



Offsides: A Labor and Antitrust Analysis of How the Nonstatutory Labor Exemption Subverts Players' Medical Autonomy

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INTRODUCTION

In 1914, while sitting on the New York Court of Appeals, Judge Cardozo opined, “[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body. . . .”² 108 years ago, Cardozo’s pronouncement presaged the contemporary definition of “medical autonomy”, defined as “[a patient’s] right to make his or her own choices concerning healthcare.”³ Despite the deep roots of this concept, Jack Eichel, a star National Hockey League (“NHL”) player for the Buffalo Sabres, had his right to medical autonomy subverted by terms in the NHL collective bargaining agreement (“CBA”).⁴ The CBA’s terms provide that teams and their doctors have final authority regarding *any* medical treatment of their players under the NHL contract.⁵ Moreover, the CBA is legally shielded by antitrust law and the nonstatutory labor exemption.⁶ This left Eichel with no viable avenue for recourse but to be traded to another team that would allow his preferred form of medical treatment.⁷ How can our antitrust laws legally protect the subversion of a human being’s right to medical autonomy and informed consent? Will this become a more prevalent issue in sports, as more forms of medical treatment attractive to players are developed?

This Note asserts that players’ rights to medical autonomy should be enforceable outside the scope of any labor agreement as a matter of legality and public policy. Furthermore, it argues that labor agreements that allow for the subversion of players’ medical autonomy should be deemed deficient and are anti-competitive under antitrust law. Part I will examine the factual background of the Eichel situation in greater detail. Part II will lay out the

² Schloendorff v. Soc’y of N.Y. Hospital, 105 N.E. 92, 93 (N.Y. 1914).

³ Christopher R. Deubert, I. Glenn Cohen & Holly Fernandez Lynch, *Comparing Health-Related Policies and Practices in Sports: The NFL and Other Professional Leagues*, 8 HARV. J. SPORTS & ENT. L. 1, 36 (2017).

⁴ Wajih AlBaroudi, *Jack Eichel, Sabres Saga Explained: How a Medical Disagreement Led to the Star’s Trade to Vegas*, CBS SPORTS (Nov. 4, 2021, 10:46 PM), <https://www.cbssports.com/nhl/news/jack-eichel-sabres-saga-explained-how-a-medical-disagreement-led-to-the-stars-trade-to-vegas/> [https://perma.cc/S82S-655F].

⁵ *Id.*

⁶ See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 235-37 (1996) (discussing and reinforcing the reasoning and policy as to why CBAs are given immunity under antitrust law).

⁷ Ryan Thomas, Comment, *How the NHL CBA Left Player with No Other Choice but to Request a Trade*, VILL. U. JEFFREY S. MOORAD CTR. FOR STUDY SPORTS L. J. 2022 JOURNAL BLOGS (Jan. 7, 2022), https://www1.villanova.edu/villanova/law/academics/sportslaw/commentary/mslj_blog/2022/HowtheNHLCBALeftPlayer.html [https://perma.cc/7CTC-8NJF].

antitrust and nonstatutory labor exemption framework employed by the courts, the unavailability of arbitration and other remedial deficiencies within this framework, and the uncomfortable situation it creates for teams and the NHL as a whole. Part III will explore the impropriety of the current framework as applied to issues such as medical autonomy and informed consent, looking to cases analogous to Eichel's while noting some differences between them. Part IV will provide recommendations as to how courts, the NHL, and the National Hockey League Players Association ("NHLPA") might resolve these issues in the future.

I. JACK EICHEL HANDCUFFED BY THE NHL CBA

When Jack Eichel was drafted second overall by the Buffalo Sabres in 2015, both sides were excited to begin to move in the right direction.⁸ Eichel, who was only eighteen years old, indicated that he thought "Buffalo as a city and the Sabres as a team [were] headed in [a] good direction," that he "want[ed] to be a piece of the puzzle" in Buffalo, and that he knew "Buffalo want[ed] success and they want[ed] success soon[.]"⁹ The Sabres as an organization felt the same way about Eichel, with then Sabres head coach Dan Bylsma stating that "[t]o be able to add [Jack's skills] to our team is pretty exciting."¹⁰ In 2017, after netting 113 points in his first two seasons, the Sabres signed Eichel to an eight-year, \$80 million contract extension.¹¹ But by the end of the 2020-21 season, some described the relationship as "a marriage gone bad."¹² How did a healthy relationship between a star franchise player and a rebuilding organization go so wrong? This section will detail the events prior to Eichel's injury, the injury itself, the timeline of events following his injury, the structure of the governing NHL CBA, and the ultimate resolution of the issues.

⁸ Mike G. Morreale, *Jack Eichel Drafted No. 2 by Buffalo Sabres*, NHL: NEWS HEADLINES (June 26, 2015), <https://www.nhl.com/news/jack-eichel-drafted-no-2-by-buffalo-sabres/c-772406> [<https://perma.cc/W9KV-6G7W>].

⁹ *Id.*

¹⁰ *Id.*

¹¹ Kristen Shilton, *Timeline of Jack Eichel's Hockey Career Prior to His Vegas Golden Knights Debut*, ESPN (Feb. 16, 2022), https://www.espn.com/nhl/story/_/id/33290616/line-jack-eichel-hockey-career-prior-vegas-golden-knights-debut [<https://perma.cc/S8WV-2TKZ>].

¹² 32 Thoughts: The Podcast, *The Eich-Stravaganza*, SPORTSNET, at 11:01 (Nov. 5, 2021), <https://podcast.sportsnet.ca/32-thoughts/the-eich-travaganza/> [hereinafter *Eich-Stravaganza*].

A. *Losing Culture and A Bad Disk*

Prior to Eichel's injury, the Sabres had been in a seemingly perpetual rebuild for several years dating back to when Eichel was drafted.¹³ At the end of the 2019-20 season, the Sabres had missed the playoffs for the ninth year in a row and Eichel was "fed up with losing," stating that it had "been a tough five years[.]"¹⁴ Eichel further stated that he was "a competitor" who wanted to win every time he got on the ice and "want[ed] to win the Stanley Cup" every season.¹⁵ Eichel played for three different coaches¹⁶ and three different general managers¹⁷ in only six years with the organization, which likely made it difficult to develop stable institutional relationships.¹⁸ Eichel was so frustrated with the state of affairs in Buffalo that he requested a trade at the end of the 2019-20 season.¹⁹ Eichel later stated that he felt like that had impacted his relationship with the team's ownership.²⁰

The situation surrounding Eichel's injury did not occur until March 7 of the 2020-21 season, when Eichel suffered a herniated disk in his neck in a game against the New York Islanders.²¹ Sabres doctors believed Eichel would only be out seven to ten days—a prognosis that likely instilled little faith in Eichel regarding the ability of the Sabres medical staff to properly diagnose him, given how unrealistic that timeline proved to be.²² Around

¹³ Adam Gretz, *Sabres' Rebuild is Still Going Nowhere*, NBC SPORTS: PRO HOCKEY TALK (Mar. 11, 2019, 5:37 PM), <https://nhl.nbcports.com/2019/03/11/sabres-rebuild-is-still-going-nowhere/> [<https://perma.cc/VGV5-CF4N>].

¹⁴ Sam Jarden, *Sabres Star Jack Eichel Admits He's Frustrated with Losing Seasons*, THE SPORTING NEWS (May 28, 2020), <https://www.sportingnews.com/us/nhl/news/sabres-jack-eichel-frustrated-losing-seasons/1u9572cympbv17cfhjfcii0bz> [<https://perma.cc/F3R8-JF5V>].

