

ELLER EXHIBIT 1

Eller, et al. v. National Football League, et al.
Civil No. 11-CV-748 (SRN/JJG)

Wednesday, April 6, 2011, 9:30 a.m.

Hearing on Plaintiffs' Motion for a Preliminary Injunction

Antitrust Violation

- ▶ *American Needle*—NFL and its teams can conspire to violate antitrust laws
- ▶ **Group Boycott/League-Wide Lockout**
 - ▶ Concerted foreclosure of entire market
 - ▶ Monopoly-Competitors and Players
 - ▶ *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (1990), bar association members colluded to stop providing legal services unless District of Columbia gave them price concessions
- ▶ League’s “Boycott Insurance”

Antitrust Violation-Likelihood of Success

- ▶ “Among the practices which have been deemed to be so pernicious as to be illegal *per se* are group boycotts and concerted refusals to deal.” — *Mackey*, 543 F.2d at 618
- ▶ Concerted refusals to deal- “an agreement by two or more persons not to do business with the other individuals, or to do business with them only on specified terms” – *Id.*
- ▶ Group Boycott- generally connotes ‘a refusal to deal or an inducement of others not to deal or to have business relations with tradesman’” – *Id.*

Antitrust Violation-Likelihood of Success

- ▶ “The unique nature of the business of professional football renders it inappropriate to mechanically apply per se illegality rules....” *Mackey*, 543 F.2d at 619.
- ▶ Rather the appropriate inquiry “is the reasonableness of the restraint under the circumstances” – *Id*

Antitrust Violation-Likelihood of Success

- ▶ “Importantly, this holding [on the nonstatutory labor exemption in *Powell*] does not entail that once a union and management enter into collective bargaining, management is forever exempt from the antitrust laws....” – *Powell v. NFL*, 930 F.2d 1293, 1303 (8th Cir. 1989).
- ▶ The League concedes that the Sherman Act could be found applicable, depending on the circumstances, if a challenged restraint related to a permissive rather than a mandatory subject of bargaining; if the restraint had been imposed on employees outside of the collective bargaining process **or had not originally been proposed in good faith**; or if the affected employees ceased to be represented by a certified union. -*Powell*, 930 F.2d at 1303 n. 12 (emphases added):
- ▶ “We hold that restraints on competition within the markets for players’ services fall within the ambit of the Sherman Act” - *Mackey*, 543 F.2d at 618.

Likelihood of Success— Damages Cases Against League Restraints

- ▶ **Smith** (D.C. Cir. 1978) (NFL College Draft)
- ▶ **Kapp** (ND Cal 1974) (NFL's Rozelle Rule, draft and other rules)
- ▶ **L.A. Coliseum** (9th Cir. 1986) (NFL rule limiting movement of member clubs)
- ▶ **NcNeil** (D Minn 1992) (Jury verdict against NFL for Plan B rules)

Likelihood of Success—Injunctions Against League Restraints

- ▶ **Bowman** (D Minn. 1975) Boycott by NFL against hiring of football players who played for WFL
- ▶ **Linesman** (D Conn 1977) World Hockey Association eligibility rule prohibiting persons under 20 from playing professional hockey
- ▶ **Denver Rockets** (CD Cal 1971) American Basketball Association eligibility rule that players could not be drafted until they were 4 years out from high school
- ▶ **Mackey** (8 Cir. 1976) NFL's Rozelle rule: team acquiring a player had to compensate the former team even if the player completed his former contract
- ▶ **Jackson** (D Minn 1992) NFL's Plan B (first refusal/compensation) rules
- ▶ **NFLPA** (D Minn 2008) Enforcement of NFL suspension against certain players
- ▶ **Robertson** (SDNY 1975) National Basketball Association's player draft, uniform player contract, reserve clause
- ▶ **White** (D Minn 1993) NFL settlement agreement that includes injunctive relief
- ▶ **White** (D Minn 2011) Injunction hearing ordered re NFL's broadcasting deals

Antitrust Injury

- ▶ **Three Subclasses:**
 - ▶ Rookies
 - ▶ Players
 - ▶ Retirees & Former Players

- ▶ Relaxed requirements for injunctive relief under Section 16 of Clayton Act (*Campos* (8th Cir. 1998))

Irreparable Injury- Balance of Harm

▶ Rookies

- ▶ Anticompetitive draft - April 28-30
- ▶ Loss of opportunity to play and build career
- ▶ Issue of accommodating successive drafts if no games played in 2011

▶ Retired/Former Players

- ▶ Loss of Bell/Rozelle Retirement Plan (which DoL has deemed “endangered”) in the absence of game revenues
- ▶ Effects on other health/retirement benefits subsidized by team contributions
- ▶ Endangerment of Hall of Fame program

Choice and Risks

▶ Union

- ▶ Collective Bargaining
- ▶ Renunciation of Collective Representation and Pursuit by interested classes of Claims of Illegal Restraint

▶ The League

- ▶ Collective Bargaining
- ▶ Group Boycott – Antitrust Accountability for Illegal Restraint