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PREPARING FOR ANOTHER ROUND OF COLLECTIVE  
BARGAINING IN THE NATIONAL BASKETBALL  
ASSOCIATION

SCOTT BUKSTEIN\*

In December 2011, National Basketball Association (NBA) team owners and the National Basketball Players Association (NBPA) entered into a new Collective Bargaining Agreement (CBA).<sup>1</sup> The term of the CBA is ten NBA seasons, from December 8, 2011 through June 30, 2021.<sup>2</sup> However, the NBA and the NBPA each have an option to terminate the agreement effective as of June 30, 2017 following the sixth season of the current CBA; the options must be exercised on or before December 15, 2016.<sup>3</sup> NBA players are expected to opt out of the current CBA.<sup>4</sup> NBA owners could

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1. See *NBA Lockout Timeline*, NBA (Dec. 9, 2011, 8:15 AM), <http://www.nba.com/2011/news/09/09/labor-timeline/> (NBA owners and NBPA eventually agreed to new comprehensive CBA on December 8, 2011 after 161-day lockout that resulted in 16 lost games for each team during the 2011-2012 NBA regular season).

2. See NBA 2011 COLLECTIVE BARGAINING AGREEMENT, art. XXXIX, sec. 1 (Dec. 8, 2011) [hereinafter NBA CBA], available at <http://www.nbpa.org/cba/2011> ("This Agreement shall be effective from December 8, 2011 and, unless terminated pursuant to the provisions of this Article XXXIX, shall continue in full force and effect through June 30, 2021").

3. See NBA CBA, *supra* note 2, sec. 2 ("The NBA and the Players Association shall each have the option to terminate this Agreement on June 30, 2017 by serving written notice of its exercise of such option on the other party on or before December 15, 2016").

4. See Larry Coon, *New Cap, Tax and Lockout Projections*, CBA FAQ BLOG (Apr. 18, 2014), <http://cbafaq.com/blog/> ("My prediction is that the players will opt out of the agreement in 2017.").

also decide to opt out of the CBA regardless of the decision made by NBA players.<sup>5</sup>

NBA players, as well as NBA owners, have already started the strategic planning process related to the possibility of either the players or the owners exercising the right to opt out of the CBA. However, neither the players nor the owners will conclusively state whether the NBPA or the NBA definitively plan to opt out of the current CBA. For example, in April 2014, Ron Klemptner—then-current acting executive director of the NBPA—explained that the players association “negotiated for the right to opt out of the CBA, and just as the owners will do, the players will consider our options at the appropriate time. It’s way too early to commit to any decision one way or the other.”<sup>6</sup> Adam Silver, Commissioner of the NBA, responded that league owners will “always be prepared, but [he has] no expectation that [the players are] going to opt out. [There have not been] any discussions whatsoever about that possibility.”<sup>7</sup>

Nonetheless, both the NBPA and league owners have made business decisions knowing that it is possible (if not probable) that games will be canceled during the 2017-2018 NBA season due to a labor dispute that results in a lockout (i.e., work stoppage).<sup>8</sup> Players have been advised by the NBPA to accept paychecks over an 18-month period for the 2016-2017 NBA season instead of the standard 12-month period as one mechanism to help players prepare financially for a potential work stoppage during the 2017-2018 NBA

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5. See CBA 101: HIGHLIGHTS OF THE COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NATIONAL BASKETBALL ASSOCIATION AND THE NATIONAL BASKETBALL PLAYERS ASSOCIATION, NBA (Aug. 2010), available at <http://www.nba.com/.element/mp3/2.0/sect/podcastmp3/PDF/CBA101.pdf>. The NBA had the option to extend the previous CBA (entered into in 2005) for one year (through June 30, 2012) but declined to exercise that option. NBA owners determined that the revenue allocation required under the previous CBA was not financially sustainable.

6. Brian Mahoney, *Silver: Premature to Say Union Will Opt Out of CBA*, ASSOCIATED PRESS, Apr. 24, 2014, available at <http://bigstory.ap.org/article/silver-premature-say-union-will-opt-out-cba>. Klemptner also stated the following: “Our league’s recently reported economic successes come as no surprise to the players.” See *id.*

7. See Mahoney, *supra* note 6. Silver further opined that “it’s premature, frankly, for either side to be making determinations about how well this deal has or hasn’t worked . . . So I don’t really buy into sort of that speculation that they’re already planning to opt out or that we’re thinking about it.” See *id.*

8. See *NBA Commences Lockout of Its Players*, NBA (June 30, 2011, 7:14 PM), <http://www.nba.com/2011/news/06/30/lockout-statement/> (stating that in event of lockout, NBA players would not receive salary compensation and would not be allowed to use team facilities for any purpose; and teams would not be allowed to negotiate player contracts or conduct any practices or similar sessions with players).

season.<sup>9</sup> Owners have entered into agreements with media rights partners in which fee payments from the networks to the NBA will still be made in the event of a work stoppage.<sup>10</sup>

NBA owners and NBPA leaders are also carefully scrutinizing the current CBA and beginning to identify specific terms and provisions each group wants added, eliminated and/or revised in a new CBA as part of the overall negotiation preparation process. In April 2014, league owners met to discuss the effectiveness of the current CBA. NBA Commissioner Adam Silver stated the following:

We presented sort of the facts as we know them so far under this agreement. Is [the CBA] working in ways we predicted, here are things that we would not have predicted under the agreement, here's the amount of free agency movement we're seeing, here's how it's working economically for the league. And I would assume the union at some point will do those same things.<sup>11</sup>

Further, in July 2014, new NBPA executive director Michele Roberts commented:

As far as I'm concerned, preparations for CBA negotiations started yesterday. It's at the top of my list of things that I've been instructed to begin the process of preparing for, and sure it's a lot to do, but I've never been shy about hard work and long hours, so we'll get it done. We'll be ready.<sup>12</sup>

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9. See NBA CBA *supra* note 2, art. II, sec. 3(d) (stating that although "the default payment schedule is 24 semi-monthly installments over a 12-month period, players have option to request payment over a period of 6 months or 18 months instead of 12 months).

10. See Sam Amick & Jeff Zillgitt, *NBA Union Wants Players to Prepare for Work Stoppage*, USA TODAY (July 1, 2014, 2:42 PM), <http://www.usatoday.com/story/sports/nba/salaries/2014/07/01/nbpa-union-players-18-month-contracts-prepare-for-lockout/11902881/> ("As we have learned in the past, the owners have made provisions with the TV networks to continue to receive rights fees throughout a work stoppage, and there is no reason the players should not make every effort to take the same precaution."); Scott Soshnick, *LeBron Advised to Take Less Money in More Paychecks by Union*, BLOOMBERG (July 1, 2014, 1:20 PM), <http://www.bloomberg.com/news/2014-07-01/lebron-advised-to-take-less-money-in-more-paychecks-by-nba-union.html> ("Every chance the owners have had they've opted out of an agreement. We can't control what they're going to do. All we're going to do is prepare ourselves.").

11. Mahoney, *supra* note 6.

12. *NBA Players Union Elects a New Director*, ESPN (July 29, 2014, 9:24 PM), <http://sports.espn.go.com/espn/wire?section=nba&id=11280794>. According to Charles Grantham, executive director of the NBPA from 1988-1995, "Ideally, whether labor or management, you begin work on the next negotiation the day after you sign the last agreement." Sean Deveney, *The Baseline: Another Lockout*

This Article provides a preview of the primary CBA deal terms that NBA owners and the NBPA are expected to focus on in the months leading up to the December 2016 opt-out deadline. Part I summarizes the current NBA business model and economic climate. It also explains how the league's new media rights agreement, recent team profitability, and increased franchise values impact the probability of players and/or owners opting out of the current CBA. Part II examines the most recent collective bargaining process between NBA owners and players in 2010-2011 and highlights some of the key business (i.e., "system") issues negotiated in 2010-2011. Part III anticipates the next round of collective bargaining in the NBA and details some of the principal deal terms that players and owners will need to negotiate and resolve. This Article concludes with a discussion of the expected outcome—one similar to the 2011 outcome—which is less than ideal, and can and should be avoided.

I. CURRENT NBA BUSINESS MODEL AND ECONOMIC CLIMATE:  
LEAGUE MEDIA RIGHTS, TEAM PROFITABILITY  
AND FRANCHISE VALUES

Similar to other professional sport leagues in the United States, the NBA attempts to create competitive balance among its thirty (30) teams.<sup>13</sup> The NBA utilizes several mechanisms to produce competitive balance (i.e., team parity which leads to unpredictable game outcomes).<sup>14</sup> For example, the NBA uses a reverse-order draft in which teams with the worst records in the previous season are given the opportunity to select higher in the draft. Also, revenue sharing and salary caps are two additional mechanisms that attempt to produce competitive balance.<sup>15</sup> The NBA's current

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*Ahead? 'We Know The Storm Is Coming,'* SPORTING NEWS (Mar. 7, 2014, 10:03 AM), <http://www.sportingnews.com/nba/story/2014-03-06/nba-lockout-cba-commissioner-adam-silver-nbpa-union-chris-paul-president-executive-director-billy-hunter-charles-grantham-david-stern>.

13. See SCOTT ROSNER & KENNETH SHROPSHIRE, *THE BUSINESS OF SPORTS* 141 (2nd ed. 2010) ("All professional sports leagues are deeply concerned about the same two basic issues: competitive balance and revenue sharing"). One of the reasons why the NBA claimed the league needed a new labor agreement in 2011 was "to address the league's competitive balance problems." David J. Berri, *Did the Players Give Up Money to Make the NBA Better? Exploring the 2011 Collective Bargaining Agreement in the National Basketball Association*, 7 INT'L J. SPORT FIN. 158, 161 (2012). Since 1980, only nine different teams have won the NBA title. See *id.*

14. See ROSNER & SHROPSHIRE, *supra* note 13, at 146 ("A predictable league ultimately becomes of little interest to its followers").

