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The Second Circuit Takes a Second Look at the Non-Statutory Labor Exemption in Professional Sports: A Review of Wood v. National Basketball Association, Caldwell v. American Basketball Association, National Basketball Association v. William, and Clarett v. National Football League

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THE SECOND CIRCUIT TAKES A SECOND LOOK AT THE NON-STATUTORY LABOR EXEMPTION IN PROFESSIONAL SPORTS: A REVIEW OF *WOOD V. NATIONAL BASKETBALL ASSOCIATION*, *CALDWELL V. AMERICAN BASKETBALL ASSOCIATION*, *NATIONAL BASKETBALL ASSOCIATION V. WILLIAMS*, AND *CLARETT V. NATIONAL FOOTBALL LEAGUE*

Walter T. Champion, Jr.[*]

I. INTRODUCTION: THE CLARETT IMBROGLIO

Maurice Clarett was the star tailback in Ohio State University's undefeated 2002 football season.[1] He was the first Ohio State freshman in sixty years to open the season as the starting running back, and he led his team to a national championship scoring the winning touchdown in the 2003 Fiesta Bowl over the University of Miami in double-overtime, 32 to 24.[2] From there, he went downhill. Ohio State and the National Collegiate Athletic Association ("NCAA") suspended him for the 2003-2004 season.[3] Additionally, it appeared that the NCAA would not permit him to play in the 2004-2005 season.[4] In short, he was forced to

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1. *See* Clarett v. Nat'l Football League (*Clarett I*), 306 F. Supp. 2d 379, 387 (S.D.N.Y. 2004).

2. *Clarett I*, 306 F. Supp. 2d at 387-88 ("As a result of his freshman year resounding success, Clarett was named the Big Ten Freshman of the Year and voted the best running back in college football by *The Sporting News*."); *see also* Joe Drape, *Extra! Extra! It's Ohio State*, N.Y. TIMES, Jan. 4, 2003, at D1.

3. *Clarett I*, 306 F. Supp. 2d at 388.

4. *Id.*

sit out what would have been his second year out of high school.[5] He sought to be included in the pool of players eligible for the 2004 National Football League ("NFL") draft to be held on April 24-25, 2004.[6]

Clarett was unable to enter that draft class because of a rule located in the NFL's Constitution and Bylaws entitled "Special Eligibility," which allowed only those athletes who were three years out of high school to be eligible.[7] Maurice Clarett graduated from high school in December 2001, and under the NFL's eligibility rules, was not able to participate in the college draft until the spring of 2005.[8]

Judge Scheindlin of the Federal District Court for the Southern District of New York granted plaintiff's motion for summary judgment on February 5, 2004.[9] Judge Scheindlin also denied the NFL's motion to stay pending appeal on February 11, 2004.[10] However, the Second Circuit Court of Appeals reversed and remanded Judge Scheindlin's grant of summary judgment on May 24, 2004.[11]

Judge Scheindlin found for plaintiff on the basis that the NFL's rule did not fall within the scope of the non-statutory labor exemption and it was not a mandatory subject of collective bargaining.[12] The Second Circuit Court of Appeals found that this rule, since it represented a condition for initial employment, affected the job security of veteran players and, therefore, had tangible effects on mandatory subjects of collective bargaining (e.g., wages, hours, and conditions of employment)

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5. *See id.*; *see generally* William C. Rhoden, *Clarett Casts a Shadow over Fallen Ohio State*, N.Y. TIMES, Nov. 23, 2003, section 8 (discussing that Clarett was suspended after accusations of "misleading investigators and violating N.C.A.A. bylaws concerning benefits for athletes").

6. *See Clarett I*, 306 F. Supp. 2d at 382; Clarett v. Nat'l Football League (*Clarett III*), 369 F.3d 124, 126 (2d Cir. 2004).

7. *See Clarett I*, 306 F. Supp. 2d at 385-87; *see also* Robert D. Koch, *4th and Goal: Maurice Clarett Tackles the NFL Eligibility Rule*, 24 LOY. L.A. ENT. L. REV. 291, 292 (2004).

8. Memorandum in Support of the National Football League's Motion for Summary Judgment at 4, Clarett v. Nat'l Football League, 306 F. Supp. 2d 411 (S.D.N.Y. 2004) (No. 03-CV-7441), 2003 WL23220580.

9. *Clarett I*, 306 F. Supp. 2d at 410-11 (Clarett's motion for summary judgment "should be granted . . . [b]ecause the Rule violates the antitrust laws, it cannot preclude Clarett's eligibility for the 2004 NFL draft.").

10. Clarett v. Nat'l Football League (*Clarett II*), 306 F. Supp. 2d. 411, 414 ("If a stay is granted, Clarett will miss the 2004 draft. He will not be eligible to play in the NFL until the 2005 draft . . . . If the stay is granted, Clarett will have effectively *lost* his lawsuit.").

11. *Clarett III*, 369 F.3d at 143; *Clarett II*, 306 F. Supp. 2d at 412 ("If that Order [granting summary judgment] is subsequently reversed on appeal, at worst, the NFL will be forced to tolerate the handful of younger players who are selected in the 2004 draft.").

12. *See Clarett I*, 306 F. Supp. 2d at 395-96. According to this case, "the Rule makes a class of potential players *unemployable*. Wages, hours, or working conditions affect only those who are employed or eligible for employment." *Id.* at 393.

for current NFL players.[13] Furthermore, the fact that the NFL and the players' union did not bargain over the rule per se was insufficient to exclude the rule from the exemption since it was included in the NFL's Constitution and Bylaws.[14] Additionally, the union was aware of the rule and it generally agreed to waive any challenge to the Constitution and Bylaws.[15] This essay will formulate the state of the Second Circuit's "new" formula on the non-statutory labor exemption in professional sports as exemplified by *Clarett v. National Football League*,[16] and three older Second Circuit cases: *Wood v. National Basketball Association*,[17] *Caldwell v. American Basketball Association, Inc.*,[18] and *National Basketball Association v. Williams*.[19]

The sad saga of Maurice Clarett continued into 2006. He sat out two seasons, and was then eligible for the 2005 NFL draft in the normal course of draft eligibility. Although slower and less agile, he was drafted as the last person selected in the third round by the Denver Broncos.[20] However, eventually he was cut in training camp.[21] On February 22, 2006, he "pleaded not guilty to charges that he flashed a gun at two people behind a bar on New Year's Day and took a cell phone."[22]

II. THE NON-STATUTORY LABOR EXEMPTION IN PROFESSIONAL SPORTS BEFORE *CLARETT*

Clarett's antitrust lawsuit was defeated on the basis of the non-

13. *See Clarett III*, 369 F.3d at 139-40. "[B]y reducing competition in the market for entering players, the eligibility rules also affect the job security of veteran players." *Id.* at 140.

