



director of the NHL Players' Association (NHLPA) from 1967 through the end of 1991. See generally Forbes v. Eagleson, 19 F. Supp. 2d 352 (E.D. Pa. 1998). Allegedly, the NHL defendants conspired to give Eagleson certain plums, such as leadership of international hockey tournament events, which he used with their acquiescence to enrich himself and his family and friends, and Eagleson, in turn, betrayed the interests of the hockey players both in collective bargaining and in his day-to-day conduct of labor-management relations. The defendants' collusive conduct allegedly constituted a pattern of violations of the Labor-Management Relations (Taft-Hartley) Act, 29 U.S.C. § 186, and thus a pattern of racketeering acts in violation of RICO. See Forbes 19 F. Supp. 2d at 359-60.

The NHL moved for summary judgment on grounds that RICO's four-year statute of limitations had run on any claims accrued more than four years before plaintiffs filed suit (i.e., before November 7, 1991) because plaintiffs knew or should have known of defendants' alleged collusion by at least the fall of 1991. I agreed and granted partial summary judgment to the NHL defendants and Eagleson.<sup>1</sup> See id. I also dismissed plaintiffs' claims for injuries incurred within the limitations period for failure to state a claim upon which relief could be granted. Id. at 377. Plaintiffs then sought leave to amend their complaint to properly plead claims for injuries incurred after November 7,

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<sup>1</sup> Plaintiffs also asserted a claim against Eagleson and certain of his companies (the "Canadian defendants") for pilfering money from the union. The Court has not yet addressed the timeliness of that claim.

1991, which I granted. See Forbes v. Eagleson, 183 F.R.D. 440 (E.D. Pa. 1998). As a result of my prior statute of limitations ruling, however, only plaintiff Douglas Smail could continue to press claims because he was the only one of the named plaintiffs who played in the NHL after November 1991.

## II.

Defendants move to dismiss or for summary judgment. Because defendants' arguments are based on facts that do not appear in the complaint and both parties have attached to their briefs and relied upon material extraneous to the pleadings, I consider the motion as one for summary judgment. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Proc. 56(c). In resolving the motion, I view the evidence and all reasonable inferences to be drawn therefrom in favor of plaintiff as the non-moving party. See, e.g., Reitz v. County of Bucks, 125 F.3d 139, 143 (3d Cir. 1997).

I note that plaintiff asserts he needs discovery in order to respond to defendants' motion. (See Pls. Brief at 2). Specifically, he appears to argue that he needs some two decades worth of discovery to establish that defendants' 27-year conspiracy continued to cause damage to the players into the limitations period. (See Pls.' Brief at 4-5, 8-9; Pls.'

Ex. D, Declaration of Roger G. Noll.) In my view this contention is patently lacking in merit and plaintiff does not need any discovery to address the merits of defendants' motion. Indeed, I proceed (as do defendants' arguments) on the assumption that plaintiff can establish that he continued to suffer damage into the limitations period. Specifically, as set forth further below, I assume that defendants' alleged 25 years of labor-management collusion resulted in a 1988 collective bargaining agreement that was not as good for the players as it should have been and, more generally, reduced both the baseline compensation levels (and bargaining positions) of the players and their bargaining strength, which in turn meant that subsequent collective bargains were not as good as for the players as they would have been but for that history of collusion.<sup>2</sup>

### III.

In the fifth amended complaint, Smail alleges that, within the limitations period and pursuant to defendants' on-going, decades-old conspiracy, Eagleson failed to adequately prepare the players' union for collective bargaining, failed to represent aggressively the players' interests in the day-to-day conduct of labor-management

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<sup>2</sup> Plaintiffs also protest that defendants' motion is barred by Rule 12(g). See Fed. R. Civ. Proc. 12(g) (requiring consolidation of Rule 12 motions); see generally 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, §§ 1384-86, 1388 (2d ed. 1990). I think this contention lacks merit given the procedural posture of the case and, in any event, it is moot in light of my treatment of the motion as one for summary judgment.

relations, and communicated with the NHL defendants both during and after he headed the union to undermine and embarrass the union and cause the NHL to take a hard-line position that may have contributed to the players' April 1992 strike. (Compl. ¶ 56.) As a result of these actions, Smail allegedly suffered injuries in that (1) the players would have gotten better benefits earlier and might have avoided the April strike altogether had Eagleson not encouraged the NHL to take a hard line and/or had he better prepared the union for collective bargaining negotiations in 1992; and (2) the players "continued to suffer suppressed compensation in subsequent years." (Amended Compl. ¶ 57.)

