The NBA Salary Cap: Controlling Labor Costs Through Collective Bargaining

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The economic viability of the National Basketball Association (NBA) is dependent upon maintaining fan interest, which, in turn, creates revenue through attendance at games and by selling broadcast rights to television networks and cable stations. In 1983, the NBA and the National Basketball Players Association (NBPA) agreed to limit the aggregate amount each team in the league may spend annually on player salaries.


The parties created the salary cap\(^3\) in response to the declining revenues of some teams and to enhance the competitive balance among teams.\(^4\)

Recognizing the need for economic stability, the players agreed to the salary cap despite its negative effects on salaries, player movement, and free agency.\(^5\) The NBA negotiated the terms of the salary cap with the NBPA, acting as the bargaining agent for the players, and the parties subsequently added the salary cap provision to the 1980 collective bargaining agreement.\(^6\) However, the collective bargaining agreement negotiated between the NBA and the NBPA expired at the conclusion of the 1993-94
season. Therefore, it is uncertain if the salary cap, or other labor provisions, will be included in future agreements.

Labor issues in the NBA have been the subject of collective bargaining since the judicial determination of Robertson v. NBA. In Robertson, NBA players filed a class action suit alleging that various NBA labor practices violated antitrust laws. The United States District Court for the Southern District of New York indicated that the labor provisions probably would fail an antitrust challenge. The district court, however, encouraged the parties to settle the dispute through collective bargaining, thereby qualifying the agreement between the NBA and the NBPA for a nonstatutory labor exemption from antitrust laws.

The traditional approach for evaluating labor disputes in other industries is to balance the goals of labor policy and antitrust laws. Antitrust laws seek to promote competition within a given industry, while labor laws seek to encourage resolution of disputes between labor and management through collective bargaining. When labor provisions result from collective bargaining, courts may shield the provisions from antitrust scrutiny by granting a nonstatutory labor exemption.

Professional sports leagues present a unique problem for courts evaluating labor disputes because teams within a league are not economic competitors. Instead, the teams are dependent upon the financial success of the other

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8. See id.
10. Id. at 872-73.
11. Id. at 895.
12. Id. For a discussion of nonstatutory labor exemptions, see infra part I.B.
13. D. Albert Daspin, Note, Of Hoops, Labor Dupes and Antitrust Ally-Oops: Fouling Out the Salary Cap, 62 IND. L.J. 95, 95 (1986) (stating that the goal of labor legislation is to encourage collective bargaining, while the goal of antitrust legislation is to promote competition).
14. Id.
15. See id. at 95-96.
16. See United States v. National Football League, 116 F. Supp. 319, 323 (E.D. Pa. 1953). One issue addressed was whether professional teams compete economically, because teams within a league are financially interdependent. Id. This economic interdependence differentiates professional sports from other industries in which companies generally seek an economic advantage over each other. Id.; see Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1391 (9th Cir.) (holding that National Football League (NFL) teams are not competitors and, therefore, the Sherman Act protections do not apply), cert. denied, 469 U.S. 990 (1984); Smith v. Pro Football, Inc., 593 F.2d 1173, 1178-79 (D.C. Cir. 1978) (stating that NFL teams are not economic competitors). But see Chicago Professional Sports Ltd. Partnership v. NBA, 961 F.2d 667, 672 (7th Cir.) (suggesting that the NBA is a joint venture only in the production of its games, but is analogous to a cartel in the sale of its television rights, thus requiring an antitrust exemption for the owners to act cooperatively), cert. denied, 113 S. Ct. 409 (1992).
teams for economic viability. Therefore, the economic interdependence between teams in professional sports necessitates the use of joint labor provisions among teams, which may encompass unacceptable restraints on trade in another industry.

Judicial resolution of labor disputes within professional sports leagues favors granting a nonstatutory labor exemption to antitrust laws if there is evidence of collective bargaining. The United States Court of Appeals for the Eighth Circuit set forth a three-pronged test in Mackey v. National Football League, which serves as the standard for evaluating antitrust challenges in professional sports. No guideline as clear as Mackey, however, exists for challenges to labor provisions under labor law principles rather than under antitrust laws.

Courts have interpreted certain provisions within the collective bargaining agreement negotiated between the NBPA and the NBA. Be-

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17. See National Football League, 116 F. Supp. at 323 (stating that if professional teams in a league compete economically with each other, then the stronger teams will bankrupt the weaker teams, which will cause the entire league to fail).

18. WEISTART & LOWELL, supra note 1, at 595 (recognizing that professional sports leagues assert that collective action, which may not survive antitrust scrutiny if adopted by a different type of industry, is essential to their existence and that restraining players' movement between teams is reasonable to maintain the league as a viable entity); see also Los Angeles Memorial Coliseum Comm'n, 726 F.2d at 1391 (holding that NFL teams are not competitors and, therefore, the Sherman Act protections do not apply); Smith, 593 F.2d at 1178-79 (stating that NFL teams are not economic competitors). Commentators have stated that courts have failed to establish acceptable analytic parameters for the reasonableness of agreements within professional sports as they relate to section 1 of the Sherman Act. Paul J. Tagliabue, Antitrust Developments in Sports and Entertainment, 56 Antitrust L.J. 341, 348 (1987). The result has been an encroachment into managerial discretion caused by insufficient guidelines for judicial review of agreements in professional sports. Id.

19. Mackey v. National Football League, 543 F.2d 606, 612 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977); Robertson v. NBA, 389 F. Supp. 867, 895 (S.D.N.Y. 1975). When courts recognize the league as a joint venture, they have applied the "Rule of Reason" to evaluate potential antitrust implications of labor policy or other league action. Chicago Professional Sports Ltd., 961 F.2d at 673. The rule of reason analysis seeks to determine the effect of the challenged activity on the entire market in question. Id.

20. 543 F.2d at 614. The Eighth Circuit found collective bargaining to be exempt from antitrust law if: (1) the restraint of trade primarily affects only those parties participating in the collective bargaining; (2) the agreement concerns a mandatory subject of collective bargaining; and (3) the agreement is the product of bona fide arms-length bargaining. Id.

21. Id. at 623.

22. See Tagliabue, supra note 18, at 359; see also NBA v. Williams, 857 F. Supp. 1069, 1074-76 (S.D.N.Y. 1994) (stating that courts have taken four approaches to determine whether labor provisions are enforceable and continue after a collective bargaining agreement between a professional sports league and a players' union expires).

23. See Robertson, 389 F. Supp. at 895 (holding that various player restraints violated antitrust laws); see also Bridgeman v. NBA, 675 F. Supp. 960, 967 (D.N.J. 1987) (holding that the provisions of the collective bargaining agreement do not cease immediately upon the expiration of the document); In re New York Knickerbockers Basketball Club, 630 F.
cause parties negotiated the labor provisions through collective bargaining, courts generally have supported the express terms of the contract and have protected the implied intent of the provisions.24 Recently, the NBA invalidated a contract signed by a free agent player, Chris Dudley, because the league claimed the contract circumvented the salary cap provision and thus violated the collective bargaining agreement.25

The league challenged a clause in Dudley's contract that allowed Dudley to terminate the contract after one year.26 In effect, this unilateral termination right exploited a clause within the collective bargaining agreement that allows teams to exceed the salary cap when re-signing their own free agents.27 Dudley can exercise his option to terminate the contract and sign a new contract with the same team without being constrained by the salary cap.28 The league sued Dudley in the United States District Court for the District of New Jersey after a Special Master upheld the one-year out provision in the contract.29 The district court agreed with the NBA's contention that the one-year out provision significantly affected the salary cap's effectiveness in regulating player move-

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26. Id. Dudley's former team, the New Jersey Nets, offered a contract that included six years of guaranteed salary and an option year. Id. at 174-75. The salary would have paid him: $1,560,000 in 1993-94; $2,028,000 in 1994-95; $2,496,000 in 1995-96; $2,964,000 in 1996-97; $3,432,000 in 1997-98; $3,900,000 in 1998-99; and $4,368,000 in 1999-2000. Id. at 175. Instead, he accepted a contract from the Portland Trail Blazers at the following salary amounts: $790,00 in 1993-94; $1,027,000 in 1994-95; $1,264,000 in 1995-96; $1,501,000 in 1996-97; $1,738,000 in 1997-98; $1,975,000 in 1998-99; and $2,212,000 in 1999-2000. Id. Though the Trail Blazers' offer was significantly less, it included a one-year out provision, which would allow Dudley to become a free agent after the first year of his contract. Id.
28. Dudley, 838 F. Supp. at 182 (stating that the Special Master did not consider sufficiently the potential that one-year out provisions may have in weakening the salary cap). In the summer of 1994, Dudley exercised the one-year out provision in his contract and signed a new, six-year contract worth $24 million with the Trail Blazers. Robert McG. Thomas, Jr., Grant in Legal Limbo After Contract Ruling, N.Y. TIMES, Sept. 13, 1994, at B19.
29. Dudley, 838 F. Supp. at 173-74. In accordance with dispute resolution involving the terms of a collective bargaining agreement, the NBA submitted its grievance to Special Master Merrell E. Clark, Jr. Id. at 173. The Special Master ruled that the one-year out provision did not violate any express term of the collective bargaining agreement. Id. at 173-74.
The court, however, applied a clearly erroneous standard to the Special Master's ruling and upheld the con-
tract. The district court's acceptance of the Special Master's ruling is indicative of a general inclination to interpret the terms of the collective bargaining agreement narrowly.

This Comment reviews leading antitrust cases and the analytic framework used to grant certain labor practices a nonstatutory exemption from antitrust laws. Next, this Comment examines the practice of determining labor policy within the NBA through collective bargaining. Then, this Comment reviews litigation between the NBA and its member teams and players to weigh the judicial response to challenged labor provisions. This analysis focuses specifically on the salary cap. Finally, this Comment concludes that the salary cap can survive as a viable labor restraint only if its terms are amended in the next round of collective bargaining.

I. STATUTORY AND NONSTATUTORY LABOR EXEMPTIONS TO ANTITRUST LAWS

The Sherman Act is the primary legislative weapon against antitrust activities in the United States. Section 1 of the Sherman Act states that every contract or business combination in constraint of trade is illegal. On its face, the Sherman Act contains no specific language exempting the

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30. Id. at 182. Judge Debevoise stated, "If such an option is permissible, there is the potential that Dudley, if he and the teams are willing to wait a year, can negotiate with many or all the teams for a salary in excess of their salary caps." Id.

31. Id. at 180 (stating that inaccurate findings of fact, inappropriate use of the law, or an abuse of discretion will constitute finding the holding of the special master clearly erroneous).

32. Id. The Special Master acknowledged that the one-year out provision of the collective bargaining agreement has a value to the players, but did not recognize this value as included in the player's salaries. Id. at 179. The Special Master consulted the definition of "'salary'" given by the collective bargaining agreement, which includes anything of "'value.'" Id. The Special Master then proceeded to delineate his own definition of salary, which limited the definition of value to money, property, and investments. Id. at 180. Hence, the Special Master narrowly constructed how the one-year out provision in a multi-year contract is to be viewed. Id. at 179-80.


34. See Weistart & Lowell, supra note 1, at 527-28 (suggesting that the plain language and the legislative intent of the Sherman Act indicate that it was meant to apply to business transactions).

activities of labor unions. However, in 1914 Congress adopted section 6 of the Clayton Act to protect labor unions. Specifically, section 6 provides that no laws shall prohibit labor unions from carrying out their legitimate objectives. Section 20 of the same Act restricts the injunctive power of courts in limiting labor union activities. The Norris-LaGuardia Act expands these classifications of protected union activities.

