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COMMENT

Beyond the Box Score: A Look at Collective Bargaining Agreements in Professional Sports and Their Effect on Competition

I. INTRODUCTION

Most sports fans have at least the limited understanding that collective bargaining agreements govern the employer-employee relationships between the owners of professional sports teams and players' associations. Indeed, sports have become a big business in the United States, and the media coverage of sports has extended beyond reporting statistics and scores to include all dealings associated with the business.¹ Every year (at various times depending on the sport), fans are bombarded with numbers detailing signing bonuses, salary cap implications, arbitration results, incentive-laden contracts, and a multitude of other terms that boggle the mind of the layperson. As most sports fans (and reporters) take a what-have-you-done-for-me-lately attitude toward the performance of their teams and the organizations that assemble them, little attention has been paid to the historical progression that has led to the current state of professional sports. A historical analysis is critical to understanding why Major League Baseball, the National Basketball Association, and the National Football League² each have separate agreements governing their leagues. Such an examination helps to explain why the Collective Bargaining Agreements (CBAs) exist in their current structure. The articles of the various CBAs govern the professional sports players' compensation, the procedures for settling disputes, and address a myriad of other issues relating to the employer-employee relationship in sports.³ This comment will examine the history of the three most prominent leagues in U.S. professional sports, the CBAs that govern the employer-employee relationship in each league, the provisions of those CBAs that influence player contracts and contract disputes, the perceptions about competition that have resulted from CBA governance of the leagues, and possible solutions to problems that exist within those leagues.

1. *See e.g.*, SportsBusiness Journal, <http://www.sportsbusinessjournal.com/index.cfm?fuseaction=page.feature&featureId=43> (last visited Mar. 3, 2008).

2. These are the current "Big Three" of U.S. professional sports. My apologies to the NHL, which has had a substantial decline in popularity since the 2004 lockout.

3. *See generally*, 2005 NBA/NBPA CBA, available at <http://www.nbpa.com/cba.php>.

II. MLB: THEN & NOW

Baseball has been played in America since the first half of the nineteenth century, though it was not played professionally until 1868.⁴ In 1871, twenty-five professional clubs formed the National Association of Baseball Clubs, which would later become the National League.⁵ The American League, lagging behind slightly, was formed in 1900.⁶ Players switched teams incessantly during the baseball's infancy.⁷ Contracts lasted only for a year, after which time the players were able to offer their services out on the open market.⁸ This process of exclusively playing one-year contracts would soon prove to be short-lived. Shortly after organized professional play began, baseball "sought to establish a policy of self-governance in all matters," including player contracts and salary disputes.⁹ This power, once established, allowed owners to be inconsiderate in compensating their players, which often led to labor disputes.¹⁰ In 1879, these disputes led to the inception of baseball's reserve system.¹¹ The reserve system was first a secret "gentleman's agreement" among owners that provided a list of five players on each team to be protected and reserved for the owner of each team.¹² The other owners acknowledged this system by agreeing not to sign protected players away from their current team.¹³ This "gentleman's agreement" proved very successful, and by the late 1880s the owners included a reserve clause in every player contract.¹⁴ The clause gave the owners the option to continue renewing each player's contract indefinitely at a salary chosen at the owner's discretion.¹⁵ If the player refused to sign the new contract, he was left with two options: (1) continue to play for the current team, or (2) permanently retire from baseball.¹⁶ This new system was a substantial departure from the early days of professional baseball, which more closely resembled "the early forerunner to today's free agency."¹⁷

The reserve system, as well as the owners' practice of trading players for cash at will, led to even greater player discord.¹⁸ Thus, by 1885, player John Montgomery Ward helped to organize the Brotherhood of Professional Baseball Players.¹⁹ Although the Brotherhood attracted many of the great players of its day, its attempt at self-help failed as the Brotherhood "lost money and many of its star

4. Frederick N. Donegan, *Examining the Role of Arbitration in Professional Baseball*, 1 SPORTS LAW J. 183 (1994).

5. *Id.*

6. *Id.* at 184.

7. Jonathan M. Conti, *The Effect of Salary Arbitration on Major League Baseball*, 5 SPORTS LAW J. 221, 223 (1998).

8. *Id.*

9. Thomas J. Hopkins, *Arbitration: A Major League Effect on Players' Salaries*, 2 SETON HALL J. SPORT L. 301, 303 (1992).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 303-04.

15. *Id.*

16. *Id.*

17. Conti, *supra* note 7, at 223.

18. Hopkins, *supra* note 9, at 304. Owner abuses included the suspension of a sick player (forcing his retirement) and the sale of players to different teams for cash. *Id.*

19. *Id.*

players were lured back by the owners' promises of steady pay and steady work.²⁰ As a result, in December of 1890, the Brotherhood folded after just one season.²¹ The players next sought relief from the courts, and in 1922, challenged the reserve clause on the grounds that the League had conspired to monopolize the baseball business.²² The players' case went to the U.S. Supreme Court. However, the Court ruled for the league, stating that the reserve clause did not violate anti-trust laws because baseball was not engaged in interstate commerce.²³ The court reasoned that "[t]he business is giving exhibitions of baseball, which are purely state affairs."²⁴ Therefore, the transportation of persons across state lines was considered an insignificant interference with interstate commerce.²⁵ In 1953, the league's reserve system was again challenged in *Toolson v. New York Yankees*,²⁶ with the players now using the advent of interstate baseball broadcasts to bolster their antitrust claim.²⁷ But, once again, the Supreme Court upheld the reserve clause, noting that invalidation of the reserve system would cause the end of competitive baseball, and thus death to the sport.²⁸ In 1972, the Supreme Court again heard a challenge to the reserve system in *Flood v. Kuhn*.²⁹ In *Flood*, "[a player] challenge[d] the reserve clause on the basis that it violated antitrust laws after he was refused the right to negotiate a new contract with another club."³⁰ The court again sided with the owners, upholding the antitrust exemption, stating that "the reserve clause was necessary to preserve baseball's economic stability and competitive balance."³¹

In 1966, the players, led by United Steelworkers of America economist Marvin Miller, formed the Major League Baseball Player's Association (MLBPA).³² In 1968, the MLBPA and baseball owners negotiated a collective bargaining agreement, Major League Baseball's First Basic Agreement.³³ The agreement established a minimum salary and a grievance procedure for settling disputes whereby the Commissioner, a position chosen by the owners, would be the ultimate arbitrator of any grievance.³⁴ Two years later, the Second Basic Agreement raised the minimum salary from ten to fifteen thousand dollars and changed the grievance procedure to one where a panel of arbitrators outside the Commissioner's office could be chosen to handle disputes.³⁵ This change in procedure would mark the first time in the history of the league that the owner's would not have total

20. *Id.* at 305.

21. *Id.*

22. *Id.*

23. *Id.* (citing *Fed. Baseball Club v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 209 (1922)).

24. *Id.* (quoting *Fed. Baseball Club*, 259 U.S. at 208).

25. *Id.*

26. 346 U.S. 356, 361-62 (1953).

27. Hopkins, *supra* note 9, at 305-06 (citing *Toolson*, 346 U.S. at 356-57 (1953)).

28. *Id.*

29. 407 U.S. 258, 258 (1972).

30. Hopkins, *supra* note 9, at 306.

31. *Id.* (citing *Flood*, 407 U.S. at 272-73).

32. Major League Baseball Players Association: MLBPA History, <http://mlbplayers.mlb.com/pa/info/history.jsp> (last visited Mar. 3, 2008).

33. Hopkins, *supra* note 9, at 307

34. *Id.*

35. *Id.*

control over player disputes.³⁶ The next major change occurred five years later with the 1973 Basic Agreement, which granted the players the ten and five rule.³⁷ This rule allowed players with ten years of major league experience and five years with his current team both the right to refuse a trade and salary arbitration.³⁸ In 1975, the reserve system was finally eliminated as arbitrator Peter Seitz declared that the reserve clause in a player's contract would apply only for that contract, and therefore ended clubs' use of the option clause as perpetual right to renew.³⁹ As a result of this ruling, the 1976 Basic Agreement allowed players with six years in the major leagues to qualify for a limited form of free agency, whereby those players would participate in a re-entry draft that would allow teams to bid for free agents in reverse order of finish to encourage competitive balance.⁴⁰ This provision was later eliminated to allow players qualifying for free agency to be available to the highest bidder.⁴¹ Salary arbitration was available to those players ineligible for free agency who had at least two years of major league experience.⁴² Free agency and salary arbitration have had a major effect on player salaries.⁴³ One year after salary arbitration was initiated in 1975 the average player salary was \$44,676.⁴⁴ In 2005, the average player salary was \$2,632,655.⁴⁵

Despite this rapid increase in player salaries, the MLB does not have a salary cap.⁴⁶ The MLB owners' last attempt to enact a salary cap in 1994 failed miserably.⁴⁷ During this year, the CBA was scheduled to be renegotiated, but serious new issues in the professional baseball arena threatened the success of this renegotiation.⁴⁸ The most important issue confronting the owners was a glaring disparity in television revenue between larger and smaller market teams.⁴⁹ Local, unshared television revenues for large market clubs were becoming increasingly profitable, to the point that the increased wealth allowed those clubs to sign many more high-priced (and presumably better) free-agent players than their small market counterparts.⁵⁰ The small-market teams were demanding that the large-market teams share their television revenues, and were prepared to vote down any new CBA that did not include such a provision.⁵¹ The large-market teams would only agree to such a revenue-sharing arrangement if the new CBA included a salary cap, so that their lost television profits could be recouped in the form of reduced

36. *Id.*

37. *Id.*

38. *Id.* at 335 n.50.

