

THE COST OF FAIR PLAY: AN EXAMINATION OF HOW SALARY CAP PROPOSALS HAVE AFFECTED PAST COLLECTIVE BARGAINING AGREEMENTS AND WILL AFFECT THE COMING NBA COLLECTIVE BARGAINING NEGOTIATIONS¹

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I. Introduction

David Stern means business. To a player who once questioned his resolve to do what he thought was “in the best interests of the league” by locking out players prior to the 1998-99 season, Stern reportedly replied, “You’re going to learn the hard way. That’s not how we operate this league. We operate in the best interest of the league.”²

¹ This article was written prior to the end of the 2010-11 NBA seasons and the subsequent lockout by NBA owners.

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² *David Stern: NBA Talks Must Intensify*, ESPN.COM (April 21, 2011) <http://sports.espn.go.com/nba/news/story?id=6404677>.

As the 2011-12 NBA season comes to a close and the expiration date on the NBA's current collective bargaining agreement (CBA) draws near, Stern clearly believes that the league's best interest at this point requires reducing costs and enhancing profitability for individual team owners.³ How does he plan on doing that? Stern and other NBA officials believe that the problem of high costs lies in players' excessive salaries, and players' salaries are excessive at least in part because the NBA's porous "soft" salary cap contains too many exceptions which allow teams to exceed it.⁴ Consequently, Stern and other NBA officials want to eliminate the exceptions and reduce spending by instituting a "hard" salary cap.⁵

However, in the context of collective bargaining between major professional sports leagues and their player unions, hard salary caps—those that completely prohibit spending above the capped amount⁶—have generally only gained acceptance after many painstaking negotiations, hesitant concessions, and devastating work stoppages. Nowhere has this been more evident than in the realm of labor negotiations between the NHL and the NHLPA and between the NFL and the NFLPA. This article examines the experience gained from salary cap negotiations in the NHL, NFL, and NBA and applies it to the upcoming NBA labor negotiations with the purpose of predicting probable outcomes and suggesting possible solutions.

Part II of this article will give an overview of the negotiations that led to the adoption of the current salary cap systems in both the NHL and the NFL. Part II will also examine the NHL and NFL salary caps as they exist in their respective CBAs. Part III will focus on the history of negotiations which led to the adoption of a salary cap in the NBA, as well as subsequent attempts to modify it and the resulting strife between the NBA and the NBPA. Part III will also discuss the NBA's current soft cap and several of the exceptions it allows. Part IV will then examine the potential effects that the dispute over a hard salary cap could have both before and after the expiration of 2005 NBA CBA. Finally, Part V concludes that the two sides should use this opportunity to do away with many of the salary cap exceptions in the interest of parity among the NBA teams.

II. Salary Caps and Their History in Other Major Sports Leagues

A. National Hockey League

1. Arriving at a Salary Cap in the NHL

a) The Reserve Clause System

The NHL's march toward a salary cap began before the establishment of the league's first CBA in 1975.⁷ Prior to 1975, NHL teams used a provision called the "reserve clause" to restrict players' ability to freely sign with other teams.⁸ The reserve clause stipulated that the player's original contracting team would retain all rights to the player's services upon the expiration of

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Darren Heitner, *What is a Salary Cap*, SPORTS AGENT BLOG (Jul. 13, 2006) <http://www.sportsagentblog.com/2006/07/13/what-is-a-salary-cap/>.

⁷ Joshua M. Liebman, *Tip your "Cap" to the Players: 2007-2008 Off-Season Reveals NHL's Salary Cap Benefits on Players*, 16 SPORTS LAW. J. 81, 83 (2009).

⁸ *Id.*

his contract.⁹ Thus, the reserve clause became a means of committing players for life to the team with whom they signed their first contract.¹⁰

This system came under fire in the 1970s when the World Hockey Association (WHA) began competing with the NHL for players' services.¹¹ The result was a series of cases in which NHL teams sought an injunction and enforcement of the reserve clause against players who had signed with WHA teams for larger salaries when NHL contracts expired.¹² In *Boston Prof'l Hockey Ass'n v. Cheevers*, for example, after the expiration of his contract with the Boston Bruins in 1972, goaltender Gerry Cheevers signed a contract with the Cleveland Crusaders of the WHA for a substantial pay raise.¹³ In response, the Bruins invoked the reserve clause in Cheevers's expired contract and argued that it was a valid and enforceable provision which immunized the team from antitrust liability.¹⁴ The court denied the Bruins' request for an injunction on the grounds that the NHL's player contracts and reserve clause system were not exempt from antitrust law, but refused to rule on the validity of the NHL's reserve clause.¹⁵ In *Nassau Sports v. Hampson*, Nassau Sports¹⁶ sought a similar injunction to keep Ted Hampson from playing for the Midwest Saints of the WHA.¹⁷ Although Nassau Sports and the Islanders met one of the tests for the issuance of a preliminary injunction by showing that they suffered "irreparable injury" as a result of losing Hampson,¹⁸ the court nevertheless denied Nassau Sports' requested injunction on the grounds that it failed to meet other required tests for such relief.¹⁹

The reserve clause was dealt its most significant blow up to that point in the case of *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*²⁰ In that case, the WHA went on the offensive against the reserve clause for the first time when it filed suit to prevent the NHL from obtaining injunctive relief against sixty former NHL players who had signed contracts with WHA teams.²¹ The NHL violated section 2 of the Sherman Act,²² the WHA alleged, by using the reserve clause to (1) control the pool of players available to play major league professional hockey and (2) expand the NHL and thereby exclude the WHA from

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² See e.g. *Boston Prof'l Hockey Ass'n v. Cheevers*, 348 F. Supp. 261, 264 (D. Mass. 1972); *Nassau Sports v. Hampson*, 355 F. Supp. 733, 734 (D. Minn. 1972); *Nassau Sports v. Peters*, 352 F. Supp. 870, 873 (E.D.N.Y. 1972).

¹³ *Cheevers*, 348 F. Supp. at 264.

¹⁴ *Id.* at 265.

¹⁵ *Id.* at 265, 270.

¹⁶ *Hampson*, 355 F. Supp. at 734 (Nassau Sports owned the New York Islanders).

¹⁷ *Id.* at 735.

¹⁸ *Id.* at 736.

¹⁹ *Id.* at 736-37 (for example, Nassau Sports failed to meet the test of whether the other's party's interests would be "substantially impaired" by an injunction because Hampson's only means of supporting himself and his family was by playing hockey and because the Saints were still a new hockey team in a new league. Thus, the court found that granting the requested injunction would "substantially impair[]" the interests of Hampson and the Saints).

²⁰ 351 F. Supp. 462 (E.D. Pa. 1972).

²¹ *Id.* at 493.

²² 15 U.S.C.A. § 2 (2004) (Section 2 of the Sherman Act prohibits monopolies).

competing as a major professional hockey league.²³ After determining that professional hockey constitutes an interstate business in commerce and is therefore subject to federal antitrust law,²⁴ the District Court for the Eastern District of Pennsylvania granted the WHA's request for injunctive relief on the grounds that the NHL's enforcement of the reserve clause violated Section 2 of the Sherman Act.²⁵ *Philadelphia Hockey Club, Inc.* therefore became the first case to find the NHL reserve clause unenforceable.²⁶

In the same year that *Philadelphia Hockey Club, Inc.* was decided, Nassau Sports²⁷ filed another suit seeking to enjoin Gary Peters from playing with the New York Raiders of the WHA, a team with which Peters had signed in 1972 in spite of the reserve clause contained in his contract with the New York Islanders.²⁸ Contrary to the decisions in *Cheevers* and *Hampson*, which denied injunctive relief to the NHL teams,²⁹ the *Peters* court granted the injunction preventing Peters from playing for any team but the Islanders.³⁰ However, the United States District Court for the Eastern District of New York also held that the reserve clause created an option for the NHL team to renew the contract for only one additional year after expiration.³¹

In response to the ruling in *Peters*, NHL owners modified their standard player contracts to include only a one-year team option in place of the seemingly indefinite reserve clause.³² This allowed NHL players to sign with other teams in other leagues.³³ At the same time, however, the NHL implemented rules which required that a team signing a free agent compensate the player's former team with current players, draft picks, or money.³⁴ The steep compensation required for signing a free agent was enough to deter teams from signing free agents and thereby limit player movement within the league.³⁵ The validity of this system was challenged in *McCourt v. California Sports, Inc.*, in which former Detroit Red Wings player Dale McCourt challenged his assignment to the Los Angeles Kings as compensation for the Red Wings' signing of former Kings goaltender Rogatien Vachon.³⁶ The Sixth Circuit applied the *Mackey* test,³⁷ which stipulates that a reserve clause system does not violate antitrust law when (1) the system only affects the parties to the collective bargaining relationship, (2) the system is a mandatory subject of collective bargaining, and (3) the system is the result of genuine arms-length negotiations between the parties.³⁸ Here, the Sixth Circuit found that the NHL reserve system did not violate

²³ *Phila. World Hockey Club*, 351 F. Supp. at 504-05.

²⁴ *Id.* at 466.

²⁵ *Id.* at 467.

²⁶ Liebman, *supra* note 7, at 86.

²⁷ *See supra* note 16.

²⁸ *Nassau Sports v. Peters*, 352 F. Supp. 870, 873 (E.D.N.Y. 1972).

²⁹ *Cheevers*, 348 F. Supp. at 265, 270; *Hampson*, 355 F. Supp. at 736-37.

