

# All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Process and Agreement in the National Football League

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*The NFL survived the 2011 offseason despite being bombarded by a sports law perfect storm. The National Football League Players Association (NFLPA or the Players) decertified itself as the bargaining representative of NFL players on March 11, 2011, hours before the expiration of the collective bargaining agreement that the NFL and the NFLPA agreed to in 2006 (the 2006 CBA). That night, nine current NFL players and one prospective NFL player, led by New England Patriots quarterback Tom Brady, filed an antitrust lawsuit against the NFL and its 32 Clubs.*

*The Brady lawsuit was just part of a litigious 2011 in professional football. The NFL responded to the Brady lawsuit with a “lockout.” Players could not report to work, Clubs could not have any contact with players and, eventually, games could have been missed. In addition to the Brady lawsuit, the Players sought damages related to the NFL’s television contracts that allegedly violated the 2006 CBA, retired players fought for their rights in the labor negotiations, and the NFL contended that the NFLPA had failed to bargain in good-faith in a proceeding before the National Labor Relations Board.*

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*The NFL and NFLPA ultimately reached a settlement of the various lawsuits and agreed to a new CBA (the 2011 CBA) without missing any regular season games. This Article examines the history of labor negotiations in the NFL, provides a thorough examination of the most recent labor dispute and its related legal actions, and concludes with a detailed analysis of the 2011 CBA.*

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## I. INTRODUCTION

The National Football League (NFL) survived its longest work stoppage ever<sup>1</sup> during the 2011 offseason despite being bombarded by a sports law perfect storm. After years of negotiation, the National Football League Players Association (the NFLPA or Players) decertified itself as the bargaining representative of NFL players on Friday night, March 11, 2011.<sup>2</sup> The decertification came only hours before the expiration of the collective bargaining agreement (CBA) that the NFL and the NFLPA agreed to in 2006 (the 2006 CBA), which had already been extended by eight days.<sup>3</sup> By the end of the night, nine current NFL players and one prospective NFL player had filed an antitrust lawsuit against the NFL and its 32 Member Clubs.<sup>4</sup> The lawsuit, styled *Brady v. NFL* for lead plaintiff and New England Patriots quarterback Tom Brady, was just one part of a lengthy and litigious 2011 in the world of professional football.

The NFL responded to *Brady* by “locking out” the Players just after midnight upon the expiration of the 2006 CBA.<sup>5</sup> Players could no longer report to work, Clubs could not have any contact with players<sup>6</sup> and, eventually, games could have been missed. Lay fans probably had no preference as to who won the *Brady* suit or the particulars of a CBA

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<sup>1</sup> The lockout lasted 127 days. Patrik Jonsson, *NFL Lockout Ends as Owners Approve New Deal. Now What?* CHRISTIAN SCIENCE MONITOR (July 21, 2011), <http://www.csmonitor.com/USA/Sports/2011/0721/NFL-lockout-ends-as-owners-approve-new-deal.-Now-what>; see also GLENN M. WONG, ESSENTIALS OF SPORTS LAW 531 (4th ed. 2010) (describing history of work stoppages in the NFL).

<sup>2</sup> Gregg Rosenthal, *NFLPA Decertifies, Work Stoppage Imminent*, PROFOOTBALLTALK (Mar. 11, 2011, 5:10 PM), <http://profootballtalk.nbcsports.com/2011/03/11/union-applies-for-decertification/>.

<sup>3</sup> *NFL Lockout Timeline*, USA TODAY (July 21, 2011), [http://www.usatoday.com/sports/football/nfl/2011-07-21-lockout-timeline\\_n.htm](http://www.usatoday.com/sports/football/nfl/2011-07-21-lockout-timeline_n.htm).

<sup>4</sup> Michael David Smith, *Tom Brady, Peyton Manning, Drew Brees, Seven Others File Antitrust Suit*, PROFOOTBALLTALK (Mar. 11, 2011, 7:03 PM), <http://profootballtalk.nbcsports.com/2011/03/11/tom-brady-peyton-manning-drew-brees-seven-others-file-antitrust-suit/>. The NFL is an unincorporated association consisting of 32 member clubs. See *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2207 (2010).

<sup>5</sup> Gregg Rosenthal, *The Lockout Has Officially Begun*, PROFOOTBALLTALK (Mar. 12, 2011, 12:34 AM), <http://profootballtalk.nbcsports.com/2011/03/12/the-lockout-has-officially-begun/>.

<sup>6</sup> Mike Florio, *League Requiring GM's to Log All Calls With Agents*, PROFOOTBALLTALK (Mar. 14, 2011, 8:57 AM), <http://profootballtalk.nbcsports.com/2011/03/14/league-requiring-g-m-s-to-log-all-calls-with-agents/>.

that would enable games to begin; instead, fans were mostly concerned that football be played.

The NFL earned an estimated \$9.3 billion in revenues in 2009.<sup>7</sup> Approximately \$3.735 billion of the NFL's revenues were from television contracts.<sup>8</sup> The Players received approximately 50 percent of those revenues pursuant to the 2006 CBA.<sup>9</sup> Despite the billions in revenues—and absence of allegations that Clubs were losing money—the Clubs unanimously voted 32 to zero to opt out of the 2006 CBA on May 20, 2008.<sup>10</sup> The Clubs had voted 30 to two in favor of the 2006 CBA only 26 months earlier.<sup>11</sup> As a result of the Clubs' dramatic change in perspective, the 2006 CBA expired in March 2011 as opposed to March 2013.<sup>12</sup>

The Players insisted that the Clubs' decision to opt out of the 2006 CBA and threaten the labor peace the game had enjoyed since 1993, was the result of a revenue-sharing dispute between higher-revenue and smaller-revenue Clubs.<sup>13</sup> The Clubs instead contended that the financial split between Clubs and Players no longer made financial sense.<sup>14</sup>

As the 2006 CBA approached extinction, closing the gap on the financial split seemed hinged on the Clubs' willingness to "open the books" and permit the NFLPA to review and understand the financial arguments being made by the NFL.<sup>15</sup> Several Clubs were reportedly

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<sup>7</sup> Maury Brown, *Numbers Show NFL's 'Economic Realities' for Lockout Unwarranted*, FORBES (Jan. 10, 2011), <http://www.forbes.com/sites/sportsmoney/2011/01/10/numbers-show-nfls-economic-realities-for-lockout-unwarranted/>.

<sup>8</sup> Wong, *supra* note 1, at 719.

<sup>9</sup> Mike Florio, *Report: CBA Talks Broke Down After Union Proposed 50-50 Split*, PROFOOTBALLTALK (Feb. 10, 2011, 10:56 AM), <http://profootballtalk.nbcsports.com/2011/02/10/report-cba-talks-broke-down-after-union-proposed-50-50-split/>.

<sup>10</sup> John Clayton, *NFL Owners Vote Unanimously to Opt Out of Labor Deal*, ESPN (May 20, 2008, 10:10 PM), <http://sports.espn.go.com/nfl/news/story?id=3404596>.

<sup>11</sup> Don Pierson, *There's Peace on Turf in NFL; 6-year Accord Raises Salary Cap, Revenue Sharing*, CHI. TRIB. (Mar. 9, 2006), [http://articles.chicagotribune.com/2006-03-09/sports/0603090179\\_1\\_salary-cap-low-revenue-teams-owners-vote](http://articles.chicagotribune.com/2006-03-09/sports/0603090179_1_salary-cap-low-revenue-teams-owners-vote).

<sup>12</sup> See NATIONAL FOOTBALL LEAGUE, NFL COLLECTIVE BARGAINING AGREEMENT (2006-2012), art. LVIII, [hereinafter 2006 CBA], available at <http://static.nfl.com/static/content/public/image/cba/nfl-cba-2006-2012.pdf>.

<sup>13</sup> Lester Munson, *Storm Clouds Gather and Lockout Looms Large in NFL Labor Strife*, ESPN (Mar. 12, 2008, 11:12 AM), <http://sports.espn.go.com/nfl/columns/story?id=3288568>.

<sup>14</sup> Clayton, *supra* note 10.

<sup>15</sup> Mike Florio, *Opening the Books Could Be the Key to Closing a Deal*, PROFOOTBALLTALK (Mar. 8, 2011, 9:36 AM), <http://profootballtalk.nbcsports.com/2011/03/08/opening-the-books-could-be-the-key-to-closing-a-deal/>; Mike Florio, *Impasse Approaches Regarding Financial*

prepared to do just that in hopes of accomplishing a deal.<sup>16</sup> In fact, the Green Bay Packers—the only publicly-owned NFL Club—reported operating profits of \$12 million for the 2010 season.<sup>17</sup> With no evidence that the Clubs were in any type of financial distress, the Players did not agree that fundamental changes were needed to the NFL-player compensation model.

The NFL has served as the crash test dummy and model for labor relations and related litigation among the major North American sports leagues, including the NFL, Major League Baseball (MLB), the National Basketball Association (NBA), and the National Hockey League (NHL) (collectively, the Big Four). The NFLPA's 2011 decertification marked only the second time that a major professional sports league's players association had decertified.<sup>18</sup> Of course, the NFLPA was the first do it in 1989.<sup>19</sup> Perhaps not surprisingly, contemporaneous with *Brady*, the NFL and NFLPA were engaged in proceedings before the National Labor Relations Board (NLRB), a legal action involving the NFL's television contracts, and a lawsuit brought on by retired NFL players. Through it all, the NFL and NFLPA did reach a new CBA (the 2011 CBA) in July 2011 without any effect to the regular season.<sup>20</sup>

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*Information*, PROFOOTBALLTALK (Mar. 9, 2011, 7:19 AM), <http://profootballtalk.nbcsports.com/2011/03/09/impasse-approaches-regarding-financial-information/>.

<sup>16</sup> Gregg Rosenthal, *Report: Some Owners Willing to Open Books*, PROFOOTBALLTALK (Mar. 10, 2011, 12:12 PM), <http://profootballtalk.nbcsports.com/2011/03/10/report-some-owners-willing-to-open-books/>; Mike Florio, *Broncos Are Willing to Open Their Books*, PROFOOTBALLTALK (Mar. 12, 2011, 11:05 PM), <http://profootballtalk.nbcsports.com/2011/03/12/broncos-are-willing-to-open-their-books/>.

<sup>17</sup> Chris Jenkins, *Packers' Operating Profit Jumps \$2.2 Million*, BOSTON GLOBE (July 26, 2011), [http://articles.boston.com/2011-07-26/sports/29817067\\_1\\_packers-lockout-lambeau-field](http://articles.boston.com/2011-07-26/sports/29817067_1_packers-lockout-lambeau-field).

<sup>18</sup> On November 14, 2011, the National Basketball Players Association provided a "disclaimer of interest" to NBA officials during negotiations over a new collective bargaining agreement. A disclaimer of interest involves the union leadership effectively dissolving itself, whereas decertification involves the union membership (the players) dissolving the union. A disclaimer of interest does not require approval from the National Labor Relations Board like a decertification. See Matt More, *Disclaimed interest by NBPA? Here's what it means to labor squabble*, CBS SPORTS (Nov. 15, 2011, 7:40 PM), <http://www.cbssports.com/nba/story/16130862/disclaimed-interest-by-nbpa-heres-what-it-means-to-labor-squabble>.

<sup>19</sup> *About Us*, NFL PLAYERS ASSOCIATION, <https://www.nflplayers.com/about-us/> (last visited Jan. 24, 2012).

<sup>20</sup> Adam Schefter, *Sources: Deal to End Lockout Reached*, ESPN (July 25, 2011, 12:14 AM), [http://espn.go.com/nfl/story/\\_id/6797238/2011-nfl-lockout-owners-players-come-deal-all-points-sources-say](http://espn.go.com/nfl/story/_id/6797238/2011-nfl-lockout-owners-players-come-deal-all-points-sources-say).

This Article examines the history of labor negotiations in the NFL, provide a thorough examination on the most recent labor dispute and its related legal actions, and conclude with a detailed analysis of the 2011 CBA.

## II. HISTORY OF LABOR NEGOTIATIONS IN THE NFL

The NFL has the most litigious labor history of the Big Four. Much of the most important litigation in the Big Four can be traced to the Supreme Court's 1922 decision in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*,<sup>21</sup> in which the Court held that MLB was not engaged in interstate commerce and therefore exempt from antitrust laws.<sup>22</sup> The other Big Four leagues thereafter assumed they too were immune from antitrust laws, and the clubs in those leagues agreed to a variety of restrictions which limited players' ability to offer their services on a free market. NFL Players first challenged the Clubs' restrictions in *Radovich*.<sup>23</sup>

Bill Radovich, an offensive lineman for the Detroit Lions, asked to be traded to the Los Angeles Raiders following the 1946 season to be closer to his ailing father.<sup>24</sup> The Lions refused and Radovich instead chose to sign with the Los Angeles Dons of the rival All American Football Conference.<sup>25</sup> Radovich then attempted to return to the NFL after two seasons with the Dons, only to find that he had been blacklisted and that no team would sign him.<sup>26</sup>

Radovich challenged the Clubs' agreement not to employ him under Sections 1 and 2 of the Sherman Act.<sup>27</sup> The district court and Ninth Circuit granted the NFL immunity on the basis of *Federal Baseball*.<sup>28</sup> The Supreme Court reversed in 1957, holding that the business of football is clearly engaged in interstate commerce and subject to antitrust laws.<sup>29</sup> *Radovich* importantly established that other

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<sup>21</sup> *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922).

<sup>22</sup> *Id.* at 208–09.

<sup>23</sup> Wong, *supra* note 1, at 462.

<sup>24</sup> *Radovich v. Nat'l Football League*, 352 U.S. 445, 448 (1957).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 446–47.

<sup>28</sup> *Id.* at 447.

<sup>29</sup> *Id.* at 447–48.

sports—but not baseball—were subject to antitrust laws, an important component of labor negotiations.<sup>30</sup>

The NFLPA was formed in 1956.<sup>31</sup> The NFLPA made little progress in advancing Players' issues until the Players went on strike during the 1968 preseason, and the Clubs instituted a lockout at the beginning of the regular season.<sup>32</sup> The first work stoppage in sports history ended with the first ever NFL-NFLPA CBA (the 1968 CBA).<sup>33</sup> The 1968 CBA resulted in an increased pension, but only lasted two years until a 1970 strike following the rise of the American Football League as a competitor for players' services.<sup>34</sup> A CBA reached in 1970 increased salaries and minimum benefits, but expired in 1974 without an extension.<sup>35</sup> The Players engaged in two largely unsuccessful strikes in the 1974 preseason and 1975 season,<sup>36</sup> while the Players' next monumental legal challenge was working its way through the Courts.

In 1972, Colts' tight end John Mackey and 35 other NFL players brought a class action lawsuit against the NFL and its, at that time, 26 Member Clubs.<sup>37</sup> The suit challenged the Rozelle Rule, named after NFL Commissioner Pete Rozelle.<sup>38</sup> The Rozelle Rule permitted Commissioner Rozelle to determine the compensation, in the form of draft picks, players, or cash, to be paid to a Club who signs a player who most recently played for a different Club.<sup>39</sup>

The plaintiffs argued that the Rozelle Rule was an unreasonable restraint on trade under the antitrust laws because it deterred Clubs from signing free agents and suppressed player salaries.<sup>40</sup> The NFL

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<sup>30</sup> See *Flood v. Kuhn*, 407 U.S. 258, 286 (1972) (Douglas, J., dissenting) (calling the baseball exemption "a derelict in the stream of law").

<sup>31</sup> Wong, *supra* note 1, at 531; NFL PLAYERS ASSOCIATION, *supra* note 19.

<sup>32</sup> Wong, *supra* note 1, at 531.

<sup>33</sup> *Id.* at 545.

<sup>34</sup> *Id.* at 531; *id.* at 545.

<sup>35</sup> *Id.* at 545.

<sup>36</sup> *Id.*

<sup>37</sup> See *Mackey v. Nat'l Football League*, 407 F. Supp. 1000, 1002 (D. Minn. 1975) (establishing that the Amended Complaint was filed on October 11, 1972); see also *Mackey v. Nat'l Football League*, 543 F.2d 606, 609 n.2 (8th Cir. 1976) (establishing that the suit was initiated by 36 players).

<sup>38</sup> *Mackey*, 543 F.2d at 609.

<sup>39</sup> *Id.* at n.1.

<sup>40</sup> *Id.* at 609.

argued that the Rozelle Rule was implemented as part of the 1968 and 1970 CBAs and therefore immune from antitrust law by the non-statutory labor exemption.<sup>41</sup>

The 32 Member Clubs of the NFL are generally exempt from antitrust laws while there is a CBA in effect.<sup>42</sup> This policy is known as the non-statutory labor exemption.<sup>43</sup> The Supreme Court has reasoned that “to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions.”<sup>44</sup>

In *Mackey*, the Eighth Circuit ruled in favor of the plaintiffs and found that the Rozelle Rule was not protected by a non-statutory labor exemption.<sup>45</sup> The *Mackey* case established an important three-prong test for determining when the non-statutory labor exemption applies:

- (1) The restraint on trade must primarily affect only the parties to the collective bargaining agreement;
- (2) The issue must concern a mandatory subject of bargaining; and
- (3) The issue must have been achieved through arm’s-length bargaining.<sup>46</sup>

The Eighth Circuit determined that the NFL could not meet the third prong in *Mackey*.<sup>47</sup> The court found that, even though the Rozelle Rule was included in the 1968 and 1970 CBA, it served no benefit to the Players and had not been accomplished through arm’s length bargaining.<sup>48</sup>

A new CBA was reached in 1977 (the 1977 CBA), following the *Mackey* ruling, which replaced the Rozelle Rule with a right of first refusal system and agreed upon compensation for the Club losing the player.<sup>49</sup> However, the Players did not gain the right to unrestricted free agency in the 1977 CBA even though players in MLB, the NBA, and the NHL now enjoyed this right due to a variety of legal

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<sup>41</sup> *Id.* at 612–13.

<sup>42</sup> *Brady v. Nat’l Football League*, 644 F.3d 661, 664 (8th Cir. 2011) (citing *Powell v. Nat’l Football League*, 930 F.2d 1293, 1296 (8th Cir. 1989)).

<sup>43</sup> *Id.*

<sup>44</sup> *Brown v. Pro Football, Inc.*, 518 U.S. 231, 236–37 (1996).

<sup>45</sup> *Mackey*, 543 F.2d at 616.

<sup>46</sup> *Id.* at 614.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Wong, *supra* note 1, at 545.

proceedings.<sup>50</sup> The Players instead agreed to increased minimum salaries and benefits.<sup>51</sup>

The NFL Draft was successfully challenged as an unreasonable restraint of trade the next year in 1978 in *Smith v. Pro Football*.<sup>52</sup> James Smith was drafted by the Redskins in 1968.<sup>53</sup> Smith played only one season in the NFL and argued that if he had not been drafted, he would have been able to secure a far more lucrative contract than the one he signed with the Redskins.<sup>54</sup> The district court and the United States Court of Appeals for the District of Columbia agreed, holding that the NFL Draft's allegedly pro-competitive effects did not outweigh the anticompetitive effects on the market for players' services.<sup>55</sup>

The Players engaged in a 57-day strike during the 1982 season, following the expiration of the 1977 CBA,<sup>56</sup> resulting in cancelled games.<sup>57</sup> A new CBA (the 1982 CBA) was ultimately reached that included the first ever drug-testing program in the Big Four and improved salaries, pension and benefits for Players.<sup>58</sup>

The expiration of the 1982 CBA in 1987 marked a dramatic and litigious turning point in NFL labor relations. The Players went on strike for 23 days during the 1987 season,<sup>59</sup> during which time the NFL used replacement players.<sup>60</sup> The Players decided to end the strike and instead filed a class action lawsuit challenging the right of first

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<sup>50</sup> See Chris Deubert & Glenn M. Wong, *Understanding the Evolution of Signing Bonuses and Guaranteed Money in the National Football League: Preparing for the 2011 Collective Bargaining Negotiations*, 16 UCLA ENT. L. REV. 179, 187 (2009).

<sup>51</sup> Wong, *supra* note 1, at 531; *id.* at 545.

<sup>52</sup> *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1174 (D.C. Cir. 1978).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 1174–75.

<sup>55</sup> See *Smith v. Pro-Football*, 420 F. Supp. 738, 746 (D.D.C. 1976); *Smith*, 593 F.2d 1173. On remand, the district court awarded Smith \$4000 in damages trebled to \$12,000. *Smith v. Pro-Football, Inc.*, 528 F. Supp. 1266, 1275. (D.D.C. 1981). The NFL Draft is now protected by the nonstatutory labor exemption because it is included in the CBA.

<sup>56</sup> Wong, *supra* note 1, at 545.

<sup>57</sup> See *1982 NFL Standings, Team and Offensive Statistics*, PRO-FOOTBALL-REFERENCE, <http://www.pro-football-reference.com/years/1982/> (last visited Feb. 11, 2012) (indicating teams played an abbreviated nine game schedule).

<sup>58</sup> Wong, *supra* note 1, at 545.

<sup>59</sup> *Id.*

<sup>60</sup> See Mike Tanier, *And Now, a Season of Booth Reviews and Touchbacks*, N.Y. TIMES, Sept. 4, 2011, at SP10.

refusal/compensation system that had existed since the 1977 CBA in the *Powell* case.<sup>61</sup>

In *Powell*, the Players argued that the system was in violation of Section 1 of the Sherman Act<sup>62</sup> because it unreasonably restrained player movement.<sup>63</sup> The NFL moved for summary judgment, arguing that the system was protected by the non-statutory labor exemption.<sup>64</sup> The Players responded by contending that the exemption was no longer applicable because the 1982 CBA had expired and impasse had been reached.<sup>65</sup> Judge David Doty of the United States District Court for the District of Minnesota agreed that the labor exemption survived expiration of the 1982 CBA because the terms and conditions of the 1982 CBA were still in effect.<sup>66</sup> However, Judge Doty also ruled that the labor exemption would expire once an impasse was reached.<sup>67</sup> From this point forward, nearly all NFL labor disputes were litigated before Judge Doty, as will be explained below.

The Eighth Circuit, in 1989, reversed Judge Doty's decision regarding when the labor exemption would expire.<sup>68</sup> The Eighth Circuit ruled that the labor exemption would survive impasse and exist so long as there was an ongoing collective bargaining relationship.<sup>69</sup> In dissent, Judge Donald Lay recognized that the Players' only option to seek redress under the antitrust laws was to decertify the NFLPA as its bargaining representative.<sup>70</sup>

The Players voted to decertify the NFLPA shortly after the Eighth Circuit's decision in *Powell*.<sup>71</sup> Several NFL players, led by the aptly named Freeman McNeil, then filed a lawsuit seeking an injunction against the NFL's proposed "Plan B" free agency system and wage scale, alleging they violated the antitrust laws.<sup>72</sup> The NFL had altered the right of first refusal/compensation system prior to the lawsuit in

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<sup>61</sup> *Powell v. Nat'l Football League*, 678 F. Supp. 777 (D. Minn. 1988).

<sup>62</sup> 15 U.S.C. § 1 (2004).

<sup>63</sup> *Powell*, 678 F. Supp. at 779.

<sup>64</sup> *Id.* at 781.

<sup>65</sup> *Id.* at 781–82.

<sup>66</sup> *Id.* at 789.

<sup>67</sup> *Id.* at 788.

<sup>68</sup> *Powell v. Nat'l Football League*, 930 F.2d 1293 (8th Cir. 1989).

<sup>69</sup> *Id.* at 1303.

<sup>70</sup> *Id.* at 1309–10.

<sup>71</sup> Wong, *supra* note 1, at 495.

<sup>72</sup> *McNeil v. Nat'l Football League*, 790 F.Supp. 871, 876 (D. Minn. 1992).

hopes it would be able to prove that the system was necessary for the survival of the league and was in its least restrictive form.<sup>73</sup> Plan B free agency permitted Clubs to designate 36 players who would be subject to the right of first refusal/compensation system after each season.<sup>74</sup> Undesignated players became unrestricted free agents.<sup>75</sup>

Judge Doty had already determined that the NFLPA had successfully relinquished its ability and right to bargain on behalf of NFL Players and that the labor exemption no longer applied as part of the *Powell* proceedings in 1991.<sup>76</sup> The parties in *McNeil* cross-moved for summary judgment and Judge Doty ruled in the Players' favor in 1992, finding that if implemented, Plan B free agency and the wage scale would likely violate the antitrust laws.<sup>77</sup>

In 1992, following the *McNeil* decision, Miami Dolphins' Keith Jackson and nine other players filed a lawsuit seeking injunctive relief preventing the implementation of the Plan B free agency system.<sup>78</sup> Judge Doty granted the plaintiffs' request, finding that the outcome was likely to be the same based on the *McNeil* decision.<sup>79</sup>

Riding the success of the *McNeil* and *Jackson* decisions, the Players filed a class action lawsuit in 1992 against the NFL seeking injunctive relief and antitrust damages for the NFL's Plan B free agency system, the NFL Draft and the NFL Player Contract.<sup>80</sup> The lead plaintiff in the lawsuit was the well-respected and future Hall of Fame defensive end Reggie White. *White v. NFL* presented NFL Clubs with the possibility of over a billion dollars in damages, after trebling, due to the restrictive policies it had imposed since the expiration of the 1982 CBA in 1987.

On January 6, 1993, the parties reached a Stipulation and Settlement Agreement (SSA), approved by Judge Doty in August

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<sup>73</sup> Wong, *supra* note 1, at 495.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Powell v. Nat'l Football League*, 764 F. Supp. 1351, 1358–59 (D. Minn. 1991).