36. See Weistart & Lowell, supra note 1, at 527-28 (noting that prior to 1914, some courts construed section 1 of the Sherman Act to include labor unions, which negatively impacted some union movements).


The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Id.

39. Id. § 20, 38 Stat. at 738 (current version at 29 U.S.C. § 52 (1988)). Section 20 of the Clayton Act provides:

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney. And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.


Antitrust laws reflect a national policy favoring economic competition between industry participants. The goal of enhancing competition, however, must be balanced with a competing national labor policy that promotes collective bargaining, despite its anticompetitive effect. Courts must weigh both the concerns of economic competitors seeking to enhance profitability and labor unions promoting collective bargaining.

A. The Statutory Exemption

In *United States v. Hutcheson,* the United States Supreme Court considered the validity of union activities within the statutory framework of labor and antitrust laws. In *Hutcheson,* a carpenters union was accused of violating section 1 of the Sherman Act by stimulating strikes by workers and a boycott of Anheuser-Busch. The Supreme Court held that the Sherman Act, sections 6 and 20 of the Clayton Act, and the Norris-LaGuardia Act are intended to be read together, forming the analytic framework by which the legality of union activities are judged. Accordingly, the Court ruled that Congress intended that union activities benefit from a statutory exemption from antitrust laws, provided that the union did not combine with a nonunion group.

41. Sherman Antitrust Act, § 1, 15 U.S.C. § 1 (1988). Section 1 of the Sherman Act 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." *Id.*

42. See Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 636 (1975) (noting the delicate balance between organized labor and federal antitrust laws and stating that union activities affect the competition among employers, but that such effects cannot violate antitrust laws without undermining the intent of federal labor laws).

43. Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers, 325 U.S. 797, 806 (1945) (stating that courts are responsible for interpreting congressional intent regarding the degree to which collective bargaining may impinge on the maintenance of an unrestrained economic environment), *superseded by statute as stated in* Brotherhood of Maintenance of Way Employees v. Guilford Transp. Indus., Inc., 803 F.2d 1228 (1st Cir. 1986).

44. 312 U.S. 219 (1941), *superseded by statute as stated in* Brotherhood of Maintenance of Way Employees v. Guilford Transp. Indus., Inc., 803 F.2d 1228 (1st Cir. 1986).

45. *Id.* at 232, 236 (finding that union activities do not violate the Sherman Act, the Clayton Act, or the Norris-LaGuardia Act).

46. *Id.* at 220-22 (stating that the union attempted to drive Anheuser-Busch from the interstate market during a jurisdictional dispute with another union).

47. *Id.* at 231 (stating that reading the statutes together provides a complete framework of allowable union conduct).

48. *Id.* at 232 (noting that conduct falling under section 20 of the Clayton Act does not constitute a crime within the general terms of the Sherman Act).
In *Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers*, the Supreme Court confirmed the *Hutcheson* ruling by clearly stating that statutory labor exemptions are conditional upon unions acting alone or solely with other labor groups. The Court held that agreements between unions and nonunion groups undermine congressional intent to end monopolies by effectively fixing prices among business groups. In *Allen Bradley Co.*, contractors committed to purchase equipment only from manufacturers employing the union’s members.

### B. The Nonstatutory Exemption

The Supreme Court aided congressional attempts to encourage collective bargaining under the National Labor Relations Act (NLRA) by creating a nonstatutory labor exemption. This exemption extends limited antitrust protection to agreements that are the product of collective bargaining between labor unions and nonunion groups. The Supreme Court established the parameters of the nonstatutory exemption in two leading cases: *United Mine Workers v. Pennington* and *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*

In *Pennington*, the Court refuted the union’s assertion that a collective bargaining agreement automatically will receive a nonstatutory exemption from antitrust laws. The case centered on an attempt to control the...
production of coal through a collective bargaining agreement between the United Mine Workers Union and various coal producers.\textsuperscript{58} Specifically, the union made concessions regarding mechanized production in return for increased wages for its members.\textsuperscript{59} Furthermore, the union agreed to impose similar wage scales on other coal producers regardless of their ability to pay the increased production costs.\textsuperscript{60} The union claimed that the agreement qualified for a nonstatutory labor exemption because wages were proper subjects of collective bargaining.\textsuperscript{61}

Justice White, writing for the majority, conceded that while negotiating employment terms and wages is a proper union activity,\textsuperscript{62} such an agreement between a union and an employer cannot affect an entire industry.\textsuperscript{63} In denying a nonstatutory exemption to the agreement in \textit{Pennington}, the Court stated that union control of product markets was not a legitimate union goal and, thus, was not within the protections provided by federal labor policy.\textsuperscript{64}

The Supreme Court clarified the analytic framework governing nonstatutory labor exemptions and their relation to union activities in \textit{Jewel Tea Co.}\textsuperscript{65} by holding that a restriction on marketing hours in a collective bargaining agreement between the union and various meat retailers qualified for a nonstatutory exemption from the Sherman Act.\textsuperscript{66} The Court

\begin{itemize}
\item \textsuperscript{58} Id. at 659-60. Because the parties considered overproduction a major concern, the union and the larger operators agreed to eliminate smaller companies and to exclude the marketing, sale, and production of nonunion coal. \textit{Id.}
\item \textsuperscript{59} Id. at 660. The union also abandoned efforts to control miners' hours. \textit{Id.}
\item \textsuperscript{60} Id.
\item \textsuperscript{61} Id. at 664. Because statutory exemptions are not available for union-employer agreements, any exemption must result from judicially created nonstatutory exemptions. \textit{Id.} at 662-63.
\item \textsuperscript{62} Id. at 666 (the Court recognized that obtaining uniformity of labor standards is a legitimate union goal).
\item \textsuperscript{63} Id. Justice White stated, "[T]here is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry." \textit{Id.}
\item \textsuperscript{64} Id. at 665-67 (noting that a union can best serve its members by responding to each bargaining situation individually rather than by attempting to control the product market).
\item \textsuperscript{65} 381 U.S. 676 (1965), \textit{superseded by statute as stated in} Brotherhood of Maintenance of Way Employees v. Guilford Transp. Indus., Inc., 803 F.2d 1228 (1st Cir. 1986). This case involved the legality of a collective bargaining agreement that limited the hours of operation of meat markets. \textit{Id.} at 680-81. The defendant union demanded that restrictions on hours of operations be included in the collective bargaining agreement. \textit{Id.} The plaintiffs claimed that the restriction violated sections 1 and 2 of the Sherman Act because it adversely affected their ability to compete freely within the industry. \textit{Id.} at 681.
\item \textsuperscript{66} Id. at 689-90 (explaining that the marketing hours restriction was intimately related to wages and working conditions and was exempt from the Sherman Act).
\end{itemize}
determined that the agreement resulted from bona fide, arm's-length bargaining and did not involve a nonlabor group. Thus, the Court held that ancillary effects on the product market were insufficient to negate the collective bargaining and to advance the interests of union members.

In Connell Construction Co. v. Plumbers & Steamfitters Local No. 100, the Supreme Court clarified the Jewel Tea Co. balancing approach that weighed the benefits of a collective bargaining agreement and its effect on product markets. Considering the acceptability of a hot cargo agreement, the Court determined that the market restraints imposed by these agreements exceeded those allowable under the balancing approach. Therefore, if a collective bargaining agreement substantially affects market conditions without promoting legitimate union concerns, courts will not grant antitrust immunity.

II. THE NONSTATUTORY LABOR EXEMPTION AND THE NATIONAL BASKETBALL ASSOCIATION

The NBA operates as a joint venture between twenty-seven member teams. Like other professional sports leagues, the NBA is dependent

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67. Id. (stating that because a nonunion group initiated this agreement it was entitled to consideration for a Sherman Act exemption).
68. Id. at 690-92; see also id. at 690 n.5 (stating that the crucial determinant is not the form of the agreement but rather it is the relative impact on the product market and the interests of the union members, keeping in mind the federal policy that encourages collective bargaining).
70. Id. at 622 (commenting that labor policy favoring association of employees never could be achieved without some ancillary effects on business competition).
71. Id. at 618-21. The hot cargo agreement was a collective bargaining agreement between the union and local contractors requiring the contractors to hire only subcontractors who were parties to the collective bargaining agreement. Id.
72. Id. at 621-23. The Court applied the same analytic approach used in Jewel Tea Co. Id. at 622-23. The Court noted, however, that the Connell Construction Co. Court did not find a policy reason justifying the direct market restraint based on the advancement of legitimate union concerns. Id. at 625-26.
73. See id. at 624-26. The union had control over the subcontract work offered by general contractors, threatening both the product market and consumers. Id.
74. See Chicago Professional Sports Ltd. Partnership v. NBA, 961 F.2d 667, 672-73 (7th Cir.), cert. denied, 113 S. Ct. 409 (1992). The Chicago Professional Sports Ltd. case involved the sale of television broadcast rights of NBA games. Id. In deciding whether the NBA was a joint venture, the United States Court of Appeals for the Seventh Circuit stated that characterization of the league's teams and their interaction as a joint venture "is a creative rather than exact endeavor." Id. at 672. Consequently, the Seventh Circuit deferred to the district court's determination that the NBA is a "joint venture in the production of games but more like a cartel in the sale of its output." Id. In making this determination, the Seventh Circuit analogized the marketing strategies and sale of television rights of NBA games to the creation of a television series. Id.
upon the financial success of each team for economic viability.\textsuperscript{75} One factor that affects the financial performance of the league is its ability to attract an audience.\textsuperscript{76} Consequently, teams seek to maintain competitive parity and to enhance audience appeal by limiting player movement between teams.\textsuperscript{77} Limiting player movement controls operating costs by discouraging open-market bidding wars between teams for a player’s services.\textsuperscript{78}

The collective bargaining agreement between the NBA and the NBPA represents the negotiated working conditions for the league players.\textsuperscript{79} The collective bargaining agreement includes a uniform player contract that each player must sign, specific salary cap provisions, other criteria regulating employment within the league, as well as the corresponding rights granted to players.\textsuperscript{80} The NBA players compelled the league to negotiate the labor provisions through collective bargaining by alleging that past league operating practices violated antitrust laws.\textsuperscript{81}

Courts evaluate labor practices, developed unilaterally by the league’s teams, under traditional antitrust criteria.\textsuperscript{82} In Robertson \textit{v. NBA},\textsuperscript{83} the


\textsuperscript{76} Levine, \textit{supra} note 1, at 73 (describing the ownership and operating characteristics of NBA teams that are consistent with the characteristics ascribed to joint ventures). Cooperation between the teams comprising a professional sports league is necessary to create an environment that enhances competition among the teams in the league. \textit{See Chicago Professional Sports Ltd.}, 961 F.2d at 672. The economic viability of a professional sports league is dependent upon its ability to market a product capable of attracting an audience, despite competition from other sports and other forms of entertainment. \textit{Id.}

\textsuperscript{77} Levine, \textit{supra} note 1, at 73, 98-99. Competitive parity is achieved by distributing the NBA’s most talented players evenly throughout the league. \textit{Id.}

\textsuperscript{78} \textit{Id.} at 73 (asserting that bidding wars begin when owners, regardless of their financial situation, offer free agents large salaries in an effort to procure the services of the best players).

