

Summer of 2011: Should the National Basketball Player's Association Shoot or Pass on Union Decertification?

Introduction

"I'm going to take my talents to South Beach and join the Miami Heat."¹ LeBron James's statement, delivered on "The Decision,"² an hour-long ESPN special, signaled the beginning of a new era in the National Basketball Association (NBA). An era where a free agent superstar, like James, can bring the ever so busy cosmos of the sports world to a screeching halt during the NBA's offseason to announce what team he will be playing for the following season. Where three free agent superstars, like James, Dwyane Wade, and Chris Bosh, can decide to play together and make it a reality, while still earning near maximum contracts.³ Where superstars, like Amar'e Stoudemire, openly court non-free agent superstars, like Carmelo Anthony, to join them in order to form a 'super team.'⁴ It is unmistakable, the "Summer of LeBron"⁵ has altered the landscape of the NBA and provided the swell for a wave of change. It remains to be seen is whether this change will affect the core structure of the league or only provide a superficial makeover with minor structural modifications.

What is certain, however, is the lasting significance of the changes that will come as a result of the upcoming Collective Bargaining Agreement (CBA) negotiations between the NBA and the National Basketball Player's Association (NBPA). In spite of

¹ http://espn.go.com/blog/truehoop/post/_/id/17853/lebron-james-decision-the-transcript

² "The Decision" was the third most watched program on cable television at that point in the year, with an estimated 9.95 million viewers. http://www.huffingtonpost.com/2010/07/12/lebron-james-decision-rat_n_642719.html

³ Sources claim James and Bosh signed six-year contracts for \$110.1 million and Wade signed a six-year contract for \$107.5 million. Each player took \$15 million less over the life of the contract that was allowable. <http://sports.espn.go.com/nba/news/story?id=5368003>

⁴ Stoudemire is also openly recruiting Anthony Parker to join him with the New York Knicks. <http://sports.espn.go.com/new-york/nba/news/story?id=5353451>

⁵ <http://bleacherreport.com/articles/420589-two-sides-divided-is-the-nba-preparing-for-a-lockout>

the media fanfare for the past summer's events, it will actually be the 'Summer of 2011,' and the CBA negotiations that will reveal the true face of the NBA's new era. These negotiations also provide the motivation for this paper.

On June 30, 2005 NBA and NBPA announced a six-year CBA had been reached.⁶ The agreement's sixth year, the 2011-2012 season, was agreed to be at the option of the NBA.⁷ On August 4, 2009 it was reported that the NBA would not exercise its option to extend the current CBA through the 2011-2012 season.⁸ As a result of the NBA's decision, the basketball world has been bracing for the Summer of 2011 and the effects the CBA negotiations will bring.

Most significantly, since the current CBA is set to expire in July 2011, the NBA and NBPA will have to negotiate and agree to a new CBA in the near future if the league is to continue without a work stoppage, which is sure to be damaging to both parties.⁹ According to numerous media reports, the NBA will seek the institution of a hard salary cap,¹⁰ which would result in a considerable decrease in player salaries, and other alterations to the existing CBA that favor its interests. It is highly unlikely that the NBPA will agree to such an agreement.¹¹ Instead, it is reported the NBPA will seek an increase in the amount of revenue sharing for players,¹² avoid anything resembling a 'true' hard salary, and work toward an agreement that only provides nominal changes to the existing

⁶ http://www.nba.com/news/cba_2005.html

⁷ http://www.nba.com/news/cba_summary_050804.html

⁸ <http://www.sportsbusinessdaily.com/article/132289>

⁹ http://www.nba.com/news/cba_summary_050804.html

¹⁰ Commissioner Stern referred to hard cap as "one of our negotiating points," after Washington Wizards owner, Ted Leonsis stated that he expected the NBA would soon have a hard cap like the NHL.

<http://www.google.com/hostednews/ap/article/ALeqM5gJ3IAKXmKswnD5dX4Zi563W4CbaQD9IHS2HG0?docId=D9IHS2HG0>

¹¹ http://www.sportsbusinessdaily.com/index.cfm?fuseaction=sbd.preview&articleID=14_2575

¹² <http://bleacherreport.com/articles/420589-two-sides-divided-is-the-nba-preparing-for-a-lockout>

CBA.¹³ The NBPA will develop a negotiation strategy to achieve this goal, which must account for the highly likely scenario of an NBA imposed lockout.¹⁴ The real possibility of such a lockout will inevitably bring the NBPA to decide whether they should shoot or pass on union decertification and antitrust litigation.

Part I of this article covers the labor history of the NBA, discussing CBA negotiations and past lawsuits involving the NBA. Part II touches upon the current state of the NBA. League and player revenue will be detailed to provide an understanding of what is at stake in the Summer of 2011. Part III analyzes the merits of possible union decertification and antitrust litigation to provide a recommendation as to whether the NBPA should decertify and pursue antitrust litigation in order to reach a CBA that best serves their interests.

I. NBA Labor History

A. NBA's Early Stages

In order to fully appreciate and understand the current NBA and NBPA's labor negotiations, knowledge and understanding of the NBA's labor history is necessary. In its early stages, the NBA provided little protection and privileges to its players.¹⁵ According to the NBPA, before the unions creation "there was no pension plan, no per diem, no minimum wage, no health benefits and the average player salary was \$8,000."¹⁶ In response to this reality, Bob Cousy,¹⁷ a legendary point guard, began organizing the

¹³ <http://www.sportsbusinessdaily.com/article/140488>

¹⁴ NBPA Executive Director, William Hunter, stated, "I'm preparing for a lockout right now, and I haven't seen anything to change that notion." <http://bleacherreport.com/articles/420589-two-sides-divided-is-the-nba-preparing-for-a-lockout>

¹⁵ <http://www.nbpa.org/about-us>

¹⁶ <http://www.nbpa.org/about-us>

¹⁷ <http://www.apbr.org/labor.html> (Bob Cousy served as the first President of the NBPA)

Jorge Salazar

leagues players¹⁸ and ultimately established the National Basketball Players Association (NBPA) in 1954.¹⁹ The NBA initially refused to recognize the NBPA as the certified labor union representative of all NBA players.²⁰ This however, did not deter the NBPA as they provided the NBA President Podoloff with a list of player concerns at the 1955 NBA All-Star Game.²¹ As a result of the NBPA's persistence, the NBA finally officially recognized the NBPA as the union representative of all NBA players and agreed to terms improving the players working conditions.²² Following this victory, the NBPA began pushing the NBA for the institution of a player pension plan.²³ After the NBA reneged on an agreed principal agreement with the NBPA²⁴ and subsequently ignored the player pension plan issue, the NBPA decided to employ aggressive bargaining tactics.²⁵ In January 1964, the NBA was set to host its first televised NBA All-Star Game, which would provide the league with important national exposure.²⁶ The All-Star Team threatened to not play if a player pension plan was not created.²⁷ Just before the start of the game, NBA President Walter Kennedy²⁸ was forced to assure the NBPA that a player pension plan would be instituted at the next owners meeting in order to convince the All-

¹⁸ [#5](http://members.cox.net/lmcoon/salarycap.htm)

¹⁹ <http://www.nbpa.org/about-us>

²⁰ <http://www.nbpa.org/about-us>

²¹ <http://www.apbr.org/labor.html>

²² The NBA agreed to “a probationary abolition of the whisper fine, a seven dollar per diem and other reasonable traveling expenses, an increase in the 1957-58 playoff pool, regular players would no longer be required to report to training camp earlier than four weeks prior to the season, elimination of exhibition games within three days of the season opener or on the day prior to a regular season game with a limit of three exhibition games during the season, player contracts would be mailed no later than September 1st, referral of player-owner disputes to the NBA League President or a committee of three NBA Governors to be chosen by the player, [and] reasonable moving expenses for a player traded during the season. <http://www.apbr.org/labor.html>

²³ <http://www.apbr.org/labor.html> (Tom Heinsohn presided as NBPA President)

²⁴ NBPA and NBA reached a principal agreement in January 1961, with details to be determined through meetings the following month. <http://www.apbr.org/labor.html>

²⁵ <http://www.apbr.org/labor.html>

²⁶ <http://www.nbpa.org/about-us>

²⁷ <http://www.nbpa.org/about-us>

²⁸ Walter Kennedy was appointed as the second NBA President in 1963. He served as NBA President until 1975. <http://www.nba.com/history/commissioners.html>

Jorge Salazar

Star Team to play.²⁹ With the players gaining more confidence and strength, the peace brought on by the pension plan agreement would not last long.

During the 1967 All-Star Game, new NBPA President and renowned player Oscar Robertson³⁰ asked owners to pay players for exhibition games and limit the number of exhibition games to ten.³¹ These demands eventually led to a standoff, with the NBA threatening to cancel the playoffs unless the players provided assurances that they would act in accordance with their contracts and participate in the playoffs as scheduled.³² The NBPA fired back by threatening to obtain certification with the National Labor Relations Board (NLRB) and strike the playoffs to get an improved pension plan.³³ Again, the NBA and NBPA avoided any game interruptions and reached an agreement improving the players' work conditions.³⁴

B. NBA – ABA Merger

While the NBA dealt with its players' unrest over working conditions, another more challenging problem presented itself, a rival league. In 1967, the American Basketball Association (ABA) was formed by businessmen who wanted to invest in basketball teams, but were unwilling to pay the high NBA fee for an expansion team.³⁵ The ABA grew quickly by acquiring top college talent³⁶ and luring top NBA players, like Rick Barry, Billy Cunningham, and Zelmo Beaty, with larger contracts to join their

²⁹ At the following owners meeting the NBA agreed to provide 50% toward the purchase of a \$2,000 endowment policy. <http://www.nbpa.org/about-us>

³⁰ Oscar Robertson succeeded Tom Heinsohn as NBPA President in 1966. <http://www.apbr.org/labor.html>

³¹ <http://www.apbr.org/labor.html>

³² <http://www.apbr.org/labor.html>

³³ <http://www.apbr.org/labor.html>

³⁴ The agreement included “a new \$600 a month pension for players with ten years of service at age 65 and retroactively to the beginning of the career for all active players, new medical and insurance benefits, elimination of games played immediately before the All-Star Game, an 82-game limitation on the regular season, discussion of exhibition game pay, and formation of a committee to review the standard player contract before the 1967-68 season.” <http://www.apbr.org/labor.html>

³⁵ <http://www.remembertheaba.com/ABAGeneralInfo/ABAFaq.html#ABAGeneralBackg> round

³⁶ This included player like Mel Daniels and Spencer Haywood. <http://www.apbr.org/labor.html>

league.³⁷ The ABA became serious competition for the NBA, resulting in elevated player salaries and a reduction of the NBA consumer base. Walter Kennedy, NBA Commissioner at this time,³⁸ sought to solve this problem by opening negotiations over the ABA with a possible merger of the two leagues.³⁹

As the merger negotiations approached an agreement in 1970, the NBPA filed an antitrust lawsuit, known as the ‘Oscar Robertson Suit.’⁴⁰⁴¹ As part of the suit, the NBPA attempted to block the merger, eliminate the team option clause,⁴² prohibit the college draft,⁴³ forbid restrictions on free agency, and receive “compensation for damages incurred in the past due to the option clause”.⁴⁴ The NBPA obtained an early victory in the form of a restraining order from the court, blocking any merger while the suit remained unresolved.⁴⁵

Despite their ongoing legal battle, the NBA and NBPA managed to work together constructively. In October 1970, their efforts produced the first NBA CBA.⁴⁶ The three-year labor agreement provided “an increase in minimum salaries, the playoff pool, and the per diem allowance.”⁴⁷ Three years later, with the Oscar Robertson Suit still being fought in court, the NBA and NBPA agreed to the 1973 CBA.⁴⁸ As the Oscar Robertson

³⁷ <http://www.apbr.org/labor.html>

³⁸ In 1967 the NBA owners changed the name of the NBA President to the NBA Commissioner and in 1971 they “gave him far-reaching authority to run the league, making perhaps the most powerful administrative figure in American pro sports at the time.” <http://www.nba.com/history/commissioners.html>

³⁹ <http://www.apbr.org/labor.html>

⁴⁰ The suit was given its name because Oscar Robertson was the president of the NBPA at its filing. http://www.nba.com/history/players/robertson_bio.html

⁴¹ *Robertson v. National Basketball Ass’n*, 72 F.R.D. 64 (D.C.N.Y. 1976).

