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What is the NBA?

Nadelle Grossman

nadelle.grossman@marquette.edu

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WHAT IS THE NBA?

NADELLE GROSSMAN^{*}

ABSTRACT

The National Basketball Association's (NBA) organizational structure is curious. While courts at times refer to the NBA as a joint venture, and at other times as a single entity, their analyses are conducted not for state organization law purposes, but to assess the NBA's compliance with federal antitrust law. Commentators, too, consistently address the NBA's organizational structure only under antitrust law and not state organization law. As I argue, given the different purposes of these two legal regimes—antitrust law to protect consumers through preserving competition, and state organization law to ensure managers are faithful to the business purpose and to create a default structure among owners and managers—conclusions about the NBA's organizational structure for purposes of compliance with antitrust law do not control the analysis of the NBA's structure for purposes of state organization law.

To fill the gap in case law and commentary, this article analyzes the NBA's organizational form under state organization law. This analysis is important because the NBA's organizational form impacts the rights and duties of the member team-owners of the NBA. If, for example, the NBA is a joint venture partnership under state organization law—that is, an association of team owners who have come together to pursue a limited scope business for profit—then, by default, its members would owe fiduciary duties to the other members and any member could seek judicial expulsion of a recalcitrant member.

^{*} Associate Professor of Law, Marquette University Law School. Any mistakes are my own.

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I. INTRODUCTION

When Los Angeles (L.A.) Clippers' owner Donald Sterling's racist remarks were made public, many urged the other National Basketball Association (NBA) team-owners to expel Sterling under the provision of the NBA Constitution that gives NBA member team-owners the right on a three-quarter vote to expel a fellow member.¹ However, the existence of that right was questionable, as none of the events that triggered this expulsion right clearly applied.²

Ultimately, the probate court presiding over the Sterling family trust that held the Clippers found that Rochelle Sterling, Donald Sterling's ex-wife, could remove Donald Sterling as co-trustee from the trust and sell the team.³ The matter was, thus, resolved without the NBA team-owners having to force such a sale. However, mysteriously absent from the public outcry and calls for action was any discussion about whether Donald Sterling breached fiduciary duties

¹ See, e.g., Greg Botelho et al., *NBA Commissioner Bans Clippers Owner Sterling, Pushes to 'Force a Sale' of Team*, CNN, <http://www.cnn.com/2014/04/29/us/clippers-sterling-scandal/> (last updated Apr. 29, 2014); Kevin Trahan, *How NBA Owners Can Force Donald Sterling to Sell the Los Angeles Clippers*, SB NATION (Apr. 29, 2014), <http://www.sbnation.com/nba/2014/4/29/5665502/donald-sterling-suspension-la-clippers-sale-adam-silver>; see also NBA, CONSTITUTION AND BY-LAWS OF THE NATIONAL BASKETBALL ASSOCIATION, at art. 13 (2012) [hereinafter NBA CONSTITUTION].

² See Botelho et al., *supra* note 1; Trahan, *supra* note 1; see also NBA CONSTITUTION, *supra* note 1, para. 13.

³ See Eric Kelsey, *Sterling's Last Bid to Halt L.A. Clippers Sale Blocked by Court*, REUTERS (Aug. 13, 2014), <http://www.reuters.com/article/2014/08/14/us-nba-clippers-idUSKBN0GD29H20140814>.

owed to the NBA by making racist remarks, which clearly went against the best interests of the NBA. Moreover, no one questioned whether an individual team-owner might have sought the judicial expulsion of Sterling apart from any right of expulsion set out in the NBA Constitution. However, such duties and rights might exist as a matter of state law, if the NBA were a partnership.⁴

In fact, for an organization that has been around for sixty-eight years,⁵ the NBA's structure is surprisingly opaque. On one hand, the relationship among the members of the NBA is clearly contractual. The NBA's own constitution describes the NBA as a "contract among the Members."⁶

On the other hand, the NBA is more than just a contract among its members. The NBA Constitution even describes the NBA as an "[a]ssociation."⁷ An association is an organization in which people unite to pursue a common purpose.⁸ If the purpose of the association is commercial in nature—a pursuit of profits through business—and has not been created through any other explicit organizational form, then the association is a partnership.⁹ If the purpose is to pursue a charitable or other nonprofit purpose, then the association is a nonprofit unincorporated association, or NUA.¹⁰ Either way, an association is not merely a contractual relationship, and it triggers the application of specialized rules.

Some courts have characterized the NBA's structure. For example, the Ninth Circuit described the NBA as a New York joint venture.¹¹ A joint venture is a for-profit business formed to pursue a specific purpose.¹² In contrast, the Seventh Circuit held that the NBA looked more like a "single entity" than a joint venture.¹³ However, both of these decisions came in the context of challenges to the NBA's compliance with federal antitrust laws.¹⁴ Given the different purposes behind antitrust law and state organizational law—the former to protect

⁴ See discussion *infra* Part IV.

⁵ See generally Leonard Koppett, *The NBA—1946: A New League*, NBA (Dec. 7, 2007), http://www.nba.com/heritageweek2007/newleague_071207.html.

⁶ See NBA CONSTITUTION, *supra* note 1, at art. 2.

⁷ See *id.* at art. 1.

⁸ See BLACK'S LAW DICTIONARY 148 (10th ed. 2014) (defining an association as the "gathering of people for a common purpose" or "[a]n unincorporated organization that is not a legal entity separate from the persons who compose it").

⁹ See *infra* note 99 and accompanying text.

¹⁰ See *infra* note 134 and accompanying text.

¹¹ See *Nat'l Basketball Ass'n v. SDC Basketball Club, Inc.*, 815 F.2d 562, 564 (9th Cir. 1987).

¹² See *infra* note 127 and accompanying text.

¹³ See *Chi. Prof'l Sports Ltd. P'ship v. Nat. Basketball Ass'n*, 95 F.3d 593, 600 (7th Cir. 1996).

¹⁴ See discussion *infra* Part IV.A.

consumers through preserving competition,¹⁵ and the latter to ensure managers are faithful to the business owners and to create a default structure¹⁶—conclusions about the NBA's structure for antitrust law compliance purposes do not control the analysis for state organization law purposes.

Yet, it is essential to determine what the NBA's structure is for purposes of state organization law because of the consequences that might flow from that structure. Thus, this article considers how to legally categorize the NBA for purposes of state organization law.

Importantly, the cooperative nature of NBA team-owners' profit-seeking and the absence of any other explicit organizational form suggest that the NBA is a partnership. As a partnership, team-owners would owe the NBA and the other members fiduciary duties.¹⁷ These include the duty to act in the best interests of the NBA.¹⁸ In the case of Donald Sterling, clearly his conduct was not in the best interests of the NBA or the professional sport of basketball, as his racist remarks reflected negatively on the sport and on the league. Moreover, in a partnership, each partner, by default, has a right to seek a judicial expulsion of a fellow partner who makes it not reasonably practicable to carry on business with that partner.¹⁹ Here, Sterling's conduct made it not reasonably practicable to carry on partnership business with him, for the other members could no longer trust or cooperate with such an offensive person. As Michael Jordan, NBA Hall-of-Famer and owner of the Charlotte Hornets, expressed after Sterling's comments were revealed, "[a]s an owner, I'm obviously disgusted that a fellow team owner could hold such sickening and offensive views."²⁰ This expulsion right would exist apart from the members' collective right to vote to expel another member under the NBA Constitution.

It is odd that the NBA's organizational structure remains shrouded in mystery given the NBA's outsized role in our society and economy. This article fills that void by analyzing the NBA's organizational structure under the two potential frameworks that apply to it—partnership law and NUA law. As this article explains, if neither of these legal schemes applies to the NBA, then, by

¹⁵ See *infra* note 171 and accompanying text.

¹⁶ See *infra* notes 173–74 and accompanying text.

¹⁷ See *infra* note 106 and accompanying text.

¹⁸ See *infra* note 108 and accompanying text.

¹⁹ See discussion *infra* Part III.B and accompanying text.

²⁰ ESPN.com News Services, *Magic, MJ Weigh in on Sterling*, ESPN, http://espn.go.com/los-angeles/nba/story/_/id/10848070/michael-jordan-magic-johnson-lash-donald-sterling-purported-comments (last updated Apr. 27, 2014).

default, contract law governs the relationships by and among the team owners.

The following is the organizational structure of the rest of this article:

First, Part II provides an overview of the NBA's structure. That discussion emphasizes the nature of the relationship by and among the team owners as well as their purposes for associating.

