Marquette Sports Law Review

Volume 15
Issue 1 *Fall*

Article 7

Player Restraints and Competition Law throughout the World

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PLAYER RESTRAINTS AND COMPETITION LAW THROUGHOUT THE WORLD

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This article reviews agreements among clubs participating in league sports in many countries throughout the world that limit competition for the services of players. Under the English common law (which governs in most of the British commonwealth), the competition law provisions of the European Union's governing treaty, the American Sherman Act, and the Canadian Competition Act, the governing standard is quite similar. Player restraints can only be justified if they are related to a legitimate purpose, which is usually defined as one that demonstrably improves the consumer appeal for the sporting competition. Moreover, and significantly, player restraints must be reasonably necessary to achieve the demonstrated purpose; in short, overbroad restraints are not consistent with competition law.

Competition law provides a meaningful, effective, and under-utilized constraint on the monopsony power of sports leagues. Although American players must surmount an additional obstacle of waiving rights under labor law, this obstacle is not present elsewhere. In all relevant jurisdictions, sensible application of competition law principles is superior to a *laissez faire* approach or direct government regulation, and is less intrusive than a restructuring of league sports to eliminate monopsony power.

I. OVERVIEW: WHAT ARE PLAYER RESTRAINTS?

In most professional sports leagues around the world, participating clubs compete among themselves to sign players, subject to rules imposed by the league or agreed to among themselves.[1] Rules imposed by leagues often

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* Professor of Law, University of Illinois. An earlier version of this paper was presented at the Marquette University National Sports Law Institute's Conference on International Sports Law & Business. This Article, which focuses specifically on player restraints and is written for a legal audience, in turn builds upon a prior work, *Competition Law as a Constraint On Monopolistic Exploitation by Sports Leagues and Clubs,* 19 OXFORD REV. OF ECON. POL. 569 (2004).

1. Beyond the scope of this paper are the nuances involved within leagues with unusual structures, such as Major League Soccer (clubs directly control league, but league centrally signs and allocates players), Fraser v. Major League Soccer, L.L.C., 284 F.3d 47 (1st Cir. 2002), or the Women's National Basketball Association (clubs indirectly control league with central labor control). *See* Larry Lebowitz, *Leagues are Forming as 'Single Entities' Where Decision and Profits are Shared by All Owners*, FT. LAUDERDALE SUN-SENTINEL, Apr. 20, 1997, at 1F.

significantly restrain competition for players. These can include a *reserve list*, whereby clubs will not bid for reserved players at the expiration of a contract; the player must either re-sign with his prior employer or seek employment elsewhere. Some players are on a *restricted list*, so that any club desiring their services agrees to provide compensation to the former employer, or to allow the former employer to match the best offer. Common among North American and Australian leagues is a *player draft,* whereby amateurs or veterans not under contract can only negotiate with the team that selects them; teams usually select in reverse order of finish from the prior season. In recent years, several leagues have employed *club salary caps*, which prevent a club from competing for players when its total payroll for players exceeds a specified amount, or a more modest version of this restraint, a *luxury tax* on payrolls that exceed a certain amount, thereby making it more expensive for high-payroll teams to compete for the services of players. Some leagues also employ *individual player salary caps* that limit the amount a player can receive based on years of service within the league or his previous salary.

Three other common practices also can significantly affect the ability of clubs to compete for player services. Rules by which clubs agree not to spend more than a certain percentage of their own revenue on players, or agree to cut payroll if debt is too high, can take profligate or poorly managed clubs out of the bidding for players. North American leagues also employ *roster limits* and *waiver rules*. In combination, these provisions limit the total number of major league-quality players that any team can employ; and the existing contracts for players in excess of that number must be offered for assignment, for a modest fixed fee, to other teams (who may select in reverse order of their current position in the standings). North American leagues also engage in another practice that is often not seen as affecting player restraints – a *ban on significant cash sales*. Because significant cash sales are banned, clubs seeking a star player must either sign one of the few "free agents" (a player whose contract has expired, and who is not subject to any of the aforementioned restrictive rules) or arrange a trade with another club.