⁴² The NBA’s reserve clause “bound a player to a team in perpetuity.” <http://www.apbr.org/labor.html>

⁴³ The NBA’s college draft allowed the drafted player to negotiate with only one team. <http://www.apbr.org/labor.html>

⁴⁴ <http://www.apbr.org/labor.html>

⁴⁵ <http://www.apbr.org/labor.html>

⁴⁶ <http://www.apbr.org/labor.html>

⁴⁷ <http://www.apbr.org/labor.html>

⁴⁸ [#5](http://members.cox.net/lmcoon/salarycap.htm) (The 1973 CBA introduced arbitration to the NBA)

Suit continued to drag on, the increasing costs of the suit brought the NBA to the negotiating table with the NBPA to hash out a settlement.

In 1976, six years after the filing of the suit, a court-approved settlement was reached.⁴⁹ The settlement, which required the dismissal of the Oscar Robertson Suit, and in turn allowed the merger of NBA and ABA, was conditioned on the NBA instituting a free agency system,⁵⁰ allowing unsigned drafted players to reenter the NBA college draft the following year, eliminating the option clause,⁵¹ paying \$4.3 million to approximately 500 players for damages and \$1 million to the NBPA for legal fees, and agreeing to a new CBA.⁵² The six-year CBA⁵³ that the settlement was conditioned upon was executed later that year.⁵⁴

Notably, the NBPA's use of the court system was a huge success. The Oscar Robertson Suit ushered free agency into the NBA, which led to higher salaries for all players and a host of other improved working conditions.⁵⁵ Additionally, with the Oscar Robertson Suit resolved, the NBA was able to merge with the ABA.⁵⁶

C. The Modern Salary Cap

In 1980, a new three-year CBA was agreed to, which increased the minimum salary and eliminated the no-trade clause in player contracts.⁵⁷ Not long after the

⁴⁹ http://www.nba.com/history/players/robertson_bio.html

⁵⁰ The settlement provided a the free agency system, which from 1976-1980 would award the player's former team compensation in the form "cash, players, or draft choices determined by the NBA Commissioner" and after 1980 "the player's former team would hold the right of first refusal on any free agent signings." <http://www.apbr.org/labor.html>

⁵¹ An exception for one-year rookie contracts remained. <http://www.apbr.org/labor.html>

⁵² <http://www.apbr.org/labor.html>

⁵³ <http://www.apbr.org/labor.html> (The six-year 1976 CBA increased pension benefits, the minimum salary by \$10,000, "the per diem, medical and dental coverage, term life insurance, the playoff pool, and player's share of the All-Star Game.")

⁵⁴ <http://members.cox.net/lmcoon/salarycap.htm> (#5)

⁵⁵ http://www.nba.com/history/players/robertson_bio.html

⁵⁶ <http://www.apbr.org/labor.html>

⁵⁷ <http://www.apbr.org/labor.html>

execution of the agreement, the financial condition of the league became a severe concern, as several franchises⁵⁸ began incurring heavy losses. The problem worsened and by 1982 the NBPA considered a player strike in response to the NBA owing approximately \$90 million in deferred money to former players.⁵⁹ The NBA was at serious risk of losing franchises and as a consequence the NBPA was at serious risk of losing jobs.⁶⁰ This grim reality set the background for tense CBA negotiations.

In March 1983,⁶¹ a four-year revolutionary CBA was reached.^{62 63} The agreement introduced the modern salary cap,⁶⁴ which guaranteed the players between 53% and 57% of the NBA's gross revenues.⁶⁵ The 1983 CBA, the 1984 implementation of the first league-wide anti-drug program,⁶⁶ and amazing young talent, like Magic Johnson, Larry Bird, and Michael Jordan, greatly improved the health of the NBA.⁶⁷ However, in 1987 as the 1983 CBA was set to expire, the NBPA⁶⁸ and NBA⁶⁹ found themselves at odds and litigation once again ensued.⁷⁰

⁵⁸ Cleveland, Denver, Indiana, Kansas City, San Diego, and Utah incurred heavy losses.

<http://www.apbr.org/labor.html>

⁵⁹ <http://www.apbr.org/labor.html>

⁶⁰ <http://www.apbr.org/labor.html>

⁶¹ Bob Lanier was the NBPA President, succeeding Paul Silas. <http://www.apbr.org/labor.html>

⁶² <http://www.apbr.org/labor.html>

⁶³ *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960, 962-63. (The NBA and NBPA had to enter into a "Memorandum of Understanding that modified the expired 1980 collective bargaining agreement" because NBPA filed a lawsuit challenging the salary cap, in which the Special Master "determined the salary cap would violate the terms of the [Oscar Robertson] settlement agreement." On June 13, 1983 the modification was approved by the court and the NBA was allowed to institute the salary cap.)

⁶⁴ <http://www.apbr.org/labor.html> (Additionally, the 1983 CBA included a guarantee that the league would preserve 253 player jobs, even in the event of a reduction in the amount of franchises, and \$500,000 in licensing revenue.)

⁶⁵ The NBA's gross revenues were based on "gate receipts, local and national television and radio revenue, and preseason and postseason revenue." <http://www.apbr.org/labor.html>

⁶⁶ "Hailed as the most far-reaching and innovative in professional sports."

<http://www.nba.com/history/commissioners.html>

⁶⁷ <http://www.apbr.org/labor.html>

⁶⁸ <http://www.apbr.org/labor.html> (NBPA led by President Junior Bridgeman.)

⁶⁹ <http://www.nba.com/history/commissioners.html> (Led by NBA Commissioner David Stern succeeded Larry O'Brien in 1984.)

⁷⁰ <http://www.apbr.org/labor.html>

D. NBPA & Union Decertification

After negotiations failed to produce a new CBA, a moratorium agreement was reached, postponing any player signings and lawsuits while negotiations continued.⁷¹ The moratorium agreement expired without an agreement, and NBPA President Junior Bridgeman subsequently filed an antitrust lawsuit against the NBA and promised not to engage in further negotiations until the completion of the lawsuit.⁷² The lawsuit alleged the college draft, the salary cap, and the right of first refusal violated antitrust laws.⁷³ The lawsuit was unsuccessful, as the court found the central issue to hinge upon whether an arms length collective bargaining relationship existed, which would invoke protection through the nonstatutory labor exemption. The court determined that such a relationship existed and dismissed the case.⁷⁴

Subsequently, the NBPA threatened union decertification to eliminate the arms length collective bargaining relationship.⁷⁵ Ultimately, the NBA and NBPA agreed on a CBA,⁷⁶ which did not take affect until 1988.⁷⁷ This agreement created goodwill between the parties, which would last until 1991 when the NBPA ascertained that the league had excluded revenues from luxury suite rentals, playoff ticket sales, and arena signage from the income used to determine the amount used for revenue sharing.⁷⁸ This discovery

⁷¹ *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960, 963 (1987).

⁷² *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960, 963 (1987).

⁷³ *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960, 961-62 (1987).

⁷⁴ *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960, 967 (1987).

⁷⁵ <http://www.apbr.org/labor.html>

⁷⁶ <http://www.apbr.org/labor.html> (The 1988 CBA six-year agreement allowed the continuation of the salary cap with players being guaranteed 53% of the leagues revenues, shrunk the college draft to three rounds in 1988 and two rounds in 1989, substituted the right of first refusal for players who completed their second contract with unrestricted free agency for certain veteran players, and included five-year veteran players who completed their careers before 1965 in the pension plan.)

⁷⁷ <http://members.cox.net/lmcoon/salarycap.htm> (#5)

⁷⁸ <http://www.apbr.org/labor.html>

destroyed the goodwill between the parties and created a contentious relationship that would threaten the NBA's no work stoppage record.

On June 23, 1994 the 1988 CBA formally expired.⁷⁹ At a bargaining session in April 1994, the NBPA demanded that the college draft, right of first refusal, and salary cap be purged and provided the NBA with a document explaining their view⁸⁰ that the three employment practices would “be subject to successful challenge under the antitrust laws.”⁸¹ The NBA responded to these demands by filing a declaratory action on June 17, 1994 seeking a court order, allowing for the continued implementation of the college draft, right of first refusal, and salary cap.⁸² The court sided with the NBA, concluding⁸³ the NBA had no antitrust liability given the fact that a collective bargaining relationship existed.⁸⁴ With the parties still far apart on a new CBA, the season approaching, and a mutual interest in avoiding work stoppage, the NBA and NBPA agreed to a no-lockout, no-strike agreement for the duration of the 1994-1995 season.⁸⁵ The season was played under the expired 1988 CBA terms, while the two parties worked toward a new agreement.⁸⁶

⁷⁹ *National Basketball Ass'n v. Williams*, 857 F. Supp. 1069, 1072 (S.D.N.Y. 1994), aff'd, 45 F.3d 684 (2d Cir. 1995).

⁸⁰ *National Basketball Ass'n v. Williams*, 857 F. Supp. 1069, 1072-73 (S.D.N.Y. 1994), aff'd, 45 F.3d 684 (2d Cir. 1995) (The NBPA restated this view in another bargaining session in May 1994 and in a letter to the NBA in June 1994.).

⁸¹ *National Basketball Ass'n v. Williams*, 857 F. Supp. 1069, 1072 (S.D.N.Y. 1994), aff'd, 45 F.3d 684 (2d Cir. 1995).

⁸² *National Basketball Ass'n v. Williams*, 857 F. Supp. 1069, 1071 (S.D.N.Y. 1994), aff'd, 45 F.3d 684 (2d Cir. 1995).

⁸³ *National Basketball Ass'n v. Williams*, 857 F. Supp. 1069, 1071, 1079 (S.D.N.Y. 1994), aff'd, 45 F.3d 684 (2d Cir. 1995). (District Judge Duffy also expressed discontent with each party “simply using the court as a bargaining chip in the collective bargaining process” and advised the parties to collectively bargain in good faith “rather than clog[ing] the courts with unnecessary litigation.”).

⁸⁴ *National Basketball Ass'n v. Williams*, 857 F. Supp. 1069, 1078 (S.D.N.Y. 1994), aff'd, 45 F.3d 684 (2d Cir. 1995).

