Decertifying Players Unions: Lessons from the NFL and NBA Lockouts of 2011

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ABSTRACT

This Article analyzes the National Football League (NFL) and National Basketball Association (NBA) lockouts of 2011, focusing in particular on the role union dissolution played in each work stoppage. Although the existing academic literature had generally concluded that players unions in the four major US professional sports leagues were unlikely to disband during a labor dispute, the unions in both the NFL and NBA elected to dissolve in response to lockouts by ownership. This Article provides an explanation for why the prior literature misjudged the role that union dissolution would play during the 2011 work stoppages. It argues that previous commentators failed to recognize that the frequently cited disadvantages of dissolving a union actually provide minimal disincentive to players during a lockout. The Article concludes by predicting that players will likely continue to dissolve their unions during future lockouts in order to gain negotiating leverage over ownership through the assertion of antitrust claims.

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In 2011, sports fans’ attention was divided between the wins and losses occurring on the playing field and those transpiring in the courtroom and at the negotiating table. The collective-bargaining agreements (CBAs) between the players and owners in both the National Football League (NFL) and National Basketball Association (NBA) expired following the completion of their respective 2010–11 playing seasons,1 setting the stage for contentious labor negotiations in each sport.2 In both cases, league owners elected to immediately commence a lockout of their players upon the expiration of the CBA in order to gain leverage in the ensuing labor negotiations, endangering the regularly scheduled start of their league’s 2011–12 season.3

While the NFL and NBA owners adopted similar strategies to begin their respective labor negotiations, players in the two leagues initially responded in different ways.4 Rather than attempt to resolve their standoff strictly through collective bargaining, NFL players decided to immediately dissolve their union—the National Football League Players Association (NFLPA)—in order to pursue an antitrust lawsuit against the NFL owners.5 Despite experiencing only modest success in the courtroom,6 the NFL players were nevertheless able to reach a suitable agreement with management prior to the start of

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2. Id.
3. See id. (“[NBA] owners locked out the players when the CBA expired at midnight, making the NBA the second major professional sports league to shut down because of a labor impasse in 2011.”). A lockout is a bargaining mechanism in which an employer refuses to allow its unionized employees to work—while at the same time withholding their salaries—in order to gain leverage over the union during labor negotiations. See C. Quincy Ewell, Comment, The Key to Unlocking the Partial Lockout: A Discussion of the NLRB’s Decisions in Midwest Generation and Bunting Bearings, 112 PENN ST. L. REV. 907, 913 (2008) (“At common law, a lockout was defined as a ‘cessation of the furnishings of work to employees in an effort to get the employer more desirable terms.’”); Jennifer M. Recht, Note, Performance Enhancement: What the Israel Baseball League Can Learn from the Agreement between Major League Baseball and Japan, 32 SUFFOLK TRANSNAT’L L. REV. 191, 205 n.92 (2008) (“A lockout is when the employer refuses to use the employees for available work.” (citing ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 482 (2d ed. 2004))).
4. See Hayes, supra note 1.
5. See Ed Bouchette, NFL Labor Dispute Heads to Federal Court, PITT. POST-GAZETTE (Mar. 12, 2011), http://www.post-gazette.com/stories/sports/steelers/nfl-locks-out-players-dispute-heads-to-federal-court-212003 (reporting that the NFLPA was dissolved shortly before the NFL's CBA expired, with the players then filing an antitrust lawsuit against the owners).
6. See infra Part I.A.
their season. In contrast, NBA players did not immediately elect to disband their union—the National Basketball Players Association (NBPA)—instead opting to continue to negotiate collectively with the league. After four-and-a-half months of largely fruitless negotiations, however, the NBA players also ultimately dissolved their union on November 14, 2011, in order to file two antitrust suits against the league owners. Twelve days later, and following several key concessions by the owners, the NBA and its players entered into a new CBA in time to salvage the bulk of the league’s playing season.

The NFL and NBA players both ultimately dissolved their unions in an effort to navigate one of the more conceptually challenging areas of US jurisprudence: the intersection of antitrust and labor law. The convergence of these fields is particularly difficult because the two bodies of law are premised upon what are at times conflicting policy objectives. Specifically, while antitrust law seeks to prevent independent economic actors from colluding, labor law aims to encourage collective action not only by individual employees—in the form of a labor union—but also at times among individual employers (through the use of a “multi-employer bargaining unit”).

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7. See D. Orlando Ledbetter, Owners Approve Deal: Player Representatives Fail to Take a Vote, ATLANTA J.-CONST., July 22, 2011, at C1 (reporting that NFL owners approved a proposed settlement ending the lockout, resulting in only one preseason game being cancelled).
12. See Brown v. Pro Football, Inc., 518 U.S. 231, 241 (1996) (“[u]nlike labor law, which sometimes welcomes anticompetitive agreements conducive to industrial harmony, antitrust law forbids all agreements among competitors (such as competing employers) that unreasonably lessen competition among or between them in virtually any respect whatsoever.”); Mark C. Anderson, Self-Regulation and League Rules under the Sherman Act, 30 CAP. U. L. REV. 125, 136 (2002) (identifying an “apparent conflict between labor policies, which seek to promote concerted activities, and antitrust laws, which seek to promote competition”); Daniel J. Gifford, Redefining
Although courts have occasionally struggled to reconcile these competing objectives, they ultimately attempted to balance the goals of antitrust and labor law by formulating what is known as the “non-statutory labor exemption” to antitrust law. Pursuant to the non-statutory exemption, courts shield the collective-bargaining process from antitrust scrutiny so long as the activity in question predominantly affects the relationship between management and the union (as opposed to restraints affecting parties outside that specific collective-bargaining relationship, such as a competitor of the employer). Following the US Supreme Court’s 1996 decision in Brown v. Pro Football, Inc., a union wishing to pursue an antitrust claim against management cannot escape the strictures of the non-statutory exemption until its labor dispute is “sufficiently distant in time and in circumstances from the collective-bargaining process.” Commentators have subsequently interpreted this standard to require that employees dissolve their union—and thereby completely forgo all of the benefits accorded to them under labor law—before pursuing antitrust remedies.


13. See infra Part I.

14. See, e.g., Michael A. McCann, The NBA and the Single Entity Defense: A Better Case?, 1 HARV. J. SPORTS & ENT. L. 39, 45 (2010) (“The non-statutory labor exemption . . . dictates that if a bargained rule concerns a mandatory subject of bargaining (most notably, players’ salaries and working conditions) and primarily affects the owners and players (as opposed to third parties, like media), it is exempt from [antitrust] scrutiny.” (footnote omitted)); Scott R. Rosner, Must Kobe Come Out and Play?: An Analysis of the Legality of Preventing High School Athletes and College Underclassmen from Entering Professional Sports Drafts, 8 SETON HALL J. SPORT L. 539, 563 (1998) (“In order to come within the ambit of the non-statutory labor exemption, a restriction must primarily affect only the parties to the collective bargaining agreement . . . .”).

15. 518 U.S. 231.

16. Id. at 250.

Following *Brown*, academic commentators generally concluded that players in the four major US professional sports leagues were unlikely to dissolve their unions given the disadvantages that accompany such a strategy. Specifically, by disbanding their union, athletes must forgo a number of union-provided benefits, including the regulation of player agents and management of player pension and health-insurance programs. Scholars largely believed that these disincentives would outweigh the potential benefits of union dissolution in most future professional sports labor disputes.

Contrary to this general scholarly consensus, however, both the NFL and NBA players elected to disband their unions in 2011. Indeed, the NFL players did not even hesitate to dissolve their union, preemptively disbanding the NFLPA and filing an antitrust suit against the league hours before their CBA expired and the owners’ lockout commenced. The litigation provided the players with leverage over the NFL owners, ultimately helping the parties reach a mutually agreeable resolution of their labor dispute well before the scheduled start of the league’s regular season. Meanwhile, although NBA players were more hesitant to break up their union, their ultimate decision to dissolve the NBPA quickly enabled them to reach a more favorable agreement with ownership.

Given that the NFL and NBA players’ respective 2011 litigation strategies departed from the prevailing consensus in the existing academic literature, a reassessment of the role that union
dissolution plays in professional sports labor disputes is necessary. Part I of this Article begins by briefly reviewing the history of antitrust law's non-statutory labor exemption in order to explain the legal framework the NFL and NBA players confronted in 2011, before Part II more closely examines the most recent NFL and NBA labor disputes. Next, Part III attempts to explain why the existing academic consensus misjudged the role that union dissolution would play in the NFL and NBA lockouts, and ascertains what the events of 2011 portend for future professional sports league labor disputes. This Article concludes that union dissolution will remain an important weapon in the arsenal of professional athletes facing the threat of a lockout in the future, but it is unlikely to be utilized in other types of labor disputes.

