NOTE

FLOOD IN THE LAND OF ANTITRUST: ANOTHER LOOK AT PROFESSIONAL ATHLETICS, THE ANTITRUST LAWS AND THE LABOR LAW EXEMPTION

In "a century and a quarter since the New York Nine defeated the Knickerbockers 23 to 1 on Hoboken's Elysian Fields June 19, 1846 with Alexander Jay Cartwright as the instigator and the umpire,"[1] Americans have seen professional baseball rise from its meager beginnings in 1871 with the formation of the National Association of Professional Baseball Players to a multimillion dollar business[2] today. While baseball is still known for its power hitters, double plays, and diamond heroes, as well as the electronic invasion of lighted scoreboards and television, not to mention the advertising receipts, it has become equally well known for the irony of not actually being a business and thus qualifying as a select member of those granted exemption from the antitrust laws. Certainly, the case which today has provided the greatest single focus on this issue is *Flood v. Kuhn,*[3] which reiterated the decisions of *Federal Baseball Club v. National League of Professional Baseball Clubs*[4] and *Toolson v. New York Yankees, Inc.*,[5] and held that neither baseball nor the reserve system, whereby players are permanently tied to ball clubs, is subject to the antitrust laws: a specious conclusion since all other professional sports are not exempt and baseball is an aberration. Nonetheless, any change would be, according to Mr. Justice Blackmun, a matter "for congressional, and not judicial, action."[6] In reaching its decision, the Court found it unnecessary "to consider the respondents' additional

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[1]Flood v. Kuhn, 407 U.S. 258, 260-61 (1972).

[2]U.S. Bureau of the Census, Statistical Abstract of the United States: 1972, at 753 (93d ed. 1972).

[3]407 U.S. 258 (1972).

[4]259 U.S. 200 (1922).

[5]346 U.S. 356 (1953).

[6]407 U.S. at 285.

argument that the reserve system is a mandatory subject of collective bargaining and that federal labor policy therefore exempts the reserve system from the operation of the federal antitrust laws."[7] Both the antitrust issue and the possible labor law exemption have arisen again in one of America's youngest and fastest growing sports, professional hockey. But before dealing with this issue, it may be helpful to review some of its background.

I. Dissatisfaction in Professional Sports

A. Contract Disputes and Curt Flood

Baseball has, with the *Flood* case, perhaps provided the most famous contractual dispute of professional athletes[8] and some of

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[7]*Id.*

[8]The sports pages over the last decade have been marked by the considerable attention given to the contractual problems of professional athletes, most notably in the ranks of professional basketball, in which the basketball gypsy, Rick Barry, now back in the fold of the Golden State Warriors, has been journeying about between the National Basketball Association (NBA) and its new rival, the American Basketball Association (ABA), each time in search of "greener pastures." Spencer Haywood, the basketball boy wonder of the 1968 Olympics, formerly of the Denver Rockets of the American Basketball Association, following the pattern of Barry and the advice of promoter Al Ross, negotiated a more satisfactory contract with the Seattle Supersonics of the NBA; and while Haywood was moving from the ABA to the NBA, Billy Cunningham, with the help of the courts, responded to the interleague warfare and financial bidding by traveling from the Philadelphia 76'ers of the NBA to the Carolina Cougars of the ABA, where he now performs. *See* Washington Capitols Basketball Club, Inc. v. Barry, 304 F. Supp. 1193 (N.D. Cal.), *aff'd*, 419 F.2d 472 (9th Cir. 1969); Lemat Corp. v. Barry, 275 Cal. App. 2d 671, 80 Cal. Rptr. 240 (1969); R. Barry with B. Libby, Confessions of a Basketball Gypsy: The Rick Barry Story (1972). *See also* Haywood v. National Basketball Ass'n, 401 U.S. 1204 (1971); Munchale Corp. v. Cunningham, 457 F.2d 721 (4th Cir. 1972); S. Haywood with B. Libby, Stand Up for Something: The Spencer Haywood Story (1972).

Football also has experienced the interleague wars of lucrative financial offers and contract jumping, but contract breaking in professional football has become a thing of the past with the congressional approval of the merger of the two football leagues. With the merger came the appearance of lower contract offers and the disappearance of antitrust litigation by the American Football League (AFL) against the National Football League (NFL) from whom the AFL was seeking to wrest some control of the football labor market. *See* Houston Oilers, Inc. v. Neely, 361 F.2d 36 (10th Cir.), *cert. denied*, 385 U.S. 840 (1966).

the most important litigation in the area of professional athletics and the antitrust laws. In October of 1969, Flood was traded from the St. Louis Cardinals to the Philadelphia Phillies. Flood complained and asked the Commissioner of Baseball to be made a free agent to bargain for himself. That request was refused. Flood then filed an antitrust suit against the Commissioner, the presidents of the two leagues, and the twenty-four major league teams. Flood's position was supported by the Major League Baseball Players Association, the players' collective bargaining representative. Flood specifically challenged the "reserve system", whereby a player is required to play for the team holding his contract or, unless released by that team or assigned to another team, not to play baseball in the United States.[9] The contracting club also has

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[9]Rule 3 of the Major League Rules provides in part:

> (a) UNIFORM CONTRACT. To preserve morale and to produce the similarity of conditions necessary to keen competition, the contracts between all clubs and their players in the Major League shall be in a single form which shall be prescribed by the Major League Executive Council . . . . No club shall make a contract different from the uniform contract or a contract containing a non-reserve clause, and no club shall make a contract containing a non-reserve clause except permission be first secured from the Commissioner.
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> (g) TAMPERING. To preserve discipline and competition, and to prevent the enticement of players, coaches, managers and umpires, there shall be no negotiations or dealings respecting employment, either present or prospective, between any player, coach or manager and any club other than the club with which he is under contract or acceptance of terms, or by which he is reserved, or which has the player on its Negotiation List, or between any umpire and any league other than the league with which he is under contract . . . unless the club or league with which he is connected shall have, in writing, expressly authorized such negotiations or dealings prior to their commencement.

Rule 9 of the Major League Rules provides in part:

> (a) NOTICE. A club may assign to another club an existing contract with a player. The player, upon receipt of written notice of such assignment, is by his contract bound to serve the assignee.
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> . . .

the unilateral right to renew the contract, subject to a certain minimum salary. Flood contended that this clause violated the

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> After the date of such assignment all rights and obligations of the assignor clubs thereunder shall become the rights and obligations of the assignee club.

The Uniform Player's Contract provides in part:

> 4. (a) . . . The Player agrees that, in addition to other remedies, the Club shall be entitled to injunctive and other equitable relief to prevent a breach of this contract by the Player, including, among others, the right to enjoin the Player from playing baseball for any other person or organization during the term of this contract.
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> 5. (a) The Player agrees that, while under contract, and prior to expiration of the Club's right to renew this contract, he will not play baseball otherwise than for the Club, except that the Player may participate in post season games under the conditions prescribed in the Major League Rules . . . .
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> 6. (a) The Player agrees that this contract may be assigned by the Club (and reassigned by any assignee Club) to any other Club in accordance with the Major League Rules and the Professional Baseball Rules.
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> 10. (a) On or before December 20 (or if a Sunday, then the next preceding business day) in the year next following the last playing season covered by this contract, the Club may tender to the Player a contract for the term of that year by mailing the same to the Player at his last address following his signature hereto, or if none be given, then at his last address of record with the Club. If prior to March 1 next succeeding said December 20, the Player and the Club have not agreed upon the terms of such contract, then on or before 10 days after said March 1, the Club shall have the right by written notice to the Player at said address to renew this contract for the period of one year on the same terms, except that the amount payable to the Player shall be such as the Club shall fix in said notice; provided, however, that said amount, if fixed by a Major League Club, shall be an amount payable at a rate not less than 80% of the rate stipulated for the preceding year. . . .
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> (b) The Club's right to renew this contract, as provided in subparagraph (a) of this paragraph 10, and the promise of the Player not to play otherwise than with the Club have been taken into consideration in determining the amount payable under paragraph 2 hereof.

Sherman Antitrust Act[10] because it restrained his freedom to sell his services to whomever he so desired.[11]

The district court found against Flood on the merits of all his causes of action.[12] The appellate court affirmed.[13] The United States Supreme Court,[14] in a five to three decision, applied stare decisis and followed the previous holding[15] that baseball was in-

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[10]15 U.S.C. §§ 1, 2 (1970). Section 1 of the Sherman Act provides:

> Every 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 . . . .

Section 2 of the Act provides:

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

Section 4 of the Clayton Act, 15 U.S.C. § 15 (1970) provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained. . . .

