The use of "one year out" clauses in National Basketball Association Player contracts is not a per se circumvention of the league's "salary cap" provisions - *Bridgeman v. National Basketball Association: In re* Chris Dudley, 838 F. Supp. 172 (D.N.J. 1993).

I. INTRODUCTION

One of the most controversial issues in professional sports is the "salary cap."[1] Among the major sports leagues in the United States, the National Basketball Association (NBA) and the National Football League (NFL) have salary caps in place as a part of their respective collective bargaining agreements[2] with their players.[3]

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1. Bridgeman V. National Basketball Ass'n, 838 F. Supp 172, 177 (D.N.J. 1993). The *Bridgeman* court stated that a "salary cap" represents a limit on the compensation professional sports teams can provide players in exchange for their services. *Id.*

Recently, National Basketball Association (NBA) players have begun to call for the abolition of the league's salary cap provision, while both the league and ownership fully support the practice. Jackie MacMullen, *Dudley's Deal Could Blow Lid Off Salary Cap*, BOSTON GLOBE, Sept. 12, 1993 at 64. MacMullen has suggested that future negotiations on the topic will prove to be "the most volatile in the history of the NBA." *Id.*

During the 1994 National Football League (NFL) season, the cap's inaugural year, players have already begun to voice criticisms regarding its operation. Christine Brennan, *No Longer Fun and Games, Sports is Labor - Sniping of Players, Owners Not Restricted to Baseball*, WASH. POST, Aug. 24, 1994 at C1. High profile veterans Phil Simms, Art Monk, and Mark Rypien all claim to have been released, at least in part, because of their respective clubs' inability to fit them under the salary cap. *Id.*

National Hockey League (NHL) players, who played the entire 1993-1994 schedule without a collective bargaining agreement, have resisted efforts by the league to include salary cap type provisions in the next agreement. Mark Asher, *NHL and Union Agree to Meet Again*, WASH. POST, Oct. 3, 1994 at C1. Player resolve is personified by Washington Capitals team representative Don Beaupre's statement that "[i]t's something we can't live with. Until you get the salary cap out of the way, you can't discuss any of the other issues." *Id.*

The history of Major League Baseball (MLB) is replete with debate over economic issues, but none came the fore as prominently as the salary cap issue, the disagreement over which led to the August 12, 1994 player strike. Mark Maske, *The Evolution of a Major League Disaster*, WASH. POST, Sept. 18, 1994 at D1.

2. Glen St. Louis, *Keeping the Playing Field Level: The Implications, Effects and Application of the Nonstatutory Labor Exemption on the 1994 National Basketball Association Collective Bargaining Process*, 1993 DET. C.L. REV. 1221 (1993). A collective bargaining agreement is defined as follows:

> an agreement between an employer and labor union which regulates terms and conditions of employment. The joint and several contract of members of union made by the officers of the union as their agents establishing, in a general way, the recip-

In 1994, attempts by both Major League Baseball (MLB) and the National Hockey League (NHL) to implement forms of a salary cap in their collective bargaining agreements have led to work stoppages.[4]

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rocal rights and responsibilities of the employer, employees collectively, and union. Such is enforceable by and against the union in matters which affect all members alike or large classes of members, particularly those who are employees of other parties to the contract.

BLACK'S LAW DICTIONARY 263 (6th ed. 1990).

3. Scott J.Foraker, *The National Basketball Association Salary Cap: An Antitrust Violation?*, 59 S. CAL L. REV. 157 (1985). The first NBA collective bargaining agreement to include a salary cap provision became effective at the beginning of the 1984-1985 season. *Id.* It limited the amount each team could allocate for player salaries to the greater of $3.6 million in 1984-1985, $3.8 million in 1985-1986, and $4 million in 1986-1987, or 53% of the NBA's gross revenues when divided by the number of teams in the league at that time. *Id.*

The NFL salary cap, part of a seven year agreement between the league and its players that runs through 1999, limits NFL teams to a total payroll of $34.6 million for the 1994 season. Christine Brennan, *No Longer Fun and Games, Sports is Labor - Sniping of Players, Owners Not Restricted to Baseball*, WASH. POST, Aug. 24, 1994 at C1. The cap limits the percentage of the league's gross revenues the players will receive in the form of compensation to sixty-seven percent. Mitch Truelock, *Free Agency in the NFL: Evolution or Revolution?*, 47 SMU L. REV 1917 (1994).

> Once player salaries and benefits reach sixty-seven percent, a salary cap will be imposed on each team, reducing the players' percentage of league gross revenue to a maximum of sixty-four percent the next year, then sixty-three percent the next year, and finally sixty-two percent for each year thereafter.

Id.

Salary caps have been characterized as either "hard" or "soft". Richard Justice, *Sports World Labors to Get Back in Game - Player Owner Conflicts Override the Competition*, WASH. POST, Oct. 1, 1994 at B1. A "soft cap" specifies a figure above which total team compensation cannot rise, but contains exceptions allowing teams to exceed payroll limitations in certain scenarios. *Id.* A "hard cap" similarly sets a maximum salary figure, but requires teams to strictly limit their total compensation to the maximum figure, providing few narrow exceptions, if any at all. *Id.* As a result, management is likely to push for a "hard cap," whereas labor, if they will consent to a cap at all, will certainly support a "soft cap". *Id.* The NBA salary cap is often characterized as "soft"; the NFL is considered to have a "hard" cap. *Id.*

4. Len Hochberg, *NHL Rejects Proposal, Drops Saturday Start - Bettman Says No Hockey Until Labor Agreement is Reached*, WASH. POST, Oct. 12, 1994 at B1. On October 11, 1994, after having already postponed the scheduled NHL October 1 start, Commissioner Gary Bettman rejected a player counter-proposal on the salary cap issue and announced that the 1994-95 season would not begin until a collective bargaining agreement was reached between management and players. The league presented a plan which imposed a 3% tax on the gate receipts of all teams, and a graduated payroll tax which began at 1/2% and topped out at 107%. Len Hochberg, *NHL Players Set to Offer New Proposal to Owners*, WASH. POST, Oct. 10, 1994 at C1. Under this plan, the average payroll of $14 million would be taxed at a rate of 7%. *Id.* National Hockey League Players Association (NHLPA) director Bob Goodenow stated the fundamental difference between player and management goals was that management sought to tax expenses while the players would tax revenues. *Id.* In support of the NHLPA position, Goodenow reasoned that taxing expenses, a large portion of which is made up by player salaries, would in effect constitute a salary cap, and punish teams with large payrolls, while allowing teams with smaller payrolls but equal revenue to be taxed at a lower rate. *Id.* The NHLPA counter-proposal, rejected by Bettman as "a step backward" which failed to address the problem of escalating player salaries, proposed a 5.5% tax on the sal-

Negotiations following the recent expiration of the 1988 NBA Collective Bargaining Agreement (CBA) have focused primarily upon the salary cap issue.[5] As one would expect, the National Basketball Association Players' Association (NBAPA) and the league have expressed dichotomous views regarding the utility of a salary cap in the league's future.[6] In 1993 and 1994, high profile cases have been litigated between the parties in federal courts regarding the applicability of antitrust laws to the CBA and alleged salary cap circumventing techniques used in player contracts.[7] As will be demonstrated, the rulings in these cases will have a profound effect upon the positions of the parties as they attempt to negotiate a new collective bargaining agreement.[8]

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aries and gate receipts of the 16 highest revenue producing clubs. *Id.* at B1. As of January 7, 1995, the parties still were not in agreement on the salary cap issue. Len Hochberg, *NHL Owners Likely to Nix New Proposal*, WASH. POST, Jan. 7, 1995 at H1.

In addition to the work stoppage in the NHL, one of the most exciting baseball seasons in recent memory was cut short by the inability of players and owners to work out a compromise over the salary cap issue. Mark Maske, *The Evolution of a Major League Disaster*, WASH. POST, Sept. 18, 1994 at D1. Because of revenue disparities among large and small market teams, a system of revenue sharing in which the larger market teams would agree to subsidize the smaller market teams was agreed to on January 18, 1994. *Id.* The plan was conditional, however, upon the players acceptance of a salary maximum and minimum. *Id.* Ownership claimed that minimum salaries would keep smaller market teams from hoarding the shared revenue rather than spending it on salary, and the maximum salary would keep large market teams from being outspent by even larger market clubs. *Id.* Nonetheless, the players viewed the root of baseball's economic problems to be one of revenue sharing, not player salaries and refused to accept any provision limiting salaries. *Id.* On August 12, 1994, the players struck ending the 1994 season and leading to the cancellation of the World Series for the first time since 1904. *Id.*

5. Christine Brennan, *No Longer Fun and Games, Sports is Labor - Sniping of Players, Owners Not Restricted to Baseball*, WASH. POST, Aug. 24, 1994 at C1. The 1988 CBA expired after the final game of the 1994 NBA Playoffs on June 22. *Rockets Win - Olajuwon Leads Houston To Its First NBA Crown*, USA TODAY, June 23, 1994 at C1.

