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## Hard Cap or Soft Cap: The Optimal Player Mobility Restrictions for the Professional Sports Leagues

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### Cover Page Footnote

This Note is dedicated to my family and friends for their support and encouragement. I am also grateful to those who helped me throughout the editing process, in particular Judd Kleeger, for their comments and suggestions.

# Hard Cap or Soft Cap: The Optimal Player Mobility Restrictions for the Professional Sports Leagues

Alan M. Levine\*

*For team owners, agents and athletes, balancing economic sense with sports sense and loyalty is the great challenge of the 90's. The mission has become a breathtaking, heart-breaking process of trial and error.<sup>1</sup>*

## INTRODUCTION

Gone are the days of the true sports hero. Whereas athletes previously played sports purely for the love of the game, today's major league professional team sport<sup>2</sup> athletes seem to be merely hired guns.<sup>3</sup> Recently, these athletes, through their players' associations, have become more vociferous about maximizing salaries

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1. William C. Rhoden, *Loyalty Issue Crystallizes On Mattingly*, N.Y. TIMES, Nov. 18, 1995, at 29.

2. This Note discusses the players' relationship vis-à-vis league management regarding employment terms in American football and basketball. This author assumes that the principles discussed in this Note will also relate to American baseball and hockey. Cf. Paul D. Staudohar & James A. Mangan, *Introduction* to THE BUSINESS OF PROFESSIONAL SPORTS 1, 2 (Paul D. Staudohar & James A. Mangan eds., University of Illinois 1991). This Note will also relate to one newcomer, soccer, see *New Pro League Will Debut in April*, ORANGE COUNTY REGISTER, Oct. 18, 1995, at D3. Announced in October 1995, Major League Soccer ("MLS") will begin its inaugural season on April 6, 1996, with teams in ten cities. *Id.* Also, it should be noted that American-style free agency will be exported to European soccer based on a recent European Court of Justice decision. Christopher Clarey, *Free Agency Crosses the Atlantic, Anxiety on Board*, N.Y. TIMES, Dec. 20, 1995, at B21.

3. For a complete discussion on the change in nature of the professional athlete and the sports business, see Robert Lipsyte, *The Emasculation Of Sports*, N.Y. TIMES MAG., Apr. 2, 1995, at 50.

and freedoms, and team owners, perpetually willing to fight over revenues, have only exacerbated the conflict. These skirmishes have resulted in many work stoppages, making the negotiations between the players' associations and the professional leagues, at times, the only sport to watch.

Historically, the owners contained players' salaries through various player mobility restrictions.<sup>4</sup> The owners' initial method of restraining player movement and preventing intra-league bidding wars over players was through a device called the reserve clause.<sup>5</sup> This device gave a team the exclusive right to a player's services and allowed a team to offer any salary to the player.<sup>6</sup> The reserve clause forced a player to accept the contract or lose his eligibility to play the sport.<sup>7</sup> Players were indoctrinated into the reserve system through another mobility restriction, which still exists, called the college draft.<sup>8</sup> The college draft is a system by which college players are selected by teams and placed on their reserve lists.<sup>9</sup> Another type of mobility restriction is the right of first refusal, which operates in conjunction with free agency restrictions to limit player mobility before a player plays a specified number of years.<sup>10</sup> When a player has not met the threshold years, upon expiration of his contract, the player becomes a restricted free agent and subject to the prior team's right of first refusal.<sup>11</sup> The right of first refusal allows a team to match any offer from another team made to its player<sup>12</sup> in order to keep the player. Once reaching the required number of years the player obtains the status of an unrestricted free agent. At this stage, the player is permitted to sign with any team

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4. See Roger G. Noll, *The Economics of Sports Leagues*, reprinted in *LAW OF PROFESSIONAL AND AMATEUR SPORTS* § 17.03[4], at 17-20 to 17-28 (Gary A. Uberstine ed. 1988). Evidence demonstrates that the player mobility restrictions limit player's salaries to approximately one half their value in a free marketplace. *Id.*

5. See *infra* note 57 and accompanying text (discussing the reserve clause).

6. See *infra* note 57.

7. See *infra* note 57.

8. See *infra* note 57 (discussing the college draft).

9. See *infra* note 57.

10. See *infra* note 85 (discussing the right of first refusal).

11. See *infra* note 85 (discussing restricted free agency).

12. See *infra* note 85 (discussing the right of first refusal).

without limitation.<sup>13</sup>

As a number of these player mobility restrictions failed under increasing antitrust scrutiny and player demands, the leagues devised new methods to restrict player mobility.<sup>14</sup> The salary cap is one such method.<sup>15</sup> The salary cap enables players to move more freely intra-league, but subtly limits the number of teams a player can negotiate with.<sup>16</sup> The reduction in the number of teams occurs because the salary cap proscribes maximum team amounts that can be paid to players.<sup>17</sup> The difference between actual salary paid to a team's current players and the team's applicable salary cap is the amount that a team can use to acquire other players.<sup>18</sup> Consequently, this system creates incentives for players to negotiate only with teams who have acceptable amounts (to the players) available under their ceiling.

Today, there are two types of salary cap in existence. The first type of salary cap, the hard cap, is employed by the National Football League ("NFL"). The hard cap sets a specific limit on the amount a team may pay its players, and teams may not exceed this amount under any circumstances.<sup>19</sup> The second type of salary cap, the soft cap, is used by the National Basketball Association ("NBA"). This cap sets a maximum amount, like the NFL cap, but

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13. See *infra* note 85 (discussing unrestricted free agency).

14. See discussion *infra* parts I.A, I.B (discussing the NFL and NBA player mobility restriction methods).

15. The salary cap is a salary limitation by which leagues set ceilings on the amount teams can pay players. Depending on the type of cap instituted, there may or may not be exclusions from its calculation for certain transactions. See discussion *infra* part II.A.4 (discussing NFL veteran salary restrictions); part II.B.4 (discussing NBA veteran salary restrictions). Another type of salary restriction is the tax system, which places a surcharge on amounts teams spend over a certain limit. See *infra* note 294 (discussing tax systems). However, no professional league, at the time of this writing, has adopted this method.

16. See discussion *infra* parts III.A.4, III.B.4 (discussing the NFL and NBA salary caps).

17. See *infra* notes 202-08 and accompanying text (discussing the NFL salary cap); notes 232-49 and accompanying text (discussing the NBA salary cap).

18. See *infra* notes 202-08 and accompanying text (discussing the NFL salary cap); notes 232-49 and accompanying text (discussing the NBA salary cap).

19. See discussion *infra* part II.A.4.

allows its teams to exceed the cap in specific situations.<sup>20</sup>

Recently, the struggle by the players' associations to prevent the imposition of, and free themselves from, these mobility restrictions has intensified. Events occurring within Major League Baseball ("Baseball") represent perhaps the most acerbic struggle between players and management to prevent the imposition of the salary restrictions. On August 12, 1994, the Major League Baseball Players' Association ("MLBPA") went on strike.<sup>21</sup> The players took action fearing that the owners would unilaterally impose a cap on players salaries when the 1990-1993 Basic Agreement<sup>22</sup> expired.<sup>23</sup> Concerned by the bitterness of the strike, politicians attempted to resolve the conflict, but to no avail.<sup>24</sup> With only days

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20. See discussion *infra* part II.B.4.

21. *Baseball Accepts Mediation*, S.F. CHRON., Aug. 13, 1994, at A1. In the eighteen year period between 1972 and 1990, there were seven work stoppages. J. Jordan Lippner, Note, *Replacement Players For The Toronto Blue Jays?: Striking The Appropriate Balance Between Replacement Worker Law In Ontario, Canada And The United States*, 18 FORDHAM INT'L L.J. 2026, 2030 (1995).

22. Basic Agreement between The American League of Professional Baseball Clubs and The National League of Professional Baseball Clubs and Major League Baseball Players Association, effective Jan. 1, 1990 (on file with the *Fordham Intellectual Property, Media & Entertainment Law Journal*) [hereinafter *Baseball Agreement*]. The *Baseball Agreement*, which expired at the end of 1993, see *id.* art. XXIII, at 61, provided for minimum salaries, *id.* art. VI.B, at 9; a World Series and League Championship Players' Pool, *id.* art. X, at 24; Grievance Procedures pertaining to salaries or disciplinary action, *id.* art. XI, at 25; and the Reserve System, *id.* art. XX, at 48. In the *Agreement*, *Baseball* had neither limits on the maximum a player could be paid nor provisions regarding revenue sharing. See *id.*

23. Murray Chass, *Owners Scrap Salary Cap to Create a Ray of Hope*, N.Y. TIMES, Feb. 4, 1995, at 27. Ultimately, the owners unilaterally imposed the salary cap anyway, *Baseball Cap Not An Ideal Fit For Many*, ORLANDO SENTINEL, Dec. 24, 1994, at B1, and further examined the use of replacement players at the end of 1994. *Bracing For A World of Replacements*, ORANGE COUNTY REG., Dec. 26, 1994, at C12.

24. After gaining majority control of Congress in early 1995, the Republicans introduced legislation ranging from a complete repeal of *Baseball's* antitrust exemption, to a requirement that the parties submit to binding arbitration. S. 15, 104th Cong., 1st Sess. (1995); H.R. 45, 104th Cong., 1st Sess. (1995); H.R. 397, 104th Cong., 1st Sess. (1995); see also Murray Chass, *Lawmakers Pursue 'Contract With Fans'*, N.Y. TIMES, Jan. 5, 1995, at B13 [hereinafter Chass, *Lawmakers Pursue 'Contract With Fans'*]; H.R. 120, 104th Cong., 1st Sess. (1995); H.R. 106, 104th Cong., 1st Sess. (1995); H.R. 365, 104th Cong., 1st Sess. (1995); H.R. 386, 104th Cong., 1st Sess. (1995); see *infra* note 60 (discussing *Baseball's* antitrust exemption). The introduction of these bills, however, did not

remaining until the start of 1995-96 season, and replacement players in training camp,<sup>25</sup> Federal District Court Judge Sotomayor issued an injunction reinstating the terms of the expired Basic Agreement.<sup>26</sup> While this injunction saved the 1995 season, it provided only a temporary solution.<sup>27</sup> To date there is still no new collective bargaining agreement and no long term labor peace.<sup>28</sup>

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provide sufficient incentive for the owners to settle the strike. Today, these bills are stalled in committee.

However, even if Congress does repeal Baseball's antitrust exemption, the players may not be free from Baseball's mobility restrictions. Lewis Kurlantzick, *Baseball's Antitrust Exemption And Labor Relations*, N.Y. L.J., Oct. 19, 1994, at 1. The non-statutory labor exemption from the antitrust laws, see *infra* note 67, would likely protect the Baseball owners from antitrust litigation since the resulting negotiating landscape would focus on the effects of non-statutory exemption once an agreement expired. Dominic Bencivenga, *Baseball's Next Game*, N.Y. L.J., Jan. 12, 1995, at 5; see *infra* notes 94-103, 146-48 and accompanying text (discussing status of non-statutory exemption once a collective bargaining agreement expires).

In February 1994, after his administration's top mediator, William Usury, failed to produce results, President Clinton attempted but ultimately failed to end the strike through arbitration. Murray Chass, *Everybody Is Shut Out At White House Talks*, N.Y. TIMES, Feb. 7, 1995, at B11 [hereinafter Chass, *Everybody Is Shut Out*]. The National Labor Relations Board ("NLRB"), which investigates charges of unfair labor practices, then stepped in to facilitate Baseball's stalled negotiations by influencing the owners to eliminate the self-imposed salary cap. *NLRB v. Major League Baseball Player Relations Comm., Inc.*, N.Y. L.J., Apr. 5, 1995, at 25 (S.D.N.Y. Apr. 3, 1995); see also Chass, *supra* note 23. Specifically, the NLRB threatened the owners with the issuance of an unfair labor practice complaint which would interfere with the owners' plan to use replacement players. *Id.* This threat, which successfully caused the owners to remove the salary cap, was significant because, under the antitrust laws, employers can legally replace workers when protecting their legitimate business interests and do not have to re-hire the striking workers once the strike ends. See *NLRB v. International Van Lines*, 409 U.S. 48 (1972). The right of an employer to replace striking workers, however, does not extend to a strike in protest of an employer's unfair labor practices. *NLRB v. Mackey Radio & Tel. Co.*, 304 U.S. 333 (1938).

25. See generally David Ferrell, *The Boys of Spring Strike Out Far From the Hoopla of Opening Day*, L.A. TIMES, Apr. 25, 1995, at A1; Wayne Lockwood, *Replacements? Padres Finally Are The Real Deal*, SAN DIEGO UNION & TRIB., Apr. 12, 1995, at D1; *Players Gladly Return to Their Day Jobs*, ORANGE COUNTY REG., Apr. 4, 1995, at D3.

26. *Silverman v. Major League Baseball Player Relations Comm.*, 880 F. Supp. 246 (S.D.N.Y. 1995), *aff'd*, 67 F.3d 1054 (2d Cir. 1995); see also Dave Anderson, *There's No Winner, Only A Big Loser*, N.Y. TIMES, Apr. 3, 1995, at C1.

27. Anderson, *supra* note 26.

28. *Id.*; see also Murray Chass, *Players and Clubs Still Need A Pact*, N.Y. TIMES, Apr. 5, 1995, at B9; John Helyar, *Owners Vote To Play Ball On April 26*, WALL ST. J., Apr. 3, 1995, at A2.

The National Hockey League ("NHL") also had its share of labor strife. In September 1994, instead of a players' strike, the NHL owners locked out their players because the NHL and the National Hockey League Players' Association ("NHLPA") disagreed over the terms of a new collective bargaining agreement.<sup>29</sup> Fearing that players' salaries were becoming unaffordable, the owners bargained for imposing player salary restraints in the form of a tax system.<sup>30</sup> The NHLPA, concerned about the effect this and other restraints would have on both players' salaries, and on their ability to garner free market wages, did not consent to these salary restrictions.<sup>31</sup> After a 103 day lockout period, however, the NHL and NHLPA finalized a new collective bargaining agreement.<sup>32</sup>

Even the NBA, normally free from labor disputes,<sup>33</sup> experienced labor problems in 1994-95. The turbulence was due to the desire of the National Basketball Players' Association ("NBPA") to eliminate the league's 12-year-old salary cap when the then-existing agreement expired in September of 1994.<sup>34</sup> Other points of contention included the college draft and free agency restrictions.<sup>35</sup> The owners, in contrast, called for stricter salary limitations, the elimi-

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29. See Joe LaPointe, *Lock Up the Zamboni, N.H.L. Season Is on Hold*, N.Y. TIMES, Sept. 30, 1994, at B9.

30. NHL Statement, Oct. 11, 1994, at 1-3 (on file with the *Fordham Intellectual Property, Media & Entertainment Law Journal*). This tax system would have allowed teams to pay players unrestricted salaries, but teams would have to pay a tax for aggregate team salaries over a specified limit. *Id.* Like the salary cap, the intended purpose of the tax system would be to restrain players' salaries. *Id.*

31. Joe LaPointe, *Pact Reached For Salvaging Hockey Season*, N.Y. TIMES, Jan. 12, 1995, at A1.

32. *Id.* The new agreement provided no salary restrictions on veteran salaries, however, it did institute limitations on rookie compensation. *Id.* Further, modifications to the expired agreement were made regarding arbitration awards and free agency restrictions. *Id.*

33. Glen St. Louis, *Keeping the Playing Field Level: The Implications, Effects and Application of the Nonstatutory Labor Exemption on the 1994 National Basketball Association Collective Bargaining Process*, 1993 DET. C.L. REV. 1221, 1249.

34. Clifton Brown, *There's No Stoppage In Sight, But The N.B.A. Is Very Much In The Labor-Woes Lineup*, N.Y. TIMES, Sept. 28, 1994, at B12; Murray Chass, *The Semantics Game May Be The Only Game In Town*, N.Y. TIMES, Sept. 27, 1994, at B18.

35. Brown, *supra* note 34.

nation of one-year clauses and balloon payments,<sup>36</sup> and rookie salary limits.<sup>37</sup> Before tempers flared, however, the parties agreed on a "no lockout, no strike" policy which saved the 1994-1995 season, while the two sides negotiated a new agreement.<sup>38</sup>

The only league absent from the 1994-95 labor disputes was the NFL, but because a new agreement<sup>39</sup> negotiated in 1993, ended years of litigation between the NFL and the National Football League Players' Association ("NFLPA").<sup>40</sup> While this agreement resolved the labor-management conflict over the mobility restrictions for the term of the agreement, the owners are already seeking to circumvent its restrictive covenants.<sup>41</sup>

36. These are methods of salary cap circumvention. See *infra* notes 348-53 and accompanying text (discussing cap circumvention methods).

