵

The NFL first instituted a compensation rule and called it the "Rozelle Rule."³⁶ That Rule gave Pete Rozelle, Commissioner of the NFL, complete discretion to determine the compensation paid to a free agent's former club if no mutual agreement between the clubs was reached. The Rule restricted player movement; clubs interested in signing free agents were reluctant to submit to the Commissioner's unbridled discretion.

Today, a modified compensation rule exists in all of the major professional sports leagues. The rule requires a club signing a free agent to bargain with the free agent's former team for reasonable compensation.

Other restraints

In addition to the previously mentioned restraints, team owners utilize other restrictions to limit a player's mobility which, in turn, devalue the player's economic worth. The system of first refusal, for example, currently in use in the NFL and NBA,³⁷ entitles a free agent's original team to retain the player's services by matching the best offer made by another team. This system allows the player negotiating leverage but, again, interferes with a player's ability to play for the team of his choice. Occasionally, players claim that owners boycott, blacklist, and illegally refuse to deal with them.³⁸

31. See, e.g., NFL Player Contract, National Football League § 17 (1982).

32. *Id.*

33. *Id.*

34. See *supra* notes 30-33 and accompanying text.

35. See *supra* notes 30-33 and accompanying text.

36. See, e.g., CONSTITUTION AND BY-LAWS OF THE NATIONAL FOOTBALL LEAGUE art. 12.1(H) (1968).

37. See R. BERRY & G. WONG, LAW AND BUSINESS OF THE SPORTS INDUSTRIES 185-90 (1986).

38. See *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867, 874 (S.D.N.Y. 1975) (perpetual reserve system in NBA analogous to illegal price fixing). Interestingly, on September 21, 1987, an arbitrator found that Major League Baseball owners conspired to destroy free agency following the 1985 season by refusing to tender any offers to top players. See Bodley, *Baseball's Next Step: Sorting It Out*, USA Today, Sept. 22, 1987, at 1C, col. 4.

Owners' Justifications for the Restraints

Equalizing player strength between teams is a significant factor in the ability of professional sports leagues to provide a marketable product.³⁹ Team owners argue that player restraints are necessary to achieve this goal.⁴⁰ The owners insist that without the restraints, star players will flock to cities with advantages such as winning teams, larger economic bases, more desirable climates, and greater media opportunities.⁴¹ Furthermore, a competitive balance in each sport would be destroyed without the restraints, leading to diminished spectator interest, franchise failure and, perhaps, the demise of the leagues themselves.⁴² Moreover, the club's investment in scouting expenses and player development costs would be wasted.⁴³ Finally, the owners argue that player continuity is important to the success of any team.⁴⁴

Players' Views Regarding Restraints

Athletes in all four major sports leagues continue to challenge the unilateral restraints placed upon their free movement.⁴⁵ The players claim that the restrictions violate federal antitrust statutes.⁴⁶ In order to understand these claims completely, a more detailed analysis is necessary.

Antitrust principles

Most of the players' challenges claim that the restraints imposed by the leagues constitute violations of section one of the Sherman Act.⁴⁷ Section one prohibits combinations, contracts and conspiracies in restraint of trade. Not every agreement with the potential to restrain trade is a violation of the Act; courts interpret the Act to prohibit only unreasonable restraints of trade.⁴⁸ When evaluating whether an activity is an unreasonable restraint of trade, courts place restrictions into one of two categories: either per se ille-

39. See *supra* note 2.

40. A recent statistical analysis of the National Football League player draft concluded that the draft system, as implemented, appears to have little impact on changing comparative team strengths. This undermines the league's primary justification for the draft. Lock & Gratz, *supra* note 5, at 47.

41. See *Mackey*, 543 F.2d at 621.

42. *Id.*

43. *Id.*

44. *Id.* In *Mackey*, the owners argued that with players continually changing clubs, the teams would not play effectively as a unit, which is of utmost importance in team sports.

45. *E.g.*, *Flood v. Kuhn*, 407 U.S. 258 (1972) (the reserve system challenged in baseball); *McCourt v. California Sports, Inc.*, 600 F.2d 1193 (6th Cir. 1979) (action challenging NHL reserve system); *Smith*, 593 F.2d 1173 (NFL draft claimed illegal); *Robertson*, 389 F. Supp. 867 (NBA draft and reserve system challenged).

46. See, *e.g.*, *Wood v. National Basketball Ass'n*, 602 F. Supp. 525, 526 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954 (2d Cir. 1987) (challenge to draft, salary cap and ban on player corporations); *Smith*, 420 F. Supp. at 741 (challenge to player draft and its surrounding restrictions); *Mackey*, 407 F. Supp. at 1002-03 (challenge to Rozelle Rule).

47. Section one of the Sherman Act provides 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 . . ." 15 U.S.C. § 1 (1982).

NBA, NHL, and NFL operations constitute interstate commerce. See *infra* notes 64-98 and accompanying text. Strangely, baseball enjoys an antitrust exemption. See *infra* notes 60-63 and accompanying text.

48. See, *e.g.*, *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

gal restraints or those that must be evaluated under the Rule of Reason.⁴⁹

An activity is per se illegal when it restrains trade⁵⁰ and either has no purpose except stifling competition or is without any redeeming virtue.⁵¹ Examples of illegal per se practices are almost all price-fixing arrangements⁵² and some covenants not to compete.⁵³ If a restraint is illegal per se, a plaintiff need only show the historical perniciousness of the restraint and need not demonstrate that specific economic harm might result from the activity. Procompetitive benefits are not entertained even if they exist under the per se test.

