



## What if Kaepernick is Correct?: A Look at the Collusion Criteria in Professional Sports

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### I. INTRODUCTION

Winning isn't everything, it's the only thing. This adage is apropos for America's four major professional sports leagues today as team owners seem to increasingly care less about competition and more about cash flow, to the point that they appear willing to ostracize certain athletes from the game. That, at least, is the position of TIME 2017 Person of the Year Runner-Up and GQ 2017 Citizen of the Year, Colin Kaepernick.

In 2016, former San Francisco 49ers' ("49ers") quarterback Colin Kaepernick became a polarizing force not just in sports, but in society, when he knelt during the National Anthem in an effort to raise awareness about racial inequality and oppression.<sup>3</sup> After he opted out of his contract with the 49ers, Kaepernick and his representatives believed that he had strong enough statistics to warrant a team signing him during the 2017 National

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<sup>3</sup> See Demand for Arbitration, *Kaepernick v. Nat'l Football League* (2017) at 3 [hereinafter "Kaepernick Demand"].

Football League (“NFL”) off-season, but no one called. Kaepernick remained unsigned for the remainder of the 2017 NFL season and he claimed NFL owners colluded to blackball him from a professional roster.<sup>4</sup> On October 15, 2017, Kaepernick filed a grievance with the NFL Players Association (“NFLPA”), alleging that the all thirty-two NFL teams and their owners colluded against him in retaliation for his demonstration during the national anthem the previous year.<sup>5</sup>

Collusion at its core is collective action that restricts competition.<sup>6</sup> Under federal law, particularly the Sherman Anti-Trust Act (the “Sherman Act”), collusion is prohibited; however, because of labor exemptions, what constitutes collusive, prohibited behavior in specific sports leagues varies based on the league’s negotiated collective bargaining agreement (“CBA”).

This Article argues that the language in each of the major U.S. professional sports league’s CBAs should be amended, through negotiation and perhaps concessions made by players, to deter teams and their owners from restraining athletes from competing professionally if such misconduct is truly occurring. Part I uses the Federal Antitrust laws to illustrate how parties customarily prove collusion and demonstrates how the four major U.S. professional sports leagues have the authority to create their own rules and procedures through a collective bargaining effort. Part II analyzes and differentiates the procedure and criteria for proving collusion under each league’s CBA. Part III discusses the grievances players and players associations have filed alleging collusive behavior. Finally, Part IV describes the policy implications and issues with the current grievance structure in major U.S. professional sports.

## II. FEDERAL ANTITRUST LAW’S CONCERN WITH COLLUSION

Antitrust law has been the primary mechanism for regulating collusion for almost four hundred years. It is premised on the ideas of consumer welfare and competition, but it was not until the late 1800s that Congress enacted the Sherman Act as a “blueprint for the way commerce ought to be conducted in the United States.”<sup>7</sup> The Sherman Act prohibits unreasonable restraint on trade and monopolization.<sup>8</sup> Specifically, Section 1 prohibits “[e]very contract, combination . . . or conspiracy, in restraint of trade or

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Daniel I. Booker, *Antitrust and Employment*, 1996 A.B.A. SEC. ANTITRUST 11.

<sup>7</sup> Mark C. Anderson, *Self-Regulation and League Rules Under the Sherman Act*, 30 CAP. U. L. REV. 125, 127 (2002).

<sup>8</sup> *Id.*; see also 15 U.S.C. §§ 1–2 (2004).

commerce among the several states,” and applies only to concerted action that restrains trade.<sup>9</sup> Section 2, on the other hand, affords three distinct claims: monopolization, attempted monopolization, and conspiring to monopolize.<sup>10</sup> To establish a Section 1 violation of the Sherman Act, a party must prove two elements: (1) a conspiracy; and (2) an unreasonable restraint of trade.<sup>11</sup>

The terms “contract, combination . . . or conspiracy,” can be used interchangeably to describe the elements in an agreement between two or more parties to restrain trade.<sup>12</sup> Wholly unilateral conduct is permissible under Section 1; therefore, to prove that an agreement between two or more parties exists, “a plaintiff must demonstrate a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful agreement.”<sup>13</sup> Thus, the underlying question is whether the challenged conduct derives from independent decision or from an agreement.<sup>14</sup>

The Supreme Court has acknowledged that plaintiffs are oftentimes unable to establish an explicit agreement; hence, conspiracies can be proven by “inferences drawn from behavior of the alleged conspirators.”<sup>15</sup> Addressing the question of the standard of proof required to find antitrust conspiracy, the Court has held:

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<sup>9</sup> See Anderson, *supra* note 7, at 125–27; see also Gabriel Feldman, *Antitrust versus Labor Law in Professional Sports: Balancing the Scales After Brady v. NFL and Anthony v. NBA*, 45 U.C. DAVIS L. REV. 1221, 1235 (“The role of Section 1 . . . is to act as a gatekeeper, ferreting out anticompetitive conduct.”).

<sup>10</sup> See Anderson, *supra* note 7, at 125, 126 n.12.

<sup>11</sup> *Id.* While the judicial reach of the Sherman Act is broad, courts have held that it is only the unreasonable restraints that are prohibited under Section 1 of the Sherman Act. See *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 241 (1980). “Taken literally, the applicability of Section §1 . . . could be understood to cover every conceivable agreement, whether it be a group of competing firms fixing prices or a single firm’s chief executive telling her subordinate how to price their company’s product. But that it not what the statute means . . . Not every instance of cooperation between two people is a potential ‘contract, combination . . . , or conspiracy, in restraint of trade.’” *American Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 189–90 (2010); see also *Mackey v. Nat’l Football League*, 543 F.2d 606, 618 (8th Cir. 1976) (“The express language of the Sherman Act is broad enough to render illegal nearly every type of agreement between businessmen.”).

<sup>12</sup> See *Caldwell v. Am. Basketball Ass’n*, 825 F. Supp. 558, 566 (S.D.N.Y. 1993), *aff’d* 66 F. 3d 523 (2d Cir. 1995).

<sup>13</sup> *Id.* (quoting *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)).

<sup>14</sup> See *Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 553 (2007).

<sup>15</sup> *Id.* at 566; see also *United States v. Washington*, 586 F.2d 1147, 1153 (“By its nature conspiracy is conceived and carried out clandestinely, and direct evidence of the crime is rarely available”).

The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the [actors]. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the [conspirators] and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.<sup>16</sup>

Once a conspiracy is established, the reasonableness is then scrutinized under either the *per se* rule or the Rule of Reason.<sup>17</sup> There are some concerted activities that are so pernicious that they are illegal *per se*. The *per se* illegality rule categorically invalidates certain activities that are in their nature, character, and effect adverse to competition, and therefore illegal without any further inquiry.<sup>18</sup> Such activities include group boycotts and horizontal price-fixing.<sup>19</sup> Although businesses cannot evade analysis under the *per se* rule, in the context of professional sports, it is inappropriate to routinely apply *per se* illegality.<sup>20</sup> Therefore, the Rule of Reason is the general approach.<sup>21</sup>

Under the Rule of Reason, a court must determine a practice's anticompetitive and procompetitive purposes and effects using a totality of the circumstances approach.<sup>22</sup> This requires courts to look at the history and nature of the restraint, its effect, and the reason for its imposition, within the context of the specific industry.<sup>23</sup> If the court determines that the anticompetitive features outweigh the procompetitive features, the practice will be deemed unreasonable.<sup>24</sup>

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<sup>16</sup> *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984).

<sup>17</sup> *See Mariucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n*, 751 F.3d 368, 374 (5th Cir. 2014).

<sup>18</sup> *See Standard Oil Co. of New Jersey, v. United States*, 221 U.S. 1, 65 (1911); *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5 (1958) (“[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.”).

<sup>19</sup> *See, e.g., Klor's v. Broadway-Hale Stores*, 359 U.S. 207, 212 (1959).

<sup>20</sup> *See Mackey*, 543 F.2d at 619.

<sup>21</sup> *See e.g., id.; see also Laumann v. Nat'l Hockey League*, 56 F.Supp.3d 280 (S.D.N.Y. 2014) (applying the rule of reason test to alleged concerted activity by the NHL); *Nat'l Basketball Ass'n v. Williams*, 857 F.Supp. 1069 (S.D.N.Y. 1994), *aff'd* 45 F.3d 684 (2nd Cir. 1995); *see also John C. Weistart & Cym H. Lowell, The Law of Sports* 518 (1979).

<sup>22</sup> *See Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918).

<sup>23</sup> *See id.*

<sup>24</sup> *See id.; see also Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984).

“Unions by their very nature are combinations of individuals that seek to restrain an employer’s ability to deal with its employees on an individual basis. Strikes and boycotts, the most obvious form of union collective action, restrict the ability of individual employees to negotiate or deal with the employer.”<sup>25</sup> Although the Sherman Act was intended to regulate commercial activity, the Act in its original form would have prohibited concerted action of unions.<sup>26</sup>

Because the aim of antitrust law is to preserve competition, while the aim of labor law is to promote peace in labor management, there is an inherent conflict between antitrust and labor law.<sup>27</sup> In order to reconcile the tension among these two doctrines, the courts and Congress have promulgated two exemptions to antitrust law—the statutory labor exemption and the nonstatutory labor exemption.<sup>28</sup>

### A. *The Statutory Labor Exemption*

Read together, the Clayton Act and the Norris-LaGuardia Act create the statutory labor exemption. Enacted in 1914, the Clayton Act prescribes that individual labor is not interstate commerce and that labor unions are not in the purview of the Sherman Act.<sup>29</sup> It also restricts the courts’ injunctive powers in labor disputes.<sup>30</sup> The Supreme Court; however, has narrowly

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<sup>25</sup> Kieran M. Corcoran, *When Does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports*, 94 COLUM. L. REV. 1045, 1048 (1994).