\textsuperscript{79} \textit{See Agreement}, \textit{supra} note 3, at i-2.

\textsuperscript{80} \textit{Id.} The Agreement also notes exceptions to the salary cap and other labor provisions negotiated between the league and the players.

\textsuperscript{81} \textit{See Bridgeman} \textit{v. NBA}, 675 F. Supp. 960, 962 (D.N.J. 1987) (alleging that past operations including the college draft, the uniform player contract, and the reserve clause were violations of federal antitrust laws); Wood \textit{v. NBA}, 602 F. Supp. 525, 527 (S.D.N.Y. 1984), \textit{aff’d}, 809 F.2d 954 (2d Cir. 1987); Robertson \textit{v. NBA}, 389 F. Supp. 867, 873-75 (S.D.N.Y. 1975).

\textsuperscript{82} \textit{See, e.g., Wood} \textit{v. NBA}, 809 F.2d 954, 958-62 (2d Cir. 1987); Robertson, 389 F. Supp. at 884-90. In \textit{Wood}, the Second Circuit stated that Connell Construction \textit{Co., Jewel Tea Co.}, and \textit{Pennington} were “so clearly distinguishable that they need not detain us.” \textit{Wood}, 809 F.2d at 963.

\textsuperscript{83} 389 F. Supp. at 867, 886-87. The district court ruled that players have standing to bring suit against professional sports leagues despite congressional intent to encourage settling labor disputes through collective bargaining. \textit{See id.} at 882-83. According to section 4 of the Clayton Act, any person injured in his business because of an action forbidden by the antitrust law has standing to bring suit against an employer. \textit{Id.} at 882 (citing Clayton Act, § 4, 15 U.S.C. § 15). In professional sports, courts generally have granted standing to
United States District Court for the Southern District of New York evaluated labor provisions that NBA players challenged in a class action suit under the balancing approach established in Pennington.84 Jewel Tea Co.,85 and Connell Construction Co.86 The district court’s holding in Robertson indicated that labor practices deemed necessary by the league would fail antitrust scrutiny unless they resulted from collective bargaining.87

A. Robertson v. NBA: The Precursor to Collective Bargaining

In 1970, NBA players brought a class action suit alleging that various league practices violated sections 1 and 2 of the Sherman Act and sections 4 and 6 of the Clayton Act.88 The suit, brought on behalf of all present and future NBA players, sought relief from the league’s college

players bringing suit against the league for potentially damaging practices, such as player restraint clauses. Id. at 883.

The NBA argued in Robertson that the players could not bring suit against the league because the contested labor practices were covered by a labor exemption from antitrust laws. Id. at 884. The Robertson court denied this claim because labor exemptions, which have their statutory basis in sections 6 and 20 of the Clayton Act, are only available for union actions. Id. at 884-85. Congress intended these sections to protect union activities without also offering protection to the activities of employers. Id. Employers may be exempt from antitrust action, however, if the specific labor practice has been the subject of collective bargaining. Id. at 886. Based on the precedent set in Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972), the court stated that such an exemption is predicated on the labor practice being “the ‘subject of serious, intensive, arm’s length collective bargaining.’ ” Robertson, 389 F. Supp. at 895 (quoting Philadelphia World Hockey Club, Inc., 351 F. Supp. at 499). The Robertson court indicated that the NBA’s assertion that the NBPA would have agreed to player restraints lacked credibility, but, nevertheless would be determined at a trial on the merits. Id. The possibility that an exemption existed, however, spawned a willingness on the part of the Robertson court to consider evidence of negotiations between the NBA and the NBPA. Id. at 884-90. It appears that the Robertson court agreed with the court in Philadelphia Hockey Club, Inc. that the labor exemption will apply only when the union has approved of the labor action, not when the employer’s actions were unilateral. Id.

84. 381 U.S. 657, 665-66 (1965) (holding that a union can make agreements with multiemployer bargaining units, but forfeits antitrust exemptions when it agrees with one employer to impose a wage scale on other bargaining units); see supra note 53 and accompanying text.

85. 381 U.S. 676, 689 (1965) (holding that exempting union-employer agreements from the Sherman Act is intended to accommodate labor law policy), superseded by statute as stated in Brotherhood of Maintenance of Way Employees v. Guilford Transp. Indus., Inc., 803 F.2d 1228 (1st Cir. 1986); see supra note 54 and accompanying text.

86. 421 U.S. 616, 621-26 (1975) (holding that an agreement between the union and employer did not qualify for a nonstatutory exemption because it imposed direct restraints on competition among subcontractors by excluding any nonunion firm); see supra note 51 and accompanying text.


88. Id. at 872.
draft, the uniform player contract, the reserve clause, and various other practices that the players characterized as blacklisting and group boycotts. Commonly, players entered into the league by selection in a college draft and the team that drafted the player retained the rights to that player's services indefinitely. League teams were free to sell or trade a player's rights, while a player had no comparable right to negotiate with another team. Every team in the league engaged in these practices, thus restricting player movement.

The players contended that such restraints violated section 1 of the Sherman Act, which prohibits any contract restraining trade.

In evaluating whether the challenged practices violated the Sherman Act, the United States District Court for the Southern District of New York utilized Supreme Court precedent in applying the "per se" and "rule of reason" tests. The per se test for unreasonableness examines

89. Each NBA team is given the exclusive right to select college players and thereafter retains the exclusive right to negotiate for the players' services. Id. at 874. Players are not free to negotiate to play for any other team in the league for as long as the drafting team retains their rights. Id.

90. After being drafted, every player must sign a "National Basketball Association Uniform Contract" (Uniform Contract) to play with a team in the NBA. Id. Veteran players sign a Uniform Contract each year. Id. The contract provides that the player will play for that particular team until he is "sold" or "traded" to another team. Id.

91. "The Reserve Clause is a part of the Uniform Contract which, if a player refuses to sign the Uniform Contract for the next playing season, empowers the club unilaterally to renew and extend the Uniform Contract for one year on the same terms and conditions including salary." Id. at 875 (emphasis omitted). "Prior to 1971, the contract could be unilaterally renewed with a 25% reduction in salary, but this provision was dropped by the NBA in 1971, and the renewal is at the same salary." Id. at 874 n.7.

92. The players cited the refusal of teams to negotiate with players who signed or refused to sign a Uniform Contract with another team, were voluntarily retired from another team, were under suspension, in military service, disabled, or injured. Id. at 874. Any team that negotiated or contracted with such a player was allegedly boycotted, blacklisted, or otherwise penalized. Id. Further, the players contended that the league banned them from negotiating with teams in the American Basketball Association, a rival league. Id.

93. Id.

94. Id.

95. Id.

96. WEISTART & LOWELL, supra note 1, § 5.07, at 592 (considering the college draft, the reserve clause, and the indemnity arrangements).

97. See supra note 41 for the text of section 1 of the Sherman Act.

98. WEISTART & LOWELL, supra note 1, § 5.07, at 592 (stating that section 1 of the Sherman Act declares "every" contract or combination in restraint of trade illegal).

99. Robertson, 389 F. Supp. at 893. Under the per se test, the plaintiff must show that a business practice plainly hinders competition and is per se unreasonable. HOLMES, supra note 35, § 1.04[1], at 160. Once the plaintiff demonstrates that a per se unreasonable event has occurred, he has satisfied the burden of proof. Id.

100. Robertson, 389 F. Supp. at 893. Under the rule of reason test, a more exhaustive examination of the trade practice is made by courts comparing the effect on competitiveness with the necessity of the business practice. HOLMES, supra note 35, § 1.04[1], at 161.
labor practices to determine whether they are so anticompetitive as to constitute a per se violation of antitrust laws.\textsuperscript{101} If a labor practice is per se unreasonable, the court can avoid the more detailed analysis necessary under the rule of reason test.\textsuperscript{102} The district court indicated that the player draft and perpetual reserve system appeared analogous to group boycotts and thus would be per se illegal.\textsuperscript{103} The court did not declare the reserve system employed by the NBA per se unreasonable because of potentially detrimental effects on competitiveness.\textsuperscript{104}

The Supreme Court established the rule of reason test in \textit{Standard Oil Co. v. United States}\textsuperscript{105} and in \textit{Board of Trade v. United States}\textsuperscript{106} as an alternative to the per se test.\textsuperscript{107} The rule of reason test determines whether a challenged restraint is justified by a legitimate business interest that imposes no greater restrictions than necessary.\textsuperscript{108} This approach considers the history and economics of the relevant industry against the reasonableness of the restraint of trade.\textsuperscript{109} If a clear economic necessity for the restriction is supported and the dominant purpose is not to re-

\begin{thebibliography}{9}
\item \textsuperscript{101} \textit{Robertson}, 389 F. Supp. at 893 (noting that using the per se test allows the court to avoid a more onerous examination under the rule of reason test).
\item \textsuperscript{102} \textit{Id.} Certain agreements are so anticompetitive that they are presumed to be illegal and do not require an elaborate inquiry into the precise harm they have caused. \textit{Northern Pac. Ry. v. United States}, 356 U.S. 1, 5 (1958). The practices that the Supreme Court has declared as per se violations of the Sherman Act include horizontal price fixing, territorial division of markets, and secondary or group boycotts. \textit{Robertson}, 389 F. Supp. at 893.
\item \textsuperscript{103} \textit{Robertson}, 389 F. Supp. at 893.
\item \textsuperscript{104} \textit{See id.} at 896. Courts, however, are hesitant to declare labor activities in professional sports per se unreasonable because of the potential for harm to the league's competitive balance. \textit{Id.} at 894.
\item \textsuperscript{105} 221 U.S. 1, 65-66 (1911).
\item \textsuperscript{106} 246 U.S. 231, 239 (1918).
\item \textsuperscript{107} \textit{See Robertson}, 389 F. Supp. at 892; \textit{see also} \textit{Northwest Wholesale Stationers, Inc. v. Pacific Stationer & Printing Co.}, 472 U.S. 284, 293-98 (1985) (determining that absent a showing of a cooperative buying arrangement, courts should apply the rule of reason analysis); \textit{National Collegiate Athletic Ass'n v. Board of Regents}, 468 U.S. 85, 104-13 (1984) (concluding that a fair evaluation of the competitive character of the members of the National Collegiate Athletic Association requires the application of the rule of reason, not the per se analysis); \textit{National Soc'y of Professional Eng'rs v. United States}, 435 U.S. 679, 690 (1978) (stating that the test "is whether the challenge contracts or acts 'were unreasonably restrictive of competitive conditions'" with "[u]nreasonableness . . . based either: (1) on the nature or character of the contracts, or (2) on the surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices").
\item \textsuperscript{108} \textit{Mackey v. National Football League}, 543 F.2d 606, 620 (8th Cir. 1976), \textit{cert. dismissed}, 434 U.S. 801 (1977); \textit{see supra} note 9 and accompanying text.
\item \textsuperscript{109} \textit{Robertson}, 389 F. Supp. at 893. The finder of fact weighs all relevant circumstances, including the competitive environment within the affected industry and the justifications offered by the defendant, to determine whether a given restriction is reasonable. \textit{Holmes}, \textit{supra} note 35, § 1.04[2], at 164.
\end{thebibliography}
stain trade, the practice will be declared reasonable. Because the restrictions on players enforced by the NBA would fail the per se test, however, further examination was not necessary in Robertson.

