As we get closer to the expiration of the NFL Collective Bargaining Agreement, we also get closer to the possibility that the NFL players will exercise their “nuclear weapon”—decertification followed by an antitrust suit against the NFL. The NFL took an aggressive step towards disarming that weapon this week when they filed an unfair labor practice charge with the National Labor Relations Board, arguing that the NFLPA’s decertification* strategy is a sham and violates the union’s duty to bargain in good faith.

This is a potential game-changer. The NFL is essentially trying to block the NFL players from decertifying their union. Why is that significant? As I discussed earlier, the decertification/antitrust suit one-two punch is the NFLPA’s most powerful economic weapon for two reasons. First, it allows the players to bring an antitrust challenge against the NFL’s player restraints. Second, it potentially blocks the ability of the NFL to lock out the players (click here for more detail on both of those points). So, an order blocking the NFLPA from decertifying would prevent them from exercising their strongest offensive (an antitrust suit) and defensive (blocking the lockout) weapons, and give the owners a big advantage at the bargaining table.

Last week, in Part I of my analysis of the legal issues surrounding the NFL CBA negotiations, I took a closer look at the lockout and decertification weapons, and readers responded with some great comments and questions. Here, in Part II (The Sequel!), I’ll start with a few of the more common general questions I have received over the last few days and then move on to an analysis of what could happen if the owners lock out the players. If you are looking for my take on the big question—will there be a lockout?—you can jump to the end…

**Why can’t the NFL players force the owners to open up their books and show them their financials? Didn’t the NBA owners *volunteer* to show the NBA players their books?**

This has become one of the focal points of the negotiations. The owners claim they need to pay the players less because of rising costs, but they refuse to reveal the details of these costs. Whether or not this is a smart negotiating tactic, the NFL owners have no legal obligation to open up their books. Labor law is very clear on this point—as long as the owners don’t claim an “inability to pay,” the players cannot compel them to open their books. The owners can claim, however, that they are having “general economic difficulties,” as long as they don’t say “we can’t afford to pay the players.” The NBA owners, however, have previously claimed an inability to pay, so they knew the players were entitled to see the books. For the NBA, the
argument is “we can’t pay.” For the NFL, the claim is “we won’t pay.” That’s the difference between open and closed books…

**Do the players have any access to the financials of the teams?**

Yes. The players have a right to an audit that allows them to see the revenue side of the owners’ books, but they do not have a right to see the cost side. Of course, the owners have argued that they need to pay the players less because of rising costs and decreasing profitability. That is not a very convincing argument—for the players or the fans—if the owners refuse to put numbers behind the rhetoric. Without full access to the books, there is simply no way for the players to evaluate the profitability of the teams…

**Did the Supreme Court’s ruling in *American Needle v. NFL* have any impact on the labor negotiations?**

Yes. The players’ decertification strategy only works if the players can then bring an antitrust suit against the NFL owners under Section 1 of the Sherman Act. Section 1 of the Sherman Act only applies to agreements, and it takes two to make an agreement. So, for example, if all of the manufacturers of wool hats in the world got together to make a series of agreements, those agreements would be scrutinized under Section 1 to ensure they were not anticompetitive (e.g., to ensure that the manufacturers were not agreeing to fix prices). The question is, what happens when all of the NFL teams in the world get together and make a series of agreements? Should those agreements be scrutinized under Section 1?

In American Needle, the NFL argued that they are a single entity, and thus incapable of violating Section 1 (because a single entity cannot reach an agreement with itself). If the Supreme Court had agreed with the NFL, the league and its owners would have been immune from antitrust attack under Section 1, thus destroying the ability of the players (or anyone) to attack the league and its rule. The NFL lost the case, and the decertification weapon was preserved…

**If there is a lockout, will there still be an NFL draft?**

Yes. The NFL Draft will take place on April 28-30, and will be the last “League activity” under the current CBA. However, with a lockout in place and no new agreement, the league has indicated that teams cannot sign their draft picks and cannot sign undrafted players or other free agents. The signing of drafted and undrafted players will remain frozen during a lockout. So, the teams can pick the players in the draft, but that’s it…

**Did the threat of a lockout scare away underclassmen from entering the draft?**

Apparently not. A record 56 underclassmen have declared for the draft for this year. Some of these underclassmen will likely go undrafted (7 underclassmen were not picked in the 2010 draft), but even if there is a lockout, NCAA rules prohibit them from returning to college.
Can Bill Belichick videotape other teams’ practices during the lockout?

