The N.B.P.A. Disclaimer: the End of the Bargaining Relationship or a Sham?

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Introduction

In the summer of 2011, the National Basketball Association (N.B.A.) locked out its players, leading to a five-month labor dispute that ended on November 26, 2011. Before the end of the conflict, however, games were canceled and litigation was initiated. To pursue litigation, the players had to end the collective bargaining relationship between their union, the National Basketball Players Association (the N.B.P.A.), and the N.B.A. In an attempt to end this bargaining relationship, the N.B.P.A. decided to disclaim interest in representing the N.B.A. players. However, the issue of whether this disclaimer of interest was sufficient to terminate the collective bargaining relationship was never resolved, as the litigation was dismissed after the two sides reached a settlement agreement in November of 2011. Although the labor dispute was resolved, the quick settlement left unanswered a sports and labor law question that has been at the center of professional sports litigation for close to thirty years: How does one terminate the nonstatutory labor exemption?

This paper argues that the N.B.P.A.'s disclaimer was not valid, and as such, it did not end the collective bargaining relationship nor terminate the nonstatutory labor exemption that protects the N.B.A. from an antitrust lawsuit. This paper begins with a factual background describing the events that led to the 2011 lockout. It then proceeds to describe the development of the judicially-created nonstatutory labor exemption. The next section discusses terminating the nonstatutory labor exemption in order to pursue an antitrust lawsuit, in the context of sports labor disputes. This paper then argues that the N.B.P.A.'s

disclaimer of interest was inadequate and thus did not lift the nonstatutory labor exemption. This portion of the argument unfolds in two parts: (1) the disclaimer was not sufficiently distant in time and circumstances from the collective bargaining process, and (2) the disclaimer was not made in good faith and was not unequivocal. This paper then briefly analyzes the possibility of forum shopping in labor disputes concerning professional sports and concludes by arguing that the business factors involved in these labor disputes will encourage the continued use of tactics such as bad-faith disclaimers.

I. Background

A. Factual Background

On June 30, 2011, the N.B.A.'s collective bargaining agreement (C.B.A.) expired, setting the stage for a labor battle that would last throughout the summer and into the fall. [1] The first set of negotiations for a new labor agreement between the N.B.A. and its players' union, the N.B.P.A., began in February of 2009 during All-Star Weekend in Phoenix.[2] Although this was merely a perfunctory discussion, the tension between the two sides and the differences between their positions was apparent when N.B.A. Commissioner David Stern and N.B.P.A. Executive Director Billy Hunter gave a joint press conference.[3]

To understand the labor battle and the legal maneuvers and decisions that were made in that context, it is necessary to understand the positions of each side with regards to the main bargaining issues. The root of the dispute is the financial loss that the N.B.A. owners have collectively suffered. The N.B.A. asserted that twenty-two of the thirty teams in the league did not generate a profit, losing over $300 million in each of the last three seasons.[4] The N.B.P.A. questioned the validity of the exact figures, stating that a large portion of the "losses" are actually accounting losses rather than cash going out the door.[5] The N.B.P.A. and the N.B.A. had large differences on a host of issues, but the main ones were as follows:

(i). Basketball Related Income

Basketball Related Income is the split of revenues between the owners and the players, which is commonly referred to simply as "BRI."[6] In the previous collective bargaining agreement, the players received 57 percent of BRI, while the owners shared the remaining 43 percent.[7] In order to augment their bottom line, the owners sought to increase their share of BRI in the new CBA. [8] Naturally, the N.B.P.A. wanted to sustain their current share of BRI or limit its decreases in order to maximize their salaries.

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[1] The previous agreement had been entered into in 2005. *See NBA Collective Bargaining Agreement Ratified and Signed*, The NBA (July 30, 2005, 1:16AM), http://web.archive.org/web/20101202233937/http:/www.nba.com/news/CBA_050730.html.

[2] Abrams, Jonathan, *The NBA Lockout Timeline*, GRANTLAND (Nov. 11, 2011, 4:18 PM), http://www.grantland.com/blog/the-triangle/post/_/id/9556/the-nba-lockout-timeline.

[3] *See Id.*

[4] Helin, Kurt, *League says 22 teams to lose money, $300 million total this season*, PROBASKETBALLTALK (Apr. 15, 2011, 3:58PM), http://probasketballtalk.nbcsports.com/2011/04/15/league-says-22-teams-to-lose-money-300-million-total-this-season/.

[5] Coon, Larry, *Is the NBA Really Losing Money?*, ESPN (July 12, 2011, 12:39AM), http://sports.espn.go.com/nba/columns/story?columnist=coon_larry&page=NBAFinancials-110630.

[6] Berger, Ken, *NBA Lockout Primer: Questions and Answers*, EYE ON BASKETBALL (June 30, 2011 1:12AM), http://eye-on-basketball.blogs.cbssports.com/mcc/blogs/entry/22748484/30342071?source=rss_blogs_NBA.

[7] *Id.*

[8] *Id.*

(ii). Salary Cap:

The salary cap is essentially a limit on the amount of salaries a team can give to its players during the course of a season. Under the 2005 agreement, the N.B.A. operated under what is traditionally known as a "soft cap."[9] This version of a salary cap allows for multiple exceptions that enable a team to have a payroll in excess of the maximum salary cap.[10] The N.B.A. wanted to institute a" hard cap" system in which these exceptions would not be allowed, thus limiting aggregate player salaries and decreasing owner expenses.[11]

(iii). Revenue Sharing:

Because of the vast differences in the television and ticket revenues between small market and large market teams, sports leagues such as Major League Baseball institute a revenue sharing system to ensure that small market teams do not collapse financially. Prior to the expiration of the 2005 CBA, the N.B.A. had practiced revenue sharing in the form of their luxury tax system,[12] but a more robust system of revenue division was a forefront topic in the negotiations.[13]

(iv). Contract Details

N.B.A. player contracts are limited by the CBA in maximum years allowed, salary, and annual raises.[14] The N.B.A. and the team owners wanted to reduce the maximum length, salary, and reduce the annual raise amounts on these contracts in the new CBA.[15]

With the owners unhappy with their profits (or lack thereof) and the players determined to safeguard a system that had proven lucrative for them, the summer of 2011 was ripe for a labor battle. Although both sides disagreed on most key issues, they began negotiations in earnest in hopes of starting the 2011-12 season on time.