37. Brown, *supra* note 34.

38. Murray Chass, *N.B.A. and Players Agree to Play Ball This Season*, N.Y. TIMES, Oct. 28, 1994, at B7 [hereinafter Chass, *N.B.A. and Players Agree*]. A number of high profile players, including Patrick Ewing and Michael Jordan sued the league, claiming antitrust violations based on the salary provisions in the expired collective bargaining agreement. Murray Chass, *N.B.A. Faces Antitrust Suit By Its Players*, N.Y. TIMES, June 29, 1995, at B9 [hereinafter Chass, *N.B.A. Faces Antitrust Suit*]. Usually, a court would dismiss the case, like in *National Basketball Ass'n v. Williams*, 857 F. Supp. 1069, 1071-72 (S.D.N.Y. 1994), *aff'd*, 45 F.3d 684 (2d Cir.), *petition for cert. filed*, 64 U.S.L.W. 3070 (U.S. July 24, 1995) (holding that an expired collective bargaining agreement's provisions continued to be exempt from antitrust scrutiny until the collective bargaining relationship ended). However, these players sought to decertify the union, making the exemption unavailable under the holding of *Powell v. National Football League*, 678 F. Supp. 777 (D. Minn. 1988), *rev'd*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991). Cf. Murray Chass, *N.B.A. and Union in Agreement at Midnight Hour*, N.Y. TIMES, Aug. 9, 1995, at B7 [hereinafter Chass, *N.B.A. and Union*].

Days before the union vote, however, the NBA and NBPA agreed to a new collective bargaining agreement which included an increase in the salary cap, a recalculation of revenues, and a rookie salary cap. Chass, *N.B.A. and Union*, *supra*; see also discussion *infra* part II (discussing the basic tenets of the new NBA agreement). When the vote was taken, a majority of the players voted against decertifying the union and for playing basketball in 1995-96. See Murray Chass, *N.B.A. Players Support Union By a Landslide*, N.Y. TIMES, Sept. 13, 1995, at B9 [hereinafter Chass, *N.B.A. Players Support Union*].

39. See discussion *infra* part II.A (discussing 1993 NFL Agreement).

40. See discussion *infra* part I.A (discussing bargaining history between the NFL & NFLPA); *infra* part III.C (discussing methods of cap circumvention under the NFL salary cap).

41. See Timothy W. Smith, *Sanders Agrees to Dallas's Rich Deal*, N.Y. TIMES, Sept. 10, 1995, SundaySports, at 7; Richard Sandomir, *Now Jones Must Prove How Smart Nike Deal Is*, Sept. 7, 1995, at B23; *supra* notes 357-66, 388-91 and accompanying text (dis-

With the NFLPA and NBPA consenting to salary and other restrictions, and the MLBPA and NHLPA resisting the imposition of new mobility limitations, professional sports teeters on the verge of continual work stoppages while the parties struggle over the form of these mobility restrictions. This Note argues that the optimal system of mobility restrictions, regardless of the sport, is based on a model of the NBA's soft salary cap. This method provides for the maximization of players' salaries while maintaining the fiscal integrity of a league. Part I presents the collective bargaining history between both the NFL and NFLPA, and the NBA and NBPA. This background information provides a framework for understanding events leading up to the adoption of both leagues' current agreements, including application of the antitrust laws to each leagues' collective bargaining agreements. Part I also discusses the changes in the leagues' and the players' associations bargaining positions in response to court defined parameters. Part II examines and compares the NFL's and the NBA's current collective bargaining agreements, specifically discussing provisions relating to current player mobility restrictions. Part III argues that the optimal foundation for a system of player restraints is the NBA's soft salary cap method, which unlike the NFL's hard salary cap, benefits both the players and league owners over the long term. Finally, this Note concludes that the NBA's soft salary cap provides a better foundation for a league to model its player restrictions upon.

## I. COLLECTIVE BARGAINING HISTORY OF THE NFL & NBA

The restrictions that both leagues use to limit player mobility have undergone substantial changes since their inception. From various forms of the reserve clause, free agency, and college draft, leading to the salary cap, the leagues have adapted these restrictions in response to court adjudication and, occasionally, player demands.<sup>42</sup> This part examines the historical and legal ramifica-

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cussing alleged methods of NFL cap circumvention).

42. For over one century, the primary focus of sports litigation has been on the intra-league mobility of players. PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE*

tions of these restrictions as incorporated into past NFL and NBA collective bargaining agreements.

*A. Collective Bargaining History Between the NFL & NFLPA*

In 1968, the NFLPA<sup>43</sup> received certification as a labor organization<sup>44</sup> from the NLRB, and as such, became the exclusive bargaining representative<sup>45</sup> of all NFL players.<sup>46</sup> Until its decertification in the early 1990s, the NFLPA bargained on behalf of the players on numerous issues including salaries, grievance procedures, and free agency.<sup>47</sup>

There were five collective bargaining agreements during the twenty-two year relationship between the NFL and NFLPA.<sup>48</sup> The first agreement, reached in 1968 ("1968 Agreement"), lasted two years.<sup>49</sup> One contentious issue for the players during the negotiations of the 1968 Agreement involved the Rozelle Rule.<sup>50</sup> The Rozelle Rule, or reserve clause, was a method by which NFL teams maintained the property rights to individual players after they were

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LAW 65 (1993). Before the 1960s, contract law was the legal theory upon which all challenges to the player mobility restraints were based. *Id.* Since then, player challenges have been founded upon antitrust theories, mainly because of player unionization and the use of collective bargaining agreements. *Id.*

43. *Kapp v. National Football League*, 390 F. Supp. 73, 83 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979). The players' association was formed in 1956 and bargained with the NFL on behalf of the players, even though it was not certified by the NLRB. *See id.*

44. A "labor organization" is defined as any organization "in which employees participate and which exists for the purpose . . . of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. § 152(5) (1988).

45. Pursuant to 29 U.S.C. § 159(a) (1988), once designated the exclusive bargaining representative, the NFLPA became the sole representative for all NFL players for purposes of collective bargaining. *Id.*; *see also Kapp*, 390 F. Supp. at 83. Once a player becomes part of this group he is bound by the terms of the collective bargaining agreement under federal law. *See Wood v. National Basketball Ass'n*, 602 F. Supp. 525, 529 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954 (2d Cir. 1987); *J.I. Case Co. v. NLRB*, 321 U.S. 332, 335 (1944).

46. *Kapp*, 390 F. Supp. at 83.

47. *St. Louis*, *supra* note 33, at 1227-39.

48. *Id.*

49. *Kapp*, 390 F. Supp. at 83.

50. *Mackey v. National Football League*, 543 F.2d 606, 612 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

drafted.<sup>51</sup> The NFLPA sought to liberalize the Rozelle Rule to allow greater player mobility.<sup>52</sup> The Rozelle Rule, however, was scarcely discussed during the negotiations, and not expressly included in the final 1968 Agreement.<sup>53</sup> Rather, the 1968 Agreement incorporated by reference the NFL Constitution and By-laws which contained explicit provisions on the player mobility restrictions including the Rozelle Rule, free agency, and the college draft.<sup>54</sup>

In 1970, the players went on strike, citing playoff compensation and pension benefits as the reasons for their second strike in two years.<sup>55</sup> During 1971, another agreement was reached ("1970 Agreement") and made retroactive to 1970.<sup>56</sup> The 1970 Agreement was the first NFL agreement to contain provisions requiring players to sign a standard players' contract.<sup>57</sup> This requirement was signifi-

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51. See *infra* note 57 (discussing the reserve clause).

52. *Mackey*, 543 F.2d at 612.

53. *Id.*

54. *Id.* at 613.

55. St. Louis, *supra* note 33, at 1229.

56. *Kapp*, 390 F. Supp. at 83.

57. *Id.* The player was bound to the team for at least two years once he signed the standard contract. *Mackey*, 543 F.2d at 610. This contract contained the "option rule," which gave the player's team the unrestricted opportunity to renew the contract with the amount of compensation set at not less than 90% of the prior year's salary. *Kapp*, 390 F. Supp. at 77. A player became a free agent by playing his option year, the last year of his contract, instead of signing a new contract. *Mackey*, 543 F.2d at 610. Additional provisions of the standard contract obligated the player to the NFL's Constitution, By-laws, Rules and Regulations. *Kapp*, 390 F. Supp. at 83-84. The player was also bound to his club's specific rules and disciplinary procedures, subject to review only by the Commissioner, which was not appealable. *Id.*

At this time in the history of labor-management relations concerning player restraints, binding a player to the NFL's Constitution, By-laws, Rules and Regulations was of particular importance to the NFL because these documents contained the player mobility provisions which limited the player's intra-league movement. *Id.* at 75-78. The first of these provisions was the college draft rule. *Id.* at 75-76. This NFL rule provided that at the annual selection meeting of the NFL clubs each team would select players, giving them the exclusive right to that player. *Id.* at 76. This player was then placed on the team's reserve list and the selecting team could offer the player any compensation, which the player then could accept or reject. *Id.* If the player rejected the offer, however, he could not play for another NFL team, even if the offer was grossly inadequate. *Id.*

Another provision which restricted player mobility was the anti-tampering provision. *Id.* This provision provided that no NFL team could negotiate with a player on the active, reserve or selection list of another team. *Id.* The offending team would be penalized for

cant because the contract explicitly bound a player to the mobility restrictions contained in the NFL Constitution and By-laws.<sup>58</sup>

The 1970 Agreement expired in 1974,<sup>59</sup> and during the negotiations for a new agreement, the NFLPA sought to repeal all existing player mobility restrictions, in particular the Rozelle Rule.<sup>60</sup> The

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such interference which included the loss of selection choice in the following years' draft or fines if the interference was intentional. *Id.*

The final important provision impacting the players was the so-called Rozelle Rule, or reserve clause. *Id.* This Rule, named after then NFL Commissioner Alvin Ray 'Pete' Rozelle, provided that no team could employ a player from another team, even if the player played out his contract and became a free agent, unless satisfactory monetary arrangements to the prior team were first negotiated. *Id.* at 76-77. If these arrangements were not agreed to before the trade, the Commissioner could provide for satisfactory compensation to the former player's club. *Id.* This Rule, adopted in 1963, created the free agency compensation system. Matthew S. Collins, *Recent Development*, 71 WASH. U. L.Q. 1269, 1273 (1993). Prior to 1963, no compensation was given to the prior team when a player was traded. *Id.*

58. See *supra* note 57 (discussing provisions of the uniform players' contract).

59. St. Louis, *supra* note 33, at 1229.

60. *Id.* The players first tried to eliminate the restrictive mobility rules in *Kapp v. National Football League*, 390 F. Supp. 73 (N.D. Cal. 1974). The players alleged that these practices were in violation of the antitrust laws because the mobility restrictions unreasonably restrained trade. *Id.* at 78. The court sided with the players in striking the practices; however, the provisions, at the time, were not part of a collective bargaining agreement. *Id.* at 85. Thus, the players again had to attack the practices when they became incorporated into a collective bargaining agreement.

Unlike Baseball, which has an exemption from the antitrust laws under *Federal Baseball Club of Baltimore, Inc., v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922) (holding that Baseball is not in interstate commerce, and thus, the antitrust laws were not implicated), and its progeny, the NFL is subject to the enforcement of the antitrust laws under *Radovich v. National Football League*, 352 U.S. 445 (1957) (holding that *Federal Baseball* was restricted only to Baseball, and that the NFL had sufficient contacts within interstate commerce to subject it to the antitrust laws). The NBA is subject to the antitrust laws under *Washington Professional Basketball Corp. v. National Basketball Ass'n*, 147 F. Supp. 154 (S.D.N.Y. 1956) (holding that basketball exhibitions coupled with the sale of the rights to the interstate transmission of games brought the NBA within the scope of the Sherman Act), and *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971) (holding that the NBA By-law prohibiting a basketball player who had not completed four years of college from playing NBA basketball constituted a group boycott in violation of the Sherman Act). Finally, the NHL is subject to the antitrust laws under *Philadelphia World Hockey Club, Inc., v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972) (holding that hockey is involved in interstate commerce and is subject to the federal antitrust laws).

Like Baseball, MLS should enjoy exemption from the antitrust laws, at least con-

NFLPA's bargaining position, however, was weakened due to an aborted league-wide strike during the 1974 pre-season,<sup>61</sup> and a five week walk-out by isolated teams at the conclusion of the 1975 pre-season.<sup>62</sup> Given the union's lack of bargaining leverage, the players were forced to play without a collective bargaining agreement for the 1974, 1975, and 1976 seasons.<sup>63</sup> The absence of an agreement intensified player uncertainty over wages and other pertinent employment issues. Because the NFLPA did not have the solidarity to resolve the issue of player mobility through negotiations with the NFL, the NFLPA resorted to court action. In *Mackey v. National Football League*,<sup>64</sup> the players argued that the mobility restrictions of the 1970 Agreement violated the antitrust laws<sup>65</sup> be-

cerning liability under § 1 of the Sherman Act. Organized as a single corporation, MLS will own and operate all the teams in the league. As a single entity, the league cannot conspire or combine to restrain trade in violation of § 1 of the Sherman Act. 15 U.S.C. § 1 (1994). See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (stating that § 1 of the Sherman Act reaches actions only between separate entities and not conduct that is "wholly unilateral") (citations omitted); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (1952), *cert. denied*, 345 U.S. 925 (1953) (stating that it is "fundamental in the law of conspiracy that you must have two persons or entities to have a conspiracy").

61. Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339, 360.

62. *Id.*

63. *Id.* at 359.

64. 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

65. Sherman Anti-Trust Act of July 2, 1890, ch. 647, § 1, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1-7 (1994)); Clayton Antitrust Act of October 15, 1914, ch. 323, § 1, 38 Stat. 730 (codified as amended in scattered sections of 15 U.S.C. & 29 U.S.C.).

Section 1 of the Sherman Act provides in relevant part, "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." 15 U.S.C. § 1 (1994).

Section 2 of the Sherman Act provides in relevant part, "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . ." 15 U.S.C. § 2 (1994).

Section 6 of the Clayton Act provides:

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

cause they were more restrictive than necessary to effectively maintain a competitively balanced league.<sup>66</sup> The owners defended their practices by invoking the non-statutory exemption<sup>67</sup> from the anti-

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members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

15 U.S.C. § 17 (1994).

Section 20 of the Clayton Act states in relevant part:

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right . . . for which injury there is no adequate remedy at law . . . .

29 U.S.C. § 52 (1994).

66. *Mackey*, 543 F.2d at 609; *see also* *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978) (holding that the college draft was an unreasonable restraint of trade in violation of Sherman Act). *But see* *Zimmerman v. National Football League*, 632 F. Supp. 398 (D.D.C. 1986) (holding no challenge could be effectively mounted against supplemental draft where collective bargaining agreement was in effect, and agreement spoke to this practice, based on application of non-statutory labor exemption).

67. The non-statutory labor exemption exempts from the antitrust laws certain concerted activities and agreements between labor and non-labor parties in the context of collective bargaining. *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622-23 (1975). In *Connell*, the Supreme Court opined that the exemption favored "collective bargaining under the N[ational] L[abor] R[elations] A[ct] and the congressional policy favoring free competition in the business markets . . . ." *Id.* at 622 (citation omitted). The exemption does not apply to agreements to eliminate competitors, *see* *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 664 (1965), or agreements outside the collective bargaining agreement. *Connell*, 421 U.S. at 633-35. The non-statutory exemption protects restraints that follow naturally from the elimination of competition over wages and working conditions, which do not have substantial anti-competitive effects in business markets. *Id.* at 622. The exemption was first recognized by the Supreme Court in *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Jewel Tea Co.*, 381 U.S. 676 (1965).