II. THE COMPETITION PROBLEM: EXERCISE OF MONOPSONY POWER

The more restrictive of the afore-mentioned rules are prevalent where clubs adhering to restraints do not face significant competition from others for the services of players. Restraints are less prevalent where players have credible options to play elsewhere. For example, although the top Italian soccer league seriously considered imposing a salary cap,[2] it was not

2. BBC SPORT, *Serie A Considers Salary Cap*, Nov. 9, 2001, *at* http://news.bbc.co.uk/

implemented. Such a plan would have been unfeasible because it was clear that the top players would simply leave Serie A and play for clubs in other European soccer leagues. However, soccer is the only league sport where serious inter-league competition exists for the world's best players. The revenue disparities between American baseball, basketball, and hockey leagues and those in other countries where these sports are played are so great that the option to play elsewhere is not a viable substitute.[3] American and Australian Rules Football are only played in those countries. While rugby has major league professional clubs, most rugby federations require that players seeking the income and prestige from participating in international rugby must play for a domestic club, thus creating a huge disincentive for players to play elsewhere.[4] Thus, most clubs in league sports around the world are able to exercise monopsony power over their players.[5]

The most obvious and immediate effect of the imposition of player restraints by clubs with monopsony power is lower salaries for players. Of course, this restraint represents a significant transfer of wealth from players to clubs. If the salary restraint is too severe, it may affect players' investment in training, and thus hurt the quality of the sport. However, professional athletes' next-best occupation usually pays so much below the salary commanded as an athlete that this will not significantly affect the supply of players. Of greatest concern to competition laws designed to promote efficiency and protect consumers, however, is that these rules can often result in the inefficient allocation of players among teams.[6] Subject to important modifications to protect competitive balance, in general, the optimal allocation of players

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sport2/hi/football/europe/1647252.stm (last visited Oct. 6, 2004).

3. To determine monopoly or monopsony power, courts inquire as to those buyers or sellers who are "reasonably interchangeable . . . for the same purposes." United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 395 (1956).

4. *See, e.g.,* Ben Kimber, *Larkham Turns His Back On Big Bucks To Stick With Australia,* SYDNEY MORNING HERALD, May 5, 2004, at 34 (rugby star declined huge salary increase to play for English rugby club because signing with the club would disable him from playing for Australian national rugby team). There are two codes of rugby, and in recent years there has been some modest competition at the top level, for a few top players capable of excelling in either rugby league or rugby union.

5. There are no relevant labor market restraints in cricket. The only level where the sport is profitable is international competition, where players play for a country and thus no market exists for competition in player services.

6. I have addressed this issue in detail in several other articles: Stephen F. Ross, *Monopoly Sports Leagues,* 73 MINN. L. REV. 643 (1989); Stephen F. Ross, *The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws,* 1997 U. ILL. L. REV. 519; Stephen F. Ross & Robert B. Locke, *Why Highly Paid Athletes Deserve More Antitrust Protection than Ordinary Factory Workers,* 33 ANTITRUST BULL. 641 (1997); 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).

among teams in a league will be to allow the market to place the players with the teams that value them the most. Contrary to conventional wisdom, player restraints often *harm* competitive balance, by making it more difficult for lousy teams to quickly improve.[7]

III. POLICY ALTERNATIVES TO ADDRESS ANTICOMPETITIVE RESTRAINTS

If monopsony power means that the normally self-correcting features of economic markets are unlikely to constrain the exercise of economic power by sports leagues and clubs, what policy alternatives are there? A variety of approaches are possible, including *laissez faire,* ongoing government regulation, or government intervention to restructure sports leagues to assure the existence of multiple competing leagues in each sport. As detailed below, each of these raises significant economic and/or political problems. Operating through private and governmental enforcement of competition statutes and the common law on restraint of trade, however, courts have had modest success in ameliorating inefficient or exploitive abuses of power. More vigorous enforcement through the courts offers an opportunity for greater protection of the public interest.

