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## Decertification: The NFLPA And NBPA's Nuclear Option

Law360, New York (January 18, 2011) -- In March, the collective bargaining agreement (CBA) between the National Football League and its players union, the National Football League Players Association, will expire. The parties are worlds apart in their negotiations for a new CBA, and a lockout is expected later this year. Similarly, the CBA between the National Basketball Association and its players union, the National Basketball Players Association, will expire in June. No deal is currently in sight.

As the NFL and NBA collective bargaining talks continue to go nowhere, tensions mount, lockouts become more of an inevitability than a possibility, and the threat of legal action by the players against the owners begins to look more real by the day. In that regard, the federal antitrust laws could be a powerful tool for the players in their negotiations with ownership.

Doubters only need to look back to 1992, when the NFL's players commenced antitrust actions against the league that gave the players free agency rights for the first time in the history of the NFL. However, there is one major impediment that the players must overcome before they can utilize this formidable weapon: the nonstatutory labor exemption to the antitrust laws. To surmount this hurdle, the players would, in all likelihood, have to decertify their union and suffer the resulting consequences.

### The Nonstatutory Labor Exemption to the Antitrust Laws

The antitrust laws have a limited application in the labor context. Recognizing the necessity of free market restraints to the success of any agreement between a labor union and an employer, courts have granted a nonstatutory labor exemption to the antitrust laws in the collective bargaining relationship between unions and employers.

The NBA and NFL are no exceptions, and the existence of the collective bargaining agreements between the leagues and the unions have — mostly — immunized the leagues from player antitrust challenges to a number of practices common to professional sports leagues — such as the salary cap and restrictions on free agency — that otherwise risk running afoul of the antitrust laws.

Unlike the antitrust exemption granted to Major League Baseball, the NFL and NBA's exemptions are not without limits. They are wholly dependent upon the existence of a collective bargaining relationship between the players unions and ownership. Therefore, once a league's CBA expires, the antitrust exemption is vulnerable to attack should negotiations between the players and owners breakdown.

However, a failure to reach agreement is not enough; the leagues' antitrust exemptions do not expire simply because the parties reach an impasse.[1] In that case, labor law permits the leagues to (among other things) implement lockouts — free from antitrust liability — until a new agreement has been reached. Likewise, labor laws permit the players to engage in collusive behavior, such as a strike, as they did during the 1998-1999 NBA season. Courts recognize these offsetting labor tools as an important part of the collective bargaining process, and will not apply the antitrust laws to undermine federal labor policy.

But at what point does federal labor policy yield to the antitrust laws? The nonstatutory

antitrust exemption applies only to agreements that 1) primarily affect only the parties to the collective bargaining relationship; 2) concern mandatory subjects of collective bargaining; and 3) are a product of arm's-length collective bargaining.[2]

The third factor is the key. In essence, it means that the leagues' antitrust exemption terminates upon the total collapse of the collective bargaining relationship between the players and the league. Thus, in order for the players to bring an antitrust challenge to any of the leagues' free market restrictions — such as the salary cap and restrictions on free agency — the players must divest themselves of a collective bargaining representative by decertifying their union.

## **Decertification: Benefits and Consequences**

The benefits of decertification are tried and tested. Following the expiration of the NFL's CBA in 1987, in December 1989, the NFLPA voted to decertify its union and restructure as a voluntary professional association. Player representatives from each team met and unanimously agreed to terminate the NFLPA's status as a labor organization under the NLRA by adopting new bylaws that prevented any officer, employee or member of the NFLPA from negotiating with the NFL or any of its member clubs on behalf of the players.

Subsequently, the players commenced antitrust actions against the NFL and in 1992 obtained unrestricted free agency rights for the first time in league history.

Should the NFLPA or NBPA decertify, the players would have the ability to challenge any anti-competitive practices — such as a lockout — that ownership implements in order to gain leverage at the bargaining table. Players could also commence individual actions challenging the league's practices, as was the case in 1990, when a group of players commenced an antitrust action against the NFL resulting in a jury verdict of over \$1.5 million.[3]

Despite the NFL players' victories in the early 1990s, a decertification of the players unions would carry significant consequences for the players. For starters, unions enjoy a statutory labor exemption that allows their members to work together to eliminate competition among themselves.[4] Decertification would eviscerate this exemption, without which the players would likely lose their guaranteed salaries and pensions, and league minimum contracts.

Moreover, players would lose the union's ability to bring grievances on their behalf and to collectively control marketing and licensing rights free from antitrust risk. Last year, the Supreme Court held in the American Needle case that the NFL's collective licensing of team marks was subject to the antitrust laws.[5] The loss of the union's ability to control licenses would be significant: following the NFLPA's decertification in 1989, the league, using its vast financial resources to entice marketable players, engaged in a bidding war with the NFLPA for the rights to players' marketing and licensing rights.

The drastic effects of decertification on both sides of the bargaining table has led NBA Commissioner David Stern to call decertification the "nuclear option." But despite the severe consequences, this "nuclear" threat should not be written off as idle or remote. In a negotiation with independently wealthy owners who can presumably absorb the financial blows of a lockout with relative ease, the players must know that they do not stand on equal bargaining ground. And their unions' legal and economic tools do not seem to level the playing field.

Consequently, the threat of viable antitrust actions would appear to provide the players with some much-needed leverage in their negotiations with the leagues. In fact, at least two NBA teams have purportedly voted to authorize decertification of the NBPA, and the NFLPA has taken steps toward decertification as well.

It may be ugly, it may be messy, and it may be a "nuclear" option. But if the leagues and unions cannot make progress at the negotiating table, decertification may be the only way to prevent lockouts and give sports fans their 2011-2012 NFL and NBA seasons.

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*The opinions expressed are those of the author and do not necessarily reflect the views of the firm, its clients, or Portfolio Media, publisher of Law360.*

[1] *Powell v. National Football League*, 930 F.2d 1293 (8th Cir. 1989).

[2] *Mackey v. National Football League*, 543 F.2d 606, 614 (8th Cir. 1976).

[3] *McNeil v. National Football League*, Civ. No. 4-90-476 (D. Minn).

[4] 15 U.S.C. § 17.

[5] 130 S. Ct. 2201 (2010).

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