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Reverse Collusion

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Abstract

In the sports industry, collusion has typically manifested itself on the team owner side of the equation, with numerous historical examples of management collectively moving to suppress player movement and/or salaries for pecuniary reasons. Such collusion is now prohibited in the league-union collective bargaining agreements ("CBAs") that govern all prominent North American team sports. However, the language in sports league CBAs is not always reciprocal. CBAs in the National Basketball Association ("NBA") and National Football League do not expressly prohibit player-level "reverse collusion." Using the recent decision (pun intended) of LeBron James and other basketball stars to create "super-teams" in the NBA through collective action as an anecdotal example, we posit that the omission of reciprocal language in such CBAs has created loopholes that should be closed for competitive balance reasons and general considerations such as sports league integrity and transparency.

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Introduction

On July 8, 2010, the sporting world was captivated by the free agency of National Basketball Association ("NBA") superstar LeBron James. ESPN broadcast "The Decision," a live seventy-five minute special during which James would announce with which team he would sign and play.[1] With 9.95 million viewers watching,[2] James (in)famously announced that he would "take his talents to South Beach," and join the Miami Heat, forming a superteam with fellow stars Dwyane Wade and Chris Bosh.[3] While the Heat was instantaneously transformed from mere playoff participant to NBA title contender, James' previous team, the Cleveland Cavaliers, and others, were left wanting.[4] This "decision" was seemingly the unveiling of

[1] Henry Abbott, *LeBron James' Decision: The Transcript*, TrueHoop (July 8, 2010, 11:35 PM), http://espn.go.com/blog/truehoop/post/_/id/17853/lebron-james-decision-the-transcript.

[2] *LeBron James 'Decision' Ratings: ESPN Gets 9.95 Million Viewers for Special*, Huffington Post (July 11, 2010, 10:51 AM), http://www.huffingtonpost.com/2010/07/12/lebron-james-decision-rat_n_642719.html.

[3] Abott, *supra* note 1; *see also* Heat *Stars Sign Six-Year Deals*, ESPN.com (July 10, 2010, 1:37 PM), http://sports.espn.go.com/nba/news/story?id=5368003.

[4] In an open letter to fans, Cleveland Cavaliers owner Dan Gilbert infamously called the Decision "narcissistic," "self-promotional," and "bitterly disappointing" before personally guaranteeing fans that the Cavaliers would win an NBA Championship before James and the Heat. *Dan Gilbert's Open Letter to Fans*, Cleveland.com (July 9, 2010, 1:43 PM), http://www.cleveland.com/cavs/index.ssf/2010/07/gilberts_letter_to_fans_james.html.

a concerted plan – a collective action by select players to the detriment of non-favored teams competing for the services of the premier free agents.

Collusion, broadly identified as collective action that restricts marketplace competition, is generally illegal under federal antitrust law. Yet the application of antitrust law to sports has been the subject of a substantial body of litigation and literature. The necessity of cooperation within the sporting industry creates unavoidable tensions within this legal corpus of competition preservation. Courts have attempted to balance this industry-specific idiosyncrasy with the spirit of the law.[5] In particular, collective anticompetitive practices within the sporting-labor market date back almost to the inception of the sports industry, as owners fought for control of the market and expenses.[6] Like the sports industry itself, the manifestations of collusive practices within the industry have grown increasingly complex.

This article argues that collusion has again revealed itself in the sport-labor market, this time through a new manifestation, representing a swing in the pendulum of labor power toward the players. After nearly a century of intermittent exploitation through owner collusion, players are now showing the capacity to collectively restrict the labor market through what we term "reverse collusion." Part I uses the extensive history of collusion in professional baseball as emblematic of the owner-driven collusion typically seen in the sporting industry. Part II introduces reverse collusion, through an examination of the 2010 NBA free agency period, and particularly the conduct of James, Wade, and Bosh (collectively, hereafter "Miami 3"). Part III examines the legality of such reverse collusion through an examination of antitrust law, labor law, and the collective bargaining efforts in professional sports. Part IV discusses the potential ramifications of reverse collusion in sports, specifically looking at the realization of increased bargaining power of players and the impact reverse collusion could have on competitive balance.

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[5] *See generally* Joseph P. Bauer, Antitrust and Sports: Must Competition on the Field Displace Competition in the Marketplace?, 60 TENN. L. REV. 263 (1993).

[6] *See generally* Stephen Willis, A Critical Perspective of Baseball's Collusion Decisions, 1 SETON HALL J. SPORT L. 109 (1991).

I. Collusion in Professional Sports

A. Historical Perspectives

Although each professional league in the array of American sports has encountered antitrust issues directly or indirectly,[7] baseball, as the pioneering sport industry, has provided the most vivid examples of such anticompetitive practices. Indeed, the evolution of professional baseball can be seen as emblematic of the historic challenges that have faced the business of professional sports in the U.S.[8] In its infancy in the mid-1800s, professional baseball was mired in instability. Teams were created, moved to various cities or leagues, and dissolved; leagues similarly came and went.[9] Even the players themselves were considered to be "revolving."[10] The labor market was free; upon the conclusion of each season, players were unrestricted, free to sell

[7] *See generally* Walter Adams & James Brock, Monopoly, Monopsony, and Vertical Collusion: Antitrust Policy and Professional Sports, 42 Antitrust Bull. 721 (1997); Joseph Bauer, Antitrust and Sports: Must Competition on the Field Displace Competition in the Marketplace?, 60 Tenn. L. Rev. 263 (1992); Shant Chalian, Fourth and Goal: Player Restraints in Professional Sports, a Look Back and a Look Ahead, 67 St. John's L. Rev. 593 (1993); Michael Jacobs & Ralph Winter, Jr., Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage, 81 Yale L.J. 1 (1971); Ethan Lock, The Scope of the Labor Exemption in Professional Sports, 1989 Duke L.J. 339 (1989); James McKeown, The Economics of Competitive Balance: Sports Antitrust Claims After American Needle, 21 Marq. Sports L. Rev. 517 (2011).

[8] For a thorough analysis of baseball's history of collusion and the evolution the labor market, *see generally* Marc Edelman, *Moving Past Collusion in Major League Baseball: Healing Old Wounds, and Preventing New Ones*, 54 Wayne L. Rev. 601 (2009) [hereinafter Edelman, *Moving Past Collusion*]; Marc Edelman, *Has Collusion Returned to Baseball? Analyzing Whether a Concerted Increase in Free Agent Player Supply Would Violate Baseball's Collusion Clause*, 24 Loy. L.A. Ent. L. Rev. 159 (2004) [hereinafter Edelman, *Has Collusion Returned to Baseball?*]; Daniel C. Glazer, *Can't Anybody Here Run This Game? The Past, Present and Future of Major League Baseball*, 9 Seton Hall J. Sport L. 339 (1999); Jeffrey S. Moorad, *Major League Baseball's Labor Turmoil: The Failure of the Counter-Revolution*, 4 Vill. Sports & Ent. L.J. 53 (1997). For the seminal economics-driven work on the professional baseball labor market, see Simon Rottenberg, *The Baseball Players' Labor Market*, 64 J. Pol. Econ. 242 (1956).

[9] *The Commissionership: A Historical Perspective*, MLB.com, http://mlb.mlb.com/mlb/history/mlb_history_people.jsp?story=com (last visited April 5, 2013).

[10] Willis, *supra* note 6, at 111 (noting that revolving was the earliest form of free agency); *see also* Moorad, *supra* note 8, at 55 (noting that while the official position of the National Association of Baseball Players, one of the sport's first governing bodies, prohibited payment by teams for players' athletic services, it was common practice to pay talented players, even to the extent of outbidding competitors for a player's performance).

their services to the team that offered the best contract for the following season. This "contract jumping" provided players with significant leverage in negotiations, as increased competition for the players' services likewise increased compensation.[11] However, the owners became increasingly fearful of the consequences of such labor bidding. Indeed, many teams collapsed under the economic weight of the labor market.[12]

To create stability throughout the industry, the owners sought to gain control over labor costs. In 1879, a secret agreement was reached among club owners in the National League, allowing each team to "reserve" five players on whom competing clubs could not bid, rendering the player bound to his previous employer.[13] This system successfully stifled players' salaries such that by the 1890s, every player contract included the infamous "reserve clause."[14] Club owners "reserved" the unilateral right, through a contractual option, to renew the player's contract upon its expiration for an additional season under the same terms.[15] Each contract thereafter would also include a reserve clause, thus having the practical effect of rendering the player's services bound to the original team in perpetuity, absent the team's unilateral decision to trade or cut the player.[16] Players could not seek employment from other clubs; a player who desired to continue a career in professional baseball played for his previous club or was banned from the league.[17]

The secret agreement resulting in the reserve clause was perhaps the first example of collusion in American professional sports. The owners' conspiracy to control the labor market and restrict salaries remained in place for nearly one hundred years, a period of great owner-driven privilege and benefit within the sporting industry. Economically, the ability to restrict labor costs provided a boon to ownership. Indeed, from the 1900s through the 1960s, Major League Baseball ("MLB") player salaries realized little appreciation in real dollars, while club owners became increasingly wealthy.[18] Without an alternative market for players' services, the economic effect was the castration of players' negotiating leverage and the extreme artificial sup-

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[11] Moorad, *supra* note 8, at 56.

[12] *Id.*

[13] Edelman, *Moving Past Collusion*, *supra* note 8, at 604.

[14] Moorad, *supra* note 8, at 56.

[15] *Id.*

[16] *Id.*

[17] *Id.*; *see* Am. League Baseball Club of Chi. v. Chase, 86 Misc. 441, 449, 454 (N.Y. Sup. Ct. 1914).

