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The NBA's New Media Rights Deal: A Look into the Multi-Billion Dollar Cause of What May Become the Next NBA Lockout

Brandon S. Ross
Maurice A. Deane School of Law at Hofstra University

Notes

THE NBA'S NEW MEDIA RIGHTS DEAL: A LOOK INTO THE MULTI-BILLION DOLLAR CAUSE OF WHAT MAY BECOME THE NEXT NBA LOCKOUT

I. INTRODUCTION

On Monday, October 6, 2014, the National Basketball Association (the NBA or the league)[1] publicly announced that it had extended its broadcasting partnerships with ESPN and Turner Sports to the tune of a nine-year exclusive media rights deal worth a staggering $24 billion.[2] At the onset of the 2016-2017 NBA season, ESPN and Turner Sports will pay the NBA $2.66 billion per year to televise games,[3] which is a 180% increase over the last deal. To put this into context, when the

1. *See NBA, Tencent Announce China Digital Partnership*, NBA.COM (Jan. 29, 2015, 9:44 PM), http://www.nba.com/2015/news/01/29/nba-tencent-announce-china-digital-partnership/. The NBA has been labeled as:

> [A] global sports and media business built around three professional sports leagues: the National Basketball Association, the Women's National Basketball Association, and the NBA Development League. . . . NBA Digital's assets include NBA TV, which is available in 60 million U.S. homes, and NBA.com, which recorded 26.9 billion page views during the 2013-14 season, with more than half of all visitors originating from outside of North America.

Id.

2. *See*, Richard Sandomir, *N.B.A. is said to Continue Network Deals*, N.Y. TIMES (Oct. 5, 2014), http://www.nytimes.com/2014/10/06/sports/basketball/nba-said-to-be-near-new-tv-deal-for-24-billion.html; *see also NBA, Tencent Announce China Digital Partnership*, *supra* note 1 ("[The NBA] and Tencent Holdings Limited . . . a leading provider of comprehensive Internet services in China, today announced a five-year expansion of their partnership that will create the league's largest international digital partnership. The new partnership will be effective on July 1, 2015. As the Exclusive Official Digital Partner of the NBA in China, Tencent will feature a record number of live NBA games and deliver enhanced original NBA programming and highlights, including NBA preseason and regular-season games, NBA All-Star, the NBA Playoffs, The Finals, NBA Summer League and the NBA Draft through personal computers system and mobile devices.")

3. Sandomir, *supra* note 2.

NBA reached its last television deal back in 2007, which was worth \$930 million per year[4] and signed at a relative low point in the NBA's popularity,[5] it represented a mere 22% increase from the previous one.[6] While the new television deal will have a minimal effect on the fans,[7] there is one pivotal class of individuals that it will have a momentous impact on the players.

After a lengthy, five-month-long "lockout"[8] period that commenced on July 1, 2011, which wound up costing each of the NBA's thirty teams sixteen games out of a possible eighty-two,[9] the National Basketball Players Association (NBPA or the players or the union)[10] and the league's thirty owners eventually agreed to a ten-year Collective Bargaining Agreement (CBA), effective December 8, 2011,[11] with an

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4. *See* Zach Lowe, *How the NBA's New TV Deal Could Blow up the Salary Cap*, GRANTLAND (Oct. 6, 2014), http://grantland.com/the-triangle/nbas-new-tv-deal-blow-up-the-salary-cap/; Sandomir, *supra* note 2.

5. Lowe, *supra* note 4.

6. Dawn C. Chmielewski & Greg Johnson, *NBA Contract takes Digital Leap Forward*, L.A. TIMES (June 28, 2007), http://articles.latimes.com/2007/jun/28/business/fi-espn28 ("The cost of sports broadcast rights has escalated despite a decline in television ratings for the recent NBA finals and overall TV viewership of the league's regular-season games.").

7. *See NBA Inks New \$24B TV Deal: Lockout Likely*, ONLY A GAME (Oct. 11, 2014), http://onlyagame.wbur.org/2014/10/11/nba-tv-deal-espn-turner ("For fans nothing really is going to change. . . . [B]asically you'll continue to watch the NBA the same way you have for the last decade.").

8. Grant M. Hayden, *Some Keys to the NBA Lockout*, 16 HOFSTRA LAB. & EMP. L.J. 453, 454-55 (1999). Hayden explains that

> [l]ockouts occur when employers attempt to put economic pressure on a group of employees by refusing to allow them to work. Depending on the role they play in a labor dispute, lockouts are typically characterized as either offensive or defensive. Offensive lockouts occur when an employer locks out its employees in order to pressure them to reach an agreement on terms favorable to the employer. Such a strategy may be deployed when an employer and union have reached a bargaining impasse.

Id.; *cf.* Paul D. Staudohar, *The Basketball Lockout of 2011*, MONTHLY LAB. REV., Dec. 2012, at 29 ("If little progress is being made in negotiations, owners may take the preemptive step of a lockout before the season begins and before players have collected paychecks. A lockout can motivate the players to make concessions and often leads to a better deal for the owners.").

9. Staudohar, *supra* note 8, at 28.

10. Robert Bradley, *Labor Pains Nothing New To the NBA*, ASS'N FOR PROF. BASKETBALL RES., http://www.apbr.org/labor.html (last visited Mar. 1, 2016). Bradley detailed that in 1954,

> Bob Cousy, the league's top player, began to organize the NBPA, which would become the first team sports player's union. Cousy began by writing to an established player from each of the league's teams . . . in hopes of encouraging solidarity among the players. . . . In April [of 1957], the NBA Board of Governors formally recognized the NBPA. . . .

Id.

11. *See* Kevin Carpenter, *NFL and NBA Lockouts: A U.K. Lawyer's Legal Retrospective*, 20 SPORTS L.J. 1, 2-3 (2013) ("CBAs in U.S. sport can be described as the labour blueprint . . . between the players and the owners. . . . They will cover what are termed 'mandatory subjects,' and

opt-out provision that the owners or players can exercise on or before December 15, 2016[12] – less than two months after the new television deal kicks in. Should the players decide to opt out of the current CBA, many NBA pundits believe that this time around, the players will use the massive infusion of wealth from the new television deal as leverage to negotiate for a bigger percentage of the basketball-related income (BRI)[13] that they relinquished to the owners during the 2011 collective bargaining period.[14] In all likelihood, the players will use the next collective bargaining period that may well occur after the 2016-2017 NBA season to steadfastly demand back much, if not all, of the BRI they surrendered to the owners during the 2011 lockout.[15] The principal challenge facing the NBPA will be to make certain they receive a sufficient share of the expected BRI growth while contemporaneously keeping the NBA's thirty owners economically content.

This Note explores the direction that the NBA might be headed in from an employer/employee standpoint by providing a framework for what actions the NBPA must take when the $24 billion media rights deal kicks in to ensure that the uptick in BRI resulting from the new television deal will be adequately dispersed among the owners and the

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certain other areas, such as: team discipline, injury and non-injury grievances, base salaries, access to club and personal files, medical rights, and retirement."); *see also* Glenn M. Wong & Chris Deubert, *National Basketball Association General Managers: An Analysis of the Responsibilities, Qualifications and Characteristics*, 18 VILL. SPORTS & ENT. L.J. 213, 218 (2011) ("The CBA is a complex legal and financial document that controls the terms and conditions of employment for NBA players and affects nearly every facet of NBA business."); NBA 2011 COLLECTIVE BARGAINING AGREEMENT, art. XXXIX, sec. 1, at 458 (Dec. 8, 2011), http://www.ipmall.info/hosted_resources/SportsEntLaw_Institute/NBA_CBA(2011)_(newversion_reflectsJeremyLinRuling)May30_2013.pdf ("This Agreement shall be effective from December 8, 2011 and, unless terminated pursuant to the provisions of this Article XXXIX, shall continue in full force and effect through June 30, 2021.").

12. *See* NBA 2011 COLLECTIVE BARGAINING AGREEMENT, *supra* note 11, art. XXXIX, sec. 2, at 458 ("The NBA and the Players Association shall each have the option to terminate this Agreement on June 30, 2017 by serving written notice of its exercise of such option on the other party on or before December 15, 2016.").

13. *See, e.g.*, Lowe, *supra* note 4 ("The Suns absolutely had the TV deal in mind when they beat the field in inking the Morris twins and Eric Bledsoe to long-term deals over the last two weeks. Those contracts look big, especially Bledsoe's five-year, $70 million deal, but they'll look very different in two or three years."); Staudohar, *supra* note 8, at 30 (explaining that BRI "includes most of the revenue received by NBA teams, from sources such as ticket sales, television, and concessions.").

14. *See* Staudohar *supra* note 8, at 32 (pointing out that the 2011 CBA resulted in a 50-50 of BRI between players and owners, with the players' share dropping from 57% under the previous CBA).

15. *See NBA Inks New $24B TV Deal: Lockout Likely*, *supra* note 7 (statement of Bill Littlefield) ("We've got a lot of the big stars weighing in and saying that they want more money. . . . [I]t's causing everybody to fight even more fiercely for this bigger pie.").

players, while simultaneously navigating through potential issues that will arise, with the prospect of another lockout at the forefront of these issues. To begin this analysis, Part II serves to detail how the NBA arrived at where it is today through a historical examination of the events that led up to the 2011 lockout, as well as the lockout itself.[16] This part emphasizes the shortcomings of the NBPA during that time, and the exorbitant concessions it made as the chief result of ineffective collective bargaining. It then encapsulates the post-lockout era of the NBA and its overall success, culminating in the multibillion-dollar media rights deal signed by NBA Commissioner Adam Silver.

Part III provides an explanation of the future implications that the television deal will have on the NBA's owners, the NBPA, and the CBA currently in place, followed by an analysis of potential issues that may subsequently arise from it.[17] These issues include the future BRI split between owners and players, the potential increase of the NBA's salary cap,[18] the state of the NBA's current luxury-tax system, the NBA's age requirement, and the likelihood of yet another NBA lockout.[19]

Part IV, therefore proposes a calculated framework outlining how the NBA's owners and players can approach the bargaining table in order to facilitate a revenue-sharing agreement upon the players' probable decision to exercise their 2017 opt-out provision from the CBA currently in place, while also ensuring that the NBA will continue to prosper for the foreseeable future.[20] Finally, Part V concludes this analysis with closing remarks regarding the implications of the proposed framework.[21]

16. *See infra* Part II.

17. *See infra* Part III.

18. *See* Terrence Caldwell, *An Overview and Comparative Analysis of the Collective Bargaining Agreements in the NBA, NFL, and MLB* (2010), at 8 (unpublished CMC Senior Thesis) (on file with Claremont Colleges), http://scholarship.claremont.edu/cmc_theses/62 ("For each year the salary cap will equal the percentage of projected BRI, less projected benefits, divided by the number of teams scheduled to play in the NBA during the year."). Caldwell adds that "[t]he projected salary cap percentage has been 51% since the 2006-2007 season. So, the . . . cap has been 51% of BRI divided by the 30 teams that make up the NBA." *Id.*

19. *See infra* Part III.

20. *See infra* Part IV.

21. *See infra* Part V.