A. Laissez Faire

Some argue that government should simply stay out of this matter entirely; the claim is that the potential harms are not significant enough to justify intervention. Because *some* player restraints are justifiable (see below), advocates of this view maintain that government agencies or courts have little ability to distinguish between good and bad restraints, so they should not try. This is especially so because of the superiority of private ordering of these matters, in the context of collective bargaining between owners and players, if the latter should wish to organize into a union.[8]

Although monopolistic abuses in sport, to be sure, raise less of a societal concern than when products essential to the economy are subject to output restraints or inefficiencies, huge social welfare costs still exist. Absent legal restrictions on employer conspiracies in labor markets, clubs will distort the efficient allocation of players. Moreover, as evidenced by the record of Major League Baseball (which historically enjoyed an exemption from competition law regulation), employer monopsonies lead to significant industrial unrest in the form of player strikes and lockouts as employers seek to maintain their

7. Ross, *Misunderstood Alliance*, *supra* note 6.

8. *See, e.g.*, Gary R. Roberts, *The Case for Baseball's Special Antitrust Immunity*, 4 J. SPORTS ECON. 302 (2003).

power.

B. Restructure the Industry

Where players can receive bids for their services from clubs in competing leagues, the market can be relied upon to approach an efficient result. Where inter-league competition exists, clubs can be expected to adopt the most efficient player restraints. As long as leagues compete against each other for player talent, there is little cause for concern about inefficient or exploitive practices. A full discussion of this point is beyond the scope of this Article, and is set forth in detail elsewhere.[9] Others have suggested this restructuring is unworkable because competitive markets are non-sustainable.[10] Although not an antitrust defense, sports fans might argue that a monopoly league is socially desirable in order to produce monopoly profits that can be used to subsidize grass roots development of the sport. While a restructuring has been recently endorsed by prominent economists,[11] implementation would face significant hurdles. Either a legislature would have to be persuaded to adopt specific legislation requiring restructuring, a daunting task given the lack of historical success with competing leagues,[12] or a court would have to order restructuring as a remedy for a suit for illegal monopolization or abuse of dominant position. The technical requirements of these suits create formidable, if not necessarily insuperable, obstacles.[13]

C. Direct Government Regulation

If we are prepared to accept a single dominant league in a sport, another alternative is to establish an expert agency to approve any restraints to which clubs may wish to agree. This approach is problematic for a number of

9. Ross, *Monopoly Sports Leagues*, *supra* note 6.

10. Roberts, *supra* note 8, at 313 n.4.

11. *See, e.g.*, Roger G. Noll & Andrew Zimbalist, *Sports, Jobs, and Taxes: The Real Connection, in* SPORTS, JOBS, AND TAXES 503 (Roger G. Noll & Andrew Zimbalist, eds., 1997); JAMES QUIRK & RODNEY FORT, HARD BALL: THE ABUSE OF POWER IN PRO TEAM SPORTS 177 (1999); Walter Adams & James W. Brock, *Monopoly, Monopsony, and Vertical Collusion: Antitrust Policy and Professional Sports*, 42 ANTITRUST BULL. 721, 746 (1997).

12. For the argument that the failure of stable competing leagues in the United States is due to a combination of monopolistic practices, exempted mergers, or business incompetence, rather than the non-viability of competing leagues, see Ross, *Monopoly Sports Leagues, supra* note 6, at 717-23. For a brief discussion of why competing leagues in Australian rugby failed, see Stephen F. Ross, *Anti-competitive Aspects of Sports*, 7 COMPETITION & CONSUMER L.J. 125, 135-38 (1999).

13. In the United States, for example, the plaintiff would have to establish that the defendant league not only exercised monopoly power but had achieved its power through unlawful means. I detail some of the obstacles to a Sherman Act divestiture in *Antitrust Options to Redress Anticompetitive Restraints and Monopolistic Practices by Professional Sports Leagues*, 52 CASE W. L.J. 133 (2001).

reasons. There are significant problems with identifying a broad "public interest" separate from the marketplace. Moreover, there is a strong risk of agency capture by special interests, most notably the clubs. Where, as in North America, strong player unions exist, the potential for agency rules to interfere with collective bargaining are significant, resulting in an increased risk of industrial disruption.

D. Subject Leagues to Legal Challenges for "Unreasonable" Restraints Under Competition Law

The remaining and most promising option for constraining monopsony power would be to subject agreements among the dominant league's clubs to a standard of reasonableness. This standard requires that agreements which appear to have anti-competitive effects must be justified as reasonably necessary to achieve some legitimate welfare- or consumer-enhancing goal. The standard evolved from the English common law of restraint of trade, which remains applicable to sports law claims in countries including the United Kingdom, Australia, New Zealand, South Africa, Ireland, and India, was further developed by judicial precedents interpreting the American Sherman Act to incorporate common law concepts, and has now been effectively adopted as the governing standard for applying, in the sports context, Section 1 of the American Sherman Act, Section 48 of the Canadian Competition Act, and Article 82 of the EU Treaty.