15. See *id.* at 141 (explaining that revenue sharing can be defined as "the amount of revenues earned by members of a professional sports league that are

revenue sharing plan redistributes money from teams that generate significant local revenue (e.g., “big market” teams such as the Chicago Bulls, Los Angeles Lakers, and New York Knicks) to teams that generate less local revenue (e.g., “small market” teams such as the Minnesota Timberwolves, Milwaukee Bucks, and Orlando Magic).<sup>16</sup> The NBA’s salary cap limits the amount of money each team is allowed to spend on player salaries. Salary caps strive to create competitive balance on the basketball court by creating competitive financial balance with respect to limiting what teams are permitted to spend on player compensation each NBA season.<sup>17</sup>

The league’s salary cap directly impacts player salaries. The salary cap each year is calculated based on a percentage of “Basketball Related Income” (“BRI”).<sup>18</sup> The NBA CBA contains a detailed formula for determining BRI, which includes most revenues earned at the league and team levels. Sources of revenue include league licensing revenue, media rights and corporate partnership agreements as well as team revenue streams such as gate receipts, local

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shared by all league teams, regardless of the teams’ contributions to the generation of these revenues”).

16. See *NBA Board of Governors Ratify 10-Year CBA*, NBA (Dec. 8, 2011, 6:44 PM), <http://www.nba.com/2011/news/12/08/labor-deal-reached/> (describing agreed upon new revenue sharing plan). NBA owners are permitted to unilaterally implement and make changes to the league’s revenue sharing plan. Prior to the 2011 NBA CBA, revenue sharing was somewhat limited. The league’s luxury tax, which required teams who exceeded a certain payroll threshold to pay a “fine,” was the primary funding source for league revenue sharing during the 2005 CBA. When the 2011 CBA was ratified in December 2011, the NBA Board of Governors also voted to approve a new revenue sharing plan that substantially increased the funds previously shared among NBA teams in part by including local team revenue in the revenue sharing equation. In response, then-current NBA Commissioner David Stern made the following comment: “The Board realized that it was imperative that our revenue sharing program be improved. We have found a solution that should provide our league with better competitive balance.” *Id.* David Stern also explained that net transfers under the new league revenue sharing system would be “a multiple of what they were under the old deal of revenue sharing.” Steve Aschburner, *Revenue Sharing a Vital (Yet Secretive) Component to Talks*, NBA (Sept. 20, 2011, 10:23 AM), [http://www.nba.com/2011/news/features/steve\\_aschburner/09/20/revenue-sharing-still-vital/index.html](http://www.nba.com/2011/news/features/steve_aschburner/09/20/revenue-sharing-still-vital/index.html). Stern estimates that the net transfers would be approximately “three times” the amount shared in 2010-2011 (i.e., \$60 million); this would result in about \$15 million being transferred to each “revenue recipient” under the new revenue sharing system, with approximately \$180 million in total team revenues being shared. See *id.*

17. See NBA CBA, *supra* note 2, art. VII (discussing NBA’s “soft” salary cap, which means there are several exceptions that allow teams to exceed salary cap in specific situations). David Stern stated that “[e]ven in a league where one team could pay [\$100 million] to its roster, another team could pay [\$50 million] and would be economically successful—our owners and our fans don’t want it because it wouldn’t be competitive.” Aschburner, *supra* note 16.

18. See NBA CBA, *supra* note 2, art. VII, sec. 1 (defining Basketball Related Income). Players negotiate with the owners to receive a percentage share of BRI.

media rights deals, and team sponsorship agreements. BRI essentially indicates the financial health of the NBA. Player salaries correlate with team and league revenue. For example, BRI increased from \$3.643 billion in 2009-2010 to \$3.817 billion in 2010-2011. Based on the terms of the NBA CBA in effect from 2005-2011, NBA players received 57% of these total BRI amounts (i.e., \$2.076 billion in 2009-2010 and \$2.176 billion in 2010-2011).<sup>19</sup> The salary cap for each NBA team during the 2009-2010 season was \$57.7 million and the salary cap for the 2010-2011 season was approximately \$58 million.<sup>20</sup> At the time of this Article, the salary cap for the 2014-2015 NBA season reached an all-time high: \$63 million.<sup>21</sup> The league has projected an increase in the salary cap to \$66.5 million for the 2015-2016 NBA season.<sup>22</sup> For the 2016-2017 NBA season, the salary cap is expected to increase exponentially—perhaps to over \$90 million—based primarily on a recently signed new league media rights deal, which will be discussed in further detail below.<sup>23</sup>

The NBA is a private company. Therefore, its financial statements are not publicly available. As a result, the true profitability of the league and its 30 individual teams is unclear. For example, according to the NBA, the league lost money during every year of the now-expired CBA that was in effect from 2005 to 2011—including a \$340 million loss during the 2009-2010 NBA season.<sup>24</sup> Media outlets such as *Forbes* and *The New York Times* have attempted to estimate the profits and losses of NBA teams without access to complete league and team-audited financials. For example, during

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19. See Steve Aschburner, *NBA, Union Finalize Audit of Revenues, Player Compensation*, NBA (July 22, 2011), <http://www.nba.com/2011/news/07/22/bri-audit/> (“Player compensation increased in each season of the six-year CBA, while the NBA has cited losses in each of the six seasons totaling more than \$1.5 billion. While BRI has increased, the owners have said their non-player expenses have risen at a greater rate.”).

20. See *NBA Salary Cap Set For 2009-10 Season*, NBA (July 7, 2009, 10:30 PM), <http://www.nba.com/2009/news/07/07/salarycap.ap/>; *NBA Salary Cap For 2010-11 Season Set At \$58.044 Million*, NBA (July 7, 2010, 7:41 PM), <http://www.nba.com/2010/news/07/07/salary.cap/>.

21. See *Salary Cap For 2014-15 Season Jumps to \$63 Million*, NBA (July 9, 2014, 5:07 PM), <http://www.nba.com/2014/news/07/09/salary-cap-increases/>.

22. See Zach Lowe, *How the NBA's New TV Deal Could Blow Up the Salary Cap*, GRANTLAND (Oct. 6, 2014), <http://grantland.com/the-triangle/nbas-new-tv-deal-blow-up-the-salary-cap/>; Coon, *supra* note 4.

23. See, e.g., Lowe, *supra* note 22 (“The importance of the league’s cap situation cannot be overstated. It has been the single biggest topic of conversation among team executives for the last year. The salary cap rises and falls hand in hand with league revenues, and this TV contract will be the largest injection of revenues in NBA history”).

24. See *NBA's Response to July 6 Story on League's Financial Losses*, NBA (July 6, 2011, 2:42 PM) <http://www.nba.com/2011/news/07/06/nba-rebuttal/>.

the same 2005-2011 time period for which the NBA claimed the league lost money each year, statistician Nate Silver concluded the NBA was a “fundamentally healthy and profitable business” that made \$183 million in 2009-2010 before interest and taxes.<sup>25</sup> In addition, while *Forbes* claimed that 17 of the 30 NBA teams lost money during the 2009-2010 NBA season, the NBA countered with its claim that 23 NBA teams had net income losses during that same season.<sup>26</sup> The NBPA also questioned the NBA’s exact figures, stating that a large portion of the “losses” reported by the NBA were actually accounting “book losses” rather than actual cash losses.<sup>27</sup> The key take away is that players and owners have consistently disagreed on league and team revenues and expenses.

Despite the lack of reliable data on league and team revenues and expenses, the league and its member teams are unquestionably in better financial shape today than they were under the 2005 CBA. In October 2014, Commissioner Silver mentioned that about one-third of teams are still not profitable under the current CBA and corresponding NBA financial system;<sup>28</sup> although this is an improvement from the 23 teams that allegedly lost money less than five years earlier. Recent sales of NBA teams combined with a new league media rights deal also impact the perceived (and actual) financial viability of the league and its member teams.<sup>29</sup>

In October 2014, the NBA announced a new nine-year, \$24 billion media rights agreement with Turner Broadcasting and ESPN.<sup>30</sup> Beginning with the 2016-2017 NBA season, NBA teams will receive a significant boost in revenue based on this new media

25. Nate Silver, *Calling Foul on NBA’s Claims of Financial Distress*, N.Y. TIMES (July 5, 2011, 10:45 AM), [http://fivethirtyeight.blogs.nytimes.com/2011/07/05/calling-foul-on-n-b-a-s-claims-of-financial-distress/?\\_r=0](http://fivethirtyeight.blogs.nytimes.com/2011/07/05/calling-foul-on-n-b-a-s-claims-of-financial-distress/?_r=0). See also Berri, *supra* note 13, at 160 (“The NBA officially disputed [Nate] Silver’s analysis but failed to release objective numbers that contradicted Silver’s analysis”).

26. See Silver, *supra* note 25 (analyzing NBA’s financials). But see NBA’s *Response to July 6 Story on League’s Financial Losses*, *supra* note 24 (rebutting *Forbes*’s claims).

27. See Milad Sedeh, *The NBPA Disclaimer: The End of the Bargaining Relationship or a Sham?*, 10 WILLAMETTE SPORTS L.J. 56, 57 (2013).

28. See Ohm Youngmisk, *Commish: ‘Premature’ to Worry*, ESPN (Oct. 22, 2014, 8:18 PM), [http://espn.go.com/nba/story/\\_/id/11746763/nba-commissioner-adam-silver-says-too-early-worry-potential-work-stoppage](http://espn.go.com/nba/story/_/id/11746763/nba-commissioner-adam-silver-says-too-early-worry-potential-work-stoppage).

29. See *NBA Extends Partnership with Turner Broadcasting, Disney*, NBA (Oct. 6, 2014, 10:03 AM), <http://www.nba.com/2014/news/10/06/nba-media-deal-disney-turner-sports/>. In addition, NBA teams have recently sold for record amounts. For example, the Los Angeles Clippers sold for \$2 billion in 2014, the Milwaukee Bucks sold for \$550 million in 2014, and the Sacramento Kings sold for \$534 million in 2013. For a discussion of recent sales of NBA teams, see *infra* notes 32-35 and accompanying text.

