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## NFL's Fixed Wage Plan Exempt from Antitrust Laws

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Sherman remarked:

[E]ither a foreigner or a native may escape 'the criminal part of the law' by staying out of our jurisdiction . . . , but if they have property here it is subject to civil process . . . . [A foreigner] may combine or conspire to his heart's content if none of his co-conspirators are here or his property is not here. 21 CONG. REC. 2461, *reprinted in* Earl W. Kinter, ed., THE LEGISLATIVE HISTORY OF FEDERAL ANTI-TRUST LAWS AND RELATED STATUTES, Part I, THE ANTI-TRUST LAWS at 126 (1978).

Accordingly, the legislative history further justified the court's refusal to apply the criminal provisions of the Sherman Act to Jujo's conduct.

In summary, despite finding sufficient contacts to establish personal jurisdiction over Nippon, the United States District Court for the District of Massachusetts granted Nippon's motion to dismiss. The court explained that the Government's criminal indictment failed to present evidence of a vertical price fixing agreement between Jujo and the Japanese trading companies. Furthermore, the court held that the Sherman Act did not permit it to rule on alleged activities occurring solely outside of the United States.

## *NFL's fixed wage plan exempt from antitrust laws*

*by Paul Lukitsch*

In certain circumstances, labor unions and multi-employer groups may negotiate free from the restrictions embodied in the federal antitrust laws. In *Brown v. Pro Football Inc.*, 116 S. Ct. 2116 (1996), the United States Supreme Court held that the National Football League ("NFL"), a group of football clubs, is immune from a player's association antitrust class action. The class action was brought after an impasse in negotiations; the football clubs, bargaining together, implemented a unilateral wage plan. In reaching its decision, the Court ruled that a "nonstatutory" antitrust exemption implicit in the federal labor laws applies. The Court stated that this exemption, which is aimed at encouraging the collective bargaining process, shielded the employers from the antitrust laws and allowed the implementation of a unilateral wage plan.

In 1987, a collective bargaining agreement between the NFL and the NFL Players Association ("Association"), a labor union, expired. During negotiations over a new contract, the NFL adopted a plan which would permit each club to establish a "developmental squad" of up to six "first-year" or rookie players. The developmental squad would include players who had failed to secure a position on a regular player roster, and under the plan, the developmental squad would play in practice games and occasionally in regular games as substitutes for injured players. The plan provided for these squad members to receive the same weekly salary as regular contracted players.

In April of 1989, the NFL presented this plan to the Association and proposed that the squad members should receive \$1,000 per week. The Association disagreed,

insisting that the developmental squad players should receive the same benefits from club owners as those provided to regular players, including allowing squad members to negotiate individually with club owners regarding their respective salaries. After two months of negotiations, the two groups reached an impasse. The NFL unilaterally implemented its last good faith offer at the proposed \$1,000 weekly salary and distributed uniform contracts to the club owners. The NFL then advised the club owners of resulting disciplinary actions to those owners who did not follow the weekly salary provisions.

As a result of the NFL's unilateral implementation, 235 developmental squad members subsequently brought this class action suit against the NFL and its member clubs. The Association claimed that the NFL's and the club owners' agreement to

pay a \$1,000 per week salary violated the Sherman Act, 15 U.S.C. § 1 (1996), which forbids agreements in restraint of trade. A federal district court found in favor of the Association, and a jury awarded it \$30 million in damages. On appeal, the Appellate Court for the District of Columbia Circuit reversed, holding that a nonstatutory antitrust exemption barred the Association's claims. The Supreme Court granted certiorari and Justice Breyer delivered the 8-1 majority opinion, holding that the NFL's unilateral implementation of the fixed wage plan after a bargaining impasse is exempt from the antitrust laws.

### **Existence and scope of the implicit "nonstatutory" antitrust exemption**

In rejecting the Association's antitrust claims, the Court relied on earlier Supreme Court precedent which states that an implicit "nonstatutory" exemption from the application of the antitrust laws exists in certain circumstances. Previously, the Court ruled that the public policy considerations implicit in federal labor laws under 29 U.S.C. § 151 *et. seq.* aim to promote free and private collective bargaining, requiring good faith negotiation over wages, hours, and working conditions. According to the Court, an exemption is implicit in this policy—Congress did not consider the judicial use of the antitrust laws as appropriate for labor disputes, but rather viewed conflicts under the labor statutes as administrative resolutions appropriately left to the National Labor Relations Board ("NLRB"). In effect, the implied

exemption takes labor-related disputes out of the hands of the antitrust courts.

Further, the Court found that for meaningful collective bargaining to take place, an exemption to the antitrust laws is necessary to give effect to the federal labor statutes and to promote the peaceful settlement of labor disputes through mediation and negotiation. For example, the Court noted that allowing the antitrust laws to interfere with collective bargaining does not allow employers to safely discuss pre-impasse offers. In essence, the Court determined that the collective bargaining process would grind to a halt if groups are prohibited from making competition-restricting agreements among themselves that are often necessary to further a collective labor-management goal.