By contrast, the statutory labor exemption from the antitrust laws, derived from the Clayton Antitrust Act of October 15, 1914, ch. 323, § 1, 38 Stat. 730 (codified as amended in scattered sections at 15 U.S.C. & 29 U.S.C.), and the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105, 113 (1988), declares that labor unions are not combinations or conspiracies in restraint of trade. *Connell*, 421 U.S. at 621-22. This exemption, different from the non-statutory labor exemption, was created to protect legitimate collective activity by employees which is, on its face, anti-competitive but favored by federal labor policy. *See* *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 504 n.24 (1940). However, the exemption does not apply to unions which act in concert with non-labor groups. *See* *Connell*, 421 U.S. at 622. The limited protection of the statutory labor exemption created

trust laws.<sup>68</sup> This defense, if accepted, would have precluded the court from examining provisions included in the collective bargaining agreement.<sup>69</sup> The court analyzed the Rozelle Rule and the previous collective bargaining agreements between the NFL and NFLPA to determine if the non-statutory labor exemption could be invoked.<sup>70</sup> The court reasoned that: (1) the restraint in question could only affect the parties to the collective bargaining relationship;<sup>71</sup> (2) the agreement had to concern a mandatory subject of collective bargaining;<sup>72</sup> and (3) the agreement must be the product of bona fide arm's length bargaining, in order for the non-statutory labor exemption to be applied.<sup>73</sup>

The court concluded that the Rozelle Rule affected only the parties to the agreement, thus satisfying the first prong.<sup>74</sup> The court further opined that the restraint related to a mandatory subject of collective bargaining.<sup>75</sup> Regarding the third prong, however, the court found that the 1970 Agreement was not the product of bona fide negotiations.<sup>76</sup> Thus, the Rozelle Rule was not exempt from the antitrust scrutiny since the non-statutory labor exemption was unavailable as a defense.<sup>77</sup>

The court next examined the jurisprudence under the Sherman Act and determined the Rozelle Rule to be a group boycott.<sup>78</sup> A

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the need for the non-statutory exemption to protect collective bargaining situations.

68. *Mackey*, 543 F.2d at 609-10.

69. See *supra* note 67 (discussing the non-statutory labor exemption).

70. *Mackey*, 543 F.2d at 609-13.

71. *Id.* at 614. The National Labor Relations Act, 29 U.S.C. §§ 141-188 (1988 & Supp. V 1993), requires that conflicts over mandatory subjects of bargaining (e.g., wages, working conditions) be resolved in privately bargained agreements without substantial interference from the government. Gary R. Roberts, *Sports League Restraints On The Labor Market: The Failure Of Stare Decisis*, 47 U. PITT. L. REV. 337, 340 n.8 (1986).

72. *Mackey*, 543 F.2d at 614.

73. *Id.*

74. *Id.* at 615.

75. *Id.*

76. *Id.* at 615-16.

77. *Id.*

78. *Id.* at 618; see also *supra* note 65 (discussing the antitrust laws). A group boycott, or concerted refusal to deal, is defined as "an agreement by two or more persons not to do business with other individuals or to do business with them only on specified terms." Note, *Concerted Refusals To Deal Under The Antitrust Laws*, 71 HARV. L. REV.

determination that the NFL's conduct was a group boycott would have generally warranted application of the *per se* doctrine, invalidating the anti-competitive conduct without analysis.<sup>79</sup> The court, however, declined to apply the *per se* doctrine, asserting that it would be inappropriate in the present case with the district court's substantial analysis of the restriction on file.<sup>80</sup> Instead, the court reviewed the Rozelle Rule under the rule of reason,<sup>81</sup> and determined that it was more restrictive than necessary to maintain the relationship between player and team.<sup>82</sup> The court thus held that the 1970 Agreement violated the antitrust laws, thereby, freeing the

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1531 (1958). Concerted refusals to deal have long been recognized by the Supreme Court as a forbidden practice. See *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959) ("The Court . . . [has realized] . . . that there [are] . . . classes of restraints which from their 'nature or character' were unduly restrictive . . .") (citation omitted).

79. Once it is determined that the practice is a group boycott, then the court may declare the practice unreasonable *per se* in violation of the Sherman Act. *Northern Pacific Ry. v. United States*, 356 U.S. 1, 5 (1958) ("[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry . . .").

80. *Mackey*, 543 F.2d at 618-20.

81. To satisfy the rule of reason test, a plaintiff must establish: (i) an agreement between two or more individuals or business entities; (ii) the practice will injure or unreasonably restrain competition; and (iii) the practice will subsequently cause actual harm to competition. *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1391 (9th Cir.) (citing *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 290 (9th Cir. 1979), *cert. denied*, 447 U.S. 924 (1980)), *cert. denied*, 469 U.S. 990 (1984). The Supreme Court indicated that a non-facially invalid practice should be analyzed under a balancing test and stated, "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918).

82. *Mackey*, 543 F.2d at 621. The court gave four reasons for this finding:

First, little concern was manifested at trial over the free movement of average or below average players . . . . Second, the Rozelle Rule is unlimited in duration. It operates as a perpetual restriction on a player's ability to sell his services in an open market throughout his career. Third, the enforcement of the Rozelle Rule is unaccompanied by procedural safeguards. A player has no input into the process by which fair compensation is determined. Moreover, the player may be unaware of the precise compensation demanded by his former team, and that other teams might be interested in him but for the degree of compensation sought.

*Id.* at 622.

players from the Rozelle Rule.

With its victory in *Mackey*, the NFLPA should have enjoyed the benefits of an open player market for the first time.<sup>83</sup> However, in later agreements the NFLPA was forced to concede the victory in *Mackey* in order to obtain improvements regarding pension and disability benefits.<sup>84</sup>

In 1977, the NFL and NFLPA finalized a new collective bargaining agreement ("1977 Agreement"), which formally eliminated the Rozelle Rule in favor of the right of first refusal compensation system.<sup>85</sup> Although, this compensation system seemed to provide more mobility for the players, such freedom ultimately proved illusory.<sup>86</sup>

In 1982, after the 1977 Agreement expired,<sup>87</sup> negotiations to produce a new agreement failed, resulting in a 57 day players' strike.<sup>88</sup> The strike's effects resulted in the 1982 Agreement ("1982 Agreement"); yet this agreement set the stage for additional conflicts because it resolved none of the NFLPA's complaints pertaining to the right of first refusal system.<sup>89</sup>

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83. Jonathan S. Shapiro, Note, *Warming The Bench: The Nonstatutory Labor Exemption In The National Football League*, 61 *FORDHAM L. REV.* 1203, 1209 (1993).

84. WEILER & ROBERTS, *supra* note 42, at 174. The union, at this time, could not build on the *Mackey* victory because *Mackey* litigation exacted a heavy toll financially as well as organizationally. Lock, *supra* note 61, at 359.

85. See Shapiro, *supra* note 83, at 1209. The right of first refusal compensation system provided that a team whose contract with a player expired had the right to match any offers that the player received from other teams. *Id.* at 1209 n.37. If the former team failed to make a matching offer, the former team would lose the player to another team. *Id.* If the player was lost, the team would be compensated in the form of draft choices. *Id.* The difference between this system and the reserve system was that under the right of first refusal system, the commissioner took no part in setting compensation for the former team. *Id.* The right of first refusal affected only restricted free agents. Restricted free agents are those players who, upon expiration of their current contracts, have not completed the requisite number of seasons to become an unrestricted free agent. Unrestricted free agents are not subject to the right of first refusal. See discussion *infra* part II.A.3 (discussing the NFL system of free agency).

86. Shapiro, *supra* note 83, at 1210. Fewer than 50 of the 600 players whose contracts expired during the five year duration of the 1977 Agreement received offers from other NFL teams and fewer than 20 moved between teams as part of a trade. *Id.* at 1209-10.

87. *Id.* at 1210.

88. *Id.*

89. See *id.* In fact, during the term of the agreement, of the 1415 players whose contracts expired, only one player received an offer from another team. *Id.*; see also

In 1987, the NFLPA sought to exact gains regarding the new generation of player mobility restrictions. Anticipating the 1982 Agreement's expiration, the players went on strike due to the restrictiveness of the right of first refusal.<sup>90</sup> The league, however, swiftly broke the strike.<sup>91</sup> Even though the strike began in the second week of the season, the NFL only canceled one week of games because the owners brought in non-union replacement players.<sup>92</sup> Thus, with the strike broken, and negotiations failing to weaken the NFL's stance, the NFLPA once again resorted to the courts.<sup>93</sup>

In *Powell v. National Football League*,<sup>94</sup> the players sought an injunction preventing the continued imposition of the right of first refusal compensation system.<sup>95</sup> The players argued that the continued use of the player mobility restraints after the expiration of the 1982 Agreement violated the antitrust laws.<sup>96</sup> The owners again countered that the non-statutory labor exemption<sup>97</sup> continued to protect the player restrictions even after the agreement's expiration, since the restrictions would have presumably met the *Mackey* test.<sup>98</sup> The district court did not focus on the *Mackey* test and held that the proper balance between antitrust law and labor law resulted in the player mobility restrictions being exempt from the antitrust laws until the parties reached an impasse.<sup>99</sup> The district court,

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WEILER & ROBERTS, *supra* note 42, at 174.

90. Shapiro, *supra* note 83, at 1210-11.

91. *Id.*

92. *Id.*

93. *Id.* at 1211.

94. 678 F. Supp. 777 (D. Minn. 1988), *rev'd*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991). Following the decision in this case, the District of Columbia Circuit held that practices included in a collective bargaining agreement would be protected by the non-statutory labor exemption as long as those restraints operate in a labor market characterized by collective bargaining, even if those provisions are not specifically included in the collective bargaining agreement. *Brown v. Pro Football*, 50 F.3d 1041 (D.C. Cir. 1995).

95. *Powell*, 678 F. Supp. at 778.

96. *Id.* at 781.

97. *Id.*; see *supra* note 67 and accompanying text (discussing the non-statutory exemption from the antitrust laws).

98. *Powell*, 678 F. Supp. at 782.

99. *Id.* at 789. The court defined impasse to mean the point at which, "there appears

finding that an impasse had been reached, held for the NFLPA.<sup>100</sup> The court, however, the court refused to grant preliminary injunctive relief to the NFLPA.<sup>101</sup>

While *Powell* was on appeal to the Eighth Circuit, the NFL, fearing that the court would affirm the district court's decision and strike the original right of first refusal, imposed a new version of the right of first refusal system known as Plan B.<sup>102</sup> The Eighth Circuit, however, reversed the district court's determination that the non-statutory exemption expired at impasse, and held that the proper balance between the antitrust and labor laws resulted in the exemption expiring only when the bargaining relationship ended between the parties.<sup>103</sup> The court then determined that the parties still maintained an ongoing bargaining relationship, and therefore the players continued to be restrained by the mobility limitations.<sup>104</sup>

With the *Powell* defeat, the NFLPA sought to end application of the non-statutory exemption in accord with the Eighth Circuit's

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no realistic possibility that continuing discussions concerning the provision at issue would be fruitful." *Id.* at 788.

100. *Powell v. National Football League*, 690 F. Supp. 812 (D. Minn. 1988).

101. *Id.*

102. *Shapiro*, *supra* note 83, at 1211. This new form of the right of first refusal allowed each team to protect 37 of the 45 players on its roster. *See Collins*, *supra* note 57, at 1276. The eight remaining players became unrestricted free agents, thus free to sign with any team without compensation owed to the players' former team. *Id.* The 37 protected players, however, were still subject to the original right of first refusal system. *Id.*

The NFL was allowed to unilaterally impose new restrictions under prevailing labor policy. "Unions are protected against unilateral action by employers with respect to subjects of mandatory bargaining while negotiations over such subjects are ongoing." *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1051 (D.C. Cir. 1995) (citing *NLRB v. Katz*, 369 U.S. 736, 743 (1962)), *cert. granted*, 64 U.S.L.W. 3414 (U.S. Dec. 8, 1995). These protections extend only until the negotiating process ends at an impasse. *Id.* (citation omitted). At that point, an employer can impose new restrictions that were included in the employer's pre-impasse proposals. *Id.*

103. *Powell*, 930 F.2d at 1304 (implicitly rejecting the *Bridgeman v. National Basketball Ass'n*, 675 F. Supp. 960 (D. N.J. 1987) determination that the non-statutory labor exemption expired at impasse because it unduly insulated provisions in the expired collective bargaining agreement). *See infra* notes 146-48 and accompanying text (discussing the *Bridgeman* holding).

104. *See Powell*, 930 F.2d at 1303-04.

prescription.<sup>105</sup> To end the bargaining relationship, the NFLPA withdrew itself as the union representing all NFL players, which effectively decertified the union.<sup>106</sup> The decertification spawned a number of lawsuits<sup>107</sup> instituted with the hope of achieving greater player mobility by attacking the expired collective bargaining agreement's restrictions on a number of fronts.<sup>108</sup> One such suit was *McNeil v. National Football League*,<sup>109</sup> which challenged the NFL's Plan B right of first refusal as applied to the New York Jets' Freeman McNeil and seven other players.<sup>110</sup> The jury, in striking down Plan B, determined that the restriction harmed competition for players' services because it was more restrictive than reasonably necessary to maintain a competitive balance between the teams in violation of the rule of reason.<sup>111</sup> Another suit followed to prevent the imposition of Plan B free agency on ten free agents who were not parties to the *McNeil* litigation,<sup>112</sup> climaxing with a class action suit for all players not otherwise involved in litigation.<sup>113</sup>

The legal doctrine of collateral estoppel,<sup>114</sup> which demands similar results to *McNeil* in the other cases, forced the NFL to relax its negotiating position regarding mobility restrictions.<sup>115</sup> With the NFL owners fearing that complete free agency would destroy the

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105. Shapiro, *supra* note 83, at 1212.

106. WEILER & ROBERTS, *supra* note 42, at 199.

107. See *White v. National Football League*, 822 F. Supp. 1389 (D. Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 2569 (1995) (seeking damages and an injunction preventing the continued imposition of Plan B, league-wide); *Jackson v. National Football League*, 802 F. Supp. 226 (D. Minn. 1992) (granting a temporary injunction releasing the plaintiffs from Plan B); *McNeil v. National Football League*, 764 F. Supp. 1351 (D. Minn. 1991).

108. Shapiro, *supra* note 83, at 1212.

109. 764 F. Supp. 1351 (D. Minn. 1991).

110. *Id.*

111. Shapiro, *supra* note 83, at 1212.

112. *Jackson*, 802 F. Supp. at 228-29.

113. WEILER & ROBERTS, *supra* note 42, at 164. On February 1, 1993, approximately 600 players would become free agents. Shapiro, *supra* note 83, at 1213.

114. Collateral estoppel is a legal doctrine which gives preclusive effect to a prior judicial determination of fact or law in a later suit between the same parties or their privies. See BLACK'S LAW DICTIONARY 261-62 (6th ed. 1990).

115. Shapiro, *supra* note 83, at 1214.

league's competitive balance, and the players feeling the costs of the lawsuits, both parties resolved to settle their disputes.<sup>116</sup> Consequently, the NFL and the NFLPA reached a settlement and incorporated this settlement into a new collective bargaining agreement.<sup>117</sup>

B. *Collective Bargaining History Between the NBA & NBPA*

Dating back to the certification of the NBPA in October 1967, the NBA and NBPA have entered into ten collective bargaining agreements.<sup>118</sup> The NBPA first took issue with mobility restrictions in 1970 by filing a class action lawsuit, *Robertson v. National Basketball Association*,<sup>119</sup> claiming that these restrictions violated the antitrust laws. The players specifically sought relief from the league's college draft and reserve clause.<sup>120</sup> Reports of the proposed merger between the NBA and the American Basketball Association ("ABA") provided the impetus for the litigation.<sup>121</sup> The players feared that, once combined, the leagues would conspire to eliminate competition for their services, and thus reduce their salaries.<sup>122</sup> The NBPA thought that if the restrictive provisions were eliminated, the free market for their services would open, and players could demand high salaries even if the leagues combined. After much pre-trial discovery, the parties settled, the leagues combined, and on April 29, 1976, a court approved the *Robertson* settlement agreement's ("*Robertson Agreement*") contents.<sup>123</sup> The significant change in the *Robertson Agreement* was the elimination of the reserve clause and the institution of the right of first refusal

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116. *Id.* at 1214-15.

117. See Collins, *supra* note 57, at 1269; see discussion *infra* part II.A (discussing the NFL Collective Bargaining Agreement).

118. National Basketball Ass'n v. Williams, 45 F.3d 684, 686 (2d Cir.), *petition for cert. filed*, 64 U.S.L.W. 3070 (U.S. July 24, 1995).

119. 389 F. Supp. 867 (S.D.N.Y. 1975).

120. *Id.* Jonathan C. Latimer, Comment, *The NBA Salary Cap: Controlling Labor Costs Through Collective Bargaining*, 44 CATH. U. L. REV. 205, 217-18 (1994).

121. *Robertson*, 389 F. Supp. at 873.

122. *Id.* at 873-74.