By contrast, restraints not characterized as illegal per se are evaluated under the Rule of Reason test. Under that test, a restraint is unreasonable and therefore illegal if its anticompetitive harms outweigh its procompetitive benefits.⁵⁴ The inquiry focuses upon the harm from the restraint, possible procompetitive advantages from the activity, whether legitimate business purposes justify the restraint, and whether the restraint is no more restrictive than necessary and does not have the purpose or effect of unreasonably restraining competition.⁵⁵ In some cases, an activity cannot operate in the absence of a restraint. In that instance, the restraint is usually deemed reasonable provided the least restrictive restraint is employed to offer the product or service.⁵⁶

An example of conduct subject to the Rule of Reason is an agreement between members of a joint venture.⁵⁷ The Rule of Reason is the applicable standard because the agreement may have legitimate purposes as well as anticompetitive effects.⁵⁸ Accordingly, professional sports leagues, which are joint venture agreements between team owners, are subject to Rule of Reason analysis.⁵⁹

Application of antitrust principles to player restraints

In 1969, the St. Louis Cardinals traded baseball player Curt Flood to Philadelphia without his consent. When Flood asked for the opportunity to negotiate with another team, the management denied his request. Then, in

49. See generally *Smith*, 593 F.2d at 1177-89.

50. A restraint on trade is equivalent to a restriction on player movement for antitrust purposes in the professional sports context. See *supra* note 8. See also *Smith*, 420 F. Supp. at 745.

51. *Smith*, 593 F.2d at 1181.

52. See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) (oil companies conspired to fix gasoline prices); *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 458 (1940) (retailer licenses required by chemical manufacturer control prices and are per se illegal).

53. See, e.g., *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255 (7th Cir. 1981) (covenants not to compete that are not ancillary to a legitimate business transaction are illegal per se), *cert. denied*, 455 U.S. 921 (1982).

54. *North Am. Soccer League v. National Football League*, 670 F.2d 1249, 1259 (2d Cir. 1982).

55. See generally *Mackey*, 543 F.2d at 620; *Smith*, 420 F. Supp. at 745.

56. See *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979) (music copyright clearinghouses' practice of issuing blanket licences and acting as joint venturers held to be necessary to market the product at all and, therefore, was not per se violative of the Sherman Act).

57. See, e.g., *Standard Oil*, 221 U.S. 1.

58. *Id.*

59. *North Am. Soccer League*, 670 F.2d at 1259.

Flood v. Kuhn,⁶⁰ he sued, claiming, among other things, that baseball's reserve system⁶¹ violated federal antitrust laws.⁶² Without reaching the issue of the legality of the reserve system, the United States Supreme Court ruled that the antitrust laws did not apply to professional baseball.⁶³ Since *Flood*, baseball's player restraints have gone unchallenged.

Baseball is the only sport that enjoys an antitrust exemption. Courts have subjected the NHL,⁶⁴ NFL,⁶⁵ and NBA⁶⁶ to antitrust liability in the past. For example, in *Smith v. Pro-Football, Inc.*,⁶⁷ the District of Columbia Court of Appeals held that the NFL college player draft was an unreasonable restraint of trade under the Rule of Reason.⁶⁸ According to the court, the anticompetitive impact of the draft outweighs its alleged procompetitive benefit.⁶⁹ In the same decision, however, the court reversed a lower court holding the draft illegal per se.⁷⁰

In *Kapp v. National Football League*,⁷¹ a federal district court ruled that the draft, the tampering rule, the standard player contract and the Rozelle Rule all patently violate the antitrust laws under the Rule of Reason.⁷² The court of appeals affirmed the holding that the challenged rules are unlawful, but agreed with the jury finding that the plaintiff did not prove any specific economic harm, a showing necessary for an antitrust victory by a private plaintiff.⁷³

Similarly, in *Mackey v. National Football League*,⁷⁴ the Eighth Circuit labeled the Rozelle Rule as more restrictive than necessary.⁷⁵ The court rejected the League's argument that it needed the restraint to recoup player development costs, to maintain player continuity and to achieve a competitive balance throughout the league.⁷⁶ While not ordering the League to abandon the Rule, the court recommended less restrictive alternatives for maintaining a healthy, competitive league. The court proposed that the

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

61. See *supra* note 28 and accompanying text.

62. *Flood*, 407 U.S. at 265-66.

63. See *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953); *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200, 209 (1922). In *Federal Baseball*, Justice Holmes concluded that baseball did not constitute interstate commerce and was not, therefore, subject to the federal antitrust laws. Baseball's antitrust exemption is an anomaly within the realm of professional sports leagues. There appears to be no justification for distinguishing baseball from the other sports except for strict adherence to stare decisis from the *Federal Baseball* and *Toolson* decisions.

64. See, e.g., *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 466 (E.D. Pa. 1972).

65. See, e.g., *Radovich v. National Football League*, 352 U.S. 445, 452 (1957).

66. See, e.g., *Washington Professional Basketball Corp. v. National Basketball Ass'n*, 147 F. Supp. 154, 155 (S.D.N.Y. 1956).

67. 593 F.2d 1173 (D.C. Cir. 1978).

68. *Smith*, 593 F.2d at 1183-85.

69. *Id.*

70. *Smith*, 420 F. Supp. at 744.