<sup>26</sup> See *id.*

<sup>27</sup> See generally Anderson, *supra* note 7, at 127; Feldman, *supra* note 9, at 1227; see also *Wood v. Nat’l Basketball Ass’n*, 602 F. Supp. 525, 529 (S.D.N.Y. 1984) (“The aim of federal labor policy is to promote peace in labor management relations, not chaos and turmoil . . .”).

<sup>28</sup> See Anderson, *supra* note 7, at 127.

<sup>29</sup> 15 U.S.C. § 17 (2012) (“The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operations of labor, agriculture, or horticulture organizations, instituted for the purposes of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.”).

<sup>30</sup> 29 U.S.C. § 52 (2012) (prohibiting injunctions in any case between employees and employers unless necessary to prevent an irreparable injury to property or a property right for which there is no adequate remedy at law).

construed the statute,<sup>31</sup> specifically restricting the Act's scope to trade union activities directed against employers by their own employees.<sup>32</sup> As a result, Congress enacted additional legislation to effectuate the purpose of the Clayton Act.<sup>33</sup>

In 1932, Congress enacted the Norris-LaGuardia Act, which further limits courts' jurisdiction in labor disputes.<sup>34</sup> The Norris-LaGuardia Act expanded a union's protections, but it was not until 1941 that the statutory labor exemption was established.<sup>35</sup> In *U.S. vs. Hutcheson*,<sup>36</sup> Justice Frankfurter construed the Norris-LaGuardia Act to give unions a broad exemption from the Sherman Act, thereby allowing unionized workers to exert economic pressure "so long as a union acts in its self-interest and does not combine with non-labor groups."<sup>37</sup> What was so important about *Hutcheson* was that it insulated unionized workers from antitrust scrutiny when they engaged in concerted activity—like pickets and boycotts—in order to obtain favorable working terms and conditions.<sup>38</sup> Ultimately, "the statutory exemption makes clear that 'labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities . . . from the operation of the antitrust laws.'"<sup>39</sup>

Courts were given more guidance beyond the original statutes when Congress passed the National Labor Relations Act ("NLRA")<sup>40</sup> and the Labor Management Relations Act ("LMRA")<sup>41</sup> in 1947. Both Acts established a public policy that favors collective bargaining as the means to govern rela-

<sup>31</sup> See, e.g., *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n*, 274 U.S. 37 (1927); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921) (holding that a union's boycott for organization purposes was a Sherman Act violation).

<sup>32</sup> See *id.*

<sup>33</sup> See *United States v. Hutcheson*, 312 U.S. 219 (1941).

<sup>34</sup> 29 U.S.C. § 101 (2012) ("No court . . . shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out a labor dispute[.]").

<sup>35</sup> See *id.*

<sup>36</sup> 312 U.S. at 219.

<sup>37</sup> The court in *Hutcheson* stated: "[s]o long as a union acts in its self-interest and does not combine with non-labor groups, the licit and illicit under § 20 [of the Clayton Act] are not to be distinguished by any [judicial] judgment regarding the wisdom . . . the rightness . . . [or the] selfishness . . . of the end of which the particular union activities are the means." *Id.* at 232.

<sup>38</sup> See Feldman, *supra* note 9, at 1228.

<sup>39</sup> *Id.* at 1228–29 (quoting *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 621–22 (1975)).

<sup>40</sup> 29 U.S.C. §§ 151–69 (2012).

<sup>41</sup> 29 U.S.C. §§ 141–44 (2012).

tionships between employers and unionized workers.<sup>42</sup> The objective was to ensure that employers and their employees could work together to establish mutually satisfactory terms, thereby protecting the employees' freedom to associate and self-organize.<sup>43</sup> The Acts also delegated rulemaking and interpretive authority to the National Labor Relations Board ("NLRB").<sup>44</sup>

Professional sports leagues do derive benefit from this exemption, but an ongoing issue is that the statutory labor exemption does not "immunize the collective bargaining process or collective bargaining agreements themselves from potential liability. Rather, the statutory exemption only protect[s] a labor organization's unilateral actions and not agreements between unions and nonunion parties."<sup>45</sup>

### B. *The Non-Statutory Labor Exemption*

Of the two antitrust exemptions, the nonstatutory labor exemption is the focal point for U.S. professional sports because of the "peculiar nature of the labor-management relations in the industry."<sup>46</sup> The Supreme Court first established the nonstatutory labor exemption in the cases *United Mine Workers of America v. Pennington*<sup>47</sup> and *Local Union No. 189 v. Jewel Tea Company, Inc.* ("*Jewel Tea*").<sup>48</sup> In *Jewel Tea*, an employer sought to invalidate the following term in its collective bargaining agreement with a butchers' union: "market operating hours shall be 9:00 a.m. to 6:00 p.m. Monday through Saturday, inclusive. No customer shall be served who comes into the market before or after the hours set forth above."<sup>49</sup> The employer was not a part of the original bargaining group, and thus alleged that the union conspired with part of the bargaining unit to impose certain terms on the rest of the

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<sup>42</sup> See Corcoran, *supra* note 25, at 1050.

<sup>43</sup> See *id.*

<sup>44</sup> 29 U.S.C. §§ 153–69 (2012).

<sup>45</sup> Feldman, *supra* note 9, at 1229 (internal citations omitted).

<sup>46</sup> Corcoran, *supra* note 25, at 1056. This is true for three out of four of the primary professional sports leagues in the United States as professional baseball has been shielded from antitrust scrutiny due to baseball's unique exemption from the antitrust laws. See *Flood v. Kuhn*, 407 U.S. 258 (1972); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); *Federal Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922). For a thorough analysis of professional baseball's antitrust exemption see Mitchell Nathanson, *Who Exempted Baseball, Anyway? The Curious Development of the Antitrust Exemption that Never Was*, 4 HARV. J. SPORTS & ENT. L. 1 (2013); Harvey Gilmore, *Major League Baseball and the Antitrust Rules: Where are we Now???*, 6 DEN. U. SPORTS & ENT. L.J. 3 (2009).

<sup>47</sup> 381 U.S. 657 (1965).

<sup>48</sup> 381 U.S. 676 (1965).

<sup>49</sup> See *id.* at 679–80.

unit, thereby proscribing the employer's right to use its property and restraining competition.<sup>50</sup> In balancing the interests of the union against the potential impact on competition, Justice White concluded that the term was exempt because it was "of immediate and direct" concern to the union employees.<sup>51</sup> Hence, agreed-upon restraints concerning mandatory bargaining subjects are thus shielded by this nonstatutory labor exemption to the antitrust laws.<sup>52</sup>

The Court used the rationale from *Jewel Tea* in *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100* ("*Connell Construction*")<sup>53</sup> to subject a union's agreement with a contractor, which prohibited the use of non-union subcontractors, to antitrust liability.<sup>54</sup> In withholding the nonstatutory labor exemption, Justice Powell articulated the following:

The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business were held to be a violation of the antitrust laws.<sup>55</sup>

From the language of *Jewel Tea* and *Connell Construction* opinions, it is clear that the Court limited the nonstatutory exemption to parties in a bargaining relationship and to matters of fundamental employee interest.<sup>56</sup> However, the Courts did not outline the "precise boundaries" of the exemption.<sup>57</sup> This was particularly troublesome given the unique nature of professional sports leagues, which are not completely independent economic competitors and ultimately depend on a degree of cooperation for economic survival.<sup>58</sup>

In one of the first cases addressing the nonstatutory exemption in relation to professional sports, the Eighth Circuit in *Mackey v. National Football*

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<sup>50</sup> See *id.* at 686.

<sup>51</sup> *Id.* at 691.

<sup>52</sup> See Corcoran, *supra* note 25, at 1051.

<sup>53</sup> 421 U.S. 616 (1975).

<sup>54</sup> See *id.*

<sup>55</sup> *Id.* at 622; see also *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) ("[T]he implicit exemption recognized 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>56</sup> See Corcoran, *supra* note 25, at 1052.

<sup>57</sup> *Clarett v. Nat'l Football League*, 369 F. 3d 124, 130 (2d Cir. 2004).

<sup>58</sup> See *Brown*, 518 U.S. at 248.