<sup>77</sup> *McNeil*, 790 F. Supp. at 877. A trial on the merits of the plaintiffs' claims was held and the named plaintiffs were granted damages on their claims. The largest award was \$240,000 for San Diego Chargers' lineman Dave Richards. See *McNeil v. Nat'l Football League*, No. 90-476, 1992 WL 315292 (D. Minn. Sept. 10, 1992).

<sup>78</sup> *Jackson v. Nat'l Football League*, 802 F. Supp. 226, 228 (D. Minn. 1992).

<sup>79</sup> *Id.* at 230.

<sup>80</sup> *White v. Nat'l Football League*, 822 F. Supp. 1389, 1395 (D. Minn. 1993).

1993, resolving the *White* case.<sup>81</sup> The SSA included a \$200 million payout to the Players.<sup>82</sup> The NFLPA recertified as the official bargaining representative of the Players as part of the SSA and the SSA became, in sum and substance, the new CBA between the NFL and Players (the 1993 CBA).<sup>83</sup> Judge Doty retained jurisdiction over the SSA and CBA—an arrangement that would prove controversial in future years.<sup>84</sup>

The SSA was a monumental and long overdue resolution to years of litigation and labor strife. Furthermore, the 1993 CBA was a groundbreaking CBA that set the framework for every NFL CBA since. The Players gained the right to unrestricted free agency for the first time in exchange for a hard salary cap.<sup>85</sup> Players could become unrestricted free agents after five years of experience and Clubs' payrolls were limited to a range of 62 percent to 64 percent of Defined Gross Revenue (DGR) depending on the year.<sup>86</sup>

In a case slightly detached from the constant proceedings in the United States District for the District Court of Minnesota, several practice squad players filed an antitrust challenge to the NFL's restrictions on practice squad player salaries in the District Court for the District of Columbia.<sup>87</sup> In May 1989, prior to the NFLPA's renunciation, the Clubs agreed to restrict practice squad salaries to \$1,000 per week.<sup>88</sup> The NFLPA adamantly rejected the NFL's decision to impose the wage restrictions.<sup>89</sup> Consequently, the district court, applying the *Mackey* test, determined that the wage restriction was not reached through arm's length bargaining and therefore was not protected by the labor exemption.<sup>90</sup>

The Supreme Court ultimately reversed the district court's decision in 1996 and determined that the NFL's unilateral imposition of the practice squad salary limitations was protected by the non-statutory

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<sup>81</sup> *White v. Nat'l Football League*, 836 F. Supp. 1458, 1462, 1468 (D. Minn. 1993).

<sup>82</sup> See Will McDonough, *Tentative Deal Reached in NFL Free Agency Among Concessions Made by Owners to NFL Players*, BOSTON GLOBE, Dec. 23, 1992, at 59.

<sup>83</sup> Wong, *supra* note 1, at 496.

<sup>84</sup> *White*, 822 F. Supp. at 1414.

<sup>85</sup> Wong, *supra* note 1, at 496.

<sup>86</sup> *White*, 822 F. Supp. at 1412–13.

<sup>87</sup> See *Brown v. Pro Football, Inc.*, 782 F. Supp. 125, 127 (D.D.C. 1991).

<sup>88</sup> *Id.* at 128.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 130–31.

labor exemption.<sup>91</sup> The Supreme Court established a loose four-pronged test, holding that the non-statutory labor exemption applies where the challenged conduct:

- (1) Took place during and immediately after a collective bargaining negotiation;
- (2) Grew out of, and was directly related to, the lawful operation of the bargaining process;
- (3) Involved a matter that the parties were required to negotiate collectively; and
- (4) Concerned only the parties to the collective bargaining relationship.<sup>92</sup>

The *Brown v. Pro Football* decision importantly allows employers to implement terms and conditions of employment after a bargaining impasse has been reached, so long as the terms were “reasonably comprehended” within the employers’ proposals. The Supreme Court’s analysis of the non-statutory labor exemption has been and will continue to be applied in sports labor disputes.<sup>93</sup>

The 1993 CBA was extended without a work stoppage or litigation in 1998, 2001 and 2006.<sup>94</sup> The most substantive changes occurred in the 2006 CBA. The 2006 CBA replaced the DGR definition with that of Total Revenue (TR).<sup>95</sup> TR included certain increasingly important revenue sources not previously included in DGR. These sources included stadium revenues related to football such as concessions, parking, local advertising and promotion, signage, magazine advertising local sponsorship agreements, stadium clubs, and luxury box income—revenue sources explicitly excluded from DGR previously.<sup>96</sup> Consequently, TR was significantly higher than DGR had been. In exchange, the Players only received approximately 57.5 percent of TR as opposed to a maximum of 65.5 percent of DGR.<sup>97</sup> Nevertheless, the Salary Cap increased significantly.<sup>98</sup>

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<sup>91</sup> *Brown*, 518 U.S. at 236–37.

<sup>92</sup> *Id.* at 249–50.

<sup>93</sup> See *Brady v. Nat’l Football League*, 644 F.3d 661, 665–66 (8th Cir. 2011).

<sup>94</sup> *Wong*, *supra* note 1, at 546.

<sup>95</sup> See 2006 CBA, *supra* note 12, art. I § 3(al).

<sup>96</sup> *Deubert & Wong*, *supra* note 50, at 181.

<sup>97</sup> 2006 CBA, *supra* note 12, Art. XXIV § 4(a).

<sup>98</sup> See *Deubert & Wong*, *supra* note 50, at 181.

The 2006 CBA was widely regarded as a win for the Players. The NFL and its Clubs complained that the new revenue-sharing arrangement significantly reduced their profits, but did not claim they were no longer profitable.<sup>99</sup> The perceived issues with the 2006 CBA led directly into the Clubs' decision to opt out of the 2006 CBA in May 2008 and to begin negotiations for what would ultimately become the 2011 CBA.

### III. THE 2011 CBA NEGOTIATIONS

#### A. *The Opt Out and Stagnant Negotiations (May 20, 2008 – February 17, 2011)*

The collective bargaining process was, at least in part, significantly accelerated when the Clubs unanimously voted to opt out of the 2006 CBA in May of 2008. The 2006 CBA was not scheduled to expire until after the 2013 Super Bowl, but the Clubs' decision to opt out eliminated the final two years of the deal.

Complicating the negotiations was the fact that the Clubs' opt out also moved the Final League Year forward two years, beginning in March 2010 and encompassing the 2010 regular season. The Final League Year—under the 2006 CBA and its predecessors arising out of the 1993 CBA—contained unique provisions that were designed to incentivize the Clubs and the Players to reach a new CBA well before the expiration of the old one. Most notably, in the Final League Year there was no Salary Cap and players needed six accrued seasons to become an unrestricted free agent as opposed to the four required in any other year.<sup>100</sup> These terms are referred to as poison pills and historically were successful at encouraging the two sides to agree to a new CBA prior to the Final League Year. Consequently, to avoid having to go through the oddity of a Final League Year, the Clubs and Players needed to agree to a new CBA before March 2010. With fundamental and vast differences over the revenue arrangement, the Clubs and Players did not even come close to avoiding the Final League Year. The effect of the poison pills is discussed below in Part IV.K.

NFLPA Executive Director and Hall of Fame offensive lineman Gene Upshaw died unexpectedly on August 21, 2008—only three

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<sup>99</sup> Mike Florio, *Owners Continue to Wallow in Their 2006 Blunder*, PROFOOTBALLTALK (May 20, 2011, 2:08 PM), <http://profootballtalk.nbcsports.com/2011/05/20/owners-continue-to-wallow-in-their-2006-blunder/>.

<sup>100</sup> See 2006 CBA, *supra* note 12, art. LVI.

months after the Clubs' decision to opt out of the 2006 CBA.<sup>101</sup> Upshaw's sudden death undoubtedly halted any progress on negotiations for a new CBA. On March 16, 2009, the NFLPA elected Washington, D.C.-based litigation attorney DeMaurice Smith as its new Executive Director.<sup>102</sup> Smith, who had no prior experience in football or labor negotiations, had to quickly meet his constituents, learn the 2006 CBA, and begin negotiating a new CBA.

The 2010 regular season was played without a Salary Cap and little to no progress was reported on a new CBA. Sporadic talks were held in the fall of 2010, but neither side pressed the issue until the week of the 2011 Super Bowl, in Dallas, Texas.<sup>103</sup> NFL Commissioner Roger Goodell, NFL attorneys, and four Club owners (Jerry Richardson (Carolina Panthers), Clark Hunt (Kansas City Chiefs), John Mara (New York Giants), and Dean Spanos (San Diego Chargers)) met with Smith, New Orleans Saints quarterback Drew Brees, Indianapolis Colts quarterback Peyton Manning, retired wide receiver Sean Morey, and other players the day before the Super Bowl.<sup>104</sup>

The meeting was the first since November 2010, and Goodell labeled it as "beneficial."<sup>105</sup> However, it was reported that Richardson, the only owner to have ever played in the NFL, was condescending and disrespectful towards the players, forcing other owners to apologize on his behalf.<sup>106</sup> The positives that came out of the meeting were the scheduling of at least two meetings later that week<sup>107</sup> and a pledge to meet aggressively over the next few weeks.<sup>108</sup>

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<sup>101</sup> Mike Florio, *De Smith Declares "War" Against the Owners*, PROFOOTBALLTALK (Jan. 23, 2011, 12:21 PM), <http://profootballtalk.nbcsports.com/2011/01/23/de-smith-declares-war-against-the-owners/>.

<sup>102</sup> Mike Florio, *De Smith's Contract Expires in March 2012*, PROFOOTBALLTALK (June 13, 2011, 11:41 AM), <http://profootballtalk.nbcsports.com/2011/06/13/de-smiths-contract-expires-in-march-2012/>.

<sup>103</sup> Mark Maske, *League, Union Have Two-Hour Labor Meeting*, WASH. POST (Feb. 5, 2011), <http://views.washingtonpost.com/theleague/nflnewsfeed/2011/02/league-union-have-two-hour-labor-meeting.html>.

<sup>104</sup> *Roger Goodell: Latest Talks 'Beneficial'*, ESPN (Feb. 7, 2011, 12:18 PM), <http://sports.espn.go.com/nfl/news/story?id=6095765>.

<sup>105</sup> Sean Leahy, *Roger Goodell: Labor Meeting with NFLPA Was 'Beneficial'*, USA TODAY (Feb. 6, 2011), <http://content.usatoday.com/communities/thehuddle/post/2011/02/roger-goodell-labor-meeting-with-nflpa-was-beneficial/1>.

<sup>106</sup> Michael Silver, *Time to Bench Richardson from Bargaining Game*, YAHOO! SPORTS (Feb. 14, 2011), <http://sports.yahoo.com/nfl/news?slug=ms-richardsonnfl021411>.

<sup>107</sup> Gregg Rosenthal, *NFL, NFLPA Release Statement After Two Hour Meeting*,

The two sides next met in Washington, D.C. on Wednesday, February 9, but any optimism from the Super Bowl evaporated by the end of that day. A meeting scheduled for the next day was cancelled and there were no plans for any future meetings.<sup>109</sup> The talks broke down when the NFLPA proposed a fifty-fifty split of the revenue (with no off-the-top expense deductions) and the owners walked away from the bargaining table.<sup>110</sup> The fifty-fifty split would have effectively maintained the status quo.<sup>111</sup> The NFL refused to comment on the cancellation of the Thursday negotiation session.<sup>112</sup>

The main issue preventing meaningful discussion was the split of revenues.<sup>113</sup> The Players received 57.5 percent of TR pursuant to the 2006 CBA.<sup>114</sup> However, before the Players' share of TR was determined, the NFL deducted five percent for expenses and 1.8 percent for the NFL's G-3 Stadium Program.<sup>115</sup> These expense deductions were estimated to be approximately \$1 billion per year.<sup>116</sup> As a result, the Players actually received much closer to 50 percent of all revenues.<sup>117</sup> The Clubs were seeking additional credits which would have equaled close to \$2 billion and lowered the Players' actual share of revenues to just over 40 percent - far lower than the amount received by players in the NBA or the NHL (the other leagues with salary caps).<sup>118</sup>

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PROFOOTBALLTALK (Feb. 5, 2011, 5:33 PM), <http://profootballtalk.nbcsports.com/2011/02/05/nfl-nflpa-release-statement-after-two-hour-meeting/>.

<sup>108</sup> Sean Leahy, *NFL, NFLPA Meet, Pledge More Sessions to Find Labor Peace*, USA TODAY (Feb. 6, 2011), <http://content.usatoday.com/communities/thehuddle/post/2011/02/nfl-nflpa-meet-pledge-more-meetings-to-find-labor-peace/1>.

<sup>109</sup> *NFL Labor Talks Occur in Washington*, ESPN (Feb. 10, 2011), <http://sports.espn.go.com/nfl/news/story?id=6105114>.

<sup>110</sup> Florio, *supra* note 9.

<sup>111</sup> *Id.*

<sup>112</sup> Mike Florio, *League Not Talking About Reason for Cancellation of Thursday's CBA Session*, PROFOOTBALLTALK (Feb. 10, 2011, 9:18 AM), <http://profootballtalk.nbcsports.com/2011/02/10/league-not-talking-about-reason-for-cancellation-of-thursdays-cba-session/>.

<sup>113</sup> Chris Mortensen, *Sources: NFL-Union Talks Canceled*, ESPN (Feb. 11, 2011, 12:34 PM), <http://sports.espn.go.com/nfl/news/story?id=6107737>.

<sup>114</sup> Deubert & Wong, note 53, at 182.

<sup>115</sup> 2006 CBA, *supra* note 12, art. XXIV, § 1(a)(xiv).

<sup>116</sup> Mike Florio, *Under Proposed Deal, Players Will Get 48 Percent of the Total Revenue*, PROFOOTBALLTALK (June 22, 2011, 8:06 AM), <http://profootballtalk.nbcsports.com/2011/06/22/under-proposed-deal-players-will-get-48-percent-of-the-total-revenue/>.

<sup>117</sup> *Id.*

<sup>118</sup> Mortensen, *supra* note 113; see NAT'L BASKETBALL PLAYERS ASS'N, 2005 COLLECTIVE

B. *Federal Mediation (February 18, 2011 – March 11, 2011)*

No progress was reported until the Clubs and Players agreed, on February 17, 2011, to conduct the negotiations under the auspices of George H. Cohen, the director of the Federal Mediation and Conciliation Service (FMCS).<sup>119</sup> The use of mediation was at the invitation of Cohen.<sup>120</sup> Mediation is a voluntary and non-binding process, but the parties' agreement to mediate was seen as progress.<sup>121</sup> Cohen had no power to issue a ruling, but could offer suggestions and speak openly about the merits of each side's arguments.<sup>122</sup>

Mediation sessions were held in three blocks, for a total of 16 days, at FMCS offices in Washington, D.C. The NFL and NFLPA met for seven straight days from Friday, February 18, 2011 to Thursday, February 24, 2011. The NFL was exclusively represented by Goodell, Jeffrey Pash, the NFL's Executive Vice President of Labor, and outside counsel Bob Batterman<sup>123</sup> during this first week, except for a Tuesday visit from Washington Redskins General Manager Bruce Allen. The NFLPA was represented by Smith and General Counsel Richard Berthelsen during this first week. Twelve current or retired players participated during the week and NFLPA outside counsel Jeffrey Kessler<sup>124</sup> was also present for four of the sessions.

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BARGAINING AGREEMENT, art. VII, § 2(e), at 125 (July 2005), *available at* <http://www.nbpa.org/cba/2005> (guaranteeing players 57% of revenues); NAT'L HOCKEY LEAGUE, 2005-2011 COLLECTIVE BARGAINING AGREEMENT, 193, § 50.4 (July 22, 2005), *available at* <http://www.nhl.com/cba/2005-CBA.pdf> (establishing players' share of revenue to be between 54 and 57%).

<sup>119</sup> Mark Maske, *NFL Owners, Players Agree to Mediation*, WASH. POST (Feb. 17, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/17/AR2011021706882>.html. FMCS is a government agency created under the Labor-Management Relations Act of 1947 (Taft-Hartley Act) whose mission is to promote cooperative labor resolutions. The FMCS was involved in the negotiations of the NHL and its players union, the NHLPA, in 2004-2005 and a dispute between the US Soccer Federation and its players in 2005. There is no charge for utilizing FMCS' services. For more information see [www.fmcs.gov](http://www.fmcs.gov).

<sup>120</sup> Maske, *supra* note 119.

<sup>121</sup> Mike Florio, *League, Union Agree to Federal Mediation*, PROFOOTBALLTALK (Feb. 17, 2011), <http://profootballtalk.nbcsports.com/2011/02/17/league-union-agree-to-federal-mediation/>.

<sup>122</sup> *Id.*

<sup>123</sup> Batterman is a Partner at Proskauer Rose LLP. Batterman has served as outside labor counsel to the NFL, NHL and Major League Soccer. *See L. Robert Batterman*, PROSKAUER ROSE, <http://www.proskauer.com/professionals/bob-batterman/> (last visited Jan. 26, 2012).

<sup>124</sup> Kessler is a Partner at Dewey & LeBoeuf LLP. Kessler has served as outside counsel to athletes in nearly every major sport, including the NFLPA, NBPA, MLBPA and NHLPA. *See Kessler, Jeffrey L.*, DEWEY & LEBOEUF, <http://www.deweyleboeuf.com/en/People/K/>

At the conclusion of the first round of mediation sessions on Thursday, February 24, the sides agreed to another round of mediation beginning on Tuesday, March 1.<sup>125</sup> The sides did not publicly disclose any details of the mediation sessions pursuant to Cohen's directive.<sup>126</sup> Cohen released a lukewarm statement on February 24 stating that "[t]he tenor of the across-the-table discussions reflected a noteworthy level of mutual respect even in the face of strongly held competing positions."<sup>127</sup> Cohen further tempered any optimism by adding that "some progress was made, but very strong differences remain on the all-important core issues."<sup>128</sup> The parties then left D.C. to attend the NFL Scouting Combine in Indianapolis, Indiana.<sup>129</sup>

Leaders from the NFL and NFLPA updated their respective sides while in Indianapolis. Goodell, Pash, and Batterman briefed the NFL's Labor Committee, which included: Richardson, Hunt, Mara, Spanos, Pat Bowlen (Denver Broncos), Art Rooney II (Pittsburgh Steelers), Mark Murphy (Green Bay Packers), Jerry Jones (Dallas Cowboys), Mike Brown (Cincinnati Bengals) and Robert Kraft (New England Patriots).<sup>130</sup> Few details emerged from the NFL meeting, but some rumors did circulate from Smith's meeting with NFLPA-certified player-agents.<sup>131</sup> Albert Breer of NFL.com reported that the NFLPA intended to decertify before the expiration of the 2006 CBA.<sup>132</sup> Adam Schefter of ESPN then tweeted the following text from an unnamed

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JeffreyLKessler (last visited Feb. 3, 2012).

<sup>125</sup> Maury Brown, *With Week to Go Till NFL CBA Expires, Federal Mediator Says "Very Strong Differences" Remain*, BIZOFFFOOTBALL (Feb. 24, 2011, 7:48 PM), [http://www.bizofffootball.com/index.php?option=com\\_content&view=article&id=760:with-week-to-go-till-nfl-cba-expires-federal-mediator-says-qvery-strong-differencesq-remain&catid=34:nfl-news&Itemid=53](http://www.bizofffootball.com/index.php?option=com_content&view=article&id=760:with-week-to-go-till-nfl-cba-expires-federal-mediator-says-qvery-strong-differencesq-remain&catid=34:nfl-news&Itemid=53).

<sup>126</sup> Mike Florio, *Mediator's Statement on NFL-NFLPA Talks*, PROFOOTBALLTALK (Feb. 24, 2011, 1:02 PM), <http://profootballtalk.nbcsports.com/2011/02/24/mediators-statement-on-nfl-nflpa-talks/>.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Mike Florio, *Mediation Ends for Now, Resumes May 1*, PROFOOTBALLTALK (Feb. 24, 2011, 1:12 PM), <http://profootballtalk.nbcsports.com/2011/02/24/mediation-ends-for-now-resumes-march-1/>.

<sup>130</sup> Albert Breer, *Owners Receive Update on CBA Mediation from NFL Officials*, NFL.COM (Feb. 26, 2011, 10:43 PM), <http://www.nfl.com/news/story/09000d5d81e7e87e/article/owners-receive-update-on-cba-mediation-from-nfl-officials>.

<sup>131</sup> *Id.*

<sup>132</sup> Albert Breer, *Lockout Block? Union Seeks to Decertify Before CBA Expires*, NFL.COM (Feb. 26, 2011, 6:28 PM), <http://www.nfl.com/news/story/09000d5d81e80385/article/lockout-block-union-seeks-to-decertify-before-cba-expires>.

agent: “Not close on one single issue . . . This WILL go into September.”<sup>133</sup> There were conflicting reports about Smith’s actual comments, but nevertheless, the reports highlighted a key difference between the NFL and the NFLPA during the negotiations: the NFL only had to provide information to its 32 owners and their lead executives who could disseminate that information within the Club as necessary; the NFLPA was required to provide ongoing information to nearly 2,000 players and approximately 773 agents.<sup>134</sup> Consequently, the chances of anything Smith said not being leaked to the media were close to zero.

Talks resumed in Washington, D.C. on Tuesday, March 1, with the 2006 CBA set to expire at midnight on March 3. Mara became the first owner to be involved in the talks.<sup>135</sup> The most significant event on Tuesday was a decision handed down by Judge Doty. Judge Doty reversed an earlier ruling by Special Master Stephen Burbank and found that the NFL had violated the 2006 CBA by agreeing to deals with television networks that required the networks to continue making payments to the NFL in the event of a work stoppage.<sup>136</sup> The procedural history and reasoning for Judge Doty’s ruling will be discussed in greater detail in Part III.A. Television Case. Judge Doty’s ruling appeared to provide leverage to the NFLPA by eliminating substantial revenues the Clubs would have received during a lockout.

Wednesday, March 2, marked the most heavily attended mediation session yet. At least nine current or retired players and the entire ten-owner NFL Labor Committee attended.<sup>137</sup> Notably, NFLPA President Kevin Mawae joined the sessions for the first time. There was speculation that Mawae had been absent from the previous meetings due to

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<sup>133</sup> Mike Florio, *More Evidence Emerges That De Smith Said Nothing About CBA Talks*, PROFOOTBALLTALK (Feb. 25, 2011, 4:27 PM), <http://profootballtalk.nbcsports.com/2011/02/25/more-evidence-emerges-that-de-smith-said-nothing-about-cba-talks/>.

<sup>134</sup> Chris Deubert, *What’s a Clean Agent to Do? The Case for a Cause of Action Against a Players Association*, 18 VILL. SPORTS & ENT. L. J. 1, 4-5 (2011).

<sup>135</sup> Eric Edholm, *Owners Who Wield Most Clout in Labor Talks*, PROFOOTBALLWEEKLY (Mar. 3, 2011, 3:45 PM), <http://www.profootballweekly.com/2011/03/03/owners-who-wield-most-clout-in-labor-talks>.

<sup>136</sup> Mike Florio, *Judge Doty Sides with Players in “Lockout Insurance” Case*, PROFOOTBALLTALK (Mar. 1, 2011, 6:42 PM), <http://profootballtalk.nbcsports.com/2011/03/01/judge-doty-sides-with-players-in-lockout-insurance-cas/>.

<sup>137</sup> Albert Breer, *Pash: League Could Extend Deadline if Gap in Labor Talks Closes*, NFL.COM (Mar. 2, 2011, 9:57 AM), <http://www.nfl.com/news/story/09000d5d81e90f98/article/pash-league-could-extend-deadline-if-gap-in-labor-talks-closes>.

the NFL's repeated restating of Mawae's January 2011 comments that the Players "got such a great deal" in the 2006 CBA.<sup>138</sup>

Thursday, March 3, the day on which the 2006 CBA was set to expire, again required all-hands-on-deck for the NFL and NFLPA. The NFLPA had to weigh throughout that day's session whether to continue negotiating or to decertify as a labor union and file an antitrust lawsuit.<sup>139</sup> The parties ultimately agreed to extend the CBA and continue negotiating for another 24 hours.<sup>140</sup> The next day, the parties agreed to a seven-day extension through Friday, March 11, with plans to reconvene on Monday for another five days of mediation.<sup>141</sup>

The weekend offered a time for the sides to reflect on their positions and for those positions to be divulged to the media. The New York Times reported that the sides had moved closer on certain non-economic issues: a rookie wage scale; post-career benefits; the 18-game season and cutbacks in physical contact during off-season workouts.<sup>142</sup> However, the sides still remained far apart on the issue of dividing the \$9 billion in annual revenue.<sup>143</sup>

The Players continued to express dissatisfaction with the financial information being provided by the NFL.<sup>144</sup> Smith called the financial information provided "insufficient" and "meaningless."<sup>145</sup> The NFLPA sent a letter to the NFL in May of 2009 requesting "each team's total operating income, total operating expenses, profit from operations, other income/expenses, income before provision for income taxes, provision for income taxes, net income, cash and

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<sup>138</sup> Mike Florio, *Five Days Later, Mediation Resumes*, PROFOOTBALLTALK (Mar. 1, 2011, 1:44 PM), <http://profootballtalk.nbcsports.com/2011/03/01/five-days-later-mediation-resumes/>.

<sup>139</sup> Albert Breer, *Labor Talks Continue; Union Was Near Decertifying Thursday*, NFL.COM (Mar. 7, 2011, 1:26 PM), <http://www.nfl.com/news/story/09000d5d81ea4341/article/labor-talks-continue-union-was-near-decertifying-thursday>.

