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THE SALARY CAP: A LEGAL ANALYSIS OF AND PRACTICAL SUGGESTIONS FOR COLLECTIVE BARGAINING IN PROFESSIONAL BASKETBALL

DAVID ROTHSTEIN*

INTRODUCTION

The National Basketball Association (NBA) is a booming business. This was not, however, always the case.¹ During the late 1970s and early 1980s, the league experienced a variety of financial problems that reduced its profitability and threatened its continued existence.²

For an NBA franchise to achieve financial success, it must draw fans to its games, and typically fan attendance is directly proportional to a team's success on the court.³ Simply put, everyone loves a winner, and no one wants to pay money to see a loser. Thus, each NBA team is continually searching to stack its roster with the best talent available in the hope that its team will win as many games as possible, the victories translating into box office profits. Accordingly, the demand for the best players is great, and owners are ready and willing to open their checkbooks to acquire

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1. Revenues for the 1992-93 NBA season eclipsed the \$1 billion dollar mark, as compared to the \$200 million earned in the 1983-84 season. Andrew E. Server, *How High?*, SPORTS ILLUSTRATED, Nov. 8, 1993, at 89.

2. The league's difficulties were caused by team owners offering free agents massive salaries in an attempt to lure the best players to their respective teams. During this period, however, the increases in some teams' gross income did not keep pace with the inevitable increases in player salaries. Jeffrey E. Levine, *The Legality and Efficacy of the National Basketball Association Salary Cap*, 11 CARDOZO ARTS & ENT. L.J. 71, 73 (1992). The problem began to compound itself as the financially unsuccessful teams, unable to afford the most talented players, were continually losing on the court, resulting in severe decreases in box office revenues. Lloyd C. Bronstein, *Sports Law: Antitrust Suit Fails to Knock Off NBA's Salary Cap*, 6 LOY. ENT. J. 231, 240 (1986). The league as a whole was losing \$15 million per year. Scott J. Foraker, *The National Basketball Association Salary Cap: An Antitrust Violation?*, 59 S. CAL. L. REV. 157, 158 (1985). Four teams—Cleveland Cavaliers, Indiana Pacers, Utah Jazz, and Kansas City Kings—were in jeopardy of folding, and there were two to four teams for sale that purportedly could not find buyers at any price. Levine, *supra*, at 73.

3. Levine, *supra* note 2, at 73.

the services of the league's choice players.⁴ The financial woes of the NBA during the late 1970s and early 1980s made it increasingly difficult for teams in the smaller markets, with less monetary power, to keep their better players, let alone acquire new ones. This resulted in a growing competitive imbalance among NBA teams and plummeting buyer interest in small market franchises, both of which prompted a decrease in the perceived value of NBA franchises.⁵

In 1983, against this background, the NBA and the National Basketball Players Association (hereinafter "Players Association") sat down at the collective bargaining table to hammer out an agreement they hoped would set the league on the path to profitability. These negotiations resulted in an agreement unprecedented in any professional sport and was commonly referred to as the "salary cap."⁶ The key feature of the salary cap was a revenue

4. *Id.*

5. Bronstein, *supra* note 2, at 240. Perhaps the most shocking example of all the evils associated with the pre-cap era of unrestrained free agency occurred prior to the 1982-83 season when the owner of the Philadelphia 76ers, Harold Katz, dug deep into his pockets and simply bought himself a championship caliber team via the acquisition of perennial All-Star Moses Malone, at the time a free agent. The message was clear: for the right price, any franchise could buy success.

6. The principles of the salary cap were laid out in this collective bargaining agreement which has become known as the Memorandum of Understanding. Memorandum of Understanding Between National Basketball Association and National Basketball Players Association (Apr. 18, 1983) (on file with author) [hereinafter cited as Memorandum of Understanding]. The history of the Memorandum of Understanding dates back to 1970, when:

NBA players commenced a class action suit against the NBA in the federal district court for the Southern District of New York. [The players challenged] on antitrust grounds certain player restrictions imposed by the NBA team owners, including the [collegiate draft and what was known as the reserve system. This litigation came to a head in 1976 when the district court approved an agreement between the parties known as the Robertson Settlement Agreement. Also] in 1976, the Players Association and the NBA . . . entered into a multi-year collective bargaining agreement that incorporated the substantive terms of the Robertson Settlement Agreement. The 1976 collective bargaining agreement expired on June 1, 1979, and on October 10, 1980, the parties again entered into a multi-year collective bargaining agreement that expressly incorporated the terms of the Robertson settlement agreement.

The 1980 agreement expired on June 1, 1982. In 1983, the NBA sought for the first time to introduce the salary cap, contending that such a restriction was necessary because the majority of NBA teams were losing money, in part because of rising player salaries and benefits. The players responded by filing a lawsuit challenging the legality of the proposed practice. *Lanier v. National Basketball Association*, 82 Civ. 4935 (S.D.N.Y.). A Special Master appointed to hear disputes under the Robertson settlement agreement determined that the salary cap would violate the terms of the settlement agreement, and therefore could not be imposed absent a modification of that agreement.

The Players Association and the NBA then entered into [the] Memorandum

sharing formula that guaranteed the players fifty-three percent of the league's gross revenues.⁷ The purposes of the salary cap were to preserve the financial integrity of the NBA and to improve the competitive balance of the league by enabling financially weaker teams to compete with financially stronger teams for high-priced players.⁸

The players were unwilling, though, to adopt the belief expressed by the league that the rapid increase in players' salaries was the sole, or even the principal, cause of certain NBA teams' financial setbacks. According to Lawrence Fleischer, General Counsel for the Players Association at the time, the players "did [,

of Understanding [, which] modified the expired 1980 collective bargaining agreement to include, among other things, a salary cap. . . . [The parties stipulated that the new agreement would govern through the end of the 1986-87 season]. On June 13, 1983, the district court approved a modification of the Robertson Settlement Agreement to incorporate the terms of the Memorandum of Understanding.

Bridgeman v. National Basketball Association, 675 F. Supp. 960, 963 (D.N.J. 1987).

7. Memorandum of Understanding, *supra* note 6, § III (C)(1)(b). The following simplified hypothetical shows basically how the cap works. Suppose there are ten teams in the league and the aggregate gross revenue of those ten teams is \$100 million. Fifty-three percent of \$100 million is \$53 million, which divided by ten equals \$5.3 million. Thus, under this hypothetical, each team may spend up to \$5.3 million on player salaries.

The 1983 agreement also mandated that each team have a minimum payroll equal to approximately 90% of the team's player salary ceiling. This provision, however, has since been altered and replaced by a complex mathematical formula that still forces the league's member teams to spend a significant portion of the ceiling figure. Collective Bargaining Agreement [hereinafter CBA], *infra* note 11, art. VII, pt. G, § 1.

This minimum spending requirement has proven to be of little practical significance, as almost all of the individual member teams' cap-associated problems have dealt with staying below the ceiling rather than obliging the minimum salary requirements. The minimum cap provisions have, however, had some significance in regard to expansion franchises. (The CBA deals with expansion teams in a special manner. CBA, art. VII, pt. G, § 1). Interestingly enough, one of the few times the minimum salary provision was a factor, it resulted in perhaps the greatest wage-related coup in the history of the NBA. The Miami Heat, an expansion franchise that entered the league in the 1988-89 NBA season, had to spend several million dollars in order to oblige the cap minimum prior to the 1990-91 NBA season. John "Hot Rod" Williams, who had played the previous season for the Cleveland Cavaliers, was a restricted free agent. Feeling that "Hot Rod" was the answer to its need for a power forward, Miami offered him a massive multi-year contract, with a disproportionately large amount of the salary payments being made in the contract's early years so as to make it difficult for Cleveland to match Miami's offer. Cleveland, though, was unwilling to let one of its brightest young players get away for nothing, and matched Miami's offer sheet pursuant to its right of first refusal as originally laid out in the Memorandum of Understanding and as adopted by the CBA. Thus "Hot Rod," a player who, to date, has never achieved All-Star status, became the highest paid player in the league for the 1990-1991 NBA season, with a salary of \$5 million.

8. D. Albert Daspin, *Of Hoops, Labor Dupes and Antitrust Ally-Oops: Fouling out the Salary Cap*, 62 IND. L.J. 95, 122 (1986) (citing the Affidavit of Lawrence A. Fleischer at 6, at 81 Civ. 6582 (RLC) Sept. 21, 1984).

however,] recognize that it was in their overall best interest to have a financially stable league with as many viable franchises as possible bidding for the services of NBA players.”⁹ The essential objectives of the players in negotiating the terms of an agreement were: (i) to maintain a system of free agency that would insure, to the greatest extent possible, that player salaries be established at competitive levels as a result of a free and open bidding system; (ii) to strengthen the long-term financial stability of the league and protect the jobs of as many players as possible; and (iii) to provide for some form of overall revenue sharing between the players and the NBA teams. Both sides believed that the agreement met their objectives.¹⁰

The Memorandum of Understanding remained in force until the end of the 1986-87 season. On November 1, 1988, after another session at the collective bargaining table, the league and the players slightly amended, but otherwise re-adopted, the provisions of the Memorandum of Understanding.¹¹

Empirical data lends support to the proposition that the salary cap has helped save professional basketball from financial ruin, turning the NBA from a money pit into a vibrant, thriving industry.¹² In 1981, only six NBA teams showed a profit, whereas by 1988, just four years after the enactment of the cap, twenty of the

9. Matter of Nat'l Basketball Ass'n, 630 F. Supp. 136 (S.D.N.Y. 1986) (citations omitted).

10. *Id.* at 137.

11. Collective Bargaining Agreement between the National Basketball Association and the National Basketball Players Association (November 1, 1988) [hereinafter 1988 CBA or CBA] (on file with author).

12. The following figures indicate the rapid rise of the salary cap since its inception (Recall that, pursuant to the salary cap agreement, the cap and individual player salaries are directly proportional to the aggregate revenue of the league):

1984-85	\$3.6	million
1985-86	\$4.233	million
1986-87	\$4.945	million
1987-88	\$6.164	million
1988-89	\$7.232	million
1989-90	\$9.802	million
1990-91	\$11.871	million
1991-92	\$12.5	million
1992-93	\$14.0	million
1993-94	\$15.175	million

league's twenty-three teams were able to show a profit.¹³ In 1981, there were four teams for sale with no prospective buyers, and there was talk of shrinking the league to twelve teams. Since the advent of the cap, however, the league's financial turnaround has been so great that during the 1980s the NBA was the only professional sports league to add expansion teams.¹⁴

Proponents of the cap attribute the league's financial turnaround to the fact that the cap has kept the league's most talented players somewhat evenly distributed throughout the league, which has enabled NBA games to be more competitive and therefore more exciting. As a result, league attendance figures have soared.¹⁵ Also, as the league has become more popular, it has become an attractive product for major television networks. This has produced television bidding wars for the right to broadcast NBA games at dollar amounts never before imagined.¹⁶

Average player salaries have risen accordingly,

Pre-Cap 1982-83	\$260,000
1984-85	\$325,000
1985-86	\$375,000
1986-87	\$440,000
1987-88	\$510,000
1988-89	\$600,000
1989-90	\$725,000
1990-91	\$925,000
1991-92	approximately \$1.05 million
1992-93	approximately \$1.17 million
1993-94	approximately \$1.27 million

Furthermore, during the 1984-85 NBA season, only ten players earned more than \$1 million, with Earvin "Magic" Johnson the highest paid at \$2.5 million. In contrast, by 1990-91 the league had nine players earning over \$3 million a year, and for the 1991-92 season, the average salary had eclipsed the \$1 million dollar mark. *NBA*, *NBA News*, Sept. 27, 1993, at 4; Foraker, *supra* note 2, at 157.

13. Levine, *supra* note 2, at 96.

14. *Id.*

15. While the league does not make its attendance data available, the league office does not deny that attendance has risen considerably since the inception of the cap.

This growth factor in regards to attendance is no small accomplishment when one considers the current economic climate as well as the increase in the cost of a ticket to attend a professional basketball game. Levine, *supra* note 2, at 95.

16. In 1989, the National Broadcasting Company (NBC) and the NBA entered into a four-year, \$600 million contract to televise NBA games, beginning with the 1990-91 season. This \$150 million per year price is approximately a 340% increase over Columbia Broadcasting System's (CBS) \$43.3 million per year fee it paid for the previous four seasons. Norman Chad, *NBC to Pay \$600 Million Over Four Years to NBA*, *WASH. Post*, Nov. 10, 1989, at C1.

The cost to televise NBA games continues to rise, as the NBA has made recent deals with NBC and TNT for \$750 million and \$350 million, respectively. Phil Taylor, *The NBA's Long, Cold Summer*, *SPORTS ILLUSTRATED*, Oct. 18, 1993, at 32.

The league is now at a point where it is as profitable as it has ever been, and proponents of the cap agreement credit the league's success to the institution of the salary cap. Others maintain that it did not really matter what agreement was struck in 1983, that the league had already begun its turnaround, and that the credit is more properly attributable to the arrival of Larry Bird, Magic Johnson, and later, Michael Jordan.¹⁷ Nonetheless, everyone seems to agree that the salary cap is, at least in part, responsible for the economic resurgence of the NBA. Furthermore, this proposition is well supported by the empirical data.¹⁸

17. In 1978, the Boston Celtics selected Larry Joe Bird of Indiana State University as a junior eligible with their first round pick and the sixth pick overall of the NBA draft. In 1979, the Los Angeles Lakers selected Earvin "Magic" Johnson of Michigan State University with the first overall pick of the draft.

These two players, arguably two of the greatest ever to wear a pair of sneakers, captured the attention of the sports world prior to their entrance into the league when their teams met in the final game of the NCAA tournament in 1979. Immediately following their rookie season, the league's popularity grew, and many attribute this growth to the rivalry between Magic and Bird. Their rivalry, one of the greatest individual rivalries in team sports history, had everything necessary to attract maximum attention. While Bird was refining his game in the rural plains of French Lick, Indiana, Johnson was polishing his skills in the urban streets of Lansing, Michigan. When they arrived in the NBA, Bird became a cult figure whose hard work and dedication epitomized the blue-collar attitude prevalent in Boston, while Magic's play captured the glitter and style of Los Angeles—he was Hollywood personified. There was something in the rivalry for everyone: white versus black; east versus west; grit and guts versus glory; hard hat versus top hat. Furthermore, both players possessed that special dynamic something extra which enabled them to appeal to a greater audience than is normally possible. This only served to heighten both their popularity and the league's. See ZANDER HOLLANDER AND ALEX SACHARE, *THE OFFICIAL NBA BASKETBALL ENCYCLOPEDIA* 160 (1989).

Then, in 1984, as Michael Jordan entered the league, basketball's popularity took off, not unlike "Air" Jordan himself. According to NBA commissioner David Stern, "[the Johnson-Bird rivalry] laid the groundwork and built the momentum that made Michael Jordan the right man in the right place at the right time." Chapin, *infra* note 175, at 6.

This Note does not deny the tremendous impact these special individuals had on the game as a business, but an in-depth analysis regarding their effect is beyond the scope of this article.

18. As far back as 1985, Commissioner David Stern was quoted as saying, "To a person, the teams who understand it, recognize that it has brought a stability that is wonderful. It has begun to blaze a trail for how you can accommodate a star system and individual contract negotiations with a need to keep 23 or more functioning, successful entities." Brenner, *Stern Visualizes No Problems for NBA*, *INDIANAPOLIS STAR*, Nov. 10, 1985, at 8, col. 1. Also in 1985, Stern prophesied:

I think that the adoption of the salary cap, together with the drug program, will some day be looked at historically as the turning point in the history of the NBA There may be other reasons for success. But I think that when you look at a system which has taken teams and the league itself to a point where perhaps as many as 15 teams will be profitable, where in the year before [it was] 11 and . . . the average salary has gone from \$270,000 to \$330,000, you have to scratch your head and say, "How is it possible that you had a system where it seems that everything got better and both management and labor prospered but

The salary cap agreement will remain effective through the end of the 1993-94 season. Although most concede that the cap has been effective in the past, many speculate that the cap, in its current form, has outlived its usefulness. Still, few deny that some sort of agreement must be struck, for if the league is left to pure capitalism, it will surely fall apart. This article examines the current issues that will be of particular interest as the current cap expires and offers some suggestions for a new collective bargaining agreement.

THE SALARY CAP AND ANTITRUST LAW

There is an ongoing debate as to whether the salary cap is constitutional in light of antitrust law. Although the matter has been litigated,¹⁹ and many commentators have addressed the subject,²⁰ it remains an area of intense debate. This section will demonstrate why the collective bargaining agreement, in its current form, does not violate antitrust law.

The arena of professional sports represents a unique place where two of the most basic American national policies come clashing together. On one side is antitrust law, principally embodied in the Sherman Act.²¹ The Supreme Court has stated that the Sherman Act represents "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade . . . [and] rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our eco-

not at each other's expense?" I think that the salary cap, together with the profit sharing, is responsible for that, both in fact and generally, in that they allowed the sport to proceed.

Anthony Cotton, *David Stern with NBA Ratings, Revenues Up, Commissioner Sees Resurgence*, WASH. POST, June 23, 1985, Sports, at 1.

19. Wood v. National Basketball Ass'n, 602 F. Supp. 525 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954 (2d Cir. 1987) (dismissing the claim of Leon Wood, a professional basketball player who challenged, among other things, the salary cap provision of the collective bargaining agreement between the NBA, its member teams, and the Players Association).

20. Levine, *supra* note 2; Bronstein, *supra* note 2; Foraker, *supra* note 2; Richard J. Haray, *Balancing Antitrust and Labor Policies on the Court: Wood v. National Basketball Association*, 61 ST. JOHN'S L. REV. 326 (1987).

21. The Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1982)). Section One provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, . . . is declared to be illegal."

Growing congressional concern that a few corporations were amassing significant economic power that could be used to the detriment of the general public prompted the passage of antitrust legislation. This legislation reflected a basic extension of congressional economic philosophy that a free market was the most efficient way to allocate resources and to produce better goods and services at lower prices. Haray, *supra* note 20, at 327 n.2.

conomic resources.”²² In contrast, American national labor policy, primarily embodied in the National Labor Relations Act (NLRA),²³ favors collective bargaining agreements and thus maintains a decidedly anti-competitive focus. Reflecting the interests of this national labor policy, there exists a labor exemption from the antitrust laws that finds its basic source in sections 6²⁴ and 20²⁵ of the Clayton Act, and in sections 104, 105, and 113 of the Norris-LaGuardia Act.²⁶ These provisions declare that labor unions are

22. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958).

23. National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169 (1982)). Under the NLRA, it is the declared “policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce” and when they have occurred to lessen or eradicate these problems “by encouraging the practice and procedure of collective bargaining.” 29 U.S.C. § 151. Employees were given “the right to self-organization, . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining.” *Id.* § 157.

24. Clayton Act § 6, 15 U.S.C. § 17 (1982). Section 6 of the Clayton Act provides that the antitrust laws do not “forbid the existence and operation of labor . . . organizations,” and labor organizations and their members shall not “be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.”

25. Clayton Act § 20, 29 U.S.C. § 52 (1982). Section 20 of the Clayton Act provides: No restraining order or injunction shall be granted by any court of the United States, . . . involving or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law

26. Norris-LaGuardia Act, 47 Stat. 70, 71, 73 (codified as amended at 29 U.S.C. §§ 104, 105, 113 (1982)). Section 104 of the Norris-LaGuardia Act provides:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing . . . any of the following act: (a) Ceasing or refusing to perform any work or to remain in any relation of employment; (b) Becoming or remaining a member of any labor organization, or of any employer organization, regardless of any such undertaking or promise as is described in section 103 [nonenforceability of undertakings in conflict with public policy; “yellow dog” contracts] of this title,

Section 105 of the Norris-LaGuardia Act states:

No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title.

Section 113 of the Norris-LaGuardia Act states:

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct, or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associa-

not combinations or conspiracies in restraint of trade and specifically exempt certain union activities, such as secondary picketing and group boycotts, from the coverage of the antitrust laws.²⁷ This statutory labor exemption was created to insulate, and thereby protect, legitimate collective activity by employees,²⁸ which although inherently anti-competitive, is favored by federal labor policy.²⁹ The exemption also extends to legitimate labor activities unilaterally undertaken by a union to further its own interests.³⁰ It does not, however, extend to concerted action or agreements between unions and non-labor groups. This is precisely why the constitutionality of the collective bargaining agreement between the NBA and the Players Association is debated so fiercely: it is an

tions of employees; (2) between one or more employers or association of employers; or (3) between one or more employees or associations of employees and one or more employees and associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" . . . of "persons participating or interested" therein

(b) a person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry therein, or is a member, officer or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

27. See *Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 621-622 (1975).

28. The non-labor group (in this case the NBA) arguably may avail itself of the labor exemption as well. See *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea*, 381 U.S. 676, 729-30 (1965). Granted, the exemption was originally created to protect unions from the antitrust laws and was initially asserted only by unions. Later, however, employers began to claim the exemption. Since the labor exemption extends to collective bargaining agreements, NBA owners argue that the exemption should extend to either party to the agreement. Courts have generally afforded management, including sports franchise owners, protection under the exemption, reasoning that immunity must be extended to encourage good faith bargaining by management. See *McCourt v. Cal. Sports, Inc.*, 460 F. Supp. 904 (E.D. Mich. 1978), *vacated on other grounds*, 600 F.2d 1193 (6th Cir. 1979); *Sooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 847 n.13 (3d Cir. 1974); *Phil. World Hockey Club, Inc. v. Phil. Hockey Club, Inc.* 351 F. Supp. 462, 499 (E.D. Pa. 1972).

