

# Pro athletes ought to bargain outside federal court, legal scholar says

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Labor law expert Michael LeRoy says as long as federal judges continue to enable NFL players to bargain in the courthouse, and not at the traditional bargaining table, collective bargaining will be a stunted institution in professional sports. Credit: L. Brian Stauffer

New research by a University of Illinois law and labor expert shows that in labor disputes between professional athletes and owners, courts have consistently failed to maintain a clear separation between antitrust and labor law.

While [players](#) in the three major sports – football, baseball and basketball – have pursued a two-pronged approach of collective bargaining and antitrust litigation to eliminate owner-imposed constraints on labor market competition, Michael LeRoy says that the institution of collective bargaining should not be subordinated to antitrust law.

"The place for [professional athletes](#) to bargain the terms and conditions

of employment is at the collective bargaining table, not the federal courthouse," said LeRoy, a professor of law and of labor and employment relations at Illinois.

"Collective bargaining is intended to allow parties to adjust their relationship through negotiation, even though it's rare that both parties have equal bargaining power. But as long as federal judges enable players to bargain in the courthouse, and not at the traditional bargaining table, collective bargaining in professional sports will be a stunted institution."

According to LeRoy, labor law is designed to be process-oriented, not result-oriented.

"If the union wins, which has been baseball's experience, then that's the way it goes," he said. "If the owners win, as has been the case with the NFL, then the players just have to accept it."

But that hasn't been the case, as the courts have sided with the players in 57 percent of antitrust suits. In the current NFL labor quarrel, the advantage for the players in fleeing from the bargaining table to the shelter of federal courts is that they can continue to work, with salaries and bonuses, while they litigate, LeRoy says.

"And a lot of that is not so much a function of the law but a function of what a particular court says the law is," LeRoy said. "If this litigation were not in the district court of Minnesota, which has a track record of favoring the players, we could be in a much different place right now. Another court – say, the eastern district of Virginia, just across the Potomac from D.C. – might have a more owner-friendly way of interpreting it. So the players certainly did well when they went court-shopping."

Professional sports are a major industry, with collective bargaining determining how the \$21 billion yearly bounty is divided among players and owners. Since players utilize collective bargaining only when they have no other choice, labor peace is of vital importance for all parties.

"Players in all the sports fear the cost of labor disputes, not because they lack fortitude, but because their short professional careers magnify any potential losses of income due to strikes or lockouts," LeRoy said. "In the current NFL dispute, when U.S. District Judge (Susan Richard) Nelson talks about 'irreparable harm,' she's focusing on that very short window of opportunity that the vast majority of football players have to ply their trade. For baseball players, it's obviously not that short. But for football players, they have (careers that last an average of) 3.5 years to earn their money."

Professional football players have twice decertified their union and turned into a professional association to pursue antitrust litigation. By contrast, professional baseball players have held fast and walked off the job five times in the past 22 years to secure gains at the bargaining table.

"What doesn't get discussed too much is that baseball has this odd history," LeRoy said. "Nearly 90 years ago the Supreme Court ruled that baseball was not interstate commerce, meaning that it's exempt from antitrust law. The only way for players to get anything from owners was to form a union and leverage their power as workers to the max, which means going on strike and toughing it out, over and over again. So the MLB Players Association has really built up its collective bargaining muscles, if you will, and has gotten good at it, institutionally speaking."

But for NFL players, it's a different story.

"The labor peace of the last 18 years in the NFL has occurred largely thanks to the 1993 settlement, after which the players association

reconstituted itself as a union and entered into a new collective bargaining agreement with the league. For the players, that opened the door to unrestricted free agency; for the owners, unprecedented growth both in revenue and popularity. But if you took away that settlement, the question becomes can the NFL players bargain on the strength of how unified they are?"

Union solidarity for NFL players is mostly artifice – about as effective as a fake punt attempt, LeRoy says.

"There's an enormous difference between the interests of the star players – Peyton Manning, Tom Brady and Drew Brees – and the rank-and-file players, which makes it hard for a union to hold all that together and make everyone happy," he said. "It's convenient for the union to say, 'We'll take this process as far as we can.' But when things start to hurt, they have the safety net of being to snap their fingers and disband through decertification, like we saw in March. So why even have a player's union if that is how you're going to behave? Well, because it allows them to game the collective bargaining and labor-law system."

But just because the NFL players association decertified and is now a professional association doesn't mean they won't engage in what LeRoy calls "union-like behavior and activities."

"Don't be surprised when you start hearing about how the former head of the NFL players association has advised 'non-members' to agree to licensing deals with the league, or has inquired about salary information," he said. "Don't be surprised when you hear about a high-powered agent acting like a surrogate union representative by bargaining and sharing contract information. In the aftermath of past labor disputes, the NFL has gone to court and complained about this type of union-like behavior to no avail, so I'll think we'll start to see it again this summer."

Provided by University of Illinois at Urbana-Champaign

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