B. Labor Negotiations and Legal Developments

Although the negotiations had already started, the first blow occurred when the N.B.P.A. filed an unfair labor practice charge with the National Labor Relations Board (N.L.R.B.) on May 24, 2011, accusing the N.B.A. of failing to bargain in good faith.[16] The N.B.P.A. accused the league of, among other things, "making grossly regressive contract demands," and "failing and refusing to provide relevant financial information properly requested." [17] On July 1, 2011, the N.B.A. officially locked out its players, taking the dispute to another level.[18] One month later, the N.B.A. made its first legal maneuver by filing both an unfair labor practice charge with the N.L.R.B. and a lawsuit in the Southern District of New

9 *Id.*

10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*
14 See generally, 2005 NBA Collective Bargaining Agreement.
15 Donahue, Tim, *CBA Talk: Comparing the Owners' and Players' Proposals*, EIGHT POINTS, NINE SECONDS (June 1, 2011, 1:17PM), http://www.eightpointsnineseconds.com/2011/06/comparing-the-owners-and-players-cba-proposals/.
16 Beck, Howard, *Turning to Labor Board, N.B.A. Union Fires First*, New York Times (May 24, 2011).
17 *Id.*
18 Abrams, *supra* note 2.

York.[19] The lawsuit sought a declaration from the court stating that (1) the owner imposed lockout was not a violation of the antitrust laws, and (2) the lockout was protected by the nonstatutory labor exemption because any disclaimer of interest made by the N.B.P.A. in the future would not be in good faith.[20] It is important to note that the N.B.A. filed this lawsuit primarily as a preemptive legal tactic. They felt that the Southern District of New York was a more favorable venue for the league in any potential litigation, as compared to the District of Minnesota, where the players would most likely file a lawsuit. That is because the District Court of Minnesota has a history of siding with players in labor disputes.[21] By filing this declaratory lawsuit in New York, the N.B.A. was hoping to avoid litigation in Minnesota.

The negotiations began in earnest in early August, and they continued through September and October.[22] The sides even enlisted the assistance of Federal Mediator George Cohen to aid in negotiations.[23] Unfortunately, October passed and both sides were too far from reaching compromise, resulting in the cancellation of several games from the 2011-2012 season. The N.B.P.A. rejected a final offer and ultimatum from the N.B.A. on November 14, 2011 and decided to disclaim interest in representing the N.B.A. players so they could pursue an antitrust lawsuit against the League.[24] By disclaiming interest in representing the players, the N.B.P.A. would terminate nonstatutory labor exemption, and therefore allow the players to file an antitrust lawsuit.

The players quickly filed federal lawsuits in both California and Minnesota, alleging that the lockout was an illegal group boycott and thus violated Section 1 of the Sherman Antitrust Act.[25] Although the battle had been taken to court, the parties were still able to negotiate under the guise of settlement talks. Eventually, on November 26, 2011, the sides reached a deal and agreed to start the regular season on Christmas Day.[26] Because of the settlement agreement, the litigation never proceeded and a number of the lingering legal questions were not decided. Namely, would the N.B.P.A.'s disclaimer of interest have been valid, thus terminating the nonstatutory exemption and allowing the N.B.P.A. to bring an antitrust action? Although this is a moot point for the 2011 lockout as the labor conflict already has been resolved, there will undoubtedly be future labor disputes in the sports arena. It is precisely that question that this paper seeks to answer.

I. The Evolution of the Non-Statutory Exemption and its Application in Sports

To determine whether the N.B.P.A.'s disclaimer of interest indeed terminates the nonstatutory labor exemption (and thus the N.B.A.'s antitrust shield), it is important to understand the inherent conflict between antitrust and labor law in the United States. Further, it is useful to trace the development of the nonstatutory labor exemption to comprehend how it operates today.

A. The Statutory Labor Exemption

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[19] NBA files federal lawsuit against players, Associated Press (Aug. 3, 2011, 1:40AM), http://espn.go.com/nba/story/_/id/6826716/nba-takes-legal-action-locked-players.

[20] Complaint at 4, *N.B.A. v. N.B.P.A,,* (S.D.N.Y. 2011) (No. 11 Civ. 5369). The interaction between the antitrust laws and the disclaimer of interest, which fall under the labor law umbrella, will be discussed in the section below.

[21] *See, e.g.*, *Powell v. N.F.*L., 678 F. Supp. 777 (D. Minn. 1988) (reversed by Eighth Circuit), *McNeil v. N.F.L*, 764 F. Supp. 1351 (D. Minn. 1991), *Jackson v. NFL*, 802 F. Supp. 226, 228 (D. Minn. 1992), *Brady v. N.F.L.*, 779 F. Supp. 2d 991 (D. Minn. 2011) (reversed by Eighth Circuit).

[22] Abrams, *supra* note 2.

[23] *Id.*

[24] Howard Beck, *N.B.A. Season in Peril as Players Reject Offer*, NEW YORK TIMES (Nov. 14, 2011).

[25] Complaint at 2, *Butler v. N.B.A.* (D. Minn. 2011) (No. 11 Civ. 03352).

[26] *Tentative NBA deal reached; season expected to start on Christmas Day, CNN.com*, (Nov. 26, 2011).

The central objective of our nation's antitrust laws is to promote competition in the business markets.[27] Employment laws have a different goal. The statutory labor scheme in the United States aims to facilitate and promote collective bargaining amongst employees and employers. Because collective bargaining often reduces competition for wages among employees,[28] it is at odds with the antitrust laws in the United States. Because of this conflict, it was necessary to carve out exemptions to the antitrust laws so labor unions could operate as they were intended to. The first of these exemptions came in Section 6 of the Clayton Act.[29] This provision declared that labor was neither a commodity nor an article of commerce,[30] and that the Sherman Antitrust Act should not be "construed to forbid the existence and operation of labor, agricultural, or horizontal organizations."[31] Further, the Clayton Act mitigated the power of courts to issue injunctions in cases that grew out of labor disputes.[32] However, a pair of Supreme Court cases had greatly minimized the protection afforded to unions by the Clayton Act,[33] leading to Congress passing the Norris-LaGuardia Act.[34] The Norris-LaGuardia Act expanded the definition of "labor dispute," and made it more difficult for courts to use injunctions in those disputes.[35] Collectively, this scheme is known as the "statutory labor exemption."

