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1-1-1986

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Recommended Citation
Lloyd C. Bronstein, *Sports Law: Antitrust Suit Fails to Knock off NBA's Salary Cap*, 6 Loy. L.A. Ent. L. Rev. 231 (1986).
Available at: http://digitalcommons.lmu.edu/elr/vol6/iss1/19

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SPORTS LAW: ANTITRUST SUIT FAILS TO KNOCK OFF NBA'S SALARY CAP

Philadelphia 76ers rookie guard Leon Wood "shot an air ball" in his 1984 antitrust suit to bar the National Basketball Association ("NBA") from enforcing its "salary cap" rules. These rules limit the amount a team can spend on players' salaries. In *Wood v. National Basketball Association*,[1] a federal district court in New York denied Wood's motion for a preliminary injunction, holding that the NBA's maximum salary cap and college draft provisions "come under the protective shield of our national labor policy and are exempt from the reach of the Sherman Act."[2] Judge Carter, writing for the court, also ruled that the league's ban on player corporations presented no antitrust issues.[3] The judge also found no showing of irreparable injury to justify injunctive relief.

In 1983, the NBA and the Players Association negotiated a new modification of an earlier collective bargaining agreement (modified *Robertson* agreement).[4] The main component of the 1983 modification was the "salary cap," which instituted a maximum and minimum team salary limitation with certain exceptions.[5] These exceptions permit teams at or over the maximum salary level to enter into one-year contracts with their draft selections, but only at the minimum wage set by the collective bargaining agreement.[6] The modified *Robertson* agreement also allows teams at or above the salary cap limitation to replace a player who retires or fails to make the team with a new player. The new player's salary can be as much as half the salary of the player being replaced. Another exception permits teams at or above the salary cap to replace a player who

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1. 602 F. Supp. 525 (S.D.N.Y. 1984).

2. *Id.* at 528.

3. *Id.* at 529.

4. The original *Robertson* agreement received court approval in Robertson v. National Basketball Association, 389 F. Supp. 867 (S.D.N.Y. 1975), *aff'd*, 556 F.2d 682 (2d Cir. 1977).

5. National Basketball Association Collective Bargaining Agreement (as modified by Memorandum of Understanding), signed on April 18, 1983 and court approved on June 13, 1984, Art. III [Memorandum of Understanding hereinafter cited as *Memorandum*].

6. While this case was pending, the 76ers and Wood reached an agreement whereby the 76ers found a way around the salary cap to sign Wood to a four-year contract worth an estimated $1.1 million. The 76ers accomplished this by "trad[ing] Leo Rautins, and his $155,000 salary, to the Indiana Pacers; and the 76ers did not re-sign veteran free agent Franklin Edwards, whose salary had been $126,000. The 76ers thus freed up $281,000 to pay Mr. Wood (and another player) during the 1984-85 season." Sobel, *Playing with the NBA Salary Cap*, 6 Ent. L. Rep. No. 11 at 5 (April 1985). Four 76ers became free agents at the conclusion of the 1984-85 season. Their salaries can be used to pay Leon Wood for the term of his contract, even if these free agents are re-signed. *Id.*

is traded, or a veteran free agent who is not re-signed, with a new player whose salary does not exceed that of the player being replaced. Finally, teams at or above the salary cap may re-sign their own veteran free agents without regard to the salary cap.[7]

The rationale for imposing a salary cap was to restrict the free-spending, and in many cases, affluent teams from buying up the top free agents, or from purchasing the star players from less financially secure teams.[8] Under the modified *Robertson* agreement, which took effect during the 1984-85 season, team salary payments were limited to the greater of either a fixed sum of $3.6 million, or fifty-three percent of the total NBA gross revenues[9] divided by the twenty-three teams in the league.[10] During the 1985-86 season, the salary limit per team was $3.8 million and will rise to $4.0 million for the 1986-87 basketball season.[11]