[18] *See* Andrew Zimbalist, Baseball and Billions: A Probing Look Inside the Big Business of Our National Pastime 4–7 (updated ed. 1994); Edelman, *Moving Past Collusion*, *supra* note 8, at 605.

pression of player wages, collectively preventing players from realizing any financial benefit from the games' revenue growth over that time.[19]

As they grew increasingly frustrated with the oppressive reserve system, players fought a long, slow battle in search of relief. For most of the 20th century, players experienced setbacks, including failed efforts through unionization.[20] In addition, through a well-documented litigation history between players and owners, the reserve clause was reinforced, if not emboldened, by the courts.[21] Indeed, as examined in Part III of this paper, the collusion perpetrated through the reserve clause was found to be exempt from written laws; although the reserve agreement was clearly restrictive, the courts failed to recognize baseball as an interstate industry as prohibited under antitrust law.[22] As such, the reserve clause resiliently survived until 1976.[23] Finally, the players achieved, through collective bargaining, the

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[19] Edelman, *Moving Past Collusion*, *supra* note 8, at 605.

[20] *See* Willis, *supra* note 6, at 112. Willis, citing JAMES DWORKIN, OWNERS VERSUS PLAYERS: BASEBALL AND COLLECTIVE BARGAINING 45 (1981), recites the tale of John Montgomery Ward, a 19th century baseball player who formed the National Brotherhood of Professional Baseball Players, the first player's union. Ward would later refer to the reserve clause as "a fugitive slave law which denied the player a harbor or a livelihood and carried him back, bound and shackled to the club from which he attempted to escape. Once a player's name is attached to a contract, his professional liberty is gone forever." DWORKIN, at 45 (quoting *Organized Baseball: Report of the Subcom. on the Study of Monopoly Power of the House Comm. on the Judiciary*, H.R. REP. No. 2002, 82nd Cong., 2nd Sess. 32 (1952)). Also, *see generally* Erwin G. Krasnow & Herman M. Levy, *Unionization and Professional Sports*, 51 GEO. L.J. 749 (1963).

[21] *See* Willis, s*upra* note 6, at 112–115.

[22] *See, e.g.*, Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922).

[23] The resilience of the reserve clause was somewhat astonishing, for practical if not legal reasons, given that the players had successfully unionized by 1965, and negotiated their first-ever CBA in 1968. *History of the Major League Baseball Players Association*, MLBPLAYERS.COM, http://mlb.mlb.com/pa/info/history.jsp (last visited Sept. 15, 2012). Yet, the 1968 MLB CBA did not eliminate the reserve clause; instead, the parties agreed to merely form a study group on changes to the reserve system. *See CBA Summaries*, THE BIZ OF BASEBALL, http://www.bizofbaseball.com/index.php?option=com_content&view=category&id=45&Itemid=76 (last visited Sept. 15, 2012). The 1970 MLB CBA again delayed any action regarding the reserve clause, tabling the issue pending the outcome of the famous antitrust lawsuit of *Flood v. Kuhn*, 407 U.S. 258 (1972). *Id.* In the wake of their defeat in that Supreme Court decision, the players decided not to address the reserve clause in the 1973 MLB CBA. *Id.* Instead, the baseball players' labor union filed grievances challenging the perpetuity of the reserve clause, receiving a ruling that the clause created only a one-time, one-year club option. *Id.* Upon receipt of that favorable

free agency that had eluded them since the owners' collusion practices began 97 years prior.[24]

B. Pre-Reverse Collusion and Free Agency

The 1976 MLB Collective Bargaining Agreement ("1976 MLB CBA") represented the first foray into collectively-bargained free agency in the history of the baseball industry. Although entry into the labor market was not unconditional,[25] the parties constructed free agency to be an exercise of the individual parties to the employment agreement, embodied in the "Individual Nature of Rights" provision, Article XVII(G) of the 1976 MLB CBA:

> The utilization or non-utilization of rights under this [Article XVII] is an individual matter to be determined solely by each Player and each Club for his or her own benefit. Players shall not act in concert with other Players and Clubs shall not act in concert with other Clubs.[26]

The plain language of the provision makes clear the intention of the parties to construct free agency as the sole province of the independent player and the independent club. The parameters are reciprocal. The individual nature of the free agency structure would guarantee that owners could no longer collectively agree to artificially restrict the baseball labor market as they had done throughout the 1900s. Yet, it was a contract dispute ten years prior that led the owners themselves to demand the provision.

In 1966, Los Angeles Dodgers star pitchers Sandy Koufax and Don Drysdale collectively held out of spring training. During the offseason, the pitchers individually met with Dodgers general manager Buzzie Bavasi to negotiate their respective contracts. The two pitchers, in discussing their negotiations, concluded that Bavasi had been attempting to drive down the salaries of the players by leveraging their individual negotiations against one another.[27] The players then decided to negotiate collectively, and each re-

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decision, the owners and players finally addressed the reserve clause in the 1976 MLB CBA. *Id.*

[24] *See* Willis, s*upra* note 6, at 118.

[25] Free agency was available only to players who had achieved six or more years of major league experience or were released or not offered a new contract by their respective former clubs. Edelman, *Moving Past Collusion*, *supra* note 8, at 608.

[26] Willis, *supra* note 6, at 118–19.

[27] JANE LEAVY, SANDY KOUFAX: A LEFTY'S LEGACY 199–211 (2003). Bavasi reportedly questioned each individual player's salary demands, claiming the player's teammate had requested a far lower salary: "How come you want that much when Drysdale only wants this much?" *Id.* at 205.

fused to sign unless the other did as well.[28] Koufax and Drysdale were seeking three-year contracts, with their combined salaries totaling $1 million.[29] Drysdale eventually agreed to a one-year contract for $110,000 in salary.[30] Koufax signed a one-year contract for $125,000 in salary,[31] matching Willie Mays for the highest salary in baseball at the time.[32] As Bavasi admitted, Drysdale received a $30,000 raise and Koufax a $40,000 raise, the largest raises in baseball history, and neither would have commanded those amounts had they negotiated alone.[33] Yet, the impact went far beyond the Dodgers' budget. Through their illustration of pre-reverse collusion, Koufax and Drysdale demonstrated the power players had to alter the labor market. Fearful that the success achieved through collective negotiation would be repeated by players throughout the league, Bavasi bluntly asserted, "[t]he next time two of them walk in together, they'll go walking out together . . . . This was a unique situation, and it will never happen again."[34]

Ten years later, the construction of free agency through Article XVII(G), codified that sentiment, ensuring that players must negotiate individually. After all, Koufax and Drysdale demonstrated the potential impact of players acting in concert within a labor market. By agreeing to the owners' provision, the players were willing to concede that free agency needed to remain independent, despite forfeiting such tremendous benefits, so long as the language of the provision applied equally to both players and owners. After all, the players wanted to prevent owners' collective restrictions in the labor market like those they had suffered since 1879. The bilateral language of the 1976 MLB CBA indeed proved to be a necessary protection for the players.

C. Post-Free Agency Collusion

It did not take long for the labor market in baseball to begin to correct a century of artificial suppression of player salaries. Players were suddenly

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[28] Such a refusal, as argued herein, would constitute reverse collusion.

[29] Buzzie Bavasi & Jack Olsen, *The Great Holdout*, SPORTS ILLUSTRATED, May 15, 1967, at 78, 80, *available at* http://sportsillustrated.cnn.com/vault/article/magazine/MAG1079835/1/index.htm. Bavasi argued that since players could not guarantee their physical performance three years in advance, they would limit offers to one-year terms. *Id.*

[30] *Id.* at 82.

[31] *Id.*

[32] Rich Lederer, *Only the Agent Was Free*, BASEBALL ANALYSTS (Mar. 20, 2006), http://baseballanalysts.com/archives/2006/03/_final_offer_re.php.

[33] *Id.*

[34] *Id.*

seeing competition for services, resulting in new and more complex contract provisions. Among these competitive strategies, club owners were suddenly offering players multi-year contracts, signing bonuses, incentive bonuses, no-trade clauses, and deferred compensation.[35] Towards the bottom line, the average player salary rose approximately 640% in the first eight years of free agency, from $51,501 in 1976 to $329,408 by 1984.[36]

Suddenly in 1985, the free-agent market became barren. Only one of twenty-nine eligible free agents received a bona fide offer, and none received an offer until his former club declared the intent to not re-sign the player.[37] Though there was no written agreement among the clubs, evidence suggested the owners were again colluding. For example, the Major League Baseball Players Association ("MLBPA") offered statements made by then-MLB Commissioner Peter Ueberroth, asserting that clubs should avoid long-term contracts and agree not to negotiate with other teams' free agents.[38] In early 1986, the MLBPA filed a grievance (hereafter "Collusion I") against the league for violating the Individual Nature of Rights provision of the collective bargaining agreement,[39] alleging the owners engaged in a collective boycott of the free-agent market.[40]

Before a decision was rendered on Collusion I, a second grievance was filed by the MLBPA, alleging the continuation of the boycott through the 1986 off-season (hereafter "Collusion II").[41] The clubs' reluctance to sign

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[35] Willis, *supra* note 6, at 119 n.91 (citing Brief for Players Ass'n, Vol. I, at 2, Major League Baseball Players Ass'n v. The Twenty-Six Major League Baseball Clubs, Grievance No. 87-3, Panel Dec. No. 79 (1988) (Nicolau, Arb.)[hereinafter *Collusion II*]).

[36] *Id*. at 119 n.90 (citing *Collusion II*).

[37] Edelman, Has Collusion Returned to Baseball?, supra note 8, at 163.

[38] Susan Seabury, The Development and Role of Free Agency in Major League Baseball, 15 GA. ST. U. L. REV. 335, 361 (1998).

[39] *1985 Collective Bargaining Agreement*, MAJOR LEAGUE BASEBALL, art. XVIII(H); *see also* 1976 *Collective Bargaining Agreement*, MAJOR LEAGUE BASEBALL, art. XVII(G) (The "Individual Nature of Rights" provision, initially Article XVII(G) of the 1976 MLB CBA, was included in identical language in Article XVIII(H) of the 1985 MLB CBA).

[40] Willis, *supra* note 6, at 120 (citing Major League Baseball Players Ass'n v. The Twenty-Six Major League Baseball Clubs, Grievance No. 86-2, Panel Dec. No. 76 (1987) (Roberts, Arb.) [hereinafter *Collusion I*]).