B. Developing an Analytic Framework for Antitrust Claims in Professional Sports

In applying labor principles to player restraints in professional sports, the United States Court of Appeals for the Eighth Circuit articulated a three-pronged test in Mackey v. National Football League. This test requires that the restraint of trade only affect parties to the collective bargaining relationship; that the agreement only concern mandatory subjects of collective bargaining; and that the agreement be the product of bona fide, arm’s-length bargaining.

In Mackey, the Eighth Circuit applied the test to the “Rozelle Rule,” which regulated free agency in professional football by requiring a team that signs another team’s free agent player to compensate that player’s former team. If an agreement as to the compensation was not reached, the commissioner of the league determined what was fair and equitable compensation to the former team. The Eighth Circuit found that the Rozelle Rule satisfied the first two prongs of the standard. The court, however, determined that the Rozelle Rule did not satisfy the test’s third criterion because it was not the subject of bona fide, arm’s-length bar-

110. Robertson, 389 F. Supp. at 893; see Holmes, supra note 35, § 1.04[2], at 163-64 (examining practices that are not per se illegal but instead are governed by the rule of reason test). The examination of evidence regarding the nature of the restraint and its effects is not intended to allow anticompetitive regulations to survive antitrust inquiries solely because of a positive intent. Smith v. Pro Football, Inc., 593 F.2d 1173, 1205 (D.C. Cir. 1978). The purpose of a broad inquiry under a rule of reason analysis is to assist the court in determining the potential consequences of a given regulation’s impact on competition. Id. at 1206. Anticompetitive effects alone may not be enough to invalidate a restriction. Id. Under the tests established in Standard Oil Co. v. United States, 221 U.S. 1, 55 (1911), Board of Trade, 246 U.S. at 238, and National Society of Professional Engineers v. United States, 435 U.S. 679, 693-95 (1978), a restraint that has long-term pro-competitive benefits may be valid. Smith, 593 F.2d at 1206. Consequently, all restraints must be examined in the context of their effect on the entire industry. Id.

111. Robertson, 389 F. Supp. at 893.

112. 543 F.2d at 609, 614.

113. Id. at 614.

114. Id. at 610. The rule is named after Pete Rozelle, former Commissioner of the NFL. Id. The challenged rule was found to deter significant player movement between teams through free agency. Id. at 615.

115. Id. at 610-11.

116. Id. at 615. The Rozelle Rule affects only the parties to the agreement. Id. The Eighth Circuit further determined that the Rozelle Rule constituted a mandatory bargaining subject within the NLRA. Id. Mandatory subjects of collective bargaining include wages, hours, and other terms and conditions of employment. Id.
gaining.\textsuperscript{117} Consequently, the Rozelle Rule did not qualify for a labor exemption.\textsuperscript{118}

Because Mackey had not yet been decided, the Robertson court evaluated the challenges to league policies based on the per se and rule of reason tests of reasonableness.\textsuperscript{119} Since Robertson, however, the Mackey test has become the basis for granting a nonstatutory exemption upholding the challenged labor practice.\textsuperscript{120}

\section*{C. Expiration of the Collective Bargaining Agreement Does Not Invalidate Its Terms}

\subsection*{1. Bridgeman v. NBA: Negotiated Provisions Apply Until Impasse}

In 1987, a class of NBA players moved for partial summary judgment and a declaratory judgment that player restraints included in the collective bargaining agreement were not exempt from antitrust laws in Bridgeman v. NBA.\textsuperscript{121} The players claimed that upon expiration the agreement's provisions were no longer binding.\textsuperscript{122} The NBA teams, however, continued to operate under the terms of the expired collective bar-
gaining agreement, contending that the terms of the collective bargaining agreement should continue as long as they were applied without modification.\textsuperscript{123}

In reviewing these claims, the court examined an issue beyond the scope of \textit{Mackey}: whether the expiration of the collective bargaining agreement affects the availability of the labor exemption.\textsuperscript{124} The United States District Court for the District of New Jersey found that protecting practices that were the subject of arm's-length bargaining fostered good faith negotiations.\textsuperscript{125} Moreover, both parties had an obligation to maintain the status quo even after impasse.\textsuperscript{126} Removing antitrust protection immediately upon expiration of the collective bargaining agreement would be contrary to the purpose of the nonstatutory exemption and the federal labor policy of encouraging collective bargaining.\textsuperscript{127}

\textsuperscript{123} Bridgeman, 675 F. Supp. at 964-65 (contrasting the league's position with the players' position that these terms expired with the agreement).

\textsuperscript{124} Id. at 965.

\textsuperscript{125} Id.

\textsuperscript{126} Id. The district court explained:

Under the NLRA, impasse exists when the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless. The National Labor Relations Board has summarized the factors to be considered in determining the existence of an impasse as follows:

"Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations, are all relevant factors to be considered in deciding whether an impasse in bargaining existed."


\textsuperscript{127} Bridgeman, 675 F. Supp. at 965; \textit{see} Powell, 930 F.2d at 1302. Immediate removal of immunity at impasse would undermine the collective bargaining process. \textit{Id.} The parties would be unable to continue negotiation without the threat of being found in violation of antitrust laws. \textit{Id.}

In \textit{Bridgeman}, the district court underscored the importance of avoiding labor disputes by maintaining the terms of the collective bargaining agreement that recognized the agreement's continued validity after its expiration. \textit{Bridgeman}, 675 F. Supp. at 965. The players argued unsuccessfully that the expiration of the agreement freed them from its restraints. \textit{Id.} The district court, however, reasoned that if the parties reasonably believe that certain provisions will be included in a new collective bargaining agreement, the provisions should remain in effect after expiration of the agreement. \textit{Id.} The labor concept of impasse, which is essentially the period between expiration of a collective bargaining agreement and the establishment of a new collective bargaining agreement, served as the basis of the reasoning. \textit{Id.} at 966 n.5. Impasse encourages collective bargaining because it is the most efficient means for either party to alter the expired collective bargaining agreement. \textit{Id.} at 966-67. Accepting the players' claim would have undermined the collective bargaining
The district court limited its holding by stating that the antitrust exemption would not continue indefinitely after the collective bargaining agreement expired. While not defining a time limitation, the court determined that the exemption would apply during impasse. The district court stated that the exemption survived only as long as employers did not modify the terms of the collective bargaining agreement. Additionally, the employer reasonably must believe that the restriction at issue will be included in the new agreement.

Courts have demonstrated a desire to support contractual obligations created through collective bargaining. Players continually raise antitrust challenges to the legality of labor provisions at the expiration of the collective bargaining agreement. These challenges may be an attempt to gain a bargaining advantage because a demonstration that the provisions violate antitrust laws would render illegal any provisions not part of a collective bargaining agreement. Courts, however, are unwilling to consider the antitrust allegations while a collective bargaining relationship continues to exist.

relationship because the players could have ignored the agreement’s restraints during the negotiating process. Id. at 965.

128. Bridgeman, 675 F. Supp. at 966; see Powell, 930 F.2d at 1301.
129. Bridgeman 675 F. Supp. at 967. Impasse is a labor law concept developed to cope with the problems created when parties reach a deadlock in negotiations. Id. at 966-67; see supra note 127 (discussing impasses under the NRLA).
130. Bridgeman, 675 F. Supp. at 967.
131. Id. As the Second Circuit stated,
the employer continues to impose [the] restriction unchanged, and reasonably believes that the practice or a close variant of it will be incorporated in the next collective bargaining agreement. When the employer no longer has such a reasonable belief, it is then unilaterally imposing the restriction on its employees, and the restraint can no longer be deemed the product of arm's-length negotiation between the union and the employer.

Id. (footnote omitted).

Should impasse occur, employers may invoke employment terms that are different than the terms in the expired collective bargaining agreement. Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co., 484 U.S. 539, 542 (1988). If the new terms differ from the terms that the parties proposed or agreed to prior to impasse, however, the employer may be vulnerable to attack for violating labor laws. Powell, 930 F.2d at 1301.

132. Bridgeman, 675 F. Supp. at 964-65; see Powell, 930 F.2d at 1303.
133. See Bridgeman, 675 F. Supp. at 962-63 (explaining player resistance to be bound by the terms of the prior agreement).
134. See NBA v. Williams, 857 F. Supp. 1069, 1079 (S.D.N.Y. 1994) (stating that provisions such as the college draft, right of first refusal, and salary cap do not violate the per se test and, consequently, their legitimacy will be judged according to the rule of reason test).
135. See id.
2. Courts Encourage Settlement Through Negotiation

In the summer of 1994, the NBA sought a declaratory order concluding that the college draft, the right of first refusal, and the salary cap did not violate antitrust laws. The NBA initiated the action in response to a letter delivered to it by the NBPA stating that because the collective bargaining agreement between the parties had expired, the labor provisions violated antitrust laws. The parties did not dispute that the provisions qualified for the nonstatutory exemption from antitrust laws prior to the expiration of the bargaining agreement. Therefore, the court was first to determine when such an exemption ceased to apply. The United

136. Id. at 1071. The players brought counterclaims, through the NBPA, seeking a temporary restraining order and preliminary injunction that would have barred teams from signing players and expedited a trial of the merits of the NBA's claims. Id. The district court granted the temporary restraining order on June 28, 1994. Id. At a hearing on July 8, 1994, Judge Duffy ordered a trial on the merits for July 11, 1994. Id.

137. Id. at 1072-73. The 1988 collective bargaining agreement formally expired on June 23, 1994. Id. at 1072. In a bargaining session on April 7, 1994, the NBPA insisted that the college draft, the right of first refusal, and the salary cap be eliminated from future collective bargaining agreements. Id.

138. Id. at 1074.

139. Id. In considering the question of how long a nonstatutory exemption exists after the expiration of a collective bargaining relationship, Judge Duffy looked to four other cases that considered the issue with regard to professional sports. Id. at 1074-76. In Wood v. NBA, the Second Circuit held that antitrust laws cannot subvert federal labor policy. Id. at 1074. For a discussion of the Wood case, see infra notes 201-10 and accompanying text. Consequently, Judge Duffy stated that the law of the Second Circuit seemed to be that federal labor law should apply to disputes between bargaining parties. Williams, 857 F. Supp. at 1074. The other decisions he considered regarding the expiration of bargaining agreements were from other jurisdictions and therefore lacked precedential effect. Id.

The first case considered by Judge Duffy was Bridgeman v. NBA. Id. For a discussion of the Bridgeman case, see supra notes 121-33 and accompanying text. Bridgeman was factually identical to Williams. Williams, 857 F. Supp. at 1074. Judge Duffy explained that the Bridgeman court rejected the assertions of the NBPA that antitrust immunity expires with the collective bargaining agreement. Id. Likewise, the Bridgeman court rejected the view that antitrust immunity continues indefinitely. Id. The Bridgeman court warned that such a holding would discourage unions from ever entering into a collective bargaining agreements because the union then would be unable to challenge the terms of the agreement in the future. Id. at 1074-75. Thus, the Bridgeman court drew upon the elements of the Mackey test regarding the likelihood that the disputed provisions will become part of future agreements. Id. at 1075; see infra note 160 (explaining the Mackey test). The Williams court then held that antitrust immunity exists as long as employers impose the restrictions in the same manner as before the expiration of the agreement and they reasonably believe that the provision will be included in future agreements. Williams, 857 F. Supp. at 1075.