II. HISTORICAL EXAMINATION OF THE EVENTS LEADING UP TO AND INCLUDING THE 2011 NBA LOCKOUT

A. *The 2005 NBA Collective Bargaining Agreement and its Resulting Discrepancies*

To properly examine the 2011 NBA lockout and the future implications it will later have on the state of the NBA, the events leading up to the lockout must first be addressed. On July 30, 2005, the NBA and NBPA announced that a new six-year CBA – the same deal that would eventually expire in 2011 and cause a five-month lockout – was ratified and signed.[22] "Relatively few changes were made to the previous [CBA] regarding free agency[23] rules and the salary cap. . . ."[24] The most notable economic changes are summarized as follows:

> The new collective bargaining agreement includes an increase in the salary cap, a lessening of the impact of the luxury tax,[25] a decrease in the escrow withholding over the term of the deal (to 8%), and a guarantee by the league that the players will receive no less than 57% of basketball-related income (a percentage that will increase as revenue increases). The maximum length of player contracts is six years (previously seven years), and maximum annual increases in salaries have been reduced from [12.5] to [10.5] percent for teams re-signing their own players and from 10% to 8% for teams signing free agents.[26]

Perhaps the highpoint of the NBPA's success in agreeing to this CBA–besides the league's guarantee to the players that they would receive no less than 57% of BRI–was avoiding the implementation of a

22. *NBA Collective Bargaining Agreement Ratified and Signed*, NBA.COM (July 30, 2005), http://www.nba.com/news/CBA_050730.html.

23. *See* Caldwell, *supra* note 18, at 12 ("NBA free agency allows players who have played out the entirety of their contract to either negotiate a contract with their current team or move to another team based on their choosing."). Caldwell adds that "[t]his power[,] which previously belonged to the owners, is what transformed sports from an industry that was dominated by owners and leagues to [one] that is now dominated by athletes and sports agents." *Id.*

24. Staudohar, *supra* note 8, at 29.

25. *See* Caldwell, *supra* note 18, at 11 ("It is simply referred to as the 'Tax Level' in the agreement but is popularly referred to as the NBA luxury tax, which sets the maximum allowable salary for each team."). Caldwell notes that the luxury tax system "create[s] an incentive for teams that do not exceed the tax level by rewarding them with the taxes of the teams that do exceed it . . . [and helps maintain] a level playing field with larger market teams who spend more on player salaries." *Id.* at 11-12.

26. *NBA Collective Bargaining Agreement Ratified and Signed*, *supra* note 22.

hard salary cap,[27] as opposed to the soft salary cap employed by the NBA.[28]

The feeling of success enjoyed by the NBPA came to a screeching halt on September 29, 2006.[29] That day, eight owners of small-market teams signed and sent a petition to then-NBA Commissioner David Stern, insisting that the league needs to address the increasing level of disparity in revenue between small-market and large-market teams due largely to profits generated from local broadcast and cable television.[30] The letter asked Commissioner Stern

> to embrace this issue because the hard truth is that our current economic system works only for larger-market teams and a few teams that have extraordinary success on the court and for the latter group of teams, only when they experience extraordinary success. The rest of us are looking at significant and unacceptable annual financial losses.[31]

According to ESPN's Brian Windhorst, this letter was the root of the 2011 NBA lockout,[32] as the gap in revenue varied greatly amongst the NBA's thirty teams.[33]

All of this occurred a few years *before* the United States was thumped by an economic crisis. Windhorst notes that the plummeting state of the economy at that point indirectly led to an increasing number of small-market owners subscribing to the viewpoints of their peers,[34]

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27. *See Definition of Hard Cap*, DAVEMANUEL.COM, http://www.davemanuel.com/investor-dictionary/hard-cap/ (last visited Mar. 4, 2016) ("A 'hard cap' [exists] when teams are not allowed to spend over a certain amount regardless of the circumstances.").

28. *See* Caldwell, *supra* note 18, at 8 ("The NBA collective bargaining agreement holds that a team shall not exceed the salary cap mandated by the league; however there exists several exceptions to the salary cap which allow teams to have salary figures that exceed the league cap . . . [making] the NBA salary cap a soft cap rather than a hard one.").

29. *See* Jonathan Abrams, *The NBA Lockout Timeline*, GRANTLAND (Nov. 11, 2011), http://grantland.com/the-triangle/the-nba-lockout-timeline/; *see also* Percy Allen, *League Needs to Assist its Small-Market Teams*, SEATTLE TIMES (Nov. 19, 2006, 12:00 AM), http://www.seattletimes.com/sports/league-needs-to-assist-its-small-market-teams/.

30. Abrams, *supra* note 29; Allen, *supra* note 29.

31. *E.g.*, Abrams, *supra* note 29; Allen, *supra* note 29.

32. Brian Windhorst, *How "Small Market" Owners Took Control*, ESPN (Oct. 25, 2011), http://espn.go.com/blog/truehoop/post/_/id/32834/how-small-market-owners-took-control.

33. *See* Abrams, *supra* note 29 (explaining that "[t]he expir[ed] collective bargaining agreement created a broken system that produced huge financial losses for our teams. . . .").

34. *See* Windhorst, *supra* note 32. Windhorst, in expounding on the idea that small-market owners began subscribing to the viewpoints of their larger-market peers, states:

> Robert Sarver of Phoenix and Dan Gilbert of Cleveland didn't sign the letter in '06, but they are now two of the biggest advocates for change in both revenue sharing and reducing player compensation. The Maloof family that owns the Kings was coming off six consecutive winning seasons and was used to selling every seat when the letter was

thus shaping the dynamic of talks with both their fellow owners and the NBPA, as well as, eventually, the five-month lockout period.[35] Further illustrating the level of disparity in the economic system of the NBA at that point, big-market teams like the New York Knicks and the Boston Celtics had recently "returned to prominence" on the court, so their revenue levels climbed as well.[36]

No one instance, however, contributed to this growing disparity more so than the Los Angeles Lakers agreeing to a "local television deal worth several billions dollars" in 2010.[37] With a number of owners feeling that the Lakers should have been required to share their new revenue stream with the other twenty-nine teams in the NBA, what was once a small "faction of owners" insisting on a redistribution of the wealth back in 2006 became a majority in 2011.[38] With the small-market owners growing frustrated by annual financial losses, paired with the fact that a small number of large-market teams were raking in disproportionate profits, the need for wholesale changes to the way revenue was shared in the NBA became evident.

After David Stern disclosed that less than half of the league's owners returned a profit at the close of the 2008-2009 season,[39] the league announced proposals for a new CBA in January 2010.[40] Included among these proposals, which the NBPA vehemently rejected, was a "38-reduction (estimated at between $750 million and $800 million) in player pay, a rollback of existing salaries, a hard salary cap, and shorter contracts."[41] Then-NBPA Executive Director Billy Hunter referred to the league's first proposal as "a nonstarter," and "the first round of a 15-round fight."[42]

Billy Hunter's comments in response to the NBA's initial CBA proposal exemplify the NBPA's willingness at that time to engage the owners in an extensive and grueling work stoppage.[43] Perhaps this

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> authored. Now, they are in dire financial straits and are certainly looking for reform. In addition to the Bobcats and Hornets changing hands, the Wizards, Warriors, 76ers, Pistons and Hawks have also [recently] been sold . . . to groups who are expecting a new CBA to be more favorable to owners than the previous one.

Id.

35. *See id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. Abrams, *supra* note 29.
40. Staudohar, *supra* note 8, at 29.
41. *Id.* at 29-30.
42. Abrams, *supra* note 29.
43. *See* Hayden, *supra* note 8, at 458-463 (explaining the history of "work stoppages" from

willingness to unflinchingly face the owners head-on either "by initiating a strike or by standing up to management in the face of a lockout"[44] is attributable to the unique status of the professional athlete. In a world of lesser-skilled workers, who employers are more than willing to replace in the face of adversity, and highly-skilled workers, who are not as easily replaceable, NBA players and other professional athletes fall under the far end of the highly-skilled spectrum, essentially rendering them irreplaceable.[45]

Whenever a work stoppage either occurs or is looming in a professional sports league, the unique status and skill level of the athletes weighs heavily, as "[o]wners of professional sports franchises, even when faced with the revenue losses that [will likely] accompany a strike or lockout, rarely consider [the possibility of] using temporary or permanent replacement" players when permissible.[46] "Professional athletes [work] in what is essentially a closed labor market," and with the nonexistence of competition in America or abroad to push our professional sports leagues, the athletes have a tremendous advantage over employees in other occupations when it comes to negotiating work-related issues with their employers.[47]

After Hunter released another statement stating, in part, that "there has been ongoing debate and disagreement regarding the numbers . . . and we do not agree that the stated loss figures reflect an accurate portrayal of the financial health of the league,"[48] the NBPA filed a complaint with the National Labor Relations Board ("NLRB") on May 24, 2011, accusing the league of conducting unfair labor practices by negotiating in bad faith and not fully disclosing financial documents.[49]

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the Bureau of Labor Statistics); *but see* Abrams, *supra* note 29.

44. Hayden, *supra* note 8 at 463.

45. *Id.* at 461.

> [I]t is clearly the lesser skilled and unskilled workers who have the most to fear, simply because they are most easily replaced. More highly-skilled workers have less to fear, and the most highly-skilled workers–workers that may even be irreplaceable–have nothing to fear and, indeed, may actually be emboldened by their unique status. Which brings us to a worker on the far end of the highly-skilled spectrum: the professional athlete. Professional athletes are some of the most highly-skilled workers in the world. They possess natural physical abilities, honed by years of practice, that cannot be easily duplicated with mere hard work or good fortune.

Id.

46. *Id.* at 462.

47. *Id.*

48. Howard Beck, *Process of Negotiations is Hidden in Semantics*, N.Y. TIMES (Feb. 19, 2011), http://www.nytimes.com/2011/02/20/sports/basketball/20stern.html?_r=0.

49. *See* Howard Beck, *Turning to Labor Board, N.B.A. Union Fires First*, N.Y. TIMES (May 24, 2011), http://www.nytimes.com/2011/05/25/sports/basketball/players-accuse-nba-of-failing-to-

Hunter may have been onto something in his statement addressing the disagreement between the owners and players regarding the owners' stated loss figures. The owners' purported loss figures conveniently disregard the extremely favorable tax benefits they receive as a direct result of "their ability to depreciate/amortize 100% of the purchase price of the team under sections 168 and 197 of the Internal Revenue Code,"[50] as well as many other non-monetized benefits inherent in owning an NBA franchise "which subsequently become monetized once they sell their [respective] team."[51] In exploring the owners' favorable tax benefits from section 197, Corporate Attorney Lance Taubin asserts that these "tax benefits and ancillary non-monetized benefits . . . are tremendous assets that do not show up on team balance sheets, but are necessary in evaluating the true economic position of the owners and the NBA as a whole."[52] Specifically, Taubin maintains that

> the ability for owners to depreciate/amortize 100% of the purchase price [of a team] over a fifteen-year period . . . the majority of which under section 197, has incredible advantages to the owners' other businesses, and thus one cannot evaluate an NBA team as a stand-alone asset. These benefits . . . involve the related business opportunities that owners enjoy as a result of owning an NBA team and the ability to use the amortization deduction in section 197 as a tax shelter for their earnings from other business ventures.[53]

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bargain-in-good-faith.html. Specifically, Beck notes that the players accused the NBA of

> making "harsh, inflexible and grossly regressive takeaway demands" without offering "appropriate tradeoffs"; "engaging in classic take-it-or-leave-it and surface bargaining" that is intended to provoke a lockout and "coerce" players into accepting the league's proposal; failing to provide "relevant financial information"; "repeatedly threatening" to lock out the players; and "making demands and threats that are inherently destructive to the collective bargaining process."

Id.

50. Lance Taubin, *Welcome to the Real 2011 NBA Lockout: Where Owner-Friendly Tax Provisions and Non-Monetized Benefits Color the Lockout Landscape*, 11 CARDOZO PUB. L. POL'Y & ETHICS J. 139, 140 (2012) (citing I.R.C. §§ 168, 197 (2012)).

