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Lawyers reflect on two-tier NFL lockout strategy

Playoffs kick off this month — after NFLPA wins \$4 billion in 2011 lawsuit

BY ROY STROM

Law Bulletin staff writer

With the NFL's first week of the playoffs fully finished, football fans may not recall the labor negotiations that threatened to scrap the 2011 season's planned kick off.

After all, that occurred two full NFL seasons ago. But for a group of Latham & Watkins LLP attorneys who represented the NFL Players Association (NFLPA) in a fast-paced, high-profile lawsuit against the league, the labor fight remains a vivid memory.

And those attorneys said the odds that fans found their Sundays football-free — meaning no playoffs this year — may have ran higher than many realize. The NFL owners, after all, prepared for a two-year lockout, the lawyers said.

"(The lockout) could well have extended throughout the entire 2011 season and into the 2012 season depending on whether or not the owners had sufficient leverage over the players to cause them to break ranks and crumble," said Thomas J. Heiden, a Latham & Watkins' litigation partner.

Heiden, a group of five other attorneys from his firm and

others from Dewey & LeBoeuf LLP represented the NFLPA in a lawsuit that helped bring football back by reducing the NFL's leverage over the players by \$4 billion.

That's how much money the NFL stood to make — regardless if it put on any games in 2011 and 2012 — after it restructured its contracts with TV networks in the years leading up to the lockout.

This article is part one in a two-part series dedicated to the legal fight that helped put an end to the NFL's 2011 lockout that threatened to cancel games to this day.

Part one focuses on the legal theory and court case that led a federal judge to deem the \$4 billion "lockout insurance," as the NFL called it, illegally obtained. Part two explores the NFLPA's strategy to obtain \$400 million worth of more formal lockout insurance.

"Did these two pieces save football?" said David A. Barrett, a Washington D.C.-based Latham & Watkins partner. "I'm not in (Dallas Cowboys owner) Jerry Jones' head. I can't be there. But my sense of it ... is that these two pieces and our ability to get them done had a material impact on ending the lockout."

When DeMaurice Smith started in his role as executive



Thomas J. Heiden

director of the NFLPA in March 2009, Barrett said Smith began to realize the NFL owners seemed poised to stage a lockout in 2011.

Despite NFL Commissioner Roger Goodell's projections of league revenue growing by \$1 billion a year until 2027, Barrett said owners wanted a bigger share.

In an April 2009 meeting between Smith and Barrett, the pair hatched their two-part plan.

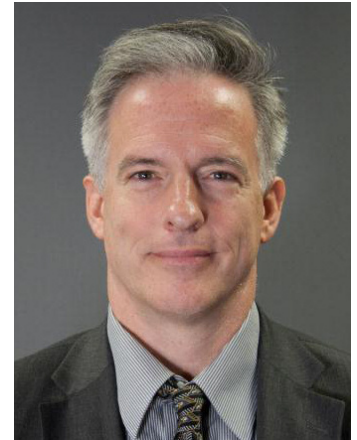
First, they would argue that the \$4 billion in TV broadcast fees the NFL negotiated in the lead-up to the lockout violated the Reggie White settlement agreement with the players, Heiden said. That would lessen the league's financial ability and willingness to continue a two-year lockout.

The Reggie White settlement, reached in a 1994 suit, said the NFL would negotiate TV contracts in good faith on behalf of the players.

"And our allegation was they set out to do precisely the opposite," Heiden said.

He said he presented the NFL's own words describing the \$4 billion to the judge handling the case.

The NFL referred to the \$4 billion as a war chest; it compared the cash to a home equity line; and it threatened to



David A. Barrett

"freeze out Fox" — meaning it would use other TV contracts agreeing to pay the NFL regardless of a season occurring as a way to induce Fox to follow.

For the lawyers, one of the biggest challenges of the lawsuit came from a cramped timeframe for discovery, Heiden said. Opening statements occurred about six months after filing the lawsuit.

That meant when Heiden cross-examined Goodell during the trial, he had not yet deposed him. The lawyers could not discuss the specifics of that cross-examination, but Michael J. Nelson, a Latham & Watkins associate who worked on the case, said it dealt "body blows" to the NFL's case.

"Given the gravity and who (Goodell) was and the success with which we pulled that (cross-examination) off, it will stick with me forever," Nelson said.

It may stick with Goodell, too.

The judge issued an order on March 1, 2011 declaring the NFL violated the Reggie White agreement and hinted he would soon restrict its access to the \$4 billion.

