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The National Basketball Association and the National Basketball Players Association Opt to Cap Off the 1988 Collective Bargaining Agreement with a Full Court Press: *In Re Chris Dudley*

Michelle Hertz

NOTE

THE NATIONAL BASKETBALL ASSOCIATION AND THE NATIONAL BASKETBALL PLAYERS ASSOCIATION OPT TO CAP OFF THE 1988 COLLECTIVE BARGAINING AGREEMENT WITH A FULL COURT PRESS: *IN RE CHRIS DUDLEY*

INTRODUCTION

In *Bridgeman v. NBA In re Chris Dudley*,[1] the United States District Court for the District of New Jersey upheld the validity of the 1993 one-year opt-out contract[2] between Chris Dudley and the Portland Trail Blazers. The court concluded that an opt-out provision was not per se circumvention of the National Basketball Association's (NBA's) soft salary cap.[3] Consequently, other players negotiated and the NBA approved 1993 contracts incorporating the judicially approved opt-out clause. After the 1993-94 NBA season, those players exercised their options and negotiated new 1994 "opt-out-free"[4] contracts with their respective teams. Recently-eligible free agents also negotiated 1994 opt-out contracts. However, the NBA selectively disapproved both contracts resulting from exercised opt-out provisions and 1994 one-year opt-out contracts on the grounds that they undermined the salary cap and the NBA's interests in team parity and league competitiveness.

For example, the NBA disapproved the 1994 opt-out-free contracts between Chris Dudley and the Portland Trail Blazers, Toni Kukoc and

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1. Bridgeman v. NBA *In re Dudley*, 838 F. Supp. 172 (D.N.J. 1993)[hereinafter *Dudley I*].

2. A one-year opt-out contract allows a player to terminate his contract after one-year, become a free agent, and negotiate with his team without regard to the salary cap.

3. The salary cap is a negotiated Collective Bargaining Agreement (CBA) provision which limits the maximum amount each team can pay in salaries during an NBA season. NBA-NBPA CBA, Article VII, (1988). Unlike the National Football League's (NFL) "hard" cap (maximum team salaries are not subject to any exceptions), the NBA's "soft" cap is subject to broad exceptions which allow teams to exceed cap payroll limitations under certain conditions. *See* discussion *infra* part I.A.2.a. For example, while the maximum salary limitation for the 1994-95 NBA season is $15.9 million per team, many teams, such as the Orlando Magic who will pay an estimated $24 million in salaries this season, have legally exceeded the cap. Tim Povtak, *NBA Deal Blocks Stoppage; No-Lockout, No-Strike Accord Protects Season*, ORLANDO SENTINEL, Oct. 28, 1994, at D1.

4. None of the resultant 1994 contracts included opt-out provisions.

the Chicago Bulls, and A.C. Green and the Phoenix Suns, each of which resulted from the exercise of 1993 opt-out provisions. The NBA also rejected the new 1994 Horace Grant and Orlando Magic opt-out contract as a blatant violation of the salary cap. Although Grant and Orlando were able to restructure their deal and obtain NBA approval, the legality of new opt-out contracts is undecided and remains critical to the upcoming negotiation of the new NBA and National Basketball Players Association (NBPA) Collective Bargaining Agreement (CBA).

Part I of this Note provides a brief history of the NBA's and the NBPA's labor relationship; an overview of the pertinent sections of the current Collective Bargaining Agreement; and an account of the first litigated case of salary cap circumvention. Part II centers on the court's decision in *Dudley I.* Part III illustrates the court's interpretation and application of its *Dudley I* decision in ruling on four distinct fact patterns. Part IV analyzes the future of the opt-out clause in the NBA vis-à-vis the upcoming CBA to be negotiated this year. Part V concludes that the real impact of any judicial decision will be overshadowed by finalization of a new CBA. In short, the new CBA will determine whether the salary cap has indeed outlived its usefulness or whether retention of the salary cap is essential to team parity, league competitiveness, and the continued financial stability, growth, and success of the NBA. Perhaps, a bastardized form of the much litigated opt-clause which permits player mobility while retaining some salary cap controls will be the perfect compromise.

PART I - BACKGROUND AND CASE LAW

A. Collective Bargaining Agreement

1. CBA History

In 1976, the NBA and the NBPA entered into a court approved settlement agreement which effected a number of changes in the operation of the NBA, including modification of the college draft and institution of the right of first refusal.[5] This agreement, known as the Robertson Settlement Agreement (RSA), expired at the end of the 1986-87 NBA season.[6] Concurrent with the adoption of the RSA in 1976, the NBA and

5. NBA v. Williams, 857 F. Supp. 1069, 1072 (S.D.N.Y. 1994).
6. *Id.*

the NBPA negotiated a multi-year CBA which incorporated the substantive terms of the RSA and expired on June 1, 1979.[7]

In October 1980, the parties elected to preserve the status quo and executed a two-year CBA expressly incorporating the terms of the RSA.[8] Nearing financial ruin by 1983, the NBA introduced a salary cap to cure its financial problems.[9] Not surprisingly, the players sought a second opinion and filed suit challenging the legality of the salary cap.[10] Although *Lanier v. NBA*[11] determined that the salary cap could not be unilaterally imposed, the players yielded to financial pressure and agreed to institute the salary cap to restore the league's financial health.[12]

Accordingly, the parties modified the expired 1980 CBA to include a salary cap and to extend its term through the end of the 1986-87 season.[13] At the expiration of the 1987 season, the players re-challenged the college draft, the right of first refusal, and the salary cap on antitrust grounds without success.[14] Accordingly, the 1988 CBA perpetuated the college draft, the right of first refusal, and the salary cap.[15] The 1988 CBA formally expired on June 23, 1994.[16] However, on October 28, 1994, the NBA and the NBPA entered into a no-lockout, no-strike agreement which effectively extended the 1988 CBA until the end of the 1994-95 season.[17] While formal negotiations were suspended pending a decision in the antitrust appeal of *NBA v. Williams*[18], the United States Court of Appeals for the Second Circuit's recent decision affirming the

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7. *Id.*

8. *Id.*

9. *Id.* Specifically, the NBA contended that "the majority of NBA teams were losing money, due in part, to rising player salaries and benefits." *Id.*

10. Lanier v. NBA, 82 Civ. 4935 (S.D.N.Y.).

11. *Id.*

12. *Williams*, 857 F. Supp. at 1072.

13. *Id.*

14. Bridgeman v. NBA, 675 F. Supp. 960 (D.N.J. 1987).

15. *Williams*, 857 F. Supp. at 1072. The Bridgeman Stipulation and Settlement Agreement (BSA) was the settlement of a class action brought by the NBA players challenging the NBA Salary Cap and other restrictions under the antitrust laws. *Bridgeman*, 675 F. Supp. at 960. The BSA authorized the continuation of a modified form of Salary Cap for a limited period of time. Additionally, the substantive terms of the BSA were incorporated into the 1988 NBA-NBPA CBA. Hence, the BSA and the CBA are often referred to interchangeably.

16. *Williams*, 857 F. Supp. at 1072.

17. Povtak, *supra* note 3, at D1. The no-lockout, no strike agreement was linked to a one-year stay of the Wood-Eisley lawsuit which alleges that this year's salary cap of $15.9 million was artificially reduced by $2.75 million due to the NBA's failure to properly include $74 million in the player's share of revenues. Murray Chass, *No-Lockout, No-Strike Accord is Near for NBA*, N. Y. TIMES, Oct. 27, 1994, at B17.

18. *Williams*, 857 F. Supp. at 1079 (holding that antitrust laws have no application to NBA collective bargaining negotiations).

NBA's victory has cleared the way for substantive CBA negotiations.[19] Although spokespersons for both the NBA and the NBPA remain upbeat about their ability to negotiate a new CBA without work stoppages or radical measures, it is clear that resolution of their biggest philosophical issue—the salary cap—will be hotly contested.[20] To date no new CBA has been negotiated.

2. The NBA Salary Cap

a. The 1988 CBA Salary Cap Provision

Article VII of the 1988 CBA governs the salary cap provisions. The salary cap equals the "then-current maximum amount that each Team can pay in Salaries during an NBA season . . . ."[21] Basically, the salary cap is computed by multiplying the league's revenues less benefits by fifty-three percent and then dividing that figure by the number of teams currently in the league.[22]

b. Salary Cap Exceptions

There are five basic exceptions to the salary cap and its application:[23]

(1) a Team is permitted to exceed the Salary Cap to the extent of its current contractual commitments;

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19. NBA v. Williams, No. 94-7709, 1995 U.S. App. LEXIS 1531 at *30 (2nd Cir. Jan. 24, 1995) (holding that antitrust laws have no application to NBA collective bargaining negotiations and that such disputes are governed by the labor laws).