One of the first major cases that extensively discussed this exemption was *Allen Bradley Co*.[36]In *Allen Bradley*, the defendant union entered into a three-party closed-shop agreement with employer contractors and employer manufacturers.[37] These agreements required the employer contractors to purchase equipment only from manufacturers that employed the union's members, and required employer manufacturers to sell equipment only to those same contractors.[38] Because of this agreement, the union's wages increased and the contractors and manufacturers profited handsomely.[39] A manufacturer not included in the closed shop agreements brought suit, alleging that the agreement violated the Sherman Act.[40] The Court held that the Clayton Act or the Norris-LaGuardia Act did not protect this type of combination because the unions had combined with other business groups to effectuate the agreements.[41] Although the closed-shop agreement was clearly an antitrust violation, this case recognized that unions lose the shelter of the statutory labor exemption when they enter into agreements with business groups other than labor organizations. This void in the statutory labor exemption allowed the nonstatutory labor exemption to develop.

B. The Birth of the Nonstatutory Labor Exemption

The judicial development of the nonstatutory labor exemption began with a pair of cases decided in 1965. [42] In *Amalgamated Meat Cutters & Butcher Workmen of North America v. Jewel Tea Co., Inc*.[43],

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[27] Albert D. Daspin, *Of Hoops, Labor Dupes and Antitrust Ally-Oops: Fouling Out the Salary Cap*, 62 Ind. L.J. 95 (1986).
[28] *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975).
[29] 15 U.S.C. § 17 (1914).
[30] *Id.*
[31] *Id.*
[32] *Allen Bradley Co. v. Local Union No.3, Int'l Bhd. Of Elec. Workers*, 325 U.S. 797, 804 (1945).
[33] *Id*. at 805. The decisions were *Bedford Cut Stone Co. v. Journeymen Stone Cutters Assn*., 247 U.S. 37, and *Duplex Co. v. Deering*, 254 U.S. 443.
[34] 29 U.S.C. § 101 (1932).
[35] 325 U.S. at 805.
[36] *Id*. at 797.
[37] *Id* at 799.
[38] *Id.*
[39] *Id.* at 800.
[40] *Id.* at 798.
[41] *Id.* at 809.
[42] Dapsin, *supra* note 27 at 101.

plaintiffs brought suit against butcher unions because of a provision in the collective bargaining agreement that disallowed the sale of meat between 6:00 PM and 9:00 AM, alleging that the unions, as well as other meat retailers, conspired to prevent the sale of fresh meat during those hours, and thus violated Sections 1 and 2 of the Sherman Act.[44] The Court ruled in favor of the defendant unions, stating that even though the provision was part of an agreement entered into with employers, "the national policy expressed in the National Labor Relations Act places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work."[45] Essentially, the Court implied that certain subjects of collective bargaining, such as hours and wages, have such a direct impact on unions that agreements embodying these subjects must be protected from the antitrust laws. This was the birth of the nonstatutory labor exemption, which protected agreements between employees *and* non-labor groups such as employers. The Court, however, ruled against the union in a case decided on the same day.

In *United Mine Workers of America v. Pennington*,[46] large coal operators, including the defendant, saw overproduction as a threat and subsequently decided to push smaller operators out of the market.[47] To accomplish this goal, the union agreed to impose the wage terms of a 1950 collective bargaining agreement on the small operators regardless of their ability to actually pay those wages.[48] It was alleged that this agreement was a violation of Sections 1 and 2 of the Sherman Act.[49] The union asserted that because the agreement concerned wages, a mandatory subject of collective bargaining, that it should be exempt from the Sherman Act. [50] The Court rejected this argument, holding that while a union may enter into a wage agreement with a multiemployer bargaining unit,[51] it forfeits any nonstatutory exemption when it agrees with a certain group of employers to impose a wage scale on other employers not party to the agreement. [52]

The key difference between *Pennington* and *Jewel Tea* was that the agreement in *Pennington* strayed outside of the mandatory subjects of collective bargaining when the union agreed with the multi-employer bargaining unit to impose certain wages on employers *outside* that unit. As it stands today, the nonstatutory labor exemption exempts certain union-employer agreements that are the product of collective bargaining from the antitrust laws.[53]

C. The availability of the Nonstatutory Labor Exemption in Sports Cases

The nonstatutory labor exemption is not available in every case, as was demonstrated in *Pennington*. In *Mackey v. N.F.L.*,[54] the Eighth Circuit outlined a test that has been widely adopted in sports litigation around the country. In *Mackey*, a group of N.F.L. players brought suit alleging that the League's "Rozelle Rule" violated Section 1 of the Sherman Act.[55] The court stated that whether the exemption is available for a labor agreement depends on whether "the relevant federal policy is deserving

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[43] *Camodeo v. United* States, 381 U.S. 676 (1965).
[44] I*d.* at 679.
[45] Id. at 691.
[46] 381 U.S.657 (1965).
[47] *Id.* at 660.
[48] *Id.*
[49] *Id.* at 659.
[50] *Id*. at 664.
[51] *Id.*
[52] *Id.* at 665.
[53] Scott J. Foraker, *The NBA Salary Cap: An Antitrust Violation?*, 59 S. Cal. L. Rev. 157, 162 (1985)
[54] 543 F.2d 606 (8th Cir. 1976).
[55] *Id.* at 609. The Rozelle Rule stated that if a player signed with a new team as a free agent, the old team must provide compensation to the former team in the form players or draft picks.

of pre-eminence over federal antitrust policy under the circumstances of the particular case."[56] In explaining the applicable test, the court held that for the nonstatutory exemption to apply three requirements must be met:

1. Restraint on trade primarily affects only the parties to the collective bargaining relationship;
2. Agreement concerns a mandatory subject of collective bargaining;
3. Agreement sought to be exempted is the product of bona fide arm's length bargaining.[57]

If the agreement or provision at issue passes this test, the nonstatutory exemption applies unless some other employer or union action has terminated it.

D. Terminating the Nonstatutory Labor Exemption

For a union such as the N.B.P.A. to bring a successful antitrust suit against the League and its owners, the nonstatutory exemption must somehow be rendered ineffective. Otherwise, the collective bargaining agreement and whatever labor action the owners take will be immune from an antitrust lawsuit. So at what point in the collective bargaining process does the exemption expire? This issue has been litigated heavily in the sports arena, and the cases below have provided guidance, although not a clear answer.