³⁰ *Peters*, 352 F. Supp. at 882.

³¹ *Id.* at 875.

³² Liebman, *supra* note 7, at 87.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ 600 F.2d 1193, 1196 (6th Cir. 1979).

³⁷ *Id.* at 1203 (the 8th Circuit adopted the *Mackey* test in *Mackey v. Nat'l Football League*, 543 F.2d 606, 614 (8th Cir. 1976). NFL player John Mackey challenged the NFL's Rozelle Rule, which required that a team signing a veteran free agent compensate the team from whom the free agent had been signed).

³⁸ *Id.* at 614.

antitrust law because its inclusion in the CBA resulted from good faith and arms-length bargaining between the parties.³⁹

The restrictions on free agency remained in effect until the early 1990s when they played a large role in causing the 1992 NHL player strike.⁴⁰ The strike lasted only ten days and culminated with the NHLPA and the NHL agreeing on a new CBA which eased the restraints on free agency only slightly.⁴¹ For example, the new CBA provided that a player would be eligible for free agency without requiring compensation to his former team at the age of 30 rather than 31.⁴² Furthermore, draft-choice compensation owed to the players' former teams for players under age 25 and between ages 26 and 29 who signed with new teams decreased under the new CBA.⁴³ The NHLPA agreed that the new CBA would only last for the 1992-93 season, and that the owners would have the option to renegotiate the CBA after two years.⁴⁴ They exercised this option after the end of the 1993-94 season, which had been played without a CBA in place.⁴⁵

b) The Struggle for a Salary Cap to Stem Rising Costs

The issues on the table during the subsequent CBA negotiations reflect a struggle between players and owners that has become common in America's major sports leagues. While NHL popularity and attendance had been on the rise in the years leading up to the negotiations, player salary had also experienced significant increases.⁴⁶ Owners sought to limit salaries and require revenue sharing in order to reduce costs and curb financial disparities between large and small-market teams.⁴⁷ To achieve this goal, the owners proposed a system in which a team would have to pay a 100% tax on any amount of its payroll that exceeded the league average payroll.⁴⁸ The money obtained from this tax system would then be given to lower-spending clubs in order to level the payroll playing field.⁴⁹ However, the NHLPA saw the NHL's proposed tax system as nothing more than a salary cap in disguise and argued that it would "artificially" limit player salaries.⁵⁰ The NHLPA strongly opposed the owners' plan, but offered two proposals of its own in response.⁵¹ Nevertheless, the NHL owners rejected both plans and locked the players out for the beginning of the 1994-95 season.⁵²

³⁹ *McCourt*, 600 F.2d at 1203.

⁴⁰ Liebman, *supra* note 7, at 88.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 88-89.

⁴⁴ *Id.*

⁴⁵ *Id.* at 89.

⁴⁶ Liebman, *supra* note 7, at 89.

⁴⁷ *Id.*

⁴⁸ *Id.* (for example, if a team had a \$18 million payroll and the average payroll was \$15 million, the team would have to pay a 100% tax on the \$3 million by which it exceeded the average payroll limitation).

⁴⁹ *We've Been Here Before*, CBC SPORTS,

<http://www.cbc.ca/sports/indepth/cba/features/flashback.html#1994>.

⁵⁰ *Id.*

⁵¹ *Id.* (the NHLPA's "five percent solution" proposed a 5% payroll and gate receipt tax for the league's top 16 teams. It also proposed a graduated tax rate for the richest 16 teams through which the top four teams who be taxed at seven percent and the bottom four teams would pay a one percent tax.).

⁵² Liebman, *supra* note 7, at 90.

The two sides finally came to an agreement on January 11, 1995, but not before a total of 468 NHL games had been lost.⁵³ Although the agreement did not contain an overall salary cap or the payroll tax that owners had sought, the NHL was still able to obtain some significant concessions from the players.⁵⁴ For example, the new CBA included a rookie salary cap for any rookies under 25, which began at \$850,000 and was set to increase to \$1,075,000 by 2000.⁵⁵ Furthermore, the deal restricted free agency even more considerably than before.⁵⁶ Draft pick compensation was still required for teams losing free agents, the age at which veterans could become unrestricted free agents increased to 32, players finishing their first contracts were ineligible for free agency, and no player under 25 could become a restricted free agent.⁵⁷ But in terms of future implications, the most significant aspect of the negotiations was likely the owners' fervent insistence on a system which kept salaries in check and helped smaller market teams to compete.⁵⁸

Without an encompassing salary cap or a luxury tax system in place, NHL player salaries continued to escalate at a high rate in the years after the 1994-1995 labor dispute and lockout.⁵⁹ According to an investigation conducted by Arthur Levitt, a former chairman of the SEC who the NHL hired to assess its financial situation, the league lost approximately \$273 million during the 2002-03 season.⁶⁰ Nineteen of the 30 NHL teams lost money in that year, according to the study, and the league spent 76% of its annual revenue on player salaries.⁶¹ A Forbes study later argued that the total amount lost was actually \$123 million and only 66% of revenue was spent on salaries,⁶² but either way it was clear that the NHL was losing money on a yearly basis.⁶³ As a result, the NHL forcefully sought a salary cap which would provide "cost certainty" for NHL owners by controlling player salaries and maintaining financial stability among all NHL teams.⁶⁴

In the ensuing dispute, the NHLPA eventually conceded and agreed to a salary cap in February 2005, but the two sides failed to agree on the logistics of the cap.⁶⁵ As a result, NHL commissioner Gary Bettman was forced to completely scrap the 2004-05 NHL season.⁶⁶ It was not until July 13, 2005 that the NHL and the NHLPA finally came to an agreement on a six-year CBA which included a salary cap.⁶⁷ In exchange for the union's eventual agreement on a salary cap system, the NHL agreed to several player-friendly concessions on, among other things, free

⁵³ *We've Been Here Before*, *supra* note 49.

⁵⁴ See Liebman, *supra* note 7, at 90-91.

⁵⁵ *Id.* at 90.

⁵⁶ See *id.* at 90-91.

⁵⁷ *Id.*

⁵⁸ *Id.* at 91.

⁵⁹ See Paul D. Staudohar, *The Hockey Lockout of 2004-2005*, MONTHLY LAB. REV. (Washington) (2005) at 24-25 (for example, the average salary during the 1993-94 season was \$558,000. It rose to \$1,430,000 in 2000-01, \$1,640,000 in 2001-02, \$1,793,000 in 2002-03, and \$1,830,000 in 2003-2004).

⁶⁰ *Id.* at 24.

⁶¹ *Id.*

⁶² *Id.* at 25.

⁶³ Liebman, *supra* note 7, at 92.

⁶⁴ *Id.*

⁶⁵ *The NHL's New Deal*, CBC SPORTS, Jul. 21, 2005, http://www.cbc.ca/sports/indepth/cba/features/issues_deal.html (last visited Apr. 23, 2011).

⁶⁶ *Id.*

⁶⁷ Liebman, *supra* note 7, at 92.

agency and salary arbitration.⁶⁸ The agreement also contained an option for the NHLPA to extend the deal for a seventh year, which it exercised on June 22, 2010.⁶⁹ As a result, the current NHL-NHLPA CBA is set to expire after the 2011-12 NHL season.⁷⁰

2. Overview of the Salary Cap in 2005 NHL-NHLPA CBA

The NHL salary cap/upper limit⁷¹ under the current NHL-NHLPA CBA is determined each year using a complicated formula which takes into account the league's hockey-related revenue (HRR).⁷² Essentially, HRR is directly proportional to the salary cap level: if HRR goes up, so too does the salary cap level; if HRR decreases, so too does the salary cap level.⁷³ If HRR is below \$2.2 billion for one year, then NHL players will receive 54% of said revenues.⁷⁴ That percentage increases to some point between 55% and 56% when HRR is above \$2.2 billion but below \$2.4 billion,⁷⁵ and again to some point between 56% and 57% when HRR is above \$2.4 billion but below \$2.7 billion.⁷⁶ When HRR exceeds \$2.7 billion, the percentage distributed to players is 57%.⁷⁷

To determine the upper limit for a given year, the preliminary HRR from the prior season is multiplied by the aforementioned applicable percentage.⁷⁸ From this amount is subtracted the preliminary benefits,⁷⁹ and the resulting amount is then divided by the number of teams in the NHL to arrive at the midpoint of the payroll range.⁸⁰ The adjusted midpoint is then determined by adding 5% of the midpoint of the payroll range to the midpoint itself.⁸¹ The upper limit is the adjusted midpoint plus \$8 million, and the lower limit is the adjusted midpoint minus \$8 million.⁸²

⁶⁸ See *Id.* at 93-94 (beginning in the summer of 2006, a player who was 29 years old or who had played in the NHL for at least eight years could become an unrestricted free agent. Also, the CBA reduced the amount of experience required for a player to go to salary arbitration from five years to just four.); see also *The NHL's New Deal*, *supra* note 65 (in 2007, the unrestricted free agency requirement dropped to 28 years of age or seven years experience, and for 2008 and thereafter the requirement is 27 years of age or seven years of experience).

⁶⁹ Pierre Lubrun, *Union Picks Up CBA Extension Option*, ESPN.COM (June 22, 2010)

<http://sports.espn.go.com/nhl/news/story?id=5316505>.