Players are prohibited from entering team facilities during a lockout, so without a new CBA in place, there would be no minicamps, no training camps, and no practices, so this shouldn’t be an issue. But, good question.

What happens to the players who are under contract for next year and beyond? Will they get paid during a lockout?

No. The general rule under labor law is clear—employers do not have to pay employees during a lockout. After all, the lockout is an economic weapon owners can use to give them leverage during negotiations. It is designed to put economic pressure on employees by depriving them of the ability to work and the ability to get paid. If employees were paid during a lockout, the lockout would be less of a threat and the employees would have little incentive to return to the bargaining table and reach a deal.

What about the small number of players with guaranteed contracts? Will they get paid during a lockout?

That’s a slightly tougher question, but the answer is still (most likely) no.

Here’s how the analysis plays out: The default rule is that employees do not get paid during a lockout. Unless the parties agree otherwise, this default rule will kick in (that’s, of course, what makes it a default rule) and permit the NFL owners to withhold payment to NFL players under guaranteed contracts during a lockout. The question then becomes, does the “guarantee” between the player and the owner change the default rule and require that the player be paid?

To answer that question, we can do two things: First, we look to the language of the guarantee provisions in the player contracts. There are two types of guarantee provisions in NFL contracts—jury and skill. As you might expect, these provisions guarantee payments to players in the event of a release based on serious injury or lack of playing skill. But they do not guarantee payment in the event of a lockout. Thus, (unless the parties agreed otherwise), typical guaranteed NFL contracts do not change the default rule and these players will not be paid during a lockout.

Second, we can look to the past and see if this issue has come up in other leagues. And, it has. During the 1998 NBA lockout, more than 200 players with guaranteed contracts filed a grievance before an independent arbitrator claiming that they were collectively owed over $800 million. The arbitrator ruled against the players, holding that the guarantee language did not override the default rule.

Bottom line: unless a player negotiated a guarantee in the event of a lockout, he will likely not be paid.
Can free agents play football in the UFL or another football league during a lockout?

Yes. If a player is no longer under contract with an NFL team, he is free to play in another league during a lockout.

Can players who are still under contract play in the UFL or another football league during the lockout?

Perhaps, but this is a much tougher question, and we’re back in uncharted territory. This issue simply does not come up in other industries. In a typical industry, an employee’s contract ends when the CBA expires. So, if an employer locks out his/her employees after the expiration of a CBA, the employees are no longer under contract and are free to work elsewhere. In the NFL, however, players sign contracts that can—and often do—extend beyond the terms of the CBA. And, the terms of these standard player contracts are clear:

Without prior written consent of the Club, Player will not play football or engage in activities related to football otherwise than for Club or engage in any activity other than football which may involve a significant risk of personal injury. Player therefore agrees that Club will have the right, in addition to any other right which Club may possess, to enjoin Player by appropriate proceedings from playing football or engaging in football-related activities other than for Club or from engaging in any activity other than football which may involve a significant risk of personal injury.

In other words, an owner has the right to prevent a player from playing non-NFL football or engaging in any other dangerous activity (e.g., boxing) during the term of the contract. But, does an owner have the right to prevent a player from playing non-NFL football at the same time he is preventing him from playing NFL football because of the lockout? There’s no clear answer to that question. The owners would argue that the above provision is enforceable during the lockout, while the player would argue that all of the provisions of the contract are frozen during the lockout.

