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ESCAPING ANTITRUST IMMUNITY—DECERTIFICATION OF THE NATIONAL BASKETBALL PLAYERS ASSOCIATION

I. INTRODUCTION

In 1963, Herman Levy and Erwin Krasnow wrote a law review article titled *Unionization and Professional Sports*. In this article the authors argued that because of the inherent weakness of the professional athlete's bargaining position vis-à-vis the strength of management, professional athletes in all team sports should follow the developing lead of major league baseball ("MLB") and the National Football League ("NFL") and unionize in order to gain greater strength at the bargaining table. In the ensuing decades, athletes in all major professional sports (football, basketball, baseball, and hockey) did in fact unionize, and salary increases for athletes over the past four decades have enormously outpaced those of society at large, to the point where the average salary of professional athletes is arguably the highest of any profession. Undoubtedly this escalation of salaries has been the result of a combination of factors. The main factors are the burgeoning popularity of professional sports and the power of television in combination with the increased bargaining power.

2. Id.
3. In 1983, the average National Basketball Association ("NBA") player salary was $240,000. Michael Goodwin, *Antitrust Trial for the NBA*, N.Y. Times, Dec. 18, 1987 at D24. In the 1994-95 season, the average player salary was about $1.35 million. Tom Notts, *NBA Dribbling by Warning Signs*, Wash. Times, Aug. 2, 1995 at B1. By 2001, in what was supposed to be the final year of a labor-management deal rejected by the players (but later agreed to after further negotiations), the average player salary was projected to rise to about $3 million. Id.
4. See sources cited supra note 3.
of the professional sports union and its individual members (represented individually within the parameters of the union by agents).\(^5\)

Despite the increased salaries (or perhaps because of them), all is not well within the confines of the professional sports world. Labor strife, extended strikes, lockouts and litigation have become increasingly common.\(^6\) Because of the uniqueness of the National Basketball Association ("NBA"), and the recent movement for the decertification of the players union, this comment will focus on the labor situation of professional basketball.

Until the summer of 1995, the NBA had proudly remained the only major sport never to have had a work stoppage due to labor strife.\(^7\) But this changed when, after much wrangling over a new collective bargaining agreement ("CBA"), ownership announced a lockout of its players on June 30, 1995.\(^8\) In the midst of this turbulent setting, NBA superstars Michael Jordan and Patrick Ewing led a movement to decertify their own union.\(^9\) Although the decertification effort was unsuccessful,\(^10\) notice was sent from within the ranks of the NBA player's union that business as usual—collective bargaining between union and management, which

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Major League Baseball owners canceled their season last year after talks with the players broke down. The league reluctantly began its current season only after being forced last March by a federal district judge and pressured by the National Labor Relations Board to start playing without an agreement in place. The current labor contracts in professional hockey and football were obtained only after the parties underwent their own bouts of drawn out litigation, strikes, lockouts and replacement games.

\(^7\) See Lee Shappell, *It's History—NBA Locks Out Players*, Ariz. Republic, July 1, 1995 at C1. "The NBA, which never had a work stoppage and prided itself on amicable labor relations, joined the tarnished age of professional sports Friday. The NBA locked out its players and suspended basketball operations until a collective bargaining agreement is reached." Id.

\(^8\) Id.

\(^9\) Id.

usually led to myriad player restrictions, would no longer satisfy all of the players.

Two recent courtroom losses\textsuperscript{11} and the ramifications of those losses have arguably led at least indirectly to the aggressive decertification movement by dissident members of the NBA's players union. The Second Circuit's decision in \textit{Wood v. National Basketball Ass'n}\textsuperscript{12} upheld the legality of the NBA's salary cap and college draft, rejecting Wood's claim that these provisions violated § 1 of the Sherman Act.\textsuperscript{13} The Second Circuit's decision in \textit{National Basketball Ass'n v. Williams}\textsuperscript{14} affirmed the lower court's holding that "the antitrust laws have no application to the collective bargaining negotiations between [the] players and [the NBA] Teams."\textsuperscript{15} These decisions have had the effect of limiting the freedom of movement and freedom of opportunity of professional basketball players, some of the most highly skilled and highly talented members of our society. The restrictions that the last several CBAs have placed on these athletes,\textsuperscript{16} and the support that these restrictions have received from the courts, led to the decertification movement during the summer of 1995. These same restrictions will certainly have a strong bearing on the future of labor-management agreements between the owners of professional basketball franchises and the members of the NBA players association.

This comment examines, analyzes and proposes solutions emanating from the holdings in \textit{Williams} and \textit{Wood}.\textsuperscript{17} It provides a background by tracing the various challenges of player restraints as violations of federal antitrust law.\textsuperscript{18} After finding that such challenges have resulted in repeated losses for the players associations, this comment includes a discussion of the labor exemption as it pertains to professional sports,\textsuperscript{19} a history of the National Basketball Players

\textsuperscript{11} National Basketball Ass'n v. Williams, 45 F.3d 684 (2d Cir. 1995); Wood v. National Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987).
\textsuperscript{12} 809 F.2d at 954.
\textsuperscript{13} \textit{Id.} at 956-57.
\textsuperscript{14} 45 F.3d at 684.
\textsuperscript{15} \textit{Id.} at 685.
\textsuperscript{16} Specifically, these restrictions encompass the college draft, the right of first refusal and the revenue sharing/salary cap system. \textit{Id.}
\textsuperscript{17} See discussion infra Part II.C.
\textsuperscript{18} See discussion infra Part II.C.
\textsuperscript{19} See discussion infra Part II.A.
A history of the attacks on the labor exemption, a discussion of the successful decertification effort of the National Football League, the differences between the NFL union and the NBA union, and a discussion of the current NBA CBA.

The particular problem addressed by this comment is that the player restrictions which have been agreed to in collective bargaining have impaired the ability of professional basketball players to earn their market value. This comment proposes that the players of the NBA decertify their union in order to obtain their market value. This comment suggests that the union decertification movement led by Messrs. Jordan and Ewing is the only way that these supremely skilled performers can be paid their true market value—that decertification is also the only way that these performers can enjoy the fruits of a free market capitalist society which other highly talented members of our society enjoy.

II. BACKGROUND

A. Background of Labor Exemption to Antitrust Laws

Antitrust law has been created primarily to promote competition. The Sherman Act condemns "every contract and combination in restraint of trade." While there is no explicit language in the Act relating to union activity, many early courts did in fact extend the Act to include it as interruptive of commercial activity. Because of the negative effects of these early decisions on the labor movement, unions turned to Congress for protection. Eventually, Congress enacted the Clayton Act and later the Norris-LaGuardia

20. See discussion infra Part II.B.
21. See discussion infra Part II.E.
22. See discussion infra Part II.F.
23. See discussion infra Part III.
24. See discussion infra Part IV.
28. Id.
These two acts provide a significant exemption for organized labor activities and they attempt to foster the collective bargaining process. Because the two ideals of antitrust and labor are essentially inimical, and due to the fact that the statutes were drafted to protect specific union activity, the Supreme Court has created a non-statutory labor exemption to allow the two ideals to exist alongside each other.

The major Supreme Court cases establishing this non-statutory exemption all deal with management seeking antitrust immunity for actions supported by the unions, whereas in the arena of sports litigation, the unions are seeking protection from actions supported by management. Thus, the Supreme Court decisions deal mainly with protecting union efforts, not protecting management from union demands. The most significant case in this area is United States v. Hutcheson, which dealt specifically with the legality of union pressure tactics on an employer. The Supreme Court, in holding that the union's activities were immune from antitrust laws, effectively confirmed that there is a "congressional intention to generally exempt legitimate union activities from the restraints applicable to other combinations having an adverse effect on competition."

31. See Weistart & Lowell, supra note 27, § 5.04, at 528-29.
32. Id.
33. Id.
34. Id. § 5.04, at 529.
35. See Connell Constr. Co. Inc. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 625-26 (1975) (denying non-statutory exemption when labor policy is not promoted and there is substantial market impact); Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 681 (1965) (providing non-statutory exemption to bona-fide arms-length bargaining); UMW v. Pennington, 381 U.S. 657 (1965) (denying non-statutory exemption when market competition is eliminated); Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 809 (1945) (denying exemption when union and employer worked together to eliminate competition); United States v. Hutcheson, 312 U.S. 219, 232 (1941) (providing exemption if union acts in self-interest and does not combine with non-labor groups).
36. Weistart & Lowell, supra note 27, § 5.04, at 530.
37. Id.
38. Id.
40. Id. at 227.
41. Weistart & Lowell, supra note 27, § 5.04, at 531.
In *Allen Bradley Co. v. Local Union No. 3, Bhd. of Elec. Workers*,\(^{42}\) price and product competition had essentially been eliminated by an agreement between electrical workers, manufacturers of electrical supplies and contractors.\(^ {43}\) The Court held that because the agreements under consideration "were not simply collective bargaining agreements between a union and an employer but included parties who seemingly had neither an interest in nor control over the immediate employment relationship,"\(^ {44}\) the agreements were not protected by the labor exemption and were thus illegal restraints of trade.\(^ {45}\)

While *Allen Bradley* clarified that agreements which included parties outside the union-employer relationship were outside the labor exemption, *United Mine Workers v. Pennington*\(^ {46}\) and *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*\(^ {47}\) detailed the limits of the antitrust exemption.\(^ {48}\) In *Pennington*, the union and a multi-employer bargaining unit entered into a CBA which contained various agreements that the union would demand the same wages from other employers as those received from the multi-employer bargaining unit.\(^ {49}\) The Supreme Court held that although all the matters agreed upon were within labor policy, because of "the attempt by the union and the employer group to affect the costs and markets of operators who were not parties to the agreement,"\(^ {50}\) the CBA did not receive antitrust protection.