⁷⁰ *Id.*

⁷¹ *Collective Bargaining Agreement between National Hockey League and National Hockey League Players' Association*, art. 50.5(b) (2005), (The salary cap is referred to as the "Upper Limit" in the current CBA.) (hereinafter "NHL-NHLPA CBA").

⁷² *Id.* art. 50.5(b)(i) (this formula is also used to calculate the salary floor, or the "Lower Limit.").

⁷³ Liebman, *supra* note 7, at 95.

⁷⁴ NHL-NHLPA CBA, *supra* note 71, art. 50.4(b)(i)(B).

⁷⁵ *Id.* art. 50.5(b)(i)(C).

⁷⁶ *Id.* art. 50.5(b)(i)(D).

⁷⁷ *Id.* art. 50.4(b)(i)(E).

⁷⁸ *Id.* art. 50.5(b)(i).

⁷⁹ NHL-NHLPA CBA, *supra* note 71, art. 50.3(b)

⁸⁰ *Id.* art. 50.5(b)(i).

⁸¹ *Id.*

⁸² *Id.*

According to the CBA, team payrolls are “not to exceed an Upper Limit.”⁸³ There are only two exceptions in the NHL-NHLPA CBA which allow a team to exceed the agreement’s hard salary cap.⁸⁴ The “Bona-Fide Long-Term Injury/Illness Exception to the Upper Limit” allows a team to exceed the salary cap by adding an additional player to its active roster to replace a player who has become “unfit to play,” based on the opinion of the team’s physician, for at least 24 days and ten regular season games.⁸⁵ Under this exception, the replacement player’s salary is allowed to increase the team’s salary to an amount which exceeds the upper limit.⁸⁶

The second exception to the salary cap requirement is the “Performance Bonus Cushion.”⁸⁷ This exception allows a team to exceed the cap by no more than 7.5% of the upper limit if the excess is due to the inclusion of certain performance bonuses.⁸⁸ The team’s upper limit for the following season will then be reduced by the amount that its total payroll exceeded the previous year’s upper limit due to the aforementioned performance bonuses.⁸⁹

B. National Football League

1. Arriving at a Salary Cap in the NFL

The establishment of a salary cap system in the NFL came as a result of the fight that the NFL Players’ Union (NFLPA) waged for several years in pursuit of free agency for NFL players.⁹⁰ Prior to the agreement which established free agency in 1993,⁹¹ the NFL and its team owners had a history of restricting player mobility within the league.⁹² For example, mobility in the first four decades of the league was limited by a reserve clause which, similar to the NHL’s reserve clause, also allowed a team to retain a player for his entire career.⁹³ The NFL later created the Rozelle Rule and the Option Clause in place of the reserve clause in order to continue its restriction on mobility.⁹⁴

In 1976, several former and then-current players filed a suit alleging that the Rozelle Rule and Option Clause were illegal restraints of trade in violation of antitrust law because they denied players the ability to freely negotiate with teams and sell their services.⁹⁵ The trial court

⁸³ NHL-NHLPA CBA, *supra* note 71, art 50.5(b).

⁸⁴ Liebman, *supra* note 7, at 97.

⁸⁵ NHL-NHLPA CBA, *supra* note 71, art. 50.10(d).

⁸⁶ *Id.*

⁸⁷ *Id.* art. 50.5(h)(ii).

⁸⁸ *Id.*

⁸⁹ *Id.* art. 50.5(h)(iii).

⁹⁰ See Brian E. Dickerson, *The Evolution of Free Agency in the National Football League: Unilateral and Collective Bargaining Restrictiveness*, 3 SPORTS LAW. J. 165, 182 (1996).

⁹¹ See *infra* note 140.

⁹² Dickerson, *supra* note 90, at 168-174.

⁹³ *Id.* at 168.

⁹⁴ *Id.* at 168-69 (the Rozelle Rule required a team signing a player whose contract with his former team had just expired to provide fair compensation to the former team, thereby creating a disincentive for teams to sign such players whose contract were up. The Option Clause allowed a player’s current team to unilaterally renew that player’s contract as long as the team agreed to pay at least 90% of his previous year’s salary).

⁹⁵ *Mackey*, 543 F.2d at 609.

in *Mackey v. NFL* ruled that the Rozelle Rule and Option Clause were not immune from antitrust liability and that they therefore violated the Sherman Antitrust Act.⁹⁶ The 8th Circuit affirmed this decision and created a test—called the player restraint test—which allows players to agree to an illegal restraint as long as it was the result of “bona fide arm’s length bargaining.”⁹⁷

Although the decision in *Mackey* represented a victory for the NFLPA and considerably increased the players’ bargaining power, the subsequent 1977 CBA still contained significant restrictions on player mobility despite the players’ improved bargaining power.⁹⁸ It did not grant free agency to the players, and the right of first refusal/compensation system that it did implement still limited player mobility to the point that, between 1977 and 1987, only one player out of the thousands who became eligible for free agency succeeded in moving from one team to another at the end of his contract.⁹⁹ The 1977 CBA also included the aforementioned option clause, which avoided antitrust scrutiny because it was the result of arm’s length bargaining and therefore satisfied the player restraint test.¹⁰⁰

The NFLPA renewed its fight for free agency and sought an increased percentage of league revenue for the players at the 1982 collective bargaining negotiations.¹⁰¹ As before, the owners refused to accept the NFLPA’s demands.¹⁰² As a result, the players voted to strike and the owners decided to lock the players out before the season began.¹⁰³ The lockout lasted 57 days and continued past what would have been the beginning of the NFL regular season,¹⁰⁴ but it was not until cancellation of the entire season became a serious threat that the two sides came to an agreement that became the 1982 CBA.¹⁰⁵

Although the 1982 CBA contained several new benefits for the players, a free agency system satisfactory to the players was not one such benefit.¹⁰⁶ This CBA continued to significantly restrict free agency by virtue of its inclusion of the same first refusal/compensation system that existed in the 1977 agreement.¹⁰⁷ Despite this disappointment, the creation of the United States Football League (USFL) in 1983 brought with it an increased level of competition for football talent which allowed players to test their value on the open market.¹⁰⁸ Salaries increased as a result, and players found new hope in the fact that they could choose between teams.¹⁰⁹ However, the USFL folded after only three seasons, which gave the players further

⁹⁶ *Id.*

⁹⁷ *Id.* at 623.

⁹⁸ Dickerson, *supra* note 90, at 171.

⁹⁹ *Id.* at 171-72.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 172.

¹⁰² *Id.*

¹⁰³ Dickerson, *supra* note 90, at 172.

¹⁰⁴ Gordon Forbes, ‘82 Strike Changed Salary Dealings Forever, USA TODAY (June, 8, 2001) <http://www.usatoday.com/sports/comment/forbes/2001-06-08-forbes.htm>.

¹⁰⁵ Dickerson, *supra* note 90, at 172 (as a result of the labor dispute, the NFL implemented a shortened season of only nine games per team); *see also*, Forbes, *supra* note 104.

¹⁰⁶ Dickerson, *supra* note 90, at 172-73.

¹⁰⁷ *Id.* at 173.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

incentive to pursue free agency and an end to the first refusal/compensation system even more forcefully during the 1987 collective bargaining negotiations.¹¹⁰

On September 22, 1987, during the week prior to the start of the 1987 NFL season, the NFLPA voted to go on strike once more.¹¹¹ The owners had no choice but to cancel the first week of games.¹¹² In the following weeks, however, the owners were able to maintain their leverage over the players by hiring replacement players to play the scheduled games.¹¹³ While owners continued to receive valuable TV revenues from the replacement games, the players continued to forfeit more and more of their salary because the NFLPA had not built up a strike fund prior to the strike.¹¹⁴ As dissension within the players' ranks grew and more strikers crossed the picket lines to play with the replacements, the NFLPA voted to end the strike on October 15, 1987 without having won free agency or any of its other demands.¹¹⁵ In fact, the players returned to work without a CBA in place.¹¹⁶

To make matters worse for the players, the 8th Circuit in *Powell v. NFL* ruled that the nonstatutory labor exemption—which immunizes labor agreements between employers and unions from antitrust attack¹¹⁷—continued to protect the NFL's first refusal/compensation system from antitrust attack even though there was no CBA in place and the two sides had bargained to impasse.¹¹⁸ The court explained that the protection continued because a labor relationship still existed between the league and the NFLPA.¹¹⁹ The owners wasted no time in taking advantage of this ruling. In anticipation of the *Powell* decision, the NFL unilaterally implemented a system called Plan B free agency which allowed the owners to subject their 37 best players to the first refusal/compensation system by placing them on a protective list.¹²⁰ The remaining players not placed on the list became unrestricted free agents.¹²¹

In December of 1989, the NFLPA took a radical step when it decided to decertify itself as the players' collective bargaining representative in order to allow individual players to file their own antitrust cases against the NFL.¹²² New York Jets running back Freeman McNeil filed the first such action in April 1990 and argued that the Plan B free agency system violated Section 1 and Section 2 of the Sherman Act.¹²³ The NFL countered by arguing that the statutory labor

¹¹⁰ *Id.* at 173-74.

¹¹¹ *Picket Lines and Replacement Players: The 1987 NFL Strike*, SHMOOP.COM, <http://www.shmoop.com/nfl-history/labor.html>.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Dickerson, *supra* note 90, at 174.