123. *Robertson v. National Basketball Ass'n*, 72 F.R.D. 64, 67 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 682 (2d Cir. 1977).

compensation system.<sup>124</sup> The *Robertson* Agreement also provided for judicial oversight<sup>125</sup> through the appointment of a Special Master who had the exclusive jurisdiction to adjudicate and enforce the *Robertson* Agreement's terms.<sup>126</sup> The *Robertson* Agreement's substantive provisions were then incorporated into the 1980 collective bargaining agreement ("1980 Agreement").<sup>127</sup>

The 1980 Agreement expired in 1982, and was modified in 1983 by a Memorandum of Understanding ("MOU"), which the court approved.<sup>128</sup> The MOU added a player mobility restriction in the form of a salary cap<sup>129</sup> to the then-existing NBA system of player restraints.<sup>130</sup> The MOU provided that each team, through the 1986-87 season, pay players a certain percentage of overall NBA gross revenue, and allowed teams to pay more than this specified amount under certain circumstances.<sup>131</sup>

The same year that the salary cap was imposed, Leon Wood, a player recently drafted by the Philadelphia 76ers, sued the NBA, alleging that the salary cap violated the antitrust laws.<sup>132</sup> Wood argued that players with similar talents were receiving inequitable salaries due to the ability of their team to work within the salary cap's restrictions.<sup>133</sup> Wood objected to receiving less compensation because the Philadelphia 76ers had less available money to pay him

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124. See St. Louis, *supra* note 33, at 1252.

125. *Wood v. National Basketball Ass'n*, 602 F. Supp. 525, 527 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954 (2d Cir. 1987).

126. See St. Louis, *supra* note 33, at 1253.

127. *Bridgeman*, 675 F. Supp. at 962.

128. *Id.* at 962-63.

129. The salary cap was developed during the 1983 negotiations by NBPA leader Larry Fleisher and NBA Commissioner Larry O'Brien. WEILER & ROBERTS, *supra* note 42, at 300. The incentive for proposing such a system was that the majority of NBA teams were losing money and a few teams were on the verge of insolvency. *Id.* The original idea, however, was formulated by NFLPA leader Ed Garvey during the 1982 NFL negotiations. *Id.* at 301. It is ironic that, at the time, the NFL owners rejected this form of socialism as an invasion on their property rights in a capitalist system, because ten years later, a cap was imposed. *Id.* at 302.

130. See *Wood*, 602 F. Supp. at 527.

131. *Id.*; see discussion *infra* part II.B.4 (discussing NBA salary cap).

132. *Wood*, 602 F. Supp. at 526.

133. *Id.*; see also Jeffrey E. Levine, *The Legality and Efficacy of the National Basketball Association Salary Cap*, 11 CARDOZO ARTS & ENT. L.J. 71, 72 (1992).

under their cap than, for example, the Chicago Bulls had to pay Michael Jordan under the Bulls' cap.<sup>134</sup> The district court, using the three-part test developed in *Mackey*<sup>135</sup> to determine whether the non-statutory labor exemption applied, upheld the salary cap as incorporated into the MOU.<sup>136</sup> The Second Circuit affirmed this decision.<sup>137</sup>

One year later, in 1985, trouble arose concerning the interpretation of the salary cap's provisions. The New York Knickerbockers ("Knicks") attempted to sign Albert King to replace Leonard Robinson, who failed to renew his contract with the Knicks.<sup>138</sup> The King negotiations led to a disagreement between the Knicks and the NBA over the proper interpretation of the salary cap.<sup>139</sup> After an independent arbiter found for the NBA,<sup>140</sup> the Knicks modified their offer by providing a large bonus to King in the first contract year to supplement the relatively low salary throughout the balance of the contract.<sup>141</sup> The NBA challenged the bonus as a cap circumvention method.<sup>142</sup> The Special Master held for the Knicks, noting that the NBA previously allowed these signing bonuses, and thus, could not disallow them now.<sup>143</sup> The district court reversed the Special Master's decision, holding that the Knicks violated the 1983 Agreement by using the signing bonus to circumvent the salary cap.<sup>144</sup>

When the 1983 Agreement expired in 1987, the NBA and the NBPA entered into a Moratorium Agreement that eliminated the

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134. Levine, *supra* note 133, at 88.

135. See *supra* text accompanying notes 71-73 (discussing the *Mackey* test).

136. Wood, 602 F. Supp. at 528.

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

138. *In re* National Basketball Ass'n, 630 F. Supp. 136, 137-38 (S.D.N.Y. 1986).

139. *Id.* at 138. Article III.C(2)(c)(i) of the 1983 Agreement allowed a team exceeding its salary cap to replace a retired player at fifty percent of that player's salary. *Id.* at 138. However, the Knicks believed that the proper provision was Article III.C(2)(e) which allowed a team to replace a veteran free agent at 100 percent of his salary. *Id.* at 138.

140. *Id.*

141. *Id.*

142. *Id.* at 138-39.

143. *Id.* at 139.

144. *Id.* at 141.

risk of a lawsuit by either party to facilitate the negotiation of a new agreement.<sup>145</sup> When the Moratorium Agreement expired and there was no new agreement, the players instituted another lawsuit<sup>146</sup> arguing that the continued imposition of the college draft, salary cap, and right of first refusal, after the expiration of the 1983 Agreement, violated the antitrust laws.<sup>147</sup> In *Bridgeman v. National Basketball Association*, the court held that if the league were to impose similar provisions, the non-statutory exemption would protect those restrictions.<sup>148</sup> The court further ruled that the NBA and NBPA bargaining relationship continued as long as the league imposed restrictions similar to those included under the expired agreement and expected these restrictions to be part of the new agreement.<sup>149</sup> This decision forced the parties to negotiate and produced the 1988 Agreement.

In 1993, another team, the Portland Trailblazers, tried to circumvent the salary cap. The general manager of the Portland team, seeking to sign Chris Dudley, an unrestricted free agent, suggested an option-out clause exercisable by Dudley after the first year of his multi-year contract.<sup>150</sup> This clause would have allowed Dudley to become a Trailblazer free agent.<sup>151</sup> Once free from the contract, the team would be permitted to re-sign Dudley to a contract equal to his fair market value without being constrained by the team's salary cap due to an available exception.<sup>152</sup> A federal district court affirmed the Special Master's decision which held that the one year option-out clause did not circumvent the 1988 Agreement on two grounds: first, the 1988 Agreement did not expressly forbid such contracts; and second, the NBA previously approved such mea-

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145. *National Basketball Ass'n v. Williams*, 857 F. Supp. 1069, 1071-72 (S.D.N.Y. 1994), *aff'd*, 45 F.3d 684 (2d Cir.), *petition for cert. filed*, 64 U.S.L.W. 3070 (U.S. July 24, 1995).

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

147. *Id.* at 964.

148. *Id.*

149. *Id.* at 965-67.

150. *Bridgeman v. National Basketball Ass'n*, 838 F. Supp. 172, 175 (D. N.J. 1993).

151. *Id.*

152. *Id.*; *see infra* notes 239-41 (discussing NBA veteran player exception).

tures,<sup>153</sup> thus allowing teams to circumvent the cap.

Before the 1988 Agreement expired in the summer of 1994,<sup>154</sup> the NBA, anticipating court action by the NBPA, sought a declaratory judgment asserting that the player mobility restrictions contained in the expired 1988 Agreement did not violate the antitrust laws<sup>155</sup>—revisiting the issue decided in *Bridgeman* and *Powell*. The impetus behind the declaratory judgment action was the refusal of the players to negotiate.<sup>156</sup> Federal District Court Judge Duffy refused to grant the NBA the injunction, holding that the non-statutory labor exemption continued to provide the league with immunity from the antitrust laws under the holding of *Powell*.<sup>157</sup> The Second Circuit affirmed the determination, denying the injunction.<sup>158</sup>

To maintain the 1994-95 season while the NBA and NBPA negotiated a new agreement, the NBA agreed not to lockout the players in return for the NBPA promising not to strike.<sup>159</sup> Even though the season was saved, players dissatisfied with the salary cap and the mobility restrictions sued the league, alleging antitrust violations.<sup>160</sup> In order to sue the league, these players had to decertify the NBPA, in accord with *National Basketball Association v. Williams*, as the bargaining representative of NBA players.<sup>161</sup> This would have ended the league's use of the non-statutory labor exemption in accord with *Powell*.<sup>162</sup> The parties, however, negotiated a new agreement before the decertification vote,<sup>163</sup> and the players voted, in an "all or nothing" vote, to end the decertification move-

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153. *Bridgeman*, 838 F. Supp. at 180-84.

154. *Williams*, 857 F. Supp. at 1072.

155. *Id.* at 1071.

156. *See Williams*, 45 F.3d at 686.

157. *Williams*, 857 F. Supp. at 1078.

158. *Williams*, 45 F.3d at 685.

159. Chass, *N.B.A. and Players Agree*, *supra* note 38.

160. Chass, *N.B.A. Faces Antitrust Suit*, *supra* note 38.

161. *Id.*

162. *Powell v. National Football League*, 678 F. Supp. 777 (D. Minn. 1988), *rev'd*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991).

163. *See Chass, N.B.A. and Union*, *supra* note 38.

ment.<sup>164</sup>

## II. THE CURRENT NFL & NBA COLLECTIVE BARGAINING AGREEMENTS

Both the 1993 NFL Agreement<sup>165</sup> and the 1995 NBA Outline of the proposed NBA agreement<sup>166</sup> contain provisions that affect the players in a myriad of ways. Most important to this discussion are the provisions concerning the player mobility restrictions.

### A. *The NFL Agreement*

The 1993-2000 NFL Agreement covers a wide range of topics pertaining to league operations and governance.<sup>167</sup> The player mo-

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164. Chass, *N.B.A. Players Support Union*, *supra* note 38.

165. NFL Collective Bargaining Agreement, 1993-2000 (on file with the *Fordham Intellectual Property, Media & Entertainment Law Journal*) [hereinafter the 1993 NFL Agreement].

166. See *infra* note 210 and accompanying text. At the time of this writing the terms of the new collective bargaining agreement have not been finalized and are subject to change.

167. The Preamble provides that the 1993 NFL Agreement is the product of bona fide, arms length negotiations, within the provisions of the applicable labor laws and between the appropriate bargaining units of the respective parties. 1993 NFL Agreement, *supra* note 165, at 1. This statement is significant because it clearly states the intent of the parties to take advantage of the non-statutory labor exemption under the prescription of *Mackey*. Most of the provisions contained in the 1993 NFL Agreement are beyond the scope of this Note, but they include, "No Strike/Lockout/Suit" provisions, stating that the NFLPA and its constituent members will not institute any interference with league operations or lawsuit for alleged antitrust violations; the NFLPA, however, reserves the right to bring suit for breaches of the 1993 NFL Agreement. 1993 NFL Agreement, *supra* note 165, art. IV, at 9-10. The owners, in return, will not lockout the players. *Id.* The provisions relating to "Union Security" provide that if a player becomes a union member he must maintain his membership in good standing or face possible suspension. *Id.* art. V, at 11-13. "NFLPA Agent Certification" provides for the licensing and regulation of player agents by the NFLPA with oversight by the NFL. *Id.* art. VI, at 14. The article concerning the "Club Discipline" provides for the sanctioning of players by individual teams for overweight players, late reporting to training camp, throwing footballs into stadium seating, unexcused absences from training camp, failure to follow rehabilitation programs, ejection from a game, and conduct detrimental to the club. *Id.* art. VIII, at 16-17.

The 1993 NFL Agreement also provides for non-injury grievance and injury grievance procedures. *Id.* art. IX-X, at 18-28. The provisions concerning "Commissioner Discipline" provide for the sanctioning of players by the NFL Commissioner for instances of unnecessary roughness or unsportsmanlike conduct. *Id.* art. XI, at 29-30. "Injury Protection" provisions provide that players under certain circumstances will be compensat-

bility restrictions included in the document are the college draft, right of first refusal, free agency restrictions, and caps on rookie and veteran salaries.

### 1. The College Draft

The college draft is the method by which college football players are selected by league teams.<sup>168</sup> The 1993 NFL Agreement provides for a seven-round college draft with as many selection choices during the draft as there are teams.<sup>169</sup> Additionally, a compensation round is provided for teams that lost free agents at the end of the prior season.<sup>170</sup> The 1993 NFL Agreement contains specific periods in which a rookie may sign contracts offered to him.<sup>171</sup> A drafted rookie may also sign with another professional football league, but the drafting NFL team would retain the exclusive right to that player's services for three years following that player's selection.<sup>172</sup> The trading of drafted rookies is also permitted.<sup>173</sup> Undrafted players may be selected by any team after the

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ed for severe injury sustained during a game. *Id.* art. XII, at 31-32. The 1993 NFL Agreement also provides for an impartial arbitrator to decide specific controversies between the parties, as defined in the 1993 NFL Agreement. *Id.* art. XXXVII, at 95-96. There are provisions stating that no team shall interfere with another team's ability to decide whether or not to negotiate with an individual player and whether or not to exercise a right of first refusal. *Id.* art. XXXVIII, at 97-102. The 1993 NFL Agreement also dictates the size of the active roster of players and practice squad size. *Id.* arts. XX-XXXIV, at 110-11. The 1993 NFL Agreement provides for the establishment of mini-camps and pre-season training camps. *Id.* arts. XXXVI-XXXVII, at 113-14. There are also provisions concerning player payment for the pro-bowl game, *id.* art. XLIII, at 125, "Players' Rights To Medical Care And Treatment," *id.* art. XLIV, at 126-27, retirement plans, *id.* art. XLVII, at 132-38, "Group Insurance," "Severance Pay," and "Supplemental Disability Benefits," *id.* arts. XLIX-LI, at 141-46, and "Workers' Compensation," *id.* art. LIV, at 150-51.

168. 1993 NFL Agreement, *supra* note 165, art. XVI, at 39-43.

169. *Id.* art. XVI, § 2, at 39.

170. *Id.*

171. If the drafted rookie has not signed a contract 30 days before the beginning of the season, then he may sign only with the selecting team until the following year's draft. 1993 NFL Agreement, *supra* note 165, art. XVI, § 4(b), at 40. A drafted rookie has until the tenth week of the regular season to accept the drafting team's offer, *id.* art. XVI, § 4(a), at 39, and after this deadline he may not play that season, absent a showing of extreme personal hardship. *Id.* art. XVI, § 4(c), at 40.

172. *Id.* art. XVI, § 5, at 40.

173. If the drafting team releases the prospective player, the rookie may sign with

completion of the college and supplemental drafts.<sup>174</sup> The 1993 NFL Agreement also requires all drafted players to sign a uniform players' contract.<sup>175</sup>

## 2. Rookie Salary Limitations

The Entering Player Pool is the salary cap that affects rookies.<sup>176</sup> As defined by the 1993 NFL Agreement, the Entering Player Pool is the league-wide limitation on aggregate salaries that may be paid to all drafted rookies.<sup>177</sup> In 1993, the applicable amount was \$56 million, or \$2 million per team.<sup>178</sup> For each successive year, the amount is the greater of: (1) two million dollars multiplied by the number of teams in the league,<sup>179</sup> (2) three and one half percent of Defined Gross Revenues,<sup>180</sup> or (3) a sum equal to the previous years' aggregate amount, providing for adjustments based on compensatory picks that a team may receive when losing a franchise<sup>181</sup> or transition<sup>182</sup> player.<sup>183</sup> Further, minor adjustments are possible based on whether a team waives or signs its rookies.<sup>184</sup> Today, the Entering Player Pool is set at three to five million dollars, depending on available adjustments.

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any other team, without penalty to himself or to the new team. *Id.* § 4(a), at 39. A drafting team may trade a drafted rookie, but then the acquiring team must immediately extend an offer to that player. *Id.* § 4(b), at 40. If the drafting team signs the rookie and then trades him, the acquiring team must count the rookie's entire salary towards the Entering Player Pool. *Id.* § 4(a), at 39-40.

174. *Id.* § 11, at 43.

175. *Id.* art. XIV, at 35. This standardized contract contains boilerplate clauses providing for the term, services required, and payment to the player. *Id.* Appendix C, at 165-73.

176. 1993 NFL Agreement, *supra* note 165, art. XVII, § 1(a), at 44-46.

177. *Id.* at 44.

178. *Id.* art. XVII, § 3(a), at 44.

179. *Id.*

180. *Id.*; see *infra* note 203 and accompanying text (discussing Defined Gross Revenues).

181. See *infra* notes 195-97 and accompanying text (discussing franchise player designation).

182. See *infra* notes 198-201 and accompanying text (discussing transition player designation).

183. 1993 NFL Agreement, *supra* note 165, art. XVII, § 3(a), at 44-45.