<sup>140</sup> *Id.*

<sup>141</sup> Jim Trotter, *NFL, NFLPA Agree to Seven-Day Extension in Labor Negotiations*, SPORTS ILLUSTRATED (Mar. 4, 2011), [http://sportsillustrated.cnn.com/2011/writers/jim\\_trotter/03/04/nfl.labor/index.html](http://sportsillustrated.cnn.com/2011/writers/jim_trotter/03/04/nfl.labor/index.html).

<sup>142</sup> Judy Battista, *Another NFL Extension Signals Some Optimism*, N.Y. TIMES (Mar. 4, 2011), <http://www.nytimes.com/2011/03/05/sports/football/05labor.html>.

<sup>143</sup> *Id.*

<sup>144</sup> Albert Breer, *League, Union Continue Mediation with 9-Hour-Plus Session*, NFL.COM (Mar. 8, 2011, 9:40 AM), <http://www.nfl.com/news/story/09000d5d81ea8448/article/league-union-continue-mediation-with-9hourplus-session>.

<sup>145</sup> Jon Saraceno & Gary Mihoces, *Financial Info Lacking, Union Says*, USA TODAY, Apr. 9, 2011, at 7C, available at [http://www.usatoday.com/printedition/sports/20110310/nflnotes10\\_st.art.htm](http://www.usatoday.com/printedition/sports/20110310/nflnotes10_st.art.htm).

investment assets, dividends and other distributions to owners and their families, and financial statement notes.”<sup>146</sup> However, the NFL only offered the NFLPA audited profitability data from all 32 Clubs for 2005–2009.<sup>147</sup> The offered data would have listed the number of Clubs that posted better or worse results relative to the previous year.<sup>148</sup> Owners remained unwilling to release any further financial data, claiming that the information they had offered “was more than teams receive and more than the union had ever received in negotiations.”<sup>149</sup>

Frustrations were at fever pitch as the stipulated extension rapidly approached. As the meetings adjourned with little to no progress reported, Pash told reporters, “[i]f both sides have an equal commitment to getting this deal done, it will get done. I don’t know if both sides have an equal commitment.”<sup>150</sup> Pash’s comments reportedly caused Smith to turn his car around and return to FMCS headquarters to respond to Pash’s comments: “[w]e’re committed to this process. We have been committed to this process. But for anyone to stand and turn to the American people and say that they question that . . . uh, look. I understand that there’s probably some things that Jeff Pash has to say. But this is the truth.”<sup>151</sup> The media battle continued throughout the evening on Twitter between each side’s media spokesman, Greg Aiello (NFL) and George Atallah (NFLPA).<sup>152</sup>

With a negotiation deadline set for 5 p.m. on Friday, Smith emerged from the offices at 4:43 p.m. and stated that “[a]t this time, significant differences continue to remain” and reiterated that “the

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<sup>146</sup> Albert Breer, *Union Wants More Financial Information Than NFL has Offered*, NFL.COM (Mar. 9, 2011, 11:38 AM), <http://www.nfl.com/news/story/09000d5d81ead445/article/union-wants-more-financial-information-than-nfl-has-offered>.

<sup>147</sup> Judy Battista, *Union Rejects NFL’s Offer to Share More Financial Data*, N.Y. TIMES (Mar. 8, 2011), [http://www.nytimes.com/2011/03/09/sports/football/09nfl.html?\\_r=1&ref=judybattista](http://www.nytimes.com/2011/03/09/sports/football/09nfl.html?_r=1&ref=judybattista).

<sup>148</sup> Mark Maske, *NFL Talks Stalling on Economic Issues*, WASH. POST (Mar. 9, 2011), <http://views.washingtonpost.com/theleague/nflnewsfeed/2011/03/nfl-talks-stalling-on-economic-issues.html>.

<sup>149</sup> Judy Battista, *Battle Lines Harden Over NFL Financial Data*, N.Y. TIMES (Mar. 9, 2011), <http://www.nytimes.com/2011/03/10/sports/football/10nfl.html?ref=judybattista>.

<sup>150</sup> Doug Farrar, *Twitter Fight! Both Sides Get Contentious as Labor War Heats Up*, YAHOO! SPORTS (Mar. 10, 2011, 8:54 PM), [http://sports.yahoo.com/nfl/blog/shutdown\\_corner/post/Twitter-fight-Both-sides-get-contentious-as-lab?urn=nfl-wp110](http://sports.yahoo.com/nfl/blog/shutdown_corner/post/Twitter-fight-Both-sides-get-contentious-as-lab?urn=nfl-wp110).

<sup>151</sup> Judy Battista, *NFL Talks Spill Into Frustration as Hope for Deal Fade*, N.Y. TIMES (Mar. 10, 2011), <http://www.nytimes.com/2011/03/11/sports/football/11nfl.html?ref=judybattista>.

<sup>152</sup> Farrar, *supra* note 150.

NFLPA want[ed] [ten] years of the owners' audited financial records by the deadline before they would agree to a third extension to negotiations."<sup>153</sup> The NFL did not respond to the NFLPA's request and the NFLPA announced at 5:00 p.m. that it had decertified as the collective bargaining representative of the Players, clearing the way for the *Brady* action.<sup>154</sup>

The NFL responded by releasing public statements through the media, saying the union walked away from a "good deal"<sup>155</sup> and listed the concessions that the NFL was willing to make.<sup>156</sup> The NFL then imposed a lockout (the Lockout)—the first work stoppage for the League since 1987.<sup>157</sup>

#### IV. THE LOCKOUT AND RELEVANT LEGAL PROCEEDINGS

The Lockout put an end to the collective bargaining process. In its place, several lawsuits were initiated or continued. Collective bargaining could not resume—and a 2011 CBA could not be reached—without the settlement or cessation of the various actions.

##### A. *Television Case*

In June 2011, the NFLPA filed a complaint with Special Master Stephen Burbank concerning the structure of the NFL's contracts with television networks.<sup>158</sup> The NFLPA alleged that the NFL violated the

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<sup>153</sup> Nate Davis, *Union: 'Significant Differences Continue to Remain'*, USA TODAY (Mar. 12, 2011), <http://content.usatoday.com/communities/thehuddle/post/2011/03/union-significant-difference-continue-to-remain/1>.

<sup>154</sup> Judy Battista, *As NFL Talks Fail, '11 Season Seems in Doubt*, N.Y. TIMES (Mar. 11, 2011), <http://www.nytimes.com/2011/03/12/sports/football/12nfl.html?ref=judybattista&pagewanted=all>.

<sup>155</sup> Nate Davis, *Official Statement from NFL Following Union Decertification*, USA TODAY (Mar. 11, 2011), <http://content.usatoday.com/communities/thehuddle/post/2011/03/official-statement-from-nfl-following-union-decertification/1>.

<sup>156</sup> Nate Davis, *NFL Releases Concessions It Was Willing to Make to Union*, USA TODAY (Mar. 11, 2011), <http://content.usatoday.com/communities/thehuddle/post/2011/03/nfl-releases-concessions-it-was-willing-to-make-to-union/1>. Among the concessions the NFL offered: "accepting the Union's proposed cap number for 2014 (\$161 million per club);" "a guarantee of up to \$1 million of a player's salary for the contract year after his injury;" "immediate implementation of changes to promote player health and safety;" "[o]wner funding of \$82 million in 2011-12 to support additional benefits to former players;" "[t]hird party arbitration for appeals in the drug and steroid programs;" and "[a] per-club cash minimum spend of 90 percent of the salary cap over three seasons." *Id.*

<sup>157</sup> Judy Battista, *The Shutdown Pushes the Fight for Field Position into the Courtroom*, N.Y. TIMES (Mar. 12, 2011), <http://www.nytimes.com/2011/03/13/sports/football/13nfl.html>.

<sup>158</sup> Dan Graziano, *Tuesday Looms as Key Date in NFL Labor Talks*, AOLNEWS.COM (Jan.

2006 CBA and breached its fiduciary duty to the Players by requiring the television networks to pay approximately \$4.5 billion to the NFL in 2011 even if no games were played as a result of a work stoppage.<sup>159</sup> The NFLPA argued that by requiring the networks to pay the Clubs' so-called "lockout insurance," the amounts the networks would have paid in years in which there actually was football being played were reduced.<sup>160</sup> And because the NFL and NFLPA share revenues pursuant to the 2006 CBA, the Players' share of revenue was also decreased because the Players would not receive any share of the "lockout insurance" money. Executive Director Smith argued that these payments provided the NFL a powerful incentive to lockout the Players.<sup>161</sup> The NFL countered by explaining that the money would have to be repaid with interest.<sup>162</sup>

The NFL began negotiating the lockout insurance shortly after opting out of the 2006 CBA in May 2008. The NFL already had provisions requiring continued payment in the event of a work stoppage with CBS, FOX, NBC, and ESPN.<sup>163</sup> These provisions were amended in various ways to remove a requirement that the NFL repay rights fees for lost games (or subscribers in the case of ESPN) and allowed the NFL instead to repay the fees with interest over the term of the contracts.<sup>164</sup> In exchange, the networks gained a variety of digital and internet rights.<sup>165</sup>

The NFL also renegotiated its contract with DirecTV to add a work-stoppage provision. The provision provided that DirecTV would pay its 2011 licensing fee and, in the event of a work stoppage, 58 percent of the 2011 fee would be applied towards the 2012 season.<sup>166</sup> The NFL similarly negotiated a non-refundable rights fee with Verizon

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2, 2011, 9:48 AM), <http://www.aolnews.com/2011/01/02/tuesday-looms-as-key-date-in-nfl-labor-talks/>.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> Sean Leahy, *NFLPA Asks Arbitrator to Put NFL's TV Money in Escrow in Event of 2011 Lockout*, USA TODAY (June 9, 2011), <http://content.usatoday.com/communities/thehuddle/post/2010/06/nflpa-asks-arbitrator-to-put-nfls-tv-money-in-escrow-in-event-of-2011-lockout/1>.

<sup>162</sup> Tom Pedulla, *The NFL's Labor Dispute: Answers to Key Questions*, USA TODAY (Feb. 14, 2011), [http://www.usatoday.com/sports/football/nfl/2011-02-14-nfl-nflpa-q-and-a\\_N.htm](http://www.usatoday.com/sports/football/nfl/2011-02-14-nfl-nflpa-q-and-a_N.htm).

<sup>163</sup> *White v. Nat'l Football League*, 766 F. Supp. 2d 941, 946–47 (D. Minn. 2011).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 945.

Wireless.<sup>167</sup> In sum, the NFL negotiated access to over \$4 billion in rights fees in 2011 in the event of a lockout—\$421 million of which it had no obligation to repay.<sup>168</sup>

The Players argued that the NFL violated Article X, § 1(a)(i) of the SSA which required that the “NFL and each NFL Team shall in good faith act and use their best efforts, consistent with sound business judgment, so as to maximize Total Revenues for each playing season . . . .”<sup>169</sup> The SSA, according to the Players, did not permit the NFL to “structure TV Contracts—the largest source of shared Total Revenues, by far—to intentionally inflict economic harm on the Players.”<sup>170</sup> The Players were required to prove “by a clear preponderance of the evidence that the challenged conduct was in violation of . . . Article XVI.”<sup>171</sup>

In an Opinion dated February 1, 2011, Special Master Burbank denied the NFLPA’s grievance.<sup>172</sup> Special Master Burbank ruled that the NFL’s decision to “maximize revenues for 2011 and beyond . . . reflected good faith, best efforts and sound business judgment.”<sup>173</sup> The vast majority of Special Master Burbank’s factual findings on which his decision was based are available only in redacted form, but Special Master Burbank cited the depressed economy and the increased digital rights negotiated in the new deals as legitimate reasons for the NFL’s negotiated receipt of the television fees in 2011.<sup>174</sup>

Special Master Burbank did, however, award the Players \$6.9 million in damages arising out of the NFL’s grant to NBC of an additional 2010 regular season game in exchange for digital rights.<sup>175</sup>

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<sup>167</sup> *Id.* at 948.

<sup>168</sup> *Id.* at 949.

<sup>169</sup> *Id.*

<sup>170</sup> Class Counsel’s and the NFLPA’s Memorandum of Law in Support of Their Objection in Part to the Recommendation of Special Master Burbank Regarding Broadcast Revenues at 2, *White v. Nat’l Football League*, 766 F. Supp.2d 941 (D. Minn. 2011) (No. 4-92-906 (DSD)).

<sup>171</sup> 2006 CBA, *supra* note 12, art. XXV § 3.

<sup>172</sup> See also Gregg Rosenthal, *Special Master Won’t Bar NFL From Taking TV Money*, PROFOOTBALLTALK (Feb. 1, 2011, 5:27 PM), <http://profootballtalk.nbcsports.com/2011/02/01/special-master-wont-bar-nfl-from-taking-tv-money/>; Special Master Report re: Broadcast Revenues Proceeding at 44, *White v. Nat’l Football League*, 766 F. Supp.2d 941 (D. Minn. 2011) (No. 4-92-906(DSD)) [hereinafter Special Master Report 2011].

<sup>173</sup> Special Master Report 2011, *supra* note 172.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 48.

Special Master Burbank awarded the Players their 57.5 percent share of the estimated \$12 million value of the game.<sup>176</sup>

On February 11, 2011, the NFLPA filed an Objection to Special Master Burbank's ruling with Judge Doty pursuant to the 2006 CBA and Fed. R. Civ. P. 53.<sup>177</sup> The NFLPA moved for an expedited hearing and also to unseal certain documents.<sup>178</sup> On February 24, 2011, Judge Doty ordered that Special Master Burbank's 48-page decision, and the NFLPA's 63-page brief in support of their Objection, be unsealed and filed as redacted.<sup>179</sup> The unsealing of the documents provided the public an opportunity to view the Players' claims and Special Master Burbank's decision.

Judge Doty overruled the majority of Special Master Burbank's Opinion in a decision dated March 1, 2011.<sup>180</sup> Judge Doty found that Special Master Burbank erred by considering the phrase "consistent with sound business judgment" in the context of the business-judgment rule applicable to the fiduciary duties of corporate directors.<sup>181</sup> Instead, Special Master Burbank "should have considered the intent of the parties and the context from which [the sound business judgment] language arose."<sup>182</sup> Judge Doty further stated that the SSA and 2006 CBA required "that the parties act in good faith and use best efforts to maximize total revenues for the joint benefit of the Players *and* the NFL."<sup>183</sup>

The NFL violated the SSA and 2006 CBA, according to Judge Doty, by "pursu[ing] its own interests at the expense of maximizing

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<sup>176</sup> *Id.* at 47–48.

<sup>177</sup> 2006 CBA, *supra* note 12, art. XXVI, § 2; Class Counsel's and the NFLPA's Objection in Part to the Recommendation of Special Master Burbank Regarding Broadcast Revenues at 1, *White v. Nat'l Football League*, 766 F. Supp. 2d 941 (D. Minn. 2011) (No. 4-92-906 (DSD)).

<sup>178</sup> Mike Florio, *Union Pushes for Expedited Review of Lockout Insurance Case*, PROFOOTBALLTALK (Feb. 9, 2011, 9:34 AM), <http://profootballtalk.nbcsports.com/2011/02/09/union-pushes-for-expedited-review-of-lockout-insurance-case/>; Mike Florio, *Unsealed Documents Show League Added "Lockout Insurance: to 2009 TV Contract Extensions*, PROFOOTBALLTALK (Feb. 24, 2011, 10:08 PM), <http://profootballtalk.nbcsports.com/2011/02/24/unsealed-documents-show-league-added-lockout-insurance-to-2009-tv-contract-extensions/>.

<sup>179</sup> Order, *White v. Nat'l Football League*, 766 F. Supp. 2d 941 (D. Minn. 2011) (No. 4-92-906(DSD)).

<sup>180</sup> The Television Case, *supra* Part III.A. *See also* Florio, note 136.

<sup>181</sup> *White*, 766 F. Supp. 2d at 949 (2011).

<sup>182</sup> *Id.* at 950.

<sup>183</sup> *Id.*

total revenues . . . .”<sup>184</sup> Judge Doty determined “that the NFL undertook contract renegotiations to advance its own interests and harm the interests of the players.”<sup>185</sup> There was evidence that “at least one broadcaster would have considered paying more in the 2009-2010 seasons to have the work-stoppage provision go away.”<sup>186</sup> The NFL was required by the SSA and 2006 CBA to “use best efforts to maximize total revenues for the 2009-2010 seasons when [entering] into widespread and lucrative contract renegotiations,”<sup>187</sup> but failed to do so.

Judge Doty ordered a hearing on May 12, 2011, to consider damages in the case.<sup>188</sup> The specter of a damages award in the hundreds of millions of dollars supplied the NFLPA with important leverage during the CBA negotiations.<sup>189</sup> Although the NFLPA’s requested damages amount is redacted in the publicly available version of its brief,<sup>190</sup> by replicating the redacted compensatory damages chart used in the NFLPA’s brief and combining it with the unredacted transcript from the May 12, 2011 hearing, it is possible to determine the damages requested by the NFLPA:

<b>Item</b>	<b>Amount (in millions)</b>
Credit Subsidy and Non-Refundable Grants Value <sup>191</sup>	\$1,422
FOX & CBS Digital and Advertising Rights Value <sup>192</sup>	\$64
NBC Extra Game Value <sup>193</sup>	\$39

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 951.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 953.

<sup>188</sup> Notice of Hearing, *White v. Nat’l Football League*, 766 F. Supp. 2d 941 (D. Minn. 2011) (No. 4-92-906(DSD)).

<sup>189</sup> Florio, *supra* note 136.

<sup>190</sup> Class Counsel’s and the NFLPA’s Memorandum of Law in Support of Money Damages and Equitable Relief Pursuant to the Court’s Order of March 1, 2011 at 11, *White v. Nat’l Football League*, 766 F. Supp. 2d 941 (D. Minn. 2011) (No. 4-92-906(DSD)).

<sup>191</sup> Transcript of Oral Argument at 33:3-8; 34:4-20, *White v. Nat’l Football League*, 766 F. Supp. 2d 941 (D. Minn. 2011) (No. 4-92-906 (DSD)). In 2009, CBS, FOX, NBC, ESPN and DirecTV committed \$3.6 billion in broadcasting revenue. An expert for the Players calculated that it cost the broadcasters \$1.022 billion to make that commitment. The \$1.422 billion figure is reached by adding in DirecTV’s \$400 million nonrefundable payment that would have been made during a lockout.

<sup>192</sup> *Id.* at 25:1-5.

Total Value	\$1,525
Players' Revenue Share	57.5%
Total Compensatory Damages	\$876.9
Already-Awarded Compensatory Damages (NBC)	(\$6.9)
Additional Compensatory Damages beyond the \$6.9 million already awarded	\$870

The NFLPA also requested punitive damages at least three times the total compensatory damages award, an injunction against the NFL from collecting television revenues during any lockout, and an order that any non-refundable amounts received by the NFL from DirecTV be placed in escrow until an agreement has been reached on how to share the funds.<sup>194</sup>

Judge Doty never had to make a final ruling in the Television Case. All claims regarding the SSA, including claims asserted in the Television Case, were dismissed with prejudice by stipulation of the parties pursuant to the 2011 CBA.<sup>195</sup>

#### B. *The Brady Case*

As discussed in the opening of this Article, the NFLPA decertified itself as the bargaining representative of NFL players on Friday night, March 11, 2011,<sup>196</sup> after years of negotiation and 16 days of federal mediation.<sup>197</sup> The *Brady* class-action lawsuit was filed later that evening and sought to enjoin the Clubs from violating federal antitrust and state contract and tort laws, such as the Lockout.<sup>198</sup>

*Brady* was filed in the United States District Court for the District of Minnesota. The clear purpose for this forum selection was that court's long history of resolving NFL and NFL player disputes, most notably Judge Doty's 18-year reign over the SSA and CBA. The NFL was so bothered by Judge Doty's oversight that it sought to have Judge

<sup>193</sup> *Id.*

<sup>194</sup> Class Counsel's and the NFLPA's Memorandum of Law in Support of Money Damages and Equitable Relief Pursuant to the Court's Order of March 1, 2011, *supra* note 190, at 21.

<sup>195</sup> Stipulation of Dismissal, *White v. Nat'l Football League*, 766 F. Supp. 2d 941 (D. Minn. 2011) (No. 4-92-906 (DSD)).

<sup>196</sup> Rosenthal, *supra* note 2.

<sup>197</sup> Battista, *supra* note 154.

<sup>198</sup> Class Action Complaint at 2, *Brady v. Nat'l Football League*, 779 F. Supp. 2d 992 (D. Minn. 2011) (No. 11-cv-639).

Doty recuse himself from the role in 2009—a motion rejected by Judge Doty and the Eighth Circuit Court of Appeals.<sup>199</sup> However, Judge Doty was not assigned the case pursuant to the court’s random selection system. The first two judges assigned to the case—Richard Kyle and Patrick Schiltz—recused themselves from the case for unspecified reasons and previous work with the NFL’s local counsel respectively.<sup>200</sup> Judge Susan Richard Nelson eventually accepted the assignment.<sup>201</sup>

The *Brady* Plaintiffs—the consistency of whom will be discussed in more detail below—alleged that the impending lockout constituted an unlawful group boycott and concerted refusal to deal in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.<sup>202</sup> Furthermore, the *Brady* Plaintiffs alleged that the NFL’s Salary Cap and free agency restrictions were anticompetitive and sought to suppress player wages below those that would exist in a competitive market.<sup>203</sup>

The *Brady* Plaintiffs devoted several pages of their complaint to allegations that the NFLPA had renounced its role as the collective bargaining representative of NFL players and therefore, relying on *McNeil*, *Powell*, *White*, and *Brown*, the non-statutory labor exemption

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<sup>199</sup> See *White v. Nat’l Football League*, 585 F.3d 1129, 1138 (8th Cir. 2009); see also Gregg Rosenthal, *League, Union Trade Mild Barbs Over Doty Ruling*, PROFOOTBALLTALK (Nov. 10, 2009, 4:19 PM), <http://profootballtalk.nbcsports.com/2009/11/10/league-union-trade-mild-barbs-over-doty-ruling/>.

<sup>200</sup> Mike Florio, *Brady Case Expected to Nudge Closer to Doty*, PROFOOTBALLTALK (Mar. 14, 2011, 7:27 AM), <http://profootballtalk.nbcsports.com/2011/03/14/brady-case-expected-to-nudge-closer-to-doty/>. Interestingly enough, the *Brady* Plaintiffs’ were represented locally by the firm of Berens & Miller, P.A. Member Barbara P. Berens was once a law clerk for Judge Doty. See James Walsh, *2 Judges Will Tackle NFL Issues*, STAR TRIBUNE (Minneapolis) (Mar. 15, 2011), <http://www.startribune.com/local/117946894.html>.

<sup>201</sup> Walsh, *supra* note 200.

<sup>202</sup> See generally Class Action Complaint, *supra* note 198. Specifically: Count I alleged the Lockout violated Section 1 as a group boycott and price-fixing agreement; Count II alleged the NFL Draft and Entering Player Pool violated Section 1 as a “horizontal agreement between competing NFL teams, which allocates the right to negotiate with and sign rookie professional football players and fixes their wages;” Count III alleged that the Salary Cap and Free Agent restrictions violated Section 1 by “fix[ing] prices and eliminating competition;” Count IV alleged Breach of Contract on behalf of the Under-Contract Subclass; Count V alleged Tortious Interference with Prospective Contractual Relations on behalf of the Free Agent and Rookie Subclasses; Count VI alleged Tortious Interference with Contract on behalf of the Under-Contract Subclass; and Count VII requested a Declaratory Judgment declaring that the Clubs could not assert a defense based on the non-statutory labor exemption or that the NFLPA’s decertification was a sham. *Id.*

<sup>203</sup> *Id.* ¶ 2–3.

no longer applied.<sup>204</sup> The actions of the NFL and its thirty-two Member Clubs would then be subject to the antitrust laws.

The *Brady* Plaintiffs consisted of nine current NFL players and one prospective NFL player.<sup>205</sup> The *Brady* Plaintiffs included persons allegedly representative of three subclasses: the “Under-Contract Subclass” consisted of Tom Brady, Drew Brees, Minnesota Vikings defensive end Brian Robison, and New York Giants defensive end Osi Umenyiora; the “Free Agent Subclass” consisted of former Indianapolis Colts quarterback Peyton Manning, former San Diego Chargers wide receiver Vincent Jackson, former Minnesota Vikings linebacker Ben Leber, former New England Patriots offensive lineman Logan Mankins, and former Kansas City Chiefs linebacker Mike Vrabel; and the “Rookie Subclass” consisted of former Texas A&M linebacker Von Miller.<sup>206</sup> Labeling the players in the Free Agent Subclass as being “former” players of their respective Clubs only indicates that the players were not under any contract with any Club at the time of the lawsuit.

The qualifications for the different classes are fairly obvious: the Under-Contract Subclass represented all players under contract on the date of the expiration of the 2006 CBA (March 4, 2011); the Free Agent Subclass represented all players who were free agents (exclusive, restricted, or unrestricted) following the 2011 season; and the Rookie Subclass represented all players who had never signed an NFL contract but were eligible to do so.<sup>207</sup>

The different subclasses purposely provided the *Brady* Plaintiffs standing to challenge the Lockout and various Salary Cap and free agent rules that suppress compensation and restrict movement but are otherwise permissible when the non-statutory labor exemption applies. For example, Jackson, Mankins, and Manning were each designated as Franchise Players prior to the expiration of the 2006 CBA.<sup>208</sup> Under the 2006 CBA, a Club was permitted to designate one player as its Franchise Player by tendering to that player a salary equal to approximately the average salary of the ten highest paid players at the

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<sup>204</sup> *Id.* ¶¶ 54–62.

<sup>205</sup> *Id.* at 1.