30. See *id.*



rights deal, that is an increase from approximately \$30 million per team each year to over \$80 million per team each year. Upon learning about the new league media rights deal, Michele Roberts, executive director of the NBPA, commented:

The new television and media deals are good news for all of the stakeholders in the NBA . . . Although we have seen strong revenue growth and significant increases in franchise values over the past three years, it is clear that the league is now entering a period of unprecedented revenue growth. Our job will be to ensure that the players receive their fair share of the results of their efforts.<sup>31</sup>

Recent purchases of NBA franchises also highlight the financial health of the NBA. In August 2014, Steve Ballmer purchased the Los Angeles Clippers for a record \$2 billion, which equaled over twelve times the expected team revenue for the 2014-2015 NBA season.<sup>32</sup> Before the sale of the Clippers, the record amount paid for an NBA team was \$550 million for the Milwaukee Bucks earlier in 2014; this sales price reflected a “5x multiple” of the Bucks’ annual revenue.<sup>33</sup> While some NBA teams might have expenses that exceed revenue in particular years, NBA owners invest in teams with the expectation that the team will appreciate in value so that the owner will experience significant capital gains upon selling the team.<sup>34</sup> For example, the Sacramento Kings were sold for \$534 million in 2013, less than 15 years after the Maloof brothers purchased the franchise in 1999 for \$185 million.<sup>35</sup> According to

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31. Jeff Zillgitt, *NBA Will Have More Programming Under New TV Deal*, USA TODAY (Oct. 6, 2014, 2:17 PM), <http://www.usatoday.com/story/sports/nba/2014/10/06/nba-tv-deal-espn-turner/16807359/>.

32. See Report of Valuation and Financial Analysis of Los Angeles Clippers by Bank of America Merrill Lynch for Project Claret, Project Claret: Preliminary Indicative Valuation Considerations 3 (May 25, 2014) [hereinafter Project Claret], available at [http://a.espncdn.com/pdf/2014/0723/Exhibit\\_43.pdf](http://a.espncdn.com/pdf/2014/0723/Exhibit_43.pdf) (indicating expected annual revenue of \$164.9 million for 2014-2015).

33. See Project Claret, *supra* note 32, at 7 (explaining that Los Angeles home market is “strikingly different” than home markets of Bucks and Kings and, therefore, valuation for Clippers should not be based on sales valuations for Bucks or Kings).

34. See ROSNER & SHROPSHIRE, *supra* note 13, at 10 (explaining that capital gains owner receives from selling team can more than offset losses team has incurred from ongoing operations).

35. See Project Claret, *supra* note 32, at 5. From 2002 to 2012, all NBA teams sold went for an amount between \$200 million and \$450 million. See *id.*

estimates by *Forbes*, “[t]he average NBA franchise is worth (equity plus debt) \$634 million, up 25% over [2013].”<sup>36</sup>

Differing views related to franchise values along with the actual profits and losses of the NBA and its member teams played a significant role in the most-recent collective bargaining process between players and owners. League and team finances are also expected to play a significant role in the next round of collective bargaining between owners and players.<sup>37</sup> The following section of this article provides an overview of the most-recent collective bargaining process and highlights some of the primary deal terms that owners and players focused on during CBA negotiations in 2010-2011.

## II. THE COLLECTIVE BARGAINING PROCESS IN 2010-2011 AND ITS KEY BUSINESS / SYSTEM ISSUES

The 2005 NBA CBA was scheduled to expire on June 30, 2011. In January 2010, the NBA sent its first official CBA proposal to the NBPA.<sup>38</sup> The NBPA quickly rejected the NBA proposal; then-current NBPA executive director Billy Hunter stated the following: “Our position was it was a nonstarter.”<sup>39</sup> In general, the NBPA was

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36. Kurt Badenhausen, *As Stern Says Goodbye, Knicks, Lakers Set Records as NBA's Most Valuable Teams*, FORBES (Jan. 22, 2014, 9:55 AM), <http://www.forbes.com/sites/kurtbadenhausen/2014/01/22/as-stern-says-goodbye-knicks-lakers-set-records-as-nbas-most-valuable-teams/>.

37. See, e.g., Josh Robbins, *Orlando Magic CEO Says the Franchise Still Doesn't Make a Profit*, ORLANDO SENTINEL (Jan. 22, 2014, 7:53 AM), <http://touch.orlandosentinel.com/#section/-1/article/p2p-79002784/> (quoting Orlando Magic CEO Alex Martins: “The assertion that the Magic made a profit last year is inaccurate. We did not make a profit last year. We have not made a profit in over a decade.”).

38. See Jonathan Abrams, *The NBA Lockout Timeline*, GRANTLAND (Nov. 11, 2011), <http://grantland.com/the-triangle/the-nba-lockout-timeline/> (discussing timeline of NBA lockout). Informal negotiations for the 2011 NBA CBA arguably started in February 2009 at the NBA All-Star Game in Phoenix. During a press conference, then-current NBA Commissioner David Stern made the following comments directed at then-current NBPA executive director Billy Hunter:

And the beauty of the NBA is that we have this perpetual flow of extraordinary talent that flows into Billy's union, for whom he gets 57 percent of every dollar that we generate. . . . We spend 43 percent on other expenses and the owners wind up with nothing. . . . We meet with the union regularly. We turn over everything we possibly can. We may argue about what they say, but you are not going to be able to argue about what they are, because it is too important a subject.

*Id.* Nonetheless, the vast majority of substantive CBA related negotiations took place in 2010 and 2011.

39. *Hunter: No Lockout Imminent*, ESPN (Feb. 13, 2010, 2:40 AM), <http://sports.espn.go.com/nba/news/story?id=4910277>. Billy Hunter was terminated from his role of NBPA executive director in February 2013. See Jeff Zillgitt, *Billy Hunter Fired by NBA Players*, USA TODAY (Feb. 16, 2013, 10:16 PM), <http://www.usatoday.com/story/sports/nba/2013/02/16/billy-hunter-fired-players-union->

content with many of the core provisions in the 2005 CBA. Conversely, the owners were pushing for some significant system changes to the 2005 CBA. The remainder of this section discusses some of the principal deal terms that were negotiated and incorporated into the 2011 CBA. This section also provides an overview of the strategic business and legal decisions made by the NBA and the NBPA during the collective bargaining process in 2010 and 2011 as a preview to the next round of collective bargaining that will likely take place in 2016 and 2017.

### A. Basketball Related Income

The split of revenue between owners and players may have been the most significant and contentious issue during the 2011 CBA negotiation process.<sup>40</sup> NBA players were guaranteed 57% of BRI in salaries and benefits under the 2005 CBA.<sup>41</sup> NBA owners wanted to substantially reduce players' share of BRI in the 2011 CBA. The NBPA claimed that from January 2010 to October 2011, NBA owners insisted on reducing the players' share of BRI to an average of 46-47%.<sup>42</sup> In June 2011, the NBPA countered the NBA owners' offer by proposing to reduce players' share of BRI to 52.4% during the first year of the CBA and then gradually increasing that

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nbpa-executive-director/1924969/ (quoting former NBPA president Derek Fisher as making following statement: "Players representatives in the general body of our association have made their voice and their votes heard. Today, the motion was raised, seconded and passed unanimously that we will terminate the employment of Billy Hunter. . . . Going forward, we will no longer be divided, misled, misinformed. This is our union and we are taking it back.").

40. See Berri, *supra* note 13 (noting NBA owners viewed decreasing player salaries as a mechanism to increase team competitive balance in the league).

41. See NBA 2005 COLLECTIVE BARGAINING AGREEMENT, art. VII, sec. 2(e) (1) (Dec. 16, 2009), <http://www.nbpa.org/cba/2005> [hereinafter 2005 NBA CBA] ("In the event that for any Salary Cap Year Total Salaries and Benefits is less than 57% of BRI, the difference shall be paid by the NBA to the Players Association no later than thirty (30) days following the completion of the Audit Report for such Salary Cap Year for distribution to all NBA players who were on an NBA roster during the Season covered by such Salary Cap Year on such proportional basis as may be reasonably determined by the Players Association."). See also *id.* art. VII, sec. 12(b) (3) (providing that Designated Percentage for each Salary Cap Year is 57%, subject to few limited exceptions that would increase Designated Percentage up to maximum of 58%).

42. See *Text of Letter to NBPA Members*, ESPN (Oct. 5, 2011, 12:19 PM), [http://espn.go.com/nba/story/\\_/id/7062675/letter-nbpa-members-billy-hunter-derek-fisher](http://espn.go.com/nba/story/_/id/7062675/letter-nbpa-members-billy-hunter-derek-fisher) (writing that, prior to October 4, 2011, NBA owners "had stood on an offer averaging 46% of BRI, rolling back this year's salaries and benefits to \$2 billion flat and growing very slowly over ten years. . . . They began the day offering an increase of just over one point—to an average of 47%. (They characterized the proposal as a 50-50 split, but with a new \$350 million expense deduction, their offer would actually result in the players receiving only 47% of current BRI.")).

percentage over the course of a six-year deal to 54%—resulting in an average of 53%.<sup>43</sup> In November 2011, Commissioner Stern sent a memo to NBA players explaining that under the NBA’s proposal, players would be guaranteed to receive 50% of BRI.<sup>44</sup> The players and owners eventually agreed that, for the 2011-2012 NBA season, players would receive 51.15% of BRI.<sup>45</sup> For all subsequent seasons under the 2011 CBA, players would receive salaries and benefits equal to 50% of BRI—subject to a few limited exceptions that could either increase players’ split of BRI to a maximum of 51% or decrease players’ share to a minimum of 49%.<sup>46</sup> The decrease in players’ share of BRI from 57% under the 2005 CBA to approximately 50% under the current 2011 CBA resulted in an annual revenue shift of between \$225 million to \$300 million from players to owners.<sup>47</sup>

## B. Salary Cap and Luxury Tax

The salary cap for the 2011-2012 NBA season was set at \$58.044 million, which was equal to the salary cap for the prior NBA season (2010-2011).<sup>48</sup> Under the 2005 CBA, teams were only required to spend at least 75% of the salary cap on player salaries.<sup>49</sup> The 2011

43. *See id.* (“This offer—measured against our current system which guarantees us 57% of BRI—shifts an average of \$185 million per year to the owners’ side, for a total of \$1.1 billion over six years. We feel this offer—which would involve no rollbacks of existing contracts and maintain the current Salary Cap and Luxury Tax levels—is fair and addresses the owners’ complaints.”).