184. See *id.* art. XVII, § 4, at 45-46.

### 3. Free Agency Restrictions

The 1993 NFL Agreement also contains provisions concerning veteran free agency, franchise, and transition players.<sup>185</sup> Regarding veteran free agency, a player becomes an unrestricted free agent upon completing four or more Accrued Seasons<sup>186</sup> in a capped year.<sup>187</sup> Once four years are completed, the player may sign with any team without penalty or restriction to the player or the acquiring team.<sup>188</sup>

Any player with three or more Accrued Seasons, but less than four in a capped year, becomes a restricted free agent upon the expiration of the player's current contract.<sup>189</sup> A restricted free agent may negotiate with any team. The player's prior team, however, has the right to match any offer made to the player<sup>190</sup> and retain the player. This right is called the right of first refusal.<sup>191</sup>

The 1993 NFL Agreement also provides that veterans with less than three Accrued Seasons whose contracts expire may only resign with their prior team, unless the prior team either fails to offer or withdraws the Required Tender.<sup>192</sup> In addition, the 1993 NFL Agreement sets minimum salaries for players with less than three years of Accrued Seasons.<sup>193</sup>

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185. *Id.* arts. XVIII-XXV, at 47-91.

186. A player receives an "Accrued Season" for every season that he was or should have been on full pay status for six or more games during the regular season. *Id.* art. XVIII, § 1(a), at 47.

187. *Id.* art. XIX, § 1(a), at 49.

188. *Id.* In the event that the player has not signed with a new team by the beginning of training camp, then the player may only sign with the player's former team. *Id.* art. XIX, § 1(b)(i), at 49. Moreover, if the player has not signed with the player's former team by the tenth week of the regular season, then the player may not play football that year. *Id.* art. XIX, § 1(b)(ii), at 49.

189. *Id.* art. XIX, § 2(a), at 50.

190. *Id.* art. XIX, § 2(b), at 50-51.

191. *Id.*

192. *Id.* art. XVIII, § 2, at 47. "Required Tender" is defined as "tender that a club is required to make to a player pursuant to this Agreement, either as a matter of right . . . or to receive Rights of First Refusal, Draft Choice Compensation and/or other rights . . . ." *Id.* art. I, § 2(ac), at 4.

193. *Id.* § 3, at 47-48. The minimum salary is \$100,000 for players with less than one credited season, \$125,000 for players with one credited season, and \$150,000 for players with two or more credited seasons. *Id.* art. XVIII, § 3, at 47.

Other free agency provisions enable a team to designate one Franchise Player and two Transition Players.<sup>194</sup> Every season, each club is permitted to designate as a Franchise Player one of its players who would otherwise become an unrestricted free agent at the end of that season.<sup>195</sup> During the period of his designation as a Franchise Player, the player can only negotiate with the designating club, regardless of the player's number of Accrued Seasons.<sup>196</sup> To ensure fairness, there are specific requirements as to the Required Tender and length of contract for a player designated as a Franchise Player.<sup>197</sup>

Two unrestricted free agents may be selected as Transition Players.<sup>198</sup> Players are selected twice, one player in 1994 and one player in 1999.<sup>199</sup> Unlike the Franchise Player designation, a Transition Player may negotiate with other teams, however, the player is subject to the prior team's right of first refusal.<sup>200</sup> The 1993 NFL Agreement also specifies the Required Tender for Transition Players.<sup>201</sup>

#### 4. Veteran Salary Limitations

The salary cap provisions<sup>202</sup> begin with definitions of Defined Gross Revenues and Salary.<sup>203</sup> Under the 1993 NFL Agreement,

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194. *Id.* art. XX, at 60-68.

195. *Id.* art. XX, § 1, at 60.

196. *Id.*

197. *Id.* § 2, at 60-62. The Required Tender for franchise players is the average of the five largest salaries paid to the player, or 120 percent of the player's last salary, whichever is greater. *Id.* art. XX, § 2(c)(i), at 61.

198. *Id.* art. XX, § 3(a), at 62.

199. *Id.*

200. *Id.* art. XX, § 3(b), at 62.

201. *Id.* art. XX, § 4, at 62-63. Required Tender for Transition Players is the average of the ten largest salaries paid to the player or 120 percent of the player's last salary, whichever is greater. *Id.* art. XX, § 4(a), at 62.

202. See 1993 NFL Agreement, *supra* note 165, art. XXIV, at 74-89.

203. *Id.* art. XXIV, § 1(a), at 74. "Defined Gross Revenues" is defined as:

(i) the aggregate revenues received or to be received on an accrual basis, for or with respect to a League Year during the term of this Agreement, by the NFL and all NFL Teams (and their designees), from all sources, whether known or unknown, derived from, relating to or arising out of the performance of players in NFL football games, with only the specific exceptions set forth below. The NFL and each NFL Team shall in good faith act and use their best efforts, consistent with sound business judgment, so as to maximize Defined

starting in 1993 and continuing every year thereafter during the term of the 1993 NFL Agreement, the salary cap is triggered when total player costs for the league equal or exceed 67 percent of Defined Gross Revenues.<sup>204</sup> Once the salary cap is triggered, the

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Gross Revenues for each playing season during the term of this Agreement. Defined Gross Revenues shall include, without limitation:

(1) regular season, pre-season, and post-season gate receipts (net of admission taxes, and surcharges paid to stadium or municipal authorities which are deducted for purposes of calculating gate receipts subject to revenue sharing), including ticket revenue from "luxury boxes," suites and premium seating subject to gate receipt sharing among NFL Teams; and

(2) proceeds including Copyright Royalty Tribunal and extended market payments from the sale, license or other conveyance of the right to broadcast or exhibit NFL pre-season, regular season and play-off games on radio and television including, without limitation, network, local, cable, pay television, satellite encryption, international broadcasts, delayed broadcasts (which shall not include any broadcast of an NFL pre-season, regular season or play-off game occurring more than 72 hours after the live exhibition of the game, unless the broadcast is the first broadcast in the market), and all other means of distribution, net of any reasonable and customary NFL expenses related to the project; and

(3) proceeds from the sale or conveyance of any right to receive any of the revenues described above.

(ii) The following is a nonexclusive list of examples of revenue received by the NFL and/or NFL Teams which are not derived from, and do not relate to or arise out of the performance of players in NFL football games (and are therefore not "DGR"): proceeds from the assignment, sale or trade of Player Contracts, proceeds from the sale of any existing NFL franchise (or any interest therein) or the grant of NFL expansion franchises, dues or capital contributions received by the NFL, fines, "revenue sharing" among NFL Teams, interest income, insurance recoveries, and sales of interests in real estate and other property.

(iii) Notwithstanding subsection 1(a)(i) above, the following shall be considered "Excluded DGR" and not included in Defined Gross Revenues: revenues derived from concessions, parking, local advertising and promotion, signage, magazine advertising, local sponsorship agreements, stadium clubs, luxury box income other than that included in subsection 1(a)(i)(1) above, sales of programs and novelties, and any categories of revenue (other than those listed in subsections 1(a)(i)(1)-(3) above) currently included under NFL Films and NFL Properties, Inc. and its subsidiaries.

*Id.* art. XXIV, § 1, at 74-75.

"Salary" is defined as any "compensation in money, property, investments, loans or anything else of value to which an NFL player . . . is entitled in accordance with a Player Contract . . ." *Id.* art. XXIV, § 1(c)(i), at 77.

204. *Id.* art. XXIV, § 2, at 77.

guaranteed salary amount, or salary floor, is at least 58 percent of Defined Gross Revenues.<sup>205</sup> The cap provisions specify that the maximum amount of players salaries equal 64 percent of Projected Defined Gross Revenues<sup>206</sup> in the first capped year, 63 percent in the second capped year, and 62 percent in any year thereafter.<sup>207</sup> The 1993 NFL Agreement also provides for the computation of team salary to determine if a team is over the proscribed limit.<sup>208</sup> Finally, the 1993 NFL Agreement contains no exceptions to the salary cap, rendering the NFL cap method a hard salary cap.

### B. *The NBA Agreement*

The most recent NBA Collective Bargaining Agreement expired after the last playoff game at the end of the 1993-1994 season.<sup>209</sup> In August 1995, however, the NBA and NBPA agreed to a new collective bargaining agreement, effective from the 1995-96 NBA season through the 2000-01 season.<sup>210</sup> The 1995 NBA Outline<sup>211</sup>

205. *Id.* art. XXIV, § 3, at 77-78.

206. "Projected Defined Gross Revenues" is defined as Defined Gross Revenues for the previous year plus specific percentage increases. *Id.* art. XXIV, § 10(b), at 87-88.

207. 1993 NFL Agreement, *supra* note 165, art. XXIV, § 4(a), at 78. However, the salary cap amount can be adjusted if total player costs for a capped year fall below certain percentages. *Id.* art. XXIV, § 4(b), at 78.

208. *Id.* art. XXIV, § 6, at 79-81. Included in the computation of Team Salary are: all players contracts, all drafted rookie offers, practice squad contracts, termination pay, 50% of a player's salary when the player files a grievance until the league year is finished or the grievance is resolved, and any expansion bonus. *Id.* The 1995 NFL Agreement also prescribes the manner in which player contracts should be valued, the valuation of signing bonuses, acceleration of the player's contract, and guaranteed contracts. *Id.* art. XXIV, § 7(b)-(d), at 81-84.

209. Collective Bargaining Agreement between the National Basketball Association and the National Basketball Players' Association, November 1, 1988, *reprinted in* LAW OF PROFESSIONAL AND AMATEUR SPORTS, app. 7A (Gary A. Uberstine ed. 1988) [hereinafter 1988 NBA Agreement].

210. *Outline and Key Terms of Collective Bargaining Agreement Between NBA and NBPA* (on file with the *Fordham Intellectual Property, Media & Entertainment Law Journal*) [hereinafter 1995 NBA Outline].

211. Although the 1995 NBA Agreement has not been finalized and made available to the public, this author assumes that the 1988 NBA Agreement's provisions that were not specifically changed by the 1995 NBA Outline will remain substantially similar.

The 1988 NBA Agreement provided that the players receive league-wide severance pay, medical and life insurance, and disability insurance. 1988 NBA Agreement, *supra* note 209, art. II, § 1, at 7-61. It also provided that compensation and expenses are to be

describes the provisions relating to those important to this discussion: the college draft, free agency restrictions, and rookie and veteran salary caps.

### 1. The College Draft

The 1988 NBA Agreement provided for a college draft consisting of two rounds, with the number of selection choices equal to the number of NBA teams at the time of the draft<sup>212</sup> which the new agreement continues. However, the 1995 NBA Outline states that, beginning in 1998, the college draft will be reduced to one round.<sup>213</sup> Also proscribed by the 1988 NBA Agreement were provisions regarding the term and time a drafted rookie may accept an offer.<sup>214</sup> For instance, once drafted, the college player may only

paid when the player is on active duty with a military reserve unit. *Id.* art. III, § 1, at 7-63. Any disputes about the interpretation of the 1988 NBA Agreement were determined by a Special Master. *Id.* art. VIII, § 2, at 7-95 to 7-96. The 1988 NBA Agreement also provided that no NBA employee could collude to interfere with the ability of a player to negotiate with an unrestricted free agent, submit an offer sheet to a restricted free agent, or exercise the right of first refusal. *Id.* art. IX, § 1, at 7-96. Enforcement of the anti-collusion provisions provides for a hearing before the Special Master. *Id.* art. X, § 1, at 7-97. Additionally, there were certification provisions which provided that, under the penalties of perjury, all terms of a player's agreement were disclosed. *Id.* art. XI, § 1(a), at 7-101. The 1988 NBA Agreement provided for travel accommodations, locker room facilities, and parking. *Id.* art. XIV, at 7-103 to 7-104. There were provisions for playoff compensation, dues for the NBPA, the maximum number of games, and the All-Star game. *Id.* arts. XV-XVIII, at 7-104 to 7-105. Medical treatment of the players was also provided. *Id.* art. XIX, at 7-105 to 7-106. The 1988 NBA Agreement provided that no contract clauses could prohibit an NBA team from trading a player. *Id.* art. XXI, § 1, at 7-107. The 1988 NBA Agreement also provided for grievance and arbitration procedures, *id.* art. XXVIII, at 7-113 to 7-119, player agent certification, *id.* art. XXXI, at 7-119 to 7-120, and the drug rehabilitation program, *id.* art. XX, at 7-120 to 7-126. Other provisions included the size of the roster, *id.* art. XXVI, § 1, at 7-110 to 7-111, the written critique of referees, *id.* art. XXVI, § 2, at 7-111, and options to retired players to purchase season tickets, *id.* art. XXVI, § 3, at 7-111.

The 1995 NBA Outline stated an increase in the amount of life and health insurance, and pension payments to be made by the league. 1995 NBA Outline, *supra* note 210, at 4. Other provisions address an increase in players' *per diem*, *id.* at 6, training camp compensation, *id.*, All-Star game player payments, *id.*, and fines and suspensions. *Id.*

212. 1988 NBA Agreement, *supra* note 209, art. IV, § 1(a), at 7-64.

213. 1995 NBA Outline, *supra* note 210, at 5.

214. 1988 NBA Agreement, *supra* note 209, art. IV, § 1, at 7-65 to 7-67. If a player is drafted but does not sign a contract and is not redrafted the subsequent year, the player becomes a free agent. *Id.* § 1(d), at 7-65. If a drafted rookie is not offered the Required Tender, the player becomes free to sign with any team without restriction in the Septem-

sign with his selecting team until the next college draft,<sup>215</sup> although, this was contingent upon the selecting team offering the drafted player the Required Tender by September following the initial draft.<sup>216</sup> Furthermore, a high school player who renounced his college eligibility may be drafted by any team.<sup>217</sup> Finally, the 1988 NBA Agreement required all drafted players to sign a uniform players' contract.<sup>218</sup> All of these provisions, this author assumes, will be incorporated into the new agreement without substantial modification.

## 2. Rookie Salary Limitations

Prior to the new agreement, there were no rookie salary limitations in the NBA. The 1995 NBA Outline states that each first round drafted player receive a three year guaranteed contract within 20 percent of the Rookie Scale amount.<sup>219</sup> This scale amount in-

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ber following the draft. *Id.* art. IV, § 1(e), at 7-65. Moreover, if the drafted player does not sign a contract the immediate year following the draft, then the drafting team retains the exclusive right to that player's services for one year. *Id.* art. IV, § 1(f), at 7-65. However, if the player does not bargain in good faith with the drafting team, or the contract provides for additional one year periods, then the drafting team maintains the exclusive right to that player. *Id.* art. IV, § 1(g), at 7-65 to 7-66. A team which subsequently drafts a player who has been previously drafted and offered the Required Tender is the only team that the player may negotiate with, provided that the acquiring team has offered the Required Tender. *Id.* art. IV, § 1(c), at 7-64. If the player does not sign with the subsequent team within one year of the subsequent draft, the player becomes free to sign with any team. *Id.* art. IV, § 1(c), at 7-64 to 7-65.

"Required Tender" is defined in the 1988 NBA Agreement as: (i) a contract personally delivered to the player or his personal representative and (ii) a player contract having as a minimum term one year and paying the player at least the minimum salary specified for that year. *Id.* art. IV, § 1(b), at 7-64. The 1995 NBA Outline changes the Required Tender for first round draftees to a guaranteed three-year contract with the contract amount subject to the Rookie Scale. 1995 NBA Outline, *supra* note 210, Rookie Salary Cap, at 5. While there are no maximum amounts for second round draftees, there are minimums. *Id.*

215. 1988 NBA Agreement, *supra* note 209, art. IV, § 1(b), at 7-64.

216. *Id.*

217. *Id.* art. IV, § 1(h), at 7-66.

218. *Id.* art. I, at 7-45 to 7-60. The contract provides for uniformity in the provisional language for all players' contracts concerning services performed, length of contract, and payment. *Id.* The contract also provides for specialized compensation arrangements, including hotel rooms, loans, personal guarantees, game tickets, and promotional appearances. *Id.* art. I, § 3(b), at 7-45 to 7-46. The contract terminates upon the death of the player, the lack of skill, or disability (mental or otherwise). *Id.* art. I, § 3(d), at 7-46.