The second case cited by Judge Duffy was Powell v. National Football League, where a United States District Court for the District of Minnesota considered whether the NFL could restrict player movement after the expiration of a collective bargaining agreement. Id. Judge Duffy noted that the Powell court held that immunity exists until the parties have reached impasse. Id.
States District Court for the Southern District of New York, in NBA v. Williams, considered the balancing of labor policies and antitrust laws.\textsuperscript{140} Because the case primarily concerned a labor market dispute, federal labor law would apply.\textsuperscript{141} Consequently, the antitrust immunity survives as long as a collective bargaining relationship exists.\textsuperscript{142}

In addressing the NBPA's contention that the labor provisions would fail antitrust scrutiny if the court removed the nonstatutory exemption, the court utilized both the per se and rule of reason tests.\textsuperscript{143} The court held that the challenged provisions would not fail a per se test because professional sports leagues are joint ventures and therefore are not vulnerable to per se challenges.\textsuperscript{144} Consequently, the labor provisions are

The third case considered by Judge Duffy was the Eighth Circuit's decision in Powell v. National Football League (Powell II), which reversed the district court's ruling.\textsuperscript{145} Judge Duffy explained that in Powell II, the Eighth Circuit held that immunity exists beyond impasse and continues as long as there is a labor relationship between the league and the union.\textsuperscript{146} Essentially, Judge Duffy stated "once a collective bargaining arrangement is established, and a valid and bona fide collective bargaining agreement is formed, federal labor law and its policies control."\textsuperscript{147} Therefore, Judge Duffy concluded that as long as labor law remedies are available, the parties should be forced to settle their disputes through negotiation.\textsuperscript{148}

The final case considered by Judge Duffy was Brown v. Pro Football, Inc., where the United States District Court for the District of Columbia considered whether salary restrictions continued after the expiration of the collective bargaining agreement.\textsuperscript{149} Judge Duffy noted that in Brown, the district court held that the salary restrictions did expire with the agreement.\textsuperscript{150} The Brown court reasoned that allowing the exemption to continue after expiration discouraged serious negotiation by the employer, who would be content to continue under the terms of the agreement.\textsuperscript{151} Judge Duffy further explained that the Brown court held that extending the exemption deprived the union of potentially receiving treble damages available under labor law.\textsuperscript{152}

140. \textit{Id.} In his opinion, Judge Duffy quoted from Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electric Workers, regarding the role of the courts in determining how Congress intended antitrust laws and labor policy to interact.\textsuperscript{153} \textit{Id.}; see supra note 43 (discussing the Allen Bradley Co. decision).

141. Williams, 857 F. Supp. at 1078. Judge Duffy further stated that the NBPA had misread the precedent cases, which indicated that labor provisions lose their antitrust exemption upon expiration of the agreement.\textsuperscript{154} \textit{Id.} at 1077. Specifically, Judge Duffy noted that no previous Supreme Court decision addressed a circumstance where the parties had engaged in collective bargaining as representatives authorized by labor law.\textsuperscript{155} \textit{Id.}

142. \textit{Id.} at 1078.

143. \textit{Id.} The NBPA contended that the college draft, right of first refusal, and the salary cap were per se violations of section 1 of the Sherman Act.\textsuperscript{156} \textit{Id.}

144. \textit{Id.} Judge Duffy relied on the Board of Trade v. United States to explain: "Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anti-competitive that each is illegal \textit{per se} without inquiry into the harm it has actually caused. Other combinations, such as mergers, joint ventures, and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Accordingly, such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect."
correctly assessed according to the rule of reason.\textsuperscript{145} The court held, however, that the NBPA had not proven that the labor provisions violate the rule of reason standard by being unreasonably anticompetitive.\textsuperscript{146} The procompetitive effects of the labor provisions may outweigh their restrictive consequences if the league’s competitive balance is enhanced.\textsuperscript{147}

III. Establishing Labor Policies in the NBA Through Collective Bargaining

A. Setting the Stage for Collective Bargaining

The legacy of \textit{Robertson} is the recognition that player restraints may avoid being classified as per se violations of antitrust laws if they result from collective bargaining.\textsuperscript{148} To qualify for the nonstatutory exemption to antitrust laws, the NBA and the NBPA entered into a collective bargaining relationship regarding labor provisions.\textsuperscript{149} This agreement altered the league’s labor practices by invalidating the reserve clause, granting a limited form of free agency, and amending the college draft.\textsuperscript{150} Thus, by participating in collective bargaining, the players achieved their goal of increasing mobility.\textsuperscript{151} Likewise, the league was able to control player movement between teams, which it considered essential to maintaining stability within the league.\textsuperscript{152}

\begin{itemize}
\item Id. (quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1983)).
\item 145. \textit{Williams}, 857 F. Supp. at 1079.
\item 146. Id. In fact, Judge Duffy pointed out that the salary cap enhanced the mutual interests of the NBA and the NBPA by regulating labor costs in return for the players receiving 53\% of the DGR of the league. \textit{Id.}; see supra note 3 (discussing DGR).
\item 147. \textit{Williams}, 857 F. Supp. at 1079.
\item 148. \textit{Robertson} v. NBA, 389 F. Supp. 867, 895 (S.D.N.Y. 1975) (requiring that such restrictions must be deemed by the NBPA to be in the players' best interest and the result of arm's-length collective bargaining), aff'd, 556 F.2d 682 (2d Cir. 1977).
\item 149. \textit{Weistart & Lowell}, supra note 1, § 5.03, at 507. The NBA and the NBPA completed the first collective bargaining agreement in 1976. \textit{Id.}
\item 150. \textit{Id.} § 5.03, at 508. The reserve clause allowed unilateral renewal of a player's contract. \textit{Id.} The parties approved a limited form of free agency that gave a player's original team a right of first refusal. \textit{Id.} The original team could retain a player's services by matching the terms of the player's new team's offer. \textit{Id.}
\item If the original team did not match the offer, the new team was required to provide compensation for the player. \textit{Id.} Also, the college draft was amended to permit the drafting team to retain a player's rights for one year, rather than indefinitely as had been the case. \textit{Id.}
\item 151. \textit{Id.} § 5.03, at 507-08. Under the new system, the teams lost the right to renew a player's contract unilaterally. \textit{Id.} § 5.03, at 508.
\item 152. \textit{Id.} Players first entering the NBA were subject to the draft system, which determined the team that acquired the player's rights. \textit{Id.}
\end{itemize}
The *Robertson* holding, which did not invalidate the labor provisions challenged by the players, is consistent with traditional judicial reluctance to dictate labor provisions in professional sports. Requiring that the provisions result from collective bargaining, however, provided some protection to the players from unilaterally imposed labor policies. The *Robertson* settlement complies with the labor exemption from antitrust laws, found in sections 6 and 20 of the Clayton Act and the Norris-LaGuardia Act. The Supreme Court created this nonstatutory exemption to encourage collective bargaining, despite possible anticompetitive ramifications. Courts must determine that the relevant labor policy is worthy of preeminence over federal antitrust policy. In professional basketball and other professional sports this requirement is satisfied because teams are not economic competitors. Consequently, courts alter the traditional balancing approach typically applied to labor disputes in other industries when antitrust violations are alleged in professional sports.

153. See Foraker, supra note 2, at 168-69. Judge Carter applied a restrictive view of labor exemptions in the *Robertson* decision. Id. at 167. In dicta, Judge Carter wrote:

I must confess that it is difficult for me to conceive of any theory or set of circumstances pursuant to which the college draft, blacklisting, boycotts, and refusals to deal could be saved from Sherman Act condemnation, even if defendants were able to prove at trial their highly dubious contention that these restraints were adopted at the behest of the Players Association.


154. See Foraker, supra note 2, at 169.


157. Apex Hosiery Co. v. Leader, 310 U.S. 469, 512-13 (1940) (holding that activities of labor organizations that restrain trade are not necessarily violations of the Sherman Act).


159. Smith v. Pro Football, Inc., 593 F.2d 1173, 1178-79 (D.C. Cir. 1981) (stating that joint action by rival clubs in the NFL does not run afoul of antitrust measures because each team is dependent on the revenues of the other team for the financial survival of the league).

160. In *Mackey* v. National Football League, 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977), the Eighth Circuit adopted a three-pronged test to address antitrust issues in professional sports. Id. at 615-22.

The first prong of *Mackey* requires that the agreement affect only the parties to the negotiation. *Mackey*, 543 F.2d at 615. In professional basketball, the parties to the negotiation are the NBA and the NBPA, which negotiates on behalf of all current and future NBA players. Wood v. NBA, 602 F. Supp. 525, 529 (S.D.N.Y. 1984), aff'd, 809 F.2d 954 (2d Cir. 1987). While such a role facilitates the resolution of a labor dispute, it demonstrates an unusually broad scope of power for the NBPA. *Id.* The current players in the league can elect player representatives to represent their interests with the union. *Id.* However, because Wood and other similarly situated players coming out of college are not
In 1983, the NBA and the NBPA amended the collective bargaining agreement to include additional labor provisions, including the salary cap.\textsuperscript{161} This amendment established a formula for determining the maximum aggregate amount teams may pay players annually.\textsuperscript{162} By upholding the written terms of the document, courts have encouraged the collective bargaining process in professional basketball.\textsuperscript{163}

\section*{B. Upholding the Salary Cap Through Narrow Construction of Its Provisions}

In addition to holding both the league and its players to the express terms of the collective bargaining agreement, courts have supported the agreement’s provisions further by binding all prospective players to the agreement’s terms.\textsuperscript{164} For instance, in \textit{Wood v. NBA}, Leon Wood contended that the NBPA did not represent him in their negotiations with the league, and consequently, he should not be bound by the agreement.\textsuperscript{165} The Second Circuit stated that Wood based his complaint on his alleged inability to receive the full market value for his talents because of the salary cap.\textsuperscript{166}

members of the league, it is difficult to see how the union could be representing their interests. \textit{Id.} In \textit{Wood}, the Second Circuit analogized the union’s power as sole negotiator for players by referring to hiring halls and the role of unions in more traditional industries. \textit{Wood v. NBA}, 809 F.2d 954, 960 (2d Cir. 1987). However, the \textit{Robertson} court discussed the role of unions in professional sports and specifically determined that draft choices are outside of the bargaining unit as it applies to collective bargaining agreements. \textit{Robertson}, 389 F. Supp. at 870.

The second prong of the \textit{Mackey} test requires that the provisions being negotiated must be mandatory subjects of collective bargaining. \textit{Mackey}, 543 F.2d at 615. Mandatory subjects of collective bargaining include such topics as wages, hours, and terms and conditions of employment. 29 U.S.C. § 158(d) (1988); see \textit{Mackey}, 543 F.2d at 615. According to the NLRA, employers have a good faith duty to negotiate these labor provisions. \textit{McCourt v. California Sports}, Inc., 600 F.2d 1193, 1200 (6th Cir. 1979). However, wage negotiations in professional sports are between an individual player and his team, not between the player and the league. \textit{Daspin, supra} note 13, at 111.