So, if a player did try to join another league during a lockout, there would be a fight…

Do the NFL players believe they have the right to play for a different league during a lockout?

Yes, but they also anticipate a fight. In the “NFLPA Guide to the Lockout” it recently distributed to NFL agents, here’s what the PA said: “During a lockout, players will be allowed to play elsewhere, but there is no guarantee that the NFL clubs won’t try to stop you.”

David Stern, the Commissioner of the NBA, recently chimed in on this issue. Surprisingly, he made it clear that NBA players would have the right to play elsewhere during an NBA lockout. Here’s what he said: "If, in fact, there's a lockout, then the player is free during the course of the
lockout to do what he wants to do if his contract is in effect. I don't want to play that game with anybody. ... If we have a collective bargaining arrangement with the union and there's a lockout, then last time around [in 1998] players were free to do what they're going to do, because they've been locked out."

Would anything else prevent an NFL player from playing for a different league during a lockout?

Yes, any NFL players still under contract with an NFL team would not be able to play in the Canadian Football League. The CFL has a provision in its rules that prevents teams from signing players that are currently under contract with another league or team.

Has this issue—players joining other leagues during a work stoppage—come up in the past?

Yes, but not frequently. During the 2004-05 NHL lockout, many NHL players played in European leagues. But, it was reported that the NHL owners did not try to stop these players from leaving. During the 1982 NFL strike, it was reported that NFL owners obtained state court injunctions prohibiting the players from engaging in “All Star” games independently of the NFL. And, as I mentioned above, David Stern commented that the NBA players were free to play in different leagues during the 1998 NBA lockout.

Is it realistic for another football league to start up during a lockout?

No. Even if players were able to join the other league during the lockout, there is no telling how long the lockout would last. During the 2004-05 NHL lockout, most NHL players who left to play for European leagues negotiated a termination provision with their new teams that allowed them to return to the NHL as soon as the lockout ended. NFL players would likely demand the same protection, thus making it too risky for a new league to form. That said, an existing league—like the UFL—could stand to gain a short-term benefit by signing locked-out players.

Is March 3rd truly “D-Day” for a new agreement?

No. The NFL and the NFLPA could agree to extend the deadline for the expiration of the CBA. In fact, in 2006, the two sides did just that, agreeing to push back the expiration date of the CBA (and the start of free agency) a week while they worked out a new deal.

Will coaches be paid during the lockout?

That depends. Most head coaches will receive their full salaries even if no football is played next season. Assistant coaches won’t fare as well. Some teams have the right to terminate (without pay) their assistant coaches in the event of a lockout, while other are obligated to pay
their assistants their full salaries. Most teams fall somewhere in between, with their assistant coaches getting paid based on how many games are missed. For more on this issue, [click here].

What about the fans? If they bought tickets for games next season and there is a lockout, will they get a refund?

Yes. The NFL has announced that fans with individual game tickets and season tickets will be offered full refunds if games are canceled because of a lockout.

It’s all a guessing game at this point, but what is the likelihood of an extended work stoppage?

As we get closer to the expiration of the NFL Collective Bargaining Agreement, the great unanswered questions remain: Will there be a work stoppage? And, if so, how long will it last? It’s anyone’s guess as to when the two sides will reach an agreement (and everyone is guessing), but looking back at the past is often a good way to predict the future. And, a closer look at the “doomsday” work stoppages of the past—where at least one regular season game was cancelled—reveals a fairly clear trend. Significant work stoppages occurred when one side was looking for a sea change—some radical transformation of the relationship between the parties. For example, in 1998-99, the NBA owners insisted on (and got) a cap on maximum player salaries. The owners locked out the players and 464 total games were cancelled, including the NBA All-Star Game. In 1994-95, the MLB owner insisted on (and did not get) a salary cap. The players went on strike and 920 games were cancelled, including the postseason and the World Series. In the best professional sports work stoppage movie of all time, the 2000 movie The Replacements (the Detroit News raved, “it’s better than average”), professional football players went on strike late in the season, apparently because of “salary disputes” (it’s not clear who got what, but Shane Falco did save the day).