71. 390 F. Supp. 73 (N.D. Cal. 1974).

72. *Kapp*, 390 F. Supp. at 82-83.

73. *Kapp v. National Football League*, 586 F.2d 644, 648 (9th Cir. 1978).

74. 543 F.2d 606 (8th Cir. 1976).

75. *Mackey*, 543 F.2d at 622.

76. *Id.* at 621.

NFL adopt a competition committee, multiple year player contracts and special incentives for a player to remain with a team.⁷⁷

Likewise, in professional hockey, the draft,⁷⁸ reserve system,⁷⁹ and option rule,⁸⁰ which included a "modified Rozelle Rule,"⁸¹ were held to violate the antitrust laws.⁸² In one NHL case,⁸³ the judge concluded that, as a matter of law, both a perpetual reserve system and one limited to three years duration constitute an unlawful monopolization⁸⁴ in violation of section two of the Sherman Act.⁸⁵

The NBA player draft has also come under intense antitrust scrutiny. In an early case, *Denver Rockets v. All-Pro Management, Inc.*,⁸⁶ a federal district court stated that a substantial probability exists that the college draft system constitutes a violation of the antitrust laws.⁸⁷ In a later NBA case, *Robertson v. National Basketball Association*,⁸⁸ another federal district court implicitly agreed with the *Denver Rockets* decision that the draft was an illegal restraint on player movement.⁸⁹ The *Robertson* court also suggested that the reserve system, the standard player contract, and the alleged boycotting and blacklisting violated the Sherman Act.⁹⁰

Recently, a player posed a third challenge to the basketball draft.⁹¹ He had been drafted in the first round by a team whose payroll already exceeded the maximum allowable team salary.⁹² The team was confined to offer only \$75,000, but the player wanted to be paid more. The player knew he could receive a larger salary from another team, one under the salary limit. He sued the NBA, alleging the player draft and salary limitations violated federal antitrust laws. However, the court dismissed his antitrust claim under the labor exemption.⁹³ The labor exemption permits provisions included in collective bargaining agreements to escape the strictures of the antitrust laws.⁹⁴ This exemption is a serious roadblock for athletes covered by collec-

77. *Id.*

78. See *supra* notes 19-22 and accompanying text.

79. See *supra* notes 28-29 and accompanying text.

80. See *supra* notes 30-33 and accompanying text.

81. See *supra* notes 34-38 and accompanying text.

82. *McCourt*, 460 F. Supp. at 907 (NHL reserve system violates Sherman Act); *Philadelphia World Hockey Club*, 351 F. Supp. at 508 (finding NHL draft, reserve, and option systems illegal).

83. *Philadelphia World Hockey Club*, 351 F. Supp. 462.

84. *Id.* at 518. "Monopolization," in this context, refers to unreasonable restrictions on player movement by the leagues. See *supra* notes 8 & 50.

85. *Philadelphia World Hockey Club*, 351 F. Supp. at 518. Section two of the Sherman Act provides that any person who attempts or conspires to, or actually does, monopolize interstate trade or commerce is subject to criminal conviction. 15 U.S.C. § 2 (1976).

86. 325 F. Supp. 1049 (C.D. Cal. 1971).

87. *Denver Rockets*, 325 F. Supp. at 1056.

88. 389 F. Supp. 867 (S.D.N.Y. 1975).

89. *Robertson*, 389 F. Supp. at 893. The *Robertson* court based its ruling on a motion for summary judgment; the case settled before the court reached the merits of the suit.

90. *Robertson*, 389 F. Supp. at 891-92.

91. *Wood v. National Basketball Ass'n*, 809 F.2d 954 (2d Cir. 1987).

92. See *infra* notes 141-54 and accompanying text.

93. *Wood*, 809 F.2d at 959.

94. A provision which otherwise may be subject to the antitrust laws is exempt from such scrutiny if it is contained in a collective bargaining agreement between the union and the management. The provision must involve a mandatory subject of bargaining and be the result of bona fide arms-length negotiations to enjoy such a protective shield. See *Local Union 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965).

tive bargaining agreements when claiming antitrust violations.⁹⁵

All of the player restraints in professional sports are more restrictive than necessary to maintain competitive balance and provide a marketable product that will induce spectator attendance.⁹⁶ Nevertheless, the leagues continue to use many of these mechanisms despite the threat of antitrust violations and liability. One reason for this practice is the players' associations' inclusion of the restraints in their collective bargaining agreements. Because the players have contractually agreed to the restraints, the restraints are protected from antitrust scrutiny by the labor exemption.⁹⁷ Additionally, the players' willingness to settle their claims before a court's antitrust scrutiny begins allows the unabated use of the restraints to continue.⁹⁸ Consequently, not only the team owners but the players and their unions have kept the athletes from freely moving and effectively bargaining for their economic worth.

Antitrust liability should be avoided at all costs. The Sherman Act permits victorious plaintiffs to collect treble damages in private antitrust actions. In the realm of professional sports, where players make large salaries, trebled damages paid to a group of victorious professional athletes based on their salaries would be a tremendous penalty. Additionally, antitrust cases require immense preparation and expense. Finally, remedies other than damages are available and may be drastic. A court may completely invalidate a restraint or may order a divestiture or dissolution of a monopolizing defendant.⁹⁹ Therefore, utilizing less restrictive methods of dealing with player mobility in professional sports is not only in the best interests of the players, but due to the extreme consequences of antitrust scrutiny and liability, it is also favorable to the owners.