[41] Willis, *supra* note 6, at 109–10 (citing *Collusion II*). There were seventy-nine free agents in the 1986-1987 off-season. The MLBPA alleged that none of the seventy-nine received a bona fide offer from any team except his former club until that club had declared its lack of interest or became ineligible to sign the player under other free agency provisions. In addition, the MLBPA argued that no eligible free agent had offers from two or more clubs at any one time. *Id*. at 14–15.

free agents was embodied in Andre Dawson, a free agent all-star outfielder who only received an offer from his previous club, the Montreal Expos, throughout the offseason. Yet, Dawson was so desperate to leave the Expos that he approached the Chicago Cubs during spring training, offering to accept a salary unilaterally determined by the club at a later date sans contract.[42] The Cubs reluctantly signed Dawson to a contract with a base salary of $500,000, less than half of his salary the previous year.[43]

A third grievance (hereafter "Collusion III") was filed by the MLBPA for owner conduct following the 1987 season.[44] While certain team owners had begun bidding on free agents, they had established other mechanisms to restrict the market.[45] Under the auspices of the Player Relations Committee, owners created an "Information Bank," providing all teams with detailed information about every contract offer made throughout the free agency period.[46] As a result of every team obtaining intimate knowledge regarding the demand for players' services, offers remained depressed.[47] Indeed, of the seventy-six eligible free agents, only twelve received offers, and only three such offers led to a player switching teams.[48]

The players were ultimately victorious on all three grievances. In finding for the players in Collusion I, the arbitrator clarified the function of

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[42] *See* Fred Mitchell, *Dallas Green Recalls Andre Dawson 'Blank Check' Signing*, CHI. TRIB. (January 7, 2010), http://web.archive.org/web/20100111033945/http://www.chicagotribune.com/sports/baseball/cubs/chi-07-mitchell-andre-dawson-jan07,0,6989682.column. Dawson suffered from ailing knees, and could no longer play on the unforgiving artificial surface in Montreal Olympic Stadium, the Expos home ballpark. *Id.* Desperate to play on the natural surface of Chicago's Wrigley Field, Dawson handed Cubs general manager Dallas Green a blank contract, allowing Green to unilaterally assign a salary. *Id.* Years later, Green admitted, "It wasn't a very nice contract for Andre at the time, particularly after what he had done. But it was all I could do." *Id.* There was speculation that the blank-contract scheme was intended to embarrass the Cubs and force their hand, while simultaneously proving collusion amongst the ownership. *Id.*

[43] Dawson's 1986 salary with the Montreal Expos was reportedly $1,047,000. *Andre Dawson*, BASEBALL-REFERENCE.COM (Sept. 16, 2012), http://www.baseball-reference.com/players/d/dawsoan01.shtml. The $500,000 in base salary was supplemented by $200,000 in performance bonuses. *See* Mitchell, *supra* note 42; Murray Chass, *Big Collusion Winners: Clark, Parrish Dawson*, N.Y. TIMES (Dec. 15, 1992), http://www.nytimes.com/1992/12/15/sports/baseball-big-collusion-winners-clark-parrish-dawson.html.

[44] *See* Lee Lowenfish, The Imperfect Diamond: A History of Baseball's Labor Wars 269 (DeCapo Press 1991) (1980).

[45] See Edelman, Has Collusion Returned to Baseball?, supra note 8, at 166.

[46] *See* Paul Weiler & Gary Roberts, Sports and the Law 232 (2d ed. 1998).

[47] See Edelman, Has Collusion Returned to Baseball?, *supra* note 8, at 166–167.

[48] *Id.*

Article XVIII(H): "What is prohibited is a common scheme involving two or more Clubs and/or two or more players undertaken for the purpose of a common interest as opposed to their individual benefit."[49] In finding for the players in Collusion II, the arbitrator stated that action in the labor market was "meager,"[50] and that the clubs' actions constituted uniform behavior, thus continuing the collusive actions of the type in Collusion I.[51] In finding for the players in Collusion III, the arbitrator ruled that, although there was no boycott agreement, unlike Collusion I and II, the collective use of the information bank was an anticompetitive practice that restricted the labor market.[52] To settle the three grievances, the MLB clubs agreed to pay the MLBPA $280 million as compensation for wages lost.[53]

II. Reverse Collusion

Baseball's lengthy history of collusion is emblematic of the antitrust tensions between owners and players throughout professional sports in the U.S. Owners have historically cited a need to control costs, specifically wages and labor expenses, particularly in the infancy of the industry.[54] However, once that authority is exercised by owners, there has been reluctance to relinquish even portions of that control to players, resulting in lengthy and complex litigation, labor struggles, and work stoppages. At times, owners have gone to great lengths to maintain that control, even creating illegal agreements and pacts that restrict the labor market in their favor.[55] Nevertheless, through collective bargaining, the professional sports industry has made clear moves toward partnerships between owners and players, often recognizing the ability to work together toward an advancement of the industry. Yet, as players exercise greater authority in the sale of their labor, there may be times when their actions reflect the collusive practices typically exhibited by owners. The 2010 NBA free agency period offers such an illustrative example.

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[49] Willis, *supra* note 6, at 122 (citing *Collusion I*, at 5).

[50] *Id.* at 125 (citing *Collusion II*, at 24).

[51] *Id.* at 128 (citing *Collusion II*, at 69).

[52] Weiler & Roberts, *supra* note 46, at 232.

[53] Edelman, Has Collusion Returned to Baseball?, *supra* note 8, at 167.

[54] *See* Lawrence Kahn, *The Sports Business as a Labor Market Laboratory*, 14 J. Econ. Persp. 75, 78 (2000).

[55] *See generally* Willis, *supra* note 6. Indeed, MLB owners were found to have illegally agreed to abstain from engaging in the free-agent market in order to artificially depress player wages and, thus, ownership costs. *Id.* at 120–23.

A. 2010 NBA Free Agency

The year 2010 included the greatest free agency class in NBA history, full of superstars, game-changers and dynasty-makers.[56] Headliners James, Wade, and Bosh were accompanied in the historic class by fellow all-stars Joe Johnson, Amar'e Stoudemire, Carlos Boozer, Dirk Nowitzki, and Paul Pierce.[57] Teams trimmed payroll to free up salary cap space while cautiously maintaining enough talent on the roster to remain appealing to potential signees.[58] Indeed, teams had strategized for this free agency class for more

[56] Chris Mannix, *Examining Free Agent Destinations*, SI.COM (June 30, 2010, 4:21 PM), http://sportsillustrated.cnn.com/2010/writers/chris_mannix/06/30/free.agent.destinations/index.html.

[57] Pierce and Nowitzki exercised options to void the remainder of their respective contracts before each re-signed with their previous teams. Julian Benbow, *Paul Pierce Re-Signs with Celtics, but Wants Help*, BOSTON.COM (July 16, 2010), http://www.bostonglobe.com/sports/2010/07/16/paul-pierce-signs-with-celtics-but-wants-help/NWxmroEbUuj0LjQqZGnZDN/story.html; Jeff Caplan, *Mavs Officially Re-Sign Dirk*, ESPNDALLAS.COM (July 20, 1010), http://sports.espn.go.com/dallas/nba/news/story?id=5393536.

[58] Mitch Lawrence, *New York Knicks' Salary Cap Set Around $56M*, N.Y. DAILY NEWS (Apr. 16, 2010, 7:35 PM), http://articles.nydailynews.com/2010-04-17/sports/27061971_1_salary-cap-cap-space-lebron-james; *see also* Daniel O'Leary, *Cleveland Pulling Out All the Stops to Try and Keep LeBron James with Cavs*, SILIVE.COM (May 14, 2010, 4:53 PM), http://www.silive.com/knicks/index.ssf/2010/05/cleveland_akron_mayor_already_pulling_out_all_the_stops_to_try_and_keep_lebron_james_with_cavs.html. Fans in some markets suffered through excruciating seasons riddled with losses, cheering instead for the potential star that the 2010 free agent class might bring. Frank Isola, *Cleveland Fans Not Ready for What Could be LeBron James' Final Home Game in a Cavaliers Jersey*, NYDAILYNEWS.COM (May 11, 2010), http://www.nydailynews.com/sports/basketball/knicks/cleveland-fans-ready-lebron-james-final-home-game-cavaliers-jersey-article-1.447403. New York fans began attending Knicks games wearing homemade LeBron James Knicks jerseys and holding signs begging "King James" to come claim his throne in New York. Gene Wojciechowski, *Blueprint for an NBA Dynasty*, ESPN.COM (Feb. 23, 2010), http://sports.espn.go.com/espn/columns/story?columnist=wojciechowski_gene&page=wojciechowski/100223&sportCat=nba. The *New York Daily News* launched www.getlebron.com, while New York City Mayor Michael Bloomberg publicly championed the case for James to play for either the New York Knicks or the New Jersey Nets. Kathleen Luchadamo & Richard Schapiro, *Mayor Bloomberg Joins the LeBron James Recruitment Chorus*, NYDAILYNEWS.COM (May 14, 2010), http://www.nydailynews.com/new-york/mayor-bloomberg-joins-lebron-james-recruitment-chorus-gonna-love-new-york-article-1.445174. In Los Angeles, Clippers fans hoped to schedule a parade to entice James to come west, while Chicago Bulls fans created www.sendlebrontochicago.com. Kurt Helin, *Clippers Fans to Put on LeBron Parade*, NBCLOSANGELES.COM (May 17, 2010), http://www.nbclosangeles.com/news/sports/Clippers-fans-to-put-on-LeBron-parade-93942639.html; Chris Cason, *Inter-*

than two years.[59] Despite the unique talent available, the process of free agency carried on; clubs still recruited and offered their best sales pitches.[60] LeBron James met with team officials from the New Jersey Nets, New York Knicks, Miami Heat, Los Angeles Clippers, Chicago Bulls, and Cleveland Cavaliers.[61] Chris Bosh met with the Houston Rockets, Chicago Bulls, Miami Heat, and Toronto Raptors.[62] Dwyane Wade met with executives from the New Jersey Nets and twice met with Chicago Bulls officials.[63] But perhaps the most important meetings of the 2010 free agency period involved no team officials at all.