The final prong of the \textit{Mackey} test requires the provision to result from bona fide, arm’s-length collective bargaining. \textit{Mackey}, 543 F.2d at 615-16. One commentator argues that the bargaining that resulted in the creation of the salary cap cannot satisfy this prong because the bargaining objectives were illegal. \textit{Daspin, supra} note 13, at 117.

\begin{itemize}
  \item \textsuperscript{161} \textit{Wood}, 602 F. Supp. at 528.
  \item \textsuperscript{162} \textit{Agreement, supra} note 3, art. VII.
  \item \textsuperscript{163} \textit{See Wood}, 602 F. Supp. at 528.
  \item \textsuperscript{164} \textit{See Wood}, 809 F.2d at 960 (stating that unsigned rookies are not at a greater disadvantage, in terms of bargaining power, than new employees in other industries regarding unions).
  \item \textsuperscript{165} \textit{Id.}
  \item \textsuperscript{166} \textit{Id.}
\end{itemize}
The Second Circuit recognized that professional athletes receive more publicity than workers in other industries, but held that professional athletes are restricted by federal labor policy if their employment is governed by a collective bargaining agreement. Thus, Wood was bound by the collective bargaining agreement by virtue of section 9(a) of the NLRA, which allows a majority of employees to appoint an exclusive representative for collective bargaining. The NBPA is allowed to negotiate a salary cap on behalf of all current and future players because in other industries, collective bargaining agreements frequently set standard wages without regard to the specific talents or abilities of an individual employee.

The Second Circuit evaluated the importance of collective bargaining and the freedom to contract between the NBA and the NBPA. Supporting the freedom to contract between employers and employees fosters agreements tailored to their specific needs and promotes labor peace. If the district court allowed Wood to challenge the authority of the NBPA, it would upset the collective bargaining process, thereby decreasing the efficiency of dispute resolution. The Second Circuit opined that the collective bargaining relationship between the NBA and the NBPA illustrated the creativity of an unfettered bargaining system.

167. Id.
168. See id. at 959 (stating that federal labor policy through section 9(a) of the NLRA encouraged collective bargaining over individual employee representation).
169. Id.
170. Id. at 960. The Second Circuit pointed to traditional labor practices, such as hiring halls, that limited a union member’s choice of employment and contracts that reward seniority at the expense of new employees. Id. Regarding Wood’s claim that he was outside the bargaining unit, the Second Circuit stated, “the National Labor Relations Act explicitly defines ‘employee’ in a way that includes workers outside the bargaining unit.” Id. (quoting 29 U.S.C. § 152(3) (1988))
171. Id. at 961.
172. Id.
173. Id. In specifically addressing the federal labor policy of freedom of contract, the Second Circuit stated:

Freedom of contract is particularly important in the context of collective bargaining between professional athletes and their leagues. Such bargaining relationships raise numerous problems with little or no precedent in standard industrial relations. As a result, leagues and player unions may reach seemingly unfamiliar or strange agreements. If courts were to intrude and to outlaw such solutions, leagues and their player unions would have to arrange their affairs in a less efficient way. It would also increase the chances of strikes by reducing the number and quality of possible compromises.

174. Id.; see also Tagliabue, supra note 18, at 358 (expressing the notion that professional sports agreements may employ unorthodox provisions to maintain the survival of a league). In Jewel Tea Co., the existence of a collective bargaining agreement between the parties was the decisive element in recognizing a nonstatutory exemption to labor laws.
Consequently, the Second Circuit refused to alter the player draft and salary cap because doing so would have altered the entire collective bargaining agreement.175

The Second Circuit's reasoning in Wood extended the antitrust analysis beyond simply determining the existence of an arm's-length bargaining agreement between the union and the professional sports league.176 In addition to the existence of the collective bargaining agreement, the court should examine the existence of a collective bargaining relationship between the union and the league, the role of the union as the official bargaining agent of the players, and the federal labor policy of the freedom to contract.177 Broadening judicial examination of a challenged labor provision to include the collective bargaining relationship between the union and the league indicates that the agreement's provisions will not expire automatically with the document if the relationship between the parties continues.178

In NBA v. Williams, the United States District Court for the Southern District of New York further encouraged collective bargaining by holding that the terms of an agreement remain effective as long as a collective bargaining relationship between the parties exists.179 The court further held that labor provisions, such as the salary cap, may not fail an antitrust

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Tagliabue, supra note 18, at 358. However, the Wood decision has expanded the labor exception to include the relationship between the parties in addition to the existence of an agreement. Wood, 809 F.2d at 961-63. In Powell, players challenged the legality of a first refusal/compensation system relating to free agency, which had been established through collective bargaining. Powell v. National Football League, 930 F.2d 1293, 1303 (8th Cir. 1989). The players challenged the validity of the provisions after impasse had been reached in negotiations between the Players Association and the NFL. Id. However, the United States Court of Appeals for the Eighth Circuit held that participants in negotiations are protected from antitrust laws if there is an ongoing collective bargaining relationship. Id.

175. Wood, 809 F.2d at 962.
176. See Tagliabue, supra note 18, at 358.
177. Id.
178. See id. at 359. Commissioner Tagliabue stated that:

The Second Circuit's analysis in Wood plainly suggests that the labor exemption would not expire or lapse immediately upon formal expiration of a collective bargaining agreement. All of the federal labor statutes and policies identified by Judge Winter—exclusive bargaining representative, freedom of contract, avoidance of strikes, maximizing the solutions that can be developed in collective bargaining, encouraging good faith bargaining on mandatory subjects, and other considerations—support the conclusion that employment terms and conditions remain exempt from antitrust challenge even after formal expiration of a collective bargaining agreement.

Id.

NBA Salary Cap

challenge. This ruling undermines the bargaining leverage of the NBPA, which has utilized the threat of antitrust challenges as a bargaining chip in prior negotiations. Consequently, while a collective bargaining relationship exists, each party must continue to engage in good faith negotiations to reach a new agreement. If the players determine that the labor provisions are not acceptable and cannot exclude them through negotiation, they could end the bargaining relationship by decertifying the union. The players then could test the provisions in an antitrust action. If the bargaining relationship remains unchanged, however, the negotiated terms of the collective bargaining agreement will govern.

In In re New York Knickerbockers Basketball Club, the United States District Court for the Southern District of New York was presented with disputed interpretations of the collective bargaining agreement. In this case, the district court invalidated the use of outsized bonus payments to sign free agent players, despite recognizing that similar provisions previously had been allowed. The district court cited potentially detrimental effects on enforcing the salary cap provisions if the bonus payments were permitted. While no specific language in the collective bargaining agreement invalidated outsized bonuses, the district court found them to be contrary to the implied intent of the agree-

180. Id. at 1079 (stating that the rule of reason may protect the labor provisions if their procompetitive effects outweigh the restrictive consequences).
181. Id. at 1071-72.
182. Id. at 1079.
183. Id. at 1078. The district court stated that the players could attempt to force the league to abandon labor provisions by applying economic pressure, such as a strike. Id. Alternatively, the players could decertify the union and bring an antitrust claim. Id. If the players decertify the union, however, they would no longer be able to avail themselves of federal labor law remedies in future disputes. Id.
184. Id.
185. Id.
187. Id. at 141 (finding that even though bonus payment may have been technically within the salary cap limitations, the bonus payments effectively voided those terms designed to protect the interests of the parties). For a discussion of outsized bonus payments, see infra notes 217-24 and accompanying text.
188. Id. at 139.
The ad hoc approach used to invalidate the bonuses ignored the precedential value of prior rulings in free agent contract decisions.\textsuperscript{190}

The United States District Court for the District of New Jersey applied a narrower analytic method in \textit{In re Dudley}.\textsuperscript{191} Unlike \textit{New York Knickerbockers Basketball Club}, where the court interpreted general language in the collective bargaining agreement regarding bonus payments, the agreement in \textit{Dudley} contained no language regarding the use of termination clauses.\textsuperscript{192} The district court recognized the high probability that Dudley would exercise his option to terminate the contract and re-sign for a higher salary.\textsuperscript{193} This probability was insufficient to invalidate the contract provision, however, absent proof of an undisclosed agreement between the parties.\textsuperscript{194} The district court reviewed the findings in \textit{New York Knickerbockers Basketball Club} to discern the criteria for invalidating past contractual provisions that circumvented the salary cap.\textsuperscript{195} Based on the interpretation of the Modification Agreement in \textit{New York Knickerbockers Basketball Club}, the \textit{Dudley} court held that the one-year out provision was within the contemplation of the parties when negotiating the agreement.\textsuperscript{196}

\textsuperscript{189} \textit{Id.} at 140. Judge Carter conceded that there was no specific language in the Modification Agreement regarding the acceptable size of a bonus. \textit{Id.} at 141. However, he stated that the Modification Agreement can work only if each side respects its provisions. \textit{Id.}

\textsuperscript{190} \textit{Id.} at 139. Judge Carter admitted that his decision in \textit{New York Knickerbockers Basketball Club} was a “judgement call,” which did not conform to past acceptance by the league of large bonus payments as a means of avoiding salary cap restraints. \textit{Id.} Judge Carter justified his ruling, however, by stating that it is the responsibility of both the special masters and judges to delineate which types of contracts will be allowed, according to the intent of the Modification Agreement. \textit{Id.}

\textsuperscript{191} \textit{In re Dudley}, 838 F. Supp. 172, 175 (D.N.J. 1993).

\textsuperscript{192} \textit{Id.} at 177-78.

\textsuperscript{193} \textit{Id.} at 182.

\textsuperscript{194} \textit{Id.} at 182-83 (holding that there was insufficient evidence that Dudley intended the termination clause to circumvent the purpose of the salary cap).

\textsuperscript{195} \textit{Id.} at 178.

\textsuperscript{196} \textit{Id.} at 179-82. The purpose of the Modification Agreement was to insure the financial stability of the league’s teams. \textit{Id.} at 181. The Agreement sought to maintain a system of free agency that would address the players’ concerns regarding mobility, while also maintaining control of salary levels so financially suspect teams would not be at a competitive disadvantage. \textit{Id.} at 181-82. The compromise required the players to agree to the salary cap constraints in return for revenue sharing. \textit{Id.} at 182. The complexity of the agreement and the need to discourage attempts to undermine the basic goals of the agreement led to the inclusion of language governing the salary cap’s implementation and dispute resolution techniques. \textit{Id.}

Section 2(a) of Article VII, Part B of the Agreement addresses signing bonuses and includes language permitting a player to shorten or lengthen the term of the contract. \textit{See Agreement, supra} note 3, at art. VII, pt. B, sec. 2(a), at 62-63.
The court was uncomfortable, however, with the potentially detrimental effects of the one-year out provision on the salary cap.\textsuperscript{197} Allowing a one-year out provision creates the possibility that teams and players will circumvent the salary cap by signing below-market free agent contracts.\textsuperscript{198} Forbidding unilateral termination by the players within a specified time period would mitigate the detrimental effects on the salary cap.\textsuperscript{199} Despite misgivings regarding the effect of contracts such as Dudley's, the district court could not find that the Special Master's findings were clearly erroneous and, therefore, sustained Dudley's contract.\textsuperscript{200}

IV. The Legality of the Salary Cap

A. Wood v. NBA: Challenging the Salary Cap

In 1984, Leon Wood became the first player to challenge the legality of the NBA's salary cap, by initiating a suit alleging that the player draft and the salary cap violated section 1 of the Sherman Act.\textsuperscript{201} After being drafted in the first round of the college draft by the Philadelphia 76ers, Wood was offered a one-year contract at the league's minimum salary of

\textsuperscript{197} Dudley, 838 F. Supp. at 182. Judge Debevoise indicated that he felt the Special Master may have minimized the potentially harmful effects of the one-year out provision. Id. The potential effects of the one-year out provision, however, cannot be forecasted. Id. 198. Id.

\textsuperscript{199} Id. at 183. Judge Debevoise stated that lines must be drawn that would enable easier determination of the intent of the parties. Id. The express terms of the agreement, however, do not provide an adequate basis for invalidating the one-year out provision. Id.