The counter-argument is that the exemption should not be extended to the NBA because the exemption was created to benefit unions, and the union in this case (the Players Association) derives no benefit from the salary cap. In the majority of instances where the exemption was extended to employers, it was in light of an agreement that was very beneficial to the union. Foraker, *supra* note 2, at 163. This argument, however, fails to appreciate the benefits the salary cap has given to the Players Association. See *supra* notes 12-18; *infra* notes 59-60, 75-80 and accompanying text; pp. 38-40; see also note 170.

29. *Connell*, 421 U.S. at 622.

30. See *United States v. Hutchenson*, 312 U.S. 219 (1941).

agreement between a union and a *non-labor* group.

The Supreme Court has held that in order to properly accommodate congressional policy favoring free competition in business markets with the congressional policy favoring collective bargaining under the NLRA, certain union-employer agreements must be accorded a limited nonstatutory exemption from antitrust sanctions.³¹ The problem is defining those "certain" union-employer agreements. When the context of the collective bargaining agreement between the NBA and the Players Association is taken into consideration, it is clear that this is one of those "certain" union-employer agreements where the balance between national labor policy and antitrust law should weigh in favor of the national labor policy.

The Supreme Court has addressed the question of whether the product of a collective bargaining process should be held accountable to antitrust standards on three different occasions.³² In each case, the Court determined whether or not it would grant immunity by analyzing policy considerations. Thus, the Court's framework, articulated by Justice White, balances labor policies against antitrust concerns.³³ Whereas labor policy has the dual goal of encouraging collective bargaining and advancing union interests, the chief concern of antitrust law is to preserve competitive markets.³⁴ These cases provide a general rule of thumb which suggests that where both labor policies are being advanced, market interference will be tolerated within reason.

Incorporating the various holdings of these Supreme Court cases, the Eighth Circuit, in *Mackey v. Nat'l Football League*,³⁵ developed a three-pronged test to determine whether certain labor-

31. See *Connell*, 421 U.S. at 616; *Local Union 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. at 729-730.

32. *Connell*, 421 U.S. at 616; *Jewel Tea*, 381 U.S. at 676; *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

33. Daspin, *supra* note 8, at 101.

34. *Id.* at 31.

35. *Mackey v. Nat'l Football League*, 543 F.2d 606 (1976). In *Mackey*, several NFL players filed an antitrust suit against the NFL, its member teams, and the NFL Commissioner, Pete Rozelle. These players challenged the "Rozelle Rule," which required a franchise signing an athlete who had played out his option year to compensate the athlete's former franchise in the form of cash, player contracts, or draft choices. The players argued that the restraint inhibited the bargaining opportunities of free agents because requiring franchises to compensate the athlete's former franchise deterred the franchises from bidding for the athlete's services. Conversely, the defendants argued that the nonstatutory labor exemption immunized them from antitrust liability. The court, in holding that the Rozelle Rule did not fall within the labor exemption, fashioned a three-part test, now commonly referred to as the *Mackey Test*. *Id.*

management agreements are to be afforded limited non-statutory immunity from antitrust review:

First, the labor policy favoring collective bargaining may potentially be given preeminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship. Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's length bargaining.³⁶

If all three requirements are satisfied, the non-statutory exemption applies, and the restraint is not considered an antitrust violation.

THE LEON WOOD STORY

The *Mackey* Test has already been applied to the collective bargaining agreement between the NBA and the Players Association. In *Wood v. National Basketball Association*,³⁷ the District

36. *Id.*

37. 602 F. Supp. 525 (S.D.N.Y. 1984). In *Wood*, Leon Wood, a highly successful college basketball player and a member of the United States basketball team that won the gold medal in the 1984 Olympic games in Los Angeles, brought an action, alleging that the NBA's college draft, maximum team salary, and ban on player corporations violated Section One of the Sherman Act. All three challenged practices resulted from the collective bargaining agreement between the league and the Players Association (the 1983 Memorandum of Understanding, *supra* note 6), and all three provisions were carried over into the CBA that expired at the end of the 1993-1994 season.

Wood's claim originated when he was selected by the Philadelphia 76ers Basketball Club (hereinafter Philadelphia or 76ers) in the NBA annual college draft on June 19, 1984. Thereafter, Philadelphia and Wood's representative, Fred L. Slaughter, began negotiations. Because Philadelphia was over the limit of the salary cap, they could not offer Wood the kind of money he deserved as the 10th pick of the draft. No agreement was reached, and the 76ers offered Wood a one-year contract for \$75,000—the minimum allowable offer. Philadelphia, however, contended that the offer was made not because of the limitations of the cap, but rather to preserve Philadelphia's exclusive right to negotiate with Wood pursuant to NBA regulations regarding rookie players. Philadelphia maintained they were prepared to seek a way around the salary cap in order to negotiate a multi-year contract with Wood but could not get Slaughter to work out the terms.

Wood declined the offer and claimed he was suffering irreparable injury by being required either to sign a one-year contract with Philadelphia at a level far below his value in an open market or forego playing basketball in the NBA for one season. He argued that if he were to sign at a salary not commensurate with his talents, he would be exposing himself to a career-ending injury.

While the case was pending, the 76ers and Wood reached an agreement whereby the 76ers found a way around the salary cap to sign Wood to a four-year contract worth an

Court for the Southern District of New York held:

The antitrust claim as to the college draft and the salary cap provisions must fail. Both provisions affect only the parties to the collective bargaining agreement - the NBA and the players - involve mandatory subjects of bargaining as defined by federal labor laws, and are the result of bona fide arms-length negotiations. Both are proper subjects of concern by the Players Association. As such, these provisions come under the protective shield of our national labor policy and are exempt from the reach of the Sherman Act.³⁸

On appeal, Judge Winter, writing for the Second Circuit, noted that if the practices in question emanated from a unilateral agreement among the NBA member teams and not from a collective bargaining agreement with a union representing the players, they would be illegal and Wood would be entitled to relief.³⁹ The court continued:

[T]he draft and the salary cap are not, however, the product solely of an agreement among horizontal competitors but are embodied in a collective agreement between the employer or employers and a labor organization reached through procedures mandated by federal labor legislation. Their legality therefore, cannot be assessed without reference to that legislation.⁴⁰

estimated \$1.1 million. The 76ers accomplished this by trading Leo Rautins, and his \$155,000 salary, to the Indiana Pacers and by not re-signing veteran free agent Franklin Edwards, whose salary had been \$126,000. The 76ers thus freed up \$281,000 to pay Mr. Wood during the 1984-85 season. Four 76ers became free agents at the conclusion of the 1984-85 season. Their salaries were to be used to pay Mr. Wood for the remaining years of his contract. Sobel, *Playing with the NBA Salary Cap*, 6 ENT. L. REP. No. 11 at 5 (1985).

Interestingly enough, in the year they drafted Wood, the 76ers had the 5th, 10th, and 22nd pick of the draft. With the 5th pick they selected Charles Barkley, who would go on to become a perennial All-Star forward. With their two remaining picks, they did not fare so well. At number 10 they selected Mr. Wood, a point guard, and with the 22nd pick they selected Tom Sewell of Lamar, also a guard. Neither Wood nor Sewell proved to be NBA caliber players. With the 16th pick of the draft, however, the Utah Jazz selected point guard John Stockton, who would go on to become an eventual NBA Dream-Teamer. Meanwhile, Leon Wood is a marginal player in the German Professional Basketball League. For more on the uncertainties associated with the NBA draft, see *supra* note 204 and accompanying text.

38. *Wood*, 602 F. Supp. at 528. Regarding the ban on private corporations, also a part of the collective bargaining agreement, the court held:

[T]he ban presents no antitrust issues. It is a restriction agreed to in labor management negotiations to simplify the union and NBA task of administering player benefits. Even though it may have an adverse impact on some individuals in the bargaining unit, it is not the proper subject of attack in proceedings seeking relief from antitrust violations.

Id. at 529.

39. *Wood v. National Basketball Ass'n.*, 809 F.2d 954, 959 (2d Cir. 1987).

40. *Id.*

Furthermore, Judge Winter noted that this collective bargaining agreement was, at its essence, no different from collective bargaining agreements in the more familiar industrial context, as both types are the result of the same federally-mandated process. Elaborating on the similarities between such agreements in the world of professional sports and in the industrial context, Judge Winter recognized they "have functionally identical and identically anti-competitive, counterparts that are routinely included in industrial collective agreements." Thus, the court concluded the same labor principles should apply.⁴¹

In applying these fundamental labor principles, Judge Winter pointed out that "[a]mong the fundamental principles of federal labor policy is the legal rule that employees may eliminate competition among themselves through a governmentally supervised majority vote selecting an exclusive bargaining representative" [in this instance the player's union].⁴² This allows employees to seek the best deal for the greatest number by the exercise of collective rather than individual bargaining power. But, as Judge Winter accurately concluded, this means that "[o]nce an exclusive representative has been selected, the individual employee is forbidden by federal law from negotiating directly with the employer absent the representative's consent, even though that employee may actually receive less compensation under the collective bargain than he or she would through individual negotiations."⁴³ The Second Circuit concluded that Wood was bound because "the policy claim that one can do better through individual bargaining is nothing but the flip side of the policy claim that other employees need unions to protect their interest. Congress has accepted that latter position, and we are bound by that legislative choice."⁴⁴

Validating this collective bargaining agreement from yet another approach, the court noted that Wood's antitrust claim was in fundamental conflict with another prong of the national labor policy which attaches prime importance to freedom of contract between the parties to a collective agreement.⁴⁵ This freedom of contract, the court noted, is a key foundation of American national labor policy for two reasons:

First, it allows an employer and a union to agree upon those

41. *Id.*

42. *Id.*

43. *Wood*, 809 F.2d at 959.

44. *Id.* at 961.

45. *Id.*

arrangements that best suit their particular interests. Courts cannot hope to fashion contract terms more efficient than those arrived at by the parties who are to be governed by them. Second, freedom of contract furthers the goal of labor peace. To the extent that courts prohibit particular solutions for particular problems, they reduce the number and quality of compromises available to unions and employers for resolving their differences.⁴⁶

In addition, the court noted that the freedom of contract is particularly important to the collective bargaining process in the context of professional sports, because standard industrial relations lend little or no precedent.⁴⁷

Based on the aforementioned arguments, the Second Circuit in *Wood* concluded that:

The interaction of the Sherman Act and federal labor legislation is an area of law marked more by controversy than by clarity. We need not enter this debate or probe the exact contours of the so called statutory or non-statutory "labor exemption," however, because no one seriously contends that the antitrust laws may be used to subvert fundamental principles of our federal labor policy as set out in the National Labor Relations Act. 29 U.S.C. Sections 151-169 (1982). *Wood's* claim is just such a wholesale subversion of that policy, and it must be rejected out of hand.⁴⁸

APPLICATION OF THE MACKEY TEST

In spite of the fact that the District Court in *Wood* applied the *Mackey* Test and held that the agreement was constitutional, and in spite of the fact that the Second Circuit⁴⁹ upheld the district court's dismissal of the challenge to the agreement on policy grounds, many commentators argue that the courts have erred and that the salary cap violates antitrust law.

One such argument is that the *Mackey* Test, when applied properly, dictates that the salary cap should not be exempt from antitrust scrutiny. Specifically, this argument suggests that the salary cap fails to satisfy the first part of the *Mackey* Test, which

46. *Id.*

47. *Id.*

48. *Id.* at 959.

49. Recall that it was Judge Winter who wrote the opinion for the Second Circuit. It should be noted that the *Wood* case was not his first exposure to this area of the law. In fact, Judge Winter was very experienced in this area of the law, having previously co-authored an article on the subject. See Jacobs and Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1 (1971).

requires "that the restraint on trade primarily affects only the parties to the collective bargaining relationship."⁵⁰ Allegedly, the salary cap affects parties outside the immediate bargaining unit: the potential first-round draft choices who are not yet members of the NBA.⁵¹ This assertion is incorrect as a matter of law and imprudent when analyzed from a policy perspective. The Supreme Court case of *J.I. Case Co. v. NLRB*⁵² has been interpreted to mean that "at the time an agreement is signed between the owners and the players' exclusive bargaining representative, all players within the bargaining unit and those who enter the bargaining unit during the life of the agreement are bound by its terms."⁵³

This holding necessarily draws an analogy between the college draft and hiring halls. Opponents of the collective bargaining agreement contend that this analogy cannot be made. They assert that whereas hiring halls are designed to "eliminate wasteful, time consuming and repetitive searching for jobs by individual workmen and haphazard uneconomical searches by employees," the player draft and the salary cap serve no analogous purpose.⁵⁴ Instead, it is contended that these devices create obstacles in an adjacent product market and impose employment barriers rather than facilitate job searches.⁵⁵ This argument fails to appreciate the nuances of the player draft and the cap. The draft provides for the efficient allocation of talent throughout the league in a manner that insures a competitive balance on the court. In the absence of a collegiate draft, a rookie player would just pick the team of his choice. As top collegians avoided the unpopular and unsuccessful franchises, such teams would likely fare continually worse on the court and at the box office and eventually fold. This pattern, when repeated, could eventually cause the demise of the entire league, as it threatened to do in the early 1980s.⁵⁶ The salary cap serves to ensure that free agency does not undo the competitive equality born of the draft. Together they are necessary and effective. The fact that they may hurt a specific individual on rare occasions should not matter, for that is inherent in the nature of collective bargaining. Although an

50. Daspin, *supra* note 8, at 113.

51. *Id.*

52. 321 U.S. 332 (1944). In *J.I. Case Co.*, an employee was hired after the collective bargaining agreement was made. The Court held that "the terms of the employee's employment already have been traded out." *Id.*

53. *Wood v. National Basketball Ass'n*, 602 F. Supp. 525, 529 (S.D.N.Y. 1984).

54. Daspin, *supra* note 8, at 115 (quoting Mountain Pacific Chapter, Assoc. Gen. Contractors, 119 N.L.R.B. 883, 896 n.8 (1957)).

55. Daspin, *supra* note 8, at 115.

56. See *supra* notes 2-5 and accompanying text.

individual may suffer, the agreement is designed to provide for the good of the majority.

Opponents of the cap agreement also assert that it fails to satisfy the third prong of the *Mackey* Test, which requires the agreement be the product of bona fide arm's-length bargaining.⁵⁷ The argument is that this prong of the *Mackey* Test presupposes lawful bargaining objectives, and the salary cap is a cost reduction tactic which eliminates competition in the product market, a type of agreement the labor exemption was never intended to immunize.⁵⁸ This argument must fail for two reasons. First, it fails as a matter of construction. The goal of the *Mackey* Test is to determine the legality of an agreement, yet this argument says that this particular agreement fails to pass part three of the *Mackey* Test because it is unlawful. The argument is painfully circular. Second, the salary cap is not a cost reduction tactic. The empirical evidence shows that every year the cap has been in existence, the cap has gone up, and as a result, in the last decade, players' salaries have risen from an average of \$260,000 in 1982-83⁵⁹ to well over \$1 million at the start of the 1993-94 NBA season.⁶⁰ The cap, which prompts parity throughout the league, creates a situation where the league is more competitive, hence more popular and profitable. Thus, the revenue of the league goes up, and player salaries increase accordingly. Therefore, it seems a rather illogical conclusion to refer to the cap as a cost reduction tactic when the evidence suggests that average salaries would most probably be significantly lower in the absence of a salary cap.

Applied properly, the third part of the *Mackey* Test merely requires that the agreement be negotiated by unrelated parties acting in their own self-interest. The parties to the NBA collective bargaining agreement were unrelated and acting in their own self-interest. Thus, the district court in *Wood* properly held that the NBA collective bargaining agreement was the product of bona fide arm's length negotiating.⁶¹

57. *Mackey v. National Football League*, 543 F.2d 606, 614 (8th Cir. 1976).

58. Daspin, *supra* note 8, at 117.

59. See Letter from Jeffrey Mishkin, Legal Counsel for the National Basketball Association, to Special Master Merrell E. Clark, setting forth the NBA's initial response to the December 12, 1991 letter and Initial Brief submitted on behalf of Class Counsel and the National Basketball Players Association, commencing a proceeding in which the Players accuse the NBA and its member teams of a pattern of gross violations of the collective bargaining agreement, page 3 (Dec. 19, 1991) [hereinafter cited as Letter] (on file with author).

60. NBA News, *supra* note 12, at 4.

61. *Wood v. National Basketball Ass'n*, 602 F. Supp. 525, 528 (S.D.N.Y. 1984).

APPLICATION OF JUSTICE WHITE'S BALANCING APPROACH

Just as some critics feel the NBA's collective bargaining agreement failed to measure up to the *Mackey* Test, there are those who feel the *Mackey* analysis should not be the decisive test in this area.⁶² Operating under the assumption that the *Mackey* Test represents a crude balance of divergent policy considerations that, in relation to the salary cap, is particularly inept at striking the proper policy balance, some maintain that the approach of the Supreme Court, first fashioned by Justice White in *Local Union 189, Amalgamated Meat Cutters v. Jewel Tea*,⁶³ is far better equipped to handle the peculiar intricacies of the professional basketball industry.

Justice White's framework in *Jewel Tea* determines whether a union-employer agreement is to receive antitrust law immunity by pitting labor policies against antitrust concerns. Labor policies have a twofold concern, encouraging collective bargaining and advancing union interests, while antitrust has a singular concern, that of preserving competitive markets.⁶⁴ Those who would employ this approach to strike the NBA's collective bargaining agreement argue that the agreement eliminates competition in the market for top-round draft choices and limits player mobility. Furthermore, it is asserted, the salary cap is professional basketball's version of price fixing, which in other industries has been condemned as a per se violation of the Sherman Act.⁶⁵ Thus, it is argued, the anti-com-

62. See, e.g., Daspin, *supra* note 8, at 118.

63. 381 U.S. 676 (1965). In *Jewel Tea*, plaintiff, a meat retailer, challenged a marketing hours restriction incorporated in an industry-wide collective bargaining agreement. Plaintiff was a member of a multi-employer bargaining unit of meat retailers. The defendant union represented virtually all butchers in the Chicago area. During contract negotiations between the two groups, defendant insisted on including the marketing hours restriction in the collective bargaining agreement. Plaintiff claimed that the restriction violated sections one and two of the Sherman Act by impeding his ability to compete freely and effectively in the product market. The Supreme Court held that the marketing hours provision, obtained by the union "through bona fide, arm's length bargaining in pursuit of their own labor union policies and not at the behest of or in combination with non-labor groups," was entitled to non-statutory exemption from the Sherman Act. *Id.* at 681.

64. Daspin, *supra* note 8, at 103-104.

65. There are certain trade practices that so blatantly restrain competition that they result in a per se violation of antitrust law. *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972) (division of markets); See also *Klor's, Inc., v. Broadway-Hale Stores*, 359 U.S. 207 (1959) (group boycotts); *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958) (tying arrangements); *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940) (price fixing). It is argued that by restraining the bidding for top round draft choices, the NBA member teams have effectively eliminated competition *inter se* to reduce expenses. This tactic is analogous to price fixing. Daspin, *supra* note 8, at 122.

The trend, however, is against per se applicability in professional sports because of the

petitive repercussions of the NBA's collective bargaining agreement weight the antitrust side of the scale accordingly.