[11]As Flood stated in a letter to the Commissioner of Baseball:

> After twelve years in the major leagues, I do not feel that I am a piece of property to be bought and sold irrespective of my wishes. I believe that any system which produces that result violates my basic rights as a citizen and is inconsistent with the laws of the several states.

Brief for Petitioner at 5, Flood v. Kuhn, 407 U.S. 258 (1972).

The reserve system is really an option clause which permits the club to, within ten days of March 1, tender a one-year contract to players reticent to bargain a longer, more common contract. If the player wishes to continue to play baseball, he must sign the contract which contains another option clause, so that into perpetuity, as long as the club is interested in exercising this option, the player has no say whatsoever in terms of his playing conditions. He signs the option contract, negotiates a new contract, or looks for a new profession. *See* J. DURSO, THE ALL-AMERICAN DOLLAR: THE BIG BUSINESS OF SPORTS 148-49 (1971). *See also* section 10 of Uniform Players' Contract, *supra* note 9.

[12]Flood v. Kuhn, 309 F. Supp. 793 (S.D.N.Y. 1970).

[13]Flood v. Kuhn, 443 F.2d 264 (2d Cir. 1971).

[14]Flood v. Kuhn, 407 U.S. 258 (1972).

[15]Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953); Federal Baseball v. National League, 259 U.S. 200 (1922).

tended by Congress to be outside the scope of federal antitrust laws because it was effectively a "sport" and not a "business."[16]

Other court decisions in professional sports have rendered the baseball decisions an anomaly since boxing,[17] football,[18] hockey,[19] and basketball[20] have all been considered subject to antitrust laws; thus, these sports are more properly businesses. In view of these cases, the rationale of *Flood* would appear incredible.[21]

B. Players' Associations

As in most major industries in the United States, unionism and the process of collective bargaining have made their impact, and each professional sport has its own players' association which represents players and negotiates conditions of employment which are incorporated into individual players' contracts.

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[16]Garadella v. Chandler, 79 F. Supp. 260 (S.D.N.Y. 1948), *rev'd*, 172 F.2d 402 (2d Cir. 1949). *See* Note, *The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws*, 81 HARV. L. REV. 418 (1967); Note, *Balance of Power in Professional Sports*, 22 MAINE L. REV. 459 (1970); Note, *Baseball's Antitrust Exemption and the Reserve System: Reappraisal of Anachronism*, 12 WM. & MARY L. REV. 859 (1971); 48 NOTRE DAME LAW. 460 (1972).

[17]United States v. International Boxing Club, 348 U.S. 236 (1955).

[18]Radovich v. National Football League, 352 U.S. 445 (1957).

[19]Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972); Petro v. Madison Square Garden Corp., 1938 TRADE CASES § 69, at 106 (S.D.N.Y. 1938).

[20]Haywood v. National Basketball Ass'n, 401 U.S. 1204 (1971).

[21]As Mr. Justice Blackmun stated in *Flood*:

> [T]he aberration is an established one, and one that has been recognized not only in *Federal Baseball* and *Toolson*, but in *Shubert*, *International Boxing*, and *Radovich*, as well, a total of five consecutive cases in this Court. It [baseball] is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis*, and one that has survived the Court's expanding concept of interstate commerce. It rests on a recognition and an acceptance of baseball's unique characteristics and needs.

407 U.S. at 282.

1. Baseball

The Major League Baseball Player's Association was organized in 1954 and since 1966 has proved to be effective in negotiations.[22] Much of the success of the players' association in obtaining better benefits in terms of pensions, life and disability insurance, health care, minimum salaries, arbitration and grievance procedure, expense allowances, salary cut maximums, termination pay, representation at salary negotiations, negotiation of rules changes, and the application of "due process" in player discipline was due to the election of Marvin Miller as director of the players' association.[23] The era of good feelings between club and clubhouse ended and the players collectively began to challenge the "Papa-Knows-Best" theory of labor relations espoused by professional baseball clubowners.[24]

The 1973 agreement provided for a three-year contract which was reported to provide in part for a minimum salary of $15,000, an increase of $1,500 from 1972 and an increase in the World Series winner's share of $5,000 to $20,000; the reserve clause would not be modified in exchange for binding arbitration of salary disputes; salary arbitration for a player with at least two consecutive years in the majors or three nonconsecutive seasons and the rule allowing for a maximum of twenty per cent salary cut in one year would still be effective; players with ten years of service in the major leagues (the last five with the same club)

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[22]This is the association that is known today. Others have existed since 1880.

[23]R. SMITH, BASEBALL 406-16 (1947).

[24]Several challenges to the structure of baseball have occurred within the past four years. Charles Finley received notice of an unfair labor practice for his firing a ballplayer in 1969. An increase was obtained in minimum salary to $10,000 with the threat of a suit to challenge the reserve clause.

The year 1972 saw the first strike in baseball history. The two issues which caused the strike concerned the pension fund and the number of games to be played during the 1972 season. Originally, the players had asked for a 17% increase in fund benefits or $1 million. A settlement was reached on $500,000. The second issue concerned the number of games that should be played during the season. The players agreed to play a full season for full pay, but the American League clubowners favored beginning the season on April 15, 1972. The National League clubowners, on the other hand, desired a full slate of 162 games. The National League eventually dropped its demand and the season opened on April 15th with the players losing nine days' pay. *See* R. SMITH, BASEBALL 413-16 (1947).

would not be traded without their consent; a player would be placed on waivers only once (instead of twice) without the waivers being irrevocable; also, spring training allowances would be increased by an undisclosed amount and other benefits would increase substantially.[25] While the reserve clause still stands in professional baseball, at least for three more years, unless there are congressional restrictions, it is increasingly apparent that collective bargaining has become a strong force in determining the conditions under which professional baseball is seen today.

2. Football

While the reserve clause in baseball ties a player permanently to the club lawfully holding his contract and, thus (according to baseball club owners) ensures player equity among teams, professional football has adopted a variation of this idea known as an option clause. The option clause,[26] while less restrictive, is due neither to the benevolence of club owners nor to effective collective bargaining on the part of the players' association, but rather to the application of the antitrust laws to professional football in *Radovich v. National Football League.*[27] The option clause provides that a club may unilaterally renew a player's contract for one year for no less than ninety per cent of his former salary. The player may either play the additional year or sit out the season. He then becomes a "free agent" and may sell his services to any club. This

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[25]*See* Basic Agreement Between the American League of Professional Baseball Clubs and the National League of Professional Baseball Clubs and Major League Baseball Players Association 1-44.

[26]Standard Player Contract for Major Professional Football Operations as Conducted by the National Football League § 10, in COUNSELING PROFESSIONAL ATHLETES AND ENTERTAINERS 377, 381 (1970):

> The Club may, by sending notice in writing to the Player, on or before the first day of May following the football season referred to in Par. 1 hereof, renew his contract for a further term of one (1) year on the same terms as are provided by this contract, except that (1) the Club may fix the rate of compensation to be paid by the Club to the Player during said further terms, which rate of compensation shall not be less than ninety percent (90%) of the sum set forth in Par. 3 hereof, and shall be payable in installments during the football season in such terms as provided in Par 3; and (2) after such renewal this contract shall not include a further option to the Club to renew his contract.

[27]352 U.S. 445 (1957).

system was challenged in *Dallas Football Club v. Harris*[28] and the court held that the option clause was not unreasonable and could be enforced in equity.[29] To the option clause, however, is also attached what has come to be called the Rozelle Rule,[30] which provides that when a player plays out his option and becomes a free agent, he may sell his services to any club desiring him. But in the event that his former club feels that the free agent's new contract adversely affects them and player equity in the league, then, Pete Rozelle, the Commissioner of Football, may award the former club one or more players from the Active Reserve or Selection List of the club acquiring the free agent or any of the acquiring club's future draft choices. The effect of the Rozelle Rule is to give some control to the distribution of players in the National Football League, but in a less restrictive way than baseball's reserve clause. No doubt this arrangement may also be thought to restrict a player's right to sell his services and thus violate the antitrust laws, but this issue has not yet been decided.

Collective bargaining in professional football was a product of the 1960's and has established a parallel course to bargaining in baseball. The threat of a player strike in 1968 over pension fund provisions resulted in a two-year contract which provided for a three million dollar contribution by club owners to the player pension fund. The players' association has thus had a significant

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[28]348 S.W.2d 37 (Tex. Civ. App. 1961).

[29]*Id.* at 49. *See also* Note, *Antitrust and Professional Sports: Does Anyone Play by the Rules of the Game?*, 22 CATH. U.L. REV. 403, 412 (1973).