39. *Id.* at 309.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. Major League Baseball Salaries by Baseball Almanac, http://www.baseball-almanac.com/charts/salary/major_league_salaries.shtml (last visited Mar. 3, 2008).

45. *Id.*

46. See 2007-2011 MLB Basic Agreement, available at http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf (last visited Mar. 29, 2008) [hereinafter MLB CBA].

47. Daniel C. Glazer, *Can't Anybody Here Run This Game? The Past, Present, and Future of Major League Baseball*, 9 SETON HALL J. SPORT L. 339, 363 (1999).

48. *Id.* at 362-63.

49. *Id.* at 363.

50. *Id.*

51. *Id.*

labor costs.⁵² The players rejected the proposed salary cap offer, ultimately resulting in a players' strike that lasted over two-hundred days, and the unprecedented canceling of baseball's postseason, including the World Series.⁵³ While the strike lasted through most of spring training of the following season, the strike ended shortly before the first games of the 1995 season, when the National Labor Relations Board (NLRB) agreed to seek an injunction against the owners, which allowed for the 1995 and 1996 seasons to be played under the old CBA.⁵⁴

In 1996, the owners and players finally reached an agreement.⁵⁵ The approved new CBA, which came into effect in 1997, included some interesting changes. First, the agreement included a "competitive balance" or "luxury tax" that called for the teams with the five highest payrolls to pay a 35% tax on payroll spending over a set threshold amount, thus hopefully discouraging high player salaries.⁵⁶ Additionally, the owners implemented a revenue-sharing plan that would transfer revenue from the thirteen wealthiest clubs to the rest of the franchises by the year 2000.⁵⁷ Salary arbitration remained largely unchanged, with the exception that the number of arbitrators was increased from one to three in order to reduce the number of "aberrant" decisions.⁵⁸ Finally, the owners and players agreed to jointly petition Congress to eliminate MLB's anti-trust exemption as it pertained to labor matters.⁵⁹

The current MLB CBA, which has been in effect since 2003,⁶⁰ maintains many of the provisions that were negotiated into the 1997 agreement. Major League clubs may have title to and reserve up to a maximum of forty player contracts.⁶¹ These contract rights are maintained by the club until a player becomes a free agent or his contract is assigned. A player can achieve free agency if he has (1) fulfilled his current contract; (2) completed at least six years of major league service; and (3) not executed a contract for the next succeeding season.⁶² There is

52. *Id.*

53. *Id.*

54. *Id.* at 364.

55. *Id.*

56. *Id.* The money collected under the luxury tax is as follows: The first \$5 million is held in reserve in the event a team should earn a tax refund during that year. The remaining balance is contributed to the Industry Growth Fund (IDF) used to help expand the baseball industry generally. Fifty percent of the proceeds over that amount go to player benefits. Twenty-five percent of those remaining proceeds go to fund high school and other projects where baseball is not played, and the last twenty-five percent goes back to the IDF. See 2007-2011 MLB Basic Agreement art. XXIII, § H, available at http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf (last visited Mar. 29, 2008).

57. Glazer, *supra* note 47 at 365.

58. *Id.*

59. *Id.* Congress finally acquiesced by passing the Curt Flood Act in 1998. *Id.* at 365 n.166.

60. It is important to note here that a new MLB CBA was recently negotiated and will be in effect through 2011. While some minor changes were made from the 2003 agreement, most of that agreement incorporated into the new one. Changes of note include increasing the luxury tax by \$40 million, eliminating deadlines for free agents to sign with their former teams, elimination of the ability of a player who was traded in the middle of a multi-year contract to demand a trade, and the ability of teams who are unable to sign their first-round amateur draft choices to be compensated with comparable choices in the subsequent year's draft. See Barry M. Bloom, *MLB, Union Announce New Labor Deal*, MLB.com, Oct. 25, 2006, http://mlb.mlb.com/news/article.jsp?ymd=20061024&content_id=1722211&vkey=ps2006news&fext=jsp&c_id=mlb.

61. MLB CBA art. XX, § A.

62. *Id.* art. XX, § B(1).

a fifteen-day election period, beginning on the latter of October 15 or the day following the last game of the World Series, for a player choosing to pursue free-agency to give notice of his intentions to the Player's Association.⁶³ After free agency notice has been given to the Association, the player is available to meet with any team to discuss the possibility of signing a contract.⁶⁴ Once the free agency election period has expired, the player can then negotiate and contract with any team he chooses.⁶⁵ However, if the player has not contracted with another team prior to December 1 of that year, the former club of that player has the right to proceed to salary arbitration and retain the player for the upcoming season.⁶⁶ If the player does sign a contract with a new club following the election period, the player's former club is entitled to compensation in the form of amateur draft picks.⁶⁷

There is no maximum player salary or salary cap, though there are established minimum player salaries as well as a unique system for arbitration. Salary arbitration, without the consent of the other party, is available to any club or any player with three to six years of service in MLB.⁶⁸ Additionally, a player with two to three years of service is eligible for arbitration if he has accumulated at least eighty-six days of service during the immediately preceding season and ranks in the top 17% in total service in that class of players that have two to three years of service with at least eighty-six days of service in the preceding season.⁶⁹ The arbitration process is as follows: After the player or club has submitted notice of the intent to pursue arbitration, the player and club exchange the figures that each side will submit for arbitration.⁷⁰ If the club submits the matter to arbitration, the player has seven days after receipt of the club's proposed figure to withdraw from arbitration (and thus continue performance at the rate contracted).⁷¹ Submissions to arbitration are made between January 5 and January 15 of each year, and the hearings are held between February 1 and February 20.⁷² The arbitration hearings are typically held before a three-person panel.⁷³ The arbitrators are selected annually by the MLB Player's Association and the MLB Labor Relations Department ("LRD"), and these two groups designate one arbitrator to serve as the panel chair.⁷⁴ The procedure of the actual hearings is unique. The player and club each submit a salary figure, along with a contract for the player's services that is com-

63. *Id.* art. XX, § B(2)(a).

64. *Id.* art. XX, §§ B(2)(a) & (b).

65. *Id.* art. XX, § B(2)(c).

66. *Id.* art. XX, § B(3).

67. *Id.* art. XX, § B(4)(a).

68. *Id.* art. VI, § F(1).

69. *Id.* art. VI, § F(1).

70. *Id.* art. VI, § F(3). The clubs are bound by special exceptions from maximum salary reduction rules in the CBA that provide that the club must submit a salary figure for arbitration that is at least 80% of the player's previous year salary and earned performance bonuses (or at least 70% of his salary and earned performance bonuses for the previous two years), unless that player received an increase of at least 50% of his previous year's salary in an arbitration proceeding in the immediately preceding year. *Id.*

71. *Id.* art. VI, § F(4).

72. *Id.* art. VI, § F(5).

73. *Id.* art. VI, § F(7).

74. *Id.*

plete except for the blank that would normally include the player's salary.⁷⁵ "The hearings [are] conducted on a private and confidential basis."⁷⁶ Each of the parties to the case is permitted just "one hour for initial presentation and one-half hour for rebuttal and summation."⁷⁷ The arbitration panel is allowed to consider as criteria for its decision "[1] the quality of the Player's contribution to his Club during the past season . . . [2] the length and consistency of his career contribution, [3] the record of the Player's past compensation, [4] comparative baseball salaries . . . [5] the existence of any physical or mental defects on the part of the Player, and [6] the recent performance record of the Club including but not limited to its League standing and attendance as an indication of public acceptance . . ."⁷⁸ The arbitrators may not consider as criteria "(i) The financial position of the Player and the Club [including the competitive balance tax consequences]; (ii) Press comments, testimonials or similar material bearing on the performance of either the Player or the Club . . . (iii) Offers made by either the Player or the Club prior to arbitration; (iv) The cost to the parties of their representatives . . . [or] (v.) Salaries of other sports or occupations."⁷⁹ After considering the allowed relevant criteria for determining the player's value, the arbitration panel renders a decision, awarding either the player's or the club's submission within twenty-four hours.⁸⁰ The arbitration award is an either/or proposition, thus the process is sometimes termed "final offer" arbitration.⁸¹ One submission or the other must be chosen, and the decision is reached without issuance of an opinion.⁸² The Players' Association and the LRD are initially informed only of the award and not how the panel members voted.⁸³

MLB also uses arbitration in its procedure for settling "grievances."⁸⁴ A grievance within the CBA is defined as "a complaint which involves the existence or interpretation of, or compliance with, any agreement, or any provision of any agreement, between the [Players'] Association and the Clubs or any of them, or between a Player and a Club."⁸⁵ This procedure requires a player to file a written notice of a grievance to his club's designated representative no later than forty-five days after the facts of the matter became known.⁸⁶ Within ten days of the player's notice, the club's representative makes a decision on the matter and then furnishes that decision in writing to the Players' Association.⁸⁷ The representative's decision is then considered final, unless the player appeals the decision

75. *Id.* art. VI, § F(6).

76. *Id.* art. VI, § F(9).

77. *Id.*

78. *Id.* art. VI, § F(12)(a).

79. *Id.* art. VI, § F(12)(b).

80. *Id.* art. VI, § F(5).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* art. XI.

85. *Id.* art. XI, § A(1)(a). The definition of a grievance is pretty well comprehensive of any dispute that might occur, although it does list complaints regarding the players' benefit plan and dues as exempt from this procedure, as well as actions taken with respect to a player by the commissioner involving "the integrity of the game." *Id.*

86. *Id.* art. XI, § B.