Similarly, *Jewel Tea* dealt with attempts to control matters beyond the employment relationship.\(^ {51}\) Despite the fact that there was no conspiracy between the butcher's union and employers to affect any other parties, the agreement restraining butcher working hours was struck down as a conspiracy in restraint of trade because it did severely and adversely affect parties outside of the collective bargaining

\(^{42}\) 325 U.S. 797 (1945).


\(^{44}\) Id. at 533.

\(^{45}\) Id. at 532-33.

\(^{46}\) 381 U.S. 657 (1965).

\(^{47}\) 381 U.S. 676 (1965).

\(^{48}\) WEISTART & LOWELL, *supra* note 27, § 5.04, at 534.

\(^{49}\) Id.

\(^{50}\) Id.

\(^{51}\) See id. § 5.04, at 536.
agreement. Because all parts of the agreement were properly within the confines of collective bargaining, the Court created a balancing test of interests in evaluating the applicability of the antitrust laws. This balancing test focused on the degree of restraint involved, the type of employee interest at stake, the subject matter, and the immediacy and directness of the employee interest.

These cases show that "immunity will be available only for those agreements arrived at between labor and management." With respect to the sports industry, the most important principle appears to be that "the Supreme Court seems to have assumed that labor and management enjoy very broad freedom to impose restraints upon themselves." The additional fact that labor-management agreements in professional sports have no effect on the business markets will keep courts from intervening in these disputes.

While these cases defined the non-statutory labor exemption for businesses, Mackey v. National Football League established the standard for evaluating antitrust challenges in professional sports. In Mackey, sixteen present and former NFL players sued the NFL claiming that the league's enforcement of the "Rozelle Rule" violated §§ 4 and 16 of the Clayton Act and § 1 of the Sherman Act. The court, while admitting that "the cases giving rise to the non-statutory exemption are factually dissimilar from the present case," created a three-pronged test to determine if limited non-statutory immunity from antitrust review should be extended to

52. See id. at 189, Amalgamated Meat Cutters, 381 U.S. 676.
53. Weistart & Lowell, supra note 27, § 5.04, at 536.
54. Id. § 5.04 at 536-37.
55. Id. § 5.04 at 540.
56. Id.
57. See id.
58. 543 F.2d 606 (8th Cir. 1976).
59. Unilaterally adopted by the member clubs of the NFL, the "Rozelle Rule" held that when a player signed a free agent contract with another team, that other team owed compensation to the player's former team. If the two teams could not decide adequate compensation, then the commissioner, Pete Rozelle, determined adequate compensation. Id. at 610-11.
60. Id. at 606.
61. Id. at 613-15 & n.12 ("It is apparent that none of the prior cases is ... [on] point. They involve union-management agreements that work to the detriment of management's competitors. In this case, petitioner urges that the reserve system works to the detriment of labor.")) (quoting Flood v. Kuhn, 407 U.S. 258, 294 (1972)).
labor-management agreements in the sporting arena.62 First, only the parties to the collective bargaining relationship must be primarily affected by the restraint on trade.63 Second, the agreement sought to be exempted must concern a mandatory subject of collective bargaining.64 Finally, the agreement sought to be exempted must be the product of bona-fide arm’s length bargaining.65 The requirements of each prong must be met before antitrust immunity will be extended.66 Therefore, “whether the non-statutory exemption will protect a particular agreement turns upon whether the relevant federal labor policy is deserving of pre-eminence over federal antitrust policy under the circumstances of the particular case.”67 As Judge Duffy later held in Williams, “Mackey also depends on a resolution of the conflicting labor and antitrust policy concerns.”68

In Williams, Judge Duffy reviewed four different tests developed to determine the narrow issue of whether antitrust immunity that existed while a CBA was in effect continues after its formal expiration date.69 Judge Duffy first considered the “Bridgeman test” as developed in Bridgeman v. National Basketball Ass’n.70 This test held that if the employer “reasonably believes that the challenged practice or a close variant of it will be incorporated” in the next CBA then the antitrust immunity survives as long as the “employer continues to impose the restrictions unchanged.”71 Next, Judge Duffy considered the Powell I72 impasse standard, which allowed

63. Id. at 614.
64. Id.
65. Id.
66. Id.
69. Id. at 1074-76. “I can find only four non-binding decisions addressing this precise issue. Unfortunately, each decision fashioned a different standard to apply.” Id. at 1074.
the labor exemption to continue only until impasse, defined as "the point at which there appears no realistic possibility that continuing discussions concerning the provision at issue would be fruitful." Third was the Powell III standard (reversing Powell I), holding that the non-statutory labor exemption extends for as long as the labor relationship continues; and finally, the Brown test, whereby the exemption ceased upon expiration of the CBA.

Judge Duffy attempted, via a thorough review of the origin of the non-statutory exemption, to ascertain which of these four tests was the appropriate test to use in the specific instance of an expired CBA. He held that "the appropriate standard to apply is the Powell II [sic] standard. Antitrust immunity exists as long as a collective bargaining relationship exists." Although Judge Duffy had before him only the precise issue of whether the terms of an expired CBA continued without a new agreement, his broad holding as to the continuation of antitrust immunity, and its affirmation by the Second Circuit, confirmed that professional sports leagues would not escape antitrust immunity as long as the players associations continued to stay unionized.

B. History of the National Basketball Players Association ("NBPA")

The growth of the NBPA roughly parallels that of the NBA itself. The NBA began operation in 1946, an outgrowth of several failed yet popular professional basketball leagues. In the late 1950s, professional basketball was seen as a growth-potential sport in this era of "new league and expansion" fever. Accordingly, the American Basketball

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75. Id. at 1078. Judge Duffy erroneously calls "Powell III" "Powell II."
77. 782 F. Supp. at 130.
78. Williams I, 857 F. Supp. at 1074-78.
79. Id. at 1078. Judge Duffy erroneously calls "Powell III" "Powell II."
80. National Basketball Ass'n v. Williams, 45 F.3d 684 (2d Cir. 1995) ("Williams II").
82. Id. at 155.
League ("ABL") began play in 1961. While this new league ceased operations early in its second year, the mere existence of the league had two major effects on professional basketball. First, this new league resulted in an increase in salaries as the leagues competed for players with skill and gate appeal; second, the players acquired a heightened confidence because of their increased salaries, resulting in an increased interest in unionization in order to present their views and obtain greater benefits. The NBPA, due in part to this intra-league competition, was then formed in 1962.

Although individual rights were increasing and working conditions for the players were getting better in the early 1960s, it was not until the arrival of the truly competitive American Basketball Association ("ABA") in 1967 that the NBA ownership in fact recognized the NBPA and its individual players. According to congressional testimony by the first executive director of the NBPA, Larry Fleisher, before 1967, the NBA had no collective bargaining agreement; the league required no minimum salary, no pension, no health or accident insurance, no life insurance, not even a trainer for road games.

In the 1960s the NBPA was basically run by Mr. Fleisher alone, and its "initial approaches stuck to basic labor issues: minimum salary, pension fund, insurance benefits, and other standard wage and condition of employment requests." In fact, the 1960s saw no litigation emanating from the NBPA, nor were any games missed due to labor-management disagreements. This streak remains alive to this day, an amazing feat considering the labor strife that has nagged at professional football, baseball and hockey over the years.
C. **Attacks on the Antitrust Exemption by the NBPA**


Despite the fact that professional basketball has been relatively strife-free, the NBA has not been free of player-led attacks on its antitrust exemption. Seemingly emboldened by unionization, the 1967 CBA between players and management, and the salary competition from the ABL and then the ABA, several NBA players brought a class action suit in 1970 against the NBA alleging that the college draft, the reserve clause and other restrictions violated §§ 1 and 2 of the Sherman Act and §§ 4 and 6 of the Clayton Act.  

This suit, *Robertson v. NBA,* additionally challenged the then-proposed NBA-ABA merger. Responding to preliminary orders issued by Judge Carter that indicated to the owners that the judge doubted that the player draft and the player reserve system could withstand a Sherman Act attack, the owners and players resumed their collective bargaining and entered into a new CBA as part of the settlement of the *Robertson* suit. In addition to approving the ABA-NBA merger, this settlement paved the way for the resumption of "give-and-take" negotiating associated with good faith collective bargaining. As a result of this bargaining, the players gained a matter of increased mobility, and the owners were able to control player movement to some extent. This 1976 CBA—emanating from the *Robertson* settlement—was

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96. *Robertson v. National Basketball Ass'n,* 389 F. Supp. 867, 872 (S.D.N.Y. 1975). The college draft is the process by which exclusive rights to negotiate with eligible college players are apportioned among the NBA teams. In general the college draft allows teams with the worst records to select earlier than teams with better records. A player who is drafted by a particular team may negotiate only with that team. A player who is not drafted may negotiate with any team. A Reserve Clause is a clause which allows owners the option of renewing a player's contract ad infinitum at a salary determined by the owner.