The 1983 modified *Robertson* agreement between the NBA and the Players Association provided that those teams currently exceeding the maximum level would be frozen at their existing levels. The 76ers were one of the teams that exceeded the $3.6 million salary limitation. The 1983 agreement provided that a team in the 76ers' financial position would be permitted to enter into a one-year contract with its draft choices, but only at the $75,000 minimum wage.[12] This modified *Robertson* agreement received court approval on June 13, 1983. The court concluded that the new agreement between the NBA and the Players Association was fair, reasonable and adequate.[13]

Once a team drafts a player, it has an exclusive right to contract with him. Furthermore, the right to negotiate with the player is perpetual. Although frequently criticized as unfairly limiting an athlete's bargaining power, the NBA justifies its draft system as a necessary means to create and maintain a competitive balance in the league, and insure the financial stability of all the teams in the NBA.[14]

Leon Wood, a gifted basketball player from California State University, Fullerton, and a member of the United States's 1984 gold medal

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7. *Memorandum* at Art. III(C)(2).

8. To date, professional basketball is the only professional sport which has imposed a salary restriction on its member teams.

9. *Memorandum* at Art. III(C)(5)(a).

10. *Id.* at Art. III(C)(1).

11. *Id.* at Art. III(C)(1)(a).

12. *Id.* Unfortunately, this $75,000 "minimum wage" is not found in any other profession.

13. *Wood*, 602 F. Supp. at 528.

14. Despite the drafting system, it may be argued that parity among the teams has not been achieved. For example, for the past six years, three NBA teams (Boston Celtics, Philadelphia 76ers, and Los Angeles Lakers) have dominated league play.

winning Olympic basketball team, was selected by the Philadelphia 76ers Basketball Club in the first round of the NBA annual college draft on June 19, 1984. Shortly thereafter, the 76ers and Fred L. Slaughter, Wood's representative, began contract negotiations.[15] Although the parties were unable to reach an agreement, the 76ers offered Wood a one-year contract worth $75,000, the minimum wage for a first-round draft selection.[16] This offer preserved Philadelphia's exclusive right to negotiate with Wood, which was guaranteed under NBA regulations. Wood rejected the 76ers' offer, and subsequently filed suit against the NBA, alleging that the NBA's college draft system, the maximum team salary rules, and the ban on player corporations contained in the collective bargaining agreement constituted a violation of section 1 of the Sherman Antitrust Act.[17] Wood sought a preliminary injunction and requested that the 76ers be ordered to negotiate with him without regard to the restrictions of the college draft, the salary cap rules, and the ban on player corporations.

A major focus of the *Wood* decision was directed toward the NBA draft, the system by which new players are allocated among the existing teams. The basic purpose of the draft is to disperse the playing talent among all the teams in the league. The selection process is structured to enable the least successful teams to secure the best of the new talent entering the league. Thus, player selections from the draft pool are made in the reverse order of the team's standing in the league at the end of the season.[18]

In *Wood,* the court rejected Leon Wood's claim that the college draft system and the salary cap rules contained in the collective bargaining agreement violated the Sherman Antitrust Act. The court held that the college draft and the salary cap were exempt from the Sherman Act.[19] Referring to the three-pronged test for a nonstatutory labor ex-

15. *Wood,* 602 F. Supp. at 529.

16. This issue was disputed at the trial. Patrick Williams, Vice-President and General Manager of the Philadelphia 76ers, stated in his affidavit that the contract was offered to Wood only to preserve the team's exclusive right to negotiate with Wood, and was not related to the NBA's 1983 team salary limitations. *Id.* at 526-27.

17. *Id.* at 526, (citing 15 U.S.C. § 1 (1982)). This section declared illegal "[e]very contract, combination . . . or conspiracy in restraint of trade."

18. This system was changed in 1985. Presently, instead of the traditional coin toss between the teams with the worst record in each conference, the seven teams failing to qualify for post-season play enter a lottery drawing. Seven cards are then placed in a cylinder. Each card has the name of one of the seven teams. The Commissioner of the NBA then randomly selects one card at a time from the cylinder. The team that is selected first receives the seventh draft selection. The next team selected receives the sixth pick and so on until the final team is selected. This team receives the first pick in the draft.