<sup>206</sup> *Id.* ¶¶ 87–115.

<sup>207</sup> *Id.* ¶ 25.

<sup>208</sup> *Id.* ¶¶ 94, 99, 103.

same position in the immediately preceding season.<sup>209</sup> The player may still sign with another Club, but the signing Club will be forced to forfeit two first round draft picks to the original Club.<sup>210</sup>

The Under-Contract Subclass alleged that the Lockout caused the breach of and tortiously interfered with the subclass' existing contracts by preventing them from playing football and earning their agreed-upon compensation.<sup>211</sup> The Rookie Subclass challenged the NFL Draft and Entering Player Pool as unreasonably restricting the rights of rookies to offer their services to any NFL Club and for the highest price.<sup>212</sup>

The decision to name Brady, Brees, and Manning as the first three Plaintiffs was clearly for public relations and symbolic purposes. Just as the Players had purposely chosen the aptly-named *Freeman* McNeil and the beloved Reggie White to lead the antitrust suits two decades earlier, Brady, Brees, and Manning are three of the most highly accomplished, recognizable, and respected players in the NFL. Collectively, the three star quarterbacks had been named to 22 Pro Bowl teams, won six MVPs and six Super Bowls.<sup>213</sup> The NFL labor dispute played out in essentially real-time before its millions of fans. Each side surely wanted the extra leverage that could come from having the fans and/or media supporting its position rather than blaming them for depriving fans of football. The Players consequently chose to have three players adored by fans as the faces of their lawsuit.

The *Brady* Complaint was accompanied by a motion for a preliminary injunction to enjoin the Lockout.<sup>214</sup> The *Brady* Plaintiffs devoted significant parts of their motion to establishing that the decertification was not a sham and that the NFL had agreed as part of the SSA and 2006 CBA that it would not challenge the NFLPA's decertification. In support of their argument, the *Brady* Plaintiffs argued that: (1) the players gave up all rights to bargain collectively; (2) the NFLPA disavowed any interest in continuing to represent the players in collective bargaining in a letter to Commissioner Goodell;

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<sup>209</sup> 2006 CBA, *supra* note 12, art. XX.

<sup>210</sup> *Id.* at art. XX § 2(a)(i). Although approximately ten players are designated as Franchise Players each offseason, no Franchise Player has ever signed with another Club.

<sup>211</sup> Class Action Complaint, *supra* note 198, ¶¶ 88, 91, 109, 111.

<sup>212</sup> *Id.* ¶ 107.

<sup>213</sup> *Id.* ¶¶ 87, 90, 102.

<sup>214</sup> See Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction, *Brady v. Nat'l Football League*, 779 F. Supp. 2d 1043 (D. Minn. 2011) (No. 11-cv-639).

(3) agents were notified that they were no longer representatives of the NFLPA; (4) the NFLPA withdrew from all pending fine appeals; (5) the NFLPA ended all participation in the benefit plans; and (6) the NFLPA was in the process of filing a labor organization termination notice with the United States Department of Labor. The fact that the Players recertified the NFLPA in 1993 following its decertification in 1989 created plenty of skepticism that the NFLPA was permanently renouncing its rights to represent the Players in collective bargaining.

Whether the NFL could challenge the NFLPA's decertification hinged on the interpretation of § 3(b) of the 2006 CBA:

The Parties agree that, *after the expiration of the express terms of this Agreement*, in the event that *at that time or any time thereafter* a majority of players indicate that they wish to end the collective bargaining status of the NFLPA on or after the expiration of this Agreement, the NFL and its Clubs and their respective heirs, executors, administrators, representatives, agents, successors and assigns waive any right they may have to assert any antitrust labor exemption defense based upon any claim that the termination by the NFLPA of its status as a collective bargaining representative is or would be a sham, pretext, ineffective, requires additional steps, or has not in fact occurred. (The italicized portions are those emphasized by the NFL in its brief and the underlined portions are those emphasized by the Brady Plaintiffs in their brief.)<sup>215</sup>

The NFL insisted that § 3(b) did not apply because the NFLPA decertified *before* the 2006 CBA expired.<sup>216</sup> In response, the *Brady* Plaintiffs argued that, although the NFLPA announced its intention to decertify as a union prior to the expiration of the 2006 CBA, the decertification was not intended to be effective until “at” or “after” the 2006 CBA's expiration.<sup>217</sup>

In support of its argument, the NFL pointed to § 3(a) of the 2006 CBA which, as the *Brady* Plaintiffs admitted,<sup>218</sup> required the Players to wait until six months after the expiration of the 2006 CBA to bring an antitrust lawsuit, provided that the NFLPA existed at the time of the

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<sup>215</sup> Compare Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction, *supra* note 214, at 7-8, with Memorandum of Law of the National Football League and its Member Clubs in Opposition to Plaintiffs' Motion for a Preliminary Injunction at 40, *Brady*, 779 F. Supp. 2d 1043 (No. 11-cv-639).

<sup>216</sup> Memorandum of Law of the National Football League and its Member Clubs in Opposition to Plaintiffs' Motion for a Preliminary Injunction, *supra* note 215, at 48.

<sup>217</sup> Reply Memorandum of Law in Further Support of Plaintiffs' Motion for a Preliminary Injunction at 8, *Brady*, 779 F. Supp. 2d 1043 (No. 11-cv-639).

<sup>218</sup> *Id.* at 8-9.

2006 CBA's expiration.<sup>219</sup> The NFL argued that the Players made the strategic choice to decertify before the expiration of the 2006 CBA to avoid the six-month waiting period and that doing so permitted the NFL to make the argument that the decertification was a sham and that the non-statutory labor exemption still applied.<sup>220</sup>

The legitimacy of the decertification would be a consideration in determining whether the Players were entitled to a preliminary injunction. A court must consider several factors in granting a preliminary injunction: "(1) the threat of irreparable harm to the moving party; (2) balancing this harm with any injury an injunction would inflict on other interested parties; (3) the probability that the moving party would succeed on the merits; and (4) the effect on the public interest."<sup>221</sup> The *Brady* Plaintiffs emphasized the short careers of professional athletes in alleging irreparable harm.<sup>222</sup> Furthermore, the *Brady* Plaintiffs argued that the Lockout "operates as both a group boycott and a horizontal agreement to fix prices for player services, and is therefore *per se* illegal."<sup>223</sup> Lastly, the *Brady* Plaintiffs identified the loss of an NFL season to communities, workers, businesses, and fans as evidence that injunctive relief would serve the public interest.<sup>224</sup>

The NFL, in opposition, focused on jurisdictional arguments. First, the NFL claimed that the Norris-LaGuardia Act prohibits federal courts from enjoining work stoppages arising out of labor disputes.<sup>225</sup> Section 4 of the Norris-LaGuardia Act provides that "[n]o court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute. . . ."<sup>226</sup> The NFL also argued that it was irrelevant that the *Brady* Plaintiffs had brought an antitrust suit because Section 5 of the Norris-LaGuardia Act expressly provides that the

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<sup>219</sup> Memorandum of Law of the National Football League and its Member Clubs in Opposition to Plaintiffs' Motion for a Preliminary Injunction, *supra* note 215, at 48–49.

<sup>220</sup> *Id.* at 44, 50.

<sup>221</sup> *Brady v. Nat'l Football League*, 779 F. Supp. 2d 992, 1033 (D. Minn. 2011).

<sup>222</sup> Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction, *supra* note 214, at 23.

<sup>223</sup> *Id.* at 26.

<sup>224</sup> *Id.* at 36.

<sup>225</sup> Memorandum of Law of the National Football League and its Member Clubs in Opposition to Plaintiffs' Motion for a Preliminary Injunction, *supra* note 215, at 17–18.

<sup>226</sup> 29 U.S.C. § 104 (2006).

prohibition against injunctive relief extends to injunctions sought under the antitrust laws.<sup>227</sup>

Second, the NFL argued that the NLRB had to decide threshold labor law issues within its primary jurisdiction before the *Brady* case could proceed.<sup>228</sup> The NFL specifically claimed that the NLRB needed to determine the legitimacy of the NFLPA's decertification.<sup>229</sup> The NFL requested that the *Brady* action be stayed pending the NLRB's determination of the previously-filed unfair labor practice charges.<sup>230</sup>

The *Brady* Plaintiffs argued in response that the Norris-LaGuardia Act did not apply, and the NLRB no longer had jurisdiction because the NFLPA had decertified as a union.<sup>231</sup>

Judge Nelson held a hearing on April 6, 2011, concerning the motion for a preliminary injunction. Ten attorneys appeared on behalf of the *Brady* Plaintiffs, and seven attorneys appeared on behalf of the NFL, including David Boies,<sup>232</sup> a leading trial lawyer who represented Al Gore in his 2000 presidential election case.<sup>233</sup> Two days later, DeMaurice Smith joined the *Brady* Plaintiffs' counsel.<sup>234</sup> Notably,

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<sup>227</sup> "No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title." 29 U.S.C. § 105 (2006).

<sup>228</sup> Memorandum of Law of the National Football League and its Member Clubs in Opposition to Plaintiffs' Motion for a Preliminary Injunction, *supra* note 215, at 25.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 32.

<sup>231</sup> *Id.* at 18.

<sup>232</sup> Minute Entry, *Brady*, 779 F. Supp. 2d 1043 (No. 11-cv-639). Appearing on behalf of the Brady Plaintiffs: Barbara Berens of Berens & Miller, P.A. (Minneapolis); Timothy R. Thornton of Briggs & Morgan, P.A. (Minneapolis); Christopher R. Clark, David Feher, David Greenspan, Jeffrey Kessler and Jennifer Stewart of Dewey & LeBoeuf LLP (New York); James Quinn and Bruce Meyer of Weil, Gotshal & Manges LLP (New York). Appearing on behalf of the NFL: Aaron Van Oort and Daniel Connolly of Faegre & Benson LLP (Minneapolis); David Boies and William Isaacson of Boies, Schiller & Flexner LLP (Washington, D.C.); and Benjamin Block, James Garland and Gregg Levy of Covington & Burling LLP (Washington, D.C.).

<sup>233</sup> Judy Battista, *N.F.L. Hires Attorney for Suit Against Players*, N.Y. TIMES (Mar. 12, 2011), <http://www.nytimes.com/2011/03/13/sports/football/13boies.html?ref=judybattista>.

<sup>234</sup> Motion for Admission Pro Hac Vice, *Brady, et al. v. Nat'l Football League*, 779 F. Supp. 2d 1043 (No. 11-cv-639), ECF No. 53.

Roger Goodell, Jeff Pash, Tom Brady, Drew Brees, and Peyton Manning did not attend the hearing.<sup>235</sup>

Reports of the hearing seemed to indicate that Judge Nelson favored the *Brady* Plaintiffs' point of view. Boies spoke for nearly three hours<sup>236</sup> and fielded approximately 64 questions or comments from Nelson.<sup>237</sup> In contrast, James Quinn, appearing on behalf of the *Brady* Plaintiffs, spoke for about an hour and a half and answered approximately 14 questions.<sup>238</sup> Reports also indicated that Judge Nelson disagreed with the NFL's argument that the Norris-LaGuardia Act divested the court of jurisdiction to grant injunctive relief.<sup>239</sup>

On April 11, Judge Nelson ordered the parties to engage in mediation before U.S. Magistrate Judge Arthur J. Boylan.<sup>240</sup> The parties engaged in four days of talks in the subsequent two weeks but then agreed to take a nearly month-long break until May 16.<sup>241</sup>

Judge Nelson granted the *Brady* Plaintiffs' motion for a preliminary injunction on April 25.<sup>242</sup> Judge Nelson ruled against the NFL on its jurisdictional arguments. Concerning the NFL's argument that the NLRB had primary jurisdiction over the dispute, Judge Nelson explained that the NFL confused the NLRB's primary jurisdiction with exclusive statutory jurisdiction.<sup>243</sup> Judge Nelson can "refer" to the

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<sup>235</sup> Albert Breer, *Judge Says Her Ruling on Lockout Will Take 'Couple of Weeks'*, NFL.COM (Apr. 6, 2011, 10:58 AM), <http://www.nfl.com/news/story/09000d5d81f1d6c1/article/judge-says-her-ruling-on-lockout-will-take-couple-of-weeks>.

<sup>236</sup> Judy Battista, *At N.F.L. Hearing, Judge Urges, But Doesn't Compel, a Return to Talks*, N.Y. TIMES (Apr. 6, 2011), <http://www.nytimes.com/2011/04/07/sports/football/07nfl.html?ref=judybattista>.

<sup>237</sup> Greg A. Bedard, *Judge Will Need 'Couple of Weeks' to Rule on Brady v. NFL*, BOSTON GLOBE (Apr. 6, 2011), [http://www.boston.com/sports/football/patriots/extra\\_points/2011/04/judge\\_will\\_need.html](http://www.boston.com/sports/football/patriots/extra_points/2011/04/judge_will_need.html).

<sup>238</sup> *Id.*

<sup>239</sup> Bob Nightengale, *NFLPA Asks Federal Judge to End 'Illegal' Lockout in Hearing*, USA TODAY (Apr. 6, 2011), <http://content.usatoday.com/communities/thehuddle/post/2011/04/nflpa-asks-federal-judge-to-end-illegal-lockout-in-hearing/1>; Bedard, *supra* note 237.

<sup>240</sup> Judy Battista, *Judge Returns Players and N.F.L. to Mediation*, N.Y. TIMES (Apr. 11, 2011), <http://www.nytimes.com/2011/04/12/sports/football/12nfl.html?ref=judybattista>.

<sup>241</sup> Sean Leahy, *NFL Mediation Talks Break Until May 16; Sides Await Judge's Ruling*, USA TODAY (Apr. 20, 2011), <http://content.usatoday.com/communities/thehuddle/post/2011/04/nfl-mediation-talks-break-until-may-16-sides-await-judges-ruling/1>; Albert Breer, *'Some Progress' in Labor Talks on Day NFL Schedule Released*, NFL.COM (Apr. 19, 2011, 12:39 PM), <http://www.nfl.com/news/story/09000d5d81f55f05/article/some-progress-in-labor-talks-on-day-nfl-schedule-released>.

<sup>242</sup> *Brady, v. Nat'l Football League*, 779 F. Supp. 2d 992, 1043 (D. Minn. 2011).

<sup>243</sup> *Id.* at 1007–12.

NLRB pursuant to primary jurisdiction but there was no statute directing that the issues be resolved by the NLRB.<sup>244</sup>

Judge Nelson also ruled, perhaps most importantly, that the NFLPA's decertification was valid, effective and made in good faith.<sup>245</sup> Furthermore, because the NFLPA had properly decertified, there was no dispute under the federal labor laws to which the Norris-LaGuardia Act applied.<sup>246</sup>

Judge Nelson then examined the irreparable harm that each Plaintiff was likely to suffer. Judge Nelson explained that the Free Agent Subclass (Jackson, Mankins, Manning, Leber, and Vrabel) could not negotiate with any Club, a process "which typically entails more compensation for a player's services, and therefore higher compensation."<sup>247</sup> The Rookie Subclass (Miller) would be harmed by missing training camp, and a year of experience against NFL-level competition, and would have to compete against other rookies in a future season.<sup>248</sup> The Under-Contract Subclass (Brady, Brees, Robison and Umenyiora) would be harmed by not being paid amounts owed under their current contracts and not being able to play towards future contracts.<sup>249</sup>

Judge Nelson explicitly stated that she was not ruling on whether the non-statutory labor exemption applied, so as to shield the NFL from the *Brady* Plaintiffs' antitrust claims.<sup>250</sup> Instead, Judge Nelson merely found that the non-statutory exemption did not protect the Lockout.<sup>251</sup> The non-statutory labor exemption generally only protects employers from antitrust scrutiny where the agreements sought to be exempted concern mandatory subjects of bargaining, such as wages, hours or conditions of employment.<sup>252</sup> The non-statutory labor exemption therefore did not shield the Lockout from antitrust scrutiny

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<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 1018.

<sup>246</sup> *Id.* at 1018, 1042.

<sup>247</sup> *Id.* at 1036.

<sup>248</sup> *Id.* at 1037.

<sup>249</sup> *Id.* at 1038.

<sup>250</sup> *Id.* at 1039.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 1041.

because a “lockout is not a substantive term or condition of employment.”<sup>253</sup>

Judge Nelson’s ruling set off a firestorm of activity as the NFL had to prepare to open for business while also seeking a stay of the court’s ruling pending appeal to the Eighth Circuit Court of Appeals. On April 27, 2011, Judge Nelson denied the NFL’s expedited motion for a stay.<sup>254</sup> Judge Nelson rejected the NFL’s argument that it would be irreparably harmed absent a stay, noting that the Lockout actually imposed significant financial harm on the NFL.<sup>255</sup>

The NFL and its 32 Member Clubs opened Club facilities on Friday, April 29, as a result of Judge Nelson’s decision while seeking a stay from the Eighth Circuit.<sup>256</sup> A three-Judge panel of the Eighth Circuit granted the NFL a temporary stay later that evening—ending the one-day Lockout reprieve.<sup>257</sup> While the stay was only intended to be temporary, the parties proceeded with the appeals process.<sup>258</sup> On May 16, 2011, the Eighth Circuit extended the stay pending the appeal and indicated that it was likely to rule in the NFL’s favor on the appeal. The Eighth Circuit stated that “we have serious doubts that the district court had jurisdiction to enjoin the League’s lockout, and accordingly conclude that the League has made a strong showing that it is likely to succeed on the merits.”<sup>259</sup>

Mediation resumed for two uneventful days in mid-May prior to oral argument before the Eighth Circuit on June 3.<sup>260</sup> At a hearing to

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<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 1044.

<sup>255</sup> *Id.* at 1048–50.

<sup>256</sup> See Mike Florio, *The Court Order is Clear—the NFL Should be Conducting Business as Usual*, PROFOOTBALLTALK (Apr. 27, 2011, 11:57 PM), <http://profootballtalk.nbcsports.com/2011/04/27/the-court-order-is-clear-the-nfl-should-be-conducting-business-as-usual/>; Mike Florio, *With No Ruling Yet, From Eighth Circuit, NFL Opens for Business*, PROFOOTBALLTALK (Apr. 29, 2011, 9:25 AM), <http://profootballtalk.nbcsports.com/2011/04/29/with-no-ruling-yet-from-eighth-circuit-nfl-opens-for-business/>.

<sup>257</sup> Mike Florio, *One Judge Wasn’t Happy With Temporary Stay*, PROFOOTBALLTALK (Apr. 30, 2011, 12:47 AM), <http://profootballtalk.nbcsports.com/2011/04/30/one-judge-not-happy-with-temporary-stay/>.

<sup>258</sup> Gregg Rosenthal, *NFL Files Opening Brief to Eighth Circuit Court of Appeals*, PROFOOTBALLTALK (May 9, 2011, 6:30 PM), <http://profootballtalk.nbcsports.com/2011/05/09/nfl-files-opening-brief-to-eighth-circuit-of-appeals/>.

<sup>259</sup> Mike Florio, *Eight Circuit Tips Its Hand; Judge Nelson’s Ruling is in Serious Jeopardy*, PROFOOTBALLTALK (May 16, 2011, 7:31 PM), <http://profootballtalk.nbcsports.com/2011/05/16/eighth-circuit-tips-its-hand-judge-nelsons-ruling-is-in-serious-jeopardy/>.

<sup>260</sup> Mike Florio, *Mediation Breaks Until June*, PROFOOTBALLTALK (May 17, 2011, 2:35 PM), <http://profootballtalk.nbcsports.com/2011/05/17/mediation-breaks-until-june/>.

consider the stay, Judge Kermit Bye urged the parties to try and settle the case before the Eighth Circuit issued its ruling.<sup>261</sup> Amazingly, it appeared that the two sides heeded Judge Bye's warning. The parties engaged in what were at first relatively secret meetings throughout the month of June in a variety of places, including St. Charles, Illinois,<sup>262</sup> Long Island, New York,<sup>263</sup> New York City,<sup>264</sup> Maryland,<sup>265</sup> and Minneapolis.<sup>266</sup>

Despite the apparent sense of urgency to get a deal done,<sup>267</sup> no settlement was reached prior to the Eighth Circuit's decision. In a decision dated July 8, 2011, the Eighth Circuit vacated Judge Nelson's decision to grant the preliminary injunction.<sup>268</sup>

The Eighth Circuit disagreed with Judge Nelson's conclusion that there was not a "labor dispute," which would necessitate the application of the Norris-LaGuardia Act.<sup>269</sup> Section 13(c) of the Act states that "[t]he term 'labor dispute' includes any controversy concerning terms or conditions of employment...."<sup>270</sup> The Eighth Circuit found that there was a labor dispute because the *Brady* Plaintiffs were seeking "broad relief that would affect the terms or

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<sup>261</sup> Mike Florio, *Deciphering Judge Bye's Warning to the NFL, Players*, PROFOOTBALLTALK (June 3, 2011, 10:10 PM), <http://profootballtalk.nbcsports.com/2011/06/03/deciphering-judge-byes-warning-to-the-nfl-players/>.

<sup>262</sup> Mike Florio, *Not-so-Secret Meetings Caused a Stir in St. Charles*, PROFOOTBALLTALK (June 5, 2011, 5:32 PM), <http://profootballtalk.nbcsports.com/2011/06/05/not-so-secret-meetings-caused-a-stir-in-st-charles/>.

<sup>263</sup> Gregg Rosenthal, *Latest Not-so-Secret Talks Wrap Up*, PROFOOTBALLTALK (June 8, 2011, 7:07 PM), <http://profootballtalk.nbcsports.com/2011/06/08/latest-not-so-secret-talks-wrap-up/>.

<sup>264</sup> Gregg Rosenthal, *Not-so-Secret Talks Expected to Resume Next Week*, PROFOOTBALLTALK (June 10, 2011, 9:42 AM), <http://profootballtalk.nbcsports.com/2011/06/10/not-so-secret-talks-expected-to-re-start-next-week/>.

<sup>265</sup> Gregg Rosenthal, *Labor Negotiations Taking Place in Maryland Tuesday and Wednesday*, PROFOOTBALLTALK (June 14, 2011, 11:35 AM), <http://profootballtalk.nbcsports.com/2011/06/14/labor-negotiations-taking-place-in-maryland-tuesday-and-wednesday/>.

<sup>266</sup> Gregg Rosenthal, *Report: NFL and Players Commit to Four Straight Days of Talks*, PROFOOTBALLTALK (June 28, 2011, 11:27 AM), <http://profootballtalk.nbcsports.com/2011/06/28/report-nfl-and-players-commit-to-four-straight-days-of-talks/>.

<sup>267</sup> Mike Florio, *Sense of Urgency Apparently has Arrived, but Will it Last?*, PROFOOTBALLTALK (June 30, 2011, 9:57 PM), <http://profootballtalk.nbcsports.com/2011/06/30/sense-of-urgency-apparently-has-arrived-but-will-it-last/>.

<sup>268</sup> *Brady v. Nat'l Football League*, 644 F.3d 661 (8th Cir. 2011).

<sup>269</sup> *Id.* at 670–673.

<sup>270</sup> 29 U.S.C. § 113(c) (2006).

conditions of employment for the entire industry of professional football.”<sup>271</sup>

The Eighth Circuit determined that the Norris-LaGuardia Act deprived the District Court of any power to issue an injunction prohibiting a party to a labor dispute from implementing a lockout.<sup>272</sup> Section 4(a) of the Norris-LaGuardia Act prohibits federal courts from issuing injunctions “in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . [from] [c]easing or refusing to perform any work or to remain in any relation of employment.”<sup>273</sup> The Eighth Circuit first held that employers, such as the NFL and the thirty-two Clubs, are clearly persons interested in a labor dispute.<sup>274</sup> Next, the Eighth Circuit held that a lockout is encompassed by the language “remain[ing] in any relation of employment.”<sup>275</sup>

There were concerns that the Eighth Circuit’s decision would embolden the NFL and stall the progress seemingly being made in negotiations.<sup>276</sup> However, the Eighth Circuit did grant the *Brady* Plaintiffs a minor victory that may have eased that concern.<sup>277</sup> The Eighth Circuit held that § 4(a) did not apply to non-employees, such as free agents and rookies.<sup>278</sup> Therefore, Judge Nelson could issue an injunction against the Lockout as it related to these employees if she held a hearing to gather testimony and evidence as required by § 7 of the Norris-LaGuardia Act.<sup>279</sup> Fortunately, both sides issued a joint statement stating that the decision would have no effect on the ongoing negotiations.<sup>280</sup>

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<sup>271</sup> *Brady*, 644 F.3d at 670.

<sup>272</sup> *Id.* at 674–81.

<sup>273</sup> 29 U.S.C. § 104(a) (2006).

<sup>274</sup> *Brady*, 644 F.3d at 675.

<sup>275</sup> *Id.* at 676–77.

<sup>276</sup> Mike Florio, *Eight Circuit Rules that Lockout May Continue*, PROFOOTBALLTALK (July 8, 2011, 10:45 AM), <http://profootballtalk.nbcsports.com/2011/07/08/eighth-circuit-rules-that-lockout-is-legal/>.

<sup>277</sup> Mike Florio, *Loophole in Eight Circuit Ruling Should Discourage Owners from Dropping the Hammer*, PROFOOTBALLTALK (July 8, 2011, 11:10 AM), <http://profootballtalk.nbcsports.com/2011/07/08/loophole-in-eighth-circuit-ruling-should-discourage-owners-from-dropping-the-hammer/>.

<sup>278</sup> *Brady*, 644 F.3d at 681.

