
A Global Pandemic and a Wildcat Strike: How COVID-19 and Civil Unrest Could Impact the NBA's Labor Relations

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I. INTRODUCTION

"There's not a mechanism in it (the NBA's collective bargaining agreement) that works to properly set the cap when you've got so much uncertainty."¹

The COVID-19 pandemic of 2020 has rocked every facet of the legal world. This is especially true for labor relations related to force majeure clauses. As businesses, employees, and customers jockey for leverage with respect to the fallout of a viral pandemic, some shifted focus to the potential disruption in sports – a workforce that has experienced change lately and one that many feel is due for new, significant change soon.

When compared to other American sports leagues, the National Basketball Association (“NBA”) and its players have a reputation for having a benevolent, progressive relationship that recently has led to increased individual autonomy and revenue sharing.² However, despite the NBA launching play amidst a pandemic, COVID-19 has the potential to change the long-term labor situation for both parties. In addition, the players' commitment to the Black Lives Matter movement has created new questions and expectations with respect to the relationship between players and owners. In order to create a safe, profitable future that is beneficial to everyone, both parties may explore opportunities to use the recent pandemic and to improve their standing, and will likely need to compromise in various ways.

Part II of this article will provide a background to the history of force majeure clause disputes amidst pandemics, a brief history of wildcat strikes, and how these apply to the NBA's current situation. Part III of this article will discuss what results players and owners are hoping for from labor negotiations, how the two parties can compromise, and potential recommendations to the collective bargaining agreement that account for recent events. Part IV of this article will conclude with a summary of the league's current standing and present final recommendations for owners and players.

II. BACKGROUND

There is a healthy volume of case law that gives precedence to force majeure disputes during pandemics. This will provide guidance for how the NBA can be expected to proceed with any labor disputes that come as a result of COVID-19. Additionally, the nation's history of wildcat strikes is instrumental to understanding the NBA's own wildcat strike in the 2020 season. That background—and the NBA's ever-present intersection of race and labor—is informative to analyzing where the future of the league is headed.

¹ Dan Feldman, *Report: NBA owners, players agree to extend league's window to suspend CBA*, NBC SPORTS (May 11, 2020), <https://nba.nbcsports.com/2020/05/11/report-nba-owners-players-agree-to-extend-leagues-window-to-suspend-cba/>.

² Jabari Young, *NBA's strong relationship with its players could prevent collective bargaining issues*, CNBC (Aug. 29, 2020), [cnbc.com/2020/08/29/nbas-strong-relationship-with-its-players-could-prevent-collective-bargaining-issues.html](https://www.cnbc.com/2020/08/29/nbas-strong-relationship-with-its-players-could-prevent-collective-bargaining-issues.html).

A. A History of Force Majeure Clauses During a Global Pandemic

In many ways COVID-19 is unprecedented, but the American legal system has settled contract disputes from the fallout of all kinds of disasters. During the Spanish Flu of 1918, health officials closed schools, resulting in a surge of lawsuits from teachers and bus drivers for wages.³ Some courts ruled the school districts were obligated to pay their employees' full contracts,⁴ while others held that the schools were not.⁵

COVID-19 has led to a wave of legal disputes that analyzed force majeure contract provisions. "Force majeure" translates to "superior force" in French, and is defined as "an event beyond the control of the parties that prevents performance under a contract and may excuse non-performance."⁶ Force majeure clauses allot risk in contracts and excuse non-performance under the contract when unforeseen circumstances render it impossible.⁷ "The party who relies on a force majeure clause to excuse performance bears the burden of proving that the event was beyond the party's control and without its fault or negligence."⁸

In general, force majeure provisions often use standard, boiler-plate language that does not include specific pandemic coverage.⁹ These types of provisions are open to debate as to the scope and execution of the provision under the parties' contract during a pandemic. Courts have narrowly applied such broad provisions, accounting for contractual interpretation, surrounding facts, and public policy arguments.¹⁰

When analyzing contracts with force majeure clauses during the current pandemic, courts must determine whether or not COVID-19 and government mandates stemming from the virus are encompassed in the provision. This issue was addressed in *In Re: Hitz Restaurant Group*.¹¹ There, a creditor moved to enforce Hitz's obligation to pay post-petition rent for a property where he was running a restaurant.¹² Normally, this would require Hitz to pay in full its rental obligations after filing for bankruptcy, but Hitz argued that this payment was excused by the lease's force majeure clause, which read:

Landlord and Tenant shall each be excused from performing its obligations or undertakings provided in this Lease, in the event but only so long as the performance of any of its obligations are prevented or delayed, retarded or hindered by ... laws, governmental action or inaction, orders of government ... Lack of money shall not be grounds for Force Majeure.¹³

³ *Phelps v. School Dist.*, 302 Ill. 193, 134 N.E. 312, 21 A.L.R. 373 (1922).

