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Abstract

A frigid dawn had not yet begun to rise when a group of weary negotiators concluded an eleven-hour, eleventh-hour meeting high above the streets of midtown Manhattan. At 7:00 p.m. on January 6, 1999, six men gathered to decide the fate of what had become, essentially over the course of the previous decade, an immensely successful element of American popular culture – professional basketball. At approximately 5:30 a.m. on January 7, 1999, an agreement was finally reached between the representatives of the National Basketball Association ("the NBA" or "the league") and of the National Basketball Players' Association ("the NBPA" or "the union"), the union representing players in the NBA. The landmark agreement ended a six-month lockout and rescued the NBA from becoming the first professional sports league to cancel an entire season due to labor strife. The agreement curtailed strike-related losses at $1 billion in revenue for owners and more than $500 million in salaries for players, and permitted both parties to vie for the remaining $1 billion in estimated revenue still to be earned in the shortened season. Yet while the NBA's settlement certainly offered immediate, short-term benefits, most notably the restoration of the 1999 NBA season, the consequences of that agreement – anticompetitive price-fixing of players' salaries – set a dangerous precedent which reaches far beyond a single basketball season. In fact, the effects of the NBA's agreement go so far as to undermine labor relations between all players' unions and leagues, and the legal relationship as a whole between athletes and their teams in all professional sports. The agreed-upon contract came one day before NBA Commissioner David Stern's self-imposed deadline, at which point he said he would recommend to the owners of the 29 NBA teams that the entire season, which would normally have begun in October, be cancelled. Stern's pressure was heaped upon the public's growing resentment of a 191-day labor dispute between "short millionaires" and "tall millionaires." "You've got a bunch of pigs at the trough," commented Allen Sanderson, an economist and professor of sports business at the University of Chicago, "and all they're trying to do is nudge each other out of the way for the spoils." Thus, while both parties had initially approached the bargaining sessions in June "like two locomotives . . . bearing down on each other [with] alarm bells . . . clanging," by January, the negotiators for both sides came to the table looking to compromise and reach an agreement. In the end, the players' union received an increase in minimum salary and two mid-level salary provisions, improving the salaries among both rookie and journeyman players. League officials projected an increase in the average player salary as a result of the agreement, from $2.6 million in 1998 to $3.4 million in 1999. The league, however, demanded and eventually received two staggering concessions. First, the NBA amended the existing team salary cap to eliminate many of the loopholes that

had allowed crafty owners to sign desired players to long-term contracts of $100 million or more. The public saw these mega-contracts as excessively extravagant, while NBA owners watched their competitors sign players to contracts worth more than some entire franchises, and recognized the paradoxical need for better (read: more expensive) players for their own teams and, at the same time, self-restraint on the part of other teams and the league as a whole. The second concession won by the league was an unprecedented "individual" salary cap, which acted as a further barrier to escalating salaries by unconditionally limiting the amount any player may earn; the individual salary cap was devised to curb owners from the temptation of signing more players to large contracts, and evading the newly- revised team salary cap. The revised team salary cap obtained by the owners, referred to as a "soft" cap, restricted the amount of money a team could spend on its roster, the total sum of salaries of the players on a team, to no more than $30 million in 1999 and $34 million in 2000. Thus, if a team wanted to acquire a particular player, but did not have enough money remaining under the salary cap to accommodate the player's salary, the team would be precluded from signing him. The new cap also limited the amount to which a team could re-sign its own players, and the amount other teams could offer to a player under free agency. A team's own players could receive no more than a 12% annual salary increase, while free agents were only entitled to a 10% increase, an arrangement devised to provide an additional disincentive for players intending to pursue the open market of free agency. The legality of the salary cap as a restraint on players' mobility has been challenged and upheld in court, and the Supreme Court recently reinforced professional sports leagues' authority to implement similar measures. The second of the NBA's demands was an "individual" salary cap, an unprecedented mechanism which limits the amount that any team may pay any particular player, irrespective of the player's worth in an unrestricted market, or, conversely, how much money a team might otherwise be willing to offer that player. In contrast to the "soft" team salary cap, this type of restriction is a "hard" cap, as there are strictly no exceptions in which teams can offer to pay a player more than the stipulated figure. According to the cap, players with up to five years of experience in the NBA can earn no more than $9 million. Players who have been in the league between six and nine years can receive up to $11 million, while for players who have played for ten years or more, the maximum salary increases to $14 million. Although a "grandfather" clause permits those players currently earning more than $14 million to keep their existing salaries, the NBA has apparently implemented the type of salary restriction which the Supreme Court found invalid per se in Arizona v. Maricopa County Medical Society. In Arizona, the Court held that maximum price-fixing agreements, "no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." In that case, the Supreme Court declared that such "invidious" price-fixing schemes, even where a maximum price is established, are illegal per se. This Note argues that both the team and individual salary caps are unlawfully anticompetitive, according to the tenets of antitrust law. This conclusion is reached through an examination of the legality of the two salary cap provisions, the team and the individual caps, particularly in light of antitrust law and any potential labor exemptions. Part I reviews the history of labor and antitrust law and the policies which they represent, as well as any potential exemptions geared to protect labor-related activities. Part I also contrasts sports unions and traditional unions, suggesting that the former possess critical, if subtle, differences from the latter, differences which require separate consideration of the two types of unions. Part II analyzes the legality of both the NBA's team and individual salary caps, and the anticompetitive effects of each type of player restraint, under labor and antitrust law. In Part III, this Note argues that the revenue-sharing "luxury tax" system used by Major League Baseball, while not without its own problems, is a much less restrictive means of harnessing players' salaries and achieving the competitive parity which all these measures are designed to accomplish. If the NBA's new, individual salary cap is shielded from antitrust law, however, the provision will prove to be unfairly and unnecessarily anticompetitive, and reduce the quality of play in the NBA and the overall public enjoyment of the sport.

NOTES

The NBA's Deal with the Devil: The Antitrust Implications of the 1999 NBA-NBPA Collective Bargaining Agreement

Dan Messeloff*

A frigid dawn had not yet begun to rise when a group of weary negotiators concluded an eleven-hour, eleventh-hour meeting high above the streets of midtown Manhattan. At 7:00 p.m. on January 6, 1999, six men gathered to decide the fate of what had become, essentially over the course of the previous decade, an immensely successful element of American popular culture – professional basketball.[1] At approximately 5:30 a.m. on January 7, 1999, an agreement was finally reached between the representatives of the National Basketball Association ("the NBA" or "the league") and of the National Basketball Players' Association ("the NBPA" or "the union"), the union representing players in the NBA.[2] The landmark agreement ended a six-month lockout and rescued the NBA from becoming the first professional sports league to cancel an entire season due to labor strife.[3] The agreement curtailed strike-related losses at $1 billion in revenue for owners and more than $500 million in salaries for players, and permitted both parties

* J.D. Candidate, 2001, Fordham University School of Law. The author thanks Rosa Pietanza and Thaddeus Tracy for their insight and guidance.

1. In addition to the National Basketball Association, the Continental Basketball Association ("CBA") is another professional basketball league. However, the CBA is the NBA's "minor league." The league functions as the "Official Developmental League" for the NBA, and trains players for the NBA. In 1998-99, 63 players were called up from the CBA to the NBA. *See* CBA History, (visited April 17, 2000) <www.cbahoops.com/history/index.shtml>.

2. *See* Mike Wise, *With Little Time on Clock, N.B.A. and Players Settle*, N. Y. TIMES, Jan. 7, 1999, at A1.

3. *See* Stefan Fatsis, *NBA, Players Reach Accord, Saving Season*, WALL ST. J., Jan. 7, 1999, at A3.

to vie for the remaining $1 billion in estimated revenue still to be earned in the shortened season.[4] Yet while the NBA's settlement certainly offered immediate, short-term benefits, most notably the restoration of the 1999 NBA season, the consequences of that agreement – anticompetitive price-fixing of players' salaries – set a dangerous precedent which reaches far beyond a single basketball season. In fact, the effects of the NBA's agreement go so far as to undermine labor relations between all players' unions and leagues, and the legal relationship as a whole between athletes and their teams in all professional sports.

The agreed-upon contract came one day before NBA Commissioner David Stern's self-imposed deadline, at which point he said he would recommend to the owners of the 29 NBA teams that the entire season, which would normally have begun in October, be cancelled.[5] Stern's pressure was heaped upon the public's growing resentment of a 191-day labor dispute between "short millionaires" and "tall millionaires."[6] "You've got a bunch of pigs at the trough," commented Allen Sanderson, an economist and professor of sports business at the University of Chicago, "and all they're trying to do is nudge each other out of the way for the spoils."[7] Thus, while both parties had initially approached the bargaining sessions in June "like two locomotives . . . bearing down on each other [with] alarm bells . . . clanging,"[8] by January, the negotiators for both sides came to the table looking to compromise and reach an agreement.

In the end, the players' union received an increase in minimum salary and two mid-level salary provisions, improving the salaries among both rookie and journeyman players. League officials projected an increase in the average player salary as a result of the

4. *See id.*

5. *See* Glenn Dickey, *Leverage Gave Owners a Large Victory*, S. F. CHRON., Jan. 7, 1999, at E5.

6. Del Jones, *Usually, Everybody Loses in Lockout*, USA TODAY, Jan. 7, 1999, at 3B.

7. Mark Asher, *NBA Ready to Lock Out its Players*, WASH. POST, June 30, 1998, at B1.

8. Ken Fidlin, *No Matter What Happens, the NBA Owners Have Won*, TORONTO SUN, January 6, 1999, at 82.

agreement, from $2.6 million in 1998 to $3.4 million in 1999.[9] The league, however, demanded and eventually received two staggering concessions. First, the NBA amended the existing team salary cap to eliminate many of the loopholes that had allowed crafty owners to sign desired players to long-term contracts of $100 million or more.[10] The public saw these mega-contracts as excessively extravagant, while NBA owners watched their competitors sign players to contracts worth more than some entire franchises,[11] and recognized the paradoxical need for better (read: more expensive) players for their own teams and, at the same time, self-restraint on the part of other teams and the league as a whole.[12] The second concession won by the league was an unprecedented "individual" salary cap, which acted as a further barrier to escalating salaries by unconditionally limiting the amount any player may earn; the individual salary cap was devised to curb owners from the temptation of signing more players to large contracts, and evading the newly-revised team salary cap.

The revised team salary cap obtained by the owners, referred to as a "soft" cap,[13] restricted the amount of money a team could spend on its roster, the total sum of salaries of the players on a team, to no more than $30 million in 1999 and $34 million in

9. *See id.*

10. *See* 1999 NBA COLLECTIVE BARGAINING AGREEMENT, ARTICLE VII, SEC. 5. On October 1, 1997, the Minnesota Timberwolves signed 21-year-old forward Kevin Garnett to a record $125-million contract over six years, a deal worth $5 million more than the asking price for the Timberwolves' baseball neighbors, the Twins. *See* Steve Aschburner, *$125,000,000*, STAR TRIB. (Minneapolis, Minn.) Oct. 2, 1997, at 1A. In July, 1996, the Los Angeles Lakers signed center Shaquille O'Neal for $120 million over seven years. Other mega-contracts included Alonzo Mourning of the Miami Heat (7 years, $112 million), and the Washington Wizards' Juwan Howard (7 years, $100.8 million). *See id.*

11. The $125 million deal between Minnesota and Garnett is worth $5 million more than the asking price for the Timberwolves' baseball neighbors, the Twins. *See* Aschburner, *supra* note 10, at 1A.

12. *See* Bruce Balestier, *Affectionate Distrust Marked Drafting of NBA Settlement*, N.Y.L.J., Feb. 5, 1999, at 1 (reporting that the league's goal for the bargaining was "cost certainty," but it achieved "a measure of cost predictability").

13. A "soft" cap is one in which teams can use "creative accounting" to shift players (and their salaries) in order to create room under the salary limit to sign new players. This is in contrast to a "hard" salary cap, to be discussed in Part II. *See* Paul Staudohar, *Salary Caps in Professional Team Sports*, COMPENSATION AND WORKING CONDITIONS, Spring 1998, at 3.

2000.[14] Thus, if a team wanted to acquire a particular player, but did not have enough money remaining under the salary cap to accommodate the player's salary, the team would be precluded from signing him. The new cap also limited the amount to which a team could re-sign its own players, and the amount other teams could offer to a player under free agency.[15] A team's own players could receive no more than a 12% annual salary increase, while free agents were only entitled to a 10% increase, an arrangement devised to provide an additional disincentive for players intending to pursue the open market of free agency.[16] The legality of the salary cap as a restraint on players' mobility has been challenged and upheld in court,[17] and the Supreme Court recently reinforced professional sports leagues' authority to implement similar measures.[18]

The second of the NBA's demands was an "individual" salary cap, an unprecedented mechanism which limits the amount that any team may pay any particular player, irrespective of the player's worth in an unrestricted market, or, conversely, how much money a team might otherwise be willing to offer that player.[19] In contrast to the "soft" team salary cap, this type of restriction is a "hard" cap, as there are strictly no exceptions in which teams can offer to pay a player more than the stipulated figure.[20] According to the cap, players with up to five years of experience in the NBA

14. *See* Phil Jasner, *Last-Second Shot Produced NBA Peace*, BUFF. NEWS, Jan. 7, 1999, at 1F.