Next, Part III explains the two potential legal structures that fit the NBA—partnership and NUA. That discussion also explains that contract law governs if the NBA is neither a partnership nor an NUA. It explains the relationship between partnership law and NUA law, on the one hand, and contract law on the other.

Then, Part IV analyzes the NBA under these alternative structures. First, it explains why conclusions about the NBA's organizational structure for purposes of antitrust law do not control that analysis under state organization law. Next, it explains why New York law governs the organizational law analysis. Finally, the discussion explains why the NBA is best described as a partnership. Alternatively, it explains why the NBA is an NUA.

Finally, Part V reviews key consequences that flow from the NBA's organizational structure, focusing specifically on the impact of that conclusion on situations such as that involving Donald Sterling.

II. NBA STRUCTURE

The NBA is the national body organized to “operate a league consisting of professional basketball teams”²¹ The NBA league currently consists of thirty teams.²²

The NBA has not been incorporated, formed as a limited partnership or limited liability company, or organized through any other organizational form by making a filing with a Secretary of State. Rather, it is constituted through two private agreements—its Constitution and Bylaws.²³

By and large, the NBA Constitution sets out the governance structure of the NBA, including the rights and responsibilities of the team owners, the board of

²¹ NBA Constitution, *supra* note 1, art. 2.

²² See FAN RELATIONS FAQ, NBA.COM, http://www.nba.com/help/fan_relations_faq.html#fanfaq14 (last visited Nov. 23, 2014).

²³ Ashby Jones, *NBA's Decision Against Clippers' Owner: Is it Legal?*, WALL ST. J. L. BLOG (Aug. 29, 2014, 7:11 pm), <http://blogs.wsj.com/law/2014/04/29/nbas-decision-against-clippers-owner-is-it-legal/>. See generally NBA Constitution, *supra* note 1.

governors, and the Commissioner.²⁴ The NBA Bylaws, in contrast, lay out the framework for the operation of the NBA, including player requirements.²⁵

The NBA Constitution provides that it and the “By-laws constitute[] a contract among the Members of the Association.”²⁶ Still, as Part III explains, this language does not preclude a finding that the NBA is a partnership or a NUA, depending on the purpose for which the NBA is operated.²⁷ In fact, partnerships and NUAs are themselves creatures of contract.²⁸

According to its Constitution, the NBA is not operated for profit.²⁹ This is consistent with the NBA Constitution’s principles of organization, which state that “[t]his Association is organized to operate a league consisting of professional basketball teams, each of which shall be operated by a Member of the Association.”³⁰ In other words, the NBA Constitution declares a non-commercial purpose.

Despite this, the NBA is not tax-exempt.³¹ Potentially, the NBA has not elected to be treated as a tax-exempt organization because it actually earns a profit. However, the NBA could have chosen to not be treated as a tax-exempt entity for reasons not tied to its generation of profits, such as the fact that as a for-profit, it need not publicly file tax reports.³²

A broader view of the NBA’s financial arrangements, though, calls into question whether the NBA is in fact a non-profit. First, while not every team

²⁴ See generally NBA Constitution, *supra* note 1.

²⁵ See generally *id.*

²⁶ *Id.* at art. 2.

²⁷ See discussion *infra* Part III.

²⁸ See discussion *infra* Part III.

²⁹ NBA Constitution, *supra* note 1, art. 2.

³⁰ See *id.*

³¹ David Van Den Berg, *NFL’s Tax Exemption Faces Scrutiny*, TAX ANALYSTS (Nov. 25, 2013), <http://www.taxanalysts.com/www/features.nsf/Articles/F0E1DC440C69E6A785257C2E006AEE33?OpenDocument>. The fact that the NBA is not tax-exempt was verified by searching the IRS database of Form 990s, which tax-exempt organizations must file. See EXEMPT ORGANIZATIONS SELECT CHECK, *Internal Revenue Service*, <http://apps.irs.gov/app/eos/> (last visited Nov. 23, 2014); see also I.R.C. § 501(c)(6) (2012) (specifically exempting “professional football leagues” but making no specific exemption for other professional sports leagues or associations); Kristi Dosh, *Examining NFL’s Tax-Exempt Status*, ESPN (June 4, 2013), http://espn.go.com/nfl/story/_/id/9342479/examining-nfl-tax-exempt-status-challenged-us-senator-tom-coburn (noting that “the NBA has never been tax exempt”).

³² See Lloyd Hitoshi Mayer, *Nonprofits, Politics, and Privacy*, 62 CASE W. RES. L. REV. 801, 806–12 (2012) (discussing federal disclosure requirements).

generates a profit every year, NBA teams clearly generate profits for their owners.³³ In fact, the public discourse around NBA teams involves much discussion about team profitability. For example, as Steve Ballmer stated at the time of his purchase of the L.A. Clippers from the Sterlings earlier this year, “[t]here’s real earnings in this business. There’s real upside opportunity. So compared to the things I looked at in tech, this was a reasonable purchase and it’s one I’m really excited about.”³⁴

Making an investment in a professional basketball team also gives its owner a sense of personal satisfaction. As Ballmer also stated, “I’m really excited about the product. I love it. I’ve been to over a hundred basketball games in the last year, and that’s just high school games.”³⁵ Yet a love for the sport of basketball does not distinguish Ballmer or any other team-owner from entrepreneurs, who also have passion for the businesses that they start.³⁶ In other words, having passion for one’s business does not indicate a non-profit motive.

There are three primary sources of NBA team revenues; one is gate receipts.³⁷ The other two primary sources of team revenues stem from contracts entered into by the NBA on behalf of all of the teams. First, the NBA, on behalf of the teams, generates revenues from granting the right to nationally and internationally broadcast games to radio, television, and cable networks.³⁸ The NBA teams equally share these revenues.³⁹ Second, the NBA—or more specifically,

³³ See Kristi Dosh, *NBA Jersey Ads Could Push Teams to a Profit*, ESPN (Nov. 15, 2012), http://espn.go.com/blog/playbook/dollars/post/_id/2362/nba-jersey-ads-could-push-teams-to-a-profit (stating that in the 2011–2012 season, eighteen teams were profitable); Chris Smith, *The NBA’s Most and Least Profitable Teams*, FORBES (Jan. 23, 2013), <http://www.forbes.com/sites/chris-smith/2013/01/23/the-nbas-most-and-least-profitable-teams/> (noting that twenty-one teams made a profit in the 2011–12 season). There may not be agreement on which teams are profitable as not all information needed to make this calculation is disclosed to the public.

³⁴ Arash Markazi, *Steve Ballmer New Clippers Owner*, ESPN, http://espn.go.com/los-angeles/nba/story/_id/11343259/steve-ballmer-officially-new-owner-los-angeles-clippers (last updated Aug. 13, 2014).

³⁵ *Id.*

³⁶ See Dave Lavinsky, *Starting a Small Business: Passion is Key*, FORBES (Nov. 14, 2013), <http://www.forbes.com/sites/davelavinsky/2013/11/14/starting-a-small-business-passion-is-key/> (noting “how important passion is when starting a small business or any venture”).

³⁷ According to Forbes, the L.A. Clippers’ gate receipts for 2013 were \$41 million, while its total revenues were \$128 million. See *Los Angeles Clippers*, FORBES, <http://www.forbes.com/teams/los-angeles-clippers/> (last updated Jan. 2014). Thus, approximately one-third of the L.A. Clippers’ revenues in 2014 came from gate receipts.

³⁸ See *Chi. Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 754 F. Supp. 1336, 1340 (N.D. Ill. 1991).

³⁹ *Id.*

NBA Properties Inc., a separate entity owned by the NBA teams—generates revenues from the grant of exclusive licenses to merchandise team names, insignias, and other similar intellectual property.⁴⁰ The teams also equally share these merchandising royalties.⁴¹

In addition to the sharing of broadcasting and merchandising revenues, the Collective Bargaining Agreement (CBA) between the NBA and the NBA Players Association—the union representing the NBA players—provides for revenue sharing among teams.⁴² This revenue sharing is designed to financially equalize teams.⁴³ One primary way teams are financially equalized under the CBA is through a luxury tax.⁴⁴ That is, every team that exceeds a maximum team salary cap must pay the NBA a tax in the amount of that excess.⁴⁵ Those tax proceeds are then either used by the NBA or shared by non-tax-paying teams.⁴⁶ This and other revenue-sharing devices set out in the CBA are designed to maintain competitive balance in the league.⁴⁷

Even where a team does not generate significant annual profits for its owners, owning a NBA team is a profitable enterprise. This is apparent from the Sterlings' sale of the L.A. Clippers. Since 2006, the Clippers have not generated an annual operating income of more than \$15 million.⁴⁸ Yet the Sterlings made a hefty sum when they sold the Clippers for \$2 billion in 2014.⁴⁹

⁴⁰ See *id.* at 1339.