⁴ *Id.* at 198.

⁵ *Gregg School Tp v. Hinshaw*, 76 Ind. App. 503, 506, 132 N.E. 586, 587 (1921).

⁶ Glen Banks, *Force Majeure*, 28A N.Y. PRACT. CONTRACT LAW 20:13 (Aug. 2019).

⁷ Myanna Dellinger, *An "Act of God"? Rethinking Contractual Impracticability in an Era of Anthropogenic Climate Change*, 67 HASTINGS L.J. 1551 (2016).

⁸ *OWBR LLC v. Clear Channel Communs., Inc.*, 266 F. Supp. 2d 1214, 1222 (D. Haw. 2003).

⁹ 1 Corbin: Force Majeure and Impossibility COVID-19 (2020).

¹⁰ *Id.*

¹¹ *In re Hitz Rest. Grp.*, 616 B.R. 714 (Bankr., N.D. Ill. June 3, 2020).

¹² *Id.*

¹³ *Id.*

Hitz argued that Illinois Governor Pritzker’s executive order temporarily banning on-premises dining triggered this force majeure clause.¹⁴ The court agreed, explaining that the governor’s order was a government action that prohibited the tenant’s performance by preventing on-premises dining, thus hindering the restaurant from operating normally and generating typical revenue.¹⁵ However, because Hitz was still allowed to operate curbside pickup, the court held the tenant was partially responsible for rent payments in proportion to the profits he could have made from carry-out.¹⁶

Because of similar disruptions to that in *Hitz*, many force majeure declarations are warranted during the COVID-19 pandemic. However, declaring a force majeure exemption that is not warranted may be a material breach of contract that subjects the breaching party to damages and/or discharges the non-breaching party from some or all of its obligations.¹⁷

In *Lantino v. Clay, LLC*, a New York gym owner sought to excuse rent payments because of the loss of revenue from COVID-19.¹⁸ The court rejected this argument for two reasons. First, New York requires “objective impossibility” for a force majeure clause to be warranted.¹⁹ This differs from a state like California, in which performance may be excused if it is impracticable via “unreasonable expense.”²⁰ Additionally, the gym owners failed to prove they were destitute or completely unable to pay.²¹ Therefore, the court ruled the force majeure clause was not warranted.²²

B. Applying Force Majeure to the NBA

The NBA has a force majeure clause that, unlike many professional sports leagues, includes language that likely covers viral pandemics. Before exploring the future of the league’s labor relationship, it is important to analyze the language of this clause and the timeline of events regarding COVID-19’s impact on the NBA thus far.

i. The NBA’s Force Majeure Clause

The NBA Collective Bargaining Agreement (“CBA”) is a contract between the thirty team owners—as well as the commissioner—and the National Basketball Players Association (“Players Association”). The CBA directs the rules of many of the league’s elements, such as trades, revenue distribution, players’ contracts, the NBA draft, and the salary cap.²³ In 2011, the

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 1 Corbin: Force Majeure and Impossibility COVID-19 § 2.04 (2020).

¹⁸ *Lantino v. Clay, LLC*, 1:18-cv-12247, 2020 WL 2239957 (S.D.N.Y. May 8, 2020).

¹⁹ *Id.*

²⁰ Jamie Gottlieb Furia and Justin Corbalis, *Covid-19, Force Majeure, and Impossibility – Still a High Bar to Win*, LOWENSTEIN SANDLER (July 22, 2020), <https://www.lowenstein.com/news-insights/publications/articles/covid-19-force-majeure-and-impossibility-still-a-high-bar-to-win-gottlieb-furia-corbalis>.

²¹ *Lantino v. Clay, LLC*, 1:18-cv-12247, 2020 WL 2239957 (S.D.N.Y. May 8, 2020).

²² *Id.*

²³ *Players, owner approve agreement*, ESPN (Dec. 8, 2011), espn.com/nba/story/_/id/7332374/nba-labor-players-owners-vote-ratify-new-labor-agreement.