Less Restrictive Variations of Player Restraints

The least restrictive alternative to promote player mobility and allow players to achieve their economic worth, under antitrust analysis, is to eliminate all restraints. Only then could players deal with any team interested in obtaining their services without artificial restrictions. While this alternative is more in line with practices common to other businesses, it is such a radical departure from the current system in sports that the suggestion is probably impractical.¹⁰⁰

95. See *Wood*, 809 F.2d at 959-60 (labor exemption made player's antitrust challenges invalid); *McCourt*, 600 F.2d at 1203 (NHL reserve system protected by labor exemption); *Mackey*, 543 F.2d at 612-16 (although mandatory subject of bargaining, the Rozelle Rule failed to qualify for labor exemption due to lack of bona fide bargaining).

96. See *supra* note 2.

97. See *supra* notes 93-95 and accompanying text.

98. For example, an NBA class action settlement received court approval in *Robertson v. National Basketball Ass'n*, 72 F.R.D. 64, 69-70 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977). Players are often eager to settle because antitrust cases under the Rule of Reason tend to drag on for many years. While quick decisions are possible under per se analysis, Rule of Reason cases require much more extensive discovery procedures.

99. See generally *United States v. United States Shoe Mach. Corp.*, 391 U.S. 244 (1968); *Schine Chain Theatres v. United States*, 334 U.S. 110 (1948); *Standard Oil*, 221 U.S. 1; *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

100. In combination with other, non-restraining mechanisms, some of the player restraints could

There are mechanisms that restrict player mobility but in less intrusive ways.¹⁰¹ For example, a modified player draft, consisting of only two rounds, may allow players who normally might not make a team to sign as free agents elsewhere.¹⁰² Under the modified draft, players not selected in either of the two rounds can negotiate their own contracts with teams interested in their services. This draft is less restrictive because it affects only approximately fifty incoming players in each league yearly. Under the current draft systems, players entering the leagues are permitted to negotiate with only one team. A two-round draft would probably increase player satisfaction and provide greater opportunity for players to make a team.¹⁰³

A second less restrictive method of player selection may be to allow several teams to select each player. Potentially, this enables players to receive multiple competitive offers and gives them the opportunity to choose where to play.¹⁰⁴ Additionally, a restriction on this selection method, allowing a team to sign only one player from each draft round, will help maintain competitive balance within a league without hindering players' mobility.

Another less restrictive alternative may be a variation of the baseball drafting scheme. In Major League Baseball, if a drafted player does not sign with the selecting club within six months, he is eligible for a re-entry draft.¹⁰⁵ This system encourages the selecting club to offer the player a multi-year contract as well as other incentives to keep him from wanting to negotiate elsewhere. Additionally, such incentives may be effective in retaining a player's services within a system of nearly complete free agency. Similar to that arrangement, but even less restrictive, may be to allow a drafted player, if unable to reach an agreement with the selecting team within a prescribed time interval, to negotiate with any other team without requiring the ultimate employing club to compensate the drafting team.¹⁰⁶

Other methods to promote player mobility and allow players to obtain their economic worth are variations on the option rule and right of first refusal. For example, leagues could eliminate the option rule from the stan-

have a positive effect on competitive balance. See *infra* notes 102-07 and accompanying text. Therefore, while eliminating all player restraints is the absolute least restrictive alternative, it is not necessarily the most effective alternative.

101. See, e.g., *Smith*, 420 F. Supp. at 747. See *infra* notes 102-04 and accompanying text.

102. In *Smith*, testimony indicated that in the NFL, there are approximately 50 players in each draft that will almost certainly make the team which drafts them; many other drafted players get released because the selecting team finds that it cannot use their services. With the 28 teams in the NFL, for example, all of the best incoming players would be evenly divided among the teams, while all other potential signees would be unrestricted free agents. *Smith*, 420 F. Supp. at 746-47.

Sometimes, a player is drafted by a team which is already replete with good players at the draftee's position. That draftee has a much less likely chance of making that team, particularly in sports like basketball where teams have smaller rosters. A less restrictive draft, therefore, would allow a player greater freedom to decide where he is most likely to make the team.

Arguably, some of the best players available are not getting the chance to play with the current draft and reserve systems. That is, some high quality players are retained by teams but do not play because more experienced veterans are already set to play at their positions. Other teams may need players at these positions, but those high quality back-ups are tied to the selecting clubs.

103. See *supra* note 102.

104. *Smith*, 420 F. Supp. at 747.

105. See *supra* note 22 regarding the Major League Baseball draft.

106. See *supra* notes 34-38 and accompanying text regarding free agent compensation.

dard player contract, but allow it to be bargained for individually.¹⁰⁷ Another alternative may be to keep the option rule, but give clubs faced with losing a player who has played out his option the right of first refusal. This right could also be bargained for in a player's contract.