⁴¹ *Id.* at 1340.

⁴² See NBA, NBA COLLECTIVE BARGAINING AGREEMENT, at art. VII(a)(8) (Dec. 2011) [hereinafter CBA] available at <http://www.nbpa.org/cba/2011>.

⁴³ See Larry Coon, 2011 *Collective Bargaining Agreement*, LARRY COON'S NBA SALARY CAP FAQ, at Questions 1, 24, <http://www.cbafaq.com/salarycap.htm> (last visited Dec. 2, 2014).

⁴⁴ See CBA, *supra* note 42, art. VII, § 12. See also Coon, *supra* note 43, at Question 24.

⁴⁵ See Coon, *supra* note 43, at Question 21.

⁴⁶ See *id.* at Question 22. For a thoughtful discussion of the 2011 changes to the revenue-sharing provisions of the CBA, and why the increase in the luxury tax rate has not led to a more equalized distribution of revenues, see Matthew J. Parlow, *Lessons from the NBA Lockout: Union Democracy, Public Support, and the Folly of the National Basketball Players Association*, 67 OKLA. L. REV. 1, 10–12 (2014).

⁴⁷ Coon, *supra* note 43, at Questions 1, 24.

⁴⁸ See *Los Angeles Clippers*, FORBES, <http://www.forbes.com/teams/los-angeles-clippers/> (last updated Jan. 2014) (showing that since 2006, the L.A. Clippers have not generated more than \$15.7 million in operating income).

⁴⁹ See Kelsey, *supra* note 3 (“Sterling will still profit from the sale, pocketing the \$2 billion along with his wife.”). While some news accounts report that the Sterlings are making a profit in the amount of the full purchase price on the sale, obviously they only profit to the extent the purchase price exceeds the price they paid for the team plus any additional capital contributions they made and any debt owed by the team.

In terms of governance, the NBA Constitution creates a board of governors.⁵⁰ The governors on that board “have the general supervision of the affairs of the Association”⁵¹ Thus, the board of governors is charged with general oversight responsibilities. This is similar to the role of a board of directors in a business corporation, which board is charged with overseeing the business and affairs of the corporation.⁵² While the NBA is not a corporation, it is useful to draw an analogy to the corporate form, for the corporate form is a familiar legal organizational form with a hierarchical management structure somewhat similar to that of the NBA.

Each NBA governor is selected by a member.⁵³ The term “member” generally refers to a team-owner. More precisely, a member is a person or entity that has been granted the rights, privileges, and benefits to organize and operate a professional basketball team to play in the league operated by the NBA.⁵⁴

Since members that are entities must act through agents, the NBA Constitution declares that “an action on behalf of a Member by any of its Owners, employees, officers, directors, managers, agents or representatives, or its Governor or Alternate Governors, shall be the action of a Member.”⁵⁵ In other words, the NBA Constitution designates who acts on behalf of an organizational member for purposes of NBA action. This statement establishes the power of virtually any agent or other representative of, as well as any governor selected by, an organizational member to bind that organization. On the other hand, an organizational owner would certainly have its own internal approval processes for taking action as a member in the NBA, and a person acting without such approval would be acting wrongfully within that organization. Moreover, if the NBA were aware of a person purporting to act on behalf of an organizational member knowing that person in fact did not have authority to act, it is doubtful the NBA could rely on this provision in the NBA Constitution to protect its reliance on that person’s action.⁵⁶

⁵⁰ NBA Constitution, *supra* note 1, at art. 18(a).

⁵¹ *Id.*

⁵² EDWARD BRODSKY & M. PATRICIA ADAMSKI, LAW OF CORPORATE OFFICERS & DIRECTORS: RIGHTS, DUTIES & LIABILITIES § 1:2 (2013).

⁵³ NBA Constitution, *supra* note 1, at art. 18(b).

⁵⁴ *Id.* at Interpretation, Definition of “Member.”

⁵⁵ *Id.* at Interpretation (a)(8).

⁵⁶ Such knowledge would remove the person’s apparent authority. *See* RESTATEMENT (SECOND) OF AGENCY § 8 cmt. c (1958).

The governor election process is unlike the director election process in corporations, where all shareholders vote on the election of directors.⁵⁷ In the NBA, in contrast, each member selects its own governor to the board of governors.⁵⁸ The other members do not vote on or otherwise approve of any other member's selected governor.⁵⁹ Moreover, a member may replace a governor selected by that member at will.⁶⁰ Thus, the board of governors is essentially a body comprised of the representatives selected by the controlling owners of NBA teams.

Likely because of the governor selection process, and the power each member has to appoint and remove its selected governor at will, each governor is described in the NBA Constitution as an agent of the member who selected that person with authority to bind that member for purposes of NBA action.⁶¹ In contrast, a director of a corporation, when acting in that capacity, is not individually an agent of the shareholder nominating that director or an agent of any other shareholder.⁶² Rather, the directors act together as a body in representing the interests of shareholders.⁶³

Still, in the NBA, a governor "may be removed with substantial cause by a

⁵⁷ See DEL. CODE. ANN. tit. 8, chap. 1 (2011); MODEL BUS. CORP. ACT. § 7.20 (2002). This need not always be the case. For instance, a shareholder may negotiate to vote as a separate series for one or more directors. 5 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2026 (2011). Still, that shareholder would likely not elect all directors. Moreover, in privately-held corporations, through private voting arrangements, shareholders often agree which shareholders have the right to nominate directors, and all of the other shareholders agree to vote their shares for the selected nominees. 1 ROBERT B. THOMPSON, CLOSE CORPORATIONS AND LLCs: LAW AND PRACTICE § 4:12 (Rev. 3d ed. 2014). In each case, directors are elected to represent the body of shareholders and not merely those who nominated or elected them. See, e.g., *Klaassen v. Allegro Dev. Corp.*, No. 8626.VCL, 2013 WL 5967028, at *12 (Del. Ch. Nov. 7, 2013) ("Delaware decisions consistently reject the related concept of 'constituency directors' as well as the notion that a director appointed by a particular minority stockholder or a particular class or series of stock can or should serve the particular interests of the appointing entity."); see also E. Norman Veasey & Christine T. Di Guglielmo, *How Many Masters Can a Director Serve? A Look at the Tensions Facing Constituency Directors*, 63 BUS. LAW. 761, 771–72 (2008) (presuming the directors' fiduciary duties to all stockholders trump contract law expectations by specific constituencies, but acknowledging that "so long as the constituency directors' representative capacity is transparently disclosed to stockholders and fellow directors, constituency directors could be permitted to advocate the interests of their sponsors").

⁵⁸ NBA Constitution, *supra* note 1, at art. 18(b).

⁵⁹ See *id.*

⁶⁰ *Id.*

⁶¹ See *id.* at art. 18(b), Interpretation, Definition of "Governor" (a)(6).

⁶² See *supra* note 57 and accompanying text.

⁶³ See *supra* note 57 and accompanying text.

vote of three-fourths (3/4) of all Governors”⁶⁴ This is unlike the corporate context, where the board of directors does not have the power to remove any other director.⁶⁵ In the case of corporations, only shareholders have the power to remove directors.⁶⁶ This power also envisions the governors acting as agents of the team-owners, rather than solely as members of a governing body.

In addition to being charged with general oversight over the NBA, the board of governors has many other governance rights under the NBA Constitution. For example, a vote of the board of governors is needed to add a new member to the NBA;⁶⁷ to approve of any transfer by a member of that person’s membership interest;⁶⁸ to expel a member where circumstances warrant expulsion;⁶⁹ to require the members to contribute more capital than the annual amount specified in the NBA Constitution;⁷⁰ to amend the Bylaws;⁷¹ to approve any unusual expenses by the Commissioner;⁷² to elect the Commissioner;⁷³ and to remove the Commissioner.⁷⁴ With such broad powers, there is no doubt that the board of governors largely controls the NBA, even though the board delegates day-to-day management responsibilities to the Commissioner.⁷⁵

Under the NBA Constitution, the Commissioner is the “Chief Executive Officer of the League and [is] charged with protecting the integrity of the game of professional basketball and preserving public confidence in the League.”⁷⁶ Moreover, the Commissioner is charged with resolving disputes among members and addressing any wrongdoing by members.⁷⁷ Generally, the Commissioner’s remedial power in the case of member wrongdoing is to suspend the member, or impose fines or penalties.⁷⁸

⁶⁴ NBA Constitution, *supra* note 1, art. 18(d).