(i). Powell v. N.F.L.

The first of the guiding cases was *Powell v. National Football League*.[58] In that case, a class of N.F.L. players brought suit in the District Court of Minnesota alleging that the N.F.L. CBA's "Right of First Refusal/Compensation" system violated the Sherman Act because it restricted players' free agency rights.[59] The District Court denied the N.F.L.'s motion for partial summary judgment and ruled that because the parties had reached a bargaining impasse, the nonstatutory labor exemption had expired.[60] The Eighth Circuit disagreed with the District Court of Minnesota.[61] Citing the Supreme Court, the Eighth Circuit explained that impasse is a frequent and not unusual aspect of the collective bargaining process, and as such, it is not sufficient to justify "unilateral withdrawal" from that process.[62]

Because impasse is a regular feature of the collective bargaining process, allowing a Sherman Act action against the N.F.L. would be inconsistent with federal labor law and disturb the equilibrium between antitrust and labor law in the United States.[63] This logic led the court to decide that the N.F.L. and its players' union were not at the point where an antitrust action would be proper.[64] Thus came the first standard in determining when the exemption expires: the nonstatutory labor exemption extends beyond a bargaining impasse, at least in the Eighth Circuit.

[56] *Id*. at 613.
[57] *Id.* at 614.
[58] 930 F.2d 1293 (8th Cir. 1989).
[59] *Id*. at 1295.
[60] *Id.*
[61] *Id.* at 1299.
[62] *Id.*
[63] *Id.* at 1302.
[64] *Id.*

(ii). McNeil v. N.F.L.

In response to the Eighth Circuit's decision in *Powell*, the National Football League Players Association (N.F.L.P.A.) decided to disclaim interest in representing the N.F.L. players.[65] The N.F.L.P.A. strongly believed that this was the best path to follow in order to terminate the nonstatutory labor exemption.[66] After the union ended its representation of the players, a new set of plaintiffs brought suit against the N.F.L. alleging that the League's "Plan B," a new system of player restraints, violated Section 1 of the Sherman Act.[67] The N.F.L. took the position that the N.F.L.P.A.'s disclaimer was a sham because the N.F.L.P.A. still operated as a union.[68] Further, the N.F.L. asserted that the disclaimer was simply a "tactical maneuver" designed to gain bargaining concessions from the N.F.L.[69] Lastly the N.F.L. claimed that the N.L.R.B. must officially decertify the N.F.L.P.A. to lose union status.[70]

It is important to briefly describe the difference between an official "decertification" and a "disclaimer of interest." Essentially, the main difference is that decertifying a union is a much longer process than a union disclaiming interest in representing the employees. First, for a decertification to occur, at least 30 percent of the employees must sign a petition saying that they no longer wish to be represented by that union.[71] That petition must be submitted to the N.L.R.B., who will then set a date for a decertification election.[72] Gabriel Feldman, Director of the Tulane Sports Law Program, estimated that the election in a case as complex as the N.B.A.'s could be scheduled for up to sixty days after the petition for decertification to be verified.[73] The union is officially decertified if a majority of the voting employees vote to decertify during that election.[74] Conversely, a disclaimer could happen almost instantaneously.[75] The union must only *disclaim* the right to represent the employees in the union.[76] Thus, employees generally initiate a decertification process, whereas the union executes a disclaimer of interest. The last significant difference is that after a decertification, a union cannot re-form the union for twelve months.[77] Because of the longer decertification process and its limits on re-unionizing, it is more characteristic of an abandonment of the collective bargaining process as compared to a disclaimer. This is why the N.F.L. in *McNeil* stressed that a decertification was necessary.[78] However, the district court said that a decertification was not necessary, explaining that "because an employer may end a bargaining relationship by simply withdrawing recognition from a certified union based on its good faith belief that the union has lost majority status, it follows that employees have the same right."[79] Because a majority of players had voted to end collective bargaining, a decertification process was unnecessary.[80] The court

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[65] *McNeil v. N.F.L.*, 764 F. Supp. 1351, 1354 (D. Minn. 1991).
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.* at 1355.
[71] Gabriel A. Feldman, *The Legal Issues Behind the NBA Players' Decertification Strategy*, Huffington Post (Nov. 8, 2011, 8:27AM), http://www.huffingtonpost.com/gabriel-a-feldman/the-legal-issues-behind-t_2_b_1081107.html.
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] NATIONAL LABOR RELATIONS BOARD, CASEHANDLING MANUAL PART TWO: REPRESENTATION PROCEEDINGS, at § 11120 (2007).
[77] 29 U.S.C. § 159(c)(3) (1935).
[78] 764 F. Supp. at 1355.
[79] *Id.* at 1357.
[80] *Id.* at 1358.

ruled that the collective bargaining process was nonexistent, and thus the nonstatutory exemption had ended.[81]

(iii). Brown v. Pro Football

Brown v. Pro Football was the Supreme Court's only venture into the issue of the nonstatutory exemption.[82] In *Brown*, twenty-three Development Squad players brought a lawsuit against the N.F.L., claiming that the $1000/week salary limit unilaterally imposed by the league violated Section 1 of the Sherman Act.[83] The players contended that the nonstatutory labor exemption did not protect the N.F.L. because the salary limit was not embodied in a CBA signed by the players.[84] In the lower D.C. Circuit, the court ruled against the Development Squad players, emphasizing that labor and not antitrust law was the tool that the players must use to fight restraints imposed by employers.[85] Allowing the players to bring this type of lawsuit would have given players more labor law rights, thus upsetting the careful equilibrium between the two legal structures.[86] The D.C. Circuit found that the N.F.L. teams were exempt from antitrust liability because of the nonstatutory labor exemption.[87] In an interesting statement however, the D.C. Circuit said that if they wanted to pursue antitrust litigation they may *decertify* their union.[88]

The Supreme Court agreed with the D.C. Circuit, finding that allowing antitrust liability in cases like this would destabilize the collective bargaining process and threaten to mitigate the benefits of multiemployer bargaining.[89] In doing so, the Court expressed its standard for the termination of the nonstatutory labor exemption: "an agreement among employers could be *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."[90] The court then cited the D.C. Circuit opinion, suggesting that the "exemption lasts until collapse of the collective-bargaining relationship, as evidenced by decertification of the union."[91] This citation towards the D.C. Circuit seemed to be an implicit affirmation that a *decertification* was sufficient to end the nonstatutory labor exemption.

