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NBA V. NBPA: Tactical Strike Or Tactical Blunder?

Law360, New York (September 20, 2011, 12:31 PM ET) -- On June 30, 2011, the collective bargaining agreement between the National Basketball Association and its players' union, the National Basketball Players Association, expired with no new agreement in sight. The parties, worlds apart in their positions, had made little progress toward reaching a new CBA. It was therefore hardly unexpected when the NBA promptly instituted a lockout of its players, giving the league significant leverage at the negotiating table.

The players' first counterpunch — individual players contemplating taking their talents overseas — lacks any real coercive effect on the owners and may not be a realistic option to keep all of the players afloat during a prolonged lockout. NBA Commissioner David Stern has publicly dismissed the notion that players entering contracts to play overseas threatens the league.

In fact, the greatest weapon in the players' negotiating arsenal may be the federal antitrust laws. Antitrust law, however, has 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. Therefore, in order to avail themselves of the antitrust laws, the players must first end the collective bargaining relationship altogether by decertifying their union.

This so-called "nuclear option" was the approach taken by the NFL Players Association in its recent duel with the NFL. That case culminated in the Eighth Circuit holding that the Norris-LaGuardia Act, a labor law, prohibited the district court from issuing a preliminary injunction ending the lockout. Although the ruling did not give any indication whether or not the lockout would ultimately be ruled an antitrust violation, the Eighth Circuit's decision ensured that the lockout would stay in place throughout the litigation. Faced with the prospect of years without a paycheck, it is not surprising the players were able to come to terms with the league mere weeks after the Eighth Circuit rendered its decision.

Both the NBA and NBPA undoubtedly followed the NFL's legal saga closely. The Eighth Circuit's decision may have given the NBPA second thoughts about decertifying. Given that antitrust lawsuits take years to resolve, the real legal victory to be had for the NBA players would be a preliminary injunction ending the lockout. If that prospect seems bleak after the NFL case, why would the players decertify and lose all of the benefits that unionization brings?

Rather than wait for the players to dictate the terms of a legal battle, on Aug. 2, the NBA commenced an action in the Southern District of New York against the NBPA and a defendant class of past, present and future NBA players. The NBA alleges that the NBPA has repeatedly threatened to decertify and commence an antitrust lawsuit, and seeks a declaratory judgment that (1) the lockout does not violate the antitrust laws, (2) any purported disclaimer of interest by the NBPA as the players' collective bargaining representative would be invalid, (3) the Norris-LaGuardia Act deprives federal courts of

jurisdiction to enjoin the lockout, and (4) if the NBPA's disclaimer of interest were ultimately not deemed invalid, all player contracts would be void and unenforceable.

The NBA's aggressive approach seems to have a twofold purpose. First, by playing offense, the NBA has chosen the forum. The Southern District of New York has historically treated the league with favor. In NBA v. Williams,[1] the court found that the salary cap, the college draft and certain restrictions on free agency were not per se antitrust violations and that the pro-competitive effects of those practices outweighed their restrictive consequences under a rule-of-reason analysis.

The players may thus face an uphill battle in the SDNY in challenging any of these restrictions as they are currently applied. Second, by commencing action before any disclaimer is finalized, the league can continue to use its leverage at the collective bargaining table. The NBA's lawsuit, therefore, appears to be a tactical strike designed to ensure a favorable litigation forum and the continuance of collective bargaining.

But was the lawsuit actually a tactical blunder?

There are a number of potential problems, both strategic and legal, with the league's lawsuit. Strategically, the Southern District of New York may not truly be the optimal forum for the NBA to litigate an antitrust lawsuit. While the holding in Williams provides the league with an advantage in any dispute over restraints such as the salary cap, the draft and restrictions on free agency, the real battle will be over a preliminary injunction ending the lockout. In that regard, Williams will be of little help. In fact, the Williams court referred to the league's argument that the Norris-LaGuardia deprives the court of jurisdiction to enjoin a labor dispute a "dubious proposition."[2]

By contrast, the Eighth Circuit's recent opinion in Brady v. NFL held that the Norris-LaGuardia Act does in fact prevent a district court from enjoining a lockout. If the league were to prevail on this issue, it would have tremendous coercive effect on the NBPA. The NBA therefore may have been better off commencing an action in a district court in the Eighth Circuit, if only to obtain the precedential benefit of the NFL holding.

Another question is whether the NBA's lawsuit actually plays right into the NBPA's hands by allowing it to test the legal waters without forcing the players to forgo the benefits of unionization. In other words, it allows the NBPA to explore the application of antitrust laws in federal court without decertification. If the players prevail in this suit, they can continue to collectively bargain with the knowledge that they would have the unquestionable ability to disband their union and end the lockout in a matter of weeks. By way of comparison, the NFL players had no such certainty. They had to decertify and lose all of their union benefits just to have their day in court.

There are also significant legal hurdles that the NBA must overcome to proceed with its case. At the outset, the NBA will have to show that a ripe, justiciable controversy exists between the league and the players. Federal courts are not in the business of issuing advisory opinions. There must be an actual controversy for the court to resolve. As such, before issuing a declaratory judgment, a court must first determine whether there is a practical likelihood that the contingencies influencing the rights or duties at issue will occur. Here, there has been no actual decertification. The NBPA has only allegedly threatened to decertify.

The court may decide that it cannot determine whether any purported disclaimer is invalid, or whether the lockout continuing beyond a valid disclaimer is permissible under the antitrust laws, when there has been no disclaimer. Ruling on the validity of a disclaimer, which the NBA insists is a determination as to whether the disclaimer was made in good faith, would necessitate an inquiry into the factual circumstances surrounding the disclaimer. Here, those circumstances have yet to play out.

Furthermore, the league's position that all player contracts would be void upon a union decertification is questionable. All player contracts incorporate by reference terms of the CBA, and those terms can presumably continue to operate in the context of an individual player contract, with or without a certified union in place. Indeed, the Williams court noted that voiding all player contracts would be "almost impossible to accomplish legally."[3]

Regardless of whether or not the NBA's lawsuit was, from a tactical standpoint, a perfect swish or an ugly brick, it may be the best thing for the league, the players and the fans. The ability of the parties to simultaneously collectively bargain and obtain a clear court ruling will likely facilitate a new CBA faster than an NFLPA-type decertification. But which side will ultimately claim victory is anybody's guess.

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[1] 857 F. Supp. 1069, 1078-79 (S.D.N.Y. 1994).

[2] Id. at 1073 n.3.

[3] NBA v. Williams, No. 94 Civ. 4488, 1994, at *1 (S.D.N.Y. June 30, 1994).