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BACKFIELD IN MOTION

A behind-the-scenes look at the legal wrangling that may have helped bring last year's NFL lockout to an end. *By* DREW COMBS

Illustration by DARREN GYGI

THE NATIONAL HOCKEY League seems poised to lockout its players if the two sides aren't able to reach a new collective bargaining agreement by September 15. Both the players and the owners can look to recent labor disputes in the National Basketball Association and the National Football League for guidance. But hockey players may want to pay particularly close attention to the maneuverings of NFL players, who didn't just depend on the negotiation process and litigation. Behind the scenes, the National Football League Players Association (NFLPA) relied on legal handiwork of a more unconventional nature in the labor dispute that led to a 132-day lockout. Latham & Watkins partner David Barrett (pictured), working on behalf of the NFLPA, put together a first-of-its-kind insurance policy that would pay players if a work stoppage led to the cancellation of games.

The idea came from an April 2009 brainstorming session between Barrett and DeMaurice Smith, the executive director of the NFLPA, while both were attending a retired NFL players conference in Palm Springs. Smith and Barrett were old work buddies: Smith, who'd joined the NFLPA in March 2009 from Patton Boggs, had been a partner at Latham & Watkins in Washington, D.C. The duo had worked on several toxic tort cases together and had stayed in touch over the ensuing years. (Smith has referred a substantial amount of union work to Latham. During a 12-month period ending in February 2011, Latham was the

union's top law firm biller at $3.1 million, according to U.S. Department of Labor filings.)

Smith and Barrett, an insurance recovery partner, were concerned about the TV deals that operated as a sort of insurance policy for NFL owners. If the season was canceled, the league would still have access to $4 billion in television revenues, the union alleged. The players, on the other hand, lacked any similar protection. Clearly, marquee players like Peyton Manning, who earn around $20 million a year, wouldn't suffer if the season was canceled, but it would be much tougher on the rank-and-file players receiving league minimums, which in 2010 ranged between $320,000 and $855,000 depending on the number of years a player had spent in the NFL.

"We spent hours strategizing how to knock out the NFL's broadcast contract lockout insurance, and we viewed obtaining our own lockout insurance as the perfect bookend to that strategy," says Barrett. But there was a hitch: It had never been done before. In the past, team owners—collectively and individually—have gotten insurance coverage in the event of a work stoppage. For instance, Major League Baseball team owners secured a strike-insurance policy leading up to the 1981 season that ultimately paid the owners more than $40 million. If Smith and Barrett succeeded, it would be the first time that an insurance policy covered professional athletes if games were canceled due to a work stoppage. "The owners were banking on the leverage of basically starving the football players of their wages and forcing them to take a deal," says Smith. "The insurance comes into play because it approaches replacing some of that lost income." (The NFL declined to comment on this story.) And to keep an ace hidden in the players' sleeves, Smith and Barrett shrouded the project in secrecy.

By 5 A.M. the day after that initial strategy session, Barrett, while still in California, was on the telephone with insurance brokers on the East Coast to get a sense of how such a policy would be structured and, most importantly, how much it would cost. Barrett wanted to draft a policy that would protect the lesser-known and less-paid players by paying each player in excess of $200,000 if the entire season was canceled, and a lower pro rated amount based on the number of weeks canceled in an abridged season.

Later that year, an insurance brokerage, which would serve as the main contact with potential carriers, was selected by way of a beauty content. By February 2010, Barrett was done drafting the policy. He spent the following two months traveling to London, Switzerland, and several U.S. cities to pitch insurers. By July 2010, there was a lead carrier in place, and negotiations regarding policy terms began in earnest. Among the key issues that had to be resolved was the amount of money the policy would pay out, how it would account for rescheduled games, and how much the premium would cost. And it was also paramount that the policy didn't constrain players' ability to negotiate with the league.

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In total, 17 insurance carriers agreed to underwrite the policy, which came with a reported $50 million price tag and an estimated total payout of $400 million. (The NFLPA declined to disclose the names of the insurers due to a nondisclosure clause that was written in the policy.) The insurers and the union signed the policy in December 2010.

Despite weeks of ongoing negotiations between players and owners leading up to the expiration of the collective bargaining agreement, the two sides were not able to settle their dispute. At the heart of their many disagreements was how the league's $9 billion in annual revenue would be divvied up. (The owners thought that the expiring CBA was too generous to players.) And so on March 11, 2011, mere hours after the collective bargaining agreement expired, the union decertified (a necessary step to file suit), and a group of prominent NFL players including Tom Brady brought an antitrust lawsuit against the league in U.S. district court in Minnesota. The players' legal team included lawyers from Dewey & LeBoeuf and Weil, Gotshal & Manges. In July 2011, after months of failed negotiations and legal maneuvering, the insurance policy finally came into play. During a session in New York between the owners and players, the owners were informed of the insurance policy for the first time. Days later, the wrangling came to an end and an agreement was reached.

Like most settlements, the deal required compromises by both sides. The new CBA resolved disagreements about the revenue split—which had been essentially set at fifty-fifty but now is more variable—and the number of games in a season, that for now remains at 16. (Some owners wanted to increase the number of regular season games to 18.) While neither Smith nor Barrett claim that it was the insurance policy that brought the standoff to an end, Smith nonetheless contends that it was instrumental in a process that was at times as much about psychology as it was about money. "It was one more thing they had to strategize against. One more factor they had to think about," he says. Matthew Mitten, the director of the National Sports Law Institute at Marquette University Law School, concurs. "This gave the union leverage it didn't have," he says. "And it would have made it a little less scary for some players to dig in their heels."

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