I. THE NON-STATUTORY LABOR EXEMPTION

Section One of the Sherman Antitrust Act outlaws “[e]very contract, combination[,] . . . or conspiracy, in restraint of trade,”25 a provision that, if read literally, would potentially criminalize any agreement between individual economic actors, including employees working together in the form of a labor union.26 Given the breadth of this statutory language, some legislators expressed concern that the Sherman Act would be used as a weapon against organized labor,27 a fear that quickly materialized when courts in the early twentieth century applied the Act to strike down various union activities.28 In response to these judicial precedents, Congress passed three pieces of legislation explicitly shielding union activity from antitrust law: section six of the Clayton Act of 1914,29 the Norris-LaGuardia Act of


1932, and the National Labor Relations Act of 1935 (NLRA). Collectively, these acts form the statutory labor exemption to antitrust law.

While the statutory labor exemption guarantees employees the right to form a union, this antitrust protection does not extend to any agreement that the union and management eventually enter. In other words, even though employees may negotiate collectively with their employers under labor law, any resulting contract between the union and management would remain potentially subject to an antitrust challenge under the Sherman Act. This is because the CBA itself might constitute an anticompetitive agreement between separate economic actors—that is, between the unionized employees and their employer(s)—despite the statutory exemption.

Courts have devised the non-statutory labor exemption to avoid the perverse result in which unionized employees can bargain collectively with management but face potential antitrust sanctions should they reach an actual agreement with their employers. As the US Supreme Court explained, this “implicit” exemption is necessary “to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place.” The doctrine was first established in a pair of companion cases that the Court decided in

31. Id.
33. See Harper, supra note 17, at 1669–70 (discussing the limitations of the statutory labor exemption); Jessica Cohen, Note, Sharing the Wealth: Don’t Call Us. We’ll Call You: Why Revenue Sharing Is a Permissive Subject and Therefore the Labor Exemption Does Not Apply, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 609, 622 (2002) (“[T]he statutory labor exemption enables union activity to obtain a labor agreement, such as a strike, even though it does not protect the collective bargaining agreement.”); Laura Mirabito, Comment, Picking Players in the College Draft Could Be Picking Trouble with Antitrust Law, 36 SANTA CLARA L. REV. 823, 832 (1996) (“The statutory labor exemption, however, does not encompass the collective bargaining agreements between unions and non-labor groups or employers which inherently restrain trade.”).
34. See Cohen, supra note 33.
1965; United Mine Workers v. Pennington[^36] and Meat Cutters v. Jewel Tea Co.[^37] In Pennington, a mine-workers union entered into a CBA with various large mining companies, with the union agreeing to have its members impose unaffordable wage increases on smaller, competing mining companies that were not parties to the agreement.[^38] The competing companies sued, arguing that the CBA was an anticompetitive effort to drive the smaller firms out of business.[^39]

Meanwhile, in Jewel Tea, a grocery store chain challenged the CBA it had entered into with a Chicago butchers union on the grounds that the butchers had forced the chain to agree to operate its meat departments only from 9 a.m. to 6 p.m., Monday through Saturday, thereby allegedly restraining trade.[^40]

The Court resolved these cases by holding that the CBA in Pennington could permissibly be challenged under antitrust law, while the agreement in Jewel Tea could not.[^41] In Pennington, the Court emphasized the fact that the union and larger mining companies designed their CBA in part to harm competing companies not party to the agreement, rather than simply to regulate the working relationship between the employees and signatory companies.[^42] In contrast, the CBA at issue in Jewel Tea was merely intended to protect union members from longer working hours and not to restrain competition with parties outside the agreement (such as other competing stores).[^43] Taken together, subsequent courts and commentators have synthesized these decisions to form an antitrust

[^37]: 381 U.S. 676 (1965).
[^38]: Pennington, 381 U.S. at 660. As Professor Douglas Leslie has explained:

In United Mine Workers v. Pennington, it was alleged that the mine workers union had agreed with one set of mining companies to impose a wage rate on smaller, competing mine companies without regard to the smaller companies' ability to pay. The reason may have been to standardize wages in the coal industry, or to concentrate the coal market by driving out the small companies. The small mine companies sued. Douglas L. Leslie, Essay, Brown v. Pro Football, 82 VA. L. REV. 629, 633 (1996).

[^39]: Pennington, 381 U.S. at 659.
[^40]: Jewel Tea, 381 U.S. at 679–81; see also Leslie, supra note 38, at 633 (noting that in Jewel Tea, “a union of butchers agreed with a group of some 300 grocery stores in the greater Chicago area that food store meat departments would only be open from 9 a.m. to 6 p.m., Monday through Saturday”).

[^41]: See Leslie, supra note 38, at 634 (reconciling the Court's decisions in Pennington and Jewel Tea).

[^42]: Pennington, 381 U.S. at 667.

[^43]: In particular, the majority in Jewel Tea held that the agreement nonetheless was exempt from the provisions of the Sherman Act because, under the facts found by the trial court, the union imposed the marketing hours in order to protect its members from either longer working hours or a loss of work, rather than to restrain competition from self-service stores.

See Harper, supra note 17, at 1672.
exemption immunizing CBAs that are negotiated in good faith and regulate only the employment relationship between the union members and signatory employer(s), without affecting competing companies not party to the agreement. Because the Supreme Court has never precisely defined the outer limits of the non-statutory labor exemption, however, its exact contours remain unclear.

The imprecise scope of the non-statutory exemption has perhaps most frequently been litigated by the professional sports industry. Professional sports labor disputes tend to raise difficult issues under the non-statutory exemption because the players unions in the four major US professional sports leagues serve a fundamentally different purpose than do unions in more traditional industries. Specifically, in a typical industry, workers form a union and negotiate collectively to “achieve wage levels that are higher than would be available in a free market.” Absent such cooperation, employers would drive wages lower by forcing otherwise fungible workers to compete against one another for employment.

44. See, e.g., Lock, supra note 32, at 352 (summarizing the general standard for the non-statutory labor exemption); Rosner, supra note 14 (“In order to come within the ambit of the non-statutory labor exemption, a restriction must primarily affect only the parties to the collective bargaining agreement, concern a mandatory subject of bargaining, and be a product of bona fide arm’s length bargaining.”); Marc J. Yoskowitz, Note, A Confluence of Labor and Antitrust Law: The Possibility of Union Decertification in the National Basketball Association to Avoid the Bounds of Labor Law and Move into the Realm of Antitrust, 1998 COLUM. BUS. L. REV. 579, 591 (“[I]n cases of good faith, bona fide arm’s length, collective bargaining between bona fide labor organizations, the implicit labor exemption trumps antitrust law, as long as it applies to both employers and employees.” (footnotes omitted)).


In contrast, professional athletes generally have not formed unions in order to seek wages above those that they would receive in an open market, but rather to prevent leagues from imposing anticompetitive labor restraints that result in below-market salaries or labor conditions.49 Because an individual professional athlete’s skill set is uniquely specialized, players cannot be as easily replaced by fungible substitutes, but they instead typically enjoy sufficient individual bargaining power to command high salaries on the open market.50 Recognizing this, professional sports leagues have historically imposed a variety of labor restraints on players in order to depress their salaries by limiting competition among teams for talent. For example, leagues have used mechanisms such as the salary cap,51 reserve clause,52 and entry-player draft53 to limit the market for athletes’ services in a particular sport, thus allowing owners to pay

49. See Paul Weiler, Leveling the Playing Field 168 (2000) (noting that, unlike in traditional industries where unions seek to restrain wage competition among union members, “[i]n sports, by contrast, the players’ unions have always sought to create a competitive free market for their members’ services”). In discussing the Brown case, Professor Harper noted:

[T]he primary aspect of both the Brown case and multiemployer bargaining in the sports industry in general that makes them both atypical, is that “it is the employers, not the employees, who seek to impose a noncompetitive uniform wage on a segment of the market and to put an end to competitive wage negotiations.” Harper, supra note 17, at 1693–94 (quoting Brown, 518 U.S. at 256 (Stevens, J., dissenting)).

50. See Feldman, supra note 48 (“[P]rofessional athletes are highly paid, uniquely talented, and possess specific skill sets.”).

51. A salary cap is an agreement between the owners in a league to limit the total amount that each team can spend on player salaries. See Mitchell L. Engler, The Untaxed King of South Beach: LeBron James and the NBA Salary Cap, 48 SAN DIEGO L. REV. 601, 604 (2011) (“[A salary cap] limits the total amount that each team can spend for all of its players.”); Gabriel Feldman, The Puzzling Persistence of the Single-Entity Argument for Sports Leagues: American Needle and the Supreme Court’s Opportunity to Reject a Flawed Defense, 2009 WIS. L. REV. 835, 889 (“[A] salary cap . . . limits the total payroll of each team.”).

52. The reserve clause was a contractual mechanism used by leagues to prevent players from negotiating future contracts with anyone but their current team. See Adam Epstein, An Exploration of Interesting Clauses in Sports, 21 J. LEGAL ASPECTS SPORT 5, 6 (2011) (noting that in professional baseball, “players were required to sign contracts that bound them to their teams permanently if they wanted to remain in the sport. That is, the club retained their rights even at the expiration of the contract unless the player was traded or released at the team’s option alone” (footnote omitted)); Michael A. McCann, Essay, Justice Sonia Sotomayor and the Relationship between Leagues and Players: Insights and Implications, 42 CONN. L. REV. 901, 907 n.20 (2010) (discussing the reserve clause).