6. Brennan, *supra* note 5, at C1. The NBAPA contends that the salary cap was necessary and useful only during the 1970's and 80's when the league was in dire financial straits. *Id.* NBAPA Executive Director Charles Grantham stated:

> [w]e want to eliminate [the salary cap]. I think it's a dinosaur. The owners have done a very good job of promoting the salary cap as getting the NBA into these prosperous times, and while it is true that the players did step up and agree to it during the time of recession in the NBA, the biggest thing in terms of the league's success is the fact that it is a product people want to purchase.

Id. Jeffrey Mishkin, the NBA's Senior Vice President for Legal and Business Affairs countered by stating, "[w]e have been able to plan to market and promote the sport because of the salary cap. When you have no idea what your costs will be, you can't devote yourself to marketing and promotion to have the success we have had." *Id.*

7. *See* Bridgeman v. National Basketball Ass'n, 838 F. Supp. 172 (D.N.J. 1993) (addressing alleged cap circumvention clauses in NBA player contracts); *see also* National Basketball Ass'n v. Williams, 857 F. Supp 1069 (S.D.N.Y. 1994) (addressing the applicability of antitrust laws to the 1988 CBA).

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

II. COLLECTIVE BARGAINING IN THE NATIONAL BASKETBALL ASSOCIATION

In the NBA during the late 1970's and early 1980's, NBA salaries began to increase faster than revenue.[9] As a remedial measure to stem the rapid increases in player salaries while, simultaneously, establishing competitive and economic parity among the member teams, the NBA and the NBAPA implemented a salary cap.[10] It was believed that this would give smaller market teams a better chance of signing high-cost talent and, therefore, increase the stability and competitiveness of the league.[11]

The 1988 CBA, contains provisions setting forth detailed definitions of salary[12], team salary[13], salary cap[14], as well as a description of the computation[15] and operation of the cap.[16] In

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9. *Id.* at 1221, 1253 (1993). On the average, NBA teams during this period were losing $700,000 each. *Id.*

10. *Id.* The NBA hoped that such parity could be achieved by limiting the ability of the financially stronger teams to acquire all high-cost players. *Id.*

11. *Id.*

12. 1988 National Basketball Association Collective Bargaining Agreement (hereinafter CBA), Art. VII, Part A, Sec. 1(c). Sec. 1(c) defines "salary", in pertinent part, as "the compensation in money, property, investments or anything else of value to which an NBA player or a person or entity designated by a player is entitled in accordance with a player contract."

13. CBA, Art. VII, Part A, Sec. (d). Sec. (d) provides, in pertinent part that:

> [t]eam Salary shall mean (i) the aggregate salary called for under all outstanding offer sheets issued by a team; (ii) the aggregate salary called for under all qualifying offers tendered; (iii) prior to July 1, the aggregate salary of all players to whom the team is entitled to extend qualifying offers; (iv) the aggregate salary last paid by a team to all unrestricted free agents who last previously played for such team; and (v) the aggregate salary of all active and former players as to whom the team has an obligation to pay such salary for and attributable to a particular season.

Id.

14. CBA, Art. VII, Part A, Sec.(e). Sec. (e) provides, in pertinent part, that: "[s]alary cap (sometimes also referred to as "maximum team salary") shall mean the then current maximum amount that each team can pay in salaries during an NBA season, subject to the rules and exceptions set forth in this agreement." *Id.*

15. CBA, Art. VII, Part D, Sec. 1. Sec. 1 reads as follows: [f]or each season during the term of this agreement, there shall be a salary cap. The salary cap shall be equal to the greater of:

> (a) $6.7 million in 1988-89
> $7.4 million in 1989-90
> $8.1 million in 1990-91
> $8.9 million in 1991-92
> $9.8 million in 1992-93
> $10.8 million in 1993-94; or
>
> (b) 53% of defined gross revenues, less 4.3% defined gross revenues, divided by the number of teams in the NBA as of July 31 of each year other than expansion teams that have not completed three full seasons.

Id.

16. CBA, Art. VII, Part E. Part E, Sec. 1 sets forth in pertinent part that the team's

order to preserve the goals of the CBA, a general safeguard provision was included forbidding either side to enter into agreements which frustrate the intention of the parties with regard to the salary cap and the remainder of the agreement.[17] Further, the CBA contains provisions guarding against undisclosed agreements between players and teams concerning consideration given to the player or future dealings with regard to the player's contract.[18]

In addition, the CBA sets forth various contractual scenarios to which the salary cap will not apply.[19] Frequently, NBA teams utilize an exception allowing them to re-sign their own players, upon expiration of his contract, free of all salary cap restrictions, even though other teams may not sign the player if such a signing would cause their total payroll to exceed the salary cap.[20]

Despite the protective measures aimed at perpetuating the effectiveness of the salary cap, NBA players and teams have endeavored to avoid the cap restrictions through various schemes.[21] The most popular cap avoidance tactic is the "one year out" provi-

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team salary may not exceed the salary cap unless the team is using one of the exceptions contained in Part F of the CBA. *Id.*

17. CBA, Art. VII, Part H, Sec. 3. Sec. 3 sets forth:

> Neither the parties hereto, nor any team or players shall enter into any agreement, player contract, offer sheet or other transaction which includes terms that are designed to serve the purpose of defeating or circumventing the intention of the parties as reflected by (a) the provisions of this Article VII with respect to defined gross revenues, salary cap and minimum team salary and (b) the terms and provisions of this agreement.

Id.

18. CBA, Art. VII, Part H, Sec. 4. Sec. 4 reads in pertinent part:

> (a) At the time a team and a player enter into any player contract, or any renegotiation, extension or amendment of a player contract, there shall be no undisclosed agreements of any kind, express or implied, oral or written, or promises, undertakings, representations, commitments, inducements, assurances of intent or understandings of any kind, between such player and any team:
>
> (1) involving consideration of any kind to be paid, furnished or made available to the player . . . by the team . . . either during the term of the player contract or thereafter; or
>
> (2) concerning future renegotiation, extension or amendment of the player contract.

Id.

19. CBA, Art. VII, Part F.

20. CBA, Art. VII, Part F, Section 1(d). Section 1(d) provides in pertinent part:

> A team may enter into a new player contract with . . . any veteran who completes the playing services called for under his player contract and who last previously played for that team, even if such team has a team salary in excess of the salary cap or such player contract causes the team to have a team salary in excess of the salary cap . . .

Id.

21. *See In re* Matter of National Basketball Ass'n, 630 F. Supp. 136 (S.D.N.Y. 1986) (declaring the relabeling of salary payments as a signing bonuses as an illegal salary cap circumvention device); *See also* Bridgeman v. National Basketball Ass'n. 838 F. Supp. 172 (D.N.J. 1993) (upholding the validity of the "one year out" clause).

sion.[22] In order to sign a veteran[23] free agent[24] who did not play for them the previous season, Team X with a total team compensation near or at the salary cap limit, can first offer the player a relatively low multi-year contract. In the contract, the parties include a "one year out" provision which allows the player to unilaterally terminate the contract and become a free agent after fulfilling only one season of his multi-year obligation.[25] Thereafter, Team X could take advantage of the CBA salary cap exceptions and proceed to re-sign the player for any monetary amount without regard for the cap.[26]

This practice led the NBA to protest the formation of contracts including "one year out" provisions, and debate over their legality intensified as several high profile players took advantage of this salary cap exception.[27]

In *Bridgeman v. National Basketball Association: In Re* Chris

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22. *In re* National Basketball Ass'n Players Ass'n and National Basketball Ass'n, *Re*: Chris Dudley, Report of the Special Master at 3. A "one year out" is the player's right to terminate a multi-year contract after one year. *Id.*

23. CBA, Definitions, (m). The CBA provides: "Veteran means a person who has signed at least one player contract with an NBA team." *Id.*

24. CBA, Definitions (h), (l). The CBA defines the two types of free agents as follows:

> (h) "Restricted Free Agent" means a veteran who completes his player contract by rendering the playing services called for thereunder but who is still subject to a right of first refusal in favor of his prior team.
>
> (l) "Unrestricted Free Agent" means a veteran who completes his player contract by rendering the playing services called for thereunder, or whose player contract has been terminated in accordance with the NBA waiver procedure, and is no longer subject to a right of first refusal in favor of his prior team.