*League*<sup>59</sup> set forth a three-pronged test for application of the nonstatutory labor exemption. The athletes in *Mackey* brought a challenge against the infamous “Rozelle Rule” on the grounds that it restrained their right to freely contract for their services.<sup>60</sup> At the time, the NFL CBA enumerated the Rozelle Rule, but the owners unilaterally promulgated it prior to its inclusion in the CBA.<sup>61</sup> The NFL argued that the Rozelle Rule was shielded from antitrust law by virtue of its inclusion in the CBA, but the Court found that argument unavailing.<sup>62</sup> Indeed, it held that in order to fall within the non-statutory exemption, a restraint must: 1) primarily affect only the parties to the collective bargaining relationship; 2) concern a mandatory subject of collective bargaining; and 3) be the product of a bona-fide arm’s length bargaining.<sup>63</sup> The Rozelle Rule violated this third prong, as the Rule predated the CBA and the record lacked evidence showing that the NFLPA received some “quid pro quo” in exchange for the Rule’s inclusion.<sup>64</sup> For that reason, the Eighth Circuit held that the Rozelle Rule was not within the contours of the nonstatutory labor exemption and therefore was invalid on antitrust grounds.<sup>65</sup>

The decision in *Mackey* influenced other courts’ treatment of antitrust challenges to labor restraints on professional athletes.<sup>66</sup> Particularly, courts started giving greater deference to the collective bargaining process.<sup>67</sup> The Supreme Court visited the nonstatutory exemption in *Brown v. National Football League*,<sup>68</sup> where a class of football players challenged the NFL’s unilateral creation of a substitute developmental squad whose players were paid

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<sup>59</sup> See *Mackey*, 543 F.2d at 622.

<sup>60</sup> The Rozelle Rule provided that whenever a player whose contract with one club had expired signed a contract to play for a different club, the NFL commissioner could award the former team compensation in the form of money or players unless the two teams reached an alternative agreement. See *id.* at 609–11.

<sup>61</sup> See *id.* at 610.

<sup>62</sup> See *id.* at 613.

<sup>63</sup> See *id.* at 614.

<sup>64</sup> See *id.* at 616.

<sup>65</sup> See *id.*

<sup>66</sup> See Michael C. Harper, *Multiemployer Bargaining, Antitrust Law, and Team Sports: The Contingent Choice of a Broad Exemption*, 38 WM. & MARY L. REV. 1663, 1677 (1997).

<sup>67</sup> See Stephen R. McAllister, *The Nonstatutory Labor Exemption and Player Restraints in Professional Sports: The Promised Land or a Return to Bondage?*, 4 U. MIAMI ENT. & SPORTS L. REV. 283, 305 (1987); see, e.g., *Wood v. Nat’l Basketball Ass’n*, 809 F.2d 954, 959 (2d Cir. 1987); *Zimmerman v. Nat’l Football League*, 632 F.Supp. 398 (D.D.C. 1986) (holding that the NFL’s supplemental draft agreement satisfied all aspects of the *Mackey* test).

<sup>68</sup> 518 U.S. 231 (1996).

a fixed salary of \$1,000 a week.<sup>69</sup> On the surface, the developmental squad appeared to violate antitrust law, but following the principles of labor law, the Court, in an eight-to-one majority, held that the league could unilaterally fix salaries for a category of employees even after impasse.<sup>70</sup>

The Court acknowledged how principles of antitrust and labor law were inconsistent and explained how the application of antitrust law would have put the owners in a “Catch-22.”<sup>71</sup> The Court stated:

If the antitrust laws apply, what are employers to do once impasse is reached? If all impose terms similar to their last joint offer, they invite an antitrust action premised upon identical behavior (along with prior or accompanying conversations) as tending to show a common understanding or agreement. If any, or all, of them individually impose terms that differ significantly from the offer, they invite an unfair labor practice charge.<sup>72</sup>

The Catch-22 is clear: the owners would be prone to either labor or antitrust scrutiny regardless of their actions, and such notion is contrary to the purpose of both the nonstatutory and statutory labor exemptions.<sup>73</sup> As the Court held, “to permit antitrust liability here threatens to introduce instability and uncertainty into the collective-bargaining process, for antitrust law often forbids or discourages the kinds of joint discussions and behavior that the collective bargaining process invites or requires.”<sup>74</sup> Nonetheless, through the nonstatutory labor exemption, the Court has ruled that an implied repeal of the antitrust law is warranted if necessary to protect federal labor policy and the labor process when labor law and antitrust law conflict.<sup>75</sup>

### III. ANTI-COLLUSION PROVISIONS IN COLLECTIVE BARGAINING AGREEMENTS

#### A. *Collusion and the NFL CBA*

The 2011 NFL CBA addresses collusion in Article 17. The Article, titled “Anti-Collusion,” prohibits clubs, its employees or agents from entering “into any agreement, express or implied, with the NFL or any other

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<sup>69</sup> See *id.* at 234.

<sup>70</sup> See *id.*

<sup>71</sup> See Feldman, *supra* note 9, at 1244.

<sup>72</sup> *Brown*, 518 U.S. at 241–42.

<sup>73</sup> See *id.*

<sup>74</sup> *Id.* at 242.

<sup>75</sup> Feldman, *supra* note 9, at 1246.

Club . . . to restrict or limit individual Club decision-making,” with regard to the following conduct: 1) player negotiations, 2) submitting an Offer Sheet, 3) offering a Player Contract to any player, 4) exercising a Right of First Refusal, or 5) deciding the terms or conditions of employment.<sup>76</sup> Additionally, Clubs are prohibited from boycotting a player on the grounds of certain contractual circumstances such as restricted free agency and the right of first refusal.<sup>77</sup> Conspiring against individual players for the purposes of ostracizing them from the league fits entirely within Section 1 of the Anti-Collusion Provision. However, teams still have the discretion to negotiate or not to negotiate with any player for reasons not precluded by the Anti-Collusion provision.<sup>78</sup>

If a player believes that he is the subject of collusive behavior, the player, or the NFLPA acting on the player’s behalf, may file a grievance with the System Arbitrator alleging a violation of Section 1.<sup>79</sup> The grievance must be brought within ninety (90) days of the time the player knew or reasonably should have known that he had a claim, or within ninety (90) days of the first regular season game in the season that the violation occurred, whichever is later. If not filed by these deadlines, the grievance is time-barred.<sup>80</sup>

The parties to a grievance are entitled to reasonable and expedited discovery and the System Arbitrator<sup>81</sup> is required to apply the Federal Rules of Evidence.<sup>82</sup> This is unusual for a professional sports labor agreement, as such a requirement is more aligned with the court system.<sup>83</sup> The System Arbitrator will weigh the parties’ arguments to determine whether certain evidence is admissible. If the evidence is inadmissible, the party cannot use it in the proceedings.

The Anti-Collusion Provision then explains the requisite burden of proof a complaining party must meet. It states, “The complaining party

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<sup>76</sup> National Football League Collective Bargaining Agreement, art. 17 §1 (2011), available at <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> [<https://perma.cc/MH6N-UXAX>] [hereinafter “NFL CBA”].

<sup>77</sup> *Id.* at art. 17 § 2.

<sup>78</sup> *Id.* at art. 17 § 3.

<sup>79</sup> *Id.* at art. 17 § 5.

<sup>80</sup> *Id.* at art. 17 § 17.

<sup>81</sup> Stephen B. Burbank has served as the System Arbitrator for the NFL for many years.

<sup>82</sup> NFL CBA, *supra* note 76, at art. 17 § 5.

<sup>83</sup> *See id.*; see also Ken Belson, *Kaepernick v. the N.F.L.: A Primer on His Collusion Case*, N.Y. TIMES, December 8, 2017, <https://www.nytimes.com/2017/12/08/sports/kaepernick-collusion.html> [<https://perma.cc/VM6V-R6NZ>].

shall bear the burden of demonstrating by a *clear preponderance of the evidence* that (1) the challenged conduct was or is in violation of Section 1 of this Article and (2) caused any economic injury to such player(s).<sup>84</sup> The “clear preponderance of the evidence” standard is derived from the traditional standard of persuasion in civil litigation; however, it adds the word “clear” prior to “preponderance of the evidence,” which distinguishes the standard from most civil courts. A mere preponderance of the evidence standard customarily requires that the fact-finder “believe that existence of a fact is more probable than its nonexistence.”<sup>85</sup> It is the tipping of the scales in favor of one position over another. The standard promulgated by the NFL is not the traditional preponderance of the evidence standard as the inclusion of “clear” indicates a higher burden.<sup>86</sup> It suggests that the grievant needs to prove more than the preponderance of the evidence, but less than beyond a reasonable doubt, which is the adopted criminal standard in the U.S.<sup>87</sup>

The Anti-Collusion provision further provides that the fact a player is not signed by any team in combination with only evidence regarding the player’s skills, does not meet the requisite burden of proof.<sup>88</sup> There needs to be some evidence, circumstantial or direct, that *clearly shows* that at least two teams entered into either an explicit or implicit agreement to deny a player an opportunity to play professional football.<sup>89</sup> Mere supposition or belief that a player is a victim of collusion is not enough under the circumstances.

If a player is able to meet the requisite burden of showing collusion, he can be awarded either compensatory or non-compensatory damages. Compensatory damages will allow the player to collect the monies he lost due to the collusion, while non-compensatory damages award the player treble damages if the violating club is a repeat offender.<sup>90</sup> When it is a Club’s first

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<sup>84</sup> NFL CBA, *supra* note 76, at art. 17 § 5 (emphasis added).

<sup>85</sup> *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997) (internal citations omitted).