(iv). Brady v. NFL

The latest case that litigated the issue of the nonstatutory exemption was *Brady v. N.F.L.*, a derivative of the N.F.L. lockout of 2011. [92] The N.F.L. players had dissolved their union through a disclaimer of interest and brought suit alleging that the League imposed lockout was a group boycott in violation of Section 1 of the Sherman Act.[93] The N.F.L. admitted that a disclaimer is valid if it is made in good faith, but asserted that the N.F.L.P.A.'s disclaimer was nothing more than a tactical maneuver and a sham.[94] The N.F.L. stressed that the N.F.L.P.A. could not simply "flip the 'light-switch.'"[95] The Court

[81] *Id.* at 1359.
[82] 518 U.S. 231 (1996).
[83] *Id*. at 231, 234.
[84] *Brown v. Pro Football*, 50 F.3d 1041, 1052 (D.C. Cir. 1995).
[85] *Id.* at 1045
[86] *Id.* at 1052.
[87] *Id*. at 1056.
[88] *Id*. at 1057
[89] *Brown*, 518 U.S. at 241-42.
[90] *Id.* at 250 (emphasis added).
[91] *Id.*
[92] 779 F. Supp. 2d 991 (D. Minn. 2011).
[93] *Id.* at 998.
[94] *Id.* at 1015.
[95] *Id.* at 1021.

disagreed with the N.F.L., explaining that the good faith requirement for the disclaimer was met.[96] The District Judge ruled in favor of the player plaintiffs and issued an order enjoining the lockout.[97] The Eighth Circuit reversed the decision on grounds not related to the nonstatutory labor exemption.[98]

As it stands now, the exact standard for terminating the nonstatutory labor exemption is unclear. A decertification or disclaimer must be far enough from the collective bargaining process so as to not threaten it or render it ineffective. That process must be allowed to run its course. It is unequivocal that impasse will not end the exemption. Additionally, after the Supreme Court's decision in *Brown*, it is likely that an official decertification effectuated through an election will terminate the exemption. The longer timetable, in combination with the prohibition on re-unionizing within twelve months, displays the necessary dedication to abandoning the collective bargaining process and demonstrates that the process is indeed no longer effective. Further, at least in the District Court of Minnesota, a simple disclaimer (even one that may be a negotiating tactic) will likely lift the exemption as well.

The rest of this paper argues that the N.B.P.A.'s disclaimer of interest in the summer of 2011 was not valid, as it was not sufficiently distant in time and circumstances from the collective bargaining process, and because it was not made in good faith nor was it unequivocal.

III. The N.B.P.A.'s Disclaimer Does Not Terminate the Nonstatutory Labor Exemption

A. The N.B.P.A.'s Disclaimer Was Not Sufficiently Distant in Time and Circumstances From the Collective Bargaining Process and Thus Threatened that Very Process

According to the Supreme Court's in *Brown*, a disclaimer of interest must be sufficiently distant in time and in circumstances from the collective bargaining process so it does not significantly interfere with that process.[99] The general notion behind this standard is that the parties involved must provide the collective bargaining process with ample opportunity to run its course and accomplish its goals before an antitrust lawsuit can be brought. This is true "even after one side unilaterally asserts that the bargaining relationship is over."[100] If this opportunity is not given and the parties resort to antitrust actions too quickly, the collective bargaining process can be destroyed. The Supreme Court recognized that to infect the collective bargaining process with the threat of antitrust litigation would render that process highly ineffective and impotent. It would be difficult for the N.B.A. and the owners to proceed with negotiations knowing that at any moment any of the statements they have made or labor related actions they have taken could be turned against them in an antitrust lawsuit. Similarly, the players have less incentive to make their best offers because they know they can increase their negotiating leverage though an antitrust lawsuit. Because of the problems created by a quick resort to antitrust protection, the parties involved in labor negotiations should look to antitrust for recourse only when they are sufficiently distant from the collective bargaining process and have exhausted all other labor remedies.

The N.B.P.A.'s disclaimer does not satisfy the "sufficiently distant" standard of *Brown*. The disclaimer was fleeting and threatened to contaminate the collective bargaining process between the two parties. The N.B.P.A. disclaimer occurred on November 14, 2011, a mere four days after the latest negotiation session. Although Commissioner David Stern had used strong language and stated that the

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[96] *Id.* at 1018.
[97] *Id.* at 1043.
[98] *Brady v. N.F.L.,* 644 F.3d 661 (8th Cir. 2011).
[99] 518 U.S. 218, at 250.
[100] Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction at 35, *Brady v. N.F.L.*, 644 F.3d 661 (8th Cir. 2011) (No. 11 Civ. 00639).

N.B.A. was done negotiating, this did not end the collective bargaining process.[101] Instead, this was more indicative of impasse, which is clearly a legitimate aspect of collective bargaining.[102] Rather than submit a counterproposal, attempt to continue discussions, or put the N.B.A.'s offer to a vote of the players, the N.B.P.A. hastily decided to pursue an antitrust lawsuit[103]. This action quickly imploded the collective bargaining process, and took the battle into the antitrust arena. This is exactly the course of conduct that the Supreme Court said would "destabilize the collective bargaining process and threaten to mitigate the benefits of multiemployer bargaining."[104] This type of quick rapid disclaimer is not indicative of a true abandonment of the collective bargaining process. Indeed, the N.L.R.B. has stated that

> "The right of withdrawal by either a union or employer from a multiemployer unit has never been held, for Board purposes, to be free and uninhibited, or exercisable at will or whim. For the Board to tolerate such inconstancy and uncertainty in the scope of collective bargaining units would…ignore the fundamental purpose of the Act of fostering and maintaining stability in the bargaining relationships."[105]

If either side were able to sabotage the collective bargaining process with a simple declaration, all future negotiations would be cloaked in uncertainty and proceed half-heartedly.