⁸⁵ Tim Povtak, NBA Deal Blocks Stoppage, Orlando Sentinel, Oct. 28, 1994, at D1.

⁸⁶ <http://www.apbr.org/labor.html>

As the 1994-1995 season drew to an end and negotiations between the parties continued, a group of disgruntled players led by Michael Jordan and Patrick Ewing moved to decertify the NBPA.⁸⁷ These players claimed they had been kept uninformed by the union with regards to CBA negotiations.⁸⁸ Within days the NBA and NBPA announced a tentative six-year agreement had been reached and approved by team owners shortly thereafter.⁸⁹ However, players promptly voted to reopen negotiations.⁹⁰ With the no-lockout, no-strike agreement having expired on July 1, 1995 the NBA answered the players actions by instituting the first lockout in NBA history.⁹¹ The parties finally reached a tentative agreement six weeks into the lockout.⁹² The NBA, in fear of losing games and the possible result of union decertification, provided concessions⁹³ in order to reach the agreement.⁹⁴ Commissioner Stern remarked, “I didn’t want to face the risk of what decertification would bring.”⁹⁵ The group of players, headed by Jordan and Ewing, still dissatisfied with the proposal, continued seeking union decertification.⁹⁶ In September 1995, with the agreement yet to be officially ratified, the NBPA held a

⁸⁷ <http://www.nytimes.com/1995/07/01/sports/basketball-nba-locks-out-players-in-first-work-stoppage.html?pagewanted=2>

⁸⁸ <http://www.nytimes.com/1995/07/01/sports/basketball-nba-locks-out-players-in-first-work-stoppage.html?pagewanted=2>

⁸⁹ Lee Shappell, *It’s History – NBA Locks Out Players*, Ariz. Republic, July 1, 1995 at C1.

⁹⁰ Lee Shappell, *It’s History – NBA Locks Out Players*, Ariz. Republic, July 1, 1995 at C1.

⁹¹ <http://www.nytimes.com/1995/07/01/sports/basketball-nba-locks-out-players-in-first-work-stoppage.html>

⁹² <http://www.nytimes.com/1995/08/10/sports/pro-basketball-nba-owners-settled-rather-than-risk-more.html>

⁹³ The NBA eliminated the luxury tax, which had been part of the CBA agreed to in June, backed off its demand that the minimum payroll be reduced to 60% of the salary cap, and “reduced its previous position on adjustments to the cap if the collective payroll exceeds the players’ percentage of the league’s basketball related income.” The NBA also agreed to the NBPA’s proposed “\$1 million exception for teams over the payroll cap to sign free agents..., restoration of the exception that allows a team to replace an injured player at 50 percent of the player’s salary..., addition of a modified Larry Bird exception for players competing two seasons with the same team.” <http://www.nytimes.com/1995/08/10/sports/pro-basketball-nba-owners-settled-rather-than-risk-more.html>

⁹⁴ <http://www.nytimes.com/1995/08/10/sports/pro-basketball-nba-owners-settled-rather-than-risk-more.html>

⁹⁵ <http://www.nytimes.com/1995/08/10/sports/pro-basketball-nba-owners-settled-rather-than-risk-more.html>

⁹⁶ <http://www.apbr.org/labor.html>

decertification election where 226 of 369 cast ballots voted against decertification.⁹⁷ A few days later, the NBPA ratified the six-year labor agreement, which contained a clause allowing the NBA to opt out of the agreement after three years, and ended the 75-day lockout.⁹⁸

E. Work Stoppage

During the third year of the agreement, on March 23, 1998, the NBA owners voted 27-2 in favor of exercising the opt out clause⁹⁹ in order to reopen CBA negotiations at the end of the season.¹⁰⁰ Throughout the season, the parties engaged in nine bargaining sessions that proved to be unproductive as a result of differing views on a hard salary cap.¹⁰¹ On July 1, 1998, the NBA imposed another player lockout.¹⁰² The NBPA reacted to this by filing a grievance with an arbitrator, arguing that guaranteed player contracts should be paid during the lockout.¹⁰³ With the season approaching and parties making no progress, the NBA took the unprecedented action of cancelling twenty-four exhibition games and indefinitely postponing training camps.¹⁰⁴

The obvious and real threat of losing regular season games failed to generate any considerable progress and on October 8, 1998, the NBA, for the first time in its history canceled the first two weeks of the regular season.¹⁰⁵ Twelve days later, the NBPA received an unfavorable arbitration ruling, as the arbitrator ruled players' guaranteed

⁹⁷ http://articles.sfgate.com/1995-09-13/sports/17816190_1_terrible-vote-dissident-players-six-year-collective-bargaining-agreement

⁹⁸ <http://www.washingtonpost.com/wp-srv/sports/longterm/memories/1995/95nba2.htm>

⁹⁹ <http://www.apbr.org/labor.html> (The NBA claimed 13 teams reporting losses was the reason behind doing so.)

¹⁰⁰ http://sportsillustrated.cnn.com/basketball/nba/news/1999/01/05/lockout_chronology/

¹⁰¹ http://sportsillustrated.cnn.com/basketball/nba/news/1999/01/05/lockout_chronology/

¹⁰² http://sportsillustrated.cnn.com/basketball/nba/news/1999/01/05/lockout_chronology/

¹⁰³ http://sportsillustrated.cnn.com/basketball/nba/news/1999/01/05/lockout_chronology/

¹⁰⁴ http://sportsillustrated.cnn.com/basketball/nba/news/1999/01/05/lockout_chronology/

¹⁰⁵ http://sportsillustrated.cnn.com/basketball/nba/news/1999/01/05/lockout_chronology/

contracts did not have to be paid during a lockout.¹⁰⁶ Despite the arbitrator's ruling, the NBPA declined to agree¹⁰⁷ to the NBA's demands and the negotiations dragged on.¹⁰⁸ On December 4, 1998, Commissioner Stern stated that the entire 1998-1999 season was likely to be cancelled.¹⁰⁹

The possibility of missing an entire season created rifts within the union. Most players were eager to provide concessions in order to reach an agreement but some superstar players, including NBPA President Patrick Ewing, were ready to call the NBA's bluff.¹¹⁰ Commissioner Stern and NBPA Executive Director William 'Billy' Hunter, sent by the majority of NBPA members with orders to reach an agreement,¹¹¹ held a secret meeting the day before the January 7 date set by the NBA as a deadline to reach an agreement before cancelling the remainder of the season.¹¹² Hunter and Stern emerged from the all-night negotiating session with a six-year¹¹³ agreement and announced the lockout was lifted.¹¹⁴

The 1999 CBA was a clear victory for the NBA.¹¹⁵ The players' conceded to maximum player salaries based on player experience, longer rookie contracts with more restraints, an escrow tax to cover salary expenditures surpassing 55% of basketball related income,¹¹⁶ and a luxury tax system.¹¹⁷ The NBA also provided some concessions

¹⁰⁶ http://sportsillustrated.cnn.com/basketball/nba/news/1999/01/05/lockout_chronology/

¹⁰⁷ http://www.bizofbasketball.com/index.php?option=com_content&view=article&id=8_0&Itemid=67 (The NBPA refused to believe the NBA's claim of financial hardship in light of the NBA entering into television contracts totaling in excess of \$2.4 billion over four years starting in 1998.)

¹⁰⁸ http://sportsillustrated.cnn.com/basketball/nba/news/1999/01/05/lockout_chronology/

¹⁰⁹ http://sportsillustrated.cnn.com/basketball/nba/news/1999/01/05/lockout_chronology/

¹¹⁰ <http://www.newsweek.com/1999/01/17/taking-it-hard-to-the-nba-hoop.html>

¹¹¹ <http://www.newsweek.com/1999/01/17/taking-it-hard-to-the-nba-hoop.html>

¹¹² http://sportsillustrated.cnn.com/basketball/nba/news/1999/01/05/lockout_chronology/

¹¹³ <http://members.cox.net/lmcoon/salarycap.htm>

¹¹⁴ http://sportsillustrated.cnn.com/basketball/nba/news/1999/01/05/lockout_chronology/

¹¹⁵ <http://www.cbsnews.com/stories/1999/01/06/archive/main27218.shtml>

¹¹⁶ <http://www.cbsnews.com/stories/1999/01/06/archive/main27218.shtml>

¹¹⁷ <http://members.cox.net/lmcoon/salarycap.htm>

Jorge Salazar

by agreeing to increase minimum salaries for based on player experience,¹¹⁸ added two salary cap exceptions, and allowed the continuation of the Larry Bird Exception.¹¹⁹

Nonetheless, the bold tactics employed by the NBPA cost them big as their failure to stay united prevented them from leveraging the NBA into a favorable deal. The entire process cost players more favorable working conditions, \$500 million in lost salaries, and the cancellation of three months of the season and the All-Star Game.¹²⁰ The 1999 CBA remained in effect without issue until its expiration at the end of the 2004-2005 season.¹²¹

F. Current NBA CBA

The memory of the 1999 CBA negotiations coupled with news of the National Hockey League cancelling its 2005 season provided the NBA and NBPA with great motivation to have productive CBA negotiations as the 2004-2005 season was being played.¹²² Also boding well was the fact that as negotiations commenced the league's financial health¹²³ was much less of a concern than during previous CBA negotiations.¹²⁴

Despite the apparent health of the league, the NBA sought changes¹²⁵ to the expiring 1999 CBA that would curtail player salaries.¹²⁶ Naturally, the NBPA felt the

¹¹⁸ <http://www.apbr.org/labor.html>

¹¹⁹ <http://www.cbsnews.com/stories/1999/01/06/archive/main27218.shtml>

¹²⁰ <http://www.cbsnews.com/stories/1999/01/06/archive/main27218.shtml>

¹²¹ <http://members.cox.net/lmcoon/salarycap.htm>

¹²² <http://query.nytimes.com/gst/fullpage.html?res=9D0CE3DE113AF93BA25751C0A9639C8B63>

¹²³ See <http://query.nytimes.com/gst/fullpage.html?res=9D0CE3DE113AF93BA25751C0A9639C8B63>; <http://query.nytimes.com/gst/fullpage.html?res=9A0DE6DB1E3AF933A15751C0A9639C8B63>; <http://www.insidehoops.com/nba-tv-contracts.shtml> (Entering into the 2004-2005 season the league's healthy economic position was evidenced by merchandise sales were at about \$3.3 billion, television ratings were rising, two franchises sold for \$401 million and \$375 million, and six-year television contracts totaling \$4.6 billion signed starting in 2002.)

¹²⁴ <http://query.nytimes.com/gst/fullpage.html?res=9D0CE3DE113AF93BA25751C0A9639C8B63>

¹²⁵ http://sports.espn.go.com/nba/columns/story?columnist=ford_chad&id=2063343 (The NBA wanted to shorten maximum length contracts from seven years for players resigning to their former team and six years for players signing with a new team to four years and three years, decrease the annual raises in a contract by half to 5%, create a super luxury tax to further penalize high spending teams, and impose a 20 years old minimum player age requirement.)