53. Entry-player drafts control labor costs by exclusively assigning the rights to each rookie player to a single franchise, preventing teams from having to compete with one another to sign new players entering the league. See Marc Edelman, Does the NBA Still Have “Market Power?” Exploring the Antitrust Implications of an Increasingly Global Market for Men’s Basketball Player Labor, 41 RUTGERS L.J. 549, 553–54 (2010) (“[F]irst-year player drafts have been found anticompetitive because they assign only one team per league the right to bid for each new player’s services.”).
Players have traditionally attempted to defeat these anticompetitive mechanisms by working together via the collective-bargaining process to pressure league owners to abandon or modify these restraints. In some cases, however, players have determined that antitrust law provides a better means for challenging a particular restriction than does labor law. Specifically, by providing for the possibility of treble damages, antitrust law may sometimes give athletes greater leverage over owners than they could hope to achieve through collective bargaining alone. As a result, recent professional sports labor disputes have frequently resulted in legal battles regarding the scope of the non-statutory exemption, with the parties disputing whether the exemption protects ownership from an antitrust suit filed by players in the midst of the collective-bargaining process.

For example, in the 1989 case of Powell v. National Football League, several NFL players alleged that the league violated federal antitrust law by continuing to limit players’ free agency rights after the CBA establishing the restrictions had expired. The players argued that the non-statutory labor exemption ended upon an “impasse” in negotiations, and thus, because talks had broken down, the exemption no longer shielded the owners from antitrust liability. The owners responded by contending that the challenged restrictions retained their antitrust immunity even after the CBA expired, so long as the restraints had originally qualified for protection under the

54. Admittedly, some of these restraints were also enacted in order to enhance competitive balance between league teams. See Jeremy Davis, A Roundtable Discussion for the Digital Age: Brady v. NFL, 29 ENT. & SPORTS LAW. 1, 6 (2011) (quoting an e-mail from Professor Gary Roberts arguing that some types of labor restraints are “reasonably necessary to promote a sufficient level of ‘competitive balance’” within a league).

55. These restraints are subject to challenge under the Sherman Act because, in order to be implemented, they must first be agreed to by the thirty-plus franchises in the league, each of which is considered an independent economic actor for antitrust purposes. See Am. Needle, Inc. v. Nat’l Football League, 130 S. Ct. 2201, 2216 (2010) (holding that § 1 of the Sherman Act applies to decisions made collectively by the NFL’s thirty-two member-teams).


57. Ironically, professional sports leagues typically want their players to unionize so that potentially anticompetitive mechanisms such as the salary cap or player draft can be included in a CBA, and thus protected from antitrust challenge under the non-statutory exemption. See Feldman, supra note 48, at 1266 (noting that leagues desire to “prevent antitrust law from interfering with the collective bargaining process”).

58. 930 F.2d 1293 (8th Cir. 1989).

59. See id. at 1295.

60. See id.
non-statutory exemption.\textsuperscript{61} The US Court of Appeals for the Eighth Circuit agreed with the league, concluding that the non-statutory exemption remains in place after a CBA expires, even if the union and management have reached an impasse in their negotiations.\textsuperscript{62} The Eighth Circuit's holding in \textit{Powell} was generally consistent with the outcome reached two years earlier by the US District Court for the District of New Jersey in \textit{Bridgeman v. National Basketball Ass'n}, a case raising similar issues following an impasse in labor negotiations between the NBA and NBPA.\textsuperscript{63}

The Supreme Court ultimately ratified this expansive interpretation of the non-statutory labor exemption a few years later in \textit{Brown v. Pro Football, Inc.}\textsuperscript{64} \textit{Brown} involved a challenge to an NFL policy establishing a fixed salary of $1,000 per week for players on each team's "developmental squad," a group of up to six first-year players.\textsuperscript{65} Development-squad members were allowed to practice with their team but could only play in regular season games as substitutes for injured players.\textsuperscript{66} The NFL unilaterally imposed the fixed salary on the players after the league was unable to reach an agreement with the players union, which had insisted that salaries for the development-squad players continue to be freely negotiated by individual players and teams.\textsuperscript{67} In response, a group of 235 development-squad players filed an antitrust suit against the league, alleging that the NFL teams had engaged in illegal price fixing in violation of the Sherman Act.\textsuperscript{68}

The Court held that the non-statutory labor exemption shielded the NFL owners from antitrust liability.\textsuperscript{69} Even though the union never agreed to the restraint at issue in \textit{Brown}—and thus never incorporated it into the CBA—the Court nevertheless held that the non-statutory exemption protected the restraint "as a matter of labor

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\textsuperscript{61} See id.
\textsuperscript{63} 675 F. Supp. 960, 961 (D.N.J. 1987); see also Andrew M. Jones, Note, \textit{Hold the Mayo: An Analysis of the Validity of the NBA's Stern No Preps to Pros Rule and the Application of the Nonstatutory Exemption}, 26 LOY. L.A. ENT. L. REV. 475, 515 (2005) ("The decisions in both \textit{Bridgeman} and \textit{Powell} conform to this understanding, as both courts applied the nonstatutory exemption to collectively bargained-for provisions past the expiration of the CBA.").
\textsuperscript{64} 518 U.S. 231, 233 (1996).
\textsuperscript{65} Id. at 234; see also Joseph Covelli, Note, \textit{Brown v. Pro Football, Inc.: At the Intersection of Antitrust and Labor Law, Supreme Court's Decision Gives Management the Green Light}, 27 STETSON L. REV. 257, 260–63 (1997) (discussing facts of \textit{Brown}).
\textsuperscript{67} See id.
\textsuperscript{68} Id. at 235.
\textsuperscript{69} See id. at 238.
law and policy.” Specifically, the Court concluded that, because federal labor law permits employers to unilaterally implement policies such as the one at issue in Brown under certain conditions, permitting affected employees to pursue antitrust claims in this case would “introduce instability and uncertainty into the collective-bargaining process.” This would be especially true in cases where multiple employers negotiated collectively with the union in the form of a multi-employer bargaining unit, a mechanism expressly sanctioned by federal labor law. Specifically, the Court feared that many positions adopted jointly by employers during negotiations would potentially be subject to challenge by the employees under Section One of the Sherman Act, ultimately undermining the effectiveness of multi-employer bargaining.

As a result, the Brown Court concluded that the non-statutory labor exemption shields both sides of a collective-bargaining relationship throughout the negotiation process, at least until such a point “sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process.” The Brown Court declined to determine precisely when the non-statutory exemption would cease to apply, but it did imply a potential standard by favorably citing the D.C. Circuit’s earlier decision in Brown, which suggested “that [the] exemption lasts until

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70. See id.
71. See id. at 238–39 (outlining that the imposed restraint must have been “reasonably comprehended” by the employees prior to its implementation, or else the employer(s) would potentially face sanction by the National Labor Relations Board (NLRB) for engaging in an unfair labor practice); see also Stephen F. Befort, Unilateral Alteration of Public Sector Collective Bargaining Agreements and the Contract Clause, 59 BUFF. L. REV. 1, 15 (2011) (stating that under federal labor law, management “may implement ‘unilateral changes that are reasonably comprehended within [its] pre-impasse proposals’” after bargaining to impasse (quoting Taft Broadcasting Co., 163 N.L.R.B. 475, 478 (1967))); Jonathan P. Heyl, Note, Brown v. Pro Football, Inc.: Pulling a Tarp of Antitrust Immunity over the Entire Playing Field and Leaving the Game, 75 N.C. L. REV. 1030, 1035 (1997) (“Labor law (acting apart from antitrust law) allows employers to unilaterally implement new or changed terms after a bargaining impasse is reached, provided that those terms were ‘reasonably comprehended’ in the employer’s previous proposals and the employer does not bargain in bad faith.” (footnote omitted)).
73. See id. at 240.
74. See Anthony B. Sanders, Multiemployer Bargaining and Monopoly: Labor-Management Collusion and a Partial Solution, 113 W. VA. L. REV. 337, 360 (2011) (“If in the multiemployer bargaining context, not extending the nonstatutory exemption to the post-impasse period would effectively ban post-impasse multiemployer bargaining.”); cf. C. Douglas Floyd, Antitrust Victims Without Antitrust Remedies: The Narrowing of Standing in Private Antitrust Actions, 82 MINN. L. REV. 1, 56 (1997) (“The nonstatutory labor exemption as currently interpreted by the Supreme Court . . . encompass[es] the activities of single employers or multiemployer bargaining associations . . . .”).
75. See Brown, 518 U.S. at 250.
[the] collapse of the collective-bargaining relationship, as evidenced by decertification of the union."