14. *See id.* at 142; *see also* Adam Epstein, *The Empire Strikes Back: NFL Cuts Clarett, Sacks Scheindlin*, 22 ENT. & SPORTS L. 12, 17 (2005) (asserting that the "2nd Circuit Court of Appeals definitely found that the draft eligibility rules are mandatory bargaining subjects . . . the eligibility rules cannot be viewed in isolation from the rest of the complex scheme of salary cap."); *see generally* Michael Scheinkman, Comment, *Running Out of Bounds: Over–Extending the Labor Antitrust Exemption in* Clarett v. National Football League, 79 ST. JOHN'S L. REV. 733 (2005) (discussing that the Second Circuit Court of Appeals expanded the non-statutory exemption to draft eligibility even though the provision was only incorporated through reference in the CBA).

15. *Clarett III*, 369 F.3d at 142.

16. *See id.* at 135.

17. 809 F.2d 954 (2d Cir. 1987).

18. 66 F.3d 523 (2d Cir. 1995).

19. 45 F.3d 684 (2d Cir. 1995).

20. Joe Drape, *Gamble on Clarett Reveals Perils of Potential*, N.Y. TIMES, Aug. 31, 2005, at D8.

21. *See* Pete Thamel, *Police Seek Clarett's Arrest on Armed Robbery Charges*, N.Y. TIMES, Jan. 2, 2006, at D1.

22. *Clarett Pleads Not Guilty to Robbery Charges*, ASSOCIATED PRESS, Feb. 22, 2006, *available at* http://sports.espn.go.com/nfl/news/story?id=2339329.

statutory labor exemption to the antitrust laws.[23] The Sherman Antitrust Act[24] makes illegal every combination in the form of a conspiracy that restrains interstate commerce.[25] However, the exemptions to the antitrust laws in sports[26] have all but negated their effectiveness as a mechanism to protect athletes from management's anti-competitive practices.[27] The major exemptions include baseball's exemption,[28] certain specific NFL exemptions,[29] the statutory labor exemption,[30] and the non-statutory labor exemption.[31] The purpose of the statutory exemption is to allow unions to eliminate competition from other unions, but this privilege cannot be claimed by businesses.[32] The non-statutory labor exemption emanates from the statutory labor exemption and protects certain union activities from antitrust scrutiny.[33] The exemption was developed by the United States Supreme Court in non-sports

23. *See* Clarett v. Nat'l Football League (*Clarett III*), 369 F.3d 124, 125 (2d Cir. 2004).

24. Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (2006).

25. *Id.* § 1; *see generally* WALTER T. CHAMPION, JR., SPORTS LAW IN A NUTSHELL 72 (3d ed. 2005) [hereinafter CHAMPION, NUTSHELL] (stating that antitrust laws have been used to change player restraint mechanisms in professional sports).

26. *See generally* CHAMPION, NUTSHELL, *supra* note 25, at 63-72 (discussing the exemptions to antitrust laws in sports including the baseball exemption, the labor exemption, the NFL exemptions, and the non-statutory labor exemption).

27. *See* WALTER T. CHAMPION, JR., FUNDAMENTALS OF SPORTS LAW 530 (2d ed. 2004) [hereinafter CHAMPION, FUNDAMENTALS] (describing that through the development of case law, the non-statutory labor exemption has been used in professional sports to try to gain antitrust immunity).

28. *See* CHAMPION, NUTSHELL, *supra* note 25, at 63-66; *see also* Flood v. Kuhn, 407 U.S. 258, 285 (1972). This exemption was categorized as "a derelict in the stream of law." *Id.* at 286 (Douglas, J., dissenting); *see also* Walter T. Champion Jr., *The Baseball Antitrust Exemption Revisited: 21 Years After* Flood v. Kuhn, 19 T. MARSHALL L. REV. 573, 574 (1994).

29. *See* 15 U.S.C. § 1291 (2006) (providing an "exemption from antitrust laws of agreements covering the telecasting of sports contests and the combining of professional football leagues"); 15 U.S.C. § 1292 (2006) (providing an exemption for local area telecasting "within the home territory of a member club of the league on a day when such club is playing a game at home").

30. *See* Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 621-22 (1975). The statutory labor exemption originated in provisions of the Clayton Act, 15 U.S.C. §§ 12-27 (2006) and the Norris-LaGuardia Act, 29 U.S.C. §§ 101-15 (2006). *See id.*; *see also* CHAMPION, FUNDAMENTALS, *supra* note 27, at 530.

31. *See Connell*, 421 U.S. at 622-23; *see generally* CHAMPION, NUTSHELL, *supra* note 25, at 67-72 (discussing the use of the non-statutory labor exemption in sports).

32. *See Connell*, 421 U.S. at 622-23; CHAMPION, FUNDAMENTALS, *supra* note 27, at 530.

33. *See* Clarett v. Nat'l Football League (*Clarett I*), 306 F. Supp. 2d 379, 391 (S.D.N.Y. 2004); *see also* Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 353 (1989); Robert A. McCormick & Matthew C. McKinnon, *Professional Football's Draft Eligibility Rule: The Labor Exemption and the Antitrust Laws*, 33 EMORY L.J. 375, 381-82 (1984) ("The [non-statutory] labor exemption attempts to accommodate inherent conflicts between national labor and antitrust policy and to protect labor-management agreements . . . from antitrust interdiction."); Jonathan S. Shapiro, Note, *Warming the Bench: The Nonstatutory Labor Exemption in the National Football League*, 61 FORDHAM L. REV. 1203, 1205 (1993) (noting that the non-statutory labor exemption protects union practices such as collective bargaining).

cases.[34] Under this exemption, any union-management agreement that is a product of good faith negotiation will be protected from the antitrust laws.[35] This exemption will apply where alleged players' restraint mechanisms primarily affect only those parties to the collective bargaining agreement, where the restraint concerns a mandatory subject of collective bargaining, and where the provision that is sought to be exempted is a product of bona fide arm's length bargaining.[36]

The preeminent sports non-statutory labor exemption case is *Mackey v. National Football League*.[37] In *Mackey*, plaintiffs sued to determine if the NFL's "Rozelle Rule" violated antitrust laws.[38] This rule allowed the NFL commissioner, Pete Rozelle, to require the club acquiring a free agent to compensate the former team with money, players, and/or draft picks.[39] Although this rule did not deal with a mandatory subject of collective bargaining, it operated to restrict a player's mobility to move freely from team to team, thus, depressing salaries.[40] The court also held that there was no bona fide arm's length bargaining over the rule on the basis that the rule remained unchanged since it was unilaterally promulgated by management.[41]

However, other courts found that the non-statutory exemption could apply to player restriction mechanisms in professional sports. In *McCourt v. California Sports, Inc.*,[42] the court found the exemption applicable to protect the National Hockey League's version of a reserve system.[43] The court found that there was sufficient bona fide bargaining so as to trigger the exemption, even though management did not yield at all from its initial position.[44] *Powell v. National Football League*[45] continued the exemption even after the parties reached impasse.[46] In

34. *See, e.g.*, *Connell*, 421 U.S. at 622-23; Local 189 v. Jewel Tea Co., 381 U.S. 676, 689-91 (1965).