98. *Id.*

99. WEISTART & LOWELL, supra note 27, § 5.04, at 507.

100. *Id.*

101. *Id.*

102. *Id.* The draft was maintained, although teams no longer had perpetual rights to the players that they drafted, rather, they had these rights for one year only. *Id.*
meant to create an eleven year plan for handling free agency.103


The 1983 salary cap was part of a jointly agreed upon modification of the CBA after the 1976 Robertson settlement between the NBA and the NBPA.104 The purpose of the 1983 modification, mainly the salary cap, was "to insure the financial stability of troubled NBA teams, improve competitive balance and at the same time preserve and improve the basic framework of the [Robertson] Settlement Agreement."105

The salary cap limits the total amount that NBA teams can pay its individual players.106 The players are guaranteed fifty-three percent of the league's gross revenues107 in return for accepting the cap.108

When the NBA sought to introduce the salary cap in 1983, several players filed suit in Lanier v. National Basketball Ass'n109 challenging its legality. After a determination by a special master that the cap would violate the terms of the Robertson settlement agreement, and could not be imposed without a modification of the existing CBA, the player's union relented and granted the owner's demands to implement the salary cap and entered into a new CBA that included the cap.110 This CBA continued through completion of the 1986-87 season.111

105. Id. See also Aff. of David Stern at 3, Ex. 1, Aff. of Gary Bettman. In re National Basketball Ass'n, 630 F. Supp. 136 (No.70-1526).
106. Id. at 137.
107. See Schneider, supra note 103, at 839, n.308 (explaining gross revenues include regular season gate receipts, proceeds from the licensing of broadcast rights, and all proceeds from playoff and exhibition games).
110. Id.
111. Id.

In June of 1984, Leon Wood, a gold medal winner on the Olympic team and an all-American at California State University, Fullerton, was taken in the first round of the NBA draft by the Philadelphia 76ers. It was against this backdrop that Leon Wood filed suit in Wood v. National Basketball Ass'n. Wood developed four arguments to prove that the draft and salary cap were illegal, each of which was disposed of by the court. Initially, Wood argued that his superior abilities, as evidenced by his selection in the first round of the NBA draft, should enable him to bargain individually. The court disposed of this argument by relying on the collective bargaining relationship between the NBPA and the NBA, noting that "Wood's theory would allow any employee dissatisfied with his salary relative to those of other workers to insist upon individual bargaining, contrary to explicit federal labor policy."

Second, Wood attacked the salary cap and the draft because these two devices allowed him no choice of where he could work, and forced him to work for below market wages. The court refuted this argument by an analogy to the "hiring hall" mechanism.

Wood's third argument was that the draft and the salary cap disadvantaged him since he was a new employee. Once again the court relied on analogizing Wood's position to that of the industrial worker.

Fourth and finally, Wood argued that the draft and salary cap were illegal because they affected employees outside

113. Id. at 954.
114. Id. at 960.
115. Id.
116. Id.
117. Id.
118. Wood, 809 F.2d at 960. The union-operated "hiring hall" receives requests for workers from employees. It provides workers who are qualified and available for industries such as construction, which are characterized by irregular and short-lived employment. Stephen Evans & Roy Lewis, Union Organization, Collective Bargaining and the Law, 10 COMP. LAB. L. 473, 479 & n.22 (1989).
119. Wood, 809 F.2d at 960.
120. Id.
the bargaining unit. Once again, the court relied on the collective bargaining process in stating that this practice "is also a commonplace consequence of collective agreements," and "[i]ndeed, the National Labor Relations Act explicitly defines 'employee' in a way that includes workers outside the bargaining unit." The Second Circuit, in disposing of Wood's claim, relied entirely on the fact that the restrictions which Wood was trying to get out from under were the product of collective bargaining. This reliance allowed the court to uphold the restrictions, even while admitting that these restrictions harmed Wood; "[i]t is true that the combination of the draft and salary cap places new players coming out of the college ranks at a disadvantage. However, as noted earlier, that is hardly an unusual feature of collective agreements."


Upon expiration of the 1983 agreement in June of 1987 (a mere five months after the Wood decision), and after the expiration of an additional four month moratorium designed to facilitate negotiations between the parties, various players filed suit in Bridgeman v. National Basketball Ass'n. Again the players were challenging the college draft, the right of first refusal, and the salary cap as violations of antitrust law. But, once again, the players' own union agreed to a collective bargaining agreement as part of the settlement of this suit which continued all three practices, albeit in modified form. This CBA went into effect on November 1, 1988 and expired on June 23, 1994, the day after the last playoff game of that season.

121. Id.
122. Id. citing 29 U.S.C. § 152(3).
123. Id. at 962.
124. Id.
125. "On June 8, 1987, the NBA and the Players entered into a Moratorium Agreement to facilitate negotiations, whereby the challenged practices would remain in effect but no new contracts would be signed. The Moratorium Agreement expired on October 1, 1987." Williams I, 857 F. Supp. 1069, 1072 (S.D.N.Y. 1994).
128. Id. at 1072.
5. National Basketball Ass'n v. Williams: *Expiration
   of the Collective Bargaining Agreement*

A suit challenging the same restrictions as those challenged in *Wood* and *Bridgeman* was brought eight years later in *National Basketball Ass'n v. Williams*. In *Williams* the collective bargaining agreement signed in 1988 had expired on June 23, 1994. The twenty seven NBA teams brought suit against numerous individual players seeking a declaratory judgment "that the continued imposition of the disputed provisions of the CBA (namely the college draft and the salary cap) would not violate the antitrust laws because that imposition 'is governed solely by the labor laws and is exempt from antitrust liability under the non-statutory exemption to the antitrust laws.'"

D. *Prelude to the Decertification Effort*

When the 1988 CBA expired in 1994, the NBA was at an all-time high in terms of popularity and profitability. It seemed that the end of the salary cap, if not the draft, was at hand. And most importantly, union leadership apparently could see that the cap had run its course. Charles Grantham (the executive director of the NBPA at that time), commented that "[t]he cap is a dinosaur[,] [i]t's outlived it's [sic] usefulness. The cap was instituted when the league was in financial trouble. That's no longer the case . . . ." Grantham had held this position since at least August of 1992, when Washington Bullets' draftee Tom Gugliotta, the sixth pick in the 1992 draft, was forced to consider the option of playing his rookie year in Italy so that he could achieve what he considered to be his market value. At the time Grantham commented, "[t]he salary cap has simply outlived its usefulness . . . The Gugliotta situation is just another example. And you're going to see more of that, not less, until something is done."
Because the management and the players were so far apart on key issues, such as the salary cap and the draft, the parties had not reached a deal on a new collective bargaining agreement as the beginning of the 1994-95 season approached. In view of this inability to reach an agreement and with the season approaching, both sides, seeking to avoid the labor strife witnessed recently in other professional sports leagues, signed a no-lockout, no-strike agreement that guaranteed that the 1994-95 season would be played in its entirety. This no-lockout, no-strike agreement came while an appeal of National Basketball Ass'n v. Williams was pending.

In Williams, the NBA commenced a declaratory action on June 17, 1994 seeking the continued implementation of the college draft, the right of first refusal, and the salary cap. The defendant players, along with the NBPA, counterclaimed alleging that the draft, the right of first refusal and the salary cap were unreasonable restraints of trade which were not exempt from antitrust law and therefore violated the Sherman Act.

Judge Duffy granted the NBA's injunction and, using the Powell III beyond impasse standard, allowed the continued implementation of the draft, the salary cap and the right of first refusal. He granted this injunction in reliance on the fact that a collective bargaining relationship existed between the NBPA and the NBA. This signaled again, and this time with finality, that the players would be unable to escape the restrictions of previous agreements without decertification of its union. Judge Duffy virtually stated this proposition himself in holding that the players were not "stuck" with the provisions forever. The players, he argued, could exert economic pressure on the owners by striking or,
the Players may request decertification of the NBPA as a collective bargaining agent. I do not mean by this ruling to encourage the Players to decertify their union so that they may bring an antitrust claim. But, decertification is certainly an option the Players have. In fact, this is exactly what the National Football League Players Union did following Powell II [sic].

The NFL's decertification movement following Powell III resulted in the first meaningful free agency accorded to the players of the NFL, followed by what was clearly the best collective bargaining agreement the players had reached to date with the NFL. For professional athletes, case history shows that when a CBA exists between a players union and management, antitrust liability is unavailable to the players to do away with collectively bargained for provisions such as the draft, the salary cap and the right of first refusal.

E. NFL Decertification Following Powell III

Originally, the NFL decertification movement began with Powell v. National Football League ("Powell I"). In 1987, following the expiration of the 1982 CBA and the inability of the parties to agree on a new CBA, the players of the National Football League went on strike. Powell I was a class action suit brought by numerous players after this strike failed and the players returned to work. The players had sought an injunction to prevent the National Football

145. Id. Judge Duffy erroneously calls "Powell III" "Powell II."
149. "Powell I" is the ruling establishing the impasse standard. Id. "Powell II" is the ruling determining the date of impasse between the parties. Powell v. National Football League, 690 F. Supp. 812 (D. Minn. 1988). Finally, "Powell III" is the holding establishing the "beyond impasse" standard, Powell v. National Football League, 930 F.2d 1293 (8th Cir. 1989), cert. denied, 498 U.S. 1040 (1991). In various law review articles and even judicial rulings "Powell III" is incorrectly called "Powell II."
151. See Powell I, 678 F. Supp. at 777.
League from imposing the player restrictions from the previous, but now expired, CBA.\textsuperscript{152}

Judge Doty of the District Court of Minnesota, with only Bridgeman\textsuperscript{153} and its "reasonable belief" test as precedent, decided that while immunity from antitrust exemption does not expire when the CBA expires, it does not continue indefinitely.\textsuperscript{154} Judge Doty created the impasse standard test. This test held that the antitrust exemption continued until "there appears no realistic possibility that continuing discussions concerning the provision at issue would be fruitful."\textsuperscript{155} By this ruling, the NFL players had a slight opportunity to escape from restrictive structures of a previous agreement. By bargaining in good faith until there was an impasse on an issue or a variety of issues, the players could at some point gain an injunction from the imposition of these restrictions.