¹⁵ *Id.*

¹⁶ Buffalo Sabres Coaches, HOCKEY REFERENCE, <https://www.hockey-reference.com/teams/BUF/coaches.html> [<https://perma.cc/59NN-BQDJ>].

¹⁷ Staff, *Adams is Fourth General Manager of Sabres in Pegulas' Time as Owners*, THE BUFFALO NEWS (July 14, 2020), https://buffalonews.com/sports/sabres/adams-is-fourth-general-manager-of-sabres-in-pegulas-time-as-owners/article_c39f1844-6290-5a90-8563-a49ed2082d69.html [<https://perma.cc/VY57-RXRM>].

¹⁸ Jack Eichel, HOCKEY REFERENCE, <https://www.hockey-reference.com/players/e/eicheja01.html> [<https://perma.cc/JD8H-AGTJ>] (last visited Dec. 20, 2022) [hereinafter Eichel Stats].

¹⁹ Elliotte Friedman, *Jack Eichel Discusses Trade Request, Desire for Disk Replacement Surgery*, SPORTSNET (Nov. 4, 2021, 6:04 PM), <https://www.sportsnet.ca/nhl/article/jack-eichel-diskusses-trade-request-desire-disk-replacement-surgery/> [<https://perma.cc/YEP3-W5V3>] [hereinafter *Eichel Discussion*]; Jarden, *supra* note 14.

²⁰ *Eich-Stravaganza*, *supra* note 12.

²¹ AlBaroudi, *supra* note 4.

²² *Id.*

March 11, Eichel traveled to an independent specialist to determine the severity of his injury.²³ The specialist suggested that he needed a surgical procedure called cervical artificial disk replacement (“artificial disk replacement”), which no NHL player had undergone before.²⁴ By March 13, Sabres head coach Ralph Kruger announced that Eichel would be out for the foreseeable future before announcing on April 14 that the Sabres had ruled Eichel out for the rest of the season.²⁵ The next day, Buffalo Sabres general manager Kevyn Adams noted that Eichel would rehabilitate the injury until a May reevaluation, hopefully avoiding surgery.²⁶ At the reevaluation on May 10, both sides determined that Eichel would require surgery on his neck, but disagreed on the type of surgery that Eichel should receive.²⁷ The Sabres were in favor of an anterior cervical discectomy and fusion (“fusion”), while Eichel favored the artificial disk replacement.²⁸ According to Eichel, this is when the relationship between him and the Sabres began to splinter, stating “[t]here’s been a bit of a disconnect between myself and the organization.”²⁹

Understanding the differences in the surgical procedures (fusion and artificial disk replacement) and their long-term effects is the key to understanding why both sides remained entrenched in their positions. Fusion is meant to mimic the healing process of a broken bone and involves a surgeon placing bone, bonelike material, metal plates, screws, or rods within the space between two spinal vertebrae so that they can heal into one solid unit.³⁰ Artificial disk replacement involves removing the damaged disk and placing an artificial disk in its place, similar to receiving an artificial hip or knee.³¹ Both procedures have high success rates: around 90%.³² However, fusion presents a greater risk of complications from degenerative disks as time passes, due to the pressure the procedure gradually places on adjacent

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Mayo Clinic Staff, *Spinal Fusion*, MAYO CLINIC: PATIENT CARE & HEALTH INFORMATION, TESTS AND PROCEDURES (Nov. 14, 2020), <https://www.mayo-clinic.org/tests-procedures/spinal-fusion/about/pac-20384523> [https://perma.cc/DP5S-XRDD].

³¹ 32 Thoughts: The Podcast, *Why Eichel Wants a Disk Replacement*, SPORTSNET, at 06:56 (July 31, 2021), <https://podcast.sportsnet.ca/32-thoughts/why-eichel-wants-a-disk-replacement/> [hereinafter *Why Eichel Wants a Disk Replacement*].

³² *Id.* at 7:30.

disks.³³ This occurs in about 25% of patients, ultimately requiring another fusion within ten years.³⁴ For artificial disk replacement, the chance of requiring additional surgery within ten years is only 4.5% to 5%.³⁵ Moreover, after only two years, a patient is two times more likely to have a degenerative disk finding in the disks above and below the initially affected disk with fusion than with an artificial disk replacement.³⁶ Additionally, a fusion can take three months to recover from, while recovery from an artificial disk replacement can take as few as six weeks, further supporting Eichel's desire to get an artificial disk replacement over fusion.³⁷

Eichel's doctor, Chad Prusmack, described these long term impacts as a "very key component in Jack's case" because of Eichel's young age.³⁸ For instance, he noted that with fusion, there was a potential that by the time Eichel reached sixty years old, he may have "difficulties swallowing" and other adverse side effects.³⁹ However, the Sabres were worried about the unprecedented novelty of the artificial disk replacement procedure in the NHL.⁴⁰ According to Prusmack, fusion was great for the Sabres "from a risk management standpoint," but from a "young adult standpoint, [was] not optimal" for Eichel.⁴¹ Yet, Prusmack pointed out that artificial disk replacement was being used to treat rugby players, UFC fighters, and younger hockey players with tremendous success rates.⁴² He further felt that Eichel could perform even better than the athletes in those cases, given the types of contact NHL players take, where their head can "move more freely [and] take less impact."⁴³

B. *The NHL CBA and Its Terms that Forced a Trade*

Heading into the summer, the two sides had not reached an agreement as to which procedure Eichel should receive, but it was certain that he would have no control over the selection of a course of treatment. Under the NHL CBA, the team maintains final say over *all* medical and treatment decisions

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 32:03.

³⁸ *Id.*

³⁹ *Id.* at 26:08.

⁴⁰ *Id.* at 13:07.

⁴¹ *Id.* at 14:50.

⁴² *Id.* at 18:35.

⁴³ *Id.* at 21:05.

of a player under contract.⁴⁴ All that is required of the teams under the NHL CBA is “due consideration” of the medical opinion of the player’s physician and—if the player’s physician deems it necessary to send the player to a third-party physician due to disagreement between the team’s doctor and the player’s physician—of that third-party physician.⁴⁵ The NHL CBA does not provide players with the option of resolving disputes of this kind through third-party arbitration.⁴⁶ Nevertheless, both the league and the players association can file a grievance for arbitration.⁴⁷ Here, the NHLPA did not want to file any grievances with the NHL because they were fearful of setting a precedent affirming the CBA language at issue.⁴⁸ In other words, Eichel had only two options: appease the Sabres and get the fusion surgery against his will, or sit out and wait while his injury continued to go untreated in hopes that the Sabres would change their mind or trade him.⁴⁹

As the summer progressed, the stalemate between the two sides continued, with talks heating up about a potential trade.⁵⁰ But other teams were, for a number of reasons, reluctant to trade for Eichel. The first issue was with the Sabres’ high asking price, which was “at least four pieces that would be equivalent [to] first-rounders. . . .”⁵¹ Teams were also concerned about the uncertainty surrounding Eichel’s recovery from a procedure that

⁴⁴ 2012-2022 NHL-NHLPA Collective Bargaining Agreement, Art. 34.4(e) (Feb. 5, 2013), https://cdn.nhlpa.com/img/assets/file/NHL_NHLPA_2013_CBA.pdf [hereinafter NHL CBA]. The CBA was extended through 2026 because of the COVID-19 pandemic in a Memorandum of Understanding. See generally NHL-NHLPA 2020 Memo. Of Understanding (July 10, 2020), available at https://cdn.nhlpa.com/img/assets/file/NHLPA_NHL_MOU.pdf.

⁴⁵ NHL CBA, *supra* note 44 at Art. 34.4(d).