Turning to the labor portion of this balancing approach, opponents of the cap feel it does not advance either of the two national labor policies. First, they argue that it does not advance union interests.⁶⁶ In large part, this argument is based on the fact that the salary cap's minimum team salary provision is based upon an aggregate concept.⁶⁷ This means that combined league payments, rather than individual club payments, must meet the minimum floor target of fifty-three percent of projected league revenues. Opponents of the cap argue that this shift in emphasis plainly defeats a central purpose of the salary cap—to force low-salaried clubs into a competitive bidding posture. As a result, any incentive for teams below cap limits to pursue high-priced free agents has been destroyed. This argument is based on the belief that under the system as it stands, low-salaried teams may simply look to the deep pockets of the league's money barons to satisfy cap dictates.⁶⁸ This argument is theoretically correct when analyzed in a vacuum. It fails, however, to take into consideration the fact that this is a professional sport where each team's financial success directly correlates to its on-court success. It is the desire to build a team that can contend for a championship, not the pressure of meeting any minimum team salary, that prompts teams to pursue valuable free agents, and the fact that the minimum team salary provision is now an aggregate concept will not alter this in the least.⁶⁹ It is

unique nature of the profession, which requires competitors to work together in the production of their product while remaining viciously competitive on the court. See *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 86 (1984) (rule of reason approach determined college broadcasting rights); See also *Mackey v. National Football League* 543 F.2d 606, 619 (1976) (per se analysis inappropriate in the context of pro sports); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 503-504 (E.D. Pa. 1972) (per se approach not appropriate in professional hockey); *Los Angeles Memorial Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1387 (9th Cir. 1984), cert. denied, 469 U.S. 990 (1984).

66. Daspin, *supra* note 8, at 119.

67. CBA, *supra* note 11, art. VII, pt. G, § 1. Section 1 provides in pertinent part "[T]here shall be a guaranteed Minimum Team Salary for each team designed to result in NBA Teams being obligated to pay, in aggregate Salary and Benefits . . . , 53% of Defined Gross Revenues." *Id.*

68. Daspin, *supra* note 8, at 119.

69. These assertions are based upon the author's personal knowledge. The author's father spent ten years in the NBA, serving five years as an assistant coach, four years as a head coach (with two separate teams), and one year as a color analyst for television and radio broadcasts. In each situation that he has been exposed to, winning championships, not trying to meet the cap minimum, has proven to be the preeminent factor behind player personnel transactions. In fact, the only time money ever seemed to play a role was when

neither fair nor accurate to characterize the NBA as a conspiracy, with the goal being for the member teams to spend as little on players' salaries as possible. The greatest motivation in player transactions is the fact that on-the-court success translates into fiscal success, and this is what prompts teams to spend money.⁷⁰

Critics also argue that the cap agreement does not advance the

the cap ceiling, not the minimum salary provision, prohibited a transaction.

70. For the upcoming 1993-94 NBA season, the salary cap has been set at \$15,175,000. As of Oct. 1, 1993 an analysis of NBA team salary reports shows that only five teams in the league were under the cap . . .

Dallas	\$13,345,960
Denver	\$15,161,379
Minnesota	\$13,145,555
Philadelphia	\$14,480,178
Sacramento	\$14,998,983

National Basketball Association Player Contracts Team Summary Report [hereinafter Player Contracts] (on file with author).

Not surprisingly, these five teams were among the league's least successful on the court during the 1992-93 NBA season. . . .

Team	Victories	Games behind division leader
Dallas	11	44
Denver	36	19
Minnesota	19	36
Philadelphia	26	34
Sacramento	25	37

THE SPORTING NEWS, NBA GUIDE, 9 (1993).

In contrast, the four teams who advanced farthest in the playoffs last year will all exceed the salary cap for the 1993-94 season by an average of over \$4,000,000. . . .

New York	\$20,984,893
Chicago	\$18,931,898
Phoenix	\$20,069,250
Seattle	\$16,765,666

Player Contracts, *supra*.

Realizing that an NBA team's primary indicator of financial success is through box office revenue, it is of significant interest to note that the teams who did poorly and spent little also fared poorly in regards to attendance . . .

Team	Avg. Home Attendance	Capacity
Dallas	13,530	17,502
Denver	14,718	17,022
Minnesota	18,405	19,006
Philadelphia	12,568	18,168
Sacramento	17,317	17,317*

THE SPORTING NEWS, NBA GUIDE, 54-107, 176 (1993).

* It should be noted that Sacramento moved to that city from Kansas City in 1985, primarily because demographics indicated there was such a strong demand for professional basketball in the Sacramento area. Thus, this evidentiary anomaly should be looked at from the perspective that Sacramento's attendance is strong in spite of their poor record.

The above represents that the five teams who are under the cap heading into the 1993-94 NBA season left open approximately 2,495 seats per ball game last year. Contrast this to last year's final four playoff contenders . . .

second half of the labor scale—encouraging collective bargaining.⁷¹ This argument is also misplaced. It concedes that the cap obviously relates to a mandatory subject of collective bargaining, namely wages. Furthermore, the argument admits that in the typical industrial setting, this obvious relation would create a presumption in favor of an antitrust exemption. The sole premise for the argument is that wage negotiation in professional basketball is removed from the collective bargaining process as player salaries are individually negotiated. Thus, the concerns of collective bargaining are correspondingly limited.⁷² This is simply wrong. One of the basic premises of the cap is that if individual negotiations are confined solely by the constraints of pure economics, the league will surely tear itself apart.⁷³ The cap agreement merely estab-

Team	Avg. Home Attendance	Capacity
New York	19,630	19,763
Chicago	18,528	17,339
Phoenix	19,023	19,023
Seattle	15,770	14,252

Id.

The above data represents that for each game played in these four arenas there was an average of 16 fans who were in the building without a chair on which to sit. Of added significance is that all of the above attendance data was for regular season games. Thus, the amazing attendance rates for the final four teams cannot be attributed to the fan frenzy associated with playoff games. One could easily assume, however, that the "standing room only" figures rise considerably come playoff time.

The data suggests rather strongly that there is indeed incentive for teams below cap limits to pursue high-priced quality free agents who can help a team on the court, which in turn will lead to positive returns at the box office.

This conclusion is buttressed by the fact that the five teams from the 1992-93 season who were under the cap, and finished with poor records, and had poor attendance figures (with the anomaly of Sacramento), have all offered rather impressive contracts to their first round draft picks in what is plainly an attempt to spend significant money to improve their on-court production . . .

Team	Player	Contract Terms
Dallas	Jamal Mashburn	Seven years, \$32 million
Denver	Rodney Rogers	Six years, \$12 million
Minnesota	Isaiah Rider	Seven years, \$25.5 million
Philadelphia	Shawn Bradley	Eight years, \$44.2 million
Sacramento	Bobby Hurley	Six years, \$16.5 million

First-Round Signings, MIAMI HERALD, Nov. 4, 1993, at 11H.

71. Daspin, *supra* note 8, at 119.

72. *Id.* at 119-120.

73. It should be noted that this fundamental principle is not peculiar to the NBA. It has universal application throughout the world of professional team sports. For example, in *United States v. National Football League*, 116 F. Supp. 319, 323-324 (E.D. Pa. 1953), Judge Grim concluded, "[T]he net effects of allowing unrestricted business competition among the clubs are likely to be, first, the creation of greater and greater inequalities in the strength of the teams; second, the weaker teams being driven out of business; and, third, the destruction of the entire league." *Id.* Likewise, in *North American Soccer League v. National Foot-*

lished the parameters within which individual players can bargain to reflect individualized variances in value, while providing protective safety restraints absent in a world of pure free agency. This argument against the cap seems to suggest that a collective bargaining agreement would be legitimate if the agreement were to provide that every player play for the same wage. If one accepts this proposition, how is it possible to conclude that the NBA's current collective bargaining agreement is illegal simply because it attempts to allow for variation, within the parameters of the agreement, to reflect individual worth?

The truth of the matter is that both of the national labor policies in Justice White's balancing approach are being advanced by the salary cap. These policies must be weighed against the anti-trust concern of preserving competitive markets. The cap's critics assert that the cap has massive anti-competitive repercussions in that it destroys the competition in the market for top-round draft choices and unnecessarily limits player mobility.⁷⁴ In analyzing these charges, one cannot lose sight of the fact that the industry of professional sports is unique. The normal rules do not apply. A professional sport is unique in that its component parts, the franchises, must cooperate to a certain extent for the sport to survive economically. A sporting event requires competition, whereas in most industries, businesses consider competition undesirable.⁷⁵ In most professions, each firm's success comes at the expense of other firms. In a professional sports league, however, each team's success is dependent upon the success of the other teams in the league.⁷⁶ As Judge Grim, District Court Judge for the Eastern District of Pennsylvania, eloquently explained forty years ago in one of the first cases of this type:

[P]rofessional sports which are organized on a league basis . . . [have] problems which no other [businesses have] The ordinary business makes every effort to sell as much of its product or services as it can. In the course of doing this it may and often does put many of its competitors out of business. The ordinary

ball League, 670 F.2d 1249, 1253 (2d. Cir.), *cert. denied*, 459 U.S. 1074 (1982), the Second Circuit held "[T]he economic success of each franchise is dependent on the quality of sport competition throughout the league and the economic strength and stability of other league members. Damage to or losses by any league member can adversely affect the stability, success and operations of other members." *Id.*

For more on this point, see *infra* notes 75-80 and accompanying text.

74. Daspin, *supra* note 8, at 118; Bronstein, *supra* note 2, at 239.

75. Foraker, *supra* note 2, at 175.

76. Donald G. Kempf, Jr., *The Misapplication of Antitrust Law to Professional Sports Leagues*, 32 DEPAUL L. REV. 625, 628 (1983).

businessman is not troubled by the knowledge that he is doing so well that his competitors are being driven out of business. Professional teams in a league, however, must not compete too well with each other in a business way. On the playing field, of course, they must compete as hard as they can all the time. But it is not necessary and indeed it is unwise for all the teams to compete as hard as they can against each other in a business way; the stronger teams would be likely to drive the weaker ones into financial failure. If this should happen not only would the weaker teams fail, but eventually the whole league, both the weaker and the stronger teams, would fail, because without a league no team can operate profitably.⁷⁷

Similarly, in their treatise on sports law, Messrs. Weistart and Lowell accurately note why the uniqueness of professional sports leagues mandate that they be treated differently in regard to the application of antitrust law:

[T]here is a great deal of economic interdependence among the clubs compromising a league. They jointly produce a product which no one of them is capable of producing alone. In addition, the success of the overall venture depends upon the financial stability of each club. The members must, therefore, refrain from direct, interfirm economic competition and, in fact, do utilize various cross-subsidy devices to compensate for the natural inequities arising from differences in the economic potential of various franchise locations.

Since a league's member-clubs do not compete with one another, it seems inappropriate to make them subject to legal principles designed to control the behavior of firms which are fundamentally different. In its basic nature, the league-firm is not a conspiracy. To treat it as such is to force results which are unlikely to achieve any purpose intended by Congress.⁷⁸

The bottom line is that the attraction of a phenomenal player such as Michael Jordan would be far less if there were not five worthy opponents on the court for him to drive past, shoot over, and dunk on. The fact, however, that the NBA has created a situation whereby each and every night he faces the absolute toughest competition, thereby providing him the opportunity to flash his skills in the exciting atmosphere of a competitive basketball game,

77. *Id.* at 628 (citing *United States v. National Football League*, 116 F. Supp. 319, 323 (E.D. Pa. 1953)).

78. *Id.* at 629-630 (citing J. WEISTART & C. LOWELL, *THE LAW OF SPORTS*, § 5.1, at 757-58 (1979)).

expands his marketability exponentially.⁷⁹ This example highlights the notion that agreements limiting economic competition "are essential to the effectiveness and sometimes to the existence of many wholly beneficial economic activities," in this instance the NBA, which on top of being a sport, is a business.⁸⁰

In light of this, this article now turns to analyzing the anti-trust concern of preserving competitive markets. The argument against the NBA's collective bargaining agreement is that it eliminates the competition for top draft choices and unnecessarily restricts player mobility. Furthermore, it is analogous to price fixing. To a certain extent, each of these complaints is true, as the draft does eliminate competition for top draft choices, and the salary cap does restrict player mobility and nominally is a form of price fixing.⁸¹ Note, however, that the antitrust concern is to preserve competitive markets. The question we must then ask is, "Does the NBA's collective bargaining agreement really hamper the preservation of competitive markets?" The answer, most definitely, is "no."

It is easy to hypothesize what might happen in the NBA were there no salary cap, but this would not be a wise way of making a decision regarding the collective bargaining agreement. There are so many influential factors involved in determining whether or not the league will be successful that it would be impossible to conduct controlled studies to determine what would happen if a given stimulus was introduced to or removed from the league. The most, and possibly the only, accurate and reliable forecaster of what would happen to the league if there were no salary cap is to examine the history of the league. As noted earlier, prior to the introduction of the salary cap, the league was not doing well. Now, just over a decade later, the league is experiencing success that no one previously could have predicted.⁸² Thus, history seems to suggest the salary

79. The author would like to note the recent retirement of Mr. Jordan, perhaps the greatest ever to wear a pair of sneakers, from professional basketball. The game of basketball will sorely miss him.

80. Kempf, *supra* note 76, at 631 (citing ROBERT BORK, *THE ANTITRUST PARADOX*, 332 (1978)).

81. It is argued that the cap agreement represents what is referred to as "monopsony price-fixing," where a single buyer of a product limits purchases in an effort to reduce input costs and thereby increase profits. The NBA has a monopoly on professional basketball in the United States. It is the only seller of professional basketball games and the only buyer of professional basketball player services. (There are other professional basketball leagues in the United States, but they are generally recognized as containing a caliber of player far inferior to the NBA.) NBA franchise owners, by agreeing to limit the amount each team can spend on player salaries, use the NBA's monopsony power to artificially limit those salaries, thereby reducing input costs and increasing franchise profits. Foraker, *supra* note 2, at 171.

82. See *supra* notes 12-16 and accompanying text. In addition, note the recent com-

cap has played a part in the league's economic success.

Refer back to the underlying antitrust concern—the preservation of competitive markets. What exactly does this mean? More precisely, what does it mean when applied to the NBA? Does it demand completely unrestrained free agency and the absence of a player draft, even though this will most likely hamper the profitability of the industry as a whole and ultimately threaten to destroy it? Or, does it suggest a prohibition of the destruction of competition where such destruction may lead to the possibility of an abuse of power by management? Clearly, the spirit of the anti-trust law dictates that the latter interpretation is the proper one.

Section One of the Sherman Act provides that “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.”⁸³ The Supreme Court has, however, more accurately stated the spirit of the rule by interpreting the Act to require that only those agreements which unreasonably restrain trade are illegal.⁸⁴ Therefore, the appropriate inquiry is whether the salary cap agreement unreasonably restrains trade. It does not.

The way things are presently, it is not too far-fetched to suggest that if there were no salary cap and the entire league were to engage in a bidding war for the services of a budding young megastar, such as Shaquille O’Neal (“Shaq”), might sign a contract worth well over \$100 million. Under the constraints of the current cap agreement, however, it is doubtful Shaq would be so fortunate. Thus, it appears the anti-competitive evils of the cap are plain and surely unreasonable. This fails to appreciate, however, that Shaq’s ability to make over \$100 million on the open market today is the direct consequence of the cap agreement. The collective bargaining

ments of Rick Welts, president of NBA Properties, the league’s main marketing arm:

Most people who look at the NBA today simply can’t realize what it was like in the early 1980’s. We were discussing everything from how many franchises we might lose to whether the league itself was a viable business venture. Network television, which has since become a major factor in the NBA’s success, clearly had its doubts. To me, the low point in our history was the 1980 Finals, when a rookie named Magic Johnson led the Lakers to the championship, and it was only on tape delay.

Chapin, *infra* note 175, at 6.

Also, note that in 1984-85 Magic Johnson was the league’s highest paid player at \$2.5 million. For the upcoming 1993-94 NBA season over 50 players will make \$2.5 million or more. Foraker, *supra* note 2, at 158; Player Contracts, *supra* note 70.

83. 15 U.S.C. § 1 (1982).

84. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958); Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918); Standard Oil Co. v. United States, 221 U.S. 1 (1911).

agreement, via the draft and the salary cap, has created relative parity throughout the league. In turn, this has led to competitive games that have prompted an increase in popularity, and as the league grows more popular, the players and owners grow ever wealthier. The collective bargaining agreement, through its restraints, has created a situation whereby a player like Shaq can make an unprecedented fortune in the absence of the cap's restrictions. What is of key importance, however, is to realize that if the restrictions of the cap were lifted, the ability of a player like Shaq to land such a massive contract would be short-lived. The profitable economic situation the cap has created would surely evaporate in a relatively short period of time if the cap were removed, and the financial situation of the league would revert to its pre-cap days. It is even conceivable that the situation might arise where a player as gifted as Shaq might not be able to earn even a portion of what he now earns under the constraints of the cap, as there might not be a profitable league for him to play in.

The essence of the antitrust question in regard to the salary cap boils down to the following inquiry: Which of the following scenarios is actually the one intended by the application of antitrust law? Scenario number one, where completely free and unfettered competition leads the industry to tear itself apart and no one makes a profit? Or, scenario number two, where, on account of forces inherent to this unique industry, a system of semi-flexible and reasonable restraints leads to the astronomical growth of an industry whereby both employers and employees see their earning capacity soar?

As applied to the NBA, the purpose of antitrust law is to prevent a situation where the owners are making more than their fair share of return at the expense of the players whose earnings are unilaterally controlled and do not reflect the players' true value. The salary cap is clearly within the spirit of the antitrust law. The presence of the salary cap, not its absence, contributes to the preservation of competitive markets.

Applying Justice White's balancing approach reveals that the collective bargaining agreement in question here advances both of our national labor policies while it fails to adversely affect the policies advanced by antitrust law. Accordingly, the balance tips heavily in favor of American national labor policies. Consequently, the labor exemption shielded the salary cap agreement from the standards of the Sherman Act.

THE RULE OF REASON APPROACH

Still, there remain critics of the cap who do not believe that American national labor policy should offer collective bargaining agreements any protection from antitrust law.⁸⁵ This argument is premised on the notion that antitrust law represents a fundamental national economic policy, a basic doctrine of economic freedom. The Supreme Court lends some credibility to these assertions, having referred to the Sherman Act as the "charter of economic liberty."⁸⁶ Also, the Court has suggested that "[a]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."⁸⁷

Thus, the argument is that the importance of antitrust laws, and the Court's hesitancy to extend exemptions of these laws, dictates that the conflict between labor and antitrust goals in sports restraint cases should be reconciled in favor of antitrust laws. Accordingly, the NBA salary cap should not be exempt from antitrust scrutiny.⁸⁸ This argument fails to consider case law to the contrary,⁸⁹ ignores national labor policy,⁹⁰ and does not account for

85. Foraker, *supra* note 2, at 170.

86. *Id.* (quoting *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958)).

87. *Id.* (quoting *United States v. Topoco Assocs.*, 405 U.S. 596, 610 (1972)).

88. *Id.* To support his proposition Mr. Foraker relies on two Supreme Court cases *Federal Maritime Common v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973); and *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973). Note, however, that both of these cases deal with the Supreme Court analyzing collective bargaining agreements in the more familiar industrial context and fail to consider that the industry of professional sports is unique, which requires that it be analyzed in a unique manner in order to achieve results which coincide with the spirit of our most fundamental national policies.

89. *Wood v. National Basketball Association*, 602 F. Supp. 525 (S.D.N.Y. 1984), *aff'd* 809 F.2d 954 (2d Cir. 1987).

90. See *supra* notes 23-26 and accompanying text. Also, note that the codification of the antitrust policy and the codification of our national labor policy both took place during 1982, which presupposes that Congress did not intend for one to so blatantly dominate the other. A more accurate perspective is that both of our national labor policies must be considered in conjunction with antitrust law. Justice Frankfurter, in *Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797, 806 (1945), succinctly characterized this national policy dilemma:

The result of all this is that we have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.

Id.

Even though this case deals with the more familiar industrial context, and the author is

the fact that the business of professional sports is unique and must be treated accordingly. Thus, its conclusion is faulty. But even assuming, for argument's sake, that antitrust law should dominate and the NBA's collective bargaining agreement should be subject to the scrutiny of antitrust law, the agreement still proves to be constitutional.

If a collective bargaining agreement is offered no immunity to antitrust law, it must measure up to the standards of the Sherman Act, which states that "every contract, combination or conspiracy in restraint of trade or commerce among the several states . . . is declared to be illegal."⁹¹ There are two techniques used to scrutinize agreements under the Sherman Act, *per se* treatment and the rule of reason analysis.⁹² *Per se* treatment is appropriate in some instances because there are certain trade practices that so blatantly restrain competition that they result in a *per se* violation of antitrust laws.⁹³ This approach, however, is typically not employed in the context of professional sports.⁹⁴ Rather, a collective bargaining agreement in the context of professional sports which is offered no immunity from antitrust law in light of labor concerns must be analyzed under the rule of reason analysis.

The rule of reason states:

The true test of legality is whether the restraint imposed . . . merely regulates and perhaps thereby promotes competition or whether it . . . may suppress or even destroy competition. To determine that . . . the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable.⁹⁵

critical of other commentators who apply case law regarding such industrial settings to the unique industry of professional sports, there is no hypocrisy involved in citing the above passage. The wise words of Frankfurter, J., above, transcend the context of the particular case and lend themselves to general applicability anytime the two declared congressional policies of antitrust law and labor square off against one another.