Id.

The right of first refusal is the right of an NBA team to match an offer made by another team to one of its own free agents. *Id.* at Definitions (i). If there is a matching offer made within 15 days, the player may not sign with the new team, and he is retained by his current team. CBA, Art. V, Sec. 5 (a)(b).

The CBA specifies that at the conclusion of the 1992-1993 season, players with less than four years of NBA experience are "restricted free agents", while players with greater than four years experience are "unrestricted free agents." *Id.* at Art. V, Sec. 1, (a).

25. Report of the Special Master at 3.

26. *See* CBA Art. VII, Part F, Sec. 1(d), *supra* note 20 for the text of the salary cap exception which makes the "one year out" provision possible.

27. David Aldridge, *Cap In Hand, NBA Seeks Solutions - Salary Situation Causes Controversy*, WASH. POST, Nov. 9, 1993, at E1. Among the players signing contracts containing "one year out" provisions are Toni Kukoc, with the Chicago Bulls, Craig Ehlo, with the Atlanta Hawks, and rookies Chris Webber, with the Golden State Warriors, and Anfernee Hardaway, with the Orlando Magic. *Id.* The NBA viewed these contracts as obvious attempts to skirt the salary cap in order to acquire players they otherwise would be unable to sign. Id NBA commissioner David Stern stated, "We have a group of owners who are encouraged to be competitive. It leads them to look at the rules and stretch them as much as possible." *Id.* Atlanta Hawks general manager Pete Babcock, who signed Ehlo, acknowledges that the "one year out" is a cap circumvention, but also notes "there is no written policy against it." *Id.*

Dudley (Bridgeman II)[28] the legality of such a "one year out" contract entered into between basketball player Chris Dudley (Dudley) and the Portland Trail Blazers (Portland), came before the United States District Court for the District of New Jersey.[29] The court held that "one year out" provisions are authorized by and in literal compliance with the CBA.[30] Moreover, the court found that utilizing the "one year out" provision to sign a player does not constitute a per se salary cap circumvention calling for appropriate penalties under the CBA.[31] The court also held that there did not exist an undisclosed agreement or understanding between Dudley and Portland that Dudley would opt out of the contract after the first year and sign for a presumably greater sum representing his market value.[32]

II. SALARY CAP LITIGATION

A. *Antitrust Issues*

All professional sports in the United States, except baseball,[33] are subject to federal antitrust laws.[34] Past and present salary

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28. 838 F. Supp 172 (D.N.J. 1993).
29. *Id.* at 172.
30. *Id.*
31. *Id.*
32. *Id.*
33. Julie Dorst, *Franchise Relocation: Reconsidering Major League Baseball's Carte Blanche Control*, 4 SETON HALL J. SPORT L. 553, 554 (1994). A series of three United States Supreme Court rulings held that baseball was exempt from the antitrust laws. *Id.* In Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922), the Court held that baseball was not a business or act of commerce, but rather a sport not subject to the provisions of the Sherman Antitrust Act. *Id.* at 208-09.

When again confronted with baseball's antitrust exemption in Toolson v. New York Yankees, Inc. 346 U.S. 356 (1953), the United States Supreme Court refused to overrule *Federal Baseball* and stated that any problem with the immunity should be remedied by legislative action, not judicial intervention. *Id.* at 357.

In Flood v. Kuhn, 407 U.S. 258 (1972), the Court conceded that an antitrust exemption for a professional sport was "an aberration confined to baseball." *Id.* at 282. The Court, however, refused to overturn the exemption because "[i]t is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis*, and one that has survived the Court's expanding concept of interstate commerce." *Id.*

Amidst the current player strike, there are several indications that Congress may consider revoking baseball's antitrust exemption, which most members view as obsolete. Reynolds Holding, *Baseball's Perk Antitrust Question Raised Again - New Push In Congress To Revoke Exemption*, S.F. CHRON., Sept. 16, 1994 at A1.

34. Dorst, *supra* note 33, at 553. *See* Denver Rockets v. All-ProManagement, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971) (applying antitrust laws to professional basketball); Radovich v. National Football League, 352 U.S. 445 (1957) (holding that professional football was subject to antitrust laws); Philadelphia World Hockey Ass'n v. Philadelphia Hockey Club, 351 F. Supp. 462 (E.D. Pa. 1972) (applying antitrust laws to professional hockey); United States v. International Boxing Club, 348 U.S. 236 (1955) (holding that the promotion of boxing matches on an interstate basis constituted "trade" or "commerce" under the Sherman Act); Gunther

cap litigation has focused on claims by the NBAPA that the salary cap itself constitutes a violation of federal antitrust law[35] because of the restricting effect it has on player mobility and individual bargaining position.[36] As a shield from antitrust liability, the NBA has raised the judicially created non-statutory labor exemption as a defense.[37] This antitrust exemption was created by the United

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Harz Sports, Inc. v. United States Tennis Ass'n., 665 F.2d 222 (8th Cir. 1981) (holding that the National Tennis Association's regulation of racket characteristics substantially effected the marketplace for such goods and was hence subject to antitrust laws.); Deesen v. Professional Golfers Ass'n, 358 F.2d 165 (9th Cir. 1988), *cert. denied*, 385 U.S. 846 (1966) (applying antitrust laws to professional golf).

35. *See* Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960 (D.N.J. 1987); Wood v. National Basketball Ass'n, 602 F. Supp 525 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954 (2nd Cir. 1987). "Antitrust acts" are defined as federal and state statutes to protect trade and commerce from unlawful restraints, price discrimination, price fixing, and monopolies. BLACK'S LAW DICTIONARY 94 (6th ed. 1990)

The primary federal antitrust act is the Sherman Act, 15 U.S.C. §1 (1994). Section 1 of the Sherman Act provides, in pertinent part, that:

> [e]very contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states . . . is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and on conviction thereof, shall be punished.

15 U.S.C. § 1 (1994).

In Northern Pac. Ry. v. United States, 356 U.S. 1, 4(1958), Justice Black, writing for the majority observed that:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions.

Id.

"Antitrust injuries" should reflect the anti-competitive effect either of the violation or of anti-competitive acts made possible by the violation. Brunswick Corporation v. Pueblo Bowl-O- Mat, 429 U.S. 477, 488 (1977).

36. Scott J. Foraker, *The National Basketball Association Salary Cap: An Antitrust Violation?*, 59 S. CAL. L. REV. 157, 158 (1985).

37. The non-statutory labor exemption allows certain agreements reached between employee unions and employers to be immune from antitrust laws. Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 691 (1965).

In addition to the judicial non-statutory exemption, Congress has created a statutory exemption to antitrust law. *See* 15 U.S.C. § 17 (1994). Specifically, 15 U.S.C § 17 states:

> Antitrust laws not applicable to labor organizations:
> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor organizations . . . ; nor shall such organization, or members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Id.

The Supreme Court has interpreted the statutory exemption to include the acts of a single union, or group of unions, but not concerted action between unions and non-labor groups, including employers. Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797, 810

States Supreme Court in order to achieve the fundamental goal of federal labor law, resolution of labor issues through collective bargaining rather than antitrust litigation.[38]

In a case involving NFL player restraints, the United States Court of Appeals for the Eighth Circuit in *Mackey v. National Football League*[39] articulated a three part test for the applicability of the non-statutory antitrust exemption.[40] The Court held that the exemption was applicable if three criteria were satisfied: (1) the restraint on trade primarily effects only the parties to the collective bargaining relationship, (2) the agreement concerns a mandatory subject of collective bargaining[41], and (3) the agreement sought to be exempted is the product of bona fide arms-length bargaining.[42] The court invalidated the "Rozelle Rule"[43] which required teams signing athletes who played out their obligations to compensate the player's former team.[44]

(1945).

38. Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622 (1975). Writing for the majority, Justice Powell reasoned: "Union success in organizing workers and standardizing wages ultimately will affect price competition, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of antitrust laws." *Id.*

The non-statutory exemption was originally created for the benefit of unions and was only asserted by unions and enforced on their behalf. *See* Robertson v. NBA, 389 F. Supp. 867, 884-89 (S.D.N.Y. 1975) (denying the NBA's motion that player restraints were shielded from antitrust law, on the ground that the exemption only applies to union activity). Employers, however, began to invoke the exemption, noting it should be available to both parties to the collective bargaining agreement. *Id.* Some courts have reasoned similarly and extended the exemption to employer activities. *See* McCourt v. California Sports, Inc, 600 F.2d 1193, 1203 (6th Cir. 1979) (holding the NHL reserve system was the product of collective bargaining and hence the NHL could raise the non-statutory exemption as a defense to a player antitrust challenge.) *See also* Wood v. NBA, 809 F.2d 954, 959 (2nd. Cir. 1987) (holding the NBA could invoke the non-statutory exemption to defend the salary cap and college draft against antitrust claims).

39. 543 F.2d 606 (8th Cir. 1976).

40. *Id.*

41. 29 U.S.C § 158(d). 29 U.S.C § 158 (1994) states:

> (d) Obligation to bargain collectively
> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to . . . confer in good faith with respect to wages, hours, and other terms and conditions of employment . . .

Id.

42. *Mackey*, 543 F.2d at 614. In dicta, the court of appeals indicated that bona fide arms-length bargaining can be determined from examining the negotiating history with respect to the issue sought to be exempted. *Id.* at 616. Relevant criteria are the relative bargaining strengths of the parties and whether the restricted side acquired benefits in exchange for accepting the restriction. *Id.*

43. *Id.* at 609. This rule was named after Alvin Ray "Pete" Rozelle, commissioner of the NFL from 1960-1989, who pushed for the implementation of the rule. *Id.*

44. *Id.* at 614. The "Rozelle Rule" provided that when a player fulfilled his contractual duties to a team and he is signed by a different team, the acquiring team must arrange to

In *McCourt v. California Sports Inc.*[45], the United States Court of Appeals for the Sixth Circuit modified the *Mackey* test when players challenged the NHL reserve system on antitrust grounds.[46] The court broadly construed the meaning of *Mackey*'s third criterion, "bona fide arms length bargaining", thus increasing the scope of the applicability of the non-statutory exemption.[47]

Conversely, the United States Court of Appeals for the Ninth Circuit took a narrow view of the non-statutory exemption in *Kapp v. National Football League*.[48] The court stated that the non-statutory exemption should not be extended to restrictions implemented via collective bargaining if those restraints have traditionally been held violative of public policy, aside from antitrust law.[49]

Courts have similarly analyzed NBA player restraints reached through collective bargaining, principally the salary cap, right of

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compensate the player's former team through a mutually satisfactory agreement. *Id.* at 609 n.1. If the two teams could not reach an arrangement, the commissioner would intervene and order fair and equitable compensation in the form of players and/or draft picks. *Id.*

The court found sufficient evidence in the bargaining history of the rule to conclude that it was unilaterally imposed upon the players and could not be considered the product of bona fide arms length negotiations. *Id.* at 616. The court noted the recent formation and inadequate finances as contributing to a weak bargaining position of a player's union. *Id.* at 615. Further, the court could not identify any benefit which accrued to the players in exchange for accepting the rule. *Id.* at 616.

45. 600 F.2d 1193 (6th Cir. 1979).

46. *Id.* In striking down the restraint, the court noted that the NHL reserve system was commonly referred to as the "modified Rozelle Rule." *Id.* at 1194. Similar in function to the "Rozelle Rule", when an NHL team signed a player who completed his contractual obligations to another team, the two teams were required to mutually agree upon an "equalization payment" to be made from the signing team to the former team. *Id.* at 1195. Unlike the "Rozelle Rule", if the teams failed to reach an agreement, an independent arbitrator, not the league's commissioner, would formulate equitable compensation. *Id.*

47. *Id.* at 1203. Prior to *McCourt*, a key factor in determining if an agreement was the product of "arms length bargaining" was whether the union received certain benefits in exchange for accepting the restrictions. *See* Mackey v. National Football League, 543 F.2d 606, 616 (8th Cir. 1976) (holding that since NFL players received no benefit in exchange for accepting the restrictive "Rozelle Rule", it was not a product of "arms length bargaining" and therefore invalid.) The court in *McCourt* held the players' acceptance of the NHL reserve system to be the product of "arms length bargaining" and exempt from antitrust law because they received benefits "in connection with", although not "exchanged for" the restriction. *McCourt*, 600 F.2d at 1203.

48. 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979). In *Kapp*, a former player challenged the "Rozelle Rule" and the draft rule, among others, on antitrust grounds. *Kapp*, 390 F. Supp. at 75. The district court pointed out that all challenged provisions were in violation of antitrust law, but noted that at the time when the plaintiff was injured, no collective bargaining agreement was in effect, hence the non-statutory exemption was not applicable. *Id.* at 86.

49. *Id.* at 86. The *Kapp* court stated that even if a restriction satisfies the criteria of the *Mackey* test and qualifies for a non-statutory exemption from antitrust rules, public policy may dictate against its enforcement, regardless of the exemption, because of anti-competitive effects. *Id.*

first refusal[50], and college draft[51], under the *Mackey* test to determine the applicability of the non-statutory exemption.[52] In *Wood v. National Basketball Association*,[53] player Leon Wood challenged the salary cap and college draft on antitrust grounds.[54] The United States District Court for the Southern District of New York held, using the *Mackey* test, that these CBA restraints were protected from antitrust scrutiny by the non-statutory exemption.[55] On appeal, Wood claimed that the cap and right of first refusal amounted to an illegal agreement between horizontal competitors and the NBA teams, to eliminate competition among players[56] and, as such, he should be allowed to negotiate with any and all NBA teams free of those restraints.[57] The court rejected this claim as a

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50. CBA, Art V, Sec. 5(a)(b), *supra* note 24.

51. CBA, Art IV, Sec. 1. Sec. 1 provides:

> (b) a team that drafts a player shall, during the period from the date of such draft to the date of the next college draft, be the only team with which such player may negotiate or sign a player contract . . .

Id.

52. *See* Bridgeman v. National Basketball Ass'n, 675 F. Supp. 960, 964 (D.N.J. 1987) (holding the college draft, right of first refusal, and salary cap provisions satisfied the *Mackey* test); *See also* Wood v. National Basketball Ass'n, 602 F. Supp 525, 528 (S.D.N.Y. 1984) (holding that the college draft and salary cap satisfied the *Mackey* test).

53. 602 F. Supp 525 (S.D.N.Y. 1984), *aff'd*, 809 F.2d 954 (2nd Cir. 1987).

54. *Wood*, 602 F. Supp. at 525. In the 1984 NBA College Draft, Wood was chosen by the Philadelphia 76ers, a team whose payroll exceeded the salary cap. *Id.* at 527. As a result, the 76ers could only tender Wood a one-year offer of $75,000, the maximum allowable contract a team exceeding the salary cap can give a draftee. *Id.* Wood claimed the draft and right of first refusal were in violation of §1 of the Sherman Act *Id.* at 525. Wood sought an injunction ordering NBA teams other than the 76ers to deal with him on terms other than those set out in the 1983 CBA. *Id.*

55. *Wood*, 602 F. Supp. at 528. The court noted that the *Mackey* test was satisfied. *Id.* Wood also claimed that since the CBA in effect at the time was implemented in 1983, one year before he was drafted, the agreement could not bind him. *Id.* The court emphasized the overwhelming absence of authority supporting this position. *Id.* On the contrary, the court asserted that the NBAPA was the sole recognized bargaining agent for the players, and therefore, any agreement signed between the NBA and NBAPA bound not only players in the NBA at the time of the signing, but also any players who entered the league during the life of the agreement. *Id.* (citing J.I. Case Co. v. National Labor Relations Bd., 321 U.S. 322 (1944)).