⁶⁵ E.W.H., Annotation, *Power of Directors of Private Corporation to Remove Officers or Fellow Directors*, 63 A.L.R. FED. 776, at 14 (1929).

⁶⁶ 14A N.Y. JUR. 2D BUSINESS RELATIONSHIPS § 572 (2009).

⁶⁷ NBA Constitution, *supra* note 1, art. 4(d).

⁶⁸ *Id.* at art. 5(f).

⁶⁹ *Id.* at arts. 13, 14(f) & (g).

⁷⁰ *Id.* at art. 32.

⁷¹ *Id.* at art. 17(a).

⁷² *Id.* at art. 24(g).

⁷³ *Id.* at art. 24(a).

⁷⁴ *Id.*

⁷⁵ *Id.* at art. 24(c).

⁷⁶ *Id.* at art. 24(a).

⁷⁷ *See id.* at arts. 24(d)–(e).

⁷⁸ *See id.* at arts. 24(i), (j), & (l).

Here, the Commissioner functions like a Chief Executive Officer (CEO) of a business corporation. However, in a corporation, a CEO does not have the discretion to suspend or fine a shareholder for misconduct.⁷⁹ As such, the Commissioner has more power over shareholders than a CEO in a corporation.

Neither the NBA Constitution nor the Bylaws contains a choice of law provision. On the other hand, in the only provision that refers to a governing law—the provision on dissolution—the NBA Constitution contains a New York choice of law provision.⁸⁰ The NBA's corporate office and headquarters are also in New York.⁸¹

III. POSSIBLE LEGAL CATEGORIZATIONS OF THE NBA

There are two potential theories for the state law structure of the NBA, which, as mentioned above, has not been organized as a corporation, limited liability company, or limited partnership—juridical entities formed upon the making of a filing with a secretary of state. First, the NBA is arguably a partnership, as an association of team owners operating a basketball league for profit. Alternatively, it is arguably a NUA, or an association of team owners operating a basketball league not for profit. If the NBA does not fit under either of these categories, then it is solely a contract among the team-owners. In fact, many contractual relationships exist without creating separate legal entities. On the other hand, a contractual relationship can also be a legally cognizable organization.

Which of these organizational structures applies to the NBA, if any, determines the duties and default rules that apply to the NBA members and managers. For instance, if the NBA is a partnership, then the team owners—the partners in the organization—would owe fiduciary duties to their fellow partners.⁸² Moreover, there would be a set of default rules to govern the team members' relationships, including the expulsion of a member.⁸³ These same rules would apply in some jurisdictions if the NBA were a NUA. If, on the other hand, the

⁷⁹ Shareholders sometimes do agree with other shareholders that specified events trigger a buy-out right of a fellow shareholder. *See Doniger v. Rye Psychiatric Hosp. Ctr. Inc.*, 122 A.D.2d 873, 875 (N.Y. App. Div. 1986). However, the CEO is not usually given the discretion to exercise that right.

⁸⁰ NBA Constitution, *supra* note 1, at art. 16.

⁸¹ FAN RELATIONS FAQ, NBA, http://www.nba.com/help/fan_relations_faq.html#fanfaq14 (last visited Dec. 2, 2014); NBA CORPORATE OFFICE AND HEADQUARTERS, CORPORATEOFFICE, <http://www.corporateoffice.com/NBA.html> (last visited Dec. 2, 2014).

⁸² *See infra* note 106 and accompanying text.

⁸³ *See infra* note 106 and accompanying text.

NBA is not one of these legally cognizable entities, then the NBA Constitution and Bylaws, along with principles of contract law, would govern the relationships by and among members and managers.

Each of these alternative legal structures is discussed next. First, Section A discusses what a contractual relationship is, as that is the default structure that applies if the NBA is neither a partnership nor a NUA. Next, Section B explores what a partnership is. Section C then considers what a NUA is. Part IV analyzes the NBA under these principles.

A. Contract

A contract is an agreement between two or more parties that creates obligations that are enforceable.⁸⁴ The parties themselves bargain for the obligation or obligations to be enforced.⁸⁵

The concept of enforcement refers to the availability of a remedy for a breach of the agreed-upon obligation.⁸⁶ There are many defenses to enforcement. For example, a court will not enforce a contract, or a contractual term, that violates public policy.⁸⁷ Absent one of these defenses, a court will provide a remedy for a party's failure to perform its agreed-on obligation.

Thus, the crux of a contract is that the parties have privately bargained for a set of obligations and rights. By and large, contract law does not impose rights and obligations on the parties; rather, it is the parties who specifically bargain for those rights and obligations. Yet, contract law does imply some obligations. Importantly, each party has an implied obligation to act in accordance with good faith and fair dealing.⁸⁸ That obligation requires that neither party seek to undermine the benefits the other party was expecting under the contract.⁸⁹

In some contexts, the common law of contracts overlaps with a separate legal scheme that governs the relationship created through the contract. The extent of that overlap depends on the nature of the contract.

⁸⁴ *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat) 518, 590 (1819).

⁸⁵ 1 WILLISTON ON CONTRACTS § 1.1 (4th ed. 2007).

⁸⁶ *See* RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979).

⁸⁷ *See id.* at ch. 8 Introductory Note.

⁸⁸ *See id.* at § 205; *see also* *Daitch Crystal Dairies, Inc. v. Neisloss*, 8 A.D.2d 965, 965 (1959), *aff'd mem.* 167 N.E.2d 643, 644 (N.Y. 1960).

⁸⁹ *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981).

For example, a transaction in goods falls under article two of a state's uniform commercial code (UCC).⁹⁰ UCC article two contains some mandatory terms. For example, section 2-201 requires contracts for the sale of goods for the price of \$1,000 or more to be in writing to be enforceable.⁹¹ The UCC also sets out some default terms, or contractual terms that apply, unless the parties otherwise agree. For example, section 2-305 implies a reasonable price if parties have concluded a contract for the sale of goods and not specified a price.⁹² This section does not have any applicability if the parties have agreed on a price, thereby contracting around this default term. Moreover, the common law of contracts still applies to transactions in goods where article two does not apply.⁹³ Thus, despite the existence of a separate statutory scheme for transactions in goods, the common law of contracts remains applicable.

Many contracts contain choice-of-law provisions. That is, they select the law that applies to those contracts. Because contract law is a matter of private bargain, courts generally respect those choice-of-law provisions unless they violate a policy in the enforcing court's jurisdiction.⁹⁴ On the other hand, a choice-of-law provision is not necessary to make a contract binding. Where a contract does not contain such a provision, a court will apply the law of the state with the closest ties to the transaction.⁹⁵

B. Partnership/Joint-Venture

Partnership law is another area of law that overlaps with contract law. The overlap arises because partners enter into contracts between themselves to set out the terms of their partnership.⁹⁶ Yet, partners need not enter into an express contract to form a partnership.⁹⁷ Rather, a partnership exists where two or more persons carry on as co-owners a business for profit.⁹⁸ That is true even where

⁹⁰ See Uniform Commercial Code § 2-102 (2002) [hereinafter UCC]; *accord* New York Uniform Commercial Code Law § 2-102 (2014) [hereinafter N.Y. UCC].

⁹¹ See UCC, *supra* note 90, at § 2-201; *accord* N.Y. UCC, *supra* note 90, at § 2-201.

⁹² See UCC, *supra* note 90, at § 2-305; *accord* N.Y. UCC, *supra* note 90, at § 2-305.

⁹³ UCC, *supra* note 90, at § 1-103; *accord* N.Y. UCC, *supra* note 90, at § 1-103.

⁹⁴ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

⁹⁵ *Id.* at § 294.

⁹⁶ 15A N.Y. JUR. 2D BUSINESS RELATIONSHIPS § 1558 (2009).

⁹⁷ See Revised Uniform Partnership Act § 202(a) (1997) [hereinafter RUPA]; J. WILLIAM CALLISON & MAUREEN A. SULLIVAN, PARTNERSHIP LAW AND PRACTICE: GENERAL AND LIMITED PARTNERSHIPS § 5.7 (2013).