¹¹⁶ *Id.*

¹¹⁷ Harvard Law Review Association, *Antitrust Law – Nonstatutory Labor Exemption – Second Circuit Exempts NFL Eligibility Rules from Antitrust Scrutiny*. – Clarett v. National Football League, 369 F.3d 124 (2d Cir. 2004), 118 Harv. L. Rev. 1379 (2005).

¹¹⁸ *Powell v. National Football League*, 930 F.2d 1293, 1303-04 (8th Cir. 1989).

¹¹⁹ *Id.*

¹²⁰ Dickerson, *supra* note 90, at 176.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *McNeil v. National Football League*, 790 F. Supp. 871, 875 (D. Minn. 1992).

exemption still applied and the league was therefore immune from an antitrust attack.¹²⁴ Judge David Doty reasoned that because the union had decertified itself prior to the creation of the players' contracts¹²⁵ in question, there was no ongoing relationship between the players and the owners, and therefore the nonstatutory labor exemption did not protect the NFL's Plan B from antitrust attack. Furthermore, the Plan B system was not protected by the *Mackey* test because it was unilaterally imposed rather than agreed upon through arm's length bargaining.¹²⁶

The NFL also defended the Plan B system on the grounds that the league constituted a single entity and could therefore not enter into a conspiracy to illegally restrain competition in violation of Section 1 of the Sherman Act.¹²⁷ Judge Doty rejected this single entity defense based on his reasoning that the individual teams competed against each other for players and revenues from television deals and therefore constituted separate operations.¹²⁸

The league's final defense outlined how Plan B free agency should survive an antitrust attack on its own because, under the rule of reason analysis, the competitive balance that it would bring to the league constituted a pro-competitive benefit which outweighed any anti-competitive effects.¹²⁹ Although it conceded that Plan B did serve a pro-competitive benefit by improving competitive balance in the league, the jury nevertheless determined in its September 10, 1992 verdict that a benefit of competitive balance did not justify the plan's anti-competitive restrictions.¹³⁰ As a result, it was determined that the Plan B free agency system violated the Sherman Act.¹³¹

Less than two weeks after the jury verdict in *McNeil*,¹³² Reggie White and four other players filed a class action suit that would bring about the free agency system that they had sought for so long.¹³³ The players once again argued that the NFL's general restrictions on their ability to openly market their services¹³⁴ violated antitrust law, and they sought injunctive relief and damages as a result.¹³⁵ Initially, NFL owners disagreed on whether they should pursue litigation in the *White* case or not. Those who favored it believed that they should try to fight and reverse Judge Doty's decision in *McNeil* because of the several differing judicial interpretations of how far the statutory labor exemption extends.¹³⁶ The rest of the owners feared that the *White*

¹²⁴ *Id.* at 878.

¹²⁵ *Id.* at 871 (this suit was also filed by NFL players Mark Collins, Lee Rouson, Niko Noga, Don Majkowski, Dave Richards, Tim McDonald, and Frank Minnifield).

¹²⁶ Dickerson, *supra* note 90, at 177.

¹²⁷ *McNeil*, 790 F. Supp at 878.

¹²⁸ *Id.* at 879.

¹²⁹ *Id.* at 876.

¹³⁰ *McNeil v. National Football League*, Civ.No. 4-90-476, 1992 WL 315292, at *1 (D. Minn. Sept. 10, 1992).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *White v. National Football League*, 822 F.Supp. 1389, 1394 (D. Minn. Apr. 30, 1993).

¹³⁴ *Id.* (these restrictions included Plan B free agency, the college draft, preseason pay rules, and the NFL Player Contract).

¹³⁵ *Id.* at 1394-95.

¹³⁶ Dickerson, *supra* note 90, at 181; *see also Powell*, 930 F.2d at 1303-04 (holding that the statutory labor exemption continues as long as there is an "ongoing collective bargaining relationship" between the NFL and the NFLPA); *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960, 967 (D. N.J. 1987)

court would follow *McNeil* and agree with the players' argument that the statutory labor exemption no longer protected the owners' restrictions on free agency.¹³⁷

In the end, the owners' fear of being forced by the court to pay treble damages to the entire class of plaintiffs in *White* led them to reach a tentative agreement to settle on January 6, 1993.¹³⁸ After receiving recognition as the players' collective bargaining representative from the National Labor Relations Board (NLRB) in March 1993, the NFLPA negotiated and reached a final settlement to the *White* case on June 6 of the same year.¹³⁹

On June 29, 1993, the two sides agreed that the *White* settlement would become the 1993 CBA.¹⁴⁰ As expected, the new CBA included the unrestricted free agency for which NFLPA had fought for several years.¹⁴¹ However, in exchange for the owners' ultimate acceptance of unrestricted free agency for the players, the players' agreed to allow the owners to restrict free agency through the implementation of a salary cap.¹⁴²

Since 1993, the CBA has been extended on several occasions, including most recently in March 2006 when the two sides agreed on an extension that would prolong the life of the agreement until 2012.¹⁴³ However, that extension also allowed either side to unilaterally opt out of the CBA and shorten it by one or two years.¹⁴⁴ The owners exercised this option in May 2008 because they felt that the current CBA granted too great a share of the league's football revenues to the players and not enough to the owners in light of rising operating costs.¹⁴⁵ Although the 2008 and 2009 seasons would be unaffected, the owners' action meant that the 2010 season would be uncapped and the CBA would come to an end in March of 2011 unless the two sides agreed to an extension prior to those dates.¹⁴⁶ In the end, the NFL and NFLPA were unable to come to an agreement on how to divide up football revenues.¹⁴⁷ As a result, the union decertified on March 11, 2011 and the league initiated a lock out when the CBA officially expired at

(holding that that exemption continues as long as the restraint in question remains unchanged and the owners reasonably believe that the practice will be included in the next agreement); *Brown v. Pro Football, Inc.*, 782 F. Supp. 125, 130 (D.D.C. 1992) (holding that the exemption ends when the collective bargaining agreement expires).

¹³⁷ Dickerson, *supra* note 90, at 181.

¹³⁸ *Id.*

¹³⁹ *Id.* at 181-82.

¹⁴⁰ *Id.* at 182.

¹⁴¹ Russel Adams, *Backtalk: A Season with an N.F.L. Salary-Cap Analyst*, N.Y. TIMES (July 21, 2002) available at <http://www.nytimes.com/2002/07/21/sports/backtalk-a-season-with-an-nfl-salary-cap-analyst.html>.

¹⁴² *Id.*

¹⁴³ National Football League, *NFL Owners Opt out of CBA*, NFL.COM (May 20, 2008)

<http://www.nfl.com/news/story?id=09000d5d81eb6e46&template=without-video&confirm=true>.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *League Locks out Players after Union Decertifies*, NFL.COM WIRE REPORTS (Mar. 13, 2011) <http://www.nfl.com/news/story/09000d5d81eb6e46/article/league-locks-out-players-after-union-decertifies> (the main dispute was over the additional \$1 billion off the top of league revenues that the league initially sought. Under the expiring CBA, owners were allowed \$1 billion in revenue for costs before the remaining amount was divided with the players).

midnight.¹⁴⁸ Shortly after decertifying, a group of ten players filed an antitrust lawsuit against the NFL which alleged that the league had conspired to restrict players' ability to market their services by means of a group boycott and a price-fixing arrangement.¹⁴⁹ U.S. District Judge Susan Richard Nelson granted the players' request for an injunction against the owners' lockout on April 25, but four days later on April 29 the 8th Circuit granted the league's request for a temporary stay of the injunction.¹⁵⁰

2. Overview of the Salary Cap in the NFL-NFLPA CBA

Although the present dispute between the NFL and the NFLPA has led to the expiration of the NFL-NFLPA CBA, it seems logical the same hard salary cap—or one similar to it—will survive the dispute since the strife between the parties has not arisen from the existence of the salary cap, but rather the apportioning of league revenues. Therefore, an analysis of the salary cap provisions in the 2006 NFL-NFLPA CBA still seems relevant even though no CBA between the parties exists at this time.

Prior to the 2006 agreement, the NFL salary cap was based on the amount of Defined Gross Revenues (DGR) that the teams earned during a “league year.”¹⁵¹¹⁵² The DGR included revenues from national television contracts, tickets sales, and NFL merchandise sales.¹⁵³ The 2006 CBA expanded that pot to include not just DGR, but “total revenue” (TR).¹⁵⁴ As a result, revenue streams such as local advertising, concessions, parking, and signage are now taken into account for purposes of determining the salary cap.¹⁵⁵

The calculation for determining the salary cap for each team begins with a determination of the projected total revenue (PTR).¹⁵⁶ The PTR is then multiplied by the CBA percentage, which is a pre-determined amount contained within the CBA that varies from 57% to 58%.¹⁵⁷ For example, the percentage is 57% for the 2006 and 2007 league years,¹⁵⁸ 57.5% for the 2008 and 2009 league years, and 58% for the 2010 and 2011 league years.¹⁵⁹ The product of the PTR

¹⁴⁸ *Id.*

¹⁴⁹ Dave Campbell, *10 Players File Antitrust Suit against NFL*, HUFFINGTON POST (Mar. 11, 2011) http://www.huffingtonpost.com/2011/03/12/players-antitrust-suit-nfl_n_834903.html.

¹⁵⁰ *Appeals Court Restores NFL Lockout*, ESPN.COM (Apr. 29, 2011) <http://sports.espn.go.com/nfl/news/story?id=6451701>.

