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ECONOMIC REALITIES & LEGAL ISSUES OF PROFESSIONAL ATHLETES

Marc Edelman*

One of the most colorful quotes in all of sports comes from retired Tampa Bay Buccaneers linebacker Warren Sapp, who once said that NFL players are “playing a kid’s game, getting [paid] a king’s ransom.” This quote has become a favorite of those in the media who wish to demonize young professional athletes for their high salary demands. However, while this quote may accurately depict Warren Sapp’s feelings, it does not depict life for all professional athletes. Indeed, many professional athletes have far more at stake than a kid’s game. And, most are earning quite a bit less than a king’s ransom.

Today I am going to discuss the life and financial status of the typical professional athlete—illustrating how multi-millionaire celebrity athletes are the exception to the rule, and how even the wealthiest of professional athletes have made big sacrifices to earn their paychecks. Then, I am going to talk about how the U.S. legal system, over the second half of last century, has played an important role in improving the living conditions for professional athletes of all economic statuses. Finally, I will conclude my talk by discussing how during the past several years there have been some new legal challenges for professional athletes that threaten to reverse the trend of their improving financial conditions.

THE TYPICAL PROFESSIONAL ATHLETE

Even if you accept on face value Warren Sapp’s quote about professional athletes being paid a “king’s ransom” to play “a kid’s game, the

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way the quote is used by the media can be misleading at best. In reality, professional athletes are entertainment professionals – not mere participants in a childhood activity. Most professional athletes make great sacrifices for their jobs. Many do not get to live in their home cities. Most do not get to sleep in their own beds. They are constantly traveling. They have limited time with their families.

Professional athletes also have relatively short careers. In some cases, they assume extreme medical risks to have these careers. Take, for example, professional athletes in the sport of football. In recent years, we have come to understand that these athletes are at far elevated risks of concussions, which may correlate with depression and dementia.\textsuperscript{2} Is it really a kid’s game if, down the road, you have a much higher chance of dementia as a result of your occupation? And, is it really surprising that professional athletes demand higher salaries to offset these later-in-life risks?

Switching gears now to the frequent portrayal of athlete pay, the realities also may surprise you. When we think about athlete pay, we often think of players such as Lebron James and Alex Rodriguez, who make top dollar in their respective sport. However, Lebron James and Alex Rodriguez represent the industry exceptions and not the rule. Thus, much as Jennifer Aniston’s annual salary does not negate one’s image of the struggling actress, LeBron and A-Rod’s paychecks shouldn’t create a misperception that all pro athletes are multimillionaires.

Forget for a moment the media perception of pro athletes and think about the pro athletes you may have met in day-to-day life - minor league baseball players who are travelling from city to city on buses, or fringe basketball players debating whether to play for a salary of only $30,000 a year in a U.S. developmental league. Professional athletes include those lacrosse players, wrestlers, and women’s basketball players who are working regular jobs in the off-season to pay the rent. They include golf and tennis players who may need to take out loans just to afford to travel on their upcoming tour. They may even include students sitting next to you in class, who recognize that even after their athletic career is done, they will need a way to make a livelihood.

No conversation about professional athletes’ economic status would be complete today without talking specifically about Jeremy Lin. Indeed, he’s been on the cover of \textit{Sports Illustrated} two weeks in a row.\textsuperscript{3}

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Part of the reason why Jeremy Lin’s recent success has gotten such huge national attention is because he is on the crux of two worlds—stardom, and that of the more traditional professional athlete. As you probably know, before Jeremy Lin’s miraculous past few weeks, he was living on his brother’s couch on the Upper East Side in New York, hoping every day for a chance to prove his worth to the Knicks in order to avoid a return to the NBA Developmental League salary of nearly $30,000 per year. It now looks as if Jeremy Lin’s hard work and persistence has paid off, as the Knicks have indicated plans to keep him for the season and Jeremy has been offered some meaningful sponsorship opportunities. But what if the Knicks starting point guard Baron Davis had come back from his injury a few weeks earlier, before Jeremy Lin’s breakout game? Odds are, Jeremy Lin would still be sleeping on somebody’s couch, and he would still have one of the lowest annual salaries of any member of his Harvard University graduating class.

However, it’s not Jeremy Lin who has worked hard for his salary. Even LeBron James deserves his salary just as much as any entertainer in America enjoys theirs. We forget sometimes, LeBron hasn’t become rich simply because he won some lottery. Rather, he worked incredibly hard to become among the best in the world at what he does. And in our free market economy, those at the top of their field frequently earn ‘1%’ salaries. In a way, it is odd that Americans overall seem to recognize that elite actors and entertainers deserve super-high pay for their accomplishments, but then look at the equation very differently when it comes to athletes. Perhaps this is in part due to the spin placed on these salaries through the media by the even wealthier pro sports team owners.