[30]The Rozelle Rule is so termed due to the power bestowed on the Commissioner of Football, Peter Rozelle. The rule states:

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

National Football League Constitution and By Laws art. XII, § 3, *as amended* (Jan. 29, 1963).

financial impact on professional football clubowners but has had no effect in altering the option clause.

3. Basketball

Professional basketball also has an option clause similar to the reserve clause of professional baseball.[31] The players' association in the National Basketball Association, like its counterpart in professional baseball, has not had any impact in mitigating the effect of the option clause. The courts, however, have altered the option clause arrangement. In *Central New York Basketball, Inc. v. Barnett*,[32] Dick Barnett, a member of the Syracuse Nationals, attempted to jump to the new, but now defunct, American Basketball League to play with the Cleveland Pipers. Arguing that the club had the right to Barnett's services for one more year as provided in the contract, the Nationals attempted to enjoin Barnett. Barnett contended that the contract was void as a restraint of trade. The court agreed with the Nationals that after the option year, 1961-62, Barnett was free to contract with any other team. This view was also taken in *Lemat Corp. v. Barry*[33] in which the plaintiff, Rick Barry, argued that the National Basketball Association's option clause was an adhesion contract. Rick Barry, one of the

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[31]National Basketball Association Uniform Players Contract § 24 provides:

> On or before September 1 next following the last playing season covered by this contract and renewals and extensions thereof, the Club may tender to the Player a contract for the next succeeding season by mailing the same to the Player at his address shown below, or if none is shown, then at his address last known to the Club. If the Player fails, neglects, or omits to sign and return such contract to the Club so that the Club renews it on or before October 1st next succeeding, then this contract shall be deemed renewed and extended for the period of one year, upon the same terms and conditions in all respects as are provided herein, except that the compensation payable to the Player shall be the sum provided in the contract tendered to the Player pursuant to the provisions hereof, which compensation shall in no event be less than 75% of the compensation payable to the Player for the last playing season covered by this contract and renewals and extensions thereof.
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> The Club's right to renew this contract, as herein provided, and the promise of the Player not to play otherwise than for the Club and its assignees, have been taken into consideration in determining the amount payable under paragraph 2 hereof.

[32]19 Ohio App. 2d 130, 181 N.E.2d 506 (1961).

[33]275 Cal. App. 2d 671, 80 Cal. Rptr. 240 (1969).

most sought after college basketball players, had signed a contract with the San Francisco Warriors of the NBA for the 1965-66 season. He then signed a second contract with the Warriors for 1966-67. The American Basketball Association had then been organized, and the Oakland Oaks of that league offered Barry a substantial increase in salary to jump leagues. Barry signed a contract with the Oaks for the 1967-68 season. The Lemat Corporation sought to have the Warrior contract enforced and obtained an injunction against Barry to prevent his playing with the Oaks. Barry refused to honor the option year with the Warriors and did not play basketball during the 1967-68 season. The next year, 1968-69, Barry began to play for the Oaks. Lemat again sought to enjoin him, but the court held that "any agreement that limits a person's ability to follow his vocation must be strictly construed"[34] against the superior party. Thus, this contract was construed in favor of Barry similar to the manner in which the court had construed the contract in *Barnett.*

The players' association which began in the early 1960's with Oscar Robertson as the head and a young New York lawyer, Larry Fleischer, as its attorney, has had an organizational pattern similar to the players' association in professional football and baseball. The association immediately demanded that clubs increase their contributions to the pension fund and that certain contract provisions, most notably the option clause, be subject to bargaining. The players threatened to cancel the playoffs for the 1966-67 season if their demands were not met. Walter Kennedy, the Commissioner of the NBA, promised the players that he would present their demands to the clubowners at the end of the season. The players received an increase in the pension fund up to $500 per month for a man with ten years in the NBA. The league also agreed to review the contract. However, there was no direct challenge to the reserve clause during that season.

The ABA directly challenged the NBA's option clause by introducing its own[35] which, like football's, was less restrictive and

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[34] *Id.* at 678, 80 Cal. Rptr. at 245.

[35] American Basketball Association Uniform Players' Contract § 15, Option to Renew:

> On or before the date of the expiration of this contract, the CLUB may, upon notice in writing to the PLAYER, review this contract for the further term of one (1) year following said expira-

permitted a player to leave the club after the option year. The presence of the ABA also gave the NBA players added bargaining strength, but they were not able to alter the option clause. Eventually, however, this goal was achieved in the suit denying the injunction against Barry.[36]

4. Hockey

Hockey is one of the fastest growing professional sports in the United States. Like professional baseball, football, and basketball, hockey has seen several attempts to unionize the players which culminated in the formation of the present players' association in 1967. The players' association has achieved significant progress in the areas of wages and working conditions.[37] But, like their brothers in other professional sports, hockey players have been unable to modify the reserve clause which perpetually binds hockey players to a club in the same manner as the reserve system

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tion date on the same terms as are provided by this contract, except that:

> a. The CLUB may fix the rate of compensation to be paid by the CLUB to the PLAYER during said period of renewal, which compensation shall not be less than ninety per cent (90%) of the amount paid by the CLUB to the PLAYER during the preceding season, and
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> b. After such renewal, this contract shall not include any further option to the CLUB to renew the contract. The compensation in subsection a. herein shall mean only the salary as prescribed in paragraph 2. above.

[36]L. KOPPETT, 24 SECONDS TO SHOOT: AN INFORMAL HISTORY OF THE NATIONAL BASKETBALL ASSOCIATION 173-91 (1968).

[37]Since its inception, the players' association has negotiated a pension plan which permits players to take pension at either age forty-five or sixty-five. If a player elects to take pension at forty-five, he will receive $300 a year for each year of service in hockey. If he takes his pension at the age of sixty-five, he will receive $1,000 a year for each year of service. In 1972, the players' association was able to get the club owners to increase the Stanley Cup playoff money from $7,500 per player for the winners to $15,000 per player for the winner and $2,500 per player on the losing team. Players also receive $2,000 for being selected for the all-star team chosen by the Professional Hockey Writers' Association. Additionally, players would receive $600 for a ten-game exhibition season and training tables have been discontinued at training camps for a $12 a day allowance for meals. *See* G. ESKENAZI, A THINKING MAN'S GUIDE TO PRO HOCKEY 131-83 (1972).

in baseball.[38] Judge Higginbotham noted in his findings of fact in *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*[39] that the "owners have been insistent on the continuation of the reserve clause basically in its present form, and the players have . . . been consistently against this type of reserve clause."[40]

The dimensions of collective bargaining in the various professional sports have been remarkably similar. The players' associations in professional football, basketball, baseball, and hockey have become viable organizations during the middle sixties and have all made great strides, particularly in the areas of pension funds, minimum salary, playoff money, training camp rules, and due process in the discipline of players. Of course, maximum salaries have also risen dramatically, although this is the result of individual bargaining, arbitration of salaries, and the increased demand for athletes due to the presence of additional leagues in

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[38]The National Hockey League Standard Player's Contract § 17 provides:

> The Club agrees that it will on or before September 1st (August 10th, in the case of protected players and those who played fifty NHL games in the preceding season) next following the season covered by this contract, tender to the Player personally or by mail directed to the Player at his address set out below his signature hereto, a contract upon the same terms as this contract save as to salary. The Player hereby undertakes that he will at the request of the Club enter into a contract for the following playing season upon the same terms and conditions as this contract save as to salary which shall be determined by mutual agreement, failing which, by arbitration under the Arbitration Agreement between the League and the NHL Player's Association dated March 29, 1972.
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> § 19. The Player agrees that the Club's right to renew this contract as provided in Section 17 . . . [has] been taken into consideration in determining the salary payable to the Player . . . .

NHL President Clarence Campbell announced on December 3, 1973, that the NHL has abolished its controversial reserve clause system and will allow a player to play out his option and become a free agent.

[39]351 F. Supp. 462 (E.D. Pa. 1972). This case was an antitrust suit by the Philadelphia World Hockey Club, Inc. (the Philadelphia Blazers of the new World Hockey Association) against the Philadelphia Hockey Club, Inc. (the Philadelphia Flyers of the National Hockey League) to enjoin the NHL from enforcing its reserve clause and preventing John McKenzie from jumping to the WHA.