¹⁵¹ Al Lackner, *Salary Cap FAQ*, ASKTHECOMMISH.COM, <http://www.askthecommish.com/salarycap/faq.asp>.

¹⁵² NFL Collective Bargaining Agreement 2006-2012, art. I, sec. 1(g) (Mar. 8, 2006) *available at* <http://images.nflplayers.com/mediaResources/files/PDFs/General/NFL%20COLLECTIVE%20BARGAINING%20AGREEMENT%202006%20-%202012.pdf> (hereinafter NFL CBA)(the term “league year” means the period between March 1 of the first calendar year through the last day of February in the following calendar year).

¹⁵³ *Id.*

¹⁵⁴ NFL CBA, art. XXIV, sec. 1(a)(i).

¹⁵⁵ *Id.* art. XXIV, sec. 1(a)(i)(3).

¹⁵⁶ *Id.* art. XXIV, sec. 4(a); Lackner, *supra* note 151; *see also* NFL CBA, art. I, Sec. 3(ar) (defining “Projected Total Revenues”).

¹⁵⁷ *Id.*, art. XXIV, sec. 4(a); Lackner, *supra* note 151.

¹⁵⁸ *Id.*, art. XXIV, sec. 4(b)(i); Lackner, *supra* note 151.

¹⁵⁹ NFL CBA, art. XXIV, sec. 4(a); Lackner, *supra* note 151.

and the CBA percentage is the players' share of total revenue (PSTR), and from the (PSTR) is subtracted the league-wide projected benefits¹⁶⁰ to arrive at the amount available for player salaries.¹⁶¹ The amount available for player salaries is then divided by the number of teams in the NFL to arrive at the salary cap for each individual team.¹⁶² This formula has yielded salary caps of \$102 million in 2006, \$109 million in 2007, \$116.7 million in 2008, and \$127 million in 2009.¹⁶³

The NFL CBA contains several provisions for enforcing its salary cap requirement.¹⁶⁴ Article XXV, Section 2 of the CBA prohibits the NFL, NFLPA and the individual clubs and players from entering into any player contract or other agreement which circumvents the salary cap.¹⁶⁵ Any of these same parties may bring an action which alleges a violation of the salary cap before a special master.¹⁶⁶ The NFL commissioner himself may also review and disapprove of a player contract for violating the salary cap.¹⁶⁷ If he so disapproves of a player contract, then the player, NFLPA, and club will all have the right to bring the matter before the special master and ask whether the contract is a violation of the salary cap.¹⁶⁸ If the special master agrees with and upholds the commissioner's disapproval of the contract, the club and the player will then have ten days to renegotiate a contract that complies with the salary cap.¹⁶⁹

In rare cases where a team has signed a player to a cap-violating deal without the league's knowledge, the NFL has levied fines against such teams and forced them to forfeit draft picks.¹⁷⁰ For example, both the Pittsburgh Steelers and San Francisco 49ers have been forced to give up draft picks in recent years because they attempted to sneak a contract which violated the salary cap past the league.¹⁷¹

III. History and Content of the NBA's Current Salary Cap

A. Arriving at the Current NBA Salary Cap

While a salary cap system has been a more recent phenomenon for the NHL and NFL, the NBA had a salary cap in place for the 1946-47 season, its first season of operation as the Basketball Association of America (BAA).¹⁷² However, that iteration of the salary cap only lasted for the first year of the BAA's existence.¹⁷³ The current NBA salary cap is the result of decades of labor disputes between the NBA and the National Basketball Players' Association

¹⁶⁰ *See Id.*, art. I, sec. 3(a) (defining "projected benefits").

¹⁶¹ *Id.* art. XXIV, sec. 4(a); Lackner, *supra* note 151.

¹⁶² *Id.* art. XXIV, sec. 4(a); Lackner, *supra* note 151.

¹⁶³ Lackner, *supra* note 151.

¹⁶⁴ *See* NFL CBA, art. XXV.

¹⁶⁵ *Id.* art. XXV, sec. 2.

¹⁶⁶ *Id.* art. XXV, sec. 3.

¹⁶⁷ *Id.* art. XXV, sec. 4.

¹⁶⁸ *Id.* art. XXV, sec. 5.

¹⁶⁹ *Id.*

¹⁷⁰ Lackner, *supra* note 151.

¹⁷¹ *Id.*

¹⁷² Robert Bradley, *Labor Pains Nothing New to the NBA*, THE ASSOCIATION FOR PROFESSIONAL BASKETBALL RESEARCH, <http://www.apbr.org/labor.html>.

¹⁷³ *Id.* (reporting that in 1949, the BAA merged with the National Basketball League to form the National Basketball Association).

(NBPA).¹⁷⁴ A discussion of the struggle between the NBA and the NBPA that led to the salary cap must necessarily begin with the efforts of Bob Cousy in organizing the players and gaining league recognition of the union.¹⁷⁵

Cousy, the league's best player at the time, began organizing the players in 1954 by writing to an "established" player on each of the NBA franchises.¹⁷⁶ After receiving a positive response from the majority of those players, Cousy then submitted a list of concerns to then-NBA President Maurice Podoloff in January 1955.¹⁷⁷ Podoloff agreed to meet with the players, but continued to put off the meeting until 1957.¹⁷⁸ Cousy's meeting with AFL-CIO officials in January of that year over possible union affiliation led the NBA Board of Governors to formally recognize the NBPA in April and agree to many of the players' demands.¹⁷⁹

In the years following the recognition of NBPA, the union's new general counsel Lawrence Fleisher sought a pension plan for the players.¹⁸⁰ As was the case with recognition of the union, the league delayed any type of agreement on such a pension plan.¹⁸¹ However, when the players threatened to sit out the 1964 NBA All-Star Game, NBA President Walter Kennedy personally guaranteed that the adoption of a pension plan would take place at the next owners meeting.¹⁸² In May of that year, the owners approved a pension plan in which they agreed to give 50% towards the purchase of a \$2,000 endowment policy.¹⁸³

When Oscar Robertson became NBPA president in 1966, he demanded that the owners pay players for exhibition games and that the number of exhibitions be reduced from 15 to 10.¹⁸⁴ As tensions between the parties rose, the owners threatened to cancel the 1967 playoffs unless the players gave assurances that they would abide by the terms of their contracts.¹⁸⁵ The NBPA responded by threatening to file for certification with the National Labor Relations Board (NLRB) and strike before the playoffs began in order to obtain an upgrade to their pension plans.¹⁸⁶ The two sides settled soon thereafter on an agreement which gave the players, among other things, a \$600/month pension at age 65 for players with at least ten years of NBA service, new medical and insurance benefits, and a discussion regarding pay for exhibition games.¹⁸⁷

The formation of the American Basketball Association (ABA) in 1967 led to a general increase in player salaries and the defection of many prominent NBA players to the ABA in search of bigger contracts.¹⁸⁸ NBA took notice and, as a result, began discussing a possible

¹⁷⁴ *See id.*

¹⁷⁵ *See id.*

¹⁷⁶ Bradley, *supra*, note 172.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

merger with the ABA.¹⁸⁹ In an effort to block the merger, several NBA players filed an antitrust class action suit that would later become known as the “Oscar Robertson Suit.”¹⁹⁰ In addition to blocking the suit, the players also sought to eliminate any NBA practices which prevented competition for their services, including the college draft, the reserve clause, and restrictions on free agents signings.¹⁹¹ On May 4, 1970, Judge Tenney of the U.S. District Court for the Southern District of New York granted a preliminary injunction which barred the merger at that time.¹⁹² The league continued to fight for the merger by unsuccessfully seeking congressional legislation which would exempt it from antitrust law.¹⁹³ There was one positive for the NBA’s efforts when, in August 1973, Judge Tenney’s injunction against the merger was amended to allow merger negotiations as long as player representatives were present during any discussions over player rights.¹⁹⁴ Furthermore, the amendments required court approval of any subsequent merger agreement.¹⁹⁵

Despite the pending litigation in the Oscar Robertson Suit,¹⁹⁶ the NBA and the NBPA were still able to negotiate and agree on a three-year collective bargaining agreement which increased minimum player salaries, the playoff pool, and the per diem allowance in October 1970.¹⁹⁷ This agreement, along with the aforementioned amendments to the initial merger-blocking injunction,¹⁹⁸ set the stage for the 1976 settlement of the Oscar Robertson Suit which coincided with the NBA’s 1976 CBA.¹⁹⁹ The settlement allowed the merger between the NBA and the ABA to go forward and, in exchange, granted limited free agency to players through the elimination of the reserve clause and ‘phaseout’ of reserve compensation.²⁰⁰ Judge Robert L Carter of the same federal district court approved the settlement,²⁰¹ and the 8th Circuit upheld Judge Carter’s approval over the appeal of three players who disapproved of the settlement.²⁰²

Whether or not it was the result of the players’ newfound free agency rights, many NBA teams in the following years underwent severe financial difficulties and suffered serious losses.²⁰³ Amid this crisis, the amount of deferred payments which the league owed to players totaled about \$80 million to \$90 million.²⁰⁴ Although there was talk of a player strike, the NBPA ultimately recognized the looming possibility that franchises could fold and player jobs could be lost.²⁰⁵ As a result, in March of 1983 the union agreed to a CBA which sought to improve teams’

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*; see also *Robertson v. National Basketball Ass’n*, 72 F.R.D. 64, 65 (S.D.N.Y. 1976).

¹⁹¹ *Robertson*, 72 F.R.D. at 65; Bradley, *supra* note 172.