CBA at the time expired, which led to the 2011 NBA lockout. This lockout ended in December of 2011.²⁴ The most recent CBA was approved in December of 2016. This contract runs through the 2023-2024 season and includes a mutual opt-out after the 2022-2023 season.²⁵

The current CBA includes a force majeure clause that seemingly would allow the league to completely withhold players' salaries for canceled games due to a viral pandemic:²⁶

'Force Majeure Event' shall mean the occurrence of any of the following events or conditions, provided that such event or condition either (i) makes it impossible for the NBA to perform its obligations under this Agreement, or (ii) frustrates the underlying purpose of this Agreement, or (iii) makes it economically impracticable for the NBA to perform its obligations under this Agreement: wars or war-like action (whether actual or threatened and whether conventional or other, including, but not limited to, chemical or biological wars or war-like action); sabotage, terrorism or threats of sabotage or terrorism; explosions; epidemics; weather or natural disasters, including, but not limited to, fires, floods, droughts, hurricanes, tornados, storms or earthquakes; and any governmental order or action (civil or military); provided, however, that none of the foregoing enumerated events or conditions is within the reasonable control of the NBA or an NBA Team.²⁷

ii. The NBA's Pandemic Timeline

The 2019-2020 NBA season was suspended on March 11, 2020 after Utah Jazz Center Rudy Gobert tested positive for COVID-19 minutes before the Jazz were scheduled to tip-off in Oklahoma City.²⁸ Just two days later, the Players Association alerted every player to the possibility that the owners could withhold a portion of their salary due to the CBA's force majeure clause.²⁹ This clause would allow the owners to reduce each player's salary about 1% for every game missed.³⁰

On April 17, 2020, the NBA and the Players Association agreed to cut 25% of each player's salary, beginning on May 15.³¹ This move avoided terminating the CBA. On May 8, NBA Commissioner Adam Silver first suggested the idea of finishing the season in one centralized location, which would eventually become known as the "bubble" in Orlando,

²⁴ *Id.*

²⁵ Adrian Wojnarowski, *Sources: CBA will extend seven years*, YAHOO (Oct. 24, 2016), sports.yahoo.com/news/sources-cba-will-extend-seven-years-161247944.html.

²⁶ Peter Botte, *NBA Paycheck Battle Could be Brewing in Coronavirus Hiatus*, N.Y. POST (Mar. 21, 2020), <https://nypost.com/2020/03/21/nba-paycheck-battle-could-be-brewing-in-coronavirus-hiatus/>.

²⁷ Mike Florio, *NBA players could soon lose pay; will that happen to NFL players, too?*, NBCSPORTS (Mar. 23, 2020), <http://profootballtalk.nbcsports.com/2020/03/23/nba-players-could-soon-lose-pay-will-that-happen-to-nfl-players-too/> (emphasis added).

²⁸ Paolo Uggetti, *A Timeline of the NBA's Path to Restarting*, THE RINGER (June 16, 2020), <https://www.theringer.com/nba/2020/6/16/21292239/nba-restart-timeline-march-to-june>.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

Florida.³² On June 5, 2020, the Players Association approved the NBA’s plan to resume play in Orlando the following month on July 30, 2020 with a revised end-of-season format before the playoffs.³³

iii. The CBA as a Shield to Litigation (and Other Benefits)

Instead of reducing the players’ pay, the owners could have taken a more drastic step and used the force majeure clause to terminate the CBA entirely. This would have led to a very volatile situation between the players and owners. Such a dramatic move would probably have damaged the symbiotic relationship shared by the league and its union, and could have resulted in antitrust litigation, which the CBA currently serves as a sort of shield against with language that requires almost all labor disputes to go to arbitration instead of the courts.³⁴

Without this shield, players could potentially use federal litigation to challenge the legality of a variety of league rules that American antitrust law would not favor, such as maximum player salaries, the pre-determined rookie wage scale, and strong-arming rookies into playing where they are drafted.³⁵ This is exactly what happened in *Robertson v. National Basketball Ass’n*, 556 F.2d 682 (2d Cir. 1977).

In 1970, the NBA was planning to merge with its largest competitor, the American Basketball Association (“ABA”).³⁶ Oscar Robertson, a player, sued the NBA, arguing this merger would create a monopoly.³⁷ This was significant to players because without a significant competitor, owners would be able to low-ball offers to players, knowing there was not a lucrative alternative for them.³⁸ This was especially true because at the time, the NBA’s college draft bound a player to the team that drafted him for as long as that team desired.³⁹ The court issued an injunction against any merger.⁴⁰ In 1976, the NBA agreed to let players become “free agents” after a period of time playing for the team that drafted them.⁴¹ This concession not only allowed the NBA to complete its merger with the ABA, but was a groundbreaking achievement for the players’ autonomy, and created a free agency model that is still used today (with slight alterations in the intermittent years).⁴²

Owners have been thrilled with the most recent CBA, as the league’s revenue boomed from under \$5.2 billion in 2015 to \$8.8 billion in 2019.⁴³ For their part, signing the CBA earned

³² *Id.*

³³ *Id.*

³⁴ National Basketball Association Collective Bargaining Agreement, Article 32.1

³⁵ Jeffrey A. Mishkin, *Dispute Resolution in the NBA: The Allocation of Decision Making Among the Commissioner, Impartial Arbitrator, System Arbitrator and the Courts*, 35 Valparaiso U. L. Rev., 449 (2001).