IV. THE COMMON STANDARDS OF COMPETITION LAW

A. Common Law of Restraint of Trade[14]

Although early common law decisions proscribed any labor market restraints, by 1711 courts established that restraints were lawful if reasonable.[15] The standard test was enunciated by the House of Lords in *Nordenfelt v. Maxim Nordenfelt Gun & Ammunition Co.*; restraints were lawful if

> reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to

14. This sub-part summarizes a detailed exposition of the application of the common law of restraint of trade to sports league in my article, Ross, *NHL Labour Dispute, supra* note 6.

15. Mitchel v. Reynolds, (1711) 1 P.Wms. 181, [1558-1774] All E.R. 26, 24 Eng. Rep. 347 (K.B.).

the public.[16]

To be lawful, labor restraints must be justified by some employer interests that courts recognized as *legitimate.* In making this determination, it is the public interest that determines what private interests are legitimate,[17] and freedom from competition is never a legitimate interest.[18] From 1711 to the present, courts have been clear that restraints must be narrowly tailored to protect legitimate interests.[19] As applied to sports, courts almost always have found restraints to be overbroad. As made clear by the New Zealand Court of Appeal, restraints must be justified as legitimate in light of public interest considerations that include consumer interests and individual freedom for players.[20]

What makes sports leagues unique is the recognition of the legitimate interest that clubs have in competitive balance, an interest that can justify restraints impermissible in other industries. The pathmarking case is *Eastham v. Newcastle United Football Club,*[21] a challenge to a rule imposed by English soccer authorities similar to baseball's reserve clause. Finding a real inequality in bargaining power, Lord Wilberforce stated that the pervasive use of this system by sports league employers justified careful judicial consideration of whether the rules went "further than is reasonably necessary to protect their legitimate interests."[22] Nonetheless, he acknowledged that, if richer teams could acquire most of the better players, this would be "to the detriment of the . . . whole."[23] Thus, the league had a special and legitimate interest in maintaining the overall quality of the sport through competitive balance.

The burden that *Eastham* places on owners and leagues cannot be overemphasized, however. Lord Wilberforce's opinion demands proof not only that (a) richer teams would indeed be more active in signing free agents than financially poorer clubs, but that (b) the free agents signed would be better, thus directly harming competitive balance, and c) that this loss of competitive balance would be "to the detriment of the . . . whole." Thus, a league must establish that a player restraint must actually help weaker teams; proof of this proposition may be difficult because ordinarily free markets ordinarily will allow players to move from overstocked talented teams to clubs

16. [1894] A.C. 535, 565, [1891-4] All E.R. 1 (H.L.).

17. J.D. HEYDON, THE RESTRAINT OF TRADE DOCTRINE 72 (2d ed. 1999).

18. Herbert Morris Ltd. v. Saxelby, [1916] A.C. 688, 702, [1916-17] All E.R. 305 (H.L.).

19. Eastham v. Newcastle United Football Club, [1964] Ch. 413, 438, [1963] 3 All E.R. 139, 148.

20. Blackler v. New Zealand Rugby Football League, [1968] N.Z.L.R. 547, 571 (C.A.).

21.[1964] Ch. 413, [1963] 3 All E.R. 139.

22. *Id.* at 438.

23. *Id.* at 431-32.

with inferior rosters. In fact, restrained markets often rigidify dominance of few top teams.

In addition to competitive balance, national sporting organizations have leeway to impose restraints "reasonably necessary for the protection or the organisation and administration of the game."[24] The court made clear, however, that this goal must be weighed against impact on players and deprivation to public of watching the highest quality sport possible.