¹⁹² *Robertson*, 72 F.R.D. at 65.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 65-66.

¹⁹⁵ *Id.* at 66.

¹⁹⁶ *Id.* at 65-66.

¹⁹⁷ Bradley, *supra* note 172.

¹⁹⁸ *Robertson*, 72 F.R.D. at 66.

¹⁹⁹ Larry Coon, *NBA Salary Cap FAQ*, (2011) <http://members.cox.net/lmcoon/salarycap.htm#Q5>.

²⁰⁰ *Robertson*, 72 F.D.R. at 67; Coon, *supra* note 199.

²⁰¹ *Robertson*, 72 F.D.R. at 71.

²⁰² *Robertson v. National Basketball Ass’n*, 556 F.2d 682, 684 (8th Cir. 1977).

²⁰³ Bradley, *supra* note 172.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

financial situations by imposing a salary cap.²⁰⁶ The salary cap adopted in that deal guaranteed that the players would receive between 53% and 57% of the NBA's gross revenues, which included gate receipts, television and radio revenue, and revenue from both the preseason and the postseason.²⁰⁷ The cap took effect in 1984,²⁰⁸ the same year in which David Stern became commissioner, and the financial situation of the league subsequently began to improve.²⁰⁹

Nevertheless, this brief period of stability was threatened in 1987 when the 1983 CBA expired and the owners conflicted with the players on the issues of the salary cap, the right of first refusal, and the college draft.²¹⁰ Once again, the players brought the fight to the courtroom by filing an antitrust suit against the NBA.²¹¹ The players' action in the U.S. District Court for the District of New Jersey, which was led by then-NBPA President Junior Bridgman, challenged the salary cap, college player draft, and right of first refusal as violations of antitrust law.²¹² The court rejected the players' claims on the grounds that the aforementioned restrictions included in the CBA did not immediately lose their antitrust immunity when the agreement expired, but rather retained their immunity as long as they remained unchanged and the employer reasonably believed that they would be included in the next CBA.²¹³

In terms of the underlying dispute which brought about the case, the final result of the *Bridgman* litigation was an agreement between the two parties on a new six-year collective bargaining agreement.²¹⁴ This new CBA renewed the salary cap, but placed the total amount that players could receive at 53% of league revenue.²¹⁵ It also reduced the college player draft to three rounds in 1988 and two rounds in 1989, eliminated the right of first refusal for a player who has completed two contracts in the league, and allowed for unrestricted free agency for certain veterans.²¹⁶

During the term of the 1987 CBA, teams commonly exploited loopholes in the agreement which allowed them to exceed the salary cap and sign the players they wanted.²¹⁷ When the CBA expired in 1994, one of the league's main goals was to strengthen the salary cap and eliminate any loopholes in the CBA which the teams could exploit.²¹⁸ Although the NBA and the NBPA initially failed to reach an agreement, the two sides were able to save the 1994-95 season by reaching a no-strike, no-lockout agreement which stipulated that that season would still be governed by the previous CBA.²¹⁹ The league and the union could not come to terms on a new

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Coon, *supra* note 199.

²⁰⁹ Bradley, *supra* note 172.

²¹⁰ *Id.*

²¹¹ *Bridgeman v. National Basketball Ass'n*, 675 F.Supp. 960, 961-62 (D. N.J. 1987).

²¹² *Id.*

²¹³ *Id.* at 965-67.

²¹⁴ Bradley, *supra* note 172.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ Bradley, *supra* note 172.

agreement during the 1994-95 season, however, and the league subsequently imposed a lockout following the conclusion of the 1995 NBA Finals.²²⁰

During the lockout, NBPA President Buck Williams of Portland and NBPA Executive Director Simon Gourdine negotiated secretly with NBA representatives and reached a tentative agreement which provided for a luxury tax and other provisions intended to tighten the flexible salary cap.²²¹ Many players were dissatisfied with the possible restrictions on player movement under this agreement, and the player representatives voted against its ratification.²²² The union then persuaded the owners to drop the luxury tax provision and restore exceptions for veteran free agents by establishing a deadline in order to obtain concessions.²²³ Unsatisfied with these concessions, several players lobbied for the decertification of the union so they could once again bring antitrust actions against the league.²²⁴ In a subsequent decertification election, however, the players demonstrated by a 226-134 vote that they did not want to decertify, and soon after the player representatives ratified the agreement which included the league's aforementioned concessions.²²⁵ The owners approved the agreement by 24-5 vote, and the lockout ended a few days later without any games being missed.²²⁶ The new six-year 1995 CBA, which was not actually signed until June of 1996, provided for unrestricted free agency for all players after the conclusion of their contracts; guaranteed 48.04% of all Basketball Related Income (BRI) to the players; included revenues from luxury suites, international television, and arena signage in the calculation of BRI; allowed for several player exemptions to the salary cap, including the previously-created "Larry Bird Exemption"²²⁷; shortened the college player draft to one round; and created a rookie salary cap with a graduated scale which took into account the player's position in the draft and allowed for free agency after the player's third year in the league.²²⁸

During the 1997-98 season, the owners voted to exercise their option to terminate the 1995 CBA.²²⁹ They claimed that 13 teams had experienced losses under the CBA, and therefore there existed a need to reopen the deal.²³⁰ When the CBA subsequently ended after the 1997-98 season, the NBA imposed a lockout on July 1, 1998 which eventually brought about the first work stoppage in the history of the league.²³¹ In the ensuing labor dispute, the owners emphasized the need for stricter cost control and, as a result, fought to implement a luxury tax and player salary limits.²³² The NBPA disputed the league's poverty claims by citing the new four-year \$2.4 billion television deal the NBA had recently signed with NBC and Turner

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ Bradley, *supra* note 172.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* (in short, the Larry Bird Exemption allows a team to resign its own free agents at any price without regard for the salary cap).

²²⁸ *Id.*

²²⁹ Coon, *supra* note 199.

²³⁰ Bradley, *supra* note 172.

²³¹ *Id.*

²³² *Id.*

Sports.²³³ However, the cancellation of almost the entire first half of the season weighed heavily on the union and eventually caused it to relent on several of the important issues in the six-year 1999 CBA.²³⁴ For example, the players agreed to maximum player salaries based on the amount of seasons played, longer rookie contracts, an escrow tax of any salary expenditures which exceeded 55% of BRI, and a luxury tax system which would take effect if the total amount of NBA salaries surpassed 61.1% of BRI.²³⁵ The players, for their part, received 57% of BRI, increases in minimum salaries for veterans, and several exceptions to the salary cap which included the mid-level exception and another carry-over of the Larry Bird Exception.²³⁶

In July 2005, the NBA and NBPA agreed on and ratified the current CBA.²³⁷ One of the few major changes in the new agreement was a modification to the luxury tax system. The 2005 CBA stipulated that the luxury tax would apply in every year and would tax any team whose salary payout exceeded 61% of BRI in a given year.²³⁸

B. Overview of the Salary Cap 2005 NBA CBA

1. Calculation of the Salary Cap

Article VII, Section 2(a) of the 2005 CBA provides for a salary cap as a limit on the amount that teams can spend on player salaries.²³⁹ As with Hockey Related Revenue in the NHL and Total Revenue in the NFL, calculation of the NBA's salary cap in a given "salary cap year" first requires a determination of Basketball Related Income for the year preceding the salary cap year.²⁴⁰ BRI includes revenue from sources such as broadcast rights, gate receipts, sponsorships, proceeds from NBA properties, a percentage of arena naming rights, suite revenues, concessions, and merchandise sales.²⁴¹ BRI from the year preceding the salary cap year is then used to determine Projected BRI by means of a formula in Article 7, Section 1(c)(1) and (2) of the CBA.²⁴² The Projected BRI is then multiplied by the Projected BRI percentage contained in Article VII, Section 2(a)(1) for the given salary cap year.²⁴³ From this amount is subtracted projected benefits for the given salary cap year.²⁴⁴ Finally, the resultant amount is divided by the number of teams scheduled to play in the league during the salary cap year.²⁴⁵ The salary cap for

²³³ *Id.*

²³⁴ *Id.*

²³⁵ Matt Tolnick, *The CBA Discussions: A Background*, HOOPSHYPE.COM NBA BLOGS (Dec. 4, 2010) <http://blogs.hoopshype.com/blogs/tolnick/2010/12/04/the-cba-discussions-a-background/> [hereinafter Tolnick, *CBA Discussions*]; Bradley, *supra* note 172.

²³⁶ Tolnick, *CBA Discussions*, *supra* note 235; Bradley, *supra* note 172; Coon, *supra* note 199.

²³⁷ Coon, *supra* note 199.

²³⁸ Tolnick, *CBA Discussion*, *supra* note 235.

²³⁹ National Basketball Players Association, *2005 Collective Bargaining Agreement*, art. VII, sec. 2(a)(1), available at <http://www.nbpa.org/cba/2005> [hereinafter NBA CBA].

²⁴⁰ *Id.*

²⁴¹ *Id.* art. VII, sec. 1(a)(1).

²⁴² *Id.* art. VII, sec. 1(c)(1)-(2).

²⁴³ *Id.* art. VII, sec. 2(a)(1).

²⁴⁴ *Id.* art. VII, sec. 2(a)(1); *see also Id.* art. IV, sec. 8 (providing the calculation for projected benefits).