<sup>279</sup> *Id.*

<sup>280</sup> Michael David Smith, *Owners, Players Agree: Ruling Won’t Stop Negotiations*, PROFOOTBALLTALK (July 8, 2011, 12:38 PM), <http://profootballtalk.nbcsports.com/2011/07/08/>

The NFL meanwhile filed a notice of motion to dismiss the case on June 6, 2011.<sup>281</sup> The *Brady* Plaintiffs countered with a notice of motion for summary judgment on July 18, 2011.<sup>282</sup> However, the two sides jointly requested, and were granted, multiple extensions to file their memorandum of law in the case in light of the ongoing settlement discussions.<sup>283</sup> Finally, on July 26, 2011, the two sides informed Judge Nelson that the case had been settled.<sup>284</sup>

### C. *NLRB Case*

The NFL filed an unfair labor practice (ULP) charge with the NLRB against the NFLPA on February 14, 2011.<sup>285</sup> The NFL claimed that negotiations were stalled because the NFLPA had failed to bargain in good faith and was committed to decertifying the union and filing an antitrust suit.<sup>286</sup> Specifically, the NFL contended that the NFLPA violated Section 8 of the NLRA by: (1) delaying the scheduling of bargaining sessions; (2) failing to respond in a timely and meaningful manner to the NFL's proposals; (3) inducing the NFL to make proposals that were categorically rejected by the NFLPA; (4) insisting upon financial data to which the NFLPA has no legal right; (5) conditioning contract proposals on the NFL's agreement to non-mandatory subjects of bargaining, such as the extension of the United States District Court for the District of Minnesota's oversight of the

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owners-players-agree-ruling-wont-stop-negotiations/.

<sup>281</sup> Defendants' Motion to Dismiss Plaintiffs' Amended Complaints, *Brady v. Nat'l Football League*, 779 F. Supp. 2d 992 (D. Minn. 2011) (No. 11-cv-639), ECF No. 137.

<sup>282</sup> Motion for Summary Judgment, *Brady*, 779 F. Supp. 2d 992 (No. 11-cv-639), ECF No. 166.

<sup>283</sup> See Joint Motion for Extension of Briefing Schedule, *Brady*, 779 F. Supp. 2d 992 (No. 11-cv-639), ECF No. 164 and Order, *Brady*, 779 F. Supp. 2d 992 (No. 11-cv-639), ECF No. 180 (extended to July 25, 2011); see also Second Amended Joint Motion for Extension of Briefing Schedule, *Brady*, 779 F. Supp. 2d 992 (No. 11-cv-639), ECF No. 181 and Order, *Brady*, 779 F. Supp. 2d 992 (No. 11-cv-639), ECF No. 182 (extended to August 1, 2011).

<sup>284</sup> Court Minutes, *Brady*, 779 F. Supp. 2d 992 (No. 11-cv-639), ECF No. 183.

<sup>285</sup> Mike Florio, *League Files Unfair Labor Practice Charge Over Plan to Decertify*, PROFOOTBALLTALK (Feb. 14, 2011, 3:22 PM), <http://profootballtalk.nbcsports.com/2011/02/14/league-files-unfair-labor-practice-charge-over-plan-to-decertify/>; *Case 02-CB-022939*, NAT'L LABOR RELATIONS BD., [https://www.nlr.gov/case/02-CB-022939#case details](https://www.nlr.gov/case/02-CB-022939#case%20details) (last visited Feb. 13, 2012).

<sup>286</sup> Florio, *supra* note 285.

collective bargaining relationship; and (6) engaging in other actions demonstrating that the NFLPA had no intent to reach an agreement.<sup>287</sup>

The National Labor Relations Board explains that:

In determining whether a party is bargaining in good faith, the Board will look at the totality of the circumstances. The duty to bargain in good faith is an obligation to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement. This implies both an open mind and a sincere desire to reach an agreement as well as a sincere effort to reach a common ground. The additional requirement to bargain in 'good faith' was incorporated to ensure that a party did not come to the bargaining table and simply go through the motions. There are objective criteria that the NLRB will review to determine if the parties are honoring their obligation to bargain in good faith, such as whether the party is willing to meet at reasonable times and intervals and whether the party is represented by someone who has the authority to make decisions at the table. Conduct away from the bargaining table may also be relevant.<sup>288</sup>

The NFL amended its ULP charge following the NFLPA's decertification on March 11, 2011, alleging that the decertification was a sham.<sup>289</sup> The entire text of the amendment is below:

The CBA expires on March 11, 2011, with no new agreement in place between the NFLMC and the NFLPA. Since on or about March 11, 2011, the NFLPA has continued its unlawful course of conduct by (i) purporting to disclaim interest in the representation of the players; and (ii) initiating antitrust litigation against the League and its member clubs, all as anticipated and described above in the original unfair labor practice charge filed against the NFLPA in Case No. 2-CB-22939 on February 14, 2011.

NFLPA President Kevin Mawae was unmoved by the NFL's charges, stating that "any case by the NLRB is trumped by a decertification. So we're not a union anymore, so it doesn't matter."<sup>290</sup> Moreover, former chairman of the NLRB and Stanford law professor William Gould noted that "the owners faced a 'real challenge,' . . . but it was not insurmountable"<sup>291</sup> and that "this board is perceived to be

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<sup>287</sup> Charge Against Labor Organization or Its Agents re: National Football League and National Football League Players Association (Feb. 14, 2011) (Case No. 2-CB-22939), available at <http://www.laborrelationstoday.com/uploads/file/nfl-nflpa-nlr-complaint.pdf>.

<sup>288</sup> *Frequently Asked Questions*, NAT'L LABOR RELATIONS BD., <http://www.nlr.gov/faq/nlr> (last visited Feb. 13, 2012).

<sup>289</sup> See Charge Against Labor Organization or Its Agents re: National Football League and National Football League Players Association, *supra* note 287; see also *Brady v. Nat'l Football League*, 644 F.3d 661, 667 (8th Cir. 2011).

<sup>290</sup> Judy Battista, *A Second Front to Open in the Labor Battle*, N.Y. TIMES (Mar. 20, 2011), <http://www.nytimes.com/2011/03/21/sports/football/21union.html>.

<sup>291</sup> *Id.*

more pro-union than my board was ever perceived to be.”<sup>292</sup> The NFL’s claims were certainly buoyed by historical fact: the NFLPA and the Players had performed the exact set of maneuvers from 1989–1993 that led to the *White* settlement.

The NFL’s unfair labor charges were presumably resolved as part of the 2011 CBA. The NLRB website indicates that the case was closed on August 31, 2011, about a month after the parties agreed to the 2011 CBA.

#### D. *Retired Players Cases*

On March 28, 2011, several retired NFL players, led by Carl Eller, filed a class action lawsuit against the NFL and its thirty-two Clubs (the *Eller I* Case).<sup>293</sup> Carl Eller was a defensive end for the Minnesota Vikings and Seattle Seahawks from 1964 to 1979 and was inducted into the Pro Football Hall of Fame in 2004.<sup>294</sup> The *Eller I* Plaintiffs, like the *Brady* Plaintiffs, alleged the Lockout violated Section 1 of the Sherman Act and sought a preliminary injunction against the Lockout.<sup>295</sup>

The *Eller I* Case sought to protect the rights of retired players who were not considered part of the collective bargaining unit in the 2006 CBA and were not represented in the *Brady* case.<sup>296</sup> The *Eller I* Plaintiffs also interestingly sought to represent rookies who were not yet part of the bargaining unit.<sup>297</sup> The *Eller I* Plaintiffs argued that the Lockout would irreparably harm them by terminating or reducing certain health benefits and programs provided to them by the NFL.<sup>298</sup>

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<sup>292</sup> Jarrett Bell, *Union or not, NFLPA Still Could Face Sanction from NLRB*, USA TODAY (Mar. 16, 2011), [http://www.usatoday.com/sports/football/nfl/2011-03-15-nflpa-nlr\\_n.htm](http://www.usatoday.com/sports/football/nfl/2011-03-15-nflpa-nlr_n.htm).

<sup>293</sup> Class Action Complaint, *Brady v. Nat’l Football League*, 779 F. Supp. 2d 992 (D. Minn. 2011) (No. 11-cv-639), ECF No. 57.

<sup>294</sup> *Id.* at ¶ 13.

<sup>295</sup> Plaintiffs’ Motion for Preliminary Injunction at 2, *Brady*, 779 F. Supp. 2d 994 (No. 11-cv-639), ECF No. 58.

<sup>296</sup> Class Action Complaint, *supra* note 293, ¶ 21.

<sup>297</sup> *Id.* ¶ 20.

<sup>298</sup> Memorandum in Support of Motion for Preliminary Injunction at 2, *Brady*, 779 F. Supp. 2d 992 (No. 11-cv-639) ECF No. 60. According to the Eller Plaintiffs, “[t]he affected programs are (a) the Cardiovascular Health Program provides extensive cardiovascular screenings and education, health screenings, obesity screening and nutritional counseling; (b) the Prostate screening program; (c) the NFL Neurological Care Program which evaluates and treat spine-related conditions among retired players; (d) the Priority access to eligible retired players for assisted living; (e) the Discount Prescription Drug Card program; (f) the Medicare supplement

The *Eller I* Plaintiffs claimed that the 2011 NFL Draft constituted a group boycott and price-fixing agreement in violation of Section 1 of the Sherman Act.<sup>299</sup>

On April 1, the *Eller I* Plaintiffs filed an Amended Complaint that included Antawan Walker as a new plaintiff.<sup>300</sup> Walker was a wide receiver for the University of Wisconsin-Stout football team who completed his collegiate career in 2010 and intended to enter the NFL Draft.<sup>301</sup> The inclusion of Walker provided a more legitimate basis for the *Eller I* Plaintiffs to pursue their claims against the NFL Draft.<sup>302</sup> Without Walker, the only plaintiffs were retired players who likely would not suffer any harm as a result of the NFL Draft.

Judge Nelson heard argument on the *Eller I* Plaintiffs' motion for a preliminary injunction at the same April 6, 2011 hearing as for the *Brady* Plaintiffs' motion for a preliminary injunction.<sup>303</sup> On April 12, 2011, The *Eller I* Case was consolidated with the *Brady* case pursuant to a motion by the *Eller I* Plaintiffs, which was uncontested by either the *Brady* Plaintiffs or the NFL.<sup>304</sup> Judge Nelson's April 25, 2011 ruling granting the *Brady* Plaintiffs' motion for a preliminary injunction mooted the *Eller I* Plaintiffs' motion for the same relief.<sup>305</sup>

The *Eller I* Plaintiffs were mostly relegated to the sidelines as the *Brady* Plaintiffs and the NFL worked to reach a new CBA. However, the *Eller I* Plaintiffs continued to press both sides to ensure that a new CBA would provide increased benefits to retired players.<sup>306</sup> The *Eller*

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program; (g) the Player Assistance Trust, which provides financial assistance to former players for financial crises, completion of bachelor degrees, and programs provided by NFL Care Foundation; (h) access by retirees to their medical records which could prevent a timely diagnosis; (i) testing and treatment for dementia under the 88 Plan; and (j) tuition assistance programs for retired players will be eliminated and a retired player may be unable to finish his education." See Class Action Complaint, *supra* note 293, ¶ 104.

<sup>299</sup> Class Action Complaint, *supra* note 293, ¶¶ 100-02.

<sup>300</sup> First Amended Class Action Complaint at ¶ 17, *Eller v. Nat'l Football League*, 2011 WL 1464888 (D. Minn. 2011) (No. 11-cv-639).

<sup>301</sup> *Id.*

<sup>302</sup> Mike Florio, *League Responds to Eller Case, Which Adds a Rookie*, PROFOOTBALLTALK (Apr. 4, 2011, 9:52 PM), <http://profootballtalk.nbcsports.com/2011/04/04/league-responds-to-eller-case-which-adds-a-rookie-to-the-class/>.

<sup>303</sup> Bedard, *supra* note 237.

<sup>304</sup> Memorandum in Support of Plaintiffs' Motion to Consolidate at 2, *Eller v. Nat'l Football League*, 2011 WL 1464888 (D. Minn. 2011) (No. 11-cv-639).

<sup>305</sup> *Brady v. Nat'l Football League*, 779 F. Supp. 2d 992, 1043 (D. Minn. 2011).

<sup>306</sup> Mike Florio, *Retired Players Make a Timely Power Play*, PROFOOTBALLTALK (June 21, 2011, 9:54 AM), <http://profootballtalk.nbcsports.com/2011/06/21/retired-players-make-a-timely-power-play/>.

*I* Plaintiffs were excluded from certain settlement discussions between the two sides and threatened in late June not to agree to a settlement unless their needs were properly addressed.<sup>307</sup> The *Eller I* Plaintiffs fortunately backed off their threat in late July and declared that they would not block the pending settlement.<sup>308</sup>

The *Eller I* Case survived the settlement between the *Brady* Plaintiffs and the NFL for about one month.<sup>309</sup> On August 24, the *Eller I* Plaintiffs voluntarily dismissed their action without prejudice.<sup>310</sup>

Eller, apparently unsatisfied with the results of the 2011 CBA, filed a new class action lawsuit against the reconstituted NFLPA, Tom Brady, Mike Vrabel, and DeMaurice Smith on September 13, 2011 (*Eller II*).<sup>311</sup> Eller and an expanded group of retired players alleged that the Defendants had no authority to bargain with the NFL about the terms of pension, retirement, and disability benefits.<sup>312</sup> The Complaint sought a declaratory judgment that the Defendants had no such authority, and damages for the Defendants' alleged intentional interference with prospective economic advantage and the NFLPA's alleged breach of fiduciary duty.<sup>313</sup> The Plaintiffs also sought to have any issues relating to NFL retirees in the 2011 CBA "excised from that agreement and . . . renegotiated between Plaintiffs and the League."<sup>314</sup>

The Defendants in *Eller II* moved to dismiss the action on December 2, 2011. The Defendants' motion is currently pending before Judge Nelson and all pleadings in the action are being filed under seal. The case is pending as of publication of this article.

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<sup>307</sup> Mike Florio, *Lawyer Representing Eller Class Threatens Settlement*, PROFOOTBALLTALK (June 28, 2011, 11:59 PM), <http://profootballtalk.nbcsports.com/2011/06/28/lawyer-representing-eller-class-threatens-settlement/>.

<sup>308</sup> Mike Florio, *Retired Players Won't Get in the Way of a Settlement*, PROFOOTBALLTALK (July 19, 2011, 5:33 PM), <http://profootballtalk.nbcsports.com/2011/07/19/retired-players-wont-get-in-the-way-of-a-settlement/>.

<sup>309</sup> Mike Florio, *Retired Players' Lawsuit Against NFL, NFLPA Still Pending*, PROFOOTBALLTALK (Aug. 10, 2011, 4:44 PM), <http://profootballtalk.nbcsports.com/2011/08/10/retired-players-lawsuit-against-nfl-nflpa-still-pending/>.

<sup>310</sup> Stipulation of Dismissal, *Brady v. Nat'l Football League*, 779 F. Supp. 2d 992 (D. Minn. 2011) (No. 11-cv-639); see also Mike Florio, *Carl Eller Case is Dismissed*, PROFOOTBALLTALK (Aug. 24, 2011), <http://profootballtalk.nbcsports.com/2011/08/24/carl-eller-case-is-dismissed/>.

<sup>311</sup> Class Action Complaint, *Eller v. Nat'l Football League Players Ass'n*, (D. Minn. 2011) (No. 11-cv-02623).

<sup>312</sup> *Id.* ¶ 1.

<sup>313</sup> *Id.* at counts I–III.

<sup>314</sup> *Id.* ¶ 136.

## V. ANALYSIS OF 2011 CBA

The 2011 CBA included the most extensive changes to an NFL CBA since 1993. The changes further complicated some parts of NFL business while simplifying others. Reading our earlier law review article, *Understanding the Evolution of Signing Bonuses and Guaranteed Money in the National Football League: Preparing for the 2011 Collective Bargaining Negotiations*,<sup>315</sup> provides important background knowledge to understand the more complex changes to the 2011 CBA.

## A. Revenue Split

Leading into and during the 2011 CBA negotiations and Lockout it was often said that if the two sides could agree on how to divide the revenues, then the other issues would fall into place.<sup>316</sup> The NFLPA undoubtedly wanted to ensure that its Players continued to receive their fair share of revenues that Commissioner Goodell projected to grow by over \$1 billion per year to a goal of \$25 billion in 2027.<sup>317</sup>

Players received 57.5 percent of TR under the 2006 CBA.<sup>318</sup> The 2006 CBA negotiations resulted in TR including certain stadium revenues previously excluded, such as concessions, parking, local advertising and promotion, signage, magazine advertising, local sponsorship agreements, stadium clubs, and luxury box income.<sup>319</sup> However, before the Players' share of TR was determined, the NFL deducted five percent for expenses and 1.8 percent for the NFL's G-3 Stadium Program.<sup>320</sup> These expense deductions were estimated to be approximately \$1 billion per year.<sup>321</sup> As a result, the Players actually received much closer to 50 percent of all revenues.<sup>322</sup>

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<sup>315</sup> Deubert & Wong, *supra* note 50.

<sup>316</sup> Mike Florio, *With Trust Restored, Talks Turn to Issues Other Than Revenue Split*, PROFOOTBALLTALK (June 23, 2011, 1:37 PM), <http://profootballtalk.nbcsports.com/2011/06/23/with-trust-restored-talks-turn-to-issues-other-than-revenue-split/>; Florio, *supra* note 116.

<sup>317</sup> Daniel Kaplan, *SBJ: Goodell Sets Revenue Goal of \$25 billion by 2027 for NFL*, SPORTINGNEWS.COM (Apr. 5, 2010, 7:51 PM), <http://aol.sportingnews.com/nfl/story/2010-04-05/sbj-goodell-sets-revenue-goal-25-billion-2027-for-nfl>.

<sup>318</sup> See Deubert & Wong, *supra* note 50, at 182.

<sup>319</sup> *Id.* at 181.

<sup>320</sup> 2006 CBA, *supra* note 12, art. XXIV § 1(a)(xiv).

<sup>321</sup> Florio, *supra* note 116.

<sup>322</sup> *Id.*

The two sides were having difficulty determining how to divide up the increasingly diverse and significant revenue streams until a proposal from the NFL's Treasurer, Joe Siclare, was made.<sup>323</sup> Siclare substantially proposed the revenue split to which the two sides agreed. The parties scuttled TR and now divide up All Revenue (AR), which includes all revenues "from all sources, whether known or unknown, derived from, relating to or arising out of the performance of players in NFL football games. . . ."<sup>324</sup> The Players and Clubs now divide three main "Revenue Buckets,"<sup>325</sup> with the Players receiving the following shares:

- (a) 55 percent of League Media.<sup>326</sup> League Media includes all broadcasting revenues, including television, satellite, radio and internet.<sup>327</sup> These revenues were worth approximately \$4 billion in 2011.<sup>328</sup>
- (b) 45 percent of NFL Ventures/Postseason.<sup>329</sup> NFL Ventures/Postseason includes all revenues arising from the operation of postseason NFL games and all revenues arising from operating of NFL-affiliated entities,<sup>330</sup> including NFL Ventures,<sup>331</sup> NFL Network,<sup>332</sup> NFL Properties,<sup>333</sup> NFL Enterprises,<sup>334</sup> NFL Productions,<sup>335</sup> and NFL Digital.<sup>336</sup>

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<sup>323</sup> Mike Florio, *Joe Siclare Gets His Props for Propping Up Labor Deal*, PROFOOTBALLTALK (July 29, 2011, 2:32 PM), <http://profootballtalk.nbcsports.com/2011/07/29/joe-siclare-gets-his-props-for-propping-up-labor-deal/>.

<sup>324</sup> NFL Collective Bargaining Agreement (2011-2020) [hereinafter 2011 CBA], art. 12, § 1(a).

<sup>325</sup> *Id.* at art. 12 § 6(a).

<sup>326</sup> *Id.* at art. 12 § 6(c)(i).

<sup>327</sup> *Id.* at art. 12 § 6(a)(i).

<sup>328</sup> Dex McLuskey and Aaron Kuriloff, *NFL Signs Nine-Year Extensions of Television Contracts with CBS, FOX, NBC*, BLOOMBERG (Dec. 15, 2011, 9:00 PM), <http://www.bloomberg.com/news/2011-12-14/nfl-renews-television-contracts-with-cbs-fox-nbc-networks-through-2022.html>.

<sup>329</sup> 2011 CBA, *supra* note 324, art. 12 § 6(c)(i).

<sup>330</sup> *Id.* at art. 12 § 6(a)(ii).

<sup>331</sup> NFL Ventures is responsible for negotiating all of the league's major sponsorship, marketing, and media rights deals. NFL Ventures, which Commissioner Goodell ran before becoming Commissioner, includes four wholly-owned subsidiaries: NFL Enterprises, NFL Properties, NFL Productions, and NFL International. See Tommy Craggs, *Exclusive: Leaked Documents Show Operating Profits for NFL Ventures Rose 29 Percent Last Year*, DEADSPIN (July 15, 2011, 1:10 PM), <http://deadspin.com/5821386/audited-financials-operating-profit-for-nfl-ventures-lp-rose-from-999-million-to-13-billion-last-year>.

<sup>332</sup> NFL Network is the league-owned and operated television network devoted full-time to the NFL, including broadcasting select Thursday night games. For more information, see [www.nfl.com/nflnetwork](http://www.nfl.com/nflnetwork).

<sup>333</sup> NFL Properties is responsible for licensing, sponsorship, and marketing. NFL Properties was the subject of *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201 (2010). NFL Properties was created by the 32 individual Clubs to collectively market and license the Clubs'

(c) Forty percent of Local.<sup>337</sup> Local revenues include those revenues not included in League Media AR or NFL Ventures/Postseason AR, and specifically include revenues from the sale of preseason television broadcasts.<sup>338</sup>

It is important to point out that the amount the Players “receive” is actually the Player Cost Amount, which includes the Players’ benefits.<sup>339</sup> In the 2011 League Year, the Player Cost Amount was pegged at \$142.4 million per Club, with \$22.025 (15 percent) of that amount allocated towards Player benefits.<sup>340</sup>

The 2011 CBA reduced the acceptable range for the Players’ share of revenues to a 1.5 percent band. The Players are limited to an upward band of 48 percent of AR for League Years 2012-2014 and 48.5 percent from 2015-2020.<sup>341</sup> At the same time, the Players’ share of AR cannot be below 47 percent.<sup>342</sup>

Under the 2006 CBA, the Players were effectively guaranteed 50 percent of TR, including both salary and benefits.<sup>343</sup> The 2006 CBA

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individual intellectual property, such as names, colors, logos, and trademarks. In 2000, the Clubs—through NFL Properties—granted Reebok an exclusive license to produce and sell trademarked headwear for the 32 Clubs. American Needle—a former licensee and creator of NFL appareled headwear—could no longer create headwear with NFL logos and trademarks. American Needle challenged the exclusive license as an illegal restraint of trade by the 32 NFL Clubs. The Northern District of Illinois granted the NFL summary judgment after finding that NFL Properties constituted a single entity for antitrust purposes, and therefore there was no contract, combination, or conspiracy to restrain trade. See *Am. Needle, Inc. v. New Orleans La. Saints*, 496 F. Supp. 2d 941, 943 (N.D. Ill. 2007). The Seventh Circuit affirmed. *Am. Needle, Inc. v. Nat’l Football League*, 538 F. 3d 736 (7th Cir. 2008). The Supreme Court reversed. *Am. Needle*, 130 S. Ct. 2201. While the Court noted that NFL Clubs “depend upon a degree of cooperation for economic survival,” the necessity of cooperation does not transform concerted action into the independent action of a single-entity. *Id.* at 2214. Furthermore, that “even if league-wide agreements are necessary to produce football, it does not follow that concerted activity in marketing intellectual property is necessary to produce football.” *Id.* at n.7.

<sup>334</sup> NFL Enterprises is responsible for advertising, publicizing, promoting, marketing, and selling broadcasts of NFL games.

<sup>335</sup> NFL Productions, also known as NFL Films, is the league-owned film company that for over fifty years has produced award-winning films about the NFL. For more information see [www.nflfilms.com](http://www.nflfilms.com).

<sup>336</sup> NFL Digital is responsible for the league’s technology and new media ventures, including [www.nfl.com](http://www.nfl.com) and NFL Mobile.

<sup>337</sup> 2011 CBA, *supra* note 324, art. 12 § 6(c)(i).

<sup>338</sup> *Id.* at art. 12 § 6(a)(iii).

<sup>339</sup> *Id.* at art. 12 § 6(b).

<sup>340</sup> *Id.*

<sup>341</sup> *Id.* at art. 12 § 6(c)(ii).

<sup>342</sup> *Id.*

<sup>343</sup> 2006 CBA, *supra* note 12, art. XXIV, § 3. The guarantee actually only kicked in when

also prohibited the Players' share of TR, including both salary and benefits, from exceeding 61.6 percent of TR.<sup>344</sup> AR under the 2011 CBA will exceed TR under the 2006 CBA based on the absence of expense deductions. Consequently, the Players are receiving a more definite piece of a larger pie.

Certain revenues are excluded from AR.<sup>345</sup> Most notably, revenues from Personal Seat Licenses which are "dedicated to stadium construction or stadium renovation," are not included in AR.<sup>346</sup> In addition, the Clubs receive a "Stadium Credit" for 50 percent of the private cost to construct or renovate a stadium, amortized over a maximum of fifteen years.<sup>347</sup>

### B. *Salary Cap and Minimum Spending Requirements*

The process by which each Club's Salary Cap is determined did not change. Each Club's Salary Cap is calculated by deducting Player benefits from the Players' share of revenues and then dividing by the number of Clubs in the NFL.<sup>348</sup>

The 2011 CBA has made important changes to how much each Club must spend in actual cash. Under the 2006 CBA, Clubs were required to have a Team Salary of at least 84 percent of their Salary Cap, increasing 1.2 percent annually to a high of 87.6 percent in 2009.<sup>349</sup> However, the calculation of Team Salary is the same as that used for Salary Cap purposes,<sup>350</sup> meaning it includes the prorated portions of signing and option bonuses paid in previous years. Consequently, Team Salary was always actually less than the actual cash paid by the Club for that League Year.