51. *Id.*

52. *Id.*

53. *Id.* at 141; *see also* Kurt Badenhausen, *Lakers Top 2015 List of NBA's Most Valuable Teams; Average Franchise is Now Worth Record $1.1 Billion*, FORBES (Jan. 21, 2015, 9:56 AM), http://www.forbes.com/sites/kurtbadenhausen/2015/01/21/average-nba-team-worth-record-1-1-billion-2/#21f5007e1fd0 (stating that NBA owners benefit from hefty tax breaks by deducting the value of the intangible assets in the purchase of a team over the following fifteen years, which can offset earnings for the franchise or other non-sports businesses the owner may control). This is significant, "90% or more of the purchase price can typically be deemed an intangible asset with a sports team." *Id.*

This issue drew increased media attention after former Microsoft Chief Executive, Steve Ballmer, purchased the Los Angeles Clippers for $2 billion.[54]

B. *2011 NBA Lockout*

On July 1, 2011, the NBA's owners officially locked out the players.[55] Adam Silver, who was the NBA's Deputy Commissioner at the time, released the following in a public statement:

> [t]he expiring collective bargaining agreement created a broken system that produced huge financial losses for our teams. . . . We need a sustainable business model that allows all [thirty] teams to be able to compete for a championship, fairly compensates our players, and provides teams, if well-managed, with an opportunity to be profitable.[56]

After one month of standstill by both sides, negotiations resumed on August 1, 2011.[57] The next day, the league brought forth two of its own claims against the NBPA: the first of which was an unfair labor practice charge with the NLRB, alleging that the players were "not negotiating in good faith" when they threatened to decertify the union,[58] the second being an antitrust lawsuit in federal district court in New York.[59] The antitrust claim sought to establish that the lockout was "not in violation of federal antitrust laws and that if the union decertified, all existing player contracts would essentially be wiped out."[60] At this point, people around the NBA started to realize that the 2011-2012 season was in serious jeopardy.[61]

Over two months later, on October 10, 2011, after having already canceled training camps and the entire preseason, the NBA announced

54. Badenhausen, *supra* note 53; Kevin Short, *Steve Ballmer could Score $1 Billion Tax Break for $2 Billion Purchase of Clippers*, HUFFPOST BUS., http://www.huffingtonpost.com/2014/10/27/steve-ballmer-clippers_n_6054308.html (Oct. 30, 2014); David Wharton, *Steve Ballmer's Clippers Purchase: Don't Write off Tax-Break Potential*, L.A. TIMES (Nov. 16, 2014, 6:42 PM), http://www.latimes.com/sports/clippers/la-sp-ballmer-clippers-taxes-20141117-story.html.

55. Abrams, *supra* note 29.

56. *Id.*

57. *Id.*

58. *Id.*

59. Class Action Complaint for Declaratory Relief, Nat'l Basketball Ass'n v. Nat'l Basketball Players Ass'n, No. 11CV05369, 2011 WL 3274242, at 1 (S.D.N.Y. Aug. 2, 2011).

60. *See* Abrams, *supra* note 29.

61. *Id.*

that the first two weeks of the regular season were canceled.[62]

> These cancellations created issues for many [of the NBA's] stakeholders . . . including the league itself, the players, and the fans. With the NBA being far less profitable than the NFL, it was possible that the owners, having less to lose [than the players], were ready and willing to lose an entire season, much like the National Hockey League (NHL) owners did in 2004.[63]

This possibility came closer to becoming a reality when, two weeks later, the NBA canceled all games through November, as talks broke off yet again after the owners delivered an ultimatum to the players to accept a 50-50 split of BRI.[64] The union stated that it would agree to the 50-50 split, "provided that the league lightened up on free-agency issues."[65] On November 14, 2011, the NBPA filed a "disclaimer of interest" and officially disbanded, dissolving the union outright.[66] This decision, due in large part to "owners' resistance at the bargaining table,"[67] was made by the union mainly in an effort to seek redress from the federal court system,[68] though a rift between the players began to surface as soon as the prospect of not having a 2011-2012 season at all started being seriously discussed.[69] "In response to the [disbandment of the NBPA], the [NBA] filed an unfair labor practice charge with the [NLRB], contending that the union was not bargaining in good faith."[70] The underpinning of the union's decision to disband was the United States Supreme Court's ruling in *Brown v. Pro Football*, which essentially held that the non-statutory labor exemption precludes an

62. Abrams, *supra* note 29.

63. Carpenter, *supra* note 11, at 14.

64. Abrams, *supra* note 29.

65. Staudohar, *supra* note 8, at 31.

66. *Id.*

67. *Id.*

68. *See id.* (stating that "[b]ecause the [NBPA] was no longer the formal representative of the players, it could legally file an anti-trust suit against the owners."); Carpenter, *supra* note 11, at 15-16 ("The benefit of this procedure . . . is that the players can immediately bring a court action against the league and the owners, which a number of players did by filing actions in Minnesota and California.").

69. Carpenter, *supra* note 11, at 14-15 ("With the prospect of a 'nuclear winter' being seriously talked about, meaning no NBA season at all for 2011-12, a split between the players began to surface. Although NBA players on average earn far more than their NFL contemporaries, the players that were taking the hard-line stance in the NBA dispute were the superstars and not those on average salaries, who obviously had far more to lose financially from the prolonged lockout and would eventually lose patience with not getting paid. The NFL players, on the other hand, seemed to have support up and down the rosters.").

70. Staudohar, *supra* note 8, at 31.

antitrust lawsuit when a sports union has a bargaining relationship with a league.[71] Thus, "[b]ecause the union was no longer the formal representative of the players, it could legally file an antitrust suit against the owners."[72]

> One view is this is a change of tact from pursuing a negotiated agreement to waging a war along the same lines as the NFL players claiming the owners are violating antitrust law by locking them out. Alternatively, . . . this tactical move by the players could bring about a renewed vigour to renegotiate and avoid potential lengthy and costly legal proceedings.[73]

Two complaints were filed by NBA players in federal district courts in California and Minnesota in November of 2011.[74] Both alleged that

> the owners [ended] the bargaining process when Stern issued his ultimatum and that the purpose of the lockout was to reduce players' salaries. . . . A few days later, the suits were merged and slated to be heard in Minneapolis. Although the union sought a prompt response from the court in the form of a summary judgment, the problem was that it could have taken months, even years, before a final decision was made.[75]

Thankfully for all stakeholders involved, "[o]n November 26, 2011, the . . . lockout ended after [fifty] negotiating sessions that took place over [two] years."[76] "The NBPA also needed to be re-formed as part of the process, which it duly was on December 1, 2011, meaning the final issues in the new CBA could be finalised."[77] Days later, "on December 8, 2011, the NBA and NBPA ratified a new CBA that forced the players to give up $270 million–an average of $610,000 per player–to team owners."[78] Because this CBA was ratified and the two sides ended their labor dispute, the NLRB never had an opportunity to reach a decision on

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71. *See* Brown v. Pro Football Inc., 518 U.S. 231, 235-36 (1996).

72. Staudohar, *supra* note 8, at 31.

73. Carpenter, *supra* note 11, at 16.

74. Class Action Complaint and Jury Demand, Anthony v. Nat'l Basketball Ass'n, No. 11-cv-05525 (N.D. Cal. Nov. 15, 2011); Class Action Complaint, Butler v. Nat'l Basketball Ass'n, No. 11-cv-03352 (D. Minn. Nov. 21, 2011).

75. Staudohar, *supra* note 8, at 31.

76. *Id.*

77. Carpenter, *supra* note 11, at 16.

78. Sam Ivo Burum, Note, *Yes, NBA Players Should Make More Money: How the NLRB Can Change the Future of Collective Bargaining Agreements in Professional Sports*, 63 AM. U. L. REV. 845, 847 (2013).

the previously filed lawsuits by the NBA and NBPA.[79]

When all was said and done, "the [owners] achieved [their] main objective: players [collectively] relinquished nearly $300 million per year in salary, roughly the same amount owners claimed they [had] lost in recent years."[80] Additionally, the BRI divide went from a 57%:43% split, which favored the players, to an even 50%:50% split.[81] These changes were viewed as an obvious victory for the owners, and, more importantly, "ensur[ed] the league's financial viability" for the next several years.[82]

Roughly two months later, the NBA was as strong as ever.[83] When asked about the effects of the lockout, Chris Granger, NBA Executive Vice President of Team Marketing and Business Operations, responded: "I don't think we're seeing lingering effects of the lockout from a fan-interest standpoint. . . . Our full-season [ticket] base is as strong as it's ever been. We're doing very well in individual game sales across all teams."[84] Adam Silver added,

> [s]omewhat to our surprise, fans quickly put it behind them and embraced our season openers on Christmas Day. Interest has continued from there to exceed expectations. In fact, I can't remember when there has been this much excitement about more teams and players across the league and more must-see games on a nightly basis.[85]

Television broadcast ratings were increasing across the board,[86] and social media traffic had hit "peak levels."[87] Merchandise sales and

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79. *Id.* at 847-48.

80. Staudohar, *supra* note 8, at 32.

81. *Id.*

82. *Id.*

83. *See* Steve Aschburner, *NBA Flourishing Post-Lockout as Excitement, Business Grows*, NBA.COM (Feb. 16, 2012, 1:41 PM), http://www.nba.com/2012/news/features/steve_aschburner/02/16/nba-in-good-shape/.

84. *Id.* (alteration in original).

85. *Id.*

86. *See id.* (illustrating that recent television ratings, as compared to the 2010-2011 season, increased for ESPN by 21%; for TNT by 24%; for ABC by 10%; and for NBATV by 57%). "Local telecasts [were] up too, in both over-the-air games (29 percent) and on regional cable networks (12 percent)." *Id.* The five-game Christmas Day opening that season was "the NBA's most heavily watched since 2001. . . ." *Id.*

87. *See id.*; *see also* Sean Deveney, *Despite Dire Post-Lockout Predictions, NBA's Business Remains on Upward Trajectory*, SPORTING NEWS (Apr. 25, 2012), http://www.sportingnews.com/nba-news/2540711-nba-playoffs-2012-david-stern-despite-dire-post-lockout-business-remains-fine. Deveney quotes David Stern, who stated:

> In some ways, the bloggers, the social media, everything that was going on, our fans were out there, whether they were saying, we're stupid, bad, good, ignorant, blind,

corporate partnerships were booming as well.[88] This was due in large part to the NBA staying in "constant communication" with its corporate partners.[89] An argument can even be made that the lockout may have provided a launching pad for the success of the 2011-2012 NBA season.[90] Less than three years later, the NBA was able to parlay its post-lockout success into a nine-year, $24 billion exclusive media rights deal with ESPN and Turner Sports,[91] which further exemplified just how far the NBA has come since the 2011 lockout.[92]

> whatever they chose to say, they were talking. . . . So, in some ways, our community, through social media, was staying engaged. And that's a big differentiator in the way the world exists.

Id.

88. *See* Aschburner, *supra* note 83 ("Every sponsorship deal up for renewal [that] season was, in fact, renewed, including Anheuser Busch, Gatorade and Auto Trader, said Mark Tatum, executive vice president for NBA global marketing partnerships. Also, the league began new deals with Sprint and Under Armour.").

89. *See id.* (explaining that the league maintained long-term relationships with retailers, manufacturers, corporate sponsors, and season-ticket holders).

90. *See* Sam Mamudi, *NBA Enjoys Post-Lockout Bounce*, MARKETWATCH (Feb. 22, 2012, 1:26 PM), http://www.marketwatch.com/story/nba-enjoys-post-lockout-bounce-2012-02-22. Mamudi explains,

> [t]he lockout meant the season's start was delayed, tipping off on Dec. 25, 2011, rather than Nov. 1. That probably helped. Christmas Day is traditionally biggest day on the NBA's regular-season calendar. And the league and its partners helped to ensure a big bang, with five games that day including the Boston Celtics versus the New York Knicks, the Chicago Bulls against the Los Angeles Lakers, and a rematch of last year's NBA Final, with the Miami Heat visiting the Dallas Mavericks.

Id.