19. *Wood,* 602 F. Supp. at 528.

emption laid out in *Mackey v. National Football League*,[20] the *Wood* court stated that conduct which restrains trade may nevertheless be exempt from antitrust laws where: 1) the restraint primarily affects only the parties to the collective bargaining relationship; 2) the restraint is over a mandatory subject of bargaining; and 3) the agreement is the product of bona fide arm's length bargaining. The court held that the provisions contained in the 1983 collective bargaining agreement reached between the NBA and the Players Association satisfied the test for a nonstatutory labor exemption articulated in *Mackey*. In *Mackey*, the court noted that "under the general principles surrounding the labor exemption, the availability of the nonstatutory exemption for a particular agreement turns on whether the relevant federal labor policy is deserving of pre-eminence over federal antitrust policy under the circumstances of the particular case."[21] Since the three-pronged *Mackey* test was satisfied in *Wood*, the provisions contained in the 1983 collective bargaining agreement were afforded the nonstatutory labor exemption from antitrust laws.

The concept of a labor exemption from the antitrust laws finds its basic source in sections 6[22] and 20[23] of the Clayton Act and in sections 104, 105 and 113 of the Norris-LaGuardia Act.[24] Those provisions state

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20. 543 F.2d 606, 614 (8th Cir. 1976).

21. *Id.* at 613.

22. Clayton Act § 6, 15 U.S.C. § 17 (1982). Section 6 of the Clayton Act provides that the antitrust laws do not "forbid the existence and operation of labor . . . organizations" and labor organizations and their members shall not "be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

23. Clayton Act § 20, 29 U.S.C. § 52 (1982). Section 20 of the Clayton Act provides that:

> [n]o restraining order or injunction shall be granted by any court of the United States, . . . involving or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law . . . .

24. Norris-LaGuardia Act, 47 Stat. 70, 71, 73, 29 U.S.C. §§ 104, 105, 113 (1982). Section 104 of the Norris-LaGuardia Act provides that:

> [n]o court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing . . . any of the following acts: (a) Ceasing or refusing to perform any work or to remain in any relation of employment; (b) Becoming or remaining a member of any labor organization, or of any employer organization, regardless of any such undertaking or promise as is described in section 103 [nonenforceability of undertakings in conflict with public policy; "yellow dog" contracts] of this title; . . .

> Section 105 of the Norris-LaGuardia Act states that:

> [n]o court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful com-

that labor unions are not combinations or conspiracies in restraint of trade, and specifically exempt certain union activities such as secondary picketing and group boycotts from the coverage of antitrust laws.[25] This statutory labor exemption was created to insulate, and thereby protect, legitimate collective activity by employees,[26] which although inherently anticompetitive, is favored by federal labor policy over federal antitrust laws.[27]

The United States Supreme Court, in *Connell Co. v. Plumbers & Steamfitters,*[28] held that in order to accommodate the two contrasting congressional policies of favoring free competition in business markets and favoring collective bargaining under the National Labor Relations Act,[29] certain union-employer agreements must be accorded a limited nonstatutory exemption from antitrust sanctions.[30]

In challenging the maximum team salary limitations and the college draft system as violative of federal antitrust laws, Wood contended that since he was not an NBA player when the collective bargaining agreement was negotiated, the agreement could not bind him.

Addressing this argument, the court focused upon the United States

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bination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title.

Section 113 of the Norris-LaGuardia Act states that:

(a) [a] case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct, or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or association of employers; or (3) between one or more employees or associations of employees and one or more employees and associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" . . . of "persons participating or interested" therein . . .

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry therein, or is a member, officer or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee. . . .

25. *See* Connell Co. v. Plumbers & Steamfitters, 421 U.S. 616, 621-22 (1975).