Although the Association conceded that an exemption exists, it claimed that the exemption did not apply in the present context. Consequently, the Court analyzed the scope of the exemption. Specifically, the Court determined whether the exemption applies to multi-employer bargaining and whether Congress intended the exemption to be effective with respect to the NFL's tactic of implementing a multi-employer wage plan after a bargaining impasse.

Writing for the majority, Justice Breyer explained that, as of 1994, multi-employer bargaining accounts for more than 40% of all major collective bargaining agreements. He further stated that multi-employer bargaining is a prevalent method of collective bargaining used in many industries, including

professional sports, and offers several advantages to both labor and management. Citing NLRB cases and treatises on the subject, the Court concluded that the practice of multiemployer bargaining plays an important part in the nation's industrial relations system.

Justice Breyer additionally noted that the courts and the NLRB have held that the federal labor laws permit the implementation of changes to preexisting conditions under an earlier contract after a bargaining impasse. In order to implement changes after a bargaining impasse, the Court noted that two requirements must be satisfied. First, the new terms must be "reasonably comprehended" within previous employer proposals prior to the impasse to assure that less favorable terms will not be imposed through the unilateral implementation of changes. Second, the new terms must not involve unfair labor practices. For example, employers must bargain in good faith.

By adhering to these requirements, the Court concluded that a unilateral implementation of a post-impasse multi-employer proposal constitutes an "integral part of the bargaining process" which gives effect to our nation's labor policy of promoting peace through strengthened collective bargaining.

### **Collective bargaining disputes should be kept out of antitrust courts**

Lastly, the Court refused to subject multi-employer post-impasse implementation to the antitrust laws. In particular, the Court expressed concern that antitrust courts would

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have to answer numerous questions regarding the procedure of collective bargaining for wages, hours, and working conditions. By not limiting the scope of the antitrust laws, the Court concluded that the inherent benefits of collective bargaining would be in jeopardy. Moreover, the Court noted that nonexpert judges or juries may premise antitrust liability on a premeditated agreement of uniform behavior on the part of the employers or on the lack of an independent decision of a competing employer.

### **Justice Stevens's dissent — an exemption from the exemption**

In his dissent, Justice Stevens pointed out that an accommodation must exist for the Congressional policy favoring collective bargaining and the Congressional policy favoring free competition in

business markets. Although Justice Stevens conceded that a nonstatutory exemption from the antitrust laws is necessary in certain circumstances, he indicated that the unique nature of the professional sports industry warrants a nonapplication of the exemption from the antitrust laws.

Justice Stevens noted that all salaries in the professional sports industry are individually negotiated—a practice which does not exist in any other industry. He emphasized that this practice existed both before and after a 1982 collective bargaining agreement which granted players an express right to negotiate their respective salaries individually with club owners. However, because this “developmental squad” introduces a new expansion of the traditional salaried players, he maintained that the current imposition of fixed wages on a player's benefits

package was not foreseeable during the original 1982 collective bargaining agreement. Thus, Justice Stevens found the “developmental squad” to warrant special attention. In agreeing with the district court, he concluded that the “developmental squad” is a novel idea which was not entertained by the 1982 agreement between the players and the NFL. Therefore, Justice Stevens determined that the antitrust exemption, normally intrinsic to a collective bargaining agreement, should not apply because the Association did not negotiate the players' rights in the original 1982 agreement. Thus, Justice Stevens concluded that the antitrust exemption, coupled with the lack of a mutually agreed upon collective bargaining agreement, would infringe upon the Association's freedom to contract and would contradict the very purpose of the exemption—the ability to negotiate freely.

## ***Independent service organizations survive Kodak's motion for summary judgment on Sherman Act claims***

*by Patrick McGovern*

In *Eastman Kodak v. Image Technical Service, Inc.*, 504 U.S. 451 (1992), the Supreme Court affirmed a lower court's ruling that a genuine issue of material fact existed as to whether Kodak possessed market power in the relevant market for service and parts for its machines even though Kodak lacked market power in the relevant market for the sale of its copying equipment. The Court held as a matter of law that a single brand of product or service can be a relevant market under the Sherman Act. Further, the Court clarified its earlier standard for summary judgment enunciated in *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), by stating that a plaintiff in an antitrust case does

not carry a special burden to defeat a motion for summary judgment. The Court referred to its decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), which held that a nonmoving party can survive a motion for summary judgment if the court finds that the party's inferences are reasonable.

### **Kodak's policy to maintain own products**

Kodak manufactured and sold copiers and micrographic equipment and replacement parts for its equipment and offered service for Kodak equipment. Kodak provided 80% to 95% of the service for Kodak ma-