Just prior to the 2010 NBA free agency period, media reports began to surface that players were gathering in Miami to discuss their free agency options.[64] This "Summit" was speculated to be a sit-down meeting, led by Dwyane Wade and Joe Johnson, wherein free agents would discuss different options before making a destination decision.[65] Reports later emerged that

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view with AJ Barthold, EXAMINER.COM (May 24, 2010), http://www.examiner.com/article/interview-with-aj-barthold-from-sendlebrontochicago-com. *But see Cleveland Asking LeBron to Stay*, ESPN.COM (May 18, 2010, 6:51 PM), http://sports.espn.go.com/nba/news/story?id=5198345 (noting that some fans in Cleveland helped fund a banner near the Cavaliers' arena, showing James through his life with the words "Born Here. Raised Here. Plays Here. Stays Here.").

[59] John Hollinger, *LeBron's Shadow Looms Over Free Agent Market*, N.Y. SUN (July 1, 2008), http://www.nysun.com/sports/lebrons-shadow-looms-over-free-agent-market/81022/.

[60] *Id.* Prior to meeting with Chicago Bulls officials, Wade openly questioned the loyalty of the Bulls organization to a Chicago reporter, only to follow up with a ringing endorsement of his Miami Heat's quality organization. Fred Mitchell, *Wade Questions Bulls' Loyalty*, CHI. TRIB. (May 27, 2010), http://articles.chicagotribune.com/2010-05-27/sports/ct-spt-0527-bulls-dwyane-wade-chicago20100526_1_bulls-don-t-measure-heat-s-dwyane-wade-free-agents. Against the backdrop of the player-only "summit," such remarks could be interpreted as a warning shot to fellow free agents that you want to sign with Wade in Miami, not Chicago.

[61] *Cavs, Bulls Cap LeBron's Meetings*, ESPN.COM (July 4, 2010, 7:50 PM), http://sports.espn.go.com/nba/news/story?id=5351794.

[62] *See* Andrew Sharp, *Chris Bosh, Free Agent, Needs a Lesson in Social Media,* SBNATION.COM (July 1, 2010, 11:40 AM), http://www.sbnation.com/2010/7/1/1547002/chris-bosh-free-agent-twitter-social-media (according to Sharp, Bosh posted this list of team meetings on his personal Twitter account).

[63] *Reports: Bosh Joins Wade in Meeting*, ESPN.COM (July 3, 2010, 10:53 AM), http://sports.espn.go.com/nba/news/story?id=5348670 (Bosh reportedly joined for one of Wade's meetings with Chicago Bulls officials).

[64] Chris Broussard & Marc Stein, *Sources: Trio Talk Free Agent Scenarios*, ESPN.COM (June 30, 2010, 2:54 AM), http://sports.espn.go.com/nba/news/story?id=5338472; *see also Source: Bosh to Join in Trio's Talks*, ESPN.COM (May 28, 2010, 1:23 AM), http://sports.espn.go.com/nba/news/story?id=5224873.

[65] *Id.*

other superstar free agents, such as Bosh, Boozer, and Stoudemire, wanted to be included in the Summit as well.[66] Although a formal sit down meeting was denied by Wade's agent, Henry Thomas, he admitted that Wade and other free agents would discuss their respective situations before decisions were made.[67] As Wade stated, "I'll gauge and see if guys want to be [in Miami], who wants to be with me."[68] Indeed, in another interview, Wade clarified his concerted vision for free agency:

> [Free agency] has been three years coming. We've discussed it prematurely, at different times. [But] you don't know what guys are thinking and where they're going. I think we'll all sit down, and before one of us makes a decision, all of us will have spoken to each other and [listened to the] thinking. . . A lot of decisions [will be based on] what other players are willing to do and what other guys want to do. So it's not just a 'me' situation here. We all have to look and see what each other is thinking.[69]

With Wade's statement, a cloud of collusion hung over the 2010 free agent period. Indeed, history suggests that the 2010 free agency was merely the final piece of the puzzle for at least a few select superstars.

James, Wade and Bosh all entered the league in 2003.[70] The three, and perhaps others, had been collectively planning their free agency since joining the U.S. National team in 2006.[71] After a positive experience playing together at the World Championships, the Miami 3 were convinced they could become successful teammates in the NBA. As restricted free

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[66] *Id.*; *see also Stoudemire Talks Looming Free Agency*, ESPN.COM (June 1, 2010, 2:22 PM), http://sports.espn.go.com/nba/news/story?id=5235598.

[67] *See* Broussard & Stein, *supra* note 64.

[68] J.A. Adande, *Wade: 'I Want to be in Miami'*, ESPN.COM (June 14, 2010, 1:44 PM), http://sports.espn.go.com/nba/news/story?id=5283536.

[69] Mitchell, *supra* note 60.

[70] *See Complete First Round Results: 2000-08*, NBA.COM (last visited Mar. 12, 2013), http://www.nba.com/history/draft_round1_2000s.html#2003. James was selected #1 overall by the Cleveland Cavaliers. *Id.* Bosh was selected #4 overall by the Toronto Raptors. *Id.* Wade was selected #5 overall by the Miami Heat. *Id.* The NBA's collective bargaining agreement sets forth relatively rigid entry-level contracts in terms of wage and duration, limiting the initial term of employment to three years, with a team option for year four. *1999 Collective Bargaining Agreement*, NATIONAL BASKETBALL ASSOCIATION, art. VIII. If a team exercises that option, the player's free agency rights are restricted for one more season. *Id.*

[71] Brian Windhorst, *Inside 'The Decision': Miami's Coup was a 'Surprise' Built on Long-Coveted Goal of James, Wade and Bosh*, CLEV. PLAIN DEALER (July 10, 2010, 9:27 AM), http://www.cleveland.com/cavs/index.ssf/2010/07/inside_the_decision_miamis_cou.html (Brian Windhorst thoroughly documented the history of the Miami 3 and their predetermined route to collectively play for the Heat, unveiling the collusive nature of their actions).

agents that offseason, rather than extending their contracts for long-term, maximum-salary deals with their respective teams as expected, the Miami 3 each extended their contracts for only three seasons.[72] In doing so, they each ensured they would reach free agency simultaneously, creating the opportunity to play together with the potential for higher maximum salaries.[73] In isolation, the individual contractual histories of the Miami 3 appear benign, but against the backdrop of their (tri-)unification in Miami, those contractual decisions create serious questions about the autonomous nature of their actions.

Wade re-signed with the Miami Heat, agreeing to a six-year contract totaling $107.5 million.[74] LeBron James and Chris Bosh received matching contracts, each agreeing to a six-year term totaling $110.1 million each.[75] To sign with Miami, each player agreed to $15 million less over the life of the contract (vis-à-vis other offers and the maximum player salary permitted within the league).[76] The complexities of the conglomeration of the three stars were perhaps facilitated by other business events as well.[77] Primarily, the unification of the Miami 3's representatives under the umbrella of celebrity representation firm Creative Artists Agency brought "the three biggest

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[72] *Id.*

[73] *2005 Collective Bargaining Agreement*, NATIONAL BASKETBALL ASSOCIATION, art. II, § 7. Under the NBA CBA governing 2005-2010, once the player achieved seven years of experience, the maximum individual salary jumped from 25% of the salary cap in effect at the time the contract is executed to 30% of the salary cap in effect at the time the contract is executed. *Id.* Thus, the Miami 3 collectively ensured they would reach unrestricted free agency simultaneous to reaching the jump-step in salary in year seven, thereby guaranteeing higher potential maximum salary.

[74] *Heat Stars Sign Six-Year Deals*, ESPN.COM (July 10, 2010, 1:37 PM), http://sports.espn.go.com/nba/news/story?id=5368003.

[75] *Id.* James and Bosh were actually acquired through respective sign-and-trade deals, wherein the player re-signs with his previous team and the previous team then trades him in return for compensation. *Id.* For James, the Cleveland Cavaliers acquired two future first-round draft picks and two future second-round draft picks. For Bosh, the Toronto Raptors acquired two future first-round draft picks. *Id.*

[76] *Id.*

[77] Additional factors aided in culmination of the Miami 3 firm. Included among them was the absence of a state income tax in Florida, which might offset any lost wages from collectively signing for below the maximum salary permitted under the CBA. *See* Sarah Talalay, *Playing for Miami Heat Could Save LeBron Millions*, SUN-SENTINEL (July 2, 2010), http://articles.sun-sentinel.com/2010-07-02/sports/fl-miami-heat-taxes-0703-20100702_1_income-tax-tax-savings-free-agents; *see also* Catherine Rampell, *LeBron James and Taxes*, N.Y. TIMES ECONOMIX (July 9, 2010, 11:55 AM), http://economix.blogs.nytimes.com/2010/07/09/lebron-james-and-taxes/.

stars of the '10 NBA free agent class under one roof."[78] For the Miami 3, consolidating representation within one agent organization facilitated consolidating employment within one team-level organization, by streamlining the negotiations of three superstars.[79]

B. Player-Driven Collusion

At its core, assemblage of the Miami 3 was the result of a select subset of players within the union, supposedly free to offer their individual labor services to the market, acting in concert to collectively impact the market for their services. While several teams, such as the New York Knicks, were perhaps in pursuit of one, or even two, star players, those players were not negotiating individually. In other words, their agency was not "free." Wade's statements made clear his intent, not to function independently as a free agent, but to first form a pact with other free agents and then negotiate collectively with a club, preferably the Miami Heat.[80] To effectuate that intent, the players acted collectively to augment the labor market, agreeing not to finalize deals until it was discussed among the group, perhaps boycotting certain markets, and limiting supply by operating as a conglomerate of labor rather than as individual laborers.