35. *See* CHAMPION, FUNDAMENTALS, *supra* note 27, at 530; *see also* Jessica Cohen, Note, *Sharing the Wealth: Don't Call Us. We'll Call You: Why Revenue Sharing Is a Permissive Subject and Therefore the Labor Exemption Does Not Apply*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 609, 626 (2002).

36. *See* CHAMPION, FUNDAMENTALS, *supra* note 27, at 530.

37. 543 F.2d 606 (8th Cir. 1976).

38. *See id.* at 609.

39. *Id.* at 610-11; *see* CHAMPION, FUNDAMENTALS, *supra* note 27, at 531-32.

40. *Mackey*, 543 F.2d at 615.

41. *Id.* at 616; *see also* CHAMPION, NUTSHELL, *supra* note 25, at 68-69.

42. 600 F.2d 1193 (6th Cir. 1979).

43. *See id.* at 1203.

44. *See id.*

45. 930 F.2d 1293 (8th Cir. 1989).

46. *See id.* at 1304; *see also* C. Peter Goplerud III, *Collective Bargaining in the National Football League: A Historical and Comparative Analysis*, 4 VILL. SPORTS & ENT. L.J. 13, 27-28 (1997) (providing that the court's holding in *Powell* "was necessary in order to give proper accord

Wood, the exemption protected their salary cap.[47] Since "Wood challenged agreements concerning mandatory subjects of bargaining, to which labor law attaches a host of rights and obligations, [the court] saw no place for the application of antitrust laws and found the non-statutory exemption applicable."[48] In *Brown v. Pro Football, Inc.*,[49] the United States Supreme Court held that the NFL's unilateral imposition of a fixed salary for developmental squad players was protected by the non-statutory exemption.[50]

III. JUDGE SCHEINDLIN DECLARES THE NFL "OUT OF BOUNDS"

Judge Scheindlin, in *Clarett*, indicated that to gain the non-statutory labor exemption, the particular provision must be a mandatory subject of collective bargaining;[51] it must cover only those actions that "affect employees within the bargaining unit or those who seek to become employees"[52] and it must evolve from arm's length negotiations.[53] Judge Scheindlin remembers, with advantages, Justice Stevens' admonition in his dissent in *Brown*, that "exemptions should be construed narrowly, and judicially crafted exemptions more narrowly still."[54] The draft eligibility rule is not the product of arm's length negotiation nor is it a mandatory subject of collective bargaining.[55] Judge Scheindlin elaborates that "[n]owhere is there a reference to wages, hours, or conditions of employment. Indeed, the Rule makes a class of potential players *unemployable*."[56] That is, the rule does not involve a mandatory subject of collective bargaining, which is a necessary prerequisite for the exemption's applicability. Mandatory

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to federal labor policies"); Robert A. McCormick, *Interference on Both Sides: The Case Against the NFL-NFLPA Contract*, 53 WASH. & LEE L. REV. 397, 413-15 (1996) (discussing the Eighth Circuit's holding in *Powell* that "as long as the NFL and the NFLPA maintained an 'ongoing collective bargaining relationship,' disagreements regarding player mobility . . . would be exempt from antitrust review.").

47. *See* Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 956-57 (2d Cir. 1987).

48. Clarett v. Nat'l Football League (*Clarett III*), 369 F.3d 124, 136 (2d Cir. 2004).

49. 518 U.S. 231 (1996).

50. *See id.* at 234.

51. *See* Clarett v. Nat'l Football League (*Clarett I*), 306 F. Supp. 2d 379, 395 (S.D.N.Y. 2004).

52. *Id.* at 393.

53. *See id.* at 396. "While Clarett offers no *evidence* on the issue of arm's-length bargaining, he certainly highlights the NFL's absence of proof." *Id.* at 397.

54. *Brown*, 518 U.S. at 258 (Stevens, J., dissenting).

55. *See Clarett I*, 306 F. Supp. 2d at 395 (explaining that the draft eligibility rule "does not concern wages, hours, or conditions of employment and is therefore not covered by the non-statutory labor exemption.").

56. *Id.* at 393.

subjects affect only those who are employed or eligible for employment.[57] Since Clarett was unable to return to college, "[t]he NFL may be his only real option for playing football next year."[58] The rule would make Clarett ineligible for employment.[59] So, he was ineligible for employment even though there was "little doubt that Clarett [wa]s an NFL-caliber player . . . ."[60] According to the complaint, "[h]ad Clarett been eligible for the 2003 Draft, it is almost certain he would have been selected in the beginning of the First Round and would have agreed to a contract and signing bonus worth millions of dollars."[61]

Moreover, "[t]he exemption is also inapplicable because the Rule *only* affects players, like Clarett, who are complete strangers to the bargaining relationship."[62] Scheindlin cites to *Mackey* and reaffirms that "labor laws cannot be used to shield anticompetitive agreements between employers and unions that affect only those outside of the bargaining unit."[63] According to the facts of the case, "Clarett's situation is very different."[64] Clarett was an individual who was "categorically denied eligibility for employment."[65] Also, Judge Scheindlin avers that "the NFL has failed to demonstrate that the Rule evolved from arm's-length negotiations."[66]

A. The Second Circuit in Clarett Reinvigorates the Non-Statutory Labor Exemption

The Second Circuit Court of Appeals in *Clarett* held that the NFL's three years from high school eligibility rule was protected from antitrust scrutiny on the basis of the applicability of the non-statutory labor exemption.[67] Although the court admitted that there was no bargaining between a union and management over the rule that alone did not exclude the rule from the scope of the non-statutory labor exemption.[68] The Second Circuit had to cobble together an argument that would

57. *See id.* at 395.
58. *Id.* at 388.
59. *See id.* at 382 ("The only thing preventing him from [playing in the NFL] is the League's rule . . . .").
60. *Id.* at 388; *see also* Complaint at para. 31, Clarett v. Nat'l Football League (*Clarett I*), 306 F. Supp. 2d 379 (S.D.N.Y. 2004) (No. 03-CV-7441), 2003 WL 22469936 [hereinafter Complaint].
61. Complaint, *supra* note 60, at para. 31.
62. *Clarett I*, 306 F. Supp. 2d at 395.
63. *Id.*
64. *Id.*
65. *Id.* at 396.
66. *Id.*
67. Clarett v. Nat'l Football League (*Clarett III*), 369 F.3d 124, 125 (2d Cir. 2004).
68. *See id.* at 142.