OTHER MECHANISMS THAT AFFECT COMPETITIVE BALANCE AND PLAYER MOBILITY

There are means other than player restraints to achieve competitive balance in professional sports leagues.¹⁰⁸ To avoid antitrust liability, less restrictive alternatives must be employed.¹⁰⁹ Some possible options, used in some form or other today, include revenue sharing,¹¹⁰ selective scheduling,¹¹¹ and salary limitations.¹¹² A totally free market system that permits each player to play for any team offering him a job is another possibility.¹¹³ Other options include less restrictive variations of the previously mentioned player restraints.¹¹⁴

Revenue Sharing

All four major sports leagues have formulas for sharing revenues among teams, although percentages vary from one league to another. There are two main sources of shared revenue: (1) gate receipts; and (2) income from national television contracts. In the NFL, gate revenues are shared on a sixty-fourth basis, with the larger share going to the home team.¹¹⁵ The NFL national television contract is split evenly among the teams in the league.¹¹⁶ In baseball and basketball, the network television packages are divided with each club getting an equal cut of the total league television revenue.¹¹⁷ The gate receipts in basketball, however, are not shared and the home team keeps all income from admissions.¹¹⁸ In baseball, the visiting team receives only fifteen percent of the gate receipts for games it plays.¹¹⁹ The NHL follows

107. See Goldstein, *Out of Bounds Under the Sherman Act? Player Restraints in Professional Team Sports*, 4 PEPPERDINE L. REV. 285, 308 (1977).

108. E.g., *Mackey*, 543 F.2d at 621 (court suggested the implementation of a competition committee, multi-year contracts and special contract incentives); see also Shapiro, *The Professional Athlete: Liberty or Peonage?* 13 ALTA. L. REV. 212, 234 (1975) (recommending a revenue sharing plan).

109. See, e.g., *Smith*, 420 F. Supp. at 746-47 (stating that the current NFL restraints are the most restrictive possible and that other, less restrictive alternatives ought to be utilized).

110. See *infra* notes 115-24 and accompanying text.

111. See *infra* notes 125-40 and accompanying text.

112. See *infra* notes 141-54 and accompanying text. In the sports context, salary limitations are popularly referred to as "salary caps."

113. See *supra* note 99.

114. See *supra* notes 19-38 and accompanying text.

115. *Id.* Exhibition game gate receipts are shared fifty-fifty in the NFL. See R. BERRY & G. WONG, *supra* note 37.

116. See *Antitrust Policy and Professional Sports, 1982: Oversight Hearings on H.R. 823, H.R. 3287 and H.R. 6467 Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary*, 97th Cong., 1st and 2d Sess. 31 (1982) (statement of Gerald Scully, Professor of Economics, Southern Methodist University) [hereinafter *Hearings*]. Each team receives an equal sum, regardless of the number of times a given team is televised. *Id.* at 69.

117. R. BERRY & G. WONG, *supra* note 37, at 3.

118. See *Hearings*, *supra* note 116, at 66.

119. *Id.*

the formula used in basketball.¹²⁰

In all four leagues, much of the total revenue acquired from media coverage is non-network in nature. Each team negotiates with the local media and retains the total income. Clubs in the larger media bases,¹²¹ therefore, make substantially more than those in smaller markets.¹²²

During a recent Congressional hearing, one economist argued that economic competitiveness in sports leagues will result solely from complete revenue sharing.¹²³ While revenue sharing certainly balances teams' incomes, incentives for owners to spend the money necessary to establish winning teams are lost.¹²⁴ Revenue sharing is potentially a "something-for-nothing" proposition; owners continue to take from the system whether they give back or not. Similarly, a player's ability to play where he chooses is seriously restricted with a revenue sharing system. Revenue sharing discourages owners from wanting to sign free agents and trade for better players because the owners do not need to spend money to collect revenues.

Selective Scheduling

Scheduling games so that teams of near-equal ability play one another should produce closely-matched, competitive games. Theoretically, spectators prefer close contests to lopsided ones.¹²⁵ This, in turn, should lead to increased revenues and competitive balance.¹²⁶

Before 1978, the NFL employed a rotational scheduling format.¹²⁷ This cyclical format often resulted in unequal contests,¹²⁸ a result, incidentally, indicating that player restraints alone do not achieve competitive balance. Currently, however, the league¹²⁹ uses a system of scheduling allegedly designed to equalize contests and reduce disparities in team win-

120. *Id.*

121. "Larger media bases," as used here, refer to the larger population centers most likely to draw more spectators.

122. Teams in larger markets receive more media revenues because, with more viewers available to watch the advertisements, stations are able to charge more for commercials. Similarly, there are more radio and television outlets competing for the exclusive right to broadcast a team's games in a larger area, so those teams can expect more lucrative local media contracts.

123. See *Hearings, supra* note 116, at 69. Revenue sharing, Scully reasoned, is essential to the viability of poorer teams and those located in smaller markets. The system allows those teams to compete more effectively with other teams for players' services. *Id.*

124. Arguably, most team owners have not implemented overall competitive strategies for forming successful team operations. The responsibility for team success is traditionally placed upon the players in the form of player restraints. The relationship between owner business initiative, competitive balance, and player restraints will be examined by the present author in a future article.

125. See *supra* note 2.

126. See *supra* note 2.

127. Under a rotational scheduling format, a team's opponents are rotated over the years to determine that team's yearly schedule. For example, in a league with a ten-game schedule and twenty-one teams, Team 1 would play Teams 2-11 in the first year, Teams 12-21 the following year, Teams 2-11 again the third year and so on.

128. See Lock & Gratz, *A Legal and Statistical Analysis of the National Football League Scheduling Format: Most Teams Can't Win for Losin'*, 3 LOY. ENT. L.J. 51 (1983).