⁴⁶ John Wawrow, *All Eyes on Eichel and Ongoing Stalemate with Sabres*, ASSOCIATED PRESS (Oct. 8, 2021), <https://apnews.com/article/nhl-sports-gary-bettman-jack-eichel-buffalo-sabres-900dae4a4c2f42176166717405fec970> [<https://perma.cc/LG2G-DH68>].

⁴⁷ NHL CBA, *supra* note 44 at Art. 17.

⁴⁸ Wawrow, *supra* note 46.

⁴⁹ *Id.*

⁵⁰ Elliott Friedman, *31 Thoughts: What Caused the ‘Disconnect’ Between Eichel, Sabres*, SPORTSNET (May 11, 2021, 12:14 PM), <https://www.sportsnet.ca/nhl/article/31-thoughts-caused-disconnect-eichel-sabres/> [<https://perma.cc/VD6P-UNWM>].

⁵¹ Larry Brooks, *Rangers Look Into Jack Eichel’s Condition in Preliminary Sabres Talks*, N.Y. POST (June 28, 2021, 1:40 PM), https://nypost.com/2021/06/28/rangers-interested-in-jack-eichels-condition-in-early-talks/?utm_source=&utm_medium=site%20buttons&utm_campaign=site%20buttons [<https://perma.cc/8QUF-ZFRJ>].

had never been performed on an NHL player before.⁵² Further, they worried about whether Eichel would be able to return from his injury in time for the start of the NHL season at all.⁵³ Finally, the Sabres were reportedly withholding Eichel's medical records from interested teams, which likely further compounded hesitation.⁵⁴

Eichel's agents, Peter Fish and Peter Donatelli, had hoped to secure a trade by the beginning of the NHL free agency period on July 28, due in part to the likely unwillingness of many teams to risk waiting on a trade for Eichel and missing key players in free agency.⁵⁵ This did not occur. On July 30, Eichel's agents released a statement about Eichel's situation, hoping to put pressure on the Sabres.⁵⁶ In the statement, Eichel's agents stated that "[t]he process is not working[,]" and that they "fully anticipate[d] a trade by the start of the NHL free agency period."⁵⁷ Eichel's agents concluded the statement by proclaiming that "[the] process is stopping Jack from playing in the NHL. . . ."⁵⁸ The Sabres however, were in no rush to move Eichel, with Sabres general manager Kevyn Adams stating that they were "in control of this process[,]" and that they had "a player under contract [and didn't] feel any pressure."⁵⁹ Eichel ultimately decided to switch agents in late August, perhaps hoping that a change could accelerate a trade.⁶⁰ While Eichel was under contract and the Sabres had every right to get the best deal

⁵² 32 Thoughts: The Podcast, *Back to Florida*, SPORTSNET, at 20:16 (July 6, 2021), <https://podcast.sportsnet.ca/32-thoughts/back-to-florida/>.

⁵³ *Id.*

⁵⁴ See Brooks, *supra* note 51.

⁵⁵ 32 Thoughts: The Podcast, *The Good and Bad of Draft Weekend*, SPORTSNET, at 30:30 (July 25, 2021), <https://podcast.sportsnet.ca/32-thoughts/the-good-and-bad-of-draft-weekend/>; @LLysowski, TWITTER (July 30, 2021, 9:45 PM), https://twitter.com/LLysowski/status/1421285967265030148?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1421285967265030148%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.cbssports.com%2Fnhl%2Fnews%2Fjack-eichel-sabres-saga-explained-how-a-medical-disagreement-led-to-the-stars-trade-to-vegas%2F [https://perma.cc/SV92-YA2Q]; Nick Goss, *NHL Free Agents 2021: Ranking Top 25 Players Available*, NBC SPORTS BOSTON (July 9, 2021), <https://www.nbcsports.com/boston/b Bruins/nhl-free-agents-2021-ranking-top-25-players-available?cid=yahoo&partner=ya4nbc> [https://perma.cc/9HYR-Y8PW].

⁵⁶ See AlBaroudi, *supra* note 4.

⁵⁷ @LLysowski, *supra* note 55.

⁵⁸ *Id.*

⁵⁹ AlBaroudi, *supra* note 4.

⁶⁰ See John Wawrow, *AP Sources: Eichel Switching Agents Amid Dispute with Sabres*, ASSOCIATED PRESS (Aug. 27, 2021), <https://apnews.com/article/sports-nhl-buffalo-sabres-hockey-854be9032e92c009a1d16c838b7472f0> [https://perma.cc/NQ3X-7RBP].

they could for Eichel, the delay was likely due in part to the Sabres owners' feelings of betrayal regarding Eichel's prior trade request.⁶¹

As training camp approached, the Sabres announced on September 23 that Eichel had failed his physical examination and would be placed on long-term injured reserve because he would "not accept [the] Sabres' desire for fusion surgery."⁶² Moreover, the Sabres declared that Eichel was no longer the captain of the Sabres, with Kevyn Adams stating, "I feel the captain is the heartbeat of your team," and "I felt we needed to address that."⁶³ As trade talks grew quiet around October 21, Eichel gathered several medical opinions to make "one last attempt to convince Sabres management to allow him to get his preferred surgery. . ."⁶⁴ Despite this last-ditch effort, the team still refused to budge.⁶⁵ About two more weeks passed before the Sabres finally traded Eichel to the Vegas Golden Knights on November 4 for slightly less than the Sabres' original asking price (three first-round equivalents and a third-round draft pick).⁶⁶ Importantly, the Golden Knights noted they would allow Eichel to get the artificial disk replacement surgery that he desired. In total, the entire saga between both sides lasted an astonishing eight months, keeping Eichel off the ice for almost an entire year.⁶⁷

II. THE ANTITRUST & LABOR FRAMEWORK

The situation was unacceptable from a public relations and a business standpoint for all sides, and it could have been avoided with a better anti-trust and labor framework under the nonstatutory labor exemption. This section will detail the current framework employed by courts and arbitrators when examining whether CBA terms are valid, how the framework would have applied in this case, and where the framework positioned all parties involved.

⁶¹ *Eich-Stavaganza*, *supra* note 12.

⁶² AlBaroudi, *supra* note 4.

⁶³ *Id.*

⁶⁴ Emily Kaplan, *Sources: Jack Eichel's Camp to Meet With Buffalo Sabres, Make Final Case for Disk Replacement Surgery*, ESPN (Oct. 21, 2021), https://www.espn.com/nhl/story/_/id/32448880/jack-eichel-meet-buffalo-sabres-make-final-case-disk-replacement-surgery [<https://perma.cc/8SYL-FTNS>].

⁶⁵ AlBaroudi, *supra* note 4.

⁶⁶ *Id.*

⁶⁷ Chris Bengel, *Why Jack Eichel's Return Can Vault the Golden Knights to Their First Stanley Cup Victory*, CBS SPORTS (Feb. 18, 2022, 1:01 PM), <https://www.cbssports.com/nhl/news/why-jack-eichels-return-can-vault-the-golden-knights-to-their-first-stanley-cup-victory/> [<https://perma.cc/T4WQ-HKFS>].