⁹⁸ See RUPA, *supra* note 97, at § 202(a); *accord* New York Partnership Law § 10 (1999) [hereinafter

parties do not specifically intend to form a partnership, or where they legally categorize their relationship as something other than a partnership.⁹⁹ It is also true where the business does not actually generate a profit, so long as the profit motive is present.¹⁰⁰

By focusing on business profits, a partnership must clearly be tied to the pursuit of commercial activity.¹⁰¹ In fact, just sharing profits leads to a presumption that parties have formed a partnership.¹⁰² It is then up to a party disputing the existence of a partnership to show that the relationship is something other than a partnership.¹⁰³

There are many justifications for partnership law. Importantly, in a partnership, partners direct their acts toward a collective business purpose—that is, toward a commercial goal or goals. Moreover, each partner can individually act toward that purpose, thereby binding the collective.¹⁰⁴ Partnership law imposes obligations on the parties to hold them to that common purpose.¹⁰⁵ Importantly, it sets out fiduciary duties that partners owe to one another.¹⁰⁶ As was famously proclaimed by Justice Cardozo of the New York Court of Appeals in *Meinhard v. Salmon* in the context of a partnership constituting a joint-venture, “[j]oint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of finest loyalty.”¹⁰⁷ The duty of loyalty requires partners to act in the best interest of the partnership and refrain from acting in their own personal interest.¹⁰⁸ Partners also owe a duty of care, which generally requires partners

N.Y. P’Ship].

⁹⁹ See RUPA, *supra* note 97, at § 202(a) & (c); CALLISON & SULLIVAN, *supra* note 97, at § 5.7.

¹⁰⁰ CALLISON & SULLIVAN, *supra* note 97, at § 5.10.

¹⁰¹ LAURA HUNTER DIETZ ET AL., AM. JUR. § 1 (2d ed. 2014) (“A partnership exists only in a business or commercial setting”).

¹⁰² See RUPA, *supra* note 97, at § 202(c)(3); *accord* N.Y. P’Ship, *supra* note 98, at § 11.4.

¹⁰³ See CALLISON & SULLIVAN, *supra* note 97, at § 5.17.

¹⁰⁴ See *id.* at § 1.1 (noting that partnership law is closely tied to agency law “because each partner is an agent for the other partners and for the partnership business”).

¹⁰⁵ See *id.*

¹⁰⁶ See N.Y. P’Ship, *supra* note 98, at § 43; see also *Terra Venture v. JDN Real Estate—Overland Park, L.P.*, 443 F.3d 1240, 1245 (10th Cir. 2006); *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928); *Lightsey v. Marshall*, 992 P.2d 904, 908 (N.M. Ct. App. 1999); *Silverstein v. Last*, 383 A.2d 718, 721 (N.J. Super. Ct. App. Div. 1978). Where there is a managing partner or co-venturer, courts have imposed the fiduciary duty on the managing venturer. See, e.g., *Indep. Asset Mgmt. LLC v. Zanger*, 538 F. Supp. 2d 704, 709 (S.D.N.Y. 2008).

¹⁰⁷ *Meinhard*, 164 N.E. at 546.

¹⁰⁸ CALLISON & SULLIVAN, *supra* note 97, at § 12.4.

to make business decisions in good faith.¹⁰⁹ Such fiduciary duties arise because of the trust and confidence placed in, and accepted by, the partners to manage the association.¹¹⁰

Partnership law, for the most part, only sets out default terms of the partner relationship—that is, terms that apply unless the parties otherwise agree.¹¹¹ Such default terms reflect the largely contractual nature of the partnership relationship.¹¹² Yet, where parties fail to specify all of the terms governing their relationship—a relationship that may continue into the distant and unforeseeable future—partnership law creates a set of default terms to govern that relationship.

Still, there are some mandatory aspects of partnership law. For instance, under the Revised Uniform Partnership Act (RUPA), partners may not eliminate the fiduciary duty of loyalty.¹¹³ Instead, they can only modify that duty in limited ways if not manifestly unreasonable.¹¹⁴ Moreover, partners cannot unreasonably reduce the duty of care.¹¹⁵ These mandatory provisions recognize that partners individually have discretion to commit the collective enterprise.¹¹⁶ Thus, there is a need to control that discretion.¹¹⁷ In other words, the mere status of being a partner justifies imposing a minimal mandatory duty.

Not all states restrict partners' power to eliminate fiduciary duties. For example, New York's partnership law does not contain such a statutory restriction. Consistently, New York case law permits contractual parties broad freedom to modify, even eliminate, fiduciary duties.¹¹⁸

As another example of a mandatory aspect of partnership law, under RUPA, parties may not modify the right of a court to expel a partner due to that partner's

¹⁰⁹ *Id.* at § 12.2.

¹¹⁰ *See id.*

¹¹¹ *See* RUPA, *supra* note 97, at Prefatory Note.

¹¹² *See id.*

¹¹³ *See id.* at § 103(b)(3).

¹¹⁴ *See id.* at § 103(b)(3)(i).

¹¹⁵ *See id.* at § 103(b)(4).

¹¹⁶ *See* Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligations*, 5 DUKE L.J. 879, 908–09 (1988).

¹¹⁷ *See id.* at 909–10.

¹¹⁸ *See* BNP Paribas Mortg. Corp. v. Bank of Am., N.A., 866 F. Supp. 2d 257, 269–70 (S.D.N.Y. 2012) (stating that fiduciary duty waivers are effective in New York and citing numerous cases that stand for this proposition).

misconduct, breach of duty, or where that partner makes it not reasonably practicable to carry on business with that partner.¹¹⁹ This mandatory judicial right of expulsion acknowledges the vulnerability of a partner to a fellow partner's discretion in binding the partnership. Given this vulnerability, it protects a partner's right to ask a court to expel another partner who is engaging in wrongdoing.

Here, New York partnership law does not have a default expulsion right.¹²⁰ Rather, New York law gives each partner a right to seek a judicial decree of dissolution due to a fellow partner's misconduct.¹²¹ In New York, a partner may request dissolution of a partnership where a partner is "guilty of such conduct as tends to affect prejudicially the carrying on of the business."¹²² Alternatively, a court may decree dissolution where a partner willfully or persistently breaches the partnership agreement or "conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him."¹²³ Where a New York partnership is dissolved due to a partner's wrongful conduct, the remaining partners can elect to continue the partnership in the same name.¹²⁴ Because of this right to continue with the partnership business, dissolution due to a partner's misconduct followed by a continuation of the partnership by the other partners has substantially the same effect as an expulsion.

Unlike RUPA, New York's partnership statute does not remove the partners' ability to modify a partner's right to seek judicial dissolution due to a fellow partner's misconduct.¹²⁵ In fact, one New York court has held that partners can eliminate this right to seek judicial dissolution so long as they do so specifically and unequivocally.¹²⁶

¹¹⁹ RUPA, *supra* note 97, at § 103(b)(7).

¹²⁰ *Ehrlich v. Howe*, 848 F. Supp. 482, 490 (S.D.N.Y. 1994).

¹²¹ *See* N.Y. P'Ship, *supra* note 98, at §§ 62, 63. While New York partnership law follows traditional partnership law in providing for dissolution rather than expulsion, in circumstances of judicial dissolution due to partners wrongdoing, it allows the continuing partners to continue the partnership rather than liquidate. *Id.* at § 69(2)(b). As such, there is not much difference between an expulsion and dissolution due to partner wrongdoing.

¹²² *Id.* at § 63(c).

¹²³ *Id.* at § 63(d).

¹²⁴ *Id.* at § 69(2)(b).

¹²⁵ *See* *Prudential Ins. Co. of Am. v. Hilton Hotels Corp.*, No. 95 CIV.5575 (KMW), 1996 WL 340002, at *3 (S.D.N.Y. June 19, 1996).

¹²⁶ *See id.* (holding that parties to a partnership agreement have the right to contract around nearly any provision of partnership law, even the right to seek a judicial dissolution, but noting that the waiver

A relationship may be a partnership even where partners limit the purpose of the business to a specific purpose. In that context, the partnership is referred to as a “joint venture.”¹²⁷ Partnership law largely applies to that joint venture in the same way that it applies to partnerships with broader purposes.¹²⁸

State law governs the terms of a partnership.¹²⁹ Partners can, and often do, select which state’s laws apply to that partnership.¹³⁰ Courts will generally respect that choice unless it violates public policy.¹³¹ Where partners do not designate a choice of law for a partnership, courts will apply the law of the state with the most ties,¹³² which usually means the state of either the partnership’s principal place of business or its chief executive office.¹³³

C. Nonprofit Unincorporated Association (NUA)

NUAs are similar to partnerships in that they are formed by people who join together to achieve a common objective.¹³⁴ The primary difference is that the participants in an NUA, in pursuing a common objective, do not seek profits.¹³⁵

The legal regime that applies to an NUA, as with a partnership, is determined by state law. However, states usually take one of two approaches to the regulation of these entities. Some states have adopted legislation to regulate

must be specific and unequivocal).