91. 15 U.S.C. § 1 (1982).

92. Daspin, *supra* note 8, at 121 (citing *Northern Pac. Ry. v. United States* 356 U.S. 1, 5 (1958) (regarding the *per se* approach) and *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (regarding the rule of reason)).

93. See *supra* note 65 and accompanying text.

94. *Id.*

95. *Chicago Bd. of Trade v. United States*, 246 U.S. at 238. It has been argued that an integral part of the rule of reason analysis is that the restraint must be no more restrictive than necessary. *Mackey v. National Football League*, 543 F.2d 607, 620 (8th Cir. 1976). This proposition is not entirely correct. The existence of a less restrictive alternative is pertinent, but it is not the decisive factor in cases revolving around the rule of reason. *National Football League v. North Am. Soccer League*, 459 U.S. 1074, 1079 (1982) (Rehnquist, J., *dissenting from denial of cert.*) ("[T]he possibility of less restrictive alternatives is only one among

Some commentators have suggested that an application of the rule of reason dictates the cap agreement is unconstitutional. One part of this argument is that one of the primary justifications of the cap—ensuring financial stability—is not a legitimate consideration under the rule of reason.⁹⁶ This conclusion, however, is wrong as a matter of law.⁹⁷ The second part of this argument is that it is inappropriate to argue that the cap is necessary to provide for a competitive balance on the playing court as this is not a proper inquiry under the rule of reason.⁹⁸ To the contrary, this must be a consideration under the rule of reason. The Supreme Court has

many proper considerations"). See also *Betased, Inc. v. U & I Inc.*, 681 F.2d 1203, 1228-1230 (9th Cir. 1982) ("[T]he presence of a less restrictive alternative is a factor to be considered in the reasonableness analysis, but it is not necessarily the decisive factor"); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 303 (2d Cir. 1979) (the least restrictive alternative is not required, but the restraint should not "exceed the limits reasonably necessary to meet the competitive problems" [and] the existence of alternatives is obviously of vital concern in evaluating putatively anti-competitive conduct") (emphasis in original, citations omitted) (quoting *United States v. Arnold, Schwinn & Co.* 365 U.S. 365, 380-81 (1967), *cert denied*, 444 U.S. 1093 (1980)).

96. Daspin, *supra* note 8, at 123.

97. This argument is based upon the decision in *United States v. General Motors Corp.*, 384 U.S. 127 (1966), where the Court stated "exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborator's profit margins or their systems . . ." See Daspin, *supra* note 8, at 123. Thus, it is argued that the salary cap cannot be saved by claims that the league would not survive in its absence. This conclusion, however, is erroneous. The *General Motors* case should not be relied upon in regard to this argument because it deals with the classic industrial context and fails to take into consideration the all-important uniqueness of the industry of professional sports. This inquiry is necessary because under the rule of reason analysis, "the court must ordinarily consider the facts peculiar to the business to which the restraint is applied . . ." *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

The holding of *General Motors*, however, is alleged to have been adapted to the context of professional sports by numerous other cases. See Daspin, *supra* note 8, at 123. These cases, however, are clearly distinguishable as a matter of law or have been interpreted incorrectly. For example, *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971), involved a successful claim by Spencer Haywood against the NBA's hardship rule, which required graduating high school seniors to wait four years before becoming eligible for the NBA draft. The distinguishing factor about this case is that the court, after a lengthy debate, concluded the *per se* approach was the proper method of antitrust review to be applied to these circumstances. Thus, any holding of the court regarding the permissibility of the financial necessity argument is irrelevant. The court did, however, imply that under a rule of reason analysis, the league's argument regarding financial necessity would be available. *Denver Rockets*, 325 F. Supp. at 1065-66.

Similarly, in *Linseman v. World Hockey Ass'n*, 439 F. Supp. 1315 (D. Conn. 1977), the court held that a financial necessity argument was not available under a *per se* approach. *Id.* at 1323. Finally, in *Robertson v. National Basketball Ass'n*, 389 F. Supp. 867 (S.D.N.Y. 1975), Judge Carter clearly stated that an argument of financial necessity is an appropriate consideration under a rule of reason analysis. *Id.* at 892.

98. Daspin, *supra* note 8, at 123.

stated that "the Court must consider the facts peculiar to the business to which the restraint is applied"⁹⁹

Proper application of the rule of reason to the NBA shows conclusively that the cap does not suppress or destroy competition; rather, it merely regulates the terms of the competition, thereby promoting it. The cap restrains competition for high draft picks, reduces player mobility, and limits player salaries. In doing so, the cap creates a situation whereby the "restrained salaries" are greater than the salaries would be if the regulations were removed. The cap provides for a healthy, thriving industry that assures that those involved will be rewarded handsomely. Thus, the NBA's collective bargaining agreement obliges the rule of reason.

ANTITRUST LAW CONCLUSION

Under the three-part test of *Mackey*, the NBA's collective bargaining agreement proves to be constitutional. Likewise, applying Justice White's balancing approach shows that the agreement is constitutional. Even assuming the cap is awarded no antitrust immunity whatsoever, it meets the requirements of the rule of reason and hence, it proves to be constitutional. The only antitrust analysis which would invalidate the agreement—the per se approach—is inapplicable. As a matter of law, the collective bargaining agreement between the NBA and the Players Association is a legal agreement.

THE FUTURE OF COLLECTIVE BARGAINING IN THE NBA

The collective bargaining agreement between the NBA and the Players Association expires at the end of the 1993-1994 season. While the league has encountered great success while under the salary cap regulations, there are many problems associated with the cap. These problems suggest that the next collective bargaining agreement, if one can be agreed upon, will be markedly different. The remaining sections of this work will address these problems associated with the cap's future, speculate as to how they will affect the continued existence of the cap, and make some suggestions as to how the parties should respond.

99. *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918). The argument also rests upon two other cases which allegedly reject the permissibility of the competitive balance argument. See *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976); *Smith v. Pro Football*, 593 F.2d 1173 (D.C. Cir. 1978). An accurate analysis of these cases, however, reveals that the competitive balance argument is not prohibited from being made, but, rather, that it will not legitimize an agreement that is otherwise unreasonable.

The Dudley Deal

One of the major complaints about the provisions of the salary cap is the manner in which they restrain player mobility. Obviously, this frustrates players who would like some freedom to choose where they play. This problem has become an even greater headache for team general managers. There was once a time when a trade meant little more than an evaluation of players' playing ability. For example, Player X and Player Y are of relatively equal caliber. So, Team 1 sends Player X to Team 2 in exchange for Player Y. The deal is simple. No hassles. Today, however, things are much more complicated because of the salary cap.

To begin to understand the complications created by the salary cap, an analysis of the once-simple Player X for Player Y scenario will prove useful. Under the cap, if two teams are paying salaries in excess of the cap, they may trade players only if the players are of almost equal value in terms of salary.¹⁰⁰ Accordingly, if the deal is between a team over the cap and a team under the cap, the deal can only be done if the team who is over the cap is receiving a player who makes less money or an amount roughly equal to the amount they paid their former player.¹⁰¹

Now, suppose there is a player who at some point during his career has an increase in salary of more than thirty percent. Such a player is referred to as a base year compensation player.¹⁰² Further, suppose that the team employing that player is above the cap and wishes to trade him to another team at or above the cap. The team desiring the trade will only be allowed to do so if the player they trade him for is a player who makes what the base year compensation player made in his base year of compensation (the year before his salary increased by more than thirty percent) or less.¹⁰³

100. CBA, *supra* note 11, art. VII, pt. F, § 1(e)(1-2). Section 1(e)(1-2) provides in pertinent part:

(e) A Team with a Team Salary at or over the Salary Cap may replace a player whose Player Contract has been assigned to another NBA team:

(1) With one or more players whose Player Contracts are acquired simultaneously and whose then current Salaries, in the aggregate, are no more than 110% of the then current Salary of the player being replaced . . .

(2) With one or more player whose Player Contracts in the aggregate call for Salary no greater than 100% of the Salary last paid to the player being replaced.

Id.

101. *Id.*

102. CBA, *supra* note 11, art. VII, pt. F, § 2.

103. *Id.* This provision has proven very restrictive indeed. For example, prior to the

Clearly, the salary cap has made it very difficult to conduct a trade considering that almost all of the teams in the league are at or above the cap.¹⁰⁴

The salary cap also has significant ramifications regarding the signing of free agents. In order to understand this fully, it is first necessary to understand the distinctions between the two types of free agents. Generally, a *restricted free agent* is a veteran player who has played in the league for less than four years and has satisfied the terms of his player contract. Also, any player who has just completed his first player contract will be a restricted free agent, regardless of the number of years of service in the NBA.¹⁰⁵ All other veteran players, at the expiration of their player contracts, become *unrestricted free agents*.¹⁰⁶ Any team is free to offer an unrestricted free agent any amount of money as long as it can fit his salary under its cap.¹⁰⁷

The manner in which the cap addresses restricted free agents is rather interesting. Basically, the cap dictates that the team for whom the restricted free agent last played can re-sign that player at any price, irrespective of the salary cap.¹⁰⁸ This provision is based on the notion that a team that has benefitted from a certain player in the past has a reliance interest in that player. Thus, in

1992-93 NBA season, the Detroit Pistons, who were over the cap, wished to trade John Salley, who made roughly \$2 million. Salley, however, was a base year compensation player earning \$615,000. Thus, the Pistons could only trade him for a player who made \$615,000, and they had to do this with a team that could fit Salley's current salary of \$2 million under the cap. Understandably, the Pistons encountered great difficulty in trying to move Salley. Eventually, however, they were able to trade Salley to the Miami Heat, which could accommodate Salley's salary. In return, the Pistons got a future draft pick, less than the \$615,000 they had room for.

With that pick, the Pistons selected Lindsey Hunter from Jackson State. With the money they cleared from unloading Salley, the Pistons were able to sign Terry Mills, who was a restricted free agent. Thus, the ultimate deal turned out to be Salley for Mills and Hunter.

104. Twenty-two of the League's 27 teams were at or above the cap as of Oct. 1, 1993. Player Contracts, *supra* note 70.

105. CBA, *supra* note 11, art. V, § 1.

106. CBA, *supra* note 11, art. V, § 2.

107. CBA, *supra* note 11, art. VII, pt. E, § 1(a).

108. CBA, *supra* note 11, art. VII, pt. F, § 1(d). Section 1(d) provides in pertinent part:

(d) A Team may enter into any new Player contract with or, where applicable, exercise its Right of First Refusal with respect to, any Veteran who completes the playing services called for under his Player contract and who has previously played for that Team, even if such Team has a Team Salary in excess of the Salary Cap or such Player Contract causes the Team to have a Team Salary in excess of the Salary Cap.

Id.

drafting the collective bargaining agreement, the parties decided it would harm the league if a team could have one of its players, upon whom it relies, simply swept away by a higher bidder. This notion is consistent with the general principle behind the cap, which limits the ability of teams to buy high-caliber players away from other teams. This salary cap provision thus allows teams who are capped to prevent this from happening by permitting them to exceed the cap in order to protect their own players.

Typically, this provision applies when a restricted free agent is tendered an offer by a team other than the team with which the player last played. Pursuant to the right of first refusal, the team who last enjoyed the benefits of that player could then match the offer and thus retain the services of that player, even if it meant placing the team over the cap.¹⁰⁹ Consistent with the policy favoring the ability of teams to protect reliance interests they may have in their players, there also exists a provision which allows a team to enter the bidding war for an unrestricted free agent, who last played for that team, regardless of cap concerns.¹¹⁰ When dealing with unrestricted free agents, however, there is no right of first refusal. Thus, a team is not assured of retaining the services of an unrestricted free agent even if it is willing to match the highest offer.

In light of all the restrictions that these provisions place upon player movement, player agents and general managers have begun to employ a creative practice which enables them to circumvent the spirit of the cap. This technique can best be understood by analyzing the example of Chris Dudley.¹¹¹ Chris Dudley was a six-year veteran player who completed a three-year contract with the New Jersey Nets on June 30, 1993, which made him an unrestricted free agent. His salary in 1993 was \$1,200,000. He had been a valuable player for the Nets, but not a starter. Pursuant to the collective bargaining agreement, New Jersey was not limited by the salary cap with respect to Dudley and made him an offer of a

109. The right of first refusal refers to a team's right to match the offer of another team trying to court a restricted free agent. CBA, *supra* note 11, art. V, § 3.

A classic example of a team using the right of first refusal to re-sign one of its own restricted free agents, although doing so would place them over the cap, is the scenario involving the Miami Heat, the Cleveland Cavaliers, and John "Hot Rod" Williams. See *supra* note 7.

110. CBA, *supra* note 11, art. VII, pt. F, § 1(d).

111. *In Re National Basketball Players Association, Petitioners and National Basketball Association, Respondents. Re: Chris Dudley.* Case No. 87-4001 CIV., 8 (D.N.J. 1993) (on file with author) [hereinafter cited as Special Master Report #28].

seven year contract worth \$20,748,000.¹¹² Dudley rejected the offer, which was then withdrawn by New Jersey, although there is evidence that it, or something close to it, would have been available if Dudley had shown serious interest.¹¹³

Meanwhile, Dudley had begun negotiations with the Portland Trailblazers. Dudley found this team particularly attractive because it was of championship caliber, it had no natural center, the team played a style of basketball that he thought would "showcase" his skills, and it was located on the West Coast where he lived.¹¹⁴ Portland, however, had no room under its salary cap, and having enjoyed tremendous success over the last four years,¹¹⁵ the team was hesitant to do any major re-shuffling with its roster so as to find enough room (money) under the cap with which to offer Dudley a sizable contract.¹¹⁶

Portland did, however, trade a lesser veteran player, Mario Elie, to open up a \$790,000 slot under the cap.¹¹⁷ Portland realized that a contract worth only \$790,000 in Year One would be of little interest to Dudley, who was receiving offers from other teams for significantly more money.¹¹⁸ In light of the situation, Portland offered Dudley the best contract it could: \$790,000 in Year One followed by a thirty percent raise each year—which is allowable under the cap¹¹⁹—for seven years.¹²⁰ Dudley accepted the con-

112. *Id.*, at 8. The proposed yearly salaries for Dudley were as follows:

1993-94	\$1,560,000
1994-95	\$2,028,000
1995-96	\$2,496,000
1996-97	\$2,964,000
1997-98	\$3,432,000
1998-99	\$3,900,000
1999-2000	\$4,368,000
Total	\$20,748,000

The first six years of the contract were to be fully guaranteed and the seventh year was partly guaranteed. *Id.*

113. *Id.* at 9.

114. *Id.*

115. Over the past four seasons (1989-90 through 1992-93), the Blazers have gone to the Western Conference Finals three times, and twice they have gone on to the NBA finals. *Id.* at 9.

116. Special Master Report #28, *supra* note 111, at 9.

117. *Id.*

118. *Id.* On top of the seven-year, \$20,748,000 contract New Jersey had offered Dudley, Phoenix was rumored to have spoken with Dudley about a six-year contract worth \$19,842,000. No firm offer, however, was made. *Id.*

119. CBA, *supra* note 11, art. VII, pt. E, § 2(c).

120. Special Master Report #28, *supra* note 111, at 9-10. The proposed yearly salaries were as follows:

tract.¹²¹ Granted, the seven year, \$10,512,000 contract was worth only about one-half as much as the contract that Dudley was offered by the Nets, but there was an important, additional provision—a one-year out.¹²² This “out” would give Dudley the right to become an unrestricted free agent after only one year. If he did opt out, Portland would be able to pay him without regard to the salary cap because Portland would then be the team for whom Dudley last played.¹²³

Based on the fact that the contract with Portland was both low in salary compared to Dudley’s “market value,” and included the option to become an unrestricted free agent after only one year, the NBA claimed the contract violated the spirit of the salary cap and was therefore illegal.¹²⁴ The league then invalidated the contract, and the Players Association responded by commencing judicial action.

The league was of the opinion that Portland and Dudley crafted a plain, under-the-table deal in an effort to circumvent the salary cap.¹²⁵ In the league’s determination, Portland had courted Dudley by promising him that if he would sign a contract with the team in which he would take a significant loss in salary for one year, it would include in the contract a clause allowing him to become a free agent after one year. Then, no longer bound by the cap in regard to Dudley, it would offer him a new contract in which it would more than make up for the lack of compensation earned in

1993-94	\$ 790,000
1994-95	\$ 1,027,000
1995-96	\$ 1,264,000
1996-97	\$ 1,501,000
1997-98	\$ 1,738,000
1998-99	\$ 1,975,000
1999-20	\$ 2,212,000
total	\$10,512,000

Id. at 10.

121. *Id.*

122. *Id.*

123. CBA, *supra* note 11, art. VII, pt. F, § 1(d).

124. Special Master Report #28, *supra* note 111, at 10.

125. The league was relying on the decision of Judge Carter of the District Court in the Southern District of New York invalidating the player contract of then-New York Knick Albert King. *Matter of Nat’l Basketball Ass’n*, 630 F. Supp. 136 (S.D.N.Y. 1986). In that case Judge Carter held:

[P]layers cannot be allowed to structure salary contracts which, although artificially and formally within salary cap limitations, void the provisions designed to protect the NBA’s interests. By sanctioning such empty formalism we would buttress the players’ interests, but would leave the league in shambles.

Id. at 141.

Year One. The league took the position that:

[A] team wishing to hire a player with a market value higher than is available under its salary cap should make roster moves to provide room under the cap. It should not avoid the cap by paying a low salary for one year, allowing the player to opt out and then renegotiate a new salary free of the cap.¹²⁶

Various portions of the collective bargaining agreement seem to suggest that the contract in question is illegal. For example, Article VII, Part H, Section 3 of the collective bargaining agreement is as follows:

Section 3. Neither the parties hereto, nor any team or player shall enter into any agreement, Player contract, Offer Sheet or other transaction which includes any terms that are designed to serve the purpose of defeating or circumventing the intention . . . [of the salary cap].¹²⁷

Similarly, Article VII, Part H, Section 4 of the agreement states:

Section 4. (a) At the time a Team and a player enter into any Player Contract, or any renegotiation, extension or amendment of a Player Contract, there shall be no undisclosed agreements of any kind, express or implied, oral or written, or promises, undertakings, representations, commitments, inducements, assurances of intent or understandings of any kind, between such player and any Team:

. . . .

(2) concerning any future renegotiation, extension or amendment of the player contract.¹²⁸

Note, however, that the collective bargaining agreement does not explicitly state that a one-year out provision in a multi-year contract is illegal. Section 4 states that an under-the-table agreement is illegal. The problem is that it is nearly impossible to prove the existence of an under-the-table agreement. Similarly, Section 3 states that cap circumvention is illegal, but it does not suggest that a one-year out provision in a multi-year contract is per se cap circumvention.

The Dudley case was decided by a Special Master, pursuant to the collective bargaining agreement.¹²⁹ Two basic issues were

126. Special Master Report #28, *supra* note 111, at 11.

127. CBA, *supra* note 11, art. VII, pt. H, § 3.

128. *Id.* § 4.

129. CBA, *supra* note 11, at art. XXVIII. It should also be noted that Dudley's con-

before the Special Master. First, did an illicit agreement exist between Dudley and the Trailblazers?¹³⁰ The second issue was whether Dudley's multi-year contract with a one-year out clause—the exercising of which would make him a free agent—constituted cap circumvention.¹³¹ This latter question is of tremendous significance to the future of the NBA. If one-year out provisions in multi-year contracts are legitimized, it will threaten to undo all the cap has accomplished because, in essence, the league will revert to a system where teams can simply buy the best players. Granted, they will have to do so indirectly, via contracts containing one-year out provisions, but it will have the same effect.¹³²

tract was not the only one to be decided by this case. Craig Ehlo, formerly of the Cleveland Cavaliers, recently entered into a contract with the Atlanta Hawks that contained a one-year out provision. European star Toni Kukoc had done the same with the Chicago Bulls. The Dudley case was to decide the fate of these two contracts, as well as Dudley's. Special Master Report #28, *supra* note 111, at 4-5.

Since this litigation commenced, the top pick of the 1993 NBA draft, Chris Webber of the Golden State Warriors, signed a massive 15-year, \$74.4 million contract which also contained a one-year out provision. In spite of the massive value of the contract, Webber might choose to exercise the out provision since in the first year of the contract he will only earn \$1.6 million and \$2.08 million in year two, salaries far below what a number one pick should command. Webber's contract, however, will increase by the permissible amount of thirty percent from season to season so that in the final year of the contract he will make over \$8 million. Webber still may opt out in order to earn more money up front. Server, *supra* note 1, at 89. Webber was joined by fellow rookie Anfernee Hardaway, who signed a similar 13-year, \$65 million deal with the Orlando Magic, which also includes a one-year out provision. *Id.* These contracts, however, were signed after this litigation had commenced and thus were not ruled upon by the special master. Consequently, the ultimate outcome of this case will not directly affect the validity of these contracts.