But Powell I was reversed by the Court of Appeals for the Eighth Circuit in Powell III.\textsuperscript{156} The Eighth Circuit created the "beyond impasse" standard, whereby the non-statutory labor exemption extended beyond a "mere impasse" (Powell I) but rather, for as long as the labor relationship continued.\textsuperscript{157} Thus, "[t]he Eighth Circuit reasoned that once a collective bargaining relationship is established, federal labor policies become pre-eminent."\textsuperscript{158} Therefore, as long as the individual players of the NFL were represented by the National Football League Players Association (NFLPA) the NFL could, absent a new agreement, unilaterally impose conditions from the previous agreement onto the players and antitrust immunity would continue, unfettered. Obviously, this resulted in a substantial increase in the bargaining power of the owners.

Judge Heaney in his dissent recognized the illogical nature of this reasoning and stated that "the end result of the majority opinion is that once a union agrees to a package of player restraints, it will be bound to that package forever un-
less the union forfeits its bargaining rights.” Further, Judge Lay, in a dissent from a denial of rehearing en banc, wrote that “the union should not be compelled, short of self-destruction, to accept illegal restraints it deems undesirable.” But what followed the ruling of the Eighth Circuit provides an indication of the potential for a decertified National Basketball Players Association.

The NFL players, having operated without a CBA for two years, and facing the prospect of the unilateral imposition of the restrictive terms of the previous CBA continuing for an infinite period, chose to decertify their own union. Despite arguments by the NFL that this decertification process was not genuine and/or insufficient to end the labor exemption, the Powell-McNeil court held that “the existence of a bargaining relationship does not depend on NLRB certification, but rather depends on whether a majority of the employees in a bargaining unit supports a particular union as their bargaining representative.” The majority (sixty-two percent) of the players signed petitions revoking the authority of the NFLPA to engage in collective bargaining on their behalf. On December 5, 1989, player representatives from all of the NFL teams voted unanimously to end the NFLPA’s status and restructure the organization as a voluntary professional organization.

This official decertification led to the filing of Powell-McNeil. In Powell-McNeil the plaintiffs were eight football players whose contracts had expired on February 1, 1990. These players alleged that the defendants violated § 1 of the Sherman Act via illegal restraints under the NFL’s Plan B system of free agency during the 1990-91 season. Because

160. Id. at 574 (Lay, J. dissenting).
162. Id. at 1354-56.
163. Id. at 1357.
164. Id. at 1356.
165. Id. at 1354.
166. See id.
168. Id. at 1353-54. Plan B allowed each team to reserve 37 players on their roster and subject these players to the Right of First Refusal/Compensation System. Those not deemed reserved were unrestricted free agents. Shant H.
the NFLPA had been decertified, the court held that there was no ongoing collective bargaining relationship with the NFL, and thus the non-statutory labor exemption had ended.\textsuperscript{169} The court thus granted the plaintiffs' motion for summary judgment striking the defendants' labor exemption defenses, and allowed the case to proceed to trial.\textsuperscript{170}

At trial,

[t]he jury found that the Right of First Refusal/Compensation Rules in Plan B [had] a substantially harmful effect on competition in the relevant market for the services of professional football players, that those rules significantly contribute[d] to competitive balance in the NFL, but that the rules [were] more restrictive than reasonably necessary to achieve the objective of establishing or maintaining competitive balance in the NFL.\textsuperscript{171}

The jury also found that all of the plaintiffs had suffered economic injury.\textsuperscript{172} The jury had spoken and ruled that the NFL's Plan B system of free agency which restricted the players had caused the players economic harm, of varying degrees.\textsuperscript{173} Therefore, the restrictive portions of the most recent NFL CBA were deemed to be injurious to the plaintiffs when the antitrust shield of collective bargaining was removed. Effectively and appropriately seen as one of the first courtroom victories by the players over management, the Powell-McNeil verdict spawned further player lawsuits to take advantage of the NFL's lack of an antitrust shield.\textsuperscript{174}

Four days after the jury verdict in Powell-McNeil was announced, Jackson v. National Football League\textsuperscript{175} was filed, with essentially the same claims as those of the Powell-Mc-

\textsuperscript{169} Powell, 764 F. Supp. at 1358-59.
\textsuperscript{170} Id. at 1359.
\textsuperscript{172} Id.
\textsuperscript{173} Id. The jury awarded the following damages to plaintiffs: Mark Collins, $178,000; Don Majkowski, $0; Tim McDonald, $0; Freeman McNeil, $0; Frank Minnifield, $50,000; Niko Noga, $0; Dave Richards, $240,000; and Lee Rouson, $75,000. Id.
\textsuperscript{175} Jackson, 802 F. Supp. at 226.
Neil plaintiffs.\textsuperscript{176} The District Court, in an order dated September 24, 1992, granted a temporary restraining order to the four players in the suit who remained unsigned.\textsuperscript{177}

This restraining order temporarily enjoined the defendants for five days from enforcing Plan B,\textsuperscript{178} thus effectively making these players free agents with the ability to sign with any team with no compensation flowing back to their former teams. The court based this injunction on the probability of the plaintiffs' success on the merits;\textsuperscript{179} the plaintiffs' sufficient showing that without the injunction they would suffer irreparable harm;\textsuperscript{180} the fact that the plaintiffs stood to suffer greater harm than the defendants without the injunction;\textsuperscript{181} and finally, the fact that the public interest would be better served by granting the injunction, since the players sacrificed union representation and the protection of the labor laws to pursue their antitrust remedies, and denying the injunction may have subverted the labor policies.\textsuperscript{182}

In addition to Jackson, on September 21, 1992 (less than two weeks after the Powell-McNeil jury verdict but three days before the Jackson injunction), a class action suit, White v. National Football League,\textsuperscript{183} was filed on behalf of five named plaintiffs\textsuperscript{184} and a class of NFL players.\textsuperscript{185} These players sought free agency and the award of treble damages

\textsuperscript{176.} Id. at 228. Ten NFL players sought relief for economic injuries suffered as a result of defendants' Right of First Refusal/Compensation Rules of Plan B. The plaintiffs' contracts had all expired on February 1, 1992, and via Plan B, all of the plaintiffs' former teams gained the exclusive rights to plaintiffs' services. Id.

\textsuperscript{177.} Id.

\textsuperscript{178.} Id. at 235.

\textsuperscript{179.} Id. at 229-30.

\textsuperscript{180.} Id. at 230-31.

\textsuperscript{181.} Jackson, 802 F. Supp. at 231-32.

\textsuperscript{182.} Id. at 233.

\textsuperscript{183.} 822 F. Supp. 1389 (D. Minn. 1993).

\textsuperscript{184.} Reggie White, Michael Buck, Hardy Nickerson, Vann McElroy, and Dave Duerson. Id.

\textsuperscript{185.} Id. at 1395. The class included:

(i) all players who have been, are now, or will be under contract to play professional football for an NFL club at any time from August 31, 1987 to the date of final judgment in this action and determination of any appeal therefrom, and (ii) all college and other football players who, as of August 31, 1987, to the date of final judgment in this action and the determination of any appeal therefrom, have been, are now, or will be eligible to play football as a rookie for an NFL team.

\textsuperscript{186.} Id. at 1395 n.4.
(for damages suffered because of the NFL's Plan B method of limited free agency) upon expiration of their contracts on February 1, 1993. The combination of losses sustained previously in the Powell-McNeil and Jackson cases, the prospect of an unprecedented number of free agents within the league, and the looming threat of treble damages for the 1100 members of the White class with Plan B damage claims effectively caused the NFL to come back to the bargaining table by way of the class settlement in White. This settlement called for the NFL to pay $195 million in damages and costs to the members of the White class and plaintiffs in other related litigation. But of greater importance is that the White settlement, gained only after decertification of the players own union and subsequent court victories, provided the most significant amount of free agency in the history of the NFL.

The settlement provided that, with the exception of "franchise" and "transition" players, "all players with at least five years of NFL experience whose contracts have expired may negotiate and enter into contracts with NFL teams as unrestricted free agents." Players with less than five years of NFL experience were subject to various restrictions on their movement upon expiration of their contracts. The significance of the White settlement was that after five years of court fights with the NFL (since the expiration of the 1982

186. Id. at 1395.
187. Id.
188. Id. at 1414.
189. [Each NFL] team is permitted to designate one Franchise Player by tendering an offer of a one year contract at a salary amounting to the greater of (1) the average of the salaries of the five highest paid players at the designated player's same position, or (2) a twenty percent increase in the designated player's previous year's salary. A team thereby obtains exclusive negotiating rights to the Franchise Player, notwithstanding his years of experience. White, 822 F. Supp. at 1413.
190. A transition player is determined by the team when that team tenders an offer of a one year contract at a salary amounting to the greater of (1) the average of the salaries of the ten highest paid players at the designated player's same position, or (2) a twenty percent increase in the designated player's previous year's salary. A team thereby obtains a RFR (right of first refusal) with respect to the transition player, notwithstanding his years of experience.