¹²⁷ See RUPA, *supra* note 97, at § 202 cmt. 31 (“Relationships that are called ‘joint ventures’ are partnerships if they otherwise fit the definition of a partnership.”). See also *Terra Venture, Inc. v. JDN Real Estate—Overland Park, L.P.*, 443 F.3d 1240, 1245 (10th Cir. 2006) (citations omitted) (“‘When the relationship of joint adventurers exists, the parties stand in a close relationship of trust and confidence and are bound by the same standards of good conduct and square dealing as are required of partners.’”).

¹²⁸ See, e.g., *supra* note 107 and accompanying text; see also RUPA, *supra* note 97, at § 202 cmt. 2.

¹²⁹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 294 (1971).

¹³⁰ See *id.* at § 294 cmt. (b).

¹³¹ See *id.* at § 187.

¹³² *Id.* at § 294

¹³³ See RUPA, *supra* note 97, at §106(b), §106(b) cmt. (providing for a governing law tied to the partnership’s chief executive office); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 294 cmt. (d) (1971) (noting that the jurisdiction with the most ties is usually where the partnership does all or substantially all of its business under its agreement, if such a place exists).

¹³⁴ REVISED UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT § 2(8) (2008) [hereinafter RUUNAA] available at <http://www.uniformlaws.org/Act.aspx?title=Unincorporated%20Non-profit%20Association%20Act%20%281992%29%281996%29>.

¹³⁵ See *id.* at § 2(8) cmt. 8 (requiring that members join together to pursue one or more common, nonprofit purposes).

NUAs. For instance, five states have adopted statutes based on the Revised Uniform Unincorporated Nonprofit Association Act (RUUNAA) drafted and promoted by the Uniform Law Commission (ULC).¹³⁶ Moreover, ten states have adopted statutes based on the RUUNAA's predecessor, the Uniform Nonprofit Association Act.¹³⁷ In contrast, other states regulate NUAs through a patchwork of common law and statutes that govern limited aspects of their operation.¹³⁸

Those common law regimes often view NUAs as amalgams of their members rather than separate legal entities.¹³⁹ As such, there is no separate legal entity, either to bind to contracts, or to sue or be sued.¹⁴⁰ In essence, these entities are not entities at all, but solely contractual relationships.

New York is an example of a jurisdiction that does not statutorily recognize NUAs. Rather, they are regulated through the common law.¹⁴¹ As such, NUAs are primarily treated as contracts and are not considered to be legal entities separate from their members.¹⁴²

Here, again, which state's laws apply depends on the selected governing

¹³⁶ See generally UNIFORM LAW COMMISSION, UNINCORPORATED NONPROFIT ASSOCIATION ACT (2008), available at <http://www.uniformlaws.org/Act.aspx?title=Unincorporated%20Nonprofit%20Association%20Act%20%282008%29>.

¹³⁷ See generally *id.* This number was derived by counting the states that the ULC shows as having adopted its original uniform unincorporated nonprofit association act (twelve), and subtracting out the two states (Arkansas and D.C.) that adopted the later Uniform Unincorporated Nonprofit Association Act.

¹³⁸ RUUNAA, *supra* note 134, at Prefatory Note. Even in states where unincorporated associations are regulated by the common law, some types of nonprofit associations are regulated, such as unions and churches. See, e.g., N.Y. CIV. SERV. § 201 (2011).

¹³⁹ RUUNAA, *supra* note 134, at Prefatory Note.

¹⁴⁰ See 12 WILLISTON ON CONTRACTS § 35:72 (4th ed. 2012) (stating that apart from states that statutorily recognize NUAs' power to enter into contracts and to sue and be sued, "the majority rule appears to be to the effect that a statute that permits an unincorporated association merely to sue or be sued in its association name does not change the legal status of the association so as to render it liable on contracts entered into in the association name.").

¹⁴¹ *People v. Norwegian Underwriters*, 247 N.Y.S. 707, 711 (N.Y. Sup. Ct. 1931) ("Unincorporated associations are mere creatures of contract freely formed at common law without any grant from the sovereign."). For a sample of some New York statutory provisions applicable to nonprofit associations, see N.Y. GEN. ASS'N § 12 (2009–2014) (empowering the nonprofit association to sue and be sued); N.Y. CIV. RIGHTS §§ 53–57 (2014) (requiring nonexempt nonprofit associations with twenty members or more that require members to submit an oath as a condition to membership to submit a copy of that oath along with other documents to the secretary of state).

¹⁴² *Martin v. Curran*, 101 N.E.2d 683, 685 (N.Y. App. Div. 1951); *L&L Assocs. Holding Corp. v. Charity United Baptist Church*, 935 N.Y.S.2d 450, 452–53 (N.Y. App. Div. 2011).

law in the associated parties' contract.¹⁴³ Failing that, as with all contracts, a court will apply the law with the most ties to the transaction.¹⁴⁴ RUUNAA specifies that in that case, the governing law is the law of the state where the association has its "main place of activities"¹⁴⁵ RUUNAA uses this standard rather than an NUA's chief executive office to determine the governing law because many NUAs are informal and do not have executive offices.¹⁴⁶ To the extent a nonprofit is multijurisdictional, RUUNAA contemplates that the members will specify which state's laws govern.¹⁴⁷

IV. WHAT IS THE NBA?

This Part tackles the question of how to characterize the NBA for state organization law purposes. First, Section A analyzes whether the NBA's organizational form is dictated by judicial opinions decided under antitrust law. As that discussion explains, judicial opinions drawing conclusions about the NBA's structure for purposes of antitrust law are not conclusive for purposes of state business organization law. Next, Section B analyzes which state's laws to look to in determining what legal framework applies to the NBA's organization. As that discussion explains, New York law applies no matter whether the NBA is a partnership, an NUA, or a contract. Next, Section C explains why the NBA is likely a partnership governed by New York partnership law. Alternatively, it contemplates that the NBA is an NUA under New York law. Part V then addresses several key consequences that flow from that conclusion.

A. NBA Structure Under Antitrust Law

Some courts have described the NBA as a joint venture. For example, in *National Basketball Ass'n v. SDC Basketball Club, Inc.*,¹⁴⁸ the Ninth Circuit described the NBA as a New York joint venture.¹⁴⁹ On the other hand, the NBA's structure was not at issue in *SDC Basketball Club*. As such, it is not clear how the court concluded that the NBA was a joint venture, or whether it viewed the NBA as a joint venture for purposes of state organization laws.

¹⁴³ See RUUNAA, *supra* note 134, at § 4(b).

¹⁴⁴ See *supra* note 95 and accompanying text.

¹⁴⁵ See RUUNAA, *supra* note 134, at § 4 (b).

¹⁴⁶ See *id.* at § 4 cmt. 2.

¹⁴⁷ *Id.*

¹⁴⁸ See generally *Nat'l Basketball Ass'n. v. SDC Basketball Club, Inc.*, 815 F.2d 562 (9th Cir. 1987).

¹⁴⁹ *Id.* at 564.

The NBA's structure was an issue in *Chicago Professional Sports L.P. v. National Basketball Association*, referred to as *Chicago Bulls II*.¹⁵⁰ In *Chicago Bulls II*, the chief issues were whether the NBA could cap the number of games for which a NBA team could grant a national broadcast right, and whether the NBA could charge a "broadcast fee" on team-licensed national broadcasts without running afoul of Section 1 of the Sherman Act.¹⁵¹ Section 1 of the Sherman Act precludes contracts among two or more distinct business entities in restraint of trade.¹⁵² Except for certain activities that are per se unlawful, to violate section one of the Sherman Act, the restraint on trade must be unreasonable.¹⁵³ However, as has been traditionally analyzed, Section 1 of the Sherman Act does not apply to single firms, as a single firm cannot collude with itself in restraint of trade.¹⁵⁴ Indeed, participants in a single firm are expected to cooperate.¹⁵⁵

On this point, while the Seventh Circuit remanded the issue of whether the NBA was a single entity for purposes of the Sherman Act, the court held that whether the NBA looks like one firm depends on the perspective from which the inquiry is conducted.¹⁵⁶ However, "when acting in the broadcast market the NBA is closer to a single firm than to a group of independent firms."¹⁵⁷

In 2010, the Supreme Court heard a similar antitrust challenge against the National Football League (NFL) in *American Needle Inc. v. National Football League*.¹⁵⁸ In that case, American Needle challenged the right of the NFL teams to agree to grant an exclusive license to produce and sell trademarked headgear under Section 1 of the Sherman Act.¹⁵⁹ The Supreme Court focused its inquiry not on whether the NFL was a single entity or a joint venture, as had the Seventh Circuit in *Chicago Bulls II*.¹⁶⁰ In fact, the Court eschewed an analysis tied to organizational form.¹⁶¹ Rather, it focused on whether the NFL teams had joined

¹⁵⁰ *Chi. Prof'l Sports L.P. v. Nat'l. Basketball Ass'n.*, 95 F.3d 593, 600 (7th Cir. 1996).