A. *The Current Framework and Its Application*

Under Section 1 of the Sherman Antitrust Act, “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.”⁶⁸ The Sherman Act was passed “in order to prevent or suppress devices or practices that . . . restrain trade or commerce by suppressing or restricting competition and obstructing the course of trade.”⁶⁹ The Supreme Court made clear in *American Needle v. National Football League* that some agreements amongst a professional sports league’s teams can be subject to scrutiny under Section 1 of the Sherman Act, despite the unique need for teams in a league to agree on certain issues, such as the rules of the sport, in unilateral concert.⁷⁰ Notably, while labor organizations would also be subject to scrutiny under Section 1 of the Sherman Act, Congress ensured in the Clayton Act that antitrust laws would not be “construed to forbid the existence and operation of labor . . . organizations. . . .”⁷¹ Additionally, the Norris LaGuardia Act prevents federal courts from issuing injunctions in labor disputes, and the National Labor Relations Act (“NLRA”) grants workers the right to collectively bargain with employers.⁷²

Oddly, neither the Clayton Act, the Norris LaGuardia Act, nor the NLRA immunized CBAs between unions and employers from antitrust scrutiny, leading the Supreme Court to create a “nonstatutory labor exemption” to protect CBAs from antitrust scrutiny in *Local Union No. 189, Amalgamated Meat Cutters and Butcher Workmen of North America v. Jewel Tea Co.*⁷³ The Court later provided a gloss on the nonstatutory labor exemption, recognizing that “a proper accommodation between congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions.”⁷⁴ In other words, courts recognize that the nonstatutory labor exemption gives effect to federal labor laws and allows for collective

⁶⁸ Sherman Antitrust Act, 15 U.S.C.A. § 1 (West).

⁶⁹ John J. Dvorske, Annotation, *Construction and Application of Sherman Act*, 15 U.S.C.A. §§ 1 et seq.—*Supreme Court Cases*, 35 A.L.R. Fed. 2d 1 § 2 (2009).

⁷⁰ *American Needle v. Nat’l Football League*, 560 U.S. 183, 200-03 (2010).

⁷¹ Clayton Antitrust Act, 15 U.S.C.A. § 17 (West).

⁷² Norris LaGuardia Act, 29 U.S.C.A. § 104 (West); National Labor Relations Act, 29 U.S.C.A. § 151 (West).

⁷³ See generally, 381 U.S. 676 (1965).

⁷⁴ *Connell Constr. Co., Inc. v. Plumbers and Steamfitters Loc. Union No. 100*, 421 U.S. 616, 622 (1975).

bargaining, even though it may restrain competition.⁷⁵ The main purpose of the exemption is to give effect to the Congressional intent to prevent the “judicial use of antitrust law to resolve labor disputes.”⁷⁶ Subsequently, many courts have held that the nonstatutory labor exemption grants near-immunity to terms created through or incorporated in CBAs between professional sports leagues and player unions.⁷⁷

The Second Circuit has stated that the nonstatutory labor exemption applies if subjecting the challenged provisions of the CBA to antitrust scrutiny would “subvert fundamental principles of . . . federal labor policy.”⁷⁸ The court made clear in *Clarett v. National Football League* that placing mandatory (and, potentially, permissive) subjects of bargaining under antitrust attack would subvert fundamental principles of federal labor policy.⁷⁹ The Eighth Circuit developed a three factor test for determining when the exemption applies, known as the “Mackey Test,” which includes: (1) whether the terms of the agreement primarily impacted only the parties to the collective bargaining relationship, (2) whether the terms were mandatory subjects of bargaining, and (3) whether the agreement is the result of bona fide arm’s-length bargaining.⁸⁰ The Third Circuit’s approach is closer to the Second Circuit’s, but does provide that an antitrust plaintiff “can establish a prima facie case under Section 4 of the Clayton Act by showing that he had been injured in in his business or property by ‘a collective bargaining agreement, or conduct taken pursuant to it, [which] has been shown to be illegal under federal labor law.’”⁸¹ All of these standards share a common feature: it is extremely difficult for a player to succeed on an antitrust claim when there is a CBA in place.

This difficulty is further exacerbated by CBAs containing arbitration or grievance provisions. When a CBA contains such a provision and a plaintiff has not used the procedures outlined in said provision, state and federal courts will usually dismiss the case to arbitration in light of the Federal Arbitration Act, which deems arbitration provisions in contracts to be

⁷⁵ See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 237 (1996).

⁷⁶ *Id.* at 236.

⁷⁷ See *Wood v. Nat’l Basketball Ass’n*, 809 F.2d 954, 963 (2d Cir. 1987); *Nat’l Hockey League Players Ass’n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 474-75 (6th Cir. 2005); *Clarett v. Nat’l Football League*, 369 F.3d 124, 142-43 (2d Cir. 2004).

⁷⁸ *Wood*, 809 F.2d at 959.

⁷⁹ See National Labor Relations Act, 29 U.S.C.A. § 158 (West); 369 F.3d at 139-40 n. 17.

⁸⁰ *Mackey v. Nat’l Football League*, 543 F.2d 606, 614 (8th Cir. 1976).

⁸¹ *Feather v. United Mine Workers of Am.*, 711 F.2d 530, 542 (3d Cir. 1983) (citing to *Consol. Express, Inc. v. N.Y. Shipping Ass’n*, 641 F.2d 90 (3d Cir. 1981)).

“valid, irrevocable, and enforceable. . .”⁸² Further, even when plaintiffs bring claims after arbitration, courts are unwilling to vacate the arbitration award as long as “the award draws its essence from the collective bargaining agreement and is not merely the arbitrator’s own brand of industrial justice. . .”⁸³

B. Applying the Framework to the Eichel Situation

Applying the current framework to Eichel’s situation shows that he was left with no proper recourse. Since the NHL has a grievance procedure outlined in Article 17 of the NHL CBA, Eichel would have been required to go through arbitration before bringing a lawsuit, as any claim brought in court would have been dismissed to arbitration.⁸⁴ Article 17 of the NHL CBA does not specify whether the arbitrator will apply state or federal law in grievance proceedings.⁸⁵ The only guidance in respect of applicable law or interpretation thereof appears in Article 17.13, which provides that “the Impartial Arbitrator has the authority to interpret, apply, and determine compliance with any provision of this Agreement. . .”⁸⁶ This provision was likely left vague and open-ended to promote flexibility. To the extent that the primary focus is on the arbitrator’s determination of compliance, it seems clear that Eichel would have been found to be out of compliance with the CBA, which plainly gives teams the right to make medical decisions for the player.

Eichel could have subsequently brought a proceeding in federal court (given that both parties are in the State of New York), where federal law tends to govern labor disputes regarding CBAs. However, since Eichel would have been in the Second Circuit, it is likely that circuit precedent would have bound a court to uphold the arbitration award to the extent that a court would likely determine that the arbitrator had acted within the powers of the CBA instead of imposing their own brand of industrial justice.⁸⁷ Alternatively, Eichel might have argued that the Articles 34.4(d) and (e) were anti-competitive under antitrust law and thus not protected by the

⁸² See 9 U.S.C.A. § 2; *Preston v. Ferrer*, 552 U.S. 346, 349, 352-53 (2008); Federal Arbitration Act, 9 U.S.C.A. § 2 (West).

⁸³ *Nat’l Football League Mgmt. Council v. Nat’l Football Players Ass’n*, 820 F.3d 527, 537 (2d Cir. 2016).

⁸⁴ See *Preston*, 552 U.S. at 349, 352-53; Federal Arbitration Act, 9 U.S.C.A. § 2 (West); NHL CBA, *supra* note 45 at Art. 17.

⁸⁵ See *id.*

⁸⁶ See *id.* at Art. 17.13.

⁸⁷ See *Nat’l Football League Mgmt. Council*, 820 F.3d at 537.

nonstatutory labor exemption.⁸⁸ Yet, Second Circuit precedent likely would have cut against his claim, since holding Articles 34.4(d) and (e) as anti-competitive would likely “subvert fundamental principles of . . . federal labor policy.” This might be the case because topics like medical treatment of a player appear likely to be viewed as conditions of employment and thus mandatory subjects of bargaining.⁸⁹

Since both arbitration and antitrust claims would have likely failed, Eichel was effectively left at the whim of the system. All he could do was give in to the Sabres’ desires or sit out and wait as the clock on his career ticked away. Alternatively, Eichel might have gone ahead and had the artificial disk replacement procedure done behind the organization’s back, but this would have put him in breach of his contract, allowing the Sabres to have “fined him, suspended him without pay until he was healthy[,] [or] based on the CBA, . . . terminated his contract [thus] voiding the final \$50 million of his contract.”⁹⁰ Meanwhile all Eichel wanted to do was exercise medical autonomy over his own body.