15. *See id.*

16. *See id.*

17. *See* Wood v. NBA, 809 F.2d 954 (2d Cir. 1987) (upholding legality of salary cap); NBA v. Williams, 45 F.3d 684 (7th Cir. 1995) (same); Bridgeman v. NBA, 675 F. Supp. 960 (D. N.J. 1987) (same). For a complete discussion of the Wood case, see *infra* notes 98-114 and accompanying text. The legality of the salary cap has been questioned by several law review articles. *See* Scott Foraker, Note, *The National Basketball Association Salary Cap: An Antitrust Violation?*, 59 S. CAL L. REV. 157 (1985); D. Albert Daspin, *Of Hoops, Labor Dupes and Antitrust Ally-Oops: Fouling Out the Salary Cap*, 62 IND. L. J. 95 (1986).

18. *See* Brown v. National Football League, 518 U.S. 231 (1996); *see also* discussion *infra*, notes 147-173 and accompanying text.

19. *See* Staudohar, *supra* note 13, at 3.

20. *See id.* No offer may be greater than the cap amount, although players are permitted the precalculated annual raises which would technically increase the salary above the cap amount. *Id.*

can earn no more than $9 million.[21] Players who have been in the league between six and nine years can receive up to $11 million, while for players who have played for ten years or more, the maximum salary increases to $14 million.[22] Although a "grandfather" clause permits those players currently earning more than $14 million to keep their existing salaries, the NBA has apparently implemented the type of salary restriction which the Supreme Court found invalid *per se* in *Arizona v. Maricopa County Medical Society*.[23] In *Arizona*, the Court held that maximum price-fixing agreements, "no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."[24] In that case, the Supreme Court declared that such "invidious" price-fixing schemes, even where a maximum price is established, are illegal *per se*.[25]

This Note argues that both the team and individual salary caps are unlawfully anticompetitive, according to the tenets of antitrust law. This conclusion is reached through an examination of the legality of the two salary cap provisions, the team and the individual caps, particularly in light of antitrust law and any potential labor exemptions. Part I reviews the history of labor and antitrust law and the policies which they represent, as well as any potential exemptions geared to protect labor-related activities. Part I also contrasts sports unions and traditional unions, suggesting that the former possess critical, if subtle, differences from the latter, differences which require separate consideration of the two types of unions. Part II analyzes the legality of both the NBA's team and individual salary caps, and the anticompetitive effects of each type of player restraint, under labor and antitrust law. In Part III, this Note argues that the revenue-sharing "luxury tax" system used by Major League Baseball, while not without its own problems, is a much less restrictive means of harnessing players' salaries and achieving the competitive parity which all these measures are de-

21. *See* Wise, *supra* note 2.

22. *See id.*

23. 457 U.S. 332 (1987).

24. *Id.* at 346 (quoting United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940)).

25. *See id.*

signed to accomplish. If the NBA's new, individual salary cap is shielded from antitrust law, however, the provision will prove to be unfairly and unnecessarily anticompetitive, and reduce the quality of play in the NBA and the overall public enjoyment of the sport.

THE LABOR-ANTITRUST CONFLICT AND PLAYERS' UNIONS:

Protecting, and Distinguishing, Electricians and Athletes

The salary cap articles of the NBA's collective bargaining agreement are not necessarily as unlawfully anticompetitive as they might first appear. To protect the collective bargaining activities of unions in their effort to advance their own interests, both Congress and the Supreme Court have immunized unions from antitrust scrutiny under certain circumstances. It is not entirely clear, however, when, or to whom, any exemption from antitrust law should be applied. Such confusion is increased in cases involving unionized athletes, or players' unions, since certain agreements are "essential" to professional sports leagues, such as arrangements for league rules or roster sizes, while other agreements are not "essential," and must be subject to antitrust law. Additionally, there are several important distinctions between unionized athletes and other industrial unions, making it even more difficult to determine exactly when to apply any antitrust exemption to collective bargaining agreements.

A. THE LABOR-ANTITRUST CONFLICT

The collective bargaining of unions has been accorded certain limited exemptions to antitrust law by both Congress and the judiciary, for those instances in which otherwise anticompetitive practices should be deemed lawful.[26] While Section 1 of the Sherman Act proclaims that "every contract, combination or conspiracy in restraint of trade or commerce among the several states . . . is declared to be illegal,"[27] which in theory includes the "conspired" acts of unions, "the most plausible understanding of the legislative history of the Sherman Act is that it was not meant to apply to standard union activities."[28] According to the National Labor Rela-

26. *See* PHILLIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS 109-112 (1997).
27. 15 U.S.C. § 1 (1994).
28. AREEDA, *supra* note 26, at 109.

tions Act ("NLRA"),[29] unions must bargain collectively to determine "wages, hours, and other terms and conditions of employment."[30] Thus, they are statutorily entitled to reach decisions in these matters that antitrust policy would normally reserve "for market determination free of collective, industry-wide decisions."[31]

In order to protect union activities from judicial review and interference, Congress enacted the Clayton Act in 1914 and the Norris-LaGuardia Act in 1932.[32] Sections 9 and 20 of the Clayton Act state that unions are not illegal conspiracies, and further exempts certain labor activities from antitrust law, "to equalize before the law the position of workingman and employer as industrial combatants."[33] Section 6 declares that:

> 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 . . . organizations from lawfully carrying out the legitimate objectives thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under antitrust laws.[34]

The Norris-LaGuardia Act further exempted unions from exposure to antitrust law by removing from courts the authority to issue injunctions in most labor disputes.[35] Judicial injunctions were now the very last line of defense, available only after all reasonable methods have been tried and found wanting.[36]

The Supreme Court has also devised a "*non*-statutory" labor exemption, which protects certain actions of employers (as opposed to unions, the designated beneficiaries of the "statutory" la-

29. 29 U.S.C. § 158(d) (1994).

30. *Id.*

31. AREEDA, *supra* note 26, at 109.

32. 29 U.S.C. § 158(d).

33. 15 U.S.C. § 17 (1994); 29 U.S.C. § 52 (1994).

34. *Id.*

35. 29 U.S.C. § 101 (1994).

36. *See* Brotherhood of R. Trainmen v. Toledo, P. & W. Railroad, 321 U.S. 50, 56-57 (1944) (holding that the complainant must make "every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration").

bor exemption) from antitrust scrutiny.[37] Still, while most activities involving unions or between unions and employers are exempt from antitrust law, those restraints which are unreasonable, will not be exempt.[38] In *Amalgamated Meat Cutters*,[39] for example, the Supreme Court held that contractually forcing employers to charge a certain price for their products was illegal, even if it was achieved through collective bargaining and intended to increase the wages of union members.[40] Furthermore, no restriction whatsoever will be permitted if it is found to be more than necessary to achieve the union's legitimate objectives.[41] However, a recent Supreme Court case firmly supported the contention that the objectives of collective bargaining supersede all but the most exceptional market concerns.[42] This holding strained the theory that certain reasonable limits to economic competition are "essential to the effectiveness, and sometimes to the existence of many wholly beneficial economic activities."[43]

While the NLRA and the concordant federal labor laws embody significant national industrial objectives, federal antitrust policy and the Sherman Act complement the significance of those labor interests as "the Magna Carta of free enterprise."[44] Antitrust

37. Although both the language of the "statutory" or "non-statutory" exemptions, as well as their respective meanings and applications, can be unclear, "all labor exemptions are drawn from the labor and antitrust statutes and are therefore statutory; at the same time, they are largely judge made, for the statutes are not very specific as to what is exempt . . . [S]ome labor exemptions are more clearly inferred from statutory language than are other labor exemptions." AREEDA, *supra* note 26, at n. 25.

38. *See* Amalgamated Meat Cutters v. Jewel Tea, 381 U.S. 676, 693 (1965) (holding illegal measures which reveal "the elements of conspiracy in restraint of trade or an attempt to monopolize").

39. *Id.*

40. *See id.* at 692. The NBA's collective bargaining agreement seems to provide an opposite example of the *Jewel Tea* principle: instead of forcing employers to charge a minimum price for a product, they are prohibited from paying more than a maximum price for the "product."

41. *See* Connell Construction Co. v. Plumbers & Steamfitters Loc. 100, 421 U.S. 616, 623 (1975) (finding that curtailment of competition based on efficiency is "neither a goal of federal labor policy nor a necessary effect of the elimination of competition among workers.").

42. *See* Brown v. National Football League, 518 U.S. 231, 245 (1996).

43. ROBERT BORK, THE ANTITRUST PARADOX, 332 (1978).

44. United States v. Topco, 405 U.S. 596, 610 (1972).

policy and its underlying task of protecting consumers from anti-competitive practices "are as important to the preservation of economic freedoms and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[45] Even after the enactment of federal labor policy, the Supreme Court has looked at the Sherman Act and the values imbued therein as "a comprehensive charter of economic liberty," the most reliable means of protecting "free and unfettered competition" in order to preserve national "democratic, political and social institutions."[46] The Supreme Court has accordingly instructed that any "exemptions from antitrust laws are to be strictly construed,"[47] mandating thorough consideration of any possible exigencies in which "Congress intended to override the fundamental national policies embodied in the antitrust laws."[48] Thus, between the two socioeconomic titans of labor policy, which protects the rights of unions and of workingmen, and antitrust policy, which protects the rights of consumers in an unrestricted economy, must lie some middle ground, a "proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets."[49] Whether the NBA's current collective bargaining agreement should be entitled to such accommodation remains to be seen.

It is important to consider that, even where applicable, the antitrust exemptions were generally devised to shield unions from antitrust liability and to promote legitimate employee interests. In recent sports cases, however, that intent has been improperly inverted: the employer, rather than the union, seeks "derivative" antitrust immunity against claims made by the members of the union itself.[50] This matter is complicated even further by the excep-

45. *Id.*

46. Northern Pac. R.R. Co. v. United States, 356 U.S. 1, 4 (1958).

47. Federal Maritime Comm'n v. Seatrain Lines, 411 U.S. 726, 733 (1973).

48. Otter Tail Power Co. v. United States, 410 U.S. 366, 374 (1973).

49. Connell Construction Co. v. Plumbers & Steamfitters Loc. 100, 421 U.S. 616, 622(1975).

50. *See* Brown v. National Football League, 518 U.S. 231, 255 (1996) (Stevens, J., dissenting) ("[I]t would be most ironic to extend an exemption crafter to protect collective action by employees to protect employers acting jointly to deny employees the op-

tional legal status of professional sports leagues, for while labor law furnishes limited protection to certain concerted activities of business competitors, the business between competing sports teams is intrinsically different from that between competitors in other industries. In professional sports leagues, for example, it would be:

> unwise for all the teams to compete as hard as they can against each other in a business way; the stronger teams would be likely to drive the weaker ones into financial failure. If this should happen, not only would weaker teams fail, but eventually the whole league, both the weak and the stronger teams would fail, because without a league no team can operate profitably.[51]

In all professional sports leagues, a limited number of "essential" horizontal restraints on competition are indispensable.[52] Professional sports teams must make joint decisions in areas such as league rules, schedules and rosters, to name a few, decisions which, strictly speaking, would be prohibited by the Sherman Act in other industries. "When a league of professional lacrosse teams is formed," for example, "it would be pointless to declare their cooperation illegal on the basis that there are no other professional lacrosse teams."[53]

Nevertheless, courts have also held that in certain regards, sports leagues and their teams should in fact be construed as business competitors.[54] Individual teams compete in the same manner

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portunity to negotiate their salaries individually in a competitive market."); Brown v. Pro Football, 50 F.3d 1041, 1085 (Wald, J., dissenting) ("New incentives for employees not to engage in collective bargaining—and the bizarre prospect of employers attempting to force employees to remain in a union so as to preserve the employers' valuable antitrust exemption—run directly contrary to the overarching purpose of the labor laws, to encourage bona fide collective bargaining."); *Powell*, 888 F.2d at 574 (Lay, C.J., dissenting from denial of rehearing en banc) ("Union decertification is hardly a worthy goal to pursue in balancing labor policy with the antitrust laws").

51. United States v. National Football League, 116 F.Supp. 319, 323 (D. Pa. 1953).

52. *See* National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., 468 U.S. 85, 101 (1984) (holding that professional sports is "an industry in which horizontal restraints on competition are essential if the product is to be available at all").