¹²⁶ <http://query.nytimes.com/gst/fullpage.html?res=9A0DE6DB1E3AF933A15751C0A9639C8B63>

NBA was unreasonable with its requests and the two sides again began strategic posturing. The parties¹²⁷ negotiated back and forth through the regular season and into the 2005 playoffs.¹²⁸ Prior to Game 6 of the NBA Finals and the expiration of the 1999 CBA, the parties declared they had come to an agreement in principle and would smoothly transition to a new CBA.¹²⁹ On July 30, 2005, the parties announced a six-year agreement had been ratified and signed. This agreement, the CBA currently in place, contained the following changes: “a reduction in the salary cap, the impact of the luxury tax, the escrow withholding (to 8%), and a guarantee that the players will receive at least 57% of basketball-related income.¹³⁰ Furthermore, it altered the maximum length of player contracts from seven to six years, and a reduction in maximum annual increases from 12.5 to 10.5 percent for teams resigning their players and from 10% to 8% for teams signing free agents.¹³¹

The 2005 CBA¹³² must be categorized as another loss for the NBPA, albeit a much smaller loss than 1999 CBA. The maximum length of player contracts and the maximum annual increases in salaries were reduced, with no equal value concession made by the league.

The 2005 CBA, which currently governs the NBA, includes a clause allowing owners to extend the CBA until the completion of the 2011-12 season by exercising the option by December 15, 2010. It has been widely reported, however, that they will reject

¹²⁷ Led by Commissioner Stern and Executive Director Hunter.

¹²⁸ http://www.nba.com/news/cba_2005.html

¹²⁹ http://www.nba.com/news/cba_050621.html

¹³⁰ http://www.nba.com/news/CBA_050730.html

¹³¹ http://www.nba.com/news/CBA_050730.html

¹³² http://www.nba.com/news/CBA_050730.html (The 2005 CBA also increased the minimum age requirement by a year to 19 years of age, with the additional requirement of being “at least one year removed from high school” for American players, allows the NBA to randomly drug test player four times per season, increased penalties for violating performance-enhancing drugs, and enables the NBA to suspend players for over 12 games for on-court misconduct.)

the option because of dissatisfaction with the agreement. This reality has set the stage for the Summer of 2011.

II. Current State of the NBA

Since its inception in 1946,¹³³ the NBA has grown to heights that its founders could have never imagined. In its inaugural season, the league was composed of eleven franchises.¹³⁴ The league's salary cap was \$55,000, with the average player salary hovering around \$5,000.¹³⁵ Tom King, the highest paid player, earned \$16,500, which also compensated King for his role as the team's business manager and publicity director; Joe Fulks, who led the league in scoring, earned \$8,000.¹³⁶ Ticket prices for games ranged from 75 cents to \$2.50.¹³⁷ Today the NBA boasts a drastically different landscape.

A. League Structure

Today, the NBA showcases 30 franchises,¹³⁸ each with a minimum of twelve active players, totaling 360 players.¹³⁹ Additionally, the NBA operates the NBA Development League,¹⁴⁰ its form of a minor league, and either already has or plans to have offices in China, Japan, Mexico, Brazil, India, Africa, and the Middle East.¹⁴¹ The NBA functions under a team salary cap of \$58,044,000 and a minimum team salary equaling 75 percent of the salary cap figure.¹⁴² Teams can function above the salary cap by using salary cap exceptions, like the Larry Bird Exception, Mid-Level Salary

¹³³ http://www.nba.com/history/firstgame_feature.html

¹³⁴ http://www.nba.com/history/firstgame_feature.html

¹³⁵ <http://www.apbr.org/labor.html>

¹³⁶ <http://www.apbr.org/labor.html>

¹³⁷ http://www.nba.com/history/firstgame_feature.html

¹³⁸ <http://www.nba.com/teams/>

¹³⁹ <http://members.cox.net/lmcoon/salarycap.htm> (#67)

¹⁴⁰ <http://www.nba.com/dleague/#>

¹⁴¹ <http://sports.espn.go.com/nba/news/story?id=4537193>

¹⁴² <http://members.cox.net/lmcoon/salarycap.htm> (#10)

Exception, and Bi-Annual Exception.¹⁴³ Most teams make use of these exceptions and operate above the salary cap amount.¹⁴⁴ The league also imposes a dollar per dollar 'luxury tax' on teams whose salary exceeds a stated amount,¹⁴⁵ \$70,307,000 in the 2010-2011 season.¹⁴⁶ In addition, the current CBA also enforces minimum and maximum¹⁴⁷ player salary restrictions based on the player's experience, with the higher amounts for more experienced players.¹⁴⁸ During the 2010-2011 season, the rookie minimum salary is \$473,604, which pales in comparison to the maximum salary for a player, with at least ten years experience, of \$20,315,400.¹⁴⁹ These restrictions, along with numerous others agreed to in the 2005 CBA, have provided players with the boundaries in which their current economic situation lies.

B. Player Contracts & League Revenues

Throughout the Summer of LeBron,¹⁵⁰ the most anticipated free agency class in the NBA, sports media outlets were littered with free agent names and possible contract figures. During this period it was clear, maybe for the first time, that players were in control of the NBA. A coveted player's decision could ruin a franchise, like the Cleveland Cavaliers, which James once called home, or a franchise like the New York Knicks, which made years worth of transactions in anticipation of acquiring James.

¹⁴³ Additional salary cap exceptions include the Early Bird Exception, Non-Bird Exception, Rookie Exception, Minimum Player Salary Exception, Traded Player Exception, Disabled Player Exception, and Reinstatement. <http://members.cox.net/lmcoon/salarycap.htm> (#19)

¹⁴⁴ <http://members.cox.net/lmcoon/salarycap.htm> (#10)

¹⁴⁵ The Lakers (\$21.4 million), Mavs (\$17.6 million), Cavs (\$15.9 million), Celtics (\$14.9 million), Magic (\$11.0 million), Spurs (\$8.8 million), Nuggets (\$5.5 million), Knicks (\$5.2 million), Suns (\$5.0 million), Jazz (\$3.1 million), and Heat (\$3.0 million) all exceeded and paid luxury tax.

<http://members.cox.net/lmcoon/salarycap.htm> (#16)

¹⁴⁶ <http://members.cox.net/lmcoon/salarycap.htm> (#16)

¹⁴⁷ This amount can be exceeded because "a free agent's maximum salary in the first year of anew contract is never less than 105% of his salary in the last year of his previous contract.

<http://members.cox.net/lmcoon/salarycap.htm> (#11)

¹⁴⁸ <http://members.cox.net/lmcoon/salarycap.htm> (#11)

¹⁴⁹ <http://members.cox.net/lmcoon/salarycap.htm> (#11)

¹⁵⁰ Summer 2010

Within the first 36 hours of the summer's free-agency, \$449 million was spent by franchises in an effort to improve their teams.¹⁵¹ The New York Knicks signed Amar'e Stoudemire to a reported five-year \$100 million contract.¹⁵² The Atlanta Hawks resigned Joe Johnson to a reported six-year \$119 million contract.¹⁵³ The Miami Heat, who were the clear cut winners of the 2010 free agency, resigned Dwyane Wade to a reported six-year \$107 million contract, signed Chris Bosh to a reported six-year \$110 million contract, and signed the crown jewel of the 2010 free agent class, LeBron James, to a reported six-year \$110 million contract.¹⁵⁴ Even the small market Memphis Grizzlies joined the action by resigning Rudy Gay to a reported 5-year \$82 million contract.¹⁵⁵ Five other free agents signed contracts reportedly totally in excess of \$50 million.¹⁵⁶

Despite these large sums being awarded to players in the Summer of LeBron, older veteran players who signed large contracts in previous, more favorable CBAs, remained the highest paid players.¹⁵⁷ Kobe Bryant tops the list¹⁵⁸ earning a \$24,806,250¹⁵⁹ in 2010, with Rashard Lewis and Kevin Garnett each earning \$19,573,711¹⁶⁰ and \$18,832,044 respectively.¹⁶¹ While these figures are indeed very large, they do not match up to Michael Jordan's 1997-1998 salary of \$33,140,000¹⁶² and

¹⁵¹ Statement made by Maurice Evans, a member of the NBPA Executive Committee.
<http://sportsbusinessdaily.com/article/140488>

¹⁵² <http://sports.yahoo.com/nba/news?slug=ys-nbafreeagenttracker2010>

¹⁵³ <http://sports.yahoo.com/nba/news?slug=ys-nbafreeagenttracker2010>

¹⁵⁴ <http://sports.yahoo.com/nba/news?slug=ys-nbafreeagenttracker2010>

¹⁵⁵ <http://sports.yahoo.com/nba/news?slug=ys-nbafreeagenttracker2010>

¹⁵⁶ Dirk Nowitzki (four-year \$80 million), Carlos Boozer (five-year \$80 million), David Lee (six-year \$80 million), Paul Pierce (four-year \$61 million), Brendan Haywood (six-year \$55 million),
<http://sports.yahoo.com/nba/news?slug=ys-nbafreeagenttracker2010>

¹⁵⁷ See <http://www.draftexpress.com/nba-player-salaries/>

¹⁵⁸ <http://www.draftexpress.com/nba-player-salaries/>

¹⁵⁹ <http://sports.espn.go.com/nba/players/profile?playerId=110>

¹⁶⁰ <http://sports.espn.go.com/nba/players/profile?playerId=469>

¹⁶¹ <http://sports.espn.go.com/nba/players/profile?playerId=261>

¹⁶² <http://www.basketball-reference.com/players/j/jordami01.html>

Shaquille O'Neal's 2004-2005 salary of \$27,696,430,¹⁶³ both of which were part of contracts signed under more player-friendly CBAs.

Players were not the only beneficiaries from the Summer of LeBron, NBA owners also received gains from the historic free agency period. A month before the 2010-2011 season started, with all teams' major pieces in place, the NBA reached record new full-season ticket sales.¹⁶⁴ More than \$100 million in revenue from new full-season ticket sales marks a 40 percent increase from the same time last year.¹⁶⁵ The perennial powerhouses are not the only teams responsible for the increase, with 21 teams selling more than 1,000 new full-season tickets, compared to the previous season when only 11 teams did so.¹⁶⁶ Renewed full-season ticket sales also received a boost, with a renewal rate increase of 10 percent from last year.¹⁶⁷ As all ticket sales have shown a marked increase, the NBA estimates \$1 billion in gate revenue,¹⁶⁸ which accounts for about one third of the NBA's \$3 billion plus yearly revenue.¹⁶⁹ Despite the success that both players and owners have benefited from, the parties' public posturing over the current CBA negotiations suggest one of the most successful sports leagues in the world could be at risk in the Summer of 2011.