With this lawsuit, the N.B.P.A. is seeking to make the N.B.A. and team owners liable for actions they took which were entirely within their legal rights under labor law.[106] A lockout is a valid and legal technique that employers have every right to utilize in collective bargaining. Bringing an antitrust suit alleging that the lockout is a violation of the Sherman Act will taint the collective bargaining process because parties on either side will be hesitant to fully utilize the tools that employment law provides because they fear that the other side will use it against them in an antitrust lawsuit. This chilling effect will take place even before the disclaimer is made and any lawsuit is brought. That is why actions such as a disclaimer must be sufficiently distant in time and circumstances from the bargaining process. This is a weapon that the N.B.P.A. should not have during the collective bargaining process. It takes the labor negotiations over the CBA out of the realm of employment law, which is where it belongs, and thrusts it into the land of antitrust law, a statutory scheme that is not designed to resolve these types of conflicts. A dispute such as this needs to be resolved within the confines of labor rather than antitrust law as Congress intended.[107]

Additionally, following the settlement agreement, the newly re-formed N.B.P.A. and N.B.A. held negotiations over a set of "B-list" issues.[108] The quick resumption of the negotiations also points to the conclusion that the disclaimer was not sufficiently distant in time and circumstances from the collective bargaining process. The N.B.P.A. quickly disclaimed interest in representation three days after the last bargaining session, and reformed three weeks later and restarted negotiating. The disclaimer, rather than being distant from the collective bargaining process, was squarely in the middle of it.

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[101] Howard Beck, *N.B.A. Players weight Stern's Latest Ultimatum*, NEW YORK TIMES, (Nov. 11, 2011), http://www.nytimes.com/2011/11/12/sports/basketball/nba-players-weigh-sterns-latest-ultimatum.html?scp=1&sq=n.b.a.%20ultimatum&st=cse.

[102] *Powell*, *supra*, note 62

[103] *Butler v. N.B.A, supra,* note 25.

[104] 518 U.S. 218 at 241-42.

[105] *Retail Associates, Inc*., 120 NLRB 388, 393(1958)

[106] Memorandum of Law, *supra* note 99 at 33.

[107] 518 U.S. at 236.

[108] Marc Stein, *Bill Hunter: Talks to Resume Friday*, ESPN.com (Dec. 2, 2011, 1:16PM), http://espn.go.com/nba/story/_/id/7304086/nba-players-association-discuss-remaining-terms-new-labor-deal-friday-according-billy-hunter.

The N.B.P.A.'s quick disclaimer was not sufficiently distant in time and circumstances from the collective bargaining process to terminate the nonstatutory exemption. Moreover, the disclaimer embodies all the concerns that worried the Supreme Court in its *Brown* decision. Because the disclaimer was made in haste and only four days removed from the most recent negotiating session, it threatened to, and did in fact, derail the collective bargaining process.

B. The N.B.P.A.'s Disclaimer Was Not Made in Good Faith and Was Equivocal

For a disclaimer to be valid and effective, it must both be unequivocal and have been made in good faith.[109] Just because a union simply says it has disclaimed the right to represent its employees, the Board is not obligated to find the disclaimer valid and effective.[110] A union's "bare statement of disclaimer is not sufficient to establish that it has abandoned its claim for representation, if the surrounding circumstances justify an inference to the contrary.[111] In *Retail Associates*, the N.L.R.B. found that the union's disclaimer was not made in good faith, but was rather a tactical maneuver made in order to prevent an employer election that the union feared they would not win.[112] Similarly, the N.B.P.A. disclaimed interest not to abandon representation of the union, but rather to utilize antitrust law to gain negotiating leverage and more favorable employment terms.[113] As such, it was an insincere disclaimer and was not made in good faith.

The equivocal and bad-faith nature of the N.B.P.A.'s disclaimer is evidenced by the fact that the players quickly reformed their union on December 1, 2011, less than three weeks after the disclaimer took place.[114] After the players reached an accord with the league and owners under the guise of settlement discussions, they wasted no time in reverting back to their union status. This indicates that they never really abandoned their representation. A disclaimer is not valid if a union engages in conduct that is inconsistent with that disclaimer.[115] As mentioned above, the newly re-formed N.B.P.A. and N.B.A. held negotiations over a set of "B-list" issues. This strengthens the conclusion that the disclaimer was merely a tactic the players utilized to gain concessions from the league and the team owners.[116] As soon as the players received the concessions they were seeking, they reformed the union and quickly went back to negotiating. It was business as usual less than three weeks after the initial disclaimer. This is indicative of a disclaimer that is made in bad faith and very much equivocal.

If the N.B.P.A. sincerely wanted to abandon the collective bargaining process, as is necessary for the nonstatutory labor exemption to expire, a decertification would have been more effective. The decertification process, as described above, is more permanent and less fleeting than a disclaimer of

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[109] *Retail Assoc., supra* note 103 at 391-92.
[110] *Capitol Market, No. 1*, 145 N.L.R.B. 1430, 1431 (1964).
[111] *Retail Assoc., supra* note 103. at 391-392.
[112] *Id.* at 393.
[113] Coon, Larry, Where NBA Labor Battle Goes From Here, ESPN.com (Nov. 14, 2011), http://espn.go.com/nba/story/_/page/lockout-111114/nba-lockout-players-owners-union-rejects-deal (stating that the "real point of dissolving the union is to generate leverage"),
[114] *Players re-form union; first step in finalizing CBA complete*, ASSOCIATED PRESS (Dec. 1, 2011, 11:30PM), http://www.dallasnews.com/sports/dallas-mavericks/headlines/20111201-players-reform-union-first-step-in-finalizing-cba-complete.ece*; See also*, Grow, Nathaniel, *Reconsidering the Role of Union Dissolution In Professional Sports Labor Disputes: Reflections on the NFL and NBA Lockouts of 2011*, (Jan. 1, 2012) available at http://ssrn.com/abstact=1978517 (explaining that the N.F.L.'s and N.B.A.'s argument that the disclaimers of their respective unions were "shams" will be strengthened by the fact that both sets of players quickly dismissed their lawsuits and re-formed their unions after reaching satisfactory settlement agreements).
[115] *McAllister Transfer*, 105 N.L.R.B. 751 (1953).
[116] Stein, *supra* note 106.

interest and is more likely to be accepted by the courts.[117] The fact that they did not pursue an official decertification indicates that the N.B.P.A. simply wanted to use the disclaimer as a tactic to gain negotiating leverage. The players were not prepared to abandon their union representation.

Because the N.B.P.A.'s disclaimer was equivocal and not made in good faith, but rather was motivated by a desire to gain negotiating leverage and bargaining concessions, it is invalid. As such, it did not terminate the nonstatutory exemption.