130. Special Master Report #28, *supra* note 111, at 6-7.

131. *Id.*

132. Those who support one-year out provisions as a legitimate tool in negotiating player contracts argue that they will not destroy the league because they will only apply to free agents. This argument, however, fails to note that at the close of every season, numerous players of significant value become free agents. For instance, at the close of the 1992-93 NBA season the following players became unrestricted free agents:

Chris Dudley
A.C. Green
Jerome Lane
Donald Royal

Kevin Edwards
Avery Johnson
Andrew Lang
Charles Smith

Craig Ehlo
Larry Krystkowiak
Ken Norman
David Wingate;

and the following players became restricted free agents:

Anthony Bonner
Matt Geiger
Robert Pack
Jerome Richardson

Elden Campbell
Keith Jennings
Will Perdue
Rick Smits.

Doug Christie
Marcus Liberty
Bobby Phills

Clearly, this represents a large enough talent pool to significantly affect the league. Memorandum from Jeffrey Mishkin to NBA General Managers (April 20, 1993) (on file with author).

Dudley Before the Special Master

The Special Master refused to accept the NBA's contention that a secret understanding in violation of the CBA existed between Dudley and Portland.¹³³ At trial, anyone who might have known about such an illicit agreement testified that such an agreement did not exist. Based on this testimony the Special Master decided the existence of such an agreement had not been established.¹³⁴ Rather, the Special Master stated:

I do not find the suggested inference compelling. As indicated above, the explanations given by Dudley for accepting the Portland offer are to me reasonable and plausible in view of his circumstances and career ambitions. The opportunity to be a starting center, plus his "fit" into the Portland style of play, plus Portland's championship caliber, plus the team's location on the West Coast, plus the one-year out with its opportunity to be rewarded for a good playing year — all these fully explain his acceptance of the contract without any secret understanding as to future compensation.¹³⁵

Regarding the more important issue of whether the Dudley Portland contract constituted illegal cap circumvention, the Special Master ruled in favor of the contract. He concluded this contract was not empty formalism as there were important substantive results for the player and for the team.¹³⁶ The Special Master did make a point of noting that the salary cap has appeared to benefit the league, stating, "It appears to have contributed to its [the league's] financial stability and to have put the teams on a

At the close of each season, a similar talent pool would then have the option of signing contracts containing one-year out provisions. Likewise, rookie draft picks would have the option to sign such contracts. Thus, teams drafting top draft picks will not really be bound by the constraints of the cap when they sign their top rookies. In fact, this practice has already begun as both Chris Webber, Golden State's prize rookie, and Anfernee Hardaway of Orlando have signed such contracts. *See supra* note 129.

All players in situations similar to those just listed will continue to have the option of signing contracts containing one-year out provisions, even if the NBA and the Players Association cannot agree on a new collective bargaining agreement. *See infra*, notes 161-164 and accompanying text.

133. According to the NBA, the Dudley/Portland deal "in the light of at least one other offer made to Dudley, simply defies all reason — but for one." Special Master Report #28, *supra* note 111, at 17 (citations omitted).

134. Special Master Report #28, *supra* note 111, at 18. At trial, however, one man, Richard Dozer of the Phoenix Suns, stated that during a phone call between him and Fagan [Dudley's agent], Fagan had inferred that there was such an agreement. The Special Master did not credit this testimony. *Id.*

135. *Id.* at 17.

136. *Id.* at 13.

more equal footing so far as bidding for players is concerned.”¹³⁷ Incredulously, though, the Special Master concluded that “[i]t does not seem to me, however, that the Dudley contract and others like it pose any threat to these benefits.”¹³⁸ It should be noted that, in great part, the Special Master’s decision to validate this contract was based on the fact that he had previously held that the collective bargaining agreement contemplated options in favor of a player to shorten a contract.¹³⁹ The Special Master stated:

Numerous examples have been cited to me of such options in contracts approved by the NBA. They include options after two or more years in multiyear contracts and one-year outs in two year contracts. I am unable to accept the proposition that a one-year out in a contract of more than two years is so different in substance as to constitute cap circumvention.¹⁴⁰

This holding, which allows for one-year outs in multi-year contracts, threatens to have a massive, negative effect on the league’s financial stability. There is some question whether such an important decision should be based upon the Special Master’s inability to distinguish between the contract at issue and numerous other contracts currently existing in the league that are agreed by all to be legal, particularly when historical analysis reveals that these “numerous other contracts” are merely the result of happenstance and not the rationalized products of in-depth salary cap scrutiny.¹⁴¹

137. Special Master Report #28, *supra* note 111, at 15.

138. *Id.*

139. Special Master Report #28, *supra* note 111, at 14. In upholding the validity of these other option clauses, the Special Master relied upon two provisions within the collective bargaining agreement. Article VI, Section 1 of the collective bargaining agreement provides, “Any Player Contract may contain an option in favor of the player.” CBA, *supra* note 11, art. VI, § 1. Article VII, Part B, Section 2(a), dealing with signing bonuses, recognizes that there may be a player contract which “provides for an option by the player either to increase or shorten the stated term of the Player Contract.” CBA, *supra* note 11, art. VII, pt. B, § 2(a).

140. Special Master Report #28, *supra* note 111, at 14.

141. The Special Master’s decision boils down to a quasi-estoppel argument which asserts that because similar provisions currently exist in numerous contracts never subject to challenge by the league, the league may not challenge this provision as it is not sufficiently distinguishable. An analysis of the evolutionary process which has given birth to the termination provision in question reveals how unjust it is that the Special Master’s far-reaching decision is based upon this quasi-estoppel argument.

There is a long history leading up to the current controversy involving the Dudley/Portland contract. The league has always frowned upon termination provisions within player contracts, primarily because it is not overly pessimistic to conclude that these provisions are typically associated with illegal side agreements which are terribly difficult to prohibit. The success of the salary cap is contingent upon the construction of a group of well-

Toward the end of oral argument, in response to the argu-

followed rules. Granted, there are draconian punishments involved when a party is found to have violated the rules, but the cap's success is necessarily tied to people abiding by the rules. It would undermine the cap's underlying purposes to have a set of rules that are easily violated, especially when one is dealing with a group of people who are highly motivated to do so. Hence, the league has traditionally frowned upon termination provisions. Such provisions, however, were not explicitly declared illegal within the collective bargaining agreement for a number of reasons.

In order for a player and a team to successfully engage in an illegal side agreement, without it being against league policy, it must, by its nature, be unwritten and undisclosed. Thus, in a purely legal sense neither party, player or team, is bound by the terms of an illegal agreement, e.g., a promise to renegotiate in terms favorable to the player. Necessarily, the probability of such agreements actually coming to fruition decreases as the number of years passes between the initial agreement and the date of termination.

Also, there are a certain legitimate justifications for desiring a termination provision. For example:

- (1) Provisions for termination in the later years of a contract allow the player and the team to re-analyze and conform a player's compensation to the then current market.
- (2) A player may not want to commit to a certain team for an extended period of time for a number of reasons:
 - (a) Personality conflicts between the player in question and other players, coaches or management;
 - (b) Geographical considerations;
 - (c) Quality of the team. For instance, a player in the twilight of his career may be hesitant to lock in with a poor team for the rest of his career knowing this may prevent the player from ever being on a championship team; or
 - (d) A young player may be hesitant to lock himself into a long term contract at a certain compensation if the player anticipates marked improvement in his skills which in a few years would warrant significantly greater earnings than the player is currently being offered.

This non-exclusive list of justifications for termination provisions serves to demonstrate that a termination provision does not necessarily mean a team is trying to circumvent the salary cap. The problem is that it is easy to see where the line begins to grow blurry, and it is not so easy to tell what is a legitimate consideration and what is an attempt to circumvent the cap. Nonetheless, in the early years of their existence, termination provisions were typically employed in the later years of multi-year contracts for what appeared to be legitimate considerations. The league thus concluded that the risk-reward ratio of termination provisions dictated that it was not worth prohibiting such provisions when they took place in the later years of a contract. As such, such provisions were not explicitly outlawed under the terms of the collective bargaining agreement.

The termination provision issue moved into the next era with the close of the 1990-91 NBA season when John Battle, a five-year NBA veteran who had spent his entire career to that point with the Atlanta Hawks, became an unrestricted free agent. Battle, a fairly sought-after free agent who had averaged almost 14 points per game the prior year, then entered into negotiations with the Cleveland Cavaliers. For various reasons that the league never questioned as illegitimate, the Cavaliers and Battle sought to enter into a six-year deal in which Battle would have the opportunity to opt out following any year after the second year. Although the league did not believe the Cavaliers and Battle were engaging in prohibited activities, the league was not pleased with the proposed contract because of its inherent disdain for termination provisions in general.

At the time, Gary Bettman, one of the chief architects of the cap, was the NBA's gen-

ments made by Dudley's counsel, which were eventually accepted by the Special Master, the league raised a new contention: "If as claimed by Dudley, Portland and the Players, the one year out provision had value, then such value should be added to Dudley's salary for salary cap purposes thus putting the Dudley/Portland contract over the cap."¹⁴²

eral counsel. Bettman was generally regarded as one of the foremost authorities when it came to interpreting the cap. In fact, because of his ability to interpret the salary cap, Bettman was referred to as "God" by more than one general manager. Gary Binford, *Wolves' Bailey is a Real Pearl*, N.Y. DAILY NEWS, Mar. 24, 1992, at 70. As the salary cap was unique and unlike any other agreement in professional sports history, a number of instances arose where the text of the agreement did not explicitly dictate how to handle the given situation, and there was no historical framework to provide guidance. Thus, Bettman, in many instances, single-handedly shaped the dictates of the cap by making judgment calls.

In this instance, Bettman informed the parties he would permit a termination provision, but it would have to be set in advance at a specifically chosen year. Bettman would not allow the contract to provide Battle the opportunity to opt out after each season following year two of the contract. In light of this decision, the parties elected to place the termination provision after Year Three. Thus, at the close of the 1993-94 season Battle had the option to explore free agency. Year Three was chosen because it coincided with the year the collective bargaining agreement was scheduled to expire, and it seemed to Battle and his representative like a good time to explore free agency.

There does not appear to be any significant reason why Bettman came to his decision. This author feels that Bettman allowed the parties to make use of the termination provision because he had the utmost confidence in their ethical integrity, yet he would not allow a termination provision following every season after Year Two because of the general policy considerations against termination provisions. So, in an attempt to be fair, he struck what he thought was an equitable balance.

This seemingly arbitrary decision, however, has proven to be of marked significance. The Battle contract has become a watershed contract and, since its inception, many teams and players have made use of similar provisions. Yet, no one had ever sought to place a termination provision after the first year of a multiyear contract until now. It is quite bizarre, but Bettman's somewhat arbitrary decision back in 1991 seems to be the primary justification for recognizing the legality of a one-year out provision like the one in the Dudley contract, as the Special Master's decision is strongly premised upon his inability to distinguish between the one-year out in question and the other termination provisions in contracts born of the Battle deal. It seems that with so much at stake, the deciding factor should not be the arbitrary judgment call of one man several years ago, especially when he could not have foreseen the magnitude of his decision.

** This information is based upon privileged information obtained through confidential sources.

142. Special Master Report #28, *supra* note 111, at 20. The Special Master validated this contract because he found that Chris Dudley will receive, in Year One of the Portland deal, \$790,000, as compared to the \$1,560,000 he would have received from New Jersey. The Special Master, however, also found a host of positive intangibles associated with the Portland deal, which might lead Dudley to accept that deal in the absence of an illegal under-the-table agreement. The Special Master defined the intangibles as: the opportunity to start and showcase his skills; Portland's style of play, which Dudley believes will suit him well; the fact that Portland is of championship caliber; the team's location; and, most importantly, the one-year out, with its opportunity to be rewarded with a new and improved contract (which could come from any team in the league, as he will be an unrestricted free agent, but only the Trailblazers will be able to sign him irrespective of cap considerations)

Initially, the Special Master conceded "the contention has at least surface plausibility" because salary is defined in Article VII, Part A, Section 1(c) as "compensation in Money, Property and Investments or *anything else of value*."¹⁴³ The Special Master, however, was not willing to decide on this issue without further briefing and argument.¹⁴⁴ He did, however, schedule a further hearing on that issue, and on September 24, 1993, he heard argument and received documentary evidence.¹⁴⁵ On September 28, 1993, the Special Master issued his Report #29 in which he concluded that a one year out is not "compensation" under Article VII, Part A, Section 1(c).¹⁴⁶

Dudley Before the District Court

The NBA appealed the Dudley case to the United States District Court of New Jersey.¹⁴⁷ In his opinion, Judge Debevoise addressed three issues, the first of which was whether the Special Master erred in finding that there was no agreement or understanding in violation of Article VII, Part H, Section 4.¹⁴⁸ Before Judge Debevoise, the NBA slightly altered its argument, stressing "that Section 4's prohibition of 'assurances of intent, or understandings of any kind' covers the obvious intent of both Dudley and Portland to renegotiate after one year free from the restraints of the salary cap."¹⁴⁹ Judge Debevoise, however, was not persuaded and adopted the Special Master's Report on this issue.¹⁵⁰ Judge Debevoise also adopted Special Master Report #29, stating that

should he perform well. Special Master Report #28, *supra* note 111, at 17.

The league contends that the intangibles should be given a dollar value and counted for cap purposes. The dollar value attributed to the intangibles would be the difference between the monetary value between the offer the player wishes to accept and the highest offer made by another team. In this instance, that would amount to the difference between Portland's \$790,000 and New Jersey's \$1,560,000, equalling \$770,000. Thus, the Portland contract for Year One would be, for cap purposes, worth \$790,000 (salary) plus \$770,000 (intangibles) equalling \$1,560,000. Because Portland only had \$790,000 under the slot, pursuant to Article VII, Part F, Section 1(b)(1)(ii), the contract would be illegal.

143. Special Master Report #28, *supra* note 111, at 20-21 (emphasis in original).

144. *Id.*

145. *Bridgeman v. National Basketball Association*, 838 F. Supp. 172, 174 (D.N.J. 1993).

146. *Id.*

147. *Id.* at 174. The standard of review was such that the district court was to "accept the Special Master's findings of fact unless clearly erroneous and the Special Master's recommendations of relief unless based upon clearly erroneous findings of fact, incorrect application of the law or abuse of discretion." *Id.* at 180 (quoting Fed.R.Civ.P. 53(b)).

148. *Id.* at 172.

149. *Id.*

150. *Id.*

one-year out provisions in multi-year contracts are not compensation and should be given no value for the purpose of computing salary cap compliance.¹⁵¹

Judge Debevoise then turned his attention to the issue of whether the Dudley/Portland contract constitutes salary cap circumvention in violation of Article VII, Part H, Section 3 of the collective bargaining agreement.¹⁵² Judge Debevoise began by stating his opinion "that the Special Master unduly minimizes the adverse effects a one-year opt out will have upon the teams' objective of controlling maximum salaries which can be paid under the BSA."¹⁵³ Judge Debevoise noted the Special Master refused to accept the proposition that a one-year out in a contract of more than two years is so different in substance from an option after two or more years in a multi-year contract and one-year outs in two year contract as to constitute cap circumvention.¹⁵⁴ Judge Debevoise then criticized the Special Master, and, in the process, eloquently expressed the proper perspective:

To me it seems that the length of time before a player can exercise an option can have a substantial impact on the teams' objective of establishing maximum team salaries. If the option cannot be exercised until after the sixth year of a seven year contract the impact would be minimal. If the option could be exercised a month after entering into the contract, the objective of maintaining team maximum salaries would be totally defeated. Lines have to be drawn and it would be a mistake to too readily equate the kinds of options which the NBA has approved in the past and the option at issue here. The impact on maximum team salaries could be quite different.¹⁵⁵

Still, Judge Debevoise could not ignore the fact that nothing in the collective bargaining agreement explicitly excluded a one-year termination option.¹⁵⁶ Thus, he found that while certain provisions do suggest that one year is perhaps the minimum length of time before a contract can be modified or terminated, a one-year option is within the contemplation of the parties.¹⁵⁷ As such, Judge

151. *Id.* at 181.

152. *Id.*

153. *Id.* at 182. The term BSA refers to the Bridgeman Settlement Agreement which was a precursor to the current collective bargaining agreement. See *supra* note 6.

154. *Bridgeman v. National Basketball Association*, 838 F. Supp. 172, 183 (D.N.J. 1993).

155. *Id.*

156. *Id.*

157. *Id.* In Particular, Judge Debevoise referred to Article VII, Part F, Section 7(d) which provides:

Debevoise concluded that "even though one-year out provisions in multiyear contracts may have a presently unascertainable adverse effect on the very legitimate objectives of the salary cap, Dudley's contract is not in violation of [the salary cap]." ¹⁵⁸

As of this writing, the NBA is in the process of appealing to the United States Circuit Court of Appeals for the Third Circuit. The Third Circuit should reverse the decision of the district court and invalidate this contract. It would be a mockery of justice to rely upon the rationale behind the decision of the Special Master, as his conclusion was grounded in a reliance upon historical happenstance rather than the appropriate degree of inquiry required by a matter of this importance. Judge Debevoise was clearly disturbed by the lack of logic associated with the Special Master's decision and argued at length in favor of striking down the Dudley contract, but he did not have the courage to do so because it was not explicitly prohibited in the collective bargaining agreement. Nonetheless, it is clear that certain portions of the cap agreement were intended to prevent creation such a contract. ¹⁵⁹ The league should not be penalized because the framers of this collective bargaining agreement did not have the foresight to prohibit explicitly the contractual provision at issue here when they originally crafted this ground-breaking collective bargaining agreement. As has been stated at length, the league will suffer powerful negative repercussions if the effectiveness of the salary cap is destroyed. ¹⁶⁰

The Dudley Problem Will Not Go Away

There is an argument that suggests the Dudley deal is all a big to-do about nothing. This argument is premised on the fact that the collective bargaining agreement is to expire at the end of the present NBA season. Thus, it is contended, the existence of one-year outs as a legitimate contractual tool will, in actuality, have

(d)(1) There may be no renegotiation, extension, or amendment of any kind, of any Player Contract during the first year of the term of the Player Contract.

(2)(i) There may be no renegotiation, extension, or amendment of any kind, of any Player Contract for a period of one year following any renegotiation, extension, or amendment concerning length of term of the Player contract or a change in Salary of more than ten percent (10%) in any year of the Player Contract.

(3) In the case of a Player Contract with a stated term of one season or less, there may be no renegotiation or extension of such contract until its term has expired.

Id.

158. *Id.* at 184.

159. CBA, *supra* note 11, art. VII, pt. H, §§ 3-4.

160. See *supra* pp. 274-275, and notes 2-5 and accompanying text.

little impact on the league for two reasons. First, there are very few unrestricted free agents who presently remain unsigned. Second, these are the only individuals who possibly stand to be affected by the provisions, because the NBA and the Players Association will have to negotiate a new collective bargaining agreement in which they can simply add a clause explicitly prohibiting such termination provisions. Surely, the league will be able to induce the players to concede this point on a *quid pro quo* basis.¹⁶¹

This argument, however, fails to account for some very pertinent facts, the most important point being that until a new collective bargaining agreement is struck, the current collective bargaining agreement will remain in place so long as the league continues to apply without modification the player restrictions (e.g., the salary cap) that were included in the agreement, and so long as the league reasonably believes that the practice or a close variant of it will be incorporated in the next collective bargaining agreement, or until an impasse is reached.¹⁶² In the case of *Bridgeman v. National Basketball Ass'n*,¹⁶³ however, the district court defined "impasse" in such a manner that any party, claiming that antitrust immunity is no longer available to an expired collective bargaining agreement because of an impasse in negotiations, faces a very heavy burden of proof.¹⁶⁴ In fact, the *Bridgeman* court, reflecting a strong bias in favor of collective bargaining, concluded that, ideally, the terms of a collective bargaining agreement should remain in force until a new agreement is ironed out.¹⁶⁵

161. See *infra* pp. 297-304 and 315-316 (suggesting some concessions the Players Association might seek from the League).

162. *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960 (D.N.J. 1987). The *Bridgeman* case involved a suit by the players against the league claiming the college player draft, the salary cap, and the right of first refusal constituted antitrust violations. The case was unique in the respect that the collective bargaining agreement which had given birth to the three provisions in question—the 1983 Memorandum of Understanding—had already expired. The players did not dispute that the restrictions at issue were covered by the labor exemption while the collective bargaining agreement was still in effect. The players, however, noting that courts have generally refused to find antitrust immunity in the absence of a collective bargaining agreement, argued that the practices were not protected by the non-statutory exemption because they are not the subject of any currently effective collective bargaining agreement, and the players have not otherwise consented to them. The court disagreed.