C. Lockout

During the 2008-2009 season, NBPA Executive Director Hunter told ESPN.com, "David [Stern] informed me that in all probability [the owners] would not exercise their

¹⁶³ <http://www.basketball-reference.com/players/o/onealsh01.html>

¹⁶⁴ <http://www.sportsbusinessjournal.com/article/67084>

¹⁶⁵ <http://www.sportsbusinessjournal.com/article/67084>

¹⁶⁶ <http://www.sportsbusinessjournal.com/article/67084>

¹⁶⁷ <http://www.sportsbusinessjournal.com/article/67084>

¹⁶⁸ <http://www.sportsbusinessjournal.com/article/67084>

¹⁶⁹ http://www.forbes.com/2007/12/06/business-basketball-nba-biz-07nba-cz_kb_mo_cs_1206nbaintro.html

option to extend the agreement.”¹⁷⁰ Since the NBA’s intentions were revealed, the media has been making all sorts predictions as to how the CBA negotiations will play out. With the disaster of the 1999 CBA still in memory, most of the predictions pointed toward a lockout and possible work stoppage. NBA insiders, like agent David Falk, have only fueled this doomsday outlook by predicting the league will threaten the players with a lockout in the Summer of 2011 to compel extreme modifications to the current soft salary cap.¹⁷¹ Amidst all the media speculation, the NBA and NBPA began having substantive talks regarding a new CBA for the 2011-2012 season in April of 2009.¹⁷² Talks between the parties continued through the 2009-2010 season with no details of concrete proposals being released to the public.

In January 2010, the NBA presented the NBPA with a proposal.¹⁷³ The NBA’s proposal asked for a “hard cap, a 40 percent rollback in player salaries, unlimited expense deductions and the elimination of guaranteed contracts.”¹⁷⁴ Executive Director Hunter and the NBPA, upset with the suggested terms, “unequivocally rejected the owner’s proposal.”¹⁷⁵ The NBPA supplied the NBA with a counterproposal during the summer of 2010, which expressed the players’ intent to continue working under terms similar to those contained in the current CBA.¹⁷⁶ In October 2010, Executive Director Hunter warned, “if owners maintain their position it will inevitably result in a lockout and the

¹⁷⁰ <http://sports.espn.go.com/nba/news/story?id=4003114>

¹⁷¹ <http://sports.espn.go.com/nba/news/story?id=4003114>

¹⁷² <http://sports.espn.go.com/nba/news/story?id=4003114>

¹⁷³ <http://www.sportsbusinessdaily.com/article/140488>

¹⁷⁴ Executive Director Hunter’s quote. <http://sports.espn.go.com/nba/news/story?id=5711172>

¹⁷⁵ Executive Director Hunter’s quote. <http://sports.espn.go.com/nba/news/story?id=5711172>

¹⁷⁶ <http://www.sportsbusinessdaily.com/article/140488>

cancellation of part or all of the 2011-2012 season. The players and union will prepare accordingly.”¹⁷⁷

If one were to believe that the public statements of the parties and media reports currently circulating are more than just public posturing, which is commonplace in professional sports CBA negotiations, it would seem that Hunter’s statement is a grim omen for the NBA’s future. However, without being privy to the negotiations themselves, it is impossible to know with certainty the parties’ true positions or the likelihood of a work stoppage. Even so, it can be assumed that the NBA will at the very least threaten the NBPA with a lockout in order to exert pressure on the players during negotiations, as they have done in the past. Facing the expected threat of a lockout, the NBPA will have to consider whether taking legal action against the NBA is the best-suited course of action to obtain a desirable CBA.

III. NBPA Union Decertification

The past months have been littered with numerous media reports stating how far apart the NBA and NBPA are in CBA negotiations. An even greater amount of reports have been spreading the doomsday message that an NBA lockout is inevitable. In the event of a lockout, the players will have two real options. First, the players can negotiate disputed terms with the NBA, providing concessions in exchange for NBA concessions until an agreement is reached. This position exposes the players to the possibility of being coerced by the NBA with a lockout into an unfavorable agreement, with nothing to combat the threat of a lockout other than simply waiting the league out.

As a second option, the players can bargain, like in the first option, until they reach an impasse, but at this point decertify the NBPA and file antitrust claims against the

¹⁷⁷ <http://sports.espn.go.com/nba/news/story?id=5711172>

NBA. A successful antitrust lawsuit or the threat of one would provide the players with a weapon to combat the NBA's lockout threat. This would undoubtedly place more pressure on the NBA to bargain in good faith and exchange concessions to reach a mutually agreeable CBA. The following will discuss the merits of this option. First, however, a discussion of the legal principles that would govern such a lawsuit is warranted.

A. Legal Environment

Professional sports in America are primarily regulated by two bodies of law: antitrust law and labor law. The underlying policies that drive these bodies of law, however, conflict with each other.¹⁷⁸ The area where they are inconsistent is precisely the area of law that is pertinent to CBA negotiations and possible NBPA litigation.

1. Antitrust Law & Rule of Reason Test

The Sherman Act of 1890¹⁷⁹ is the seminal statute in antitrust law.¹⁸⁰ The statute's language expresses the strong free market policy¹⁸¹ of antitrust law. The courts have construed the statute¹⁸² to ban only unreasonable restraints of trade.¹⁸³ Recognizing that certain combinations should be allowed which restrain trade but "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively," the courts

¹⁷⁸ *NBA v. Williams*, 857 F. Supp. 1069, 1076 (S.D.N.Y. 1994), *aff'd*, 45 F.3d 684 (2d Cir. 1995).

¹⁷⁹ It states, "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..."

¹⁸⁰ 15 U.S.C. §§ 1-7.

¹⁸¹ Clayton Act § 4, 15 U.S.C. § 15 (2006) (The Clayton Act of 1914 provided for treble damages in private actions with antitrust violations, making Sherman Act violations very costly.)

¹⁸² Literally read, the Sherman Act prohibits all contracts, which place a restraint on trade.

¹⁸³ *Standard Oil Co. v. United States*, 221 U.S. 1, 55 (1911) (holding that a restraint that is "not unreasonably restrictive of competitive conditions" is valid); see *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986); *Northwest Wholesale Stationery's Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985); *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982); *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978); *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918).

created a Rule of Reason Test to make the determination.¹⁸⁴ The Rule of Reason Test analyzes¹⁸⁵ the purpose and intent of the restraint and weighs its pro and anti-competitive effects to decide whether it is a justified deviation from the free market.¹⁸⁶ Furthermore, the restraint, even if found to be reasonable, must be “no more restrictive than necessary.”¹⁸⁷ The plaintiff must first show the impact of the restraint affects a relevant market, which the defendant possesses monopoly or monopsony power over.¹⁸⁸ Plaintiff then “bears the [initial] burden of showing that an agreement had a substantially adverse effect on competition.”¹⁸⁹ If the plaintiff is successful, the defendant assumes the burden of evidencing the “procompetitive virtues” of the action in question.¹⁹⁰ If the defendant does so, the burden switches and the plaintiff must establish that the action in question “is not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner.”¹⁹¹ Finally, if both parties are able to fulfill their burdens the court weighs the harms and benefits and determines “whether the challenged behavior is, on balance, reasonable.”¹⁹²

The opportunity to attain treble damages, eliminate restrictive practices, and gain enormous amounts of leverage in CBA negotiations has made pursuing litigation under antitrust violations a very attractive option for players in professional sports. However,

¹⁸⁴ *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984).

¹⁸⁵ *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911) (The analysis is based on the nature of the collaboration or the surrounding circumstances of the act, which infers intent to wrong the public.).

¹⁸⁶ *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 91 (1984).

¹⁸⁷ *Mackey v. National Football League*, 543 F.2d 606, 620 (8th Cir. 1976).

¹⁸⁸ *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); See *United States Football League v. National Football League*, 644 F.Supp. 1040, 1042 (S.D.N.Y. 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988); *Robertson v. National Basketball Ass'n*, (67 F.R.D. 691, 694 & n. 3 (S.D.N.Y. 1975), *aff'd*, 72 F.R.D. 64 (D.C.N.Y. 1976). *Mackey v. National Football League*, 543 F.2d 606, 620 (8th Cir. 1976). (Establishing the monopoly power over a relevant market by the defendant has generally been a nonissue for plaintiffs bringing antitrust claims in the professional sports context.).

¹⁸⁹ *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998).

¹⁹⁰ *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998).

¹⁹¹ *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998).

¹⁹² *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998).

the numerous antitrust lawsuits that have been brought against professional sports leagues, usually after protracted CBA negotiations, have only resulted in three notable victories for players.¹⁹³ The majority of antitrust violation claims brought against professional sports leagues are unsuccessful, as courts prefer labor law to be the controlling body of law if a collective bargaining relationship exists.¹⁹⁴

2. Labor Law & Nonstatutory Labor Exemption

Labor law, with respect to collective bargaining, is built around two statutes, the Clayton Act of 1914¹⁹⁵ and the Norris-La Guardia Act of 1932,¹⁹⁶ which produced the statutory labor exemption.¹⁹⁷ While these statutes provided protection to certain union actions, they did not address issues arising from the intricacies of collective bargaining.¹⁹⁸ However, in 1947 Congress passed the National Labor Relations Act¹⁹⁹ (NLRA) and the Labor Management Relations Act²⁰⁰ (LMRA), which in turn created the National Labor Relations Board (NLRB), all of which bestowed much needed protection to collective

¹⁹³ See *Mackey v. National Football League*, 543 F.2d 606, 620 (8th Cir. 1976); <http://query.nytimes.com/gst/fullpage.html?res=9E0CE4DA143AF937A25755C0A964958260&sec=&spon=&pagewanted=all>; *Robertson v. National Basketball Ass'n*, 72 F.R.D. 64 (D.C.N.Y. 1976); *McNeil v. National Football League*, 790 F. Supp. 871 (D. Minn. 1992); *McNeil v. National Football League*, Civ. No. 4-90-476, 1992 WL 315292, at note 4 (D. Minn. 1992); *White v. National Football League*, 822 F. Supp. 1389, 1398 (D. Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1994); <http://www.nflplayers.com/about-us/History/> (These victories include, *Mackey v. National Football League* in 1976, in which the court's invalidation of the Rozelle Rule led to a settlement paying \$15.8 million in damages to players, the Oscar Robertson suit in 1977, where the pressure of the litigation resulted in an extremely favorable settlement and CBA before a judgment was given, and *McNeil v. National Football League* in 1992, in which the court awarded four players total damages equaling \$1,629,000 and led to a historic settlement that paid players \$195 million in damages and ushered in modern free agency to the National Football League.)

¹⁹⁴ *Brown v. Pro Football*, 50 F.3d 1041, 1056 (D.C. Cir. 1995), *aff'd*, 516 U.S. 1021 ("We therefore conclude that when federal labor policy collides with federal antitrust policy in a labor market organized around a collective bargaining relationship, antitrust policy must give way.")

¹⁹⁵ 15 USCA § 12(b)

¹⁹⁶ 29 U.S.C.A. s 101

¹⁹⁷ When does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports, 94 Colum. L. Rev. 1045, 1049 (1994).

¹⁹⁸ When does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports, 94 Colum. L. Rev. 1045, 1050 (1994).

¹⁹⁹ 29 U.S.C. §§ 151-169 (1988).

²⁰⁰ 29 U.S.C. §§ 141-144 (1988).