44. *See* Memorandum from David Stern, Comm’r, NBA, to NBA Players, Re: Collective Bargaining (Nov. 13, 2011), available at [http://managingsport.com/files/MgSport-NBA\\_Carta\\_David\\_Stern\\_a\\_Jugadores\\_NBA\\_13\\_Noviembre\\_2011.pdf](http://managingsport.com/files/MgSport-NBA_Carta_David_Stern_a_Jugadores_NBA_13_Noviembre_2011.pdf) (noting NBA’s proposal in response to NBPA).

45. *See* NBA CBA, *supra* note 2, art. VII, Sec. 12(b) (3) (“The Designated Share for the 2011-12 Salary Cap Year shall equal 51.15% of BRI.”).

46. *See* NBA CBA, *supra* note 2, art. VII, Sec. 12(b) (3) (providing that “in no event shall the Designated Share for any Salary Cap Year commencing with the 2012-13 Salary Cap Year be less than 49% of BRI or greater than 51% of BRI”).

47. *See* Lance Taubin, *Welcome to the Real 2011 NBA Lockout: Where Owner-Friendly Tax Provisions and Non-Monetized Benefits Color the Lockout Landscape*, 11 CARDOZO PUB. L. POL’Y & ETHICS J. 139, 140-41 (2012).

48. *See* NBA CBA, *supra* note 2, art. VII, sec. 2 (“The Salary Cap for the 2011-12 Salary Cap Year will equal \$58.044 million.”). The salary cap for future seasons under the 2011 CBA will be at least \$58.044 million. *See id.* The salary cap could also increase based on a formula that involves projected BRI. *See id.* The salary cap has increased since the 2011-2012 NBA season. *See id.* The salary cap for the 2014-2015 NBA season is \$63.1 million. *See id.*

49. *See* 2005 NBA CBA, *supra* note 41, art. VII, sec. 2(b) (1) (“For each Salary Cap Year during the term of this Agreement, there shall be a Minimum Team Salary equal to 75% of the Salary Cap for such Salary Cap Year. The Minimum Team Salary for the 2005-06 Salary Cap Year for all Teams other than the Charlotte Bobcats shall be deemed to be \$37.125 million. The Minimum Team Salary for the

CBA required teams to spend at least 85% of the salary cap during the first two years of the CBA and a minimum of 90% of the salary cap amount for all future seasons during which the 2011 CBA is in effect.<sup>50</sup>

NBA owners initially proposed a hard salary cap, which would not allow teams to exceed a specific payroll (i.e., salary cap) threshold. The owners eventually backed away from this hard cap requirement and agreed to maintain the existent soft cap system. Owners still insisted on a “harder cap” that would modify existing salary cap exceptions, while also eliminating other exceptions.<sup>51</sup> For example, owners and players agreed to revise the Mid-Level Salary Exception, which resulted in modifications to contract length and allowable salaries. Under the 2005 CBA, the Mid-Level Salary Exception allowed teams to sign players to five-year contracts starting at 108% of the average NBA player salary with 8% annual increases permitted.<sup>52</sup> The 2011 CBA contains different Mid-Level Salary Exceptions based on a team’s payroll. For instance, under the 2011 CBA, for non-taxpaying teams, i.e., teams that do not exceed a specified team payroll of \$4 million more than the luxury tax threshold, the Non-Taxpayer Mid-Level Salary Exception allows teams to sign a player for a contract of up to four years in length, with a starting salary of \$5 million in 2011-2012 and with 3% annual raises permitted after the 2012-2013 NBA season.<sup>53</sup> For taxpaying teams, the Taxpayer Mid-Level Salary Exception in the current CBA allows teams to sign a player for a contract of up to three years, with

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2005-06 Salary Cap Year for the Charlotte Bobcats shall be deemed to be \$27.844 million.”).

50. See NBA CBA, *supra* note 2, art. VII, sec. 2(b) (1) (“For the 2011-12 Salary Cap Year, there shall be a Minimum Team Salary equal to \$46.435 million. For the 2012-13 Salary Cap Year, there shall be a Minimum Team Salary equal to 85% of the Salary Cap for such Salary Cap Year. For each Salary Cap Year thereafter during the term of this Agreement, there shall be a Minimum Team Salary equal to 90% of the Salary Cap for such Salary Cap Year.”).

51. See Stern, *supra* note 44 (noting NBA’s “move away from a ‘hard’ salary cap”); see also *Text of Letter to NBPA Members*, *supra* note 42 (reporting following statement in letter: “After two years of hard cap proposals, the owners recently agreed to consider retaining a soft cap system. They have asked us to address their concerns that we (1) help to better match pay for performance and (2) improve competitive balance among the teams.”).

52. See 2005 NBA CBA, *supra* note 41, art. VII, sec. 6(e) (“A Team may sign one (1) or more Player Contracts during each Salary Cap Year, not to exceed five (5) Seasons in length, that, in the aggregate, provide for Salaries and Unlikely Bonuses in the first Salary Cap Year totaling up to 108% of the Average Player Salary for the prior Salary Cap Year . . .”).

53. See NBA CBA, *supra* note 2, art. VII, sec. 6(e).

a starting salary of \$3 million and with 3% annual increases permitted.<sup>54</sup>

To increase competitive balance, NBA owners also proposed modifications to the luxury tax system, which financially penalizes teams with total player salaries that exceed the luxury tax threshold. NBA players conceded on this issue. The 2005 CBA required teams who exceeded the luxury tax threshold to pay \$1 to the league for every dollar the team's payroll exceeded the luxury tax threshold; this money was the primary source of funding for the league's revenue sharing system.<sup>55</sup> The 2011 CBA provided that this dollar-for-dollar luxury tax penalty would remain consistent for the first two seasons of the 2011 CBA. However, beginning in the third season (2013-2014), a progressive luxury tax system was to apply, in which the tax rate increases for every \$5 million that a team exceeds the tax level. For instance, the tax rate is \$1.50-for-\$1 if a team exceeds the tax level but is less than \$5 million above the level. The tax rate is \$2.50-for-\$1 for teams that exceed the tax level by at least \$10 million but by less than \$15 million. And, the tax rate is \$3.75-for-\$1 if a team exceeds the tax level by at least \$20 million but by less than \$25 million.<sup>56</sup> In addition, the 2011 CBA provides for even more punitive financial penalties if teams exceed the luxury tax threshold in at least four out of any five seasons.<sup>57</sup> The overall goal of this new luxury tax system is to deter teams from spending significantly above the luxury tax threshold in order to decrease the financial disparity between big market and small market teams. The NBA is permitted to distribute up to 50% of the proceeds from the luxury tax system to teams that do not exceed the luxury tax threshold as one component of the league's current revenue sharing plan.<sup>58</sup>

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54. See *id.* art. VII, sec. 6(f) (noting 2011 CBA also contains third exception, Mid-Level Exception for Room Teams). This exception allows teams that have not exceeded the salary cap to sign a player to a contract of up to two years in length with a starting salary of \$2.5 million and 3% annual increases. See *id.* art. VII, sec. 6(g) (highlighting tax effects on different teams throughout league).

55. See 2005 NBA CBA, *supra* note 41, art. VII, sec. 12(f) (1) ("Each Team whose Team Salary exceeds the Tax Level for any Salary Cap Year shall be required to pay a tax to the NBA equal to the amount by which the Team's Team Salary exceeds the Tax Level.").

56. See NBA CBA, *supra* note 2, art. VII, sec. 12(f) (1).

57. See 2005 NBA CBA, *supra* note 41, art. VII, sec. 12(f) (1) (iii)-(iv).

58. See *id.* art. VII, sec. 12(g) (2) (1) ("[T]he NBA may elect to distribute up to 50% of such amounts to one (1) or more Teams based in whole or in part on the fact that such Team(s) did now owe a tax for such Salary Cap Year (*e.g.*, the NBA could elect to distribute 50% of such amounts in equal shares to all non-taxpayers in such Salary Cap Year)").

### C. Player Contracts: Guaranteed Contracts, Contract Length, and Annual Salary Increases

The owners initially proposed eliminating guaranteed contracts.<sup>59</sup> NBA players understandably pushed back on this issue. Owners and players eventually agreed that salary guarantees would remain the same as under the 2005 CBA—which followed that industry standard that all player salaries are 100% guaranteed unless otherwise agreed to by a team and player. While owners conceded on the contract guarantee issue, players conceded on several other items related to maximum contract lengths and annual increases for rookie contract extensions as well as veteran contract extensions. For example, under the 2005 CBA teams were allowed to offer six year contracts with 10.5% annual increases in order to retain a free agent who played at least the prior three seasons with that team (i.e., a “Bird player”<sup>60</sup>); moreover, teams could offer five year contracts with 8% annual increases to free agents who played for a different team the preceding season.<sup>61</sup> The 2011 CBA reduced allowed contract lengths and decreased permitted annual percentage raises. For instance, the maximum contract length allowed for Bird players is now five years (as compared with six years in the 2005 CBA) and maximum annual increases are now 7.5% (as compared with 10.5% in the 2005 CBA). In addition, for other free agents the maximum contract length allowed is now four years (as compared with five years in the 2005 CBA) and maximum annual increases are now 4.5% (as compared with 8% in the 2005 CBA).<sup>62</sup>

Players and owners also negotiated and agreed to several additional provisions related to player contracts and player mobility (i.e., free agency). For example, the 2011 CBA contains an “amnesty provision” that allows each team to waive one player that was under contract when the CBA was entered into in December 2011; the team would still be required to pay the player but that player’s salary would not count for salary cap purposes.<sup>63</sup> In addition, quali-

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59. See *NBA Owners No Longer Insist on Non-Guaranteed Contracts*, NBA (June 17, 2011, 8:26 PM), <http://www.nba.com/2011/news/06/17/labor-update.ap/> (confirming that “NBA owners relaxed their insistence on non-guaranteed contracts . . . but players cautioned that isn’t enough because the league is still seeking a hard salary cap”).