191. Id. at 1412.
192. Id. at 1412-13.
CBA) professional football players for the first time were granted unrestricted free agency at certain levels. These players obtained this free agency only after: (1) decertifying their union, (2) obtaining a ruling that the non-statutory labor exemption did not apply when labor no longer was represented by a union, (3) winning a jury trial that found that the players had suffered harm, and (4) after the startling reality for the league that hundreds of players could be granted unrestricted free agency in White if the NFL continued its losing streak.

Additionally, the settlement provided for a substantially limited player draft, anti-collusion provisions, and court supervision over enforcement of the settlement itself. On the other hand, the players relented to a team salary cap and a limited entering player pool, but the outcome was that a "radically modified player reservation system that provide[d] for substantial unrestricted free agency for veteran players" was obtained only through decertification and the removal of the antitrust exemption.

F. Differences between NFLPA and NBPA

On January 6, 1993, an agreement in principle was reached to settle the White class action and other related litigation. At this point, the NFLPA began efforts to recertify itself as the collective bargaining agent of the NFL players. By the end of March, 1993, the NFLPA was again unionized, and was recognized by the NFL "as the sole and exclusive col-

193. Id. at 1413.
194. Id. at 1414.

Anti-collusion provisions prohibited the NFL and any NFL member team from agreeing with any other team regarding: (1) the decision to negotiate or not to negotiate with any player; (2) the decision to submit or not submit an offer sheet to any restricted free agent; (3) the decision to offer or not to offer a contract to any player; (4) the decision to exercise or not to exercise a right of first refusal; or (5) the terms or conditions of employment offered to any individual player for inclusion in a player contract.

Id.

196. Id. at 1413-14.
197. Id. at 1419.
198. Id.
199. Id. at 1435.
200. Id.
collective bargaining representative of present and future employee players in the NFL."\textsuperscript{201}

1. \textit{Fungible v. Non-Fungible Players}

Generally, professional athletes can be divided into two types: fungible and non-fungible players.\textsuperscript{202} Non-fungible players are the stars, those rare players who make an immediate impact on their team's win-loss record or financial success.\textsuperscript{203} Fungible players are those who are easily replaced, whose individual presence rarely effects the win-loss record and/or profits.\textsuperscript{204} Because football requires an on-field team of eleven where only the quarterback, running back, and possibly a wide receiver or a truly superior (and truly rare) defensive player are actually non-fungible, the NFL consists greatly of fungible, easily replaced players. Thus, the majority of players, those who never touch the ball, score touchdowns, or make a noticeable impact, are for the most part expendable and their salaries would be driven \textit{down} without the presence of a union. Obviously, the rare non-fungible player in the NFL would benefit tremendously from decertification, for his talents would be available to the leagues highest bidder from the day he renounced his collegiate eligibility.

Basketball players, on the other hand, would actually thrive en masse without the presence of a union because they are all non-fungible. In basketball, each team has only five players on the court, each of which has the same opportunity to be dominant. In fact, in the past decade, championship teams have been led by players from all five positions.\textsuperscript{205} Additionally, because of the smaller rosters (basketball has

\begin{itemize}
\item \textsuperscript{201} White, 822 F. Supp. at 1435.
\item \textsuperscript{202} Schneider, supra note 103, at 847.
\item \textsuperscript{203} Id.
\item \textsuperscript{204} Id.
\item \textsuperscript{205} The five basketball positions, in modern day parlance are: point guard, off guard, small forward, power forward, and center. In fact, in basketball, arguably the five biggest stars of the past decade played different positions. At point guard, Magic Johnson led the Los Angeles Lakers to four NBA championships; at off guard, Michael Jordan has led the Chicago Bulls to four championships; at small-forward, Julius Erving revolutionized the game while leading the Philadelphia 76ers to a world championship; at power forward, the versatile Larry Bird (a hybrid power-forward-small forward) led the Boston Celtics to three championships; and at center, Hakeem Olajuwon has led the Houston Rockets to two world championships. Before the era of specialization, basketball positions were labeled merely guard, forward and center.
\end{itemize}
twelve players on each roster, while football has fifty-three), the NBA would not have the potential for huge numbers of fungible players shuttling aimlessly between franchises.

Football players also face the perils of an extremely violent profession where serious injury is fairly commonplace. The NFLPA is needed to protect the rights of these players during and after their extremely brief careers.

To the average player... who may have a brief career and crippling knee pain thereafter, the guarantees provided by the CBA are extremely important. If the purpose of a union is to make life better for its membership as a whole and to protect its members from management abuses, dissolving the NFLPA for the express purpose of creating free agency is a mistake.

The NBA, despite the large stature of its players and the physical style of play, is essentially a non-violent sport, whose players enjoy longer careers than NFL players.

Finally, the tremendous growth and popularity of college basketball in the past decade has made individual players entering professional basketball highly marketable entities on their own, and not in need of the protection of the union. In fact, the union did a disservice to these athletes when it agreed to the latest CBA which placed a cap on rookie salaries. This rookie cap is a glaring example of the NBPA doing exactly the opposite of what unions were created for: "to make life better for its membership... and to protect its members from management abuse."

The NBPA has put its

206. See Schneider, supra note 103, at 847.

207. Id. at 847-48.

208. The average playing career in the NFL is less than four years. See Aaron Bernstein, Football Owners May Be Sacked by a Jury, Bus. Wk., June 22, 1992 at 42. Further, studies show that 65% of NFL players suffer permanent injuries and the life expectancy of a professional football player is approximately 60 years, compared to 72 years for the average male. See Joe Urschel, Football Fever Is Hazardous to Our Health, U.S.A. TODAY, Feb.2, 1993 at A10. On the other hand, the average career length for NBA players between 1977 and 1992 was 4.5 years. Lawrence DeBrock, Wallace Hendricks, & Roger Koenker, The Economics of Persistence: Graduation Rates of Athletes as Labor Market Choice, 31 J. HUM. RESOURCES 512 (1996).

209. See D. Albert Daspin, Of Hoops, Labor Dupes and Antitrust Ally-Oops: Fouling Out the Salary Cap, 62 IND. L.J. 95, 110 n.99 (1986). "Top draft choices, in some sports, are accustomed to receiving upwards of forty million dollars in compensation. Considered alongside endorsement revenues, these figures suggest that today's top round draft picks are themselves commercial entities deserving of Sherman Act protection." Id.

membership in the odd position of having to seek protection from its own union.

For the above reasons, the risks that professional basketball players would take by decertifying their union are relatively slight in comparison to the great risks that football players would face with a permanently decertified union.

G. Current Terms of the NBA CBA

At the conclusion of the 1994-95 NBA season, the one year no-lockout, no strike moratorium had expired. On June 21, 1995, several players, led by Michael Jordan and Patrick Ewing, petitioned the National Labor Relations Board to decertify the players association, complaining that the union had not kept them informed about negotiations. Later that day NBA Commissioner David Stern and NBPA Executive Director Simon Gourdine announced a tentative agreement on a new six-year labor deal. On June 23, the team owners unanimously approved the collectively bargained for labor deal, but the players tabled a vote on the proposal, asking that union leadership reopen negotiations with the league. On June 30, 1995, the NBA owners announced a player lockout to begin that day.

Given the reality that attacks on the non-statutory labor exemption fail consistently, and that the NFL had gained several courtroom victories against the exemption after union sponsored decertification along with a successful court inspired settlement, numerous elite NBA players pressed for decertification of the union to escape what they felt was a disadvantageous labor agreement. Simultaneously, Ewing

211. Shappell, supra note 7.
212. Id.
213. Id.
214. Id.
215. Id.
216. Id.
filed suit seeking to restructure the salary cap, revenue-sharing methodology, free-agency rules and the college draft.  

Mysteriously, the original labor agreement proposed on June 21, 1995 was shrouded in secrecy and ratified surprisingly quickly by the players association. Players leading the decertification movement (and their agents) were bothered by the seeming urgency to get the agreement, the little time allotted the player representatives to discuss the terms with their teammates, and the urgency of the subsequent ratification vote. With the decertification movement gathering momentum, the two sides returned to the bargaining table and, in circumstances extremely similar to those seen after the filing of the White suit in the NFL, the players obtained a better agreement. Obviously the threat of decertification and its inherent risks were greater than the risks contained in this second agreement. Although this second agreement has yet to be officially put in writing, the players obtained management concession on several major issues in the second agreement. Concessions include the elimination of the proposed luxury tax, a $1 million exception for teams over the payroll cap to sign free agents, the addition of a modified "Larry Bird" exception for players who have


Late yesterday afternoon, Simon Gourdine, the union's executive director, said no agreement had been reached and that there were four to six issues, including "a couple of really tough ones," left to be resolved. Less than six hours later, he and Russ Granik, the N.B.A deputy commissioner, jointly announced the agreement.

Even as Gourdine was saying there was not yet a deal, he talked of using Federal Express to deliver term sheets outlining details of the agreement to all players by today so the player representatives can be prepared for the ratification meeting tomorrow.

Id.
223. Id.
224. Murray Chass, N.B.A. Owners Settled Rather Than Risk More, N.Y. Times, Aug. 10, 1995, at B11. "Commissioner David Stern said the agreement was riskier for the owners than the first deal the two sides made in vain in June." Id.