<sup>86</sup> The inclusion of clear may also allude to a standard similar to “clear and convincing evidence.” The clear and convincing standard has a higher burden than preponderance of evidence, but less than beyond a reasonable doubt. *See Colo. v. N.M.*, 467 U.S. 310, 316 (1984). Clear and convincing evidence is “evidence that produces in your mind a firm belief or conviction as to the matter at issue.” *Clear and Convincing Evidence*, 3 FED. JURY PRAC. & INSTR. § 104:02 (6th ed.).

<sup>87</sup> *See* Michael McCann, *Colin Kaepernick’s Collusion Claim: Does he Have a Case?*, SPORTS ILLUSTRATED (Oct. 15, 2017), <https://www.si.com/nfl/2017/10/15/colin-kaepernick-collusion-lawsuit-against-nfl> [<https://perma.cc/5JNH-995C>].

<sup>88</sup> *See* NFL CBA, *supra* note 76, at art. 17 § 6.

<sup>89</sup> *See* McCann, *supra* note 87; *see generally* NFL CBA, *supra* note 76, at art. 17 § 6.

<sup>90</sup> *See* NFL CBA, *supra* note 76, at art. 17 § 9.

offense, non-compensatory damages amount to twice the value of the athlete's compensatory damages.<sup>91</sup> Any club found to have violated the Anti-Collusion provision for the first time is to be jointly and severally liable for two times the amount of compensatory damages.<sup>92</sup>

In egregious situations, the NFLPA has the discretion to terminate the CBA.<sup>93</sup> Specifically, there are three situations where the CBA can be terminated: (1) when a total of five or more clubs injure at least twenty players in a single season; (2) when a total of seven or more clubs injure at least twenty-eight players collectively in two seasons; or (3) where a proceeding is brought by the NFLPA and it is shown by clear and convincing evidence that fourteen or more clubs have violated Article 17.<sup>94</sup> In the latter circumstance, the evidence must also show that the violation was willful.<sup>95</sup>

If the player receives an unfavorable outcome in arbitration, then he can file a petition to vacate the arbitration order in a United States District Court.<sup>96</sup> Federal courts typically give deference to an arbitrator's decision; therefore, it is unlikely that the decision will be overturned absent a showing that the arbitration was fundamentally unfair.<sup>97</sup>

### B. *Collusion and the NBA CBA*

Article XIV of the 2017 National Basketball Association ("NBA") CBA sets forth the league's governing Anti-Collusion provisions. Section 1 expressly prohibits the following:

No NBA Team, its employees or agents, will enter into any contracts, combinations or conspiracies, express or implied, with the NBA or any other NBA Team, their employees or agents: (a) to negotiate or not to negotiate with any Veteran or Rookie; (b) to submit or not to submit an

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<sup>91</sup> See *id.* Non-compensatory damages would be paid to any NFL player pension fund. See *id.* at art. 17 § 11.

<sup>92</sup> *Id.* at art. 17 § 9.

<sup>93</sup> *Id.* at art. 17 § 16.

<sup>94</sup> *Id.* When the NFLPA is trying to show that at least fourteen or more teams colluded in a single season, the opportunity to terminate the CBA is only granted if the NFLPA requests such damages at the outset and the Clubs *engaged in* "willful collusion with the intent of restraining competition among teams for players."

<sup>95</sup> See *id.*

<sup>96</sup> See McCann, *supra* note 87.

<sup>97</sup> See generally *Nat'l Football League Players Assoc. v. NFL*, 831 F.3d 985 (8th Cir. 2016) (upholding a fine the NFL Commissioner imposed); See also *Nat'l Football League Players Ass'n. v. NFL*, 874 F.3d 222 (5th Cir. 2017); *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 820 F.3d 527 (2d Cir. 2016) (upholding Tom Brady's suspension for his involvement in Deflategate).

Offer Sheet to any Restricted Free Agent; (c) to offer or not to offer a Player Contract to any Free Agent; (d) to exercise or not to exercise a Right of First Refusal; or (e) concerning the terms or conditions of employment offered to any Veteran or Rookie.<sup>98</sup>

The language is directed toward collusive action between teams, or their employees, that would interfere with player trades and contract negotiations; yet, because the language mirrors that of the Sherman Act, unlawfully boycotting individual athletes should also be prohibited under the Anti-Collusion article.<sup>99</sup>

The remainder of the NBA's Anti-Collusion provision is almost *in verbatim* to the Anti-Collusion Article in the NFL CBA, with the exception of the addition of the Contributions Section and the modified Discovery Section.<sup>100</sup> "Contributions" provides that teams found liable under Section 1 of the Anti-Collusion provisions have the right to seek contribution from any other team found liable of the same violation if the System Arbitrator deems such contribution fair and equitable.<sup>101</sup> With regard to discovery, the parties are granted a reasonable and expedited discovery. However, the National Basketball Players Association ("NBPA") and the NBA are only granted the right to obtain discovery in three collusion grievances during the term of the CBA.<sup>102</sup>

### C. Collusion and the Major League Baseball Basic Agreement

The Major League Baseball ("MLB") Basic Agreement does not have an express anti-collusion clause, but since 1976 "The Individual Nature of Rights" clause has set forth the basic anti-collusion provisions that players

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<sup>98</sup> National Basketball Association, Collective Bargaining Agreement, Art. XIV § 1 (January 19, 2017), <http://3c90sm37lsaecdwtr32v9qof.wpengine.netdna-cdn.com/wp-content/uploads/2016/02/2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf> [https://perma.cc/PA47-D5JQ] [hereinafter "NBA CBA"].

<sup>99</sup> See *id.*; see also Ryan M. Rodenberg and Justin M. Lovich, *Reverse Collusion*, 4 HARV. J. SPORTS & ENT. L. 191, 215 (2013).

<sup>100</sup> See NBA CBA, *supra* note 98, art. XIV §§ 12–15. Like the NFL CBA, the NBA's grievance procedures establish a burden of proof in which the complaining party must meet a "clear preponderance of evidence" standard. *Id.* The Termination of Agreement provision is also modified to reflect the relatively smaller roster size of basketball teams as compared to football teams. For example, the NBPA has the right to terminate the CBA if there has been a finding or findings of one or more instances of violation with respect to any one season which, individually or in total, involved at least five teams, and injured at least five players. See *id.* at art. XIV § 15.

<sup>101</sup> See *id.*

<sup>102</sup> *Id.* at art. XIV § 16. The current NBA CBA will run through 2023–24.

and Clubs are mandated to follow.<sup>103</sup> Article XX(E) of the 2017–21 Basic Agreement (“Basic Agreement”) states as follows:

[t]he utilization or non-utilization of rights under [the Consent to Assignment and the Reserve System rules] is an individual matter to be determined solely by each Player and each Club for his or its own benefit. Players shall not act in concert with other Players and Clubs shall not act in concert with other clubs [sic].<sup>104</sup>

Article XX(E) prohibits concerted action from both Clubs and players, but the Basic Agreement fails to specify any redress if players violate the provision.<sup>105</sup> The remaining sections of Article XX(E) outline the damages players can collect if they show a violation of Section E(1). Sections E(2) and E(3) provide that in addition to awarding attorney’s fees and costs, an arbitrator can award an aggrieved player treble damages, calculated from lost baseball income if the injury was the product of two or more clubs.<sup>106</sup> Further, if five (5) or more clubs are shown to have violated Section E(1), the MLB Players Association (“MLBPA”) is entitled to reopen the Basic Agreement for renegotiation.<sup>107</sup>

The Basic Agreement does not provide what burden needs to be met in order to prevail in this type of grievance. Baseball, unlike many other professional sports, has a well-documented history of collusion and, although an arbitrator is not required to follow precedent, the three proven instances of collusion can provide guidance on the threshold burden a grievant must meet.<sup>108</sup>

After a decade in which there was a relatively active market for free-agents, the market suddenly cooled beginning in 1985.<sup>109</sup> Owners who were

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<sup>103</sup> The limit on concerted action was first recognized in Article XVII, Section H of the 1976 Basic Agreement. See Marc Edelman, *Has Collusion Returned to Baseball? Analyzing Whether a Concerted Increase in Free Agent Supply Would Violate Baseball’s “Collusion Clause”*, 24 LOY. L.A. ENT. L. REV. 159, 161 (2004).

<sup>104</sup> Major League Baseball, 2017–21 Basic Agreement, art. XX(E), <http://www.mlbplayers.com/pdf9/5450407.pdf> (last visited Jan. 24, 2018) [<https://perma.cc/BG2H-5P7Z>] [hereinafter “MLB Basic Agreement”].

<sup>105</sup> See Rodenberg & Lovich, *supra* note 99, at 219.

<sup>106</sup> See MLB Basic Agreement, *supra* note 104, at Art. XX(E).

<sup>107</sup> See *id.*

<sup>108</sup> See Roger D. Blair and Jessica S. Haynes, *Collusion in Major League Baseball’s Free Agent Market: The Barry Bonds Case*, 54 ANTITRUST BULL. 883, 886 (2009) (“[Arbitrators] have a general obligation not to render decisions that are wildly at variance with public policy, but they need not adhere strictly to the legal precedents in reaching their decisions.”).