Thus, the common law provides a meaningful restriction on the ability of clubs with monopsony power to unjustifiably limit competition for players. Because the common law is not preempted by statute in most Commonwealth jurisdictions, it remains a vital policy alternative.[25]

B. U S. Law: Sherman Act

The literal wording of section 1 of the Sherman Act condemns *every* agreement in restraint of trade.[26] However, landmark decisions in *United States v. Addyston Pipe & Steel Co.*[27] and *Standard Oil Co. v. United States*[28] established a non-literal reading of section 1 as barring only "unreasonable" restraints. *Addyston Pipe* holds that restraints among competitors are reasonable only when "ancillary to the main and lawful purpose of the contract and necessary [to protect] the covenantee in the [enjoyment of the legitimate fruits of the contract.]"[29] Applying these principles to sports, the Supreme Court held in *National Collegiate Athletic Ass'n v. Board of Regents*[30] that the organization of a sports league is a "lawful" contract, but a restraint is

24. Greig v. Insole, [1978] 3 All E.R. 449, 497 (Ch.).

25. Although common law restraint of trade claims are not preempted in the United States, players challenging American sports league restraints are not likely to rely on the common law. Traditionally, the common law in the United States is a question of state law (so there are really fifty common laws), with each state's Supreme Court as final arbiter. Because player restraint rules must be uniform throughout the country, the prospect of inconsistent determinations precludes the application of the common law of any single state. *See, e.g.,* Partee v. San Diego Chargers Football Co., 668 P.2d 674 (Cal. 1983) (application of state law would unconstitutionally burden interstate commerce). There is a novel argument that, just as the United States Supreme Court created a federal common law for commercial relations with the federal government, the unique uniform needs of sports leagues would justify the creation of a federal common law of restraint of trade for sports leagues, with ultimate uniform review by the United States Supreme Court. However, absent any meaningful substantive difference between a common law claim and a Sherman Act claim, players are likely to pursue the latter and leave the former for academic speculation.

26. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (2000).

27. 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

28. 221 U.S. 1 (1911).

29. 85 F. at 283.

30. 468 U.S. 85 (1984).

unreasonable if it is shown that, as a result of the restraint, prices are higher, output is lower, or output is unresponsive to consumer demand compared to what "would otherwise be."[31] Courts have held that player restraints that affect stars and ordinary players alike are overbroad.[32] In demonstrating that restraints are necessary, these precedents suggest that, for example, the leagues would have to demonstrate why revenue sharing is not a less restrictive alternative means of achieving competitive balance.

The Sherman Act takes a narrower focus than the common law with regard to permissible justifications: they must relate to a demonstration that the restraint will promote competition or make the product more attractive to consumers. Arguments seeking to justify a restraint as protecting the general administration of the game, which might be acceptable under the common law, will not be legitimate if the claim is reduced to an argument that competition will lead to undesirable results in the market.[33] The policy question for Americans is whether the principles of competition reflected in the Sherman Act should apply to sports league restraints.

Historically, player restraints in baseball were held exempt from the Sherman Act by judicial decree. Initially, this was based on an outmoded view that competition among clubs for the services of baseball players did not constitute interstate commerce.[34] Then, the Court reaffirmed the exemption, expressing concern with the retroactive application of the Sherman Act in light of clubs' asserted reliance on the exemption, and the Court's preference that the matter be resolved by Congress.[35] Later, the exemption was reaffirmed again, the Court noting that Congress had displayed "positive inaction" in failing to subject baseball's reserve clause to antitrust scrutiny and implying that the Court agreed with the owners that competition for player services would ruin the game.[36] Finally, however, this was overruled by the Curt Flood Act of 1998,[37] and thus major league baseball players can now bring an antitrust action.

The recent statute simply puts baseball players on par with their counterparts in other sports. Clubs can still seek to employ two other defenses to avoid the reasonableness test of the Sherman Act. One is the "non-statutory labor exemption," which holds that where players form a union, they cannot

31. *Id.* at 107.
32. Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976); McNeil v. NFL, 1992-2 Trade Cas. (CCH) ¶69,982 (D. Minn.) (jury verdict).
33. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978).
34. Fed. Baseball Club v. Nat'l League, 259 U.S. 200 (1922).
35. Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953).
36. *See* Flood v. Kuhn, 407 U.S. 258 (1972).
37. 15 U.S.C. § 27a (2000).