In addition, it is also worth noting that when compared to other entertainers, professional athletes may actually face far greater obstacles—further justifying the pay of the select few who make it to the top. One additional obstacle for professional athletes is the short duration of their careers. Another obstacle is the way in which the structure of their industry is based. In professional sports, you generally have one choice of an employer in this country. If an athlete is signed by an NBA team, he cannot work on a premier level for anyone else other than the NBA team that signs him. The National Basketball Development League (NBDL) has very little money and is owned by the NBA. This makes life as a professional athlete in many ways even more challenging than that of a singer or actor.
THE FINANCIAL STATUS OF PROFESSIONAL ATHLETES TODAY VERSUS THE PAST

Of course, as compared to other times throughout history, professional athletes of today have it far better than ever before. For instance, more than 100 years ago, baseball actually had a salary cap—most people don’t know that. In addition, in most sports, when a team signed a player, that team had the option to renew that player’s contract perennially, sometimes without even offering a raise. There was no free agency.

Beginning in the 1960s, however, successful use of three areas of law greatly improved the rights of players: antitrust law, labor law, and right of publicity law. In the area of antitrust law, cases involving primarily football players—and later involving basketball players—opened the doors for improving freedom of movement, as well as player salaries. Antitrust law was used most powerfully in the late ’60s and ’70s to overturn league-wide collusive agreements, such as league drafts and reserve clauses that held players to their same team for their entire careers.4 Even age or education requirements that were not collectively bargained were successfully challenged during this time, in cases such as Spencer Haywood v. National Basketball Association.5

Likewise, in the area of labor law, professional athletes became highly successful at forming unions during the late 1960s and 1970s. By forming these unions, the players obtained the power to collectively bargain for better terms of employment. Unionization and labor negotiation has been especially important to Major League Baseball players because their league enjoys a limited exemption from antitrust law that other leagues do not. Thus, labor negotiation has been the primary way for MLB players to obtain higher salaries and free agency rights. Meanwhile, for football and basketball players, unionization has served as a double edged sword because, by unionizing, these athletes trade certain antitrust rights for labor rights. Nevertheless, unionized football and basketball players likely retain the ability to de-unionize at any time and re-invoke some of their antitrust law rights. The NFL players union used this strategy effectively in their late 1980s labor negotiations, and the NFLPA and NBPA briefly attempted it in their most recent round of negotiations.

4. See, e.g., Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978) (finding NFL draft illegal under Section 1 of the Sherman Act); Mackey v. Nat’l Football League, 543 F.2d 606 (8th Cir. 1976) (finding rule that undermined NFL free agency illegal under Section 1 of the Sherman Act).

Lastly, the emergence of state law publicity rights during the past half century has given professional athletes the ability to control the use of their likenesses, as well as the ability to make money by selling their own likenesses to third parties. These rights were first recognized by the U.S. Court of Appeals for the Second Circuit in the case *Haelan Laboratories v. Topps Chewing Gum*—a case involving two disputing baseball card companies. Today, professional athletes sell these rights to third parties, either collectively or on an individual basis. Revenue from group licensing arrangements are then shared equally by all of the players in the league, thus making this revenue stream especially valuable to the fringe major leaguer.

To put it into perspective just how valuable publicity rights are for athletes that play on the highest professional ranks, Electronic Arts (EA Sports), the maker of the “Madden” NFL videogame series, paid between $25 million and $30 million last year to NFL players in order to use their names and likenesses in these videogames. I am not sure how much of that the players’ association holds onto for overhead and fees. However, I would have to guess that this contract alone, even after union costs and fees, places somewhere between $10,000 and $15,000 in each player’s pocket. That money’s especially significant to those earning close to the league minimum.

**How Three Recent Court Decisions Could Hurt the Status of Tomorrow’s Professional Athletes**

So, it is certainly true that things have gotten far better for professional athletes over the past fifty years. However, it is not altogether clear that things will stay this way.

The 1960s, 70s, 80s and 90s brought many favorable rulings for professional athletes. Yet, three decisions since then lead to rational fear that the pendulum may be moving back in the opposite direction, in favor of ownership and large corporations.

**Fraser v. Major League Soccer**

In the area of traditional antitrust law, the case of greatest concern to professional athletes is most likely *Fraser v. Major League Soccer.* The holding of that case calls into question the ability of even non-unionized professional athletes to benefit from antitrust law in leagues

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6. *Haelan Labs. v. Topps Chewing Gum,* 202 F.2d 866, 868 (2d. Cir. 1953) (“[A] man has a right in the publicity value of his photograph . . . . Whether it be labelled [sic] a ‘property’ right is immaterial; for here, as often elsewhere, the tag ‘property’ simply symbolizes the fact that courts enforce a claim which has pecuniary worth.”).

7. See *Fraser v. Major League Soccer,* L.L.C., 284 F.3d 47 (1st Cir. 2002).
where many players come from overseas and where there are opportunities for Americans to compete abroad.

The *Fraser* case specifically involved Major League Soccer players that wanted to challenge restraints on salary and free movement in the league under antitrust principles, much as players had done in the ‘60s and ‘70s in football and basketball. However, unlike in the football and basketball cases of the 1960s and 70s, the court in *Fraser* ultimately upheld a jury’s finding that the players’ antitrust suit could not proceed because the plaintiffs failed to show that the Major League Soccer teams collectively exercised power over any relevant player market.

