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NFLPA Collusion Case: First Salvo?

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The initiation of a collusion case by the NFL Players Association against the league last week will likely add to an increasingly tense relationship between the NFL and the players union regarding their collective-bargaining agreement, legal and industry experts say.

At the same time, the union's charge of collusion in connection with player salaries could hinge on whether the league was motivated by economic factors or by the CBA, which many owners say is too player-friendly.

In a proceeding the NFLPA initiated before NFL Special Master Stephen Burbank last week, the league is alleging that the NFL violated the anti-collusion and anti-circumvention provisions of the CBA when it voted in October to lower the debt ceiling for NFL clubs and the league overall. It's the first collusion case ever brought against the NFL by the NFLPA.

Gary Roberts, who formerly worked as an outside counsel to the NFL, said the action could be an indication of a major change in what for many years has been a peaceful relationship between the NFL and the NFLPA.

"I think you are seeing economic circumstances starting to drive the parties apart," said Roberts, now dean of the Indiana University School of Law-Indianapolis. "This is the first salvo in what is likely to be a long and contentious struggle between the two sides."

The filing of the collusion case comes as there is increasing speculation that NFL owners will opt out of the labor deal early.

The CBA is set to expire after the 2012 season, but club owners can give notice before November that they want to end the labor agreement two years early. If they do opt out, 2010 would be the last year of the deal and the league would be forced to operate that year without a salary cap. The league's debt plan forces clubs to reduce debt in three years and the NFLPA

has asserted there is a link between the expected 2010 uncapped year and the league's debt reduction plan.

"It's no coincidence that this measure has a deadline which comes just before the 2010 league year, when there would be no cap," NFLPA Executive Director Gene Upshaw said in a statement.

Roberts said the case is likely to center on "very complicated financial and market questions."

"There are two major issues here," Roberts said. "Is there a legitimate business reason for the NFL to lower that debt limit? Is their credit in jeopardy if they don't? And what is the impact of this on the free agency market?"

NFLPA officials point to a statement by New Orleans Saints owner Tom Benson, made soon after the NFL voted in October to lower the debt ceiling for teams from \$150 million to \$120 million and to lower the overall league debt by \$1 billion over the next three years. Benson told SportsBusiness Journal, "The union forced this, not us."

Upshaw, in his statement last week, said Benson's comment was "obviously referring to the cost of player salaries and benefits provided for under the CBA."

When the league took the action in October 2007, Commissioner Roger Goodell told reporters it was in reaction to the turbulence in the global credit markets. The league maintained that was the case last week after the NFLPA filed the collusion charge.

"The union's attack on that prudent financial decision, which serves to protect the league's credit ratings and its strong reputation as a borrower, is inexplicable and totally lacking in merit," wrote league spokesman Brian McCarthy, in an e-mail. "The prescribed reduction in the league's overall debt (a phased reduction in an amount up to the equivalent of \$30 million per club) will have no impact on the league's financial obligations to players under the CBA. Those obligations are determined by revenue, not by debt."

Josh Zuckerberg, labor and employment specialist with Pryor Cashman and former National Labor Relations Board attorney for the Manhattan office, said that if an entity, be it a league or a steelmaker, can prove an action is core to its entrepreneurial mission, then the action is exempt under labor law.

"I doubt there is something in their CBA about debt," he said. "It will be asking the arbitrator to make a leap of faith."

If the action does have a labor effect, however, an arbitrator might then agree the two sides should bargain over the impact of such a move, he said.

Also, Benson's comment that the union forced the league to adopt the debt policy could point to motive, Zuckerberg said, and cause an arbitrator to rethink whether the policy is truly outside the labor pact.

The NFL CBA provides that the players union must bring any collusion charge before the NFL special master and not to a state or federal court. Both sides can take depositions under oath and produce expert witnesses, and a trial will be conducted before the special master with live witnesses and evidence, NFLPA outside counsel Jeffrey Kessler said. Once Burbank issues a decision, the losing side can appeal it to U.S. District Judge David Doty. The NFLPA's collusion case is not the first time a sports union has tried to overturn a league's imposition of debt limits.

"The baseball players have attacked the debt limitations, but they were unsuccessful in going after that in arbitration," said Bill Gould, a Stanford Law School professor and former NLRB chairman.

In 1983, the MLBPA brought a case before arbitrator Richard Bloch, alleging that the MLB's 60/40 debt rule, which did not allow clubs to have debt larger than 40 percent of assets, was a violation of the MLB CBA because it limited the amount of money available for MLB clubs to use to pay players' salaries and benefits. But Bloch ruled in 1985 that the MLB debt limit was "designed not as a device for chilling long-term player bargaining, but as an overall test of, and protection against, financial instability."

Gould said a difference in the cases is Benson's comment. Gould said it "suggests motivation, which is the stuff of conspiracy."