<sup>109</sup> See Stephen L. Willis, *A Critical Perspective of Baseball’s Collusion Decisions*, 1 SETON HALL J. SPORT L. 109, 121 (1991).

notorious for spending vast amounts of money were “praising the merits of ‘fiscal responsibility’” and not spending on free-agents.<sup>110</sup> Players had no real opportunity to move to new teams and, by New Year’s Day 1986, no free-agents had received an offer compelling enough to change teams.<sup>111</sup> Based on this bizarre behavior, on January 31, 1986, the MLBPA filed the first of its collusion grievances on behalf of the 139 MLB players who were purportedly injured by the owners’ collective boycott of the free-agent market.<sup>112</sup>

The Clubs contended that the “non-existent” free agent market was a product of “individually made rational independent decisions, [based on] the general economic condition of the industry,” but the arbitrator, Mr. Thomas Roberts, found the Clubs’ argument unpersuasive.<sup>113</sup> In ruling in favor of the MLBPA, Arbitrator Roberts held that a “common scheme involving two or more clubs and/or two or more players undertaken for the purpose of a common interest as opposed to their individual benefit,” is prohibited.<sup>114</sup> Despite the lack of a formal agreement between the Clubs, Roberts found that a common scheme prohibited by the Basic Agreement existed based on inferences drawn from the totality of the circumstances.<sup>115</sup>

In February 1987, even before Arbitrator Roberts rendered a decision in the first collusion case, the MLBPA filed a second collusion grievance claiming that the Clubs conspired against the players that became free-agents after the 1986 season.<sup>116</sup> The Clubs tried to rebut accusations by proffering evidence of free-agent activity, but the arbitrator, Mr. George

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<sup>110</sup> Marc Edelman, *Moving Past Collusion in Major League Baseball: Healing Old Wounds, and Preventing New Ones*, 54 Wayne L. Rev. 601, 611 (2008) (quoting Glen Macnow, *Free Agency/The Big Money and the Big Offers are Disappearing as Major-League Owners Fashion the “Era of Good Sense,”* HOUSTON CHRON., Dec. 25, 1985); See also Jeffrey S. Moorad, *Major League Baseball’s Labor Turmoil: The Failure of Counter-Revolution*, 4 VILL. SPORTS & ENT. L.J. 53, 69 (1997).

<sup>111</sup> See Edelman, *supra* note 110, at 611–13.

<sup>112</sup> See *id.* at 613.

<sup>113</sup> See Willis, *supra* note 109, at 121 (quoting *In re Arbitration Between Major League Baseball Players Ass’n & Twenty-Six Major League Baseball Clubs*, Grievance No. 86-2, Panel Decision No.76 (Sept. 21, 1987) [hereinafter “Collusion I”]).

<sup>114</sup> Edelman, *supra* note 103, at 164 (quoting Collusion I).

<sup>115</sup> See *id.*; see also Jerome Holtzman, *Arbitrator: Baseball Owners In Collusion*, CHICAGO TRIBUNE, Sept. 22, 1987, [http://articles.chicagotribune.com/1987-09-22/sports/8703110920\\_1\\_messersmith-decision-arbitration-major-league-service](http://articles.chicagotribune.com/1987-09-22/sports/8703110920_1_messersmith-decision-arbitration-major-league-service) [https://perma.cc/939H-AXJM] (“[General Counsel of the MLB’s Players Relations Committee Barry] Rona . . . told the owners Roberts, in his decision admitted he found no specific evidence of collusion but that because ‘we changed our way of doing business, there was the inference of collusion.’”).

<sup>116</sup> See *id.*



Nicolau, found such activity to be “meager” and “simply insufficient to justify any other determination.”<sup>117</sup> Arbitrator Nicolau took a similar approach to that of Arbitrator Roberts and concluded that the Basic Agreement was violated “when a plan or ‘common scheme for a common benefit’” is proven.<sup>118</sup> The common scheme for a common benefit did not need to be written nor spoken as long as the circumstantial evidence of “‘sufficient clarity and force could be shown to demonstrate [the existence of an agreement.]’”<sup>119</sup>

The final grievance of the 1980s was decided in the same way as the two previous grievances—in favor of the players. Instead of a collective boycott, the Clubs were allegedly creating an “information bank” that allowed Clubs to see what others were offering certain players.<sup>120</sup> The collective use of the information bank was an anti-competitive practice because information that was generally only known by one Club became available to all.<sup>121</sup> The three collusion cases were settled for a sum of \$280 million and chief counsel for the MLBPA at that time, Gene Orza, said “[a] smoking gun was not the basis of that decision. Instead it was simply the inference of collu-

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<sup>117</sup> See Willis, *supra* note 109, at 125. Willis, citing *Major League Baseball Players Ass’n v. The Twenty-Six Major League Baseball Clubs*, Grievance No. 87-3, Panel Dec. No. 79 (Aug. 31, 1988) [hereinafter “Collusion II”], illustrates how the Philadelphia Phillies signing catcher Lance Parrish was not an example of active competition even though he signed with a different club. *Id.* at 126. Rather, when the Phillies publicly expressed interest in signing Parrish, numerous owners requested that the Phillies not sign him. *Id.* In Arbitrator Nicolau’s Collusion II opinion, he also described several other instances of collusion including when the Chicago Cubs signed Andre Dawson to what amounted to a blank contract. *Id.*; see also Peter Gammons, *The Verdict Is In*, SPORTS ILLUSTRATED, (Sept. 12, 1988) at 60–61.

<sup>118</sup> Willis, *supra* note 109, at 125; see also Edelman, *supra* note 110, at 619 (quoting Collusion II) (“It was ‘not one piece of evidence, but the evidence taken as a whole that tells us where a common understanding exists[.]’”).

<sup>119</sup> Edelman, *supra* note 103, at 166 (quoting Collusion II).

<sup>120</sup> This meant that all bidding was essentially done openly, and clubs immediately knew what they would have to offer to get a player on their roster. See *id.* at 167.

<sup>121</sup> See *id.*; see also *Major League Baseball Players Association and the Twenty-Six Major League Baseball Clubs*, Grievance 88-1 (July 18, 1990) (The “information bank converted the free agency process into a secret buyers’ auction, to which the sellers of services-the players- had not agreed and the existence of which of which they were not aware . . . and . . . it is evident that many used the bank to report offers to free agents and to track just how far they would have to go with particular players.”).

sion, that all of sudden not one player who was a free agent was getting an offer.”<sup>122</sup>

Based on the foregoing, circumstantial evidence of “sufficient clarity and force” could imply the existence of a common scheme for a common benefit, and thus successfully show a party acted in violation of Article XX(E). The decisions implicitly acknowledge the rarity of direct evidence of collusion, yet also seem to establish a higher burden than just an incident of parallel behavior or independent action.

#### D. Collusion and the NHL CBA

The National Hockey League’s (“NHL”) 2012–22 CBA does not have precise language prohibiting Clubs or players from colluding, but Article 26, “No Circumvention,” acts as catch-all provision to penalize those who try to circumvent the terms of the Agreement.<sup>123</sup> In part, Article 26 states as follows:

No club or Club Actor, directly or indirectly, may: (i) enter into any agreements, promises, undertakings, representations, commitments, inducements, assurances of intent, or understandings of any kinds, whether express, implied, oral or written, . . . or (ii) take or fail to take any action whatsoever, if either (i) or (ii) is intended to or has the effect of defeating or Circumventing the provisions of this Agreement or the intention of the parties as reflected by the provisions of this Agreement . . .<sup>124</sup>

Similar language also applies to the players.<sup>125</sup> It is apparent that Article 26 can be used to protect players from collusion, as Article 10 of the NHL CBA provides that players should be completely free of restraints to negotiate and sign a Standard Player Contract (“SPC”) with a club of his choosing.<sup>126</sup> Therefore, any agreement among the Clubs to restrain an individual’s ability

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<sup>122</sup> See Edelman, *supra* note 103, at 167; Chris Isidore, *How much could Colin Kaepernick win in his collusion case against the NFL?*, CNNMONEY (Oct. 17, 2017, 4:45 PM), <http://money.cnn.com/2017/10/17/news/colin-kaepernick-collusion/index.html> [<https://perma.cc/5PVM-NLCU>].

<sup>123</sup> “This Article 26 is designed to prohibit and prevent conduct that Circumvents the terms of this Agreement, while not deterring or prohibiting conduct permitted by this Agreement, the latter conduct not being a Circumvention.” See *2012–22 Collective Bargaining Agreement Between National Hockey League and National Hockey League Players’ Association*, art. 26, [http://www.nhl.com/nhl/en/v3/ext/CBA2012/NHL\\_NHLPA\\_2013\\_CBA.pdf](http://www.nhl.com/nhl/en/v3/ext/CBA2012/NHL_NHLPA_2013_CBA.pdf) [<https://perma.cc/HMC2-T2LN>] [hereinafter “NHL CBA”].

<sup>124</sup> *Id.* at art. 26.3(a).

<sup>125</sup> See Rodenberg and Lovich, *supra* note 99, at 217–18.