Because Brown failed to provide clear guidance regarding the termination of the non-statutory labor exemption, it is unclear exactly what a union must do in order to successfully initiate antitrust litigation against management. In particular, subsequent courts have not yet decided whether a more binding, formal decertification of the union is necessary before unionized employees may file an antitrust lawsuit, or instead if a less formal and less binding “disclaimer of interest” by the union would suffice. Specifically, in order to formally decertify a union, at least 30 percent of the membership must sign an initial petition filed with the National Labor Relations Board (NLRB) indicating that they no longer wish to be represented by the union. Upon receipt of the petition, the NLRB will schedule a vote by the entire union membership to determine whether a majority supports decertification, a process that can take up to two months. If a majority of the union votes to decertify, then the employees must wait at least twelve months before the NLRB will allow them to re-unionize.

In contrast, a disclaimer of interest is a much easier and less binding procedure, simply requiring that the union “waive[] and disclaim[] any right to represent [the unionized] employees.” So long

76. See id. (citing Brown v. Pro Football, Inc., 50 F.3d 1041, 1057 (D.C. Cir. 1995)); see also Davis, supra note 54, at 4 (quoting an e-mail from Professor Gabriel Feldman stating that, “At best, Brown suggests that decertification might be a method for ending the bargaining relationship and removing the exemption”).


78. As Professor Gabriel Feldman has noted:

It is official NLRB policy to schedule a decertification election “as soon as possible,” and uncontested elections can take place within 30 days of the verification of the petitions. But, given the complex circumstances of the NBA situation, it is more likely that the election will be scheduled approximately 45–60 days after the petitions are verified.


79. See 29 U.S.C. § 159(c)(3) (2006) (“No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held.”).

80. NAT’L LABOR RELATIONS BD., CASEHANDLING MANUAL PART TWO: REPRESENTATION PROCEEDINGS § 11120 (2007); see also Symposium, Professional and Ethical Dilemmas Facing Attorneys Representing Entities, Athletes and Entertainers, 21 SETON HALL J. SPORTS & ENT. L.
as the union makes the disclaimer of interest in good faith and does not subsequently undertake any inconsistent action—such as organizing a strike—the NLRB will consider the disclaimer effective.\footnote{381, 439 (2011) ("[D]isclaimer of interest means that the union says, 'I don't want to represent you' [to its members"] (quoting Jessica Berman, associate counsel for the NHL)).} Moreover, unlike decertification, which requires employees to wait a full year before reforming their union, a disclaimer of interest can be reversed at any time simply by obtaining the approval of a majority of the bargaining unit.\footnote{82. See Gabe Feldman, The Nuclear Winter Is Over: The New CBA, and How the Lawyers Saved the Day (Sort of), GRANTLAND (Dec. 2, 2011, 10:37 AM), http://www.grantland.com/blog/the-triangle/post/_/id/11258/the-nuclear-winter-is-over-the-new-cba-and-how-the-lawyers-saved-the-day-sort-of ("[To reform the union,] the players only needed to get authorization from a simple majority of the [unionized employees] indicating that they wanted the [union] to represent them in collective bargaining.").}

Setting aside the decertification versus disclaimer-of-interest distinction, scholars generally concluded that antitrust law would play an insignificant role in future professional sports labor disputes following Brown.\footnote{83. See, e.g., Edmund P. Edmonds, The Curt Flood Act of 1998: A Hollow Gesture After All These Years?, 9 MARQ. SPORTS L.J. 315, 341 (1999) ("[B]rown] plainly reduces the potential value of the antitrust weapon from a treble damage bomb to a child's pop gun that will necessarily remain predominantly at the bottom of the toy chest.").} In particular, these scholars believed that professional athletes would not dissolve their unions due to the risks accompanying such a strategy.\footnote{84. See Harper, supra note 17, at 1722–24 ("The availability of [decertification] is unlikely to help stabilize labor relations in the sports industry . . . ."); Gary R. Roberts, A Brief Appraisal of the Curt Flood Act of 1998 from the Minor League Perspective, 9 MARQ. SPORTS L.J. 413, 433–34 (1999) (asserting that a players’ union “would probably employ [decertification] only as a last resort”); Philip R. Bautista, Note, Congress Says, “Yooou’re Out!!!!” to the Antitrust Exemption of Professional Baseball: A Discussion of the Current State of Player-Owner Collective Bargaining and the Impact of the Curt Flood Act of 1998, 15 OHIO ST. J. ON DISP. RESOL. 445, 478 (2000) (“Some commentators believe that the likelihood of the MLBPA to decertify is slight.”); Lacie L. Kaiser, Note, Revisiting the Impact of the Curt Flood Act of 1998 on the Bargaining Relationship between Players and Management in Major League Baseball, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 230, 250 (2004) ("The decision to decertify was drastic and not a practical solution to dealing with an ongoing bargaining relationship."); Glenn Merten, Chapter, The Nonstatutory Labor Exemption, Collective Bargaining, and Impasse, 64 GEO. WASH. L. REV. 1332, 1338–39 (1996) (questioning the view that decertification is more likely following Brown).} Specifically, players lose a number of benefits by disbanding their union, including union certification of player agents, union-imposed limitations on agent commissions, and union management of player pension and disability plans.\footnote{85. See Roberts, supra note 84, at 433 ("[Decertification] is a costly process that strips the union during the lengthy pendency of the antitrust case of its ability, among other things, to certify and control player agents and to be involved in the control of collectively bargained player pension and disability plans.").}
Moreover, by dissolving their union, the players forgo any protections afforded to them under federal labor law, including the restrictions prohibiting various unfair labor practices by management during the course of any subsequent negotiations. Given these drawbacks, scholars largely concluded that professional athletes would be unwilling to abandon their players associations in future labor disputes, predicting instead that they would attempt to resolve their differences with ownership strictly through collective bargaining and labor law.

II. THE NFL AND NBA LABOR DISPUTES OF 2011

Initially, the general post-Brown consensus that union dissolution was unlikely in future professional sports labor disputes proved prescient. Players in both the NBA and NHL faced extended lockouts in 1998 and 2004–05, respectively, without either players union disbanding. These predictions proved less sage in 2011, however, when union dissolution played a central role in both the NFL and NBA lockouts.

A. The NFL Lockout of 2011

The origins of the 2011 NFL lockout date back to the league’s previous CBA, executed in 2006. In the prior agreement, NFL players and owners decided that either side could opt out of the contract by November 8, 2008, in which case the CBA would expire following the league’s 2010–11 season. Hoping to strike a more favorable deal, the NFL owners elected to opt out of the agreement on May 20, 2008, setting the stage for a potential work stoppage in 2011.

86. See Feldman, supra note 48, at 1261 (“[Post-decertification,] the comprehensive regulations of labor law governing collective bargaining do not apply.”).
87. See Jeffrey F. Levine & Bram A. Maravent, Fumbling Away the Season: Will the Expiration of the NFL-NFLPA CBA Result in the Loss of the 2011 Season?, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1419, 1453–56 (2010) (discussing the NHL’s season-long lockout in 2004–05, and noting that the NHL’s players’ union continued to negotiate on behalf of its members throughout the labor dispute); Roberts, supra note 84, at 433 (“[T]he NBPA did not undertake to decertify and file an antitrust suit during the lengthy lockout that resulted in the loss of the first half of the 1998–99 NBA season.”). For additional discussion of the reasons neither union decertified during these lockouts, see infra notes 184–188 and accompanying text.
89. Id.
90. Id. (“In May 2008, NFL owners exercised their opt-out option, effectively shortening the term of the current CBA by two years.”).
The NFL owners hoped to obtain a number of concessions from the players by reopening the CBA negotiations. Specifically, the owners wanted to gain a larger share of the league’s $9 billion in annual revenue, add two extra games to the regular-season schedule (extending the season from sixteen to eighteen games per team), and implement a salary cap on rookie players.\(^{91}\) Given that the owners had never alleged any financial hardship under the previous agreement but instead simply appeared to be seeking an even more lucrative deal,\(^{92}\) the NFL players rejected the owners’ demands during preliminary negotiations.\(^{93}\)

Rather than rely entirely upon collective bargaining to resolve their differences with ownership, the NFLPA elected to disclaim interest on March 12, 2011, just hours before the CBA was set to expire.\(^{94}\) The players dissolved the NFLPA so quickly in no small part due to a provision in the previous CBA requiring them to either disband the union prior to the expiration of the agreement or else wait at least six months to file an antitrust lawsuit against the league.\(^{95}\) Facing the unusual predicament of having to choose between dissolving the union immediately or else forgoing any antitrust litigation until mid-September, the players chose to expedite their potential antitrust remedies.\(^{96}\)

Indeed, the very same day that the NFLPA disclaimed interest, ten NFL players filed a class action lawsuit against the league in the US District Court for the District of Minnesota on behalf of a class of current and future players.\(^{97}\) The complaint—captioned *Brady v. National Football League*—asserted various antitrust, tort, and

\(^{91}\) See Feldman, supra note 20 (“[W]e all know about the major issues—carving up a $9 billion pie; adding 2 regular season games; creating a rookie salary cap . . . .”).