The *Bridgeman* case was eventually resolved when the parties to the litigation came to a settlement agreement made and entered into on November 1, 1988. *Id.* This settlement agreement was the collective bargaining agreement between the NBA and the Players Association which expires at the end of the 1993-94 NBA season.

163. *Bridgeman*, 675 F. Supp. at 960.

164. *Id.* at 966-967.

165. *Id.* at 965-966. Specifically, District Court Judge Debevoise stated:

Herein lies the problem. The current collective bargaining agreement will expire at the end of the 1993-94 season. It is, however, not realistic that the parties will immediately enter into a new agreement. Thus, pursuant to *Bridgeman*, unless the league unilaterally imposes changes in the application of the cap restraints or the parties reach impasse, which will be almost impossible to prove, especially since the parties have not been engaged in negotiations for a sizeable period of time, the requirements of the present cap will continue to govern until a new settlement can be agreed upon. As the cap agreement continues to govern, the "one-year out" termination provisions—if the Third Circuit affirms the findings of the district court—will be recognized as a legitimate contractual tool pursuant to the collective bargaining agreement. This would undeniably affect a vast player base, as the one-year out provisions would apply when teams pursue those players becoming free agents at the close of the season, and when teams begin negotiations with the next year's prize rookies.¹⁶⁶ The ramifications to the league will surely prove to be very costly.¹⁶⁷ The situation sense, thus, reveals that the Third Circuit would be serv-

I find no merit in the players' contention that restrictions included in a collective bargaining agreement should lose their antitrust immunity the moment the agreement expires. At the outset such a rule is unrealistic in light of the requirement that employers must bargain fully and in good faith before altering a term or condition of employment subject to mandatory bargaining even after the collective bargaining agreement expires. . . . It would be anomalous for such restraints to enjoy antitrust immunity during the period of the previous agreement, to lose that immunity automatically upon expiration of the agreement — regardless of the status of negotiations for a new agreement — and then to regain immunity upon entry of the new agreement.

Id. at 965. Judge Debevoise continued:

Stripping player restraints of their antitrust immunity the instant a collective bargaining agreement expires would also inhibit the collective bargaining process, a result that is contrary to the purpose of the non-statutory exemption. Because agreements often expire without immediate replacement, employers operating under such a rule would in many cases be reluctant to agree to potentially anticompetitive restraints, even where desired by their employees, for fear that such practices would expose them to antitrust suits during any period between agreements.

Id. at 965-966. Thus, Judge Debevoise concluded, "This obligation to maintain the status quo until impasse means that, in a practical sense, terms and conditions of employment that are subjects of mandatory bargaining survive expiration of the collective bargaining agreement. *Id.* at 965.

166. See *supra* note 132 (demonstrating the huge talent pool associated with free agency).

167. Recognizing that such one-year out provisions defeat the purpose of the salary cap, it is here asserted that the effects of allowing teams to be able to sign such a large group of talented players, irrespective of cap considerations, will be analogous to completely removing the salary cap. See *supra* note 131 and accompanying text.

ing the best interests of all parties involved, including Chris Dudley,¹⁶⁸ by invalidating the Dudley-Portland contract.

IRONING OUT A NEW COLLECTIVE BARGAINING AGREEMENT

Thus far, this article has examined the legality of the cap and the current legal crisis involving the legality of termination provisions exemplified in the contract recently signed by Chris Dudley. The remainder of this work will address what promises to be the most intense areas of debate during negotiations regarding a new collective bargaining agreement. Also included are some recommendations which would most likely be beneficial to all parties involved.

When the current collective bargaining agreement expires in 1994, the Players Association has made it known that they will push for a discontinuance of the cap.¹⁶⁹ It remains to be seen whether this is just posturing to obtain a position of strength for the actual negotiations, or if it is truly the legitimate position of the Players Association.¹⁷⁰ For the remainder of this work, the

168. The main reason a player like Dudley stands to benefit from a provision such as the one-year out in his contract is the prosperous economic atmosphere that has resulted from the restraints of the cap. Allowing him to abuse the favorable position in which the cap has placed him will only serve to undo all the good the cap has done for players like Dudley in the future, and they will surely suffer accordingly.

169. Charles Grantham, the executive director of the Players Association, has stated that "[w]hen we were approached with the idea in the early 1980s, it was very apparent the league was having financial difficulties. Now, I think it has outlived its [sic] usefulness." William D. Murrar, *NBA and its Players Reach Accord on Creative Accounting*, UPI, Feb. 14, 1992, available in LEXIS, Nexis Library, UPI File.

170. This uncertainty involving the Players Association is in part due to a change in leadership of the Players Association. Lawrence A. Fleischer, formerly the head man of the Players Association and a most formidable advocate on behalf of the players, believed that a cap, constructed properly, is good for the league. It seemed to have been his belief that under the cap, the players, in actuality, stood a chance to make more than they would in the absence of the cap. Needless to say, the league appreciated Mr. Fleischer's perspective. His death was mourned by players and management alike.

Mr. Fleischer's replacement, Charles Grantham, does not appear to share his predecessors' appreciation for the cap. His posturing indicates that he believes the players would fare better if there were no restrictions at all. Although this seems to be a valid argument, it fails to consider the intricacies of the salary cap.

According to the views espoused by Mr. Grantham, a player will earn the greatest salary when he is entitled to bargain for an unlimited income—an unlimited piece of the pie. Under the cap an individual is restricted and entitled to only a certain portion of the pie. What Mr. Fleischer seemed to appreciate and what Mr. Grantham does not, however, is that under the cap, the pie grows infinitely larger. In the absence of the cap, simple supply and demand will dictate wages. In a league that is popular and thriving, demand will be high and salaries will rise accordingly. In a league that does poorly, salaries will fall accordingly. History reveals that the league has struggled without the stabilizing influence of the cap. See *supra* notes 2-5 and accompanying text. The truth of the matter is that the theoretic-

more likely scenario will be assumed, that the Players Association will pursue a continuance of the cap, although under terms more favorable to their case.

Redefining Gross Revenue

Basically, the salary cap dictates that for any given year, the players are entitled to, in the form of salaries, fifty-three percent of the league's defined gross revenue less a certain amount of that money which is set aside for player benefits.¹⁷¹ What is of key importance is the manner in which gross revenue is *defined*.¹⁷² As the parties approach a new collective bargaining agreement, the Players Association has made clear its desire to restructure the agreement so as to broaden the definition of "defined gross revenue."

cally unlimited wages available to players in the absence of a cap will, in fact, be limited by the economics of a struggling league. Eventually, only the money barons of the league will be able to offer the players the high wages they seek. Financially weaker teams will be driven out of the league, unable to bid for the top talent. This is exactly the dismal situation that prompted the creation of the cap. Need this situation repeat itself in order for everyone involved to wise up? The bottom line is that the "limited piece of the pie" under the cap will turn out to be much greater than the allegedly unlimited income available to players in the cap's absence.

171. CBA, *supra* note 11, art. VII, pt. D, § 1(b); art. II (benefits).

172. Under the collective bargaining agreement "defined gross revenue" means: \$1,000,000 plus the aggregate revenues received or to be received on an accrual basis, for or with respect to a playing season during the term of this agreement, by the NBA and all NBA Teams . . . from all sources, whether known or unknown, derived from, relating to or arising out of the performance of players in NBA basketball games, *but not including revenues* derived from the All Star Game, concessions, parking, sales of programs and novelties, NBA Properties, Inc. and its subsidiaries, and sources included within "Other Basketball Income" as previously defined by the parties for the purposes of the 1983 Memorandum of Understanding to produce the annual Combined Financial Statement of NBA Teams. Defined Gross Revenues shall include, without limitation:

(i) regular season gate receipts, net of admission taxes;

(ii) proceeds from the sale, license or other conveyance of the right to broadcast or exhibit NBA preseason, regular season and playoff games on radio and television including, without limitation, network, local, cable and pay television, and all other means of distribution, net of reasonable or customary expenses related thereto;

(iii) exhibition game proceeds, net of admission taxes and all reasonable or customary game, pre-season and training camp expenses; and

(iv) playoff gate receipts, net of admission taxes, arena rentals and all other reasonable or customary expenses except the player playoff pool.

CBA, *supra* note 111, art. VII, pt. A, § 1(a).

NBA Properties

Perhaps the most important provision in the collective bargaining agreement regarding "defined gross revenue" is the clause which states "defined gross revenue" does not include "revenues derived from . . . NBA Properties, Inc. and its subsidiaries."¹⁷³ NBA Properties, Inc., a separate corporation owned by the teams, is the licensing and marketing arm of the league.¹⁷⁴ NBA Properties, Inc. is a booming business which anticipates additional growth and success in the foreseeable future.¹⁷⁵ Ball caps, trading cards, and NBA team sportswear, which are growing ever more popular, all fall under the wide-sweeping arm of NBA Properties, Inc. Note also that the agreement excludes from the definition of "defined gross revenue" the subsidiaries of NBA Properties, Inc., such as NBA Entertainment and NBA International.¹⁷⁶ These two subsidiary corporations are presently rich assets for the league, and the potential earning power represented by these two corporations is of particular interest, especially with the recent discovery of the previously untapped international market, which promises to bring the league unprecedented amounts of income for years to come.¹⁷⁷ The earnings from these entities represent a tremendous amount of money,¹⁷⁸ none of which the players receive under the collective bargaining agreement. The Players Association will attempt to ensure that at least a portion of the income brought in via NBA Properties, Inc. and its subsidiaries is included within the definition of "defined gross revenue." Speculative financial figures reveal that if this were the sole change made in the next collective bargaining agreement, the 1994-95 salary cap would jump from \$15,175,000 to over \$25,000,000.¹⁷⁹

173. CBA, *supra* note 11, art. VII, pt. A, § 1(a)(1).

174. CBA, *supra* note 11, art. XXXII (Group Licensing Rights). Article XXXII provides in pertinent part:

Section 1. The Players Association, on behalf of present and future NBA players, agrees that NBA Properties, Inc. has the exclusive right to use the "Player's Attributes" of each NBA player as such term is defined and for such purposes as are set forth in the Agreement between NBA Properties, Inc. and the National Basketball Players Association, dated July 19, 1986.

Id.

175. Dwight Chapin, *They Love this Game*, 1993 STREET AND SMITH'S PRO BASKETBALL 6-8 (1993).

176. CBA, *supra* note 11, art. VII, pt. A, § 1(a)(1).

177. Chapin, *supra* note 175, at 7-8.

178. In the decade between 1982 and 1992, retail sales of NBA licensed merchandise went from \$10 million to \$1.4 billion, and they're projected to reach \$1.8 billion this season. *Id.* at 6.

179. This figure is obtained through the application of the following data:

Who is properly entitled to this money? At least a portion of it should go to the league's players. From one perspective, it seems ridiculous that a group of men, who currently earn, on average, more than \$1,000,000 a year for playing the game of basketball, somehow deserve more money.¹⁸⁰ The question, however, is not whether it makes sense for the players to make more money, but rather, in light of the fact that the money is there, who should get it. NBA Properties, Inc.'s massive earning power derives from the fact that pursuant to the collective bargaining agreement, it has the exclusive right to use the "Player's Attributes" of NBA players.¹⁸¹ NBA Properties, Inc. is a thriving business because the players are a hot commodity to sell. Granted, the players are a hot commodity because the league has proven to be a master marketer, but regardless of the degree of marketing excellence, NBA Properties, Inc. would not be a successful entity were it not for the players. Thus, it only seems proper that this income should be shared between the league and its players like the remainder of the in-

Cap for the current season — \$15,175,000

Projected Cap for the 1994-95 season under the current definition of "defined gross revenue" — \$16,692,500

This projected figure represents a ten percent increase over the previous year's salary cap, in accordance with the collective bargaining agreement's provision for projecting team salary caps. CBA, *supra* note 11, Article VII, Part D, Section 1. Note, however, the cap has increased at an average of not 10% from one season to the next, but rather at an average of 18%. See *supra* note 12. The remainder of this calculation will be based upon this eighteen percent figure:

Actual Projected Cap for the 1994-95 season under current definition of "defined gross revenue" — \$17,906,500

It is rumored that for 1993-94 NBA season the league has projected that NBA Properties, Inc. and its subsidiaries will earn roughly \$400,000,000. Assuming this figure is introduced into "defined gross revenue," the salary cap for the 1994-95 NBA season stands to be \$10,000,000 higher than it was for the 1993-94 season:

53% of \$400,000,000 = \$212,000,000 which divided by 27 [the number of teams in the league] equals \$7,851,851. Thus, if the revenues brought in by NBA Properties, Inc. and its subsidiaries were added to the definition of "defined gross revenue" each team would gain an additional \$7,851,851 under the cap, thereby increasing the cap from \$15,175,000 in 1993-94 to \$25,758,351 in 1994-95

1993-94 Salary Cap	\$15,175,000
Projected Cap for 1994-95	\$17,906,500
Additional Revenues from NBA Properties	<u>\$ 7,851,851</u>
Cap for 1994-95 with expanded definition of "defined gross revenue"	\$25,758,351

180. This perspective, however, is not necessarily the proper one. After all, other entertainment stars are also tremendously overpaid. No one criticizes Oprah Winfrey for taking home more than \$50 million a year while the typical high school teacher makes roughly \$25,000. Server, *supra* note 1, at 91.

181. See *supra* note 174.

come incorporated within the definition of "defined gross revenue." It is violative of inherent justice that under the current system, the league's owners are the only ones profiting from the league's ability to market the "Player's Attributes."

Furthermore, it is a ridiculous notion to suggest that the league is properly entitled to this money based upon the principle of estoppel, as the Players Association bargained away the rights to this income when the original cap agreement was struck in 1983.¹⁸² When the Players Association bargained away its rights to this money back in 1983, it was not a major concession, as there was relatively little money involved.¹⁸³ This is no longer the situation.¹⁸⁴ In negotiating a new collective bargaining agreement, the NBA and the Players Association should be governed by the facts as they presently exist, not by the facts of a decade past. The presence of this income is a new factor to the situation, and it should be dealt with equitably. Equity demands that the players receive a share of this money.

This issue, however, cannot be so easily resolved. There exists a problem in that the Players Association has negotiated away the rights to this income (for at least some of its players) beyond the expiration of the current collective bargaining agreement—until 1997.¹⁸⁵ Thus, it appears that as a result of contractual negotiations, the league is entitled to the money brought in via NBA Properties, Inc. through the 1997 season, and accordingly, the league is under no legal obligation to forfeit this right during the negotiations of the next collective bargaining agreement. Hence, as a matter of law, the players will have to concede the rights to this income through at least 1997 under the terms of the next collective bargaining agreement.

182. The 1983 Memorandum of Understanding also contains a provision stating that defined gross revenue is not to include "... revenues derived from the All Star Game, concessions, parking, sales of programs and novelties, NBA Properties, Inc. . . ." Memorandum of Understanding, *supra* note 6, at 2-3. This provision was then adopted by the current collective bargaining agreement.

183. As of 1982, the retail sales of NBA licensed merchandise was only \$10 million. Chapin, *supra* note 175, at 6.

184. See *supra* notes 175-179 and accompanying text.

185. Collective Bargaining Agreement, *supra* note 11, Exhibit A, 18(b) (Uniform Player Contract). 18(b) states in pertinent part:

(b) the Player hereby grants to NBA Properties, Inc., for the term of this contract only, but in no event longer than August 31, 1997, the exclusive rights to use the Player's Attributes as such term is defined and for such purposes as are set forth in the Agreement between NBA Properties, Inc. and the National Basketball Association, dated July 19, 1986

Id.

Recall, however, that in validating the collective bargaining agreement under the *Mackey* Test, which appears to be the controlling test, a major reason why the agreement was upheld is because it was found to be the "result of bona fide arms-length negotiations."¹⁸⁶ Query whether a concession dating back to 1983, which is binding upon the same parties who will engage in the renegotiation of the collective bargaining agreement, would be deemed to be the "result of bona fide arms-length negotiations" in light of the very different factual setting of today. Put differently, should the league refuse to renegotiate the rights to the revenue associated with NBA Properties, Inc. at the next collective bargaining session where there is reason to believe that any agreement struck might not survive antitrust scrutiny?

Analyzing equitable considerations, along with the relevant law, it seems proper and wise for the revenues of NBA Properties, Inc. and its subsidiaries to be included within the definition of "defined gross revenue" when the NBA and the Players Association form the next collective bargaining agreement. Practical considerations regarding the applicability of the salary cap also dictate that the definition of "defined gross revenue" should be expanded to include these revenues. Since the institution of the salary cap, the league and the players have both experienced tremendous financial success. The major negative effect associated with the salary cap is the way in which it has limited player mobility. The cap, however, only serves as a serious impediment to player mobility for teams that are at or over the cap.¹⁸⁷ When the cap was first adopted in 1984-85, almost all the league's teams were at or near the salary cap.¹⁸⁸ Furthermore, as the agreement was unique in professional sports, many teams did not have the foresight to effectively apply the cap to plan for the future. The combination of these two factors created a situation where teams have traditionally been hovering near the salary cap ceiling, and thus the cap has, in fact, served as a considerable restraint upon player mobility. If, however, the money from NBA Properties, Inc. and its subsidiaries were to be included within "defined gross revenue," it would pump the cap up to create somewhat of a comfort zone between existing team pay-

186. *Wood v. National Basketball Ass'n*, 602 F. Supp. at 528. See also *supra* note 38 and accompanying text.

187. Collective Bargaining Agreement, *supra* note 11, art. VII, pts. E-F.

188. In fact, five of the league's teams were already over the cap. Those teams, the Lakers, Nets, Knicks, 76ers, and the Seattle Supersonics, had their team payrolls grandfathered in, but had to be in line with cap mandates by the beginning of the 1988-89 playing season. Levine, *supra* note 2, at 87 n.97.

rolls and the roof of the salary cap.¹⁸⁹ This comfort zone would be of particular significance because now, after almost a decade of fighting with the cap, teams are familiar with the cap's intricacies and should be able to apply it with the necessary foresight to plan for the future and stay under the roof as dictated by the cap. Thus, the league would be able to enjoy the financial success precipitated by the cap while avoiding the restrictions imposed upon player mobility when teams exceed the cap.

Sky Boxes

Another area that promises to be the focus of much attention involves the revenue generated from the sale of luxury boxes. Under the current collective bargaining agreement, the definition of "defined gross revenue" expressly includes proceeds generated from gate receipts for exhibition, regular season and playoff games.¹⁹⁰ The agreement, however, expressly provides for the exclusion of "Other Basketball Income" from "defined gross revenue."¹⁹¹ "Other Basketball Income" is defined in the agreement to include sources of revenue reported by the teams as "Other Basketball Income" in the combined financial statement of NBA teams prepared before the institution of the salary cap in 1983.¹⁹² It appears that prior to the institution of the cap in 1983, NBA teams reported the revenue generated by the sale of luxury boxes as "Other Basketball Income." Thus, the revenue generated from the sale of luxury boxes is money the players are not entitled to under the collective bargaining agreement. Under the next agree-

189. The cap for the 1994-95 season could be well over \$25 million if the income from NBA Properties, Inc. and its subsidiaries were to be included in the definition of "defined gross revenue." See *supra* note 179. If the cap for the 1994-95 season were to exceed \$25 million, most, if not all, of the league's teams would be substantially beneath the cap. In fact, for the 1993-94 NBA season, there were only three teams in the league whose payrolls exceeded \$22 million, none of which exceeded \$24.8 million, and the 1993-94 average team salary was roughly \$18.2 million. Player Contracts, *supra* note 70.

190. Collective Bargaining Agreement, *supra* note 11, art. VII, pt. A, § 1(a)(1)(i-iv).

191. *Id.* at art. VII, pt. A, § 1(a)(1).

192. *Id.* The NBA does not report directly to the Players Association the amount of its revenues included in "defined gross revenue." Rather, the parties have by agreement appointed an independent accounting firm to review the revenues reported by the NBA and its member teams and then to report to the Players and the NBA regarding "defined gross revenue" and other pertinent information. Arthur Anderson & Co. (AA) has performed this function since the 1983 inception of the salary cap system. Each year the NBA and its teams complete "defined gross revenue" reporting packages prepared by AA, and forward them directly to AA. AA then conducts certain review procedures agreed to by the NBA and the Players Association. Letter from Jeffrey A. Mishkin, Legal Counsel on behalf of the Players Association, to Merrell E. Clark, Special Master 5 (Dec. 19, 1991) (on file with author).

ment, the players will want to see some of this money. Similar to the revenue generated by NBA Properties, Inc. and its subsidiaries, when the Players Association negotiated away the rights to the income generated from the sale of luxury boxes there was little at stake, whereas there is now a great deal of money involved.