20. Richard Sandomir, *Pro Basketball; NBA and Stern Take the Road Less Traveled*, N.Y. TIMES, Oct. 6, 1994, at B19. The NBA is seeking to tighten the salary cap by eliminating loopholes (such as the opt-out contracts) and institute a hard salary cap to control owners costs. The NBPA wants to eliminate the salary cap and its restrictions on free agency. *Id.*

21. NATIONAL BASKETBALL ASSOCIATION-NATIONAL BASKETBALL PLAYERS ASSOCIATION COLLECTIVE BARGAINING AGREEMENT, Article VII, Part A (e)(1988) [hereinafter "NBA-NBPA CBA"].

22. Jeffery E. Levine, *The Legality and Efficacy of the National Basketball Association Salary Cap*, 11 CARDOZO ARTS & ENT. L. J. 71, 74 (1992).

23. NBA-NBPA CBA, Article VII, Part F, § 1 (a)-(e)(1988). To understand the full meaning of the salary cap and its exceptions, the key terms defined under the 1988 CBA are provided as follows: "Veteran" means a person who has signed at least one Player Contract with an NBA Team; "Right of First Refusal" means the right of NBA Teams, in the circumstances described in Article V below, to retain the services of certain Veterans by matching offers made to those players; "Restricted Free Agent" means a Veteran who completes his Player Contract by rendering the playing services called for thereunder but who is still subject to the Right of First Refusal in favor of his prior Team; and "Unrestricted Free Agent" means a Veteran who completes his Player Contract by rendering the playing services called for thereunder, or whose Player Contract has been terminated in accordance with the NBA waiver procedure, and is no longer subject to the Right of First Refusal in favor of his prior Team. NBA-NBPA CBA, Definitions (1988).

(2) a Team with a Team Salary at or over the Salary Cap may replace:
  (i) a Restricted and Unrestricted Free Agent who elects not to re-sign a contract with that team at 100% of the Salary last paid to the player being replaced; and
  (ii) a retiree, a waived player, a holdout, or a player injured within 56 days of the first scheduled game at 50% of the Salary last paid to the player being replaced;
(3) a Team with a Team salary at or over the Salary Cap may enter into a one-year Player Contract with a College Draftee at the minimum player salary;
(4) a Team may enter into any new Player Contract with any team Veteran without regard to salary cap limitations; and
(5) a team at or over the Salary Cap may replace a player whose Player Contract has been assigned to another NBA Team.

c. Salary Cap Safeguards

In order to protect the interests of both the NBA and the NBPA, the salary cap is also expressly safeguarded under Article VII, Part H.[24] Specifically, the CBA prohibits the NBA, the NBPA, any Team, or any Player from entering into

> any agreement, Player Contract, Offer Sheet or other transaction which includes any terms that are designed to serve the purpose of defeating or circumventing the intention of the parties as reflected by (a) the provisions of this Article VII with respect to Defined Gross Revenues, Salary Cap and Minimum Team Salary and (b) the terms and provisions of this Agreement.[25]

Furthermore, to ensure that each agreement is executed in good faith, all undisclosed agreements are expressly prohibited.[26]

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24. *Id.* at Article VII, Part H, §§ 3 and 4 (1988).

25. *Id.* at Article VII, Part H, § 3 (1988).

26. *Id.* at Article VII, Part H, § 4 (1988). This article specifically provides that:

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

Id.

d. Salary Cap Objectives

Conspicuously missing from the text of the salary cap provision is its stated purpose. However, the purpose of the salary cap has been judicially defined and refined through the course of litigation. According to NBA Commissioner, David Stern, the purpose of the salary cap is "to insure the financial stability of troubled NBA teams, improve competitive balance and at the same time preserve and improve the basic framework of the [Robertson] Settlement Agreement."[27]

Nevertheless, the NBPA maintains that

> the essential objectives of the players in negotiating the terms of the Modification Agreement [which includes the salary cap provisions] were: (i) to maintain a system of free agency, which to the greatest extent possible, would insure that player salaries be established at competitive levels as a result of a free and open-bidding system; (ii) to strengthen the long-term financial stability of the league and to protect the jobs of as many players as possible; and (iii) to provide for some form of overall revenue sharing between the players and the NBA teams . . . .[28]

Regardless of whether the dual-purposes of the salary cap can be reconciled, the resultant salary cap provision was clearly the product of hard-fought, arms-length negotiations and adequately met each's fundamental agenda.[29] Agreeing that a financially stable league was essential, the NBA and the NBPA modified the Robertson Settlement Agreement incorporating the innovative salary cap.[30] Although reaching agreement on the cap issue was not easy, the courts were charged with the impossible task of preserving the integrity of the agreement without compromising the basic interests of either party.[31] This is especially difficult given the conflicting motives and interests of the parties and the incentive each has to technically meet the salary cap provisions while looking out for their own best interests.

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27. *In re* NBA and New York Knickerbockers, 630 F. Supp. 136 (S.D.N.Y. 1986) (citations omitted) [hereinafter *King*].

28. *Id.* at 137.

29. *Id.*

30. *Id.*

31. *Id.*

B. Salary Cap Circumvention Case Law

In re NBA and the New York Knickerbockers[32] was the first case to involve salary cap circumvention. The key issues in *King*[33] were: (1) whether Albert King was replacing a Knickerbockers' ("Knicks") veteran free agent or a retiree and (2) whether a contract which extends beyond the term of the CBA must comply with the CBA salary cap in the out-years.[34]

In *King*, Leonard Robinson, an eleven year NBA veteran, failed to renew his $540,000 a year contract with the Knicks for the upcoming 1985-86 season.[35] Seeking to replace their "veteran free agent", the Knicks offered Albert King a five year fully guaranteed contract totalling $3.3 million. This initial offer contained a $400,000 signing bonus[36] and a five-year guaranteed salary as follows: 1985-86 — $450,000; 1986-87 — $450,000; 1987-88 — $600,000; 1988-89 — $700,000; and 1989-90 — $700,000.[37]

The NBA vetoed the Knicks' offer, asserting that Robinson was merely a retiree not a veteran free agent.[38] As a result, the Knicks could only offer King fifty percent of Robinson's last salary to comply with the salary cap limitations.[39] Consequently, the Knicks revised their offer. "The new proposal contained a signing bonus of $960,000, and five years of guaranteed salary as follows: 1985-86 — $75,000; 1986-86 (sic) — $75,000; 1987-88 — $700,000; 1988-89 — $700,000; and 1989-90 — $800,000."[40] Technically, this new offer met the salary cap restrictions by keeping King's salary within the $270,000 limit (fifty percent of Robinson's last salary) during the CBA term.[41] However, the NBA challenged the proposed contract asserting that its backloaded structure was expressly designed to circumvent the intent of the team salary cap.[42]

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32. 630 F. Supp. 136.

33. *Id.*

34. *Id.* at 137-38. Out-years are those years in which the contract term extends beyond the term of the applicable CBA.

35. 630 F. Supp. at 138.

36. *Id.* Under NBA-NBPA CBA, Article III (C)(7)(1988), a signing bonus is allocated, pro rata, over the number of "guaranteed" salary seasons covered by the contract.

37. *King*, 630 F. Supp. at 138.

38. *Id.*

39. *Id.* NBA-NBPA CBA Article VII, Part F, § 1(b)(2)(1988). *See* discussion *supra* part I.A.2.b.

40. *King*, 630 F. Supp. at 138.

41. *Id.* The CBA was scheduled to expire in the spring 1987.

42. *Id.*

The Special Master determined that both the outsize bonus[43] and the revised King offer were within the scope of the CBA.[44] Nonetheless, the United States District Court for the Southern District of New York ruled that both the structure of the initial offer and the revised offer between Albert King and the Knicks constituted a stark case of intentional salary cap circumvention.[45] The court reasoned that because the salary cap was an integral part of the bargain to which the NBPA agreed in order to secure revenue sharing and a minimum salary floor for its players, the players could not be permitted to structure contracts (although artificially and formally within the salary cap limitations) to void the provisions designed to protect the NBA's interests.[46] In short, the court would not allow the players, although seemingly playing within the rules, to throw the game.