87. *Id.*

within fifteen days.⁸⁸ If the player elects to appeal, the Association and a designated representative of the LRD discuss the grievance, after which the LRD representative issues an opinion to the Association.⁸⁹ Once again, if the player does not appeal this decision within fifteen days, the matter is considered settled.⁹⁰ However, if the player appeals this decision, either the player or the association may appeal to the Panel Chairman for impartial arbitration.⁹¹ Upon receipt of notice for appeal, the Panel Chairman will set a time and date for a hearing, not to be more than twenty days from the receipt of notice.⁹² The hearings are then heard by an arbitration panel and conducted in accordance with Rules of Procedure set out in the CBA.⁹³ The hearings are informal, and begin by first allowing the initiating party to present its case, and then allowing all interested parties the opportunity to be heard.⁹⁴ Legal rules of evidence do not apply to the proceedings, so that all evidence desired to be offered by the parties is allowed, and the Panel Chairman judges its relevancy and materiality.⁹⁵ Additionally, the Panel Chairman may request that the parties produce additional evidence that the chairman deems necessary to understanding and adjudicating the dispute.⁹⁶ Following a determination by the panel, two copies of the written decision are given to each party.⁹⁷ The panel's decision is considered the full and final disposition of the matter.⁹⁸

III. NBA: THEN & NOW

The National Basketball Association (NBA) was founded in 1949, when the remaining six teams in the National Basketball League (NBL) combined with the Basketball Association of America (BAA).⁹⁹ In 1954, Boston Celtics star Bob Cousy attempted to organize NBA players, becoming the first president of the National Basketball Players Association (NBPA).¹⁰⁰ At that time, the NBA had no minimum wage, no health benefits, no pension plan, no per diem, and the average player salary was \$8,000.¹⁰¹ From 1957-58, the NBA first began to enter into discussions with the NBPA.¹⁰² But it was not until 1964, when the players threatened to strike for the first televised NBA All-Star game, that the NBA recognized

88. *Id.*

89. *Id.* Grievances involving more than one Club or a player not under contract can be filed to begin at this stage. *Id.*

90. *Id.* Note that there are also special procedures for grievances necessitating a medical expert. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* (The Rules are contained in Appendix A of the Agreement).

94. *Id.* app. A, §§ 3 & 6.

95. *Id.* app. A, § 8.

96. *Id.*

97. *Id.* app. A, § 13.

98. *Id.* art. XI, § B.

99. NBA.com: Powerful Lakers Repeat, <http://www.nba.com/history/season/19491950.html> (last visited Mar. 3, 2008).

100. NBA Player's Association: NBPA History, <http://nbpa.com/history.php> (last visited Mar. 3, 2008).

101. *Id.*

102. *Id.* These discussions could not be termed "negotiations," as the NBA had not yet recognized the NBPA as the voice of the players.

the NBPA as the exclusive collective bargaining representative of the players.¹⁰³ Negotiations, and the CBA that followed, resulted in the players receiving an eight dollar per diem and a pension plan (albeit funded in part by the players themselves).¹⁰⁴ “In 1976, the NBA and NBPA entered into a . . . settlement agreement which [changed] a number of . . . operation[s in] the NBA, including a modification of the college draft and [the] institution of the right of first refusal.”¹⁰⁵ This agreement was known as the Robertson Settlement Agreement (RSA) and was set to expire at the end of the 1986-87 season.¹⁰⁶ The RSA eliminated the “reserve” or “option” clauses that, like those clauses that were common in the old days of the MLB, would bind a player to his team after his contract had expired.¹⁰⁷ Concurrent with the adoption of the RSA, the NBA and NBPA entered into a multi-year CBA, which incorporated the substantive terms of the RSA and would be in effect until 1979.¹⁰⁸ In 1980, the parties sought to preserve the status quo, and “executed a two-year CBA expressly incorporating the terms of the RSA.”¹⁰⁹ In 1983, many NBA teams were experiencing financial difficulty, both spending and losing a lot of money.¹¹⁰ As a result, the NBPA and the Commissioner decided to implement a salary cap in order to create a salary structure capable of accommodating the interests of both sides.¹¹¹ The cap was to be the first of any kind seen in professional sports, and the decision was predictably met with huge opposition from the players.¹¹² Though the players challenged the cap in court,¹¹³ they ultimately “yielded to financial pressure and agreed to institute [a] salary cap to restore the league’s financial health.”¹¹⁴ The salary cap that was ultimately approved by the players in 1983 called for a sharing of league revenues, appropriating 53% to the players.¹¹⁵ The salary cap also limited the amount of compensation that teams could offer new players, regardless of whether the new player was a free agent or a rookie.¹¹⁶ Additionally, the salary cap provided for a minimum total team payroll and a predetermined cap for rookie salaries.¹¹⁷ Along with the salary cap, the 1983 agreement included the “Larry Bird Exception.”¹¹⁸ The Larry

103. *Id.*

104. *Id.*

105. Michelle Hertz, *The National Basketball Association and the National Basketball Players Association Opt to Cap Off the 1988 Collective Bargaining Agreement with a Full Court Press*: In re Chris Dudley, 5 MARQ. SPORTS L.J. 251, 252 (1995).

106. *Id.* The agreement was named the “Robertson Settlement Agreement” after Oscar Robertson. Robertson was the president of the NBPA until 1974, and the agreement came after a class action lawsuit instituted by the players challenging some of the League’s actions as violative of antitrust laws. *See id.*; National Basketball Players Association: NBPA History, *supra* note 100 (in the 1964 and 1970 sections).

107. National Basketball Players Association: NBPA History, *supra* note 100.

108. *See* Hertz, *supra* note 105, at 252-53.

109. *Id.* at 253.

110. *See* Melanie Aubut, *When Negotiations Fail: An Analysis of Salary Arbitration and Salary Cap Systems*, 10 SPORTS LAW. J. 189, 218 (2003).

111. *Id.* at 218-19.

112. *Id.* at 220-21.

113. *Id.* at 253 (citing *Lanier v. NBA*, 82 Civ. 4935 (S.D.N.Y.)).

114. *See* Hertz, *supra* note 105, at 253.

115. NBPA History, *supra* note 100.

116. *See* Aubut, *supra* note 110, at 219.

117. *Id.* *See infra* footnotes 139-142 and accompanying text for a discussion of rookie contracts.

118. Aubut, *supra* note 110, at 219.

Bird exception allows teams to exceed the salary cap when signing free agents in limited circumstances.¹¹⁹ Basically, the exception provides teams resigning their veteran free agents the ability to offer up to 12.5% more of the player's salary per season, regardless of the salary cap.¹²⁰ The effect of the luxury tax is to limit team abuse of salary cap exceptions, such as the Larry Bird exception, by doubling the expense of excess spending and redistributing that penalty amount to those teams not exceeding the luxury tax threshold.¹²¹ To deter teams from using this exception to substantially exceed the salary cap, the luxury tax penalty was set to be 100% of any average.¹²²

At the end of that season, the players sued the owners once again on anti-trust grounds.¹²³ Though the lawsuit was ultimately settled out of court, the 1988 CBA was a landmark lawsuit for professional sports.¹²⁴ The 1988 agreement was an incorporation of the Bridgeman Settlement Agreement which brought the first unrestricted free agency to any professional sports league, among other player-favorable provisions, and was set to run through 1994.¹²⁵ At the expiration of that agreement, the players again unsuccessfully sought relief in the courts, again challenging the salary cap, the college draft, and the right of first refusal.¹²⁶ However, the parties entered into a no-lockout, no-strike agreement which effectively extended the CBA through the end of the 1994-95 season.¹²⁷ After a short lock-out in 1995, the NBPA and NBA agreed to a new CBA that was in effect until 1998.¹²⁸ In 1998, the NBA exercised its option to terminate the 1995 agreement and attempted to roll back salaries and institute a hard salary cap.¹²⁹ The NBPA refused to submit to these demands, resulting in the longest lockout and work stoppage in NBA history.¹³⁰ The two sides finally reached an accord, and in 1999 a new six-year CBA was reached.¹³¹ The latest CBA was reached in July 2005 and will remain in effect until the end of the 2010-2011 season.¹³²

As previously stated, the NBA was the first professional sports league to establish a salary cap. The current NBA CBA defines the term "salary cap" as the "maximum allowable Team Salary for each Team for a Salary Cap Year," and this

119. *Id.*

120. *Id.* (citing Larry Coon, *NBA Salary Cap FAQ*, <http://members.cox.net/lmcoon/salarycap.htm#16> (last visited Mar. 1, 2008) and 1999 NBA/NBPA CBA art. VII, §5(a)). Note that the application of the Larry Bird exception has several subtle yet complex variations that are outside the scope of this article. For a thorough explanation of this exception, see Larry Coon, *NBA Salary Cap FAQ*, <http://members.cox.net/lmcoon/salarycap.htm#16> (last visited Mar. 1, 2008).

121. See Aubut, *supra* note 110, at 219-20.

122. *Id.* at 220.

123. NBPA History, *supra* note 100 (Under the 1987-88 section).

124. *Id.*

125. *Id.*

126. *Id.* (Under the 1994 section).

127. *Id.* This agreement was made to ensure the 1994-95 season would be played in its entirety. *Id.*

128. *Id.* (Under the 1995 section).

129. *Id.* (Under the 1997-98 section).