Whereas previous examples of collusion in the sports labor market included agreements by owners to restrict the market for acquiring players' services, thereby diminishing competition for those services, this was collusion in reverse. Indeed, had the owners: organized a meeting or otherwise held discussions wherein no employment contracts would be finalized until first consulting with other owners; collectively strategized to sign previous deals which would alter the supply and demand of high caliber players available through the "free" market in the future; or set themselves out to be operating independently in the sale and purchase of labor while covertly operating in concert; surely, these practices would be considered collusion. Logic suggests that the reverse of such actions, if perpetrated instead by the labor side of the market, could likewise be considered collusion.

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[78] Liz Mullen, *CAA Sports Nearing Deal to Acquire Henry Thomas' NBA Practice*, SPORTS BUS. DAILY (July 20, 2009), http://www.sportsbusinessdaily.com/Daily/Issues/2009/07/Issue-209/Sports-Industrialists/CAA-Sports-Nearing-Deal-To-Acquire-Henry-Thomas-NBA-Practice.aspx.

[79] *Id.* (while CAA was the marketing agency representing the Miami 3, James was individually represented by agent Leon Rose, while Wade and Bosh were represented by Henry Thomas).

[80] *See* Adande, *supra* note 68.

There were indeed instantaneous cries of collusion and tampering upon the assembling of the Miami 3.[81] Yet, NBA Commissioner David Stern repeatedly asserted that while there would not be any formal "summit," discussion amongst free agents was permissible and did not violate league policy.[82] Further examination is therefore required if, as Commissioner Stern asserted, not all collusive practices violate the law.

III. Primer on Federal Antitrust and Labor Laws

A. *Federal Antitrust Law*

Collusion is regulated, primarily, through federal antitrust laws. Antitrust laws regulate the conduct of economic actors, and are specifically designed to promote competition in the marketplace.[83] In doing so, antitrust laws are intended to protect the individual right to contract, to yield the best allocation of economic resources, and to encourage the greatest material progress.[84] The keystone to antitrust law is the Sherman Act, first enacted by Congress in 1890.[85] The goal of the Sherman Act was to remove restraints to competition.[86] Section 1 of the Sherman Act makes illegal every

[81] Dallas Mavericks owner Mark Cuban called for just such a tampering investigation into the accumulation of the Miami 3 by the Heat. *See* Ira Winderman, *Tampering in Heat's Haul to be an Issue?*, Sun-Sentinel (July 10, 2010), http://articles.sun-sentinel.com/2010-07-10/sports/sfl-ira-nba-column-s071110_1_tampering-free-agent-process-james-and-bosh.

[82] *Stern: Players Can Talk Before Deciding*, ESPN.com (June 3, 2010, 11:48 PM), http://sports.espn.go.com/nba/news/story?id=5249480. David Stern claimed to have been assured at the "highest level" that there would be no summit-type sit-down meeting, but he expected that the players would discuss free agency with each other. *Id.* "They can have it," Stern said of the summit, somewhat tongue-in-cheek. *Id.* "I was wondering whether they would get together, eight players and they'll all look at D-Wade's ring? They'd be better off watching these finals to see how you construct a team and how you play and the like. There's not going to be a summit." *Id.* Stern, however, did differentiate tampering, which he said he would investigate if it was implicated. *Id.*

[83] *See generally* M.A. Adelman, Effective Competition and the Antitrust Laws, 61 Harv. L. Rev. 1289 (1948); Kenneth G. Elzinga, The Goals of Antitrust: Other than Competition and Efficiency, What else Counts?, 125 U. Pa. L. Rev. 1191 (1977).

[84] *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958); *see also* Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911).

[85] 15 U.S.C. §§ 1–7 (2010).

[86] *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 492–93 (1940) (describing the "evil at which the Sherman Act was aimed," the court noted, "[i]t was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of

contract, combination or conspiracy, which restrains interstate trade or commerce.[87] Section 1 applies only to the concerted actions of multiple parties; the actions of single entities are not subjected to antitrust scrutiny under Section 1, as one entity cannot logically take concerted action with itself.[88] Section 2 focuses on conduct that has monopolistic results, making it illegal to monopolize, attempt to monopolize, or conspire to monopolize any part of interstate commerce.[89]

Sections 1 and 2 of the Sherman Act have been interpreted broadly by the courts. If taken literally, Section 1 would prohibit many legitimate and necessary business activities.[90] Subsequent to its enactment, the Supreme Court interpreted the language of the Sherman Act to prohibit only restraints of trade that were unreasonable.[91] Thus, the reasonableness of concerted actions prohibited under Section 1 are scrutinized by the courts under two "complementary categories of antitrust analysis,"[92] the per se rule and the rule of reason.[93]

Concerted actions that restrain trade with no competitive benefits are illegal per se.[94] That is, courts invalidate restraints of trade that are inherently unreasonable and lack redeeming competitive virtue, without further inquiry into the specific practices of the industry in question.[95] These re-

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goods and services, the monopolistic tendency of which had become a matter of public concern. The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.").

[87] Sherman Act, 15 U.S.C. § 1 (2010).

[88] *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984) ("Section 1 of the Sherman Act . . . reaches unreasonable restraints of trade effected by a 'contract, combination . . . or conspiracy' between separate entities. It does not reach conduct that is 'wholly unilateral.'").

[89] Sherman Act, 15 U.S.C. § 2 (2010).

[90] *See* 15 U.S.C. § 1 (2010); *see also* Lock, *supra* note 7, at 343–44.

[91] *See*, *e.g.*, Standard Oil Co. v. United States, 221 U.S. 1, 66 (1911) ("[I]n every case where it is claimed that an act or acts are in violation of the statute, the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be applied.").

[92] Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978).

[93] *Id.*

[94] *Id.*

[95] *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) ("[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.").

straints include certain types of price fixing,[96] group boycotts,[97] horizontal market division,[98] and tying arrangements.[99]

Instances of such blatant anticompetitive behavior are rare; more commonly, restraints are scrutinized using the rule of reason. Unlike per se violations wherein the restraint of trade is patently unreasonable, the rule of reason evaluates the reasonableness of the challenged restraint.[100] Justice Brandeis, in the landmark case *Board of Trade of City of Chicago v. United States*, defined the rule of reason, in relevant part, as follows:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint is imposed; the nature of the restraint and its effect, actual and probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and predict consequences.[101]

Thus, in the rule of reason analysis, courts determine the competitive nature of the actions by analyzing the specific facts of the restraint in question, including the existence of less restrictive alternatives to realize legitimate, pro-competitive objectives.[102] Concerted actions, which serve to regulate an industry through promoting competition, or which have merely an incidental impact on competition, are permissible. Section 1 of the Sherman Act only prohibits concerted action if the anticompetitive outcomes outweigh the pro-competitive results.[103]

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[96] *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210 (1940).

[97] *See*, *e.g.*, Fashion Originators' Guild of Am. v. Fed. Trade Comm'n, 312 U.S. 457, 465 (1941).

[98] *See*, *e.g.*, United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 (1898), *aff'd*, 175 U.S. 211 (1899).

[99] *See*, *e.g.*, Int'l Salt Co. v. United States, 332 U.S. 392, 395 (1947).

[100] *See* Nat'l Soc'y of Prof'l Eng'rs, *supra* note 92, at 687.

[101] 246 U.S. 231, 238 (1918).

[102] White Motor Co. v. United States, 372 U.S. 253, 270 (1963) ("[T]he problem is not simply whether some justification can be found, but whether the restraint so justified is more restrictive than necessary, or excessively anticompetitive, when viewed in light of the extenuating interests.").

[103] Edward Mathias, *Big League Perestroika? The Implications of Fraser v. Major League Soccer*, 148 U. Pa. L. Rev. 203, 206 (1999).

While Section 1 is primarily intended to regulate commercial activity, it also theoretically includes the "concerted" actions of unions. "Unions by nature are combinations that attempt to restrain an employer's ability to deal with employees."[104] Further, union activities, such as strikes and boycotts, restrain the movement of labor as well as the production and movement of employers' goods.[105] As such, a literal interpretation of the Sherman Act, alone, could lead to the prohibition of union activities, if not union existence altogether.[106] However, "the most plausible understanding of the legislative history of the Act is that it was not meant to apply to standard union activities."[107]

B. Statutory Labor Exemption

Nevertheless, Congress attempted to clarify this conundrum through the Clayton Act of 1914,[108] another pillar of federal antitrust law. Section 6 of the Clayton Act provides that an individual's labor is not to be considered commerce and that labor unions are not combinations in restraint of trade.[109] Section 20 of the Act restricts the injunctive power of the courts in labor disputes to certain enumerated types of organizational activity.[110] Upon its enactment, however, the courts interpreted the Clayton Act narrowly, failing to give it the scope intended by Congress.[111] To more accu-

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[104] Lock, *supra* note 7, at 351.

[105] *See* Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 437–38 (1911) (holding that a boycott caused by listing on ALF "we don't patronize" list constituted an illegal restraint of trade under the Sherman Act); *see also* Loewe v. Lawlor, 208 U.S. 274, 294–95 (1908) (holding that labor unions' boycott of non-union manufacturer prevented sale of its goods outside its own state in violation of Sherman Act).

[106] Application of antitrust laws to union activity would have had "potentially devastating consequences" for the labor movement. JOHN C. WEISTART & CYM H. LOWELL, THE LAW OF SPORTS 528 (1979).

[107] PHILLIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS 109 (1997).

[108] 15 U.SC. §§ 12–27 (2010); 29 U.S.C. §§ 52–53 (2010).

[109] 15 U.S.C. § 17 (2010) ("Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.").

[110] 29 U.S.C. § 52 (2010).