PART II - *DUDLEY I*

In *Dudley I*,[47] another innovative contract structure, the one-year opt-out contract,[48] was attacked by the NBA as the newest device to circumvent its interests in the salary cap. Facing this case of first impression, the United States District Court for the District of New Jersey held that although "one-year out provisions in multiyear [NBA] contracts may have a *presently* unascertainable adverse effect on the very legitimate objectives of the salary cap, Dudley's [one-year opt-out] contract is not [salary cap circumvention] in violation of [CBA] Section 3."[49]

A. Statement of Facts

Chris Dudley, a six-year veteran player, completed a three year contract with the New Jersey Nets on June 30, 1993.[50] Although Dudley was not a starter, his salary during the 1992-93 season was $1,200,000.[51] As the Nets back-up center, Dudley aspired to be the starting center on a

43. In accordance with the NBA-NBPA CBA, Section VII, Part B, Section 2, the CBA was "written to cover any signing bonus without restrictions of any kind."

44. *King*, 630 F. Supp. at 139.

45. *Id.*

46. *Id.* at 141.

47. *Bridgeman*, 838 F. Supp. 172.

48. *See* definition *supra* note 2.

49. *Bridgeman*, 838 F. Supp. at 184 (emphasis added).

50. *Id.* at 174.

51. *Id.*

championship caliber team.[52] Prior to expiration of his contract, Dudley negotiated with the Nets for a new player contract.[53]

Because the Nets were not limited by the salary cap with respect to Dudley under CBA rules, they were able to offer him a seven-year contract with six years fully guaranteed and the seventh year partly guaranteed at the following yearly salaries: 1993-94 - $1,560,000; 1994-95 - $2,028,000; 1995-96 - $2,496,000; 1996-97 - $2,964,000; 1997-98 - $3,432,000; 1998-99 $3,900,000; and 1999-2000 - $4,368,000 totalling $20,748,000.[54] However, Dudley summarily rejected the Nets offer and proceeded to shop around the NBA for more attractive offers.[55]

Subsequently, Dudley began negotiations with the Portland Trail Blazers.[56] Although Portland was "particularly attractive to Dudley because it was of championship caliber, it had no natural center, it played a style of basketball that he thought would 'showcase' his skills and it was located on the West Coast where he lived,"[57] Portland had no room under its salary cap.[58] Accordingly, Portland made a trade opening up a $790,000 salary slot and signed Dudley to a seven-year, guaranteed contract starting at $790,000 a year.[59]

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52. *Id.*

53. *Id.*

54. *Id.* at 174-75. The NBA-NBPA CBA, Article VII, Part F, § 1 (d)(1988), essentially provides that any Team may enter a new Player Contract with any Veteran who last played for that Team without regard to Team Salary Cap limitations.

55. *Bridgeman*, 838 F. Supp. at 174-75. After completing his contract with the Nets, Dudley became an "unrestricted free agent" and was no longer subject to a "right of first refusal" in favor of the Nets. *See supra* note 23 for definitions of "unrestricted free agent" and "right of first refusal."

56. *Bridgeman*, 838 F. Supp. at 175.

57. *Id.*

58. *Id.* Under NBA-NBPA CBA, Article VII, Part A, § 1(g) (1988), the concept of "room" is defined as "the extent to which: (i) a Team's then-current Team Salary is less than the Salary Cap; or (ii) a Team is entitled to use one of the Salary Cap Exceptions set forth in Part F, Section 1 below." Since, Portland had no room under the salary cap and no cap exceptions applied, in order to make an offer, Portland had to reduce their current team salary to make "room" and limit their offer to the team salary reduction achieved.

59. *Bridgeman*, 838 F. Supp. at 175. Dudley's initial salary of $790,000 equaled the "room" provided via Portland's trade. Thereafter, Dudley's salary increased at an annual rate of 30% in accordance with NBA-NBPA CBA, Article VII, Part E, Section 2(c)(1988). Accordingly, Dudley's annual salary is allocated as follows: 1993-94 - $790,000; 1994-95 - $1,027,000; 1995-96 - $1,264,000; 1996-97 - $1,501,000; 1997-98 - $1,738,000; 1998-99 $1,975,000; and 1999-2000 - $2,212,000 for a total of $10,512,000. *Bridgeman*, 838 F. Supp. at 175.

However, this resultant contract contained an unconventional contract clause—a one-year out.[60] Dudley's one-year out contract structure allowed him to terminate his contract with Portland at the end of one year and become an unrestricted free agent. As an unrestricted free agent, Dudley would be free to negotiate a new contract with Portland without salary cap limitations or negotiate with another NBA team subject to salary cap limitations. Immediately,

> [t]he NBA challenged the Dudley contract on the grounds that: (i) by its terms it constitute[d] cap circumvention under Article VII, Part H, Section 3 of the BSA and (ii) the circumstances reflect[ed] an unwritten understanding concerning future renegotiations of the contract in violation of Article VII, Part H, Section 4(a)(2) of the BSA.[61]

Special Master Clark addressed the NBA's challenge and found that: (1) "a multiyear contract with a one-year out is not per se cap circumvention;"[62] (2) "Articles VI and VII of the BSA contemplate that there may be player options in multiyear contracts to lengthen or shorten the contracts;"[63] (3) a one-year out provision allowing negotiation of a new contract uninhibited by the salary cap did not constitute an undisclosed agreement of any kind;[64] and (4) "one-year out provisions in multiyear

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60. *Bridgeman*, 838 F. Supp. at 175. Although a one-year out provision gives a player the opportunity to renegotiate as a free agent, the player's free agent status (restricted/unrestricted) implicitly limits his ability to negotiate salary (unrestricted mobility gives the player valuable bargaining leverage). As an unrestricted free agent, a player is free to either negotiate a new contract with his team without salary cap limitations or negotiate with another NBA team subject to salary cap limitations. As a restricted free agent, a player's mobility is limited in that his prior team holds the "right of first refusal" and may retain the player's services by matching other team's offers.

61. *Id.* NBA-NBPA CBA, Article VII, Part H, § 3 specifically provides:

> [n]either parties hereto, nor any Team or player shall enter into any agreement, Player Contract, Offer Sheet or other transaction which includes any terms that are designed to serve the purpose of defeating or circumventing the intention of the parties as reflected by (a) the provisions of this Article VII with respect to Defined Gross Revenues, Salary Cap and Minimum Team Salary and (b) the terms and provisions of this Agreement.

Additionally, Article VII, Part H, § 4(a)(2) provides:

> At the time a Team and a player enter into any Player Contract, or any renegotiation, extension or amendment of a Player Contract, there shall be no undisclosed agreements of any kind, express or implied, oral or written, or promises, undertakings, representations, commitments, inducements, assurances of intent or understandings of any kind, between such player and any Team: concerning any future renegotiation, extension or amendment of the Player Contract.

62. *Bridgeman*, 838 F. Supp. at 180.

63. *Id.*

64. *Id.* at 181.

contracts are not compensation and should be given no value for the purpose of computing salary cap compliance . . . ."[65] Consequently, the Special Master concluded that "the [1993] Dudley/Portland contract [did] not constitute salary cap circumvention in violation of Article VII, Part H, Section 3 of the BSA."[66]

On appeal, the United States District Court for the District of New Jersey affirmed Special Master Clark's findings and ultimately held that: "even though one-year out provisions in multiyear contracts may have a *presently* unascertainable adverse effect on the very legitimate objectives of the salary cap, Dudley's [1993 one-year opt-out] contract [was] not [salary cap circumvention] in violation of [CBA] Section 3."[67]

B. Summary of Court's Analysis

Applying the prescribed "clearly erroneous" standard of review,[68] Judge Debevoise summarily affirmed all of the Special Master's findings except "whether under the circumstances the [1993] Dudley/Portland contract constitute[d] impermissible salary cap evasion."[69] Regarding that issue, Judge Debevoise rejected the Special Master's: (1) finding that one-year opt-out contracts would have a negligible impact on the owner's objective of controlling maximum salaries"[70] (i.e., Judge Debevoise expected that opt-out contracts would have the effect of pushing maximum salaries upward[71]); (2) equation of past NBA approved agreements containing options and current agreements containing the one-year out provision;[72] and (3) finding that Dudley type contracts do not pose any threat to the benefits of the salary cap.[73] However, because conclusions regarding the long-term impact of the salary cap objectives were not self-evident and nothing precludes a one-

65. *Id.*

66. *Id.*

67. *Id.* at 184 (emphasis added).

68. *Id.* at 180. The BSA, Article XIV, § 3, specifically provides that "the Court shall accept the Special Master's findings of fact unless clearly erroneous and the Special Master's recommendations of relief unless based upon clearly erroneous findings of fact, incorrect application of the law or abuse of discretion."

69. *Bridgeman*, 838 F. Supp. at 180.

70. *Id.* at 182.

71. *Id.* at 184.

72. *Id.* at 182-83.