129. The NFL is the only league that uses selective scheduling. The other three leagues employ set schedules each year. A selective scheduling mechanism could potentially have a greater effect in the other three leagues than in the NFL since the NFL schedule is made up of only 16 games while the number of regular season games in the NHL, NBA, and Major League Baseball is 80, 82, and 162, respectively.

ning percentages.¹³⁰ Each team automatically plays each of its divisional opponents twice.¹³¹ All other opponents are determined by reviewing each team's divisional standings from the previous season. Ideally, teams finishing lower in their division play other teams similarly situated.¹³² With more closely-matched teams playing one another, the scheme ostensibly promotes competitive balance and opponent variety.¹³³

The effect of selective scheduling is to initially increase competitive balance in games. Later, in the playoffs, Team A, which played poorer opponents but has a winning record, will play Team B. Team B has a winning record against better quality opponents. Team A should soundly lose that match-up. Additionally, problems may arise because Team A, although a much poorer quality team than Team B, will not improve through the draft if it must choose late in each round based on its winning record.

The goals of player mobility and players obtaining their economic worth may also suffer from selective scheduling. Clubs with winning records against poorer quality opponents, like Team A above, may not want to improve their teams with player acquisitions. Improving means having to play the best quality opponents throughout the season.

Indeed, in the NFL, selective scheduling has not achieved the results the NFL envisioned.¹³⁴ A comparative analysis of team winning percentages for the four years before and after implementing the current scheduling scheme revealed that the new system prompted little change in team winning percentages.¹³⁵ Commentators attribute this result to the inequitable scheduling method under the current system.¹³⁶ Because NFL scheduling is based on divisional place-finish rather than winning percentage, the study found that few teams each year actually played a schedule that adequately matched them with teams of similar ability.¹³⁷ While a few teams did enjoy the benefits of selective scheduling, overall there were very few changes in team winning percentages from year to year.¹³⁸

The authors of the study, while acknowledging the potential usefulness of selective scheduling, suggest a more effective means of scheduling to attain the league goal of close matches. They maintain that scheduling based on a team's previous year's winning percentage, regardless of divisional standing, will more effectively match similarly successful teams and will achieve the goal of competitive balance.¹³⁹ The most effective, but most radical, alternative the authors advocate is to dissolve the divisional opponent system.¹⁴⁰ While it might conflict with other league objectives such as intra-divisional rivalry, divisional tie-breaking criteria and home-and-away intra-

130. NATIONAL FOOTBALL LEAGUE MEDIA INFORMATION BOOK 8 (1981).

131. There are six divisions in the NFL, each comprised of four or five teams.

132. See Lock & Gratz, *supra* note 128, at 67, for a diagram of the NFL scheduling procedure.

133. NATIONAL FOOTBALL LEAGUE MEDIA INFORMATION BOOK 8 (1981).

134. See *supra* note 130 and accompanying text.

135. Lock & Gratz, *supra* note 128, at 65.

136. *Id.* at 68.

137. *Id.*

138. *Id.* at 73.

139. *Id.* at 74.

140. *Id.*

divisional scheduling schemes, this alternative is more likely to promote evenly-matched contests than the plan based on divisional standings.

Salary Limitations

Limiting the amount each team may spend on total player salaries theoretically equalizes competition among the teams in a league. Permitting teams to spend only a prescribed amount places them on a more equal basis when competing for players, regardless of the team's financial resources. Assuming playing ability correlates with salary, a "salary cap"¹⁴¹ allows poorer teams to sign high ability players. At the same time, teams with higher payrolls, and higher ability players, do not have the available financial reserves to sign other high ability players. Theoretically, lower quality teams will improve while teams already at a high quality level will remain the same, making for more equalized contests.

In 1983, the NBA and its players' association supplemented the existing collective bargaining agreement to include maximum team salaries.¹⁴² This "salary cap," which took effect in the 1984-85 season, set limits on the amount each NBA team could spend on player salaries in a given year.¹⁴³ Teams with salaries at or above the prescribed limit had their player payrolls frozen at their current levels until they fell within the cap.¹⁴⁴

The purpose of the salary cap was: (1) to alleviate the effect of skyrocketing player salaries on financially struggling teams;¹⁴⁵ and (2) to allow teams with less financial backing to compete for the more talented players. According to team owners, the salary cap maintains economic and competitive balance.¹⁴⁶ Players are guaranteed financially stable employers while team owners benefit from limited payrolls. With a salary cap, teams allegedly become more equalized, increasing contest excitement and ticket sales.

The salary cap, unfortunately, has failed to achieve its objectives¹⁴⁷ and both players and owners are disenchanted with the arrangement.¹⁴⁸ The cap has had a deadening effect on player movement within the league, especially for those players with higher salaries.¹⁴⁹ Owners are generally unhappy since they cannot get the players they want without devising creative tactics

141. See *supra* note 112.

142. MEMORANDUM OF UNDERSTANDING BETWEEN THE NATIONAL BASKETBALL ASSOCIATION AND THE NATIONAL BASKETBALL PLAYERS' ASSOCIATION art. III (1983) [hereinafter MEMORANDUM OF UNDERSTANDING].

143. In 1984-85, player salaries and benefits were limited to \$3.6 million; in 1985-86, the limit rose to \$3.8 million, and it again increased to \$4.0 million in 1986-87. However, if 53% of the league's gross revenue divided by the number of teams in the league exceeded those fixed amounts, then that amount would be the salary limit imposed. MEMORANDUM OF UNDERSTANDING art. III C (3)(4).