\(^{92}\) See Gabriel A. Feldman, *NFL Labor Negotiations: Are We Headed for the Doomsday Scenario?*, HUFFINGTON POST (Feb. 18, 2011, 8:51 AM), http://www.huffingtonpost.com/gabriel-a-feldman/nfl-lockout_b_824910.html (“The [NFL] owners claim they need to pay the players less because of rising costs, but they refuse to reveal the details of these costs.”).

\(^{93}\) See Bouchette, supra note 5.

\(^{94}\) Id.

\(^{95}\) See Feldman, supra note 20 (“Under a literal reading of the current CBA (in Article LVII, Section 3), if the players wait until after the expiration of the CBA to dissolve their union, two things happen: first, the players cannot bring an antitrust suit for at least six months (or until the parties bargain to impasse, whichever happens last); second, the owners cannot challenge the decertification as a sham.”).


\(^{97}\) Complaint, Brady v. Nat’l Football League, 779 F. Supp. 2d 992 (D. Minn. 2011) (No. 11-00639). The ten named plaintiffs in the suit included then-current NFL players Tom Brady, Drew Brees, Vincent Jackson, Ben Leber, Logan Mankins, Peyton Manning, Brian Robison, Osi Umenyiora, and Mike Vrabel, as well as Von Miller, a prospective rookie player who was projected to be picked in the early stages of the 2011 NFL draft. Id. ¶¶ 87–115.
contract claims against the owners. Most significantly, it alleged that the owners intended to commence a lockout of the NFL players upon the expiration of the CBA, a maneuver that they asserted would be an unlawful “horizontal group boycott and price-fixing agreement” among competitors, in violation of Section One of the Sherman Act. The lawsuit asked the court to enjoin the owners from locking the players out in order to prevent the league from inflicting an ongoing antitrust injury on its employees.

As the players’ lawsuit had anticipated, the NFL owners commenced a lockout the very next day. The owners hoped that by preventing the players from working—and in the process withholding their salaries—they would gain additional leverage in subsequent negotiations. Indeed, given that the average career of an NFL player lasts only around three years, football players have historically been unwilling to endure a prolonged labor dispute with management. Similarly, the players hoped their lawsuit would provide leverage over the owners by not only neutralizing the NFL’s lockout—and thereby forcing the owners to continue paying players throughout the course of the labor dispute—but also by introducing the potential threat of treble antitrust damages into the negotiations. Thus, the Brady lawsuit was ultimately a battle for bargaining leverage between players and owners.

The NFL players experienced the first victory in the courtroom battle. Following an initial court hearing, Judge Susan Richard Nelson granted the NFL players a preliminary injunction prohibiting the owners from continuing their lockout. The court believed injunctive relief was necessary in order to prevent irreparable harm to

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98. See generally id.
99. Id. ¶ 119.
100. Id. ¶¶ 49, 63.
101. See Hubbuch, supra note 96.
103. See A. Jason Huebinger, Beyond the Injured Reserve: The Struggle Facing Former NFL Players in Obtaining Much Needed Disability Assistance, 16 SPORTS LAW. J. 279, 281 (2009) (“The average NFL player’s career spans three years.”).
104. See Levine & Maravent, supra note 87, at 1497 n.524 (“NFL players are more likely to acquiesce to Ownership’s demands in a long labor dispute because of their relatively short playing career.”); Shelly Kendricks, Note, The NFL Franchise Player Rule: Legal and Economic Justifications, 5 DePaul J. Sports L. & Contemp. Pros. 1, 14 (2008) (“Despite the role of the NFLPA, the players in the NFL have a very weak bargaining position compared to that of the team owners. Part of the reason for this inequity is players’ dispensability and short career span in the NFL.” (footnote omitted)).
the NFL players. In particular, it emphasized the brevity of the average NFL player’s career, holding that the loss of even a single season would inflict harm upon the players that could not be fully compensated through monetary damages alone.

The NFL players’ initial victory in Brady ultimately proved to be short-lived, however. The NFL immediately appealed the decision to the Eighth Circuit, which granted the league a temporary stay of the injunction pending appeal just a few days later. The appellate court ultimately vacated the district court’s injunction in early July 2011 in a 2-to-1 decision. The majority focused on jurisdiction, finding that the Norris-LaGuardia Act prevented the district court from issuing an injunction. Specifically, Section 4(a) of the Norris-LaGuardia Act provides that federal courts lack jurisdiction “to issue any . . . temporary or permanent injunction in any case involving or growing out of any labor dispute . . . prohibit[ing] any person . . . from . . . [c]easing or refusing to perform any work or to remain in any relation of employment.”

The Eighth Circuit held that Section 4(a) precluded the preliminary injunction issued by the district court in Brady. First, the majority determined that the initial element of the provision applied insofar as the case had originally grown out of a labor dispute between the NFL owners and players. The players had contested this point, arguing that their case ceased to be a labor dispute once they dissolved their union and formally ended their collective-bargaining relationship with ownership under labor law. The court rejected this argument, concluding instead that the current status of the union was immaterial given the origins of the dispute. Next, the majority determined that the second half of Section 4(a) also applied because the NFL owners were “refusing . . . to remain in [a]

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107. *Id.* at 1035–38.
108. *Id.*
109. Brady v. Nat’l Football League, 638 F.3d 1004, 1005 (8th Cir. 2011). This first decision granted a temporary stay until such time as the court could consider the NFL’s request for a stay pending the ultimate resolution of the interlocutory appeal, a request that the Eighth Circuit granted as well. Brady v. Nat’l Football League, 640 F.3d 785, 787 (8th Cir. 2011); see also Timothy J. Bucher, Comment, *Inside the Huddle: Analyzing the Mediation Efforts in the NFL’s Brady Settlement and Its Effectiveness for Future Professional Sports Disputes*, 22 MARQ. SPORTS L. REV. 211, 213–17 (2011) (discussing phases of the Brady litigation and appeal).
110. *Id.* at 673–77.
111. *Id.* at 1035–38.
113. Brady, 644 F.3d at 661, 663, 682 (8th Cir. 2011).
114. *Id.* at 673.
115. *See id.* (rejecting the players’ argument).
116. *Id.*
relation of employment” with the players by locking them out. In other words, the court believed that because an injunction would force NFL owners to maintain an employment relationship with the players, it would necessarily violate Section 4(a).

In dissent, Judge Kermit Bye disagreed with the majority’s interpretation of Section 4(a), instead emphasizing Congress’s original intent when passing the Norris-LaGuardia Act. In particular, he argued that Congress specifically intended that the Act protect the rights of unionized employees. Indeed, he contended, the language “refusing . . . to remain in any relation of employment” relied on by the majority was simply intended to prevent courts from issuing injunctions that prohibit workers from going on strike. Consequently, he believed that applying Section 4(a) to shield the NFL’s lockout from injunctive relief was inconsistent with Congress’s intent when passing the Act. Judge Bye argued that his interpretation was consistent with prior opinions from the First, Seventh, and Ninth Circuits, each of which he believed had held that the Norris-LaGuardia Act did not protect employers from injunctions in labor disputes.

Even though a majority of the appellate court panel ultimately voted to vacate the district court’s preliminary injunction, the decision was not a complete victory for the NFL owners. First, although the Eighth Circuit determined that a preliminary injunction was unwarranted for the entire class of NFL players, it held that injunctive relief might be necessary to protect certain subclasses of

117. In particular, the court held:
A one-way interpretation of § 4(a)—prohibiting injunctions against strikes but not against lockouts—would be in tension with the purposes of the Norris-LaGuardia Act to allow free play of economic forces and “to withdraw federal courts from a type of controversy for which many believed they were ill-suited and from participation in which, it was feared, judicial prestige might suffer.” We are not convinced that the policy of the Act counsels against our textual analysis of § 4(a).

Id. at 678–79 (citations omitted).

118. See id.

119. Id. at 682 (Bye, J., dissenting).

120. Id. at 683–84.

121. Id. at 691–92.

122. Id. at 693.


126. Brady, 644 F.3d at 688, 693 (Bye, J., dissenting).

127. Id. at 663, 682 (majority opinion).
Specifically, the court noted that two segments of the class—current free agents and prospective rookie players—were not currently under contract with any NFL team. Therefore, by locking these players out, the NFL owners were not refusing “to remain in any relation of employment,” because there was “no existing employment relationship in which ‘to remain.’” Because the district court had failed to conduct a sufficient evidentiary hearing to determine the damage that the lockout would inflict on these two subsets of players, however, the appellate court vacated the entire injunction pending further deliberation by the lower court. Even if the appellate court had affirmed this portion of the injunction, though, it would have provided relatively little relief to the players, as the court noted that the league would only be required to enter new employment contracts with the free agent and rookie players before it could then permissibly lock them out.

Meanwhile, the NFL owners’ victory in the Eighth Circuit was also limited by the fact that the appellate court’s decision did not reach the ultimate merits of the players’ substantive antitrust claims. Thus, even though the players had failed to convince the court to enjoin the NFL’s lockout, the Brady suit still provided players with some leverage over the league in the form of the threat of continually escalating treble antitrust damages.