[40]*Id.* at 484.

three of the four major sports. The increased salaries have had little to do with the collective bargaining mechanism except that collective bargaining has brought about arbitration when disputes or holdouts occur between players and clubs over the matter of salary. These improvements and the solidification of bargaining have occurred simultaneously with the expansion of the National Football League, the National Basketball Association, and the National Hockey League as well as both the National and American Leagues in professional baseball and the appearance of three new rivals: The American Football League, the American Basketball Association, and the World Hockey Association, which have increased the demand for professional athletes and noticeably increased player salaries. No doubt much of this expansion is due to public interest in sports.[41] But accompanying this interest is also the ability to pay as provided by the noticeable increase in disposable personal income in the United States. The single most important reason, however, for this tremendous expansion of professional athletics is television which has brought millions of dollars to professional athletes from the advertising industry.[42] While the presence of television sports coverage has provided increased club receipts, it has so escalated player salaries that many club owners claim that they are climbing too fast and if the salaries cannot be reduced, many of the clubs will fail financially.[43] In football,

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[41]Between 1960 and 1972, fifteen baseball stadiums, costing from a minimum of $15 million to a maximum of $51 million and seating from 42,500 to 75,000, were constructed.

[42]By the 1970 season, television had provided football with the following money:

College and pros	$62,500,000
Local radio rights for NFL games	$2,100,000
Local preseason rights for NFL games	$375,000
Local radio and delayed TV rights for 125 college games	$1,305,375

Besides football, Columbia Broadcasting System has contracted to carry the ABA playoffs, National Broadcasting Company carries the NHL Stanley Cup playoffs and weekly professional baseball games, and the American Broadcasting Company carries the NBA games, not to mention numerous local television contracts to provide sports coverage in local and regional areas. *See* J. DURSO, THE ALL-AMERICAN DOLLAR: THE BIG BUSINESS OF SPORTS 256 (1971).

[43]Shortly after World War II, the All-America Conference made a short-lived attempt to compete with the established National Professional Football League. The result was bankruptcy and the demise of the teams

the two leagues have merged and eliminated competitive bidding for players. The ABA is presently seeking a merger with the NBA in an effort to follow the example of professional football. Certainly professional hockey will experience the same effort in the next few years. The relationship between the two football leagues was marked by antitrust suits to obtain free access to players[44] and to provide additional leverage in establishing a merger. The players' associations have also attempted to free players from the restraints of restrictive reserve and option clauses so that they might enjoy lucrative effects of supply and demand created by the presence of the new leagues. The associations have failed to eliminate the reserve clauses and all of the contracts agreed upon by club owners and associations have, at most, provided for the arbitration of salaries. The only alternative was for individual players to sue the clubowners on the theory that their contracts were in fact restraints of trade and thus illegal under the Sherman Act.

II. Antitrust Laws and the Labor Law Exemption

A. Background

The expansion of collective bargaining in professional athletics also raised certain legal questions in the contract disputes of athletes in the late 1960's and early 1970's. The arguments that the reserve system is a mandatory subject of collective bargaining and that federal labor policy exempts the reserve system from the antitrust laws were advanced in *Flood* but these issues were not decided.[45] This theory was initially raised in a 1971 article attacking the professional athlete's right to sue on the players' contract.[46] The article argued that Curt Flood, who was then leading an individual attack on the reserve clause via the courts, was barred from initiating a suit on a contract which was the result of collective bargaining. The article relied upon *J. I. Case Co. v. NLRB*.[47]

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in the Conference with a few of the more promising Conference teams being taken into the National Professional Football League.

[44]American Football League v. National Football League, 205 F. Supp. 60 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963).

[45]*See* note 7 *supra*.

[46]Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 Yale L.J. 1 (1971) [hereinafter cited as Jacobs & Winter].

[47]321 U.S. 332 (1944).

In that case, the employer, J. I. Case Co., refused to bargain with the union and contended that the company had pre-existing individual contracts which would be breached if it established a collective agreement covering all employees. The Court first described the relationship among the employer, employee, and union in light of the labor philosophy of the Wagner Act[48]—*i.e.*, that after a collective agreement is made, the employer is then free to accept those he will employ or discharge; "the terms of the employment already have been traded out. There is little left to the individual agreement except the act of hiring."[49] The primary question which the Court had to determine was whether the collective agreement superseded the individual contracts. The Court, in light of the philosophy of recognzing labor organizations and promoting industrial peace, held that the collective agreement was to be given priority over the individual contracts.[50]

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[48]29 U.S.C. § 158 (1970).

[49]321 U.S. at 335.

[50]As the Court stated:

> But, however engaged, an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms. The individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits, any more than a shipper can contract away the benefit of filed tariffs, the insurer the benefit of standard provisions, or the utility customer the benefit of legally established rates.

Id. at 336.

> Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement.

Id. at 337.

> It is equally clear since the collective trade agreement is to serve the purpose contemplated by the Act, the individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreement. The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group.

The implications of *J. I. Case* are that since professional athletic contracts are the product of collective bargaining between club owners and the players' associations, there is no standing for an individual player to sue on the contract simply because he does not find the terms favorable. Thus, any individual player cannot challenge the reserve or option clause. This argument was urged in *Flood,* but was never considered since the Court found it unnecessary to go beyond the historical considerations that baseball as a sport is not subject to the antitrust laws.[51]

The second line of thought the article pursued is that antitrust principles should not apply between employers and employees engaged in collective bargaining.[52] Collective bargaining is per se collusive in that it binds employees together to bargain with an employer or employers on terms of employment which are mutually agreeable to both parties. The terms of wages, hours, and working conditions are thus fixed and not subject to the interaction of supply or demand in a more classical sense. From the view of classical economics, unions and collective agreements are impediments in the market and when unions bargain in monopolistic and oligopolistic industries, this process has been referred to as bilateral monopoly.[53] Thus, the fact that the reserve clause may be part of a monopolistic effort would not be violative of the Sherman Act since the collective agreement is exempted from the Sherman Act.[54]

Id. at 338.

> We cannot except individual contracts generally from the operation of collective ones because some may be more individually advantageous.

Id. at 339.

[51]407 U.S. at 248.

[52]Jacobs & Winter 21-28.

[53]*Id.* at 22.

[54]Section 6 of the Clayton Act, 15 U.S.C. § 17 (1970), provides:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be

The labor exemption to the Sherman Act, although established in 1914 in the Clayton Act,[55] was not actually clarified until the decision of *United States v. Hutcheson.*[56] In *Hutcheson,* the United Brotherhood of Carpenters and Joiners of America struck Anheuser-Busch, Inc., when the company awarded to the International Association of Machinists certain jobs which the carpenters claimed should have been performed by them. A strike ensued. The company maintained that the strike violated the Sherman Act. The trial court upheld a demurrer to the charge and stated that unions were exempt from the Sherman Act.[57] The Supreme Court affirmed the lower court's ruling: "the facts here charged constitute lawful conduct under the Clayton Act unless the defendants cannot invoke that act because outsiders to the immediate dispute also shared in the conduct."[58]

The issue of the labor exemption to the antitrust laws was again raised in *Allen-Bradley Co. v. Local 3, Electrical Workers.*[59] In that case, the union had organized most of the employees of the electrical manufacturers and contractors in the New York area. The terms of the collective agreements provided that the manufacturers would sell only to those contractors with whom Local 3 had contracts. Conversely, the contractors agreed to buy from only those manufacturers who also held contracts with Local 3. Excluded manufacturers brought an antitrust action

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illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Section 20 of the Clayton Act, 29 U.S.C. § 52 (1970), provides:

> No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employees, or between persons employed and persons seeking employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

[55]15 U.S.C. § 17 (1970).

[56]312 U.S. 219 (1941).

[57]United States v. Hutcheson, 32 F. Supp. 600 (E.D. Mo. 1940).

[58]312 U.S. at 233.

[59]325 U.S. 797 (1945).

against Local 3. The Supreme Court reversed the appellate court[60] and held that such agreements violated the Sherman Act and that a "business monopoly is no less such because a union participates, and such participation is a violation of the Act."[61]

In *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*,[62] the Meat Cutters' Union had entered into an agreement with several employers which provided that market operating hours would be from 9:00 a.m. to 6:00 p.m., Monday through Saturday, and that no customer should be permitted into the market before or after those hours.[63] One of the companies to the agreement, Jewel Tea, signed reluctantly and then sued the union on the ground that the trade agreement violated the Sherman Act. Jewel Tea specifically charged that its stores were equipped to vend meat in a prepackaged, self-service fashion and that the presence of a butcher was unnecessary; thus, the trade agreement restrained Jewel Tea from using its facilities before or after the hours designated in the trade agreement.