219. 1995 NBA Outline, *supra* note 210, at 5. The Rookie Scale amount provides

creases each year.<sup>220</sup> The 1995 NBA Outline also describes a minimum rookie salary for second round draftees and undrafted rookies.<sup>221</sup> Finally, the maximum length of contract a first round draftee may sign is for three years.<sup>222</sup> All others may sign for a maximum of seven years.<sup>223</sup>

### 3. Free Agency Restrictions

Before the new agreement, NBA players were subject to restricted and unrestricted free agency.<sup>224</sup> Unrestricted free agency was available following the conclusion of the 1992-93 season, the last season of the 1988 NBA Agreement, for any veteran player with four or more years service in the NBA.<sup>225</sup> Unrestricted free agency allowed players to offer their services to any team without being subject to the prior team's right of first refusal.<sup>226</sup> The right of first refusal provided that the prior team could match any offer from another team to keep the player. A restricted free agent was defined as a player with less than four years of service and subject to the prior team's right of first refusal.<sup>227</sup> Under both restricted and unrestricted free agency, no compensation was given to the prior team for losing a player.<sup>228</sup>

The 1995 NBA Outline, however, describes changes in this system.<sup>229</sup> The 1995 NBA Outline states that restricted free agency and the right of first refusal are to be eliminated.<sup>230</sup> Upon completion of their contracts, all players would become unrestricted free agents.<sup>231</sup> Thus, with the elimination of free agency restrictions, the

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specific amounts that rookies may be paid, depending on the order of selection. *Id.*

220. *Id.*

221. *Id.* The minimum starting salary is \$200,000 for 1995-96, and it increases 10 percent annually. *Id.*

222. *Id.* at 6.

223. *Id.*

224. 1988 NBA Agreement, *supra* note 209, art. V, at 7-68 to 7-77.

225. *Id.* art. V, § 1(a)(1), at 7-68.

226. *Id.*

227. *Id.*

228. *See id.* art. V, at 7-68 to 7-77.

229. 1995 NBA Outline, *supra* note 210, at 4.

230. *Id.*

231. *Id.*

market for players' services would only be limited by the salary cap.

#### 4. Veteran Salary Limitations

These provisions<sup>232</sup> begin with a definition of Defined Gross Revenues and Salary.<sup>233</sup> Further defined is "Team Salary" as the

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232. 1988 NBA Agreement, *supra* note 209, art. VII, at 7-77 to 7-95.

233. *Id.* art. VII, Part A, § 1, at 7-77. The 1988 NBA Agreement defines "Defined Gross Revenues" as:

\$1,000,000 plus the aggregate revenues received or to be received on an accrual basis, for or with respect to a playing season during the term of this Agreement, by the NBA and all NBA Teams other than Expansion Teams . . . during their first two seasons (but including the Expansions Teams' shares of national network and cable television revenues), from all sources, whether known or unknown, derived from, relating to or arising out of the performance of players in NBA basketball games, but not including revenues derived from the All Star Game, concessions, parking, sales of programs and novelties, NBA Properties, Inc. and its subsidiaries . . . . Defined Gross Revenues shall include, without limitation:

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

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

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

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

It is understood that the following is a non-exclusive list of examples of revenues received by the NBA and/or NBA Teams which are not derived from, and do not relate to or arise out of the performance of players in NBA basketball games: proceeds from the assignment, sale or trade of Player Contracts, proceeds from the sale of any existing NBA franchise (or any interest therein) or the grant of NBA expansion franchises, dues or capital contributions received by the NBA, fines, "revenue sharing" among Teams, interest income, insurance recoveries, and sales of interests in real estate and other property.

*Id.* art. VII, Part A, § 1(a)(1), at 7-77 to 7-78.

The 1995 NBA Outline expands the definition of Defined Gross Revenues to encompass income from all sources, including income from luxury boxes, signage, sponsorships, parking, and concessions among others. 1995 NBA Outline, *supra* note 210, at 1.

"Salary" is defined as:

compensation in Money, Property, Investments or anything else of value to which an NBA player (including a player whose contract has been terminated in accordance with the NBA's waiver procedure) or a person or entity designat-

aggregate Salary under all offers and players' contracts, whether or not the player is on an active roster,<sup>234</sup> which then defines how to value a team's salary.<sup>235</sup>

The expired 1988 NBA Agreement provided that the salary cap for all NBA teams equal 53 percent of Defined Gross Revenues.<sup>236</sup> The 1995 NBA Outline, however, states that this percentage will be adjusted to ensure the players receive a greater absolute dollar amount of the new calculation of Defined Gross Revenues, which includes all basketball related revenue.<sup>237</sup>

Generally, the NBA rules demand that teams may not exceed the salary cap; there are, however, specific exceptions, thus making it a soft cap.<sup>238</sup> The first exception is the veteran player exception,<sup>239</sup> which allows a team to re-sign its own free agent for any amount, provided the player played with the team for at least three

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ed by a player is entitled in accordance with a Player Contract, but not including Benefits. Salary with respect to any period shall include all Salary actually payable with respect to such period under the terms of Player Contract and all Salary attributable to such period under the terms of this Agreement.

(1) A player's Salary shall also include any and all consideration received by the player or any person or entity controlled by or related to the player from any person or entity affiliated with, related to or controlled by the player's Team or any person or entity owning an interest in the Team ("Team Affiliate"), even if such consideration is ostensibly paid to the player for services other than basketball playing services if the NBA can demonstrate either that:

(i) the consideration paid to the player for such nonbasketball services does not represent a reasonable approximation of the fair market value of such services as performed by such player; or

(ii) the consideration paid to the player for performing basketball services represents less than a reasonable approximation of the fair market value of such player's basketball services.

1988 NBA Agreement, *supra* note 209, art. VII, Part A, § 1(c), at 7-79.

234. 1988 NBA Agreement, *supra* note 209, art. VII, Part A, § 1(d), at 7-80.

235. *Id.* art. VII, Part B, at 7-80 to 7-83. Included components are deferred compensation, *id.* § 1, at 7-80 to 7-81, signing bonuses, *id.* § 2, at 7-81 to 7-82, loans to players, *id.* § 3, at 7-82 to 7-83, and performance bonuses, *id.* § 4, at 7-83.

236. 1988 NBA Agreement, *supra* note 209, art. VII, Part D, § 1(b), at 7-85.

237. 1995 NBA Outline, *supra* note 210, at 1.

238. *Id.* at 1-2; *see also* 1988 NBA Agreement, *supra* note 209, art. VII, Part F, at 7-88 to 7-92.

239. 1995 NBA Outline, *supra* note 210, at 2.

years.<sup>240</sup> The new agreement provides for a phase-in of the three year rule, so that free agents are now eligible under this exception after one year with a team, and in 1996-97 after two years.<sup>241</sup> A second exception allows a player who has finished a two-year contract to re-sign with his team and increase his compensation by the greater of 75 percent of his second year salary or the average NBA player salary.<sup>242</sup> The new contract, however, must be for an additional two years.<sup>243</sup> The third exception is the one million dollar exception, which allows a team to sign one or more players, even if the team is over the cap, to contracts totaling one million dollars per year.<sup>244</sup> However, a team may use this exception only three times during the term of the new agreement.<sup>245</sup> A fourth exception gives a team the ability to sign its first round draft choice for up to 120 percent of the Rookie Scale amount, even if over the cap.<sup>246</sup> The fifth exception or injury exception permits a team to sign a player for up to 50 percent of the injured player's salary not to exceed the average players' salary.<sup>247</sup> The sixth exception allows a team to sign a player to a one year contract at the minimum team salary, even if the team is over the cap and has no other available exceptions.<sup>248</sup> Finally, the seventh exception allows a team to trade for another player or players, as long as the sum of the players' contracts being traded is within 15 percent plus \$100,000 of each other.<sup>249</sup>

### C. *Comparison of the Agreements*

There are significant differences between the provisions of the 1993 NFL Agreement and those described by the 1995 NBA Outline. To understand the nature of these differences and the effect of the player mobility restrictions in their totality on the players, it

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240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

is important to examine the agreements side-by-side.

### 1. The College Draft

The NFL's college draft consists of seven rounds.<sup>250</sup> The NBA's selection process, however, which consists only of two rounds,<sup>251</sup> will be reduced in 1998 to one round.<sup>252</sup> Both leagues' agreements provide for signing procedures and for guidelines whereby, in the event that a rookie does not sign a contract, he may not play for the one year period following his draft, if offered a specified minimum amount.<sup>253</sup> Both leagues' uniform players' contracts provide for certain standard employment terms including, the length of player service, employment requirements and payment.<sup>254</sup>

### 2. Rookie Salary Limitations

Both agreements restrict movement of rookies by the cap method without any significant differences in the enforcement provisions under either agreement.<sup>255</sup>

### 3. Free Agency Restrictions

In contrast to the provisions described in the 1995 NBA Outline, the 1993 NFL Agreement restricts player mobility through free agency provisions. An NFL player can only become an unrestricted free agent after four years of service to a team.<sup>256</sup> In addition, an NFL player becomes a restricted free agent after three, but less than four years of service,<sup>257</sup> and is subject to the right of first

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250. See discussion *supra* part II.A.1 (discussing NFL draft).

251. See discussion *supra* part II.B.1 (discussing NBA draft).

252. See discussion *supra* part II.B.1 (discussing NBA future draft changes).

253. See *supra* note 171 and accompanying text (discussing the NFL rookie signing procedures); *supra* note 214 and accompanying text (discussing the NBA rookie signing procedures).

254. See *supra* note 175 and accompanying text (discussing the NFL uniform players' contract); *supra* note 218 and accompanying text (discussing the NBA uniform players' contract).

255. See discussion *supra* part II.A.2 (discussing NFL rookie salary limitations); discussion *supra* part II.B.2 (discussing NBA rookie salary limitations).

256. See *supra* note 187 and accompanying text (discussing NFL unrestricted free agency provisions).

257. See *supra* note 189 and accompanying text (discussing the NFL restricted free agency provisions).

refusal,<sup>258</sup> which no longer exists in the NBA.<sup>259</sup> Finally, in the NFL a player can be designated as a franchise<sup>260</sup> or transition<sup>261</sup> player; the NBA does not have these types of restrictions.<sup>262</sup>

#### 4. Veteran Salary Limitations

Restrictions concerning players' salaries are also different between the two leagues. Beginning with the definitions, Defined Gross Revenues in the NBA includes many items not included in the NFL's calculation.<sup>263</sup> For example, newly included in the NBA's definition of Defined Gross Revenues are revenues from luxury boxes, signage, sponsorships, parking, and concessions.<sup>264</sup> Another difference between the two agreements is that the NFL has no exceptions to its salary cap.<sup>265</sup> The NBA's cap has numerous exceptions that allow a team to exceed the cap, making it a soft salary cap.<sup>266</sup>

### III. THE OPTIMAL MOBILITY RESTRAINT SYSTEM FOR THE PROFESSIONAL SPORTS LEAGUES SHOULD BE BASED ON THE NBA SOFT SALARY CAP

The above discussion illuminates the differences between the NBA's and NFL's collective bargaining agreements, regarding restrictions concerning players' mobility. To understand why players compete under these restrictions, a comparison to other industries is instructive.

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258. See *supra* notes 190-91 and accompanying text (discussing the NFL right of first refusal compensation system).

259. See *supra* note 230 and accompanying text (discussing the elimination of the NBA right of first refusal compensation system).

260. See *supra* notes 195-97 and accompanying text (discussing the NFL franchise player designation).

261. See *supra* notes 198-201 and accompanying text (discussing the NFL transition player designation).

262. See discussion *supra* part II.B.3 (discussing NBA free agency restrictions).

263. See *supra* note 203 (discussing NFL Defined Gross Revenues); *supra* note 233 (discussing NBA Defined Gross Revenues).

264. See *supra* note 233 and accompanying text (discussing NFL salary cap).

265. See discussion *supra* part II.A.4 (discussing NBA salary cap).

266. See discussion *supra* part II.B.4.

### A. Professional Sports As A Unique Industry

By setting maximum player costs, through salary caps, the sports leagues are price fixing.<sup>267</sup> The most common type of price fixing occurs when a monopolist<sup>268</sup> charges consumers a price above the prevailing market price.<sup>269</sup> The monopolist can maintain this artificially inflated price because it is the only producer of the product.<sup>270</sup> This activity is normally illegal under the antitrust laws because of its anti-competitive effect on the marketplace.<sup>271</sup> The reverse situation, however, is true within the sports labor market, and is also illegal under the antitrust laws.<sup>272</sup> This situation, called a monopsony, occurs when a single purchaser limits purchases in an effort to reduce costs of a product.<sup>273</sup> The sports leagues operate as monopsonizers when imposing salary restrictions since they are reducing the costs of player compensation.<sup>274</sup> And, absent judicially created exemptions,<sup>275</sup> the leagues, too, would be subject to sanctions under the antitrust laws.<sup>276</sup>

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267. Price fixing occurs when a business combination is "formed for the purpose of and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity." BLACK'S LAW DICTIONARY 1189 (6th ed. 1990) (citing *Optivision, Inc. v. Syracuse Shopping Center Assocs.*, 472 F. Supp. 665, 676 (N.D.N.Y. 1979)).

268. A monopolist is defined as one who exercises "the exclusive right (or power) to carry on a particular business or trade, manufacture a particular article, or control the sale of the whole supply of a particular commodity." BLACK'S LAW DICTIONARY 1007 (6th ed. 1990).

269. See *id.*; see also Scott J. Foraker, Note, *The National Basketball Association Salary Cap: An Antitrust Violation?*, 59 S. CAL. L. REV. 157, 171 (1985).

270. Foraker, *supra* note 269, at 171.

271. *Id.* at 159. An executive in industry who sought a similar advantage would expose his firm and possibly himself to civil and criminal penalties by the United States Department of Justice, as well as to private suits by independent competitors. *Id.* at 179 n.126; see also *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (holding that price fixing under the Sherman Act is illegal *per se*).

272. Foraker, *supra* note 269, at 171.

273. WEILER & ROBERTS, *supra* note 42, at 129; cf. BLACK'S LAW DICTIONARY 1007 (6th ed. 1990) (defining "monopsony").

274. Christopher D. Cameron & J. Michael Echevarria, *The Ploys of Summer: Antitrust, Industrial Distrust, and the Case Against A Salary Cap For Major League Baseball*, 22 FLA. ST. U. L. REV. 827, 844-45 n.116 (1995).

275. See *supra* note 60 and accompanying text (discussing Baseball's exemption under the antitrust laws); note 67 and accompanying text (discussing the non-statutory exemption from the antitrust laws for collective bargaining agreements).

276. It has been argued that toleration of these monopolistic practices is permitted

It is the structural nature of the sports industry that requires tolerance of the leagues' monopsonistic practices. Teams within a league are not competitors in the true business sense, competing monetarily against each other. In other industries, with many competing firms, companies generally do not take concerted action because one firm's profitability depends upon successfully competing against other firms.<sup>277</sup> In professional sports, however, teams are dependent upon the financial success of other teams for their own economic success.<sup>278</sup> Economic cooperation is the key: the financial failure of a particular franchise may be detrimental to the league as a whole.<sup>279</sup> The possibility of the fiscal demise of a league results from the interdependent nature of team sports, which demands that teams have quality opponents to play against.<sup>280</sup> It is this economic necessity of interdependence which requires the use of labor agreements between players and owners, ensuring the leagues a steady source of quality labor at a reasonable cost.<sup>281</sup>

In addition to the economic structure rationale for labor cost restrictions, there are other reasons why players compete under

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by the controlling powers of society because these capitalists require outlets for their surplus capital. Paul Hoch, *Rip Off the Big Game: The Exploitation of Sports by the Power Elite* (1972), reprinted in *THE BUSINESS OF SPORTS* 12, 21 (William P. Lineberry ed. 1973). Thus, it has been argued, the sports industry provides an illustration of how, when it suits society's needs, the law is re-interpreted to satisfy a goal. *Id.*

277. Foraker, *supra* note 269, at 159.

278. Latimer, *supra* note 120, at 215-16.

279. Foraker, *supra* note 269, at 159; see WEILER & ROBERTS, *supra* note 42, at 145.

280. All of the professional leagues operate as joint ventures, defined as "a group which undertakes an economically productive activity in concert in order to overcome the impracticability of any one member's amassing sufficient capital for the project or in order to eliminate the economic waste involved in duplication of effort." Note, *Concerted Refusals to Deal Under the Federal Antitrust Laws*, 71 HARV. L. REV. 1531, 1536 (1958); see also Herbert Hovenkamp, *Exclusive Joint Ventures And Antitrust Policy*, 1995 COLUM. BUS. L. REV. 1-8.