somehow side-step the fact that there was no bargaining over the rule.[69] The *Clarett* appeals decision based its holding on the earlier Second Circuit opinions of *Wood*, *Caldwell*, and *Williams*. However, all of these opinions undeniably involved player restraint mechanisms that were negotiated over and included as a part of the collective bargaining agreement.[70] The *Clarett* appeals court then combined these three opinions with the United States Supreme Court opinion in *Brown*, which applied the non-statutory labor exemption to management's unilaterally setting the wages for developmental squad players.[71] The *Clarett* appeals decision was based on the fact that these particular rules were included in the NFL's Constitution and Bylaws,[72] the union was aware of these rules,[73] and that the union generally agreed to waive any challenge to the Constitution and Bylaws.[74]

Clarett's argument was "that the NFL clubs invited antitrust liability when they agreed amongst themselves to impose that same criteria on every prospective player."[75] According to *Clarett III*, "federal labor policy permits the NFL Teams to act collectively as a multi-employer bargaining unit in structuring the rules of play and setting the criteria for player employment."[76] The *Clarett* appeals court averred that the fact that the rule excluded some potential employees from consideration "does not render the NFL's adherence to its eligibility rules as a multi-employer bargaining unit suspect."[77]

The Second Circuit Court of Appeals summarized that Maurice Clarett's suit was "simply a prospective employee's disagreement with the criteria, established by the employer and the labor union, that he must meet in order to be considered for employment."[78] The Second Circuit Court of Appeals in *Clarett III*, like the United States Supreme Court in *Brown*, declined to "fashion an antitrust exemption [giving] additional advantages to professional football players . . . that transport workers, coal miners, or meat packers would not enjoy."[79]

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69. *See id.* at 142-43.

70. *See Clarett III*, 369 F.3d at 126.

71. *See* Brown v. Pro Football, Inc., 518 U.S. 231, 234 (1996); *Clarett III*, 369 F.3d at 135.

72. *See Clarett III*, 369 F.3d at 142.

73. *Id.*

74. *Id.* (The union "acquiesced in the continuing operation of the eligibility rules contained therein—at least for the duration of the agreement.").

75. *Id.* at 141.

76. *Id.*

77. *Id.*

78. *Id.* at 143.

79. *Id.* at 143 (quoting Brown v. Pro Football, Inc., 518 U.S. 231, 249 (1996)).

B. Clarett Appeals Court Posits Wood *to Re-define the Exemption*

The Second Circuit Court of Appeals indicated that "[t]he Supreme Court has never delineated the precise boundaries of the exemption."[80] The court in *Clarett III* acknowledged that Maurice Clarett maintained that these boundaries were properly identified by the Eighth Circuit's opinion in *Mackey*,[81] and that the appeals court should follow *Mackey*.[82] The Second Circuit declined to do so by reasoning that it has "never regarded the Eighth Circuit's test in *Mackey* as defining the appropriate limits of the non-statutory exemption."[83] The *Clarett III* appeals court noted that other Second Circuit opinions similarly decided to avoid *Mackey*.[84] In *Local 210, Laborers' International Union v. Labor Relations Division Associated General Contractors*,[85] the Second Circuit declined to follow *Mackey* in favor of the balancing test articulated in *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co*.[86] Additionally, in *United States Football League v. National Football League*,[87] the Second Circuit recognized that *Mackey* was "not consistent with [the] decision in *Wood*."[88]

In *Wood*, the Second Circuit reviewed the legality of the National Basketball Association's ("NBA") salary cap provisions.[89] A salary cap "limits the total amount that each team can annually pay to its players."[90] The *Wood* court held that the salary cap was exempt from antitrust analysis.[91] The court noted on appeal that "no one seriously contends that the antitrust laws may be used to subvert fundamental principles of our federal labor policy . . . . Wood's claim is just such a wholesale

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80. *Clarett III*, 369 F.3d at 131.

81. *See* Mackey v. Nat'l Football League, 543 F.2d 606, 614 (8th Cir. 1976) (holding that the boundaries of the non-statutory labor exemption dictate that the restraint only affects parties to a bona fide arm's-length collective bargaining arrangement concerning a mandatory subject of collective bargaining).

82. *Clarett III*, 369 F.3d at 133.

83. *Id.* Judge Lay in *Mackey* anticipated that the non-statutory exemption could be applicable if the Rozelle Rule was "reached through good faith collective bargaining." *See Mackey*, 543 F.2d at 623.

84. *See Clarett III*, 369 F.3d at 133.

85. 844 F.2d 69 (2d Cir. 1988).

86. *See id.* at 79., (discussing that the test from *Jewel Tea* "is one that balances the conflicting policies embodied in the labor and antitrust laws, with the policies inherent in labor law serving as the first point of reference.").

87. 842 F.2d 1335 (2d. Cir. 1988).

88. *Id.*

89. *See* Wood v. Nat'l Basketball Ass'n (*Wood I*), 602 F. Supp. 525, 526 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954 (2d Cir. 1987).

90. CHAMPION, FUNDAMENTALS, *supra* note 27, at 534.

91. *See Wood I*, 602 F. Supp. at 528.

subversion of that policy, and it must be rejected out of hand."[92]

The Court of Appeals in *Wood* pointed out that "Wood further [attacked] the draft and salary cap as disadvantaging new employees."[93] He also "argue[d] that the draft and salary cap are illegal because they affect employees outside the bargaining unit."[94] "If Wood's antitrust claim were to succeed . . . federal labor policy would essentially collapse unless a wholly unprincipled, judge-made exception were created for professional athletes."[95] Wood's assertion that he would be paid more if the restrictive provisions were absent "also implies that others would receive less if he were successful."[96] The court noted that Wood "offered [it] no reason whatsoever . . . *on antitrust grounds* prohibiting agreements . . . that use seniority as a criterion for certain employment decisions."[97]

The *Clarett* appeals court used *Wood* to defeat Clarett's contention that the eligibility rules are impermissible because they affect players outside of the union, "[b]ut simply because the eligibility rules work a hardship on prospective rather than current employees does not render them impermissible."[98] Clarett argued that waiting another year was unrelated to his ability to play.[99] However, "Clarett . . . is no different from the typical worker who is confident that he . . . has the skills to fill a job vacancy but does not possess the . . . requisite criteria that have been set."[100]

> In the context of this collective bargaining relationship, the NFL and its players union can agree that an employee will not be hired or considered for employment for nearly any reason whatsoever so long as they do not violate federal laws such as those prohibiting unfair labor practices. Any challenge to those criteria must "be founded on

92. Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 959 (2d Cir. 1987).

93. *Id.* at 960. "However, newcomers in the industrial context routinely find themselves disadvantaged vis-à-vis those already hired. A collective agreement may . . . provide salaries, layoffs, and promotions be governed by seniority, even though some individuals with less seniority would fare better if allowed to negotiate individually." *Id.* (citation omitted).