Despite the pending litigation, NFL owners and players reached an agreement on a new ten-year CBA less than three weeks after the Eighth Circuit issued its final decision in Brady. The agreement required concessions on the part of both the players and owners. The players ultimately agreed to a limitation on rookie salaries, as the owners had desired, and accepted a slightly reduced share of league revenues. Meanwhile, the owners agreed to table their proposed extension of the regular season for at least three years

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128. Id. at 681 (finding that section 4(a) does not apply to rookies and free agents because they are not employees, but that any injunction “growing out of a labor dispute” and concerning them must conform to section 7 of the act, 29 U.S.C. § 107).
129. Id.
130. Id.
131. Id. at 681–82.
132. Id.
133. Id. at 682.
134. See Ledbetter, supra note 7 (reporting that NFL owners approved a proposed settlement ending the lockout).
136. Specifically, the players agreed to reduce their share of league revenues from roughly 50 percent to around 46 to 48 percent under the agreement. Id.
(a key victory for the players), raised the minimum amount that teams must spend on player salaries each year, and provided players with additional protections against injuries.137

B. The NBA Lockout of 2011

A little over three months after the start of the NFL lockout, the NBA owners commenced a lockout of their own following the expiration of the league’s CBA on June 30, 2011.138 NBA owners sought to extract several significant concessions from the players during the ensuing negotiations. First, the owners wanted to eliminate guaranteed contracts and instead make all player contracts nonguaranteed agreements subject to renewal on an annual basis, a major point of contention for the players.139 Second, the owners wanted to significantly reduce the players’ share of league revenues, potentially by as much as 14 percent.140 Finally, the owners sought to eliminate most exceptions to the league’s salary cap—in other words creating a so-called “hard” cap—a proposal that could have further reduced player salaries by hundreds of millions of dollars.141

Unlike the NFL—which never claimed that the previous CBA was imposing financial hardship on its teams and instead simply appeared to seek an even more lucrative deal for the owners—the NBA asserted that these modifications to the CBA were necessary in order to address the league’s alleged losses of more than $300 million per year.142 Given these supposed financial difficulties, many

137. With regard to the increased injury protections, the CBA provides players with an “enhanced injury protection benefit of up to $1 million of a player’s salary for the contract year after his injury and up to $500,000 in the second year after his injury.” Nat’l Football League, NFL Clubs Approve Comprehensive Agreement, NFL.COM (July 21, 2011, 7:34 PM), http://www.nfl.com/news/story/09000d5d820e6311/article/nfl-clubs-approve-comprehensive-agreement.

138. See Hayes, supra note 1.


140. See Jeff Zillgitt, Sharing Is Big Sticking Point, USA TODAY, June 30, 2011, at C8 (“In the current CBA, players receive 57% of basketball-related income about $2.2 billion during the 2010–11 season and the league gets 43%. In the next CBA, owners want a complete reversal, if not more, of that annual 57-43 split.”).

141. See Amy Shipley, NBA Lockout Is Set After Last-Ditch Talks Collapse, WASH. POST, July 1, 2011, at A1 (“Ownership also wants a hard cap on team payrolls to replace the current soft cap that teams can exceed by using a variety of exceptions.”).

commentators believed that the NBA owners—unlike their NFL counterparts—would be willing to sacrifice a substantial portion of their season in order to resolve their labor dispute on favorable terms, foreshadowing a potentially lengthy lockout.143

In light of the hard-line bargaining posture adopted by the NBA owners and the potential for a season-long lockout, the media speculated that NBA players might pursue a decertification strategy similar to that adopted by the NFL players.144 The NBA players initially decided not to dissolve their union, however, choosing instead to rely on the collective-bargaining process and labor law to resolve the ongoing labor dispute.145

NBA players may have initially hesitated to disband the NBPA due to their desire to continue pursuing an unfair-labor-practice charge the union filed with the NLRB against the owners in May 2011.146 The charge alleged that the league had failed to negotiate in good faith,147 a claim that, if found to be meritorious, could have resulted in the NLRB itself seeking an injunction preventing the NBA from continuing its lockout.148 Had the players immediately dissolved their union before the NLRB issued a ruling, however, the agency would have dismissed the unfair-labor-practice charge.149

billion in revenue, the N.B.A. and its players are arguing about losses—more than $300 million a year, according to league officials.”).

143. See, e.g., id.; Michael Wilbon, NBA Lockout Will Dwarf the NFL Strife, ESPN (July 1, 2011), http://sports.espn.go.com/espn/commentary/news/story?page=wilbon-110630 (“A new group of [NBA] owners who paid a ton of money for their franchises since the last work stoppage 13 years ago are ready to sacrifice the season.”).

144. See Beck, supra note 142 (discussing speculation that NBA players may elect to decertify their union).

145. Id.


147. Id. (“The legal maneuvering in the N.B.A.’s labor battle began in earnest Tuesday, when the players union filed a complaint with the National Labor Relations Board, accusing league officials of failing to negotiate in good faith.”).

148. See Beck, supra note 142 (“In May, the N.B.A. players union filed an unfair-labor-practice charge with the N.L.R.B. If the board’s general counsel finds merit to the charge, the board could seek an injunction to end the lockout.”); cf. Catherine L. Fisk & Deborah C. Malamud, The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform, 58 DUKE L.J. 127, 128 (2009) (“Under section 10(j) of the NLRA . . . the [NLRB] is empowered to petition a federal district court for a preliminary injunction against an ongoing unfair labor practice.”); William K. Briggs, Note, Deconstructing “Just and Proper”: Arguments in Favor of Adopting the “Remedial Purpose” Approach to Section 10(j) Labor Injunctions, 110 MICH. L. REV. 127, 128 (2011) (“The NLRB authorizes the Board to seek a preliminary injunction in federal court on behalf of a private party who has filed a complaint of an unfair labor practice with the Board.”).

149. See 29 U.S.C. § 160(j) (2006); Beck, supra note 142 (“If the N.B.A. players elect to decertify, they will have to withdraw their unfair-labor-practice charge first.”).
Although NBA players did not rush to disband their union, the league’s owners nevertheless treated the possibility of union dissolution as a legitimate threat. Indeed, the owners were sufficiently concerned about a potential decertification or disclaimer of interest that they took the preemptive step of filing a declaratory-judgment action against the players in federal district court on August 2, 2011. The lawsuit sought a declaration that the league’s lockout did not violate antitrust law and asked the court to declare that any future dissolution of the NBPA would render all existing player contracts void and unenforceable. This latter claim was particularly novel, effectively asserting that all player contracts were inextricably intertwined with the CBA, insofar as the CBA specifies most of the provisions in the contracts. Therefore, because a decertification or disclaimer of interest would render the CBA null and void, the league argued it would also void any existing player contracts. While the legal validity of the owners’ contractual argument was questionable, it nevertheless may have caused players some hesitation before voting to disband the NBPA. More importantly, the owners’ preemptive lawsuit showed that they believed union dissolution—along with the leverage it would provide to players in the form of potential treble antitrust damages—presented a significant threat to their bargaining position.

The NBA players and owners continued to negotiate over the next several months but were unable to reach an agreement prior to the regularly scheduled start of the NBA’s season. The negotiations ultimately reached a standstill in mid-November, when the players rejected what the owners insisted was their last, best offer on November 14, 2011. Instead, the NBPA announced that it was disclaiming interest in its representation of the NBA players, paving the way for the players to pursue antitrust litigation against the league owners.

151. Id. ¶¶ 8–10, 52, 61, 65 (setting out alternative reasons for the declaratory judgment).
152. Id. ¶¶ 12, 77.
153. Id. ¶¶ 45–47, 77.
155. See Zillgitt, supra note 9 (“[NBA Commissioner] Stern had reiterated . . . that the proposal on the table was the best players would get and agreeing to the terms was the best shot to salvage a 72-game season starting Dec. 15.”).
156. Beck, supra note 8.
criticized the move, stating that the NBPA’s disclaimer of interest marked the beginning of “the nuclear winter of the NBA.” 157 The next day, the players filed two separate class action lawsuits against the league, one in the Northern District of California 158 and the other in the District of Minnesota. 159 Both suits alleged that the league had violated Section One of the Sherman Act—among other various asserted tort and contract law claims—insofar as its lockout constituted an unlawful group boycott agreement among the thirty NBA teams. 160

Despite Commissioner Stern’s ominous reaction to the NBPA’s disclaimer of interest, the NBA’s “nuclear winter” ultimately proved to be short-lived. Less than two weeks after the union disclaimed interest, the players and owners reached a tentative agreement on a new ten-year CBA, 161 enabling the league to salvage most of the 2011–12 playing season. 162 Significantly, the agreement included several key concessions from ownership, improving the league’s previous “last, best” offer made just a few weeks before. 163 These concessions included modifications to certain exceptions under the league’s salary cap that the players considered to be particularly important. 164 Given the speed with which the owners retreated from their previous take-it-or-leave-it bargaining posture once the NBPA disclaimed interest, it certainly appears that the NBA players’ decision to finally pursue antitrust litigation against the league provided them with valuable new leverage in the negotiations. 165

III. LESSONS FROM THE NFL AND NBA LOCKOUTS OF 2011

The central role that union dissolution played in both the NFL and NBA lockouts of 2011 raises two important questions. First, why did the general academic consensus after Brown v. Pro Football,
Inc.—suggesting that professional athletes were unlikely to disband their unions in order to pursue antitrust litigation against their leagues—misjudge the likelihood that the NFLPA and NBPA would dissolve during the 2011 lockouts? And second, following the events of 2011, what role is union decertification or disclaimer of interest likely to play in future professional sports labor disputes?