¹⁵¹ *Id.* at 595.

¹⁵² *See* Sherman Act, 15 U.S.C. §1 (2006).

¹⁵³ *See* *Bd. of Trade City of Chi. v. U.S.*, 246 U.S. 231, 238 (1918). For a critique of the rule of reason, *see* Jesse W. Markham, Jr., *Sailing a Sea of Doubt: A Critique of the Rule of Reason in U.S. Antitrust Law*, 17 FORDHAM J. CORP. & FIN. L. 591, 603 (2012).

¹⁵⁴ *Chi. Prof'l Sports L.P.*, 95 F.3d at 599.

¹⁵⁵ *Id.* at 598.

¹⁵⁶ *See id.* at 600.

¹⁵⁷ *Id.* at 600; *see also* *Standard Oil Co. of N.J. v. U.S.*, 221 U.S. 1, 87 (1911).

¹⁵⁸ *See generally* *Am. Needle Inc. v. Nat'l Football League*, 560 U.S. 183 (2010).

¹⁵⁹ *Id.* at 187.

¹⁶⁰ *Id.* at 191–92.

¹⁶¹ *See id.*

together separate decision-makers in concerted action such that the marketplace was deprived of a diversity of entrepreneurial interests and, thus, actual or potential competition.¹⁶² If so, the NFL teams remained subject to scrutiny under section one of the Sherman Act.¹⁶³ Otherwise, the teams' grants of the exclusive license was not subject to review under that section.¹⁶⁴

The Court ultimately found that the thirty-two NFL teams were in fact separate, profit-maximizing entities with separate interests in licensing team trademarks.¹⁶⁵ As such, the plaintiff could challenge the NFL's action under Section 1 of the Sherman Act.¹⁶⁶ While *American Needle* involved the NFL, its reasoning behind whether a contract deprives the marketplace of independent centers of decision-making within a single sports league could apply to other similarly structured professional sports leagues, including the NBA.¹⁶⁷

There are several reasons why conclusions about the NBA's organizational form made in the context of an antitrust law challenge should not control such an inquiry for purposes of state law. To begin, the different organizational options typically considered in the antitrust context are different than in the state organization law context. For example, the court in *Chicago Bulls II* limited itself to two organizational options—a single entity or a joint venture.¹⁶⁸ In state organization law, it is not clear what "single entity" means, for all organizational forms are treated as single entities; that is true of partnerships, limited partnerships, limited liability companies, and corporations. Moreover, the term "joint venture" alone does not indicate what organizational form that joint venture has taken. By default, a joint venture is a partnership,¹⁶⁹ but the parties could have formed it in some other organizational form. Not only do courts in these antitrust cases not focus on these different organizational forms, but their inquiry into whether an entity is a joint venture does not even comport with the joint venture test under state organization law.¹⁷⁰

¹⁶² *Id.* at 191–95.

¹⁶³ *Id.* at 191–92.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 196–97.

¹⁶⁶ *Id.*

¹⁶⁷ For a discussion of how *Chicago Bulls II* reconciles with *American Needle*, see Herbert Hovencamp, *American Needle and the Boundaries of the Firm in Antitrust Law* 18-19 (Working Paper, 2010), available at <http://ssrn.com/abstract=1616625>.

¹⁶⁸ Chi. Prof'l Sports L.P. v. Nat'l Basketball Ass'n, 95 F.3d 593, 599 (7th Cir. 1996).

¹⁶⁹ See discussion *supra* Part III.B.

¹⁷⁰ See *id.*

In addition, the goals of the federal antitrust law regime and the state organizational law regime are different. Antitrust law, on the one hand, seeks to protect consumers by preserving competition.¹⁷¹ Thus, the focus of the inquiry is on whether various market participants acted anti-competitively toward consumers.¹⁷² State organization law, on the other hand, focuses on ensuring managers act faithfully to achieve the business purpose.¹⁷³ Moreover, it seeks to impose default terms to govern the associated parties' on-going relationship absent agreement to the contrary.¹⁷⁴ Thus, organization law shifts the focus away from consumers and toward the owners and managers of the business; away from protecting the public from harm and toward creating a functional, long-term business relationship. These different policy rationales justify conducting separate inquiries into the NBA's organizational structure under state organizational law from that conducted under federal antitrust law. Thus, as the Supreme Court recognized in *American Needle*, state organizational form does not affect the inquiry into a violation of federal antitrust laws.¹⁷⁵ The opposite is true, as well; conclusions about businesses drawn for purposes of federal antitrust law do not control the state organization law analysis.

Case law is not alone in ignoring the NBA's organizational structure outside of the antitrust realm; academic commentary, too, fails to discuss the NBA's structure under state organization law.¹⁷⁶ The dearth of such discussions further emphasizes the void in the literature about the NBA's structure under state organization law.

B. Governing Law: New York

Before analyzing the NBA's legal categorization under state law, it must first be determined which state's laws govern the inquiry. Here, the NBA's Constitution does not select a governing law. Thus, the governing law must be determined by application of conflict-of-law principles.

Regardless of whether the NBA is partnership, NUA, or solely a contract,

¹⁷¹ See Babette Boliek, *Antitrust, Regulation, and the "New" Rules of Sports Telecasts*, 65 HASTINGS L. J. 501, 509 (2014).

¹⁷² See, e.g., *supra* note 162 and accompanying text.

¹⁷³ See discussion *supra* Part III.B.

¹⁷⁴ See discussion *supra* Part III.B.

¹⁷⁵ See *supra* note 161 and accompanying text.

¹⁷⁶ See, e.g., Stephen F. Ross, *The Supreme Court's Renewed Focus on Inefficiently Structured Joint Ventures*, 14 U. PA. J. BUS. L. 261, 263 (2011). See generally Michael A. Flynn & Richard J. Gilbert, *The Analysis of Professional Sports Leagues as Joint Ventures*, 111 THE ECON. J. 27 (2001).

the inquiry seems fairly clear: New York law governs. To refresh, if the NBA is a partnership, the applicable law is the law of the jurisdiction of its chief executive office.¹⁷⁷ Because the NBA's corporate office and headquarters are in New York,¹⁷⁸ New York law governs. If the NBA is an NUA, the applicable law is the law in which the NBA conducts the majority of its affairs.¹⁷⁹ That again is New York, given the location of the NBA's corporate office and headquarters in New York.¹⁸⁰ Finally, even if the NBA is solely a contractual relationship among its members, New York law governs. That is because New York is the state with the most ties to the transaction given that the NBA's corporate office and headquarter are in New York.

C. NBA as a Partnership or NUA

The NBA has not been formed as a limited partnership, limited liability company, or corporation. To form as one of these legal entities, the NBA would have had to file an instrument of formation with the Secretary of State in the state of organization. Without one of these filings, the only potential organizational forms applicable to the NBA are a partnership and NUA.

An analysis of whether the NBA is a partnership or NUA, as compared to a contract, must begin with whether the NBA team-owners have associated to pursue one or more joint objectives. If they have, then either partnership or NUA law applies. Otherwise, contract law will govern that relationship without application of partnership or NUA law.

In the case of the NBA, it is clear that the team-owners have associated to pursue at least one common objective—to operate a professional basketball league. The nature of this association allows them to coordinate regular and playoff game days and times; game rules; dispute resolution procedures; the election of a manager (Commissioner); and the addition of new teams; among other things. The existence of a management structure similar to that used in business corporations also reflects the level of cooperation needed—and achieved—to operate a unified professional basketball league. The court in *American Needle* even recognized the need for this kind of cooperation to operate a professional sports league.¹⁸¹ Thus, it is clear the NBA is an association,

¹⁷⁷ See *supra* note 133 and accompanying text.

¹⁷⁸ See *supra* note 81 and accompanying text.

¹⁷⁹ See *supra* note 145 and accompanying text.

¹⁸⁰ See *supra* note 81 and accompanying text.

¹⁸¹ *Am. Needle Inc. v. Nat'l Football League*, 560 U.S. 183, 202 (2010).

at least for purposes of operating a professional basketball league.