73. *Id.* at 183.

year termination option,[74] Judge Debevoise was forced to validate the 1993 use of one-year opt-out contracts.[75]

Arguably, Judge Debevoise's holding is narrow—absolute for Chris Dudley but of little use to players ineligible to take advantage of the *Dudley I* decision in time for the 1993 season. In short, the certainty of the opt-out provision in future player contracts is not guaranteed. Under Judge Debevoise's ruling, the NBA is not precluded from rechallenging such contracts based on new evidence of an adverse impact to their salary cap objectives. Not surprisingly, this was exactly the NBA's approach in the continued litigation of *Bridgeman v. NBA In re Dudley*.[76]

PART III - *DUDLEY II*

In *Dudley II*,[77] the United States District Court for the District of New Jersey was forced to interpret and apply its *Dudley I* decision relative to four different scenarios. Specifically, the court ruled on the following: (1) Chris Dudley and the Portland Trail Blazers' motion for an order under their original suit declaring their resultant 1994 contract valid and binding and enjoining the NBA from disapproving or interfering with their 1994 contract; (2) Toni Kukoc and the Chicago Bulls' motion asserting that as parties to *Dudley I*, the doctrine of res judicata[78] expressly precluded the NBA from disapproving or interfering with their resultant 1994 contract; (3) A.C. Green and the Phoenix Suns' motion asserting that based on the doctrine of collateral estoppel[79] or, in the

74. The NBA-NBPA CBA, Article VI, § 1 (1988), specifically provides that "[a]ny Player Contract may contain an option in favor of the player."

75. *Bridgeman*, 838 F.Supp. at 183-84. Specifically, Judge Debevoise concluded that "even though one-year out provisions in multiyear contracts may have a *presently* unascertainable adverse effect on the very legitimate objectives of the salary cap, Dudley's [1993 one-year opt out] contract [was] not [salary cap circumvention] in violation of [CBA] Section 3." *Id.* at 184 (emphasis added).

76. Bridgeman v. NBA *In re Dudley*, No. 87-4001 (D.N.J. Sept. 12, 1994)(order granting summary judgment on res judicata grounds)[hereinafter *Dudley II*]. In *Dudley II*, the court disposed of the following related motions: A.C. Green, Jr. and Phoenix Suns Limited Partnership v. NBA, No. 94-4106 (D.N.J. 1994); Horace Grant v. NBA, No. 94-4160 (D.N.J. 1994); and Orlando Magic, Inc. v. NBA, No. 94-4103 (D.N.J. 1994).

77. *Bridgeman*, No. 87-4001.

78. Res judicata may be invoked where there was a final judgment in the matter; the proceeding included the same parties; and the action resolved the claims between the two parties. Arab African Int'l. Bank v. Epstein, 10 F.3d 168, 171 (3rd Cir. 1993).

79. The doctrine of collateral estoppel can be successfully invoked where: (1) the issue decided in the prior action is identical to the issue presented in the pending litigation; (2) there was a final judgment on the merits in the prior litigation; (3) the party against whom the estoppel is asserted is a party or in privity with a party in the prior action; and (4) the party

alternative the doctrine of equitable estoppel,[80] the NBA was precluded from challenging the validity of their resultant 1994 contract; and (4) Horace Grant and the Orlando Magic's motion asserting that based on *Dudley I* their new 1994 contract which included a one-year opt-out provision was valid and binding, and that, under the doctrine of collateral estoppel, the NBA was precluded from re-litigating the validity of one-year opt-out contracts.

The *Dudley II* court held that although *Dudley I* precluded the NBA from disapproving or interfering with the 1994 contracts executed by Dudley, Kukoc, and A.C. Green on res judicata and collateral estoppel grounds, the NBA is not estopped from challenging *new* one-year opt-out contracts (such as the 1994 Grant/Magic contract) based on fresh evidence of an adverse impact to the salary cap.[81] In reaching this result, the court rejected the players' claim that *Dudley I* upheld the validity of all one-year opt-out provisions.[82] Thus, until a new CBA is negotiated, the NBA will continue to disapprove one-year out contracts that undermine the NBA's interests in the salary cap.[83]

A. Statement of Facts

1. The 1994 Chris Dudley/Portland Trail Blazers Contract

On June 24, 1994, after the successful litigation of *Dudley I* and subsequent NBA approval of his 1993 opt-out contract, Chris Dudley pre-

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against whom it is asserted has a full and fair opportunity to litigate the issue in that prior action. Temple University v. White, 941 F.2d 201, 212 (3rd Cir. 1991), *cert. denied* 112 S.Ct. 873 (1992). *See also*, Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 331 (1978); Glictronix Corp. v. Am. Tel. & Tel., Co., 603 F. Supp. 552, 563 (D.N.J. 1984).

80. Equitable estoppel acts to prevent injustice where "one by his acts, representations or admissions intentionally or through culpable negligence induces another to believe and have confidence in certain material facts and the other justifiably relies and acts on such belief causing him injury or prejudice." St. Joseph's Hosp. v. Reserve Life Ins. Co., 742 P.2d 808, 818 (Ariz. 1987). *See also*, Heltzel v. Mecham Pontiac, 730 P.2d 235, 237-38 (Ariz. 1986); Foley Mach. Co. v. Amland Contractors, Inc., 506 A.2d 1263, 1266 (N.J. App. Div. 1986). The three elements essential to a claim for equitable estoppel are: (1) conduct by a party that induces another party to believe in certain material facts; (2) justifiable reliance on those facts by the party so induced; and (3) injury to the party relying on that conduct. *Heltzel*, 730 P.2d at 238. *See also*, Tuscon Elec. Power Co. v. Arizona Dep't of Revenue, 851 P.2d 132, 141 (Ariz. Ct. App. 1992).

81. *Bridgeman*, No. 87-4001. Dudley, Kukoc, and Green each exercised the opt-out provision at the conclusion of the 1993 season and re-negotiated a new player contract with their respective teams as unrestricted free agents. None of the resultant 1994 contracts included an opt-out provision.

82. *Id.*

83. *Contract Ruling*, SPORTS NETWORK, Sept. 12, 1994, at NBA Section (quoting a prepared statement released by NBA Deputy Commissioner, Russ Granik).

dictably "exercised his right to terminate his contract with the Trail Blazers and became an unrestricted free agent."[84] Although Dudley seriously considered a six-year, $24 million offer from another NBA team, he ultimately signed a new six-year contract with the Portland Trail Blazers which called for a first year salary of $3.5 million and an average salary of approximately $4 million per year.[85] Dudley's 1994 contract did not include an opt-out provision.[86]

On August 30, 1994, the NBA disapproved Dudley's 1994 contract with the Trail Blazers on the grounds that "the contract, when considered in conjunction with Dudley's previous contract . . . , constitutes a transaction that violates the anti-circumvention provisions of Article VII, Part H of the CBA."[87] In short, the NBA contended that "the 1994 contract between Dudley and Portland completed a transaction begun in 1993" that circumvented the salary cap.[88]

Consequently, Dudley sued the NBA alleging that not only was the NBA's disapproval of his 1994 contract in direct violation of the court order in *Dudley I*, but that re-litigation of the opt-out issue was barred by the doctrines of res judicata and collateral estoppel.[89] Dudley also maintained that the NBA had no reasonable grounds to challenge the 1994 contract itself, because it did not contain an "opt-out provision" nor was the proffered salary limited by salary cap restrictions—Dudley was an unrestricted free agent re-signing with his team.[90]

2. The 1994 Toni Kukoc/Chicago Bulls Contract

"In 1993 the Chicago Bulls entered into a contract with Toni Kukoc containing an early termination option, exercisable after the first season."[91] Kukoc exercised his option and signed a new six-year contract with the Bulls.[92] "On August 19, 1994 the NBA disapproved the new

84. *Bridgeman*, No. 87-4001, Brief for Chris Dudley at 12.

85. *Id.*

86. *Id.*

87. *Id.* at 12-13.

88. *Bridgeman*, No. 87-4001, Brief for NBA at 19. Specifically, the NBA alleged that as a whole the Dudley transaction enabled Portland "to obtain a player with skills worth a first year salary of $3.5 million and an average salary of $4 million per year when the Trail Blazers only had Room for a player with skills worth a first year salary of $790,000 and an average of $1.5 million per year." *Id.*

89. *Bridgeman*, No. 87-4001, Brief for Chris Dudley at 14-16.

90. *Id.* at 14.

91. *Bridgeman*, No. 87-4001, Record at 63.