56. Wood v. National Basketball Ass'n, 809 F.2d 954 (2nd Cir. 1987). The court recognized that if the cap and draft were products of such a horizontal agreement among the NBA teams and unilaterally imposed on the players outside of collective bargaining, they would indeed be illegal restraints in violation of the Sherman Act. *Id.* at 959. Since the cap and draft were not imposed unilaterally by the NBA, but were agreed to by the players via collective bargaining, the non-statutory exemption prevented any antitrust challenge. *Id.*

57. *Id.* at 959. The court stressed that a fundamental principle of federal labor law is that employees can choose to eliminate competition among themselves by appointing a collective bargaining body to represent them as a whole. *Id.* Once the employees have exercised that option, no employee may seek to bargain individually, without consent from the collective body, even though they may receive less compensation under the collective bargaining agreement that through individual negotiations. *Id.* (citing J.I. Case Co. v. National Labor Relations Bd., 321 U.S. 321, 338-39 (1944)).

subversion of national labor policy goals and affirmed the decision of the lower court.[58]

In *Bridgeman v. National Basketball Association* (Bridgeman I)[59], the right of first refusal, draft, and salary cap were again challenged on antitrust grounds.[60] The crux of the players' argument was that they were no longer bound by the 1983 CBA which expired five months earlier at the end of the 1987 Playoffs, and hence the contested provisions were no longer shielded from antitrust law.[61] The NBA argued that the restraints continued indefinitely after the expiration of the agreement as long as the employer maintains the status quo.[62] The court rejected both positions and held the antitrust exemption continues "only as long as the employer continues to impose that restriction unchanged and reasonably believes that the practice or a close variant of it will be incorporated in the next collective bargaining agreement."[63] The court did not, however, reach the merits of the case.[64] Further litigation of the issue did not occur because the NBA and NBAPA reached a settlement agreement, the final terms of which were incorporated into the 1988 CBA.[65]

A review of the relevant precedent suggests that where a collec-

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58. *Wood*, 809 F.2d 954 at 959. Circuit Judge Winter put Wood's claim in perspective by stating: "No one seriously contends that antitrust laws may be used to subvert fundamental principles of our federal labor policy as set out in the National Labor Relations Act." *Id.*

59. 675 F. Supp 960 (D.N.J. 1987).

60. *Id.*

61. *Id.* at 964. The court emphasized that the *Mackey* test was satisfied. *Id.* Further, the players conceded that the non-statutory exemption immunized the cap, draft, and right of first refusal from antitrust law when the CBA was in effect. *Id.* The players cited the general refusal of courts to extend antitrust immunity in the absence of a collective bargaining agreement. *Id.*

62. *Id.* The court rejected this argument and reasoned that unions would be reluctant to enter collective bargaining agreements for fear that any anti-competitive restraints they consent to would never be challengeable in court. *Id.*

63. *Id.* at 967. The court theorized that where the employer ceases to have such a belief, the restraint is unilaterally being imposed on the employee, and hence cannot satisfy the arms-length bargaining criterion of *Mackey*. *Id. But see* Powell v. National Football League, 678 F. Supp. 777 (D.Minn. 1988) ("Powell I") (rejecting the *Bridgeman* standard and adopting the so-called "impasse" standard which states that the non-statutory exemption applies only until "there appears no realistic possibility that continuing discussions concerning the provision at issue would be fruitful); Powell v. National Football League, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991) ("Powell II") (reversing the district court and holding that the non-statutory exemption extends beyond impasse for as long as the labor relationship continues); Brown v. Pro Football, Inc., 782 F. Supp. 125 (D.D.C. 1991) (holding that the exemption ends concurrently with the expiration of the collective bargaining agreement).

64. *Bridgeman*, 675 F. Supp. at 967. The case reached the court on a motion for summary judgment and the record was incomplete to resolve the necessary issues of material fact. *Id.*

65. National Basketball Ass'n v. Williams, 857 F. Supp. 1069 (S.D.N.Y. 1994).

tive bargaining relationship exists between two parties, and the *Mackey* test is satisfied, anti-competitive restraints will qualify for the non-statutory antitrust exemption and will be subject only to federal labor law.[66] The majority of courts have held that the NBA's salary cap provision fulfills the *Mackey* test.[67] Hence, as long as courts find an existing collective bargaining relationship, it is highly unlikely that the NBAPA will be able to utilize antitrust law to abolish the salary cap.[68]

B. NBA Salary Cap Circumvention Issues

Litigation of a different issue, salary cap circumvention, occurred during *In re* National Basketball Association, the "Albert King Case."[69] In 1985, the New York Knickerbockers (Knicks), who were over the salary cap at the close of the 1984-1985 season, sought to sign King after another player chose not to renew his contract.[70] Believing they had a $540,000 salary cap exception available to fill the vacated roster spot, the Knicks offered King a contract they assumed to be valid.[71] However, the contract was challenged by the NBA and an arbitrator ruled that the Knicks had

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66. *Id.*

67. *See Wood*, 809 F.2d. at 959; *See also Bridgeman*, 675 F. Supp. at 964.

68. *See Bridgeman*, 625 F. Supp at 964.

69. 630 F. Supp. 136 (S.D.N.Y. 1986).

70. *Id.* at 137-38. The player, Leonard "Truck" Robinson, had been paid $540,000 for his final season with the Knicks. *Id.*

71. *Id.* at 137-38. Under the 1983 CBA, Art. III, Sec. C(2)(c)(i) any team exceeding the salary cap may replace "a player who retires" at a salary not greater than 50% of what the retiring player was last paid. *Id.* at 138. Article III, Sec. C(2)(e) states that a team over the salary cap may replace a veteran free agent with "a salary no greater than 100% of the salary last paid to the veteran free agent." *Id.*

The Knicks assumed Robinson to be a veteran free agent, and accordingly they made King the following $3.3 million offer:

1985-86 - $450,000
1986-87 - $450,000
1987-88 - $600,000
1988-89 - $700,000
1989-90 - $700,000.

Id.

Also included was a signing bonus of $400,000 disbursed evenly over the five years of the contract, for a total year by year salary of:

1985-86 - $530,000
1986-87 - $530,000
1987-88 - $680,000
1988-89 - $780,000
1989-90 - $780,000.

Id.

Hence, King's 1985-86 and 1986-87 salary was below the $540,000 Robinson made in his final season. *Id.* The remainder of the contract was over the salary cap, but the 1983 CBA was scheduled to terminate in the spring of 1987. *Id.*

only $270,000 available.[72] In response, the Knicks made a second proposal to King which contained the same aggregate compensation as the first offer, but which was restructured to comply with the reduced cap exception.[73] The court held that the Knicks second offer was an intentional circumvention of the salary cap because it provided the exact same amount of compensation, while merely relabelling yearly salary payments as signing bonuses and altering the timing of payment disbursals.[74] The court reasoned that the contract was "artificially and formally" within the salary cap, but that the interests of the NBA were nonetheless compromised.[75]

III. *BRIDGEMAN V. NATIONAL BASKETBALL ASSOCIATION: IN RE* CHRIS DUDLEY, 838 F. SUPP. 172 (D.N.J. 1993)

In *Bridgeman v. National Basketball Association: In Re* Chris Dudley[76], the NBA challenged the legality of both the preliminary negotiations and the final contract between Dudley and Portland.[77] On June 30, 1993, Dudley completed a three year contract with the New Jersey Nets.[78] Prior to that date, New Jersey ten-

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72. *Id.* Both sides chose Billy Cunningham, a former player and coach, and present part owner of the Miami Heat, to arbitrate the dispute. *Id.* He ruled that Robinson was a retiring player and not a veteran free agent as the Knicks had assumed. *Id.* As a result, the Knicks could offer King only $270,000 for the two seasons during which the 1983 CBA was in effect. *Id.*

73. *Id.* The second offer, also totaling $3.3 million, contained the following yearly salaries:

1985-86 - $75,000
1986-87 - $75,000
1987-88 - $700,000
1988-89 - $700,000
1989-90 - $800,000.

The contract, however, contained a $960,000 pro rata signing bonus. Totaling salary and signing bonus, King's compensation for the 1985-86 & 1986-87 seasons amounted to $267,000, complying with the $270,000 cap exception. *Id.*

74. *In re* National Basketball Ass'n, 630 F. Supp. at 141. The court set forth as a rough standard for salary cap compliance whether the offer remained within the salary cap for all years in which salary was guaranteed, regardless if the contract extended past the 1983 CBA's spring 1987 termination point. *Id.* Based on this standard, Judge Carter expressed his opinion that the first Knicks' offer was also a cap circumvention, but those violations were only "modest infractions" compared to those in the second offer. *Id.* He noted that the second offer provided an unrealistic base salary during the first two seasons for a player of King's ability, whereas the salary increased approximately 300% after the CBA's scheduled end. *Id.*

75. *Id.* The court explained that if the contract were allowed to stand, it would undermine the NBA's purpose in signing the agreement: to maintain the financial stability of the league and improve the competitive balance throughout the league. *Id.* Judge Carter stated: "By sanctioning such empty formalism we would buttress the players' interests, but leave the league in shambles." *Id.*

76. 838 F. Supp 172 (D.N.J. 1993).