Not every player will have the good fortune of a platform from which to refuse an undesired medical procedure until traded. Indeed, though the details on what occurred between the two sides are scarce, New Jersey Devils goaltender, Mackenzie Blackwood, encountered a similar medical treatment dispute with the Devils during the 2021-22 NHL season.⁹¹ While the Devils did not release Blackwood, they did trade for Washington Capitals goaltender, Vitek Vanecek, who they then signed to a three year contract, signaling that the Devils may not have appreciated Blackwood’s hard-headedness regarding his medical treatment.⁹² Where players like Eichel and Blackwood face resistance over their preferred forms of medical treatment, it is not hard to see that the current NHL CBA terms put many bubble and fringe players in poor positions. These players may only get one shot to play in the NHL and do not have the same platform or voice as Eichel or Blackwood to stand up to the teams’ decisions on their medical

⁸⁸ See *Connell Constr. Co., Inc. v. Plumbers and Steamfitters Loc. Union No. 100*, 421 U.S. 616, 622 (1975).

⁸⁹ See National Labor Relations Act, 29 U.S.C.A. § 158 (West); see also *Clarett v. Nat’l Football League*, 369 F.3d 124, 142-43 (2d Cir. 2004).

⁹⁰ Thomas, *supra* note 7 (citing to Tim Graham, *Will the Bills, Sabres Stay in Buffalo for the Long Term? The Satchel Addresses the Angst on Both*, THE ATHLETIC (Aug. 18, 2021), <https://theathletic.com/2776616/2021/08/18/will-the-bills-sabres-stay-in-buffalo-for-the-long-term-the-satchel-addresses-the-angst-on-both/> [https://perma.cc/69CM-2AN3]).

⁹¹ 32 Thoughts: The Podcast, *Willing Combatants*, SPORTSNET, at 45:00 (Apr. 4, 2022), <https://podcast.sportsnet.ca/32-thoughts/willing-combatants/>.

⁹² *Id.*

treatment. They may well fear that they might be labelled as “difficult” and buried in the minors for speaking up.

The current CBA puts teams in a difficult position as well. While the Sabres certainly had a right to enforce the CBA terms as they were written, the saga was damaging from a public relations perspective.⁹³ Sports attorney Dan Lust stated that “[the Sabres were] trying to force this down the player’s throat,” and noted that he did not “think there [was] much of a win from a [public relations] perspective with the Sabres.”⁹⁴ To spectators, it looked like Sabres ownership was retaliating in response to Eichel’s earlier trade request.⁹⁵ Notably, however, while the Sabres were certainly worried about damaging Eichel as an asset, they were also genuinely concerned about him from a health perspective, with general manager Kevyn Adams stating, “I care about Jack Eichel as a person,” and “I wish him nothing but the best for him. I want nothing more than for Jack to get healthy. I also told him nothing in this was personal.”⁹⁶ Yet, outsiders and fans will struggle to fully credit Adams’ comments. Moreover, players have already told NHL insiders that they are hesitant about playing for the Sabres in light of this situation because it left them wondering, “what if that’s me?”⁹⁷

From the league’s perspective, this situation was a worst case scenario. Whether the NHL anticipated this when they made the medical decision provision of the CBA is unknown, though some believe the league never imagined it would be an issue.⁹⁸ Previously, teams had routinely allowed their star players to get preferred medical treatment, even when those forms of treatment were unconventional.⁹⁹ When Sidney Crosby was going through his concussion and neck problems, he used unusual treatments like chiropractic neurology with the full support of the Pittsburgh Penguins.¹⁰⁰ The Edmonton Oilers allowed their star player, Connor McDavid, to get

⁹³ See Wawrow, *supra* note 47 (discussing how Attorney Dan Lust thought the whole situation was a really bad look for the league).

⁹⁴ *Id.*

⁹⁵ See *Eich-Stravaganza*, *supra* note 12.

⁹⁶ Sean Leahy, *Jack Eichel Saga Ends as Sabres Deal Forward to Golden Knights*, NBC SPORTS (Nov. 4, 2021, 8:11 AM), <https://nhl.nbcports.com/2021/11/04/jack-eichel-saga-ends-as-sabres-deal-forward-to-golden-knights/> [<https://perma.cc/LNJ6-Z5QA>].

⁹⁷ *Eich-Stravaganza*, *supra* note 12 at 44:01.

⁹⁸ *Eich-Stravaganza*, *supra* note 12 at 42:35; See also Deubert, *supra* note 3 at 60 (noting how at the time the article was written there had not been any documented instances where an NHL team tried to perform treatment against a player’s wishes, likely signaling that the NHL had not anticipated this issue to arise).

⁹⁹ See *Eich-Stravaganza*.

¹⁰⁰ *Id.*

unorthodox rehabilitation treatments for a PCL knee injury he suffered a few years ago, despite not being entirely keen on the course of treatment.¹⁰¹ However, the plain language of the CBA creates an uncomfortable situation for the NHL, where it must split support for its teams and owners with the obvious desire to have star players back on the ice quickly.¹⁰²

The current legal framework played a substantial role in creating a difficult situation for all parties involved and makes clear how deference to CBAs is not always the best course of action.

III. WHY THE CURRENT FRAMEWORK DOES NOT WORK FOR THESE TYPES OF ISSUES

The current framework does not work for issues like a player's medical autonomy, and there need to be appropriate changes in the law. This is especially so considering that this is not just an issue that is exclusive to the NHL, but also a potential issue in the National Basketball Association ("NBA"), whose CBA contains a similar provision to the one at issue in the NHL CBA regarding player medical autonomy.¹⁰³ This section will detail how this framework promoted illegal tort-like behavior and poor public policy and how these terms in the CBA can be anti-competitive.

A. *Illegality & Public Policy*

The medical decision provision in CBAs can tempt team physicians to breach their duty to adhere to the informed consent doctrine under state tort law. Under tort law, physicians have a duty to disclose material information about the patient's physical condition and to obtain informed consent to the

¹⁰¹ See *id.*

¹⁰² See Brandon Maron, *Bettman: Both Sides of Eichel Stalemate Have "The Best Intentions"*, THE SCORE (Oct. 4, 2021), <https://www.thescore.com/nhl/news/2200797> [<https://perma.cc/3QWN-K9P9>].

¹⁰³ See 2017 NBA-NBPA Collective Bargaining Agreement, Art. XXII § 10 (g) (Jan. 19, 2017), <https://cosmic-s3.imgix.net/3c7a0a50-8e11-11e9-875d-3d44e94ae33f-2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf> (stating how the team is only required to *consider* the player's second medical opinion, suggesting that the ultimate decision lies with the team); Chris Deubert, *Jack Eichel's Dispute with Sabres Reveals NHL-NHLPA CBA in Conflict with Bioethical Principles*, LINKEDIN (Oct. 6, 2021) <https://www.linkedin.com/pulse/jack-eichels-dispute-sabres-reveals-nhl-nhlpa-cba-conflict-deubert/> [<https://perma.cc/M3BF-DRE5>].

recommended medical treatment from the patient.¹⁰⁴ To obtain informed consent, the physician must relay “sufficient medical information to a patient relevant to the proposed treatment, allowing [the patient] to make an intelligent decision as to whether he should begin or continue medical treatment.”¹⁰⁵ Should the physician consciously choose not to reveal important information to the patient, then the physician is engaging in fraudulent concealment, which can be imputed to the team under a theory of vicarious liability.¹⁰⁶ When the player lacks the necessary information to provide informed consent, it can have disastrous repercussions for the athlete because “professional athletes are expected to perform at the highest level attainable” and “the physician’s failure to disclose [important information] could potentially cost the athlete his career through continued or subsequent injury.”¹⁰⁷ Allowing physicians to have total control over the player’s medical decisions thus endorses a physician to breach their duty under the informed consent doctrine. In other words, the CBA is endorsing the team physician and medical personnel to violate the doctrine of informed consent and the patient’s right to choose.