91. *See NBA Inks New $24B TV Deal: Lockout Likely*, *supra* note 7.

92. *See* Scott Soshnick & Mason Levinson, *Walt Disney, Time Warner Said to Renew NBA TV Contracts*, BLOOMBERG (Oct. 6, 2014, 10:24 PM), http://www.bloomberg.com/news/2014-10-06/disney-time-warner-are-said-to-renew-tv-contracts-for-nba-games.html (statement of Ted Leonsis, Washington Wizards owner and chairman) ("[the new TV deals] are significant enough to show 'the value enhancement of owning a team.' There's never been a better time to be an owner of an NBA franchise, or frankly, any professional sports team.").

III. FUTURE IMPLICATIONS AND POTENTIAL ISSUES THE TELEVISION DEAL WILL HAVE ON THE NBA'S OWNERS, THE NBPA, AND THE CURRENT CBA

A. *The NBPA Will Most Likely Opt Out of the Current CBA and Demand a Bigger Share of BRI*

With the new TV deal set to launch for the 2016-2017 NBA season, the players will almost certainly exercise their right to opt out of the current CBA in December of 2016.[93] Michele Roberts, the union's new executive director,[94] recently stated that there is a good chance the players will opt out of the current CBA, and that it would be "silly for anyone to assume otherwise."[95] Roberts added that the minute she was told she would be selected as the NBPA's new executive director, she began to prepare for the opt-out.[96]

Roberts' statements more or less abolished the notion that certain provisions of the current CBA could merely be modified to prevent the players from opting out.[97] While Commissioner Silver has publicly expressed that he foresees an easy transition from this CBA to a future one,[98] the players have offered a more ominous outlook on what lies

93. Howard Beck, *TV Windfall Makes for a Happy NBA Now, But Sets Stage for Future Labor Showdown*, BLEACHER REPORT (Oct. 7, 2014), http://bleacherreport.com/articles/2223607-tv-windfall-makes-for-a-happy-nba-now-but-sets-stage-for-future-labor-showdown.

94. Pablo S. Torre, *NBPA Director: Let's Stop Pretending*, ESPN (last updated Nov. 13, 2014, 2:06 PM), http://espn.go.com/nba/story/_/id/11868612/nba-owners-expendable-players-union-chief-michele-roberts-says ("Roberts, hailed as one of the most brilliant trial lawyers in the United States, made history in July by being elected the first female union chief in major North American sports."); Jeff Zillgitt, *Who is New NBPA Executive Director Michele Roberts?*, USA TODAY SPORTS (July 29, 2014, 8:29 PM), http://www.usatoday.com/story/sports/nba/cba/2014/07/29/michele-roberts-players-union/13331807/ ("Roberts, who will turn 58 in September, has worked at Skadden, Arps for the past three years. She graduated from Wesleyan University in 1977 and California-Berkeley's law school in 1980. She is known as an outstanding trial attorney and praised for her profound connection with jurors.").

95. Beck, *supra* note 93.

96. *Id.*

97. *See* Ben Bolch, *NBA Players' Union Chief is 'A Woman Who's not Going to Back Down'*, L.A. TIMES (Dec. 27, 2014, 4:28 PM), http://www.latimes.com/sports/nba/la-sp-nba-players-union-20141228-story.html ("Roberts said her office has begun to engage the league in discussions that could result in modifications to the collective bargaining agreement before either side would need to decide whether to exercise the opt-out clause that could lead to a lockout starting in the summer of 2017. The sides would need to inform each other of their decision by December of 2016.").

98. *See* Beck, *supra* note 93 (statement of Commissioner Silver) ("I don't want to speak for the union, and I'm not prepared to make a judgment yet from our owners' standpoint. . . . But it's my hope that even if we have to do some tinkering or make some adjustments, we can avoid any sort of work stoppage (in 2017).").

ahead.[99] Although the influx of revenue[100] and increase in player salaries attributable to the TV payouts from the new deal[101] looks like a win for all on the surface, it is for the reasons discussed *infra* that many people close to the situation fear that another lockout could be in store.[102]

Firstly, the considerable financial concessions that the NBPA made during the 2011 collective bargaining period[103] will be at the forefront of negotiations between the owners and players when the players exercise their opt-out provision, as the players will not be so easily willing to make similar concessions this time around.[104] The new TV deal undoubtedly precludes the owners' rationale for those concessions and calls for an overhaul of the current labor deal.[105] The owners will likely argue that the 51% of the BRI that the players will receive when the new TV deal takes effect – which could be more than $3.1 billion – "far exceed[s] the $2.1 billion the players drew [during the 2010-2011 season] when they were earning 57 percent" of the BRI.[106] This "smaller share of a larger pie" argument invokes the notion that the "players did not actually take a pay cut when you account for the revenue growth."[107]

However, Michele Roberts, who will be the chief representative of the players at the bargaining table, recently commented on the intensifying state of affairs of the NBA's labor relationship between its

99. *Id.* In regards to how a potential future CBA negotiation period might play out, then "Brooklyn Nets star and union representative" Deron Williams stated, "I hope guys are preparing." *Id.* LeBron James added, "[the owners claiming hundreds of millions in losses, as they did to justify the 2011 lockout] will not fly with us this time." *Id.*

100. *See id.* ("[T]he league will receive $2.1 billion in 2016-17, the first year of the new deal with Disney(ESPN/ABC) and Turner . . . according to a league memo sent to teams, and the payments will steadily increase over the nine-year deal, to $3.1 billion in 2024-25.").

101. *See id.* ("[A]s the salary cap surges go from $63 million this year, to a projected $84.4 million in 2016-2017[, which could theoretically put] [e]very team . . . under the cap in two years . . . [thus] creating a cash surplus that–under the NBA's current system–must be spent on the players.").

102. *See infra* Part IV.

103. *See* Beck, *supra* note 93 ("[T]he players had their percentage of basketball revenues slashed in 2011, from a guaranteed 57% to a range of 49 to 51 percent[,] [c]ontracts were shortened[,] [a]nnual raises were reduced[,] [a]nd the NBA adopted a highly punitive luxury-tax system that acts as a virtual hard cap on most teams.").

104. *See id.*; *see also* Bolch, *supra* note 97 (statement of Michele Roberts) ("There's a ton of money coming in . . . so no one can claim poverty and therefore take the position to try to prevent some concessions for the players.").

105. *See* Bolch, *supra* note 97.

106. Beck, *supra* note 93.

107. *Id.*

owners and players.[108] Roberts made it clear that in the wake of exploding NBA franchise valuations and the record-setting TV deal, the players will be seeking a significantly higher share of BRI once they opt out of the current CBA regardless of whatever increase in salary the players are already set to receive under the existing system:

> The new television and media deals are good news for all of the stakeholders in the NBA . . . . Although we have seen strong revenue growth and significant increases in franchise values over the past three years, it is clear that the league is now entering a period of unprecedented revenue growth. Our job will be to ensure that the players receive their fair share of the results of their efforts.[109]

A more fundamental point that the players will likely raise at the bargaining table is that "not every class of player will benefit from the [imminent] cash surge."[110] Under the construction of the current CBA, "max[imum] contracts rise in proportion to the salary cap," but rookie salaries do not.[111] They are "locked in for the duration of the CBA, without regard to cap increases. So are minimum salaries. So is the mid-level exception–the primary tool used by over-the-cap teams to sign quality players."[112] While these salary levels will rise moderately in the coming years and are "based on predetermined formulas[,] . . . their growth will be miniscule compared to the growth in the [salary] cap," substantially devaluing them on a relative scale.[113]

108. *See NBA Union Chief: Owners are Expendable, Salary Cap Needs to Go*, FOX SPORTS (Nov. 13, 2014, 7:20 AM), http://www.foxsports.com/nba/story/nba-union-chief-michele-roberts-owners-are-expendable-salary-cap-needs-to-go-111314 [hereinafter *NBA Union Chief*].

109. Jeff Zillgitt, *NBA will have More Programming Under new TV Deal*, USA TODAY SPORTS (Oct. 6, 2014, 2:17 PM), http://www.usatoday.com/story/sports/nba/2014/10/06/nba-tv-deal-espn-turner/16807359/ (statement of Michele Roberts).

110. Beck, *supra* note 93.

111. *Id.*

112. *Id.*

113. *Id.* ("The non-taxpayer mid-level exception, for instance rises by roughly $150,000 per year, so it will continue to lose value in comparison to the growing pool of dollars. A mid-level slot worth $5.3 million is far more valuable under a $63 million cap than it will be under, say, a $90 million cap.").

B. *The NBPA Will Also Push for the Abolition of the Current Luxury-Tax System*

Another complaint that the players will likely raise is that the luxury-tax system,[114] implemented in the 2011 CBA, which penalizes the NBA's highest spending owners, is too restrictive.[115] Even the owners who are wealthy enough to routinely exceed the salary cap and pay the luxury tax without batting an eye are hurt by the current CBA in that these owners, should they enter the luxury tax threshold, "surrender other rights," such as their ability to use "the full mid-level exception and the bi-annual exception, and the ability to acquire players in sign-and-trade deals."[116] While it is clear that the players will "reopen the [collective bargaining negotiations] in pursuit of a richer rookie scale, higher minimum salaries, [and] longer contracts,"[117] the one topic of negotiation that will "almost certainly" receive the highest level of attention will be the payroll restriction issue.[118]

This became the case when Michele Roberts stated that the NBA's salary cap is "incredibly un-American," and that her "DNA is offended by it."[119] Roberts added,

> I don't know of any space other than the world of sports where there's this notion that we will artificially deflate what [someone is] able to make, just because. . . . I can't understand why the [players' association] would be interested in suppressing salaries at the top if we know that as salaries at the top have grown, so have salaries at the bottom . . . if that's the case, I contend that there is no reason in the world why the union should embrace salary caps or any effort to place a barrier on the amount of money that marquee players can make.[120]

Based on these statements, it is evident that Michele Roberts and the NBPA are unnerved by the concept that the NBA would try to place an upper limit on player salary increases in a league defined by unequivocal success.

Commissioner Silver publicly "disagreed with Roberts' stance in a recent statement," and attributed the NBA's recent success to "the

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114. *See Definition of Hard Cap*, *supra* note 27.
115. Beck, *supra* note 93.
116. *Id.*
117. *Id.*
118. *See id.*
119. *NBA Union Chief*, *supra* note 108.
120. *Id.*

collective efforts of owners, team employees, and players."[121] Silver "also pointed out that the salary-cap system, agreed to by players and owners, had stimulated an unprecedented era of growth for the league and player salaries."[122] Silver added,

> [n]o single group could accomplish this on its own. Nor is there anything unusual or "un-American" in a unionized industry to have a collective system for paying employees–in fact, that's the norm. The salary cap system, which splits revenues between team owners and players and has been agreed upon by the NBA and the players association since 1982, has served as a foundation for the growth of the league and has enabled NBA players to become the highest paid professional athletes in the world. We will address all of these topics and others with the players association at the appropriate time.[123]

The importance of this issue simply cannot be overstated, as "[i]t has been the single biggest topic of conversation among team executives for the last year."[124] The salary cap increases and decreases in conjunction with league revenues, and the new TV contract will produce the largest injection of revenues in NBA history.[125] Over the past ten years, the salary cap has "jumped from $49.5 million to $63.2 million, a 28 percent increase."[126] For a period of five years, the cap stayed stagnant at around $58 million before finally increasing about $5 million last year "due to an uptick in revenue."[127]

As for the 2015-2016 season, the final year of the current $930 million media rights deal, the salary cap increased to $70 million.[128] After that, the new TV deal will officially kick in at $2.1 billion for the 2016-2017 season, and escalate in even, "year-over-year increments to a peak of $3.1 billion in the final year."[129] As of the writing of this note, the salary cap projection is set at roughly $90 million for the 2016-2017 season,[130] which is a $20 million increase over the projected value of the

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121. Bolch, *supra* note 97.
122. *Id.*
123. Torre, *supra* note 94.
124. Lowe, *supra* note 4.
125. *Id.*
126. *Id.*
127. *Id.*
128. Sandomir, *supra* note 2.
129. Lowe, *supra* note 4.
130. Apraku Anane-Appiah, *NBA Salary Cap Rises to $70 Million for 2015-2016 Season*, MOZAIC SPORTS (July 9, 2015), http://mozaicsports.com/3456/nba-salary-cap-rises-to-70-million-for-2015-2016-season/.

previous year's cap alone.