92. *Id.*

contract as violative of the anti-circumvention provisions of the [Bridgeman] Settlement Agreement and the CBA."[93]

Accordingly, Kukoc and the Bulls filed suit alleging that the NBA's rejection of their contract was tantamount to circumvention of the court's prior order and was a naked "attempt to re-litigate issues already decided" in *Dudley I*.[94] Specifically, Kukoc/Bulls sought judicial approval of their 1994 contract on res judicata grounds.[95]

3. The 1994 A.C. Green/Phoenix Suns Contract

"Green was a veteran player who became a[n] [unrestricted] free agent at the conclusion of the 1992-93 season after eight seasons with the Los Angeles Lakers."[96] During his 1992-93 season with the Lakers, Green earned $1.75 million.[97] Although Green was seeking a long-term deal with annual compensation of $5.25 million and had already secured a lucrative Laker offer for a five-year, guaranteed contract at $3.5 million per year, Green signed a five-year, $15 million deal with the Suns that included a one-year opt-out provision.[98] After a career year, Green exercised his option and became an unrestricted free agent.[99] Although Green negotiated with other NBA teams, he signed a competitive deal with the Suns at an average salary of approximately $5.2 million per

93. *Id.*

94. *Bridgeman*, No. 87-4001, Brief for Chicago Bulls at 5.

95. *Id.*

96. *Bridgeman*, No. 87-4001, Record at 71-72.

97. *Id.* at 72.

98. *Id.*; *Bridgeman*, No. 87-4001, Brief for A.C. Green and Phoenix Suns at 26. In accordance with Article VII, Part E, Section 2(d),

> [i]f the Salary in the first season of the Player Contract is less than the Team's Room at the time the Team enters into the Contract, the Salary in any succeeding season may increase to the extent of the difference between such Room and the first season's Salary, plus, for each such succeeding season, 30% of the first season's Regular Compensation.

NBA-NBPA CBA, Article VII, Part E, § 2(d) (1988). Thus, since Green's first year salary equaled the Suns' room under the cap, each succeeding year was merely escalated by $565,500 (i.e., 30% of his first season's regular compensation of $1,885,000). A breakdown of Green's contract is as follows: 1993-94 - $1,885,000; 1994-95 - $2,450,500; 1995-96 - $3,016,000; 1996-97 - $3,581,500; and 1997-98 - $4,147,000 totalling $15,080,000.

99. *Bridgeman*, No. 87-4001, Brief for A.C. Green and Phoenix Suns at 26-27.

year.[100] Green's new 1994 contract does not contain an opt-out clause.[101]

Yet, on August 2, 1994, the NBA disapproved Green's contract on the grounds that "when considered in conjunction with Green's previous contract dated September 28, 1993, it constitutes a transaction that violates the anti-circumvention provisions of Article VII, Part H of the CBA."[102] Subsequently, Green and the Suns sued the NBA to compel approval of their 1994 contract asserting that: (1) *Dudley I* collaterally estops the NBA from re-litigating the one-year opt-out issue; (2) the NBA is equitably estopped from interfering with their new 1994 contract; and (3) the NBA has no reasonable grounds to assert that their new 1994 contract is on its face violative of the salary cap.[103]

4. The 1994 Horace Grant/Orlando Magic Opt-Out Contract

During the 1993-94 season, Horace Grant played for the Chicago Bulls under a 1990 contract that called for an average salary of $1.65 million per year.[104] On July 1, 1994, Grant's contract with Chicago expired and he became an unrestricted free agent.[105] Consequently, Grant shopped around the NBA for the most attractive contract package. Although Grant was in receipt of a five-year, $20 million offer from Chicago[106] and had negotiated with more than ten NBA teams, the Orlando Magic signed Grant to a six-year contract with an average salary of approximately $3.7 million per year.[107] Unlike the 1994 contracts of Dudley, Kukoc, and Green, Grant's 1994 contract with the Magic contains a clause that "*might* allow Grant to terminate his contract following *any* NBA season in which he achieved certain specified performance

100. *Bridgeman*, No. 87-4001, Record at 72. Arguably, Green's 1994 negotiated salary is commensurate with other forwards of comparable ability (such as Larry Johnson and Derrick Coleman) who receive upwards of $7 million per year without the use of the opt-out contract structure. *Bridgeman*, No. 87-4001, Brief for A.C. Green and the Phoenix Suns at 27.

101. *Bridgeman*, No. 87-4001, Record at 72.

102. *Id.* at 73.

103. *Bridgeman*, No. 87-4001, Brief for A.C. Green and Phoenix Suns.

104. *Bridgeman*, No. 87-4001, Brief for Horace Grant at 11.

105. *Id.*

106. *Bridgeman*, No. 87-4001, Record at 75.

107. *Bridgeman*, No. 87-4001, Brief for Horace Grant at 11. The court noted on the record that "[u]nder the Orlando Magic contract Grant is to receive $2,125,000 salary during the first season . . . an amount equal to all of Orlando Magic's room under the salary cap." *Bridgeman*, No. 87-4001, Record at 76. The court further noted that Orlando's proffered average annual salary of approximately $3.7 million was $300,000 less than Chicago's offer and $670,000 less than what another NBA team was willing to pay without an early termination clause. *Id.*

levels."[108] On August 2, 1994, the NBA disapproved the Grant/Magic contract on the grounds that "the contract 'circumvents the Revenue Sharing/Salary Cap System in violation of Article VII, Part H, Section 3 of the Collective Bargaining Agreement.' "[109] Subsequently, Grant and the Magic sued the NBA seeking court approval of their new 1994 contract on collateral estoppel grounds and arguing that the 1994 contract by its terms is not violative of the cap provisions because: (1) the Grant/Magic contract represents fair market value in terms of salary and non-salary factors; (2) the Grant/Magic contract did not contain an absolute opt-out provision; and (3) the NBA recently approved three other 1994 one-year opt-out contracts— those of Sean Elliot, Chuck Person, and Dominique Wilkins.[110]

B. Summary of Court's Analysis

To resolve the issues before the court, Judge Debevoise reviewed his *Dudley I* opinion and highlighted portions particularly relevant to the instant proceedings. First, Judge Debevoise stated that although detailed facts were only developed with respect to the Dudley/Portland contract, his legal rulings were equally applicable to the Chicago Bulls/Toni Kukoc and the Atlanta Hawks/Craig Ehlo contracts.[111] After summarizing the basic salary cap provisions, Judge Debevoise defined the salary cap as a means "to preserve team competition throughout the entire league by preventing the richest teams from taking the bulk of the best players to the disadvantage of the less well-situated teams."[112]

Judge Debevoise then took pains to reiterate these salient *Dudley I* points: (1) the salary cap played a key role in preserving the financial stability of the NBA teams;[113] (2) the salary cap was the quid pro quo for the NBA concessions of revenue sharing and minimum salary floor;[114] (3) Article VII protects both the NBA's anti-circumvention interests and the player's right to receive options that lengthen or shorten the term of

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108. *Bridgeman*, No. 87-4001, Brief for Horace Grant at 12 (second emphasis added).

109. *Id.* at 12.

110. *Id.* at Brief for Horace Grant.

111. *Bridgeman*, No. 87-4001, Record at 65. Since the one-year opt-outs contracts between the Atlanta Hawks/Craig Ehlo and the Chicago Bulls/Toni Kukoc were also in dispute at the time of the Dudley controversy, the court consolidated the actions in *Dudley I*. *Id.* Since neither Craig Ehlo nor the Atlanta Hawks were a party to the instant litigation, detailed facts regarding their contract are not developed in this Note.

112. *Id.* at 66.

113. *Id.* at 68.

114. *Id.*

contract;[115] (4) one-year opt-out contracts could threaten the benefits of the salary cap;[116] (5) widespread use of one-year opt-out contracts could have a devastating impact upon the teams' salary cap objectives;[117] and (6) one-year opt-out contracts are within the contemplation of the parties as reflected by the BSA.[118] Finally, Judge Debevoise restated his *Dudley I* holding and addressed each motion.[119]

First, Judge Debevoise concluded that *Dudley I* was "res judicata as to the new [1994] Dudley, Ehlo and Kukoc contracts,"[120] on the grounds that all three players and the NBA were parties to *Dudley I* and the order issued thereunder was a final judgment on the merits resolving the claims between the parties.[121] Accordingly, the NBA's disapproval of these 1994 opt-out-free contracts on the grounds that they completed an improper 1993 transaction was directly contrary to the *Dudley I* holding.[122] Thus, both the Dudley/Portland and the Kukoc/Chicago motions were granted, ultimately compelling NBA approval of both 1994 contracts.[123]

Similarly, Judge Debevoise applied the doctrine of collateral estoppel to the A.C. Green/Phoenix Suns situation and precluded the NBA from challenging their 1994 contract.[124] Although the court recognized that new evidence of a trend could preclude validation of the 1994 one-year opt-out provision on collateral estoppel grounds, the court confirmed that "[t]he validity of the one-year opt-out provisions in 1993 contracts was established in the [*Dudley I*] decision."[125] Accordingly, "[t]he doctrine of collateral estoppel precludes [the] NBA from renewing its challenge to 1993 opt-out provisions in the present proceedings."[126] Thus, the NBA was estopped from asserting that Green's "1993 contract was

115. *Id.*

116. *Id.* at 69.