77. *Id.*

78. *Id.* at 174. Dudley was a backup center who received $1,200,000 for his last year

dered to Dudley, free of the salary cap, a seven year $20,748,000 contract.[79] Dudley's agent, Dan Fegan, rejected the offer and continued to negotiate with New Jersey and other NBA teams, most notably Portland and the Phoenix Suns.[80]

Portland provided an attractive situation for Dudley, but the team had no room under the salary cap.[81] Portland team management suggested trading a player in order to open up a $790,000 slot on the roster, which they could offer Dudley in a contract containing a "one year out" provision.[82] After further meetings between Portland and Fegan, Dudley signed a seven year guaranteed contract worth $10,512,000, one-half the value of the New Jersey offer.[83] The contract, of course, contained an additional clause, the "one year out" provision.[84]

The NBA challenged the contract on the grounds that it constituted a salary cap circumvention under Article VII, Part H, Section 3 of the CBA.[85] The league also contended that the surrounding

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with New Jersey. *Id.*

79. *Id.* at 175. The contract contained the maximum allowable yearly increases of 30% of the initial salary. CBA, Art VII, Part F, Sec. 2(c). The contract contained the following yearly salaries:

1993-94 - $1,560,000
1994-95 - $2,028,000
1995-96 - $2,496,000
1996-97 - $2,964,000
1997-98 - $3,432,000
1998-99 - $3,900,000
1999-2000 - $4,368,000.

Id.

80. *Id.* Based on a salary study of starting NBA centers, Fegan believed New Jersey's offer was not commensurate with Dudley's ability or playing time. *Id.* Fegan also discussed a contract with the Phoenix Suns averaging $3,307,000 per year, but no offer was made. *Id.*

81. Bridgeman v. National Basketball Ass'n: In re Chris Dudley, 838 F. Supp. 172 (D.N.J. 1993). Portland was particularly favorable to Dudley because the team was one of the league's best, it had no natural center, a need Dudley could satisfy, and the city was located on the West Coast where he lived. *Id.*

82. *Id.* Based upon the figures Dudley was offered by New Jersey and Phoenix, a $790,000 contract alone would certainly be unacceptable. *Id.* Portland needed to include the "one year out", which, if exercised, would allow them to re-sign Dudley for his market value, closer to the New Jersey and Phoenix offers. *Id.*

83. *Id.* The Portland contract contained the allowable 30% yearly increases and was structured as follows:

1993-94 - $790,000
1994-95 - $1,027,000
1995-96 - $1,264,000
1996-97 - $1,501,000
1997-98 - $1,738,000
1998-99 - $1,975,000
1999-2000 - $2,212,000.

Id.

84. *Id.*

85. CBA., for full text *see supra* note 17.

contract negotiations pointed to an unwritten agreement regarding future renegotiations of the contract in violation of Article VII, Part H, Section 4(a)(2).[86] The dispute was referred to a Special Master as required by the CBA.[87] Special Master Merrell E. Clark heard arguments on August 30, 1993 after which he issued a report addressing the NBA's allegations.[88] On September 7, 1993, Report #28 of the Special Master, *In re* National Basketball Association Player's Association and National Basketball Association (*Re:* Chris Dudley), was issued in which Clark ruled that the Dudley/Portland contract did not constitute a cap circumvention.[89] He also found the parties did not have an undisclosed understanding that Dudley would opt out of the contract after one year, nor that Portland would offer him a new deal providing him with a salary indicative of his market value.[90] On September 28, 1993, Report # 29 was issued in which the Special Master addressed and rejected a new NBA contention: if the one year out provision had value, it should be included for salary cap computation purposes.[91] The NBA filed

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86. CBA., for full text *see supra* note 18.

87. CBA, Article VIII, Sec. 2. If the Special Master found a violation of Sec. 4, the NBA Commissioner would be authorized to impose up to $1 million in fines on Portland. CBA Article VII, Part H, Sec. 4(c)(1). If there was also a violation of Sec. 3, Dudley's contract would be voided. Article VII, Part H, Sec. 4(c)(2).

In addition to the Dudley/Portland contract, the Kukoc/Chicago and Ehlo/Atlanta contracts, which also contained one year outs were before the Special Master. Report #28 of the Special Master at 3.

88. *Bridgeman*, 838 F. Supp. at 176. The court identified the questions the Special Master found to be at issue in the case:

> (1) Does a multi-year contract with a one year out, the exercise of which will make the player a free agent, constitute a per se cap circumvention?
> (2) Do Article VI and VII of the (CBA) contemplate that there may be player options in multi-year contracts to lengthen or shorten contracts?
> (3) In the circumstances of this case, does the Dudley/Portland contract constitute a cap circumvention under Article VII, Part H, Section 3?
> (4) In the circumstances of this case, was there an unwritten understanding concerning future renegotiation of Dudley's contract with Portland in violation of Article VII, Part H, Section 4?

Id.

At oral arguments, the Special Master ruled that multi-year contracts with one year outs were not per se cap circumvention. Report #28 at 7. Further, the Special Master preliminarily ruled that Article VI and Article VII allow player options which lengthen or shorten the contract. *Id.* The Special Master resolved these points without discussion in Report #28, but the court, providing support, pointed to the CBA which, in Article VI, Sec. 1 states: "any player contract may contain an option in favor of the player." *Bridgeman*, 838 F. Supp. at 177. Article VII, Part B, Sec. 2(a) states "if a player contract provides for an option by the player either to increase or shorten the stated term of the player contract . . . " *Id.* The parties did not appeal the Special Master's rulings on these issues. *Id.*

89. Report #28 of the Special Master at 15.

90. *Id.*

91. *Id.*; *See* Report #29 of the Special Master at 7.

objections to both Report #28 and #29 and a hearing on both subjects was held on October 12, 1993 before Federal District Court Judge Dickinson Debevoise.[92]

At the outset, Judge Debevoise acknowledged that he must accept the Special Master's findings of fact and recommendations of relief unless clearly erroneous or demonstrating an abuse of discretion.[93] First, the court addressed the allegations of an unwritten understanding regarding future contract negotiations between Dudley and Portland.[94] The court emphasized the importance of personal testimony and documentary evidence presented before the Special Master.[95] Based upon the Special Master's findings, the court agreed that both parties understood, in all likelihood, that Dudley would opt out in order to take the opportunity to renegotiate with Portland.[96] Although this was probable, no undisclosed agreement existed on the subject which would violate Section 4.[97] The court then adopted, in full, the Special Master's findings with regard to the NBA's Section 4 claims.[98]

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92. Bridgeman v. National Basketball Ass'n, 838 F.Supp 172, 174 (D.N.J. 1993).

93. FED. R. CIV. P. 53.

94. *Bridgeman*, 838 F. Supp. at 181.

95. *Id.* Before the Special Master, the NBA based its allegations on "inferences drawn from undisputed circumstances," such as Dudley's acceptance of the much lower Portland contact over the New Jersey offer. Report #28 at 17. In a letter received by the Special Master, NBA attorney Howard L. Ganz charges the existence of an unwritten agreement because the contractual terms "in light of at least one other offer made to Dudley, simply defies all reason - but for one." *Id.* Disagreeing, the Special Master accepted as valid alternative reasons why Dudley would accept a below market value contract from Portland, ie. the quality and style of play of the Trail Blazers, the city's convenient location near his West Coast home, and the team's need for a natural center. *Id.*

The NBA also relied on the testimony of Phoenix Suns vice president and Chief Operating Officer Richard Dozer. Report #28 at 17. At the hearing, Dozer testified regarding a conversation he had with Fegan, during which he claims Fegan told him Portland had agreed to open up a spot on its roster and offer Dudley a contract with an out provision and, after one or two years, would renegotiate the contract to give Dudley his original asking price. *Id.* at 18. However, on cross examination, Dozer admitted Fegan had inferred such an agreement, and that he himself was paraphrasing Fegan's remarks. *Id.* The Special Master also pointed out other reasons why he believed Fegan never mentioned an agreement regarding future renegotiations of the contract:

> (1) Prior to speaking with Dozer, Fegan prepared a "script" detailing what he wished to say. The script makes reference only to "a unique agreement . . . a one year opt out on a seven year deal." No mention is made regarding an "agreement" to renegotiate the contract in the future.
>
> (2) Such an agreement would be a blatant violation of Sec. 4, as Fegan was aware, and it was doubtful he would announce its existence.
>
> (3) Dozer knew such an agreement was a violation of Sec. 4, yet he nor others whom he told about the conversation reported it to the NBA.

