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The Football Issue

SPORTS LAW PRACTICE GROUP CO-CHAIRS

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About This Issue

Our [last issue](#) focused on soccer, a sport known around the world as football. This issue's focus is also on football — American football. The sport has come a long way since its origins in 19th Century rugby. One of the major challenges facing professional football in the 21st Century is how to address the rights and needs of retired players. As with soccer, Manatt lawyers are at the vanguard of this sports-law issue.

Our first article recounts Manatt's success in obtaining class certification of retired NFL players seeking redress from the league's Players' Association. Our second article then profiles sports union pioneer Marvin Miller and his role in assisting Manatt's class certification efforts on behalf of retired NFL players. These stories set the stage for future developments that will affect the law and business of sports in coming decades.

Manatt's Motion To Certify Class Of Thousands Of Retired NFL Players Is Granted

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OUR PRACTICE

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Pro Football Hall of Fame cornerback Herb Adderley is no stranger to winning. During his 11 seasons in the National Football League Adderley earned five championship rings with the Green Bay Packers (including for victories in Super Bowls I and II) and his sixth with the Dallas Cowboys (in Super Bowl VI). Thanks to an April 29, 2008 ruling that Adderley can represent roughly 3,000 retired players in a class action lawsuit worth more than \$100 million, Adderley can now add one more victory to his list of accomplishments.

On February 14, 2007, Manatt sued the National Football League Players Association ("NFLPA") and its licensing subsidiary, Players Inc., in federal court on behalf of Adderley. Adderley alleged that he and thousands of other retired NFL players were solicited to sign group licensing agreements ("GLAs") with Defendants but received no revenue from the licensing of their names, images, and biographies. The GLAs define Defendants' group licensing program as "programs in which a licensee utilizes a total of six (6) or more present or former NFL player images in conjunction with or on products that are sold at retail or used as promotional or premium items." Adderley also alleged that Defendants breached their fiduciary duty to the retired players by failing to pursue licensing activities on their behalf. After extensive motion practice by Defendants, in March 2008 Adderley sought certification of a class of all retired NFL players who signed GLAs with Defendants during a four-year period.

In his April 29 ruling granting certification, Judge William Alsup of the Northern District of California, called the single-page GLA a "masterpiece of obfuscation" that "raises more questions than it answers." Judge Alsup also noted that "only twice has any licensing revenue been distributed to retired NFL players pursuant to a GLA. Although the retired players who were part of those distributions received varying amounts, defense counsel could give no explanation for how such revenues were divided — except at the 'discretion' of defendants. Other than those two distributions, no retired NFL player has received any licensing revenue from a GLA. Thousands have signed up but without receiving a penny." Even though the GLA promised funds from an escrow fund, Judge Alsup said that it was unclear "whether the escrow account was ever even created by defendants."



Football legend Herb Adderley
and Manatt attorney Ron Katz

Judge Alsup also recognized the overwhelming disparity between the powerful NFLPA on the one hand and the retired NFL players on the other hand: "Under defendants' own depiction of the group-licensing program, retired NFL players are at the complete mercy and whim of the NFLPA."

Noting that the GLA has "thus far proven to be an empty promise," Judge Alsup concluded that all retired players have a common interest in determining their rights under the GLA. "Retired players have a common interest in establishing an entitlement *to something* more than the whim of defendants," he said.

Trial is currently scheduled for September 2008. For questions about this article, or the lawsuit against the NFLPA and Players Inc., please contact [Ronald S. Katz](#) at Manatt, Phelps & Phillips. Click [here](#) for a copy of Judge Alsup's class certification order.

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Former MLBPA Executive Director Marvin Miller Submits Expert Declaration For NFL Retirees Represented By Manatt

By [Ryan S. Hilbert](#)

Former Major League Baseball Players Association ("MLBPA") Executive Director Marvin Miller has submitted an expert declaration against the National Football League Players Association ("NFLPA") and its licensing arm, Players Inc., in the case reported above. One of the issues in the case is whether the NFLPA breached its fiduciary duty by failing to

pursue licensing activities on behalf of retired players. Miller, who served as Executive Director of the MLBPA from 1966 to 1983, recently was ranked by *The Sporting News* as the fifth most powerful person in sports in the 20th century.