117. *Id.*

118. *Id.*

119. *Id.* at 69-70. Recall, Judge Debevoise specifically held that "even though one year out provisions in multiyear contracts *may have a presently unascertainable* adverse effect on the very legitimate objectives of the salary cap, Dudley's contract is not in violation of Section 3." *Id.*

120. *Id.* at 70.

121. *Id.* at 71.

122. *Id.*

123. *Id.* Since neither Craig Ehlo nor the Atlanta Hawks was a party to the instant litigation, the court made no ruling regarding their case.

124. *Id.* at 70.

125. *Id.* at 74.

126. *Id.*

invalid and infected the 1994 contract."[127] Further, since the 1994 contract between Green and the Phoenix Suns did not contain an opt-out provision, the NBA had absolutely no grounds to disapprove the 1994 contract for salary cap violation.[128] Accordingly, the court also granted the Green/Phoenix motion for summary judgment compelling NBA approval of their 1994 contract.[129]

However, Judge Debevoise distinguished the 1994 Grant/Orlando contract concluding that "neither the doctrine of res judicata nor collateral estoppel principles prevent[ed] the NBA from challenging the Grant-Orlando Magic contract."[130] In considering the Grant/Magic contract, Judge Debevoise made the following critical observations: (1) although Grant's right to terminate the contract was not absolute, it was practically certain that Grant would be able to exercise his option after one year;[131] (2) "[t]he circumstances of the Grant-Orlando Magic contract differ[ed] significantly from the other contracts involved in these proceedings;"[132] and (3) "any suggestion in the 1993 opinion that a one-year out provision is permissible under the Settlement Agreement regardless of the consequences of general use of such provisions was merely dicta."[133] Then, Judge Debevoise clarified his prior holding stating that "a violation of the Section 3 circumvention provision is not established where the record fails to disclose an adverse impact on the purpose of the salary cap provisions."[134]

For the purposes of ruling on the present motion, the standard of review required Judge Debevoise to "accept as true the factual data [presented by the NBA] and . . . draw from those facts all reasonable inferences favoring the NBA."[135] Accordingly, the court accepted as

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127. *Id.* at 73. Because the 1993 contract was valid, the proffered grounds for the NBA's disapproval of the 1994 Green-Phoenix Suns contract was destroyed. *Id.* at 75.

128. *Id.* at 73.

129. *Id.* at 75. Because the court granted the motion on collateral estoppel grounds, the court did not reach the issue of equitable estoppel.

130. *Id.* at 70.

131. *Id.* at 76-77.

132. *Id.* at 77. Specifically, the court distinguished the 1994 Grant/Orlando contract noting that: (1) the other 1994 contracts did *not* contain one-year opt-out provisions; (2) the other 1994 contracts were executed after termination of 1993 contracts pursuant to one-year opt-out provisions contained therein; (3) the validity of the 1993 contracts were specifically upheld via res judicata or collateral estoppel grounds; and most importantly (4) a factual dispute exists as to whether the circumstances in the Fall of 1994 are substantially different from those existing during the Fall of 1993 when the *Dudley* case was decided. *Id.* at 77-78.

133. *Id.* at 78.

134. *Id.* at 78-79.

135. *Id.* at 79. In deciding a motion for summary judgment, the court must view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in that

true the NBA's factual data which asserted that: (1) since 1993, the "use of the one-year opt-out [had] proliferated";[136] (2)"players using the device had achieved salary level that greatly exceeded the room available to their teams;"[137] and (3) "teams [were] able to acquire players whose values greatly exceed the team's room under the salary cap."[138] The court further assumed that the NBA would be able to establish that "use of the one-year opt-out options is destructive for the purposes of the salary cap provisions and that use of the one-year opt-out is designed to serve the purpose of defeating or circumventing the salary cap provisions."[139] Giving the NBA the benefit of all reasonable inferences, Judge Debevoise accepted the argument that, *for the purposes of this motion*, "the circumstances in 1994 are . . . significantly different from those which prevailed in 1993."[140] Accordingly, the court declined to apply the doctrine of collateral estoppel to the 1994 Grant/Orlando contract.[141] Because there were issues of material fact, Grant's motion for summary judgment was not granted.[142]

PART IV - CRITIQUE

A. Application of Res Judicata

Judge Debevoise's decision regarding the application of res judicata to the Dudley/Kukoc, Ehlo/Hawks, and Green/Phoenix contracts is cor-

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party's favor. *See* Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 106 S.Ct. 1348, 1356 (1986); Gray v. York Newspapers, Inc., 957 F.2d 1070, 1078 (3rd Cir. 1992).

136. *Bridgeman*, No. 87-4001, Record at 79. Recent statistics reveal that just 3% of 324 players have signed deals with the opt-out clauses. Ed Graney, *Opt-Out Clause in NBA is Ruled Valid by Judge*, SAN DIEGO UNION-TRIBUNE, Sept. 13, 1994, at D1.

137. *Bridgeman*, No. 87-4001, Record at 79.

138. *Id.*

139. *Id.* at 79-80.

140. *Id.* at 80.

141. *Id.*

142. *Id.* at 81. Although the NBA claimed victory in the Grant/Magic opt-out litigation, the fact remains that denial of the Grant/Magic motion to dismiss is not victory on the merits. Barry Cooper, *Judge Sides with NBA, Won't Approve Grant's Contract with Magic*, ORLANDO SENTINEL, Sept. 13, 1994, at A1. In fact absent continuation of the suit and a decision on the merits, neither side can gain any real bargaining leverage in the battle over the salary cap. *Id.* Essentially, the denial of the motion gave Grant four viable options: (1) restructure the current deal with the Magic for a two-year opt-out; (2) sign a one-year deal for an amount equal to the room under the Magic's cap; (3) sign a contract with another team subject to their salary cap limitations; or (4) continue the suit and seek judgement on the merits. Id. In an effort to sign Grant before training camp, the parties took the easier, less costly road, and executed a five-year, $17 million contract with a two-year opt-out provision. Barry Cooper, *Wish Granted — Take 2; Magic Sign Forward to $17 Million, 5-Year Deal*, ORLANDO SENTINEL, Sept. 20, 1994, at B1.

rect. Dudley, Ehlo, Kukoc, and the NBA were all parties to the *Dudley I* litigation; *Dudley I* resulted in a final judgment on the merits; and *Dudley I* completely resolved the validity of a one-year opt-out provision in a multi-year NBA player contract. Accordingly, application of the doctrine of res judicata to enforce the court's prior judgment and to compel NBA approval of these 1994 contracts was warranted.

B. Use of Collateral Estoppel

Applying collateral estoppel to resolve the validity of the 1994 Green/Phoenix contract is also proper. Because the NBA could only manage to challenge Green's 1994 contract on the grounds that it was infected by an invalid 1993 contract, the NBA's disapproval of Green's 1994 contract was a blatant attempt to re-litigate the validity of the underlying 1993 opt-out contract.[143] Clearly, all of the requisite elements of collateral estoppel were met in Green's case: (1) the issue decided in *Dudley I*, validity of 1993 opt-out contracts, was identical to the issue in the Green/Phoenix litigation; (2) there was a final judgment on the merits in *Dudley I*; (3) the NBA, the party against whom the estoppel is asserted, was a party to *Dudley I*; and (4) the NBA, the party against whom Green's motion is asserted, had a full and fair opportunity to litigate the issue in *Dudley I*. Accordingly, Judge Debevoise properly applied the doctrine of collateral estoppel to enjoin the NBA from disapproving the 1994 Green/Phoenix contract.

C. The Validity of 1994 One-Year Opt-Out Contracts

1. 1994 Opt-Out Contracts in Legal Limbo

Unfortunately, Judge Debevoise's ad hoc solution to the Grant/Orlando situation is not a model of efficient or practical jurisprudence. Although operating within the constraints of *Dudley I*,[144] the court's failure to extract a bright-line rule validating the use of the opt-out clause during the current CBA term is a total waste of judicial resources. This decision not only invites continued litigation and periodic re-litigation of the one-year opt-out provisions, but will likely inhibit future contractual innovation without practical pay-off (any judicial decision will be of little precedential value since it can be overturned in less than one year via demonstration of changed circumstances or via negotiation of a new

143. *Bridgeman*, No. 87-4001, Record at 73.