53. BORK, *supra* note 43, at 278.

54. *See* Los Angeles Mem. Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1387-1390 (9th Cir.), cert. denied, 469 U.S. 990 (1984); North Am. Soccer League v. Nat'l Football League, 670 F.2d 1249, 1256-1258 (2d Cir 1982); McNeil v.

as other industries over players, coaches and management personnel, as well as over ticket prices, radio and television revenues, media space, and other income sources.[55] For example, agreements between teams to control players' salaries are not "essential" to professional sports leagues the way agreements establishing schedules, roster size or uniform rules and regulations of the game are "essential." Therefore, agreements relating to conventional business matters should be subject to antitrust law, while agreements "essential" to professional sports should be entitled to exemption. In this manner, sports leagues constitute "association[s] of teams sufficiently independent and competitive with one another to warrant [antitrust] scrutiny . . . [as] separate business entities whose products have an independent value."[56] Because they compete like other industries in business matters, sports leagues have been and should continue to be treated like other industries in matters where market restraints are generally not entitled to broad antitrust exemption.

B. Professional Sports Unions v. Traditional Unions:

Discerning Power Forwards from Auto Workers

At this point, the subtle differences between sports unions and traditional unions, those which antitrust exemption was initially legislated to protect, become critical. Particularly relevant to the issue of the NBA salary cap is the difference within professional sports leagues between what employers (teams) pay and what employees (players) earn. On its face, the clarification seems merely semantic, although for collective bargaining purposes (and, more importantly, for the purposes of determining antitrust exemption), an understanding of this distinction is crucial. In the professional

Nat'l Football League, 1992-1 Trade Cas. (CCH) P69,841, at 67,978-80 (D. Minn. 1992).

55. *See Los Angeles Mem. Coliseum Comm'n*, 726 F.2d at 1390 (Determining that the disparity in profits between teams is due to "independent management policies regarding coaches, players, management personnel, ticket prices, concessions, luxury box seats, as well as franchise location, all of which contribute to fan support and other income sources. In addition to being independent business entities, [sports teams] do compete with one another off the field as well as on to acquire players, coaches, and management personnel. In certain areas of the country where two teams operate in close proximity, there is also competition for fan support, local television and local radio revenues, and media space.").

56. *Id.* at 1389 (citations omitted).

sports industry, like the entertainment industry, individual salaries are not negotiated through collective bargaining efforts between a union and an employer. Players' unions negotiate "terms and conditions of employment"[57] such as player drafts, minimum salaries, pensions, and salary and grievance arbitration procedures.[58] It is the recognized practice within the professional sports industry, however, that negotiations over the salaries of individual players are explicitly excluded from union administration. Rather, the deliberation and negotiation of individual players' salaries are left strictly to the jurisdiction of each player and his agent, individually.[59] This is largely due to the "extraordinary and unique skill and ability"[60] required of professional athletes, and stands in contrast to traditional labor unions, in which, despite "differing responsibilities, skills and levels of efficiency,"[61] the sheer number of skilled members of traditional unions betrays this notion of "unique" or "extraordinary" skill. This idiosyncrasy in professional sports both predates and was consented to by players' unions,[62] and constitutes an indispensable practice which any court must recognize to prop-

57. 29 U.S.C. § 158(d) (1994).

58. In response to the argument that the NBA's collective bargaining agreement sets minimum salaries and therefore should be permitted to set maximum salaries, see Michael S. Jacobs & Ralph Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L. J. 1 (1971). The Supreme Court has held that where there is considerable variation in the circumstances of employment (like the differences in skill levels and positions among professional basketball players), collective bargaining agreements may in fact cover only minimum wages and certain conditions of employment, and leave other areas to individual bargaining. *See* J. I. Case, Co. v. N.L.R.B., 321 U.S. 332, 335-36 (1944).

59. *See* 1999 NBA COLLECTIVE BARGAINING AGREEMENT, ARTICLE XXXVI.

60. NATIONAL BASKETBALL ASSOCIATION UNIFORM PLAYER CONTRACT, PARAGRAPH 9: "The Player . . . agrees that he has extraordinary and unique skill and ability as a basketball player, [and] that the services to be rendered by him hereunder cannot be replaced or the loss thereof adequately compensated for in money damages." *Id.* This type of characterization is not unique to basketball, but is contained within the Uniform Player Contracts for other sports as well. *See* Uniform Player Contract for Major League Baseball, Section 4(a) ("The Player represents and agrees that he has exceptional and unique skill and ability as a baseball player; that his services to be rendered hereunder are of a special, unusual and extraordinary character which gives them peculiar value which cannot be reasonably or adequately compensated for in damages at law, and that the Player's breach of this contract will cause the Club great and irreparable injury and damage.").

61. Wood v. NBA, 809 F.2d 954, 959 (2d Cir. 1987).

62. *See* LIONEL S. SOBEL, PROFESSIONAL SPORTS AND THE LAW, 303, 327 (1977).

erly distinguish players' unions from other labor unions.

Professional sports leagues and players' unions agree upon the unique talent required for professional athletics. Players' unions, therefore, cannot effectively bargain over the wages of their members (unlike traditional labor unions). Professional sports leagues are closely related to, if not completely a part of, the entertainment business. In entertainment, the same rules do not apply to one-of-a-kind artists as with the typical wage earner.[63] The salaries of professional athletes generally do not vary upon their titles, responsibilities, or years of service. Like celebrities, athletes are paid in relation to the audience they attract and entertain.[64] Traditional union members are paid strictly according to the service they provide, and on a much smaller scale. Electricians, for example, generate service fees for their employers, but do not generate millions of dollars in revenue from sell-out crowds or broadcasting fees so that fans worldwide may watch them do their job. This is not to disparage the services performed in traditional industries, but rather to illustrate the difference in revenue generated for employers by employees and the relative worth of those employees to their employers. The salary structure within professional sports leagues is dissimilar to the salary structure in traditional industries, because it is intrinsically connected to the ability of its employees individually to generate revenue. Measures taken by professional sports leagues with respect to their players are therefore negotiated individually. Consequently, the "wages" of professional athletes are not resolved collectively by players' unions such as NBPA. According to the established practice of negotiating salaries individually, and the underlying grounds for that practice, the NBPA should not have jurisdiction to argue on behalf of (or in the case of the NBA's individual salary cap, compromise) the salaries of individual players.

Other differences between the two types of unions are also significant in terms of collective bargaining and reinforce the need for separate consideration of unionized athletes. For example, in other industries, workers may pursue other employment and adapt

63. *See* Paul Staudohar, *Baseball's Changing Salary Structure*, COMPENSATION AND WORKING CONDITIONS, Fall 1997, at 4.

64. *See id.*

their skills to apply to related fields, thus providing surplus outlets for their services. In professional sports, however, the "extraordinary and unique skill and ability"[65] possessed by professional athletes is rarely marketable in any other industry, reducing the number of employment opportunities to the select number of teams in a league.[66] This employment market is restricted even further by the needs of a particular team, so that not all teams will require the services of a particular type of player at a particular time. While employees in other industries face similar concerns as well, the already-limited number of employment opportunities available to professional athletes heighten the concern for such individuals.[67] The unique relationships between both individual players on a team and between the players as a group and the team itself place pressure on teams to find "a winning combination of attitude, talent and leadership."[68] This adds to a lack of job security, increased even further by risk of injury or trade.[69] Professional athletes possess extraordinary talent – inversely proportionate to the length of their careers - and are entitled to concomitant salary considerations from both the league and the players' union. Combined, these factors reinforce the theory that in the matter of "wages," the right of unionized professional athletes to negotiate their salaries individually should not be infringed upon.

In sum, because of the extraordinary and unique talent possessed respectively by professional athletes, the salaries of such individuals cannot be bargained or decided upon collectively, in spite of the objectives of federal labor policy. Furthermore, this position is neither novel nor is it contested by professional sports leagues, players' unions or athletes. Therefore, for a court to hold that a professional sports league may find a player's worth to be so exceptional that it must be determined individually and without the involvement of the union, but that the league may reach an agreement with the players' union that no player's salary can exceed a

65. SOBEL, *supra* note 62, at 17.

66. *See* Ethan Lock, *The Scope of Labor Exemption in Professional Sports,* 1989 DUKE L.J. 339, 403 (1989).

67. *See id.*

68. *Id.*

69. *See id.*

predetermined amount of money, is untenable. The right of professional athletes to negotiate their salaries individually must be respected, and any restrictions or intrusions upon that authority must be condemned.

II. THE NBA'S CURRENT AGREEMENT:

THE TEAM AND INDIVIDUAL SALARY CAPS

The NBA's "soft" team salary cap has received greater legal analysis than the individual salary cap, but only because it is an older, "veteran" restraint. Its legality has been upheld in several cases, most arguing that the importance of collective bargaining outweighs any minor constraint on professional athletes' employment opportunities. This rationale is similar to the Rule of Reason antitrust analysis, in which employers may avoid antitrust liability by imposing only restraints that can be justified as procompetitive. The "hard" individual cap, on the other hand, has yet to be challenged in any court, but may ultimately prove to be much more destructive to players' rights to employment and to a competitive market as a whole. Because of the clear price-fixing element involved, the individual salary cap is not deserving of antitrust immunity under any labor-related exemption, and should be subject to *per se* analysis under antitrust law. Any assertions that applying antitrust law to such market restraints will endanger professional sports leagues are untenable except to the extent that those businesses are themselves anticompetitive.[70]

THE TEAM SALARY CAP:

"Protecting Owners From Themselves," In Perpetuity[71]

The team salary cap, the "quid pro quo" to free agency,[72] was introduced to the professional sports world during the 1984-85 NBA season. In 1981, the NBA was struggling: sixteen of its twenty-three teams lost money, and four had been put up for sale.[73] Many teams, particularly those located in small markets, could not

70. *See* Note, *Releasing Superstars From Peonage: Union Consent and the Nonstatutory Labor Exemption*, 104 HARV. L. REV. 874, 885 n.81 (1991).

71. Brenton Welling & Jonathan Tasini, *Basketball: Business is Booming*, BUS. WK., Oct. 28, 1985, at 78.

72. *See* Staudohar, *supra* note 13, at 3.

73. *See* Welling, *supra* note 71, at 78.

attract talented players because they did not generate the same revenue as big-market teams, and were therefore unable to extend comparable offers to talented players. Without talented players, such teams became "perpetual losers," and could not attract fans. Without fans providing a steady source of revenue, small-market teams were on the verge of bankruptcy.[74] At the peril of financial instability, the NBA argued with the NBPA that the only way for the league to escape "economic Darwinism"[75] and to stay in business was to set a maximum amount that each team could spend on players' salaries. In exchange, the league offered to share a percentage of revenues in order to guarantee a minimum amount that each team would spend on salaries. Under the proposal, players would receive 53% of the defined gross-revenue – gate receipts, local and national media contracts, and other sources of income – and the owners would receive a "salary cap" on team payroll of $3.6 million per club.[76]

Since its inception in 1954, the NBPA had made significant strides in its representation of players, including the elimination of the reserve clause, the establishment of a pension, increases in health benefits, the minimum salary, and *per diem* allowances.[77] The union understood, however, that large losses suffered by the league and its teams would inevitably result in large losses suffered by players. If it agreed to the salary cap, the respective successes and failures of each party would be linked like never before. Faced with the alternative of a potentially sinking ship, the players acquiesced, and an agreement was reached in March, 1983, to implement the salary cap beginning with the 1984-85 season.

The salary cap was intended to make the game of professional basketball more competitive, and hence more attractive to fans. The NBA, not unlike other professional sports leagues, feared that without restrictions on player mobility, the richer teams in major media markets would outbid their poorer rivals for the best players

74. *See* Jacobs, *supra* note 58, at 18.

75. David M. Carter, *The Crack of the Bat – and Labor Strife in the Air*, BUS. WK., April 19, 1999, at 120.

76. *See* Scott Howard-Cooper, *A 10-Year-Old System That Revolutionized Sports*, L.A. TIMES, Aug. 21, 1994, at C9.