281. *National Basketball Ass'n v. Williams*, 45 F.3d 684, 689 (2d Cir.), *petition for cert. filed*, 64 U.S.L.W. 3070 (U.S. July 24, 1995). In addition to the need for standardization in employment terms, uniformity is also required concerning the number of games, season length, playoff structure, and roster size. *Id.*; see also *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*, 754 F. Supp. 1336, 1339 (N.D. Ill. 1991) ("agreements on game rules are essential to producing basketball games at all"), *aff'd*, 961 F.2d 667 (7th Cir.), *cert. denied*, 113 S. Ct. 409 (1992).

these systems of restraints. The labor unions are in an inherently weaker bargaining position than unions in multi-competitor markets.<sup>282</sup> The nature of the sports business requires players' associations and league owners to negotiate with each other. Limited other outlets for professional players' services exists. In other industries, workers may find other employment in various industries, thus providing surplus outlets for their services. In professional sports, however, practically all players possess skills which are rarely marketable in another industry.<sup>283</sup> Thus, players must, to some extent, take what the owners are giving.

Furthermore, in contrast to industrial workers, professional athletes within the union do not possess homogenous skills. A wide range of ability exists among players which diversifies players' associations bargaining directives because of different demands made by players of varying skill levels.<sup>284</sup> For example, average players benefit from higher minimum salaries and greater job security, while superstars under a cap system gain more from free agency.<sup>285</sup>

Additionally, players' associations implicitly realize that a player's value to a team depends not only on that player's ability but also on the needs of the team.<sup>286</sup> The unique fit of player with team places pressure on teams to search for a winning combination of attitude, talent, and leadership.<sup>287</sup> This creates a lack of job security that is further magnified by injuries and trades,<sup>288</sup> because

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282. Lock, *supra* note 61, at 354.

283. *Id.* at 356.

284. *Id.* at 354.

285. *Cf. id.* While one could argue that it is the owners that are actually at the mercy of the players because of the difficulty in finding high quality replacements, in fact, the players are the weaker bargaining unit. While the use of replacement players may not be an attractive option, it has been used before. In 1987, the NFL used replacement players to break a player's strike, *see* discussion *supra* part II.A, and in 1994 Baseball had replacement players in training camp and were prepared to use them, but for an injunction reinstating the expired collective bargaining agreement. *See supra* note 25 and accompanying text.

286. Lock, *supra* note 61, at 354.

287. *Id.* at 354-55.

288. *Id.*

when a player no longer satisfies the needs of a team, the player can be traded.<sup>289</sup> This also causes players' associations to speak with multiple voices. Finally, when compared to other industrial workers, professional athletes have short careers.<sup>290</sup> The short career span creates a high turnover in union membership,<sup>291</sup> further weakening the players' bargaining position because demands are always in flux. This results in pressure on the players' associations to further fracture its' demands.<sup>292</sup> All of these factors combine to result in players accepting mobility restraints.

*B. Why Should A System of Player Restraints Include A Salary Cap?*

As noted, the leagues controlled players' salaries through the use of the reserve clause, right of first refusal, and free agency restrictions.<sup>293</sup> Judicial activism and players' associations' demands forced the leagues to replace these mobility restrictions with a subtler type of restriction, the salary cap.<sup>294</sup> Whereas the other

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289. *Id.*

290. *Id.* at 355.

291. *Id.*

292. *Id.*

293. See discussion *supra* parts I.A, I.B.

294. Cf. Latimer, *supra* note 120, at 216. Both Baseball and the NHL proposed a "salary tax" instead of a salary cap to bolster the sagging finances of lower-revenue teams. See George Vecsey, *Economics 101: Baseball Owner's Egos Would Ease the Luxury Tax*, N.Y. TIMES, Feb. 20, 1995, at C; NHL Statement, *supra* note 30; see also Murray Chass, *Face-Off or Batter Up: 2 Sports with Similar Objectives In Mind*, N.Y. TIMES, Sept. 30, 1994, at B11; Murray Chass, *Baseball Talks Are Back With An Offer By Owners*, N.Y. TIMES, Nov. 16, 1995, at B17. The tax is appealing because it allows smaller market teams to receive the tax which is paid on the amount the owner pays above a specific salary limit. NHL Statement, *supra* note 30. Sports analysts have argued that the tax would discourage increased spending by the teams in the larger markets. See Gary S. Backer, *Baseball: How To Level The Playing Field*, BUS. WK., Oct. 10, 1994, at 26.

However, a taxation system standing alone is implicitly flawed. *Id.* There is simply no incentive for teams with high salaries and in large cities to lower their team compensation, since these teams would be able to afford the increased salaries and salary tax absent an equalizing system of revenue sharing. Also, the poorly managed teams with low salaries in small cities have no incentive to acquire better players and pay them more because by receiving the tax from the higher paying teams, they could theoretically keep the additional revenue. Thus, there is continued incentive for these teams to maintain their place on the welfare side of the equation. Furthermore, based on past spending

mobility restrictions explicitly bound players to teams, the salary cap allows limited player mobility. The salary cap only allows certain teams to negotiate with players—those who have money available under their salary cap. To determine which teams can bargain with players, the difference between a team's actual salary and a team's cap is determined. The remaining balance can then be used to acquire players. Because some players will not accept contract offers reduced to the cap limitation, the number of teams able to bargain with players is reduced. Since the salary cap is a relatively recent restriction, it must be examined in light of the league economics which led to its adoption.

Three important themes resonate throughout all leagues' rationale for imposing or proposing a salary cap.<sup>295</sup> First, any modern system of league economics should define a relationship between league revenue and players' salaries.<sup>296</sup> Second, the system must treat owners and players fairly.<sup>297</sup> Finally, all teams must stay competitive.<sup>298</sup>

The economics of professional sports are the confluence of two factors: sources of revenue and costs of operation.<sup>299</sup> The main revenue factors consist of ticket sales, broadcasting fees,<sup>300</sup> licens-

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patterns, it seems likely that the owners of high salaried teams in larger markets could and would continue to pay players escalating salaries, thereby consistently maintaining a competitive edge on teams in smaller markets. See Vecsey, *supra*.

295. David Zimmerman, Associate General Counsel to the NHL, Address at the Fordham Sports Law Society Forum (Nov. 29, 1995).

296. *Id.*

297. *Id.*

298. *Id.*

299. St. Louis, *supra* note 33, at 1246.

300. *Id.* at 1247. Important factors for a league's success are: quality of play, competitive balance, and reputation for integrity. Roger G. Noll, *Professional Basketball: Economic and Business Perspectives*, reprinted in THE BUSINESS OF PROFESSIONAL SPORTS 18, 30 (Paul D. Staudohar & James A. Mangan eds. 1991). Important factors contributing to a team's success include absolute and relative quality of play, as well as the size of the market it plays in. *Id.* The relative quality of play between teams is especially important in determining both the success of the team and the league. *Id.* at 31. Generally, fan interest is determined by two factors: the close competition of play and the likelihood that the winner will be the team that is favored most by the fans. *Id.*

Broadcasting fees today are a significant part of league revenue. This, however, was not always the case, and agreements regarding broadcasting restrictions were not always viewed with favor. Thane N. Rosenbaum, *The Antitrust Implications of Professional*

ing, and sponsorships. Major costs include staff and player salaries, stadium rental, and travel expenses.<sup>301</sup>

To maximize fan allegiance, financial support, and revenue for themselves, team owners seek to draft and trade for the best players to keep games competitive.<sup>302</sup> In turn, the owners' competitiveness for players leads to teams with more discretionary revenue to out-bid other, small market teams when attempting to sign able players.<sup>303</sup>

The main rationale behind the imposition of both salary caps was to stop the above process and equalize the field for players. The leagues believed that salary restrictions were necessary to ensure that large and small market teams have an equal chance to

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*Sports Leagues Revisited: Emerging Trends In The Modern Era*, 41 U. MIAMI L. REV. 729, 769-70 (1987). In 1953, an NFL By-law was struck down as violating the Sherman Act because it prevented the broadcasting of a game into a city when that city's team was on the road, but the game was still being broadcast in the home city. *Id.* (citing *United States v. National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953)). In response, Congress enacted the Sports Broadcasting Act, 15 U.S.C. § 1291 (1994), which removed these types of rules from the purview of the Sherman Act. Rosenbaum, *supra*, at 770. As a result, the leagues were able to sell the broadcasting rights to their games and in some instances distribute that revenue through revenue sharing. *Id.*

Each league has its own form of revenue sharing. The NFL system of revenue sharing provides for the equal split of television monies from contracts with ABC, FOX, NBC, ESPN and TNT, and income from NFL Properties, Inc. Telephone Interview with Lal Heneghan, Director of Labor Relations, *National Football League* (Nov. 16, 1995). Ticket revenue is split 60/40, with 60 percent going to the home team. *Id.* The NBA system of revenue sharing divides proceeds from national television contracts and NBA Properties revenue equally among all NBA teams. See *Chicago*, 754 F. Supp. at 1339-42. However, luxury box revenue, local gate and local television contracts are not equally shared. *Id.*

It also is important to note that, even with rules defining what goes into the pool to be divided, NFL owners, at least, still try to keep more of the pot for themselves. See Richard Sandomir, *Dollars and Dallas: League of Their Own?*, N.Y. TIMES, Sept. 24, 1995, sec. 3, at 1; Richard Sandomir, *Now Jones Must Prove How Smart Nike Deal Is*, N.Y. TIMES, Sept. 7, 1995, at B23; Richard Sandomir, *N.F.L. Properties Sues Cowboys Over Dealings*, N.Y. TIMES, Sept. 19, 1995, at B11. In particular, Jerry Jones, owner of the Dallas Cowboys, has even sued the leagues over the calculation of revenue sharing. Timothy W. Smith, *Cowboy Owner Fires Back With Suit Against N.F.L.*, N.Y. TIMES, Nov. 7, 1995, at B11.

301. St. Louis, *supra* note 33, at 1247.

302. Levine, *supra* note 133, at 73.

303. Cameron & Echevarria, *supra* note 274, at 852-53.

sign players.<sup>304</sup> Without these restrictions, proponents of the salary cap argue, the resulting salary disparities would allow large market teams to outbid small market teams for the best players, thereby winning championships year after year.<sup>305</sup> Moreover, without the salary restrictions, the smaller market teams would flounder, lose fan support, and eventually become bankrupt,<sup>306</sup> destroying the competitive structure of a league.<sup>307</sup> Therefore, the greater the equality of the off-the-field competition for players, the higher the quality of the games, leading to greater overall revenue for the teams.<sup>308</sup> The increase in revenue results from tighter championship races and better regular season competition which generates greater fan interest and financial support.<sup>309</sup> This theoretical justification is called the competitive balance theory.

In contrast, critics of the salary restraint system and competitive balance theory argue along two important premises: (1) that the cap and other restraints are designed to *artificially* restrict players' salaries,<sup>310</sup> interfering with the unfettered operation of the free market;<sup>311</sup> and (2) that the competitive balance theory lacks any empirical evidence to support its basic tenets.<sup>312</sup>

The critics, however, fail to recognize that in the period before the institution of the NBA salary cap, it was the large market teams which consistently made the playoffs.<sup>313</sup> During the ten year period before the salary cap was imposed, only nine franchises reached the finals, of which fourteen appearances were made by the Boston Celtics and Los Angeles Lakers.<sup>314</sup> Similar evidence is found in the NFL.<sup>315</sup>

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304. Cf. *id.*

305. *Id.* at 853.

306. *Id.*

307. *Id.*

308. Jeffrey A. Rosenthal, *The Football Answer to the Baseball Problem: Can Revenue Sharing Work?*, 5 SETON HALL J. SPORT L. 419, 428 (1995).

309. *Id.*

310. See Foraker, *supra* note 269, at 172.

311. *Id.* at 173.

312. Cameron & Echevarria, *supra* note 274, at 853.

313. See *id.* at 862.

314. *Id.*

315. In the seven years directly preceding the NFL cap only four teams won the Super Bowl: New York Giants, Washington Redskins, San Francisco 49ers, and Dallas Cowboys.

Besides the competitive balance rationale, a more compelling reason for the cap is that the free market for players services exacerbated the leagues' fiscal problems. Instrumental in bringing the NBA to the brink of financial ruin in the late 1970s and early 1980s was the dichotomy between the ability of large market and small market teams to attract players.<sup>316</sup> The losing teams could not attract talented players because they were perpetual losers, and as such they could not attract fans.<sup>317</sup> Without fans providing a steady source of revenue, the small market teams were on the verge of bankruptcy.<sup>318</sup> This reasoning was also instrumental in motivating the NFL to propose its cap.<sup>319</sup> With similar problems occurring within NFL teams, the league proposed strict salary limitations to ensure the teams would return to profitability.<sup>320</sup>

Thus, it has been argued that the NBA's salary cap was the primary reason the NBA did not self-destruct.<sup>321</sup> When the cap was instituted in 1984, the financial outlook of the league suggested the consolidation of teams, rather than expansion.<sup>322</sup> In the ten year period following the salary cap's institution, however, the NBA achieved financial stability through its cap system.<sup>323</sup>

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316. Foraker, *supra* note 269, at 157-58.

317. *Id.* at 158.

318. *Cf. id.*

319. Interview with Lal Heneghan, *supra* note 300. When combined with the number of teams that were losing money at the time, the outlook for the league was not promising. *Id.*; see *Antitrust Issues in Relocation of Professional Sports Franchises: Hearings before the Subcomm. on Antitrust, Business Rights, and Competition of the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. (1995).

320. Interview with Lal Heneghan, *supra* note 300.

321. Levine, *supra* note 133, at 72-73.

322. *Id.* at 93; see also *National Basketball Ass'n v. Williams*, 857 F. Supp. 1069, 1072 (S.D.N.Y. 1994) (citing Grantham Trial Decl., July 11, 1994, ¶¶ 3, 13 (stating that the salary cap was necessary because "the majority of NBA teams were losing money, due in part, to rising player salaries and benefits.")), *aff'd*, 45 F.3d 684 (2d Cir.), *petition for cert. filed*, 64 U.S.L.W. 3070 (U.S. July 24, 1995); WEILER & ROBERTS, *supra* note 42, at 300.

323. Levine, *supra* note 133, at 72-73. "Although as late as 1985, the league lost money, every year thereafter the league has shown steadily increasing profits." Steve Patterson, *The National Basketball Association Salary Cap, Dead or Alive?*, 19 T. MARSHALL L. REV. 535, 536-37 (1994). "Players [sic] salaries and benefits have decreased from a pre-cap high of nearly 60% of total revenues to below 50%." *Id.* To coincide

One effect of the NBA's cap has been to distribute talent evenly throughout the league.<sup>324</sup> By limiting the profitable teams ability to acquire the twelve most talented players, the league improved the ability of financially unstable teams to build successful franchises around gifted college athletes.<sup>325</sup> The cap finally allowed these teams a fair shot at acquiring the more talented players.<sup>326</sup> The equal distribution of talent increased the competitiveness of the exhibitions which, in turn, resulted in increased attendance.<sup>327</sup> Teams profited by maintaining and increasing the financial support of fans. The NFL cap is built upon the same rationale,<sup>328</sup> and is likely to have similar effects in this area.

A by-product of the increased competitiveness is that network television now broadcasts NBA games to a larger audience, due to greater fan interest.<sup>329</sup> When just a few cities had the best players, only fans in winning cities would tune in. With talent spread evenly throughout the NBA, however, games are watched by fans all over the country.<sup>330</sup> Advertisers, sensing the public's support, are willing to pay more for commercials, and the networks, in turn, are apt to pay more for the broadcast rights.<sup>331</sup> The increases in attendance and television monies have increased the revenues and profitability of the teams.<sup>332</sup>

Finally, the increased revenue has increased the salary cap be-

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with the increased league revenues, the salary cap has grown from \$3,600,00 in 1984-85 to \$15,175,000 in 1993-94. *Id.* This increase has greatly benefited the players. *Id.* League wide total revenues increased from approximately \$150,000,000 in 1984 to over \$800,000,000 in 1992. *Id.* Broadcasting receipts have reached the \$350,000,000 mark and television ratings have increased 11% during the ten-year period ending in 1993, while ratings for all other sports have decreased. *Id.*

324. Levine, *supra* note 133, at 93.

325. *Id.* (citing Jane Gross, *N.B.A.'s Rebuilding Program Is Showing Results*, N.Y. TIMES, Dec. 23, 1984, § 5, at 3).

326. *Id.*

327. *Id.* at 95.

328. Interview with Lal Heneghan, *supra* note 300.

329. Levine, *supra* note 133, at 96.

330. *Id.*

331. *Cf. id.*

332. *Id.* at 96-97. During the 1981-82 season only six teams were able to show a profit. *Id.* By 1988, twenty of the twenty-three were profitable. *Id.*

cause the cap is based on a percentage of Defined Gross Revenues. The relational structure of the salary cap, which assures players a percentage of NBA revenues, permits players to enjoy the increasing revenue with the owners.<sup>333</sup> Because the money available to pay players' salaries increases as the gross revenues of the league increases, the players have incentive to make the games exciting. Exciting exhibitions attract more spectators, which generates greater network interest for larger national television contracts,<sup>334</sup> creating more league revenue and higher salaries.