At this juncture, the process by which the NBA will infuse the new TV money is still unclear,[131] but with thirty teams that are all in different financial situations, how the NBA chooses to filter in this new money could create discord amongst the teams.[132] If the league sees a cap increase ahead of the 2016-2017 NBA season as drastic as the current projection–just in time for what could be the most transformational free agency period the NBA has ever seen in July 2016[133] with megastars such as Kevin Durant,[134] Anthony Davis,[135] and potentially LeBron James, Chris Paul, and Dwight Howard[136] possibly hitting the open market–some of the big market teams could simply luck into an unprecedented amount of salary cap space at the expense of the smaller market teams that have intricately planned for cap flexibility over a number of years.[137] Big market teams such as the Brooklyn Nets, New York Knicks, and Los Angeles Lakers, could theoretically get additional maximum-salary cap slots, even in addition to the max players already under contract for the 2016-2017 NBA season.[138] This would allow

131. Lowe, *supra* note 4.

132. *Id.*

133. *See* Jeremy Rucker, *Anthony Davis or Kevin Durant: How the 2016 Free Agent Pool will Redefine the NBA Landscape*, NUMBERFIRE (Nov. 21, 2014), https://www.numberfire.com/nba/news/3733/anthony-davis-or-kevin-durant-how-the-2016-free-agent-pool-will-redefine-the-nba-landscape ("[T]he 2016 NBA market climate will mark the beginning of an unparalleled period of spending–and the first wave of high profile free agents for this period may very well set the precedent for years to come.").

134. *See, e.g., id.* ("[Kevin Durant] will be a free agent in potentially the most transformational free agent summer in NBA history.").

135. Lowe, *supra* note 4 ("Anthony Davis is a lock for a max contract once his rookie deal is up, and that new contract coincidentally kicks in for the 2016-17 season.").

136. *See* Chris Bernucca, *Durant Heads 2016 Free Agency Class that will be Best Ever*, SHERIDAN HOOPS (Aug. 6, 2014), http://www.sheridanhoops.com/2014/08/06/durant-heads-2016-free-agency-class-that-will-be-best-ever/ (listing LeBron James as a free agent in 2016 if he opts in to the final year of his two-year contract after the 2014-2015 NBA season, as well as Chris Paul and Dwight Howard as potential free agents in 2016 if they opt out of their current deals prior to the free agency period).

137. Lowe, *supra* note 4 ("Teams that have planned carefully for cap flexibility will be unhappy when other teams simply luck into it. The players union has to look out for its entire membership, and a single-year mega-leap would benefit one slice of that membership at the expense of everyone else.").

138. *Id.* Lowe expounds on this thought by explaining that,

> [t]he Nets, even with Deron Williams's atrocious contract still on the books, could suddenly find themselves with two maximum cap slots—enough for Durant and a costar. The Knicks, with Carmelo Anthony locked into what today looks like a better deal, might be able to add two more max or near-max players over the next three summers. The Lakers, with Kobe Bryant's disastrous extension wiped away that summer, could sniff three max cap slots. The Lakers' cap flexibility yielded nothing of note last summer, but a Lakers team with the ability to offer a package deal to multiple stars is the

those teams to pry away superstars from smaller market teams that have been preparing to heavily recruit them for years.[139]

In addition to creating inconsistency among the teams, the injection of the new TV revenue could even create an irregularity among the amount of money players could make who have earned maximum contracts, as a player who signs a max deal prior to the influx of cash from the TV deal would make a substantially lower amount of money than a player who signs a max deal after the cash comes in from the TV deal.[140] Granted, the NBA has made it no secret that its salary cap levels will change dramatically once the TV deal kicks in, so the league's high-profile stars have had ample opportunity to plan accordingly.[141] However, in taking this route, players are risking the opportunity to obtain financial security in the present, in hopes that this risk will pay off in a few of years, as the long-term contracts they will be able to sign then could be worth millions more.[142] That is why the NBA has recently seen a number of its players sign long-term extensions despite recognizing that the salary cap will rise dramatically in the coming years.[143]

C. *Cap Smoothing*

To combat this problem, there have been internal discussions in the NBA about potentially easing the trauma of the coming increase to the salary cap figure. These discussions have been referred to as "cap smoothing."[144] The idea is that cap smoothing would be implemented "[t]o prevent a historic jump of $20 million . . . and the spending spree that would follow, therefore the league sought to set cap figures in the first few years of the media deals that would lead to gradual

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ultimate NBA boogeyman.

Id.

139. *See id.* (including, as an example, Kevin Durant, who "may not have any interest now in the Bay Area, but if the Warriors came calling with Stephen Curry, Klay Thompson, . . . and $25 million in cap space, he'd be a fool not to at least pick up the phone.").

140. Lowe, *supra* note 4 ("Would the union want Davis making nearly $25 million per year on his max deal while Kyrie Irving's max nets $16.5 million, simply because Davis entered the league one year later?").

141. *See id.* ("High-profile stars have planned for this with short-term deals that set them up to enter free agency whenever it most benefits them . . . [and] [p]layers just below the All-NBA-level . . . who might otherwise consider contract extensions should probably opt against them and enter free agency.").

142. *See id.*

143. *Id.*

144. *Id.*

increases."[145] This would make any post-2016 salary cap increase a "bit less dramatic, since the jump would already be in motion."[146] If the league were to decide it wants to implement a "cap smoothing" system, it may be able to do so without support from the NBPA, as it would be an exclusive deal between the television networks and the league.[147]

Despite this, there are methods in which the NBA can implement a "cap smoothing" system and simultaneously involve the union in its implementation.[148] This could be accomplished through an agreement by both parties to "retroactively bump[] up existing contracts that carry into the new TV deal, to make sure those players get their share."[149] However, this method could, and probably will, draw opposition from the teams that signed those contracts in anticipation of how their value would evolve over time.[150] Perhaps the league could tinker with how the revenue is currently split so that players would receive more than their current 51% share of BRI in a particular season, most probably the 2016-2017 season. The league could even adjust escrow funds,[151] which would "set aside the players' share of revenue from the cap itself, so that players would get paid in full without a corresponding leap in the team-by-team cap,"[152] though this solution seems much less fathomable and likely to play out.

Although Michele Roberts does not expect the players to swiftly agree to a "cap smoothing" system,[153] she did not initially dismiss the idea of it outright.[154] When first questioned about it, Roberts said:

> [y]ou can call [cap smoothing] a "spike," but it's also just an accurate reflection of what the revenue is. . . . At first glance, [cap smoothing] is not that attractive, I won't lie. But we're studying it to figure out if

145. Brian Mahoney, *NBA Salary Cap could Skyrocket to $90 Million in 2016-2017 after Players Refuse 'Smoothing'*, HUFFPOST SPORTS, http://huffington1191.rssing.com/chan-24431777/all_p268.html#item5352 (last updated May 11, 2015).

146. Lowe, *supra* note 4.

147. *Id.*

148. *See id.*

149. *Id.*

150. *See id.* ("The [Phoenix] Suns absolutely had the TV deal in mind when they beat the field in inking [Marcus Morris, Markieff Morris, and] Eric Bledsoe to long-term deals. . . . Those contracts look big, especially Bledsoe's five-year, $70 million deal, but they'll look very different in two or three years.").

151. Caldwell, *supra* note 18, at 10-11 ("The NBA has implemented an Escrow account system to ensure that player salaries do not account for more than the recommended percentage of BRI.").

152. Lowe, *supra* note 4.

153. Torre, *supra* note 94.

154. *See id.*

there really is some advantage for players.[155]

Eventually "there will be a shock at some point, regardless of how the league and the television networks decide to filter in the new money over time."[156] It should be noted, however, that the union adamantly rejected the league's first cap smoothing proposal,[157] which was summarized as follows: "[t]he NBA suggested that the difference be given to the union in a lump sum and divided evenly among all players. So instead of a few free agents in 2016 benefiting, all players would get a smaller piece of the TV rights deal increase."[158] In response to the league's initial proposal, Michele Roberts stated, "[t]he proposal that the league submitted . . . would artificially deflate the salary cap . . . . [a]nd that, of course, meant that players' salaries would not increase as much as they would otherwise were it not for smoothing. That pretty much was what killed it."[159]

D. *The Age Requirement Issue*

With the NBPA set to take a bullish stance when it comes to the inevitable renegotiation of the BRI split, this will likely be an opportunity for the owners to further some of their own objectives–most notably, raising the minimum age limit for NBA players.[160] Commissioner Silver has made it known that he wants to raise the minimum age of NBA draft eligibility,[161] which is currently nineteen years old.[162] Silver has stated:

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155. *Id.*

156. Lowe, *supra* note 4.

157. Ben Golliver, *NBPA Rejects Salary Cap Smoothing, Setting Stage for 2016 Fireworks*, SPORTS ILLUSTRATED, http://www.si.com/nba/2015/03/11/nbpa-rejects-salary-cap-smoothing-labor-negotiations-cba-lebron-james (last updated Mar. 12, 2015).

158. Brian Windhorst, *Historic Salary Cap Increase Set*, ESPN, http://espn.go.com/nba/story/_/id/12461874/players-union-rejects-salary-cap-smoothing-historic-cap-increase-nba-set (last updated Mar. 12, 2015).

159. *Id.*

160. Matt Reevy, *Why the $24B NBA TV Deal Totally Changes the Next Labor Agreement*, SPORTS CHEAT SHEET (Oct. 6, 2014), http://wallstcheatsheet.com/sports/why-the-24b-nba-tv-deal-totally-changes-the-next-labor-agreement.html/?a=viewall.

161. Jeff Zillgitt, *NBA's Adam Silver wants NCAA input on Higher age Limit*, USA TODAY SPORTS (Apr. 18, 2014, 4:36 PM), http://www.usatoday.com/story/sports/nba/2014/04/18/adam-silver-commissioner-age-limit-draft-board-of-governors/7879115/.

162. *Id.* (noting that a player can also be eligible to enter the NBA draft if he is at least one year removed from his high school graduation).

> I've been a proponent of raising the age from [nineteen] to [twenty] because I think it would make for a better league. . . . I believe and continue to believe it will be in the best interest of the league. I think that the extra year in college will be a benefit for these young men to grow and develop as people and basketball players . . . [it is] an issue that should be collectively bargained. . . . When the union brings in an executive director, I think it's an issue that we need to bring up again.[163]

A major concern with the current rule, also known as "the one-and-done" rule,[164] is that NBA scouts are not getting enough chances to evaluate players,[165] perhaps from both a skill-level standpoint, as well as an evaluation of their maturity level. In a comment addressing this concern, Commissioner Silver stated, "[i]deally we want our teams in a position to have more information about these young men before they come into the league, and from a developmental standpoint we would like them to have more opportunity for them to develop before they come into the league."[166]

It has also been said that the rule has "made a complete mockery of the notion that the best college basketball players have any intention of graduating. They are mercenaries passing through only because the rules force them to be there."[167] What is more, the current rule produces an added pressure to the kids who have to make a decision after their freshman year of college; former Georgetown head coach John Thompson, when discussing the professional prospects of 2013-2014 freshman standout Jabari Parker during a game broadcast, said "[h]e's not ready . . . [b]ut he has to come out. He has no choice. There's too much money there for him and he can't go back to college and then face

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163. Lorenzo Reyes, *NBA Commissioner Reiterates Desire to Raise Age Limit*, USA TODAY SPORTS (Apr. 24, 2014, 1:36 PM), http://www.usatoday.com/story/sports/nba/2014/04/24/nba-commissioner-adam-silver-wants-to-change-one-and-done-rule/8099083/.