60. See NBA CBA, *supra* note 2, art. VII, sec. 6(b). The Larry Bird Exception is also called the “Veteran Free Agent Exception,” which allows the incumbent team to offer a higher salary amount and a longer salary length as compared with a new team.

61. See 2005 NBA CBA, *supra* note 41, art. VII, sec. 5(c), 6(b).

62. See *id.* art. VII, sec. 5(c), 6(b); *id.* art. II, sec. 7.

63. See *id.* art. VII, sec. 12(j).

fyng offers are now in part based on player performance. This is a change from the qualifying offer model in the 2005 CBA. For example, if a player picked 10th to 30th in the first round meets one of the following two “Starter Criteria,” then the player’s qualifying offer amount will be equal to the qualifying offer for the 9th overall draft pick: (1) started an average of 41 regular season games or played an average of 2,000 regular season minutes during third and fourth seasons combined; or (2) started at least 41 regular season games or played at least 2,000 minutes during fourth season. In addition, if a player picked 1st to 14th in the first round fails to meet the Starter Criteria, then the player’s qualifying offer amount will be equal to the qualifying offer for the 15th overall draft pick.<sup>64</sup> This new qualifying offer model in the current CBA attempts to address the issue that a player’s market value (and corresponding salary) during his fifth year in the league should not be determined solely by when that player was drafted four years prior.

The above examples are intended to provide an overview of some of the key business issues that were negotiated and ultimately resolved in 2010-2011. Agreeing on the above terms called for a lot of time and energy, and reaching an agreement was not without numerous business and legal challenges. The following section provides a recap of the extensive and intensive collective bargaining and legal processes that eventually led to the owners and players agreeing on a new CBA.

### III. OVERVIEW OF THE COLLECTIVE BARGAINING PROCESS: HOW THE LAW IMPACTED BUSINESS DECISIONS

In January 2010, the NBA sent its initial proposal to the NBPA. As discussed above, this initial proposal sought to implement a hard salary cap, drastically decrease the players’ share of BRI (i.e., reduce and roll back player salaries), and reduce contract length and salary guarantees. The NBPA responded with a counter-proposal in July 2010. Little progress was made between July 2010 and December 2010. The league and players fundamentally disagreed over league revenue and league financial viability. In December 2010, NBA spokesperson Mike Bass issued the following statement: “Our

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64. *See id.* art. XI. Players and owners also agreed to shorten the period that a player’s team has to match an offer sheet extended to a restricted free agent from a period of 7 days under the 2005 CBA to 3 days under the 2011 CBA. This change was intended to address the issue of teams demonstrating reluctance to extend offer sheets to restricted free agents because the amount of that offer was “on the books” for salary cap purposes for 7 days under the 2005 CBA. *See id.* art. XI, sec. 5(e).



goal remains the same: a sustainable business model that encourages teams to make necessary investments and provides the opportunity for all 30 teams to compete for a championship.”<sup>65</sup> In February 2011, Billy Hunter issued a statement explaining that “[t]here has been ongoing debate and disagreement regarding the numbers and we do not agree that the stated loss figures reflect an accurate portrayal of the financial health of the league.”<sup>66</sup>

With little progression evident at the negotiation table, the NBPA turned to the legal system in May 2014 by filing a complaint with the National Labor Relations Board alleging that the NBA was failing to negotiate in good faith; the NBPA accused the league of making “harsh, inflexible and grossly regressive takeaway demands,” failing to “provide relevant financial information,” “repeatedly threatening” to lock out the players, and “making demands and threats that are inherently destructive of the collective bargaining process.”<sup>67</sup>

The NBA and the NBPA failed to reach agreement on a new CBA before the June 30, 2011 deadline. On June 30, 2011, Adam Silver, the then-NBA Deputy Commissioner, made this statement: “The expiring collective bargaining agreement created a broken system that produced huge financial losses for our teams . . . . We will continue to make every effort to reach a new agreement that is fair and in the best interests of our teams, our players, our fans, and our game.”<sup>68</sup> The NBA announced that it was commencing a lockout of its players effective as of 12:01 a.m. on July 1, 2011.<sup>69</sup>

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65. Art Garcia, *Hunter Lays Out Proposal for Players, Shoots Down Hard Cap*, NBA (Dec. 8, 2010, 12:06 PM) [http://www.nba.com/2010/news/features/art\\_garcia/12/08/union-proposal/](http://www.nba.com/2010/news/features/art_garcia/12/08/union-proposal/) (explaining that, before 2010-2011 NBA season Commissioner Stern said that reduction of \$750-800 million in salaries was needed under new CBA to ensure financial health of all teams in league).

66. Abrams, *supra* note 38. The NBPA distributed a “Lockout Handbook” to all NBA players in which Billy Hunter wrote the following: “Prepare yourself financially. A lockout is VERY likely and you must be financially prepared to manage it. The revenue increases and unprecedented growth the league is experiencing has done nothing to assuage ownership’s demand that we drastically reduce player salaries and benefits.” See NBPA, *Lockout Handbook: Hope for the Best, Prepare for the Worst* (2011) (explaining how players cannot expect league expansion to solidify and improve their job positions).

67. See Howard Beck, *Turning to Labor Board, N.B.A. Union Fires First*, N.Y. TIMES (May 24, 2011), [http://www.nytimes.com/2011/05/25/sports/basketball/players-accuse-nba-of-failing-to-bargain-in-good-faith.html?\\_r=0](http://www.nytimes.com/2011/05/25/sports/basketball/players-accuse-nba-of-failing-to-bargain-in-good-faith.html?_r=0); Howard Beck, *Turning to Labor Board, N.B.A. Union Fires First*, N.Y. TIMES, May 25, 2011, at B12.

68. *NBA Commences Lockout of Its Players*, *supra* note 8.

69. Locking out the players is a strategy of exerting economic pressure on the players as a means for increasing the league’s leverage for obtaining concessions from the NBPA during the negotiation process. See William B. Gould, IV, *The 2011 Basketball Lockout: The Union Lives to Fight Another Day—Just Barely*, 64 STAN. L. REV.

A little over a month later, on August 2, 2011, the NBA decided to file its own complaint with the National Labor Relations Board claiming that the NBPA has failed to collectively bargain in good faith. The NBA also alleged that the NBPA had engaged in the “impermissible negotiating tactic” of threatening to decertify (or disclaim interest in) representing players and subsequently file an antitrust lawsuit as a means to create leverage in the collective bargaining process.<sup>70</sup> Also on August 2, 2011, the NBA filed a lawsuit asking a federal court to rule that the league’s lockout was protected by the nonstatutory labor exemption and therefore did not violate antitrust laws.<sup>71</sup>

Despite the ongoing litigation, the NBA and the NBPA continued to engage in collective bargaining sessions, including a meeting on October 4, 2011. In a letter from then-current NBPA executive director Billy Hunter and then-current NBPA president Derek Fisher to all NBA players, Hunter and Fisher wrote the following:

We will continue to review the numbers and assess the various proposals, but we will hold firm until we can get a fair deal. While this negotiation is far from over, we cannot now say when it will resume again in earnest. For today, the players made a stand. It was the right stand to make for ourselves and for the generations of players to follow.<sup>72</sup>

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ONLINE 51 (2012), <http://www.stanfordlawreview.org/online/2011-basketball-lockout>; see also Paul D. Staudohar, *The Basketball Lockout of 2011*, MONTHLY LAB. REV. 28, 29 (2012), available at <http://www.bls.gov/opub/mlr/2012/12/art3full.pdf> (“A lockout can motivate the players to make concessions and often leads to a better deal for the owners.”).

70. Federal labor law encourages collective bargaining and insulates the results of collective bargaining from antitrust scrutiny, even in situations where agreed upon terms might be anticompetitive. See, e.g., *Brown v. Pro-Football, Inc.*, 518 U.S. 231, at 237 (1996) (noting that “the implicit [i.e., nonstatutory labor] exemption recognizes that, to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions”). Historically, players associations have disclaimed interest in functioning as the exclusive collective bargaining representative of players (i.e., terminate the collective bargaining relationship between a players association and the respective league) to attempt to take advantage of federal antitrust laws. NFL players resorted to this negotiation tactic in 2011, as the NFL players association purportedly disclaimed interest in functioning as the collective bargaining representative of players; players subsequently filed an antitrust lawsuit against the NFL. See *Complaint, Brady v. NFL*, 779 F. Supp. 2d 992 (D. Minn. Apr. 25, 2011) .

71. See *Class Action Complaint for Declaratory Relief at 2, NBA v. NBPA*, (S.D.N.Y. Aug. 2, 2011) (No. 11-cv-05369) [hereinafter *NBA v. NBPA Complaint*]

72. *Text of letter to NBPA Members, supra* note 42.

Because no bargaining agreement had been agreed upon, the NBA canceled the first two weeks of the regular season on October 10, 2011.<sup>73</sup>

On November 13, 2011 the NBA sent a memorandum to all players that included an overview of the NBA's revised proposal and which encouraged the players:

to focus on the numerous compromises that were made to the NBA's initial bargaining positions in these negotiations, including our move away from a "hard" salary cap, the withdrawal of our proposal to "roll back" salaries in existing player contracts, our agreement to continue to allow players to negotiate fully guaranteed contracts, and our agreement to a 50/50 split of BRI . . . . We urge you to study our proposal carefully, and to accept it as a fair compromise of the issues between us.<sup>74</sup>

During the next few days, the NBPA disclaimed its status as the NBA players' collective bargaining representative.<sup>75</sup> NBA players then filed two lawsuits in federal courts alleging that the NBA was in violation of antitrust laws because the league refused to allow players to work.<sup>76</sup> Commissioner Stern warned that, as a result of these antitrust lawsuits, "We're about to go into the nuclear winter of the NBA."<sup>77</sup>

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73. See *NBA Cancels First Two Weeks of 2011-12 Regular Season*, NBA (Oct. 10, 2011, 10:04 PM), <http://www.nba.com/2011/news/10/10/nba-games/>.