[111] *See* Bedford Cut Stone Co. v. Journeyman Stone Cutters Assoc., 274 U.S. 37 (1927) (holding that the Clayton Act applied only to labor disputes involving pick-

rately reflect their intentions, Congress passed a third federal antitrust statute, the Norris-LaGuardia Act of 1932,[112] which expanded the protection given to unions under Section 20 of the Clayton Act.[113]

Collectively, the Clayton and Norris-LaGuardia Acts combine to constitute the "statutory labor exemption," protecting unions and shielding a broad range of union activities from antitrust liability. While these statutes provide immunity for certain types of union actions, they do not sufficiently cover the complexity and multiplicity of issues stemming from the collective bargaining process. Indeed, the National Labor Relations Act ("NLRA")[114] requires unions to bargain collectively to determine "wages, hours, and other terms and conditions of employment."[115] Unions, therefore, are statutorily permitted to reach agreements that antitrust policy would otherwise reserve "for market determination free of collective, industry-wide decisions."[116] Through the NLRA, Congress hoped to further encourage collective bargaining so as to "stabilize competitive wage rates, the purchasing power of wage earners, and working conditions."[117] The NLRA also established the National Labor Relations Board ("NLRB") to make rules and regulations for the collective bargaining process, to guard against unfair labor practices, and to act as an enforcement agency and investigatory body.[118]

Through these statutes, Congress did not specify the full extent to which these pro-labor policies would coexist with the antitrust policies. There remained an incongruence of interests in promoting competition through antitrust policy while protecting the collective bargaining process

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eting and other direct employer/employee relationships); *see also* Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921).

[112] 29 U.S.C. § 101–115 (2010).

[113] *See* United States v. Hutcheson, 312 U.S. 219, 236 (1941) (the purpose of the Norris-LaGuardia Act is to "restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction."); *see also* Larry Smith, *Collusion to Fix Wages and Other Conditions of Employment: Confrontation between Labor and Antitrust Law*, 49 J. Air L. & Com. 290, 292 (1983).

[114] 29 U.S.C. § 158(d) (2010).

[115] *Id.*

[116] Areeda & Kaplow, *supra* note 107, at 109.

[117] Kieran M. Corcoran, *When does the Buzzer Sound?: The Nonstatutory Labor Exemption in Professional Sports*, 94 Colum. L. Rev. 1045, 1050 (1994) ("By encouraging the practice and procedure of collective bargaining, the Acts protect the exercise by workers of full freedom of association, freedom of self-organization, and freedom to designate representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment.").

[118] 29 U.S.C. §§ 153–169 (2010).

through labor policy, whereby the application of antitrust laws to labor-management relations would subvert the NRLA mandate. Courts, therefore, were forced to accommodate two conflicting sets of laws and policies through the interpretation of the nonstatutory labor exemption, a rule of common law intended to supplement and complete the protection provided to the collective bargaining process by the Clayton and Norris-LaGuardia Acts.

C. Nonstatutory Labor Exemption

The nonstatutory labor exemption was first set forth by the Supreme Court in *Amalgamated Meat Cutters v. Jewel Tea Company.*[119] A collectively bargained employer-union agreement was challenged as it restrained the sale of goods to certain hours during which employees worked.[120] The Court noted that such restraints were under the coverage of the Sherman Act, a fact, which, if determinative, could undermine the pro-collective bargaining spirit of labor policy.[121] The specific issue addressed by the Court was "whether the agreement [was] immune from attack by reason of the labor exemption from the antitrust laws."[122] The Court noted that the requirement of the NLRA to collectively bargain on issues of wages, hours and working conditions offered strong support for an antitrust exemption.[123] The Court concluded that restraints resulting from the bargaining of a mandated matter, such as working hours, although adverse to competition, were exempt from the Sherman Act.[124] The Court held:

> Weighing the respective interests involved, we think the national labor policy expressed in the [NLRA] places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work. An agreement on these subjects between the union and the employers in a bargaining unit is not illegal under the Sherman Act . . . .[125]

Thus, the Court offered a congruent interpretation of two seemingly juxtaposed codified policies, giving rise to the so-called "nonstatutory labor exemption."

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[119] 381 U.S. 676 (1965).
[120] *Id.* at 689.
[121] *Id.*
[122] *Id.*
[123] *Id.* at 691.
[124] *Id.*
[125] *Id.*

The precise scope of the nonstatutory labor exemption has been disputed.[126] In its broadest terms, any union-management agreement that is a product of a good-faith negotiation will be protected from antitrust laws.[127] The exemption, however, is not unfettered; certain minimum criteria must be met to receive its protection. The Supreme Court has limited the nonstatutory labor exemption to those parties within the collective bargaining relationship; matters within the agreement which affect other employees or employment relationships are not protected.[128] The exemption is similarly limited to matters of fundamental employee interest.[129] There must be a "good-faith and arm's length negotiation between the employer and the union on mandatory subjects of collective bargaining."[130] The NLRA defines "mandatory subjects" to include "wages, hours and other terms and conditions of employment . . . ."[131]

In *Mackey v. National Football League*,[132] the Eighth Circuit Court of Appeals set forth a three-pronged test for the nonstatutory labor exemption. The terms of a collective bargaining agreement may be exempt from antitrust scrutiny: (1) where the restraint on trade primarily affects only the parties to the collective bargaining relationship; (2) where the agreement concerns a mandatory subject of collective bargaining; and (3) where the agreement is the product of a bona fide arm's length bargaining.[133]

A key protection, added by virtue of the nonstatutory labor exemption, is the inclusion of protection for employers. Congress's explicit statutory exemption applied only to bona fide labor organizations, thereby protecting only unions and their legitimate activities from antitrust attack.[134] However, to protect the unions and the collective bargaining process as Congress intended, the exemption must apply to both parties to the agreement, the employers and the employees.[135] The result is a derivative protection from antitrust laws for employers, a recognition that such agreements require reciprocity to thrive.

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[126] *See* Lock, *supra* note 7, at 352 (citing J. Weistart & C. Lowell, The Law of Professional Sports 525 (1979)).

[127] *Id.* at 353.

[128] *Id.* at 352.

[129] *Id.*

[130] Walter T. Champion, Jr., Fundamentals of Sports Law § 26.3, at 460 (1990).

[131] 29 U.S.C. § 158(d) (2010).

[132] 543 F.2d 606 (8th Cir. 1976).

[133] *Id.* at 614–15.

[134] Brown v. Pro Football, Inc., 518 U.S. 231, 237–38 (1996).

[135] *Id.*

Ultimately, the nonstatutory labor exemption demands deference by the courts to the NLRB's jurisdiction. "The labor laws give the [NLRB], not antitrust courts, primary responsibility for policing the collective-bargaining process," to ensure a socially and economically desirable collective bargaining policy.[136] It is their duty to determine reasonable practices in an industrial conflict.[137] The exemption "thereby substitutes legislative and . . . labor-related determinations for judicial-related determinations as to the appropriate legal limits of industrial conflict."[138] Labor law inquiry, however, focuses on the process by which the agreement was reached; so long as that process is permissible, the language of the agreement has authority.

D. Specific Collective Bargaining Agreement Language

1. National Basketball Association

Upon the expiration of the 2005 CBA on July 1, 2011, NBA owners initiated a lockout of the National Basketball Players Association ("NBPA"). The work-stoppage, the fourth lockout in league history, lasted 161 days and reduced the 2011-12 regular season to 66 games (from a normal 82-game regular season). A year removed from the free agency events of the Miami 3, the owners' primary concern was to substantially reapportion revenue shares between players and owners.[139] Indeed, the nationwide Great Recession had left many teams with depressed ticket sales, difficulties filling luxury suites, and declining local sponsorships.[140] Such revenue streams are components of Basketball Related Income ("BRI"), the composite revenues generated by the NBA and member teams. Through the collective bargain-

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[136] *Id.* at 242.

[137] *Id.* at 236–37.

[138] *Id.* at 237.

[139] *See* Larry Coon, *Breaking Down Changes in New CBA*, ESPN.COM (Nov. 28, 2011), http://espn.go.com/nba/story/_/page/CBA-111128/how-new-nba-deal-compares-last-one. Under the 2005 CBA, players collectively received 57% of Basketball Related Income (BRI). *Id.* After claiming losses of $370 million, $340 million, and $300 million in the final three seasons under the 2005 CBA, *id.*, the owners successfully negotiated to reset the distribution of BRI to a near 50%/50% split between owners and players, Ira Winderman, *NBA CBA: Official NBA Agreement Document*, SUN-SENTINEL.COM (Nov. 27, 2011, 9:49 AM), http://blogs.sun-sentinel.com/sports_basketball_heat/2011/11/nba-cba-official-nba-agreement-document.html.

[140] Matthew Parlow, *The NBA and the Great Recession: Implications for the Upcoming Collective Bargaining Agreement Renegotiation*, 6 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 195, 199–200 (2010).

ing process, the league and players negotiate the distribution of BRI through mechanisms such as salary cap restrictions, luxury taxes, and maximum player salaries.

Although neither the NBA nor the NBPA have made publicly available the complete 2011 CBA, they have released a Summary of Principal Deal Terms of the NBA's Collective Bargaining Proposal.[141] Therein, the parties illustrate the agreements reached by illuminating the new financial structures of the league, including, inter alia: shares of BRI among players and owners and guarantees of those shares through escrow; the salary cap and tax systems; maximum contract length; maximum annual salary increases; maximum and minimum salaries; salary guarantees; rookie salaries; player benefits; and revenue sharing. In the 17-item Summary of Principal Deal Terms, the parties did not address collusion. The provision addressing Free Agency is also silent regarding collaborative free agent actions.[142] Thus, despite the opportunity to address the type of concerted action displayed by the Miami 3, the NBA and the NBPA offered no indication that the prior collusion provisions had been altered. Without indication of change in policy, it is useful to review the NBA's stance on collusion under the previous CBA.

Under the 2005 NBA CBA, Article XIV sets forth anti-collusion provisions. Section 1 expressly prohibits specific collusive practices:

> [N]o NBA Team, its employees or agents, will enter into any contracts, combinations or conspiracies, express or implied, with the NBA or any other NBA Team, their employees or agents: (a) to negotiate or not to negotiate with any Veteran or Rookie; (b) to submit or not to submit an Offer Sheet to any Restricted Free Agent; (c) to offer or not to offer a Player Contract to any Free Agent; (d) to exercise or not to exercise a Right of First Refusal; or (e) concerning the terms or conditions of employment offered to any Veteran or Rookie.[143]

Immediately apparent is the language prohibiting certain "contracts, combinations or conspiracies." This language is identical to Article I of the Sherman Act, which clearly establishes intent to prohibit collusive behavior.