²⁴⁵ *Id.* art. VII, sec. 2(a)(1).

the current 2010-11 season is \$58.044 million, which is an increase from last year's cap of \$58.044 million.²⁴⁶

2. Salary Cap Exceptions

As previously mentioned, the current iteration of the NBA CBA differs from those in the NHL and NFL because it is a "soft" salary cap.²⁴⁷ The soft designation is due to the various exceptions in the CBA which allow teams to exceed the cap when signing players.²⁴⁸ In light of the exceptions allowed under the NBA CBA, the basic rule is that a team's player salary may not exceed the salary cap at any time unless the team employs such an exception.²⁴⁹

The most prominent of the salary cap exceptions is likely the Qualifying Veteran Free Agent exception, or the Larry Bird Exception as it is more commonly known.²⁵⁰ This exception allows any given team to resign a free agent who has played for three seasons without being waived or changing teams as a free agent and who has played for the signing team for either the entirety or at least part of the prior three seasons.²⁵¹ Under the Bird exception, the player may receive up to his maximum possible salary.²⁵² A contract under this exception is limited to six years in length.²⁵³ The original intention of the Bird Exception was to prevent teams from being unable to resign their franchise-defining superstars purely because their other salary obligations put them too close to the salary cap limit.²⁵⁴

The second veteran free agent exception is the Early Qualifying Veteran Free Agent exception, or the Early Bird Exception.²⁵⁵ This exception allows a team to exceed the salary cap by signing a player who has played two seasons in the league without being waived or changing teams as a free agent and who has played for the signing team for the entirety or at least part of the two-year period.²⁵⁶ Under this exception, the "Early Bird" player may receive up to 175% of his salary from the last season of his prior contract or 108% of the average player salary from the prior season, whichever is greater.²⁵⁷ Such a contract may be for up to five years in length.²⁵⁸

The final form of the Veteran Free Agent exception is the Non-Qualifying Veteran Free Agent—or Non-Bird—exception. Teams may use this exception to sign veteran free agents who do not fall into the Qualifying Veteran Free Agent or Early Qualifying Veteran Free Agent

²⁴⁶ *CBA Basics: Owners, Players Brace for Negotiations*, NBA.COM (Nov. 17, 2010) <http://www.nba.com/2010/news/11/17/labor-primer/index.html>.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ Coon, *supra* note 199.

²⁵⁰ Matt Tolnick, *A Harder Soft Cap: Exploring the Possibilities*, HOOPSHYPE.COM (Jan. 6, 2011) <http://blogs.hoopshype.com/blogs/tolnick/2011/01/06/a-harder-soft-cap-exploring-the-possibilities/> [hereinafter Tolnick, *A Harder Soft Cap*]; Coon, *supra* note 199.

²⁵¹ *CBA Basics*, *supra* note 246; Coon, *supra* note 199.

²⁵² *CBA Basics*, *supra* note 246; Coon, *supra* note 199.

²⁵³ Coon, *supra* note 199.

²⁵⁴ Tolnick, *A Harder Soft Cap*, *supra* note 250.

²⁵⁵ *CBA Basics*, *supra* note 246; Coon, *supra* note 199.

²⁵⁶ *CBA Basics*, *supra* note 246; Coon, *supra* note 199.

²⁵⁷ *CBA Basics*, *supra* note 246.

²⁵⁸ Coon, *supra* note 199.

categories for a salary of up to the greatest of 120% of the player's previous season salary, 120% of the minimum salary, or the amount needed to tender a qualifying offer.²⁵⁹

The Mid-Level Salary Exception allows a team to exceed the cap by signing one or more free agents to a salary of up to the league's "average salary" for the prior year.²⁶⁰ Because this exception allows for raises of up to 8% of the salary in the first year of the contract,²⁶¹ the total amount which a player or players can receive under this exception is actually 108% of the league average player salary for the previous season.²⁶² This 108% limit can be divided up between more than one player, and the fact that it may be used to sign a player to a multi-year deal does not prevent the team from using the exception to sign a different player in the following year.²⁶³

Another characteristic of the NBA CBA that allows for spending over the cap is the luxury tax system. Rather than specifically prohibiting teams from exceeding the salary cap, the CBA requires that teams who do exceed the salary cap pay a dollar-for-dollar tax to the extent that the team's total player salaries exceed the salary cap amount.²⁶⁴ Thus, if the salary cap is set at \$70 million, a team with a salary of \$74.5 million will be required to pay \$4.5 million in luxury tax.²⁶⁵

In addition to those already mentioned, several other exceptions to the salary cap exist. These include the Non-Qualifying Veteran Free Agent exception, the Bi-Annual exception, the Rookie exception, the Minimum Salary exception, the Disabled Player exception, and the Traded Player exception.²⁶⁶ What is important to note at this point is that the NBA's soft salary cap is subject to many more exceptions than are the NHL's and NFL's hard salary caps.

IV. Potential Effects of the NBA's Salary Cap on the CBA Negotiations

A. What the League and the Union Want

The 2005 NBA CBA contained an option for the league to extend the agreement past the 2011-12 season.²⁶⁷ However, the NBA showed little interest in picking up such an option by its December 15, 2010 deadline.²⁶⁸ Why? The simple answer is, of course, money. The more complicated answer has to do with the league's claim that it has lost money in very large amounts since the 2005 CBA went into effect.²⁶⁹ Specifically, David Stern claims that the NBA has lost more than \$1 billion since the beginning of the deal and that several teams have been in

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *CBA Basics*, *supra* note 246.

²⁶³ Coon, *supra* note 199.

²⁶⁴ *CBA Basics*, *supra* note 246.

²⁶⁵ *See id.* (giving an similar example which explains how much luxury tax is required in a situation where a team exceeds the salary cap).

²⁶⁶ *Id.*; Coon, *supra* note 199.

²⁶⁷ *CBA Basics*, *supra* note 246.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

the red for the past few seasons as well.²⁷⁰ For example, a study in *Forbes* claims that 12 NBA teams lost money during the 2008-2009 season.²⁷¹

Player representatives counter by pointing out that the NBA's financial position cannot possibly be as bad as league representatives claim given that the league has enjoyed record-setting revenues in the past couple of years.²⁷² Indeed, NBA revenues have increased each year since the two sides implemented the 2005 CBA, and this has translated to an overall revenue increase of \$469 million in that time.²⁷³ NBPA executive director Billy Hunter argues that the high-priced acquisitions that took place during the summer of 2010 indicate that the owners of NBA teams have plenty of money to spend and are therefore not suffering financially.²⁷⁴ Additionally, the players point to the fact that the mega-deals of last summer—principally the LeBron James signing—led to the highest level of season-ticket sales in years.²⁷⁵

NBA officials do not deny that there have been record increases in revenue and ticket sales.²⁷⁶ The problem, they argue, is that inherent costs in the system have prevented many teams—and the league in general—from turning losses into profits.²⁷⁷ David Stern has stated publicly that his goal for the upcoming labor negotiations is “to get profitable [and] have a return on investment.”²⁷⁸ Because the majority of the aforementioned costs come from, not surprisingly, player salaries, Stern believes that his goal of profitably will require a salary reduction of \$750 to \$800 million.²⁷⁹ Although David Stern has not explicitly called for a hard salary cap, having merely called it an “interesting detail,”²⁸⁰ the NBA did include it in its initial February 2010 proposal to the union.²⁸¹ It is clear that the NBA sees a hard salary cap as a means of achieving a reduction in salary costs and moving towards overall profitability for the league. Thus, there is no reason to believe that a hard salary cap—or at least a stricter one—will not be high on the NBA's list of priorities as negotiations between the two sides intensify.

B. Analysis

As the 2010-11 season draws to a close and the June 30 expiration of the CBA nears,²⁸² it is difficult to predict what the short and long term effects of the NBA's insistence on a harder salary cap and a general reduction in costs will be. However, the history of labor negotiations in not only the NBA, but also the NFL and NHL provide a great deal of valuable insight into the ramifications on this impending dispute.

²⁷⁰ *Id.*

²⁷¹ Tolnick, *CBA Discussions*, *supra* note 235.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *CBA Basics*, *supra* note 246.

²⁷⁶ *Id.* (quoting NBA deputy commissioner as admitting that the league reported “record season ticket sales over the summer and otherwise very robust revenue generation”).

²⁷⁷ *Id.*

²⁷⁸ Tolnick, *CBA Discussions*, *supra* note 235.

²⁷⁹ *Id.*

²⁸⁰ Tolnick, *A Harder Soft Cap*, *supra* note 250.

²⁸¹ *David Stern: NBA Talks Must Intensify*, *supra* note 2.

²⁸² *CBA Basics*, *supra* note 246.