Jorge Salazar

bargaining from antitrust laws.²⁰¹ Consequently, courts had to address the conflict between antitrust and labor law.²⁰² This led to the creation of the nonstatutory labor exemption.²⁰³

In 1965, the Supreme Court for the first time²⁰⁴ defined the nonstatutory labor exemption in *Local No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*²⁰⁵ In *Jewel Tea*, the Court held collective bargaining agreements concerning working hours between a union and employers were exempt from antitrust scrutiny.²⁰⁶ The Supreme Court further delineated the nonstatutory labor exemption in *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, by concluding CBAs will not enjoy the nonstatutory labor exemption's protection when such protection imposes direct restraints on parties outside of the collective bargaining relationship.²⁰⁷ Without Congress or the Supreme Court supplying further details as to how the nonstatutory labor exemption should be applied, courts' interpretation and application of the exemption has been fairly unpredictable.²⁰⁸ The first case to tackle the issue was *Mackey v. National Football League*,²⁰⁹ which has become the seminal case on application of the nonstatutory labor exemption in professional sports.²¹⁰

3. Mackey Test

²⁰¹ 94 Colum. L. Rev. 1045, 1050 (1994).

²⁰² 94 Colum. L. Rev. 1045, 1051 (1994).

²⁰³ 94 Colum. L. Rev. 1045, 1051 (1994).

²⁰⁴ 37 B.C. L. Rev 303, 306.

²⁰⁵ 381 U.S. 676 (1965).

²⁰⁶ *Jewel Tea Co.*, 381 U.S. 676, 697 (1965).

²⁰⁷ *Connell*, 421 U.S. 616, 622-23 (1975).

²⁰⁸ 94 Colum. L. Rev. 1045, 1052-53 (1994) (Additional uncertainty is present in the context of professional sports because employers are seeking to immunize collectively bargained restraints against union members, instead of unions seeking application of the exemption as is typical in other industries, and the fact that owners invariably possess greater bargaining power, resulting in the inclusion of several player restraints in CBAs.).

²⁰⁹ *Mackey v. National Football League*, 543 F.2d 606 (8th Cir.1976).

²¹⁰ 94 Colum. L. Rev. 1045, 1058 (1994).

In *Mackey*, the Eighth Circuit, recognizing no court had determined when the nonstatutory labor exemption should be given affect in professional sports' CBAs, created a three-pronged test that came to be known as the Mackey Test.²¹¹ First, the restraint on trade's primary effects must be limited to parties to the CBA.²¹² Second, the agreement must concern a mandatory subject of collective bargaining.²¹³ Finally, the agreement must be a product of bona fide arm's-length bargaining.²¹⁴ Since the Mackey Test's creation, players have been unable to elude the nonstatutory labor exemption by challenging a violation of either of the test's first two elements.²¹⁵ As a result, players' unions focus on the third element of the Mackey Test in their attempts to subvert the nonstatutory labor exemption and successfully litigate antitrust claims.

B. Court Selection

If the players are to pursue litigation against the NBA, court selection is a basic, yet vital decision they would have to make. Upon surveying the courts' holdings in cases with similar facts, it is obvious which court the players should file their lawsuit. The Eighth Circuit has written key opinions on the legal issues at the heart of the players' prospective claim.²¹⁶ As a result, the Eighth Circuit provides more predictability with key legal issues essential to the players. Additionally, the two landmark cases, *Mackey v. NFL*²¹⁷ and *McNeil v. NFL*,²¹⁸ which saw players pierce the nonstatutory labor

²¹¹ *Mackey v. National Football League*, 543 F.2d 606, 613-15 (8th Cir.1976).

²¹² *Mackey v. National Football League*, 543 F.2d 606, 614 (8th Cir.1976).

²¹³ *Mackey v. National Football League*, 543 F.2d 606, 614 (8th Cir.1976).

²¹⁴ *Mackey v. National Football League*, 543 F.2d 606, 614 (8th Cir.1976).

²¹⁵ 88 N.C.L. Rev. 212, 224.

²¹⁶ See *Mackey v. National Football League*, 543 F.2d 606 (8th Cir.1976); *Powell v National Football League*, 930 F.2d 1293 (8th Cir. 1989) (The court held that bona fide arm's-length bargaining and antitrust immunity is found to exist as long as the relationship between the parties continued); *McNeil v. National Football League (McNeil II)*, 790 F.Supp. 871 (D. Minn. 1992).

²¹⁷ See *Mackey v. National Football League*, 543 F.2d 606 (8th Cir.1976) (Current and former NFL players successfully argued that the Rozelle Rule, which restricted player movement and reduced player salary by

exemption and awarded damages for antitrust violations by their league were also tried in the Eighth Circuit.²¹⁹ Thus, it would seem to benefit the players to file their prospective lawsuit in the Eighth Circuit, as it will provide players with predictability and favorable binding authority. Because *McNeil II* was decided in the District Court of Minnesota and did not reach the circuit level, the players should specifically file in the District Court of Minnesota in order to enjoy *McNeil II*'s holdings as binding authority at trial court.²²⁰

With the decision regarding court selection determined, the players know what case law will be binding or persuasive²²¹ in their prospective antitrust lawsuit against the league. The players should use the binding case law to guide them in their actions leading up to the actual filing of their lawsuit. This will prove to be especially helpful in creating the favorable facts, which will overcome the nonstatutory labor exemption in litigation. It is important to note, the players should choose only a small group of plaintiffs to minimize the costs of the litigation. If a favorable ruling is provided by the court, the

requiring a team acquiring a free agent to provide compensation to the player's former team, was not entitled to nonstatutory labor exemption protection because it was unilaterally implemented and thus not a product of bona fide arm's-length bargaining. The court then held the restraint was considerably more restrictive than necessary to serve the legitimate purpose of competitive balance because it restricted player movement regardless of their status or ability, the duration was unlimited, and its enforcement did not have procedural safeguards.).

²¹⁸ *McNeil v. National Football League (McNeil II)*, 790 F.Supp. 871 (D. Minn. 1992) (Eight NFL players with recently expired contracts, who before filing the case decertified the NFL Players Association to abandon all collective bargaining rights, successfully argued that the league's Right of First Refusal/Compensation Rules, which restricted player movement and reduced player salary by requiring a team acquiring designated free agents to provide compensation to the player's former team, were subject to antitrust because a collective bargaining relationship no longer existed. The jury subsequently found the restraint's harmful effects on the competition outweighed competitive balance and was in violation of antitrust laws.)

²¹⁹ See *Mackey v. National Football League*, 543 F.2d 606 (8th Cir.1976); *McNeil v. National Football League (McNeil II)*, 790 F.Supp. 871 (D. Minn. 1992).

²²⁰ See *McNeil v. National Football League (McNeil II)*, 790 F.Supp. 871 (D. Minn. 1992).

²²¹ See *National Basketball Ass'n v. Williams*, 45 F.3d (2d Cir. 1995) (The court dismissed players claim challenging the college draft, right of first refusal, and salary cap as illegal restraints on trade, holding the nonstatutory labor exemption provided immunity as long as a collective bargaining relationship exists.); *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1045 (DC Cir. 1995), aff'd 516 U.S. 1021 (1995) (The court held that the nonstatutory exemption extended past a bargaining impasse and provided protection as long as a collective bargaining relationship existed between the parties.).

players then can immediately bring another lawsuit arguing collateral estoppel with a much larger group of plaintiffs, to maximize damages recovery, like in *Jackson v. NFL* following *McNeil II*.²²²

C. Overcoming the Nonstatutory Labor Exemption

The most difficult issue the player's antitrust lawsuit is likely to face is the nonstatutory labor exemption. Many past NBA player lawsuits have in fact found this obstacle to be insurmountable.²²³ However, all of these cases were tried before *McNeil II*,²²⁴ which would be binding authority at the trial court level if the case were brought in the same district court. Consequently, players would be wise to adopt actions very similar to those adopted by the players in *McNeil II*.²²⁵

Both the binding and persuasive case law is clear in requiring that the collective bargaining relationship between the players and league cease to exist in order for the players to overcome the nonstatutory labor exemption.²²⁶ The progression of what ultimately resulted in the NFL players' victory in *McNeil II* provides the best specific example of how to elude the nonstatutory labor exemption. While working under an expired CBA, negotiations between the NFLPA and NFL broke down and led to the NFL players performing a strike.²²⁷ After the players ended their strike, still without a CBA

²²² See *Jackson v. National Football League*, 802 F. Supp. 226 (D. Minn. 1992).

²²³ See *National Basketball Ass'n v. Williams*, (2d Cir. 1995); *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960 (1987); *Wood v. National Basketball Ass'n*, 809 F.2d 954 (2d Cir. 1987).

²²⁴ See *McNeil v. National Football League (McNeil II)*, 790 F.Supp. 871 (D. Minn. 1992).

²²⁵ See *McNeil v. National Football League (McNeil II)*, 790 F.Supp. 871 (D. Minn. 1992).

²²⁶ See binding *Powell v. National Football League (McNeil I)*, 764 F.Supp. 1351, 1358-59 (D. Minn. 1991); *Powell v National Football League*, 930 F.2d 1293, 1303-04 (8th Cir. 1989); *Mackey v. National Football League*, 543 F.2d 606, 616 (8th Cir.1976); and see persuasive *National Basketball Ass'n v. Williams*, 45 F.3d 684, 692-93 (2d Cir. 1995); *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1045 (DC Cir. 1995), aff'd 516 U.S. 1021 (1995).

²²⁷ *Powell v. National Football League*, 930 F.2d 1293, 1296 (8th Cir.1989).

agreement, they filed an antitrust lawsuit against the league.²²⁸ The court, on appeal, maintained that the nonstatutory labor exemption applied given the circumstances because, in its eyes, a collective bargaining relationship still existed.²²⁹ The players understood the court's ruling to indicate that the collective bargaining relationship could be ended by abandoning the NFLPA as their bargaining representative.²³⁰ As a result, they voted unanimously²³¹ to terminate the NFLPA's position as its collective bargaining representative and took other actions in an attempt to end the collective bargaining relationship.²³² The court found the players actions to sufficiently end the collective bargaining relationship and held the nonstatutory labor agreement no longer protected the league.²³³

To provide themselves with the best opportunity of success in litigation, the NBA players should, for the most part, mimic the actions of the NFL players in the McNeil case. The players should staunchly hold to their negotiation positions, which will likely lead to an impasse in negotiations and lockout. In doing so, the players must be cognizant to always bargain in good faith to avoid labor law violations. Subsequently, the players should unanimously vote to terminate the NBPA's position as its collective bargaining representative. They should accompany this action with the same formalities that the NFL players undertook, restructure the NBPA as a voluntary professional association,

²²⁸ *Powell v. National Football League*, 930 F.2d 1293, 1296 (8th Cir.1989).

²²⁹ *Powell v National Football League*, 930 F.2d 1293, 1295, 1303-04 (8th Cir. 1989).

²³⁰ *Powell v. National Football League (McNeil I)*, 764 F.Supp. 1351, 1354 (D. Minn. 1991).

²³¹ *Powell v. National Football League (McNeil I)*, 764 F.Supp. 1351, 1354 fn 1 (D. Minn. 1991).

²³² See *Powell v. National Football League (McNeil I)*, 764 F.Supp. 1351, 1354 (D. Minn. 1991) (NFLPA notified the league on November 6, 1989 that they were abandoning their collective bargaining rights, restructured the NFLPA as a voluntary professional association, implemented new bylaws prohibiting the organization from engaging in collective bargaining with the league, NFLPA also terminated their status as a labor organization with the United States Department of Labor, and reclassified the NFLPA's tax-exempt status.).

