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## Sporting Judgment

### Sports' unions help maintain integrity of competition

By Timothy L. Epstein

With the NBA and the NFL labor disputes making front page headlines this summer and our historical sports landscape littered with strikes, lockouts and work stoppages, one cannot help but wonder: Would our sports leagues be better off without unionized players' associations and collective bargaining? After all, from a fan's perspective, a dispute pitting billionaires against millionaires hardly induces sympathy and disenchantment is certainly merited.

Yet, while these lockouts might cause games to be missed and dollars to be forfeited, the mechanisms causing short term losses are beneficial in the long run, and promote the most essential element of sport: competition. The structure of labor law in this country is fundamental and it fosters this on-field competition through the bilateral imposition of conditions that ordinarily would not be tolerable in a free market system.

All four major sports leagues in North America have players' unions and teams operate within systems controlled by various bargained for restraints such as age restrictions, salary caps and entry drafts. Conversely, European sports leagues are structured differently and operate in a system that is much less restrictive. Player movement is almost completely vulnerable to the free market. In Europe, there are no players' unions and leagues are governed by overarching governing bodies such as Union des Associations Europeennes de Football (UEFA), which governs European

football (i.e. soccer). There are no entry drafts, clubs are free to sign players at any age and there is no cap on salaries. The aggregate effect of this system has spawned a top-heavy structure manifesting that free market competition does not necessarily equate to on-field "competition."

In the United States, many of the constraints under which leagues operate do not pass antitrust muster under Section One of the Sherman Act. 15 U.S.C. 1. Section One of the Sherman Act states, "Every contract, combination ... or conspiracy, in restraint of trade or commerce ... is hereby declared to be illegal." Restraints such as age restrictions, salary caps and entry drafts would all likely be considered per se illegal under the Sherman Act, or at minimum, proscribed under rule of reason analysis because the restraints limit players' rights to be compensated freely and limit players' market access.

Because of these restrictions, labor unions are essential. Courts have carved out nonstatutory labor exemptions for restraints that would otherwise be considered illegal, as long as such restraints are collectively bargained for. Interestingly, sports leagues have often been a battleground for the tension between antitrust law and labor law. Courts have recognized that competition in the free market is not always conducive to on-field competition and that certain restrictions actually improve the product in the professional sports context.

In *Mackey v. National Football League*, the 8th Circuit articulated a three-factor test to determine if a restriction is subject to a non-statutory labor exemption. 543 F.2d 606, 614 (8th Cir. 1976). The exemption may be applied when a restraint on trade: 1) involves mandatory subjects of bargaining; 2) primarily affects the parties involved; and 3) is reached through bona fide arm's length dealing. Id.

The *Mackey* court struck down the NFL's "Rozelle Rule," which required teams that acquired a player whose contract had expired to compensate the player's former team. The court held that the rule violated the third prong of the test because the rule was unilaterally instituted and was not agreed upon through bona fide arm's length dealing.

By contrast, there is no such labor exemption in Europe, and even if there were, athletes are not unionized. This leaves sports leagues and the unilaterally imposed regulatory schemes susceptible to attack under European competition law. In Europe, Article 81 of the Treaty Establishing the European Community applies to competition law. Article 81(1) prohibits agreements that prevent, restrict or distort competition either by object or effect. Article 81(3) permits exemptions to Article 81(1), but the restrictions must be indispensable to the market efficiencies created.

The sporting world in Europe has also been used as a battleground for the fight between labor law and antitrust law. In 1995, the European Court of Justice made a clear statement regarding the European Commission's disfavor of market restraints. The court's seminal ruling in *Union Royale Belge des Societes de Football Association ASBL v. Bosman* had two important holdings: 1) transfer fees for players who are out of contract are illegal; and 2) a quota system limiting the number of foreign players on teams' rosters was illegal. 1995 E.C.R. I-5040.

The *Bosman* ruling has had profound effects. These restrictions benefited smaller clubs by regulating player movement and maintaining balance. The transfer system was first implemented for this very purpose. It helped the smaller clubs maintain their star players and at least allowed the smaller clubs to gain revenue if these clubs did lose players. Now, though some restrictions remain, player movement has been

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liberalized and it has become increasingly difficult for these smaller clubs to retain, let alone obtain, the best players. Players can now demand higher wages more commensurate with their market value, and oftentimes only the wealthiest clubs can afford these salaries.

In basketball, this free market is allowing the wealthiest European clubs to sign American stars such as Deron Williams while the NBA is entrenched in what looks to be a prolonged lockout. Certainly only the richest European teams will be able to entice NBA superstars. If European teams were subject to the same restrictions as American teams, these players would potentially be forced to enter into a draft, and teams could not lure them in with astronomical salaries.

Empirical evidence supports the contention that the free market system in Europe is actually detrimental to competition. In the English Premier League, the triumvirate of Manchester United, Chelsea and Arsenal have won every title since 1995. The same holds true in the Spanish League, where Real Madrid and FC Barcelona dominate; as well as the Italian League, where Juventus, AC Milan and Inter Milan reign. These clubs are free to outspend the competition to bring in the best players regardless of age or nationality, which creates more revenue and ultimately broadens the chasm between the have's and have not's. In stark contrast, the NFL has had 12

different Super Bowl champions since 1995.

This lack of competitive balance in European football is well documented. See, Thomas M. Schiera, "Balancing Act: Will the European Commission Allow European Football to Reestablish the Competitive Balance that it Helped Destroy?" 32 *Brook. J. Int'l L.* 709 (2007). There has been a recent movement toward implementing some sort of salary cap in European football, but this would likely be subject to Article 81(1) of the EC Treaty because it would restrict or distort competition, and thus would have to satisfy the exception requirements of Article 81(3). This would be a difficult hurdle to overcome and would require showing that European football would be at risk of existence because of inadequate competition. *Id.* at 737-738.

Interestingly, Article 81 could pose a significant hurdle if North American sports leagues choose to expand overseas, which has been discussed as part of leagues' globalization strategies. North American leagues would likely be subject to strict European competition law and many player movement restrictions could be in jeopardy. See, Marc Edelman and Bryan Doyle, "Antitrust and 'Free Movement' Risks of Expanding U.S. Professional Sports Leagues into Europe," 29 *N.W. J. Int'l L. & Bus.* 403 (2009).

The significance of labor unions and the nonstatutory labor exemption is clear from

this comparison of the American and European systems of sport. As long as restrictions on player movement are agreed upon by the leagues and the players' unions, the conditions will not face the intense antitrust scrutiny that a potential salary cap would endure in Europe. Many of the same restrictions that are covered by the nonstatutory labor exemption in the United States would be illegal within this European framework. Much of what makes our sports leagues in the United States so competitive are these rules that regulate player movement. The absence of players' unions and the interjection of European courts has clearly hindered the competitive balance.

Sports fans watch games because of the competition and maintain perpetual hope that one day their team will eventually win the championship. Every spring, Cubs fans utter, "this is our year." In America, this rhetoric is not empty and optimism is not lost because our leagues and courts have developed a system that brings parity and gives teams a fighting chance. In most cases, belief in one's team is not completely delusional. By contrast, for fans of many European sports teams, such hope teeters on the edge of utter fantasy. While sports leagues' labor disputes are aggravating and the thought of games being lost is disheartening, ultimately, collective bargaining through players' unions preserves the integrity of sporting competition in America.