26. The non-labor group (in this case the NBA) may avail itself of the labor exemption as well. *See* Meat Cutters v. Jewel Tea, 381 U.S. 676, 729-30 (1965).

27. *Connell,* 421 U.S. at 622.

28. *Id.* at 616.

29. 29 U.S.C. § 151 (1982).

30. *Connell,* 421 U.S. at 622.

Supreme Court's decision in *J.I. Case Co. v. NLRB*.[31] In that case, an employee was hired after the collective bargaining agreement was made. The Court held that "the terms of the [employee's] employment already have been traded out."[32] Judge Carter stated that according to the holding in *J.I. Case,* "at the time an agreement is signed between the owners' and the players' exclusive bargaining representative, all players within the bargaining unit and those who enter the bargaining unit during the life of the agreement are bound by its terms."[33] The collective bargaining agreement in question expires on June 1, 1987, and therefore all players who enter the NBA up to that date are bound under the 1983 modified *Robertson* collective bargaining agreement, including Leon Wood. Thus, the first of three prerequisites for a nonstatutory labor exemption from the Sherman Antitrust Act was satisfied.

The second requirement for a nonstatutory labor exemption from the Sherman Act is that the restraint on trade must involve a mandatory subject of the bargaining agreement. In the case of *NLRB v. Wooster Division of Borg-Warner Corp.*,[34] the Supreme Court stated: "the duty to bargain is limited to mandatory subjects and within that area neither party is legally obligated to yield. As to other matters, however, each party is free to bargain or not to bargain, and [to] agree or not to agree."[35] In defining the duty of each party to bargain, the subject matter of the bargaining has been classified into two basic categories: mandatory and permissive subjects of bargaining. Citing the Supreme Court's conclusion in *Wooster*, the *Wood* court stated that the mandatory subjects of bargaining included "wages, hours and other terms and conditions of employment,"[36] while permissive subjects of bargaining included all other matters. Parties are required to bargain in good faith about mandatory subjects, but may refuse to bargain about permissive subjects.[37] In addition, a party may insist that the other agree to proposals with respect to mandatory subjects even to the point of impasse.[38] Since the college draft provisions and salary cap limitations contained in the collective bargaining agreement between the NBA and the Players

31. 321 U.S. 332 (1944).

32. *Id.* at 335.

33. *Wood*, 602 F. Supp. at 529.

34. 356 U.S. 342 (1958).

35. *Id.* at 349.

36. *Wood,* 602 F. Supp. at 528.

37. R. GORMAN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 399 (2d ed. 1976).

38. "Impasse" may be defined as "that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless." *Id.* at 448.

Association fall within the definition of wages and terms and conditions of employment, they are considered mandatory subjects of bargaining.

The third and final requirement for a nonstatutory labor exemption was that the collective bargaining agreement must be the product of bona fide arm's length bargaining. Simply stated, an agreement which is negotiated at arm's length is one which is negotiated by unrelated parties, each acting in its own self-interest. Since the parties to the NBA collective bargaining agreement were unrelated and acting in their own self-interests, the *Wood* court held that the NBA collective bargaining agreement was the product of bona fide arm's length negotiating.[39] The court thus concluded that Leon Wood's claim that the college draft system and the maximum salary limitation violated existing antitrust laws must fail, because the collective bargaining agreement reached between the NBA and the Players Association met the *Mackey* test for a nonstatutory exemption from the Sherman Antitrust Act.

Finally, the *Wood* court discussed the player corporation ban. The player corporation or personal service corporation refers to a "corporation that is organized for the purpose of utilizing the individual's athletic, or other, abilities."[40] The personal service corporation permits an individual to defer his income by use of corporate pension and profit-sharing plans, adopt corporate fringe benefit programs, and qualify for estate planning advantages offered by the corporate form of organization.[41] The 1983 NBA collective bargaining agreement contained a ban on player corporations. According to the Players Association General Counsel, the ban on player corporations was agreed to because "these individual corporations created administrative entanglements and accounting difficulties for the benefit plans established by the Players Association and the NBA."[42] The court concluded that since the ban potentially affects the terms and conditions of employment, it could be considered a mandatory subject of bargaining.[43] However, even if the ban on player corporations could not be classified as a mandatory subject of bargaining, the court concluded that the ban presented no antitrust issues.[44] It was merely a restriction agreed upon by both parties to the agreement for general convenience. Therefore, Leon Wood could not successfully allege antitrust violations regarding the player corporation ban.