Mr. Justice White, writing the majority opinion, commented that the major issue in the case was whether the marketing-hours restriction was so tied to wages, hours, and working conditions and the result of good-faith, arms-length bargaining, not of a combination with nonlabor groups, that it fell within the protection of the national labor policy which exempts labor and collective agreements from the Sherman Act.[64] He adhered to the theory behind the labor exemption that collective bargaining agreements are per se restraints of trade in that they preclude individuals in the collective unit from bargaining individually, except in rare cases in which the collective agreement permits bargaining by individuals, and they preclude management from dealing with any other labor union. But the policy behind the exemption promotes the recognition of the labor movement and the importance of ensuring industrial peace at the expense of the trade laws.

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[60]Allen-Bradley Co. v. Local 3, Electrical Workers, 145 F.2d 215 (2d Cir. 1945).

[61]325 U.S. at 811.

[62]381 U.S. 676 (1965).

[63]*Id.* at 679-80.

[64]*Id.* at 691.

Mr. Justice Goldberg, in a concurring opinion, stated that the issues in question were "mandatory subjects of bargaining."[65] "To tell the parties that they must bargain about a point but may be subject to antitrust penalties if they reach an agreement is to stultify the congressional scheme."[66]

In *United Mine Workers v. Pennington,*[67] decided at the same time as *Jewel Tea,* the Court again reviewed the labor exemption to the antitrust laws. The United Mine Workers had entered into a collective agreement with the larger mining companies designed to end overproduction in the market by eliminating the smaller companies. This was to be achieved by making the smaller companies meet the higher pay scales that had already been agreed upon by the union and larger mine owners. Since the smaller companies would not be able to meet this higher pay standard, they would be forced out of business. The trustees of the union sued one small mining company for royalty payments due the miners' retirement fund as provided under the wage agreement. The company crossclaimed that the union's agreement with the large mining companies violated the Sherman Act. The trial court set aside a verdict against the union and the appellate court affirmed.[68] The Supreme Court, however, reversed and remanded the case on the grounds that "one group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy."[69] The union was considered part of a conspiracy even though it could "secure the same wages, hours, or other conditions of employment from the remaining employers . . . ."[70]

Thus, the crucial point is that antitrust liability is founded on a situation in which unions have entered into collective agreements with the employers which are specifically designed to damage the employer's competitors. The thrust of this viewpoint is

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[65]*Id.* at 711.

[66]*Id.* at 711-12.

[67]381 U.S. 657 (1965).

[68]Pennington v. United Mine Workers, 325 F.2d 804 (6th Cir. 1963).

[69]381 U.S. at 665-66.

[70]*Id.* at 666.

that if individual players challenge restrictive reserve or option clauses allegedly negotiated by the players' associations and the club owners, the agreement will only constitute a violation of the Sherman Act when some competitor has been damaged by the trade agreement. Under the rationale of *J. I. Case,* however, players have no standing to challenge the agreement. Thus, Flood could not challenge the reserve clause any more than a butcher could challenge the *Jewel Tea* agreement restricting him from working after 6:00 p.m. in the meat markets of Jewel Tea.[71] To permit such suits would undermine collective bargaining by subverting the authority of collective units to represent and bind their members and would further "involve the courts in rewriting potentially every collective agreement in the country at the behest of individual employees."[72]

B. The Product and Labor Markets

Apparently, the labor market is distinct from the product market, and the Sherman Act applies only to the product market. Thus, any restraints of labor or monopolization of labor could not be prohibited under the Sherman Act.

C. Implications

The above theories indicate that any professional athlete, to the extent that he is represented by a players' association, is not only incapable of raising an antitrust question, but is powerless to sue on his contract. Thus Flood would have been barred from suing and professional basketball players would have no standing to challenge the proposed merger of the ABA and the NBA.[73] Since the presence of the WHA in professional hockey and the higher salaries being offered due to the increased demand for hockey players, players traditionally contracted with NHL teams are playing out their contracts and trying to jump to the new league. These players, like Flood, would also be barred from

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[71] Jacobs & Winter 27.

[72] *Id.*

[73] *Id.* An antitrust suit was filed by the ABA against the NBA but later dropped as part of a settlement under which both leagues would pursue a merger. It is reported that the NBA is dragging its feet on the merger proposal and, thus, litigation may be renewed.

challenging the reserve clauses in their contracts as violative of the antitrust laws.[74]

III. Suits by Individual Players and Competitors

A. Competitor's Suits

Although the labor exemption to the antitrust laws was not considered in *Flood,* the theory has been argued in professional hockey cases in which players are seeking to free themselves for the more lucrative offers of the market and competitors are joining in the fray in an attempt to get equal access to players in the market. In the recent case of the *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*,[75] five suits involving the attempts of a NHL player, John McKenzie, and several WHA teams to strike down the reserve clause of the NHL as a violation of the antitrust laws were joined. Judge Higginbotham, in considering the labor exemption to the antitrust laws, noted that the Court in *Pennington* had indicated that

> there are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws.[76]

It is particularly crucial for a violation of the Sherman Act that unions and employers conspire to restrain a competitor and thus monopolize the market. Neither unions nor employers will be shielded from the antitrust laws when they act independently or in concert with nonlabor groups to effectuate wage policies which restrain trade.[77] Thus employers and unions will not be exempted from the Sherman Act solely because one party to an agreement is a labor organization. The *Allen-Bradley* and *Pen-*

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[74]*Id.* at 28. Jacobs and Winter did not deal with the merits of a rival league's seeking to have free access to players bound by reserve clauses to the traditional league. As they stated, "We express no opinion on the merits of claims by rival leagues or maverick owners." *Id.* Although no reason is given for this position, it would seem that the authors may have been aware of the success of the AFL in challenging the NFL's control over football players as a monopoly.

[75]351 F. Supp. 462 (E.D. Pa. 1972).

[76]*Id.* at 498.

[77]*Id.* at 499-500.

nington cases involved situations in which a competitor's trade had been restrained by the collusive agreement of another employer and a union and, in each of these cases, the competitor challenged the union's agreement to a collective bargaining contract as being a violation of the Sherman Act. The question in each of these cases was whether the fact that the defendant was a union would exempt it from the antitrust laws. The Court answered the question in the negative: the exemption was not designed to free unions or employers from the antitrust laws so that they might engage in collusive activity. Thus, when the WHA challenges the NHL on the grounds that the latter's collective agreement or reserve clause prohibits the WHA from competing for players, the NHL cannot take advantage of the labor exemption to shield itself from antitrust liability.

The *Jewel Tea* case involved a company's challenging the agreement that it made with the union as being a restraint of the company's (Jewel Tea's) trade. The court indicated that when the agreement was reached "through *bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with non-labor groups.*"[78] the agreement falls within the national labor exemption to the Sherman Act. "The crucial determinant is not the form of the agreement—*e.g.*, prices or wages—but its *relative impact* on the *product market* and *the interests of union members.*"[79]

Jewel Tea involved union demands challenged as antitrust violations similar to the union's conspiratorial role in *Allen-Bradley* and *Pennington.* The players' associations in all professional sports have been opposed to reserve clauses but have been unable to modify them. Thus, the role of the players' associations is opposite that of the unions in *Allen-Bradley, Pennington,* and *Jewel Tea.* Additionally, there is little evidence, as Judge Higginbotham indicated, that the reserve clause "was ever a subject of serious, intensive, arm's-length collective bargaining."[80] Even if there had been substantial arm's-length bargaining, the NHL is not in a position to use the form of the union to shield it from antitrust liability. The argument is a mythological ma-

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[78] *Id.* at 498, *quoting from* United Mine Workers v. Pennington, 381 U.S. 657, 689-90 (1965).

[79] *Id.*

[80] *Id.* at 499.

neuvering with all the religious candor of a theory and a line of cases which were never intended to protect unions or employers from antitrust violations.[81] In reality, the NHL occupies a position similar to the union in *Allen-Bradley* and *Pennington*: it is involved in a union-employer combination to exclude others, especially newcomers, from the market. What is viewed as a shield becomes a sword for engaging in monopolistic competition.[82]

B. Individual Suits

While it seems that the reserve clause will not stand when challenged by a new league as a competitor and that the labor exemption should not be permitted as an illusory bar to such suits, a more difficult question would seem to be: May an individual player as a member of an authorized players' association challenge the terms of his contract when such terms have in large part been the result of collective bargaining between the players' association and the clubowners?

1. Individual Contracts

A preliminary question that must be raised is what do the current Uniform Standard Players' Contracts used in all professional athletics mean? Are they individual contracts for personal services or collective bargaining agreements under which the individual has no right of action, as the clubowners would seem to interpret them? Based upon the intention of the parties and the historical line of cases enjoining athletes from appearing elsewhere or from jumping leagues,[83] the proper view of these agreements would suggest that the contract is a personal one, between a certain player and the team for a salary which is for the most part negotiated by the player and the club as the contracts indicate in very bold print. They are not contracts between the club and the players' association albeit some of the terms of the collective agreement appear in the individual contracts. When an individual athlete is sought to be enjoined by a team, the argument is based upon the old and well studied case, *Lumley v. Wagner*.[84] In that case, the court enjoined a concert singer from

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[81] 381 U.S. at 665-66.