Team physicians have several potential conflicts of interest and may be improperly pressured or feel compelled by a team’s management to make a decision that is not in the best interests of the player.¹⁰⁸ A prime example of how physicians can be pressured into not revealing information to the player is the case of Charlie Krueger, a former defensive lineman for the San Francisco 49ers. Krueger had a reputation for playing hurt and accepting team medical care without question.¹⁰⁹ Five years after Krueger retired, he was suffering from chronic pain and a doctor discovered that he was missing a ligament in his knee.¹¹⁰ It was at this point that Krueger realized that 49ers medical staff had concealed the severity of his injuries and let him keep playing on the field, while prescribing him excessive pain-killing medications.¹¹¹ Krueger had received surgery on this knee fifteen years prior to his discovery of the missing ligament and was told by team doctors that his knee was in “good repair,” although one of them noted in his surgical re-

¹⁰⁴ Twila Keim, *Physicians for Professional Sports Teams: Health Care Under the Pressure of Economic and Commercial Interests*, 9 SETON HALL J. SPORTS L. 196, 204 (1999); Deubert, *supra* note 103.

¹⁰⁵ *Id.*

¹⁰⁶ WALTER T. CHAPMAN, JR., FUNDAMENTALS OF SPORTS L. § 4:2 (2D ED. 2022), WESTLAW (DATABASE UPDATED JAN. 2022).

¹⁰⁷ Keim, *supra* note 104, n. 58.

¹⁰⁸ *Id.* at 212-13.

¹⁰⁹ *Id.* at 205.

¹¹⁰ *Id.*

¹¹¹ *Id.*

view that a ligament appeared to be absent from Krueger's knee.¹¹² This information was especially important because the medical community knew that lacking this ligament would be "debilitating" for said person.¹¹³ Ultimately, a court found the 49ers and their medical staff guilty of fraudulent concealment.¹¹⁴

Like Krueger, many ice hockey players play through serious injuries and accept team medical care without full knowledge, due to the sport's culture of playing through pain.¹¹⁵ Some notable injuries that hockey players have played through include torn ACLs and MCLs, broken feet, broken fingers, acute compartment syndrome, broken ribs, collapsed lungs, and more.¹¹⁶ This culture leads to players, like former first-round NHL draft pick Ryan Kesler, having serious health issues after playing.¹¹⁷ Kesler discussed his post-NHL life and how he has "holes in [his] colon and ulcers, and basically [his] whole intestines went into spasm."¹¹⁸ He also suffered from Chron's Disease, having to go the bathroom thirty to forty times a day, and many other health issues because he "wasn't made aware of what [toradol] could potentially do to [him]."¹¹⁹ His stated reason for continuing to take the painkiller without asking questions was that he "never wanted to hurt the team. . ." ¹²⁰ While it is true that many NHL players likely do not fully understand the severity of their injuries,¹²¹ there are real possibilities that team physicians are being pressured into not revealing the repercussions

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 206.

¹¹⁵ Sarah Hall, *Hockey's 'Ice Warrior' Culture Feeds Injuries & Dangerous Habits*, SB NATION: NHL EDITORIALS (Jun. 1, 2017, 11:00 AM), <https://www.fiveforhowling.com/2017/6/1/15717694/nhl-injuries-erik-karlsson-sidney-crosby-and-hockey-culture> [<https://perma.cc/MYQ9-4KSK>].

¹¹⁶ *See id.*

¹¹⁷ Greg Wyshynski, *Former Player Ryan Kelsey Says There's Lack of Education Across NHL in Risks of Pain Medications*, ESPN: NHL (Sep. 22, 2020), https://www.espn.com/nhl/story/_/id/29946533/former-player-ryan-kesler-says-there-lack-education-nhl-risks-pain-medications [<https://perma.cc/Y245-DS5U>].

¹¹⁸ *Id.*

¹¹⁹ *Id.* Toradol is a nonsteroidal anti-inflammatory drug (painkiller) that is not approved for long-term use. *Id.* Many players, like Kesler used it long-term in order to keep playing and were not made aware of the risks of doing so. *Id.*

¹²⁰ *Id.*

¹²¹ *See* Hall, *supra* note 116 (suggesting that hockey culture asks players to blindly play through injuries, perhaps not realizing the severity of those injuries).

of certain medical treatment because the teams likely know that players are not asking questions when getting treatment and are blindly accepting.¹²²

What is most striking about the Krueger case are the parallels that it draws to hockey players and Eichel's situation. Krueger, like many hockey players, chose to play through pain and injuries and willingly accepted team medical care without asking any questions, thus remaining totally unaware of any of the risks involved with such medical treatment. Eichel took an approach different from many other hockey players and Krueger, and instead considered what his options were and the treatment that would be best for him.¹²³ In spite of this, Sabres' doctors tried to push a procedure onto Eichel that had much higher likelihoods of needing further surgery and affecting his quality of life after his NHL career.¹²⁴ What if Eichel had done what Krueger and Kesler had done and just accepted what the Sabres' doctors had to say? What about hockey players who are on the cusp of making it to the NHL and have no choice but to accept medical treatment for fear of being labeled difficult, selfish, or weak? What happened to Krueger, Kesler, and countless other players underpins these questions and why team physicians are allowed to—or being forced to—not disclose injuries and repercussions of treatments to players.

Moreover, the medical decision provision places players in a position where they either need to get the team's prescribed medical treatment or risk breaching their contract by holding out or getting their preferred medical treatment against the wishes of the team's doctors and in violation of the CBA. In essence, the NHL CBA is telling players to either get the team's preferred treatment or risk forfeiting their livelihood and earnings. Leagues and teams are trying to prevent player holdouts because it causes instability in leagues.¹²⁵ Additionally, one of the main pillars of contract law is promoting parties to faithfully fulfill their obligations and to protect the expectancy interests of each party.¹²⁶ The medical decision provision cuts against these two important interests and makes the player resort to breaching a contract if they want to receive their preferred medical treatment.

¹²² See Wyshynski, *supra* note 118 (stating that Kesler took painkillers because he knew he had to in order to play, which implies that other players likely do the same and that NHL teams seemingly know this).

¹²³ See *Eichel Discussion*, *supra* note 20.

¹²⁴ See *Why Eichel Wants a Disk Replacement*, *supra* note 31 at 08:23.

¹²⁵ Basil M. Loeb, *Deterring Player Holdouts: Who Should Do It, How to Do It, and Why It Has to be Done*, 11 MARQ. SPORTS L. REV. 275, 275 (2001).

¹²⁶ See *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 573 N.W.2d 842, 846 (W.I. 1998).