The 2011 CBA is not concerned with what a Club's Salary Cap total might be, but rather with the actual amount of cash that is being

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there was a salary cap in place—which there was in every League Year of the 2006 CBA except for 2010.

<sup>344</sup> *Id.* at art. XXIV, § 4(c).

<sup>345</sup> 2011 CBA, *supra* note 324, art. 12 § 1(a)(ii).

<sup>346</sup> *Id.* at art. 12 § 1(a)(vi).

<sup>347</sup> *Id.* at art. 12 § 4. The Stadium Credit is 75 percent for the construction or renovation of a stadium in California.

<sup>348</sup> Compare 2006 CBA, *supra* note 12, art. XXIV § 4(a) with 2011 CBA, *supra* note 324, art. 12, § 6(c)(v).

<sup>349</sup> 2006 CBA, *supra* note 12, art. XXIV, § 5.

<sup>350</sup> *Id.* at Art. 1, § 3(au).

spent by the Clubs. The 2011 CBA requires that the Clubs, as a collective unit, spend 99 percent of the Salary Cap for the 2011 and 2012 League Years in cash (Guaranteed League-Wide Cash Spending).<sup>351</sup> For each four-year period from 2013-16 and 2017-20, the Clubs must spend 95 percent of the Salary Cap in cash.<sup>352</sup>

It is important to recognize that the Guaranteed League-Wide Cash Spending requirements do not require individual Clubs to use nearly their entire Salary Cap. A Club may spend a considerable amount in cash in one League Year on signing bonuses, which are then prorated over the life of the contract for Salary Cap Purposes. Consider as an example a player who signs a five-year contract with a \$10 million signing bonus prior to the 2012 League Year. The Club's contribution towards the Guaranteed League-Wide Cash Spending will be \$10 million for the 2012 League Year, but the player's salary cap charge for the 2012 through 2016 League Years is only \$2 million per year.

The 2011 CBA technically does not impose a Salary "floor" for each Club as the 2006 CBA did.<sup>353</sup> The 2011 CBA instead requires that Clubs spend at least 89 percent of the Salary Cap in cash for each four-year period from 2013-16 and 2017-20 (Minimum Team Cash Spending).<sup>354</sup> The Players are not interested in how Clubs structure contracts and allocate salaries for Salary Cap purposes, but instead are concerned with ensuring that the Players actually receive a certain percentage of money. A Club that fails to reach the Minimum Team Cash Spending threshold must pay the shortfall to its players before the next season.<sup>355</sup> There is no Minimum Team Cash Spending in the 2011 or 2012 League Years.

### C. *Bonus Forfeitures*

The 2006 CBA inserted a new provision governing when players could be required to forfeit certain portions of their income. Article XIV, Section 9(c) stated that there were "[n]o forfeitures permitted (current and future contracts) for signing bonus allocations for years already performed, or for other salary escalators or performance

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<sup>351</sup> 2011 CBA, *supra* note 324, art. 12 § 8(a).

<sup>352</sup> *Id.* at art. 12 § 8(b).

<sup>353</sup> See 2006 CBA, *supra* note 12, art. XXIV § 5(a).

<sup>354</sup> 2011 CBA, *supra* note 324, art. 12 § 9(a).

<sup>355</sup> *Id.* at art. 12 § 9(b).

bonuses already earned.”<sup>356</sup> The interpretation of Section 9(c) led to unexpected and litigious results.<sup>357</sup>

### 1. Denver Broncos and Ashley Lelie

Confusion arose when Special Master Burbank ruled that former Denver Broncos wide receiver Ashley Lelie could keep \$220,000 from a previously paid option bonus. Prior to the 2002 season, the Broncos signed Lelie to a five-year contract that included a team option for a sixth season.<sup>358</sup> The Broncos exercised the option prior to the 2003 season and paid Lelie an option bonus of \$1.1 million.<sup>359</sup> The \$1.1 million option bonus was prorated over the remaining five years of the contract for an annual Salary Cap charge of \$220,000 through the 2007 season.<sup>360</sup>

Payment of the option bonus required Lelie to agree that if he ever refused to play for the Broncos—“defaulted”—he would be required to return the proportionate amount of the bonus affected by the default.<sup>361</sup> This type of forfeiture provision was and is used by virtually every NFL Club for every type of bonus paid. The Broncos contemplated, for example, that if Lelie refused to perform prior to the 2005 season—with three years remaining on the contract—that he would be required to forfeit \$660,000 of the option bonus (three years multiplied by \$220,000 per year). Signing bonuses had long been subject to similar forfeiture provisions, and indeed players had been required to return the proportionate share of their signing bonus on default.<sup>362</sup>

Lelie refused to report to the Broncos for the 2006 season.<sup>363</sup> The Broncos agreed to trade Lelie to the Atlanta Falcons conditioned on Lelie’s execution of an “Acknowledgement and Agreement” in which Lelie admitted that he breached his contract and agreed to return \$220,000, other portions of his original \$3.3 million signing bonus, and

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<sup>356</sup> 2006 CBA, *supra* note 12, art. XIV, § 9(c).

<sup>357</sup> *See* Deubert & Wong, *supra* note 50, at 215–17 (discussing § 9(c) and several cases dealing with its interpretation).

<sup>358</sup> *White v. Nat’l Football League*, 2007 WL 939560, at \*1 (D. Minn. Mar. 26, 2007).

<sup>359</sup> *Id.*

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> *See* Deubert & Wong, *supra* note 50, at 211–14 (discussing the cases of the Denver Broncos and Eddie Kennison and the Miami Dolphins and Ricky Williams).

<sup>363</sup> *Id.* at 214.

other fines.<sup>364</sup> The Broncos could have demanded the return of \$440,000 for the \$220,000 option bonus allocation for each of the two years remaining on the contract.

The NFL initiated a non-injury grievance on behalf of the Broncos to recover the unremitted amounts.<sup>365</sup> The NFLPA countered by requesting that Special Master Burbank declare that the Acknowledgment and Agreement violated Section 9(c) and order the Broncos to return the \$220,000 to Lelie. Special Master Burbank ruled in the NFLPA's and Lelie's favor, prompting an objection to Judge Doty of the United States District Court for the District of Minnesota.<sup>366</sup> Judge Doty affirmed Burbank's decision and ruled that the option bonus was "earned" upon the Broncos' exercise of the option, and therefore could not be forfeited under Section 9(c).<sup>367</sup>

The *Lelie* case was significant because it differentiated the forfeiture treatment of option bonuses from that of signing bonuses. Despite the fact that both bonuses are prorated over the term of the contract for Salary Cap purposes, defaults on option bonuses could not result in a proportionate return of the option bonus while default on signing bonuses would. The ruling created two schemes relevant to contract structures: one for forfeiture and one for salary cap purposes. The separate schemes shocked NFL front offices and resulted in certain clubs refusing to use option bonuses.<sup>368</sup>

## 2. Other Cases

Clubs' attempts to enforce forfeiture provisions were further frustrated by two subsequent cases. First, in 2008, Judge Doty reversed in relevant part Special Master Burbank and ruled that former Falcons quarterback Michael Vick could keep \$16.22 million in previously paid roster bonuses.<sup>369</sup> The Falcons had paid the roster bonuses on the condition that the bonuses be subject to proportional forfeiture.<sup>370</sup> Judge Doty expressly found that the treatment of bonuses for Salary Cap purposes was not relevant to forfeiture

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<sup>364</sup> *Id.*

<sup>365</sup> *Id.* at 215.

<sup>366</sup> *Id.*

<sup>367</sup> *Id.* at 216.

<sup>368</sup> *Id.* at 216.

<sup>369</sup> *Id.* at 223.

<sup>370</sup> *Id.* at 220.

determinations.<sup>371</sup> Nevertheless, the *Vick* ruling did comport with the Salary Cap scheme in which the entire amount of a roster bonus counts against the Salary Cap for the League Year in which it is paid.<sup>372</sup> Secondly, in 2009, Special Master Burbank ruled that the New York Giants could not withhold portions of a signing bonus owed to wide receiver Plaxico Burress following Burress' accidental self-inflicted gunshot wound.<sup>373</sup> Special Master Burbank ruled that Burress' actions were not "willful" so as to permit forfeiture of signing bonus allocations.<sup>374</sup>

### 3. Changes in 2011 CBA

The 2011 CBA significantly expanded and clarified the rules on forfeiture of Player bonuses and salaries. Furthermore, the new forfeiture language is NFL-friendly, implicitly overrules *Lelie* and *Vick*,<sup>375</sup> and explicitly overrules *Burress*.<sup>376</sup>

Section 9(b) of the 2011 CBA permits signing, roster, option, and reporting bonuses to be subject to proportional forfeiture based on the length remaining on the player's contract.<sup>377</sup> Section 9(b) specifically states that the scheme for forfeiture is independent of the scheme for Salary Cap purposes.<sup>378</sup> Consequently, per the 2011 CBA's example, a \$1 million roster bonus, which is paid when a player has two years remaining on his contract, is subject to a \$1 million forfeiture in the event of default prior to the first remaining season and a \$500,000 forfeiture in the event of default prior to the last remaining season.<sup>379</sup> Such a forfeiture ignores that the entire roster bonus counted entirely against the Club's Salary Cap during the first season. These provisions overrule the *Lelie* and *Vick* decisions.

The 2011 CBA also redefined what constitutes a default or "Forfeitable Breach." Under the 2006 CBA, a default occurred when a

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<sup>371</sup> *Id.* at 223–24.

<sup>372</sup> *Id.* at 230.

<sup>373</sup> *Id.* at n.18.

<sup>374</sup> See 2006 CBA, *supra* note 12, art. XIV § 9(a).

<sup>375</sup> See 2011 CBA, *supra* note 324, art. 4 § 9(b).

<sup>376</sup> *Id.* at art. 4 § 9(i).

<sup>377</sup> *Id.* at art. 4 § 9(b).

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

player voluntarily retired, withheld his services, or willfully took action which undermined his ability to play.<sup>380</sup> To this list, the 2011 CBA added a player's unavailability due to "conduct by him that results in his incarceration"<sup>381</sup> or a non-football injury resulting from a player's engaging in activities outside of football in violation of the Standard NFL Player Contract.<sup>382</sup> These provisions overrule the *Burress* decision, and Section 9(i) specifically states that the new forfeiture rules are intended to "overrule the decision . . . involving Plaxico Burress."<sup>383</sup>

It was expected that the *Lelie* and *Burress* decisions would be overruled by the 2011 CBA. However, the express disavowal of the Salary Cap scheme for forfeiture purposes—and the implied overruling of the *Vick* decision—is surprising. The new forfeiture provisions completely eliminate any application of the historical purpose of signing bonuses. Signing bonuses were traditionally used in sports as an inducement for execution of the contract,<sup>384</sup> and interpreted by several courts as evidence of the contract in the context of professional football.<sup>385</sup> Signing bonuses played an important part in bidding wars between AFL clubs, and later USFL clubs, and NFL Clubs.<sup>386</sup> Notably, the AFL persuaded Alabama quarterback Joe Namath to join the New York Jets, rather than the NFL's St. Louis Cardinals, by offering a \$200,000 signing bonus in 1965.<sup>387</sup> Moving forward, the 2011 CBA establishes that nearly any bonus paid to a player is subject to forfeiture regardless of its purpose and Salary Cap treatment.

#### D. Rookie Compensation

Rookie compensation was probably the most contentious issue following the revenue split. 2010 first overall pick Sam Bradford

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<sup>380</sup> See 2006 CBA, *supra* note 12, art. XIV, § 9(a).

<sup>381</sup> See 2011 CBA, *supra* note 324, art. 4 § 9(a)(ii).

<sup>382</sup> *Id.* at art. 4 § 9(a)(iii); see also 2011 CBA App. A ¶ 3 (prohibiting players from engaging in activities other than football which "may involve a significant risk of personal injury").

<sup>383</sup> *Id.* at art. 4 § 9(i).

<sup>384</sup> Deubert & Wong, *supra* note 50, at 193–94.

<sup>385</sup> See *Ala. Football, Inc. v. Greenwood*, 452 F. Supp. 1191 (W.D. Pa. 1978); *Bryant v. Tanenbaum*, 1990 WL 26693 (E.D. Pa. 1990), *aff'd* 928 F.2d 1131 (3d Cir. 1991); *Miami Dolphins, Ltd. v. Cowan*, 601 So. 2d 301 (Fla. Dist. Ct. App. 1992); *McGlasson v. Workmen's Comp. Appeal Bd. (Philadelphia Eagles Football Club)*, 557 A.2d 841 (Pa. Commw. Ct. 1989).

<sup>386</sup> Deubert & Wong, *supra* note 50, at 193–94.

<sup>387</sup> *Id.* at 194.

agreed to a six-year, \$78 million contract with the St. Louis Rams, including \$50 million guaranteed.<sup>388</sup> By comparison, Tom Brady, a three-time Super Bowl champion and two-time MVP, received only a four-year, \$72 million contract with \$48.5 million guaranteed from the New England Patriots prior to the 2010 season.<sup>389</sup> As a result, Clubs often looked to trade their high draft picks to avoid guaranteeing an unproven rookie tens of millions of dollars.<sup>390</sup> NFLPA President Kevin Mawae also agreed that rookie compensation was out of balance and argued that the money should instead be used to pay proven veterans.<sup>391</sup>

The exorbitant sums being paid each year to rookies may have created the false impression that there was no limit on rookie compensation. However, the 2006 CBA and the preceding 2002 CBA included an Entering Player Pool that was the total amount of money that could be paid to drafted rookies.<sup>392</sup> Each Club was provided the maximum Salary Cap charge (the Rookie Allocation) it could incur for that League Year.<sup>393</sup> The Rookie Allocation was determined based on a formula agreed to by the NFL and NFLPA that accounted for the number, round, and position in round of the Club's draft picks in that year's NFL Draft.<sup>394</sup> The formula designates a certain Salary Cap charge for each drafted player. The combined Salary Cap charges for each Club make up that Club's Rookie Allocation.

Under the 2006 CBA, Clubs were given their Rookie Allocation, but not the formula or the designated Salary Cap charge for their drafted players. The NFL and NFLPA agreed not to provide this information because it would significantly curtail negotiations and the free market sensibility. The growth of a rookie's compensation is limited

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<sup>388</sup> *Rams Give Bradford 50M Guaranteed*, ESPN (July 31, 2010, 9:09 AM), <http://sports.espn.go.com/nfl/news/story?id=5425041>.

<sup>389</sup> *Tom Brady Signs Extension*, ESPN (Sept. 11, 2010, 3:13 PM), <http://sports.espn.go.com/boston/nfl/news/story?id=5552561>.

<sup>390</sup> Gregg Rosenthal, *Talk Increases that Rams Would Trade Down on the Cheap*, PROFOOTBALLTALK (Apr. 20, 2010, 6:53 AM), <http://profootballtalk.nbcsports.com/2010/04/20/talk-increases-that-rams-would-trade-down-on-the-cheap/>.

<sup>391</sup> *Mawae: Big Rookie Contracts Like Ryans' 'Disheartening'*, ESPN (May 21, 2008, 4:43 PM), <http://sports.espn.go.com/nfl/news/story?id=3406508>.

<sup>392</sup> 2006 CBA, *supra* note 12, art. XVII § 1.

<sup>393</sup> *Id.* at art. XVII § 4.

<sup>394</sup> *Id.* at art. XVII § 3.

by the 25 Percent Rule.<sup>395</sup> The 25 Percent Rule does not permit a player's Salary Cap charge to grow by more than 25 percent per year unless he was being paid the minimum Paragraph 5 salaries.<sup>396</sup>

Nevertheless, industrious agents and Clubs eager to prevent holdouts continuously found new and creative ways to increase rookie compensation. A rookie's compensation was only restricted by the Entering Player Pool for his first year. To circumvent the purposes of the 25 Percent Rule, many creative contract structures were created. For example, a contract may include a Club's right to "supersede" the contract. When the Club exercises its right to supersede the contract, the originally executed contract is discarded in favor of a new contract that will pay the player a higher salary. The player is protected against the Club's possible non-exercise of the right to supersede by a "nonexercise fee." A nonexercise fee required the Club to pay the player a substantial bonus if the contract is not superseded—typically in the same amount that would have been included had the Club exercised its right to supersede.

The Entering Player Pool increased annually at the same rate as the Salary Cap up to a maximum of five percent.<sup>397</sup> Consequently, it would seem logical that each year a drafted rookie's compensation should be a maximum of five percent more than the compensation paid to the player drafted in the same position in round in the previous year's Draft. However, the amounts being paid to first round draft picks routinely increased at much higher rates.<sup>398</sup> The compensation for later round draft picks typically increased at much slower rates—and less than the growth of the Salary Cap—because the first round draft picks were consuming more than their allotted share of the Rookie Allocation.

The 2011 CBA dramatically overhauls and limits the manner in which rookies are compensated. The Entering Player Pool remains—re-labeled the Total Rookie Compensation Pool—and continues to increase along with the Salary Cap up to five percent plus 50 percent of any increase over five percent.<sup>399</sup> However, the 2011 CBA removes

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<sup>395</sup> *Id.* at art. XVII § 4(e).

<sup>396</sup> *Id.*

<sup>397</sup> *Id.* at art. XVII § 3(a).

<sup>398</sup> Mike Florio, *Lions, Ndamukong Suh Agree to Deal*, PROFOOTBALLTALK (Aug. 3, 2010, 6:37 PM), <http://profootballtalk.nbcsports.com/2010/08/03/lions-ndamukong-suh-agree-to-deal/>.

<sup>399</sup> 2011 CBA, *supra* note 324, at art. VII § 2(a).

nearly all of the flexibility Clubs and agents used to inflate rookie compensation within the new Total Rookie Compensation Pool. These changes are discussed in detail below.

### 1. Contract Length

Rookie contract lengths are now “fixed and unalterable.”<sup>400</sup> Rookies drafted in the first round are limited to four-year contracts with a Club option for a fifth year.<sup>401</sup> Under the 2006 CBA, rookies drafted in the first 16 picks could sign six-year contracts and rookies drafted in picks 17 through 32 could sign five-year contracts.<sup>402</sup> Rookies drafted in rounds two through seven must sign four-year deals.<sup>403</sup> Previously, under the 2006 CBA, rookies in rounds two through seven were limited to four-year deals, but they were not mandatory.<sup>404</sup>

The fixed duration of rookie contracts in rounds two through seven removes a strategic choice made by Clubs as to whether to sign players to three or four-year contracts. A player who received a three-year contract could then become a Restricted Free Agent at the expiration of his contract and command a larger salary. However, because most players’ careers will never last four years, many Clubs were willing to take that risk.

Four-year rookie contracts almost always included an “escalator.” The escalator often increased the player’s fourth year salary to the Restricted Free Agent Qualifying Offer for a Right of First Refusal if the player met certain playtime requirements and the Club improved in certain statistical categories. By agreeing to a four-year deal, the player gave up the right to be a Restricted Free Agent after three seasons.<sup>405</sup> Clubs offset that choice by contracting to pay the player potentially the same amount as if he had become a Restricted Free Agent.

The 2011 CBA mandates a “Proven Performance Escalator” be incorporated into every rookie contract for third through seventh round

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<sup>400</sup> *Id.* § 3(a).

<sup>401</sup> *Id.*

<sup>402</sup> 2006 CBA, *supra* note 12, at art. XVII § 5.

<sup>403</sup> 2011 CBA, *supra* note 324, at art. VII § 3(a).

<sup>404</sup> 2006 CBA, *supra* note 12, at art. XVII § 5.

<sup>405</sup> *Id.* at art. XIX § 2.

draft picks.<sup>406</sup> Importantly, the Proven Performance Escalator does not count for purposes of the 25 Percent Rule.<sup>407</sup>

Lastly, Clubs will hold an option on their first round picks for a fifth year. The player's salary for that fifth year is based on the Transition Tender for that player's position. The Transition Tender is the amount a Club must offer to a player whom the Club has designated as a Transition Player.<sup>408</sup> The Transition Tender is offered to otherwise Unrestricted Free Agents and provides the player's former Club the opportunity for a Right of First Refusal on any offers made to the player.<sup>409</sup> The Transition Tender for a particular player equals the average salary of the ten highest paid players at that player's position.<sup>410</sup> The fifth-year salary of rookies drafted in the first ten picks will equal the Transition Tender for that year.<sup>411</sup> All other rookies drafted in the first round will receive a fifth-year salary based on a Transition Tender using the third through twenty-fifth highest salaries at that position.

The fifth-year option must be exercised by May 3 of the fourth year of the contract.<sup>412</sup> This is approximately two months into the League Year and following the bulk of free agent signings. Consequently, Clubs will have the ability to go after certain free agents before determining whether they need to exercise the fifth-year option. The option year Paragraph 5 salary is guaranteed for injury upon exercise of the option, and becomes fully guaranteed for skill, injury, and Salary Cap purposes if the player is on the Club's roster at the start of the player's option year.<sup>413</sup>

## 2. Prohibition on Certain Bonuses

The 2011 CBA continues only to restrict player compensation during the first year of the contract. Nevertheless, circumvention of the Rookie Compensation Pool's purpose is nearly impossible due to the restricted contract lengths and the prohibition on previously used mechanisms. The 2011 CBA specifically prohibits "option bonuses,

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<sup>406</sup> 2011 CBA, *supra* note 324, at art. VII § 4(a).

<sup>407</sup> *Id.* at art. VII § 4(e).

<sup>408</sup> *Id.* at art. X § 4.

<sup>409</sup> *Id.* § 5.

<sup>410</sup> *Id.* § 4(a).

<sup>411</sup> *Id.* at art. VII § 7(e).

<sup>412</sup> *Id.* § 7(a).

<sup>413</sup> *Id.* § 7(e)(ii); *id.* § 7(f)(ii).

option exercise fees, option nonexercise fees, Salary Advances . . . voidable year(s) provisions, buybacks of voidable year(s) provisions, and any “contract within the contract” (i.e. terms and conditions of a contemplated superseding contract within the Rookie Contract).” In addition, the 25 Percent Rule remains.<sup>414</sup>

### 3. Performance Incentives

The 2011 CBA eliminates the negotiation of extensive incentive provisions which provided opportunities for players to earn additional income based on their on-field performance. The most complicated provisions were almost exclusively the purview of first round picks. Rookies from all rounds are now limited to negotiating certain Performance Incentives.<sup>415</sup>

The Performance Incentive described by the 2011 CBA is effectively what has been known as a “One-Time Incentive.”<sup>416</sup> The Performance Incentive is a lump-sum cash payment that can be earned when a player participates in a certain percentage of his Club’s plays.<sup>417</sup> For a first or second rounder to earn the Performance Incentive, he must participate in at least 35 percent of the Club’s offensive or defensive plays in his first year or 45 percent in any subsequent year of the contract.<sup>418</sup> Third through seventh round picks need only play in 15 percent of the Club’s offensive or defensive snaps in the first year and 30 percent in any subsequent year.<sup>419</sup>

The 2011 CBA does not prescribe that the playtime requirement in the Performance Incentive be coupled with a requirement that the Club improve in a certain statistical category. However, Clubs will almost certainly continue to include such requirements as they long have in One-Time Incentives.<sup>420</sup> The 2011 CBA also does not state that the Performance Incentive can only be earned “one time,” but this practice will likely continue as well.

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<sup>414</sup> *Id.* § 3(e).

<sup>415</sup> *Id.* § 6.

<sup>416</sup> See Deubert & Wong, *supra* note 50, at 197.

<sup>417</sup> 2011 CBA, *supra* note 324, at art. VII § 6(a).

<sup>418</sup> *Id.*

<sup>419</sup> *Id.*

<sup>420</sup> See Deubert & Wong, *supra* note 50, at 197.

One-Time Incentives were most importantly used as part of the compensation package for second round draft picks. Due to the Entering Player Pool, Clubs could not pay signing bonuses sufficient to satisfy the second round rookies' demands for guaranteed money. As a result, the One-Time Incentive was a way for Clubs to supplement and partially replace the signing bonus. Although not actually guaranteed, the relative ease with which a player can earn the One-Time Incentive meant that the One-Time Incentive was considered part of the player's guaranteed money.

An important change is that the Performance Incentives count towards the Salary Cap for each year in which they can be earned.<sup>421</sup> One-Time Incentives were previously structured with those particular playtime requirements so that they would be considered "not likely to be earned" and would not count against the Salary Cap.<sup>422</sup>

Additionally, because the Performance Incentive counts towards the 25 Percent Rule,<sup>423</sup> a player would have to replace some form of his compensation with the Performance Incentive for the Performance Incentive to be included in his contract. Rookies in rounds two through seven generally only have two forms of compensation: Paragraph 5 salary and signing bonuses. Rookies generally receive the minimum Paragraph 5 salaries so as to comply with the 25 Percent Rule<sup>424</sup> and to maximize their signing bonus under the Club's Rookie Compensation Pool. Therefore, to include an unguaranteed Performance Incentive in a contract, the player would have to agree to a decreased guaranteed signing bonus—an unlikely accord. Consequently, it is not surprising that not a single player in the 2011 NFL Draft agreed to a Performance Incentive.