Part one of the NFLPA's strategy proved successful. Part two of the strategy — informing the NFL of the players' own lockout insurance — remained unfinished.

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Lawyers discuss \$400M lockout insurance policy

NFLPA attempts to outmaneuver NFL owners, in the end helps prevent a potential two-year lockout

BY ROY STROM

Law Bulletin staff writer

This is part two in a two-part series on the legal strategy used by the NFL Players Association to help end the NFL's 2011 lockout. The first part ran on Jan. 8.

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In the years leading up to its 2011 lockout, a court ruled that the NFL illegally amassed \$4 billion of what it called "lockout insurance" by renegotiating TV contracts to pay out whether or not players took the field.

Thomas J. Heiden, a partner at Latham & Watkins LLP, made that argument to David S. Doty, a U.S. District judge in Minnesota who agreed in a trial that ended in the NFL Players Association's (NFLPA) favor.

Doty's ruling meant NFL owners likely could not rely on \$4 billion in cash to support them during a two-year lockout that Heiden said they prepared to endure.

What if the NFLPA could create its own war chest? What if an insurance policy existed to pay a portion of the players' contracts week-by-week as the lockout dragged on?

David A. Barrett, a Washington D.C.-based Latham & Watkins partner, said he and NFLPA Executive Director DeMaurice Smith pondered that question at a meeting in April 2009 in Palm Springs, Calif.

"I think the idea was hatched at around midnight," Barrett said.

"And by 5 a.m. ... I was on the phone discussing the concept with (insurance) brokers."

What followed — 20 months of secretly crafting a deal with 17 insurance companies in New York, London and Switzerland before signing a policy worth about \$400 million — resulted in what Barrett called "checkmate" in creating an end to the lockout.

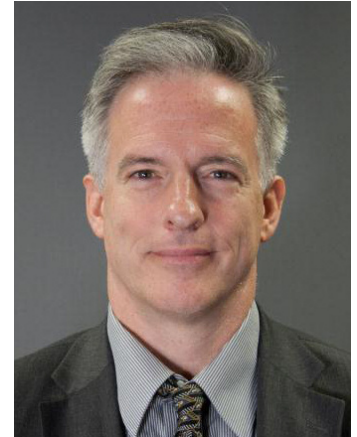
"Once the owners learned that not only would they be \$4 billion short in cash flow, but that the players themselves would have substantial income during the lockout ... their strategy was done," Barrett said.

Creating the insurance policy, though, involved overcoming a series of challenges, he said.

Nothing like the policy existed in the past. It hinged on Smith and the lawyers' ability to convince insurance companies that the NFLPA would win the \$4 billion TV lawsuit.



Thomas J. Heiden



David A. Barrett

And it didn't come cheap. Barrett declined to comment when asked to confirm a reported premium of \$45 million to \$50 million, citing confidentially agreements with the insurance companies.

Drafting the policy terms presented another issue involving "moral hazard," Barrett said.

If the policy paid too much during a lockout, a majority voting block of players earning at or near the league's minimum salary may prefer the guaranteed insurance cash over nonguaranteed NFL contracts, Barrett said.

The people taking out the insurance policy would hold both an incentive to collect it and the ability to make that happen.

Insurance writers, citing fears over moral hazard, don't make deals like that, Barrett said.

But that also created a more nuanced problem: The power of the policy lay in how close it straddled that line. It needed to convince the owners that players may prefer holding out for a better deal rather than taking the field, he said.

The insurance companies and the NFLPA eventually found the sweet spot. They issued the policy, details of which remain under a confidentiality agreement, three

months before Doty made the \$4 billion ruling in the NFLPA's favor.

When Smith unveiled the insurance to the owners, a labor agreement followed within days. Barrett said that proved the policy struck a powerful balance.

"It just goes directly to who will feel the lockout the most," said Garrett S. Long, a Latham & Watkins litigation associate who worked on the case.

"And the owners suddenly realized the players wouldn't be suffering during this lockout quite as much as they anticipated."

With the two-part strategy now complete, Smith, the NFL players and their lawyers helped prevent a possible two-year lockout that could have threatened to scrap even this year's playoff matchups.

"(In 2009) It certainly looked like the owners had a handful of aces and that the players didn't have any high cards at all," Heiden said.

"And DeMaurice Smith, to his credit, looked around and tried to find what high cards he could use in his hand. And I think the gutsy part was that he had the courage and determination to play both of those cards."

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