The provision is similarly unambiguous, however, in the unidirectional nature of the collusive conduct prohibited. NBA teams, employees, and

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[141] *See Summary of Principal Deal Terms*, ESPN.COM (Nov. 26, 2011), http://assets.espn.go.com/photo/2011/1113/nba_proposal.pdf.

[142] *Id.* § 11 (the tentative agreement addressed the mechanisms of sign-and-trades, contract offers to restricted free agents, and the retention of a rookie's rights through qualifying offers).

[143] *2005 Collective Bargaining Agreement*, NATIONAL BASKETBALL ASSOCIATION, art. XIV, § 1.

other team representatives or actors are banned from concerted restrictive actions; yet, the provision is silent as to the collective actions of free agents. Such omission is revealing. Indeed, a free agent, untethered to any team through employment, is exempted from the anti-collusion provision.[144] The unidirectional interpretation of collusion is further supported by Section 3 of this Article, regarding "Individual Negotiations."[145] Therein, NBA teams are prohibited from boycotting or otherwise refusing to negotiate with or sign a player in certain circumstances.[146] The prohibition, again, only governs club conduct; the provision is silent as to player-initiated boycotts or refusal to negotiate.[147]

If any question remains about the one-way prohibition on collusion in the NBA, Section 5 sets forth procedures for "Enforcement of Anti-Collusion Provisions," laying to rest any such doubt.[148] According to this section, "any player, or the Players Association acting on behalf of a player or players" may seek remedy for collusive action under Section 1 of Article XIV.[149] The section is silent as to any such remedial procedure for aggrieved owners. The CBA, once again, clearly establishes collusion as a vertical construction, prohibiting concerted actions by owners and their employees with restrictive consequences, while rendering inconceivable the possibility that players possess the capacity to act in concert to the detriment of owners. Through examination of other professional sport leagues, it

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[144] *See id.* (the anti-collusion provision would prohibit players already under contract from tampering with another player on behalf of a team, as they would qualify as employees under the plain meaning of the term).

[145] *2005 Collective Bargaining Agreement*, NATIONAL BASKETBALL ASSOCIATION, art. XIV, § 3

[146] *Id.* ("No NBA Team shall fail or refuse to negotiate with, or enter into a Player Contract with, any player who is free to negotiate and sign a Player Contract with any NBA Team, on any of the following grounds: (a) that the player has previously been subject to the exclusive negotiating rights obtained by another NBA Team in an NBA Draft; or (b) that the player has previously refused or failed to enter into a Player Contract containing an Option; or (c) that the player has become a Restricted Free Agent or an Unrestricted Free Agent; or that the player is or has been subject to a Right of First Refusal. The fact that a Team has not negotiated with, made any offers to, or entered into any Player Contracts with players who are free to negotiate and sign Player Contracts with any Team, shall not, by itself, be deemed proof that such Team failed or refused to negotiate with, make any offers to, or enter into any Player Contracts with any players on any of the prohibited grounds referred to in this Section 3.").

[147] *Id.*

[148] *Id.* § 5.

[149] *Id.*

becomes evident that the NBA is not the only governing body to collectively bargain and define collusion as an owners/employees-only prohibition.

2. National Football League

Just prior to the 2011 NBA lockout, the National Football League ("NFL") concluded a lockout of its own, spanning from March 11, 2011 to July 25, 2011, ending with the culmination of a new collective bargaining agreement on August 4, 2011 (hereafter "NFL CBA"). Therein, the NFL addresses collusion in Article 17. The provision titled "Anti-Collusion," prohibits clubs, their employees, or agents, from entering into any agreement with the league or another club that restricts or limits an individual club from deciding whether to negotiate with a player; to submit an offer to a restricted free agent, to offer a player a contract; to exercise a contract option, or what terms or conditions of employment should be included in the contract.[150] In addition, clubs are prohibited from boycotting a player on the basis of certain contractual circumstances, including restricted free agency or a previously declined option clause.[151] Beyond those circumstances, clubs retain the right to negotiate or agree with any individual player at their discretion.[152] Enforcement of these anti-collusion provisions provides only for the possibility that players are harmed by the proscribed collusive behaviors. As such, player-side reverse collusion would not be impermissible under the current NFL CBA.

3. National Hockey League

The National Hockey League ("NHL") was in the midst of a lockout as of October 2012. It is uncertain whether the new post-lockout collective bargaining agreement will include reciprocal collusion provisions to address player-driven actions. Unlike its NBA and NFL counterparts, its previous incarnation did not set forth a specific anti-collusion provision. However, the NHL does address collusive actions through certain policies.

For example, Article 26 of the 2005 NHL Collective Bargaining Agreement ("NHL CBA"), the recently expired version, defines "circumventions" as prohibiting clubs or players from engaging in agreements, promises, or other actions with the intent to sidestep the NHL CBA, includ-

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[150] *2011 Collective Bargaining Agreement*, NATIONAL FOOTBALL LEAGUE, art. 17, § 1.

[151] *Id.* § 2.

[152] *Id.* § 3.

ing provisions regarding free agency.[153] Article 10 explains that during unrestricted free agency, both clubs and players must be free to negotiate and reach agreements on standard player contracts ("SPC"):

> Such Player shall be completely free to negotiate and sign an SPC with any Club, and any Club shall be completely free to negotiate and sign an SPC with such Player, without penalty or restriction, or being subject to any Right of First Refusal, Draft Choice Compensation or any other compensation or equalization obligation of any kind.[154]

While the latter phrase suggests that the NHL and NHL Players Association ("NHLPA") were concerned with differentiating unrestricted and restricted free agency groups, the plain language of Articles 10 and 26, when read together, allows for protection against reverse collusion. Clubs must be able to negotiate and sign an unrestricted free agent without "restriction," and an agreement amongst several unrestricted free agents to only negotiate as a collective or to first confer with such free agents about offers before signing a contract, would constitute restrictions that circumvent the NHL CBA.

The language of the SPC, attached to the NHL CBA as Exhibit 1, provides evidence to support the interpretation that the NHL CBA prohibits reverse collusion.[155] Provision 10 of the SPC provides:

> The Player agrees he will not tamper with or enter into negotiations with any Player under SPC or reservation to any Club of the League for or regarding such Player's current or future services, without written consent of the Club with which such Player is connected under penalty of a fine to be imposed by the Commissioner of the League.[156]

Although this provision prohibits tampering, collusive action committed by players already under contract, it suggests that both the NHL and NHLPA recognize the influence that players can have over one another in the labor market, and that players may be inclined to create pacts that have the capacity to restrict that market. Thus, strong anti-reverse collusion language may be wise – Pittsburgh Penguins superstar Sidney Crosby has already stated that he could foresee a Miami 3-type scenario unfolding in the NHL.[157]

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[153] *2005 Collective Bargaining Agreement*, NATIONAL HOCKEY LEAGUE, art. 26, § 3.

[154] *Id.* art. 10, § 1(a)(i).

[155] *Id.* Exhibit 1.

[156] *Id.* Exhibit 1, § 10.

[157] Dave Molinari, *On the Penguins: The LeBron Precedent*, PITTSBURGH POST-GAZETTE.COM (Mar. 29, 2012, 6:32 AM), http://www.post-gazette.com/stories/sports/penguins/on-the-penguins-the-lebron-precedent-267633/. Said Crosby, "Obvi-

4. Major League Baseball

Like the NHL, MLB does not have an express anti-collusion provision. Rather, in its most recent CBA, MLB's "collusion clause" is found in Article XX(E), setting forth the individual nature of bargaining rights.[158] As previously discussed in Part I, this provision was originally intended to merely define free agency.[159] In practice, however, it has become the fundamental provision prohibiting collusive behavior in the MLB labor market.

The remaining provisions of Article XX(E) provide redress for players harmed by collusive action by two or more clubs.[160] Sections E(2) and (E)(3) provide that an aggrieved player may recover treble damages based upon lost baseball income, as well as attorneys' fees and expenses, while section E(6) allows such an aggrieved player to void his existing contract and reopen his free agency upon the end of the season.[161] Importantly, players may not collude with other players,[162] such as by negotiating collectively or putting together a package deal.[163] Thus, professional baseball prohibits the type of reverse collusion exhibited by the Miami 3. Indeed, Koufax and Drysdale would have less luck today than LeBron and company. Yet, MLB has not set forth the procedures and remedies to address such possible player misconduct.

IV. Policy Implications

NBA Commissioner David Stern was consistent in asserting that Wade, James, and Bosh had done nothing impermissible under the NBA

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ously, they all agreed that's the place they wanted to be." *Id.* Crosby wouldn't rule out something similar happening in the NHL, stating, "You'd have to have a perfect scenario where you get guys who really weren't happy where they were, for some reason and had an organization that could fit three guys [under the cap]. It's kind of like a perfect storm kind of thing. Who thought it would happen [with James and Co.], so you never know. You can never say never." *Id.*

[158] *2012 Collective Bargaining Agreement*, Major League Baseball, art. XX(E)(1)–(9).

[159] *See* Part I.B., *supra*.

[160] *2012 Collective Bargaining Agreement*, Major League Baseball, art. XX(E)(1)–(9).

[161] *Id.* art. XX(E)(2)–(3), (6).

[162] *Id.* art. XX(E)(1).