#### 4. The NFLPA's Leak of Confidential Rookie Pool Information

The NFL and NFLPA have never disclosed the formula that determines each Club's Rookie Allocation. The formula and its accompanying calculations would reveal the allotted Salary Cap charge

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<sup>421</sup> 2011 CBA, *supra* note 324, at art. VII § 8.

<sup>422</sup> 2006 CBA, *supra* note 12, at art. XXIV § 7(c)(xviii).

<sup>423</sup> 2011 CBA, *supra* note 324, at art. VII § 6(b).

<sup>424</sup> *Id.* at art. VII § 3(e) ("No Rookie Contract may provide for an annual increase of more than 25% of the player's Year-One Rookie Salary unless such contract provides only for Paragraph 5 Salary equal to the then-applicable Minimum Active/Inactive Salary for each League Year of the Contract.").

for each player in the Draft. The NFL and NFLPA have not disclosed the formula to permit free negotiation between agents and Clubs.

Unfortunately, prior to the 2011 League Year, an NFLPA employee inadvertently sent to all agents the 2011 Rookie Allocations for each Club, including the Year-One Rookie Allocation for every drafted player.<sup>425</sup> As a result, Clubs and agents had the exact Salary Cap figure allocated to each player. With this information, the agents and Clubs could easily calculate the signing bonus owed to each player drafted in rounds two through seven and negotiations could take less than five minutes.

The player's contract value can be determined by first deducting the Minimum Salary from the Year-One Rookie Allocation. The remaining amount can then be multiplied by four years—the only permissible contract length for rookies in rounds two through seven—to reach the total signing bonus amount. It is important to remember that signing bonuses are prorated for Salary Cap purposes of the life of the four-year contract. The below example demonstrates the ease with which rookie contract negotiations occurred prior to the 2011 League Year:

Club	Round	Pick in Round	Year-One Rookie Allocation
New York Giants	3	19	\$518,813

Year-One Rookie Allocation: \$518,813

Less Minimum Salary in 2011: \$375,000<sup>426</sup>

**Year-One Signing Bonus Proration: \$143,813**

X Four Year Contract: 4

**Total Signing Bonus: \$575,252**

In fact, Jerrel Jernigan, the 19th pick of the third round of the 2011 NFL Draft, agreed to exactly a \$575,252 signing bonus. Agents were quick to agree to these deals because—without first round picks consuming more than their fair share of the Rookie Pool—later round

<sup>425</sup> Mike Florio, *Sources: Disclosure of Rookie Scale Formula by NFLPA Nearly Blew up Settlement*, PROFOOTBALLTALK (July 31, 2011, 12:39 AM), <http://profootballtalk.nbcsports.com/2011/07/31/sources-disclosure-of-rookie-scale-formula-by-nflpa-nearly-blew-up-settlement/>.

<sup>426</sup> 2011 CBA, *supra* note 324, at art. XXVI § 1.

picks received deals with significantly larger signing bonuses than in years past.

In future years, Clubs and agents can simply increase the allocated Salary Cap charges by the same amount that the Salary Cap increases to determine the allocated Salary Cap charge for a player. For example, if the Salary Cap for the 2012 League Year increases 5 percent, the Entering Player Pool will also increase 5 percent.<sup>427</sup> Consequently, the allocated Salary Cap charge for the 19th pick of the third round of the 2012 NFL Draft should be approximately \$604,015 (\$575,252 X 105%). As a result, rookie contract negotiations should continue to be relatively easy affairs for the length of the 2011 CBA.

## 5. Summary

In general, the new rookie compensation system significantly limits the scope of rookie contract negotiations and permissible provisions. The new system is much closer to the system used in the NBA, in which each draft position is specifically allocated a salary.<sup>428</sup> The curtailed negotiating power of the agent also led the NFLPA to limit agent fees on rookie contracts to two percent instead of the previously permitted three percent.<sup>429</sup> Lastly, the largely predetermined compensation structure will greatly reduce the threat of rookie holdouts, as players will have little choice or leverage in negotiating how much they want to make.<sup>430</sup>

The new rookie compensation system resulted in 2011 first overall pick Cam Newton agreeing to a four-year contract for \$22,025,498 with the Carolina Panthers.<sup>431</sup> The Rookie Allocations accidentally released by the NFLPA showed that Newton's Total Rookie Allocation

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<sup>427</sup> *Id.* at art. VII § 2(a).

<sup>428</sup> See Collective Bargaining Agreement Between National Basketball Association and the National Basketball Players Association, art. VIII (b)(i) [hereinafter 2005 NBA-CBA]; 2005 NBA-CBA ex. B.

<sup>429</sup> Gregg Rosenthal, *Agent Fees for Rookie Contracts Expected to Go Down*, PROFOOTBALLTALK (July 21, 2011, 6:44 PM), <http://profootballtalk.nbcsports.com/2011/07/21/agent-fees-for-rookie-contracts-expected-to-go-down/>.

<sup>430</sup> Mike Florio, *Under New CBA, Rookies Won't Have Much of a Reason to Holdout*, PROFOOTBALLTALK (July 23, 2011, 6:57 PM), <http://profootballtalk.nbcsports.com/2011/07/23/under-new-cba-rookies-wont-have-much-of-a-reason-to-hold-out/>.

<sup>431</sup> Michael David Smith, *Cam Newton, Panthers Agree to Four Year, \$22 million Contract*, PROFOOTBALLTALK (July 29, 2011, 6:35 PM), <http://profootballtalk.nbcsports.com/2011/07/29/cam-newton-panthers-agree-to-four-year-22-million-contract/>; Florio, *supra* note 425.

was actually \$22,025,500.<sup>432</sup> Clearly the Panthers and Newton's representatives used the Rookie Allocations as a guide, at a minimum. Newton's total contract value, including an approximate \$14 million option in year five, is only about \$36 million.<sup>433</sup> Thus, Newton's contract was less than half of what Bradford received as the first overall pick in the prior year. The most positive point for Newton is that his entire \$22 million pre-option contract is guaranteed—even if it is still less than half of what Bradford was guaranteed.

Moving forward it will be interesting to see the extent to which rookie compensation is guaranteed. Approximately half of the first round picks in 2011 had their contracts fully guaranteed.<sup>434</sup> The remaining first rounders had the first three years of their contract guaranteed.<sup>435</sup>

#### E. *Movement Toward Guaranteed Contracts*

A review of the changes to the Salary Cap and compensation schemes makes it appear that the 2011 CBA was a clear win for NFL Clubs. The 2011 CBA reduces the Players' share of revenue, permits forfeiture of nearly any type of compensation, cuts rookie compensation in half, effectively eliminates the use of One-Time Incentives, and otherwise prohibits creative contract structures designed to increase player compensation. The possible upside for the Players is that the new structure appears to be part of a larger movement towards guaranteed contracts in the NFL.

As already mentioned, most of the compensation to be paid to 2011 first round picks is guaranteed. Not surprisingly, that trend trickled into the second round where nearly all of the players had at least one year's salary guaranteed against skill, injury, and the Salary Cap.

Possibly the biggest reason Clubs have avoided guaranteed compensation is the high rate of injury in the NFL. Nevertheless, both the 2006 and 2011 CBAs provided that a certain portion of a player's

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<sup>432</sup> Florio, *supra* note 425.

<sup>433</sup> Gregg Rosenthal, *Cam Newton Will Make Roughly \$22 Million in First Four Seasons*, PROFOOTBALLTALK (July 22, 2011, 3:50 PM), <http://profootballtalk.nbcsports.com/2011/07/22/cam-newton-will-only-make-22-million-in-first-four-seasons/>.

<sup>434</sup> Mike Florio, *Signing Status of First Round Picks*, PROFOOTBALLTALK (Aug. 2, 2011, 1:56 AM), <http://profootballtalk.nbcsports.com/2011/08/02/signing-status-of-first-round-picks/>.

<sup>435</sup> *Id.*

salary is guaranteed when his career is cut short by injury. This benefit is known as “Injury Protection.”<sup>436</sup>

Under the 2006 CBA, if a player was injured during the season and subsequently failed the pre-season physical for the next season, the Club could cut the player and the player could receive 50 percent of his contract salary for that season up to \$275,000.<sup>437</sup> The 2011 CBA increases the maximum payment to \$1 million in the 2011–2012 League Years, up to \$1.2 million for the 2019-20 League Years.<sup>438</sup> Furthermore, the 2011 CBA provides that the player may receive up to 30 percent of his Paragraph 5 Salary for the second season following the season of injury if he is still physically unable to play.<sup>439</sup> This second-year payment is capped at \$500,000 for the 2011–2012 League Years, up to \$575,000 for the 2019-20 League Years.<sup>440</sup>

The new rules effectively provide that a player is guaranteed to receive \$1.5 million if at least \$1.5 million is owed on a multi-year contract.<sup>441</sup> Under both the 2006 and 2011 CBAs, a player can receive Injury Protection only once during his career.<sup>442</sup>

Veteran contracts may also be increasingly guaranteed in light of the guarantees given to rookies and the guarantees provided by Injury Protection.<sup>443</sup> The abbreviated 2011 offseason did in fact see many veterans sign long-term contracts with substantial guarantees. For example: linebacker David Harris and the New York Jets agreed to a four-year deal worth \$36 million with \$29.5 million guaranteed (82 percent);<sup>444</sup> linebacker Tamba Hali and the Kansas City Chiefs agreed to a five-year deal worth \$60 million with \$35 million guaranteed (58

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<sup>436</sup> See 2006 CBA, *supra* note 12, at art. XII; 2011 CBA, *supra* note 325, at art. XLV.

<sup>437</sup> *Id.* at art. XII.

<sup>438</sup> 2011 CBA, *supra* note 325, at art. XLV § 2.

<sup>439</sup> *Id.* at art. XLV § 5.

<sup>440</sup> *Id.*

<sup>441</sup> Gregg Rosenthal, *New CBA Has Protection for Career Ending Injuries*, PROFOOTBALLTALK (July 25, 2011, 9:04 AM), <http://profootballtalk.nbcsports.com/2011/07/25/new-cba-has-protections-for-career-ending-injuries/>.

<sup>442</sup> 2006 CBA, *supra* note 12, at art. XII § 2; 2011 CBA, *supra* note 324, at art. XLV § 2.

<sup>443</sup> Mike Florio, *Rookie Wage Scale Could Be the First Step Toward Guaranteed Veteran Contracts*, PROFOOTBALLTALK (July 28, 2011, 10:16 PM), <http://profootballtalk.nbcsports.com/2011/07/28/rookie-wage-scale-could-be-the-first-step-toward-guaranteed-veteran-contracts/>.

<sup>444</sup> Michael David Smith, *Jets Sign David Harris, \$29.5 Million Guaranteed*, PROFOOTBALLTALK.COM (Aug. 2, 2011, 6:38 PM), <http://profootballtalk.nbcsports.com/2011/08/02/jets-sign-david-harris-29-5-million-guaranteed/>.

percent);<sup>445</sup> safety Quintin Mikell and the St. Louis Rams agreed to a four-year deal worth \$27 million with \$14 million guaranteed (52 percent);<sup>446</sup> and linebacker Jon Beason and the Carolina Panthers agreed to a five-year deal worth \$50 million with \$25 million guaranteed (50 percent).<sup>447</sup> Veteran contracts with greater than 50 percent of compensation guaranteed are rare, but increasingly common, in the NFL.

#### F. *Commissioner Discipline*

Perhaps the most memorable piece of Commissioner Goodell's legacy will be his strict enforcement of a personal conduct policy for Players as well as Club employees. The 2006 CBA permitted the Commissioner to fine or suspend a player for "conduct detrimental to the integrity of, or public confidence in, the game of professional football."<sup>448</sup> There were no limitations placed on the Commissioner's disciplinary authority. Goodell became Commissioner in August 2006—shortly after the 2006 CBA's ratification. Commissioner Goodell proceeded to enforce a personal conduct policy in ways never previously imagined.<sup>449</sup>

Since Goodell became Commissioner, the following players have all been given suspensions ranging from six games to a full season or more for various types of illegal and inappropriate conduct: Michael Vick, Adam "Pacman" Jones, Tank Johnson, Chris Henry, Donte Stallworth, Ricky Manning, Joey Porter, Plaxico Burress, and Ben Roethlisberger.<sup>450</sup> Consequently, it was anticipated that the Players

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<sup>445</sup> Mike Florio, *Tamba Hali, Chiefs Do a Five Year Deal*, PROFOOTBALLTALK (Aug. 3, 2011, 11:28 PM), <http://profootballtalk.nbcsports.com/2011/08/03/tamba-hali-chiefs-do-a-five-year-deal/>.

<sup>446</sup> Clifton Brown, *Quintin Mikell Leaving Eagles to Join Rams*, SPORTINGNEWS (July 26, 2011, 9:51 PM), <http://aol.sportingnews.com/nfl/story/2011-07-26/quintin-mikell-leaving-eagles-to-join-rams>.

<sup>447</sup> Mike Florio, *Panthers Lock Up Jon Beason*, PROFOOTBALLTALK (July 28, 2011, 11:07 PM), <http://profootballtalk.nbcsports.com/2011/07/28/panthers-lock-up-jon-beason/>.

<sup>448</sup> 2006 CBA, *supra* note 12, at art. XI § 1(a).

<sup>449</sup> See Marc Edelman, *Speech: A Different Look at Compliance in Professional Sports: Why the NFL Personal Conduct Policy Might Be More Illegal Than the Very Conduct It Seeks to Regulate*, 7 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 89 (2011).

<sup>450</sup> See D. Orlando Ledbetter, *QB Penalty 'Unprecedented'*, ATLANTA J.-CONST., Apr. 22, 2010, at C1.

would attempt to reign in Commissioner Goodell's unchecked disciplinary authority in the 2011 CBA.<sup>451</sup>

The 2011 CBA, however, makes almost no change to the Commissioner's disciplinary authority.<sup>452</sup> Commissioner Goodell made clear that retaining full control over disciplinary matters was an important point for him and the NFL successfully retained that control in the 2011 CBA.<sup>453</sup>

The only positive change for the Players concerning Commissioner discipline is the amount of imposed fines. The 2011 CBA permits a player to assert as a defense that the fine "should be reduced because it is excessive when compared to the player's expected earnings for the season in question."<sup>454</sup> A fine may be reduced to 25 percent of one week of a player's salary for a first offense, and 50 percent of a player's weekly salary for a second offense.<sup>455</sup>

This possible change in the fine schedule was brought to light by Minnesota Vikings linebacker Erin Henderson during the 2010 preseason. Henderson expected a fine after throwing a ball into the stands following a fumble recovery for a touchdown.<sup>456</sup> Henderson, an undrafted free agent, was entering his third-year in the league and likely making the league minimum of \$475,000, or about \$27,941 per week.<sup>457</sup> The NFL ultimately fined Henderson \$5000<sup>458</sup>—about 18 percent of his weekly pay. The \$5000 fine clearly meant significantly more to Henderson than some of his multimillionaire teammates and

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<sup>451</sup> See Joshua A. Reece, *Throwing the Red Flag on the Commissioner: How Independent Arbitrators Can Fit Into the NFL's Off-Field Discipline Procedures Under the NFL Collective Bargaining Agreement*, 45 VAL. U. L. REV. 359, 413 (2010); Gregg Rosenthal, *Union Faces Dilemma on Personal Conduct Policy*, PROFOOTBALLTALK.COM (Apr. 30, 2010, 9:04 AM), <http://profootballtalk.nbcsports.com/2010/04/30/union-faces-dilemma-on-personal-conduct-policy/>.

<sup>452</sup> Compare 2006 CBA, *supra* note 12, at art. XI, with 2011 CBA, *supra* note 324, at art. XLVI.

<sup>453</sup> Mike Florio, *Report: Goodell Will Retain Full Control over Conduct Policy Under New CBA*, PROFOOTBALLTALK (Aug. 4, 2011, 10:04 AM), <http://profootballtalk.nbcsports.com/2011/08/04/report-goodell-will-retain-full-control-over-conduct-policy-under-new-cba/>.

<sup>454</sup> 2011 CBA, *supra* note 324, at art. XLVI § 1(d).

<sup>455</sup> *Id.* at art. XLVI § 1(d).

<sup>456</sup> Mike Florio, *Erin Henderson's Bright Idea: Make Fines a Percentage of Salaries*, PROFOOTBALLTALK (Sept. 3, 2010, 4:21 PM), <http://profootballtalk.nbcsports.com/2010/09/03/erin-hendersons-bright-idea-make-fines-a-percentage-of-salaries/>.

<sup>457</sup> See 2006 CBA, *supra* note 12, at art. XXXVIII § 6(a).

<sup>458</sup> Access Vikings, *Childress Explains Change in Strategy*, STAR TRIBUNE (Minneapolis) (Sept. 10, 2010), <http://www.startribune.com/printblog/?id=102652484>.

opponents. For example, a week earlier Detroit Lions defensive tackle Ndamukong Suh was fined \$7500 one month after signing a contract guaranteeing him \$40 million.<sup>459</sup> The 2011 CBA will at least help to bring some proportional fairness to the fines levied on players.

### G. *Drug Testing*

The NFL and NFLPA have jointly administered two long-standing policies concerning drug use: (1) the Policy and Program on Substances of Abuse; and (2) the Policy on Anabolic Steroids and Related Substances. Neither is an explicit part of the 2011 CBA, but both are incorporated by reference.<sup>460</sup>

The major change in the 2011 CBA is that the Players agreed to blood testing for human growth hormone (“HGH”).<sup>461</sup> The testing includes both annual and random blood testing.<sup>462</sup> The NFL and NFLPA disputed the specifics of the testing, and none occurred, during the 2011 season,<sup>463</sup> but ultimately the NFL became the first major North American professional sports league to obtain permission for blood testing of its athletes.<sup>464</sup> The number of players in the NFL taking HGH is uncertain,<sup>465</sup> but hopefully dwindling as a result of this change in policy.

The NFL and NFLPA also agreed to reduced suspensions for four players originally suspended in 2008 but permitted to continue playing by court order. Minnesota Vikings defensive tackles Pat Williams and Kevin Williams and New Orleans Saints defensive ends Will Smith and Charles Grant were suspended prior to the 2008 season after

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<sup>459</sup> Florio, *supra* note 456.

<sup>460</sup> See 2011 CBA, *supra* note 324, at art. XXXIX § 7(b).

<sup>461</sup> *Id.*

<sup>462</sup> *Id.*

<sup>463</sup> See Marke Maske, *Goodell: NFL hopes to implement blood testing next season*, WASH. POST. (Jan. 15, 2011), [http://www.washingtonpost.com/sports/redskins/goodell-nfl-hopes-to-implement-blood-testing-next-season/2012/01/15/gIQA9bB1P\\_story.html](http://www.washingtonpost.com/sports/redskins/goodell-nfl-hopes-to-implement-blood-testing-next-season/2012/01/15/gIQA9bB1P_story.html).

<sup>464</sup> Major League Baseball and the Major League Baseball Players Association reached a new collective bargaining agreement in November 2011, that included blood testing for HGH beginning in the spring of 2012. See Amy Shipley, Mark Maske, *Banning HGH comes with a catch*, WASH. POST, Dec. 4, 2011, at D03.

<sup>465</sup> Mike Florio, *Jeff Saturday on HGH Prevalence: “I Don’t Think Anybody Truly Knows”*, PROFOOTBALLTALK (Aug. 12, 2011, 4:06 PM), <http://profootballtalk.nbcsports.com/2011/08/12/saturday-on-hgh-prevalence-i-dont-think-anybody-truly-knows/>.

testing positive for bumetanide, a banned diuretic.<sup>466</sup> The players consumed bumetanide through a product known as Star Caps—which did not list bumetanide as one of its ingredients.<sup>467</sup>

The Williamses sued in Minnesota state court, alleging that the NFL had violated its fiduciary duties to the players by not informing them that Star Caps contained a banned substance, even though they knew players would continue to take Star Caps and test positive.<sup>468</sup>

The Williamses successfully obtained a temporary restraining order blocking the suspensions pending the outcome of the lawsuit.<sup>469</sup> Through a twisted procedural history—which included the case being removed to federal court, consolidated, and then remanded—the Williamses added claims that the NFL violated the Minnesota Drug and Alcohol Testing in the Workplace Act (DATWA).<sup>470</sup> DATWA requires employers to notify employees of a positive drug test within three days of the positive test.<sup>471</sup>

The NFL admittedly violated DATWA's three-day notice policy but argued that the Williamses' Minnesota state law claims were preempted by the collective bargaining agreement pursuant to the Labor Management Relations Act.<sup>472</sup> The District Court of Minnesota rejected that argument and the Eighth Circuit affirmed.<sup>473</sup>

On remand, the Minnesota trial court found that the NFL violated DATWA but refused to issue a permanent injunction against the suspensions because the players were not harmed by the DATWA violation.<sup>474</sup> The Court of Appeals of Minnesota affirmed on different grounds<sup>475</sup> and the Minnesota Supreme Court denied review in April 2008.<sup>476</sup>

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<sup>466</sup> *Williams v. Nat'l Football League*, No. 27-CV-08-29778, 2010 WL 1793130 (D. Minn. May 6, 2010), *aff'd* 794 N.W.2d 391 (Minn. Ct. App. 2011).

<sup>467</sup> *Id.*

<sup>468</sup> *Id.*

<sup>469</sup> *See Williams v. Nat'l Football League*, 582 F.3d 863, 872 (8th Cir. 2009).

<sup>470</sup> *Williams*, 794 N.W.2d at 394 (describing the procedural history).

<sup>471</sup> MINN. STAT. ANN. §181.953, subd. 7. (2011).

<sup>472</sup> *Williams*, 794 N.W.2d at 394.

<sup>473</sup> *Williams*, 582 F.3d at 868.

<sup>474</sup> *Williams*, 2010 WL 1793130, at \*15.

<sup>475</sup> *Williams*, 794 N.W.2d at 396.

<sup>476</sup> Michael David Smith, *NFL Declares Victory in StarCaps Case*, PROFOOTBALLTALK (Apr. 28, 2011, 1:01 PM), <http://profootballtalk.nbcsports.com/2011/04/28/nfl-declares-victory-in-starcaps-case/>.

The litigation lasted two-and-a-half years and through three NFL seasons. In the meantime, the NFL could not suspend the Williamses and chose not to suspend Smith and Grant while the Williamses' litigation was pending. The NFL was free to impose four-game suspensions as mandated by the steroid policy following the Minnesota Supreme Court's denial of review. However, the NFL, through negotiations with the NFLPA, agreed to suspend the players for only two games.<sup>477</sup> The NFLPA likely would not have had any leverage to negotiate shorter suspensions had there not been ongoing CBA negotiations. The suspensions for Pat Williams and Charles Grant were mooted as neither veteran signed with a team for the 2011 season.

#### H. *Court Oversight*

The 2006 CBA was part of a series of extensions of the modern CBA agreed to in 1993. As discussed earlier, the 1993 CBA arose out of the *White* class-action antitrust lawsuit brought against NFL Clubs. The SSA logically settled all matters related to the *White* lawsuit. These issues—affecting player compensation and free agency—were clearly the most important parts of the 1993 CBA. The 1993 CBA incorporated the SSA, and Judge Doty and the District Court of Minnesota retained jurisdiction over the SSA. Pursuant to Fed. R. Civ. P. 53, Judge Doty appointed a Special Master to enforce the CBA terms incorporating the CBA. Specifically, the Special Master retained oversight over the following articles of the CBA:<sup>478</sup>

- Art. I: Definitions;
- Art. XIV: NFL Player Contract;
- Art. XVI: College Draft;
- Art. XVII: Entering Player Pool;
- Art. XVIII: Veterans with Less than Three Accrued Seasons;
- Art. XIX: Veteran Free Agency;
- Art. XX: Franchise and Transition Players;
- Ar. XXI: Final Eight Plan;
- Art. XXIV: Guaranteed League-Wide Salary, Salary Cap, & Minimum Team Salary;

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<sup>477</sup> Mike Florio, *Starcaps Suspensions Finally Are Finalized*, PROFOOTBALLTALK (Sept. 2, 2011, 5:07 PM), <http://profootballtalk.nbcsports.com/2011/09/02/starcaps-suspensions-finally-are-finalized/>.

<sup>478</sup> 2006 CBA, *supra* note 12, at art. XXVI § 1.

Art. XXV: Enforcement of the Salary Cap and Entering Player Pool;  
Art. XXVI: Special Master;  
Art. XXVII: Impartial Arbitrator;  
Art. XXVIII: Anti-Collusion;  
Art. XXIX: Certifications;  
Art. XXX: Consultation and Information Sharing;  
Art. XXXVIII-A: Minimum Salary Benefit;  
Art. XXXVIII-B: Performance-Based Pool;  
Art. LVI: Final League Year;  
Art. LVII: Mutual Reservation of Rights: Labor Exemption; and  
Art. LVIII: Duration of Agreement.

University of Pennsylvania law professor Stephen Burbank—an admitted non-football fan—was chosen as the third Special Master in November 2002.<sup>479</sup> The parties retained the right to seek the District Court’s review of the Special Master’s rulings.<sup>480</sup> On appeal, the parties agreed that the District Court would accept the Special Master’s findings of fact unless clearly erroneous and the Special Master’s recommendations of relief unless based upon clearly erroneous findings of fact, incorrect application of the law, or abuse of discretion.<sup>481</sup>

A perception developed over the years that Judge Doty was biased in favor of the Players. Doty granted the Players major victories in the *Lelie* and *Vick* cases, including reversing the bulk of Special Master Burbank’s decision in *Vick*. The NFL moved for Judge Doty to recuse himself from the *Vick* case because of an alleged bias.<sup>482</sup> Judge Doty denied the NFL’s motion and the Eighth Circuit affirmed that decision in the fall of 2009.<sup>483</sup>

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<sup>479</sup> Don Steinberg, ‘Special Master’ Says He’s a Fan of the Other Eagles, PHILA. INQUIRER (Mar. 13, 2004), [http://articles.philly.com/2004-03-13/sports/25385892\\_1\\_owens-matter-stephen-b-burbank-special-master](http://articles.philly.com/2004-03-13/sports/25385892_1_owens-matter-stephen-b-burbank-special-master). John Feerick was the original Special Master. *NFL Has Labor Agreement, but Salary Cap Stirs Debate*, ASSOCIATED PRESS, Oct. 16, 1994, available at 1994 WLNR 1991229. Feerick was replaced by Jack Friedenthal in 1996. Dave Sell, *Schuler’s Salary Cap Status Requires Further Review*, WASH. POST, Aug. 24, 1996, available at 1996 WLNR 6488812.