Note that the boxes in question are now commonly referred to as "luxury boxes." This name has significant meaning. At one time, these boxes were commonly referred to as "sky boxes," appropriately named because they hovered far above the playing court, just below arena ceilings. Now, however, not all of the boxes are up in the sky. Prior to the 1988-89 NBA season, the Detroit Pistons moved from the Pontiac Silverdome down the street into an arena the Pistons built themselves: the Palace of Auburn Hills.¹⁹³ The Palace is a state-of-the-art, 21,000-seat arena. One particularly interesting aspect of the Palace is that the sky boxes are not all in the sky. In fact, many of the "luxury boxes" are located roughly half-way up the lower level. Aesthetically, the boxes are most impressive.¹⁹⁴

The Pistons, prior to the opening of the 1988-89 NBA season, hoped to charge what was then considered an unreasonable amount of money for these boxes. The boxes, however, wound up selling for everything the Pistons had hoped, and they became a tremendous source of revenue.¹⁹⁵

Trying to emulate the Pistons' ingenuity and financial success, many teams who have since built new stadiums have constructed them with luxury boxes in the lower level.¹⁹⁶ With the presence of this "new source"¹⁹⁷ of revenue, the Players Association now

193. The Pontiac Silverdome is a massive domed arena, much better suited for football than basketball. It is home to the Detroit Lions football team. In order to play basketball there, a quarter of the arena was portioned off by hanging huge drapes from the roof of the dome. The Pistons moved because the City of Pontiac would not allow the Pistons to have a share of almost any of the income the Pistons were generating for the arena, such as parking, food, and beverages. Thus, the Pistons moved less than two miles down the road into the Palace of Auburn Hills. This information is from personal knowledge obtained while the author's father was an employee with the Piston organization (assistant coach 1986-87, 1987-88; broadcaster 1991-92; head coach 1992-93).

194. The interior of the boxes resembles a four-star hotel and the wall closest to the playing court is open and gives way to a couple of rows of seats in the general Palace audience.

195. The Pistons organization was unwilling to disclose how much revenue they earn via their luxury boxes.

196. For example, Cleveland and Chicago have recently built new arenas with luxury boxes in the lower level. Similarly, Philadelphia, Boston, and Portland all have plans to build arenas in the near future which will include luxury boxes in the lower level. This is based upon personal knowledge and information obtained via confidential sources.

197. Recall that when the Players Association bargained away the right to revenue

desires a piece of the action. This is another area where the owners should concede to the desires of the Players Association. The luxury boxes are successful for two reasons: (1) the players and the game itself are a top attraction for which people are willing to pay top dollar; and (2) management has built arenas where the boxes are closer to the playing action and hence markedly more desirable. Fairness dictates that the players should be entitled to at least a portion of this income.

THE GIVE AND TAKE OF IT ALL

Thus far, two topics have been addressed which both promise to be the focus of much attention as the league and the Players Association try to work out a new agreement. In both instances, it has been suggested that the league give in to the demands of the Players Association. These requests, however, have not been unreasonable, for in any bargaining process both sides must be prepared to give something in order to get something. The next section of this work will address an area where the Players Association is the party that should give a little.

A Rookie Salary Cap

There has been talk that the league will try to initiate a rookie salary cap to supplement the league-wide salary cap.¹⁹⁸ Such a provision would certainly be well-received by NBA team owners, as the annual inflation of rookie salaries seems to be the primary force behind the continual upward surge of player wages throughout the league.¹⁹⁹ Unfortunately, it appears that this is little more

associated with luxury boxes back in 1983, it was a minor concession. That is no longer the case.

198. This information is based upon informal conversations with players, coaches, player agents and general managers, all of whom have asked to remain anonymous.

199. Prior to last season (1992-93), Shaquille O'Neal signed a contract which in the aggregate is reportedly worth slightly more than \$40 million. At the time it was one of the larger contracts the league had ever seen. Yet two of this year's top three picks, Chris Webber and Anfernee Hardaway, have already signed contracts worth \$74.4 million and \$65 million, respectively. *First Round Signings*, MIAMI HERALD, Nov. 4, 1993, at 11H.

This inflation has effects that transcend more than just the amount of money the league pays its rookies. Veteran free agents are aware of what the league's new talent is being paid, and this has a substantial effect on what these veterans demand. For example, Derrick Coleman of the New Jersey Nets was reportedly seeking a contract worth \$70 million over 10 years. After the signings of Webber, Hardaway, and Larry Johnson, who struck a new deal with the Charlotte Hornets worth \$84 million over 12 years, the Nets offered Coleman a contract worth \$69 million over eight years, which would have made him the highest paid player in the NBA. S.L. Price, *\$69 million? Chump Change in Two Years*, MIAMI HERALD, Nov. 4, 1993, at 11H. Coleman, who rejected the offer, indicated his position was directly

than talk, as the Players Association has expressed extreme animosity towards such a proposition.²⁰⁰ Such a provision, though, would be most beneficial to the continued success of the league. This is one instance where it is the Players Association that should give in and allow for the institution of a rookie salary cap, as it would ultimately prove to be in the players' best interest.

There are two elements associated with a rookie cap that make it an attractive proposition. First, it will introduce into the league's player status hierarchy the beneficial aspects of a "quasi" seniority system. Second, it will ensure that the limited amount of money the players are entitled to under the cap will be distributed according to merit.

A basketball team cannot be at its best when the team locker room is one where friction dominates over camaraderie. Likewise, it will tend to adversely affect the games being played if the games are between teams which are dealing with internal friction as well as one another. Simply put, the quality of the final product, NBA games, is best when the two teams involved are focused primarily on winning the game, and off-court distractions are kept to a minimum. The media makes it plainly obvious that NBA teams are not always cohesive units. A rookie salary cap will in no way eliminate all the problems that can arise in an NBA locker room that might adversely effect the quality of play, but it will help significantly.

One of the major differences between a college and professional locker room is that in college basketball, there is a well-respected seniority system. In most programs, the seniors impart to the freshmen the traditions of their particular program, and, in the traditional program, the seniors serve as the leaders on the team.²⁰¹ For the most part, this hierarchical system, based upon seniority, is well-respected at the collegiate level, and tends to produce cohesive units where senior players lay down the rules, and

influenced by the recent signings of the top rookies:

Wasn't always like this. Too bad. I mean, four rookies come in, haven't done a thing, and rack up cake like you've never seen. Chris Webber: \$74.4 mill. Shawn Bradley: \$44.2 mill. Anfernee Hardaway: \$65 mill. Jamal Mashburn: \$32 mill. After he signs, Webber—Mr. TimeOUT!—says he would've gladly played for free. Uh-huh. . . . \$69 million for *me*? You don't understand. I *am* the game.

Id. (emphasis in original).

200. The players have taken the stance that if the league wants to cap the rookies, then the league-wide cap must be removed. The league will not make such a concession. Information obtained via confidential sources.

201. This assertion is based upon conversations with college and professional players as well as the author's personal experience as a Division I college basketball player at Holy Cross College, where, as a senior, the author was team captain.

the younger players respectfully follow them. This prompts a great deal of integrity within the college game. One could contend this is one reason why the college game is so popular.

There is a similar seniority system in the NBA. Veteran players are traditionally the ones most respected by their peers and treated with the most respect by officials. Team captains are almost always veterans, while rookies assist the equipment manager in carrying luggage on road trips. The system in the NBA, however, is distinguishable in one major regard. Rookies, particularly those who were lottery picks, are often among the highest paid on a given NBA roster.²⁰² This has far-reaching ramifications within NBA locker rooms. The seniority system, inherent in team sports, loses some of its effectiveness when the alleged low man on the totem pole is the most handsomely compensated. One reason is that young players have less of a tendency to respect their elder teammates when their wages indicate to the young player that he is the player most valuable to the team. In turn, veteran players tend to grow envious. The logic of the veteran player is both understandable and undeniable: "I have been a good player for this team and they reward me by going out and signing this kid who has not played a day in this league for three times what they pay me."²⁰³ These off the court unpleasanties inevitably affect on-the-court performances, and the end product tends to suffer.

The jealousy emanating from veterans towards top draft picks, and the negative influence such emotions have upon the on-court product, grow considerably in degree when it becomes evident that the high salary awarded to a rookie is not merited. The history of the NBA is heavily tattooed with top draft picks who have not panned out.²⁰⁴ Needless to say, these players all signed substantial

202. For example, Christian Laettner, number three pick overall in his rookie year, was the highest paid player on the Minnesota Timberwolves as a rookie. Shaquille O'Neal was the highest paid member of the Magic during his rookie season. For the 1993-94 season, then-rookie center Shawn Bradley of the Philadelphia 76ers was their highest paid player. *Player Contracts*, *supra* note 70.

203. See *supra* note 199.

204. In recent years all of the following players were high first-round draft picks, yet, in the author's opinion, they have all either performed at a level far below their advance billing or simply failed to make it as an NBA caliber player:

Name	Team	Year	Pick	
Doug Smith	Dallas	1991	6th	pick
Luc Longley	Minnesota	1991	7th	pick
Mark Macon	Denver	1991	8th	pick
Greg Anthony	New York	1991	12th	pick
Rich King	Seattle	1991	14th	pick
Dennis Scott	Orlando	1990	4th	pick

contracts upon their entrance into the league. It also goes without saying that these players were probably not well-received by their teammates when it became evident their pay was unwarranted. In-

Felton Spencer	Minnesota	1990	6th	pick
Bo Kimble	L.A. Clippers	1990	8th	pick
Willie Burton	Miami	1990	9th	pick
Rumeal Robinson	Atlanta	1990	10th	pick
Alec Kessler	Miami	1990	12th	pick
Travis Mays	Sacramento	1990	14th	pick
Pervis Ellison	Sacramento	1989	1st	pick
Danny Ferry	Cleveland	1989	2nd	pick
JR Reid	Charlotte	1989	5th	pick
Stacey King	Chicago	1989	6th	pick
George McCloud	Indiana	1989	7th	pick
Randy White	Dallas	1989	8th	pick
Tom Hammonds	Washington	1989	9th	pick
Tim Perry	Phoenix	1988	7th	pick
Rex Chapman	Charlotte	1988	8th	pick
Armon Gilliam	Phoenix	1987	2nd	pick
Dennis Hopson	New Jersey	1987	3rd	pick
Reggie Williams	L.A. Clippers	1987	4th	pick
Olden Polynice	Chicago	1987	8th	pick
Chris Washburn	Golden State	1986	3rd	pick
Kenny Walker	New York	1986	5th	pick
William Bedford	Phoenix	1986	6th	pick
Brad Sellers	Chicago	1986	9th	pick
Pearl Washington	New Jersey	1986	13th	pick
Walter Berry	Portland	1986	14th	pick
Wayman Tisdale	Indiana	1985	2nd	pick
Benoit Benjamin	L.A. Clippers	1985	3rd	pick
Jon Koncack	Atlanta	1985	5th	pick
Joe Kleine	Sacramento	1985	6th	pick
Ed Pickney	Phoenix	1985	10th	pick
Keith Lee	Chicago	1985	11th	pick
Kenny Green	Washington	1985	12th	pick
Melvin Turpin	Washington	1984	6th	pick
Lancaster Gordin	L.A. Clippers	1984	8th	pick
Leon Wood	Philadelphia	1984	10th	pick
Steve Stipanovich	Indiana	1983	2nd	pick
Sidney Green	Chicago	1983	5th	pick
Russel Cross	Golden State	1983	6th	pick
Bill Garnet	Dallas	1982	4th	pick
Keith Edmonson	Atlanta	1982	10th	pick
Al Wood	Atlanta	1981	4th	pick
Danny Vranes	Atlanta	1981	5th	pick
Joe Barry Carroll	Golden State	1980	1st	pick
Kelvin Ransey	Chicago	1980	4th	pick
James Ray	Denver	1980	5th	pick
David Greenwood	Chicago	1979	2nd	pick
Greg Kelser	Detroit	1979	4th	pick
Kent Benson	Milwaukee	1977	1st	pick
LaRue Martin	Portland	1972	1st	pick.

deed, it must be difficult for a player to walk into his locker room and sit next to a man who is inferior as a player yet earns considerably more money.²⁰⁵ It is not a stretch to suggest that these unmerited rookie wages serve as a most significant factor in increasing player salaries league wide. Often, when a veteran free agent begins renegotiation talks with his team, it is a major bargaining tool to point out other players who have entered the league since the player in question signed his contract, who play a similar position, signed for significantly more money, and have produced far less.²⁰⁶

The institution of a rookie cap would help to remedy some of these difficulties. The Players Association feels that such a provision will only serve to slow the rising player wages throughout the league. This will not occur. Wages will continue to rise, but a rookie cap will ensure that the money will be distributed to players who have proven their value in the league. For an example of how this proposition might work, focus on the 1989 NBA draft. The 1989 draft involved a number of players who were predicted to be impact players upon their entrance into the league but who turned

205. Imagine being a fourth-year associate at a major law firm, and the firm offers more money to a first-year associate you always have to cover up for on account of his inept lawyering skills.

206. See, e.g., *supra* note 199. Another classic example where an unmerited rookie contract prompted difficulty recently affected the Miami Heat.

Despite having a very accomplished career at Eastern Michigan University, Grant Long was overlooked by most NBA talent scouts and was not selected until Miami plucked him in the middle of the second round with the 33rd pick overall of the 1988 NBA draft. In light of his draft status, Long reportedly signed a contract worth considerably less than the average NBA player was making. Long, however, surprised everyone and has become a very effective professional player, averaging 12 points per game as a rookie. His scoring average, however, does not reflect the true value of Long, who is the type of player whose total worth does not always show up in the box score.

Two years later, the Heat had the rights to the 12th pick in the draft, which they used to select Alec Kessler of the University of Georgia. At 6'11" and 240 pounds with the ability to step back and shoot the perimeter jump shot, Kessler was widely regarded as a wise pick, a player certain to become a good professional. Kessler was awarded a contract that reflected the high expectations the Heat had for him. Kessler, however, turned out to be a flop. In the first three years of his NBA career, he failed to average more than six points per game in a single season. During the 1992-93 season, Kessler averaged a career low 3.9 points per game.

Prior to the 1992-93 NBA season, the Heat had both Kessler and Long in the power forward slot on the depth chart. Kessler earned far more money, while Long was far superior on the court. The paradox caused problems. Long reportedly grew disheartened with management and was seeking to be traded. The controversy was well documented in the media. From sources close to the team, all the negative publicity associated with the controversy had a negative effect upon the entire team. Eventually, however, the situation was alleviated when after considerable stalemates in contract negotiations and trade rumors, the Heat offered Long a contract which more accurately reflected his valuable contributions. Information obtained via confidential sources.

out to be marginal players at best. In contrast, the draft included a number of players from whom the talent scouts expected far less, who, nonetheless, have turned out to be very good professional players, and in some instances, excellent.²⁰⁷ Thus, pursuant to the traditional manner in which draft picks are signed, the 1989 draft produced some players very undeserving of their lofty contracts, and some bright young talents who were vastly underpaid.²⁰⁸

Suppose there were a rookie cap in place where all the draft picks were slotted to a predetermined salary for a predetermined number of years, with salaries rising by a set amount each year. Further, suppose that after the number of years for which the parties decide to cap rookie salaries expires, all of those players become restricted free agents.²⁰⁹ Pay would, at long last, be distrib-

207. Among the first nine picks of the 1989 NBA draft were . . .

Danny Ferry	-	2nd
J.R. Reid	-	5th
Stacey King	-	6th
George McCloud	-	7th
Randy White	-	8th
Tom Hammonds	-	9th

. . . all of whom have failed to live up to their advance billing. The 1989 draft did, however, produce the following sleepers between picks #10-26. . . .

Pooh Richardson	-	10th
Nick Anderson	-	11th
Tim Hardaway	-	13th
Shawn Kemp	-	17th
Blue Edwards	-	21st
Vlade Divac	-	26th

THE SPORTING NEWS, NBA REGISTER (1993).

208. For example, Shawn Kemp, the Supersonics' budding young superstar, reportedly was to earn roughly \$700,000 for 1992-93, a season in which he was an All-Star. Obtained via confidential sources. Recall the average NBA salary was over one million dollars. *See supra* note 12.

209. For example, a suggested rookie cap would slot rookie salaries for two years. Any number of years could be chosen, but two years seems to be a reasonable period of time in which to determine how good a given professional will become without locking the players into wages dictated by their draft position for too long. For any given year, the league and the Players Association would decide upon a salary to be paid to the number one pick. Ideally, it is a salary that is below what the marquee players in the league earn but still enough to indicate that a player was the number one player chosen. The remaining picks in the draft are then slotted in at a certain amount less than the pick immediately preceding. Then, in Year Two, each player's salary is increased by ten percent. For the following season, the player picked at each number will earn what the player picked the year prior at the same position earned in Year Two. The process would then repeat itself. At the end of the two years all the draft picks then become restricted free agents as pay is reallocated according to merit.

To illustrate, suppose that such a rookie cap was instituted for the 1990 NBA draft, and the league and the players determined that the number one pick should be awarded \$2 million. Salaries would then be as follows for a player's first two years in the league through the

uted according to merit. After the rookie cap period expired, a player's salary will increase or decrease according to his perceived market value. Making the formerly capped rookies restricted free agents will allow their salaries to reflect their market worth, while it will still provide for the reliance interests of the teams who selected them.²¹⁰ It would be foolish to contend that player salaries would cease to rise as rapidly as they have been over the past several years.²¹¹ They would continue to rise, but unlike the current system, there would be a more direct correlation between salary and player performance.²¹²

1993-94 NBA season:

year of draft	draft pick	wages in year 1	wages in year 2
90	1	\$2,000,000	\$2,200,000
90	2	\$1,900,000	\$2,090,000
90	3	\$1,800,000	\$1,980,000
90	4	\$1,700,000	\$1,870,000
90	5	\$1,600,000	\$1,760,000
91	1	\$2,200,000	\$2,420,000
91	2	\$2,090,000	\$2,299,000
91	3	\$1,980,000	\$2,178,000
91	4	\$1,870,000	\$2,057,000
91	5	\$1,760,000	\$1,936,000
92	1	\$2,420,000	\$2,662,000
92	2	\$2,299,000	\$2,528,900
92	3	\$2,178,000	\$2,395,800
92	4	\$2,057,000	\$2,262,700
92	5	\$1,936,000	\$2,129,600
93	1	\$2,662,000	\$2,928,200
93	2	\$2,528,900	\$2,781,790
93	3	\$2,395,800	\$2,635,380
93	4	\$2,262,700	\$2,488,970
93	5	\$2,129,600	\$2,342,600.

Teams would be allowed to sign rookie free agents at any price, but only for a period of two years at which point they, too, would be re-evaluated according to merit.

In regard to Team Salary Cap limits, a team would only have to clear enough money under the cap to sign a player for what his slotted salary dictates.

If at any point it appears that the escalation of rookie salaries is not keeping pace with the financial success of the league, then the league and the Players Association could renegotiate the starting salary for the number one pick for the following year, as well as the percentage by which the salaries are to increase.

210. See *supra* notes 108-109 and accompanying text.

211. For example, imagine what Shaquille O'Neal or Alonzo Mourning would sign for at the close of the 1993-94 season (their second in the league) if they were to become restricted free agents.

212. Still, situations might occur where a bidding war for a restricted free agent might drive his salary beyond his actual worth if his former team is not willing to let him go. The player in question, however, in such a situation would have already established exactly what he was and was not capable of. If a team decided they were going to outbid another team for him, they would, in advance, be aware of the fact that they were going to overpay him. The guessing game involved with paying unproven rookies top money would come to a close.

This would be a welcome change to the game of professional basketball. Needless to say, team owners would appreciate not having to pay marginal players the type of money due an All-Star.²¹³ NBA fans would also be certain to approve of a rookie cap. Attendance at any NBA game will reveal that the crowd tends to grow upset with players who earn a hefty paycheck but do not produce accordingly.²¹⁴ In addition, the institution of a rookie cap would go a long way in clearing up some of the bad vibes which currently exist in NBA locker rooms. Such a provision may even be welcome by some NBA players. Within team locker rooms, some of the emphasis would be shifted away from the ridiculous individual attitudes, e.g., "this damn rookie is making more than I am and I am twice the player he will ever be," towards a team attitude whose primary focus is winning games. Placing more emphasis on winning games and removing the negative vibes associated with unwarranted salaries will improve the ultimate product: NBA games. The average basketball fan will be able to appreciate this. The laws of economics dictate that all things being equal, demand will rise with the quality of the product. Thus, the institution of a rookie cap, via the introduction of merited salaries, a touch of integrity, and the removal of all the negatives associated with unmerited wages will prompt the league to grow ever more popular. Under the revenue sharing plan of the salary cap, a more popular league means more money for the players. It would appear that even the players stand to benefit, on an aggregate level, from the institution of a rookie cap. All things considered, it seems like this would be a beneficial provision for all parties involved.