This medical decision provision is furthermore abysmal public policy because it promotes players concealing their injuries or playing through said injuries when they know it is wrong for fear of losing current or future earnings or their place on the team. These issues affect even the National Football League (“NFL”), where the players hypothetically have control over their medical decisions.¹²⁷ A prime example is the case of Antonio Brown with the Tampa Bay Buccaneers in the 2021 season. Certainly, Antonio Brown has had a troubled history in the NFL.¹²⁸ However, Brown alleged in January of 2022 that he was pressured by his coach to continue to play with an injured ankle and receive injections of dangerous painkillers.¹²⁹ When Brown determined that he could no longer play, he told Buccaneers head coach, Bruce Arians, and alleged that Arians told him he was done and no longer a member of the team.¹³⁰ What truly happened between Arians and Brown is unknown. However, it highlights the fact that players who do not have the leverage that someone like Jack Eichel has are left seriously vulnerable to undue influence to play through an injury or not reveal the injury to team medical staff in the first place.

In sum, the current framework is not fit for the NHL CBA’s medical decision provision because it allows illegal behavior in the form of physicians failing to disclose injuries and treatment side effects to players, violations of the informed consent doctrine, and even fraudulent concealment—all of which can put teams at risk for vicarious liability and angers fans, who are mad at the teams and league for allowing their favorite players to suffer. They enable poor public policy in making players choose between getting a treatment they do not want or holding out and risk breaching their contracts, thus forfeiting earnings and their livelihoods. Finally, they encourage players to conceal injuries, despite it not being in the player’s best interest to do so.

¹²⁷ See 2020 *National Football League Collective Bargaining Agreement*, Art. 39, § 6 https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFL-NFLPA_CBA_March_5_2020.pdf [hereinafter NFL CBA].

¹²⁸ See Billy Heyen, *Antonio Brown’s Timeline of Trouble: From Steelers Benching to Suspensions and Buccaneers Release*, THE SPORTING NEWS (Jan. 01, 2022), <https://www.sportingnews.com/us/nfl/news/antonio-brown-suspension-lawsuit-steelers/14i8a1dpzxzlr1u0x9kqhybd3c> [<https://perma.cc/WNL9-6WLS>].

¹²⁹ Ian Rapoport, @RapSheet, TWITTER (Jan. 5, 2022, 8:58 PM), <https://twitter.com/RapSheet/status/1478908690627506176> [<https://perma.cc/XD5G-4MPT>].

¹³⁰ See *id.*

B. Anti-competitiveness

The medical decision provision in CBAs is anti-competitive and should not receive protection under the nonstatutory labor exemption because it risks collusion among teams, keeps players off the playing surface, and creates bad public relations for the team and league.

The current framework creates risks of collusion by teams in the league to prevent a player from getting their preferred medical treatment and to not allow a player to play unless they give in to the medical treatment all of the teams want. A semi-analogous situation can be seen in Major League Baseball (“MLB”), where MLB teams colluded in the free-agency market against players by agreeing to not pursue players on other teams, agreeing to not pursue a player until other teams showed disinterest in the player, and agreeing to create an “information bank” for all teams with detailed information about every contract offer made to a player in free agency.¹³¹ Quite conceivably, NHL teams could have chosen to engage in collusion and agreed not to trade for Eichel until he got the fusion procedure. The current framework seriously risks collusion that is clearly anti-competitive and should not be protected by the nonstatutory labor exemption.

The current framework also inhibits the player’s ability to compete freely and effectively to the best of his ability. In *Flood v. Kuhn*, Kurt Flood, a talented MLB player, sued the Commissioner of Baseball, arguing that baseball’s reserve clause violated antitrust law and the Thirteenth Amendment.¹³² The Supreme Court ultimately rejected his claims, largely on *stare decisis* grounds because the Court had already granted the MLB an antitrust exemption fifty years earlier.¹³³ However, Justice Marshall notably pointed out in his dissent that the antitrust laws guarantee “the right to compete freely and effectively to the best of one’s ability.”¹³⁴ While a Thirteenth Amendment claim would be preposterous and not apply to Eichel’s situation, like Flood, Eichel did have his right to compete freely and effectively to the best of his ability hindered because he felt that he needed the artificial disk replacement to perform to the best of his ability. Thus, an argument can be made that the Sabres denying Eichel his procedure is anti-competitive under antitrust laws as an unreasonable restraint on trade.

¹³¹ See Connor Mulry, *Is Baseball Shrouded in Collusion Once More? Assessing the Likelihood that the Current State of the Free Agent Market Will Lead to Antitrust Liability for Major League Baseball’s Owners*, 25 *FORDHAM J. CORP. FIN. L.* 273, 286-88 (2019).

¹³² *Flood v. Kuhn*, 407 U.S. 258, 265-66 (1972).

¹³³ *Id.* at 285.

¹³⁴ *Id.* at 292-93.

Finally, the medical decision provision harms teams' and leagues' brand image and reputation in that it has economic impacts on viewership and ticket sales, making it anti-competitive. Studies have shown that a team's reputation, brand image, and fan loyalty are directly impacted by a star player's presence on the team.¹³⁵ By having star players sidelined because of a dispute over medical treatment, ticket sales and viewership will inevitably go down and harm the team's economic interests. Moreover, when teams trade their star players to resolve situations like this (consider, for instance, Eddy Curry of the NBA)¹³⁶, there are further economic impacts to the team through reduced viewership, brand reputation and image, and fan loyalty. All these considerations could lead to smaller broadcast rights deals and directly impact the potential earnings of the league, teams, and players. These economic interests can point to an argument that the medical procedure provision is anti-competitive under antitrust law.

IV. RECOMMENDATIONS

In the future, situations like this can be prevented by several parties involved. This section will discuss recommendations for preventing situations like this from occurring again through courts and player unions, teams, and leagues.

One way to prevent these situations in the future is for courts to make changes to the nonstatutory labor exemption. Where the nonstatutory labor exemption was crafted by courts to begin with, they have more flexibility to adjust it as needed. The best way for courts to do this is to make determinations that a player's right to medical autonomy cannot be extinguished by any CBA. Such an idea is not new for courts, as they have held that CBAs cannot extinguish certain rights in the past. For example, Roy Tarpley sued the National Basketball Association ("NBA") claiming that the NBA CBA's reinstatement policy violated the Americans with Disabilities Act ("ADA") and that his rights under the ADA trumped the CBA.¹³⁷ While

¹³⁵ NATHAN DAVID PIFER, AN EXAMINATION OF STAR PLAYERS' EFFECTS ON THE BRANDING PROCESS OF PROFESSIONAL SPORTS TEAMS 49 (Marshall U., Jan. 1, 2012).

¹³⁶ Eddy Curry played for the Chicago Bulls and the team wanted him to undergo a DNA test to determine the extent of potential heart problems Curry may have had. Michael A. McCann, *The Reckless Pursuit of Dominion: A Situational Analysis of the NBA and Diminishing Player Autonomy*, 8 U. Pa. J. Lab. & Emp. L. 819, 819-20 (2006). Curry refused and he was ultimately traded to the New York Knickerbockers who did not require him to get a DNA test. *Id.*

¹³⁷ Robin L. Muir, *Drunk or Disabled? The Legal and Social Consequences of Roy Tarpley's Discrimination Claim Against the NBA*, 15 VILL. SPORTS & ENT. L.J. 333, 334 (2008).

Tarpley's case was ultimately settled before reaching a substantive ruling,¹³⁸ other courts have ruled on the issue and found that in some situations, a CBA does not reign supreme when reasonable accommodations under the ADA are possible.¹³⁹ Courts could take this approach and adopt similar holdings, stating that a player's right to medical autonomy trumps any CBA that tries to infringe on this right. Moreover, taking this approach would allow courts to remain relatively uninvolved in CBAs and leave the nonstatutory labor exemption with plenty of bite.