130. *Id.* The lockout extended from late summer of 1998 to January 20, of 1999. *Id.*

131. *Id.* The CBA also included an owner option to extend to a seventh season, which was exercised for 2004-05. *Id.*

132. 2005 NBA Player's Association Collective Bargaining Agreement art. XXXIX, § 1, available at http://www.nbpa.com/cba_articles.php (last visited Mar. 1, 2008) [hereinafter 2005 NBA CBA]. Again, the owners have the option of extending the CBA by one year to include the 2011-12 season. *Id.* art. XXXIX, § 2.

amount is determined each year as a percentage of projected operating revenues.¹³³ The current salary cap provides for a 51% share of revenues, calculated as a percentage of projected Basketball Related Income (BRI) for the current salary cap year, minus projected benefits, divided by the number of teams scheduled to play in the NBA during the salary cap year.¹³⁴ The CBA also mandates a yearly minimum team salary, which is calculated as 75% of that year's salary cap.¹³⁵ In addition to the salary cap and minimum salary limitations, there is also a luxury tax that mandates a dollar-for-dollar penalty tax for any team spending over the "Tax Level," which is also defined in the CBA.¹³⁶ This amount differs from the amount listed as the salary cap because the NBA has what is referred to as a "soft" salary cap, meaning that there are exceptions that allow a team to exceed the cap. For example, the NBA salary cap for 2006-07 was \$53.135 million, while the tax level was not breached until teams passed the \$65.42 million spending mark.¹³⁷ Therefore, teams could spend in excess of \$12 million over the stated salary cap before they would be taxed, provided their spending fell within an approved exception, most notably the Larry Bird exception.¹³⁸

While the free agency systems of the NBA and MLB are similar, the NBA's system differs from MLB in several respects. While it is easiest to think of unrestricted free agency as the rule and restricted free agency as the exception, the restricted form plays a major role in the NBA. Understanding restricted free agency begins with determining whether a rookie player was signed to a "Rookie Scale Contract" or a "regular contract."¹³⁹ Rookie Scale Contracts are for those players who are drafted in the first round of the NBA Amateur draft.¹⁴⁰ These "rookies" are slotted into predetermined contract amount scale (determined by each player's draft position) and are signed to two-year contracts that give the signing team an option to renew for a third and fourth year.¹⁴¹ These rookie players become unrestricted free agents after their third season if the team does not choose to exercise the option for the fourth season.¹⁴² If the team does choose to exercise the option for the fourth year, the team may then make what is termed a "qualifying offer" for the player's service for a new contract. By making a qualifying offer, the player becomes a restricted free agent, and his current team has the right of first refusal on competing offers.¹⁴³ This offer is a one-year proposition,

133. *Id.* art. I, §§§ ggg, hhh, mmm. A salary cap year begins July 1 and ends the following June 30. *Id.* art. I, § hhh.

134. *Id.* art. VII, § 2(a)(1). "Basketball Related Income" means the aggregate operating revenues received by the NBA or any of its subsidiaries during the salary cap year. *Id.* art. VII, § 1(a).

135. *Id.* art. VII, § 2(b)(1).

136. *Id.* art. VII, §§ 12(a)(17) & (f).

137. NBA News, http://www.nba.com/news/NBA_salarycap_060711.html (last visited Mar. 1, 2008).

138. See Aubut, *supra* note 110, at 219-20. The Larry Bird exception is termed the "Veteran Free Agent Exception" in the CBA. Other exceptions include the "Existing Contracts Exception," the "Disabled Player Exception," the "Bi-Annual Exception," the "Mid-level Salary Exception," the "Rookie Exception," the "Minimum Player Salary Exception," and the "Traded Player Exception." See 2005 NBA CBA art. VII, § 6.

139. 2005 NBA CBA art. VIII, § 1.

140. *Id.*

141. *Id.* art. VIII, § 1(a).

142. *Id.* art. XI, § 4(a)(i).

143. *Id.* art. XI, § 5(a). Other than the specific provisions for Rookie Scale Contracts, the rest of the restricted free agency rule apply to all veteran free agents with three or fewer years of NBA service. *Id.* art. XI, § 4(b).

and if accepted, will allow the player to become an unrestricted free agent after that year of service.¹⁴⁴ If another team wishes to sign that player for a higher amount than what his current team has offered as its qualifying offer, they will submit an offer sheet that provides terms for a contract lasting for at least two years. If the player wants to accept the offer from the other team, he would sign the offer sheet, and his current team then would have seven days to match the offer and keep the player.¹⁴⁵ If that team fails to do so, the player is deemed to have automatically entered a contract with the new team at the offered rate.¹⁴⁶ Likewise, if the current team chooses to exercise its right of first refusal and match the offer, the exercise of that right binds the player and the team to a new contract at the offered terms.¹⁴⁷ Additionally, if the player's current team submits what is termed a "Maximum Qualifying Offer," it must be for a minimum of six-years and all guaranteed compensation.¹⁴⁸ Maximum qualifying offers are based on the provision restricting the maximum annual salary a player may receive, which is defined as a certain percentage of the total salary cap of each team.¹⁴⁹ Thus, a maximum qualifying offer states the player's first year salary as the maximum annual salary for players with his years of service, with 10.5% increases per year for the rest of the contract.¹⁵⁰ This offer puts other teams who would consider exceeding this maximum contract offer in a difficult position, because unlike the player's current team, new teams would not qualify for a salary cap exception with respect to that player and thus all of the money offered would count against the salary cap.¹⁵¹ Finally, unlike the MLB, there is no compensation for teams whose free agents sign with new teams.¹⁵²

Like Major League Baseball, the NBA also employs an arbitration procedure for settling grievances, as well as a system arbitrator to settle any and all disputes relating to the specific articles of the CBA.¹⁵³ The NBA grants a "Grievance Arbitrator" the exclusive jurisdiction to settle "all disputes involving the interpretation or application of, or compliance with, the provisions of [the CBA] or the provisions of a Player Contract, including a dispute concerning the validity of a Player Contract."¹⁵⁴ The grievance arbitrator also has jurisdiction to settle disputes relating to the various trusts created by the NBA and NBPA for the benefit of the players.¹⁵⁵ The grievance arbitrator is appointed by joint agreement of the NBA

144. Coon, *supra* note 120 (number 36). If the qualifying offer is neither accepted nor withdrawn and the time for accepting it passes, the current team's right of first refusal continues. 2005 NBA CBA art. XI, § 4(c)(ii).

145. Coon, *supra* note 120 (number 36).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* See also 2005 NBA CBA art. II, § 7 (defining the maximum annual salary). Note that the maximum annual salary is also dependent on how many years the player has been in the NBA.

150. 2005 NBA CBA art. XI, § 4(a)(ii)(B).

151. See *id.*; Coon, *supra* note 120 (number 19).

152. *Id.* art. XI, § 1.

153. *Id.* art. XXXI-XXXII.

154. *Id.* art. XXXI, § 1(a)(i). Any dispute involving the provisions CBA or player contracts are defined in this section as a "grievance." *Id.*

155. *Id.* art. XXXI, § 1(a)(ii). These trusts include the National Basketball Association Supplemental Benefit Plan and the Agreement and Declaration of Trust Establishing the National Basketball Players Association/National Basketball Association Labor-Management Cooperation and Education Trust. *Id.*

and the NBPA, as is any successor grievance arbitrator that may be necessary due to the discharge or resignation of the original arbitrator.¹⁵⁶ The process used for grievance arbitration may be initiated by a player, a team, the NBA, or the players association.¹⁵⁷ Before the process may be initiated, the party with the grievance must first discuss the matter with the opposing party in an attempt to settle.¹⁵⁸ The grievance must then be initiated within thirty days of the occurrence upon which the grievance is based (or within thirty days of when the party initiating the grievance first learns of the facts of the matter, whichever is later).¹⁵⁹ The party initiating the grievance then files notice with the opposing party that they are initiating a grievance.¹⁶⁰ Upon at least thirty days of written notice to the other party, the NBA and NBPA may schedule a hearing on a date that is convenient to all the parties of the dispute.¹⁶¹ The parties then submit, no later than seven days prior to the hearing, a “joint statement of the issue(s) of the dispute.”¹⁶² Then, “no[] later than three (3) business days prior to the hearing, the parties shall exchange witness lists, relevant documents and other evidentiary materials, [as well as] citations of legal authority that each side intends to rely on [at the hearing].”¹⁶³ The arbitrator may also allow any party wishing to file a pre- or post-hearing brief to do so at least three business days before the hearing, unless an opposing party can show that it is unreasonable under the circumstances.¹⁶⁴ All hearings are then “conducted in accordance with the Labor Arbitration Rules of the American Arbitration Association,” as long as those rules do not conflict with the provisions of the CBA.¹⁶⁵ Following the hearing, the arbitrator is instructed to render a decision as

156. *Id.* art. XXXI, § 6. The grievance arbitrator is set to serve for the duration of the CBA, although he may resign or be discharged by either the NBA or NBPA upon notice to the arbitrator and the other party. *Id.* In the event of a notice of discharge, the arbitrator maintains jurisdiction to settle disputes for which a date has been set or are filed in the thirty days preceding the notice of discharge. *Id.*

157. *Id.* art. XXXI, § 2(a).

158. *Id.* art. XXXI, § 2(b).

159. *Id.* art. XXXI, § 2(c).

160. *Id.* art. XXXI, § 2(d):

(i) a player or the Players Association may initiate a Grievance (A) against the NBA by filing written notice . . . with the NBA, and (B) against a Team, by filing written notice . . . with the Team and the NBA; (ii) a team may initiate a Grievance by filing written notice . . . with the Players Association and furnishing copies of [the] notice to the player(s) involved and to the NBA; and (iii) the NBA may initiate a Grievance by filing written notice . . . with the Players Association and furnishing copies of [the] notice to the player(s) and teams involved.

Id.

161. *Id.* art. XXXI, § 3(a). Once a hearing is scheduled, neither the NBA nor NBPA may postpone it more than once. *Id.* art. XXX, § 3(d). In the event that a hearing is postponed, the party seeking the postponement pays the arbitrator’s postponement fee. *Id.* art. XXX, § 3(c). However, if the opposing party objects to the postponement and the arbitrator finds the request was for good cause, the parties then share the postponement fee. *Id.*

162. *Id.* art. XXXI, § 4(a). If the parties cannot agree on a joint statement, each party may issue a separate statement that is given to the opposing party at the same time as it is given to the grievance arbitrator. *Id.*

163. *Id.* art. XXXI, § 4(c). Unless the proffering party has good cause, the parties may not rely on any material or witnesses not identified and given to the opposing party in advance of the hearing to prove its case. *Id.*

164. *Id.* art. XXXI, § 4(d).