<sup>126</sup> See NHL CBA, *supra* note 123, at art. 10.1(a)(i).

to play professional hockey should constitute a Circumvention prohibited by the NHL CBA. Article 26 delineates eleven instances where a Circumvention can be inferred, but the list is non-exhaustive.<sup>127</sup> If an athlete believed that Clubs were colluding against him, he would be required to inform the NHL Players' Association ("NHLPA") of such conduct because only the NHL and the NHLPA can initiate a System Grievance.<sup>128</sup>

Prior to filing the System Grievance, the Executive Director of the NHLPA, who at this time is Donald Fehr,<sup>129</sup> can "commence an investigation regarding whether a Circumvention occurred."<sup>130</sup> As the "Investigator," he "may obtain the authority, upon good cause shown to the System Arbitrator, to require any Player, Player Actor, Club or Club Actor to produce any relevant books and records."<sup>131</sup> Upon completion of the investigation, the parties must meet and confer before the Investigator determines whether to issue a written determination of his findings.<sup>132</sup>

If the parties cannot resolve the matter, the Investigator will issue a report on his findings and, at his discretion, file an action with the System Arbitrator.<sup>133</sup> The System Arbitrator can find a Circumvention has occurred based on direct or circumstantial evidence and then impose any or all of the penalties set forth in the CBA including, but without limitation, a fine of up to \$5 million.<sup>134</sup> If a fine is imposed, the monies are not be disbursed to the aggrieved player; rather, they are to be contributed to the Emergency Assistance Fund.<sup>135</sup> Unlike the NFL, NBA and MLB's anti-collusion provisions, the NHLPA has no ability terminate or reopen the CBA if multiple Clubs are found to engage in collusive behavior. Hence, there is little redress that can be provided to a hockey player who is found to be the subject of a Circumvention.

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<sup>127</sup> *Id.* at art. 26.3.

<sup>128</sup> *Id.* at art. 48.1–48.2; *see also id.* at art. 26.11.

<sup>129</sup> Fehr was the executive director of the MLBPA prior to joining the NHLPA and was instrumental to the MLBPA's three collusion grievances in the 1980's. *See Fehr leaving post after quarter-century*, ESPN (Jun. 23, 2009), <http://www.espn.com/mlb/news/story?id=4278728> [<https://perma.cc/6QG4-NR6M>].

<sup>130</sup> NHL CBA, *supra* note 123, art. 26.10.

<sup>131</sup> *Id.* at art. 26.10(c).

<sup>132</sup> *Id.* at art. 26.12.

<sup>133</sup> *Id.* at art. 26.13.

<sup>134</sup> *See id.* (inferring that circumstantial evidence that an SPC or any provision of an SPC cannot reasonably be explained in the absence of conduct prohibited Article 26 may be enough to meet the burden of proof needed to show a Circumvention).

<sup>135</sup> *Id.* at art. 26.14.

## IV. ALLEGATIONS OF INDIVIDUAL PLAYER RESTRAINTS

A. *Colin Kaepernick*

In modern professional sports, a world of billion-dollar television revenues, salary caps and news cycles accelerated by social media, owners attempt to control costs using player restraints.<sup>136</sup> Restraints come in the form of salary caps, player drafts and squad size restrictions, but most of these restraints are justified by the need to maintain competitive balance in professional sports.<sup>137</sup> Ostracizing a player, on the other hand, could never serve such purpose.

In Kaepernick's seven-page long grievance, he accuses all thirty-two NFL team owners—who were provoked by President Donald Trump—of depriving him of the opportunity to play, practice or try out for an NFL team when he was “eminently qualified” for the position.<sup>138</sup> Kaepernick was drafted by the 49ers in the second round of the 2011 NFL Draft and quickly rose to the starting quarterback position.<sup>139</sup> In his first season as starting quarterback, he led the 49ers to the team's first Super Bowl in nearly two decades.<sup>140</sup> As such, when he opted out of his contract,<sup>141</sup> he assumed that there would be a bidding war for his professional services.<sup>142</sup>

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<sup>136</sup> See generally Michael Jacobs, *Professional Sports Leagues, Antitrust, and the Single Entity Theory: A Defense of the Status Quo*, 67 IND. L.J. 25 (1991).

<sup>137</sup> See, e.g., *Wood v. Nat'l Basketball Ass'n*, 602 F. Supp. 525 (S.D.N.Y. 1984) (upholding the NBA's college draft and use of a salary cap); *Brown*, 518 U.S. at 231 (upholding the NFL's use of a “developmental squad”); *The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws*, 81 HARV. L. REV. 418, 419 (1967) (“The basic ‘housekeeping’ arrangements of league sports such as scheduling, limits on team rosters, and uniform playing rules throughout the league are the deviations from a purely competitive model which are most clearly necessitated by the nature of the industry.”).

<sup>138</sup> Kaepernick Demand, *supra* note 3, at 2.

<sup>139</sup> See *id.* at 3.

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

<sup>141</sup> Kaepernick originally signed a six-year, \$114 million contract with the 49ers in 2014, but the contract was restructured down to a two-year deal in 2016. See AP, *Colin Kaepernick opts out of contract with San Francisco 49ers*, USA TODAY, Mar. 3, 2017, <https://www.usatoday.com/story/sports/nfl/2017/03/03/kaepernick-opts-out-of-contract-becomes-free-agent/98714304/> [<https://perma.cc/46JQ-HP3W>].

<sup>142</sup> “During his free agency period, the purportedly ‘free market’—whose natural function should have resulted in a bidding war (or at least high-level interest) for a quarterback of Mr. Kaepernick's caliber—instead functioned as a peculiar institution with suspicious design and objective.” Kaepernick Demand, *supra* note 3 at 4.

The 2017 NFL season was plagued with quarterback injuries, yet no team signed Kaepernick.<sup>143</sup> Since he opted out his contract in March 2017, sixty-two other quarterbacks have been signed to NFL teams and only two of them posted a higher quarterback rating in 2017 than Kaepernick's 2016 season rating.<sup>144</sup> Kaepernick called the league's behavior unusual, bizarre and even mysterious, but his complaint lacked any explicit examples of how the owners acted in concert to keep him from playing in the NFL.<sup>145</sup> He claims that "multiple NFL head coaches and general managers stated that they wanted to sign [him], only to mysteriously go silent with no explanation and no contract offer made to [him]."<sup>146</sup> The Complaint stated, in part:

The mere suspicion of collusion against Mr. Kaepernick has risen to the level of concrete and actual collusion. It is no longer a statistical anomaly but instead a statistical impossibility that Mr. Kaepernick has not been employed or permitted to try out for any NFL team since the initiation of his free agency period. NFL General Managers and team leaders have referred to directives from NFL owners to not let Mr. Kaepernick so much as practice with a team.<sup>147</sup>

Kaepernick contends that the owners' retaliatory scheme to oppress his "peaceful protests" were the sole reason for his unemployment, but teams have proffered reasonable justifications for not extending an offer to Kaepernick.<sup>148</sup> Among those reasons include that Kaepernick is not compatible with teams' offensive schemes and that he hasn't played football "in a while."<sup>149</sup>

### B. *Joseph Caldwell*

The Plaintiff in *Caldwell v. American Basketball Ass'n*,<sup>150</sup> Joseph Caldwell, was a nationally recognized basketball player who, after being indefinitely suspended and unable to find subsequent employment, sued the

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<sup>143</sup> See Andrew Beaton, *Why Your Team Didn't Sign Colin Kaepernick*, Wall Street Journal, Dec. 27, 2017, <https://www.wsj.com/articles/why-your-team-didnt-sign-colin-kaepernick-1514312820> [<https://perma.cc/DN5L-BL7X>].

<sup>144</sup> *Id.*

<sup>145</sup> See Kaepernick Demand, *supra* note 3, at 4.

<sup>146</sup> *Id.* at 5–6.

<sup>147</sup> *Id.* at 3.

<sup>148</sup> See *id.*

<sup>149</sup> Beaton, *supra* note 143.

<sup>150</sup> See 825 F. Supp. 558, 566 (S.D.N.Y. 1993), *aff'd* 66 F. 3d 523 (2d Cir. 1995).

American Basketball Association (“ABA”)<sup>151</sup> alleging that the league’s actions following his suspension constituted an impermissible group boycott.<sup>152</sup> In 1970, Caldwell signed a contract with the now defunct Carolina Cougars incorporating only certain provisions of the ABA Uniform Player Contract, and intentionally omitting provisions that would bind him to the ABA’s constitution and by-laws.<sup>153</sup> The by-laws provided that a suspended player would be placed on a “reserve list” whereby no member teams could contract with a player on said list.<sup>154</sup> In order to remove a player from the reserve list, the suspending team needed to notify the ABA commissioner, and the commissioner was required to then notify the other teams.<sup>155</sup>

In the four seasons Caldwell played for the Cougars, Caldwell played ably and was elected to the All-Star Team during two of those four years.<sup>156</sup> He was also elected President of the ABA Players Association.<sup>157</sup> Nevertheless, in late 1975, he was suspended indefinitely for helping a teammate allegedly breach his contract.<sup>158</sup> Caldwell contended that he automatically ended up on the reserve list “forever” and was ultimately blacklisted from playing professional basketball.<sup>159</sup> Following Caldwell’s suspension, no professional basketball team ever gave him a tryout or any opportunity to compete for a spot on a team despite the contention that he was ready, willing and fit to play professional basketball at all times.<sup>160</sup> The named defendants did, however, dispute Caldwell’s ability to play professional basketball at the time of his suspension, because his age made him an undesirable recruit and he sustained injuries in 1971 and 1975.<sup>161</sup>

After the case was stagnant for almost eighteen (18) years, the defendants moved for summary judgment on the grounds that Caldwell failed to come forth with sufficient evidence of the existence of a contract, combina-

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<sup>151</sup> The ABA was a professional basketball league that ceased to exist following the ABA-NBA merger in 1976, leading to several teams joining the NBA. *Id.* at 564.