While no other professional sports labor market is nearly as international as men’s professional soccer, the *Fraser* holding nevertheless opens the door for professional sports leagues, such as the National Basketball Association and the National Hockey League, to attempt to defend labor-side antitrust suits based on this same argument of lack of market power. For example, the NBA teams may try to argue that, based on *Fraser*, they too collectively lack market power due to the fact that an increasing number of their players come from overseas, and American born players—even some that have received NBA offers—sign in Greece, Italy, or other foreign countries, perhaps even including China.

**Brady v. National Football League**

With respect to labor law, a recent case that may hurt professional athletes’ bargaining power, at least to a limited degree, is *Brady v. Nat’l Football League.* In that case, which emerged out of a labor-side antitrust suit the same way *Fraser* did, the U.S. Court of Appeals for the Eighth Circuit created some doubt as to whether a players’ union may decertify and then bring an antitrust suit to entirely enjoin a league-wide lockout. The court in *Brady* said ‘no’ because even presuming the union had properly decertified, the matter still related to an ongoing labor dispute and thus the court could not issue an injunction pursuant to labor law’s Norris-LaGuardia Act.

The *Brady* decision did not altogether close the door to the players’ decertification strategy. Indeed, it seemed to leave open the possibility that the players could decertify and then bring suit seeking monetary damages against the league-wide lockout by claiming it to be a form of group boycott. The *Brady* decision also skirted the issue of whether certain NFL players—those that were either rookies or not

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under contract—could have obtained a narrower injunction against the lockout without violating the Norris-LaGuardia Act. Nevertheless, the Brady case made clear that, at least in the Eighth Circuit, a players associations’ threat to decertify and then bring suit seeking to enjoin a league-wide lockout isn’t going to fly. So, professional athletes have to remain fearful of the risk of lockouts.

Hart v. Electronic Arts

Finally, in the area of right of publicity law, the courts in several recent cases have attempted to cut away at these rights by broadly defining free speech that trumps publicity rights when balanced against the First Amendment. Of these cases, the one that holds the greatest direct relevance to professional athletes is the very recent case from a federal district court in New Jersey, Hart v. Electronic Arts. The Hart case calls into doubt whether videogame makers ever have to pay athletes for the use of their likenesses in sports games.

The Hart case arose when EA Sports, which felt that it was unable to directly pay college football players, went forward without these athletes’ permission and made NCAA videogames that featured player avatars that looked just like the real-life players in terms of their skin color, hair style, height, weight, skill level, and even headbands and wristbands. The only thing EA Sports did not do was use the players’ actual names. However, a game feature allowed gamers to download those too.

Nevertheless, the court in Hart ruled for the NCAA, finding that the First Amendment trumped the college athletes’ publicity rights. Important to the court’s decision was that game designers added stadium backgrounds and other elements to the game, beyond just player avatars, which made the game even more realistic.

It should be noted that Hart was merely a district court decision, and moreover only the decision of one district court. However, the case’s outcome represents an ongoing trend among many courts of cutting away at publicity rights based on First Amendment grounds.

Coming out of the Hart decision, both amateur players and professional players—especially those in the NFL, NBA, MLB, and NHL—have to fear that if this case gets upheld and ultimately becomes the law of the land, it will become so much easier for videogame makers and other companies to get around having to pay players for their publicity rights. In essence, this might set professional athletes in this

area back to the pre-1950s era when there was little, if any, group licensing money available to them.

THE FINANCIAL STATUS OF PROFESSIONAL ATHLETES TODAY VERSUS THE PAST

For the past twenty minutes, I have attempted to illustrate how, despite Warren Sapp’s colorful metaphor, not all professional athletes reasonably feel as if they are making a “king’s ransom” to play a “kid’s game.” For some professional athletes, earning more than $30,000 per year would be a step in the right direction. Meanwhile, for others like Jeremy Lin, they know the success and high pay may be ephemeral. So, they need to save some of the money they make—more so than those in other lines of work.

While antitrust law, labor law, and the right of publicity have greatly increased the standard of living for athletes across the board—and especially those in the top rungs of their profession—it is possible that some of these legal benefits achieved by professional athletes over the past half century may be slowly crumbling.

Many of the legal issues discussed remain undetermined today, but will greatly affect the future financial status of our professional athletes. For example, will courts continue to find that, in the antitrust sense, the labor market for professional athletes in most sports is national? Or, will leagues like the NBA and NHL be able to successfully argue that today they compete against foreign leagues in a worldwide marketplace?10 Also, in labor negotiations, will players unions still have as credible a threat to decertify in the wake of Brady v. National Football League?11 Finally, to the extent that the players need or want a secondary source of income, will the ability to sell their rights of publicity still avail itself to the same degree, in light of recent court decisions such as Hart v. Electronic Arts?12 Or, will videogame makers just begin to use professional athletes’ likenesses free of charge and argue First Amendment protection?13

These are the issues that currently are at play within sports law as they relate to the financial status of professional athletes. The answers to these questions will largely shape the financial status of professional athletes in the years that lie ahead.