Whether the NBA is a partnership or NUA depends on the nature of that association. In the case of the NBA, the association is arguably not to pursue a commercial objective. A business is a commercial endeavor.¹⁸² Here, the team members have associated in creating these league rules to avoid utter chaos on the court and in the operation of the league. That, in turn, allows the members to operate a unified basketball league. Thus, they are arguably not employed to pursue a joint profit-seeking business.

However, the more likely view is that the team members have associated to create these league rules not merely to further the social cause of operating a professional basketball league, but to maximize the collective revenues of the entire league. Part of this conclusion stems from the nature of NBA team revenue-sharing. Again, under the CBA, teams share in any excess taxes paid by teams that have exceeded the annual salary cap.¹⁸³ Teams also share merchandising and broadcast revenues from contracts that the board of governors authorizes the Commissioner to enter into on behalf of the league.¹⁸⁴ In other words, teams, through their collectively-appointed managers, are leveraging the team-owners' joint assets—the right to collect merchandising revenues from the licensing of the teams' collective marks and the right to collect broadcast revenues from the licensing of all NBA team games—to maximize revenues for the league and, in turn, for the team-owners. In fact, the equal sharing of those revenues tracks the default partnership rules on equal sharing of profits among partners.¹⁸⁵ Clearly, this monetization of collective rights to intellectual property is not *necessary* to operate an effective professional basketball league. Rather, it is clearly designed to financially benefit the NBA member teams.

The NBA might respond that profit-sharing is not intended to be a partnership; rather, it is intended to be a method to equalize revenues among teams to ensure the league operates effectively. In other words, the purpose for the sharing of profits is to further the social purpose of ensuring the survival of a professional basketball league.

However, the sharing of those revenues in conjunction with the association of team-owners at least raises a presumption of partnership.¹⁸⁶ It would then

¹⁸² See *supra* note 101 and accompanying text.

¹⁸³ See *supra* note 46 and accompanying text.

¹⁸⁴ See *supra* note 38–41 and accompanying text.

¹⁸⁵ See RUPA, *supra* note 97, at § 404.

¹⁸⁶ See *supra* note 102 and accompanying text.

fall to the NBA to prove that no partnership was intended.¹⁸⁷

The NBA might also respond that operating a professional basketball league is not a profit-seeking venture, but a social venture. Yet, even if one were to acknowledge that team owners derive much social value from operating a functional professional basketball league, partnership law does not exclude these types of social motivations from its scope. Entrepreneurs involved with closely held businesses often make business decisions on the basis of emotion.¹⁸⁸ That, however, does not prevent the existence of a for-profit motive. It simply means that the individuals are getting personal satisfaction out of their joint investment.

If the NBA is not a partnership because the joint profit-motive of the NBA, teams cannot be established; then the NBA is an NUA under New York law. That is because it remains an association of team-owners, even if they do not jointly pursue a business profit. While in some jurisdictions this leads to the imposition on the members of rights and duties similar to those under partnership law,¹⁸⁹ in New York, the laws governing NUAs are essentially the laws of contracts.¹⁹⁰ In other words, there would be no default rights of NBA team members, and no default duties of those team members. As such, the NBA Constitution and Bylaws, along with other contracts among members, would set out the terms of the association by and among the members.¹⁹¹

V. CONCLUSION: CONSEQUENCES OF LEGAL CATEGORIZATION OF THE NBA

While courts and commentators have given substantial treatment to the NBA's structure, those discussions have not focused on the NBA's structure for purposes of state organization law. As I have argued above, it is important to identify what organizational form applies to the NBA given the consequences that could flow from such structure. As I have also argued above, the NBA may be a partnership, even though there is some basis to conclude it is a NUA.

There are numerous consequences that would flow from the NBA's categorization as a partnership. Importantly, each member would owe a fiduciary duty to the other members. That means each member would have a duty to act with

¹⁸⁷ See *supra* note 103 and accompanying text.

¹⁸⁸ See *supra* note 36 and accompanying text.

¹⁸⁹ See generally RUUNAA, *supra* note 134.

¹⁹⁰ See *supra* notes 141–42 and accompanying text.

¹⁹¹ Even as an NUA, governors are clearly agents of their appointing members. Thus, they owe fiduciary duties to their appointing members under agency law.

the requisite degree of care in making partnership decisions.¹⁹² Moreover, each member would have a duty to act loyally, in the best interest of the NBA, and not in the member's own self-interest.¹⁹³

In the case of Donald Sterling, he would have breached his duty of care by carelessly making remarks that could injure the league's reputation and the NBA's collective brand. He would have also breached his duty of loyalty by uttering remarks opposed to the best interests of the NBA and its players, and their desire to maximize league revenues.

Here, the members have not eliminated these fiduciary duties in the NBA Constitution. While the NBA Constitution does address conflicts of interest,¹⁹⁴ that provision does not state that it sets out the exclusive scope of fiduciary duties. Admittedly, the NBA Constitution does not contain such a provision because the NBA does not appear to view itself as a partnership. As such, no waiver is supposed to be necessary. However, as I argued in Part IV above, it is entirely plausible that the NBA is a partnership.

It is beyond the scope of this paper to analyze the intricacies of how these fiduciary duties would apply to the NBA's members. That analysis might be especially tricky given that the members also seek to maximize profits from their individually-owned teams. On the other hand, courts in business organization law regularly resolve disputes among business owners who operate competing firms.¹⁹⁵

One of the other key consequences to finding the NBA is a partnership is that any member could seek judicial dissolution due to a fellow partner's misconduct.¹⁹⁶ The other partners could then choose to continue with the partnership, effectively leading to an outcome similar to an expulsion.¹⁹⁷ This is true under New York law, which would govern, as New York allows partners to waive the right to seek judicial dissolution.¹⁹⁸ Without such a waiver in the NBA Constitution, presumably any member could exert this right.

This right could have been useful as pressure mounted on the NBA members to expel Donald Sterling after he made racist remarks. Instead of wringing their hands and wondering whether the NBA Constitution afforded them the

¹⁹² See *supra* note 109 and accompanying text.

¹⁹³ See *supra* notes 107–08 and accompanying text.

¹⁹⁴ See NBA Constitution, *supra* note 1, at art. 3.

¹⁹⁵ See, e.g., *Coastal Sheet Metal Corp. v. Vassallo*, 904 N.Y.S.2d 62, 63–64 (N.Y. App. Div. 2010).

¹⁹⁶ See *supra* note 121 and accompanying text.

¹⁹⁷ See *supra* note 124 and accompanying text.

¹⁹⁸ See *supra* notes 125–26 and accompanying text.

right to expel Sterling and, if so, whether they could garner enough votes to do so, any member could have petitioned a court to dissolve due to Sterling's misconduct. The grounds likely would have been that Sterling was "guilty of such conduct as tends to affect prejudicially the carrying on of the business."¹⁹⁹ Alternatively, arguably Sterling either breached the partnership agreement by uttering a racist remark to the extent justifying a fine under the NBA Constitution, or "conduct[ed] himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him."²⁰⁰ Again, the remaining members could then have opted to continue with the partnership business after this dissolution, effectively removing Sterling from the partnership.

On the other hand, NBA members might not want other members to have this right. As such, assuming the NBA is a partnership, the partners would remove this right in the NBA Constitution.

While these rights of members would arise in the case of a fellow member's wrongdoing, there are numerous other rights—most of them default—that would also arise if the NBA were a New York partnership. If the members did not see a need for these rights and default terms, they could specifically agree to eliminate them.²⁰¹ Absent such an agreement, a member could plausibly seek to employ one of the rights provided under state partnership law.

If, alternatively, the NBA is a New York NUA, then members would not owe fiduciary duties or have statutory expulsion rights, as those rights do not exist by default under New York NUA law.²⁰² Rather, the terms of the association would be contained in the NBA Constitution and Bylaws and any other agreements among the members.²⁰³ This is likely the state of affairs the NBA members expect exists, explaining why no member mentioned that Donald Sterling's racist remarks breached a fiduciary duty or gave right to a claim of expulsion. On the other hand, given the possibility that the NBA is a partnership, if the members of the NBA want to avoid the existence of these default rights, they should be explicit about that.

¹⁹⁹ See N.Y. P'Ship, *supra* note 98, at § 63(c).

²⁰⁰ See *id.* at § 63(d).

²⁰¹ See RICHARD A. WILLIAMSON, 4B COMMERCIAL LITIGATION IN NEW YORK STATE COURTS § 78:6 n.4 (3d ed. 2010) (citations omitted) ("Under New York law, parties entering into a partnership agreement have the right to change by contract many of the 'default' provisions of the New York Partnership Law that would otherwise be mandated.").

²⁰² See *supra* notes 141–42 and accompanying text.

²⁰³ See *id.*