165. *Id.* art. XXXI, § 3(g). Additionally, the arbitrator has jurisdiction and authority only to go so far in resolving disputes, including the ability to: “(i) interpret, apply, or determine compliance with the provisions of [the CBA]; (ii) interpret, apply or determine compliance with the provisions of Player Contracts; (iii) determine the validity of Player Contracts; (iv) award damages; (v) award declaratory

soon as possible.¹⁶⁶ The decision is to be accompanied by a written opinion, or if both the NBA and NBPA agree, a written opinion may follow soon after the decision.¹⁶⁷ The arbitrator's decision is considered the full and final disposition, binding all the parties to the matter.¹⁶⁸

In addition to "grievance arbitration," the NBA also has what is termed "system arbitration."¹⁶⁹ The NBA uses system arbitration to resolve disputes arising out of the CBA provisions relating to some of the structural provisions of the CBA such as the salary cap, minimum team salary, rookie scale contracts, the NBA draft, free agency, and league expansion.¹⁷⁰ A system arbitrator is selected by the NBA and NBPA jointly, and serves for continually renewable two-year terms.¹⁷¹ Like grievance arbitration, the parties to a system dispute must first attempt to settle the matter prior to initiating arbitration proceedings.¹⁷² However, unlike grievance arbitration, system arbitration may only be initiated by the NBA or NBPA, and the initiation must be started within three years of the date of the act upon which the system arbitration is based, rather than the thirty-day deadline for grievances.¹⁷³ The party initiating the arbitration then provides notice to both the system arbitrator and the opposing party, after which time a hearing may be commenced in as soon as seventy-two hours.¹⁷⁴ Upon notice of arbitration, the arbitrator has the authority to order the production of documents, conduct pre-hearing dispositions, and compel the attendance of witnesses to the extent necessary to make findings of fact and issue a decision.¹⁷⁵ As in grievance arbitration, the arbitrator then issues a decision, which may be accompanied by a full written opinion of the grounds upon which the decision is based.¹⁷⁶ This decision is typically the final resolution of the matter, though system arbitration does include the availability of an appeal process in most cases.¹⁷⁷ Appeals are heard before a three-member panel chosen jointly by the NBPA and the NBA.¹⁷⁸ A party seeking to appeal the decision of a system arbitrator must serve upon the other party and file with the system arbitrator notice of appeal within ten days of the decision appealed.¹⁷⁹ This service and filing of notice of appeal automatically stays the system arbitrator's decision pending the outcome of the appeal.¹⁸⁰ The appeal process begins with the parties setting a briefing schedule,¹⁸¹ after which time each party has between fifteen and twenty-five days to serve the brief to the op-

relief . . ." *Id.* art. XXXI, § 5(b). However, he may only decide questions of procedural arbitrability, and he may not modify terms of the CBA or any player contract. *Id.*

166. *Id.* art. XXXI, § 5(a).

167. *Id.*

168. *Id.*

169. *Id.* art. XXXII.

170. *Id.* art. XXXII, § 1.

171. *Id.* art. XXXII, §§ 6(a)-(b).

172. *Id.* art. XXXII, § 2(b).

173. *Id.* art. XXXII, §§ 2(c)-(d).

174. *Id.* art. XXXII, §§ 2(d) & 5.

175. *Id.* art. XXXII, § 3(c).

176. *Id.* art. XXXII, § 3(b).

177. *Id.* art. XXXII, § 3(d).

178. *Id.* art. XXXII, § 7.

179. *Id.* art. XXXII, § 3(d).

180. *Id.* art. XXXII, § 8(a).

181. *Id.* art. XXXII, § 8(b). The schedule may be agreed upon by the NBA and NBPA, or by the appeals panel if the parties are unable to come to an agreement. *Id.*

posing party and file the brief with the appeals panel.¹⁸² The appeals panel then schedules oral arguments on the parties' briefs between five and ten days after the filing.¹⁸³ The appeals panel then reviews the system arbitrator's findings of fact and conclusions of law and issues a written decision on the matter within thirty days of that argument.¹⁸⁴ This decision constitutes the full, final, and complete resolution of the matter.¹⁸⁵

IV. NFL: THEN & NOW

The National Football League (NFL) has been in existence since 1922,¹⁸⁶ although the NFL as we now know it did not exist until the 1966 merger of the American Football League (AFL) and the existing National Football League (NFL).¹⁸⁷ In 1956, the players of the NFL organized to back a representative body, the National Football League Players Association (NFLPA).¹⁸⁸ At that time, the players had virtually no bargaining power, and although several proposals, such as a minimum salary requirement, were made to the owners, those proposals were likely not even considered.¹⁸⁹ The NFLPA continued to be a fairly weak organization after the AFL-NFL merger until 1970, when the players first threatened to strike.¹⁹⁰ Though the players' threat was essentially empty,¹⁹¹ the NFLPA and the owners soon reached a four-year agreement (the 1968 Agreement) providing for a minimum wage and an improved pension and insurance plan.¹⁹² The agreement solidified the NFLPA as an established entity and formidable bargaining force, and the union then moved for larger concessions. In 1974, the NFLPA challenged the 1968 Agreement's "Rozelle Rule," which required any team signing a free agent from another team to compensate that team in the form of draft picks and players.¹⁹³ In *Mackey v. National Football League*,¹⁹⁴ the Eighth Circuit Court of Appeals found that the Rozelle rule violated the Sherman Act by creating an unreasonable restraint on trade.¹⁹⁵ The adverse court ruling prompted owners to negotiate with the NFLPA, and in 1977 a new CBA was

182. *Id.*

183. *Id.*

184. *Id.* art. XXXII, §§ 8(b)-(c).

185. *Id.* art. XXXII, § 8(c).

186. NFL – History, 1921-1930, <http://www.nfl.com/history/chronology/1921-1930> (last visited Mar. 2, 2008). This was following a name change from the American Professional Football Association.

Id.

187. NFL – History, 1961-1970, <http://www.nfl.com/history/chronology/1961-1970> (last visited Mar. 2, 2008).

188. NFL Players Association: History, The Beginning-1956, <http://www.nflplayers.com/user/template.aspx?fmid=182&lmid=239&pid=0&type=c> (last visited Mar. 29, 2008).

189. *Id.* The representative for the NFLPA was quoted as saying that when he went to New York to present their proposals, "We never did get a chance to meet with the owners and we never got a response from any of the proposals at that time." *Id.*

190. *Id.*

191. *Id.* The players were in a weak bargaining position, and after the owners threatened to cancel the season the strike ended after only two days. *Id.*

192. *Id.*

193. Aubit, *supra* note 110, at 212.

194. 543 F.2d 606 (8th Cir. 1976).

195. *Id.* at 623.

formed.¹⁹⁶ The new CBA included increased benefits, arbitration of grievances, and reforms of the waiver system and the option clause.¹⁹⁷ In 1987, the players attempted to negotiate a new CBA that allowed for more meaningful free agency, but the inability to agree to terms led to a strike season.¹⁹⁸ The owners rendered the players' strike unsuccessful by employing replacement players and allowing players to cross the picket line and play under the existing terms, which many players did.¹⁹⁹ Recognizing the situation as futile, the players ended the strike and filed a lawsuit.²⁰⁰ In 1993, after five years of litigation, the NFL reached a settlement that created a new CBA with a new system of free agency, a salary cap, and a salary floor.²⁰¹ The 2006 NFL CBA maintains these provisions and is to remain in effect through the 2012 season.²⁰²

Like the NBA, the NFL has a salary cap and a guaranteed minimum salary provision.²⁰³ However, unlike the "soft" salary cap of the NBA, the NFL salary cap does not allow teams to use exceptions to exceed the cap. Thus, the NFL's salary cap is termed a "hard" cap, and attempted violations of the cap may be voided or result in stiff penalties.²⁰⁴ While the current CBA has prescribed actual dollar figure amounts for the 2006 and 2007 seasons, the balance of the agreement defines the salary cap in terms of a percentage of the projected total league revenues, minus projected total league benefits, divided by the number of NFL teams.²⁰⁵ The agreement, after defining the percentage upon which the cap is based, allows for future adjustments if the salary cap does not match the agreed percentage after the season is over and the actual numbers are tallied.²⁰⁶ The agreement also provides an exception if the final numbers substantially deviate from the projected percentage of profit that the cap is based upon.²⁰⁷ For instance, the CBA provides that an adjustment (up or down) will be made to the 2009 cap if the 2007 total league-wide cash player costs exceed or fall below a triggering percentage of the total revenues for that year.²⁰⁸ This provision ensures that the cap will not begin to substantially deviate from the bargained-for percentage of profits that either the players or owners actually receive. The exception/guarantee provisions in the agreement are an extension of this adjustment formula and exist

196. NFL Players Association: History, The 1970's-AFL and NFL Players Associations Merge, <http://www.nflplayers.com/user/template.aspx?fmid=182&lmid=239&pid=1036&type=c> (last visited Mar. 28, 2008).

197. *Id.*

198. Aubut, *supra* note 110, at 212. The right of first refusal and the compensation system limited player movement. *Id.*

199. *Id.*

200. *Id.* See also Powell v. NFL, 678 F. Supp. 777 (D. Minn. 1978).

201. Aubut, *supra* note 110, at 213.

202. 2006 NFL CBA art. I, § 4(aw), available at <http://www.nflplayers.com/user/template.aspx?fmid=181&lmid=231&pid=507&type=c> (last visited Apr. 18, 2008) (membership required to access the full CBA).