Miller's experience with unions and labor issues began long before he was elected to head the MLBPA. After earning his B.S. degree in economics, Miller worked for a number of New York City and federal agencies. During World War II, he served as an economist for the War Production Board and War Manpower Commission, and as a labor management disputes hearing officer for the National War Labor Board. In the post-War period, he was a Commissioner of Conciliation for the U.S. Conciliation Service of the Labor Department and then an organizer/economist/negotiator for the IAM-AFL and the UAW-CIO. In 1950, Miller became associate director of research for the United Steelworkers of America-CIO (later AFL-CIO). Miller remained with the Steelworkers Union for more than 16 years, becoming its chief economist, the assistant to the president and a member of the union's top negotiating team.

Miller was elected Executive Director of the MLBPA in 1966 (narrowly avoiding having Richard Nixon as his General Counsel). At that time, the union — which was created by the owners and not the players — was considered to be weak and ineffectual. Things changed, however, when Miller became the union head. In 1968, he led the committee of players that negotiated the first collective bargaining agreement in the history of professional sports. That agreement recognized the union as the major league baseball players' sole collective bargaining representative; led to large increases in minimum salary and expense allowances; and established a grievance procedure, a safety and health committee, and the right of a player to select his own agent (who, for the first time, would assist the player in his individual salary talks with his employing club).

In 1970, Miller helped players negotiate the right to arbitration to resolve grievances. That breakthrough led to Andy Messersmith and Dave McNally successfully challenging the "reserve clause" before arbitrator Peter Seitz five years later, thereby opening the door to free agency. As a result of Miller's almost 17-year tenure as Executive Director of the MLBPA, the conditions of all major league players' employment were or have been vastly improved.



Marvin Miller (center) flanked by Manatt attorneys Peter Parcher, Noel Cohen, Ron Katz and Ryan Hilbert (from left to right).

One of the linchpins of Miller's success was and is his unwavering belief that all players represented by the union must be treated equally. In a sworn declaration submitted on behalf of Adderley, Miller stated: "I have always believed, and continue to believe, that all members of a sports union must be treated equally because solidarity is a pre-eminent union value." It is because of his focus on equality that Miller did not include retired players in the union, and has been critical of the NFLPA for doing so: "Having a second category of non-voting retired members (as I understand the NFLPA has done) would have created untenable conflicts of interest for me as Executive Director of the MLBPA and for the MLBPA as a whole. For that reason and others, retired players were not solicited to join nor permitted to join the MLBPA."

Miller also believed and believes that the focus on equality should extend to all aspects of a sports union's activities, including its licensing program. Miller states in his declaration that "[t]he group licensing program of the MLBPA when I was its Executive Director provided for an equal share royalty to everyone who was invited to participate. I managed the program in this way in order to promote the solidarity of the union and to avoid conflicts of interest. Also, it was important that every player who played for the same period of time during a season share equally in the proceeds of group licensing, even if a particular player's image was not used. In the event one player was more famous than another and thus more marketable, that player was free to negotiate his own agreement with a potential licensee. I did not think that the MLBPA should intervene in this relationship because to do so would favor one player over another, which I am and have always been firmly against."

Unlike the MLBPA, the NFLPA has solicited retired players such as Adderley to license their names and images as part of its group licensing program. Although Miller understands the economic value the NFLPA receives by doing this, he disagrees with the NFLPA's decision: "In my opinion, [the NFLPA's] combination of active and retired players provides the benefit of greatly increased bargaining power to the NFLPA and to its licensing arm, Players Inc. Even though, on its face, the definition of 'group licensing program' . . . does not distinguish between active and retired player licensing, I understand that very few retired players, if any, have been paid . . . and that no retired player has received an equal share royalty. In my opinion, once the NFLPA invited retired players to participate in its group licensing program alongside active players, it was incumbent upon the NFLPA to treat all of the participants in the group licensing program equally in terms of opportunities, information, revenues and any other aspect of group licensing. I know of no principle of union organization that would permit these two groups of members to be treated differently."

Miller is not the only one to have raised concerns about the NFLPA's treatment of retired players. In a 2007 poll conducted by *SportsBusiness Journal*, 23.5% of the respondents said that compensation for retired players was the biggest challenge facing the NFL in the year ahead. In the past few weeks, there also have been numerous stories about the potential ouster of long-time NFLPA head Gene Upshaw. Whether and to what extent Upshaw's actions with respect to retired players may have influenced the calls for his ouster is unknown.

A copy of Miller's entire declaration, which is publicly available, can be found [here](#). For questions about this article, or the lawsuit against the NFLPA and Players Inc., please contact [Ronald S. Katz](#) at Manatt, Phelps & Phillips.

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