[82] 351 F. Supp. at 499-500.

[83] *See* note 9 *supra*.

[84] 42 Eng. Rep. 687 (Ch. 1852).

performing anywhere else for anyone else during the time she was under contract to the plaintiff. The cases involving contract jumping argue the rationale of *Lumley* that an athlete's services are of a specific, personal nature and, thus, damages would be inadequate and equity ought to enjoin the athlete[85] from playing for any team other than the plaintiff team which insists that it has a valid contract with the player. The validity of the contract would be a matter for a separate hearing on the merits but what is important is that player contracts are contracts of personal service and not collective agreements. The individual player and team would each have the right to sue on breach of the contract or to test the legality of the contract.

2. Collective Contracts

If these contracts are collective agreements under which the individual player has no right of action, the individual is not totally precluded from bringing an action as indicated by the situation in *J. I. Case*. The Court has not precluded individual suits under collective agreements although the Court has been especially cautious in hearing individual cases in order to avoid the deluge of litigation that might befall the Court and, thus, undermine national labor policy. As the Court stated in *J. I. Case*, when there is great variation in the circumstances of employment or capacity of employees, the collective agreement may designate or leave certain areas open to individual bargaining.[86] In other

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[85] *See* Munchak Corp. v. Cunningham, 457 F.2d 721 (4th Cir. 1972); Houston Oilers, Inc. v. Neely, 361 F.2d 36 (10th Cir.), *cert. denied*, 385 U.S. 840 (1966); Madison Square Garden Corp. v. Carnera, 52 F.2d 47 (2d Cir. 1931); Shubert Theatrical Co. v. Ruth, 271 F. 827 (2d Cir. 1921); Lemat Corp. v. Barry, 275 Cal. App. 2d 671, 80 Cal. Rptr. 240 (1969); Philadelphia Ball Club, Ltd. v. Lajoie, 202 Pa. 210, 51 A. 973 (1902).

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> We are not called upon to say that under no circumstances can an individual enforce an agreement more advantageous than a collective agreement, but we find the mere possibility that such agreements might be made no ground for holding generally that individual contracts may survive or surmount collective ones. The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. *Of course, where there is great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining.*

321 U.S. at 338 (emphasis added).

words, individual contracts may in fact surmount collective agreements and there may be situations in which, due to a variation in circumstances of employment and skill, individual agreements may be within the overall framework of the collective agreement.

The problem is primarily a philosophical one involving an attempt to define the individual's relationship to the union and the individual's rights under the collective agreement. The interpretations indicate that the individual stands in the position of a third party beneficiary to the agreement, that the union is an agent which finds its members as principals, or that the relationship may be viewed as a type of constitutional government in which the members elect the union administrators who perform the bargaining tasks. But regardless of the philosophical position, it seems that the individual as "principal," third-party beneficiary, or member of a constitutional system would properly have the right to sue on the collective agreement.

Congress, however, in order to implement consistent labor policy, passed section 301 of the Labor Management Relations Act,[87] which provides that an individual union member may bring a suit in any federal district court for violations by a union or employer of a labor contract. Notwithstanding case law precluding section 301 suits, an individual athlete may have the right to sue given recent developments in the area of section 301.

In 1955, in *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*,[88] the United States Supreme Court held that section 301 was not intended to authorize accrued wages since such claims involved individual claims of uniquely personal rights. The Court, however, dealt with section 301 two years later in *Textile Workers Union of America v. Lincoln Mills*.[89] In that case, the collective bargaining agreement provided for arbi-

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[87] [S]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185 (1970).

[88] 348 U.S. 437 (1955).

[89] 353 U.S. 448 (1957).

tration of grievances. The union began the procedural process, but the employer refused to acknowledge the process. The union brought suit to compel arbitration. The Supreme Court agreed with the union's position and stated that the federal district court could order an employer to arbitrate grievances which were personal in an action brought under section 301.[90]

Seven years later in *Humphrey v. Moore*,[91] the Supreme Court entertained the next logical proposition which was a consideration of the individual's right to sue under section 301. Moore brought a class action seeking an injunction against the company and the union to keep them from combining the seniority lists of two transportation companies. The action was brought without first exhausting the administrative remedy of arbitration as provided by the collective agreement. The Supreme Court indicated that the subject matter was proper for federal jurisdiction under section 301 and that the union was not guilty of misrepresentation nor did it have to exhaust the grievance procedure.[92] Thus, both unions and individuals had standing to sue under section 301.

The inroads into section 301 that had taken place from 1947 to 1965 were soon ended in *Republic Steel Corp. v. Maddox*.[93] In *Maddox*, an individual employee sued his employer for severance pay as provided by the collective bargaining contract. The trial court found for Maddox and the appellate court affirmed, but the Supreme Court, reversing the lower courts, stressed that section 301 will only be available to individuals when they have exhausted the grievance procedure delineated in the collective bargaining agreement or the union fails to properly represent them. The Court in *Maddox* relied on the decision of *Smith v. Evening News Association*[94] for the proposition that grievance procedures must be invoked before a suit may be brought under section 301. The *Smith* facts involved an employee of the Evening News Association and member of a labor organization, the Newspaper Guild of Detroit, with whom the company had a collective bargaining agreement. The petitioner brought a suit for breach of contract

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[90] *Id.*

[91] 375 U.S. 335 (1964).

[92] *Id.* at 344.

[93] 379 U.S. 650 (1965).

[94] 371 U.S. 195 (1962).

in the local circuit court. Another union had struck the employer, and the petitioner and other Guild members, although willing and able, were not permitted to work while other employees not covered by a collective bargaining agreement were permitted to work. Smith contended that this was a breach of the collective bargaining agreement which provided that there would be no discrimination against any employee because of membership in the Guild. The trial court dismissed for lack of jurisdiction and the Supreme Court of Michigan affirmed.[95] The Supreme Court, saying that the "petitioner's action arises under § 301,"[96] reversed and remanded. The Court stated in dicta that individual claims for wages or working conditions, even though they are intertwined with union interests, are directly within the ambit of section 301.[97] In light of the language of *Smith,* it is difficult to say that the Court intended to deny petitioner relief, particularly since the Supreme Court reversed the state courts and remanded the case. Thus, *Maddox* would seem to have misconstrued *Smith.*

However, two years later in *Vaca v. Sipes,*[98] the Court followed the *Maddox* rationale when an employee sued, claiming he had been wrongfully discharged in violation of the collective bargaining agreement and that the union refused to see his claim through the proper grievance procedure. The union began the grievance procedure but later suspended it and instructed the employee to settle with the employer. The employee refused and brought a section 301 action. In reversing the lower courts which had held that the employee had been wrongfully discharged, the Supreme Court held that if an individual employee had no absolute right to have a grievance arbitrated, then "a breach of the union's duty of fair representation is not established merely by proof that the underlying grievance is meritorious."[99] To recover there must have been "arbitrary or bad-faith conduct on the part of the union in processing the grievance."[100] This evidence was not provided. The effect of *Sipes* is to leave a wrong without a

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[95]Smith v. Evening News Ass'n, 362 Mich. 350, 106 N.W.2d 785 (1962).

[96]371 U.S. at 201.

[97]*Id.* at 200.

[98]386 U.S. 171 (1967).

[99]*Id.* at 195.

[100]*Id.* at 193.

remedy—this suggests that the Court is denying recovery out of a fear of increased litigation.

Although *Maddox* and *Sipes* appear to have restricted the individual's right to sue under a collective agreement, there is some indication based upon recent decisions that the Supreme Court is returning to the rationale of *Smith v. Evening News Association.* In *United States Bulk Carriers, Inc. v. Arguelles,*[101] the United States Supreme Court appears to have applied the dictum of *J. I. Case* and the philosophy of *Smith,* providing for the right of an individual to bring a section 301 action. *Arguelles* involved a suit for wages "brought by a seaman whose employment was covered by a collective bargaining agreement that provided grievance procedures and arbitration of disputed claims."[102] The seaman bypassed arbitration and elected to file a suit in federal court. The Court was faced with the issue of whether section 301 was the only remedy available to seamen in view of statutory remedies in the maritime field. The Court held that section 301 was an optional remedy and, inasmuch as the employee had a justiciable claim that was "grist for the judicial mill,"[103] the seaman had the right to sue, particularly since seamen from the start were wards of admiralty law and thus different from other types of workers.[104]

More recently in *Norfolk & Western Railway v. Nemitz,*[105] railroad employees sued their employer to recover compensation promised in an agreement with their union in 1962. The employer had agreed with the union that its members would not be adversely affected by a company merger. The Interstate Commerce Commission approved the merger, and the employer and the union entered into an agreement which substantially reduced employee benefits. The employees petitioned the union to arbitrate but were refused on the grounds that a new agreement had been entered into by the union. The employees then brought suit in

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[101]400 U.S. 351 (1971).