The answer to the first question appears to be that academic commentators failed to distinguish between owner-imposed lockouts and other forms of labor disputes when considering the disadvantages of disbanding a union. Specifically, many of the frequently cited drawbacks to dissolving a union provide little benefit to players at a time when the league owners refuse to allow them to work. For example, players have little need for union certification of player agents, regulation of agent commissions, or management of health-insurance programs during a period when they are not being paid, cannot negotiate new contracts with the league, and are not being provided with league-subsidized health insurance.166

Moreover, in light of the most recent NFL and NBA labor negotiations, having a union formally in place is not even necessary in order for the players to reach a satisfactory new CBA with ownership. Indeed, despite the disclaimers of interest by both the NFLPA and NBPA, players in the two leagues were able to resolve their respective disputes with league owners in time to salvage most or all of their 2011–12 playing seasons.167 Admittedly, the players had to walk a fine line between preserving the validity of their unions’ disclaimers of interest while simultaneously negotiating a new CBA satisfactory to a majority of players. But the players accomplished this feat by structuring any subsequent talks as class action–litigation settlement negotiations rather than collective-bargaining sessions. As a result, players now know that they can gain the potential leverage provided by decertifying or disclaiming interest without necessarily derailing their chances of simultaneously negotiating a new agreement with ownership.

Although the disadvantages of dissolving a union during a lockout were thus generally overstated, there is one possible exception

166. See supra notes 84–85 and accompanying text. Meanwhile, because courts have held that union decertification alone does not terminate an employer's obligations to fund a previously established pension plan, current players also do not risk immediate harm to retirees by dissolving the union. See Cent. States, Se. & Sw. Areas Pension Fund v. Schilli Corp., 420 F.3d 663, 670 (7th Cir. 2005) (citing Cent. States, Se. & Sw. Areas Pension Fund v. Gerber Truck Serv., Inc., 870 F.2d 1148, 1153 (7th Cir. 1989) (en banc)) (holding that employers must generally continue to contribute to a pension fund even after union decertification, at least until the employer satisfies ERISA's requirements for terminating its obligations to the pension fund).

167. See supra notes 134–137 and 161–162 and accompanying text.
that warrants mention. Specifically, by disbanding their union, players lose any protections provided under labor law, including the ability to assert unfair-labor-practice claims against management.\footnote{See Feldman, supra note 48, at 1261 (“[Post-decertification,] the comprehensive regulations of labor law governing collective bargaining do not apply.”).} Such claims would include allegations that management has refused to bargain in good faith, perhaps by failing to provide relevant financial information to the union,\footnote{Michael J. Cozzillo et al., Sports Law: Cases & Materials 740 (2d ed. 2007) (“[R]efusal to bargain can assume many forms including . . . refusing to furnish relevant information (particularly in the context of claiming financial inability to meet the union’s economic demands).”).} or by unilaterally implementing a policy implicating a mandatory subject of collective bargaining (i.e., wages, hours, and working conditions).\footnote{See id. at 764 (“[R]efusal to bargain can assume many forms including . . . unilaterally implementing changes in wages, hours, or working conditions.”).} While these protections may not always outweigh the potential leverage to be gained through disbanding the union during a lockout,\footnote{Indeed, players could still potentially challenge any unilateral implementation of a policy involving a mandatory subject of collective bargaining following a decertification or disclaimer of interest on antitrust grounds.} they do nevertheless provide some benefits to players in the event ownership adopts an unreasonable negotiation position during the course of the labor dispute, protection that the players lose if the union dissolves.

In this respect, the NBA players’ strategy of delaying the dissolution of the NBPA may provide the best model for future players facing a lockout.\footnote{However, future players may wish to initiate a decertification or disclaimer of interest strategy at least a few weeks earlier than the NBPA did in 2011, as by waiting until mid-November the NBA players risked the possibility that their entire playing season would be cancelled before they were able to obtain any judicial relief in the antitrust litigation.} As noted above, the NBPA likely deferred its disclaimer of interest at least partly in the hope of receiving a favorable decision from the NLRB regarding its allegation that the NBA owners had failed to negotiate in good faith.\footnote{See supra notes 147–149 and accompanying text.} Had the NLRB ruled in favor of the players, it could have potentially dealt the NBA owners a major blow by obtaining an injunction ending the lockout.\footnote{See supra note 148.} Such an action by the NLRB would not have been unprecedented, as the NLRB has been credited with helping end the 1994 MLB players’ strike by successfully pursuing an injunction preventing MLB owners from unilaterally imposing a salary cap on the players.\footnote{See William B. Gould IV, Labor Issues in Professional Sports: Reflections on Baseball, Labor, and Antitrust Law, 15 Stan. L. & Pol’y Rev. 61, 75–76 (2004) (reviewing the history of the NLRB’s intervention during the 1994 MLB strike); Jon S. Greenwood, Note, What Major League Baseball Can Learn From Its International Counterparts: Building a Model Collective Bargaining Agreement for Major League Baseball, 29 Geo. Wash. J. Int’l L. & Econ.} Therefore,
it was reasonable for the NBPA to wait a few months before disclaiming interest in order to give the NLRB time to consider the union's complaint.

Moreover, because sports-league CBAs are typically scheduled to expire after the league’s playing season is over, the first few months of a lockout will usually occur during the sport’s off-season, a period when players generally do not receive a salary from their teams. Thus, in most cases, players will have no compelling reason to immediately dissolve their union, but rather they will initially be better off focusing on collective bargaining and exhausting any potential labor-law remedies they may have against the owners. Should collective bargaining and labor law prove fruitless, however, then there will be little downside to disbanding the union, especially in the face of a lockout that threatens to extend well into the regular season. Indeed, as the outcome of the NBA lockout illustrated, union dissolution continues to provide potentially significant benefits to players facing an owner-imposed lockout.

As an initial matter, the mere filing of an antitrust suit provides players with valuable leverage over the owners by introducing the possibility of continually escalating, treble damages throughout the course of a prolonged lockout. Players can use this leverage to gain valuable concessions from ownership. For example, some have argued that the mere threat of decertification allowed NBA players to reach a more favorable agreement with the league in 1995, while the NBA owners quickly improved their asserted last, best offer in 2011 following the NBPA’s disclaimer of interest.


177. As noted above, the NFLPA’s decision to immediately disclaim interest upon the expiration of their CBA in 2011 was unusual due to the provision in the agreement forcing the players to either dissolve their union prior to the expiration of the CBA, or else wait at least six months to file an antitrust suit against the league. See supra note 95 and accompanying text. Barring a similar provision in a future CBA, players are unlikely to face the same pressure to dissolve their union before the CBA expires.

178. See Eric R. McDonough, Comment, Escaping Antitrust Immunity—Decertification of the National Basketball Players Association, 37 SANTA CLARA L. REV. 821, 847 (1997) (“With the decertification movement gathering momentum [during the NBA’s 1995 labor dispute], the two sides returned to the bargaining table and . . . the players obtained a better agreement.”). Perhaps more significantly, NFL players successfully used decertification to obtain free agency rights from the NFL owners, following a favorable jury verdict in a 1989 antitrust suit the
In addition to gaining negotiating leverage over the owners, a decertification or disclaimer of interest also continues to provide players with a potential means of defeating a lockout, despite the Eighth Circuit’s decision in the Brady litigation. As Judge Bye noted in his Brady dissent, precedents from three other circuits—the First, Seventh, and Ninth—can all be interpreted as holding that the Norris-LaGuardia Act does not preclude courts from granting injunctive relief in cases of employer-imposed lockouts. Should future players file an antitrust suit in one of these circuits, they may be able to obtain a preliminary injunction preventing ownership from continuing a lockout. Such a victory would deliver a significant blow to the owners, eliminating any leverage that they hoped to gain by withholding paychecks from the players.

Moreover, as noted above, even if a future court followed the lead of the Eighth Circuit in Brady, players can still potentially obtain limited injunctive relief preventing owners from locking out players not currently under contract with a league team. While the long-term significance of such an injunction would be limited—as the Eighth Circuit noted, the league could immediately lock these players out after they signed contracts—it would nevertheless provide some certainty to the unsigned players, and it would give all players some incremental leverage over the owners insofar as teams would be forced to sign players before the parties had agreed to the provisions of a new CBA.