²³³ *Powell v. National Football League (McNeil I)*, 764 F.Supp. 1351, 1358-59 (D. Minn. 1991).

implement new bylaws prohibiting the organization from engaging in collective bargaining with the league, terminate the NBPA status as a labor organization with the United States Department of Labor, reclassify the NBPA's tax-exempt status as a labor organization with the United States Department of Labor, and reclassify the NBPA's tax-exempt status. As long as the players take these actions in good faith after good faith negotiating, overcoming the nonstatutory labor exemption is very likely.

If they are able to overcome the statutory exemption, the players will next have to persuade the court that the NBA's rules restricting players' rights are more restrictive than necessary to serve any legitimate purpose, under the Rule Of Reason Test.

D. Antitrust Analysis

If the players convince the court that the NBA should not be availed the benefits of the nonstatutory labor exemption, they must proceed to prove specific restrictions imposed by the NBA violate antitrust laws. The court will use the Rule Of Reason Test to determine the validity of the players' assertions. Under the test, the players will first have to establish the NBA's restrictions impact a relevant market, which the NBA possesses monopoly or monopsony power over.²³⁴ Similar to *Mackey* and *McNeil*, where NFL players fruitfully argued professional football player services in the United States was a relevant market, the court will recognize professional basketball player services in the United States as a relevant market.²³⁵ Next, the players will have the initial burden of detailing specific NBA imposed restrictions' substantial adverse effect on the players' services.²³⁶ The players will have to select the restraints which produce the most

²³⁴ See *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

²³⁵ See *Mackey v. National Football League*, 543 F.2d 606, 618 (8th Cir.1976); *McNeil v. National Football League (McNeil II)*, Civ. No. 4-90-476. 1992 WL 315292. pg 3 (D. Minn. 1992).

²³⁶ See *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998).

restrictive effects on players' services. Accordingly, players should argue that the NBA's implementation of the salary cap, college draft and rookie scale, and free agency rules constitute antitrust violations.

1. Salary Cap

NBA teams currently operate under a "soft" salary cap.²³⁷ As noted in Part II, the NBA's soft salary cap contains a maximum team salary of \$58,044,000 and a minimum salary equaling 75 percent of the salary cap maximum.²³⁸ Additionally, the salary cap contains various exceptions, which most teams use during the season to operate above the salary cap.²³⁹ The NBA's salary cap also enforces maximum and minimum player salaries, maximum and minimum player salary raises, and maximum player contract terms.²⁴⁰

In arguing the harmful affects of the NBA salary cap on player services, the players should explain that it prohibits teams from pursuing desired players and restricts players from contracting their services on terms agreeable to both players and teams.²⁴¹ The argument for this is that both of these effects ultimately result in players not realizing the true market value of their services. Additionally, it is not uncommon for teams that have the funds and desire to acquire a particular player's services to acquire a less desired player or no player at all because of salary cap restrictions. For instance, after the Miami Heat signed LeBron James, Dwyane Wade, Chris Bosh, and others, they had the money and desire to sign other skilled players, who would have loved to join the team. However, because of the salary cap they could only sign much less desired players to minimum

²³⁷ <http://members.cox.net/lmcoon/salarycap.htm> (#2)

²³⁸ <http://members.cox.net/lmcoon/salarycap.htm> (#10)

²³⁹ <http://members.cox.net/lmcoon/salarycap.htm> (#2)

²⁴⁰ <http://members.cox.net/lmcoon/salarycap.htm> (#10, #19)

²⁴¹ See Colum. Bus. L. Rev. 579, 632-33 (1998).

salaries. It is also not extraordinary in the NBA for a player and team to share the goal, deriving from different underlying interests, of building a long term relationship in contract. Nonetheless, they are limited in the amount of years they can provide for in contract. For example, Kevin Durant, who never seemed to doubt whether he wanted to be a part of the Oklahoma City Thunder's long term plans, signed a five-year extension with his team.²⁴² It's safe to speculate, Oklahoma City wanted and were willing to offer more money if they could sign him to a longer contract. It is also extremely likely that Durant would have accepted such an offer. After making these points, using various examples occurring over the expired CBA's term, the players should conclude their argument noting that the salary caps effects ultimately result in players not realizing the true market value of their services.

Rebutting this argument the NBA will claim that without the salary cap the richest teams would sign all of the best players, leaving other teams with mediocre rosters. In turn, those few rich teams will dominate the league. Thus, the NBA will maintain, the salary cap is essential to maintaining competitive balance, which is critical to fan interest and the economic health of the league. Furthermore, the NBA will cite dicta in *Williams*, which concluded that the NBA's 1993-1994 salary cap would not violate antitrust laws in the absence of the nonstatutory labor exemption.²⁴³ The NBA will also contend, the various salary cap exemptions minimizes the restriction on player's services by allowing teams to operate well above the salary cap.

In weighing the salary cap's adverse and beneficial effects on player's services, the court will likely find no antitrust violation. The lack of pro player case law, its

²⁴² <http://www.news-herald.com/articles/2010/07/10/sports/nh2755738.txt>

²⁴³ *National Basketball Ass'n v. Williams*, 857 F. Supp. 1069, 1079 (S.D.N.Y. 1994), *aff'd*, 45 F.3d 684 (2d Cir. 1995).

apparent promotion of competitive balance, and the various available salary cap exceptions will likely lead the court to conclude that the NBA's salary cap is not overly restrictive given its legitimate purpose.

2. College Draft & Rookie Scale

The NBA college draft consists of two rounds.²⁴⁴ Each round consists of the same number of picks as there are teams in the NBA, which is currently thirty.²⁴⁵ Upon selecting a player, teams hold exclusive rights to the player until he signs or the following year's draft ensues.²⁴⁶ If a player chooses not to sign with the team, the player will enter the same draft process the following year.²⁴⁷ If a player is selected in the first round and comes to an agreement with his team, the agreement will be subject to the rookie scale.²⁴⁸ The rookie scale requires that contracts contain two fully guaranteed years and two team option years.²⁴⁹ Additionally, if a team exercises both option years it holds the right of first refusal in the form of a qualifying offer.²⁵⁰ The first round player's contract salary must be within 20% of a predetermined number for his first two years and contains other strict restrictions for the two separate team option years.²⁵¹ On the other hand, second round player's contracts are not required to be guaranteed or longer than a year, as these players are treated like free agent rookies for contract purposes.²⁵²

When arguing against the college draft and rookie scale, the players should be sure to explain how the combination of the two restraints severely restrains players'

²⁴⁴ <http://www.nbpa.org/sites/default/files/ARTICLE%20X.pdf> (Section 3)

²⁴⁵ <http://www.nbpa.org/sites/default/files/ARTICLE%20X.pdf> (Section 3)

²⁴⁶ <http://www.nbpa.org/sites/default/files/ARTICLE%20X.pdf> (Section 4)

²⁴⁷ <http://www.nbpa.org/sites/default/files/ARTICLE%20X.pdf> (Section 4)

²⁴⁸ <http://www.nbpa.org/sites/default/files/ARTICLE%20VIII.pdf> (Section 1)

²⁴⁹ <http://www.nbpa.org/sites/default/files/ARTICLE%20VIII.pdf> (Section 1)

²⁵⁰ http://www.nba.com/news/cba_summary_050804.html

²⁵¹ <http://www.nbpa.org/sites/default/files/ARTICLE%20VIII.pdf> (Section 1)

²⁵² ???(Not sure where to find a source for this; it's a result of no rule specifically for second round players)

services. The players should make clear that the college draft and rookie scale together remove nearly all agency the player has over his services. Once a player enters the college draft they have no input as to what team will select them and hold the rights to their services. Moreover, the player's agency is restrained by the NBA's requirement that their contract salary for the first two years be within 20% of a predetermined figure. This particular restraint is evidenced by the fact that most first round picks sign contracts for the maximum amount allowed, instead of a much higher free market value.²⁵³

Furthermore, first round picks have to endure these restraints, playing for a potentially undesirable team with compensation considerably under free market value, for up to five years.²⁵⁴ As a result, players like Kevin Durant and Derrick Rose, both NBA Rookie of the Year winners,²⁵⁵ made or will make less than \$5.2 million for their second year,²⁵⁶ while Wesley Matthews, an undrafted rookie whose market value is far below that of Durant or Rose, received a six year contract after his rookie season that pays him \$5,765,000 in his second year in the league.²⁵⁷ For both players, who after their rookie years were the face of their respective franchises, had a free market value for their second, third, and fourth year contracts that was easily double and possibly triple their actual salary. Thus, players in the position of Durant and Rose stand to lose \$20 to \$30 million in the first four years of an NBA career that for most players is incredibly short.²⁵⁸

²⁵³ See <http://members.cox.net/lmcoon/salarycap.htm> (#42)

²⁵⁴ See http://www.nba.com/news/cba_summary_050804.html

²⁵⁵ http://www.nba.com/history/awards_rookieofyear.html

²⁵⁶ <http://www.basketball-reference.com/players/d/duranke01.html> (Kevin Durant's second year \$4,484,040); <http://www.draftexpress.com/nba-player-salaries/team/Bulls/> (Derrick Rose's second year \$5,184,480).

²⁵⁷ <http://www.draftexpress.com/nba-player-salaries/team/Blazers/>

²⁵⁸ See http://www.time.com/time/magazine/article/0,9171,990035,00.html?prom_oid=googlep%29 (Average NBA career in length of seasons is 4.82 years).

Another example the players should use in attacking the college draft and rookie scale is undrafted rookie Timofey Mozgov's three-year \$9 million contract.²⁵⁹ While Mozgov collects his contract, which is not subject to the rookie scale because he was undrafted, tenth overall pick Paul George signed a four year contract paying him about \$7.2 million over his first three years²⁶⁰ and fifteenth overall pick Larry Sanders signed a four year contract potentially him about \$8.6 million.²⁶¹ It should be emphasized that it is overly restrictive to drafted players for a player who was passed on 60 times in the college draft to earn more than players chosen in the first round because of the rookie scale.

Players should supplement this argument with *Smith v. Pro Football, Inc.*, which found the NFL's college draft to be an unreasonable restraint violating antitrust laws.²⁶² While the *Smith* court did not recognize competitive balance as a legitimate reason for restraint,²⁶³ it still can be persuasive in its determination that the college draft robs players of any real bargaining power.²⁶⁴ Additionally, the players can cite *Robertson v. NBA*, as its dicta mentions the possible antitrust violation the college draft presents.²⁶⁵ Concluding their argument, the players should assert that even if the court believes the college draft and rookie scale are reasonable restraints, there are less restrictive alternatives available, which would also promote competitive balance.²⁶⁶ For instance, an alternative system, which enables multiple teams to select a player in the college draft

²⁵⁹ <http://www.nytimes.com/2010/07/12/sports/basketball/12knicks.html>

²⁶⁰ <http://www.draftexpress.com/nba-player-salaries/team/Pacers/>

²⁶¹ <http://www.draftexpress.com/nba-player-salaries/team/Bucks/>

²⁶² *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1183-85 (D.C. Cir. 1978).

²⁶³ *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1186 (D.C. Cir. 1978).

²⁶⁴ *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1185 (D.C. Cir. 1978).

²⁶⁵ *Robertson v. NBA*, 389 F. Supp. 867, 893-96 (S.D.N.Y. 1975).