\textsuperscript{200} Id. at 184. In the two leading cases involving the implementation and interpretation of the salary cap provision, New York Knickerbockers Basketball Club and Dudley, both courts have utilized an ad hoc approach to dispute resolution. In New York Knickerbockers Basketball Club, the district court found that the Knicks attempted to circumvent the salary cap by using bonus payments to fit the total amount of compensation paid to King under the salary cap constraints. In re New York Knickerbockers Basketball Club, 630 F. Supp. 136, 137 (S.D.N.Y. 1986). The Special Master allowed the King contract to stand because he recognized that the league had permitted other contracts with outsized bonus payments. Id. However, in this case, the district court adopted the NBA's position that such contracts were a dangerous threat to the survival of the salary cap. Id. Therefore, King's contract was invalidated. Id.

In Dudley, the court cited the New York Knickerbockers Basketball Club reasoning regarding the potentially detrimental effects of the one-year out provision on the salary cap. Dudley, 838 F. Supp. at 179. The district court warned that such contracts might undermine the intent of the salary cap. Id. at 181. However, the district court reviewed the Special Master's acceptance of the one-year out provision rather than making an express ruling on the contract provision. Id. at 183. The district court may have realized that it would be difficult to rule that a player may not sign a contract for less money than another team had offered and still justify the salary cap as promoting the financial stability of the league. See id. at 181.

\textsuperscript{201} Wood v. NBA, 602 F. Supp. 525, 526 (S.D.N.Y. 1984), aff'd, 809 F.2d 954 (2d Cir. 1987).
$75,000 because the team was under salary cap constraints.\textsuperscript{202} In response, Wood challenged the salary cap, alleging that the salary cap restrictions required him to accept a contract worth less than his fair market value or to miss a year of professional basketball.\textsuperscript{203}

Finding that the three-pronged Mackey test\textsuperscript{204} had been satisfied, the United States District Court for the Southern District of New York denied Wood's claim that the player draft and the salary cap violated antitrust laws.\textsuperscript{205} First, the collective bargaining agreement only affected the parties involved in the negotiations.\textsuperscript{206} Second, the subjects of the agreement were proper subjects of collective bargaining.\textsuperscript{207} Third, the agreement resulted from bona fide, arm's-length collective bargaining.\textsuperscript{208}

In affirming the district court's decision, the United States Court of Appeals for the Second Circuit stressed that the draft and the salary cap were products of an agreement between an employer and an employee, not among horizontal competitors.\textsuperscript{209} Consequently, the district court should have examined these agreements under federal labor legislation, despite the unique nature of professional sports in which teams support

\textsuperscript{202} Id. Wood had enjoyed a successful college basketball career and was a member of the 1984 United States Olympic Basketball Team, which won the gold medal. \textit{Id.} His success at these levels led to his selection in the first round of the NBA draft. \textit{Id.} Historically, there has been a correlation between a player's ability and prospects for success in the NBA and the round in which the player is selected in the college draft. \textit{Id.} According to Patrick Williams, Vice President and General Manager of the Philadelphia 76ers, the team offered Wood the minimum salary to maintain the team's exclusive negotiating rights with him while they tried to maneuver around the salary cap restrictions. \textit{Id.} at 526-27.

\textsuperscript{203} Id. at 527.

\textsuperscript{204} See supra note 160 (discussing the Mackey test).

\textsuperscript{205} \textit{Wood}, 602 F. Supp. at 528. Judge Carter stated:

\begin{quote}
Both provisions affect only the parties to the collective bargaining agreement—
the NBA and the players—involve mandatory subjects of bargaining as defined
by federal labor laws, and are the result of bona fide arms-length negotiations.
Both are proper subjects of concern by the Players Association. As such these
provisions come under the protective shield of our national labor policy and are
exempt from the reach of the Sherman Act.
\end{quote}

\textit{Id.} at 528. The Second Circuit adopted this reasoning and affirmed the district court's denial of Wood's cause of action. \textit{Wood}, 809 F.2d at 962-63. The Second Circuit stated that Wood's claim for damages was based on a claim for lost wages. \textit{Id.} at 962. The controversial nature of the conditions of employment in professional sports, however, are precisely why such issues are the subjects of collective bargaining. \textit{Id.}

\textsuperscript{206} \textit{Wood}, 602 F. Supp. at 528.

\textsuperscript{207} \textit{Id.}

\textsuperscript{208} \textit{Id.}

\textsuperscript{209} \textit{Wood}, 809 F.2d at 959 (suggesting that such an agreement between NBA teams would be illegal if they were horizontal competitors).
each other’s economic growth. Courts continued to preserve the validity of the salary cap in two subsequent cases challenging its legitimacy.

B. The Salary Cap and Free Agency: In re New York Knickerbockers Basketball Club

In 1985, the New York Knickerbockers (Knicks) attempted to sign Albert King to replace Leonard Robinson, a veteran forward who did not renew his contract for the 1984-85 season. The Knicks and the NBA disagreed over the correct interpretation of an exception to the salary cap regarding free agent signings. The Knicks had exceeded the maximum team salary limitation for the 1984-85 season and therefore had to comply with an exception stated in Article III.C(2)(a)-(g) of the Modification Agreement. Specifically, Article III.C(2)(c)(i) requires that a team exceeding the salary limitation could replace a retired player at fifty percent of the salary paid to the retired player. Article III.C(2)(e), however, allows a team to replace a veteran free agent who left the team at 100% of his last salary. Thus, the disagreement between the league and the Knicks required a judicial determination of the status of Leonard Robinson.

The Knicks contended that Robinson was an unsigned veteran free agent, and consequently, they offered Albert King a contract worth 100% of Robinson’s last salary. The NBA claimed that Robinson retired, thus allowing the Knicks to spend only fifty percent of Robinson’s last salary. The Second Circuit recognized that the “[t]he nature of professional sports as a business and professional sports teams as employers calls for contractual arrangements suited to that unusual commercial context.” The Knicks originally offered King a contract that included a $400,000 signing bonus and guaranteed salaries for five years in the following amounts: $450,000 in 1985-86; $450,000 in 1986-87; $600,000 in 1987-88; $700,000 in 1988-89; $700,000 in 1989-90. Article III.C(7) of the Modification Agreement stipulates that signing bonuses are to be prorated over any seasons in which salary was guaranteed. Therefore, the Knicks initial offer to King was below the $540,000 salary paid to Robinson in his last season by offering King $530,000, which included the prorated bonus payment for the first two seasons. The Knicks contended that the contract only needed...
salary on a replacement player.\textsuperscript{218} According to the guidelines of the Modification Agreement, the dispute was submitted to an independent expert who concurred with the league's interpretation.\textsuperscript{219}

In response to the ruling, the Knicks made a second offer to King.\textsuperscript{220} The second offer contained a large bonus in the first year that augmented relatively low salary figures throughout the contract.\textsuperscript{221} Under the collective bargaining agreement, signing bonuses are prorated over the life of the contract, thus resulting in an annual amount paid to King below fifty percent of Robinson's last salary.\textsuperscript{222} In response, the NBA challenged this offer as an attempt to circumvent the salary cap.\textsuperscript{223} In November 1985, a Special Master ruled in favor of the Knicks, noting prior acquiescence by the NBA to the use of outsized bonuses to achieve formal compliance with the salary cap.\textsuperscript{224}

to comply with the salary cap for the first two seasons because the collective bargaining agreement was due to expire at the conclusion of the 1986-87 basketball season. \textit{Id.} \textsuperscript{218} \textit{Id.}

\textsuperscript{219} The district court explained that Article III.C(2)(e)(ii) and Article IV.A(3) of the Modification Agreement state that disagreements between the league and the NBPA regarding the proper applications of exceptions to the salary cap will be decided by an "Impartial Basketball Expert" chosen by the partes. \textit{Id.} In this case, the parties chose William Cunningham, a former NBA player. \textit{Id.}

\textsuperscript{220} \textit{Id.} This second offer conformed to the requirements of the salary cap for a player signed to replace a retiree. \textit{Id.}

\textsuperscript{221} \textit{Id.} The Knicks' offer to King contained a signing bonus of $960,000. \textit{Id.} The salary figures for five seasons were: $75,000 in 1985-86; $75,000 in 1986-87; $700,000 in 1987-88; $700,000 in 1988-89; $800,000 in 1989-90. Because the $960,000 bonus was prorated over five years, the first two years of the contract would have paid King $267,000 per year. \textit{Id.} This was below the allowable amount according to the terms of the Modification Agreement, which enabled the Knicks to replace Robinson's salary with a player earning $270,000. \textit{Id.}

\textsuperscript{222} \textit{Id.}

\textsuperscript{223} \textit{Id.} Article III.C(9) prohibits devices designed to circumvent the salary cap. \textit{Id.} at 139. In accordance with the provisions governing dispute resolution in the collective bargaining agreement, a Special Master is appointed to hear labor disputes. \textit{Id.}

\textsuperscript{224} \textit{Id.} In 1984, the Knicks attempted to sign Jim Paxson to replace Ray Williams, a veteran free agent who left the team. Newton, \textit{supra} note 2, at 1008. The Knicks offered Paxson, a veteran free agent from the Portland Trail Blazers, a six-year contract. \textit{Id.} According to the terms of the Modification Agreement, the Knicks had $500,000 to spend on a replacement player. \textit{Id.} Consequently, the Knicks structured a contract for Paxson including total salary payments of $3.5 million, a $3.5 million loan, and a $2.5 million signing bonus. Newton, \textit{supra} note 2, at 1008-09. The term of the loan called for $1.75 million to be repaid after three years and the remaining $1.75 million to be repaid after five years. \textit{Id.} at 1009 n.55. Paxson's total remuneration in the first year of the contract was $495,000, which was comprised of $75,000 salary and $420,000 from the pro rated signing bonus. \textit{Id.} at 1009 n.56.

The NBA claimed that the structure of the contract circumvented the salary cap. \textit{Id.} at 1009. An arbitrator, however, ruled that the large signing bonus was acceptable because it was within the plain language of the Modification Agreement. \textit{Id.}
The District Court for the Southern District of New York, in *In re New York Knickerbockers Basketball Club*, reversed the Special Master’s ruling as undermining the intent of the salary cap. The district court limited the scope of its ruling to the present case by requiring a case-by-case evaluation of player contracts. In evaluating the salary cap provision, the district court observed that both the league and the players made concessions in negotiations. For instance, the NBA received a maximum aggregate salary, while the NBPA received a minimum aggregate salary limitation per team. Therefore, the court deemed negotiated terms as well as their implied intent to be worthy of protection.

C. Contract Provisions Favoring Players in Free Agency

On October 27, 1993, the United States District Court for the District of New Jersey narrowly construed the salary cap language in a suit challenging the validity of the contract Chris Dudley signed with the Portland Trail Blazers. The NBA objected to a one-year out provision that allowed for escalated salary payments in years after the Modification Agreement expires. Backloading provides for escalated salary payments in years after the Modification Agreement expires. One example is the contract signed by Patrick Ewing with the Knicks that paid him salaries of $750,000 in 1985-86; $1,000,000 in 1986-87; $2,250,000 in 1987-88; $2,750,000 in 1988-89; $3,500,000 in 1989-90; and $3,750,000 in 1990-91. The contract also called for Ewing to receive a $5,000,000 interest-free loan. The NBA approved the contract.