144. *Dudley I* did not foreclose the possibility that with the advent of time the NBA might be able to present evidence of an adverse impact to the purpose of the salary cap and thereby re-challenge the validity of the one-year opt-out provision.

CBA specifically addressing use/non-use of the controversial contractual provision) and provide little guidance to negotiators in structuring new, litigation-proof salary cap language.

In the instant case, the interlocutory order denying summary judgment in the Grant/Orlando matter only prolongs the controversy at a critical juncture in the negotiation of a new CBA.[145] Deferring judgment now only invites abuse of process for a mere bargaining chip. Under current conditions, when the very usefulness[146] of the salary cap is at issue, the value of such a negotiation tool relative to its judicial cost is questionable. A decision on the merits of "this"[147] 1994 opt-out contract will soon be preempted by arms-length negotiations of a new CBA

145. This year, professional sports has been the subject of extensive media hype and public scrutiny. Beginning August 1994, fans were frustrated by the Major League Baseball (MLB) strike which ended the 1994 season and led to the first World Series cancellation since 1904. *Hatch Decries Big Business in Baseball*, UPI, Feb. 15, 1995. Currently the baseball strike is affecting spring training camps in Florida and Arizona and is threatening to victimize Opening Day. Mark Maske, *Baseball's Waiting Game: Now Both Sides Cool Off; Action Shifts to Camps, Hearings on Hill*, WASH. POST, Feb. 12, 1995, at D1. Even the best mediator, W.J. Usery, can't help the players and owners resolve the basic issues in dispute (such as the payroll tax, salary arbitration, revenue sharing, and free agency). *Id.* In fact, things are so bad that 10 Congressional bills proposing baseball-related legislation have been introduced in the 104th Congress. *Rep. LaFlace Offers Bill to Establish National Baseball Commission, End Strike*, DAILY LABOR REPORT, Feb. 1, 1995. Concurrently, hockey fans suffered a 103-day lockout as a result of National Hockey League (NHL) and the NHL Players Association's failure to negotiate a new CBA in time for the season opener. Ultimately the season was salvaged on January 11, 1995, when the players finally conceded to a owner friendly CBA which imposed a rookie salary cap. Kisha Ciabattari, *Can Hockey Win Back Fans?; Many Feel Frustrated by Dispute*, WASH. TIMES, Jan. 12, 1995, at B1. Generally, public reaction to the underlying cause of the stoppages (commonly view as industry-wide greed) has been characterized by disgust and resentment. In short, there is no public sympathy for the National Football League's (NFL) bellyaching over their recently negotiated CBA nor an understanding for MLB's or the NHL's troubles in negotiating new CBAs. Consequently, the success of the NBA and the NBPA in reaching a workable CBA is critical to the public image of professional sports.

146. In the late 1970s and the early 1980s, the NBA was experiencing serious financial problems and teetering on the brink of insolvency. Levine, *supra* note 22, at 73. During that period the NBA considered folding four teams (Cleveland Cavaliers, Indiana Pacers, Utah Jazz, and Kansas City Kings) and there were several teams for sale who could not find buyers at any price. *Id.* In fact by 1983, losses per NBA team averaged $700,000 per year. *Id.* at 74 n.23. However, ten years later, the NBA has achieved financial stability via a self-imposed salary cap. *Id.* at 74. During its tenure, the cap struck a competitive balance throughout the league and recaptured its fans. *Id.* Furthermore, revenues have skyrocketed due to increased attendance and lucrative national television contracts. *Id.* Consequently, today, NBA owners are claiming a profit and players are realizing increased minimum salaries. *Id.*

147. The court does not address the fact that not all new 1994 opt-out contracts have been disapproved by the NBA. Specifically, the NBA approved the 1994 one-year opt-out contracts of Sean Elliot, Chuck Person, and Dominique Wilkins. *Bridgeman*, No. 87-4001, Brief for Horace Grant at 23.

(which will either eliminate the salary cap altogether or modify salary cap language to address the one-year opt-out provision).[148]

2. Balancing Cap Interests & Fashioning A Fair Circumvention Standard

Further, the court's holding that "a violation of the Section 3 circumvention provision is not established where the record fails to disclose an adverse impact on the purpose of the salary cap provisions"[149] will be difficult to apply fairly. Case law and news commentary have carefully noted that embodied in the CBA are the parallel agendas of both the NBA and the NBPA.[150] For example, the quid pro quo for institution of the soft salary cap was the institution of player revenue sharing and a minimum salary floor. The NBA's purpose for instituting the salary cap was to achieve financial stability, league parity, and competitiveness. Conversely, the NBPA focused on the maintenance of player mobility within the free agent system and adequate player compensation. Clearly, each must be protected, but not at the expense of the other.

A player's contractual decision is not necessarily a pure financial decision.[151] There are other legitimate non-salary factors such as team lo-

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148. *See* Clifton Brown, *Pro-Basketball; There's No Stoppage in Sight, But the NBA is very much in the Labor Woes Lineup*, N.Y. TIMES, Sept. 28, 1994, at B1. In his article, Brown states:

> [t]he major issues in the dispute center on the union's proposal to eliminate the salary cap, the college draft and restricted free agency. Increased revenue sharing between the players and owners is also something that will be discussed. The owners have proposed a hard salary cap. Management also wants to eliminate what it considers to be salary-cap loopholes, like contracts with one-year escape clauses and contract with balloon payments. The league wants the college draft to continue, and a salary cap for rookies is also expected to be a negotiating issue. [Additionally], [w]ith the league so strong, the players' union believes the salary cap has outlived its usefulness. The union also contends that the cap and its rules restrict player movement and salaries. *Id.*

149. *Bridgeman*, No. 87-4001, Record at 78-79.

150. *See* George Diaz, *Salary Caps: Picking Out the Real Losers*, ORLANDO SENTINEL, Aug. 7, 1994, at C10. In his article, Diaz states:

> [a] majority of sports owners insist the salary cap is necessary to ensure financial stability within leagues and allow small market franchises to compete against their big-city rivals. A majority of the professional athletes argue that the cap restricts them from earning their fair market value and is simply a legal crutch to protect overzealous owners from emptying their pocketbooks.

Id.

151. *See* Shant H. Chalian, Note, *Fourth and Goal: Player Restraints in Professional Sports, A Look Back and a Look Ahead*, 67 ST. JOHN'S L. REV. 593 (1993).

> The simple fact is that professional athletes have as many geographical preferences as lawyers, teachers, machinists, or Congressmen. Some people want to live on the coast, some in the Midwest, and some in the South. Their choices are based on family back-

cation; team quality; a player's status on the new team (starter/non-starter); length of the contract; expected career-life and career-goals (has the player ever won a championship); and whether the compensation is guaranteed. In the decision making process, all factors must be considered. Although the NBA wants to maintain relative league competitiveness, it should not be permitted to do so at the expense of an individual player who is willing to take a significant pay cut and risk non-renewal of his contract or career ending injury to play on the team of his choice by accepting a one-year contract or one-year opt-out contract. Antitrust advocates agree stating that

> [t]he salary cap inhibits what is generally regarded as a fundamental American value—the ability to sell one's services on a free market. The right to work where one wants and at a wage equal to what the market will bear seems as basic a right in our society as almost any constitutional right.[152]

Notwithstanding this antitrust perspective, the NBA's goals are not any more protected in a one-year contract situation than in a one-year opt-out situation. In either case, the player chooses to leave both his former team and the potential for unlimited salary to play for another team which is subject to salary cap limitations. Moreover, in both situations, the player is not guaranteed that his contract will be renewed and/or renegotiated by his new team at the end of the one-year period. As an unrestricted free agent, the player may be paid more than his first contract, but there is no guarantee the team will retain his services. Thus, within one year, a player may end up back where he started—in the free agent system without a team and with limited salary potential. In any event, the new team by virtue of its team salary limitation gets a one-year bargain for valuable player talent.

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ground, where their families live, where they went to school, where they wish to raise a family, where they have educational and vocational opportunities. While obviously money is a factor, there are many others. *The primary one that I have found in talking with professional athletes is that they will go where they can perform.*"

Id. at 633 n. 263 (quoting Ed Garvey former Director of the NFL Players' Association); Matthew S. Collins, Note, *C as in Cash, Cough it Up, and Changes — NFL Players Score with Free Agency Following Freeman McNeil's Big Gain*, 71 WASH. U. LAW Q. 1269 (1993). "Players change teams under the free agency system not only to receive the maximum compensation currently available, but also to be on a team for whom they will play regularly. . . . The development and exhibition of the player's skills are necessary to achieve the recognition and attention that players desire." *Id.* at 1275 n. 40.