203. *Id.* art. XXIV.

204. *Id.* art. XXV, § 6(a). See also Aubut, *supra* note 110, at 216 (mentions "hard" salary cap).

205. 2006 NFL CBA art. XXIV, § 4(a). The agreement does provide that the last year of the agreement will be an uncapped year, though the same provision was included in previous CBAs and the parties have renegotiated or extended the agreements without ever actually going to an uncapped year. *Id.*

206. *Id.* art. XXXII, § 4(b).

207. *Id.* art. XXIV, § 4(d).

208. *Id.* art. XXIV, § 4(b)(i).

to ensure that both the minimum salary guarantees and the cap have been followed once the actual dollars are received.²⁰⁹ For example, the guaranteed league-wide salary is set at 50% of total revenues.²¹⁰ If the final accounting reflects that the player compensation falls below that amount for a given year, then the teams must disburse the difference to the players.²¹¹ A “trigger/bail-out” provision of the agreement ensures that the minimum guarantee is further complied with, in that if the percentage of total revenue paid to the players stays at least at 56.074%, then the salary cap stays in effect for the duration of the agreement.²¹² However, if that amount falls below 46.868% in a given year, then there will be no salary cap for the league until the amount again breaks the 56.074% mark for a year.²¹³ Without these provisions, owners could constantly pay the players based on the lowest projection of league revenues, and then pay whatever difference there was up to the league-wide minimum every year.

The NFL has a relatively complex system of free agency. The system is best understood by dividing the free agents into restricted or unrestricted categories, with sub-categories of “transitional” and “franchise” players.²¹⁴ Unrestricted free agents consist of those players whose contracts have expired and have completed five or more accrued seasons,²¹⁵ or four or more accrued seasons in any capped year.²¹⁶ Such players have the right to negotiate and sign a contract with any team that the player chooses.²¹⁷ The only caveat to this unrestricted negotiation is that if the player has not signed with another team by the time NFL training camp begins or July 22, whichever is later, he may only sign a one-year contract with his current team with a pay of at least 110% of his prior year salary.²¹⁸ The player then has until the tenth week of the NFL regular season to sign this contract, or he is prohibited from playing in the NFL that year and will begin the next free agency period as an unrestricted free agent once again.²¹⁹

Restricted free agents fall into two categories: (1) players with less than three accrued seasons; and (2) players with at least three but less than five accrued seasons.²²⁰ A player “with less than three Accrued Seasons whose contract has expired may . . . sign a Player Contract only with his Prior Club,” if that club offers him a one-year contract on or before the March 1 deadline.²²¹ If the prior club makes no such offer, the player then becomes an unrestricted free agent, available to negotiate and sign with any club.²²² A player with at least three but less than five accrued seasons has the right to sign with any club just as an unrestricted free

209. See generally *id.* art. XXIV, § 4.

210. *Id.* art. XXIV, § 3.

211. *Id.*

212. *Id.* art. XXIV, § 2(a).

213. *Id.* art. XXIV, § 2(b).

214. Aubit, *supra* note 110, at 213.

215. 2006 NFL CBA, art. XIX, § 1(a). An “accrued season” is defined as each season a player was or should have been on full pay status for at least six or more regular season games. *Id.* art. XVIII, § 1(a).

216. *Id.* art. XIX, § 1(a).

217. *Id.*

218. *Id.* art. XIX, § 1(b)(i).

219. *Id.* art. XIX, §§ 1(b)(ii)-(iii).

220. *Id.* art. XVIII-XIX.

221. *Id.* art. XVIII, § 2.

222. *Id.*

agent would, but with restrictions.²²³ The main restriction includes giving the prior club a right of first refusal and/or draft choice compensation if that club tenders a qualifying offer on or before the first date of the free agency signing period.²²⁴ The CBA establishes the minimum qualifying offer that a current club must make in order to maintain their right of first refusal, though clubs may make offers in excess of that minimum amount to increase the amount of draft choice compensation that the team would receive if the player signs with a new team.²²⁵ For example, if a team makes the minimum qualifying offer to a player who was originally drafted in the fourth round, and a new team makes a higher offer, the current team has two options: (1) match the new team's higher offer and keep the player, or (2) allow the player to sign with the new team and receive a compensatory draft choice from that player's original draft round (in this example, a fourth round draft pick).²²⁶ If the current team's qualifying offer is in excess of the minimum allowable qualifying offer, thus placing the offer in a category requiring additional draft compensation, the cost to the new team for signing what was originally a fourth round draft choice could be as much as a first and third round draft choice.²²⁷ However, if the current club chooses not to make a qualifying offer to a player who would otherwise be a restricted free agent, that player will become an unrestricted free agent and able to sign with any new team he chooses.²²⁸

Two subsets of the NFL free agency system, "franchise" and "transition" player designations, further restrict player movement. Every year, a team is permitted to choose one player who would otherwise be a free agent to be a "franchise player."²²⁹ A team designating a franchise player has the option of two required tenders that will make the player an "exclusive" or "nonexclusive" franchise player.²³⁰ If the team offers the designated franchise player a one-year contract of at least the average of the top five salaries of that player's position as of the end of the restricted free agent signing period of *that year*, that player is an exclusive franchise player.²³¹ An exclusive franchise player may not negotiate or sign a contract with any new club.²³² To make a player a nonexclusive franchise player, a club must only offer a one-year contract of the greater of the average of the top five salaries of that player's position from *the prior year* or 120% of the player's salary from the prior year.²³³ If the team makes this designation, the player may still negotiate and sign a contract with a new team, but the former team must then be compensated in the form of two first round draft choices.²³⁴

Finally, if a team chooses to designate the same player with the franchise label for a third time, the required tender for that player is increased to either (1) the

223. *Id.* art. XIX, § 2(a).

224. *Id.* art. XIX, §§ 2(b)(i)-(ii). The signing period dates are determined by the league and the player's association every year by September 1st, and the period lasts at least forty-five days. *Id.* art. XIX, § 2(h).

225. *Id.* art. XIX, §§ 2(b)(i)-(ii).

226. *Id.* art. XIX, §§ 2(c)(i)-(ii).

227. *See id.*

228. *Id.* art. XIX, § 2(j).

229. *Id.* art. XX, § 1.

230. Aubut, *supra* note 110, at 215 (citing 2006 NFL CBA art. XX, §§ 1-2).

231. *Id.*

232. *Id.*; 2006 NFL CBA art. XX, § 1.

233. Aubut, *supra* note 110, at 215; 2006 NFL CBA art. XX, § 2(a)(i).

234. 2006 NFL CBA art. XX, § 2(a)(i).

average of the highest five salaries for the position with the highest average; (2) 120% of the average of the five highest salaries of the prior year at the player's position; or (3) 144% of the player's salary of the prior year, whichever is greater.²³⁵ NFL clubs also have the ability to designate up to two players per year as "transition" players.²³⁶ Once a club has designated a player as a transition player, that club is deemed to automatically have offered the player a one-year contract worth the greater of the average of the highest ten player salaries for the player's position from the previous year, or 120% of that player's prior year salary.²³⁷ A transition player maintains the right to negotiate a contract with any team he chooses, but his prior team gains the right of first refusal.²³⁸ And unlike the franchise player designations, if the prior team does not exercise its right of first refusal, that team is not entitled to draft choice compensation.²³⁹

The NFL also has an arbitration system in place for injury²⁴⁰ and non injury grievances.²⁴¹ The non-injury grievance procedure is in place for disputes that relate to the interpretation of, compliance with, and application of the provisions of the CBA, player contracts, and other rules and bylaws of the league.²⁴² The process begins when a player, club, the NFL Management Council, or the NFLPA files a written notice of the grievance with the opposing parties within forty-five days of the occurrence upon which the grievance is based.²⁴³ The parties to whom the notice is sent then have a week to answer the complaint by setting forth admissions to or denials of the facts alleged in the grievance.²⁴⁴ "If the answer denies the grievance, the specific grounds for denial [must be stated]."²⁴⁵ If the answer does not settle the grievance, any of the parties may appeal the grievance by filing a notice to the Notice Arbitrator and sending notice of appeal to the other parties involved.²⁴⁶ The appeals are then scheduled based upon a series of dates available to four separate arbitrators and are typically heard upon the next available date.²⁴⁷ "No later than ten (10) days prior to any hearing, each party [must send] to the other copies of all documents, reports and records relevant to the dispute."²⁴⁸ Failure to do so bars the party from offering that evidence at the hearing, although the opposing party will still have the opportunity to examine those documents and use them as it so desires.²⁴⁹ Following this disclosure, the parties have the oppor-

235. *Id.* art. XX, § 2(b).

236. *Id.* art. XX, § 3(a).

237. *Id.* art. XX, § 4(a).

238. *Id.* art. XX, § 3(b).

239. *Id.* See also *supra* text accompanying note 224.

240. *Id.* art. X, § 1. An "injury grievance" is defined as "a claim or complaint that, at the time a player's NFL Player Contract was terminated by a Club, the player was physically unable to perform the services required of him by that contract because of an injury incurred in the performance of his services under that contract." *Id.* While this is an important provision of the NFL CBA, especially due to the physical nature of the sport, the discussion of this process is outside the scope of this article.

241. *Id.* art. IX.

242. *Id.* art. IX, § 1.

243. *Id.* art. IX, § 2.

244. *Id.* art. IX, § 3.

245. *Id.*

246. *Id.* art. IX, § 4.

247. *Id.* art. IX, §§ 6-7.

248. *Id.* art. IX, § 5.