C. The N.B.P.A.'s Disclaimer Was Distinct from the N.F.P.A's Disclaimer in McNeil

If the *Butler v. N.B.A.* antitrust litigation had continued, the N.B.A. would surely claim, correctly, that the N.B.P.A.'s disclaimer was invalid as it was merely a sham and a tactical maneuver. The players would likely have responded that the N.B.P.A.'s disclaimer was similar to the N.F.L.P.A.'s disclaimer in *McNeil*, which the District Court of Minnesota concluded was valid.[118] As the *Butler* lawsuit was consolidated with the *Anthony* lawsuit (which was originally filed in the Northern District of California) in the District Court of Minnesota, this argument could be persuasive. However, these two disclaimers are distinct for a number of reasons.[119] First, the N.F.L. players suffered actual loss from their disclaimer. Following the disclaimer, the League unilaterally cut insurance benefits and lengthened the playing season to seventeen weeks.[120] This type of unilateral imposition of unfavorable terms is indicative of a lack of collective bargaining relationship. The N.B.P.A. conversely suffered no loss from dissolving their union. They were in the midst of a lockout and were not allowed to negotiate contracts so many of the risks that were associated with disclaiming interest such as the loss of union certification of player agents or loss of regulation of agent commissions did not matter as the players had little use for those benefits during a lockout.[121] The N.F.L. players by contrast were not locked out when they disclaimed interest. The fact that the N.B.P.A. had almost nothing to lose by disclaiming interest distinguishes it from the disclaimer in *McNeil*. A second and strong factor that distinguishes the two disclaimers is the fact that in the *McNeil* and *Powell* litigations, the N.L.R.B. had found that the two sides had been at impasse since October of 1987.[122] The N.F.L.P.A. did not disclaim interest in representing the players until December of 1989; a full *two years* after the impasse had begun.[123] Further, the N.F.L.P.A. had initiated a strike in 1987.[124] The N.F.L. players had exhausted the tools that labor law had provided for them. They had negotiated, went on strike, and played football through a two-year impasse without the protection of a new CBA. The N.B.P.A. however had seriously negotiated for two months, had arguably not even reached an impasse, and had not utilized any of the tools that labor law provided for them other than an unfair labor practice charge with the N.L.R.B.[125] The collective bargaining process had simply not run its course and thus the nonstatutory labor exemption had remained effective. Proponents of the N.B.A.

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[117] Grow, *supra* note 112 at 27 ("...should future players anticipate that they may be forced to see any antitrust litigation through to its completion, rather than use it simply to obtain short-term bargaining leverage over the owners, then a decertification—rather than a disclaimer of interest—will likely best serve their interest.")
[118] 764 F. Supp 1351.
[119] This is not to say that the disclaimer in *McNeil* actually was valid, but rather that the two disclaimers were distinct in key ways.
[120] *Id.* at 1354.
[121] Grow, *supra* note 112 at 22.
[122] 930 F.2d at 1296.
[123] 764 F. Supp at 1354.
[124] 930 F.2d at 1296.
[125] Yoskowitz, Marc J., *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 Law*, 1998 Colum. Bus. L. Rev. 579, 617 (1998) ("should decertification take place after prolonged attempts at negotiations, and should it take place in good faith after an extended impasse during which the players see no hope for resolution, a court ought to accept such a move.").

disclaimer may argue that like the fact pattern in *McNeil*, a substantial majority of N.B.A. players had authorized the N.B.P.A. to disclaim interest, and thus the good faith issue discussed above is not applicable.[126]

There is one key difference between the authorization vote in *McNeil* and the authorization vote in the N.B.A. labor dispute. In *McNeil*, the authorization vote occurred after the players had already conducted a strike, decided they wanted to pursue antitrust litigation, and had been a part of a two-year impasse.[127] Conversely, the N.B.P.A. authorization vote occurred during the 2010-11 season, *before the negotiations had even begun*.[128] This authorization vote was a preemptive move in order to facilitate the later invalid disclaimer. This is another indication that the N.B.P.A. disclaimer was not made in good faith and was merely a tactical maneuver.

IV. Forum Shopping? The District Court of Minnesota Gives Players Home Court Advantage

As discussed earlier, the N.B.A. filed suit in the Southern District of New York, likely in order to avoid any future litigation in the District of Minnesota. The District of Minnesota has historically ruled in favor of players in labor disputes.[129] It is interesting to mention how the District of Minnesota became an advantageous forum for players. In the 1970s, John Mackey, the Baltimore Colts tight end and then president of the N.F.L. players' union, wanted to bring an antitrust lawsuit against the N.F.L's Rozelle Rule.[130] He asked two of his fellow players and union members, who were law students, to ask their professor who they should hire as legal counsel.[131] Their professor recommended Leonard Lindquist, a partner at the Minneapolis law firm Lindquist & Vennum.[132] One of the firm's partners eventually became the union's head litigator.[133] Because of a simple recommendation from a Wisconsin law professor, the District Court of Minnesota became the chief battleground for N.F.L. labor disputes. Since the *Mackey* decision, the District of Minnesota has been very player friendly.

Furthermore, District Judge David Doty, who handed down the District of Minnesota's pro-player *McNeil* and *Powell* decisions, was literally embedded into the N.F.L.'s C.B.A.[134] In 1993, the N.F.L. and its players reached a settlement agreement regarding free agency and other labor issues.[135] Part of the agreement stipulated that if either side feels the agreement is being violated, they can appeal to a special master.[136] If one of the parties believed that the special master ruled incorrectly, they could appeal to Judge Doty.[137]

The pro-player nature of the District of Minnesota surely drew the N.B.A. players to the forum when they filed their antitrust lawsuit in November of 2011. Based on the legal analysis discussed above,

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[126] 764 F. Supp. at 1358.
[127] *Id*. at 1354.
[128] Feldman, *supra* note 71.
[129] *See, e.g.*, *Powell*, 678 F. Supp. 777 (D. Minn. 1988) (*rev'd* by Eighth Circuit), *McNeil v. N.F.L*, 764 F. Supp. 1351 (D.Minn. 1991), *Jackson v. NFL*, 802 F. Supp. 226, 228 (D.Minn. 1992), *Brady v. N.F.L.*, 779 F. Supp.2d 992 (D.Minn. 2011) (*rev'd* 640 F.3d 785 (8th Cir.).
[130] Richard Sandomir, *Court in Minnesota Has Been a Home Field for a League's Labor Disputes*, NY TIMES (March 12, 2011) http://www.nytimes.com/2011/03/13/sports/football/13judge.html?pagewanted=all&_r=0.
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] Matthew Futterman, *Judge Doty: An X-Factor in NFL Labor Talk,* (March 4, 2011, 5:35 PM) http://blogs.wsj.com/dailyfix/2011/03/04/judge-doty-an-x-factor-in-nfl-labor-talks/.
[135] *Id.*
[136] *Id.*
[137] *Id.*

it is unlikely that any other federal court would find a disclaimer such as the ones in *McNeil* and *Brady* valid. However, because all sports labor disputes squarely addressing disclaimers of interests and decertification has been litigated in Minnesota, there is no direct precedent to turn to in any other jurisdiction.