²⁶⁶ See *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1187-88 (D.C. Cir. 1978).

and subsequently compete for the rights to the player's services, would provide the player more agency and promote competitive balance.²⁶⁷

The NBA will rebut the players' argument by claiming the college draft and rookie scale strongly promote competitive balance. The NBA will posit that the two restrictions allow unsuccessful teams to rebuild their teams with the best young talent available at a reasonable price.²⁶⁸ The NBA will also contend the college draft has been modified over the years to its current, less restrictive form.²⁶⁹ The court will undoubtedly recognize the NBA's argument as a legitimate one, and will have balance the college draft and rookie scale's relevant benefits and harms.

Analyzing the affects of the college draft and rookie scale, the court will likely hold in favor of the players. The obvious adverse affects of the restraints on player services, coupled with concrete proposals of less restrictive systems that will produce the same positive affects should be enough to convince the court that the current college draft and rookie scale is more restrictive than necessary.

3. Free Agency Rules

The NBA free agency system contains numerous rules. The most restrictive group of these rules creates the restricted free agent.²⁷⁰ A team can make a player, who is a first round pick with both team options exercised or a veteran of three years experience or less, a restricted free agent by extending the player a qualifying offer.²⁷¹ Qualifying offers for first round picks whose team exercised both team options are a one-year contract

²⁶⁷ See *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1188 (D.C. Cir. 1978).

²⁶⁸ See 1998 Colum. Bus. L. Rev. 579, 629.

²⁶⁹ See 1998 Colum. Bus. L. Rev. 579, 629-30.

²⁷⁰ See <http://www.nbpa.org/cba/2005/article-xi-free-agency>

²⁷¹ <http://www.nbpa.org/cba/2005/article-xi-free-agency> (Section 4)

whose salary is determined by the player's draft position.²⁷² Additionally, a team with a player in the same situation can also extend a maximum qualifying offer, which must be for six years with the first year equaling the maximum player salary and subsequent years' salary increased by 10.5%, in an effort to retain a superstar player.²⁷³ Qualifying offers for all other veteran players of three years of experience or less must be for one season and the greater of 125% of the player's previous salary and the player's minimum salary plus \$175,000.²⁷⁴ Upon the qualifying offer being made, a player becomes a restricted free agent and their former team holds a right of first refusal over their services.²⁷⁵ Other teams interested in the player's services may extend a contract offer to the player, known as an offer sheet, which the player's former team can match and consequently maintain the player's services.²⁷⁶ The interested team's offer sheet, for a player with a regular qualify offer, cannot be for more than 108% of the previous year's average player salary in the contract's first year.²⁷⁷ There are also special salary cap implications involved in large offer sheets favoring the player's previous team.²⁷⁸ These restrictions ensure teams the ability to retain any of their restricted free agents regardless of their salary cap situation.²⁷⁹ In concert, the NBA's restricted free agency rules make it extremely difficult for a restricted free agent to escape a former team that wants to retain their services.

The players should argue the NBA's restricted free agency rules severely limits player movement and player salary, both of which leave restricted free agents with

²⁷² <http://www.nbpa.org/cba/2005/article-xi-free-agency> (Section 4)

²⁷³ <http://www.nbpa.org/cba/2005/article-xi-free-agency> (Section 4)

²⁷⁴ <http://members.cox.net/lmcoon/salarycap.htm> (#37)

²⁷⁵ <http://www.nbpa.org/cba/2005/article-xi-free-agency> (Section 5)

²⁷⁶ <http://www.nbpa.org/cba/2005/article-xi-free-agency> (Section 5)

²⁷⁷ <http://www.nbpa.org/cba/2005/article-xi-free-agency> (Section 5)

²⁷⁸ <http://members.cox.net/lmcoon/salarycap.htm> (#38)

²⁷⁹ <http://members.cox.net/lmcoon/salarycap.htm> (#38)

nominal agency over their services. The players should posit that restricted free agents who have fulfilled previous contract, which is highly likely to be a rookie contract in which they exercised little bargaining power and their former team set the terms of, should have the ability to freely contract their services. They should highlight the fact that the current restrictions allow restricted free agents with three years of experience or less to be held captive by teams who undervalued their services by not exercising their team option or offering a longer term contract in the player's previous contract.

Furthermore, the players should argue, the current rules significantly depress restricted free agents salary. For example, after playing two seasons, second round pick Gilbert Arenas, signed a six year \$65 million contract,²⁸⁰ which paid him about \$8.5 million in the first year, with the Washington Bullets.²⁸¹ Under the current restricted free agency rules Washington could only offer a salary of about \$4.9 million in the first year of the contract,²⁸² about 58% of the contract he actually received. The players should note, under the current rules it is difficult to measure the amount of player salaries affected because teams often do not make contract offers because of the rules structure.

The players should supplement their argument by citing Mackey²⁸³ and McNeil²⁸⁴ where in both cases the courts found NFL rules containing a right of first refusal to be violations of antitrust laws.²⁸⁵ They should also underscore the Mackey court's decision to not recognize the "need to recoup player development costs cannot justify" restraints,

²⁸⁰ <http://sports.espn.go.com/nba/news/story?id=2899563>

²⁸¹ [#38](http://members.cox.net/lmcoon/salarycap.htm)

²⁸² [#38](http://members.cox.net/lmcoon/salarycap.htm)

²⁸³ *Mackey v. National Football League*, 543 F.2d 606 (8th Cir.1976).

²⁸⁴ *McNeil v. National Football League (McNeil II)*, 790 F.Supp. 871 (D. Minn. 1992).

²⁸⁵ See *Mackey v. National Football League*, 543 F.2d 606, 623 (8th Cir.1976); *McNeil v. National Football League (McNeil II)*, Civ. No. 4-90-476. 1992 WL 315292. pg 1 (D. Minn. 1992).

as they are “an ordinary cost of doing business.”²⁸⁶ This will prove useful in rebutting the NBA’s likely defense of the restricted free agency rules.

The NBA will counter this claim, like the others, by stating the restricted free agency rules advances competitive balance. They will likely argue that the restricted free agency rules are essential to maintaining competitive balance because they protect teams’ investment expenses in developing players by enabling them to enjoy the results of the time and expenses the team invested for at least one extra year. The NBA will also contend that without the restricted free agent rules richer teams with more money to spend will consistently pluck newly developed talent from mediocre teams by outbidding them. They will challenge the use of Mackey and McNeil by the players noting both cases not only dealt with right of first refusal rules but also compensation rules, which are not present in the current CBA. The NBA will argue that without the restricted free agency rules the NBA’s competitive balance will suffer and result in a decrease in fan interest and NBA revenue.

The court will likely be conflicted on whether the NBA’s restricted free agent rules violate antitrust laws, however it is more likely that the court will rule in favor of the NBA. It is clear that the court will acknowledge the players’ assertion on the adverse effects that the restricted free agency rules create. Nonetheless, the court will likely be persuaded by the NBA’s contention that the rules in question promote competitive balance and are much less restrictive than those in Mackey and McNeil. As a result, the court is likely to find the NBA’s restricted free agent rules to be legitimate.

If NBA players bring an antitrust lawsuit against the NBA, after decertifying the NBPA as their collective bargaining unit, success is likely. The court will dismiss any

²⁸⁶ *Mackey v. National Football League*, 543 F.2d 606, 621 (8th Cir.1976).

NBA claims seeking protection from the nonstatutory labor exemption because the NBPA decertification would mark the end of the collective bargaining relationship. Subsequently, the court will find the salary cap and the restricted free agency rules to be legitimate restraints, which promote competitive balance in the NBA. The court will then hold the college draft and rookie scale violate antitrust laws, as they are overly restrictive with less restrictive options available to attain the sought after affects.

Upon ruling in favor of the players, the court will grant damages to the plaintiffs in the lawsuit.²⁸⁷ The court will determine the damages by assessing how much of the player's market value the plaintiffs failed to be compensated for as a result of the restraints found to be in violation.²⁸⁸ Additionally, the court will likely require the NBA to compensate the plaintiffs for their attorney fees.²⁸⁹ The total costs to the NBA will increase exponentially following an immediate subsequent lawsuit, with a much larger plaintiff group, filed by the players.²⁹⁰ While this total cost to the NBA would be significant, it is unlikely that it will reach the \$2.1 billion in annual player salaries and benefits²⁹¹ that would be lost by players if the NBA decides to cancel the NBA season to place more pressure on the players, instead of playing the season under the expired CBA while litigating the lawsuit. Nevertheless, the costs of litigation and bad public relations will put substantial pressure on the NBA that otherwise would none existent without litigation.

Conclusion

²⁸⁷ See *Mackey v. National Football League*, 543 F.2d 606, 623 (8th Cir.1976); *McNeil v. National Football League (McNeil II)*, Civ. No. 4-90-476. 1992 WL 315292. pg 1 (D. Minn. 1992).

²⁸⁸ See *Mackey v. National Football League*, 543 F.2d 606, 623 (8th Cir.1976); *McNeil v. National Football League (McNeil II)*, Civ. No. 4-90-476. 1992 WL 315292. pg 1 (D. Minn. 1992).

²⁸⁹ See *Mackey v. National Football League*, 543 F.2d 606, 623 (8th Cir.1976).

²⁹⁰ See *White v. National Football League*, 836 F.Supp. 1458 (D. Minn. 1993).

²⁹¹ <http://www.slamonline.com/online/nba/2010/10/david-stern-wants-nba-player-salaries-cut-by-one-third/>

The NBA and NBPA seem well on their way to long grueling CBA negotiations. Both the owners' and players' resolve will be tested. It appears certain that the owners will use their strongest economic weapon, the lockout, to pressure the players into conceding to their bargaining positions. This will certainly lead the players to consider using their most powerful economic weapon, union decertification coupled with antitrust litigation. In doing so the players will have to consider, not only the merits of an antitrust lawsuit, whose success is likely as detailed above, but also their ability to maintain unity throughout the process.

To successfully circumvent the nonstatutory labor exemption the players will have to end the collective bargaining relationship through union decertification. Knowing this and drawing from past CBA negotiations, the NBA will attempt to divide the players using various tactics, as they did in 1995, to thwart a decertification vote.²⁹² If the players' leadership, who is privy to its constituents' sentiments, believes the players can stay united in a belief that union decertification and antitrust litigation is their best tactic throughout various NBA attacks, the players should aim for union decertification.

If this is the case, the players should begin efforts to decertify the NBPA as soon as the NBA takes steps toward instituting a lockout. In doing so the players should keep in mind that a successful antitrust lawsuit is not the goal but a powerful tool to obtain their CBA bargaining positions through concession exchanges. Because the NBA's health is moving in the right direction, after suffering great losses from its 1998 work stoppage and recent tough economic times, it is highly unlikely that NBA will test the players' will if the players prove to be unified and will agree to a CBA that favors the

²⁹² http://articles.sfgate.com/1995-09-13/sports/17816190_1_terrible-vote-dissident-players-six-year-collective-bargaining-agreement

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players. Under these circumstances, the Summer of 2011 will end without NBA work stoppage and with a new NBA CBA. The players will determine whether they or the NBA will arise from the new agreement as winners through their decision to shoot or pass on union decertification.