Legal Analysis of the Issues Behind the NFL Collective Bargaining Agreement Negotiations
Part I

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These are interesting times for the National Football League. Immediately after producing the most watched television show in U.S. history, the focus has shifted towards the negotiations for a new collective bargaining agreement between the NFL and the NFLPA.

At this point, we all know about the major issues -- carving up a $9 billion pie; adding 2 regular season games; creating a rookie salary cap; building gigantic stadiums with gigantic scoreboards that have an actual seat (inside the stadium) for every ticket sold; etc.

Rather than rehash those issues, I want to focus on the legal options of each side if they can't reach an agreement by the March 3rd expiration of the CBA. The basics are easy: the owners can lock the players out or impose their "last, best offer" upon reaching a bargaining impasse. The players can strike, or decertify and bring an antitrust suit. But, what does all that really mean? Below, I answer a series of questions about the legal issues and options that might arise over the next several weeks. I start with some of the basic issues and then progress to the more complex ones (if you have a background in labor law, you should skip the first 11 or so questions).

Here we go...

What is a lockout?

A lockout is the "withholding of employment by an employer from its employees for the purpose of either resisting their demands or gaining a concession from them." In other words, a lockout is when an employer refuses to let workers work, and therefore get paid, as a form of leverage. A lockout is prohibited if it is motivated primarily as an attempt to discourage union membership or interfere with employees' organizational rights. Lockouts can occur before or after a bargaining impasse has been reached.

Would the NFL owners be permitted to lock the players out?

Yes, as long as the lockout is used for the purpose of increasing bargaining power, not to discourage union membership or to interfere with the players' organizational rights.

Would the NFL owners be permitted to lock out Brett Favre, and only Brett Favre?

Good thought, but it would not be permitted under labor law.

In the event of a lockout, can the owners hire replacement players?
Employers may hire temporary employees during a lockout where the harm to the locked out employees is "comparatively slight" and the decision to hire is motivated by a legitimate business reason. The NFL used replacement players in 1987 during the players' short-lived, and largely unsuccessful, strike.

**Have owners locked out players in the past?**

Yes. There have been lockouts in the NBA, the NHL and MLB.

The lockout cautionary tale, of course, is the NHL. The NHL lost its entire 2004-05 season after the NHL owners locked the players out, marking the first time in North American professional sports labor history that an entire season was lost.

**The owners' second option is to wait for impasse to impose their "last, best offer" rather than locking the players out. What does that mean?**

After bargaining to impasse, labor law permits employers to unilaterally implement changes to the terms of the previous collective bargaining agreement. These changes must be "reasonably comprehended" within the employer's pre-impasse proposals -- in essence, this means that, after the impasse, the owners can implement their last, best offer as the new set of rules to govern the NFL and its relationship with the players.

**Why would the owners implement their last, best offer?**

It's an alternative to a lockout. By implementing their last, best offer, the owners would essentially be saying to the players, take it, leave it, or decertify. By implementing their last, best offer instead of locking the players out, it would force the players to either accept the terms while continuing to negotiate, strike, or decertify. In any of those events, the owners would not be the ones responsible for a work stoppage. The NFL owners implemented their last best offer during the 1989 collective bargaining negotiations. As I discuss below, those negotiations ended with decertification and an antitrust suit.

**What can the Players do if there is no agreement?**

The players have their own economic weapons. Labor law encourages collective bargaining by providing a proper balance of power between employees and employers. To ensure this balance, the principle weapon that labor law provides to employees is the right to strike. Decertification is also a potential weapon for the players.

**What is a strike?**

Generally speaking, a strike is when a group of employees ceases work in order to gain leverage in bargaining negotiations. To be protected under the labor laws, a strike must be associated with a labor dispute between the striking employees and an employer. Striking employees are not paid during a strike and can be replaced by replacement workers.
Are the NFL players going to strike?

At this point, a player strike seems unlikely for at least two reasons. First, the NFLPA has publicly stated that they will not go on strike. Obviously, the players are not legally bound by their public statements, but a strike following their "Let us Play" campaign would not sit well with the public. Second, players don't want to be the ones responsible for a work stoppage. In addition to the public relations hit they might take, a strike is a particularly risky move for professional football players, who have very short windows to make very large amounts of money. Most players won't want to voluntarily shorten that window through a strike.

What is decertification?

Decertification occurs when employees formally revoke the authority of their union to engage in collective bargaining on their behalf. In other words, decertification dissolves the union (a related concept is the "disclaimer of interest," where the union formally terminates its right to represent the players).

What is the process for decertification?

There are multiple steps to decertification. First, at least 30 percent of the players must sign a petition stating that they no longer want the NFLPA to represent them as a union (this process began several months ago). Second, the petition must be filed with the NLRB. The NLRB must verify the petition and then schedule an election. The union is decertified if at least 50 percent of the voting players opt for decertification.

Why would the players break up their own union?

The players would use decertification as a means to end. The end is the ability to bring an antitrust lawsuit against the NFL challenging all of the rules that they have in place that restrict a player's ability to make money or otherwise impact the players working conditions. For example, the players could challenge the NFL's salary cap, the player draft, franchise tags and other player and free agency restrictions.

Why do the players have to break up their union to bring an antitrust suit?

Here's the short version (for the even shorter version, skip to the next paragraph): Because of a doctrine known as the "non-statutory labor exemption." This exemption protects the product of collective bargaining from attack under antitrust law. Thus, any terms of the collective bargaining agreement are immunized from attack under antitrust law. But, the exemption extends beyond just the terms of an actual agreement -- the Supreme Court has held that the exemption applies, even in the absence of a current collective bargaining agreement, as long as a bargaining relationship still exists.