164. *See* Darren Heitner, *The Inevitable Death Of NBA's One-And-Done Rule*, FORBES (May 18, 2014, 9:29 AM), http://www.forbes.com/sites/darrenheitner/2014/05/18/the-inevitable-death-of-nbas-one-and-done-rule/ ("Basketball players who wish to perform in the NBA must be at least nineteen-years-old and one year removed from high school. Otherwise, those players are not eligible to enter their names into the annual NBA Draft. This is known as the NBA's one-and-done rule. . . .").

165. Zillgit, *supra* note 161 ("The NBA is paying first-round picks guaranteed millions, and with that kind of investment, teams want more chances to evaluate players. The more they can scout players, the more confident they believe they are in making significant decisions in the draft.").

166. *Id.*

167. John Feinstein, *College Basketball's One-and-Done Rule must be Done with Immediately*, WASHINGTON POST (Jan. 31, 2015), http://www.washingtonpost.com/sports/colleges/college-basketballs-one-and-done-rule-must-be-done-with-immediately/2015/01/31/e465091e-a8e1-11e4-a2b2-776095f393b2_story.html.

his friends back home. It's not right, it's not fair, it just is."[168]

Back in April of 2014, this issue was gaining steam as NCAA President Mark Emmert[169] visited with NBA owners in New York, and Commissioner Silver expressed that the NCAA should have a seat at the table when the NBA and NBPA discuss the league's draft-eligibility age.[170] Silver added:

> [Emmert] and I have had an ongoing dialogue, not only just about the one-and-done rule, but about officiating, how we can come together on the rules of the game to make it more of a smooth transition from college to the NBA, and we talked generally about things we can be doing to improve the collegiate experience.[171]

Although it was clear that raising the age limit for NBA draft eligibility was a top priority for Silver when he first became Commissioner of the league, this issue took a back seat once the Donald Sterling scandal came to light.[172]

Donald Sterling, the eighty-one-year old former owner of the Los Angeles Clippers, who had owned the team since 1981, was handed a lifetime ban from the NBA plus a $2.5 million fine for racist comments he made about his players.[173] At a news conference in April of 2014, Commissioner Silver declared that "[e]ffective immediately, I am banning Mr. Sterling for life from any association with the Clippers organization or the NBA."[174] Eventually, after a bid by Sterling to block his wife, Rochelle Sterling, from selling the team, Judge Michael Levanas of Los Angeles County Superior Court held that "Rochelle Sterling had properly followed the directions of the family trust in removing Donald Sterling, her estranged husband, as co-trustee and that the sale of the team could be completed without waiting for what would

168. *Id.*

169. *See* NCAA President Mark Emmert, NCAA, http://www.ncaa.org/about/who-we-are/office-president/office-president-history (last visited Mar. 7, 2016) ("Dr. Mark A. Emmert became the fifth president of the NCAA in October 2010.").

170. *See* Zillgitt, *supra* note 161 ("One thing that [Emmert and Commissioner Silver] also agree on is that historically what you've heard is that the age issue is one that needs to be negotiated almost in isolation between the NBA and its union. . . . What Dr. Emmert, and I agree on is that the NCAA needs to have a seat at the table, as well, for those discussions.").

171. *Id.*

172. *See, e.g.*, Colleen Curry, *Breaking down the Donald Sterling Scandal: The Audio, The Lawsuits, the Reactions*, ABC NEWS (Apr. 28, 2014), http://abcnews.go.com/US/donald-sterling-scandal-audio-lawsuits-reactions/story?id=23497322.

173. *Id.*

174. *Id.*

be a lengthy appeal."[175] The Clippers were sold to ex-Microsoft Chief Executive, Steve Ballmer,[176] and Silver was praised for his swift decisiveness in issuing Sterling's lifetime ban.[177]

While one might presume the next logical step for Silver would be to parlay his wide-ranging support[178] following the Donald Sterling scandal into a momentous push to amend the NBA's age requirement, NBPA Director Michele Roberts[179] will undoubtedly do her best to act as a roadblock in Silver's plans.[180] When asked about the league's current age minimum, Roberts certainly did not shy away from addressing the question head on:

> [I am] adamantly opposed to [raising the age minimum]. . . . I've been practicing law for [thirty] years. One of the beauties of being in that job is that I can practice until I lose my mind or die. That is not the case with athletes. You have a limited life to make money as a basketball player. Anything that limits those opportunities is distressing to me. I view [the age minimum] as just another device that serves to limit a [player's] ability to make a living.[181]

Additionally, recent developments overseas have helped shape the league's age requirement issue,[182] making it one of the more hot-button topics set to be collectively bargained in 2017.

Last year, Emmanuel Mudiay was an eighteen-year-old "blue chip"[183] NBA prospect and signed a one-year, $1.2 million contract with

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175. Billy Witz, *Donald Sterling Loses Bid to Block Sale of Clippers*, N.Y. TIMES (July 28, 2014), http://www.nytimes.com/2014/07/29/sports/basketball/judge-ruling-donald-sterling-sale-clippers.html.

176. Marissa Payne, *Clippers Sold to Steve Ballmer, NBA Confirms*, WASH. POST (Aug. 12, 2014), http://www.washingtonpost.com/blogs/early-lead/wp/2014/08/12/nba-confirms-clippers-have-been-sold-to-steve-ballmer/.

177. Catherine E. Shoichet, *Sterling Scandal: NBA Commissioner Adam Silver's Moment to Shine*, CNN (Apr. 29, 2014, 10:31 PM), http://www.cnn.com/2014/04/29/us/nba-adam-silver/.

178. *See* Dana Ford, *#BiggerThanBasketball: 9 Best Shout-outs for Sterling's NBA Ban*, CNN (Apr. 29, 2014, 7:24 PM), http://www.cnn.com/2014/04/29/us/clippers-sterling-scandal-reaction/index.html?hpt=hp_t2.

179. Torre, *supra* note 94.

180. *See* Chris Mannix, *NBPA Chief Michele Roberts Looking to Make Her Mark on the League*, SPORTS ILLUSTRATED (Nov. 26, 2014), http://www.si.com/nba/2014/11/26/nbpa-director-michele-roberts-making-her-mark.

181. *Id.*

182. *See* Tom Ziller, *Emmanuel Mudiay's Injury Highlights the Absurdity of the NBA age Limit*, SB NATION (Dec. 5, 2014, 10:29 AM), http://www.sbnation.com/nba/2014/12/5/7338967/emmanuel-mudiay-rumors-injury-china-nba-draft-age-limit ("the top 2015 NBA Draft prospect may lose his roster spot in China and have to sit out until the draft.").

183. *Blue Chip*, MERRIAM-WEBSTER, http://www.merriam-

the Guangdong Southern Tigers of the China Basketball Association in July of 2014,[184] making him the most notable player to forego playing college basketball in favor of signing with a professional team overseas since Brandon Jennings became the first American to do so in 2008.[185] Mudiay's decision was presumably due to the likelihood that he would have been declared academically ineligible to play NCAA college basketball at Southern Methodist University after previously committing to play there.[186] The Mudiay situation drew more attention when it was announced that the eighteen-year-old standout had suffered an ankle injury while playing only his tenth game for his Chinese Basketball Association team in November of 2014.[187]

After suffering what was originally thought of as a week-to-week injury, Mudiay was forced to sit out the remainder of the regular season, and eventually returned to action during the playoffs on March 1st, 2015.[188] Mudiay finished out the year preparing for the 2015 NBA draft,

webster.com/dictionary/blue%20chip (last visited Mar. 7, 2016) (defining blue chip as "an athlete rated as excellent or as an excellent prospect").

184. Scott Gleeson, *Report: Emmanuel Mudiay Signs $1.2 Million Contract in China*, USA TODAY SPORTS (July 22, 2014, 1:47 PM) http://www.usatoday.com/story/sports/ncaab/2014/07/22/emmanuel-mudiay-notches-12-million-contract-in-china/12997021/.

185. *See* Pete Thamel, *At 19, Plotting New Path to N.B.A., via Europe*, N.Y. TIMES (Oct. 4, 2008), http://www.nytimes.com/2008/10/05/sports/basketball/05jennings.html ("Jennings, of Compton, [California], was unsure about meeting the academic requirements for a [college] scholarship. . . . Instead he chose to play in Italy, where he will earn $1.2 million this season in salary and endorsements, including a shoe contract with Under Armour.").

186. *See* Eric Prisbell, *SMU Men's Basketball Under NCAA Investigation*, USA TODAY SPORTS (Jan. 16, 2015, 7:14 PM), http://www.usatoday.com/story/sports/ncaab/aac/2015/01/16/smu-southern-methodist-ncaa-investigation-larry-brown/21884551/; Adrian Wojnarowski, *Sources: Emmanuel Mudiay's Future in China Unclear*, YAHOO SPORTS (Dec. 4, 2014, 11:34 PM), http://sports.yahoo.com/news/sources—emmanuel-mudiay-s-future-in-china-unclear-043423006.html ("Mudiay was unable to qualify academically to play basketball for coach Larry Brown at Southern Methodist University, which led to him accepting the $1 million-plus contract and an endorsement deal with Under Armour.").

187. *See, e.g.*, *Emmanuel Mudiay Suffers Right Ankle Injury*, ONE WORLD SPORTS (Nov. 24, 2014, 10:52 AM), http://www.oneworldsports.com/blogs/emmanuel-mudiay-suffers-right-ankle-injury/. Mudiay's injury was reported as follows:

> Emmanuel Mudiay, the top NBA prospect playing this season in China rather than the NCAA, twisted his right ankle on Sunday in the Guangdong Southern Tigers' 118-101 loss to the Xinjiang Flying Tigers. Mudiay landed awkwardly after being fouled on a lay-up attempt, with his right ankle rolling inward almost 90 degrees. After writhing in pain, Mudiay's teammates carried him off the floor and into the locker room.

Id.

188. Eric Pincus, *Draft Prospect Emmanuel Mudiay returns to action in China*, L.A. TIMES (Mar. 2, 2015, 7:01 PM), http://www.latimes.com/sports/lakers/lakersnow/la-sp-ln-emmanuel-mudiay-returns-action-china-20150302-story.html.

and was drafted by the Denver Nuggets with the seventh overall pick.[189] While his lone season playing professionally overseas did not go entirely as well as he might have anticipated, his NBA draft stock remained unchanged.[190] But what if the age minimum to enter the NBA draft this past year was twenty instead of nineteen? What if Emmanuel Mudiay was unable to enter the June, 2015 NBA draft, and, by virtue of his decision to sign professional basketball and sponsorship contracts overseas, was precluded from being NCAA-eligible *this* year as well? In answering that very question, NBA reporter Tom Ziller stated:

> [Mudiay would] be ineligible to play in the NCAA forever because he played professionally for a month. He'd be out in China. European rosters are set and those clubs don't seem amenable to renting [eighteen]-year-old Americans, regardless. So Mudiay's only real competitive option (other than international leagues) would be the NBA [Developmental] League, where he'd earn about $30,000 a season and have to hang out until June, 2016. . . . There is still not a single case in which a highly rated prospect spent his pre-draft year totally in the [Developmental] League and got picked in the first round.[191]

The cost to the NBA itself in implementing an increased age minimum is practically nothing, while the entire cost of that policy would be borne by teenage players in predicaments similar to Emmanuel Mudiay's situation last season.[192] If the NBA opts to easily sacrifice some of their BRI shares to the players in 2017 without a fight, they will be more likely to find success at the bargaining table in furthering their own agenda: a continued relationship with the NCAA, which would be all but ensured by raising the age minimum for its players.[193]

189. Christopher Dempsey, *Emmanuel Mudiay selected by Denver Nuggets with No. 7 pick in 2015 NBA draft*, DENVER POST, http://www.denverpost.com/nuggets/ci_28383659/emmanuel-mudiay-selected-by-nuggets-no-7-pick (last updated June 26, 2015).