<sup>152</sup> *See id.* at 568.

<sup>153</sup> *See id.* at 560–61.

<sup>154</sup> *See id.*

<sup>155</sup> *See id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *See id.* at 562.

<sup>159</sup> *See id.* at 562–63.

<sup>160</sup> *See id.* at 564.

<sup>161</sup> Defendants provided statistics showing that fewer than two percent (2%) of the NBA players between 1976 and 1981 were 34 years old or older. They also claimed a torn ligament, in 1971, and an automobile accident in 1975 interfered with his playing ability. *See id.* at 564.

tion or conspiracy that would allow a reasonable jury to rule in his favor.<sup>162</sup> In ruling for the defendants, the court held that:

[T]he mere fact that Caldwell never again was offered a position to play professional basketball does not, in and of itself, give rise to the inference that the defendants conspired to blacklist Caldwell from professional basketball. This is especially true since the Defendants have proffered a great deal of evidence . . . that Caldwell's age and physical condition made him a less than appealing prospect to other ball clubs.<sup>163</sup>

Although this case was not conducted pursuant to the NBA's grievance procedure, it is instructive of the evidence a player claiming collusion must offer in order to show that he has been blacklisted from his respective sport.<sup>164</sup>

Caldwell's was not the only federal court case in which a basketball player alleged collusive behavior.<sup>165</sup> In *Hodges v. National Basketball Ass'n*,<sup>166</sup> Plaintiff Craig Hodges claimed that the owners of the twenty-nine NBA franchises had a gentleman's agreement to blackball him from the league "because of his outspoken political nature as an African American man."<sup>167</sup> Hodges' career came to a sudden halt following the 1991 season, after he visited the White House with the Chicago Bulls.<sup>168</sup> Hodges wore a dashiki and handed the press secretary a letter asking President George H.W. Bush to come up with a comprehensive plan to end the injustices toward the African-American community.<sup>169</sup> In 1992, Bulls representatives conveyed to

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<sup>162</sup> See *id.* at 570.

<sup>163</sup> *Id.*

<sup>164</sup> Caldwell appealed the District Court's grant of summary judgment, but the Second Circuit affirmed the decision on the grounds that Caldwell's claims were barred by the nonstatutory labor exemption. See Caldwell, 825 F.Supp. at 557. ("[A]llowing Caldwell to proceed with his action would 'subvert fundamental principles of our federal labor policy as set out in the National Labor Relations Act.')" (quoting Wood, 602 F. Supp. at 529).

<sup>165</sup> It is to the authors' belief, that at the time of this Article, there have been no NBA grievances where an individual player has alleged that the teams engaged in a group boycott to blackball them from playing professional basketball.

<sup>166</sup> See generally No. 96-CV-7530 JFG, 1998 WL 26183 (N.D. Ill. Jan. 8, 1998).

<sup>167</sup> Ira Berkow, *The Case of Hodges vs. the N.B.A.*, N.Y. TIMES, Dec. 25, 1996, <http://www.nytimes.com/1996/12/25/sports/the-case-of-hodges-vs-the-nba.html> [<https://perma.cc/EM85-AZL2>]; see also Evan F. Moore, *How Former NBA Player Craig Hodges Helped Create the Activist Athlete*, ROLLING STONE, (Mar. 23, 2017), <https://www.rollingstone.com/sports/features/craig-hodges-and-the-modern-activist-athlete-w472667> [<https://perma.cc/Z2JN-QJB4>].

<sup>168</sup> See Berkow, *supra* note 167.

<sup>169</sup> See *Hodges*, 1998 WL 26183, at \*1.

Hodges that they were embarrassed by these actions and he was subsequently waived.<sup>170</sup> He called every team in the NBA and not one was willing to give him an opportunity to play.<sup>171</sup> Consequently, he contended that the NBA conspired to keep him from playing on any NBA team, because his political activities were not welcome by the NBA.<sup>172</sup> Hodges brought a claim under The Civil Rights Act of 1991, 42 U.S.C. § 1981, but the case was dismissed because it was time-barred.<sup>173</sup>

### C. Barry Bonds

In 2008, Barry Bonds was coming off a season with the San Francisco Giants in which he broke Hank Aaron's home run record.<sup>174</sup> Even at the age of forty-three, these statistics were not an anomaly for Bonds as he was awarded the MLB's Most Valuable Player Award seven times and played in fourteen All-Star Games.<sup>175</sup> All things considered, he still may have been the one of the "most dominant players of his generation."<sup>176</sup> However, by the time Bonds sought a new contract, he was at the center of a performance enhancement drugs ("PEDs") scandal and had been indicted on four counts of perjury as well as one count of obstruction of justice.<sup>177</sup> Despite the PED allegations and the indictments, many believed that Bonds should have been offered an MLB team contract.<sup>178</sup>

Come opening day of the 2008 season, Bonds remained unsigned, effectively ending his career in MLB.<sup>179</sup> He was willing to be compensated at the league minimum salary despite receiving nearly \$19.3 million the pre-

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *See id.*

<sup>173</sup> *See id.*

<sup>174</sup> *See* Marc Edelman, *Sports and the Law: Are Baseball Teams Colluding Against Barry Bonds*, ABOVE THE LAW, (Mar. 24, 2008, 1:00PM) <https://abovethelaw.com/2008/03/sports-and-the-law-are-baseball-teams-colluding-against-barry-bonds/?rf=1> [<https://perma.cc/8X6A-4RGX>].

<sup>175</sup> Anthony Torrente, *The Dark Side of Professional Baseball: The Fall of Barry Bonds*, 5 ALB. GOV'T. L. REV. 352, 354 (2012).

<sup>176</sup> Edelman, *supra* note 110, at 629.

<sup>177</sup> *See* Torrente, *supra* note 175, at 359–60.

<sup>178</sup> Bonds was also described as "surly and a poor clubhouse fit." Torrente, *supra* note 175. However, none of the "purported blemishes to Bond's resume seems to fully explain why not a single team has made the slugger an offer at any price." *Id.*

<sup>179</sup> *Id.*



ceding season.<sup>180</sup> Because fans would flock to the seats to watch Bonds as he approached the 3,000-hit milestone, there were certainly financial benefits to signing him.<sup>181</sup> Despite his strong statistics, players of a lesser caliber received playing contracts over Bonds.<sup>182</sup> Whispers of blacklisting Bonds predated the 2007 season when *Philadelphia Daily News* reporter John Smallwood reported that “Commissioner Bud Selig should get together on a conference call . . . with the owners and convince every one of them that Bonds is off limits,” but there was no direct evidence to support that such a call ever occurred.<sup>183</sup> Lower-level team employees expressed interest in signing the veteran; nevertheless, teams refused the requests.<sup>184</sup> When asked why teams were so uninterested in signing Bonds, reporters received answers like “[Do you] expect me to answer this on record?”<sup>185</sup>

Without a single team outwardly expressing a desire to sign Bonds, in October 2008, the MLBPA announced that it uncovered evidence showing that Bonds was the “victim of collusion.”<sup>186</sup> Rather than taking the traditional approach and filing a grievance against the MLB and the club-owners, the MLBPA sought to engage in private negotiations.<sup>187</sup> It was not until approximately May 2015<sup>188</sup> when Bonds, with the assistance of the MLBPA, filed a grievance alleging that his early retirement from MLB was the prod-

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<sup>180</sup> See Michael McCann, *Unsigned and unwanted: Is Barry Bonds building a case for collusion?*, SPORTS ILLUSTRATED, (Mar. 16, 2009), <https://www.si.com/more-sports/2009/03/16/bonds-collusion> [<https://perma.cc/JBZ-BVZG>].

<sup>181</sup> See Edelman, *supra* note 110, at 631.

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

<sup>183</sup> *Id.* at 630 (quoting John Smallwood, *Unemployment Remedy for Dealing with Bonds*, PHILA. DAILY NEWS, Sept. 1, 2006, at 112).

<sup>184</sup> Specifically, St. Louis Cardinals manager Tony LaRussa wanted to sign Bonds to a contract, but the Cardinals’ front office refused the request without providing any explanation. See *id.* at 631.

<sup>185</sup> *Id.* (internal citations omitted).

<sup>186</sup> See McCann, *supra* note 181; see also Associated Press, *Union Finds Collusion on Bonds*, N. Y. TIMES Oct. 16, 2008, at B14.

<sup>187</sup> See Michael McCann, *MLB Agents Want Union to Take More Active Stance Against Collusion*, SPORTS LAW BLOG (July 15, 2009), <http://sports-law.blogspot.com/2009/07/> [<https://perma.cc/ZNE6-LYPK>].