[102]Comment, *The Individual Worker's Right to Sue in His Own Name in a Collective Bargaining Situation,* 17 S.D.L. Rev. 217, 232 (1972).

[103]400 U.S. at 357.

[104]Comment, *The Individual Worker's Right to Sue, supra* note 102, at 233.

[105]404 U.S. 37 (1971).

federal court. The Supreme Court again disregarded *Maddox* and *Sipes* and ruled that section 5(2)(f) of the Interstate Commerce Act[106] directs the Interstate Commerce Commission to "require a fair and equitable arrangement to protect the interests of the railroad employees affected"[107] in order for the Commission to approve the merger. The Court also held that any protection provision must be effective for four years.[108] Although the third provision of the Act states that, notwithstanding any other provisions of the Act, an agreement protecting the interests of the employees can be entered into by any railroad carrier and the duly authorized representative or representatives of the employees,[109] the Court, in granting the employees' right to sue, interpreted the first two sections requiring protection of the employees' interests as pre-empting the third section which demands that the collective agreement be controlling as to the interests of employees.

The Court in *Arguelles* and *Nemitz* was searching for a way to deal with justiciable individual claims without flooding the courts with such claims. In so doing, the Court has sought to avoid *Maddox* and *Sipes* when a union employee has a legitimate cause of action under some other federal law. It would certainly seem, then, that Flood or any other professional athlete should be accorded such standing under the Sherman Act, notwithstanding *Maddox* or *Sipes*.

Although this theory has never been argued, two courts have dealt with professional athletic contracts in light of collective bargaining agreements and concluded that the contracts are individual contracts for personal services. In *Philadelphia Hockey Club*, Judge Higginbotham regarded professional hockey contracts as individual contracts that cannot be modified by arbitration agreements negotiated between the NHL and the NHL players' association unless specifically authorized by the individual player.[110] Thus, a three-year restraint[111] of a hockey player following

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[106]49 U.S.C. § 5(2)(f) (1970).

[107]*Id.*

[108]404 U.S. at 42.

[109]49 U.S.C. § 5(2)(f) (1970).

[110]351 F. Supp. at 507-08.

[111]It has been argued by the NHL that players should be enjoined for three years beyond their contract rather than permanently.

the expiration of his contract is unreasonable and in violation of section 2 of the Sherman Act.[112]

More recently in *Nassau Sports v. Peters*,[113] the defendant Peters jumped from the New York Islanders of the NHL to the WHA's New York Raiders and was enjoined from leaving the Islanders under the terms of the NHL contract. The court held that the controversy between the plaintiff and Peters was not a labor dispute and did not involve a labor contract. "The contract is purely and simply one for unique personal services to be rendered by an individual."[114]

The decisions that have occurred in professional athletics since *Flood* have considered the argument that standard player contracts are collective bargaining agreements and have rejected the contention.[115] However, courts have reached decisions contrary to *Flood* in *Philadelphia Hockey Club*, holding that the hockey reserve clause is invalid, and *Nassau Sports*, holding that the contract right must be held "in favor of plaintiff which must prevail over unproved and questionable defensive claims that such an option violates the antitrust laws."[116] No doubt there will be many forthcoming appeals in this area in which the labor contract theory will be raised and which should be rejected as obfuscating the more realistic interpretation that professional athletic contracts are contracts for personal services. But under either interpretation, the athlete should have the right to sue under the contract to challenge its provisions.

IV. The Peculiar Economics of Professional Athletics

Professional baseball and hockey have utilized the most restrictive of the reserve clauses while professional football and basketball have been forced through judicial decisions to adopt

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[112]351 F. Supp. at 508.

[113]352 F. Supp. 870 (E.D.N.Y. 1972).

[114]*Id.* at 882.

[115]Nassau Sports v. Peters, 352 F. Supp. 870 (E.D.N.Y. 1972); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972).

[116]352 F. Supp. at 882.

more flexible option clauses, although there may be some question as to the flexibility of player freedom extended under the football option clause.[117] The defense most frequently raised for the necessity of the reserve system is that it assures "an equal distribution of playing talent among opposing teams; that a more or less equal distribution of talent is necessary if there is to be uncertainty of outcome."[118] It is crucial, of course, that there be uncertainty of outcome if the consumer is to desire to view athletic contests and pay the admission price to a game. The argument in favor of the reserve system is also based upon a fear of team failures similar to that which occurred in the late nineteenth century in professional baseball when the wealthier clubs outbid the poorer clubs for the most competent players. The players have contended that the reserve clause is a restraint of trade and provides a monopoly over the player market to the detriment of newly organized leagues, such as the WHA.

In reaction to reserve clause opposition, the clubs have emphasized that the clause ensures equality of team strength and that this fact is crucial in viewing the economics of professional athletics.[119] If a team is to be successful, it must hope and ensure that "competitors also survive and prosper sufficiently so that the differences in the quality of play among teams are not too great."[120] In other words, the ideal place of most firms in American industry is as close to monopoly as possible, as close to total domination of the market and maximization of profit through the superiority of its product as will be permissible under the antitrust laws. Monopoly, however, for the professional sports

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[117]It has been thought by some that there is a tacit agreement among clubowners to refrain from buying the services of a player who has played out his option and thus discourage players from acting as free agents. This charge has never been substantiated.

[118]D. WATSON, PRICE THEORY IN ACTION 342 (1969), *reprinting* Rottenberg, *The Baseball Players' Labor Market*, 64 J. POL. ECON. 242 (1956).

[119]

> Professional team competitions are different from other kinds of business ventures. If a seller of shoes is able to capture the market and to cause other sellers of shoes to suffer losses and withdraw, the surviving competitor is a clear gainer.

Id. at 347.

[120]*Id.*

team is disastrous.[121] Thus, it is peculiar to the economics of athletics that profit maximization depends upon competition among the teams and not on business competition among the firms controlling the teams, "for the greater the economic collusion and the more the sporting competition the greater the profits."[122] The implication which seemed in part to have swayed Congress in granting the football merger is that professional athletics are natural monopolies. Thus, the "several joint products [contests] which are joint products of legally separate business firms are really the complex joint products of one firm, [which] is necessarily an all-embracing firm or natural monopoly."[123]

The general reaction to sports as a natural monopoly has been complicated in football by the emergence of the AFL, in basketball by the ABA, and now in hockey by the WHA. Curiously enough, baseball has merged its apparent oligopolistic firms into one monopoly. Thus, the American League and National League are really not two separate leagues, but rather two divisions within a single league of professional baseball. Ironically, the courts have subjected football to the antitrust laws, provided free access to players, and have in effect declared that two or more leagues must compete among themselves.[124] Congress, however, permitted the two leagues to merge and there is now one league with four divisions. Professional basketball is presently fighting on two fronts, in the courts and in Congress. The ABA

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[121] *Id.* at 218-19, *reprinting* Neale, *The Peculiar Economics of Professional Sports*, 78 Q.J. Econ. 1 (1964). Mr. Neale has characterized monopoly in professional sports as the "Louis-Schmelling Paradox":

> But now consider the position of the heavyweight champion of the world. He wants to earn more money, to maximize his profits. What does he need in order to do so? Obviously, a contender, and the stronger the contender the larger the profits from fighting him. And since doubt about the competition is what arouses interest, the demonstration effect will increase the incomes of lesser fighters (lower on the rating scale or lighter on the weighing scales). Pure monopoly is a disaster: Joe Louis would have had no one to fight and therefore no income.

Id. at 219.

[122] *Id.*

[123] *Id.* at 221.

[124] American Football League v. National Football League, 205 F. Supp. 60, 64 (D. Md. 1962), *aff'd*, 323 F.2d 124, 131-32 (4th Cir. 1963).

desires a shortcut to a merger with the NBA through Congress and around the more expensive court litigation which may well separate the two leagues in view of the *American Football League v. National Football League* decision.[125] Professional hockey occupies the same position with the NHL squaring off with the WHA. The *Philadelphia World Hockey Club* decision indicates that hockey will also have to seek the more sympathetic ear of Congress.