190. *See id.*

191. Ziller, *supra* note 182.

192. *Id.*

193. Reevy, *supra* note 160.

IV. HOW THE NBA AND ITS PLAYERS CAN APPROACH THE BARGAINING TABLE IN ORDER TO FACILITATE A REVENUE-SHARING AGREEMENT WHILE ENSURING THAT THE NBA WILL CONTINUE TO PROSPER

Before any of the substantive issues surrounding the future state of affairs of collective bargaining in the NBA can be addressed, the first step in the process that the players must take – and arguably the most crucial one–to make sure they are on the same wavelength as their current union leader, Michele Roberts.[194] To put it lightly, Roberts' predecessor, Billy Hunter, did not see gaining the support of the players as his number one priority.[195] This is evidenced by the disintegration of Hunter's relationship with then-union Player President Derek Fisher, which ultimately led to Hunter's termination by the NBPA after an investigation into Hunter's hiring practices and business dealings ordered by Fisher revealed that "Hunter ran the union like a mom-and-pop store, hired relatives[,] and funneled business to companies that employed his relatives."[196] If Roberts intends to regain some of the BRI shares Hunter surrendered to the owners during the last CBA negotiation period, she *must* have the unyielding support of Chris Paul, LeBron James,[197] and the rest of the NBPA; and together, they must approach the bargaining table as a united front.

A. *The BRI Split*

As for the substantive issues that will arise when the owners and players inevitably make their way back to the bargaining table, none will be more prevalent than how the two sides will split the BRI, which, by that point, will almost certainly have reached heights never seen before

194. *See* Sean Deveney, *The Baseline: The Lockout, Courts and Michele Roberts' Master Plan*, SPORTING NEWS (Feb. 27, 2015, 12:40 AM), http://www.sportingnews.com/nba-news/4636912-nba-lockout-nbpa-michele-roberts-union-media-billy-hunter-donald-fehr.

195. *See id.*

196. Jason Whitlock, *Lawsuit Signals Fisher's Game is Up*, FOX SPORTS (May 16, 2013, 1:00 AM), http://www.foxsports.com/nba/story/billy-hunter-lawsuit-against-derek-fisher-nba-players-association-jason-whitlock-051613. Eventually, the rift between Hunter and Fisher became so severe that Hunter filed a lawsuit against Fisher in California. *Id.*; *see* Plaintiffs' Complaint for Compensatory, Assumed, and Punitive Damages, Hunter v. Fisher, No. RG13679736 (Cal. Super. Ct. May 16, 2013).

197. Chris Paul is the current Player President of the NBPA, and LeBron James was unanimously elected as the first NBPA Vice President. Lindsey Foltin, *LeBron James Voted 1st VP of NBA Players Union*, FOX SPORTS (Feb. 13, 2015, 5:49 PM), http://www.foxsports.com/ohio/story/lebron-james-chris-paul-nba-players-union-cba-021315.

in the NBA.[198] This time around, unlike in 2011 when the players ultimately surrendered just about 7% of BRI to the owners,[199] the NBPA has a lot more working in its favor, as evidenced by the massive TV deal. With "almost all of the game's financial metrics going north, the union surely is feeling the heat from its members to do something to recoup at least some of the estimated $3 billion in future salaries it surrendered to owners in [2011]."[200]

Back in October of 2014, NBPA Player Vice President LeBron James stated, "[t]he whole thing that went on with the last negotiation process was the owners telling us that they were losing money. There's no way they can sit in front of us and tell us that right now after we continue to see teams selling for billions of dollars."[201] James was referring to the Los Angeles Clippers, who were recently sold for a record $2 billion.[202] Couple the recent sale of the Clippers with the sky-rocketing valuations of smaller-market NBA franchises,[203] and it is easy to see why any claim by the owners that they are operating at an annual financial loss, which essentially won them a higher share of BRI in 2011,[204] will be a tougher sell this time.

However, just to complicate things further, the owners claim that they have "independently-audited financial records to show a number of teams are losing money."[205] This ploy by the owners indicates that they

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198. *See generally* Arturo Galletti, *A Layman's Guide to the Coming NBA Salary Cap Apocalypse*, BOXSCORE GEEKS (July 16, 2014), http://www.boxscoregeeks.com/articles/a-layman-s-guide-to-the-coming-nba-salary-cap-apocalypse ("[T]he financial landscape of the NBA is about to completely change. . . . Salaries will rise to match this new projected influx of cash . . . and all of a sudden, [long-term] deals signed before the advent of the new TV contract will be discount deals.").

199. *See supra* text accompanying note 81.

200. David Aldridge, *Hopes for Smooth Road to Future Labor Peace Looks Bleak*, NBA.COM (Mar. 16, 2015, 10:17 AM), http://www.nba.com/2015/news/features/david_aldridge/03/16/morning-tip-impact-of-looming-nba-salary-cap-changes-state-of-memphis-grizzlies-qa-with-george-karl/.

201. Doug Sibor, *Are We Headed Towards another NBA Lockout?*, COMPLEX SPORTS (Feb. 16, 2015), http://www.complex.com/sports/2015/02/are-we-headed-towards-another-nba-lockout.

202. *See, e.g.*, Nathan Rott, *LA Clippers Sold To Ex-Microsoft CEO Ballmer*, NPR http://www.npr.org/2014/08/13/340005033/la-clippers-sold-to-ex-microsoft-ceo-ballmer (last updated Aug. 14, 2014, 8:02 AM) ("Former Microsoft CEO Steve Ballmer is officially the new owner of the Los Angeles Clippers. A California court confirmed Shelly Sterling's authority to sell the team for a record $2 billion.").

203. The Milwaukee Bucks were recently sold for $550 million. Rob Mahoney, *Bucks to be Sold for $550 Million, but will Remain in Milwaukee*, SPORTS ILLUSTRATED, http://www.si.com/nba/point-forward/2014/04/16/milwaukee-bucks-sold-herb-kohl (last updated June 14, 2014).

204. *See supra* text accompanying note 28.

205. Michael McCann, *NBA Staring Down Labor Crisis in 2017*, SPORTS ILLUSTRATED, http://www.si.com/nba/2015/03/12/nba-nbpa-smoothing-salary-cap-labor-crisis-lockout-2017 (last

will not go down without a fight. While the owners could theoretically approach the BRI issue with a willingness to compromise in pursuit of increasing their likelihood of success in other areas of negotiation,[206] they do not seem to be so forward thinking in their approach.[207] Longtime NBA analyst David Aldridge believes that "[g]etting the players to give so much [BRI] the last time may embolden some of the league's hardline owners rather than placate them."[208] Granted, the owners also took an aggressive stance in their initial proposals back in 2011,[209] but, eventually, they fell back on a *slightly* more amicable agreement.[210]

As for the players, things will be very different once the impending negotiation period begins, as they more than likely have learned from their mistakes in 2011.[211] For instance:

> Among the numerous problems with how the NBPA approached the last lockout, one of the biggest [was] that they were led by players nobody cared about. While public support for the union wouldn't have guaranteed a more favorable outcome for the players, it certainly [would have] helped. But the stars of the league weren't involved in negotiations . . . until well into the lockout, leaving Derek Fisher, Roger Mason Jr., and Maurice Evans as the public faces of NBA players.[212]

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updated Mar. 13, 2015).

206. *See supra* Parts III.B, D.

207. *See* McCann, *supra* note 205 (stating that "[t]he inability of NBA and NBPA to agree on a strategy, [shows other signs] of a fraying relationship between the league and NBPA leaders.").

208. Aldridge, *supra* note 200.

209. *See id.* In describing these proposals, Aldridge explains:

> [T]he league's initial proposals to the NBPA before the [2011] lockout began called for a hard cap, salary rollbacks by players and giving players just 41 percent of BRI. The players didn't seriously consider any of those proposals. Later, in November of that year, former Commissioner David Stern said if the players didn't accept the proposed "band" of 49 to 51 percent of BRI from owners, the league would reduce its offer to 47 percent.

Id.

210. The deal eventually agreed-upon did not include a hard cap and salary rollbacks. *See* Larry Coon, *Breaking down Changes in new CBA*, ESPN, http://espn.go.com/nba/story/_/page/CBA-111128/how-new-nba-deal-compares-last-one (last updated Dec. 3, 2011).

211. *See* Tom Ley, *NBA Players are Coming to get their Money Back in 2017*, DEADSPIN (Oct. 7, 2014, 3:29PM), http://deadspin.com/nba-players-are-coming-to-get-their-money-back-in-2017-1643445955.

212. Kevin Draper, *The NBA Players Union Made Two Big Decisions Yesterday*, DEADSPIN (Feb. 14, 2015, 5:50 PM), http://deadspin.com/the-nba-players-union-made-two-big-decisions-yesterday-1685863703.

Should there be a lockout in 2017, however, the NBPA quite possibly will have a substantially greater amount of public support with superstars Chris Paul and LeBron James at the helm.[213] With the Paul/James duo leading the way for the players, the potential is there for other superstars to follow suit and get more involved as well.[214]

"The public may not care that they can't watch Maurice Evans play basketball, but they certainly care that they can't watch LeBron James, and that point is easier to get across with him helping lead the union's efforts."[215] Perhaps with these superstars leading the way for the players, and with the public having a fervent interest in seeing these stars get back on the basketball court, this will put an impetus on the two sides to reach an agreement quickly. Moreover, while megastars like James and Paul will not be hurting for money in the event of a lockout,[216] the reality is that the "haves," as compared with the "have-nots," are far better equipped to sustain a lengthy period of time without regularly earning a paycheck,[217] further exemplifying why it is vital for the two sides to act swiftly during CBA negotiations.

The fracas that will predictably take place once the two sides hit the bargaining table to negotiate how the ever-increasing BRI should be split will undoubtedly influence how the other issues[218] are resolved as well, operating like the first domino to fall in a line. One approach the owners could take would be to surrender a more sizeable portion of BRI than they had originally planned on in an attempt to gain more leverage when negotiating the salary cap system and the minimum age requirement. But as previously mentioned, the owners have not shown that they are considering this tactic,[219] at least not yet. If the owners would soften their stance on the BRI split, they would have a significantly better chance of influencing Michele Roberts and the NBPA to consider compromising on other issues, such as (1) revisiting their cap-smoothing proposal;[220] and (2) approving a raised minimum age requirement for

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213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* ("James, Paul, and the rest of the superstars can afford to miss an entire season of basketball. They've got money in the bank, money from shoe deals, money from State Farm and Samsung, etc.").

217. *Id.* ("[T]here is a huge gulf between what Jakarr Sampson ($845,059) and Kobe Bryant ($23.5 million) earn, and there are a lot more of the former than the latter.").

218. *Id.* Such as the future of the NBA's salary cap system and minimum age requirement. *Id.*

219. *See* Jeff Zillgitt, *Fan's Guide to the NBA Lockout: What We Know, What We Don't*, USA TODAY (Nov. 7, 2011, 8:22 PM) http://usatoday30.usatoday.com/sports/basketball/nba/story/2011-11-06/A-fans-guide-to-the-NBA-lockout/51098590/1.

220. *See supra* Part III.C.