<sup>480</sup> See FED. R. CIV. P. 53(f); see also 2006 CBA, *supra* note 12, at art. XXVI § 1.

<sup>481</sup> 2006 CBA, *supra* note 12, at art. XXVI § 2(b).

<sup>482</sup> *White v. Nat’l Football League*, No. 4-92-906(DSD), 2008 WL 1827423, at \*1 (D. Minn. Apr. 22, 2008); see also *Judge Denies NFL Motion to Take Back Vick \$16.5 Million in Vick Bonuses*, ESPN (Apr. 22, 2008, 7:18 PM), <http://sports.espn.go.com/nfl/news/story?id=3361514>.

<sup>483</sup> *White v. Nat’l Football League*, 585 F.3d 1129 (8th Cir. 2009); see also Gregg

The 2011 CBA removes a Special Master subject to the jurisdiction of Judge Doty or any district court. Instead, the parties agreed to a “System Arbitrator,”<sup>484</sup> whose decisions are subject to the review of an Appeals Panel.<sup>485</sup> The System Arbitrator has exclusive jurisdiction over the following Articles of the 2011 CBA:

- Art. 1: Definitions;
- Art. 4: NFL Player Contract;
- Art. 6: College Draft;
- Art. 7: Rookie Compensation and Rookie Compensation Pool;
- Art. 8: Veterans with Less than Three Accrued Seasons;
- Art. 9: Veteran Free Agency;
- Art. 10: Franchise and Transition Players;
- Art. 11: Transition Rules for the 2011 League Year;
- Art. 12: Revenue Accounting and Calculation of the Salary Cap;
- Art. 13: Salary Cap Accounting Rules;
- Art. 14: Enforcement of the Salary Cap and Rookie Compensation Pool;
- Art. 15: System Arbitrator;
- Art. 16: Impartial Arbitrator;
- Art. 17: Anti-Collusion;
- Art. 18: Certifications;
- Art. 19: Consultation and Information Sharing;
- Art. 26: Salaries;
- Art. 27: Minimum Salary Benefit;
- Art. 28: Performance-Based Pool;
- Art. 31: Additional Regular Season Games;
- Art. 68: Mutual Reservation of Rights: Labor Exemption;
- Art. 69: Duration of Agreement; and
- Art. 70: Governing Law and Principles.

The Articles over which the System Arbitrator has jurisdiction are nearly the exact same as those governed by the Special Master. The only substantive Articles added to the System Arbitrator’s jurisdiction

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Rosenthal, *Appeals Court Refuses League’s Request to Replace Judge Doty*, PROFOOTBALLTALK (Nov. 10, 2009, 1:35 PM), <http://profootballtalk.nbcsports.com/2009/11/10/appeals-court-refuses-leagues-request-to-replace-judge-doty/>.

<sup>484</sup> 2011 CBA, *supra* note 324, at art. XV.

<sup>485</sup> *Id.* § 7.

are Art. 31: Additional Regular Season Games; and Art. 70: Governing Law and Principles.

It is unknown whether Professor Burbank will be retained as the System Arbitrator. Likewise, the members of the Appeals Panel are still to be determined. Nevertheless, the NFL successfully removed interpretations and decisions concerning the most important aspects of the CBA from the jurisdiction of Judge Doty or any other district court that might have retained jurisdiction over the Players' antitrust claims.

### I. *Retiree Benefits*

The physical costs of an NFL career have gained significant attention in recent years. Consequently, the NFL and the NFLPA made it a priority to provide much-needed benefits to retired and future retired players in the 2011 CBA. The 2011 CBA created a Legacy Benefit Fund to provide benefits to players who played prior to the 1993 season.<sup>486</sup> The NFL and its Clubs agreed to pay \$620 million into the Legacy Fund over the ten-year life of the CBA.

The 2011 CBA also created an NFL Player Disability Benefit,<sup>487</sup> a Long Term Care Insurance Plan,<sup>488</sup> a Former Player Life Improvement Plan,<sup>489</sup> and a Neuro-Cognitive Disability Benefit.<sup>490</sup> The NFL Player Disability Benefit provides a benefit of up to \$250,000 depending on the player's level of disability.<sup>491</sup> The Former Player Life Improvement Plan permits qualifying retired players not otherwise covered by health insurance to receive up to \$250,000 in medical costs.<sup>492</sup> Lastly, the Neuro-Cognitive Disability Benefit permits qualifying retired players to receive no less than \$3000 per month for a maximum of 180 months.<sup>493</sup>

### J. *Other Salary, Salary Cap and Contract Rules*

One of the seemingly rare benefits the Players obtained in the 2011 CBA is significantly increased minimum salaries. During the 2010

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<sup>486</sup> *Id.* § 1.

<sup>487</sup> *Id.* at art. LXI.

<sup>488</sup> *Id.* at art. LXII.

<sup>489</sup> *Id.* at art. LXIV.

<sup>490</sup> *Id.* at art. LXV.

<sup>491</sup> *Id.* at art. LXI § 3.

<sup>492</sup> *Id.* at art. LXIV §1(c)(i).

<sup>493</sup> *Id.* at art. LXV § 3(a)(i).

season, a rookie's minimum salary was \$320,000.<sup>494</sup> The 2011 CBA raises a rookie's salary for the 2011 season to \$375,000,<sup>495</sup> a 17 percent increase. The salary increases are important because nearly half of the Players earn the league minimum.<sup>496</sup>

Although the increased minimum salaries are beneficial to rookies, new limits were placed on signing bonuses for undrafted rookies. Clubs are now limited to a total of \$75,000 in signing bonuses to be paid to undrafted rookies, an amount to increase annually with the Rookie Compensation Pool.<sup>497</sup> Undrafted players were previously able to determine which Clubs were seriously interested in having them as a member of the Club by the signing bonus being offered.

Clubs' interests are now less clear as a result of the cap on signing bonuses to undrafted players. As a result, undrafted rookies might not have the same chances to establish themselves and stay in the NFL as they did previously.<sup>498</sup>

Rookie contracts previously could not be renegotiated until after the player's second season.<sup>499</sup> Consequently, players had to wait at least until after their second year to consider holding out for purposes of obtaining a new contract. Some Clubs—notably the Philadelphia Eagles—renegotiated rookie contracts after the second year believing they could negotiate a long-term deal at a lower salary than if the player were closer to free agency.<sup>500</sup> This strategy, although potentially cost-saving, also invited young players to demand higher salaries, whether privately or in the media, based on limited credentials. The 2011 CBA has further limited the leverage of rookies who have

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<sup>494</sup> 2006 CBA, *supra* note 12, at art. XXXVIII § 6.

<sup>495</sup> 2011 CBA, *supra* note 324, at art. XXVI § 1.

<sup>496</sup> Gregg Rosenthal, *Winners, Losers from the NFL Lockout*, PROFOOTBALLTALK (July 25, 2011, 3:15 PM), <http://profootballtalk.nbcsports.com/2011/07/25/winners-losers-from-the-nfl-lockout/>.

<sup>497</sup> 2011 CBA, *supra* note 324, at art. VII § 1(i).

<sup>498</sup> Mike Florio, *Undrafted Players Get Screwed in the New Deal*, PROFOOTBALLTALK (July 25, 2011, 3:48 PM), <http://profootballtalk.nbcsports.com/2011/07/25/undrafted-players-get-screwed-in-the-new-deal/>.

<sup>499</sup> 2006 CBA, *supra* note 12, at art. XVII § 4(i).

<sup>500</sup> Greg Rosenthal, *New CBA Limits Early Renegotiated Contracts*, PROFOOTBALLTALK (July 25, 2011, 10:26 PM), <http://profootballtalk.nbcsports.com/2011/07/25/new-cba-limits-early-renegotiated-contracts/>.

outperformed their contracts by prohibiting renegotiation of rookie contracts until after a player's third season.<sup>501</sup>

The NFL Salary Cap has long been known as a "hard cap" under the assumption that there are no ways for a Club to exceed the Salary Cap.<sup>502</sup> In reality, the NFL Salary Cap does permit for certain exceptions for veterans playing for the league minimum.<sup>503</sup> Also, each Club's Salary Cap is uniquely based upon whether certain incentives were earned by the Club's players in the previous season.<sup>504</sup>

The 2011 CBA provides Clubs with further flexibility by permitting Clubs to carry over Salary Cap room from one year to the next.<sup>505</sup> The 2011 CBA does not limit the amount a Club may carry over. However, the carry-over amount will be practically limited by the requirement that each Club spend at least 89 percent of the Salary Cap in cash for each four-year period from 2013–2016 and 2017–2020.<sup>506</sup> Nevertheless, Clubs may be more strategic in their spending plans and may target specific years for success by signing better players as a result of carried over Salary Cap room.

#### K. *CBA Duration*

The 2011 CBA is a ten-year agreement that runs through the 2020 League Year.<sup>507</sup> This is the longest CBA in the history of the Big Four.<sup>508</sup> Furthermore, there are no opt-out provisions. In contrast, the 2006 CBA ran through 2012 but permitted the NFLPA or the NFL to opt out of the CBA and terminate the 2011 and/or 2012 League Years.<sup>509</sup> Of course, the NFL exercised its option to terminate the 2011 and 2012 League Years.

The NFL enjoyed relative labor peace from 1993 until the 2011 CBA. During that time, the CBA was extended in 1998 and 2001

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<sup>501</sup> 2011 CBA, *supra* note 324, at art. VII § 3(k)(i).

<sup>502</sup> In contrast, the NBA is known for having a "soft" salary cap, which includes several contract types and structures that are "exceptions" and do not count against the salary cap.

<sup>503</sup> See 2006 CBA, *supra* note 12, at art. XXXVIII-A; 2011 CBA, *supra* note 324, at art. XXVII.

<sup>504</sup> See 2006 CBA, *supra* note 12, at art. XXIV § 7(c)(ii–iii); 2011 CBA, *supra* note 324, at art. XII § 6(c)(ii–iii).

<sup>505</sup> 2011 CBA, *supra* note 324, at art. XII § 6(b)(v).

<sup>506</sup> *Id.* at art. XII § 9(a).

<sup>507</sup> *Id.* at art. LXIX § 1.

<sup>508</sup> Wong, *supra* note 1, at Exhibits 11.3–11.6.

<sup>509</sup> 2006 CBA, *supra* note 12, at art. LVIII §§ 2–3(a)–(b).

without the CBA expiring.<sup>510</sup> The NFL and NFLPA's ability to extend the CBA without much controversy can, in part, be attributed to the existence of "poison pills" in the previous CBAs. The 2006 CBA and its predecessors included provisions that were meant to incentivize each side to extend the CBA. The NFL was incentivized to extend the CBA because the Final League Year of a CBA was agreed to be played without a Salary Cap.<sup>511</sup> Players believed this would lead to increased salaries in the Final League Year of any CBA. On the other hand, players were not eligible for unrestricted free agency in the Final League Year unless they had six years of experience<sup>512</sup> as opposed to four years in a normal League Year.<sup>513</sup>

The 2010 League Year did not result in the type of spending bonanza for which the Players had hoped. Although there was no Salary Cap, there was also not a salary floor.<sup>514</sup> Consequently, during the 2010 season, several Clubs spent well below what they would have been required to had there been a Salary Cap.<sup>515</sup> For example, the Tampa Bay Buccaneers' player payroll was only about \$80.5 million—nearly \$30 million below the salary floor in the 2009 League Year.<sup>516</sup>

The 2011 CBA does not include these poison pills. Ultimately, the poison pills seemed to favor the Clubs over the Players as owners enjoyed the ability to control players through their first six years of service. In general, the Uncapped Year did not provide the type of unwanted scenario that was intended to incentivize the NFL and the Players to extend an existing CBA. As a result, it seems that the parties determined the poison pills were no longer necessary.

#### L. *Practice Limitations and Season Duration*

Perhaps the Players' biggest gains concerned preventing and rectifying the wear and tear of an NFL career on players' bodies. The

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<sup>510</sup> Wong, *supra* note 1, at Exhibit 11.3.

<sup>511</sup> 2006 CBA, *supra* note 12, at art. LVI § 1.

<sup>512</sup> *Id.* at art. LVI § 2.

<sup>513</sup> *Id.* at art. XIX § 1(a).

<sup>514</sup> *Id.* at art. XXIV § 5(a) (providing that Minimum Team Salary exists only in Capped Years).

<sup>515</sup> Gregg Rosenthal, *With No Salary Floor, Bucs, Chiefs, Jags, Keep Millions in Their Pockets*, PROFOOTBALLTALK (Sept. 18, 2010, 12:24 PM), <http://profootballtalk.nbcsports.com/2010/09/18/with-no-salary-floor-bucs-chiefs-jags-keep-million-in-their-pockets/>.

<sup>516</sup> *Id.*

NFL made known its desire to extend the NFL regular season from 16 to 18 games.<sup>517</sup> However, the Players were adamant not to add additional games that would almost certainly shorten careers. The 18-game season never became a major issue during the negotiations and the 2011 CBA specifically states that the NFL may only add games to the regular season “with NFLPA approval, which may be withheld at the NFLPA’s sole discretion.”<sup>518</sup>

Offseason workouts were also significantly reduced. Clubs may only hold offseason workouts for a total of nine weeks.<sup>519</sup> Previously, Clubs could conduct offseason workout programs over a 14-week period.<sup>520</sup> The new offseason program is broken down into three Phases: Phase One is two weeks long and consists solely of strength and conditioning work;<sup>521</sup> Phase Two is three weeks long, includes individual player drills but prohibits live contact and helmets;<sup>522</sup> and Phase Three is four weeks long, permits helmets but no pads, and still prohibits live contact.<sup>523</sup> Clubs are limited to holding one mandatory veteran minicamp not to exceed three days in length during Phase Three.<sup>524</sup>

Furthermore, veterans—other than quarterbacks and injured players—cannot be required to report to preseason training camp more than 15 days prior to the first preseason game.<sup>525</sup> During training camp, Clubs are limited to one padded practice per day for a maximum of three hours per day.<sup>526</sup> In addition, Clubs may only hold 14 total padded practices during the regular season and one padded practice per week in the postseason.<sup>527</sup>

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<sup>517</sup> Michael David Smith, *Animosity over 18-game Season Becomes a Distant Memory*, PROFOOTBALLTALK (July 16, 2011, 1:23 PM), <http://profootballtalk.nbcsports.com/2011/07/16/animosity-over-18-game-season-becomes-a-distant-memory/>.

<sup>518</sup> 2011 CBA, *supra* note 324, at art. XXXI.

<sup>519</sup> *Id.* at art. XXI § 2(a).

<sup>520</sup> 2006 CBA, *supra* note 12, at art. XXXV § 2(a).

<sup>521</sup> 2011 CBA, *supra* note 324, at art. XXI § 2(b)(i).

<sup>522</sup> *Id.* at art. XXI § 2(b)(ii).

<sup>523</sup> *Id.* at art. XXI § 2(b)(iii).

<sup>524</sup> *Id.* at art. XXII § 2.

<sup>525</sup> *Id.* at art. XXIII § 5.

<sup>526</sup> *Id.* § 6(a).

<sup>527</sup> *Id.* at art. XXIV § 1(a)–(b).

The 2011 CBA also includes requirements that all minicamp, training camp, and regular season practices be filmed.<sup>528</sup> This requirement seems to address constant accusations that Clubs routinely violated previous practice limitations.<sup>529</sup> The 2011 CBA also adds significant fines for coaches and Clubs that break the rules: coaches will be fined \$100,000 for a first offense and \$250,000 for a second; Clubs will be fined \$250,000 for a first violation and \$500,000 for a second.<sup>530</sup>

## VI. CONCLUSION

The NFL has managed to become by far the most popular sports league in the United States despite an extensive legal history that has often threatened play. The 2011 CBA was reached despite the most recent incarnations of that history. The 2011 CBA should provide the NFL, Players, and fans with ten years of labor peace. However, many complex legal issues spanning several decades of review in football and labor relations in sports generally remain unresolved. The negotiations leading up to—and the eventual successful negotiation of—the 2011 CBA demonstrated that both the Clubs and Players earn significant amounts of money from the business of football. Nevertheless, the 2011 CBA appears to strongly favor the Clubs when compared to the 2006 CBA. Time will tell whether the 2011 CBA is a fair agreement that can be extended without significant rancor, or if the NFL's extensive legal history will only be expanded in 2020.

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<sup>528</sup> *Id.* at art. XXII § 8; *id.* at art. XXIII § 10; *id.* at art. XXIV § 4.

<sup>529</sup> *Lions Forfeit OTA Days Too*, PROFOOTBALLTALK (June 17, 2010, 12:27 PM), <http://profootballtalk.nbcsports.com/2010/06/17/lions-forfeit-ota-days-too/>; Mike Florio, *Ravens Dispute Claim of Increased Practices Length During Playoffs*, PROFOOTBALLTALK (Feb. 7, 2011, 8:24 PM), <http://profootballtalk.nbcsports.com/2011/02/07/ravens-dispute-claim-of-increased-practice-length-during-playoffs/>.

<sup>530</sup> 2011 CBA, *supra* note 324, at art. XXI § 8(d)(i).

	Session 1: Friday (2/18/11) <sup>531</sup>	Session 2: Saturday (2/19/11) <sup>532</sup>	Session 3: Sunday (2/20/11) <sup>533</sup>	Session 4: Monday (2/21/11) <sup>534</sup>	Session 5: Tuesday (2/22/11) <sup>535</sup>	Session 6: Wednesday (2/23/11) <sup>536</sup>	Session 7: Thursday (2/24/11) <sup>537</sup>	Session 8: Tuesday (3/1/11) <sup>538</sup>
<b>NFL</b>								
Roger Goodell	X	X	X	X	X	X	X	X
Jeffrey Pash	X	X	X	X	X	X	X	X
Bob Batterman	X	X	X	X	X	X	X	X
<b>Owners:</b>								
John Mara								X
Jerry Richardson								
Pat Bowlen								
Art Rooney II								
Jerry Jones								
Clark Hunt								
Robert Kraft								
Dean Spanos								
Mike Brown								
Mark Murphy								
<b>Executives:</b>								
Bruce Allen					X			X
Rich McKay								X
Joe Banner								
<b>NFLPA</b>								
DeMaurice Smith	X	X	X	X	X	X	X	X
Richard Berthelsen	X	X	X	X	X	X	X	X
Jeffrey Kessler		X	X	X	X			
<b>Current Players:</b>								
Kevin Mawae								
Drew Brees								
Domonique Foxworth					X			
Tony Richardson		X						
Jeff Saturday		X	X			X	X	X
Charlie Batch	X	X	X	X				X
Scott Fujita			X	X				
Hunter Hillenmeyer				X	X			
Brian Dawkins						X	X	X
Mike Vrabel						X	X	
Brian Waters						X	X	
Chester Pitts								X

<sup>531</sup> Mike Florio, *Day One of Mediated Talks Ends with Silence*, PROFOOTBALLTALK (Feb. 18, 2011, 6:37 PM), <http://profootballtalk.nbcsports.com/2011/02/18/day-one-of-mediated-talks-ends-with-silence/>.

<sup>532</sup> Albert Breer, *League, Union Meet in D.C. for Second Day of Labor Talks*, NFL.COM (Feb. 19, 2011, 2:39 PM), <http://www.nfl.com/news/story/09000d5d81e631bf/article/league-union-meet-in-dc-for-second-day-of-labor-talks>.

<sup>533</sup> Associated Press, *NFL, Union Meet for 3<sup>rd</sup> Straight Day*, ESPN (Feb. 21, 2011, 10:18 AM), <http://sports.espn.go.com/nfl/news/story?id=6141304>.

<sup>534</sup> Albert Breer, *NFL, NFLPA Reps Meet for Fourth Day of Mediated Discussions*, NFL.COM (Feb. 21, 2011, 9:12 AM), <http://www.nfl.com/news/story/09000d5d81e67c0b/article/nfl-nflpa-reps-meet-for-fourth-day-of-mediated-discussions>.

<sup>535</sup> Albert Breer, *One Day to Go in Mediated Labor Talks Between NFL, Union*, NFL.COM (Feb. 24, 2011, 11:38 AM), <http://www.nfl.com/news/story/09000d5d81e6ff8c/article/one-day-to-go-in-mediated-labor-talks-between-nfl-union>.

<sup>536</sup> 2011 WLNR 4284116.

<sup>537</sup> Florio, *supra* note 129.

Ben Leber								X
Jay Feely								X
Jake Scott								X
<b>Retired Players:</b>								
Pete Kendall	X	X	X	X				X
Jim McFarland	X							
Sean Morey		X	X	X	X	X		
Cornelius Bennett								X

	Session 9: Wednesday (3/2/11) <sup>539</sup>	Session 10: Thursday (3/3/11) <sup>540</sup>	Session 11: Friday (3/4/11) <sup>541</sup>	Session 12: Monday (3/7/11) <sup>542</sup>	Session 13: Tuesday (3/8/11) <sup>543</sup>	Session 14: Wednesday (3/9/11) <sup>544</sup>	Session 15: Thursday (3/10/11) <sup>545</sup>	Session 16: Friday (3/11/11) <sup>546</sup>
<b>NFL</b>								
Roger Goodell	X	X	X	X	X	X	X	X
Jeffrey Pash	X	X	X	X	X	X	X	X
Bob Batterman	X	X	X	X	X	X	X	X
<b>Owners:</b>								
John Mara	X	X		X	X	X	X	X
Jerry Richardson	X	X					X	X
Pat Bowlen	X	X					X	X
Art Rooney II	X	X				X	X	X
Jerry Jones	X	X					X	X
Clark Hunt	X	X			X	X	X	X
Robert Kraft	X	X						

<sup>538</sup> Albert Breer, *League, Union to Meet Again Wednesday After Six-hour Session*, NFL.COM (Mar. 1, 2011, 12:32 PM), <http://www.nfl.com/news/story/09000d5d81e8c973/article/league-union-to-meet-again-wednesday-after-sixhour-session>.

<sup>539</sup> Breer, *supra* note 137; Gregg Rosenthal, *NFL Ownership Joins Party Too*, PROFOOTBALLTALK (Mar. 2, 2011, 10:23 AM), <http://profootballtalk.nbcsports.com/2011/03/02/nfl-ownership-joins-the-party-too/>.

<sup>540</sup> Jason La Canfora, *League, Player's Union Agree to 24-hour Extension in Labor Talks*, NFL.COM (Mar. 3, 2011, 10:31 AM), <http://www.nfl.com/news/story/09000d5d81e95bf8/article/league-players-union-agree-to-24hour-extension-in-labor-talks>.

<sup>541</sup> Gary Mihoces, *NFL, Players Union Agree 7-day, CBA Extension; will Resume Talks*, USA TODAY (Mar. 4, 2011, 9:34 PM), <http://content.usatoday.com/communities/thehuddle/post/2011/03/nfl-labor-negotiations-mediation-owners-players-cba/1>.

<sup>542</sup> Breer, *supra* note 139.

<sup>543</sup> Information relating to which Players appeared during the Wednesday, March, 9, 2011 mediation session is unavailable.

<sup>544</sup> Breer, *supra* note 146.

<sup>545</sup> Daniel Kaplan, *NFL Labor Talks Continue as Ownership Contingent Arrives*, SPORTS BUS. DAILY (Mar. 10, 2011), <http://www.sportsbusinessdaily.com/Daily/Closing-Bell/2011/03/10/NFL-legal.aspx?hl=nfl%20nflpa&sc=0>.

<sup>546</sup> Arin Karimian, *NFL Players, Owners Convene Amid Friday Deadline*, USA TODAY (Mar. 11, 2011, 2:16 PM), <http://content.usatoday.com/communities/thehuddle/post/2011/03/nfl-cba-deadline-lockout-players-union-nflpa-owners-federal-mediation-labor-negotiations/1>.

Dean Spanos	X	X					X	X
Mike Brown	X	X					X	X
Mark Murphy	X	X					X	X
<b>Executives:</b>								
Bruce Allen		X			X	X	X	
Rich McKay					X			
Joe Banner							X	
<b>NFLPA</b>								
DeMaurice Smith	X	X	X	X	X	X	X	X
Richard Berthelsen	X	X	X	X	X	X	X	X
Jeffrey Kessler							X	X
<b>Current Players:</b>								
Kevin Mawae	X					X		X
Drew Brees	X	X						X
Domonique Foxworth	X	X	X	X	X		X	X
Tony Richardson	X	X		X	X			X
Jeff Saturday		X		X	X		X	X
Charlie Batch	X	X		X	X		X	X
Scott Fujita								X
Hunter Hillenmeyer								
Brian Dawkins	X						X	
Mike Vrabel	X			X	X			X
Brian Waters		X	X				X	X
Chester Pitts								
Ben Leber	X							
Jay Feely					X			
Jake Scott								
<b>Retired Players:</b>								
Pete Kendall		X		X	X		X	
Jim McFarland	X	X					X	
Sean Morey		X			X		X	X
Cornelius Bennett				X	X		X	