Essentially, players are required to choose labor law (and collective bargaining) or antitrust law (and individual bargaining and litigation). If the players choose labor law, an antitrust shield is raised that prevents them from attacking NFL rules under the antitrust laws. To lower the shield
and choose antitrust law, the players must end the collective bargaining relationship. Decertification is how the players surrender their collective bargaining rights and choose antitrust law instead of labor law.

**Have professional athletes decertified their union in the past?**

Yes. On November 6, 1989, the Executive Committee of the NFLPA notified the NFL Management Council that it was abandoning all collective bargaining rights. On December 5, 1989, player representatives from the then-24 NFL teams met and unanimously voted to decertify, thus ending the NFLPA’s status as the players' collective bargaining representative. The NFLPA then re-formed as a voluntary professional association. The "new" NFLPA enacted new by-laws which prohibited the NFLPA or its members from engaging in collective bargaining with the NFL.

**Was the 1989 decertification successful for the NFLPA?**

Very. Following decertification, a small group of players filed an antitrust suit challenging the restrictive "Plan B Free Agency" rules that the owners unilaterally implemented (as their last, best offer) after the expiration of the CBA (*McNeil v. NFL*). A jury found that Plan B was an unreasonable restraint of trade and awarded damages to four of the players, ranging from $50,000 to $240,000. Players then filed a class action suit (*White v. NFL*) challenging Plan B and all free agency restrictions (including the draft). At that point, the players had tremendous leverage, and the parties agreed to settle the litigation. The settlement -- which included the creation of real free agency for the players -- was then embodied in the new CBA.

**How long did it take for the NFLPA to achieve their victory when they decertified in 1989?**


**Decertification has been referred to as the "nuclear option," the "silver bullet," the "doomsday weapon," and a "tender contemplation on duty and the crippling weight of expectancy" (that last one may have been about *The King’s Speech*). Is decertification really that powerful?**

Yes and no. Yes, because it subjects the owners to antitrust attack and treble damages. Even the mere threat of decertification can help shift collective bargaining leverage in favor of the union.

No, for two reasons: First, depending on the timing of the decertification, the NFL will try to challenge the decertification as a "sham." In essence, this argument is that the decertification is not "real" -- it is being done merely to improve the players' bargaining position, and in reality the NFLPA is still acting as a union behind the scenes (and, they will point to the decertification and re-certification in 1989 as further proof that it is being used as a bargaining tactic rather than for any genuine reason). The NFL will argue that the union is still representing the players and still bargaining on behalf of the players, and therefore the labor exemption should continue to apply.
Second, the NFL will argue that the NFLPA's sham decertification violates its duty to bargain with the NFL in good faith.

(The NFL made both of these arguments in 1989, and was unsuccessful on both counts.)

And, even if decertification is successful, it is only the first step in a lengthy process. Decertification merely opens the door for the players to bring an antitrust suit against the NFL and its teams. The players will then have to fund a potentially long and expensive antitrust suit -- an antitrust suit they could lose.

**Are there any other risks to decertification?**

Yes. Players will also lose all of benefits contained in the CBA. This includes pensions, insurance benefits and medical benefits. Other benefits of the union, such as control over agent certification and group licensing rights, could also come under attack.

**What would the players be challenging under antitrust law?**

Section 1 of the Sherman Act prohibits agreements that unreasonably restrain trade. Generally speaking, an agreement is an unreasonable restraint if its anticompetitive effects outweigh its procompetitive benefits, as judged under the "Rule of Reason." The players would be arguing that all rules that restrict a player's ability to make money or restrict a player's mobility -- including the salary cap, the draft, and free agency restrictions -- are unreasonable restraints.

**If it comes down to it, will the players win their antitrust suits?**

Perhaps, but perhaps not. Antitrust cases are complex and unpredictable, even more so in the sports arena. Each side does have a few points in their favor. On the one hand, courts have already held that a variety of player restraints were unreasonable -- and thus illegal -- under the Sherman Act. For example, courts have struck down age restrictions, player drafts, and free agency restrictions, including NFL's "Plan B Free Agency," as violations of the Sherman Act. (All of these restrictions have reappeared in sports leagues -- immune from antitrust attack -- as part of league collective bargaining agreements.) On the other hand, modern versions of these player restraints are less restrictive than the earlier versions that were challenged (and defeated). And, the numbers are not on the players' side -- from 1999 to 2009, defendants won 221 out of 222 antitrust cases.

**When can the players decertify?**

Whenever they want, but here's where things start to get interesting (in the event that you didn't find the other stuff interesting). As agreed to in the current CBA (in Article LVII, Section 3), if the players wait until after the expiration of the CBA to decertify, two things happen: first, the players cannot bring an antitrust suit for at least six months (or until the parties bargain to impasse, whichever happens last); second, the owners cannot challenge the decertification as a sham.
Can the owners lock out the players if they have already decertified their union?

Now we're dealing with completely uncharted territory. Once the players decertify, any attempt by the owners to lock them out could be challenged as an antitrust violation. The argument would be that the teams have unreasonably restrained trade by agreeing to refuse to deal with all of the players.

Additionally, the players could argue that the lockout is an unfair labor practice that interferes with their right to choose whether or not to form a union. Essentially, the players would be claiming that the owners are forcing them to form a union (Why would the owners force the players to form a union? -- to get the antitrust protection of the non-statutory labor exemption.)

If the owners can't lock out the decertified players, what happens?

The owners would likely agree on rules to continue operating the league, and the players would challenge some of those rules as antitrust violations.

What has happened when unions in other industries have decertified?

Good question (thanks). Still in uncharted territory here. There is not much (if any) precedent out there to guide us in these situations, as unions in other industries usually spend time figuring out how to stay unified, not how to dissolve.