77. *See* NBPA TIMELINE, provided by NBPA (on file with author).

and dominate the league, ruining competitive balance and reducing fan interest.[78] The team salary cap limited the payrolls of all teams, irrespective of revenue, to the same modest amount, thereby placing an artificial control on team payrolls and fostering an anticompetitive practice *among* teams in order to improve the level of competition *between* them. The initial cap was $3.6 million in 1983, and although that figure had exploded to $34 million in 1999, the salary cap has regularly made jugglers out of general managers, forcing them to find ways to "create room" under the cap for desired players and preventing them from pursuing otherwise-desirable players whose salaries cannot be accommodated.[79] Nevertheless, the salary cap has been widely championed as "the league's stabilizing force," largely responsible for the NBA's "return from the abyss."[80] NBA Commissioner David Stern has gone so far as to say that the adoption of the salary cap will go down in history as "the turning point of the NBA."[81] Thus, the recent dominance of the Chicago Bulls notwithstanding, small-market teams like those located in Portland, Oregon and Salt Lake City, Utah, have been able to remain competitive. This plan culminated most recently in the San Antonio Spurs' victory over the New York Knicks in the 1999 NBA Finals.[82]

Some critics – individual players and the NBPA, to be sure – have argued that in an atmosphere of unimagined, unbridled success such as currently exists in the NBA, the salary cap is unnecessary and that it should have ended with the league's financial turnaround which it was originally intended to induce.[83] Still other critics argue that the salary cap is not the rainmaker its proponents claim it to be.[84] Admittedly, Stern acknowledged that "[w]hether

78. *See* Smith v. Pro Football, 593 F.2d 1173, 1176 (D.C. Cir. 1978).

79. *See* Joseph Juliano, *NBA Salary Cap Rule Keeps GMs Hustling*, L.A. TIMES, Oct. 13, 1984, at D1.

80. Welling, *supra* note 71, at 78.

81. Anthony Cotton, *With NBA Ratings, Revenues Up, Commissioner Sees Resurgence*, WASH. POST, June 23, 1985, at D1.

82. In the 1990s, small-market teams like the Portland Trail Blazers, Utah Jazz, Orlando Magic, Seattle Supersonics, and the Spurs all reached the NBA Finals, while many other small-market teams have reached the playoffs. *See* <www.nba.com/history/awards_finalschampsmvp.html>

83. *See* Howard-Cooper, *supra* note 76, at C9.

84. A salary cap may not ensure competitive balance between teams, since owners

it's working depends on who you're asking."[85] Nevertheless, in its defense, Stern has argued that the salary cap is still a necessity: in spite of the NBA's good fortune, newfound success has created newfound problems, and the salary cap is now needed, perpetually, to "protect owners from themselves."[86]

The anticompetitive nature of the team salary cap was put directly into question in *Wood v. NBA*,[87] although other courts have deliberated similar player restraints with differing results.[88] In *Wood*, the Second Circuit held that while the salary cap was injurious to players, the benefits of the collective bargaining agreement in which it was contained furthered federal labor policy, and thereby established an inference of legitimacy for the provision as well.[89] However, the *Wood* decision has been criticized for not properly considering the anticompetitive implications of the salary cap in violation of antitrust law, and for not giving sufficient weight to the singular characteristics of sports leagues and unions as compared to more traditional unions.[90] In *Mackey v. National Football League*,[91] the Eighth Circuit devised a three-prong test for granting professional sports leagues antitrust exemption to ensure

individually do not want competitive balance, they want to win:

> Certain general managers and executives are paid six- and sometimes seven-figure salaries because they do a superior job of sizing up players and building a cohesive team. Coaches and managers vary in their ability to get the most out of a roster of players, and their inputs can be critical to a team's success. A salary cap applies only to expenditures on players, so it is expected that strong drawing teams, with more revenue potential than other teams, will be in a better position to hire top general managers and coaches or managers.

Joseph P. Fuhr, Jr., *Stee-rike Four! What's Wrong With the Business of Baseball?*, ATL. ECON. J., June 1, 1999, at 221 (reviewing DANIEL R. MARBURGER, STEE-RIKE FOUR! WHAT'S WRONG WITH THE BUSINESS OF BASEBALL? (1997)).

85. Ian Brenner, *Stern Visualizes No Problems for NBA*, INDIANAPOLIS STAR, Nov. 10, 1985, at 8

86. Welling, *supra* note 71, at 78.

87. Wood v. NBA, 809 F.2d 954, 959 (2d Cir. 1987).

88. *Compare* National Basketball Association v. Williams, 45 F.3d 684 (2d Cir. 1995) (upholding player restraints); Bridgeman v. National Basketball Association, 924 F. Supp. 103 (D.N.J. 1993) (same); Robertson v. National Basketball Association, 389 F. Supp. 867 (S.D.N.Y. 1975) (finding player restraints illegal); Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971) (same).

89. *See Wood*, 809 F.2d at 958-59.

90. *See* Daspin, *supra* note 17, at 103.

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

that lawful collective bargaining agreements do not effectuate unreasonable market restraints.[92] This test was crudely applied in *Brown v. National Football League*, in which the Supreme Court held that, in terms of labor relations, professional sports leagues are, for the most part, completely exempt from antitrust liability.[93] Yet while the Supreme Court applied elements of the *Mackey* test from that decision, it disregarded any meaningful distinction between players' unions and traditional unions, similar to the *Wood* holding.[94] It is likely that *Brown* will blaze a trail for anticompetitive, misguided, league-sponsored market restraints such as the salary cap, all under the guise of lawful collective bargaining.

WOOD V. NATIONAL BASKETBALL ASSOCIATION

In *Wood v. NBA*,[95] Leon Wood, an accomplished college basketball player and member of the gold medal-winning 1984 U.S. Olympic basketball team, challenged under Section 1 of the Sherman Act certain provisions of the collective bargaining agreement between the NBA and the NBPA.[96] Among other articles of the agreement, Wood contested the legality of the salary cap, which limited him to an offer of $75,000 from the Philadelphia 76ers. The team was over the salary cap at the time it drafted Wood, and thus could offer him no more than the minimum salary.[97] The Second Circuit found that the provision in question was not "the product solely of an agreement among horizontal competitors but [was] embodied in a collective bargaining agreement between the employer or employers and a labor organization reached through procedures mandated by a federal labor legislation."[98] The court emphasized the virtues of collective bargaining, commenting that "no one seriously contends that the antitrust laws may be used to subvert fundamental principles of our federal labor policy."[99] While the court admitted that Wood was in fact injured by the

92. For further discussion of Mackey, *see infra* notes 111-137 and accompanying text.

93. *See* Brown v. National Football League, 518 U.S. 231, 249 (1996).

94. *Id*.

95. Wood v. NBA, 809 F.2d 954 (2d Cir. 1987).

96. *Id.* at 954.

97. *Id.* at 955.

98. *Id.* at 954.

99. *Id.* at 958.

NBA's collective bargaining agreement, it declined to determine whether the salary cap is a *per se* violation of antitrust law or subject to the Rule of Reason, a more tolerant standard of antitrust analysis.[100]

Writing for the court in *Wood*, Judge Ralph Winter held that as a matter of policy, any judicial interference in labor negotiations and collective bargaining whatsoever would "unravel" the very agreements courts were obligated to protect. However, the congressional enactment of both the Fair Labor Standards Act,[101] for example, as well as the Occupational Safety and Health Act,[102] each of which imposes contract terms which would ordinarily be left to be negotiated between the parties under a strict interpretation of labor policy, apparently contradict Judge Winter's assertion.[103] These federally-mandated "terms and conditions of employment" cannot be disregarded even upon agreement of both parties involved, as Congress felt that certain national economic interests did indeed prevail over federal labor policy. In line with these statutes, the Supreme Court has similarly refused to grant blanket antitrust exemptions in the name of labor policy.[104]

In response to Wood's argument that his athletic ability entitled him to bargain individually for a higher salary, Judge Winter noted that "collective agreements routinely set standard wages for employees with differing responsibilities, skills and levels of efficiency."[105] What Judge Winter failed to recognize, however, is the precedent, in professional sports, that individual players' skills do not occupy different "levels of efficiency,"[106] but rather are recognized by league and union alike as "extraordinary and unique."[107] Consequently, their salaries are based entirely on individual "re-

100. *Id.* at 962. For further discussion of the per se and Rule of Reason analyses of antitrust law, see *infra* notes 168-213 and accompanying text.

101. 29 U.S.C. § 207 (1994) (minimum wages and maximum hours).

102. 29 U.S.C. §§ 651-678 (1994) (working conditions).

103. *See* SOBEL, *supra* note 62, at 327.

104. *See* Amalgamated Meat Cutters v. Jewel Tea, 381 U.S. 676, 684 n.3 (1965), *accord* United Mine Workers v. Pennington, 381 U.S. 657 (1965).

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

106. *Id.*

107. *See* SOBEL, *supra* note 62, at 17.

sponsibilities [and] skills,"[108] and are never negotiated collectively. Indeed, standard collective bargaining agreements in professional sports contain clauses explicitly excluding player salaries from negotiations.[109] This does not mean that players' unions should be entitled to preferential treatment, but rather an understanding that the "terms and conditions of employment" on a basketball court differ significantly from those on an assembly line. This is a fundamental distinction whose application undermines the purpose of the federal labor policy to protect employees. In the words of Justice Stevens, "[i]t would be most ironic to extend an exemption crafted to protect employees to protect employers acting jointly to deny employees the opportunity to negotiate their salaries in a competitive market."[110] The *Wood* court's failure to address this difference critically impairs its analysis of the salary cap under labor and antitrust law.

MACKEY V. NATIONAL FOOTBALL LEAGUE

In *Mackey v. National Football League*,[111] the Eighth Circuit examined a litany of Supreme Court cases deliberating the proper circumstances under which a court may grant antitrust exemption to the activities of an employer such as a professional sports league. [112] In *Mackey*, several professional football players challenged "the Rozelle Rule," a provision of their collective bargaining agreement which required that a team compensate an acquired player's former team through cash, other players or draft selections for its loss.[113] The result of this rule was that teams were increasingly reluctant to compete for the services of a player from another team, thus greatly reducing the number of offers made to free agents.[114] The court balanced the competing objectives of labor and antitrust law and held that if the collective bargaining agreement was undertaken by the union in "furtherance of its own inter-

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

109. *See* Robert Garbarino, *So You Want to Be a Sports Lawyer*, 1 VILL. SPORTS & ENT. L. F. 11 at 36 (1994).

110. Brown v. National Football League, 518 U.S. 231, 255 (1996) (Stevens, J., dissenting).

111. Mackey v. National Football League, 543 F.2d 606, 610 (8th Cir. 1976).

112. *Id.* at 610.

113. *Id.*

114. *Id.*

ests," the statutory labor exemption will generally apply.[115] Even in circumstances in which an exemption might apply, however, unions may not use the antitrust exemption to assist employers in violating the Sherman Act.[116] Where an agreement both encourages collective bargaining and advances union objectives, market interference will be tolerated and exemption from antitrust law will be granted, along with the concurrent "preeminence over federal antitrust policy" of protecting competitive markets.[117]

The *Mackey* court ultimately streamlined these labor and antitrust interests into a three-prong test specifically designed for dealing with facts particular to professional sports cases. The first element of the test is that the market restraint may only "primarily" affect parties to the collective bargaining relationship.[118] This argument was gleaned from an earlier Supreme Court case in which an agreement barred non-union subcontractors from competing for work from an employer.[119] Second, the agreement sought to be exempted must pertain to mandatory subjects of collective bargaining.[120] Finally, the agreement must be the result of "bona fide arm's length bargaining" between the parties.[121] If all three elements of the *Mackey* test are satisfied, then the collective bargaining agreement will be entitled to labor exemption.

The first element of the *Mackey* test, that the agreement can only have a primary effect on parties to the agreement, is most likely satisfied by the NBA's team salary cap provision. Although union members might argue that the team salary cap reduces the opportunities for teams to accommodate players' individual salary demands, the team salary cap only relates directly to a team's total payroll, and does not affect any player's earning potential indi-

115. *Id.* at 611 (quoting United States v. Hutcheson, 312 U.S. 219, 224 (1941)).

116. *See* Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797 (1945) (Finding that "[i]f business groups, by combining with labor unions, can fix up prices and divide up markets, it was little more than a futile gesture for Congress to prohibit price-fixing by business groups themselves").

117. Amalgamated Meat Cutters v. Jewel Tea, 381 U.S. 676, 689-697 (1965).

118. *Mackey*, 543 F.2d at 617.

119. *Id.* (quoting Connell Construction Co. v. Plumbers & Steamfitters Loc. 100, 421 U.S. 616, 625-26 (1975)).

120. *Id.* at 619.

121. *Id.* at 624.

vidually. That the team salary cap is a flexible, soft cap, and may thus be arranged to accommodate a particular player's salary demands, supports this argument. Alternatively, team owners might contend that the salary cap artificially limits their ability to acquire the services of talented, if high-priced, players whose skills would make their clubs more competitive and more profitable. The NBA, however, is authorized to bargain on behalf of all member teams, and is not prevented from limiting the spending of those teams in order to further their collective interests. Therefore, it is likely that the team salary cap has a primary effect only on parties to the collective bargaining agreement.