The record establishes the following additional undisputed facts.<sup>3</sup> The last collective bargaining agreement ("CBA") negotiated by defendant Eagleson was executed on June 1, 1988 and expired by its terms on September 15, 1991. As of January 1, 1991, Eagleson's employment with the NHLPA ended and Robert Goodenow took over as the union's executive director. After the 1988 collective bargain expired, the NHL and the NHLPA failed to agree to new terms and the 1991-92 season began without a new agreement. On April 1, 1992, days before the Stanley Cup playoffs were to begin, the players went out on a strike. Ten days later, on April 11, 1992, the NHL and the NHLPA reached an agreement on the major terms of a new agreement. The agreement was ultimately executed on January 21, 1993, but some provisions were made retroactive to September 16, 1991 (when the 1988 CBA expired), and the rest were retroactive to April

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<sup>3</sup> See Lovelace Decl.; Bolduc Aff., and Exhibits A and B attached to Defs.' Motion; Fifth Amended Complaint at ¶¶ 19

11, 1992.

On August 29, 1991, before the 1988 CBA had expired, plaintiff Smail signed a “Standard Player Contract” as an unrestricted free agent to play with the Quebec Nordiques for the 1991-92 season. The standard terms of the Standard Player Contract were governed by the 1988 CBA. Smail never missed a paycheck during the 1991-92 season as a result of the strike. His contract with the Nordiques expired on July 1, 1992, and on August 31, 1992, he signed a new Standard Player Contract with the Ottawa Senators. The terms of this contract, which expired on August 31, 1993, were governed by the new CBA negotiated by Goodenow. The 1992-93 season was Smail’s last.

### III.

Defendants’ motion presents two primary questions. One is whether plaintiff has stated a claim for any “new and independent” injury within the limitations period. See generally Glessner v. Kenney, 952 F.2d 702, 707-08 (3<sup>rd</sup> Cir. 1991) (discussing “new and independent injury” requirement for separate accrual of RICO claims). The second is whether any such new and independent injuries are sufficiently causally related to defendants’ alleged racketeering and sufficiently certain to be recoverable under RICO. See generally Steamfitters Local Union No. 420 Welfare Fund, 171 F.3d 912, 923-934 (3<sup>rd</sup> Cir. 1999) (discussing the proximate cause requirement for standing to assert RICO claim).

Defendants argue that Smail could not have suffered any new and independent injury after November 1991 as a result of defendants' alleged misconduct because he was already under contract with his club before November 1991, never lost a paycheck as a result of the April 1992 strike, and signed his next contract for the 1992-93 season under the 1992 collective bargaining agreement negotiated by the players' new union leader, Robert Goodenow, who is not alleged to have ever colluded with the NHL defendants. The new collective bargaining agreement was retroactive in part, moreover, to September 16, 1991. Thus, even if Eagleson had helped instigate the April 1992 strike or the NHL defendants and Eagleson had otherwise colluded to hinder and delay collective bargaining, Smail could not have suffered any injury from the delay. Any injuries that plaintiff can identify, defendants further argue, amount to no more than the "continuing effects" of harm incurred prior to November 1991, for which he cannot recover due to the running of the statute of limitations, or are too remote, uncertain, and speculative to be recoverable.

Plaintiffs counter that they are not just alleging that defendants' alleged collusion delayed a new agreement, but that it resulted in a new collective bargain that was not as good for the players as it should have been. (Pls.' Brief at 2.) I am not sure that plaintiff's assertion is consistent with a close reading of the complaint, which seems to allege only that "greater benefits" were delayed in coming (until the end of the strike), not that they did not come. (See Amended Compl. ¶ 57.) For the sake of argument, however, I will

accept plaintiff's characterization of his complaint. Plaintiff also argues that he was injured by the failure of the players to obtain a new CBA in 1993 and by a lockout that occurred in 1994-95. (See Pls. Brief at 5-7.) There are no such allegations in the complaint, however, and, in any event, it is undisputed that the 1992-93 season was Smail's last. Accordingly, he could not have suffered injury after that time and has no standing to maintain these latter claims.