249. *Id.*

tunity to present all relevant evidence at the hearing—testimony and otherwise.²⁵⁰ After the presentation of evidence, either party may request post-hearing briefs, which each party will then simultaneously submit.²⁵¹ The arbitrator must then “issue a written decision within thirty days of the submission of briefs,” or sixty days of the end of the hearing, whichever is sooner.²⁵² The arbitrator’s decision is considered the full and final disposition of the dispute, binding all of the parties.²⁵³ One caveat to this procedure involves the “grievance settlement committee,” which consists of the Executive Director of the NFLPA and the Executive Vice President for Labor Relations of the NFL.²⁵⁴ This committee meets periodically to discuss pending grievances. If the committee so chooses, they may contact parties to a grievance and, with the parties’ consent, attempt to settle the grievance themselves.²⁵⁵ If the committee is successful, that settlement constitutes the full and final disposition of the matter.²⁵⁶

V. ACTUAL CBA EFFECTS ON ON-FIELD COMPETITION VS. PERCEPTION

Comparing the success of different professional sports leagues is a difficult task. Part of this difficulty stems from the different structures of the leagues—depending on the sport, regular season games vary from 164 to 16, league mandated roster limits range from 12 to 54, the number of playoff teams may be 16 or 8, and the playoff formats may be “sudden death” or best of seven-game series. The complexity of the comparison task is compounded by the lack of a uniform opinion on what constitutes success. Are champions more attractive in “Cinderella” or “Dynasty” form? Is the success of a league better measured by its weakest teams or strongest? The answer to such questions depends on the individual fan, though a popular opinion seems to be that parity is the goal, and that competitive balance is the best indicator of success.²⁵⁷ The NFL is generally viewed as the model of parity in professional sports, while the MLB has come to represent professional sports in its most dynastic form.²⁵⁸ This is due to the perception that any NFL team may become playoff eligible in any given year regardless of their market or win-loss record from the prior season, while poor performing MLB teams are deemed resigned to a perpetual state of mediocrity.²⁵⁹

250. *Id.* art IX, § 7.

251. *Id.*

252. *Id.* art IX, § 8.

253. *Id.*

254. *Id.* art IX, § 13.

255. *Id.*

256. *Id.*

257. See e.g., Branden Adams, *Streaks, Stats, and Minutiae*, THE HARVARD INDEPENDENT, Nov. 1, 2007, available at <http://www.harvardindependent.com/node/20> (last visited Mar. 3, 2008).

258. For example, Major League Baseball has currently has six teams who have not reached the playoffs in the last ten years, while every team in the NFL has made the playoffs at least once in that span except for the Houston Texans, who were founded in 2002. See e.g., Pro Football Hall of Fame: Playoff Results, http://www.profootballhof.com/history/release.jsp?RELEASE_ID=584 (last visited Mar. 3, 2008); Major League Baseball: History: Division Series Overview, http://mlb.mlb.com/mlb/history/postseason/mlb_ds.jsp (last visited Mar. 3, 2008).

259. See Pro Football Hall of Fame: Playoff Results, *supra* note 258; Major League Baseball: History: Division Series Overview, *supra* note 258.

The question remains whether these perceptions are justified. Considering the popular adage that only champions are remembered, a closer examination of each sport is necessary to determine whether a disparity exists in some sports as opposed to others or if that perception is unfounded. As previously stated, developing a uniform system of comparison is difficult due to the differences in the format and schedule of each league. However, one way to determine whether real competition exists within the various leagues is to examine the chance that any given team has to achieve a berth in the league's postseason playoff system. In examining five seasons of professional sports seasons from 2001-2005, the argument for the NFL system appears to be the most persuasive. In the NFL's 12-team playoff format, 25 of its current 32 teams (78.1%) became playoff eligible in the five year period.²⁶⁰ Of those teams that participated in the playoffs, only one was able to accomplish the feat in all five years, while 13 of those teams only made the playoffs two or fewer times.²⁶¹ An examination of the NBA's 16-team playoff format over the same time period reveals that 25 of its 30 teams (83.3%), participated in the playoffs.²⁶² Of those teams, five participated in the playoffs all five years, while just eight made the playoffs two or fewer years.²⁶³ And finally, in the MLB's eight-team playoff system, only 17 of its 30 teams (56.7%) attended the playoffs from 2001-2005.²⁶⁴ Two of those teams were in the playoffs in all five years and nine of those teams played in the playoffs in two or fewer years.²⁶⁵ Over the five sample years the NBA, NFL, and MLB had 80, 60, and 40 playoff positions available respectively.²⁶⁶ If the playoff positions occupied by the teams that made the playoffs in every year are removed, assuming that those teams were in fact superior to the rest of the teams in their league due to consistent performance,²⁶⁷ then what remains is the pool of playoff slots that the rest of the teams can realistically hope to obtain. Thus, from 2001-2005 in MLB there were 28 teams (93.3% of the league) competing for 30 (75%) of the playoffs spots.²⁶⁸ The NBA had 25 teams (83.3% of the league) competing for 55 (68.8%) playoff spots, and the NFL had 31 teams (96.9% of the league) competing for 55 (91.7%) of its

260. See NFL Standings: Division (years 2001-2005), www.nfl.com/standings (last visited Mar. 3, 2008).

261. See *id.*

262. See NBA.com: Season by Season Index, <http://www.nba.com/history/season/index.html> (last visited Mar. 14, 2008); NBA.com: 2001 Playoff Results, <http://www.nba.com/history/playoffs/20002001.html> (last visited Mar. 14, 2008) (only 2000-2001 through 2002-2003 seasons).

263. See *id.*

264. See The Official Site of Major League Baseball: Schedule: 2005 Postseason, http://mlb.mlb.com/mlb/schedule/ps_05.jsp (last visited Mar. 14, 2008); The Official Site of Major League Baseball: Schedule: 2004 Postseason, http://mlb.mlb.com/mlb/schedule/ps_04.jsp (last visited Mar. 14, 2008); The Official Site of Major League Baseball: Standings: Regular Season Standings, <http://mlb.mlb.com/mlb/standings/index.jsp?ymd=20051002> (last visited Mar. 14, 2008) (2001-2003 seasons).

265. See *id.*

266. See, e.g., John Clayton, *Playoff Format is Matter of Integrity*, Dec. 30, 2005 http://proxy.espn.go.com/nfl/columns/story?columnist=clayton_john&id=2275183; NBA.com: The Playoffs, <http://www.nba.com/analysis/00423850.html> (last visited on Mar. 3, 2008); Baseball Post-season Playoffs by Baseball Almanac, <http://www.baseball-almanac.com/ws/postseason.shtml> (last visited on Mar. 3, 2008).

267. This may assume too much, but it is for argument's sake.

268. The Official Site of Major League Baseball: Standings, *supra* note 264.

playoff spots.²⁶⁹ These numbers suggest that the playoff races are more consistently “open” in the NFL than in the NBA or MLB.

The percentages for the NBA and MLB are actually almost equal, even taking into consideration the fact that the MLB’s playoff system is half the size of the NBA. So then why is the NBA system generally accepted and the MLB system shrouded in controversy? One explanation may simply be the perception that meaningful competition is impossible with the rising salaries of professional athletes without a salary cap or significant restrictions on free agency. The concept that revenue sharing in the MLB would help level the playing field took a significant hit in 2000 when it was reported that the lower-payroll, small-market clubs were using the money that they were receiving as part of revenue sharing to turn a profit, rather than to increase payroll, as it was designed to do.²⁷⁰ Also, the baseball system of arbitration is not nearly as effective at restraining player movement as the other systems of free agency. This is due in part to the fact that the financial position of each club cannot be taken into account when reaching an arbitral award, thus the salaries of the players on small-market teams are measured against the salaries of the highest paying big-market clubs.²⁷¹ Because each club’s particular financial position is not considered, the placement of all players is determined by a market value that is based upon an inflated market that only exists for teams with the highest revenues and highest payrolls. The result is that owners (especially those from smaller markets) must either grant significant pay raises to the player contemplating arbitration or bid considerably more than they would otherwise be willing to pay in order to have a realistic chance of winning should a matter proceed to arbitration. For example, one study of arbitration results showed that although owners succeeded in most arbitration proceedings, the average salary of players invoking the arbitration process increased at a rate of 95%!²⁷² While the study takes into account a large number of players who reached a settlement prior to an arbitrator issuing a final decision,²⁷³ it nonetheless illustrates the notion that arbitration is a win-win situation for the players. However, the result of the arbitration process for many of the smaller market teams is that these teams are either “priced-out” of retaining players or forced to reduce salary in other areas of their rosters in order to keep the arbitrating players on staff. Thus, for some teams, the arbitration system actually forces player movement instead of restraining it. The best players (or at least the most valuable based on the criteria considered during salary arbitration) are therefore shuttled to the teams that can afford to pay their salaries, a continuous cycle that effectively ruins any attempt at equality amongst all teams in the league.

Meanwhile, the NBA seems fortunate that either the number of teams in its playoff system or a relative lack of knowledge by the average fan hides the flaw in its “soft” cap. One Larry Bird exception in the NBA is the free agency equivalent

269. See NFL History, <http://www.nfl.com/history> (last visited Mar. 3, 2008); NBA.com: History, <http://www.nba.com/history/> (last visited Mar. 3, 2008).

270. See Richard C. Levin et al., *The Report of the Independent Members of the Commissioner's Blue Ribbon Panel on Baseball Economics* (2000), available at http://www.mlb.com/mlb/downloads/blue_ribbon.pdf (last visited Mar. 3, 2008).

271. See 2007-2011 MLB Basic Agreement art. VI, § F(12)(b)(i), available at http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf (last visited Mar. 29, 2008) (MLB CBA).