<sup>188</sup> Bonds and the MLBPA waited until 2015 to file the grievance to allow Bonds to resolve his longstanding steroid trial. See SI WIRE, *Report: Barry Bonds is suing Major League Baseball for Collusion*, SPORTS ILLUSTRATED (May 12, 2015), <https://www.si.com/mlb/2015/05/12/barry-bonds-mlb-collusion-lawsuit> [<https://perma.cc/QSP2-38JB>]. In 2011, Bonds was charged with obstruction of justice relating to testimony in a case in 2003, but the Ninth Circuit reversed the conviction in April 2015. See *United States v. Bonds*, 784 F.2d 582 (9th Cir. 2015).

uct of a covert, collusive process, that violated Section XX(E) of the Basic Agreement.<sup>189</sup> His “best evidence” came in the form of statistics.<sup>190</sup>

Shortly thereafter, Arbitrator Frederic Horowitz ruled in favor of the MLB.<sup>191</sup> “[T]here was no smoking gun in the case, and the arbitrator apparently did not find the case compelling enough.”<sup>192</sup> While the three MLB collusion grievances discussed herein were also based on circumstantial evidence, Bonds presumably did not present circumstantial evidence of “sufficient clarity and force” to show the existence of a common scheme.<sup>193</sup> Rather, the totality of the circumstances may have made it reasonable to conclude that each club decided independently to not pursue Bonds and thereby did not violate the Basic Agreement. What also separated Bonds’ grievance from the three proven grievances of the past was not just the lack of a smoking gun, but the fact that he was a single player alleging that teams agreed to keep him out of the league. The three aforementioned collusion grievances directly harmed at least sixteen players.<sup>194</sup> Bonds was a sole player alleging that every MLB team at least had an understanding to not sign him to a contract. Professor Michael McCann—an Associate Dean for Academic Affairs at the University of New Hampshire School of Law and a legal analyst for *Sports Illustrated*—made the following observation:

Therein rests a key point about collusion: There must be actual evidence of conspiracy. In the 1980s, some baseball owners and team executives took notes during meetings that later became evidence of collusion. If no such notes exist—emails, texts, . . . admissions of witnesses, whatever it is—there must be evidence that corroborates a player’s contention that he has been blackballed. A player merely pointing out that he has been treated worse than players of similar abilities doesn’t prove collusion. Teams are not obligated to sign anyone.<sup>195</sup>

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<sup>189</sup> See Torrente, *supra* note 175, at 359.

<sup>190</sup> See Jon Heyman, *MLB prevails over Barry Bonds in collusion case over his career ending*, CBS SPORTS (Aug. 27, 2015), <https://www.cbssports.com/mlb/news/mlb-prevails-over-barry-bonds-in-collusion-case-over-his-career-ending/> [https://perma.cc/7JKE-4QAG].

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* Horowitz’s reason for the decision is unknown as the decision was not made public.

<sup>193</sup> See Edelman, *supra* note 103, at 165 (quoting Collusion II); see also Michael McCann, *Some Colin Kaepernick supporters are crying collusion, but what does that really mean?*, SPORTS ILLUSTRATED (Mar. 24, 2017) <https://www.si.com/nfl/2017/03/24/colin-kaepernick-protest-nfl-collusion-free-agency> [https://perma.cc/J3RZ-DEDD] (“[A]n arbitrator ruled against Bonds, reasoning that even if Bonds’ *theory* of collusion was logical, he lacked evidence of teams conspiring against him.”).

<sup>194</sup> See Edelman, *supra* note 110, at 622.

<sup>195</sup> McCann, *supra* note 193 (emphasis added).

## V. THE CASE FOR KAEPERNICK

Assuming that Kaepernick can conclusively prove his case in front of the System Arbitrator, such a “win” for Kaepernick and the NFLPA would not be enough to deter owners and leagues from colluding against individual players in the future. Each respective professional sports league maintains multiple revenue streams and, when those streams are threatened, the costs of collusion may be worth it.<sup>196</sup> In 2016, the NFL endured roughly an eight percent decrease in viewership.<sup>197</sup> Some suggest that the existence of National Anthem protests was an important factor in this decline.<sup>198</sup> This could further implicate television revenues and overall viewership. If an athlete is able to show that teams colluded against him, the player, and the NFLPA, will carry the heavy burden of showing that the CBA should be reopened or terminated. For the NFL, when an individual player is claiming collusion, it is not only the “clear preponderance of evidence,” that must be shown, but there also has to be a showing of a willful violation.<sup>199</sup> With such a high standard, it is unlikely that the NFL or any other league should

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<sup>196</sup> In 2016, the NFL distributed up to \$7.8 billion to its thirty-two teams with each team receiving approximately \$244 million, up from \$222.6 million each team received the prior season. Eben Novy-Williams, *NFL Teams Split Record \$7.8 Billion in 2016, Up 10 Percent*, BLOOMBERG (July 12, 2017), <https://www.bloomberg.com/news/articles/2017-07-12/nfl-teams-split-record-7-8-billion-in-2016-up-10-percent> [<https://perma.cc/A32B-QLPC>]. The average NFL, MLB, NBA, and NHL franchise is valued at \$2.5 billion, \$1.54 billion, \$1.36 billion and \$594 million, respectively. See Kurt Badenhausen, *The Dallas Cowboys Head the NFL's Most Valuable Teams at \$4.8 Billion*, FORBES (Sept. 18, 2017) <https://www.forbes.com/sites/kurtbadenhausen/2017/09/18/the-dallas-cowboys-head-the-nfls-most-valuable-teams-at-4-8-billion/#325cf08e243f> [<https://perma.cc/SBG5-RK3C>]; Mike Ozanian, *Baseball Team Values 2017*, FORBES (Apr. 11, 2017) <https://www.forbes.com/sites/mikeozanian/2017/04/11/baseball-team-values-2017/#31b4133b2451> [<https://perma.cc/ZT27-YDKH>]; Kurt Badenhausen, *The Knicks and Lakers Top the NBA's Most Valuable Teams 2017*, FORBES (Feb. 15, 2017), <https://www.forbes.com/sites/kurtbadenhausen/2017/02/15/the-knicks-and-lakers-head-the-nbas-most-valuable-teams-2017/#44d3062c7966> [<https://perma.cc/29WL-MEAK>]; Mike Ozanian, *The NHL's Most Valuable Teams 2017*, FORBES (Dec. 5, 2017), <https://www.forbes.com/sites/mikeozanian/2017/12/05/the-nhls-most-valuable-teams-4/#26f0f4ef17c7> [<https://perma.cc/SSK3-3P2R>].

<sup>197</sup> See Phillip Bump, *What that Study about the Decline in Football Viewership Actually Says*, WASHINGTON POST, July 27, 2017, [https://www.washingtonpost.com/news/politics/wp/2017/07/27/what-that-study-about-the-decline-in-football-viewer-ship-actually-says/?utm\\_term=.4599bfd70cfc](https://www.washingtonpost.com/news/politics/wp/2017/07/27/what-that-study-about-the-decline-in-football-viewer-ship-actually-says/?utm_term=.4599bfd70cfc) [<https://perma.cc/E54U-8A9D>].

<sup>198</sup> *Id.*

<sup>199</sup> See NFL CBA, *supra* note 76, art. 17 § 6.

reasonably fear the termination of the CBA unless there is direct evidence of collusive behavior among and between many teams.

If Kaepernick were to prevail in his case, he “stand[s] to win millions in lost wages and damages.”<sup>200</sup> However, pursuant to the NFL’s Anti-Collusion Provision, the violating Clubs are “jointly and severally liable,” meaning that the player may collect the amount from any one, several, or all the liable parties. Thus, the parties may proportion the damages among them.<sup>201</sup> Therefore, if collusion is found, the amount of damages each team could be required to pay would likely be miniscule compared to the money each team earns through ticket sales, jersey sales and media rights fees. Again, the most potent weapon for the NFLPA is the threat of terminating the CBA but, in Kaepernick’s and many other athletes’ cases, terminating a CBA altogether is not a realistic option.<sup>202</sup> Athletes have attempted to prove such misconduct by the leagues and team owners, but they have ultimately lacked sufficient evidence to sustain their burden of proof. Thus, there is little-to-no penalty that would deter the teams from colluding against an individual player given that the potential damages pale in comparison to their revenues.

## VI. CONCLUSION

Through the labor exemptions that render the major U.S. professional sports leagues’ respective CBAs the controlling documents, it is clear that prohibiting an individual from playing his respective sport is impermissible. Although each league does impose punishments on such behavior, these punishments are insufficient to deter clubs from conducting business in such a manner when a player hinders the league’s pursuit of money. Indeed, the MLBPA, NFLPA and NBPA all have the right to terminate or reopen the CBA in some circumstances, but situations in which an impartial arbitrator will award such relief are rare. A unique set of facts and evidence must exist for a professional sports league to truly feel threatened with such an oppressive penalty. Accordingly, come the next round of negotiations for new CBAs, players associations should attempt to include stronger language and punishments for those that collude against a player’s interest if there is a serious concern that players may be prevented from participating professionally based on collective action by ownership.

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<sup>200</sup> Isidore, *supra* note 122.

<sup>201</sup> NFL CBA, *supra* note 76, art. 17 § 11.

<sup>202</sup> See Michael McCann, *Why Colin Kaepernick’s Grievance is Unlikely to Lead to the Termination of the CBA*, SPORTS ILLUSTRATED (Oct. 16, 2017), <https://www.si.com/nfl/2017/10/16/colin-kaepernick-nfl-grievance-collusion-cba-lawsuit> [https://perma.cc/LJ3P-9WBQ].