As already mentioned, my previous ruling has established that the plaintiff hockey players, including Smail, knew or should have known by at least October 1991 that the NHL defendants and Eagleson had engaged in a pattern of labor-management collusion resulting in bad representation and poor deals for the players. Accordingly, plaintiff's claims for injuries incurred prior to the limitations period – before November 7, 1991 – were barred. 19 F. Supp. 2d at 377. In light of that ruling, Smail cannot (and does not) press a claim for injuries incurred because his 1991-92 contract was governed by the allegedly collusive 1988 CBA negotiated by Eagleson. Because plaintiff knew or should of known by October 1991 that his 1991-92 contract reflected defendants' alleged collusion, his injury was sustained, fully determinable, and actionable at that point. See Glessner, 952 F.2d at 708.

Thus, plaintiff's arguments that he suffered new and independent injuries after November 1991 center on the collective bargaining agreement negotiated in April 1992 by the union's new leader, Robert Goodenow. Although plaintiff was already under an

individual contract for the 1991-92 year governed by the 1988 CBA and did not lose any money as a result of the April 1992 strike, he argues that because some provisions of the new 1992 CBA were made retroactive to September 1991 he could have retroactively enjoyed in his 1991-92 contract year the better 1992 CBA terms that would have been obtained but for the defendants' misconduct. Of course, he also would have enjoyed the terms of this hypothetically better 1992 CBA when he later negotiated his 1992-93 contract.

Plaintiff alleges that defendants' wrongdoing caused a poor 1992 CBA in two ways. Between November 7, 1991 and December 31, 1991, and thereafter, Eagleson allegedly communicated to management his belief that the players would not strike, which allegedly made the NHL owners more intransigent and thus helped cause the strike, which in turn somehow led to a worse collective bargaining agreement than the players would have achieved if it were not for the strike.<sup>4</sup> I assume for the sake of argument that Eagleson's alleged communications about the unlikelihood of a strike could be considered racketeering acts or part of a racketeering scheme. Nonetheless, I think these communications were simply too remote from the 1992 CBA negotiations, and their

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<sup>4</sup> In addition to being somewhat incredible, plaintiff's arguments concerning Eagleson's role in instigating the 1992 strike are somewhat untethered to any alleged racketeering activity. Plaintiff argues as if he can base a RICO claim on Eagleson's conduct even after he no longer represented the union. Of course, this is not so. The racketeering acts supporting plaintiff's RICO claim consist of Eagleson's alleged mail fraud and collusion with management – acts which were unlawful precisely because Eagleson headed the players' union. Since Eagleson's representation of the union ended at the end of 1991, plaintiffs' RICO claims can only be based on his alleged collusive acts up until December 31, 1991.

effect in possibly contributing to the strike (and thence affecting negotiations) too speculative, to be considered a proximate cause of a poor 1992 CBA.

Plaintiff also claims that defendants' history of collusion weakened the union and artificially reduced the players' negotiating position (i.e., their historic compensation baseline) and thus lead to the poor 1992 CBA. (See Pls.' Brief 4-9; Noll Decl.; Amended Compl. ¶ 57.) In my view, this claim does not set forth new and independent injuries. See Glessner, *supra*; Pilkington v. United Airlines, 112 F.3d 1532, 1536-38 (11<sup>th</sup> Cir. 1997) (discussing cases applying "new and independent injury" separate accrual rule). Just as plaintiff cannot recover for the alleged reduction in his compensation that lingered past November 1991 as a result of the 1988 CBA negotiated by Eagleson, plaintiff cannot recover damages arising from the fact that Eagleson's 20-year collusion with the NHL defendants had artificially reduced the players' historic compensation levels or otherwise weakened the union in a manner that carried over and affected its post-November 1991 collective bargaining position. Such injuries are not "new and distinct . . . from the initial injury" caused by defendants' alleged years of colluding prior to 1992. Glessner, 952 F.2d at 708. They are the lingering, obvious consequences of nearly twenty years of alleged misconduct by defendants -- misconduct of which the players knew or should have known by at least the fall of 1991. See Forbes, 19 F. Supp. 2d at 370-74, 377. Such injuries could have been redressed by a suit filed at that time and/or by collective

bargaining.<sup>5</sup> Accordingly, plaintiff's claims are barred on the strength of my prior statute of limitations ruling.