94. *Id.* "However, that is also a commonplace consequence of collective agreements." *Id.*

95. *Id.* at 961. "Employers would have no assurance that they could enter into any collective agreement without exposing themselves to an action for treble damages." *Id.*

96. *Id.*

97. *Id.* at 962.

98. Clarett v. Nat'l Football League (*Clarett III*), 369 F.3d 124, 140 (2d Cir. 2004) (citing *Wood*, 809 F.2d at 960); *see also* Walter Champion, Clarett v. NFL *and the Reincarnation of the Nonstatutory Labor Exemption in Professional Sports*, 47 S. TEX. L. REV. 587, 601-02 (2006).

99. *Clarett III*, 369 F.3d at 141.

100. *Id.*

labor rather than antitrust law."[101]

Clarett holds that the exemption "extends as far as necessary to ensure the successful operation of the collective bargaining *process*."[102] Furthermore, this process safeguards the "unique bundle of compromises" that is reached by management and the union as a means of settling differences in professional football.[103]

IV. *CLARETT* APPEALS COURT POSITS *CALDWELL* TO RE-DEFINE THE EXEMPTION

In *Caldwell*, a former professional basketball player sought antitrust relief based on his suspension as an alleged result of his activities as president of the player's union.[104] The Second Circuit held that his "antitrust claims [were] barred by the non-statutory labor exemption and his state law claims [were] preempted by the National Labor Relations Act ("NLRA") . . . ."[105]

The Second Circuit Court of Appeals in *Clarett* reiterated its earlier position: "In *Caldwell*, our analysis began with the observation that '[t]he inception of a collectively bargaining relationship between employees and employers irrevocably alters the governing legal regime.'"[106] The ability of management to discharge an employee, or refuse to hire a potential employee, involves a mandatory subject of collective bargaining.[107] "Thus, federal labor law afforded Caldwell a host of administrative and judicial remedies to contest the parties' agreements on the subject, as well as his firing and any team's refusal to hire him."[108] In the *Clarett* appeals decision, the court cited to *Caldwell* again to indicate that just because "employers acted jointly in refusing employment" does not transform issues remediable under labor law into questions of antitrust; therefore, the non-statutory exemption is applicable in both *Caldwell* and the *Clarett* appeals decisions.[109]

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101. *Id.* (quoting Caldwell v. Am. Basketball Ass'n, 66 F.3d 523, 530 (2d Cir. 1995)) (citation omitted).

102. *Id.* at 142-43.

103. *Id.* at 143 (quoting Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 961 (2d Cir. 1987).

104. *Id.* at 526-27.

105. *Id.* at 525.

106. *Clarett III*, 369 F.3d at 137 (quoting Brown v. Pro Football, Inc., 50 F.3d 1041, 1054 (D.C. Cir. 1995)).

107. *Id.* (citing *Caldwell*, 66 F.3d at 529).

108. *Id.* (citing *Caldwell*, 66 F.3d at 529).

109. *Id.* (quoting *Caldwell*, 66 F.3d at 529).

The *Caldwell* court reasoned that, "[t]o be sure, in sports leagues, unionized players generally engage in individual bargaining with teams."[110] But, it is "not an exercise of a right to free competition under the antitrust laws; rather, it is an exercise of a right derived from collective bargaining itself."[111] The *Caldwell* court also noted that, "[o]nce an exclusive representative has been selected, the individual employee is forbidden . . . from negotiating directly with the employer . . . even though that employee may actually receive less compensation . . . ."[112] The "mandatory subject of bargaining pertinent in the instant matter [*Caldwell*] is the circumstances under which an employer may discharge or refuse to discharge an employee."[113] "We turn now to the question of whether an employee's antitrust claim is somehow bolstered by an allegation that employers acted jointly in refusing employment. It is not."[114]

The *Caldwell* court looked back again to other Second Circuit sports exemption cases: "As we held in *Williams*, and as reaffirmed in *Brown*, multi-employer bargaining groups do not violate the antitrust laws although they plainly involve horizontal competitors for labor acting in concert to set and to implement terms of employment."[115] In *Caldwell*, once defendant, American Basketball Association ("ABA"), was obligated to recognize the ABA Players Association ("ABAPA") as the exclusive bargaining representative for all ABA players, "Caldwell lost his right to seek the best bargain from individual ABA teams."[116] Those teams then "became exempt from any antitrust rule that might have compelled them to compete individually for players represented by the Union."[117]

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110. *Caldwell*, 66 F.3d at 528.

111. *Id.*

112. *Id.* (quoting Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 959 (2d Cir. 1987)).

113. *Id.* at 529.

114. *Id.*

115. *Id.* (citations omitted).

116. *Id.* at 530

117. *Id.* "If the ABA and the Union had agreed in a collective agreement that Caldwell . . . could be discharged for any reason not *specifically* prohibited by . . . federal law . . . he could not have challenged that agreement under the antitrust laws." *Id.* (emphasis added). *See also* Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 962, n.4. The *Wood* court noted:

> At oral argument, counsel for Wood argued that because players are allowed a limited right by the collective agreement to bargain individually, the antitrust laws somehow compel that the right be *unqualified*. *We perceive neither logic, policy, nor legal authority supporting this claim.* No one denies that a union and employer . . . may set a fixed salary for an employee . . . . To hold that the NBPA and NBA must as a matter of law opt either for fixed salaries or unlimited individual bargaining would further no legitimate goal. One might well speculate that only a destructive impasse would result.

Id. (emphasis added).

"Unlike the claim in *Wood*, Caldwell's claim regarding his discharge is not directly inconsistent with substantive federal labor law."[118] But, to allow Caldwell to precede here would "subvert fundamental principles of our federal labor policy . . . ."[119] The Second Circuit compares the core dispute in *Caldwell* to the familiar case of determining whether a discharge was "for cause."[120] Plaintiff claims that he was refused employment because of his position "as Union president and [the ABA's] resultant desire to exclude him from the NBA-ABA merger negotiations. [Whereas], [t]he ABA claims that it [was] because of his physical limitations."[121] If *Caldwell* [were] allowed to proceed, similarly situated employees from now on might circumvent the NLRB by instituting "parallel administrative and antitrust proceedings with the risk of inconsistent adjudications."[122] The Second Circuit emphatically concluded *Caldwell* with the reminder that "*[t]here is no precedent outside sports for ever initiating this genre of litigation.*"[123]

A. Clarett Appeals Court Posits Williams *to Re-define the Exemption*

The Second Circuit noted in *Williams* that *Wood* concluded that "no one seriously contends that the antitrust laws may be used to subvert fundamental principles of our federal labor policy."[124] However, "[t]he present case [*Williams*] appears to have proven us wrong because just such a contention is being seriously made."[125] In *Williams*, the NBA Teams sought a declaration that the continued imposition of disputed provisions of the collective bargaining agreement ("CBA") would not violate the antitrust laws because of the non-statutory labor exemption, even after impasse.[126] The players in *Williams* argued that "by acting

118. *Caldwell*, 66 F.3d at 530.