NBA eligibility.[221]

While at one point this strategy may have been deemed a conceivable one at best, it can now be argued that this approach has gained considerable traction after various media outlets began drawing attention to the favorable tax benefits owners receive.[222] These benefits, which do not appear on balance sheets when individual teams calculate their gains and losses for a season,[223] could prove to be the determinative bargaining chip if and when the two sides negotiate a reallocation of BRI in a new CBA.[224] Armed with this knowledge, if the owners voluntarily surrender a percentage of their BRI shares to the players, it will only serve to work in their favor when negotiating other collective bargaining issues.

B. *The Salary Cap System*

If the owners would accept a smaller share of BRI than what they currently own, they would have a fighting chance at convincing the players to compromise on the implementation of some kind of cap smoothing plan. Now that upper-echelon players are spearheading the NBPA's negotiation team, the owners have an opportunity that they did not have in 2011: the liberty to negotiate with these players face to face.[225] Although Michele Roberts has made it abundantly clear that she is not willing to accept the league's initial cap smoothing proposal,[226] perhaps the owners will have more success in persuading the players that cap smoothing is an optimal course of action for all involved parties when the two sides negotiate face to face, assuming the issue will be revisited in future collective bargaining sessions.

Without a cap smoothing strategy in place to artificially lower the salary cap, the NBA will experience the largest salary cap jump in league history for the 2016-17 season.[227] "Owners have been trying to avoid such a spike because it would dramatically raise salary levels for free agents that season. [LeBron] James, for example, could take his

221. *See supra* Part III.D.

222. Banenhausen, *supra* note 53; Short, *supra* note 54; Whorton, *supra* note 54.

223. *See supra* text accompanying note 52.

224. *See* Taubin, *supra* note 50, at 163-64 (noting that "the principal source of owners' profits comes from the available tax provisions [of Internal Revenue Code section 197]" as opposed to what is misleadingly shown on the balance sheets).

225. Jeff Schwartz, *Process for NBPA's Search Must Change*, ESPN: TRUEHOOP (Mar. 13, 2014), http://espn.go.com/blog/truehoop/post/_/id/66693/process-for-nbpas-search-must-change.

226. *See supra* text accompanying notes 153-156.

227. Windhorst, *supra* note 158.

salary from about $22 million next season to around $30 million if he signs for the maximum salary in 2016."[228] Yet, Michele Roberts is not on board with the cap smoothing initiative.[229] Simply stated, this is a shortsighted viewpoint.

A spike in the salary cap as substantial as what it would be in 2016-2017 in the absence of a cap smoothing plan would have unprecedented effects on the NBA and its players alike. In alluding to one of these unprecedented effects, David Aldridge stated that "[t]here is the obvious issue of players who won't be free agents in 2016 sitting on the sidelines while those fortunate enough to be free that summer line their pockets."[230] Another issue with a 2016-2017 cap spike is that a jump that massive would be primarily enjoyed by the league's superstars, such as newly-elected NBPA Vice President LeBron James, who many believe will sign a one-year extension this summer in order to become a free agent again in 2016.[231] A third issue is that a potential record increase of the salary cap could be detrimental to maintaining competitive balance throughout the NBA, as elite-level players could theoretically be more inclined to accept slightly-less-than maximum-salary contracts to join up and play for the same teams–more likely than not in the large-market cities.[232]

For these reasons, the owners will have a significant opportunity to induce the NBPA into believing that cap smoothing is the best approach to ensure that the NBA will continue to prosper for the foreseeable future and the league's competitive balance will not fall by the wayside. Additionally, now that the owners will be negotiating directly with at least two maximum-salary players, they can accentuate the idea that "the vast majority of NBA players benefit from the LeBron Jameses of the world being relatively underpaid, because it means more money for them[.]"[233] In the past, LeBron James was entitled to aim to be paid as much money as he possibly could during his time in the NBA, just as

228. *Id.*

229. *See supra* text accompanying notes 153-156.

230. Aldridge, *supra* note 200.

231. *Id.*

232. *See id.* Aldridge explains,

> a Miami Scenario–in which three stars take slightly less than the max to come together, as James, Dwyane Wade and Chris Bosh did in 2010–is certainly possible. And given that the max salaries will be stratospheric in '16, asking three stars to live on, say, $20 million a year to allow a team to build around them, isn't farfetched. . . . And that cuts to the very heart of competitive balance.

Id.

233. Draper, *supra* note 212.

almost any other player is.[234] But now, James might have second thoughts about drinking the well dry.

As NBPA Vice President, James's job is to advocate for every class of NBA player, whether that player is a superstar or the last guy on the bench. This begs the question of whether the union's leadership committee would serve the interests of *all* the players if they do not succumb to a future cap smoothing proposal, or just the league's highest earners. If the owners emphasize this point to the players during negotiations and are willing to accept a reduced share of BRI, perhaps they will be successful in convincing the union to, at a minimum, revisit the idea of cap smoothing on a broader scale, and possibly even agree to the league's initial proposal once and for all.

C. *The Age Requirement*

The next domino to fall in the line is the future of the NBA's minimum age requirement. NBA Commissioner Adam Silver has made it clear to the public that he has plans to do everything in his power to raise the minimum eligibility age from nineteen to twenty.[235] Meanwhile, NBPA union leader Michele Roberts has adamantly opposed Silver's plans.[236]

Back in 1996, the U.S. Supreme Court established in *Brown* that the federal non-statutory labor exemption to antitrust laws favors the collective bargaining process in professional sports.[237] Therefore, it is extremely likely that the only way to change the NBA's eligibility rules from this point forward would be through an agreement between the players and owners in a future collective bargaining session, because, like in the NFL,[238] the labor market for NBA players "is organized around a collective bargaining relationship that is provided for and promoted by federal labor law,"[239] and the NBA clubs, "as a multi-employer bargaining unit, can act jointly in setting the terms and conditions of players' employment and the rules of the sport without

234. *See, e.g.*, Larry Coon, *Larry Coon's NBA Salary Cap FAQ: 2011 Collective Bargaining Agreement*, CBAFAQ, http://www.cbafaq.com/salarycap.htm (last updated Mar. 20, 2016) (illustrating pay scales of various players in the industry).

235. *See supra* text accompanying note 160.

236. *See supra* text accompanying note 180.

237. Brown v. Pro Football, Inc., 518 U.S. 231, 236 (1996) ("[T]he 'non-statutory' exemption [has been inferred] from federal labor statutes, which set forth a national labor policy favoring free and private collective bargaining.").

238. Clarett v. Nat'l Football League, 369 F.3d 124, 130 (2d Cir. 2004).

239. *Id.*

risking antitrust liability."[240]

Recently, there have been a few innovative proposals to amend the age requirement, but for now, they are merely ideas. One such proposal calls for a similar format to what Major League Baseball currently has in place. According to Major League Baseball's official rules,

> [t]he basic categories of players eligible to be drafted are: [(1)] [h]igh school players, if they have graduated from high school and have not yet attended college or junior college; [(2)] [c]ollege players, from four-year colleges who have either completed their junior or senior years or are at least 21 years old; and [(3)] [j]unior college players, regardless of how many years of school they have completed.[241]

If the NBA wanted to follow this system, players could either enter the NBA draft upon their high school graduation,[242] or they would need to attend a four-year college for three or more years before regaining draft eligibility. Nevertheless, this idea is still in its earliest stages of development, as Commissioner Silver and the NBPA are yet to address the idea publicly.

It is no secret that Silver and Roberts have strongly opposing viewpoints regarding the age requirement.[243] Consequently, the most likely way for the two sides to come to an agreement quickly and avoid another lockout is if one side defers to the other. Much like the salary cap smoothing issue, the owners would unquestionably increase their odds of convincing the NBPA to accept an increased age minimum if they conceded a percentage of BRI to the players.

Even if the owners retain a smaller share of BRI, the new TV deal would likely keep most, if not all, of the NBA's franchises profitable for the foreseeable future, and the owners would presumably have gained concessions from the players in other areas of negotiation.[244] Conversely, if the players were open to agreeing upon an increased age minimum, they could leverage that into a bargaining chip for other more

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240. *See id.*

241. *Official Rules*, MLB.COM, http://mlb.mlb.com/mlb/draftday/rules.jsp (last visited Mar. 7, 2016).

242. *See* Ziller, *supra* note 182 (illustrating that for overseas players the rule is altered to "upon their eighteenth birthday").

243. Kelly Dwyer, *NBPA Chief is 'Adamantly Opposed to' Raising the NBA Age Limit*, YAHOO SPORTS (Nov. 28, 2014, 6:06 PM), http://finance.yahoo.com/blogs/nba-ball-dont-lie/nbpa-chief-michele-roberts-is—adamantly-opposed-to—raising-the-nba-age-limit-230739189.html.

244. Jorge Arangure Jr., *No, The NBA's New TV Contract does not Mean there will be a Work Stoppage*, VICE SPORTS (Oct. 9, 2014) https://sports.vice.com/en_us/article/no-the-nbas-new-tv-contract-does-not-mean-there-will-be-a-work-stoppage.

pressing matters, like regaining a higher BRI percentage. Furthermore, "[an increased] age requirement would allow more veterans opportunities to sign contracts[,] as it would further delay competition from younger players."[245]

V. CONCLUSION

The $24 billion, nine-year exclusive media rights deal with ESPN and Turner Sports recently signed by the NBA will have large-scale effects on the upcoming renegotiation of the NBA's Collective Bargaining Agreement, which is set to inevitably commence upon the completion of the 2016-2017 season.[246] While it is everyone's hope that the renegotiation will be amicable for both sides, the likelihood is that it will be contentious. Both sides have been unbending in their views to this point, though that is to be expected when it is this early in the process.

245. Matthew J. Parlow, *The NBA and the Great Recession: Implications for the Upcoming Collective Bargaining Agreement Renegotiation*, 6 DEPAUL J. SPORTS L. CONTEMP. PROBS. 195, 219 (2010).

246. Kevin Draper, *What the NBA's Insane New TV Deal Means for the League and for You*, DEADSPIN (Oct. 6 2014, 2:49 PM), http://deadspin.com/what-the-nbas-insane-new-tv-deal-means-for-the-league-a-1642926274.

Hopefully, the ever-ascending salary cap projections that have been set for once the TV deal kicks in will provide both sides some room to compromise on their discrepant economic positions. Otherwise, the implementation of a lockout is not merely a possibility, but rather a foregone conclusion. The players should be mindful of this, as they have a lot more to lose in the event of a lockout than the owners do.[247] Moreover, the fact that the NBA was able to come out of the last lockout period and experience unequivocal success[248] could make the owners that much more comfortable with the possibility of locking out the players again. Irrespective of what happens when the owners and players finally take opposing seats at the bargaining table in 2017, one thing is certain: The $24 billion exclusive media rights deal will have a profound effect on how each and every collective bargaining issue is resolved in the short-term, and it will shape the economic landscape of the NBA for years to come.

*Brandon S. Ross**

247. *See* Parlow, *supra* note 245 (stating that, "[w]ith no player payroll, many owners–if not all– make money on television revenues alone" during a lockout period, whereas the players would not be earning paychecks from the league).

248. *See supra* text accompanying notes 81-83.

* Brandon S. Ross is a J.D. candidate at the Maurice A. Deane School of Law at Hofstra University, from where he anticipates graduating in 2016. Mr. Ross would like to thank Professor Susan Joffe, as well as Andrew L. Dressler (J.D., Hofstra Law 2015), for their insightful feedback and invaluable guidance throughout the preparation of this Note. Mr. Ross would additionally like to thank the current Staff and Managing Board of Volume 33 for their assistance throughout the publication process. On a personal level, Mr. Ross would like to thank his immediate family– Arlene, Steve, Jonathan, Jamie, Miles, and Danielle – whose unwavering love, support, and encouragement made this Note possible.