74. Memorandum from David Stern, Comm'r of NBA, to NBA Players (Nov. 13, 2011), available at <http://www.cbssports.com/mcc/blogs/entry/22748484/33309672/2>.

75. See Letter from G. William Hunter, Derek Fisher, and the NBPA Executive Committee to All Players (Nov. 14, 2011), available at <http://usatoday30.usatoday.com/sports/story/2011-11-14/NBA-union-letter-sent-to-players-Monday/51206352/1> (explaining that "[f]or two and a half years and through more than 50 collective bargaining sessions, we sat at the table and attempted to negotiate a fair labor agreement with the owners . . . It has become clear to us that we have exhausted our rights under the labor laws, and continuing in that forum would not be in the best interest of the players").

76. See, e.g., Class Action Complaint and Jury Demand of Plaintiff at 5, *Anthony v. NBA*, (N.D. Cal. Nov. 15, 2011) (No. C11-05525) (alleging the NBA was engaged in an illegal "group boycott and price fixing system to reduce the salaries, terms, benefits, and conditions of employment available in the market for players").

77. *NBPA Rejects Owners' Offer, Begins to Disband as Union*, NBA (Nov. 14, 2011, 10:30 AM) <http://www.nba.com/2011/news/11/14/nbpa-labor-meeting-monday.ap/>. Stern expressed additional thoughts on the NBPA antitrust lawsuits: "It's just a big charade. To do it now, the union is ratcheting up I guess to see if they can scare the NBA owners or something. That's not happening." *Id.*

Within two weeks of the players filing antitrust lawsuits, the NBA and its players had a tentative agreement in place on November 26, 2011.<sup>78</sup> The NBA issued a “Summary of Principal Deal Terms” document, which detailed the key negotiated provisions, for example, BRI split, salary cap and luxury tax system, contract length and salary, and free agency rules.<sup>79</sup> On December 8, 2011, the NBA announced that a new CBA had been approved and the NBA would begin the 2011-2012 regular season on Christmas Day.<sup>80</sup> Commissioner Stern said:

I am pleased to announce that we have concluded the collective bargaining process and have reached an agreement that addresses many significant issues that were challenges to our league . . . . This collective bargaining agreement will help us move toward a better business model, a more competitive league and better alignment between compensation and performance.<sup>81</sup>

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78. See *cf.* Gould, *supra* note 68, at 56 (expressing the viewpoint that NBPA lawsuits “seems to have moved the parties together. It most certainly called the NBA’s bluff, in that the league’s regressive or inferior option was quickly forgotten”). See also Berri, *supra* note 13, at 169 (noting that importance of filing the antitrust lawsuits “was not so much the likelihood the courts would side with the players. The key issue was that this move posed a serious threat to the owners’ revenues.”). Any monetary damages awarded by a court based on federal antitrust violations are automatically tripled based on a federal statute called the Clayton Act of 1914—this financial reality is what posed a genuine revenue threat to the owners.

79. See Berri, *supra* note 13, at 169 (“[T]he big winners [with respect to the 2011 NBA CBA] were the owners of small-market teams . . . [the new agreement] will allow small-market teams to earn more money, regardless of the quality of the product offered on the court.”).

80. See *NBA Board of Governors Ratify 10-Year CBA*, *supra* note 16. The NBA and NBPA agreed on a new CBA before any of the ongoing lawsuits and NLRB disputes were resolved. As a result, numerous legal questions regarding the collective bargaining process were not decided by the NLRB or the courts. See Sedeh, *supra* note 27, at 59 (questioning if “the N.B.P.A.’s disclaimer of interest . . . [was] valid, thus terminating the nonstatutory exemption and allowing the N.B.P.A. to bring an antitrust action”).

81. *NBA Board of Governors Ratify 10-Year CBA*, *supra* note 16 (reporting former Commissioner Stern’s statement). According to well-respected labor expert and sport law professor William Gould, “[w]hat appeared to be a rout of the players in November emerged as a reasonable face-saving compromise.” Gould, *supra* note 69, at 56. According to another sports law scholar, “[p]layer concessions were predictable because the NBA’s economic structure desperately needed an overhaul. The magnitude of such concessions, however, was startling.” Matthew J. Parlow, *Lessons from the NBA Lockout: Union Democracy, Public Support, and the Folly of the National Basketball Players Association*, 67 OKLA. L. REV. 1, 1 (2014).

#### IV. ANTICIPATING THE COLLECTIVE BARGAINING PROCESS IN 2016-2017

Similar to the 2010-2011 collective bargaining process, the NBA and the NBPA are attempting to shape the narrative through media reports and public perception and to create negotiation leverage related to the collective bargaining process. During an October 2014 press conference that followed an NBA Board of Governors meeting in New York, Commissioner Silver downplayed any possible level of concern about a potential work stoppage in the NBA during the 2017-2018 NBA season in the following statement:

I've said previously, we didn't get everything we wanted in the last collective bargaining cycle . . . . It's premature even for me to be concerned. We negotiated a 10-year collective bargaining agreement, there is a six-year out for either side. We are going into year four. We have, in my mind, something that is incredibly positive and that is two new great media deals. Fifty-one percent of that money goes to the players.<sup>82</sup>

In November 2014, NBPA executive director Michele Roberts responded: "I'll give the league credit. They have done a great job controlling the narrative."<sup>83</sup> Roger Mason Jr., NBPA director of player relations, similarly commented:

No player, no fan, and even the union, we don't want a lockout, we don't want a strike. . . . But, at the same time, sometimes the cost of doing business is standing firm on what you believe in. And I think us, as players, we believe in the fact that we work really hard. We're all very fortunate to even be in a position to make this kind of money.<sup>84</sup>

Almost all of the system issues that were central to the negotiation process in 2010-2011 are once again surfacing as primary issues for the next collective bargaining session that will likely commence in 2016, if not sooner.

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82. See Youngmisuk, *supra* note 28.

83. Pablo S. Torre, *NBPA Director: 'Let's Stop Pretending'*, ESPN (Nov. 13, 2014, 2:06 PM), [http://espn.go.com/nba/story/\\_/id/11868612/nba-owners-expendable-players-union-chief-michele-roberts-says](http://espn.go.com/nba/story/_/id/11868612/nba-owners-expendable-players-union-chief-michele-roberts-says). When Michele Roberts criticized several aspects of the current NBA business model in November 2014, Commissioner Silver responded: "We will address all of these topics and others with the Players Association at the appropriate time." *Id.*

84. Ira Winderman, *Fight to Avert 2017 NBA Lockout Starts Now*, SUN SENTINEL (Nov. 22, 2014, 11:29 AM), <http://touch.sun-sentinel.com/?dssReturn#section/1/article/p2p-82051023/&z=32828>.

V. ANTICIPATED KEY BUSINESS / SYSTEM ISSUES DURING 2016-2017  
 COLLECTIVE BARGAINING PROCESS

A. Basketball Related Income

Expect the owners to once again push for a reduction in the percentage of BRI that players receive as well as a modification to the current formula for determining BRI.<sup>85</sup> Remember that in 2010-2011, the owners’ initial proposal set players’ share of BRI at 46-47%. On the other side, there is no question the NBPA will seek to increase the current BRI percentage (between 49% and 51% each year under the current CBA). Michele Roberts said the following about the current BRI split:

Why don’t we have the owners play half the games? . . . There would be no money if not for the players . . . I know that as a result of the last CBA, at least 1.3 billion dollars in revenue that would have otherwise been on the players’ side is now on the owners’ side. I see the valuations of these teams going through the roof. . . . How much more do you need to make money?<sup>86</sup>

Roberts reiterated that it is the responsibility of the NBPA “to ensure that the players receive their fair share of the results of their efforts.”<sup>87</sup>

B. Salary Cap

NBA owners will likely make another push to implement a harder salary cap with fewer exceptions than in the current salary

85. For example, the NBA might ask that specific revenue streams be excluded from the BRI formula to reduce the total amount of money that NBA owners are required to share with players. NBA owners will also likely push for a modification to NBA CBA, Article VII, Section 12(b) (3), which currently provides that the players designated share will increase by 60.5% of the difference between actual BRI and projected BRI in years where actual BRI exceeds forecasted BRI. This provision provides significant upside to players in years where actual BRI greatly exceeds forecasted BRI. The players’ designated share of BRI cannot exceed 51% of BRI under the current CBA.

86. Torre, *supra* note 83. LeBron James commented: “The whole thing that went on with the negotiation process was that the owners were telling us that they were losing money. . . . There is no way they can sit in front of us and tell us that right now.” Harvey Araton, *Owners Can’t Line Their Pockets Now and Cry Poverty Later, LeBron James Says*, N.Y. TIMES (Oct. 6, 2014), [http://www.nytimes.com/2014/10/07/sports/basketball/lebron-james-nba-television-deal-revenue-espn-tnt.html?smid%3D=tw-nytsports&\\_r=0](http://www.nytimes.com/2014/10/07/sports/basketball/lebron-james-nba-television-deal-revenue-espn-tnt.html?smid%3D=tw-nytsports&_r=0).

87. Scott Soshnick, *LeBron James Will Reap \$50 Million More From TV Deals*, BLOOMBERG (Oct. 7, 2014, 12:56), <http://www.bloomberg.com/news/2014-10-06/lebron-james-will-reap-50-million-more-from-nba-tv-deals.html>.

cap system. Commissioner Silver opined that he would prefer “to have a harder cap, where teams couldn’t elect to spend so much more than other teams . . . There’s gradations of hardness in terms of the cap as well. I wish our current cap system was harder. It’s what we proposed last time around, but we compromised.”<sup>88</sup> Michele Roberts is not a proponent of a salary cap altogether. Roberts stated, “I don’t know of any space other than the world of sports where there’s this notion that we will artificially deflate what someone’s able to make, just because. . . . It’s incredibly un-American. My DNA is offended by it.”<sup>89</sup>

Commissioner Silver responded to Roberts’s comments with a statement that in part provided that there is nothing:

unusual or ‘un-American’ in a unionized industry to have a collective system for paying employees—in fact, that’s the norm. . . . The salary cap system, which splits revenues between team owners and players and has been agreed upon by the NBA and the players association since 1982, has served as a foundation for the growth of the league and has enabled NBA players to become the highest-paid professional athletes in the world.<sup>90</sup>

### C. Player Contracts: Contract Length, Salary Amount, and Guaranteed Salaries

The NBA might once again push for reductions in contract length and allowable salary amounts. The NBPA will likely want to revise rules related rookie scale salaries and maximum player contracts. Michele Roberts offered her view on maximum contracts:

I can’t understand why the [players’ association] would be interested in suppressing salaries at the top if we know that as salaries at the top have grown, so have salaries at the bottom. . . . If that’s the case, I contend that there is no reason in the world why the union should embrace salary caps or any effort to place a barrier on the amount of money that marquee players can make.<sup>91</sup>

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88. Ken Berger, *Adam Silver: ‘My Preference Would Be To Have a Harder Cap’*, CBS SPORTS (Oct. 22, 2014, 3:39 PM ET), <http://www.cbssports.com/nba/writer/ken-berger/24763615/adam-silver-my-preference-would-be-to-have-a-harder-cap>.