119. *Id.* (quoting *Wood*, 809 F.2d at 959).

120. *Id.* "This dispute is the familiar case of an employee asserting a discharge based on union activities, a violation of NLRA § 8(a)(3), and an employer claiming that the discharge was for cause." *Id.*

121. *Id.* "Caldwell, however, chose not to pursue his claim under the NLRA. Instead, he sought relief under the Sherman Act." *Id.*

122. *Id.* "Every employee who is locked out by a multiemployer group, every striker who is not reinstated, and every employee who is discharged could bring an antitrust action similar to Caldwell's. Clearly, congress had no such intention." *Id.*

123. *Id.* (emphasis added). "[W]e adhere to what we said in *Wood*, namely that 'a wholly unprincipled, judge-made exception . . . for professional athletes' should not be created." *Id.* at 531 (quoting *Wood*, 809 F.2d at 961).

124. Nat'l Basketball Ass'n v. Williams, 45 F.3d 684, 690 (2d Cir. 1995) (quoting *Wood*, 809 F.2d at 959).

125. *Id.*

126. *Id.* at 686 (explaining that the disputed provisions were the College Draft, the Right of

collectively to impose terms of employment after expiration of the CBA, the NBA Teams are . . . acting as a cartel and committing a *per se* violation of the Sherman Act."[127]

"In the sports industry, multiemployer bargaining exists . . . because some terms and conditions of employment must be the same for all teams in a sports league."[128] The players then almost illogically argue "that the most routine practices of multiemployer bargaining . . . are *per se* unlawful."[129] This "stark claim" has not been asserted in the 104 years of existence of the Sherman Act.[130] "The lack of any antitrust challenge to, or congressional action restricting multiemployer bargaining, for a century during which it prominently existed, grew, and flourished, strongly suggests some kind of general understanding about the legality of multiemployer bargaining that is fundamentally inconsistent with appellants' claim."[131] Therefore, "[t]o hold at this late date that it . . . is illegal under the antitrust laws would cause a massive reshaping of the institution of collective bargaining."[132]

"Turning to the precise facts" of *Williams*, "under the Teams' obligation to bargain in good faith, they were obligated to maintain the *status quo* until an impasse was reached."[133] The *Williams* basketball players, however, argued that the "imposition of those provisions violated the antitrust laws as soon as the CBA expired, a position that views as illegal, *conduct required by the NLRA*."[134] However, the *Williams* court concluded that "[e]ven after impasse . . . employers . . . are surely free to maintain the *status quo*."[135] In *Brown*, petitioners

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First Refusal, and the Revenue Sharing/Salary Cap System). In both Powell v. Nat'l Football League, 888 F.2d 559, 568 (8th Cir. 1989), *amended by* 930 F.2d 1293 (8th Cir. 1989), and Brown v. Pro Football, Inc., 518 U.S. 231, 246 (1996), the non-statutory labor exemption was deemed to extend beyond impasse for two particular player restraint mechanisms in professional football.

127. *Williams*, 45 F.3d at 687.

128. *Id.* at 689.

> Unlike the industrial context in which many work rules can differ from employer to employer—even though a roughly common bottom line is desirable—sports leagues need many common rules. Number of games, length of season, playoff structures, and roster size and composition, for example, are just a few of the many kinds of league rules that are typically bargained over by sports leagues and unions of players.

Id.

129. *Id.*

130. *Id.* "It is true that recent antitrust challenges in the professional sports industry have at times involved facts very similar to those in the instant matter, but the multiemployer bargaining issue appears to have been raised obliquely, if at all." *Id.* (citations omitted).

131. *Id.* at 690.

132. *Id.* at 691.

133. *Id.*; *see also* NLRB v. Katz, 396 U.S. 736 (1962).

134. *Williams*, 45 F.3d at 691 (emphasis added).

135. *Id.*

argued "that irrespective of how the labor exemption applies elsewhere to multiemployer collective bargaining, professional sports is 'special.'"[136] The Supreme Court in *Brown* "can understand how professional sports may be special in terms of, say, interest, excitement, or concern. But [it] do not understand how they are special in respect to labor law's antitrust exemption."[137]

The *Williams* court agreed with the Eight Circuit in *Powell* that the exemption precludes antitrust challenges to various terms and conditions implemented by the NFL after impasse.[138] "The [*Powell*] Court . . . concluded that application of antitrust principles to a collective bargaining relationship would disrupt collective bargaining as we know it."[139] "We agree. The claim before us [in *Williams*], if adopted, would prevent employers in all industries from jointly bargaining hard with a common union."[140]

> We therefore hold that the antitrust laws do not prohibit employers from bargaining jointly with a union, from implementing their joint proposals in the absence of a CBA, or from using economic force to obtain agreement to those proposals. *What limits on such conduct that exist are found in the labor laws.*[141]

The *Clarett* appeals court, echoing *Williams*, noted "that the players' antitrust claims were inconsistent with federal labor law because they imperiled the legitimacy of multi-employer bargaining . . . ."[142]

B. The Second Circuit's "Second Look" at the Exemption

The Second Circuit in *Clarett* began its analysis[143] with the following assumption: "The Supreme Court has never delineated the

136. Brown v. Pro Football, Inc., 518 U.S. 231, 248 (1996).

137. *Id.*

138. *Williams*, 45 F.3d at 692-93 (agreeing with Powell v. Nat'l Football League, 930 F.2d 1293 (8th Cir. 1989)).

139. *Id.* at 693.

140. *Id.*

141. *Id.* (emphasis added).