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39. *Wood*, 602 F. Supp. at 528.

40. J. WEISTART & C. LOWELL, THE LAW OF SPORTS 880-81 (1979).

41. *Id.*

42. *Wood*, 602 F. Supp. at 529.

43. *Id.* The court did not explain how the ban potentially affects the terms and conditions of employment.

44. *Id.*

In his suit, Leon Wood sought a grant for preliminary injunctive relief. In the Second Circuit, for a plaintiff to prevail in this type of action, he must show an "unequivocal establishment of irreparable injury and either (1) the likelihood of success on the merits [of the case] or (2) sufficiently serious questions going to the merits [of the case] to make them a fair ground for litigation and the balance of hardships tipping in favor of the party seeking relief."[45] The court held that Wood could not meet these standards, as there was no "likelihood of [Wood] succeeding on the merits or of showing that he has raised serious questions to warrant their being tested in further litigation."[46] In addition, the court ruled that Wood failed to show any irreparable harm; he only claimed that he was being underpaid. This was far from a showing of irreparable harm, as money damages would sufficiently compensate him for whatever injury he had suffered.[47] Since irreparable harm could not be shown, the court denied Wood's motion for preliminary injunctive relief.

To date, *Wood v. National Basketball Association* has not been cited by other courts. At first glance, it appears doubtful that *Wood* will ever become a landmark case within the sports law field. It is a case which seemingly raises few, if any, new or unique issues. As Judge Carter stated, "to adopt plaintiff's principle would turn federal labor policy on its head."[48] If Leon Wood had prevailed in this case, the courts could become inundated with an influx of litigation: employees hired after the terms of collective bargaining agreements were negotiated by their employers and unions would challenge the agreements' terms as non-binding on themselves.

A more detailed examination of the *Wood* case reveals one astonishing fact: the Players Association agreed to a restriction on the salaries of the NBA players. The question which immediately comes to mind is, does the Players Association's acquiescence to player restraints such as the salary cap and college draft violate its duty of fair representation[49] to the players? This question must be answered in the negative. The Players Association has a duty to act in the best interests of all the players, not just the relatively small number of superstars in the league. The salary cap achieves this goal by providing a minimum salary which benefits a large percentage of the NBA players.

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45. *Id., citing* Jackson Dairy, Inc. v. H.P. Hood and Sons, 596 F.2d 70 (2d Cir. 1979).

46. *Wood*, 602 F. Supp. at 529.

47. *Id.* at 530.

48. *Id.*

49. *See generally* GORMAN at 695-728 for an explanation of a union's duty of fair representation to its members.

Arguably, public policy favors the imposition of the salary cap in professional basketball. Many sports fans have great difficulty sympathizing with athletes in a sport where the average salary is approximately $300,000 per year.[50] Absent a salary restriction, there is the potential for a few teams to purchase the top players and dominate league play. The result of this could be an erosion of fan interest leading to the financial demise of the game. The college draft system and salary cap limitation are attempts to evenly distribute talent throughout the league, thus affording each franchise financial security.

It may be argued that professional sports should be treated like any other business and therefore should not be able to claim an exemption from antitrust laws. However, the realities of the professional sports world can be quite different from the realities of the business world. It should be emphasized that teams within a league differ from businesses which compete against one another in other industries. A business firm normally seeks to sell as much of its product as it can and is typically indifferent whether, in so doing, it drives its competition out of business. Conversely, a professional sports team is vitally concerned about the financial well-being of the other teams in the league. By the very nature of professional sports, it is not possible for a particular sport to survive unless the majority of the teams in that sport are successful, as there is an interdependence among the teams.