Id. at 19.

96. *Bridgeman*, 838 F. Supp. at 181.

97. *Id.* Judge Debevoise wrote, "it was a situation which all the world could see. The NBA saw it and instituted these proceedings." *Id.*

98. *Id.*

The court next addressed the NBA's contention that the one year out provisions have monetary value which should be included when calculating salaries to determine if the cap has been exceeded.[99] The court adopted the reasoning of the Special Master who noted the contract of Mario Elie, the player Portland traded to open up Dudley's roster spot, also contained an identical out provision.[100] Therefore, if any value was attached to the out provision "Dudley's contract would still be no larger than the slot created by Elie's departure."[101] The court agreed with several reasons, advanced by the Special Master, why out provisions should not be used for salary computation purposes.[102] Judge Debevoise found the Master's ruling on this topic to be sound and accepted it in full.[103]

The court next dealt with what it viewed to be the most complex issue in the case: whether the Dudley/Portland contract constituted a cap circumvention in violation of Section 3.[104] The NBA based their allegations on the fact that Dudley accepted a salary significantly below his market value[105] and that the contract included an option out clause exercisable after one year.[106] The court underscored the importance of the salary cap stating that by limiting the amount of money teams could spend on salaries, the financially weaker teams were better able to compete, both on the court and in

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99. *Id.* at 179. Primarily, the NBA contends that when value is assigned to the out provision in Dudley's contract, it results in a salary cap violation. *Id.*

100. *Id.*

101. *Bridgeman*, 838 F. Supp. at 179 (quoting Report #29 at 4).

102. *Id.* at 180. "Salary" under the CBA includes compensation in money, property, investments, or "anything else of value." CBA, Art. VII, Part A, Sec. 1(c); *See* note 12 for full text. First, usual meanings of "compensation" do not include the right to terminate a contract. Report #29 at 5. The inclusive general nature of the phrase "or anything else of value" should be limited to things similar to those enumerated. *Id.* The CBA specifies how various forms of compensation are to be computed for salary cap purposes, and no mention is made about procedures for computing the value of an option to terminate a contract. *Id.* at 6. Moreover, there are other provisions in player contracts which have value to a player, for example guarantee clauses, which are not included for salary cap computation purposes. *Id.* Lastly, the NBA has approved many contracts containing out provisions, and never indicated their value would be included in cap computations. *Id.*

103. *Id.* at 181.

104. *Id.*

105. Report #28 of the Special Master at 10. Dudley's market value was considerably higher than the $790,000 he accepted from Portland, in light of the $1,560,000 New Jersey offer, and the report six-year $3,307,000 per year deal Phoenix had discussed. *Id.* at 8-10.

The NBA took the position that a team unable to sign a player because they are at or above the salary cap should make roster moves to free up the necessary assets. *Id.* at 11. The team should not be allowed to evade the cap by paying the player a below market value salary, allow the player to terminate the contract, and renegotiate with him for any amount. *Id.*

106. *Id.* The NBA had approved contracts with termination options after two or more years in multi-year contracts and one year outs in two year contracts, but never a one year out in a multi-year contract. *Id.* at 14.

the market for player services, with the financially stronger teams.[107] The overall result was a stable system beneficial to all involved parties.[108] The court, focusing on Judge Carter's opinion in "the Albert King Case," emphasized the importance the salary cap played in the collective bargaining process and reiterated his point that player contracts, although literally conforming to the cap, cannot be allowed to nonetheless jeopardize the league's interests.[109]

Judge Debevoise noted that one year out provisions weaken the NBA's objective in implementing the cap; equalizing competition for player services among the league's financially weak and strong teams.[110] Absent such a provision, Dudley would have been able to negotiate free of the salary cap with only one team, New Jersey.[111] With the provision, Dudley could conceivably sign a contract with any NBA team having an open roster spot, exercise his option, and then proceed to renegotiate free of the salary cap.[112] In the end, this amounted to cap free negotiations with the team of his choice.[113]

The court next reasoned that the length of time before a player can exercise an option could have consequences for the league's salary cap goals.[114] Allowing options to be exercised only after six or seven seasons would likely discourage the use of such devices.[115] Conversely, options exercised after only a few months would all but eliminate the purpose of instituting the salary cap.[116]

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107. *Bridgeman*, 838 F. Supp. at 181.

108. *Id.* The court quotes NBA Commissioner David Stern's statement that the purpose of the agreement is "to insure the financial stability of troubled NBA teams, improve competitive balance and at the same time preserve and improve the basic framework of the (agreement)." *Id.*

109. *Id.* at 181, (citing *In re* National Basketball Ass'n, 630 F. Supp. 136, 141 (S.D.N.Y. 1986)).

110. *Id.* at 182. The court disagreed with the Special Master's following view:

> True (Dudley) can become a free agent, and his team, Portland, can pay him any amount, free of the cap. But that is the same situation he was in on July 1 of this year. He was then a free agent and his team, then New Jersey, could have paid him any amount free of the cap. If he opts out next year, the only change vis-a-vis the salary cap will be that the team which can pay him free of the cap will be Portland instead of New Jersey. Report #28 at 14. The threat to the salary cap from Portland appears to me to be no different than the threat from New Jersey or from any other team wanting to resign its own players.

Report #28 of the Special Master at 15.

111. *Id.*

112. *Bridgeman*, 838 F. Supp. at 182.

113. *Id.*

114. *Id.* at 183

115. *Id.*

116. *Id.*

The court admitted that such contracts may pose a threat to the NBA's salary cap goals, but agreed with the Special Master's statement that "only the future will tell whether taken all together such contracts will raise salaries in the long run."[117] The court stated that the evidence on record could not provide a conclusion regarding the long term repercussions of the one year out provision on the effectiveness of the league's salary cap.[118] Such contracts might indeed nullify the goals of the cap, but the court emphasized such an inference was not self evident.[119] Hence, the Dudley/Portland contract could not be held to have been "designed to serve the purpose of defeating or circumventing the intention of the parties" regarding the salary cap in violation of Section 3.[120]

The court ultimately ruled the Dudley/Portland contract to be in literal compliance with the CBA and within the expressed intent of the parties.[121] Notwithstanding the possible future impact of these contracts, the evidence before the court was insufficient to provide a conclusion regarding their effects on the league's salary cap objectives.[122] In the absence of evidence establishing damage to the league, Dudley's contract could not be ruled a Section 3 violation.[123]

IV. CONCLUSION

The *Bridgeman* decision seems to disregard the realities of professional sports and tends to raise more questions than it answers. Although the court found no secret agreement between the parties, it seems highly unlikely that Fegan would commit his client to such an undervalued contract without some assurance from Portland that they would resign Dudley on very favorable terms. If Dudley opted out and Portland, for whatever reason, refused to renegotiate the contract in his favor, Dudley would have had to accept a deal on Portland's terms or head to the market negotiating with other teams subject to their cap restrictions. Even if Dudley's statistics

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117. *Bridgeman*, 838 F. Supp. at 183. (citing Report #28 at 15).

118. *Id.*

119. *Id.*

120. *Id.* The CBA authorizes options to increase or shorten terms of player contracts. CBA Art. VII, Sec 1. No provision excludes one year options to terminate a player contract. *Bridgeman*, 838 F. Supp. at 183. Although one year may be the minimum length of time before an option may be exercised, it is within the contemplation of the parties. *Id.* The CBA also allows teams to pay their own free agents without regard to the salary cap. CBA, Art. VII, Part F, Sec. 1(d).

121. *Bridgeman*, 838 F. Supp. at 184.

122. *Id.*

123. *Id.*

in his first year did not improve, after opting out he could still command from Portland a market value contract comparable to the original New Jersey offer.

Absent a career threatening injury, Dudley would be able to conduct cap free negotiations with only one team after the 1993-94 season, the Portland Trail Blazers.[124] It is unconvincing to hold that Fegan would secure this valuable asset by relying on an "understanding that with the one year out it was highly probable that at the end of the year . . . Portland would take advantage of the situation to negotiate a new contract uninhibited by the salary cap."[125]

At some point, it is likely that a mutual agreement was reached which guaranteed Dudley renegotiation of his contract on very favorable cap-free terms. The presence of such an agreement would explain why Fegan committed Dudley to a seven-year undervalued contract even though, to the disinterested observer, a risk existed that Portland might not re-sign Dudley, after he opted out, for the 1994-95 season at his market value. Of course, anyone seeking to establish these allegation would find it difficult, if not impossible, to unearth corroborating evidence because both parties to the agreement had a stake in keeping it hidden; Portland needed Dudley to fill a present roster gap and Dudley wanted the market value salary waiting for him after he opted out.