142. Clarett v. Nat'l Football League (*Clarett III*), 369 F.3d 124, 136 (2d Cir. 2004).

143. *Id.* at 130. "The non-statutory exemption has been inferred 'from federal labor statues, which set forth a national labor policy favoring free and private collective bargaining; which require good-faith bargaining over wages, hours, and working conditions; and which delegate related rulemaking and interpretive authority to the National Labor Relations Board.'" *Id.* (quoting Brown v. Pro Football, Inc. 518 U.S. 231, 236 (1996)).

precise boundaries of the exemption . . . ."[144] In that vacuum, the Second Circuit boldly formulated an alternative theory[145] in contrast to the Eighth Circuit's semi-classic interpretation of the exemption in *Mackey*,[146] which did not allow the exemption to be foisted on the union on the grounds that their weak position precluded effective collective bargaining.[147] Judge Lay developed a three-part test: He would allow immunity when the restraint affects only the parties to the agreement, when it is a mandatory subject, and when the agreement is a product of bona fide arm's length negotiation.[148]

> In conclusion, although we find that non-labor parties may potentially avail themselves of the non-statutory labor exemption where they are parties to collective bargaining agreements pertaining to mandatory subjects of collective bargaining, the exemption cannot be invoked where, as here, the agreement was not the product of bona fide arm's-length negotiations.[149]

Mackey concludes that the exemption is inapplicable if "the agreement was not the product of bona fide arm's-length negotiations."[150]

One can certainly effectively argue, as Judge Scheindlin did in *Clarett I*, that there was no bargaining at all over the NFL's three-year out-of-high school rule,[151] let alone the bona fide arm's-length negotiation that Judge Lay called for in *Mackey*.[152] Judge Sotomayor in *Clarett III* avoided the absolute necessity of the requirement of legitimate negotiation by re-defining the parameters of the discussion.[153] Under Sotomayor's view, it is not an antitrust problem, but instead labor law is controlling.[154] Sotomayor indicated that "we [the Second Circuit] found [in *Williams*] that the players' antitrust claims were inconsistent with federal labor law because they imperiled the legitimacy of multi-employer bargaining, 'a process by which employers band together to

144. *Id.* at 131.
145. *Id.* at 130.
146. Mackey v. Nat'l Football League, 543 F.2d 606, 616 (8th Cir. 1976).
147. *Id.*; *see also* CHAMPION, NUTSHELL, *supra* note 25, at 68-69.
148. *Mackey*, 543 F.2d at 623.
149. *Id.*
150. *Id.*
151. Clarett v. Nat'l Football League (*Clarett I*), 306 F. Supp. 2d 379, 396. "[T]he NFL has failed to demonstrate that the Rule evolved from arm's-length negotiations." *Id.*
152. *Mackey*, 543 F.2d at 623.
153. *See* Clarett v. Nat'l Football League (*Clarett III*), 369 F.3d 124, 137 (2d Cir. 2004).
154. *See id.*

act as a single entity in bargaining with a common union.'"[155] In short, the Second Circuit in *Clarett III* held that the fact that the league and the union failed to bargain over the rule did not exclude the rule from the scope of the exemption.[156]

Sotomayor's analysis of the problem in *Clarett* was different than Judge Lay's interpretation in *Mackey*.

> Thus, we need not decide here whether the *Mackey* factors aptly characterize the limits of the exemption in cases in which employers use agreements with their unions to disadvantage their competitors in the product or business market, because our cases have counseled a decidedly different approach where, as here, the plaintiff complains of a restraint upon a unionized labor market characterized by a collective bargaining relationship with a multi-employer bargaining unit.[157]

"Our cases" that counsel "a decidedly different approach"[158] are *Caldwell*, *Williams*, and *Wood*. Moreover, *Clarett III* again distances itself from *Mackey* by indicating that the *Mackey* guideposts do "not comport with the Supreme Court's most recent treatment of the non-statutory labor exemption in *Brown*."[159] "In each case [*Caldwell*, *Williams*, *and Wood*], [the court] held that the non-statutory labor exemption defeated the players' claims."[160] "[The court's] analysis in each case was rooted in the observation that the relationships among the defendant sports leagues and their players were governed by collective bargaining agreements and thus were subject to the carefully structured regime established by federal labor laws."[161] Thus, the court "need only retrace the path laid down by these prior cases to reach the conclusion that Clarett's antitrust claims must fail."[162]

In *Clarett III*, the court observed that "we held that to permit Wood to challenge particular aspects of their agreement on antitrust grounds would 'subvert fundamental principles of our federal labor policy.'"[163] Wood's claim that the CBA prevented him from negotiating directly with individual teams "contravened the principle . . . that once . . .

155. *Id.* at 136 (quoting Nat'l Basketball Ass'n v. Williams, 45 F.3d 684, 688 (2d Cir. 1995)).

156. *Id.*

157. *Id.* at 134 (citing Caldwell v. American Basketball Ass'n, 66 F.3d 523 (2d Cir. 1995); Nat'l Basketball Ass'n v. Williams, 45 F.3d 684 (2d Cir. 1995); Wood v. Nat'l Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987)).

158. *Id.*

159. *Id.*

160. *Id.* at 135.

161. *Id.*

162. *Id.*

163. *Id.* (citing Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 959 (2d Cir. 1987)).

employees . . . unionize and elects . . . representative[s], individual employees—whether in the bargaining unit or not—no longer possess the right to negotiate with the employer for the best deal possible."[164] *Clarett III* incorporates that notion from *Wood*—that it is immaterial whether the "employee" in question is actually in the unit—and synthesizes it as a major component of the Second Circuit's "new" look at the exemption.[165] O. Leon Wood was *about* to become a part of the bargaining unit, whereas Maurice Clarett *wanted* to join the unit, but *could not* because of the NFL's eligibility rule.[166] If there is a distinction, *Clarett III* pays little attention to it.

> We further rejected Wood's contention that the non-statutory exemption did not preclude his challenge because he was not a member of the union when the collective bargaining agreement became effective, observing that new union members often find themselves disadvantaged vis-à-vis more senior union members and that collective bargaining units commonly disadvantage employees outside of, or about to enter, the union.[167]

Judge Scheindlin, on the other hand, noted that "[t]he only thing preventing him [*Clarett*] from achieving that goal [playing in the NFL] is the League's rule limiting eligibility to players three seasons removed from their high school graduation."[168]

Clarett III used *Williams* in its equation to negate Clarett's contention that since the NFL's eligibility rule was "buried" in the NFL's Constitution and By-laws, it was never negotiated in any meaningful sense.[169] *Williams* took a bolder stance, in that the challenged player restraints were unilaterally promulgated after impasse; that is, these restraints "were not encompassed in any effective agreement . . . because the collective bargaining agreement had expired."[170]

> Moreover, in the context of sports leagues, we observed that multi-employer bargaining units serve the additional, important purpose of allowing the teams to establish and demand uniformity in the rules

164. *Id.* at 135 (citing *Wood*, 809 F.2d at 959-60).

165. *Id.* at 135-36 (citing *Wood*, 809 F.2d at 960).

166. *Wood*, 809 F.2d at 960.

167. *Clarett III*, 369 F.2d at 135-36 (citing *Wood*, 809 F.2d at 960).

168. Clarett v. Nat'l Football League (*Clarett I*), 306 F. Supp. 2d 379, 382 (S.D.N.Y. 2004).

169. *Clarett III*, 369 F.3d at 136 (citing Nat'l Basketball Ass'n v. Williams, 45 F.3d 684, 693 (2d Cir. 1995)).

170. *Id.* (citing *Williams*, 45 F.3d at 686).