The introduction of a rookie cap does, however, raise equitable concerns in the unfortunate event that a young player suffers a career-ending injury. Under the current system, a rookie entering the league has the opportunity to contract for many years, thereby protecting himself against the possibility of a career-ending injury.²¹⁵ Once a rookie signs a contract, he is assured of his money for the life of his contract, even if he wrecks a knee in training

213. The Cleveland Cavaliers, for example, cannot be pleased about the fact that for the 1993-94 NBA season, they are obligated to pay Danny Ferry \$3,542,857. Player Contracts, *supra* note 70. Even worse, Ferry has two years left on his contract at similar dollar figures.

214. For example, the crowd in the Omni, home to the Atlanta Hawks, continually displays their displeasure with Jon Koncack. A bidding war several years ago made Koncack, a marginal NBA center, a very highly-paid player. Koncack has thus earned the infamous nickname of Jon "Contract."

215. A vast majority of NBA contracts are guaranteed. Player Contracts, *supra* note 70.

camp and, as a result, cannot ever play a single minute in the league. Under a rookie cap similar to the one recommended here,²¹⁶ a player no longer has the opportunity to ensure his financial security by signing a long-term contract immediately upon his entrance into the league.

From the perspective of the average fan, this must seem unfair. From the perspective of a potential first-round draft pick, it surely seems draconian. The inequity of the situation, however, can easily be alleviated by the institution of an insurance program which would award protection to each and every rookie player upon the signing of their initial contracts.²¹⁷ This would protect

216. See *supra* note 208 and accompanying text.

217. Referring to the proposed rookie salary cap in note 209, an accompanying insurance policy plan might work as follows:

1. The league and the Players Association agree on the number of years a player is to be covered. In determining this figure, the parties should consider the player is to be compensated for his pain and suffering, and that the player, in the form of collective bargaining, has previously given up his right to sign a long-term contract as a rookie. For example, ten years would serve as a good figure as it would represent a period longer than the average playing career.

2. The amount awarded under the policy, in the event the player does suffer a career ending injury within his first two years, is to be directly correlated to the position in which he was drafted. The amount should also consider that wages would most likely continue to rise, on a league wide basis, throughout what would have been the playing career of the player had he not been hurt. For example, the player's salary would continue to rise at a rate of 10% per year, beginning with what the player was to make in Year Two of his rookie contract. This would then continue for 10 years beyond the expiration of his rookie contract.

Thus, referring to the rookie plan in note 209, *supra*, suppose the first pick of the 1990 draft and the fifth pick of the 1991 draft were both to suffer career ending-injuries in their rookie season, both players would receive the amount remaining under their rookie contract. Thus, the number one pick of the 1990 draft would receive \$2 million in Year One and \$2.2 million in Year Two. The number five pick of the 1991 draft would receive \$1,760,000 in Year One and \$1,936,000 in Year Two. At this point—the beginning of what would have been their third year in the league—the players would begin to receive payments arising from their respective insurance policies, which as stated earlier, will continue to rise at a rate of ten percent per year. Thus, in Year Three the number one pick of the 1990 draft would earn \$2,420,000 and the number five pick of the 1991 draft would earn \$2,129,600. These payments would continue for the next 10 years. The exact payments would be as follows:

Source of Payment Recipient and Dollar designation

	#1 pick of '90 draft	#5 pick of '91 draft
Year #1 of Rookie Contract	\$2,000,000	\$1,760,000
Year #2 of Rookie Contract	\$2,200,000	\$1,936,000
Insurance Payments		
Year #1	\$2,420,000	\$2,129,600
Year #2	\$2,662,000	\$2,342,600
Year #3	\$2,928,200	\$2,576,860

the financial interests of the rookie who suffers the unfortunate fate of having his career ended prematurely, yet it would allow the league to enjoy all the benefits of a rookie cap. Team owners would not be adverse to the introduction of such a provision because it presents a lesser financial burden, and less of a headache, than having to pay a player an undeserved salary.²¹⁸

The Legality of a Rookie Cap

A cursory glance would seem to indicate that a rookie salary cap, although a good idea, remains an impossibility, because it would violate antitrust law. A more thorough analysis, however, shows that according to pertinent case law, a rookie cap would not be violative of antitrust law.²¹⁹ Indeed, the district court in *Wood*²²⁰ stated that “[a]t the time an agreement is signed between the owners and the players’ exclusive bargaining representative, all players within the bargaining unit and those who enter the bargaining unit during the life of the agreement are bound by its

Year #4	\$3,221,020	\$2,834,546
Year #5	\$3,543,122	\$3,118,000
Year #6	\$3,897,434	\$3,429,800
Year #7	\$4,287,177	\$3,772,780
Year #8	\$4,715,894	\$4,150,058
Year #9	\$5,187,483	\$4,565,063
Year #10	\$5,706,231	\$5,021,569

12 year totals	\$42,768,561	\$37,636,876
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218. This is because the money that would be used to pay off such an insurance policy would come from the league’s 27 member teams collectively. Under the current system, individual owners have to bear the financial brunt of what proves to be an unwise draft selection. Recall in note 217, *supra*, that the value of the insurance policy that would have to be paid to the number one pick of the 1990 draft was \$38,568,561:

\$42,768,561	12-year total
– \$ 4,200,000	his collective salary from his rookie contract
\$38,568,561	total value of insurance policy

This figure divided by the league’s 27 member teams amounts to \$1,428,465 per team to be paid out over the course of 10 years. Thus, a career-ending injury to the number one pick of the 1990 draft would cost every team in the league \$142,846 per season (which would not count against them under the cap). In contrast, the Cavaliers of Cleveland are obligated to pay Danny Ferry over \$3.5 million for the 1993-94 season alone.

219. See *J.I. Case Co. v. NLRB*, 321 U.S. 332, 335 (1944) (holding that when an employee is hired after the collective bargaining agreement has been made, “the terms of [his] employment already have been traded out”); *NLRB v. Laney and Duke Storage Warehouse Co.*, 369 F.2d 859, 866 (5th Cir. 1966) (“The duty to bargain is a continuous one, and a union may legitimately bargain over wages and conditions of employment which will affect employees who are to be hired in the future.”).

220. *Wood v. National Basketball Ass’n*, 602 F. Supp. 525 (1984).

terms.”²²¹ Emphasizing this point, the district judge in *Wood*, referring to the salary cap, announced, “It is binding on plaintiff and all others now in the bargaining unit prior to the expiration date of the agreement.”²²²

This premise, that the provisions of a collective bargaining agreement are binding upon rookies who had no actual say in the bargaining process, was adopted by the Second Circuit Court of Appeals, which further elaborated on the point, while affirming the district court’s decision denying Mr. Wood’s motion for injunctive relief.²²³ In response to Mr. Wood’s argument that the salary cap was illegal because it affects NBA players (employees) who were outside of the bargaining unit when the agreement was struck, the court stated that this effect is a “commonplace consequence of collective agreements [In fact,] the National Labor Relations Act explicitly defines ‘employee’ in a way that includes workers outside the bargaining unit.”²²⁴ Further, the court stated that “even if some such arrangements [collective bargaining agreements] might be illegal because of discrimination against new employees [players] the proper action would be one for breach of the duty of fair representation.”²²⁵ As this would involve a draft pick suing his fellow players, it is doubtful such a suit would ever come to fruition. A player who initiated such a suit would indeed have a long and frustrating career if he were to single-handedly shoot down an agreement upon which the majority of the players had agreed.

THE VETERAN PROVISION

One of the knocks against the salary cap is that it is discriminatory in its application because it unduly burdens the league’s non-stars. These complaints date all the way back to 1984.²²⁶ The problem arises from the fact that in many instances, teams use the bulk of the limited amount of money they are permitted to spend under the cap to sign their marquee players. This, in turn, leaves little money to sign the players who serve in valuable reserve ca-

221. *Id.* at 529.

222. *Id.*

223. *Wood v. National Basketball Ass’n*, 809 F.2d 954 (2d Cir. 1987).

224. *Id.* at 960.

225. *Id.* at 962.

226. In 1984, Greg Ballard, then a member of the Washington Bullets, stated that while the new agreement was supposed to benefit all of the players, it really only benefitted the superstar players. David Dupree, *60 Slated to Become Free Agents in NBA*, WASH. POST, Apr. 22, 1984, at C8.

pacities.²²⁷ Thus, many of these players are faced with the option of signing for at or about the minimum salary, or going abroad to earn greater wages in one of the many European professional leagues.²²⁸ Following the best economic opportunities, many of these players opt for the European route. Thus, the cap, in a roundabout way, is having the effect of pricing the valuable, reserve-capacity veteran player out of the league.²²⁹

This is an undesirable effect for several reasons. It is unfair to the players. Most players, assuming the pay was equal, would rather stay home and play in the NBA than go to Europe. Also, this trend threatens to dilute talent in the league, thereby weakening the on-court product. Finally, it threatens to prompt the same kind of locker room tension sought to be avoided by the institution of a rookie cap. Indeed, it must be an unpleasant situation for a player to enter a locker room where his peers earn two, three, ten, and even twenty times what he does.

All of these negative factors can be alleviated if, in the next collective bargaining agreement, the league and the players create a new exception to the salary cap. Under such an exception, a team would be permitted to pay a veteran player a predetermined amount above the allocated cap minimum, without having that money counted against them under the salary cap.²³⁰ Note, however, the exception would not be mandatory; rather, it would give a team the option to do so if it so desired.

This would have many positive effects. First, it would keep home the many veterans who would otherwise leave for the greater

227. For example, as of October 1, 1993, while the Los Angeles Lakers had five players on their payroll who were to earn over \$1.5 million for the 1993-94 season, they also had five players slated to earn less than \$250,000 for the same season. *Player Contracts*, *supra* note 70.

228. European leagues have made a steady practice of snatching up NBA-caliber players who have difficulty coming to terms with the teams that possess their rights. *THE SPORTING NEWS*, *NBA REGISTER* (1993).

229. One player whose situation represents this trend is forward Chucky Brown of the New Jersey Nets. Brown has proven he has the ability to play in this league and is an adequate back-up forward. In his four-year career, in which he has played for three different teams, he has scored at a clip of seven points per game, despite averaging less than 17 minutes per game for his career. *THE SPORTING NEWS*, *NBA REGISTER* 29 (1993). For the 1994-95 season, Brown is under contract with the New Jersey Nets to play for the league minimum of \$150,000. *Player Contracts*, *supra* note 70. Brown could command considerably more in Europe.

230. For example, allow a \$75,000 exception for each year of NBA service and provide for a ceiling to the exception of \$750,000. Thus, a player who has played in the league for five years can be offered \$375,000 (five years at \$75,000) above the \$150,000 minimum with only the \$150,000 minimum being counted against the cap.

salaries available in Europe,²³¹ thereby helping ensure that the available talent is not diluted. Second, valued veterans who contribute to their teams off the court as much as on the court can now be retained without embarrassing such players by paying them the league minimum.²³² Similarly, teams who wish to present such veterans legitimate offers are freed from the burden of having to create room under the salary cap.²³³ Recall, the recommended exception is an optional one. Thus, in its application, it would most likely only be extended to veterans who fall under the heading of "good citizen," the type of veteran a team wants around to have its young players learn from. In essence, the exception would allow an NBA team to provide for a quasi-mentor program for their young stars without significantly affecting team salaries. The presence of these "elder statesmen" would certainly benefit the league. Any time a team introduces a means for upgrading the integrity of the league as well as the quality of play, it can only benefit all involved. Management might also see some attractive features in this provision. They could now sign the veteran free agent they desire without subtracting money from the cap, which they could better use to sign their building blocks for the future. Further, such an exception, if crafted properly, would remain immune from the possibility of abuse.²³⁴

231. For example, Rick Mahorn, a quality power forward with 11 years of experience, and who was named to the NBA All-Defensive second team in 1990, was forced to go abroad in 1991-92 when he played for Il Messagero Roma of the Italian Professional League. *THE SPORTING NEWS*, NBA REGISTER 116 (1993). Several NBA teams had showed interest in Mahorn, but none were able to offer him the kind of money he stood to make in Italy.

232. As of October 1, 1993, all of the following NBA veterans, many of whom were once impact players, were scheduled to receive the league minimum salary for the 1993-94 season:

Bernard King	Kiki Vandeweghe	Danny Young
Ed Nealy	Trent Tucker	Darrel Walker
Terry Teagle	Maurice Cheeks	Chucky Brown
Sleepy Floyd		

Player Contracts, *supra* note 70.

233. For the 1991-92 NBA season, any team would have enjoyed the veteran leadership that a player like Rick Mahorn offers. *See supra* note 230. No team in the league, however, was willing to clear up enough room under the cap to keep Rick from going abroad. Under this proposal, Mahorn would have had his pick of every team that chose to offer him a contract, which pursuant to this exception could have been worth \$900,000 (\$150,000 in salary and \$750,000 from the exception), of which only \$150,000 would be counted for cap purposes. The \$900,000 figure would have most likely been enough to keep "the Horn" here in the United States. Based upon information obtained via confidential sources.

234. The exception should only be available to veterans who would otherwise be signed to the league minimum. It should not be applicable, for example, when a team would like to pay a veteran \$1.5 million but can only clear \$1 million under the cap. The \$500,000 difference could not be made up via this exception. The maximum salary that could be

CONCLUSION

The collective bargaining agreement between the NBA and the Players Association is not violative of antitrust law. The agreement's questioned legality does not pose a threat to its continued existence. With the agreement due to expire, however, at the close of the 1993-94 NBA season, professional basketball is at a critical juncture in its history. In the game of basketball, selfishness is a most contagious disease. Once it rears its ugly head, it is terribly difficult to combat, and can have devastating effects. On the playing court, selfishness can cripple even the most talented of basketball teams. Similarly, it has the capacity to do the same to the league as a whole. As the league and the Players Association negotiate the next collective bargaining agreement, both sides must be prepared to give as well as take.

The Players Association has postured that it will push for a discontinuance of the cap. Thus, it appears that the players will have the upper hand in the negotiations, especially in light of the fact that the district court approved the contract recently signed by Chris Dudley.²³⁵ If a new agreement is not struck, the former agreement will continue to govern.²³⁶ Under the ruling of the district court in the *Dudley* case, termination provisions are a legitimate contractual tool under the most recent agreement. Thus, the salary cap presently exists in name only. If a salary cap allows for termination provisions such as Dudley's, the cap cannot accomplish its purpose.²³⁷ The existence of a salary cap which allows for termination provisions akin to the one in the Dudley contract threatens to harm, and possibly even destroy, the league. Thus, it is the league's owners who are under pressure to strike a new agreement as soon as possible, and must, therefore, be prepared to

offered under the exception is \$900,000 (\$150,000 league minimum plus \$750,000 maximum allowable exception to a veteran of ten or more years). If a team sought to sign a player for more than that, his entire salary would have to fit under the cap, unless another exception was available.

Also, a team would not be able to offer a few great players the bulk of the salary cap and then have a handful of veterans who benefit from this provision, such that the team is technically within the confines of the cap, but is, in actuality, far in excess of the cap on account of this exception. While this remains theoretically possible, it is almost certain that such a situation would never arise. Recall, the ultimate goal of an NBA franchise is to win a championship. This can not be accomplished with a roster full of marginal veterans, who in the absence of this exception would not be able to command more than the league minimum.

235. *Bridgeman v. National Basketball Association*, 838 F. Supp. 172 (D.N.J. 1993).

236. See *supra* notes 162-165 and accompanying text.

237. See *supra* text accompanying note 131.

give in to the players in several instances. In order to appease the players, "defined gross revenue" should be redefined to give the players a much sweeter share of the pot.

The players, however, would be foolish to take advantage of the league.²³⁸ They should not lose sight of the fact that under the reign of the salary cap, they have benefitted tremendously. Should they not willingly agree to a revamped continuance of the cap, which explicitly disallowed termination provisions such as the type employed in the Dudley contract, as soon as possible, they may very well be doing themselves a tremendous disservice in the long run. Should the cap be discontinued completely, or continued with termination provisions, the players may soon find their potential earning power declining as the league begins to feel the ill-effects of life without an effective cap. Also, the players would be wise to allow for the introduction of a rookie cap. If "defined gross revenue" is indeed redefined, the players will be receiving ample money. It coincides with general principles of fairness to make certain this money is properly allocated to those who deserve it most.²³⁹ The rookie cap will provide a framework to ensure that

238. The Players Association is currently involved in a dilemma all its own. Isiah Thomas of the Detroit Pistons is the current president of the Players Association. Isiah, however, has just come to terms with the Pistons on a deal which will make Isiah a member of the Piston organization for life. *NBA Notebook*, MIAMI HERALD, January 8, 1994, at 5D. More importantly, the deal promises Isiah 10% ownership of the team upon his retirement. Query as to how Thomas can bargain in good faith on behalf of the Players Association when it is common knowledge that he is soon to become part of management.

239. In order to deal with the ever-wealthier NBA player, another change need be made in the business of professional basketball. This change, however, falls outside of the scope of the collective bargaining agreement. Nonetheless, it cannot go unmentioned. Presently, the way most NBA teams allocate power throughout their front office leaves something to be desired. NBA teams should endow their coaches with more power so that they can more effectively control what goes on on the basketball court. Most teams have a general manager to whom a coach is subordinate. Yet, it is the coach who is directly responsible for the team's on-the-court performance. Should a coach and a player come into conflict, often the player and or players go over the coaches' head and complain to the general manager. If the town is not big enough for both the coach and the player(s), it is usually the coach who goes.

It should also be noted that NBA players on the average make considerably more than NBA coaches. In many instances, it has become somewhat impossible to coach the NBA player. How can a player be expected to follow orders from a man whom he knows only makes a portion of what he does, especially when the player knows that if push comes to shove he will win the battle? Hence, NBA coaches are often relegated to the role of baby sitter, forced to appease the sometimes selfish and lazy desires of their players, so that the coach does not lose his job. As a result, the on-court product often tends to suffer. A coach is supposed to lead and guide his team, but how can a team be at its best when the head is necessarily inferior to the tail?

This raised consciousness of the ever-wealthier NBA player, aware of his significant power over team affairs, was recently made very clear by the actions of the New Jersey Nets'

this happens.

This Article has not been written with a bias in favor of one party over another. Rather, it has been written from the perspective of an individual who truly loves the sport of professional basketball and cares very deeply about its continued success. All the suggestions contained herein are motivated by the underlying concern of how to best provide for the continued health and prosperity of professional basketball, which translates into profitable franchises and the continued rise of player salaries. As the league and the players head towards crunch time of the single most important game ever played, hopefully both sides will emerge victorious.

spoiled man-child, Derrick Coleman. Coleman, a three-year veteran, possesses unquestionable ability. Nonetheless, he has yet to be named an NBA All-Star. Recently, he rejected an offer the Nets tendered him that would have made him the highest paid player in the league. *See supra* note 199. Justifying the refusal, Coleman stated:

Some people call me a problem child. When I was at Syracuse, Coach Jim Boeheim used to ask my mother, "How come every time I tell Derrick to do something, he has to ask, 'Why?'" Here I feuded with Bill Fitch, refused to get off the bench in one game at Miami Arena. *He doesn't coach here any more.* . . . You don't understand. I *am* the game."

S.L. Price, *supra* note 199, at 11H (emphasis not in original).

To deal effectively with this "modern player," NBA coaches must be given a sufficient amount of power in regard to a team's basketball operations. Paying coaches higher wages alone won't help the situation, since the players will always make far more. Power is the missing ingredient. If a coach were at liberty to bench, trade, or waive a player for any reason he deemed sufficient, he would then be able to do his job effectively. The bottom line is that all players, or at the least, most players, are still concerned about their playing time—regardless of how much money they make. If they knew they had to follow their coaches' rules in order to stay on the playing court, they will probably respond. Unfortunately, this is one area where the business aspect of the sport truly dominates. The underlying mentality seems to be that fans want to see certain players on the floor, and it is not the coach's place to alter that scheme. Management has made this decision. Thus, players, for the most part, do as they wish and there is little coaches can do about it. With few exceptions, coaches are not provided with sufficient authority. Query as to whether the sports business's best interests are really being served. Seemingly, it would be in the sport's best business interest to do whatever is possible to improve the ultimate product: NBA games. Constantly pampering the game's highly paid young stars may create a situation where the league will cease to become a marketable entity. The day may come when fans will no longer pay to see spoiled, uncoachable millionaires.