Further, the proposed explanations, offered by the Special Master and adopted by the court, rationalizing Dudley's acceptance of the deal without any prior secret agreement are questionable. First, would Dudley accept a contract at approximately 50% of his market value simply to play in a West Coast city located near his home, even though he would be travelling for at least one-half the NBA's seven month season? Second, Dudley joined a Portland team past its prime, while he turned down a more valuable contract from an up and coming New Jersey team with all-star talent such as Derrick Coleman and Kenny Anderson. It certainly can be argued that Dudley might have had a better chance for a championship with New Jersey rather than Portland in the near future. This may be speculation, but such arguments are relevant in determining the parties' motivations for entering into the contract.

Certainly, even though it also falls literally within the parame-

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124. Steve Brandon, *Who Will Plug the Middle?*, THE OREGONIAN, Nov. 11, 1993 at D1. On November 8, 1993, Dudley suffered a broken ankle which sidelined him for almost the entire 1993-94 season. *Id.* He returned for the final three games of the season and played in the Trail Blazers first round loss to the eventual NBA champion Houston Rockets. Jeff Baker, *Dudley Continues to Shop*, THE OREGONIAN, July 30, 1994 at B1.

125. *Bridgeman*, 838 F. Supp. at 181.

ters of the CBA, it is likely that the contract was aimed at circumventing the spirit and objectives of the salary cap. Not unlike federal and state tax codes, a loophole has been found in the CBA. It is evident, as it was to Judge Debevoise, that the one year out provision could perhaps again place the financially weaker teams at a complete disadvantage in the market for player services. It is claimed, however, that since this scheme of avoiding the cap is relatively new, the overall impact on the league's financial structure and stability are not yet manifest.

At the time of the decision, the repercussions of Judge Debevoise's ruling should have been obvious. After judicial approval of the one year out, why would any player agent fail to utilize this device for his client? What will keep NBA general managers with the most money at their disposal from using it to acquire the majority of big name players?[126] The court's opinion demonstrates that it understood the potential harm that extensive use of the one year out could cause to the league. By sanctioning the use of the provision, the court has given the green light to the practice. Contracting parties will use this court approved salary cap circumvention device in order to remove the NBA's restraints on spending. Horace Grant with the Orlando Magic, A.C. Green with the Phoenix Suns (both are the subjects of pending litigation in Federal Court), Chris Webber with the Golden State Warriors, and Anfernee Hardaway with the Orlando Magic, just to name a few, have used the device.

In the aggregate, the only results on the league's stability will be negative. With financial resources once again becoming the foremost determinant of what team players sign with, the polarization of talent and revenue that plagued the NBA in the late 70's and early 80's will revisit the league. It seems irrational to postpone declaring the one year out provision to be a cap violation until the league begins to crumble. Should the league have to crash before the provision threatening its well being is eradicated?[127]

The *Bridgeman* decision is also significant because of its implications for the ongoing NBA collective bargaining negotiations which commenced at the conclusion of the 1994 playoffs. It seems,

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126. Shaun Powell, *Call Goes NBA's Way*, NEW YORK NEWSDAY, July 19, 1994 at A61. NBAPA Executive Director Charles Grantham stated that he would encourage all free agents and rookies to utilize the device in order to sign cap-free contracts indicative of their market value.

127. *Dudley Deal Nixed Again*, THE WASHINGTON POST, August 31, 1994 at B6. At the close of the 1993-94 season, Dudley exercised his option under his original contract. *Id.* After negotiations, Portland resigned him to a six-year contract with an average salary of $4 million per season. *Id.*

based on precedent, that the NBA salary cap will be insusceptible to player antitrust challenges. Support for this position was bolstered by the July 1994 ruling by Judge Kevin Duffy in *National Basketball Association v. Williams*[128] which allows the salary cap to retain its antitrust immunity as long as the NBA and NBAPA maintain a collective bargaining relationship.[129] Included in this time frame is the period after the expiration of the 1988 collective bargaining agreement when negotiations for renewal are in progress. Hence, if the present negotiations continue for three years, the salary cap would endure for three NBA seasons.

It seems the only bargaining chip NBA players have regarding the salary cap, short of striking or decertifying its union[130], is the Bridgeman II decision allowing the use of one year out provisions. The league has the non-statutory antitrust exception in its corner and the players have the one year out in theirs. The advantage seems to be with the players who can, until a court says otherwise, use the one year out to avoid the salary cap. The league can wait until the negative effects of the one year out begin to manifest themselves prompting judicial intervention or it can negotiate with the players for new collective bargaining terms which close the one year out loophole. In all probability, the players will ask for significant concessions from the league; some have suggested a larger share of licensing revenues.[131]

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128. 857 F. Supp. 1069 (S.D.N.Y. 1994.)

129. *Id.* The court was in accord with this standard, enunciated by the Court of Appeals for the Eighth Circuit in Powell V. National Football League, 930 F.2d 1293 (1989), *cert. denied*, 498 U.S. 1040 (1991). National Basketball Ass'n v. Williams, 857 F. Supp. 1069, 1078 (S.D.N.Y. 1994).

130. *Id.* at 1078. After the decision of the Eighth Circuit in *Powell III*, player representatives from the twenty-four NFL teams voted unanimously on December 5, 1989 to decertify the NFLPA as its collective bargaining representative. Mitch Truelock, *Free Agency In the NFL: Evolution or Revolution*, 47 SMU L. REV. 1917 (1994). The effect of this action was to sever the collective bargaining relationship between the players and the NFL. *Id.* As a result, the federal district court in Minnesota held that since no collective bargaining relationship existed, the non-statutory labor exemption no longer shielded the restraints from players' antitrust claims. *Id.* (citing Powell v. National Football League, 773 F. Supp. 1351, 1358 (D. Minn. 1991)).

Decertification of player unions, although beneficial to NFL players in 1991, leads to the elimination of many favorable federal labor remedies. National Basketball Ass'n v. Williams, 857 F. Supp. 1069, 1078 (S.D.N.Y. 1994). If union decertification becomes the players' only option for establishing negotiation leverage, the principles of collective bargaining are not being served. Glen St. Louis, *Keeping the Playing Field Level: The Implications, Effects and Application of the Nonstatutory Labor Exemption on the 1994 National Basketball Association Collective Bargaining Process*, 1993 DET. C.L. REV. 1221 (1994). Federal labor law seeks to encourage the voluntary settlement of disputes within the collective bargaining framework. *Id.* (citing Powell v. National Football League, 930 F.2d 1293, 1303-04 (8th Cir. 1989)).

131. Shaun Powell, *Call Goes NBA's Way*, NEW YORK NEWSDAY, July 19,1994 at A61. NBA Deputy Commissioner Russell Granik alluded that the league would be open to the NBAPA's demands for concessions, including the delivery of more merchandising revenue to

Perhaps the best way to prevent the practice without wholesale changes to the CBA would be to extend the minimum time period which must elapse before an option to terminate or renegotiate a contract can be exercised. By requiring a player to fulfill four to seven years, for example, of a contractual obligation before opting out would certainly discourage contracts analogous to Dudley's. It is easy to see that the *Bridgeman* decision is far from the final word on the NBA salary cap issue.

Collective bargaining negotiations between the NBA and NBAPA during the summer of 1994 failed to yield a new agreement. The points of contention were the same issues which have sparked debate throughout the league's history: the salary cap, the college draft, and free agency. However, on October 27, 1994, NBA Commissioner David Stern and NBAPA Executive Director Charles Grantham signed a pact in which the players pledged not to strike and the owners agreed not to initiate a lockout during the 1994-1995 NBA season.[132] Although the NBA represents an area of relative calm in the recent tempestuous labor relations between player unions and sports leagues, basketball enthusiasts should take the no-strike/no-lockout agreement with a grain of salt. The disagreements between the parties will once again crop up when the 1994-95 season ends and the pressure to reach a new collective bargaining agreement begins to build. Anyone who doubts this need only look to the present state of labor unrest in the National Hockey League and remember that both parties agreed to postpone labor negotiations in order to play a full uninterrupted 1993-1994 season.

Jerry A. Cuomo

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the players. *Id.*

132. Richard Justice, *NBA Strikes Labor Deal - Owners, Players Agree to Play Uninterrupted Season*, WASH. POST, Oct. 29, 1994 at C1.