The team salary cap will likely be seen to deal with mandatory subjects of collective bargaining, thereby meeting the second prong of the *Mackey* test as well.[122] The National Labor Relations Act imposes a good-faith duty on the party of both employers and unions to negotiate mandatory subjects of collective bargaining, which include "wages, hours and other terms and conditions of employment."[123] Because the team salary cap deals directly with how much a team may pay its roster in the form of a ceiling on payroll, this would likely constitute "wages."[124] Admittedly, the *Mackey* test has been criticized for endowing this criterion with far too much significance, regardless of whether or not the team salary cap falls within its definition.[125] In *Robertson v. NBA*,[126] a court in the Southern District of New York held that "'mandatory subjects of collective bargaining' do not carry talismanic immunity from the antitrust laws" and went so far as to say that they are largely "irrelevant" to the legality of a collective bargaining agreement.[127] This sentiment echoed the opinion of Justice Goldberg in *Jewel Tea*, who stated that "[t]he direct and overriding interest of unions in such subjects as wages, hours and other working conditions which Congress has recognized in making those subjects of man-

122. *See id.*

123. 29 U.S.C. § 158(d) (1994).

124. This is in contrast to the individual salary cap, which more directly limits how much a particular player may earn, as opposed to how much a particular team may pay its players as a whole.

125. *See* Daspin, *supra* note 17, at 111-113.

126. Robertson v. NBA, 389 F. Supp. 867 (S.D.N.Y. 1975)

127. *Id.* at 888.

datory bargaining, is clearly lacking where the subject of the agreement is price-fixing and market allocation."[128] "Moreover," Justice Goldberg continued, "such activities are at the core of the type of anticompetitive commercial restraint at which the antitrust laws are directed."[129] Regardless of whether an agreement concerns mandatory subjects of collective bargaining, any artificial distribution of market allocation is strictly prohibited, even where the intent of the agreement is to establish a balanced allocation of resources, as was the objective of the team salary cap.[130] Thus, it is disputed whether "mandatory subjects of collective bargaining"[131] is as pertinent as the *Mackey* test seems to imply.

The third element of the *Mackey* test requires that the agreement must be reached through "bona fide arm's length collective bargaining" between the parties.[132] This criterion is also presumably satisfied by the agreement between the NBA and the NBPA, as evidenced by the conflict's rancorous six-month history.[133]

In the end, however, the *Mackey* test throws a toss-up as to whether the team salary cap is lawful, particularly in light of the circumstances in which the NBA's collective bargaining agreement was negotiated. The team salary cap most likely affects only parties to the agreement, and was conducted at the requisite "bona fide arm's length." On the other hand, whether the agreement properly deals with "wages" as part of collective bargaining, and whether the NBPA has authority to bargain in such matters, may be disputed. In *Brown v. National Football League*,[134] the most recent review of the conflux of labor and antitrust law as it relates to professional sports, the Supreme Court indirectly employed the *Mackey* test to reach a *Wood*-like conclusion.[135] It maintained the

128. Amalgamated Meat Cutters v. Jewel Tea, 381 U.S. 676, 732-33 (1965) (Goldberg, J. dissenting in part, concurring in part).

129. *Id.*

130. *See* Daspin, *supra* note 17, at 103.

131. 29 U.S.C. § 158(d).

132. *Mackey*, 543 F.2d at 617.

133. It could even be said that the relationship between the NBA and the NBPA was, at times, at much farther than arm's length. For further details of the NBA lockout, *see* Zack Burgess, *NBA Beats the Buzzer*, KANSAS CITY STAR, Jan. 7, 1999, at D1.

134. Brown v. National Football League, 518 U.S. 231 (1996)

135. *Id.* at 250.

steadfast supremacy of labor law over antitrust law, and dispensed a largely indiscriminate antitrust exemption to collective bargaining.[136] Legal critics have speculated that the Court's "end-run" around antitrust policy in *Brown* will immunize team owners in all professional sports from essentially all antitrust scrutiny, increasing "the potential to spread baseball's bitter and debilitating player-owner relations to their sports."[137] The Supreme Court's holding thus threatens to exclude all professional athletes from the protection of the law, depriving members of players' unions of any legitimate course of action against the anticompetitive practices of their employers.

3. Brown v. National Football League

During the course of labor negotiations in 1989, the National Football League ("NFL") proposed a "developmental" practice squad, comprised of players who had not made the team roster but would be available in case of injury to roster players.[138] These players would each receive a flat, weekly salary of $1,000. The football players' union rejected the league's proposal, arguing that the new, non-roster players should be able to negotiate their own salaries like roster players.[139] After the negotiations reached an impasse, the league unilaterally implemented its plan, which included the initiation of the "developmental" squad. This action was challenged by members of the practice squads as a violation of the Sherman Act as a restraint of trade which prevented them from negotiating their individual market worth.[140] In rejecting the players' argument, the Supreme Court held that "to permit antitrust liability here threatens to introduce instability and uncertainty into the collective bargaining process, for antitrust law often forbids or discourages the kinds of joint discussions and behavior that the collective bargaining process invites or requires."[141] The Court reflected the same contention as Judge Winter proposed in *Wood*,

136. *Id.* at 253.

137. Harvey Berkman, *Baseball Labor Woes May Move Onto the Gridiron*, NAT'L L. J., April 8, 1996, at B1.

138. *Brown*, 518 U.S. at 242.

139. *Id.*

140. *Id.* at 243.

141. *Id.* at 242.

that no one could reasonably question the primacy of labor interests over antitrust law.[142] By following the reasoning in *Wood*, however, the Supreme Court lay itself open to the same criticism: complete oversight of the differences between players' unions and other traditional unions, with particular inattention to the industry practice in professional sports of negotiating salaries individually, resulting in a disquieting, all-inclusive judgment.

The Supreme Court developed its argument in favor of the nonstatutory antitrust exemption at length.[143] Only in its conclusion did the Court hastily insert an indirect reference to the *Mackey* test:

> For these reasons, we hold that the implicit ("nonstatutory") antitrust exemption applies to the employer conduct at issue here. That conduct took place during and immediately after a collective-bargaining negotiation. It grew out of, and was directly related to, the lawful operation of the bargaining process. It involved a matter that the parties were required to negotiate collectively. And it concerned only the parties to the collective bargaining relationship.[144]

Returning to its motivation to bolster federal labor policy, the Court asserted that, as part of its origins, one of the objectives of the National Labor Relations Board "was to take from antitrust courts the authority to determine, through application of the antitrust laws, what is socially or economically desirable collective-bargaining policy."[145] The theory which the *Brown* decision imputed to the NLRB, however, and the subsequent policy which the Court itself independently enacted, is that labor law and antitrust law can never subsist in congruity with each other. If the policy of collective bargaining is to be protected at all, the Supreme Court seems to say, then all activities conducted therein must be protected, regardless of undue market restraint. The Supreme Court tempered its holding and admitted that it did not condone "every

142. *Wood*, 809 F.2d at 958.
143. *Brown*, 518 U.S. at 242.
144. *Id.* at 250.
145. *Id.* at 242.

joint imposition of terms by employers,"[146] but that the facts of *Brown* did not call for a definition of such "extreme outer boundaries."[147]

As a matter of policy, however, employers should not be entitled to antitrust exemption in the name of labor policy where their conduct restrains the interests of employees in violation of federal labor policy legislated to advance those interests.[148] The nonstatutory exemption is rooted not in the interests of employers to stabilize costs, but in "the association of employees to eliminate competition over wages and working condition."[149] In contrast, however, there is "no similarly strong labor policy that favors the association of employers to eliminate a competitive method of negotiating wages that predates collective bargaining and that labor would prefer to preserve."[150] With the unprecedented scope of employers' antitrust exemption in *Brown*, the only alternative left to players to challenge an existing restraint of trade is to decertify their union, resulting in "the bizarre prospect of employers attempting to force employees to remain in a union so as to preserve the employers' valuable antitrust exemption."[151] Therefore, contrary to the Supreme Court's reasoning, federal labor policy is actually compromised, not promoted, when antitrust exemption is extended in cases in which "protecting the objectives of collective bargaining" leaves union members with decertification of their union as the only method of furthering their collective interests.[152]

The facts surrounding the NBA team salary cap may be distinguished further from *Brown* in several key respects. First, the

146. *Id.* at 250.

147. *Id.*

148. *See id.* at 255 (Stevens, J., dissenting) ("[I]t would be most ironic to extend an exemption crafter to protect collective action by employees to protect employers acting jointly to deny employees the opportunity to negotiate their salaries individually in a competitive market.").

149. Connell Construction Co. v. Plumbers & Steamfitters Loc. 100, 421 U.S. 616, 622 (1975).

150. *Brown*, 518 U.S. at 257 (Stevens, J., dissenting).

151. Brown v. Pro Football, Inc., 50 F.3d 1041, 1065 (D.C. Cir. 1995) (Wald, J., dissenting).

152. *See* Paul Staudohar, *The Scope of Pro Football's Antitrust Exemption*, LAB. L. J., March 1999, at 41.

plaintiffs in *Brown* were relatively inconsequential "bit" players, members of an "experimental" practice squad who challenged the mechanical salary structure of a proposed training system (one which provided them with their only opportunity to play professional football). The Supreme Court could not look to any "industry practice" relating to the salaries of such players: otherwise-unqualified non-roster members specifically employed exclusively to practice with members of a team's roster. The NFL offered them a pat figure, which had to be accepted if the players wanted to play football at all. Similarly, the effect of the league's "market restraint," the predetermined salary instituted by the NFL for these players, would be negligible at most. The players were not sufficiently skilled to play for NFL teams, and thus held no collective bargaining power. To evaluate and negotiate the individual value of relatively unskilled players might arguably cost more than the introduction of the practice squad system as a whole would be worth.

The salaries of NBA players, on the other hand, with their "extraordinary" talent, have always been negotiated individually, a right explicitly granted to NBA players in their contracts.[153] In contrast to NBA players, "the developmental squad contracts [in *Brown*] indicate that the prospective developmental squad players had no right to negotiate their own salary terms but instead were to receive a fixed non-negotiable salary of $1,000 per week."[154] The majority opinion in *Brown* conceded that athletes "often have special, individualized talents, and, unlike many unionized workers, they often negotiate their pay individually with their employers."[155] However, the Supreme Court missed the target: individual athletes don't "often" negotiate their salaries, they always do, and the imposition of the salary cap limits that ability of highly-skilled, highly-marketable players to negotiate offers individually from NBA teams. This difference, however, is seen by the Court as "simply a feature, like so many others" relevant to the collective bargaining process, and is casually dismissed.[156]

153. *See* 1999 NBA COLLECTIVE BARGAINING AGREEMENT, ARTICLE XXXVI.
154. *Brown*, 518 U.S. at 256, n.3 (Stevens, J., dissenting).
155. *Id.* at 249.
156. *Id.*

Additionally, the impact of the salary cap as a market restraint upon NBA players is much more significant than that of the developmental squad salary upon the practice players in *Brown*. Whereas the players in *Brown* had no other opportunities to play professional football and were presented with a "take-it-or-leave-it" offer, the sports sections of newspapers are filled with accounts of general managers trying to engineer deals to accommodate the salaries of talented players under their teams' caps.[157] Some players are fortunate and are signed, and some – those whose salaries cannot be accommodated – are not. Those who are not signed are denied their market worth in the form of salaries from teams that would be interested in acquiring their services, teams which would gladly confer tens of millions of dollars but are prevented from doing so by the team salary cap. The salary cap, once again, is an effort "to protect the owners from themselves."[158] It is also a potentially anticompetitive market restraint, and yet because it was contrived during the course of collective bargaining, it would most likely be characterized by the Supreme Court as similar to the practice challenged in *Brown*, sufficiently so to warrant the same antitrust exemption as was extended in that case.

While collective bargaining does deserve protection from antitrust law if it is to achieve its purpose, such entitlement cannot provide employers such as professional sports leagues with a *carte blanche* privilege to implement anticompetitive practices in violation of antitrust law. Within the context of collective bargaining, employers must be assured that concerted activity, where reasonable, will be protected under labor law; alternatively, employers must be warned that concerted activity, where unreasonable, will be disciplined under antitrust law. This type of "judicial interference" is necessary to ensure not just the protection of employees as mandated by the NLRA,[159] but also the maintenance of a free and open economy, as guaranteed under the Sherman Act.[160] Any disruption or "unraveling" of collective bargaining agreements would

157. *See, e.g.*, Jerry Greene, *Movers & Shakers; Is It Rebuilding or Reloading?* ORLANDO SENTINEL, Oct. 29, 1999, at G4.

158. Welling, *supra* note 71, at 78.

159. 29 U.S.C. § 158(d).

160. 15 U.S.C. § 1.

only be as a result of the appropriate and necessary protection of the objectives of both federal labor and antitrust policy.