144. *Id.*

145. NATIONAL BASKETBALL ASSOCIATION, PRESS RELEASE (March 31, 1983).

146. *Id.*

147. See Note, *Of Hoops, Labor Dupes and Antitrust Ally-Oops: Fouling Out the Salary Cap*, 62 IND. L.J. 95, 106-07 (1986); Note, *The National Basketball Association Salary Cap: An Antitrust Violation?*, 59 S. CAL. L. REV. 157, 158 (1985).

148. See Note, *Of Hoops, Labor Dupes and Antitrust Ally-Oops: Fouling Out the Salary Cap*, 62 IND. L.J. 95, 104-06 (1986).

149. Under the salary cap restriction, few teams have the payroll reserve to afford to fit a highly-paid player into their budgets. These players, therefore, have rarely moved.

to sidestep the cap.¹⁵⁰ Most importantly, however, the salary cap scheme is apparently illegal under the Rule of Reason¹⁵¹ because it restricts player movement and player salaries.¹⁵² Since the NBA collective bargaining agreement expired,¹⁵³ the labor exemption no longer shields the salary cap from antitrust scrutiny.¹⁵⁴ Therefore, it is likely that the cap will come under attack in the future.

A SUGGESTED MODEL FOR ACHIEVING AND MAINTAINING COMPETITIVE BALANCE USING LESS RESTRICTIVE MEANS

Ideally, professional sports leagues should present evenly-matched contests to maximize income¹⁵⁵ and to allow player movement that is as unrestricted as possible. Currently, team owners rely upon player restraints to maintain competitive and economic balance. Some of the responsibility for intra-league balance must shift to the owners. Players should not suffer the entire burden of maintaining competitive balance.

The ideal¹⁵⁶ model for achieving and maintaining competitive balance using less restrictive means combines minimal player restraints¹⁵⁷ with the most enjoyable contests,¹⁵⁸ giving viability to the league as a whole. A modified draft and a free agency system with a compensation scheme are the only mechanisms required to effectuate this model.

A Less Restrictive Draft

It is inevitable that professional sports leagues will retain a player selection system for incoming players. The draft conveniently disperses new players among the teams. The current method of permitting teams to choose in reverse order of their previous year's finish theoretically helps equalize relative team strength in the leagues.¹⁵⁹ However, the draft, as implemented in all professional sports leagues, is more restrictive than necessary.¹⁶⁰

Maintaining reverse-order selection while limiting the draft to two rounds is one way to allow player movement without lessening league com-

150. For example, although the New York Knicks' payroll exceeded the salary cap, the team was able to sign Patrick Ewing to a \$31.2 million package for a 10-year term which included deferred payments and interest free loans in addition to the base salary. See Vescey, *The Fine Print of Ewing's Pact*, N.Y. Post, Nov. 5, 1985, at 74, col. 1. Because of methods like this used to outwit the limitations, the cap does little to promote equalization of teams within the league.

151. See *supra* notes 54-59 and accompanying text.

152. See Note, *The National Basketball Association Salary Cap: An Antitrust Violation?*, 59 S. CAL. L. REV. 157, 180 (1985).

153. See *supra* note 10 and accompanying text.

154. See *supra* notes 93-95.

155. See *supra* note 2.

156. An ideal model is one that falls within the antitrust laws, allows more freedom of player movement and promotes league financial success.

157. That is, less restrictive under antitrust analysis.

158. Interesting contests promote spectator attendance and economic returns. See *supra* note 2.

159. See *supra* notes 19-22 and accompanying text.

160. See, e.g., *Smith*, 593 F.2d at 1183-85 (NFL draft is an unreasonable restraint under the Rule of Reason). The other leagues' drafts operate in essentially the same manner as the NFL's. See *supra* note 22.

petitiveness.¹⁶¹ The system disperses the top players, those most likely to affect the competitive balance within the league,¹⁶² to the teams most in need. Players not drafted would be free to negotiate with any interested team. This drafting scheme is less restrictive because it affects fewer incoming players.¹⁶³

A period of exclusive negotiation with drafted players is important to the two-round draft. Without prohibitions on tampering by other teams, the draft's function of equalizing teams to maintain competitive balance is rendered impotent. The exclusive negotiation period, however, should be limited in time to assure good-faith bargaining between the team and the player. In baseball, for example, a team has only a six-month right to negotiate with a drafted player without any tampering.¹⁶⁴ If a player does not sign within that period, he is eligible to be drafted in the next draft by any team.¹⁶⁵ These restraints on a player's ability to negotiate freely are still restrictive.

Alternatively, a shorter no-tampering period of three months gives the parties adequate time to negotiate a deal and is more likely to survive a court's scrutiny under the Rule of Reason.¹⁶⁶ If no agreement is reached after three months, the player is free to negotiate with any other team immediately without waiting for the next draft.¹⁶⁷

A second possible player selection system allows each player to be drafted by, for instance, three teams instead of one. By negotiating with more than one team, a player is better able to gauge his true economic value. Under this scheme, teams should be restricted from signing more than one player from each round. That way, more wealthy¹⁶⁸ or desirable¹⁶⁹ teams could not monopolize the labor market, ensuring compatability with the antitrust laws. Moreover, such a restriction advances the draft's asserted function of maintaining a competitive balance. If a selected player is unable to agree to a contract with any of the choosing clubs within a reasonable negotiating period, he should be allowed to negotiate elsewhere.