Another device utilized to sign players to larger contracts that the league has allowed, despite salary cap constraints, has been “backloading.” At 1010. Backloading provides for escalated salary payments in years after the Modification Agreement expires. In dicta, Judge Carter offered the following approach as a means of evaluating terms of a contract that would be acceptable under the Modification Agreement:

A rough guide for the Special Master is to determine whether an offer sheet comes within the requisite salary cap for each of the guaranteed years. If it does, it is in keeping with the agreement. If it does not, it circumvents the agreement unless the party claiming compliance presents justifying reason and circumstance to warrant a contrary conclusion.

At 141.

The players were willing to agree to the salary cap limitations to receive the revenue-sharing provisions. Therefore, they should not be allowed to structure contracts that formally comply with the Modification Agreement if the effect is to undermine the Agreement’s provisions. At 141.

At 140.

In re Dudley, 838 F. Supp. 172, 184 (D.N.J. 1993) (holding that the one-year out provision in Dudley’s contract did not violate the salary cap).
owed Dudley to terminate the contract unilaterally after one year.\textsuperscript{231} The league contended that Dudley intentionally circumvented the salary cap when he signed a contract that paid him a salary below his fair market value.\textsuperscript{232} The NBA further contended that the parties implicitly agreed that Dudley would exercise the out clause after one year, thus permitting the parties to negotiate a new contract reflecting Dudley's market value determined by competitive bids for his services.\textsuperscript{233}

The NBA filed its objections to the contract with a Special Master for a ruling on the validity of one-year out provisions.\textsuperscript{234} The Special Master found that the one-year out provision did not undermine the salary cap or threaten financial stability within the league.\textsuperscript{235} A free agent player may accept a lower salary to retain the freedom to choose the team that best suits his contractual requirements without necessarily circumventing the salary cap.\textsuperscript{236} If Dudley had signed only a one-year contract, both he and the team would be in exactly the same position as if he exercised the one-year out provision.\textsuperscript{237} Furthermore, the Special Master noted that the league had not objected to multiyear contracts signed by other players that provided for opt-out opportunities after the second year of the con-

\begin{itemize}
\item \textsuperscript{231} Id. at 174. Dudley was a veteran player who previously played for the New Jersey Nets. Id. On August 3, 1993, Dudley signed a seven-year, fully-guaranteed contract to play for the Portland Trail Blazers. Id. at 175-76.
\item \textsuperscript{232} Id. at 181. Dudley's agent, Dan Fegan, contended that considerations other than salary factored into the player's decision regarding which team to join. Id. at 175. Among these considerations were the player's desire to play for a team with a proven ability to compete for the league championship and the player's familiarity with the West Coast. Id. Express provisions in the salary cap, however, prohibit a player from signing a contract for an amount below his market value if his intent is to circumvent the salary cap. Id. at 177.
\item \textsuperscript{233} Id.
\item \textsuperscript{234} Id. While the case involving Dudley's contract became the focus of the Special Master's report and was heard by the district court the one-year out provision had been included in two other contracts signed by free agent players: Craig Ehlo with the Atlanta Hawks and Toni Kukoc with the Chicago Bulls. Id. at 175-76.
\item \textsuperscript{235} Id. at 177-78. The purpose of the salary cap was to create competitive parity throughout the league by limiting the amount of money that each team could spend on player salaries. Id. at 176; see supra note 4 (discussing the salary cap in more detail). Therefore, teams in larger markets would not have an unfair advantage over teams playing in smaller markets. Dudley, 838 F. Supp. at 176. No evidence, however, currently exists to confirm or refute the notion that allowing contracts with one-year out provisions necessarily will result in the escalation of salaries. Id. at 183.
\item \textsuperscript{236} Id. The Special Master distinguished the holding in the New York Knickerbockers Basketball Club by reasoning that the second offer to King merely relabeled the payments to King. Id. at 178. The Dudley offer, on the other hand, was a new transaction. Id. According to the contract that Dudley signed with the Portland Trail Blazers, he may or may not wind up with more money than he would have received from the New Jersey offer. Id.
\item \textsuperscript{237} Id.
\end{itemize}
tracts. Absent any evidence of a secret agreement between the parties, the Special Master upheld the validity of the one-year out provision and denied the NBA's claim.

In a final attempt to have one-year out provisions invalidated, the league brought suit against Dudley in the New Jersey district court. In considering the league's claims, the district court required a finding that the Special Master's ruling was clearly erroneous to overrule the findings. Consequently, the district court upheld the Special Master's rulings despite concern that the one-year out provisions ultimately might have a detrimental effect on the salary cap.

V. Dudley Has Exposed a Weakness in the Salary Cap That Can Be Remedied Only Through Collective Bargaining

One-year out provisions pose an obvious threat to the salary cap's effectiveness in controlling the league's labor costs. In effect, the provision provides a player with the opportunity to negotiate a salary without salary cap constraints within a relatively short period after joining a team. This provision weakens the NBA's salary cap objective significantly. Because the collective bargaining agreement does not address

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238. Id. The Special Master noted that the logic behind a one-year out provision included in a multiyear contract does not necessarily demonstrate an intent to circumvent the salary cap. Id. Because the league had allowed contractual clauses enabling players to terminate contracts in the later years of multiyear contracts, it would seem inequitable to invalidate one-year out provisions without a more definite showing of intent to circumvent the salary cap. Id.

239. Id. at 180.

240. Id. The league also sued the Bridgeman class plaintiffs because they nominally represented Dudley, through the NBPA, in the defense of a player's right to include a one-year out provision in his contract. Id. at 174.

241. Id. at 180. The district court cited the Bridgeman Settlement Agreement, which incorporates Federal Rules of Civil Procedure 53(a), (c), (d), and (e). Id. The settlement agreement specifically provided that "the Court shall accept the Special Master's findings of fact unless clearly erroneous and the Special Master's recommendations of relief unless based upon clearly erroneous findings of fact, incorrect application of the law or abuse of discretion." Id.

242. Id. at 180-83. The district court held that a one-year out provision in multiyear contracts had been within the contemplation of the parties during the negotiation of the Bridgeman Settlement Agreement. Id. at 183. Therefore, the findings of the Special Master must be upheld despite the potential consequences the provisions will have on the implementation of the salary cap. Id.

243. Id. at 182 (holding that one-year out provisions negatively affect the salary cap).

244. Id. at 183.

245. Id. An example of the effect of the provisions allowing teams to re-sign their own free agents without being constrained by the salary cap is the Los Angeles Lakers, who will pay $42 million in salary for the 1993-94 season, while the salary cap for the season is $15.9
the one-year out provision, there is little ground for courts to invalidate contracts without proof of an intention to circumvent the cap.246 Recognizing the national labor policy of encouraging settlement of disputes through collective bargaining, courts cannot strike down the one-year out provision without relying on some basis in the negotiated agreement.247 Consequently, the NBA must determine what consideration is valuable enough to the players to persuade them to surrender their rights to contracts with out clauses.

When the NBPA agreed to the league's demand for a salary cap in 1983, the league was suffering through a difficult period financially.248 More than half of the league's teams lost money in the 1980-81 season and attendance at games was poor.249 The NBA proposed the salary cap as a means of stabilizing the finances of the teams and enhancing competitive parity throughout the league.250 The league contended that setting a maximum aggregate salary amount for each team would slow the trend of rising player salaries.251 The league intended the creation of the minimum and maximum aggregate salary amount to foster a sense of partnership between the league and the players because increased revenues were in both parties' best interests.252

A major concern of the league prior to the implementation of the salary cap was that free agency would induce star players to play for teams in larger media markets, where greater financial resources were available to sign these players.253 The league was concerned that teams in the larger markets would dominate the teams in smaller markets, which could not compete for the free agent talent.254

In the ten years since the NBA included the salary cap in the collective bargaining agreement, the financial performance of the NBA has improved substantially.255 Some commentators believe that this financial
improvement directly relates to the implementation of the salary cap.\textsuperscript{256} While the salary cap has stabilized the trend of higher salaries, other factors have contributed to the league’s financial strength including the advent of star players who have increased the league’s visibility and greater television revenues.\textsuperscript{257}

In response to the heightened demand for league-related products, the NBA created NBA Properties, Inc.\textsuperscript{258} This subsidiary maintains the right to market the images of the players on novelty items and to sell paraphernalia bearing team logos worldwide.\textsuperscript{259} According to one estimate, NBA Properties generated $1 billion in revenues in 1991.\textsuperscript{260} This revenue figure is expected to increase substantially in the future as NBA Properties begins to exploit the league’s growing popularity in international markets.\textsuperscript{261}

According to the definition of “Defined Gross Revenues” in the collective bargaining agreement, the revenues generated by NBA Properties are not included in salary cap calculations.\textsuperscript{262} The exclusion of this income lowers the maximum aggregate salary for each team. Public statements by players and the NBPA indicate that this income will be a point of negotiation if the current salary cap is to be included in future collective bargaining agreements.\textsuperscript{263}

If the league determines that labor costs must be constrained but is unable to negotiate a salary cap for veteran players, it may try to implement a cap on rookie salaries.\textsuperscript{264} Such a provision would allow teams to avoid committing to large contracts for unproven talent.\textsuperscript{265} A rookie cap probably would be challenged by players entering the league. Courts, however, have previously held that the NBPA is authorized to negotiate labor provisions affecting prospective players.\textsuperscript{266}

Based upon the players’ agreement to the original salary cap, it is evident that the players recognize the important correlation between the

\begin{footnotes}
\textsuperscript{256} Id.
\textsuperscript{257} Swift, supra note 4, at 86-88.
\textsuperscript{258} Agreement, supra note 3, at art. XXXII, sec. 1, at 125.
\textsuperscript{259} Id.
\textsuperscript{260} Swift, supra note 4, at 82; see also Justice, supra note 245, at B1, B5 (stating that the owners expect to make approximately $300 million from the sale of licensed apparel in the 1993-94 season and that the players want to share this profit).
\textsuperscript{261} Swift, supra note 4, at 82.
\textsuperscript{263} Hubbuch, supra note 255, at D8.
\textsuperscript{264} Harvey Araton, Penny for Your Thoughts, Billions of Them, N.Y. Times, Oct. 14, 1994, at B14.
\textsuperscript{265} Id.
\textsuperscript{266} See infra notes 217-29 and accompanying text.
\end{footnotes}
league's and their financial viability. The players were willing to limit the aggregate salary amount available in return for a minimum salary amount. In upcoming negotiations for a new collective bargaining agreement, the players may agree to maintain a salary cap if they are adequately compensated. Adequate compensation probably will include a portion of the income generated by NBA Properties. Therefore, whether the salary cap is included in the next collective bargaining agreement most likely will be decided on basic contract principles, rather than on any element of antitrust or labor relations.

VI. Conclusion

The NBA included the salary cap included in the collective bargaining agreement as a means of controlling labor costs in the NBA. The arm's-length negotiations between the NBA and the NBPA satisfied courts that the collective bargaining agreement, in general, qualifies for a nonstatutory exemption from antitrust laws. Thus, courts have applied the exemption to specific provisions of the collective bargaining agreement. In re Dudley demonstrates, however, that the courts are likely to construe the written terms of the agreement narrowly. If the NBA deems it necessary to include the salary cap in future collective bargaining agreements, the provision's effectiveness will be based on the league's ability to negotiate the elimination of one-year out provisions. In the current judicial environment, courts are unlikely to intervene in the collective bargaining relationship between the NBA and the NBPA or to interpret the express terms of the agreement in a broad manner.

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