89. Torre, *supra* note 83.

90. Torre, *supra* note 83.

91. *Id.*

#### D. Free Agency System & Qualifying Offers

The NBPA will likely advocate for changes to the NBA's current restricted free agency system and qualifying offer rules. The current NBA CBA rules pertaining to restricted free agency give a player's prior team a significant advantage in being able to retain the player's services under a new contract.<sup>92</sup> The prior team has a right of first refusal to match any offer sheet that the player signs with a new team. The NBPA might try to shift the leverage from team to player during the restricted free agency process. In addition, the NBPA might push to change the existing qualifying offer system, which remains a seldom used and imbalanced one-year contract model that usually does not produce fair and mutually beneficial results for teams and players.<sup>93</sup>

#### E. Minimum Age Requirement to Enter NBA Draft

In a December 2014 interview with *GQ Magazine*, Commissioner Silver was asked the following question: "If you could instantly change anything about the NBA, without having to negotiate the terms or compromise your position, what change would you make?" Silver stated that he would create a harder salary cap. He said the second item he would change is the minimum age required to enter the NBA draft from 19 to 20 years of age. Silver explained that the NBA:

bargained with the union many years ago in order to move it from 18 to 19. Going to 20 was on the table during the last bargaining cycle [in 2011], but it was an issue we parked, having already lost several weeks of the season [due to the lockout], and we were anxious to get the sea-

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92. Any first round pick who finishes the fourth season of his rookie scale contract (which is for two guaranteed years and two team option years), and any veteran free agent who will have three or fewer years of service entering the off-season, will be a restricted free agent if his prior team makes a qualifying offer to the player at any time from the day following the season (e.g., in mid-June after the NBA Finals) through June 30. If such a qualifying offer is made, then, on July 1, the player will become a restricted free agent, subject to a right of first refusal in favor of the prior team. See NBA CBA, *supra* note 2, art. XI, sec. 4.

93. See Scott Bukstein & Jacob Eisenberg, *Implementing a Franchise Player Designation System in the NBA*, HARV. J. SPORTS & ENT. L. (forthcoming), to learn more about a proposed franchise player designation system that would complement and improve the NBA's restricted free agency system and also partially replace the NBA's current qualifying offer system.



son going. But it's something I hope to address in the near future.<sup>94</sup>

As expected, Michele Roberts has a different perspective than Commissioner Silver on the age limit issue. Roberts said the following:

It doesn't make sense to me that you're suddenly eligible and ready to make money when you're 20, but not when you're 19, not when you're 18. I suspect that the association will agree that this is not going to be one that they will agree to easily. There is no other profession that says that you're old enough to die but not old enough to work.<sup>95</sup>

#### F. Player Conduct: League Domestic Violence Policy

The NBA is planning to "take a fresh look" at its domestic violence policies and procedures; for example, by creating programs to further educate players on domestic violence issues in the wake of widespread criticism of the NFL for its handling of recent domestic violence situations.<sup>96</sup> Currently, the NBA CBA stipulates a minimum 10-game suspension for any player convicted of a violent felony.<sup>97</sup> NBA owners, and Commissioner Silver, will likely attempt to revise this CBA provision so that domestic violence that does not

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94. Chuck Klosterman, *Rookie of the Year: Adam Silver*, GQ MAG. (Dec. 2014), <http://www.gq.com/moty/2014/adam-silver-rookie-of-the-year>. Commissioner Silver also explained that the NBPA's "principal argument is that it's a restriction on players." *Id.* He commented further:

And as a philosophical argument, I totally understand that. Of course it's a restriction, in the same way a draft is a restriction. But our view is that it would make for a better league. You'd have more skilled players, more mature players. The draft would be better. It would be better for basketball in general. Strong college basketball is great for the NBA. And we know those players are eventually going to come to the NBA, whether they are 19 or 20 or 21.

*Id.*

95. Torre, *supra* note 83.

96. Brian Mahoney, *Silver: NBA Will Review Domestic Violence Policies*, NBA (Sept. 22, 2014, 4:14 PM), <http://www.nba.com/2014/news/09/22/adam-silver-nba-domestic-violence.ap/>. Commissioner Silver explained the following:

[The NBA learns] from other leagues' experiences. We're studying everything that's been happening in the NFL. We're working with our players' association. . . . We have in place the appropriate mechanisms for discipline, although we'll take a fresh look at those as well. . . . But most importantly, it's education, and it's not just the players, but it's the players' families. That's what we're learning, too.

*Id.*

97. See NBA CBA, *supra* note 2, art. VI, sec. 7 (providing that "[w]hen a player is convicted of (including a plea of guilty, no contest, or nolo contendere to) a violent felony, he shall immediately be suspended by the NBA for a minimum of ten (10) games").

rise to a felony conviction is still punishable (e.g., minimum 10-game suspension) and so that Commissioner Silver has more flexibility in general to fine and suspend players for misconduct.

For example, in November 2014, Commissioner Silver suspended Charlotte Hornets' player Jeffrey Taylor for 24 games after Taylor pleaded guilty to misdemeanor domestic violence assault and malicious destruction of hotel property. In issuing the suspension, Commissioner Silver made this statement:

Mr. Taylor's conduct violates applicable law and, in my opinion, does not conform to standards of morality and is prejudicial and detrimental to the NBA . . . . While the suspension is significantly longer than prior suspensions for incidents of domestic violence by NBA players, it is appropriate in light of Mr. Taylor's conduct, the need to deter similar conduct going forward, and the evolving social consensus—with which we fully concur—that professional sports leagues like the NBA must respond to such incidents in a more rigorous way.<sup>98</sup>

Following the announcement of this suspension, Michele Roberts wrote a memo to all players that in part read:

The CBA contemplates a minimum 10-game suspension in any case involving a conviction for a violent felony, including domestic violence. . . . In contrast, Jeff Taylor was charged with a misdemeanor that is likely to be dismissed at the end of a probationary period. The 24-game suspension is one of the longest in the history of the league.

We have a scheme of discipline that was the result of collective bargaining between the parties that has been applied consistently over the years. While we appreciate the sensitivity of this societal issue, the Commissioner is not entitled to rewrite the rules or otherwise ignore precedent in disciplinary matters.<sup>99</sup>

Michele Roberts has clearly indicated that no changes to the league's domestic violence policy should (or will) take place until the next round of formal collective bargaining. In an interview

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98. Sam Amick, *NBPA Chief: NBA Tried to 'Out-Muscle' NFL with Jeffrey Taylor Suspension*, USA TODAY (Nov. 21, 2014, 9:49 AM), <http://www.usatoday.com/story/sports/nba/2014/11/21/michele-roberts-adam-silver-nba-nbpa-executive-director/70045956/>.

99. *Id.*

with *Sports Illustrated*, she asserted this position: “There are existing policies in place that were negotiated. That said, we would be open to discussions about increased training and education and, most importantly, developing strategies to prevent domestic violence from happening in the first place.”<sup>100</sup>

## VI. CONCLUSION: THE EXPECTED OUTCOME

In an interview on *ESPN Outside the Lines* in December 2014, ESPN reporter and journalist Andy Katz asked Commissioner Silver to comment on the threat of the NBPA opting out of the current CBA. Commissioner Silver responded:

I take everything that Michele Roberts says very seriously . . . It’s something our owners and teams will study as we get closer to the six year mark, how the agreement works for us—and obviously they’re studying it from their standpoint. But, my sense is the league is going really well right now and I think we have a very fair system. But, they are our partners. And to the extent they think it is unfair and we need to then get together and reexamine it, we will. They have the right to do that and we have the obligation to respond.<sup>101</sup>

Commissioner Silver also made comments during this same interview suggesting that NBA owners are less likely than NBA players to opt out of the current CBA. When asked to identify the right BRI percentage split between owners and players, Commissioner Silver said the following:

I think the right split is the split that we negotiated with our players in the last Collective Bargaining Agreement, and that’s a split that is a sliding scale between 49 and 51% . . . At the time the new television money comes in in

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100. Michael McCann, *Why The NBA Won't Touch Its Domestic Violence Policies Anytime Soon*, SPORTS ILLUSTRATED (Oct. 3, 2014), <http://www.si.com/nba/2014/10/01/nba-domestic-violence-policy-michele-roberts-jeff-taylor>.