challenge a restraint that is a mandatory subject of bargaining under labor law, even if restraint was imposed by owners (pursuant to labor law) over the union's objection.[38] While it remains unclear whether consumers or the government could challenge a player restraint because of its adverse effect on the quality of the product, the only way in which unionized players can take advantage of the Sherman Act is to decertify as a union and file a lawsuit.[39] While this law now appears settled in the United States, because labor market restraints can also significantly affect product quality - through the inefficient allocation of players among teams, particularly via restraints that harm competitive balance by making it more difficult for inferior teams to improve - the public interest in competition ought only be sacrificed only when the benefits of labor peace are likely to be achieved.[40] This narrowing of the benefits of competition law in the area of player restraints need not be followed elsewhere.[41]

Another possible argument the clubs may use to evade the requirements of competition law is that clubs are so interdependent that they are more like unincorporated divisions of a single corporation than competing entities. Courts have never accepted this argument, and properly so. Leagues are controlled by owners who vote for their own club's interest, rather than interest of the league as a whole. Clubs compete for player services, and each club retains its own profits and losses. Thus, leagues are properly treated as joint ventures subject to competition law.

C. European Community Law

Two provisions of the EU Treaty govern agreements among European clubs that limit competition for player services. Article 48 prohibits restrictions on the free movement of workers, while Article 81 prohibits concerted practices that restrict competition. In *Union Royale Belge des*

38. Brown v. Pro Football, Inc., 518 U.S. 231 (1996).

39. This is exactly what the NFLPA did in the 1990s, when it decertified and won a successful antitrust case against NFL labor restraints. *See* Powell & McNeil v. NFL, 764 F. Supp. 1351, 1356 (D. Minn. 1991) (allowing players to proceed with antitrust challenge after decertifying union); McNeil v. NFL, 1992-2 Trade Cas. (CCH) ¶69,982 (D. Minn. 1992) (jury verdict in favor of plaintiffs).

40. Ross & Locke, *supra* note 6.

41. There is no support in the common law of restraint of trade for the proposition that an agreement among employers imposed without the consent of a union is reasonable simply because it was imposed in the context of a process of collective bargaining. Nor is there a labor exemption contained in European Union competition provisions. For a discussion of why the statutory labor exemption in the Canadian Competition Act does not apply to unreasonable player restraints, see Ross, *NHL Labour Dispute, supra* note 6.

Sociétes de Football Association v. Bosman,[42] the court held that Article 48 barred a rule that a club signing a player pay a transfer fee to his prior employer. The Advocat General, employing the same analysis, also found the restraint unlawful under Article 81. The court recognized that leagues had a legitimate interest in competitive balance, but found the challenged restraint to be overbroad. The court also recognized a legitimate interest in assuring that previous employers were fairly compensated for training a player, but here too found the challenged restraint to be overbroad.

As I have detailed elsewhere,[43] an across-the-board limit on player mobility, that applies equally to transfers from lower-table financially poor teams to European powerhouses as well as the reverse, is necessarily going to be overbroad. As to recouping investment, it is unclear what sort of restraints would meet this standard: a club investing in a young player can simply sign the player to a multi-year contract to ensure training investments can be recouped when the player's contract is sold.

D. Canadian Competition Act[44]

Section 45 of the Competition Act prohibits agreements that lessen competition unduly. Although this statute is similar in wording to section 1 of the Sherman Act and Article 81 of the EU Treaty, it has been construed to bar agreements among firms with the power to control the market even if necessary to enhance a product's appeal. Accordingly, when the statute, which previously applied only to the sale of goods, was extended in 1976 to cover services, the National Hockey League succeeded in obtaining a partial exemption. Instead of being governed by section 45, a special provision, section 48, was enacted that prohibits sports leagues from lessening competition "unreasonably." The history of Canadian competition law demonstrates that the parliamentary purpose was to apply the more flexible standards of the common law to player restraints.[45]

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42. [1996] 1 C.M.L.R. 645 (E.C.J.).

43. *See* Ross, *Misunderstood Alliance, supra* note 6; Stephen F. Ross, *Restraints on Player Competition that Facilitate Competitive Balance and Player Development and their Legality in the United States and Europe, in* COMPETITION POLICY AND PROFESSIONAL SPORTS (Claude Jenrenaud & Stefan Késenne eds. 1999).