1. Labor Stoppage?

It is completely possible that even after the June 30 expiration of the CBA, the two sides will continue to bargain with each other in good faith. If this indeed becomes the case, the terms of the expired agreement would continue to remain in effect and the teams could carry on their off-season activities.²⁸³ However, the league has indicated that it is prepared to lock the players out on July 1 if the parties are not close to a deal.²⁸⁴ It would be motivated to do so immediately by the fact that many players receive their pay during the offseason, and acting without delay would keep the players from being paid and would subsequently work to save teams money.²⁸⁵

Given the current state of the negotiations and the inability of the two sides to reach any agreements up to this point, it seems possible, if not likely, that the owners will lock the players out in order to gain concessions to their demands. Indeed, NBPA executive director Billy Hunter has admitted that if the league continues to stick to its demands—such as a hard salary cap, a 40% reduction in player salaries, and the elimination of guaranteed contracts—the result will likely be a lockout and cancellation of at least part of the 2011-12 season.²⁸⁶

This would not be the first time that a league has locked out its players over a salary cap dispute. In fact, the situation which led to the 2004-05 NHL lockout bore many resemblances to the NBA's current situation. Like the NHL owners during the period leading up to the lockout, who argued that too much of the league revenues were going to players and that several teams and the league itself were losing money,²⁸⁷ the NBA and its officials now claim that the league and several of its teams are losing money because player salaries are too high.²⁸⁸ The NHL owners prior to the 2004-05 lockout saw controlling player salaries as the only way they would be able to establish "cost certainty" and thereby maintain financial stability,²⁸⁹ and today David Stern and the NBA owners seek to increase the profitability of the league by reducing costs associated with player salaries by \$750 to \$800 million.²⁹⁰

There are many similarities between the NBA's current state and the situation surrounding the NHL prior to the 2004-05 lockout. Of course, this does not mean NBA games will be lost or even that a lockout will occur, but if the NBA is ever to achieve the reduced costs that a hard salary cap will likely bring, how else will they achieve it? What do they have to offer the players in exchange for a hard salary cap? In the case of the NFL, the NFLPA only agreed to the hard salary cap when it was able to obtain unrestricted free agency from the NFL.²⁹¹ Unfortunately for David Stern and NBA owners, the NBA agreed to unrestricted free agency for players finishing their contracts back in 1996.²⁹² At this point, it appears that the NBA does not have anything as substantial as unrestricted free agency to offer the players in exchange for a

²⁸³ *David Stern: NBA Talks Must Intensify*, *supra* note 2.

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *CBA Basics*, *supra* note 246.

²⁸⁷ Staudohar, *supra* note 59, at 24-25.

²⁸⁸ *CBA Basics*, *supra* note 246.

²⁸⁹ Liebman, *supra* note 7, at 92.

²⁹⁰ *CBA Basics*, *supra* note 246.

²⁹¹ Adams, *supra* note 141.

²⁹² Bradley, *supra* note 172.

hard salary cap. Consequently, if NBA officials and owners want a strict hard salary cap in the same vein as the NHL and NFL salary caps—not just a less soft cap with fewer exceptions—their only choice may be a resilient and potentially lengthy lockout.

2. Resort to the Courts?

If the NBA moves forward with plans to lock the players out after the expiration of the CBA, what will be the players' next move? Will the NBPA follow suit with the NFLPA by decertifying to allow the players to file antitrust suits against the NBA? It appears that that is also a very good possibility, given that Hunter has reportedly already collected enough signatures to approve a vote for decertification.²⁹³ The NBPA does have a history of filing antitrust suits to gain concessions from the league, having done so in 1970 with the *Robertson* case²⁹⁴ and again in 1987 in *Bridgeman*.²⁹⁵ Additionally, several players within the union favored decertification during the labor dispute that occurred after the 1994-95 season.²⁹⁶ Nevertheless, the whole contingent of players within the union voted against decertification by a 226-134 vote,²⁹⁷ which could suggest that the NBPA is less willing to use decertification as a tactic in CBA negotiations. The implications of the union's failure to decertify in 1995 is even more significant given the fact that the owners' demands in that dispute included a tighter salary cap and a luxury tax system,²⁹⁸ and the owners' demands in the current dispute also include a tighter—if not hard—salary cap.²⁹⁹ While it is true that Hunter has collected enough names for a decertification election to take place,³⁰⁰ the NBPA's non-action in 1995 despite several players' call for decertification suggests that it may not be willing to take a step as drastic as decertification where the salary cap is one of the main issues.

What kind of implications could Judge Nelson's injunction and the subsequent stay on said injunction by the Eighth Circuit have on potential litigation between the NBA and the NBPA? The short answer is probably "not much." First of all, part of Judge Nelson's underlying reasoning for issuing the injunction was that the NFL had not show that any of its teams were losing money, and therefore the NFL did not sufficiently demonstrate that it would suffer harm if she issued an injunction.³⁰¹ The NBA, on the other hand, has been able to show that several of its teams are losing money.³⁰² This is in addition to the more obvious reasons that the NBPA would likely file its suit in New York rather than in Minnesota, where the NFL lawsuit is taking place, and therefore the New York federal district court would be under no obligation to follow Judge

²⁹³ Ken Berger, *NFL Ruling a Victory for NBA Players*, CBSSPORTS.COM (Apr. 25, 2011) <http://ken-berger.blogs.cbssports.com/mcc/blogs/entry/11838893/28816625>.

²⁹⁴ See *Robertson*, 72 F.R.D. at 65.

²⁹⁵ See *Bridgeman*, 675 F. Supp at 961-62.

²⁹⁶ Bradley, *supra* note 172.

²⁹⁷ *Id.*

²⁹⁸ Bradley, *supra* note 172.

²⁹⁹ *David Stern: NBA Talks Must Intensify*, *supra* note 2.

³⁰⁰ Berger, *supra* note 293.

³⁰¹ Michael McCann, *Recent NFL Ruling Could Drastically Alter NBA's Labor Strategy*, SI.COM (Apr. 27, 2011)

http://sportsillustrated.cnn.com/2011/writers/michael_mccann/04/26/nfl.ruling.nba.impact/1.html.

³⁰² *Id.*; Tolnick, *CBA Discussions*, *supra* note 235.

Nelson's decision.³⁰³ Furthermore, many elements of the NFL lawsuit are still pending, as evidenced by the Eighth Circuit's decision to grant a stay of the injunction, so no one is certain if Judge's Nelson's decision will carry any weight at all in the end.³⁰⁴

3. What Might a Compromise Look Like?

If what they say is true, neither of the two sides favors resorting to either a labor stoppage or a battle in the courtroom. According to NBPA president and Los Angeles Lakers point guard Derek Fisher, "[w]e don't want a lockout . . . There's no desire on our part to not play basketball in 2011-12."³⁰⁵ David Stern, for his part, has stated that he and Billy Hunter agree that all steps should be taken to avoid involving the NLRB or the federal courts in the dispute.³⁰⁶

So what will it take for the two sides to reach a compromise that would avoid any sort of legal battle or any loss of games? Unfortunately for Stern and the NBA, any solution which avoids such a battle cannot include a hard salary cap similar to those in the NHL and NFL. The Union has already expressed its resolve to fight any proposal that includes a hard cap, and given the circumstances the threat of decertification and an antitrust lawsuit is too real for the NBA to ignore. Therefore, to reach such a compromise the NBA will have to relent on its hard cap proposal.

That is not to say, however, that a compromise between the two parties could not include a significant tightening of the cap through the elimination of at least a few of its exceptions. Although the NBA may not have much to offer the players in exchange for their demands, the NBPA must nevertheless realize that salaries cannot continue to grow at the present rates if the league is to remain viable. Although some would argue that allowing teams like the Lakers and Heat to stockpile superstars and role players using the Bird Exception is great for ratings, revenues, and season ticket sales,³⁰⁷ the truth is that such exceptions significantly harm small-market teams without billionaire owners because they cannot pay that kind of money to compete. Stern and the NBA owners must emphatically point out to the players that a league with no parity in which franchises are struggling to get by or moving from city to city is neither healthy nor sustainable.

Matt Tolnick argues that the solution to this problem should involve a derivation of the "franchise player" system that the NFL utilizes.³⁰⁸ Essentially, Tolnick's proposal would restore the Bird Exception to its original purpose of protecting only true franchise players by permitting teams to have on their roster only one Qualifying Veteran Free Agent—i.e. Bird Veteran—whose salary causes the team to exceed the cap.³⁰⁹ The team would then not be allowed to sign

³⁰³ McCann, *supra* note 301, at 2.

³⁰⁴ *Appeals Court Restores NFL Lockout*, *supra* note 150.

³⁰⁵ *CBA Basics*, *supra* note 246.

³⁰⁶ Berger, *supra* note 293.

³⁰⁷ See e.g. *CBA Basics*, *supra* note 246 (noting the players' argument that high revenues and ticket sales in the past year indicate that the league's situation is not as dire as the NBA alleges).

³⁰⁸ Tolnick, *A Harder Soft Cap*, *supra* note 250.

³⁰⁹ *Id.*

any other free agent whose salary would bring the team over the cap.³¹⁰ In this way, the aforementioned player would become the team's "franchise player."³¹¹

V. Conclusion

Despite claims from the NBA and the NBPA that each wants to reach an agreement before any NBA games are lost, the fact remains that both a labor stoppage and court battle remain a very real threat to the stability of the league. The union will likely not accept a truly hard salary cap, and the league's insistence on it could lead to fruitless negotiations and the expiration of the CBA on June 30. At that point, it is very possible that the league will impose a lockout and that the union will respond with decertification and an antitrust law suit.

It is unclear what a compromise satisfactory to both sides would look like. Matt Tolnick provides the best example of a compromise which would limit player spending, increase parity and competition in the league, and still allow teams to keep at least one of their superstars. Owners would likely agree to this deal, as it has the potential to significantly reduce player spending, but players may reject this as eliminating too many of the current salary cap exceptions. Owners may be willing to carry over a few more of the existing exceptions, but the softer the players try to make the new salary cap, the more likely it becomes that the owners will resort to a lockout.

³¹⁰ *Id.*

³¹¹ *Id.*