225. Id. NBA Commissioner David Stern said: "I didn’t want to face the risk of what decertification would bring." Id.


228. Id.
completed two seasons with the same team, and the league dropping its threatened demand for the minimum payroll to be 60% of the payroll cap, keeping it at the 75% minimum of the June 21 agreement (although down from the 80% minimum of the expired agreement). The owners do have the option of reopening the agreement in three years, however. If not reopened, the latest six-year deal will not expire until after the 2000-2001 season.

III. STATEMENT OF THE PROBLEM

Professional basketball players are extremely well paid. On this there is no disagreement. Somehow, the players have managed to attain these salaries despite years of restrictions on their earning power and freedom of opportunity via the player draft, free agency restrictions, and the salary cap, to name a few. Without these restrictions, how much would they earn, how much could they earn? There are very few questions of this ilk being asked concerning people employed in the world of law, medicine, and business. In these well paying, professional fields, the unbridled competition of the free market allows people the ability to garner the highest possible salary in the location that they choose to work in.

On the other hand, the common worker, with few distinctive and/or marketable skills seeks the protection of a union to guarantee certain wages and benefits. Unions were developed for the singular purpose of protecting workers from management abuse concerning salary and working conditions.

Thirty years ago, professional basketball players faced management abuse as the NBA and other professional basketball leagues developed. To escape this abuse the players unionized, and the past thirty years, with the exception of various fits and starts, has seen a tremendous growth in the popularity of the league and a tremendous growth in player salaries.

229. Id. The "Larry Bird" exception allows teams to re-sign their veteran free agents without regard for the salary cap.
230. Id.
231. Id.
232. See Dave Krieger, NBA's County Fair Opens for Business, ROCKY MOUNTAIN NEWS, July, 12, 1996 at IC.
233. See discussion supra Part II.B.
But now, these players are actually restricted by the presence of their union because courts refuse to interfere with the collective bargaining process and rule on obvious restraints of trade present in CBAs.\textsuperscript{234} The rulings in Wood, Bridgeman and Williams all relied on the fact that arms length collective bargaining had taken place between the players union and management.\textsuperscript{235} These cases all upheld various restraints of trade that restricted the players freedom of opportunity.\textsuperscript{236} The courts are correct in relying on the fact that arms length collective bargaining took place in agreeing to the CBAs, for that is the obvious purpose of labor and anti-trust law. However, the courts are incorrect in failing to attempt creative solutions to a distinctive problem.

The NBPA (along with other professional sports unions), is tremendously far removed from the common labor union.\textsuperscript{237} The courts should admit this and thus attempt to fashion creative solutions to the problems facing professional basketball players. Because they have not, the players only means of attaining complete freedom to earn their true market value is via decertification.

The NFLPA briefly decertified in the early 1990s and gained substantial concessions from the NFL as a result.\textsuperscript{238} For these reasons, professional basketball players should have decertified during the summer of 1995 when they had the opportunity. When the current CBA expires after the 2001 season the players should vote to decertify their union in order to create true free agency and achieve their true worth.

IV. ANALYSIS

Some people find it hard to sympathize with players making millions of dollars who complain about where they have to play. However, to understand the underlying inequity of the situation, suppose, instead of a basketball player, that the victim of the restraint on freedom of choice in connection with employment was a regular college student. Suppose further that this college student was a lawyer in train-

\textsuperscript{234} See discussion supra Part II.
\textsuperscript{235} See discussion supra Part II.C.3-5.
\textsuperscript{236} See discussion supra Part II.C.3-5.
\textsuperscript{237} Corcoran, supra note 174, at 1056-59.
\textsuperscript{238} See discussion supra Part II.E.
ing on the east coast and wanted to go to one of the top law schools in the east in order to receive the finest possible education and training so that he or she could become the best lawyer possible. Upon graduating from law school, assume that this same law student was told that he or she could not negotiate with any law firm in the country. More precisely, this student could not negotiate with law firms in the regional area in which he or she wanted to practice and live, but rather, his or her rights upon graduation were assigned to the Dallas, Texas branch office of a large national law firm. This was so because the last several years had been rather unsuccessful for that office. Additionally, this graduating law student could sign only for a pre-determined amount of money.

Assume further that upon fulfilling this first contract, and having proven himself or herself to be a successful attorney, this lawyer could not offer his or her services to the highest bidder because every law firm had a ceiling on salaries, that ceiling being a pre-determined amount relative to the average income of American law firms. And finally, if this lawyer wanted to go to a firm back east that was under this limit, if his salary caused that firm to go over the predetermined limit, that firm would have to pay a fixed amount into a general pot which would be given to weaker and less well run law firms. Of course this arrangement would defy logic and common sense, but it is exactly this logic under which basketball players enter the professional basketball market and move within the market after they have entered into their chosen profession. It is against this logic that this comment is written.

Before the growth of professional sports and their unions, salary abuse of players was generally quite commonplace.239 However, because of the incredible growth of interest in professional basketball and its individual players and the attention paid to these players (even in college and high school) in today's society, combined with the strength and

239. Krasnow & Levy, supra note 1, at 756 n.22. "One sportswriter commented: '[w]hile big league players are remarkably well paid, it is equally remarkable they aren't paid more.' Coughlan, Baseball's Happy Serf: The Player, SPORTS ILLUSTRATED, March 5, 1958, at 30. According to Judge Frank, "if the players [are to] be regarded as quasi-peons, it is of no moment that they are well paid; only the totalitarian-minded will believe that high pay excuses virtual slavery." Gardella v. Chandler, 172 F.2d 402, 410 (2d Cir. 1949).
prevalence of the role of agents (some would say too prevalent) in representing individual players, it is not realistic that players will be abused by management as they had been in the past. Therefore, union organization in the NBA is no longer needed.

A. Successful Decertification by the NFL

Since the creation and growth of professional sports unions, individual players have frequently litigated as restraints of trade numerous and varied provisions in the labor agreements entered into between their unions and management. For the players "the collective bargaining playing field in professional sports has been littered with defeats."242

Since the landmark decision, the 1976 holding in Mackey v. National Football League that upheld restraints on competition within the market for players as falling within the Sherman Act, players attempting to escape the restraints of the provisions negotiated by their own unions have faced an uphill and generally fruitless struggle. Making these efforts increasingly more difficult was the Eighth Circuit's holding in Powell III. The Powell III decision further insulated disputes between professional athletes and management by creating the beyond impasse standard which upheld various limitations on the rights of players to sign with other teams in addition to extending the time period for

241. See, e.g., Wood v. National Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987) (upholding draft and salary cap as protected by non-statutory antitrust exemption because terms were collectively bargained for); Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976) (claiming football team owners cannot be sued for alleged antitrust violations arising out of collective-bargaining agreement talks); Williams I, 857 F. Supp. 1069 (S.D.N.Y. 1994) (upholding draft and salary cap as protected by non-statutory antitrust exemption because terms were collectively bargained for); Robertson v. National Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975) (upholding player draft as not a violation of antitrust laws).
242. Van Duch, supra note 6.
243. 543 F.2d 606 (8th Cir. 1976).
245. 930 F.2d 1293 (8th Cir. 1989).
246. See discussion supra Part II.E.
which these limitations could extend under a collective bargain-
ning agreement.\footnote{247}

The "littered with defeat" playing field in the NFL changed after Powell III. After this ruling, the NFL decerti-
fied its union, plaintiffs in various suits were awarded treble damages, and other plaintiffs were awarded total free agency.\footnote{248} At this point, NFL superstar Reggie White brought a class action suit on behalf of himself and all other players whose contracts were to expire as of February 1, 1993, asking for treble damages and free agency.\footnote{249} Fearing another loss in the courtroom and unprecedented free agency amongst its rank and file, the NFL came to the bargaining table and a much more player-friendly collective bargaining agreement was reached.\footnote{250} The players were able to negotiate a much better CBA only after union decertification and the courtroom victories by individuals who did not have to hurdle over federal statutory labor exemptions previously enjoyed by professional sports ownership. The NFL players later decided that unionization was a better alternative than complete decertification and a union free existence, so they recertified the NFLPA.\footnote{251} This recertification by the NFL players was an appropriate move, for permanent decertification of the NFL players union would have adverse effects which NBA decertification would not.\footnote{252}

If the players of the NFL had not decertified their own union, what kind of CBA would they have been forced to ac-
cept? How much profit would ownership be making on the backs of the players, who are the product in professional sports? How much of that profit would the players see? Certainly the players would not be able to approach the free

\footnote{247. Powell III, 930 F.2d at 1302-03 (determining that after expiration of agreement, the labor exemption extended indefinitely beyond any impasse between labor and management). "This decision effectively prohibited players from bringing antitrust challenges to existing restraints and immunized other unilaterally imposed restraints for an indefinite period of time. The result was to dramatically increase the bargaining power of the owners." Corcoran, supra note 174, at 1064.}


\footnote{249. See White v. National Football League, 822 F. Supp. 1389 (D. Minn. 1993).}

\footnote{250. Corcoran, supra note 174, at 1064.}

\footnote{251. Id. at 1063.}

\footnote{252. See discussion supra Part II.G.1.}
agency and compensation scale that they now enjoy. After Powell III—but before decertification—the NFL knew it had the upper hand in negotiating strength, and they were intent on using it. 253

The clear picture, that evolves after more than five years of legal wrangling with the league, is that the decertification process works when professional athletes are seeking to escape from restraints on their freedom.