The latter proposed draft, like the two-round draft, necessitates a no-tampering rule to insure good faith bargaining on the player's part.¹⁷⁰ If a player has knowledge of a more attractive offer from a non-selecting team, he could simply hold out for the better offer. This action, again, subverts the team equalization rationale for the draft.

161. See *supra* notes 102-03 and accompanying text.

162. See *supra* note 102.

163. See *supra* note 102.

164. See *supra* note 22 regarding the Major League Baseball draft.

165. *Id.*

166. See *supra* notes 54-59 and accompanying text.

167. It may be necessary to require a team signing a player after the three month period to compensate the drafting team for losing its draft choice. While the burden of compensating the losing team may cause some teams to be reluctant to sign these players, compensation is necessary to promote the purpose of the draft of maintaining competitive balance.

168. In this context, a wealthy team is one where the owner has greater financial reserves as distinguished from team revenues alone. Typically, team owners have other sources of income, usually emanating from outside business ventures unrelated to their sports teams' profits.

169. See *supra* text accompanying note 41 describing why some cities may be more desirable than others.

170. The three selecting teams, of course, would be exempt from the no-tampering restriction.

A Free Agency Compensation System

The other mechanism necessary to promote competitive balance and to allow players to move freely and to obtain their economic worth is a free agency system that includes compensation. When a player's contractual obligation with a team ends, the player should be free to negotiate with any other team without restrictions. Additionally, there should not be an option rule unilaterally imposed on each player. Rather, the owner and the player may negotiate to include an option clause in the player's contract. A player may accept an option clause in exchange for a higher salary, better fringe benefits, a longer term or other incentives even though the clause restricts his mobility. Similarly, players and owners should bargain over the club's right to first refusal. A right of first refusal allows a player to shop around to see if he can get a more lucrative offer. If he receives a better offer, his former team has the opportunity to match that offer. If the team does match the offer, the player stays; if not, the player is free to go.

The right of first refusal severely restricts a player's actual mobility; nevertheless, it allows a player negotiating leverage to obtain his economic worth. Regardless of where the player ends up, he will receive a better contract than his previous one. A player who actually desires to play for a new team, however, may be prevented from moving if his current club matches the offering team's package. This system is currently utilized in the NFL and NBA.¹⁷¹

A team gaining a player through free agency should compensate the team losing the player for its loss. The amount of compensation should depend on the ability level of the player. Because there are a limited number of players of the caliber required for playing professional sports, monetary compensation is often not enough.¹⁷² Accordingly, players currently on the signing team's roster or its future draft choices should be the basis of the compensation. Each player in the league could be rated based on his ability. For example, a team losing a level "A" free agent would receive an "A" player or draft choice from the signing team. This system keeps teams' strength within the league relatively balanced. Major League Baseball currently employs a rating system for compensation purposes that has proved to be workable.¹⁷³

Factors Excluded from the Model

Revenue sharing, selective scheduling and salary limitations have been excluded from the suggested model. Their burdens outweigh their benefits in terms of competitive balance, player mobility and antitrust acceptability. While revenue sharing balances teams' incomes,¹⁷⁴ it severely restricts

171. See NATIONAL FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT art. XV (1982); COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NATIONAL BASKETBALL ASSOCIATION AND THE NATIONAL BASKETBALL PLAYERS' ASSOCIATION art. XXII (D) (1980).

172. Money in the hands of an owner searching for a player is useless if there are no quality players available.

173. In baseball, however, players are rated on only three levels: A, B, or C. Additional levels may allow more exact ability determinations, thereby enhancing intra-league competitive balance.

174. See *supra* note 123 and accompanying text.

player mobility.¹⁷⁵ Additionally, revenue sharing, as an agreement among horizontal competitors, may not withstand an antitrust challenge. Selective scheduling is also unduly burdensome; it is merely a short-term attempt to maintain competitive balance within a league¹⁷⁶ and may have a detrimental long-term effect on relative team strength.¹⁷⁷ Finally, salary caps are also more restrictive than necessary.¹⁷⁸ These caps inhibit player movement and limit the amount of money that players may be paid. Moreover, the NBA salary cap has failed to promote league competitive balance.¹⁷⁹ The negative effects of these three mechanisms are clearly onerous, rendering them dispensable in constructing a new, less restrictive model.

CONCLUSION

A player selection mechanism¹⁸⁰ that does not significantly restrain player movement, unlike the current system, is much more likely to conform to the antitrust laws. A combination of a less restrictive draft, free agency with a compensation scheme and bargained-for option and right of first refusal clauses would better achieve the leagues' alleged goals of competitive balance, maximum revenues and continued league viability. By promoting player mobility, the system enables a player to obtain his economic worth. Additionally, the proposed system is likely to withstand antitrust scrutiny. Finally, unlike the present system, the responsibility for achieving team quality and success under the proposed model is shared by owners and players in a unified, cooperative effort.

175. See *supra* note 124 and accompanying text.

176. See *supra* notes 125-33 and accompanying text.

177. See *supra* notes 134-40 and accompanying text.

178. See Note, *The National Basketball Association Salary Cap: An Antitrust Violation?*, 59 S. CAL. L. REV. 157 (1985).

179. *Id.* See also *supra* notes 147-48 and accompanying text.

180. See *supra* notes 141-49 and accompanying text. Some sort of player selection mechanism is necessary in order for the league to maintain some initial control over incoming players.