> necessary for the proper functioning of the sport. Second, we found that legality of conduct undertaken in the course of negotiations over a collective bargaining agreement is an issue committed to the specialized knowledge of the National Labor Relations Board, for which federal labor law provides a "soup-to-nuts array of rules and remedies."[171]

The *Clarett* appeals court continued to manipulate *Williams* and postulated that to double-police the same conduct by the antitrust laws would disrupt the NLRB's "remedial scheme."[172]

The final piece in Judge Sotomayor's puzzle was the Second Circuit case of *Caldwell*, decided on September 21, 1995.[173] "Jumping Joe" Caldwell "alleged that the teams consequently agreed among themselves, in violation of the antitrust laws, that he should be fired and then blacklisted from professional play."[174] Although the district court did not see the necessity of referring "whatsoever" to the CBA since the exemption was inapplicable "because the dispute did not implicate a then-existing collective bargaining agreement";[175] however, the Second Circuit in affirming the district court's decision held "that the non-statutory exemption defeated Caldwell's claims."[176]

Clarett III incorporated *Caldwell's* reasoning that Caldwell's claims "insofar as they concerned the 'circumstances under which an employer may discharge or refuse to hire an employee,' involved a mandatory bargaining subject."[177] "Drawing upon our discussion . . . in *Williams*, we then observed that the legality . . . of his [Caldwell's] treatment did not become a question of antitrust law simply because the

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171. *Id.* (quoting *Williams*, 45 F.3d at 693) (citation omitted).

172. *Id.*

173. Caldwell v. Am. Basketball Ass'n, 66 F.3d 523, 523 (2d Cir. 1995).

174. *Clarett III*, 369 F.3d at 136 (citing *Caldwell*, 66 F.3d at 526).

175. *Caldwell*, 66 F.3d at 528, n.1.

> The district court in the instant case held that the nonstatutory labor exemption did not apply to appellees because the dispute did not implicate a then-existing collective bargaining agreement. Noting that Caldwell's suspension "was not predicated on the suspension provisions of the Collective Bargaining Agreement [first entered in 1972] or the Association By-laws," the district court stated that "this controversy may be entirely resolved without any reference whatsoever to the Collective Bargaining Agreement." National Basketball Ass'n v. Williams, has since applied the nonstatutory exemption in circumstances in which no collective bargaining existed, as did Brown v. Pro Football, Inc., which held that the nonstatutory exemption applies whenever there is a collective bargaining relationship regardless of whether a collective bargaining agreement is in force.

Id. at 528-29, n.1.

176. *Clarett III*, 369 F.3d at 137 (citing *Caldwell*, 66 F.3d at 527).

177. *Id.* (quoting *Caldwell*, 66 F.3d at 529).

'employers acted jointly in refusing employment.'"[178] *Clarett III* continued that "[b]ecause such [employment] issues are remediable under labor law [in *Caldwell*], we concluded that the non-statutory exemption applied,"[179] and that conclusion fairly states the basic presumption in the Second Circuit's logic in all four cases (*Clarett III*, *Wood*, *Williams*, and *Caldwell*) that "employment decisions" must *only* be remediated by the labor laws.[180] Therefore, the non-statutory labor exemption is prima facie applicable in all comparable cases. In its reasoning, the only way to hold otherwise would be to create an unprecedented sports exception: "We, however, follow the Supreme Court's lead in declining to 'fashion an antitrust exemption [so as to give] additional advantages to professional football players . . . .'"[181]

V. CONCLUSION

"[T]he Supreme Court's treatment of the non-statutory exemption in [Brown] gives [no] reason to doubt the authority of our prior decisions in *Caldwell*, *Williams*, and *Wood*."[182] The *Clarett* appeals decision concluded "that our prior decisions in this area fully comport—in approach and result—with the Supreme Court's decision in *Brown*, we regard them as controlling authority."[183] *Clarett III* posited that the rules governing draft eligibility in the case of Maurice Clarett were similarly exempted on the basis of the three earlier Second Circuit cases [*Caldwell*, *Williams*, and *Wood*], as well as the Supreme Court's decision in Brown, that dealt with professional sports rules involving practices that directly affect wages, hours, or working conditions.[184]

The beauty of the Second Circuit's school of thought on the non-statutory exemption is that it effectively manipulates the three earlier decisions in *Caldwell*, *Williams*, and *Wood* to strengthen the weakness of *Clarett III*, which is that the NFL's eligibility rule arguably does not affect mandatory subjects of collective bargaining (e.g., wages, hours, and working conditions).[185] *Caldwell* described a mandatory subject as "the circumstances under which an employer may . . . refuse to hire an

178. *Id.* (quoting *Caldwell*, 66 F.3d at 529).
179. *Id.*
180. *Id.*
181. *Id.* at 143 (quoting Brown v. Pro Football, Inc., 518 U.S. 231, 249 (1996)).
182. *Id.* at 138.
183. *Id.*
184. *See generally id.* at 134-38.
185. *Id.* at 138.

employee."[186] But remember Judge Scheindlin's major sticking point: "Nowhere is there a reference to wages, hours, or conditions of employment. Indeed, the Rule makes a class of potential players *unemployable*."[187] Sotomayor trumps Scheindlin with the proffered maxim that "[t]hough tailored to the unique circumstance of a professional sports league, the eligibility rules for the draft represent a quite literal condition for initial employment and for that alone might constitute a mandatory bargaining subject."[188]

The overriding thrust of the "Second Circuit School" is the preeminence of labor laws over antitrust law in deciding the legality of player restraint mechanisms in professional sports. *Clarett III* poses the question in this manner: "The issue we must decide is whether subjecting the NFL's eligibility rules to antitrust scrutiny would 'subvert fundamental principles of our federal labor policy.'"[189] The court answers "that it would and that the non-statutory exemption therefore applies."[190] *Mackey's* three-prong test[191] is, therefore, effectively side-stepped or at least seriously marginalized.[192]

186. Caldwell v. Am. Basketball Ass'n, 66 F.3d 523, 529 (2d Cir. 1995).

187. Clarett v. Nat'l Football League (*Clarett I*), 306 F. Supp. 2d 379, 393 (S.D.N.Y. 2004).

188. *Clarett III*, 369 F.3d at 139.

189. *Id.* at 138 (quoting Wood v. NBA, 809 F.2d 954, 959 (2d Cir. 1987)).

190. *Id.*

191. Mackey v. Nat'l Football League, 543 F.2d 606, 614 (8th Cir. 1976).

192. *Clarett III*, 369 F.3d at 133.

> Specifically, the district court found that the rules exclude strangers to the bargaining relationship from entering the draft, do not concern wages, hours, or working conditions of current NFL players, and were not the product of bona fide arm's-length negotiations during the process that culminated in the current collective bargaining agreement.

Id. (citing *Clarett I*, 306 F. Supp. 2d at 395-97). Notwithstanding the finding of the district court, the court then elaborated on its own disapproval of the *Mackey* test. *Id.* at 133-34.