B. Recent Challenges to NBA Collective Bargaining Agreements

1. Robertson v. National Basketball Ass’n

The true legacy of the Robertson holding is the solidification of judicial reluctance to dictate labor provisions in professional sports. 254 Furthermore, the courts will do as much as possible to keep the parties out of the court system and within a collective bargaining arrangement. 255 By merely accepting that these provisions are the result of collective bargaining, past and current courts continue to avoid firm judicial resolution of whether or not issues such as the draft, salary cap and free agency restrictions are restraints of trade and, thus, not allowed non-statutory protection. Instead courts simply allow these issues to fail under the backdrop of labor and antitrust exemptions. 256

The 1976 CBA, emanating from the Robertson settlement, was meant to create an eleven-year plan for handling free agency. 257 Unfortunately for the owners, player salaries under this most recent CBA had by 1983 risen to an average of more than $200,000 per year. 258 Therefore, financial ruin was predicted by the owners, 259 who came up with the idea of

253. Corcoran, supra note 174, at 1063.
256. See, e.g., Wood, 809 F.2d at 954; Williams I, 857 F. Supp. at 1069.
257. Schneider, supra note 103, at 828.
258. Id. at 830.
259. Id.
the salary cap in order to, inter alia, to limit player salaries.\textsuperscript{260}

Without question, the league has prospered since its low point in the early eighties.\textsuperscript{261} And while the cap has certainly helped ensure that teams do not lose money, whether or not the cap itself has been the league-wide savior as some argue is certainly debatable. Fortunately for NBA Commissioner David Stern, professional basketball owners, and all other advocates of salary caps, this cap was instituted at the same time that three of the greatest basketball players of all time were blossoming as talents and marketers of the game of professional basketball: Larry Bird, Magic Johnson, and Michael Jordan.\textsuperscript{262}

More importantly, the salary cap is a clear cut labor restraint.\textsuperscript{263} Despite the fact that player salaries have skyrocketed over the past 12 years,\textsuperscript{264} the players own union has been a hindrance to the players ability to achieve true market value for their services. This has occurred because the presence of the union (and thus a collectively bargained for agreement) allows courts to continue to uphold the non-statutory labor exemption for professional basketball, and more directly, to acquiesce to restraints such as the salary cap and the draft.

\section{2. Wood v. National Basketball Ass'n}

When Leon Wood entered the 1984 NBA draft he had highly marketable basketball skills as a former college All-American and Olympic gold medal winner.\textsuperscript{265} Unfortunately for Wood, "[a]t the time of the draft, the 76ers' team payroll exceeded the amount permitted under the salary cap. The 76ers therefore tendered to Wood a one-year $75,000 contract, the amount stipulated under the salary cap."\textsuperscript{266} Hence,

\begin{footnotesize}
\textsuperscript{260} Id.
\textsuperscript{262} Bird and Johnson entered the league in 1979 and Jordan was a rookie in 1984.
\textsuperscript{264} See What's the Deal?, supra note 3. "The six year deal may allow average salaries to grow to as much as $3 million per year." Id.
\textsuperscript{265} Wood v. National Basketball Ass'n, 809 F.2d 954, 956 (2d Cir. 1987).
\textsuperscript{266} Id. at 958.
\end{footnotesize}
because of an agreement reached between the union that supposedly represented his interests (the NBA players union, like most unions, has the right to represent future players\textsuperscript{267}) Wood was in the awkward position of being an individual with highly marketable and highly desirable skills who, nonetheless, could not market those skills to anyone other than the team who had his draft rights. Moreover, the team that had his draft rights was restricted from offering Wood his true value because of the salary cap.\textsuperscript{268}

Because the draft and salary cap were "embodied in a collective agreement between the employer or employers and a labor organization reached through procedures mandated by federal labor legislation,"\textsuperscript{269} the second circuit found that there was "no reason to ignore federal legislation that explicitly prevent[ed] employees, whether in or out of a bargaining unit, from seeking a better deal where the deal [was] inconsistent with the terms of a collective bargaining agreement."\textsuperscript{270} All four of Wood's arguments for striking down the draft and the salary cap were rejected by the court.\textsuperscript{271} These arguments were that his superior abilities and high draft status enabled him to bargain individually,\textsuperscript{272} that the draft and salary cap "assign[ed] him to work for a particular employer at a diminished wage,"\textsuperscript{273} that the provisions disadvantage[d] new employees,\textsuperscript{274} and finally "that the draft and salary cap [were] illegal because they affect[ed] employees outside the bargaining unit."\textsuperscript{275} Essentially these provisions were struck down because Wood was arguing against national labor policy which upholds collective bargaining agreements.\textsuperscript{276}

However, labor policy cannot be expected to have foreseen, nor be designed for, a situation where an employer self-imposes a cap on how much it spends on worker salaries because management was paying them too much money, and could not stop themselves! Although the courts' respect for

\textsuperscript{267} Id. "Indeed the National Labor Relations Act explicitly defines 'employee' in a way that includes workers outside the bargaining unit." Id. at 960.

\textsuperscript{268} Id.

\textsuperscript{269} Id. at 959.

\textsuperscript{270} Id. at 960.

\textsuperscript{271} Wood, 809 F.2d at 959.

\textsuperscript{272} Id.

\textsuperscript{273} Id.

\textsuperscript{274} Id.

\textsuperscript{275} Id. at 960.

\textsuperscript{276} Id.
the collective bargaining process itself is certainly warranted, reliance on federal labor policy, in the context of the professional sports industry, is certainly misplaced considering how dislike professional sports unions are from common labor unions.

In disposing of Wood's second argument, that the draft and salary cap "assign[ed] him to work for a particular employer at a diminished wage," the second circuit relied on the hiring hall mechanism in analogizing Wood's status and defeating this argument. This reliance is wholly misplaced and errant. Hiring halls are usually incorporated into labor-management agreements in order to benefit both sides. In effect, both sides are saved the time and expense of job placement by having the employee placed into a compatible position with the employer via the hiring hall.

This analogy fails for several reasons. First, in professional basketball the services of the players are so unique that the athlete (usually via an agent) negotiates his wages independently of the union. Second, the purpose of hiring halls is to facilitate job placement, while the draft and salary cap actually impose employment barriers by limiting who a player can work for. And finally, the employee does not have to work for whom the hiring hall places him, while the first-round draftee is forced to negotiate only with the team that drafted him.

In rejecting Wood's third claim, that the draft and salary cap disadvantage[d] him since he was a new employee, the court once again narrow-mindedly relied on analogizing Wood's status to that of the industrial worker. The court made this analogy despite the fact that the two have nothing in common absent the collective bargaining agreement. Because the court made no effort to differentiate the highly skilled, basketball player and the generalized, standard wage scale compensated industrial worker, the player's freedom is restricted by labor policy developed for the protection of the

277. See discussion supra Part II.C.3.
278. See discussion supra Part II.C.3.
280. Id. at 115.
281. Id.
282. Id.
283. See discussion supra Part II.C.3.
common worker, not the specialized professional basketball player. This lack of vision and creativity by the court system has left the players in the precarious situation of having to go on strike and incur the wrath of the fans (not to mention the loss of earnings in a career with a very short window of earning opportunity), or decertify their own union in order to escape various restraints on their economic freedom of opportunity.

Because of the agreement between the NBPA and the NBA which included the salary cap and draft, Wood stood to lose hundreds of thousands of dollars merely because the 76ers drafted him instead of any of the teams ahead of or behind the 76ers in the draft. Such an arbitrary system seems to have no basis in a free market economy, especially one in the purely entertainment based industry that is professional basketball.

3. Bridgeman v. National Basketball Ass'n

Although the settlement of the Bridgeman lawsuit led to a collective bargaining agreement, it represents yet another loss for the players in their legal struggles with the NBA. Despite the fact that the business of the NBA was growing rapidly, that teams were increasingly profitable in the middle to late eighties, and that player support for the cap was wavering, the union agreed to the continued imposition of the draft and the salary cap as part of the settlement of the Bridgeman suit. The union leadership was apparently swayed by the management's "sky is falling" arguments that without a cap protecting owners from themselves the league would teeter on the precipice of disaster as it had in the early eighties before the advent of the salary cap. The court, by recognizing the validity of the collective bargaining agreements after their expiration, cost the players a great deal of bargaining leverage as to creating new terms. Undoubtedly this factored heavily into negotiations for a new CBA.

285. Wood v. National Basketball Ass'n, 809 F.2d 954, 958 (2nd Cir. 1987). Eventually, after Philadelphia completed several roster maneuvers to free up space for Wood, they signed him to a four-year $1.02 million dollar contract. Id. 286. Welling et al., supra note 108, at 72. 287. Id. "By 1986-87, all 23 (teams) should make money." Id. 288. Id. 289. See discussion supra Part II.C.4.
4. National Basketball Ass'n v. Williams

The players had demanded, during negotiations over a CBA in 1994, that the restrictive draft and salary cap provisions be eliminated.\(^{290}\) When the league refused, and later sought an injunction to continue these practices absent an agreement, the players and management were in court again to determine the validity of restrictive provisions of a CBA.\(^{291}\) Once again, as seen in *Wood* and *Bridgeman*, the court held that "antitrust immunity exists as long as a collective bargaining relationship exists,"\(^{292}\) so the players' freedom was curtailed as long as their union existed.