152. Scott J. Foraker, Note, *The National Basketball Association Salary Cap: An Antitrust Violation?*, 59 S. CAL. L. REV. 157, 179-80 (1985).

To date, the NBA has not challenged one-year contracts like that of Phoenix's Danny Manning.[153] This is particularly interesting because not only has Phoenix been very successful in recent seasons, but the team is clearly talent loading with the hopes of winning the 1995 NBA championship. It is also disconcerting because one-year contracts place all the risk on the player (players take a pay cut and risk career ending injury without the salary insurance of a long-term contract) and allow owners to enjoy risk free benefits (because a team has no obligation to renew or renegotiate, they get the player at a bargain price and take-on no downside risk if the player is injured during the season).[154]

Additionally, the NBA has not consistently imposed its cap values on other new 1994 opt-out contracts such as that of Sean Elliot, Chuck Person, and Dominique Wilkins; nor has it condemned the use of the opt-out contract structure to sign number one draft picks such as Chris Webber and Anfernee Hardaway.[155] In fact, the NBA Deputy Commis-

153. In a Phoenix Suns press release on September 8, 1994, President and Chief Financial Officer, Jerry Colangelo, explained why All-Star forward Danny Manning who made $3.25 million with the LA Clippers and the Atlanta Hawks during the 1993-94 season signed a one-year $1 million contract with the Suns "putting his security in money down the list" by stating that Manning "wants to win." Colangelo further defended the contract stating that "the league should champion the signing of Danny Manning because that is what free agency is all about; the player has the opportunity to pick his spot, not necessarily go to the highest bidder."

154. A perfect example is the Danny Manning situation. Prior to the start of the 1994-95 NBA season, the Phoenix Suns signed unrestricted free agent forward Danny Manning to a $1 million, one-year contract. *NBA-Suns Sign Free Agent Danny Manning to One-Year Contract*, REUTERS WORLD SERVICE, Sept. 8, 1994. Manning took a voluntary pay cut of more than $2 million to play on a winning team. *Id.* In fact, Manning turned down a $35 million long-term contract with the Atlanta Hawks to play for the Suns. Shaun Powell, *Manning's Loss Darkens Suns*, NEWSDAY, Feb. 9, 1995, at A77. Although, Manning's one-year contract operates just like a one-year opt-out contract (the only difference being that a one-year contract necessarily ends at the end of one-year), the NBA approved Manning's contract, because it didn't violate the spirit of the salary cap. *Id.* On February 6, 1995, Manning snapped a major tendon in his knee ending his season and potentially his basketball career. *Id.* In retrospect, not only was Manning's championship sacrifice in vain, but his financial future with any team is now at risk.

155. In order to sign the 1993 No. 1 draft pick to a $1.6 million slot, the Golden State Warriors offered Chris Webber a 15-year, $74 million contract that included a one-year escape clause. Richard Justice, *Bullets' Fab Day Nets Webber, Howard; Gugliotta, Three No. 1 Draft Picks Go to Warriors for No. 1 Pick in '93*, WASH. POST, Nov. 18, 1994, at C1. In 1994, Webber exercised his option and signed another low dollar, one-year opt-out contract with his team to facilitate a trade to the Washington Bullets (Webber accepted $2.08 million, the maximum amount available under Washington's cap). *Id.* This summer Webber will once again become a restricted free agent. *Id.* Similarly, the Orlando Magic signed Anfernee Hardaway to a 13-year guaranteed contract which provided $1.24 million in first year salary (maximum slot available under the Magic's cap), a $20 million line of credit, and a floating option to terminate exercisable after the first season. Greg Boeck, *Hardaway Agent: Deals Not Out of Line*, USA TODAY, Oct. 22, 1993, at 9C. In both cases, the team was over the cap and unable to

sioner, Russ Granik, recently stated that the NBA would only pursue egregious one-year opt-out contracts, admitting that not every one-year opt-out is cap circumvention.[156] This type of arbitrary authority will certainly make it difficult to gauge when such contracts will be approved, disapproved, or ultimately litigated.

Further, NBA teams are also in the driver's seat as far as salary is concerned—they ultimately determine the player's market value. For example, an unrestricted free agent who values non-salary factors at a premium may not be able to negotiate his perceived market value salary (i.e., a player may bargain away a portion of his salary to obtain an optimum compensation package). Thus, a player's actual market value is more accurately defined by his total, negotiated compensation package. For example, the Milwaukee Bucks, a franchise valued at $75 million, refused to acquiesce to Purdue rookie Glenn Robinson's demand for a $100 million, lifetime contract preferring to let the "Big Dog" sit out for the season rather than jeopardize the team's financial health. Ultimately, Robinson came to his senses and signed a 10-year, $68.15 million contract less than an hour before the Buck's home opener.[157] Conversely, other teams like the Orlando Magic might be willing to pay outrageously high salaries and compensation to bring their team to the next level. These teams, while revering the basic tenets of the salary cap, are unwilling to personally sacrifice their own championship goals to honor the cap. As a result, team management is often caught between the competing desires of the owners who on one hand want to keep salaries at a minimum to maximize profits but on the other try to work the cap to their advantage.[158] Although the owners want it both ways, both the

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offer market value to their rookie, so the rookie settled for less than market value in first year salary in exchange for long-term contracts with escape clauses which would allow them to become restricted free agents and negotiate their next contract without regard to salary cap limitations. Tim Povtak, *Dudley's Contract Validated by Court; A Judge Ruled that Escape Clauses Don't Violate Salary Cap Rules*, ORLANDO SENTINEL, Oct. 28, 1993, at D10. As a result of *Dudley I*, the NBA was forced to approve both Webber's and Hardaway's 1993 opt-out contracts. Under *Dudley II*, the NBA is collaterally estopped from disapproving Hardaway's opt-out free 1994 contract, however, they could have legitimately challenged Webber's 1994 contract. The NBA's failure to question Webber's new contract is further evidence of their inconsistent application of league policy.

156. Peter May, *No Vacation This Summer for the NBA*, BOSTON GLOBE, Aug. 15, 1994, Sports Section, at 37.

157. *Around the NBA*, WASH. POST, Nov. 6, 1994, at D4.

158. *See* Diaz, *supra* note 150, at C10 (quoting Orlando's General Manager, John Williams, "I'm not saying that working within the cap is easy. We all tend to want to adjust it and work it to our particular problems, but in principle, in concept, the cap has been very important."); Levine, *supra* note 22, at 90 n. 121. Jan Volk, former Boston Celtics general manager, stated that "[t]he cap has been good for the league. At any one time I might curse it. It's

NBA's inconsistent treatment of one-year opt-out contracts and the courts' failure to adopt a workable circumvention standard has left the teams and the players without any indication of how to legally achieve their goals.

PART V - CONCLUSION

Circumstances may indeed be radically different now than they were in the Fall of 1993 when *Dudley I* was decided. There also may be a proliferation of opt-out contracts which allow players to get higher salaries and teams to acquire player talent in excess of their room. However, the salary cap has already fulfilled its original purpose of making the NBA a financial success and keeping the game exciting through league competitiveness. Further, it is undisputed that the NBA has achieved financial stability and that the league has not been dominated by team dynasties due to talent loading in recent years.[159] There is nothing left for the salary cap to accomplish nor is there any indication that the NBA's gains will be ruined by a further softening of the salary cap. The existence and/or elimination of the one-year opt-out clause will certainly undermine either the NBA goals of "team parity, financial stability, and league competitiveness" or the NBPA goal of "player mobility." Thus, without the opportunity for quid pro quo, a decision for either party will infringe on the interests of the other.

These controversial issues are precisely the issues to be debated in the negotiation of the new CBA. Accordingly, it is not only a waste of judicial resources to try to resolve these issues in the courtroom, but a disservice to the process of negotiating a new workable CBA. In short, at this point, any judicial remedy is moot.

MICHELLE HERTZ*

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limiting in the opportunities it presents you. You have to be very creative." *Id.* Further, it is interesting to note that Bulls owner, Jerry Reinsdorf, filed a brief supporting the NBA's position against Horace Grant while at the same time his own team was challenging the NBA on Toni Kukoc's deal in the same case. Sam Smith, *Kukoc's Contract Upheld; Grant's On Hold*, CHI. TRIB., Sept. 13, 1994, at N3.

159. The author does not consider the Chicago Bulls consecutive NBA championships of 1991, 1992, and 1993 as indicative of a dynasty—just the superb play of NBA superstar Michael Jordan.

* B.A. 1988, Economics and French, St. Lawrence University; 1997 J.D. Candidate, George Mason University School of Law. Ms. Hertz is a full member of the George Mason Independent Law Review.