V. The Business Factor

Although the disclaimer utilized by the N.B.P.A. in the recent labor dispute is likely legally invalid, such tactics will surely be used by the N.B.P.A. in such disputes in the future. The reason players will utilize this strategy again is because it accomplishes its tactical goals. It sufficiently increases pressure on the N.B.A. and owners, and forces them to give concessions to the players. The N.B.A. and owners do not want to go through a protracted litigation battle because it is simply bad for business.

Aside from the threat of treble damages, there is literally billions of dollars at stake for the N.B.A. and its owners. No single player stands to lose nearly as much as any single owner if a season is canceled. The N.B.A. had BRI (as mentioned above, BRI is essentially all the revenue that the N.B.A. produces on an annual basis) of $3.817 billion.[138] This is almost $4 billion in revenue that would simply evaporate if the season were cancelled. The N.B.A.'s concern for their revenue streams was evident during the lockout, as David Stern gave assurances to ESPN and TNT that there ultimately would be an N.B.A. season.[139] This indicates that David Stern and the N.B.A. simply could not afford a lost season, even if they would ultimately win the litigation. The N.B.A. television deal brings the league and its teams $930 million in revenue on an annual basis ($485 million from ABC/ESPN, and $445 million from TNT).[140] The N.B.P.A. was aware of this, and acted accordingly by filing the lawsuit. Another reason that the N.B.A. cannot afford to lose a full season is because the public will undoubtedly lose interest. The public does not sympathize with either side in what they perceive to be a battle between greedy and greedier. In the summer of 2011, the N.B.A. was coming off a record breaking regular season in terms of television ratings.[141] Following that immensely popular season with a lost season would have been devastating to public interest. As such, the N.B.A. was in no position to continue with the litigation, and the N.B.P.A. knew this when they disclaimed interest and filed an antitrust suit.

It is important to analyze these business related issues when discussing sports labor disputes, because they play a pivotal role in the decisions that each side makes. Because these situations often involve celebrity players, billion dollar revenue streams, and hundreds of millions of fans worldwide, a decision cannot be made purely on legal grounds. Regarding the N.B.A., and its financial and entertainment factors, a maneuver such as the disclaimer of interest and antitrust lawsuit, even if legally invalid, will continue to place pressure on the N.B.A. and owners to give financial concessions to the players. Thus, we will continue to see these tactics in future labor disputes.

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[138] Steve Aschburner, *NBA, union finalize audit of revenues, player compensation*, NBA.com (July 21, 2011 6:15PM), http://www.nba.com/2011/news/07/22/bri-audit/index.html.

[139] Sam Amick, *NBA Turns Talks into Disgrace*, SI.com (Oct. 21, 2011, 9:09PM), http://sportsillustrated.cnn.com/2011/writers/sam_amick/10/21/lockout/index.html ("While two weeks of the regular season have already been canceled and at least two more are expected to go soon, two sources close to the negotiations said the union believes that Stern assured his ESPN and TNT television partners that, by back-ending the missed games, he can still deliver an 82-game season even if starts in December.").

[140] Mike Wise, *NBA lockout: Thank Network Television Contract for Forcing Season to be Salvaged*, WASH. POST (Nov. 26, 2011) http://articles.washingtonpost.com/2011-11-26/sports/35281341_1_nba-season-nba-lockout-nba-calendar.

[141] Sean Deveney, *NBA television ratings continue impressive trend in postseason*, SPORTING NEWS (May 2, 2011, 1:41 PM), http://aol.sportingnews.com/nba/story/2011-05-02/nba-television-ratings-continue-impressive-trend-in-postseason.

VI. Conclusion

Although the 2011 N.B.A. lockout was resolved through a settlement agreement, the litigation could very well have moved forward. If this occurred, the Courts should have ruled that the N.B.P.A.'s disclaimer was invalid, therefore keeping the nonstatutory labor exemption operational. Although the N.B.P.A. disclaimer was a sham, player unions will likely continue to use this maneuver in future disputes. This is because the *threat* of prolonged litigation and treble damages may give them enough leverage to receive concessions and settle the dispute before the disclaimer issue is fully litigated. This is exactly what happened during the 2011 N.B.A. lockout. This is unfavorable because it rewards frivolous tactics by player unions. However, until the disclaimer and nonstatutory labor exemption issue is fully litigated, this practice by the player unions will likely persist, as the N.B.A. simply cannot afford to lose full seasons because of labor disputes.

This paper has discussed the origins of the N.B.A. lockout and the development of the nonstatutory labor exemption and its application in sports litigation. It concluded that the N.B.P.A.'s disclaimer was invalid because it did not meet the *Brown* standard of sufficiently distant in time and circumstances, and because it was not made in good faith and was not unequivocal. Further, this paper determined that the N.B.P.A.'s disclaimer was not similar and is distinguishable from the disclaimer in *McNeil*. The paper then discussed the possibility of forum shopping in the District of Minnesota, as the venue has been favorable to players in past labor disputes. Lastly, the paper discussed the business factors that are involved in labor disputes. It concluded that because these factors weigh heavily during negotiations, tactics such as a disclaimer of interest will be used in the future and will remain effective. Although the labor conflict in the N.B.A. is settled for now, another dispute will surely arise when the most recent C.B.A. expires. When that happens, the N.B.P.A. should decertify or make a stronger effort to see the collective bargaining process through to its natural endpoint if it wants to bring a legitimate antitrust suit.