And, most recently, in 2004-2005, the NHL owners insisted on (and got) a salary cap. The owners locked out the players and the entire season was cancelled, including the playoffs and the Stanley Cup. Other lengthy work stoppages were caused by fights regarding basic rights of free agency for the players. In each of these cases, one side claimed that the current system was broken (see the chart below for more details).

In the current negotiations, we’re not dealing with fights over the creation of free agency or the implementation of a salary cap. The players have free agency and the owners have a cap. But, are the owners asking for a sea change? That’s a difficult question. One could make an argument that the NFL’s latest proposal for a rookie wage scale—which could actually impact a majority of NFL players—would represent something close to a sea change. But, despite the NFL’s proposal, it’s difficult for anyone to argue—even the owners—that the system is broken. The NHL owners were willing to cancel an entire season because they believed they lost less money by not playing games than by playing games. That is certainly not the situation facing the owners and their multi-billion dollar television deals.
So, if the past is any guide, we may not be looking at a major work stoppage for the NFL…

*Technically, the NFLPA is “disclaiming interest” in representing the players, and the players are decertifying the NFLPA as their representative, but I refer to it all as “decertification” for sake of simplicity.
## DOOMSDAY STOPPAGE CHART

Work Stoppages Resulting in the Loss of Games in Professional Sports

<table>
<thead>
<tr>
<th>League</th>
<th>Year</th>
<th>Main Issue(s)</th>
<th>Type</th>
<th>Number of Games Cancelled</th>
<th>Who Won?</th>
</tr>
</thead>
<tbody>
<tr>
<td>NFL</td>
<td>1982</td>
<td>Sharing of Revenue</td>
<td>Strike</td>
<td>98</td>
<td>Both sides</td>
</tr>
<tr>
<td>NFL</td>
<td>1987</td>
<td>Free Agency</td>
<td>Strike</td>
<td>14</td>
<td>Big win for owners</td>
</tr>
<tr>
<td>NBA</td>
<td>1998-99</td>
<td>Cap of maximum player salaries</td>
<td>Lockout</td>
<td>464, including the NBA All-Star game.</td>
<td>Big win for owners</td>
</tr>
<tr>
<td>MLB</td>
<td>1972</td>
<td>Pensions and binding arbitration</td>
<td>Strike</td>
<td>86</td>
<td>Players</td>
</tr>
<tr>
<td>MLB</td>
<td>1981</td>
<td>Free agency</td>
<td>Strike</td>
<td>712</td>
<td>Players</td>
</tr>
<tr>
<td>MLB</td>
<td>1985</td>
<td>Increased salaries and pension fund contributions</td>
<td>Strike</td>
<td>25 (But, games were rescheduled.)</td>
<td>Players</td>
</tr>
<tr>
<td>MLB</td>
<td>1994-95</td>
<td>Revenue sharing, salary cap, and free agency</td>
<td>Strike</td>
<td>920, including the World Series</td>
<td>Good question</td>
</tr>
<tr>
<td>NHL</td>
<td>1992</td>
<td>Salary arbitration and free agency</td>
<td>Strike</td>
<td>30 (But rescheduled)</td>
<td>Players</td>
</tr>
<tr>
<td>NHL</td>
<td>1994-95</td>
<td>Salary cap</td>
<td>Lockout</td>
<td>468</td>
<td>Owners</td>
</tr>
<tr>
<td>“Replacements” Fictional football league</td>
<td>2000</td>
<td>“salary disputes”</td>
<td>Strike</td>
<td>4 games</td>
<td>Moviegoers</td>
</tr>
<tr>
<td>NHL</td>
<td>2004-05</td>
<td>Salary cap</td>
<td>Lockout</td>
<td>1230</td>
<td>Big win for owners</td>
</tr>
</tbody>
</table>