Whether the NBA's team salary cap constitutes an "essential" horizontal restraint necessary to the sports industry,[161] or an unreasonable restraint in violation of antitrust law, must be decided under this analysis. In cases involving both labor and antitrust law, "the crucial determinant is not the form of the agreement – e.g., prices or wages – but its relative impact on the product market and the interests of union members."[162] Here, the relative impact of the team salary cap is the artificial diminution of opportunities available to NBA players, which does nothing to promote the interests of those union members. In spite of antitrust law, the *Wood* and *Brown* decisions have established a dangerous line of precedent by turning the table on players' unions, lauding the union-oriented objectives of federal labor policy while pulling from the reach of unionized athletes their only reasonable course of action. No court has yet been able to sink a game-winning shot and fulfill the conflicting yet equally-important objectives of labor and antitrust policy.

THE INDIVIDUAL SALARY CAP:

"It's not ordinarily the way one does business in this country."[163]

A unique form of logic was employed by the NBA during the recent collective bargaining negotiations, manifesting itself in the birth of the individual salary cap. While representatives of the NBA referred to the individual salary cap as "a measure of cost certainty" [164] for the team owners, the unprecedented restraint is actually an unabashedly artificial limit on the earning potential of NBA players in response to the extravagant business habits of their employers. As a result of frantic bidding wars resulting in skyrocketing player salaries, the NBA has unconditionally prohibited any team from spending more than a predetermined figure on any indi-

161. *See* BORK, *supra* note 43, at 278.

162. Amalgamated Meat Cutters v. Jewel Tea, 381 U.S. 676, 690 n.5 (1965).

163. Gary Pomerantz, *Baseball Owners Want NBA-Type Salary Cap*, WASH. POST, May 21, 1985, at D1.

164. Fatsis, *supra* note 3, at A3.

vidual player. In short, the players are doing penance for the owners' sins. In an open market players could earn significantly more than the prescribed figures. This imposition of the individual salary cap constitutes price-fixing, a prohibited market restraint in violation of the Sherman Act.

The Supreme Court has devised two standards to analyze the reasonableness of market restraints. The Rule of Reason balances the market restraint against its business purpose to determine whether or not the procompetitive benefits of the practice to the industry outweigh its anticompetitive effects. This argument relies upon similar considerations to the nonstatutory labor exemption (although applied generally), that in certain industries and businesses some restrictive practices are ultimately beneficial and deserving of legal protection instead of penalty. The second rule, the *per se* rule, is targeted specifically for instances of price-fixing,[165] and is therefore a more appropriate gauge by which to measure the NBA's individual salary cap. This rule is applied where the court finds unambiguous tampering with prices or wages and may consequently adjudicate the case without needlessly considering any attempt at justification.[166] Admittedly, market restraints in professional sports cases are usually analyzed under the Rule of Reason because of the industry's need for certain limited restrictions in order to operate.[167] However, because of the inflexibility of the hard individual salary cap, its direct impact on players' salaries and its disproportionately anticompetitive consequences, it is possible that the market restraint at hand could prove to be an exception even in the sports industry, and demand scrutiny under the *per se* rule.

1. The Rule of Reason

Under the Rule of Reason, market restraints are more widely recognized than under the *per se* rule. Indeed, technically, all contracts, agreements, regulations and laws concerning trade consti-

165. *See* Northern P. R. Co. v. United States, 356 U.S. 1, 5 (1958).

166. *See id.*

167. *See* NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85 (holding unreasonable NCAA's television restrictions on number of intercollegiate football games school may televise); Regents of Univ. of Calif. V. ABC Inc., 747 F.2d 511 (9th Cir.1984)(holding unreasonable similar College Football Association television restriction).

tute market restraints in violation of the Sherman Act.[168] In response to this theory, the Supreme Court devised a test for dealing with those instances where the injury from the restraint does not clearly outweigh its benefits. In the landmark case of *Chicago Board of Trade v. United States*,[169] Justice Brandeis provided a definition of the Rule of Reason:

> The true test of legality is whether the restrain imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and predict consequences.[170]

In that case, the Supreme Court upheld a particular regulation of the Chicago grain market which restricted the times in which bids could be made.[171] The Court reasoned that the rule in question had "no appreciable effect on general market prices,"[172] and the rule itself concerned "the period of price-making,"[173] not price-making itself. This standard was narrowed in *National Society of Professional Engineers v. United States*,[174] in which the Court held that the Rule of Reason, "[c]ontrary to its name, . . . does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competi-

168. *See* AREEDA, supra note 26, at 109.
169. 246 U.S. 231 (1918).
170. *Id.* at 238.
171. *Id.*
172. *Id.* at 239.
173. *Id.* at 240.
174. 435 U.S. 679 (1978).

tive conditions."[175] In that case, the Supreme Court ruled that a group of professionals which voluntarily prohibited competitive bidding was not justified under the Rule of Reason, in spite of its claim that the prohibition prevented inferior work products and ensured ethical behavior within the industry.[176] The Court held that the only relevant inquiry in the Rule of Reason is into the impact of the restraint on competitive conditions, "whether the challenged agreement is one that promotes competition or one that suppresses competition."[177]

Even if the individual salary cap were analyzed under the Rule of Reason, it would not be likely to survive. Although the Rule of Reason as defined in *Chicago Board of Trade* permits a lengthy list of considerations,[178] the individual salary cap's suppression of competition through the severe market diminution available to players outweighs any alleged "promotion" of competition. After learning of the details of the agreement, Kevin Willis, a center for the Toronto Raptors, said, "Guys can still make $14 million, and that's a lot of money. If you can't live off that, something's wrong."[179] Without denying the exceedingly understated truth of Willis' comment, a market restraint is a market restraint; while anyone should be able to live off $14 million, many players in the league, including all-stars Karl Malone and Scottie Pippen, reasonably believed that their market value had and would increase above $14 million, and expected to take advantage of that market.[180]

Like Hollywood, professional sports is an entertainment business: "Big stars get millions, while most get union scale."[181] However, whereas Mr. Malone could have expected to receive offers from teams willing to pay him upwards of $20 million, his artifi-

175. Id. at 688.

176. *Id.* at 690.

177. *Id.* at 691.

178. *See* Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

179. *What They're Saying About the Settlement*, ORLANDO SENTINEL, Jan. 7, 1999, at C4.

180. *See* Richard Alm, *NBA Players' Salaries Now Have Fewer Zeros*, DALLAS MORNING NEWS, Feb. 13, 1999, at 1F.

181. *See* Floyd Norris, *N.B.A. War Could Last a Long Time*, N.Y. TIMES, Oct. 21, 1998, at A24.

cially-imposed market worth is now $14 million. Not coincidentally, the "new" market worth for Scottie Pippen also happens to be $14 million, while the market worth for an Allen Iverson or a Stephon Marbury, or any player for that matter, is similarly stunted. NBA teams will conveniently have a wide variety of players available at their disposal, all for the same predetermined price. General managers will no longer have to juggle different players' salary demands, since the "demands" of all players within a certain range will all be the same. Similarly, players will no longer be able to consider different salary offers, since teams are likely to extend the exact same salary as one another. "With maximums set on salaries and stricter salary cap rules," one NBA team owner noted, "teams bidding for free agents in many cases basically will be offering the same salary."[182] The convenience and ease with which the NBA has coordinated and manipulated its labor pool is an example of thinly-veiled collusion, and it is corrupt in every respect.[183] It is also contrary to public policy, unreasonably restraining the freedom of individuals to seek employment, and it offends the conscience to direct players to support weak franchises by restricting their own right to bargain for higher salaries. "The heart of our national economic policy long has been faith in the value of competition,"[184] and the implications of the individual salary cap are repugnant to the national antitrust policy of maintaining free and open markets.

The primary justification for the individual salary cap proffered by the NBA has been that it is necessary to hinder the otherwise-unstoppable escalation in player salaries.[185] This defense, however, is dangerously misleading, confusing the harm for the cause. The supposed achievement of this objective was celebrated upon the

182. Tim Kawakami, *The Healing Begins . . . Season to Begin Feb. 5*, L.A. TIMES, Jan. 8, 1999, at D1.

183. In the mid-1980s, Major League Baseball team owners were found guilty of collusion after agreeing not to extend offers to free agents playing on other teams, which illegally decreased salaries. The owners were consequently forced to pay $87 million. *See* Stephen L. Willis, *A Critical Perspective on Baseball; Collusion Decisions*, 1 SETON HALL J. SPORT L. 109 (1991).

184. National Soc. of Prof'l Engineers v. United States, 435 U.S. 679, 695 (1978)(quoting Standard Oil v. F.T.C., 340 U.S. 231, 248 (1951))

185. *See* Fatsis, *supra* note 3, at A3.

announcement of the agreement. "In the modern sports world, this answers the question, 'When will it stop?'," said one NBA executive, "It's stopped."[186] A hard cap does not "slow" player salaries: it builds a brick wall. Even so, ironically, the payrolls of those economically-weak teams on whose behalf the salary caps are alleged do not often approach the team salary cap amount, nor are those teams likely to sign many players to $14 million. Rather, the result of the individual salary cap will be increased profits for big-market teams, rescuing strong market forces from the "nuisance" of paying players their market worth, teams which may retain the services of those players all the while. And yet, even with an artificially-deflated labor market, it is not difficult to predict that NBA owners will continue to compete with each other to acquire the services of talented players, the real reason behind escalating salaries.

It is a fundamental principle of economics that any interference with a market will result in the emergence of a black market;[187] in the NBA, black markets manifest themselves through owners devising ways to beat the salary cap, beat the system, and eventually beat each other.[188] For certain NBA owners, therefore, the cost in acquiring a highly-paid player is clear: salary. The benefits of winning a high-stakes bidding war, however, go far beyond the player's skills on the court, but include media exposure and attention, increased fan attendance and interest, and a much more valuable sense of triumph, not necessarily on the court, but at the very least, at the bargaining table, in the media and elsewhere. Team owners became team owners through competitive business practices. Once they achieve the status of team owner, they are neither willing nor able to "turn down" their competitiveness in acquiring players, regardless of league rules or agreements.[189] In response to the news of the NBA-NBPA agreement, one commentator said that "[t]he fun part of recent sports labor negotiations has been that the

186. *Id.*

187. *See* Andrew Zimbalist, *Let the Market Rule the Basketball Court*, WALL ST. J., Nov. 10, 1998, at A22.

188. *See id.*

189. *See* Richard Alm, *Even With NBA Settlement, Business of Basketball Uncertain*, DALLAS MORNING NEWS, Jan. 7, 1999, at 7B.

owners insist they have to have caps, and when they get them, they compete to see who can be first to circumvent the cap."[190] In sum, in the battle of "overinflated egos, . . . emotion and adrenaline,"[191] basketball players are nothing more than $9-, $11- and $14-million pawns.

"It's a Catch-22," admitted Jerry Colangelo, owner of the Phoenix Suns and baseball's Arizona Diamondbacks. "Players always say, 'We didn't put a gun to your head to pay us that money.' But there's tremendous pressure for us to pay it, from fans and from media."[192] Indeed, in no city in the country does a professional sports team constitute a "dominant" business, yet both team owners and players are bestowed with the status and attention usually reserved only for major celebrities.[193] As public figures, team owners receive the benefit of attention from the public. In return, they owe a quasi-duty of service to the public in large- and small-markets alike.[194] George Steinbrenner, owner of baseball's New York Yankees, explained his responsibility most simply: "I've got to deliver a great product to New York."[195] Ownership in every city is pressured by *vox populi*, local media and fans, to invest as heavily in possible in the team, and team owners are vilified at any sign of hesitation. New owners interested in making a "grand entrance" are particularly susceptible to such public pressure.

Team owners do not become team owners through naivete, however, and in exchange for the burden imposed upon them, many owners use their teams and any attention or publicity the team receives to promote themselves. Indeed, the individual arrogance of professional sports team owners has been called "one of life's great certainties."[196] "You're either going to be a have or a

190. Murray Chass, *In Final Staredown, Players Take the Hit*, N.Y. TIMES, Jan. 8, 1999, at D5.

191. Del Jones, *Usually, Everybody Loses in Lockout*, USA TODAY, Jan. 7, 1999, at 3B.

192. Ian O'Connor, *Baseball Salaries Out of Control*, Gannett News Service, Dec. 3, 1998.

193. *See* Fuhr, *supra* note 84, at 225.

194. *See id.*

195. O'Connor, *supra* note 192.

196. George Vecsey, *Economics 101: Baseball Owners' Egos Would Ease the Luxury Tax*, N.Y. TIMES, Feb. 20, 1995, at C4.

have-not," said Colangelo, asserting the outlook of a select number of team owners. "I didn't get into this business to be a have-not."[197] Similarly, the alleged "mission" of another owner in purchasing a sports team was "to get the important people of the world to know who he is."[198] Mr. Steinbrenner, whose Yankee ownership has earned him both notoriety and adulation in equal measure, once said, "when you're a shipbuilder, nobody pays attention to you. But when you own [a sports team], they do, and I love it."[199] While owners of big-market teams, those accused of buying up talented players and dominating the free-agent market, are exceptional,[200] in the case of professional sports team owners, the exception is indicative of the rule. To be sure, there is nothing wrong with exposure and attention received through the self-promotion implied within highly-publicized bidding wars. Such indulgences, however, do not deserve exemption from antitrust law. By extension, disciplining such behavior cannot reasonably be interpreted as a legitimate business purpose, and so even under the Rule of Reason, the individual salary cap should not survive antitrust scrutiny.