[163] Roger D. Blair & Jessica S. Haynes, *Collusion in Major League Baseball's Free Agent Market: The Barry Bonds Case*, 54 Antitrust Bull. 883, 885 (2009). Blair and Haynes note that, prior to the advent of free agency, Los Angeles Dodgers star pitchers Don Drysdale and Sandy Koufax once tried to jointly negotiate their contracts. The effort was unsuccessful and would now violate the CBA. *Id.*

CBA. To the extent that each was a free agent,[164] all communications and agreements, even those that served to create a restrictive component within the labor market, were permissible. Yet, it remains to be seen whether the permissibility of such actions will have negative long-term consequences for the competitive balance of the NBA, as well as other leagues that do not expressly prohibit reverse collusion.[165]

The professional sports industry in the U.S. has introduced many institutional mechanisms to protect, promote, and ensure competitive balance. Leagues utilize and structure amateur drafts to the benefit of unsuccessful teams and to the detriment of successful teams; this allows poor teams to improve on the field, while limiting the ability of large, wealthy, or desirable markets from accumulating all the labor talent through open bidding.[166] Similarly, salary caps are used to protect small or poor market teams by artificially limiting the amount a team can spend on player wages.[167] To further adjust for differentiations in market size, teams often engage in revenue sharing, pooling together certain streams of revenue so that teams in Green Bay and Kansas City are not crippled by market size or wealth when competing against teams from Chicago or New York.[168]

The economic principles governing free agency suggest that, although free agency "shifts the property right to the labor service from the owners to the players," such a shift will not alter the distribution of talent and, thus, will not impact competitive balance.[169] "Players will be distributed to the

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[164] One could argue, given his constant statements regarding how he wished to remain in Miami and wished to find who would join him, that Dwyane Wade was a free agent by the letter of the rule only. Broussard & Stein, *supra* note 64. One could interpret Wade's actions as those of a Miami Heat employee without a contract. Indeed, the actions undertaken by Wade certainly would have violated the CBA had he still been under contract with the Miami Heat.

[165] *See generally,* Joel Maxcy & Michael Mondello, *The Impact of Free Agency on Competitive Balance in North American Professional Team Sports Leagues*, 20 J. SPORT MGMT. 345 (2006). Maxcy and Mondello note that there is no consensus for empirically constructing competitive balance. *Id.* at 347. While most economic studies of competitive balance have relied upon the standard deviation of winning percentages, that method may represent just one aspect of competitive balance. *Id.* Alternatively, to more comprehensively examine competitive balance, one might investigate (1) closeness of within-season competition, (2) the discontinuity of team performance from season to season, and (3) minimal large market dominance (small-market weakness). *Id.*

[166] *See* Allen R. Sanderson & John J. Siegfried, *Thinking about Competitive Balance*, 4 J. SPORT ECON. 255, 257–58 (2003).

[167] *Id.* at 259.

[168] *Id.* at 263.

[169] Maxcy & Mondello, *supra* note 165, at 346.

rosters of the teams in which they are most highly valued, whether by sale or trade at the owners' discretion, or by marketing themselves as free agents."[170] The result of free agency, like the intent of the amateur draft, the salary cap, and revenue sharing, is to create a balance throughout the league through a distribution of talent, thereby allowing clubs to have a semblance of competitiveness and a compelling product that fans can enjoy. The grave potential of reverse collusion, wherein players do not market themselves and instead act collectively, lies in its capacity to alter that distribution of talent by restricting the labor market through collective action. In doing so, reverse collusion could undermine the many institutional mechanisms intended to establish and protect competitive balance.

In the short-term aftermath of the Miami 3, the NBA has seen a glimpse of this danger. Indeed, players have realized the extent of leverage granted them via the CBA and have exercised it. The mere threat of leaving a current club through free agency, as with LeBron James and the Cleveland Cavaliers, has enabled many players to leverage a trade to a larger market with the potential to play with other superstars.[171] The result has been the

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[170] *Id.* at 346–347.

[171] *See* Rick Reilly, *NBA No Longer Fan-Tastic*, ESPN.COM (Feb. 28, 2011, 5:56 PM), http://sports.espn.go.com/espn/news/story?id=6150136. Reilly lamented the consolidation of talent around the league, beginning with Ray Allen, Paul Pierce and Kevin Garnett leading the Boston Celtics to a championship. *Id.* Carmelo Anthony threatened to leave the Denver Nuggets via free agency, forcing a trade to the New York Knicks to play with friend and fellow superstar Amar'e Stoudemire. *Id.* Chris Paul, who once toasted someday joining Anthony and Stoudemire in New York, *id.*, leveraged a trade out of small market and star-less New Orleans to play with rising star Blake Griffin and the Los Angeles Clippers. *See* J. Michael Falgoust, *Chris Paul Traded to Clippers*, USATODAY SPORTS (Dec. 15, 2011, 3:36 AM), http://usatoday30.usatoday.com/sports/basketball/nba/story/2011-12-14/Hornets-trade-Chris-Paul-to-Clippers/51932616/1. Deron Williams similarly leveraged a trade from the small-market Utah Jazz, which plays its home games in Salt Lake City, to the large market Nets, which moved its home from large-market New Jersey to larger-market Brooklyn. *See* Fred Kerber, *Deron Ready to Recruit for Nets*, N.Y. POST.COM (Mar. 1, 2011, 2:17 AM), http://www.nypost.com/p/sports/nets/star (search "Deron Ready to Recruit for Nets" then follow hyperlink). Upon being traded, Williams publicly stated that he sought superstars to join him. *Id.* All-star Dwight Howard, unhappy with the small-market Orlando Magic, tried for over a year to leverage a trade to the Nets, a move he and Williams collectively discussed for years. Kurt Helin, *Deron Williams, Dwight Howard Talked About Teaming Up "For Years"*, PROBASKETBALLTALK (July 10, 2012, 10:07 AM), http://probasketballtalk.nbcsports.com/2012/07/10/deron-williams-dwight-howard-talked-about-teaming-up-for-years/. Alas, Howard was forced to settle for a trade to large-market Los Angeles to play with Kobe Bryant, Steve Nash, Pau Gasol, and the Lakers. Arash Markazi, *Dwight Howard Headed to Lakers*, ESPNLA.COM (Aug. 11, 2012, 1:18 PM),

perception of a growing gap between competitive and noncompetitive teams and discontent among team-focused fans.[172] Teams that have multiple superstars, one superstar and sufficient salary cap room to acquire more superstars, or no superstars and sizable salary cap room to acquire multiple superstars, can compete;[173] otherwise, they may struggle to remain competitive, both on the court and in the labor market.[174] The growing consolidation of stars among a few select teams in the league, if continued long-term, could have severe competitive balance implications, wherein some teams are assured of successful seasons and others perennial losers, with few teams in between.[175] The possibility of reverse collusion also lends itself to integrity concerns, as certain teams (and their fans) may perceive player movement to be a function of something that is less than transparent to non-insiders.

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http://espn.go.com/los-angeles/nba/story/_/id/8256377/dwight-howard-traded-los-angeles-lakers. In a fitting twist, star Ray Allen, whose trade to Boston before the 2007 season helped trigger the star-consolidation movement, left the Celtics to sign as a free agent with the Miami Heat. Brian Windhorst, *Ray Allen Joining Miami Heat*, ESPN.COM (July 10, 2012, 10:26 AM), http://espn.go.com/nba/truehoop/miamiheat/story/_/id/8137389/ray-allen-leaving-boston-celtics-nba-champion-miami-heat.

[172] *See* Dan Markel et al., *Catalyzing Sports Fans (and the Rest of Us)* (Working paper, 2012). The alienation of fans because of unpopular player trades and retention decisions has led a group of leading commentators to propose the development of "Fan Action Committees" charged with transforming fans into stakeholders capable of influencing player or team decision-making. *Id.*

[173] *See* Kerber, *supra* note 171 (Nets star Deron Williams stated, "I want to win. In order to do that, you see the trend now: two, three, sometimes four stars in every city. . . We have the market to do that right now and I think it's going to improve with the move to Brooklyn to attract some of the bigger name guys and *it's on not only management, but me, to try to get some people here*.") (emphasis added).

[174] There is an additional caveat; the team's home city is advantaged by desirable locations or markets. Thus, teams in Miami, New York, and Los Angeles, that provide compelling living experiences or endorsement opportunities, will be more competitive than Milwaukee, Sacramento, or Cleveland, for example.

[175] *See* Reilly, *supra* note 171; *see also* Kevin Clark, *How the NBA Became English Soccer*, WALL ST. J., Feb. 23, 2011, http://online.wsj.com/article/SB10001424052748703775704576160791914631796.html. Clark suggests that the NBA already suffered from a stark contrast between competitive and noncompetitive teams, a gap that appears to be increasing rapidly. *Id.* For example, in the 2006-07 season, the NBA's standard deviation of wins was 10.8; by the 2009-10 season, that figure rose to 13.4. *Id.* The standard deviation of wins can be used as a measure of competitive balance. *Id.* Standard deviation is a measure of variance or dispersion from the mean average. In this context, a higher standard deviation suggests a less equitable dispersion of wins, representing an imbalance in league competition.

Conclusion

Four-plus decades later, the specter of Sandy Koufax and Don Drysdale collectively negotiating with the Los Angeles Dodgers was felt throughout the 2010 NBA offseason. The NBA free agents, including, most notably, LeBron James, Dwyane Wade, and Chris Bosh, organized discussions wherein no employment contracts would be finalized until first consulting with each other. They collectively strategized to reach agreements that would later alter the supply and demand of high caliber players available through the "free" market and set themselves out to be operating independently in the sale of their labor, while covertly operating in concert. These practices constitute reverse collusion. However, through the antitrust exemptions that render the leagues' respective CBAs the controlling documents of the permissibility of such practices, reverse collusion is implicitly permissible in the NBA (and NFL). Indeed, whereas the NHL's previous CBA included language that could be interpreted to prevent such restrictive practices, only MLB, with its extensive history of ownership collusion and with the first examples of player-driven reverse collusion, explicitly bans reverse collusion. As the immediate results in the NBA are indicating, the advent and permissibility of reverse collusion could represent a shift in power, leverage, and control of the sporting labor market. Accordingly, to the extent the NBA, NFL, and NHL foresee future problems stemming from the absence of an anti-reverse collusion clause, it would be prudent for the leagues to insist that such clauses be explicitly included during negotiations towards the next league-union CBA.