Alternatively, I reach the same conclusion analyzing plaintiff's claims in terms of proximate cause, a fundamental requirement for recovery which is usually analyzed in the RICO context in terms of the plaintiff's standing to assert a claim. See generally Callahan v. A.E.V., Inc., 1999 WL 437289, at \*22-\*28 (3<sup>rd</sup> Cir. 1999); Steamfitters Local Union, 171 F.3d at 923-934. Crucial, in my view, are the facts that, one, the players (and hence their union) knew or should have known of defendants' pre-1992 collusion, and two, that a new and untainted union leader, Robert Goodenow, negotiated the 1992 collective bargaining agreement. These intervening factors, together with the complex, unpredictable, and adversarial intangibles of collective bargaining, compel me to

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<sup>5</sup> In granting plaintiff leave to amend the complaint, I discussed the "separate accrual" rule for RICO claims and noted the analogy drawn by courts between an on-going racketeering conspiracy and a continuing price-fixing conspiracy in violation of antitrust law. See Forbes, 183 F.R.D. at 444, citing, inter alia, Klehr A.O. Smith Corp., 521 U.S. 179, 117 S. Ct. 1984, 1990 (1997) (noting that under antitrust law a victim of a continuing price-fixing conspiracy may sue on each overt act (e.g., each sale) that occurs within the limitations period and causes injury, regardless of his or her prior knowledge of the ongoing conspiracy). Plaintiff might argue, similarly, that he too may recover damages for every year he lost income as a result of defendants' alleged history of collusion. Plaintiff's situation is significantly distinct from that of the victim of a price fixing conspiracy, however. The latter is at the mercy of two or more conspiring third parties and has no control over whether or not the conspiracy continues into the future, and incurs no damages until such time as s/he buys price-fixed goods, at which point damages are certain and discrete. Players' union members such as Smail, on the other hand, have control over one of the two sides allegedly involved in a collusive labor-management conspiracy (their labor representative) and control their collective bargaining position. Since the hockey players knew or should have known of their representative's alleged collusion, they could have addressed it and its foreseeable consequences in court (by seeking injunctive and/or monetary relief for any future harm sufficiently certain to be visited on them) or in subsequent collective bargaining negotiations.

conclude that the connection between defendants' alleged racketeering and the collective bargain negotiated in April 1992 is simply too remote and speculative to sustain plaintiff's claim. Cf. Seawell v. Miller Brewing Co., 576 F. Supp. 424, 430-31 (M.D.N.C. 1983) (plaintiffs' claims against employer for lay off due to low seniority resulting from alleged collusion between union and employer were barred by intervening collective bargain negotiated by different union which knew of the alleged prior collusion yet did not redress plaintiffs' seniority claims).

V.

In sum, I conclude that the NHL defendants have established that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law as to plaintiff's remaining claims against them.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID S. FORBES, et al.	:	CIVIL ACTION
	:	No. 95-7021
v.	:	
	:	
R. ALAN EAGLESON, et al.	:	

**ORDER**

AND NOW this        day of September, 1999, upon consideration of the NHL defendants' Motion to Dismiss the Fifth Amended Complaint or for Summary Judgment, plaintiff's Motion for an Extension of Time and to Compel Discovery or to Strike, and the parties' filings related thereto, it is hereby ORDERED that plaintiff's motion is DENIED and defendant's motion is GRANTED.

IT IS FURTHER ORDERED that plaintiff's motion to certify the class is DENIED as moot.

AND IT IS FURTHER ORDERED pursuant to Federal Rule of Civil Procedure 54(b) that the Court finds there is no just reason for delay and that final judgment is therefore entered in favor of the NHL defendants and against plaintiffs with respect to all claims against the NHL defendants, and in favor of R. Alan Eagleson and against plaintiffs with respect to Count I of the complaint.

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THOMAS N. O'NEILL, JR., J.