It is likely that the NFL's hard cap, will be similar, if not greater to that of the NBA cap, in terms of its effect on league revenue and the competitive balance because of the greater restrictiveness of the cap.

*C. The Optimal System of Player Mobility Restraints Is Based on the NBA Salary Cap*

Thus, the case is strong for using a form of the salary cap to limit player mobility and control costs in competitive sports. The NFL and NBA have two different systems of restricting players salaries, each with its merits and faults. The NBA salary cap, however, provides the best prototype upon which other leagues should model their restrictions.

The success of the NBA cap method has been in no small part due to the cap's exceptions.<sup>335</sup> The NBA's cap has kept its players satisfied by allowing NBA teams to renew players' contracts without regard to salary cap considerations.<sup>336</sup> Owners can maintain their competitive teams by using the veteran player exception.<sup>337</sup> This exception allows a team to re-sign its own free agent without concern for the salary cap.<sup>338</sup> Players, confronted with the possibility that they will have to accept a lower salary when changing

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333. *Id.* at 97.

334. *Id.* at 76.

335. See *supra* notes 238-49 and accompanying text (discussing the NBA salary cap exceptions).

336. Levine, *supra* note 133, at 94-95.

337. *Id.* at 95.

338. See discussion *supra* part II.B.4 (discussing the NBA salary cap).

teams, can negotiate for their free market salary with their current team.<sup>339</sup> The incentives of the NBA system is that while players have full free agency with no compensation given to prior teams, players have a strong financial incentive to remain with their existing team.<sup>340</sup>

In contrast, the NFL's cap, on the other hand, does not share league revenues with the players in the same manner as the NBA system.<sup>341</sup> Although this cap rises as league revenues increase, similar to the NBA system, teams are still constrained by the salary cap when negotiating with their own players. Since free agents are unable to profit from the direct benefits of the escalating revenue from television, attendance, licensing, and sponsorships when resigning with teams, players must be excised to make room for other, less expensive players. In one particularly extreme example of the NFL's cap in operation, New York Giants quarterback Phil Simms, was cut from the team because his salary formed too large a percentage under the cap.<sup>342</sup> Thus, under the NFL's hard cap system, some players will not share in steadily increasing league revenue.<sup>343</sup> Additionally, a team's veteran role players and substitutes, still constrained by the exceptionless salary cap, must subordinate their demands to those of the superstar players on the team.<sup>344</sup> With teams awarding their top players multi-million dollar salaries, low profile players must accept what is offered to them. Conversely, if a team feels that a superstar is no longer worth his salary, he is likely to be cut from the team's roster.

Other exceptions to the NBA's cap make it a better system because it allows teams flexibility when faced with adverse circumstances. For example, both the injury and the one million dollar exceptions allow for contingencies unforeseen during the regular or off seasons.<sup>345</sup> Further, the trade exception<sup>346</sup> allows NBA teams

339. Levine, *supra* note 133, at 95.

340. WEILER & ROBERTS, *supra* note 42, at 301.

341. See discussion *supra* part II.A.4 (discussing the NFL salary cap).

342. See Mike Freeman, *It's 15 Years Down And So Long: A Stunned Simms Is Cut*, N.Y. TIMES, June 16, 1994, § B, at 5.

343. See Bernard Pellegrino & Seth Josephson, Recent Case, 4 SETON HALL J. SPORT L. 1, 24 (1994).

344. *Id.*

345. See *supra* notes 244, 247 and accompanying text (discussing the one million

the ability to structure themselves so as to assemble a winning combination of talent, thereby making games exciting. No longer do teams have to renegotiate contracts for players on their teams to acquire talented players. The NFL has no such exception,<sup>347</sup> and therefore must renegotiate contracts with existing players or excise them in order to acquire new players.

One former flaw of the NBA's cap system was that it contained loopholes whereby teams could devise methods to circumvent the salary cap in spite of the many exceptions. In one recent example, a federal district court affirmed a Special Master's decision that allowed owners to circumvent cap restrictions by allowing them to negotiate contracts with early termination clauses.<sup>348</sup> As discussed above,<sup>349</sup> the general manager of the Portland Trailblazers suggested an option-out clause to sign Chris Dudley.<sup>350</sup> The early termination clause operated so that Dudley could opt-out of the remainder of the contract after his first year to become a Trailblazer free agent.<sup>351</sup> The team could then re-sign him to a contract equal to his fair market value without being restrained by the salary cap.<sup>352</sup> These provisions posed a threat to the cap's effectiveness of controlling the league's labor costs.<sup>353</sup> The new NBA agreement, however, seems to have eliminated this problem through the veteran player exception.<sup>354</sup> This exception requires a player to be on the roster of a team for at least three years before negotiating as a team's free agent.<sup>355</sup> This is significant because it resolves the interpretation problems which ensures the owners comply with the cap, at least until new methods of circumvention arise.

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dollar and injury exceptions to the NBA salary cap).

346. See *supra* note 249 and accompanying text (discussing the trade exception to the NBA salary cap).

347. See discussion *supra* part II.A.4 (discussing the NFL salary cap).

348. *Bridgeman v. National Basketball Ass'n*, 838 F. Supp. 172 (D.N.J. 1993).

349. See discussion *supra* part I.B (discussing the collective bargaining history between the NBA and NBPA).

350. *Bridgeman*, 838 F. Supp. at 175.

351. *Id.*

352. Seth Josephson, Recent Case, 4 SETON HALL J. SPORT L. 732 (1994).

353. Latimer, *supra* note 120, at 238-40.

354. See *supra* notes 239-41 and accompanying text (discussing the veteran player exception).

355. *Id.*

Similar problems have arisen under the NFL salary cap system. Although there are no exceptions to the NFL's cap, two instances have indicated that the NBA methods of cap circumvention will be revisited in the NFL.<sup>356</sup> The first instance involved the San Francisco 49ers ("49ers").<sup>357</sup> In 1994, the first year of the salary cap, the 49ers seemingly retarded the apparent purpose of the salary cap—to evenly distribute talent throughout the league.<sup>358</sup> The 49ers entered into agreements whereby most of their free agent players would be given low base salaries plus bonus incentives if the team made the playoffs and the Super Bowl.<sup>359</sup> These incentive clauses, when coupled with below market salaries, seem to violate the spirit, if not the letter, of the NFL's hard cap system<sup>360</sup> because it allows owners in large market cities, in effect, to buy quality players in apparent disregard of the intended purpose of the salary cap.

A second example of alleged cap circumvention under the hard cap system is the signing of Deion Sanders by the Dallas Cowboys.<sup>361</sup> Jerry Jones, the owner of the Dallas Cowboys, outbid the 49ers by offering Sanders a deal valued at over \$35 million for seven years including a \$13 million signing bonus.<sup>362</sup> Under league rules,<sup>363</sup> the Cowboys are allowed to apply \$1.8 million of the bonus toward the calculation of their salary cap for each of the contract's seven years.<sup>364</sup> Sanders will receive only \$178,000 in the first year of his contract, but his salary will steadily increase to \$5 million in the last year of his contract, when the salary limit presumably will be higher.<sup>365</sup> The NFL immediately criticized the deal

356. The NFL and NFLPA are currently devising methods to correct this problem and the one regarding the Entering Player Pool discussed *infra* notes 387-91. *NFL on NBC: Free Agency: Will the Game Survive?*, (NBC television broadcast, Dec. 10, 1995).

357. Timothy W. Smith, *Free Agency Appears to Be a Big Problem for Some Teams and a Panacea for Others*, N.Y. TIMES, Feb. 19, 1995, § 8, at 1.

358. *Id.*

359. *Id.*

360. See discussion *supra* part II.A.4 (discussing the NFL salary cap).

361. Smith, *supra* note 41.

362. Allen R. Myerson, *Jerry Jones Has An Ally In Fight Against the N.F.L.*, N.Y. TIMES, Oct. 13, 1995, at B12.

363. 1993 NFL Agreement, *supra* note 209, art. XXIV, § 7(b), at 81.

364. Myerson, *supra* note 362.

365. *Id.* The amount of the cap increases as Defined Gross Revenues increases, thus

because of its low base salary and large bonus as a method of cap circumvention.<sup>366</sup> To date, however, the NFL has not ruled on the propriety of Sanders' contract. This is an area that will prevent the NFL system from achieving its intended effect, if action is not taken by the league.

Another aspect that weighs in favor of the NBA cap is the method calculating Defined Gross Revenues. Responding to the increased demand for the league's trademarks, the NBA formed NBA Properties, Inc.<sup>367</sup> This division owns the rights to market the images of the players and the team's logos worldwide.<sup>368</sup> Today, this subsidiary has revenues of over \$1 billion.<sup>369</sup> This amount was not included in the 1988 NBA Agreement's definition of Defined Gross Revenues when calculating the salary cap.<sup>370</sup> The 1995 NBA Outline, however, states that licensing, luxury box revenue, and signage, among other things, will now be included in the calculation of Defined Gross Revenues.<sup>371</sup> The NFL in its calculation of Defined Gross Revenues, on the other hand, does not include any of these items.<sup>372</sup> The NFL includes this money, with the exception of luxury box revenues, however, in calculating revenue sharing.<sup>373</sup> Therefore, NFL players do not share in this money because players only receive amounts, for salary cap purposes, included in Defined Gross Revenues.<sup>374</sup>

Arguably, one of the NFL's cap merits, as compared to the NBA which has relatively fewer players and requires smaller facili-

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Sanders' higher salary will constitute a smaller percentage of the cap than it would today.

366. *Id.*

367. Latimer, *supra* note 120, at 241. The NFL has a marketing arm similar to NBA Properties, Inc.

368. *Id.*

369. *Id.*

370. *Id.*

371. See *supra* note 233 and accompanying text (defining NBA Defined Gross Revenue).

372. See *supra* note 203 and accompanying text (defining NFL Defined Gross Revenue).

373. Interview with Lal Heneghan, *supra* note 300; see also *supra* note 300 (discussing NFL revenue sharing).

374. See *supra* note 233 (discussing NFL Defined Gross Revenues).

ties to exhibit games,<sup>375</sup> is that its cost structure is significantly different.<sup>376</sup> An NFL exhibition requires more players, larger playing fields, and more equipment,<sup>377</sup> making costs more prohibitive than basketball.<sup>378</sup> One rationale for the NFL when implementing its hard cap was the indirect concern of the number of players on the roster and the higher costs associated with such a large team.<sup>379</sup> The NFL chose a hard cap, as opposed to the NBA cap, because the league felt that a governor on compensation was not enough to control costs for the league.<sup>380</sup> The league, however, did allow for some flexibility regarding signing bonuses<sup>381</sup> and incentives.<sup>382</sup> While this rationale seems clear, further analysis of the NFL's economic structure reveals the flaws. NFL teams do not start on equal revenue footing. Luxury box revenues make up a significant amount of revenues and for the basis of large disparities in discretionary revenue for teams.<sup>383</sup> With the system of NFL revenue sharing, this income is not shared, so in order to place owners on equal footing the league had to place a strict upper limit on salaries,<sup>384</sup> since the owners wanted to keep the extra money. Similarly in the NBA while all revenue is not equally shared between the owners,<sup>385</sup> players are still able to reap the benefits of the larger revenue pie because all league revenues are included in Defined Gross Revenues.<sup>386</sup> Since all amounts are included in Defined Gross Revenues, owners have incentive to actively market their

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375. St. Louis, *supra* note 33, at 1248.

376. *Id.*

377. *Id.*

378. *Id.*

379. Interview with Lal Heneghan, *supra* note 300.

380. *Id.*

381. 1993 NFL Agreement, *supra* note 165, art. XXIV, § 7(b), at 81. Signing bonuses are pro rated over the term of the contract. *Id.*

382. *Id.* § 7(c), at 83. Incentives are included in the calculation of the salary cap if they are likely to be earned that year. *Id.*

383. Interview with Lal Heneghan, *supra* note 300. Further, with the new deals that Jerry Jones has made, the best marketed team in the NFL can now become richer. *See supra* note 41 (discussing Jones' new player contracts).

384. Interview with Lal Heneghan, *supra* note 300.

385. *See supra* note 300 (discussing NBA revenue sharing procedures).

386. *See supra* note 233 (defining NBA Defined Gross Revenues).

teams to further increase the revenue pie, which in turn would increase players' compensation. With a more equal distribution of revenue between the owners and players, the hard cap becomes unnecessary.

Additionally, although the hard cap was supposed to restrain salaries and promote the competitive balance, neither effect has yet come to fruition. Since teams can keep the extra luxury box revenue, they still try to circumvent the cap through the incentive and signing bonus provisions. Additionally, in the NFL the lack of exceptions has resulted in NFL owners seeking to escape the restrictiveness of their own cap. For example, the signing of Deion Sanders' by the Dallas Cowboys demonstrates an obvious willingness to disregard the hard cap in order to obtain talented players.

Furthermore, even with agreement about the need for rookie salary restrictions,<sup>387</sup> NFL owners have attempted to circumvent the cap regarding rookie salary amounts.<sup>388</sup> This new generation of cap circumvention is effectuated by including performance standards clauses in some of the rookies' contracts.<sup>389</sup> These clauses provide that a player can become a free agent, upon meeting certain performance goals.<sup>390</sup> For example, if a player makes a certain number of tackles or plays in a specified number of games, over a specified period, the player would automatically become a free agent.<sup>391</sup>

A final criticism of the entire NFL restraint system is that the NFL, unlike the NBA, continues to impose free agency restrictions.<sup>392</sup> These provisions are overly restrictive in a system that has a hard cap, because player mobility is sufficiently constrained by

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387. See discussion *supra* parts II.A.2, II.B.2 (discussing the NFL and NBA rookie salary limits). With league owners realizing that able college players could attract fans, and thus, increase revenue, the owners bid up salaries for them. However, these rookie salary increases affected the ability of veteran players to receive salary increases under the cap system. Therefore, both leagues and players' associations agreed to rookie salary caps as a means of stabilizing the salaries of unproven rookies.

388. Pellegrino & Josephson, *supra* note 343, at 17-22.

389. *Id.* at 17-18.

390. *Id.*

391. *Id.* at 18.

392. See discussion *supra* part II.A.3 (discussing NFL free agency restrictions, franchise, and transition players).

this cap since teams must fit all 45 players under the cap.<sup>393</sup>

To complete the system of restrictions and ensure players receive adequate salaries while owners control costs, the college draft must remain in effect as well as rookie salary caps. The college draft is especially important for league sports because of the competitive balance necessary for meaningful sports competition.<sup>394</sup> The primary rationale for the draft is to promote competition between the teams, and that by allowing the teams that finish last to select first, the games become more competitive.<sup>395</sup> Thus, with better contests, fan interest increases due to tighter championship races.<sup>396</sup> The draft further assists teams who have not been able to select the "right" players, have made inequitable trades, or suffered a losing season because of player injuries to acquire new, quality talent. Free agency becomes unimportant under an NBA salary cap system because of the exceptions to the salary cap which enable a player to sign or re-sign, depending what he thinks his market value is. The right of first refusal also becomes irrelevant because a team can always offer more to its existing player, since it will not be restrained by the salary cap. The rookie caps are necessary to ensure that rookies prove themselves before squeezing out more experienced veteran players from their fair share under the cap.

### CONCLUSION

To ensure the long-term profitability of sports enterprises and provide an arena for athletes to continue showcasing their abilities, escalating costs must be controlled.<sup>397</sup> Salary escalation can be effectively contained mainly through the salary cap. While early forms of the mobility restrictions reduced athletes' station to just above involuntary servitude, today's NBA salary cap and greater

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393. However, in light of the NFL cap circumvention methods, these restrictions may become more important unless the league addresses the issue.

394. *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1197-99 (D. D.C. 1978) (MacKinnon, J., dissenting).

395. *Id.*

396. *Id.*

397. Latimer, *supra* note 120, at 241-42.

system of restraints allows players to share increasing league revenue with the ability to shop their services for suitable employment opportunities.

The optimal scenario for all leagues is to operate under an NBA-like system. A salary cap with specific exceptions and limited additional mobility restraints would serve to eliminate the bickering over the revenue pie and player mobility. Owners would be able to plan and control escalating costs, and players would either gain mobility, or with the utilization of available exceptions, increase their compensation. Most importantly, players would be able to return to exhibiting their skills to the fans. Once this balance over revenue and freedom is reached, fans could re-focus their attention from the negotiating sessions to the fields of competition.