2. THE PER SE RULE

It is still more likely that the hard individual salary cap would be examined under the *per se* rule because of the inherent price-fixing element involved. This rule is applied where the practice in question appears to be one that would always, or almost always, restrict competition and decrease output.[201] These agreements, exemplified most commonly in market allocation and price-fixing schemes, have a "pernicious effect" on competition without "any redeeming virtue," and because of the public policies against such practices, may be adjudicated irrespective of any alleged justifica-

197. O'Connor, *supra* note 192.

198. Fuhr, *supra* note 84, at 224.

199. *Id.*

200. While most big-market team owners will spend extravagant amounts of money to acquire talented players, George Steinbrenner is admittedly exceptional in his own right. "It's worth remembering, that under Steinbrenner we tend to operate on the theory that no one is unsignable," said one Yankee scout, allegedly trying to lure former Denver Broncos quarterback John Elway away from football. PLAY BALL!, 29 (1995).

201. *See* Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20 (1979) (citations omitted).

tion.[202] Because in instances of price-fixing, condemnation is meted so swiftly, courts have sought excuse to apply the Rule of Reason or some other means of antitrust analysis, reserving use of the uncompromising *per se* rule for only those restraints which are "plainly anticompetitive."[203] The individual salary cap, even if it was agreed upon between the NBA and the NBPA, is strikingly, shamelessly, "plainly anticompetitive."

According to the Sherman Act, price-fixing arrangements are found "if the range within which purchases or sales will be made is agreed upon . . . if they are to be uniform, or if by various formulae they are related to market prices."[204] In *United States v. Socony-Vacuum Oil*,[205] the Supreme Court explained what distinguishes those practices which deserve review under the Rule of Reason from those subject to the *per se* rule. [206] In *per se* cases, either the purpose or the effect of the market restraint must be "aimed at price manipulation or the control of market prices," ultimately manifested through "any combination which tampers with price structures."[207] The application of the *per se* rule was expanded in *Arizona v. Maricopa County Medical Society*,[208] in which a group of physicians established maximum fees which they would charge for medical services. While price-fixing schemes had characteristically been conducted to establish minimum prices, the Supreme Court ruled that price-fixing agreements could not escape *per se* condemnation on the ground that they were horizontal and fixed maximum prices.[209] Although the physicians' agreement, similar to that undertaken by the engineers in *Professional Engineers*, was argued to be in the public interest, the Court still found that it was a *per se* violation of the Sherman Act.[210] Whereas the practice in *Professional Engineers* dealt with bidding procedures (as opposed

202. *See* Northern P. R. Co. v. United States, 356 U.S. 1, 5 (1958).
203. *See* National Soc. of Prof'l Engineers v. United States, 435 U.S. 679, 692 (1978).
204. 15 U.S.C. § 1 (1994).
205. 310 U.S. 150 (1940).
206. *Id.* at 154.
207. *Id.* at 217.
208. 457 U.S. 332 (1987).
209. *Id.* at 347.
210. *Id.* at 356.

to actual prices), the Supreme Court ruled in *Arizona* that it was not authorized to judge whether a case of actual price-fixing was justified or not.[211] The Court ruled that it was not within its power to change the *per se* rule, only to abide by it, a decision which was rooted in "economic prediction, judicial convenience and business certainty."[212] The Court returned to the unrelenting conclusion intrinsic to the *per se* rule, that the anticompetitive potential of any price-fixing scheme mandated "facial invalidation," even if certain alleged justifications might be offered for some such arrangements.[213]

The NBA's individual salary cap is so clearly anticompetitive in its attempt to control the market, and so far removed from any rational business purpose, that it is an exemplary model of a price-fixing arrangement deserving of *per se* analysis. The acknowledged motivation behind the individual salary cap, limiting the salaries of players, can only be achieved permissibly through the curbing of the fierce bidding wars of NBA owners, and disciplining the owners themselves. The undue economic encumbrance of professional basketball players in an attempt to temper the behavior of their spendthrift magnates is irrational, unreasonable, unfair and unlawful. Although it is difficult to argue conscientiously against market restraints for individuals earning upwards of $14 million, limiting these individuals to any amount violates the collective conscience embodied in the Sherman Act. The "Magna Carta of free enterprise"[214] must be equally available to one and all, and it must be employed to defend against any unreasonable market restraint. The NBA's individual salary cap is precisely that, an unreasonable market restraint, and must succumb to federal antitrust policy.

BUILDING A BETTER MOUSETRAP:

BASEBALL'S "LUXURY TAX" AS THE OPTIMAL PLAYER RESTRAINT

The idea of the salary cap was considered by Major League

211. *Id.* at 351.
212. *Id.* at 354.
213. *Id.* at 351.
214. United States v. Topco, 405 U.S. 596, 610 (1972).

Baseball ("MLB") in order to protect baseball's own small-market teams like Milwaukee and Minnesota from having their talented free agents lured away by the big-market teams in New York, Los Angeles and elsewhere. After adamant opposition to the salary cap by the Major League Baseball Players' Association ("MLBPA"), the union representing professional baseball players, and after suffering the Strike of 1994,[215] the owners suggested a "luxury tax," a "poor man's salary cap."[216] Under the luxury tax, a club's payroll would be taxed if it exceeded a certain amount, and the collected funds would be redistributed among small-market teams in order to increase their ability to sign high-priced players. The MLBPA initially viewed this proposal as a salary cap in disguise, since clubs would be reluctant to sign free agents if they had to pay a tax in addition to the players' salaries. However, after the Strike of 1994 and federal intervention,[217] the MLBPA agreed in theory to the adoption of the luxury tax. On November 26, 1996, the owners finally approved the collective bargaining agreement. After a total loss of more than a billion dollars resulting from the labor strife which had plagued baseball since August 12, 1994, there was labor peace in baseball. Within that agreement, baseball established the

215. To be sure, considering its history, it is almost laughable to look to Major League Baseball for an exemplary model of anything related to labor relations. Despite an increase in player salaries of more than 2,000 percent over a twenty-year period and an average salary of $1.57 million in 1999, not a single collective bargaining agreement has been signed without a strike or lockout since 1972. Due to "the Strike of 1994," the league's most recent – and most damaging – labor strife, dubbed "baseball's Hundred Years War," the league had to cancel 686 regular season games between 1994 and 1995, as well as the 1994 World Series, the "Fall Classic," for the first time in 90 years. The strike was so damaging that only after the success of interleague play and record-breaking performances by sluggers like Mark McGwire of the St. Louis Cardinals and the Chicago Cubs' Sammy Sosa has attendance begun to approach pre-strike levels. After playing two seasons under the terms of the expired collective bargaining agreement, MLB and the MLBPA finally reached an agreement in November, 1996, and the luxury tax emerged from beneath the rubble.

216. Murray Chass, *Yankees to Pay $4.4 Million as Lion's Share of Teams' 1997 Luxury Tax*, N.Y. TIMES, Dec. 25, 1997, at C6.

217. On January 26, 1995, President Clinton ordered mediator Bill Usery to bring both sides of the baseball strike back to the bargaining table. Ultimately, Usery recommended a 50 percent tax on payrolls over $40 million, a proposal much closer to the owners' position than to the players', and because of the likely impact such a measure would have on the salaries of free agents, one which the players most likely would have found to be unacceptable. *See* ROGER ABRAMS, LEGAL BASES, 189 (1998).

ideal (at least in theory) player restraint, the luxury tax.

The luxury tax works as follows: the five teams with the highest payrolls above a certain threshold – in 1997, it was $51 million, $55 million in 1998, and $58.9 million in 1999[218] – must pay a "tax" on the excess amount; the tax rate was 35 percent in 1997 and 1998, and 34 percent in 1999.[219] The tax is added to a revenue-sharing fund,[220] which is then redistributed among 13 small-market teams such as the Montreal Expos and the Kansas City Royals. Therefore, in 1999, for example, the New York Yankees paid $4.8 million in luxury tax on a total payroll of $92 million; while the total revenue-sharing assessments have yet to be calculated, the Montreal Expos benefited the most under revenue sharing in 1998, in the amount of $13 million.[221] In all, upwards of $140 million will be collected and redistributed among baseball's small-market teams in 2000.[222] While teams are not required to reinvest the shared revenue in more-talented players, small-market teams may increase their payrolls in order to field a better, more-competitive

218. According to the terms of the MLB agreement, no luxury tax will be in place for the 2000 season, and the players may elect to extend the agreement without a tax to 2001. Considering the history between the parties, however, the issue of player restraints will invariably be revisited during the collective bargaining sessions in 2001.

219. To clarify, team owners would prefer a higher tax on payrolls, which would be more likely to deter teams from spending money, and would increase the total amount of revenue redistributed under the plan; conversely, the players' union would prefer a low tax rate, which would provide as little resistance as possible to owners willing to sign free agents.

220. The luxury tax system is Major League Baseball's equivalent to the NBA's salary cap, and is therefore the only provision that will be considered here. The revenue-sharing plan as a whole redistributes funds received not only from the luxury tax on team payroll, but also from revenue from television and media sources and ticket sales, among other sources of incomes, as well as a 2.5% tax on players salaries paid by the players themselves. While players' salaries are criticized by the media most frequently for causing the competitive disparity which player restraints are intended to balance, team payroll is a minor consideration in terms of some teams' revenues. Local media rights primarily fuel the Grand Canyonesque gap in revenue between Major League Baseball teams. In 1998, for example, the Montreal Expos earned a total of $35 million, $5 million of which was from local media deals; the New York Yankees took in $175 million, $70 million of which was from the media.

221. *See* Murray Chass, *The Haves Have It and the Nots Don't*, N.Y. TIMES, April 4, 1999, at sec. 8, p. 2.

222. *See* Tracy Ringolsby, *Owners Serious About Relocation*, DENVER ROCKY MOUNTAIN NEWS, April 21, 1999, at 7C.

team and eventually increase their revenue independent of the luxury tax.[223] The deal is relatively good for players, as well, in that little salary restraint is likely: big-market owners are not precluded from signing high-priced players, while small-market owners are partially compensated, and thus gain strength themselves in the bidding war over talented players as well.[224]

From a legal perspective, the luxury tax is not nearly as anti-competitive as the NBA's salary cap, as owners are free to spend as much money as they like on players, with the understanding that they will "pay to play," and will themselves bear the cost for their excesses. Whereas a salary cap prohibits a team from spending more than a set amount, the luxury tax only inhibits clubs from spending more than a certain amount, thus creating a brake, as opposed to a wall, for excessive salaries.[225] Through this formula, the luxury tax system implemented by Major League Baseball redistributes payroll funds between teams, making the league more competitive without crippling the earning potential of the players, the game's feature attraction.

Admittedly, the luxury tax is not without its problems, and has been criticized as ineffective against deterring big-spending clubs like the New York Yankees and the Los Angeles Dodgers from throwing exorbitant amounts of money at players.[226] Indeed, in 1997, the first year of the luxury tax system, the teams with the top five payrolls – the New York Yankees, Baltimore Orioles, Cleveland Indians, Florida Marlins and Atlanta Braves – all made the playoffs, while none of the nine clubs with payrolls under $32 million had even a winning record. More recently, the Dodgers and Yankees alone account for four of baseball's top 10 salaries in 2000.[227] Similarly, six players all have contracts worth more than

223. *See* Staudohar, *supra* note 63, at 6.

224. One observer noted the irony of an arrangement in which "a club can use the money it receives from the other club to compete against that club for players in the open market." Fuhr, *supra* note 83, at 224.

225. *See* ABRAMS, *supra* note 216, at 199.

226. *See* Fuhr, *supra* note 84, at 224.

227. The Dodgers' Kevin Brown and Shawn Green make $15 and $14 million per year, respectively, while the Yankees' Bernie Williams and David Cone earn $12.5 and $12 million per year, respectively. The Yankees are also expected to sign shortstop Derek Jeter to a contract worth a record $17 million per annum, but could not close the deal be-

the $75 million being sought from bidders to buy the Royals. In their entirety, these figures suggest that certain owners will treat the luxury tax "as just some annoying (but in its own way prideful) assessment down at the country club."[228]

Indeed, the primary concern is that, even with the limited revenue sharing which exists, the revenue of big-market teams is so substantial that they can afford the tax, and will ultimately "treat the luxury tax like a jaywalking ordinance."[229] Baseball owners – or, for that matter, team owners in any professional sport – will never stop spending money. If they want a relief pitcher in August, a power hitter in the off-season, or a one-time superstar to produce a champion, team owners will spend the money, luxury tax or no luxury tax.[230]

Several big-market owners, those primarily responsible for contributing to the revenue-sharing fund, have returned fire, claiming that the real problem in baseball is not between the "haves" and the "have-nots," but between the "do somethings" and the "do nothings," and successful businessmen do not reward their competitors for doing nothing. The luxury tax ostensibly creates a disincentive for winning, as teams in large markets (and competitive, financially-successful teams in small markets) are penalized for their success, and are forced to compensate other teams for their shortcomings, problems in which the successful teams played no direct role.