272. Conti, *supra* note 7, at 235.

273. See *id.*

of allowing an NFL team to designate five franchise players, but without salary cap consequences.²⁷⁴ Considering that only five players are playing for an NBA team at any one time, this exception can swallow the salary cap-rule for teams that strike it rich in the draft. The Larry Bird exception was a major point of controversy in the 1998 lockout just as it was during settlement discussions prior to the 1995 CBA agreement, but the exception has survived negotiations again and again and so is not likely to be deleted anytime soon.²⁷⁵ The problem is that the effects of the exception could subject the NBA to issues similar to those that exist in Major League Baseball. Considering that wealthier NBA clubs can afford to pay not only the extremely high salaries for star players regardless of the salary cap, but also the contracts of star rookies, the Larry Bird exception limits competition by discouraging player movement.²⁷⁶ The question, then, is whether the NBA “soft cap” is actually any more effective at maintaining competitive balance than no cap at all. The playoff numbers indicate that the NBA’s soft cap has little effect on maintaining competitive balance, and thus suggest the answer to the question is “no.” There remains a real chance in the NBA that a team with good fortune in its choice of draft picks could conceivably lock-in a serious competitive advantage for years and years with skillful use of the salary cap exceptions.²⁷⁷ This situation essentially existed for the Chicago Bulls in the 1990s when that team won six championships in eight years (using the Larry Bird exception for star Michael Jordan during that period), and they could have been even more dominant had Jordan not elected to play baseball instead of basketball for a year and a half in the mid-90s.²⁷⁸ If such a circumstance comes to fruition again, critics of the soft cap demanding to be heard will have many fans listening to their howl.

VI. SOLVING EXISTING PROBLEMS OF COMPETITION AND PERCEPTION IN THE NBA AND MLB

Major League Baseball seems to be the most criticized of the leagues, due in part to the fact that the same teams seem to reach the playoffs every year, while “dark horse” champions are few and far between.²⁷⁹ For example, the New York Yankees, perennially the team with one of, if not the, highest salaried rosters in baseball, have won twenty-six total championships.²⁸⁰ That number is more than the total of sixteen other clubs combined.²⁸¹ The cause of this imbalance is clear—smaller market teams are priced out of high quality talent and this results in playoff races that are largely predictable even before the regular seasons have started. To deflect some of this criticism and as a potential solution, the MLB

274. This is based on the number of players allowed in each league’s active roster.

275. See Aubut, *supra* note 110, at 235.

276. See *id.* at 234.

277. See *id.* at 235.

278. See NBA.com: NBA Finals: All-Time Champions, <http://www.nba.com/history/finals/champions.html> (last visited Mar. 3, 2008); NBA.com: Michael Jordan Career Perspective, <http://www.nba.com/jordan/index.html> (last visited Mar. 3, 2008).

279. See The Official Site of Major League Baseball: World Series Overview, http://mlb.mlb.com/mlb/history/postseason/mlb_ws.jsp?feature=club_champs (last visited Mar. 3, 2008).

280. *Id.*

281. *Id.*

could expand its playoff format to twelve teams and thus allow for more meaningful competition towards the lower revenue clubs. An increased number of playoff teams should also renew interest in the baseball season for those fans whose teams have been consistently eliminated from playoff contention long before season's end. Additionally, adding playoff teams may have the ancillary benefit of slowing the inflation of player salaries, as teams would not be willing or required to pay as much in order to load a roster with high-priced talent and have a legitimate chance of reaching the playoffs.

Another possible change that could help with competitive balance includes altering the arbitration process from the "final offer" format to the traditional system in which an arbitrator could choose a figure between the offers given by the players and teams. Studies of the arbitration system in MLB have shown that the disparities between player and team offers have grown fairly steadily since the arbitration system was put in place.²⁸² The current system of arbitration places a great amount of pressure on teams to settle before an arbitrator renders a decision that may force the team to pay the higher amount proposed by the player. The player, meanwhile, may rely on free agency to eventually deliver the payoff he hopes to receive during arbitration so that he has less of an incentive to have his offer represent his actual market value. The original idea of "final offer" arbitration was that the risk of the either/or decision would serve to keep offers by both sides reasonably close,²⁸³ but it appears that the prospect of free agency is wearing down that rationale. While a change to the traditional system would undoubtedly lead to less settlements, it would be replaced by the discretion of the arbitrator and prevent skyrocketing salaries by decreasing the risk to teams that a reasonably low offer could be shunned in favor of an unreasonably high one. This transition would also be convenient for the league, as MLB already has a system in place for grievance arbitration that could be easily transferred over to be used in salary arbitration. Additionally, a change from the current procedure to one in which the arbitrator issues a written opinion would be valuable to both clubs and players, due to the fact that each would have a better understanding (via the impartial arbitrator's perspective) of how each evaluated criteria contributes to the estimation of a player's market value, thus making the approach to contract negotiations and arbitration more consistent.

Another possible solution that would involve a drastic change in the structure of Major League Baseball would be to eliminate free agency altogether. The salary arbitration system would be modified to permit consideration of other player salaries in other sports, thereby restricting the owners' ability to collude and deflate player salaries, while at the same time allowing smaller market teams to retain marquee players without the cloud of free agency hanging over the process. It has been widely recognized that the combination of salary arbitration and free agency have become inextricably intertwined and nightmarish to owners ever since free agency was allowed in the sport,²⁸⁴ giving virtually all of the bargaining power to the players. Removal of the free agency system and modifying the arbitration process could better equalize the bargaining power.

282. See Conti, *supra* note 7, at 233-34.

283. *Id.* at 230.

284. See, e.g. Conti, *supra* note 7, at 228; Aubut, *supra* note 110, at 226; Donegan, *supra* note 4, at 190.

The NBA has a similar competition problem brewing, though it has not fully come to fruition as it has in Major League Baseball. The easiest answer for the NBA is the one that has eluded owners during every lockout/strike in recent history—a switch to a hard salary cap. The players are understandably adamant against a hard salary cap as the elimination of salary cap exceptions would prevent many of the players from receiving the most lucrative contracts.²⁸⁵ The Larry Bird exception, while effective at limiting player movement, is the most obvious culprit in preventing a steady competitive balance. Elimination of this and other exceptions to the cap would force player salaries down by providing an absolute bar for contracts at the most extremely high levels, but this is not necessarily a bad thing, even for the players involved. Increased parity and competition among teams in the NBA should make for a more spectator-friendly product, and if the salary cap remains as a percentage of league revenues,²⁸⁶ then the players will receive the benefit of the increase in merchandising, television rights, and ticket sales along with team owners. While this sort of a change does not appear to be immediately on the horizon, the soft cap will continue to pose a danger to the integrity of the competition in the NBA. While neither the NBA or MLB needs to precisely follow the path of the NFL to continue to be successful, those leagues continue to be perceived as having some serious flaws in their operation and should consider changes to their CBAs to better ensure that their systems to maintain real competition do not become broken past the point of repair.

VII. CONCLUSION

The historical progression of the NBA, MLB, and NFL have created entities whose modes of operation, as defined in their respective collective bargaining agreements, make each distinct but popular among sports fans. While each league has undergone its own series problems and renovations, the results have thus far been exciting and successful. The activities of the several sports leagues are monitored and discussed long after each season's end, and while the arguments over some aspects of the leagues sometimes drown out the cheers, it is generally agreed that business is good.²⁸⁷ Both the NFL and MLB have recently signed enormous television contracts,²⁸⁸ and the average NBA team is worth 6% more than it was a year ago.²⁸⁹ Additionally the NFL's "Super Bowl" was recently named the "World's Most Valuable Sporting Event Brand" by Forbes, based on "television rights fees . . . sponsorship revenue from signage inside the stadium, ticket receipts and licensing revenue."²⁹⁰ The Super Bowl's value is estimated at \$379

285. See Aubut, *supra* note 110, at 235.

286. See *supra* Section III.

287. See Monte Burke, *The Big Trend*, Dec. 27, 2006, http://www.forbes.com/business/2006/12/09/sports-2007-predictions-sneakpeek_sp07_22_monteburke_sports.html.

288. *Id.*

289. See Kurt Badenhausen et al., *The Business of Basketball*, Dec. 6, 2006, http://www.forbes.com/2007/12/06/nba-team-valuations-biz-07nba-cz_kb_mo_cs_1206nba_land.html.

290. Peter J. Schwartz, *The World's Most Valuable Sporting Event Brands*, Jan. 31, 2007, http://www.forbes.com/business/2007/01/30/sports-brands-superbowl-biz-cz_ps_0131mvse.html.

million, higher than the total of the next three highest sporting events combined.²⁹¹ To be fair, the report does divide the revenue amount by the number of days in the competition, and concedes that next year's Summer Olympics will be the highest grossing single event by bringing in excess of \$3 billion.²⁹² This factor would also help to explain why MLB's World Series and the NBA's Finals are considerably farther down on the list but still respectable at 9th and 10th, respectively.

Despite the success of various professional sports, a balancing act is constantly performed to account for the interests of players and owners alike that can be profitable to both and enjoyed by fans. With both sides always jockeying for the best financial position, it seems that as soon as a potential disaster is avoided in one sport by way of a new collective bargaining agreement, another sport is furiously negotiating to avoid a ruinous strike or lockout. Throughout most of professional sports history, collective bargaining has done a brilliant job of calculating the interests of teams, players, and fans, and carrying the sports forward to successful, profitable ends. "Soft" cap or "hard" cap, free agency or arbitration, professional sports continue to represent one of the most popular forms of entertainment and most passionate outlets for fans across the country and around the world. Meanwhile, the struggle to maintain competitive balance continues, and the face of sports continues to evolve with each new CBA.

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291. *See id.* The next three highest valued sporting events are, in order: the Summer Olympics, the FIFA World Cup, and the NASCAR Daytona 500. *Id.*

292. *Id.*