44. The following is a summary of a detailed analysis contained in Ross, *NHL Labour Dispute, supra* note 6.

45. A detailed analysis of the Australian Trade Practices Act's application to player restraint has not been recently undertaken and is beyond the scope of this summary. *See generally,* Brian Ward, *Fair Play: Professional Sports and Restraint of Trade*, 59 L. INST. J. 545 (1985). Australian law generally prohibits corporations from agreeing with competitors where the purpose or effect is to substantially lessen competition. Although a specific provision that exempts employment agreements from the terms of the competition statute was initially thought to exempt player restraints from the

V. NEW OPPORTUNITIES FOR COMPETITION LAW INTERVENTION

Labor restraints imposed by leagues with monopsony power can severely exploit players by limiting competitive bids to amounts significantly below what the market would bear. Moreover, as noted above, player restraints can result in an inefficient allocation of players among clubs, harming consumers by producing a result unresponsive to consumer demand. Three justifications are often asserted for player restraints: (1) enhancing competitive balance; (2) recovering club investment in player development; and (3) achieving "cost certainty" for clubs. Most labor restraints are unnecessary to the first two goals, and the third is not a legitimate one. Competition law, which bars unnecessary restraints, can be employed more vigorously to protect consumers and players against unnecessary labor restraints.

Salary caps and blanket restraints on signing veteran players whose contracts have expired are not tailored to promote competitive balance. Indeed, as noted above, these restraints may harm balance by inhibiting the ability of poor teams to quickly improve. This inhibition is exacerbated in North America where cash transfers are disfavored. A salary cap that restricts the chronically disappointing Baltimore Orioles, or free agent restrictions that prevent both the perennial Stanley Cup contending Detroit Red Wings and the under-achieving New York Rangers from signing new players, demonstrate why these restraints are overbroad. In contrast, consider the so-called "Rooney Rule" in effect in the NFL for 1994 only: playoff teams could not raise payroll, but all other teams were unrestrained; this restraint is narrowly tailored to promote competitive balance.

As noted earlier, restraints have never been shown to be necessary to protect investment in players. Any club making a substantial investment in the training or development of a young player can sign the player to a multi-year contract with the last year's terms at the option of the club. When the penultimate contract year has finished, the club can seek to re-sign a blooming player, or, if it lacks confidence it will be able to do so, the club can be compensated for transferring the player's contract to another club willing to come to terms on a new long-term arrangement.

The justification of "cost certainty," used recently in the National Basketball Association and the National Hockey League, is simply not a

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statute, in *News Ltd. v. Australian Rugby League,* 139 A.L.R. 193, 343-43 (Full Fed. Ct. 1996), the court suggested a loophole for players and others to challenge labor market restraints: if the player's relationship with the club is not in the form of an employer's contract for the employee's services, then the agreement is subject to the statute. On the other hand, if the league attempts to evade the statute by insisting that all contracts be contracts for employee services, this itself is a potential statutory violation.

legitimate, pro-competitive goal for an established league. The rhetoric may have originated in 1982 when the NBA's commissioner persuaded the players' union to agree to a salary cap (thus exempting the cap from antitrust challenge), in part based on the need to attract additional investment into a game that was faltering. Absent viability-threatening circumstances, the desire of owners to be certain of future costs is completely antithetical to competition. Owners *should be* uncertain about their costs. In other industries, firms whose poor business acumen results in an inferior product do indeed have to spend more than their rivals to bring their goods or services up to par. In sports, when front-office management make poor personnel or coaching decisions that result in an inferior team on the field, they too should be required to increase spending.

The system of promotion and relegation common in Europe does raise the specter of financial insolvency if too many lower-tier teams spend sums of money on players that will only be profitable if the club secures promotion to the top tier. Maintaining the viability of lower-tier clubs might, therefore, justify rules that limit the debt that clubs can incur. However, such rules must focus on long-term debt and real threats to insolvency. A rule, for example, that limited lower-tier club payrolls to a fixed percentage of revenue prevents teams with a reasonable likelihood of promotion from spending an amount reflecting that likelihood.

VI. CONCLUSION

The common law of restraint of trade and the competition statutes of major sporting nations all effectively use the same test for sports league restraints. Under these legal regimes, courts ask first, whether the restraint serves a legitimate interest, and second, whether the restraint is reasonably necessary or overbroad. These similar approaches provide flexibility for leagues to restrain player competition to promote competitive balance but not to monopsonize market, a process which hurts other players through lower salaries and fans, because of the inability of lousy teams subject to player restraints to quickly improve.