Owners have expressed concern over a "welfare system" for professional sports teams, supporting clubs in markets which cannot support the teams independently.[231] This criticism of the luxury

fore baseball's arbitration deadline, so Jeter signed a one-year contract for $10 million. *See Baseball's Top Contracts*, USA TODAY, February 11, 2000, at 4C.

228. Vecsey, *supra* note 196, at C4.

229. John Henderson, *Tax is No Luxury to Conduciveness of Trading*, DENVER POST, March 29, 1997, at 2D. "The present system doesn't share enough revenue," said Andrew Zimbalist, an economist at Smith College and author of 'Baseball and Billions.' "The Yankees give the Expos $11 million, which is better than giving them nothing, which is what they'd get in the NBA or in the NHL. But it still leaves a huge gap." Jeff Gordon, *How Do Teams Go From Cellar to Stellar?*, ST. LOUIS POST DISPATCH, Oct. 24, 1999, at D1.

230. *See* Vecsey, *supra* note 196, at C4.

231. "If I were sitting in another city, you'd say I might feel differently," said

tax is echoed by the players' union, player agents, and the players themselves, who are not in favor of any player restraint. Opponents of the salary cap argue that, historically, baseball progresses cyclically, with today's perennial losers becoming tomorrow's World Series champions.[232]

One suggestion to achieve competitive parity between teams, instead of focusing on market size, is to provide incentives for small-market teams to reinvest the proceeds from revenue sharing back into their rosters. Currently, teams that receive money may use it to improve their bottom line, not their starting lineup, resulting in little or no effect on the competitiveness of the team they put on the field.[233] Inferior teams should have a financial incentive attached to the luxury tax to improve their records and to make competition closer.[234] This can be accomplished in a number of ways, such as only compensating those teams that maintain a payroll of at least 85% of the league average,[235] for example, or reducing the amount of money received by teams that perform below a certain level. [236] Another remedy would be to stagger the tax for both the high-spending and low-spending teams. Under this plan, similar to federal income tax, the more a team spent above a certain limit, the higher the tax rate would be for that excess amount. Conversely, the fund would be pro-rated for teams below a certain payroll level, so that the more games a team lost, the less money they

Steinbrenner, who voted in favor of the luxury tax although he does not believe that his Yankees should have to compensate the Expos. "No. I'd get busy and figure out how I could improve what I'm doing . . . You can't say, 'Well, let's all share everything equal,' or else we should be over in Russia. And it didn't work over there." Hal Bodley & Erik Brady, *Baseball's New Caste System*, USA TODAY, April 2, 1999, at 1C. "Seattle is a classic case of a team that was a have-not and became a have," said Jerry McMorris, owner of the Colorado Rockies. "I still struggle [with] how long and how hard Seattle and Colorado should support Montreal and Minnesota." Larry Stone, *In Game of Inches, Gaps Widen*, SEATTLE TIMES, Feb. 15, 1998, at D1.

232. "In the middle 80's, Kansas City, Minnesota and Oakland were all winners, [while] Baltimore, Cleveland, and Atlanta were all losers," said player agent Scott Boras. "It isn't about big-market, small-market. It's about good decisions, bad decisions." Bodley, *supra* note 231, at 1C.

233. *See id.*

234. *See* Gary S. Becker, *Baseball: How to Level the Playing Field*, BUS. WK., Oct. 10, 1994, at 26.

235. *See* Zimbalist, *supra* note 187.

236. *See* Becker, *supra* note 234.

would receive under revenue sharing. This would provide an incentive for teams to win until the very end of the season, particularly those teams normally eliminated from playoff contention by August. In all, the percentages and calculations of the luxury tax, whether how much certain teams contribute or how much other teams are compensated, may be amended or adjusted without the chaos or fanfare – or legal repercussions – of the union decertification threatened as a result of the NBA's salary cap.

In contrast to the NBA's imposition of the salary cap upon its teams, several small-market baseball teams have taken responsibility for their own competitiveness, independent of league action. In large part, these teams have emerged as both competitive as well as successful financially. Teams in Baltimore, Cleveland and Arlington, Texas, for example, have all built new stadiums to attract fans, increase attendance and ultimately increase revenue. With amenities such as spacious luxury boxes and ample room for corporate advertising, these teams have increased their revenue even more, and have been able to sign high-priced free agents in order to field competitive teams consistently. Small-market teams like Milwaukee, Pittsburgh, and Detroit, among others, are following suit with the construction of new stadiums, a strategy to increase revenue which has worked so well that teams in big markets like New York and Boston are now pushing for new stadiums of their own, in an ironic twist, to keep pace with the likes of Seattle and Tampa Bay.[237] In all, MLB Commissioner Bud Selig predicts that as many as twelve new stadiums will be built by 2003, which would generate an additional $475 million in revenue and which would in all likelihood abate any need for a salary-cap-type provision.

Amid the debate and discussion over the luxury tax, revenue sharing, the salary cap and other player restraints "essential" to professional sports leagues, not everyone is convinced that the predicaments of magnate team owners are as dire as the owners suggest. Paul Beeston, current CEO and former vice president of the Toronto Blue Jays, once said, "[u]nder generally accepted account-

237. *See* David Lewis, *Rudy: Stadium a Super Idea*, DAILY NEWS (NEW YORK), April 12, 1996, at 26; Anthony Flint, *Ballpark Plan Seen Favored*, BOSTON GLOBE, Jan. 27, 1999, at D1.

ing principles, I can turn a $4 million profit into a $2 million loss and I can get every national accounting firm to agree with me."[238] By manipulating the team's ledgers, owners may employ "creative accounting" techniques to pay themselves salaries and other fees considerably above market level.[239] Similar ploys have been used by team owners who, in addition to the team, may own the stadium in which the team plays, and pocket rent costs, or they may own the media ventures which broadcast the team's games, and pocket broadcasting fees.[240]

This line of criticism is bolstered by the fact that professional sports leagues have avoided adopting restrictions on investments in player development, coaches or executive talent, all of which would balance competition, although none would reduce bothersome labor costs in the form of players' salaries.[241] In fact, despite all the "poor mouthing" and complaints about lack of balanced competition, 24 different teams reached the playoffs in the 1990s.[242] Economist Roger Noll explained in short why team owners in baseball and other professional sports complain so frequently about any imbalance in competition on the field: "To get mooneeey."[243]

Thus, while local media have not provided small-market teams with the same level of revenue as their big-market opponents in New York or Los Angeles, increased attendance and other sources of revenue have made up much of the difference.[244] Furthermore, professional athletes have as many geographical preferences as lawyers, teachers, machinists, or members of any profession.

238. Stone, *supra* note 231.

239. George Steinbrenner allegedly rewarded himself with a $25 million consulting fee for negotiating the Yankees' cable contract. *See* Fuhr, *supra* note 84, at 231.

240. *See id.* at 232.

241. Stephen Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 680 (1989).

242. Apologies to fans of the Anaheim Angels, Kansas City Royals, Milwaukee Brewers, and Detroit Tigers (all of whom reached the playoffs during the 1980s), as well as the Montreal Expos (who were in first place in the National League East and poised to make the playoffs at the time of the players' strike in 1994) and the Tampa Bay Devil Rays (who have only been playing since 1998). COMPLETE BASEBALL RECORD BOOK, 244 (Craig Carter ed., 2000).

243. *See* Stone, *supra* note 231, at D1.

244. *See* Becker, *supra* note 234, at 26.

While salary is a factor, some people want to live on the coast, some people in the Midwest and some in the South. In making employment decisions, professional athletes, like members of any other profession, consider myriad factors, including family background, overall educational and vocational opportunities.[245]

In all, the luxury tax devised by Major League Baseball is far superior to the salary cap in balancing the competition between big- and small-market teams. The luxury tax does not directly affect the salaries of players like the salary cap, and thus does not raise the same antitrust issues. Under the tax, team owners are permitted to spend as much money as they desire, with the common understanding that they will pay through the nose for doing so, and compensate the small-market teams in the league. In turn, those teams will be able to field more competitive teams and attract more fans to increase their revenue independent of the revenue-sharing plan. The luxury tax does not limit the salaries of individual players like the salary cap, and is therefore not nearly as anticompetitive and as stifling of the players' earning potential. Any alleged ineffectiveness on the part of the luxury tax is merely a matter of degree: it would work better if the money were distributed differently, or if different percentages were applied to different payroll amounts. Clearly, however, the luxury tax promotes competition more reasonably than the salary cap, and is a promising step towards balancing the competition essential to professional sports.

CONCLUSION

"It's Deja Vú All Over Again."[246]

Slowly but surely, the game of basketball is increasing in stature. On the court, many signs indicate that the NBA has been able to recapture most of its fan base and restore its popularity, a particularly noteworthy accomplishment in barely a year's time since

245. *See* Ross, *supra* note 241, at 682. Mark McGwire (St. Louis), Ken Griffey, Jr. (Cincinnati) and Tony Gwynn (San Diego) are only three of baseball's biggest names who could have commanded salaries far higher than those they currently earn, but preferred the comforts of a small-market team.

246. Dave Anderson, *The Games He Played And The Things He Said*, N.Y. TIMES, Aug. 8, 1999, at Sec. 13, p. 4 (quoting Yogi Berra).

the resolution of its labor dispute.[247] In court, through "that other great American pastime, litigation,"[248] basketball is rapidly gaining on baseball's unique antitrust exemption,[249] with a growing number of cases shielding teams and the league from antitrust action. Ironically, however, just when the Supreme Court has expanded the antitrust exception for professional sports in *Brown*, Congress decided to confine baseball's "unrealistic, inconsistent [and] illogical" [250] exemption.[251] Thus, in spite of judicial endorsement, the *Brown* holding returns professional sports to an era in which the professional baseball establishment was able to hold players in "involuntary servitude."[252] In *Flood v. Kuhn*,[253] the Supreme Court held that Curt Flood, an outfielder for the St. Louis Cardinals, had not been unreasonably restrained by his employer, the Cardinals, since he could always exercise his option to retire, in effect, to quit his job. The Court held that so long as a baseball player remained in the "industry" of professional baseball, however, he was at the disposal of the league and its teams.[254] The *Brown* decision lurches in that direction, permitting sports leagues to disable national antitrust policy and manhandle their players, so long as they comport with certain objectives of labor law.

The growing national passion for breakaway slam dunks, or 500-foot home runs, must be tempered, not in the stands but in the courtroom and at the bargaining table, by a sense of justice in favor of those individuals performing those extraordinary feats. Instead,

247. Three teams sold out every home game during the abbreviated, 50-game 1999 season. Leaguewide, attendance slipped just 2%, and nearly half the teams averaged larger crowds this season than last. *See* Mark Hyman, *Another Ruined Season That Wasn't*, BUS. WK., June 7, 1999, at 40.

248. Jacobs, *supra* note 58, at 3.

249. Apart from baseball, "[o]ther professional sports operating interstate, football, boxing, basketball and presumably hockey and golf, are not so exempt." Flood v. Kuhn, 407 U.S. 258, 282-283 (1972).

250. Radovich v. NFL, 352 U.S. 445, 452 (1957).

251. For details of the Curt Flood Act of 1998 and its interaction with the decision in Brown v. Pro Football, see *Curt Flood Act Revokes Antitrust Exemption For Practices That Affect Employment Of Major League Baseball Players*, ENTERTAINMENT LAW REPORTER, December, 1998.

252. *Flood*, 407 U.S. at 265-66.

253. *Id.*

254. *Id.*

the NBA's team and individual salary caps punish those not responsible for the offenses intended to be disciplined. How the *Brown* holding will be applied to the provisions of the NBA's collective bargaining agreement remains to be seen. In light of the Supreme Court's sweeping exemption, it is unlikely that any player would be so bold as to try to find out. Alternatively, under a system like baseball's luxury tax, no antitrust challenge would ever be necessary. In the face of baseball's mighty reserve clause, Curt Flood argued, albeit in vain, that "a well-paid slave is still a slave."[255] With its team salary cap and its individual salary cap, the NBA is regrettably headed in the same direction, towards well-paid slavery.

255. Winston, *Fighting for his Freedom*, NAT'L L. J., Aug. 15, 1988, at 13.