Is there any way to please both the owners and the players? The modified *Robertson* agreement appears to accomplish this seemingly impossible task, a view supported by the affidavit of Russell T. Granik, Executive Vice-President of the National Basketball Association.[51] Although the salary cap may affect the freedom of individual player contract negotiations, the players in return secured a number of important benefits. By agreeing to a limitation on the amount that can be spent for players' salaries, the players materially improved the prospects of the league's financial survival, thereby protecting against the loss of jobs for all NBA players and reducing the risk of failure of teams to meet deferred obligations of retired players. In exchange for the players' agreement to a maximum team salary, the players gained a minimum team salary that results in the unprecedented right to a guaranteed fifty-three percent share of projected league gross revenues for the upcoming sea-

50. This approximation was arrived at by dividing the allowable team salary limitation by the twelve members on each team ($3.6 million divided by 12 equals approximately $300,000 per player per year).

51. Affidavit of Russell T. Granik, Executive Vice-President of the National Basketball Association (Sept. 21, 1984) (unpublished document).

son. Furthermore, by reason of the guaranteed percentage, the players secured the right to share in the future financial growth of the NBA.[52]

The benefits achieved by the players must also be viewed against the background of the severe financial hardship faced by the NBA. During the seven years in which the *Robertson* agreement[53] had been in effect before its modification, the great majority of NBA teams lost money.[54] Players' salaries and benefits, the largest expense items of the league,[55] rose steadily, fueled by the record salary levels being offered and paid to veteran free agents.[56] This trend made it increasingly difficult for teams in the smaller markets to retain some of their most talented players, resulting in growing competitive imbalance among NBA teams.[57] This in turn led to a decrease in the perceived value of NBA franchises, and seriously eroded buyer interest in small market franchises.[58]

Mr. Granik stated in his affidavit that:

> [t]o address these problems, the NBA believed that some mechanism was required to allow teams to project future profitability based upon manageable expenses and to enhance their ability to compete for the services of the most talented players. The provisions of the Memorandum of Understanding and Modification Agreement were designed to promote those ends.[59]

The modified *Robertson* agreement will not dispose of all of the problems encountered by the NBA. Its intended result is to guarantee the financial security and stability of the league. The salary cap provision protects the owners from other free-spending owners. Under the salary cap provision, the owners are limited in the amount that each may pay a team's twelve members. The salary cap regulation also provides a salary floor (fifty-three percent of the NBA projected gross revenues), which assures financial security to all NBA players. Therefore, both the owners and the players derive a direct benefit from the salary cap provisions contained in the modified *Robertson* agreement.

Although Leon Wood may have "shot an air ball" in his 1984 anti-

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52. *Id.*

53. *Robertson*, 389 F. Supp. 867 (S.D.N.Y. 1975), *aff'd*, 556 F.2d 682 (2d Cir. 1977).

54. Affidavit of Russell T. Granik, Executive Vice-President of the National Basketball Association (Sept. 21, 1984) (unpublished document).

55. *Id.*

56. For example, between 1981 and 1984, the average NBA salary escalated from $175,000 to nearly $350,000. Sobel, *Playing With the NBA Salary Cap*, 6 Ent. L. Rep. No. 11 at 4 (April 1985).

57. Affidavit of Russell T. Granik, Executive Vice-President of the National Basketball Association (Sept. 21, 1984) (unpublished document).

58. *Id.*

59. *Id.*

trust action to bar the National Basketball Association from enforcing its salary cap rules, his suit may serve as a means of sensitizing the owners and the players to the necessity of these rules and the beneficial effects the salary cap rules will have for both owners and players. Conceivably, Leon Wood's "air ball" could become a "three-point play!"[60]

Lloyd C. Bronstein

60. On Jan. 10, 1986, Leon Wood was traded from the Philadelphia 76ers to the Washington Bullets in exchange for rookie forward Kenny Green.