In addition to holding that rights under the ADA trump provisions in CBAs, courts have also held some issues to fall outside of the CBA entirely. One example of this was *Tynes v. Buccaneers Limited Partnership*, a case where the Tampa Bay Buccaneers' kicker, Lawrence Tynes, suffered an MRSA infection in his toe because the Buccaneers did not properly sterilize their facilities.¹⁴⁰ Tynes sued the Buccaneers, under a theory of state premises liability and negligent misrepresentation.¹⁴¹ The Buccaneers argued that any lawsuit was barred by the CBA's medical treatment provisions.¹⁴² The court determined that Tynes's claims fell outside of the CBA where the CBA had no disclaimers that narrowed the scope of a team's common law duty.¹⁴³ Such an approach could be taken to players' rights to medical autonomy, as courts could determine under state tort law that a CBA provision like the NHL's does not narrow the scope of a team's common law duty to provide the player with pertinent medical information to properly consent under the doctrine of informed consent. As with the ADA example, such a solution would avoid touching the nonstatutory labor exemption and leave CBAs intact.

Whether courts get involved or not, the NHLPA will need to make this issue a focal point when the CBA expires in 2026. The NHLPA has generally done a good job in CBA negotiations on behalf of its players, but it fell short on this particular CBA term, leaving Eichel, like many other players, in a rough situation. Tom Brady's Deflategate case against the NFL shows a good example of what can happen when the players' union does not

¹³⁸ See Associated Press, *Tarpley Settles Lawsuit Against Mavericks, NBA*, TORONTO STAR (Mar. 17, 2009), https://www.thestar.com/sports/basketball/2009/03/17/tarpley_settles_lawsuit_against_mavericks_nba.html [<https://perma.cc/D8BE-M9HK>].

¹³⁹ See GARY PHELAN ET AL., *DISABILITY DISCRIMINATION IN THE WORKPLACE* § 15:5, Westlaw DISDW.

¹⁴⁰ *Tynes v. Buccaneers Ltd. P'Ship*, 134 F.Supp.3d 1351, 1353-54 (M.D. Fla. 2015).

¹⁴¹ *Id.* at 1356.

¹⁴² *Id.* at 1357.

¹⁴³ *Id.* at 1358.

consider the ramifications of a certain provision and it ultimately has seriously negative effects on the player. In Brady's case, the National Football League Players' Association agreed to a provision that gave NFL Commissioner Roger Goodell unchecked power to be the arbitrator to any appeals that a player made regarding suspensions.¹⁴⁴ Goodell was ultimately able to use this power to change the grounds of Brady's suspension, despite it violating notions of fundamental fairness.¹⁴⁵ As a recommendation, the NHLPA should do everything in its power during the next CBA negotiations to have this provision changed so that players have the ability to make these medical decisions, while also ensuring that the players are getting the proper information to make such decisions.

One way of achieving this could be to allow the NHL to have limited games on Christmas Eve or Christmas Day in exchange for the players being given the right to medical autonomy. Currently, the NHL CBA does not allow the NHL to schedule games on Christmas Eve or Christmas.¹⁴⁶ However, both the NBA and the NFL play games on these days.¹⁴⁷ Certainly, the number of games played on either of these days should not be an ordinary schedule, but the NHLPA could agree to have two or three games being played on these days or over the course of these two days. Additionally, they could argue for teams that play one year to be cycled out for a certain number of years before they can be required to play on the holiday again. This would make it so most players would not have to play yearly on these holidays, while also allowing the NHL to take advantage of an opportunity to earn revenues in broadcast rights over the holidays. This is just one possible area of many that the NHLPA could bargain on in attempting to secure its players' right to medical autonomy.

Turning the focus to what the NHL and its teams can do, they should be more willing to let the players determine their own medical treatment despite what the CBA says. Generally, the NHL and its teams have done a superb job of promoting healthy relationships and avoiding issues between its teams and players, while also ensuring stability within the sport. However, by not allowing the players to get their preferred forms of medical treatment, the NHL and its teams are creating instability that is unneces-

¹⁴⁴ National Football League Mgmt. Council v. National Football League Players Ass'n, 820 F.3d 527, 534-35 (2d Cir. 2016).

¹⁴⁵ *Id.* at 535-36.

¹⁴⁶ NHL CBA, *supra* n. 45 at Art. 16.5(b).

¹⁴⁷ See generally NFL CBA, *supra* n. 127; see also 2017 NBA-NBPA Collective Bargaining Agreement, Art. XX § 5(a), (c)-(d) (Jan. 19, 2017). <https://cosmics3.imgix.net/3c7a0a50-8e11-11e9-875d-3d44e94ae33f-2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf>.

sary. Teams have seen others already engaging in this more permissive practice, such as when the Penguins let Sidney Crosby get his preferred form of treatment for his concussions and neck and when the Oilers let Connor McDavid get his preferred form of treatment for his knee.¹⁴⁸ Both players had successful recoveries and came back still playing at their best levels. While it is certainly important for teams to have a say in the treatment of a player, they need to be in an advisory and support role for the player's treatment, not a decision-making role. Doing so will allow for better relationships with players, as well as more trust between both sides (something NHL Commissioner Gary Bettman has worked extremely hard to try and achieve). Moreover, it will prevent bad public relations situations from popping up for both the team and the NHL. Additionally, with the rapid growth of non-fungible tokens ("NFTs") and the legalization of sports gambling, the NHL will certainly want the players' approval on some of these topics in CBA negotiations, and providing the players with the right to medical autonomy would be a strong avenue to do this.

While these solutions are ideal, CBA negotiations can be contentious, and less ideal compromises are often needed to get a deal done. Should the NHL and NHLPA be unable to reach an agreement that gives players the right to medical autonomy, both sides could alter Article 34.4(e) to mimic the procedures that are outlined in Article 17.7 of the NHL CBA. Article 17.7 details the procedures for determining a player's fitness to play, or more specifically, "whether a Player is disabled and unable to perform his duties as a hockey Player. . . ."¹⁴⁹ The procedures outlined in these provisions generally provide that a team's physician will determine the player's fitness to play, that the player can get a second medical opinion regarding this determination, and that if both physicians disagree on the diagnosis, they can jointly select an independent third physician to examine the player.¹⁵⁰ In the event the team physician and player physician cannot agree on an independent third physician, then a medical designee appointed by the NHL and a medical designee appointed by the NHLPA will jointly decide who the third physician will be.¹⁵¹ Most importantly though, this third physician's decision is "conclusive, final and binding upon the [Team] and the Player. . . ."¹⁵² These provisions could easily be "copied-and-pasted" into the provisions of Article 34 in the CBA and make it so that a third physician, who would essentially be acting as an arbitrator, would determine

¹⁴⁸ *Eich-Stravaganza*, *supra* note 12 at 42:35.

¹⁴⁹ NHL CBA *supra* note 45 at Art. 17.7(a).

¹⁵⁰ *Id.* at Art. 17.7(a)-(d).

¹⁵¹ *Id.* at Art. 17.7(d)(iv).

¹⁵² *Id.* at Art. 17.7(f).

the player's course of treatment, and not solely the team physician. While the other solutions are preferable to this one, this solution would be a step in the right direction. It is likely the most feasible of the solutions outlined here and would provide players with some protection against having undesirable treatments forced upon them.

CONCLUSION

This problem will likely only get worse in the future as new forms of medical treatment come about that players want to get because it will be better for them, and teams, like the Sabres, will likely fall into similar situations where they are worried about the unknowns surrounding a new type of procedure the player wants. Ultimately though, players need to be allowed to make these medical decisions for themselves with team insight on what they believe is best. We should not allow our laws to protect provisions in labor agreements that push medical treatments onto players who are against those treatments, especially regarding treatment for critical medical issues that have the potential to impact the players' health during and long after their career.