The legal rationale involved in applying the antitrust laws to professional athletics has followed the decision of *United States v. Aluminum Co. of America*[126] that the monopolist must have both the power and intent to monopolize, although no specific intent is required, "for no monopolist monopolizes unconscious of what he is doing."[127] As a practical matter, the courts have looked at restrictive option clauses and geographical expansion of the older leagues as barring the new leagues from effective competition.[128]

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[125]205 F. Supp. 60 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963). The AFL brought suit against the NFL and charged that the NFL monopolized football and restricted the AFL teams from access to the players. The AFL was unable to prove a conspiracy to monopolize or monopoly power on the part of the NFL.

[126]148 F.2d 416 (2d Cir. 1945).

[127]*Id.* at 432.

[128]*See* Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 455, 504-13 (S.D.N.Y. 1972); American Football League v. National Football League, 205 F. Supp. 60 (D. Md. 1962), *aff'd*, 323 F.2d 124 (4th Cir. 1963). *See also* Note, *The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws*, 81 HARV. L. REV. 418 (1967).

The congressional and economic reasoning for merging professional athletic leagues into one league in each sport has grown out of a consideration for the effect of trying to keep two leagues economically and sportingly competitive, particularly in light of the bankruptcies of professional football teams during the forties. Economic competition demands that the team cover its costs of rent, equipment and stadium rent, reinvestment, transportation, and the cost of players. The cost of players has been regarded as payment for an unreproducible talent or unique service, or a quasi-rent. Unlike the rent and costs of retailers which would be relatively constant for competitors and permit those handling the same goods to exist in the same market area, professional athletics does not enjoy identical nonrental costs. Thus, transportation for some teams may be greater than in an opposing league and as competition bids up the cost or rent of players, the profit margin can only decline and teams will necessarily fail. This is particularly

In addition to the challenges from competing leagues, established leagues have also been under attack from the players. They are attacking the monopsonistic power of the teams in controlling the price of labor and, in effect, paying them a price which is less than the price they would receive in a competitive market; they are attacking the reserve clause as it restrains the athlete's ability to trade his services.[129] Under the present reserve clauses in baseball and hockey, it is doubtful that equality of ability is achieved among teams.[130] Whether a free market or free access to players would create more equality among teams is questionable and difficult to determine. It would, however, provide athletes with payment for the full value of their services without part of it being retained by the clubs.[131]

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true for teams which geographically have not been receptive to certain sports or when expansion and diminishing returns in playing ability have occurred and discouraged consumer interest and gate receipts. The conclusion is that many individual teams will experience bankruptcy as costs steadily increase and eventually exceed revenues. The paradox is that the firm in law is not the firm in economics, and the concept of professional athletics as an economic unit demands exemption from the antitrust laws. Congress appears willing to provide this exemption. *See* Neal, *The Peculiar Economics of Professional Sports*, 78 Q.J. ECON. 1 (1964), *reprinted in* D. WATSON, PRICE THEORY IN ACTION 218-26 (1969).

[129]Besides Flood's attack on baseball's reserve clause and the recent attacks on the NHL's reserve clause, the NBA and ABA basketball players have also challenged the merger of the two professional basketball leagues.

[130]From 1920-51, the New York Yankees led the American League in eighteen years, and the Chicago White Sox in none. During the same period of time the National League saw the St. Louis Cardinals win in nine years, the New York Giants in eight, and the Philadelphia Phillies and Boston Braves each won one year. Rottenberg, *The Baseball Players' Labor Market*, 64 J. POL. ECON. 242 (1956), *reprinted in* D. WATSON, PRICE THEORY IN ACTION 342-43 (1969).

In professional hockey during the period 1946 to 1967 Montreal finished first nine times and second seven times. Detroit finished first nine times and second twice, while Boston finished last five times and fifth four times. New York finished last four times and fifth ten times and Toronto finished first twice, second five times, and last only once. Very little uncertainty seems to have resulted. Jones, *The Economics of the National Hockey League*, 2 CAN. J. ECON. 6 (1969).

[131]One of the most difficult problems in analyzing wages of professional athletes is that there is little information available and any analysis must be based on the assumption that the team owners and players desire to maximize their profits. If this is true, "players will be distributed among teams so that they are put to their most 'productive' use; each will play

Legally, the restraint of trade argument was lost in *Flood* and was not directly considered in *Philadelphia World Hockey Club*; however, it appears to fit squarely within the holding of *United States v. Socony Vacuum Oil Co.*[132] that all agreements to manipulate prices are conclusively unreasonable restraints of trade in violation of section 1 of the Sherman Act.[133]

In their present form professional athletics—baseball and hockey—appear to violate the Sherman Act. If Congress wishes to merge the leagues and provide professional sports with an exemption, it will probably do so at the price of condoning the exploitation of labor.[134] If the demand for professional athletics is great enough to support two leagues in football, baseball, basketball, and hockey, and if the owners and players attempt to maximize their profits, then a free market should allocate players as effectively as a system whereby players are controlled by a reserve system. If the demand for those sports is not present, then a congressional exemption will help underwrite professional

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for the team that is able to get the highest return from his services." The allocation of players may well be similar under both the reserve and free market systems, but under the latter system, the player avoids exploitation. Rottenberg, *The Baseball Players' Labor Market*, 64 J. POL. ECON. 242 (1956), *reprinted in* D. WATSON, PRICE THEORY IN ACTION 342 (1969).

[132]310 U.S. 150 (1940). *See also* Note, *Monopoly in Manpower: Organized Baseball Meets the Antitrust Laws*, 62 YALE L.J. 576 (1953).

[133]As Mr. Justice Douglas stated,

> The elimination of so-called competitive evils is no legal justification . . . . If the so-called competitive abuse were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition. . . .

310 U.S. at 220-21.

> The Sherman Act places all such schemes beyond the pale and protects . . . our economy against any degree of interference. Congress . . . has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed real or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination . . . .

Id.

[134]It should be noted that not all players are exploited since they might not command more money in a free market.

sports by permitting clubs to reduce costs by exploiting labor. In a free market in which owners desire to maximize their profits and there is no restrictive reserve clause, a club which desires near equality among teams would not maximize its profits by buying superstars who will play very little. It is also probable that most professional athletes desire to play their sport rather than receive a high wage for sitting out and being unavailable to another club. A club indulging in this type of behavior would not be maximizing its profits and would experience players leaving in an effort to play the sport although for less money. One reason that makes it doubtful that one or several wealthy clubs could dominate player talent is the unparalleled growth of athletics on the amateur, elementary, and secondary school level, as well as in the colleges and universities in the United States. For the major league sports of baseball, football, basketball, and hockey, there is a ready supply of good players who will become increasingly better in a free market system; the AFL's progress is a good indication of this growth. Given the supply of players today, clubs will only price themselves into bankruptcy if they fail to maximize their profits.

V. Conclusion

The contract "jumping" that has occurred in professional athletics over the last eight years is due to the desire of athletes to sell their services to the highest bidder, in short, to have their wages determined by supply and demand. While this has been relatively easy for professional football and basketball players as a result of their more flexible option clauses, their brothers in professional baseball and hockey have been permanently tied to the clubs holding their contracts. Curt Flood failed in his challenge of baseball's reserve clause. More recently, professional hockey players have foregone the legal challenge and simply left the NHL for the higher wages of the WHA. When the NHL teams have sued for contract violations, the players have challenged the hockey option clause as restraining their ability to trade their services. Aside from the merits of the antitrust issue, the question whether they may challenge those contracts as violative of antitrust laws remains unanswered.

Certainly the right of a player to sue on his contract would seem apparent if player contracts are viewed as individual contracts for personal services. But even if they are regarded as col-

lective agreements, the player may well have a right to bring a suit attacking the contract if there is standing under another federal law notwithstanding the prohibitions of section 301 as viewed in *Maddox* and *Sipes*. Although the Supreme Court has not overruled these decisions, its most recent decisions in *Arguelles* and *Nemitz* indicate that when an employee has a legitimate cause of action, and he may attack the collective contract under another law, he will not be denied his opportunity to do so even in the face of more prohibitive case law which has closed the door to individual suits under section 301.

Under the present antitrust laws the reserve system would be violative of section 1 of the Sherman Act even in view of the anachronistic rationale of *Flood*. The view that the reserve systems do not present a restraint of trade is somewhat specious; at any rate, the matter of antitrust exemptions for professional sports is for Congress and not the judiciary to determine, and there is little reason to believe that equality among teams will only be achieved through the judicious and sympathetic functioning of Congress. Team equality could as easily be achieved through the free market and could be achieved without exploiting the player.

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