101. *Outside the Lines with Bob Ley, Interview by Andy Katz, ESPN Reporter and Journalist, with Adam Silver, NBA Commissioner* (ESPN television broadcast, Dec. 19, 2014), available at <http://espn.go.com/video/clip?id=12053721> (reporting interview by ESPN journalist Andy Katz and NBA Commissioner Adam Silver). In a separate interview with ESPNW, Commissioner Silver acknowledged that “no one at the NBA is underestimating [Roberts] . . . [s]he’s made it clear she will be a strong advocate for the players.” Kate Fagan, *Impact 25: NBA Union Chief Michele Roberts Knows Exactly What She’s Doing*, ESPNW.COM (Dec. 17, 2014), <http://espn.go.com/espnw/news-commentary/article/12025034/nba-union-chief-michele-roberts-knows-exactly-doing>.

the 2016-17 season the players will be receiving 51% of something that looks very much like the gross revenue that comes into the league. So, that strikes me as very fair.<sup>102</sup>

Commissioner Silver is being both honest and strategic. As previously discussed, the owners were able to convince players to compromise on a number of significant system issues during the collective bargaining process in 2010-2011, including a significant reduction in players' share of BRI (from 57% to between 49% and 51%). Overall, the current system is working well for NBA owners. Therefore, owners might not see much upside to opting out of an agreement that contains many owner-friendly provisions.<sup>103</sup> However, even if the owners believe opting out of the CBA by December 2016 is the best approach, they might prefer that the players opt out given the potential negative media coverage and public perception.<sup>104</sup> This strategy would allow the owners to frame any potential work stoppage as the result of unreasonable player demands instead of owner decisions. During a November 2014 interview, Michele Roberts commented: "To the extent that there's going to be any pressure on the players to accept some proposal from the owners, that pressure will come from fans, and it will come from fans if they have an image of the players as greedy and unappreciative."<sup>105</sup>

Based on the above analysis in this article, I anticipate the NBPA provides written notice to the NBA on or before December 15, 2016 notifying the NBA that the NBPA has exercised its option

102. *Outside the Lines with Bob Ley*, *supra* note 101.

103. For example, one scholar who examined the 2011 collective bargaining process opined that "[i]f you were an owner, though, and you were interested in capturing more revenue, than this agreement clearly works. In other words, the players clearly lost." Berri, *supra* note 13, at 167. Collective bargaining should focus on win/win solutions instead of creating an apparent winner and loser. See Staudohar, *supra* note 69 (noting that "collective bargaining outside of professional sports typically has been less adversarial").

104. See Andrew Keh & Harvey Araton, *Establishing Her Position in the Post*, N.Y. TIMES (Nov. 26, 2014), [http://www.nytimes.com/2014/11/27/sports/basketball/michele-roberts-new-nba-players-union-leader-isnt-afraid-to-throw-elbows.html?\\_r=0](http://www.nytimes.com/2014/11/27/sports/basketball/michele-roberts-new-nba-players-union-leader-isnt-afraid-to-throw-elbows.html?_r=0) (explaining that any substantive negotiations with league will take place in private, but Roberts understands importance of "shaping the perceptions of the NBA" and protecting "the image of the players" who Roberts believed were labeled as "money hungry" during 2010-2011 collective bargaining process).

105. *Id.* See also Fagan, *supra* note 101 (quoting Michele Roberts: "The league's narrative was so powerful in 2011 that it even had the fans saying, 'Share the money. Don't stop playing. You make a lot of money.' I remember thinking, 'Everyone believes the players make too much money.'").

to terminate the CBA effective as of June 30, 2017.<sup>106</sup> The subsequent collective bargaining process is far less predictable. Commissioner Silver was the lead negotiator for the NBA during the most recent collective bargaining process.<sup>107</sup> On the other hand, Michele Roberts, a former public defender, trial lawyer and corporate attorney with little prior sport business or collective bargaining experience, will be responsible for “controlling the narrative”<sup>108</sup> as well as building consensus and creating common objectives among all NBA players.<sup>109</sup> Roberts’s initial focus has been to “rally the troops, restore their confidence in collective bargaining, [and] instill some credibility in terms of her own leadership.”<sup>110</sup> Roberts will play a central role in the negotiation process as well as in the potential litigation process should the NBA and NBPA reach an impasse in collective bargaining.<sup>111</sup> One NBA player agent is of the view that Roberts is “itching for a fight.”<sup>112</sup> Based on Roberts’s legal background as a trial lawyer, her preferred forum might be the courtroom instead of the negotiating table. A separate NBA player agent commented: “If there’s a lockout, I would bet you she would

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106. See NBA CBA, *supra* note 2, art. XXXIX, sec. 2 (explaining requirements for opting out of CBA).

107. See Staudohar, *supra* note 69 (“Although Stern led the owners, much of the face-to-face negotiation at the bargaining table was handled by deputy commissioner Adam Silver.”).

108. See Fagan, *supra* note 101 (writing that “Roberts is a master at controlling narrative, a skill that will almost definitely be tested in the coming years, when the NBA and players’ association are back at the negotiating table”).

109. For a discussion on how the NBPA’s arguable deficiencies in union democracy, intra-union communications, and public relations undermined its bargaining position and adversely impacted its negotiation efforts in 2010-2011, see Matthew J. Parlow, *Lessons from the NBA Lockout: Union Democracy, Public Support, and the Folly of the National Basketball Players Association*, 67 OKLA. L. REV. 1 (2014). Roberts must “come across as a strong figure to the players, unify them, and, as well, influence public opinion.” Keh & Araton, *supra* note 104.

110. Keh & Araton, *supra* note 104 (quoting labor expert and sport law professor William B. Gould IV).

111. See Deveney, *supra* note 12 (quoting one NBA player agent as stating that the NBPA needs “a skilled, innovative, experienced businessperson at the top of the chain . . . . [Otherwise] there will be a lockout and the players will suffer.”).

112. Sean Deveney, *The Baseline: NBPA’s Michele Roberts ‘Itching for a Fight,’* SPORTING NEWS (Nov. 21, 2014), <http://www.sportingnews.com/nba/story/2014-11-21/nbpa-nba-union-michele-roberts-adam-silver-billy-hunter-jeffery-taylor-agents> (“She’s serious, she is impressive. She is coming at this from an outsider’s perspective. With Billy, he accepted that the system we have is what it is, and all we can do is try to protect as much ground as possible. Michele is a clean slate, she flat-out sees some of the things we accept as wrong.”).

decertify the next day and get it into a courtroom. She's a trial lawyer, that's her strength."<sup>113</sup>

I anticipate that the NBPA and the NBA will fail to reach agreement on a new CBA before the June 30, 2017 deadline. As a result, at 12:01 a.m. on July 1, 2017 the NBA will lock out the players.<sup>114</sup> Later that day (July 1, 2017), the NBPA will disclaim interest in functioning as the collective bargaining representative of NBA players. Within a few days, NBA players will file one or more lawsuits in federal court(s) alleging that the lockout is illegal and that many of the NBA's business practices violate federal antitrust law.<sup>115</sup> The players and owners will continue to negotiate principal deal terms from July 2017 up until less than a week before the scheduled start of the regular season in October 2017. It is also quite possible that the players and owners fail to agree on certain system issues (for example, split of BRI) by the scheduled start of the regular season, which will result in cancellation of regular season games.<sup>116</sup>

Players will likely negotiate for an increased annual percentage of BRI between 52% and 54%, and owners will likely insist on modifying other system issues such as implementing a hard salary cap, the BRI formula and resultant revenue split, and maximum contract salaries and length. For example, NBA players might request that salaries under existing player contracts increase based on specified future increases in league revenues in addition to increasing the overall future team salary cap amount based on actual increases

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113. *Id.* ("Hunter occasionally offered [the decertification] threat, but was never really on board with decertification. Roberts, though, comes to the NBPA with a reputation as one of the nation's strongest trial lawyers.").

114. See Berri, *supra* note 13, at 167 (explaining that "owners have an incentive to lock the players out in the off-season"). Past research studies have shown that lockouts typically do not adversely impact the financial health of host cities and have no permanent impact on fan attendance. See Dennis Coates & Brad R. Humphreys, *The Economic Consequences of Professional Sports Strikes and Lockouts*, 67 S. ECON. J. 737 (2001); Martin B. Schmidt & David J. Berri, *The Impact of Labor Strikes on Consumer Demand: An Application to Professional Sports*, 94 AM. ECON. REV. 344 (2004).

115. The NBA will likely not be extremely concerned with the NBPA disclaimer of interest and subsequent lawsuit(s) filed by NBA players. See Michael McCann, *NBA's New TV Deal Brings Potential Lockout, Expansion Into Play*, SPORTS ILLUSTRATED (Oct. 6, 2014), <http://www.si.com/nba/2014/10/06/nba-tv-deal-adam-silver-lockout-expansion-espn-turner> ("The league is also keenly aware that litigation brought by NFL players to end the NFL's 2011 lockout failed, thus giving the NBA more confidence that labor law insulates the league from lockout liability.").

116. See Berri, *supra* note 13, at 159 (describing how collective bargaining process often results in loss of games—from 1981 to 2011, eight labor disputes have led to cancellation of part or all of a regular season in the NBA, NFL, NHL, and MLB).

in BRI. NBA players might also focus on player mobility items such as a player having the ability to select his new team if multiple teams claim that player off of waivers, as well as players having both an early termination option and a player option in the final two years of a maximum salary contract.

NBA owners might push for a limit on the number of guaranteed years in player contracts (e.g., three guaranteed years in a five-year contract) and might also request that player contracts contain “conditional guarantees” based on factors such as meeting a minimum “games/minutes played” threshold. NBA owners might also focus on decreasing the existing maximum salary percentage thresholds (e.g., 25% and 30% of salary cap) due to the significant impending increase in the salary cap from \$63 million in 2014-2015 to a projected salary cap of at least \$90 million in 2017-2018. The NBA will likely make several concessions during the negotiation process. For example, the owners will likely trade off on the minimum age eligibility issue to gain leverage with respect to other deal points. Players will likely concede on issues such as requesting a decrease in the number of regular season games, because a decrease in the current 82-game schedule would likely result in a reduction in BRI—for example, fewer tickets sold and less revenue from corporate partners—in turn, this would lead to a corresponding reduction in player salaries. I anticipate the players and owners will eventually agree to a new “2017 NBA Collective Bargaining Agreement,” which will once again be a ten year agreement with mutual opt-out options after year seven or year eight of the new CBA.

The expected outcome hypothesized above might never materialize. It may be several years before we find out. In the words of Commissioner Silver:

It’s too early to talk about collective bargaining. When the time comes to negotiate a new collective bargaining agreement, the facts regarding our finances will speak for themselves . . . obviously, we don’t agree on every issue, but we have a strong relationship based on mutual respect and our joint interest in the success of the league and game.<sup>117</sup>

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117. Fagan, *supra* note 101.