Given these benefits, union decertification will likely continue to appeal to future players confronting a lockout. This is significant because players will likely continue to face lockouts in future labor disputes, in light of the fact that every work stoppage in the four major US professional sports leagues since 1994 has taken the form of a lockout by ownership, rather than a players’ strike.

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179. See supra notes 163–165 and accompanying text.
181. See supra notes 130–132 and accompanying text.
182. See supra note 132 and accompanying text.
183. Cf. Beck, supra note 142 (“The [Brady] decision obviously indicates that one option available to N.B.A. players is to end their union and seek an injunction against the N.B.A.’s lockout for all free agents and rookies.” (quoting NBPA outside counsel Jeffrey Kessler)).
184. See Feldman, supra note 82 (“Since 1994, there have been a handful of work stoppages. All of them have been lockouts.”).
In this respect, the prior instances in which NHL and NBA players decided not to dissolve their unions despite facing prolonged lockouts by ownership will likely prove anomalous. Specifically, in the case of the season-long NHL lockout of 2004–05, the players reportedly decided to remain unionized in part so that they would retain the right to challenge any attempt by the league to use replacement players under Canadian labor law.185 Future players generally will not share this same concern, as owners traditionally have not used replacement players during lockouts.186 Even if owners do threaten to use replacement players during future lockouts, however, Canadian labor law will provide much less protection to players in the NFL, NBA, and MLB, since those leagues have far fewer teams in Canada than does the NHL.187 Indeed, owners in these three leagues could more feasibly elect to forgo playing any games in Canada using replacement players, rendering Canadian law inapplicable.

Meanwhile, NBA players decided not to disband the NBPA during the 1998 lockout largely due to concerns about the effect that decertification would have on their ability to negotiate a new CBA

185. See Steve Erwin, NHLPA Wants Union Certification, MONTREAL GAZETTE, April 29, 2005, at C2 (reporting that the NHL players' union was seeking to block the league from using replacement players under Canadian labor law). Due to the NHL’s significant Canadian presence, see infra note 187, professional hockey players must consider a host of complex issues under Canadian antitrust and labor law when deciding whether to dissolve their union. See generally Stephen F. Ross, The NHL Labour Dispute and the Common Law, the Competition Act, and Public Policy, 37 U.B.C. L. REV. 343 (2004), available at http://law.psu.edu/_file/Sports%20Law%20Policy%20and%20Research%20Institute/NHLLabourDisputeAndTheCommonLaw.pdf.

186. Rather, replacement players have historically been used during a players’ strike, when ownership would prefer that games continue to be played. The use of replacements may potentially have greater appeal to the major professional sports leagues during lockouts of other employees, however. For example, the NFL opted to use replacement referees for several weeks during a lockout before resolving its labor dispute with the NFL Referees Association in 2012. See Sam Borden, Waking Up from a Dream After Weeks Full of Pinches, N.Y. TIMES (Sept. 27, 2012), http://www.nytimes.com/2012/09/28/sports/football/nflis-replacement-referees-wake-up-from-a-dream.html. This Article does not consider the efficacy of union dissolution in such a non-player context. Meanwhile, it is also possible that the use of replacement players during a lockout would have more appeal to less popular sports leagues—such as the Women’s National Basketball Association (WNBA) or Major League Soccer (MLS)—a question ultimately beyond the scope of the present Article.

Future players are unlikely to exhibit this same level of concern given that players in both the NFL and NBA were successfully able to negotiate new CBAs in 2011 despite having dissolved their unions.189

Although this Article has concluded that players will typically elect to disband their union when facing a lockout in the future, they may not always do so in the same manner (i.e., formal decertification versus disclaimer of interest). In most cases, players will prefer the disclaimer-of-interest process insofar as it provides players with the most flexibility, enabling them to obtain the leverage provided by antitrust law while preserving the ability to quickly reform their union upon reaching an agreement with ownership.190 In contrast, decertification would leave the players unable to reconstitute a union for a full twelve months,191 a delay that could hamper their ability to reach a binding settlement with the owners.

Disclaimer of interest presents its own risks for players, however. Following Brown, it remains unsettled whether a disclaimer of interest alone will eliminate the owners’ antitrust immunity under the non-statutory labor exemption. Should a future labor dispute progress long enough for a court to decide the applicability of the non-statutory exemption, players may find their disclaimer of interest deemed insufficient to escape the bounds of the exemption. Indeed, there are strong arguments that a disclaimer of interest alone is not sufficiently finite to terminate the collective-bargaining relationship and set aside the non-statutory labor exemption.

Specifically, given the potentially fleeting nature of a disclaimer of interest, one could persuasively argue that it does not satisfy Brown’s requirement that the parties to a labor dispute reach such a point “sufficiently distant in time and in circumstances from the collective-bargaining process” before the non-statutory labor exemption is set aside and antitrust litigation permitted.192 For example, both the NFL and NBA owners argued in 2011 that the disclaimers of interest filed by their respective players unions were little more than a “sham,” intended simply to obtain short-term bargaining leverage over the owners without the players truly

188. See Roberts, supra note 84, at 433 (stating that the fact that decertification “diminishes the importance of the [union] leadership in the process of negotiating a new arrangement with the teams” was one of the reasons “the NBPA did not undertake to decertify and file an antitrust suit during the lengthy lockout that resulted in the loss of the first half of the 1998–99 NBA season”).

189. See supra note 167 and accompanying text.

190. See supra note 82 and accompanying text.

191. See supra note 79 and accompanying text.

intending to abandon the collective-bargaining process.\textsuperscript{193} Such arguments will be bolstered in the future by the resolution of both 2011 lockouts, insofar as the players in both leagues quickly dismissed their antitrust lawsuits and reformed their unions upon reaching a satisfactory agreement with the owners.\textsuperscript{194}

As a result, a court could quite plausibly—and perhaps properly—hold that a more formal and irreversible decertification is required under \textit{Brown} before players can escape the non-statutory exemption and successfully pursue an antitrust lawsuit against their league. Thus, should future players anticipate that they will be forced to engage in prolonged antitrust litigation, rather than use the suit simply to obtain short-term bargaining leverage over the owners, then a formal decertification will likely be their best course of action.

Finally, although this Article has concluded that the existing academic literature generally overstated the drawbacks of dissolving a union during a lockout, union dissolution would nevertheless prove much more costly to players engaged in other types of labor disputes. For example, there will be little motivation to decertify or disclaim interest when the union is able to negotiate a new CBA with ownership without the threat of a work stoppage. In such a case, players will generally choose to maintain the benefits provided by their union and preserve any potential labor-law remedies, while avoiding the potentially disruptive effect that dissolution could have on the negotiations.\textsuperscript{195} Meanwhile, in disputes in which players elect to go on strike, preserving the union will be essential to maintain cohesion among the players and sustain the legality of their collective action under antitrust law. Therefore, in future labor disputes that do not result in a lockout, players will likely follow the prior academic consensus and forgo dissolving their union.

\textsuperscript{193.} \textit{See, e.g.,} Brief of Appellant at 47, Brady v. Nat'l Football League, No. 11-1898 (8th Cir. May 9, 2011), 2011 WL 2003085, at *49 (‘‘[C]onsequences’ [of a disclaimer of interest] are at best temporary, if not wholly illusory, and can be readily reversed . . . .’’), Nat'l Basketball Ass'n Complaint, \textit{supra} note 150, ¶¶ 4–5 (arguing that the NBPA's "threatened 'disclaimer' is nothing more than an impermissible negotiating tactic, which the Union incorrectly believes would enable it to commence an antitrust challenge to the NBA's lockout, which the Union in turn believes would strengthen its position in negotiations" and therefore "is designed only to misuse the antitrust laws in an effort to secure more favorable collective terms and conditions of employment").

\textsuperscript{194.} \textit{See} Feldman, \textit{supra} note 82.

\textsuperscript{195.} To the extent the players wish to gain some leverage from a potential antitrust lawsuit in this situation, they can always threaten to decertify their union without actually following through with it, as the NBA players successfully did in 1995. \textit{See supra} note 178 and accompanying text.
IV. Conclusion

At the time this Article was going to press in late 2012, the NHL was in the midst of its own labor dispute with the National Hockey League Players’ Association (NHLPA). As was the case with the NFL and NBA in 2011, the NHL opted to lock its players out in September 2012 in the hope of obtaining bargaining leverage during the ensuing negotiations. Although some commentators have speculated that the NHLPA may dissolve so that its players could pursue antitrust remedies against the league, as of November 2012 the union was still intact. Based on the foregoing analysis, however, decertification could potentially provide the NHL players with important leverage as their dispute with the league progresses.

Indeed, this Article argues that despite the Eighth Circuit’s decision in *Brady*, union dissolution still potentially offers significant benefits to professional athletes confronting a lockout by management. Consequently, union dissolution will likely continue to remain an important weapon in the arsenal of professional athletes facing a lockout in the future.

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