The ramifications of *Williams* is the stunning finality of its ruling. Absent decertification, antitrust immunity will protect NBA ownership from antitrust attack against restrictive provisions in the CBA negotiated by the NBA and the NBPA. The loss that the players suffered in this case signaled, once again, that the players would not get freedom from the courts from any terms entered into by their union, no matter how restrictive the terms happened to be. This ruling, including the near urging of Judge Duffy that the players decertify,\(^{293}\) paved the way for the unsuccessful, yet properly conceived, decertification movement.

While law review articles will continue to be written attacking the legality of these rulings, and players will continue to sue their leagues seeking protection from these restraints, the bottom line is that courts will not disturb CBAs (or even the terms of expired CBAs) as long as the players are represented by unions. While this may be appropriate in the traditional labor-management environment, its precision in the field of professional sports is questionable at best, improper at worst. But the courts have proven that it will remain.

5. Current CBA

The league operated in 1994-95 without a collective bargaining agreement.\(^{294}\) And it was against this backdrop of a league without a CBA that the decertification movement of the summer of 1995 was led. This decertification movement

\(^{290}\) Welling et al., *supra* note 108, at 72.
\(^{291}\) National Basketball Ass'n v. Williams, 45 F.3d 684, 686 (2d Cir. 1995).
\(^{292}\) *Id.*
\(^{293}\) *See* discussion *supra* Part II.D.
\(^{294}\) *See* Shappell, *supra* note 7.
failed by a 226-134 vote, and a new six year deal between the players union and management was immediately entered into. But according to the attorney who led the decertification movement, "[t]he players will regret ... (the new CBA)," insisted [Jeffrey] Kessler, while predicting future challenges to the NBA's 'way of doing things' on antitrust grounds."

V. Proposal

At the conclusion of the current six year deal, the players of the NBA should decertify their union. The player draft, the salary cap and other restrictions placed upon the players are clearly labor restraints, protected only by the non-statutory labor exemption of collective bargaining. The players should test these claims in a court of law, absent such protection, and allow a jury to decide if these are restraints, much as happened in Powell-McNeil.

When the players in the NFL decertified their union, the NFLPA was still in existence, but it had been voluntarily relegated to the status of a voluntary professional organization. While decertified, the NFLPA contended that its role was simply "to further the interests of active and former NFL players using methods other than collective bargaining." The membership of the NBPA could thus choose to deem its former union as a voluntary professional organization. Alternatively, certain sub-groups of players could form their own units for purposes of collective bargaining in order not to be bound by the terms negotiated by the representatives of the other players. This would be most realistic if all superstars broke into their own sub-group. Since the decertification movement of the summer of 1995 was led mainly by "superstars," this seems to be a realistic approach. Or simply, professional basketball could move forward wholly without a union and the protections provided by it, and allow the free market to determine the worth of the players.

295. See Van Duch, supra note 6.
296. Id.
297. Id.
299. Id.
300. WEISTART & LOWELL, supra note 27, § 5.04 at 798.
Management of professional sports leagues has always held firmly to the argument that without the draft, various types of salary caps, and other player restraints, large market, big-wallet franchises would dominate the leagues.\(^{301}\) This would in turn drive smaller market, lesser financed teams out of competition and, thus, out of the league. The NBA's two-fold argument—that teams in small markets such as Milwaukee and Salt Lake City should have live access to one of the finest entertainment outlets in today's society, and that the league itself is better for having teams in these markets—is inherently improper. However, if the NBPA makes this argument because consolidation would mean less available jobs for its rank and file, the argument is more plausible.

The finest plays, symphonies, and art museums are historically in large metropolises such as New York, Chicago, Washington, D.C., San Francisco and Los Angeles. From a pure business standpoint, the finest law firms are traditionally based in large cities as well. From a pure entertainment standpoint, Hollywood is where the vast majority of movies are made, yet people throughout the country flock to the theaters. For these reasons, it is not incorrect to assume that the finest basketball teams should be in the larger cities, that the people who are the best at what they do should be able to perform in the largest markets where they can command the top dollar possible (if they choose to work and live in these large markets); and finally, the NBA, with its athletes evolving into entertainers, could still be enjoyed by citizens of small markets who could enjoy watching Michael Jordan's grace on the television screen, much as they can marvel at their favorite stars of the big screen.

Assuming that the NBA is better off with teams in a wide variety of national locales, the players would be better off without a union that agrees to restrictive terms during the collective bargaining process. The arguments advanced by owners of professional sports teams throughout the years, that the draft, assorted restrictions on player movement, and the advent of salary caps are needed in order to maintain competitive balance are fallacious, and the NBA would actually prosper without these restraints.

Wealthier teams in large cities will not attract all the top players. First, athletes want to perform. Unlike a successful law firm, which can certainly find room year after year for the best and the brightest to perform, a basketball team has only a certain number of games in which to play, and only a certain number of minutes in which to play these games. No player will sign with a team if it means diminished playing time. Second, athletes grow up in various locales and thus have markedly different tastes. Certainly many would prefer to earn a living in their hometown, be it in Los Angeles, Atlanta or Portland.

Third, as seen for example, in baseball, the best run teams, not those in the largest markets will succeed, even with the relatively unfettered free agency seen in baseball. In the 1995 baseball playoffs, Cincinnati faced Atlanta for the National League Championship, while Cleveland and Seattle did battle for the American League Championship. Meanwhile, such major market teams such as the New York Mets, San Francisco Giants, and California Angels (southern California), did not even make it to post-season play.

Furthermore, the draft has not worked to strengthen weaker teams. The New Jersey Nets and Los Angeles Clippers are prime examples of two teams that have had high draft choices for several years, yet because of sheer ineptitude and mismanagement, they remain uncompetitive year after year. These franchises should not be rewarded for bad management with high draft choices. Nor should an extremely talented individual be forced into a franchise that is poorly run on a consistent basis. These franchises should be forced to be competitive or they should perish. While some may point to the rise of the Orlando Magic in the NBA (the Magic made it to the NBA finals in only their seventh year in existence) as an example that the draft works as it should, this is more an accurate reflection of a well run franchise that has an eye for talented, emotionally stable individuals, that develops its players well, makes the proper decisions as to who should coach the team, and treats its players well.

302. For example, Shaquille O'Neal, when he came out of college, most likely would not have signed with the New York Knicks, for they already had all-star Patrick Ewing playing the same position for them.
303. These two franchises are in the two largest metropolises, New York and Los Angeles.
enough to have a league-wide reputation solid enough that high profile free agents are attracted to their franchise. These less obvious, more intangible traits are what make a professional basketball franchise competitive and profitable, not the quick fix simplicity of the draft or restricted free agency. Furthermore, if a team has performed poorly for several years, it seems to make eminently more sense to give that team the opportunity to sign several college stars if they wish, rather than the one they are normally allowed to draft.

At the root of the inherent problems that athletes face in dealing with stubborn ownership is that the players are incredibly well paid for participating in games that a great deal of the population grew up participating in and enjoying. While most do not deny that those who make it to the professional level of sports are supremely skilled at what they do (and highly entertaining), society continues to be incredulous at the stratospheric salaries paid to these individuals, even as many pay increasingly escalating ticket prices, stay glued to the television during numerous sporting events, and, to an extent, live and die with the fortunes of favorite teams. Because these are "games" the salaries are seen as "out of line" despite the fact that the average salary of NBA players (of which there are approximately 350) roughly mirrors that of the top 350 individuals in various other professions, such as doctors, lawyers, and CEO's of major companies. Add to that the fact that professional basketball players, like other professional athletes, have a tiny window of opportunity in which to earn their salaries, and the salaries are relatively unremarkable.

Unfortunately, athletes cannot escape the current swell of popular opinion that it is wrong for these individuals to strike. For this reason, owners—who are vastly wealthier than the players—are able to paint a picture of the players as being out of touch for having the audacity to consider striking despite their high remuneration; the general feeling during the most recent baseball strike was outrage and incredulity that the two sides could not agree on the best way to divide a billion dollar pie. Therefore, the players tend to be backed further against the wall than the owners when it comes to public relations in regard to strikes and lockouts.

For these reasons, legal and otherwise, the best course of action for the NBA players is to decertify their union upon
the expiration of the most recently negotiated six-year CBA. Upon decertification, the players will stand a realistic chance in the courtroom to have the player draft, free agent restrictions, and the salary cap found to be illegal restraints of trade. If decertification occurs, and these restrictions are deemed illegal, then the owners will be forced to run their teams well in order to compete in the marketplace. This will lead to better management overall, better player development, wiser talent decisions, and better and greater competition not only in the marketplace but on the court as well. Those franchises that are not well run, and thus not successful, will have to be either sold, moved, or folded. Certainly there will be no shortage of potential buyers for these teams.

VI. CONCLUSION

The days of professional basketball players needing the protection of a union are long past. When Krasnow and Levy wrote their article on unionization\(^ {304}\) the players were in dire need of just such protection. They currently need greater freedom to earn their market value, and the only thing preventing this freedom appears to be the very existence of the union created to protect them. The NBPA has been very successful in gaining numerous advantages for its players, both in terms of respect from the owners and increased compensation. It is clear that with the success of the NBA and the popularity of its players, the players of the NBA do not need the union for protection. The NBPA has run its course and should be decertified, for the betterment of the players and the product.

_Eric R. McDonough_