³⁶ *Robertson v. National Basketball Ass’n*, 389 F.Supp. 867, 873 (S.D.N.Y. 1977).

³⁷ *Id.* at 873-874.

³⁸ *Id.* at 874.

³⁹ *Id.*

⁴⁰ *Id.* at 903.

⁴¹ William C. Rhoden, *First Day of NBA Free Agency Should Be Called Big O Day*, THE UNDEFEATED (July 2, 2017), <https://theundefeated.com/features/locker-room-talk-first-day-of-nba-free-agency-should-be-called-big-o-day/>.

⁴² *Id.*

⁴³ Christina Gough, *Total Revenue of the National Basketball Association 2001-2020*, STATISTA (Feb. 17, 2001), <https://www.statista.com/statistics/193467/total-league-revenue-of-the-nba-since-2005/>.

the players many new benefits. Most notably, the players gained more licensing rights via a branch of the Players Association called Think450.⁴⁴ This new element of the union proactively coordinates individual players with sponsors so they can earn revenue from their individual stardom separate from their team.⁴⁵ Before this agreement, the NBA would in essence sell players' licensing rights of corporate sponsors.⁴⁶ Now, the Players Association controls the marketing rights to the players as a group.⁴⁷ Think450 President Jordan Schlacter said while the NBA does a great job marketing the game on the court, the players seized an opportunity to control their own marketing rights and develop sponsorship opportunities.⁴⁸ Chris Paul, the president of the Players Association, said, "There are so many personalities in our league that I think the sky's the limit in terms of how guys want to make an impact. It's about making sure every player has a chance to take advantage of the opportunities in and out of the game."⁴⁹

iv. Long-term Salary Cap Complications

The shortened season had many executives worried about the following season's salary cap.⁵⁰ The salary cap is the maximum amount of money each NBA team may spend on its roster of players without being penalized with a luxury tax.⁵¹ Its purpose is to prevent the richer teams in large markets from overwhelming teams in smaller markets with high-paid talent. The salary cap is calculated based on previous seasons' earnings.⁵² About 40% of the NBA's revenue comes from tickets and other in-arena sales,⁵³ so while NBA was projected to make around \$8 billion this season, it instead only made about \$6.5 billion.⁵⁴ Before the pandemic, the 2020-2021-salary cap was initially projected to be around \$115 million.⁵⁵ However, applying the formula the league uses to determine the cap, the lost revenue would have decreased the cap to about \$90 million.⁵⁶ This would have been only the third time in NBA history the salary cap decreased.⁵⁷

⁴⁴ Jeff Beer, *NBA Player Union Unveils New Marketing Rights Group Think450*, FAST COMPANY (Feb. 2, 2018), fastcompany.com/40527883/nba-players-union-unveils-new-group-for-player-marketing-rights.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Dan Feldman, *Report: NBA Salary Cap Will Be Lowered*, NBC SPORTS (May 9, 2020), <https://nba.nbcsports.com/2020/05/09/report-nba-salary-cap-will-be-lowered/>.

⁵¹ *Salary Cap Overview*, CBA BREAKDOWN, <https://cbabreakdown.com/salary-cap-overview>.

⁵² *Id.*

⁵³ Paolo Uggetti, *A Timeline of the NBA's Path to Restarting*, THE RINGER (June 16, 2020), <https://www.theringer.com/nba/2020/6/16/21292239/nba-restart-timeline-march-to-june>.

⁵⁴ Chris Cwick, *NBA Came in Under \$1.5 Billion in Revenue Projections in 2020*, YAHOO (Oct. 24, 2020), <https://sports.yahoo.com/report-nba-came-in-15-billion-under-revenue-projections-in-2020-135356538.html>.

⁵⁵ Dan Feldman, *Report: NBA Salary Cap Will Be Lowered*, NBC SPORTS (May 9, 2020), <https://nba.nbcsports.com/2020/05/09/report-nba-salary-cap-will-be-lowered/>.

⁵⁶ Adrian Wojnarowski, *Sources: NBA, players' union agree for 2nd time to push back window preserving CBA termination rights*, ESPN (Aug. 25, 2020), espn.com/nba/story/_/id/29639338/sources-nba-players-union-agree-2nd-push-back-window-preserving-cba-termination-rights.

⁵⁷ *NBA Salary Cap History*, BASKETBALL REFERENCE, <https://www.basketball-reference.com/contracts/salary-cap-history.html>.

There would have been great fallout from this type of dip in the salary cap. Players seeking new contracts in the 2020 offseason would have been paid less than their expected value, as each team would have less money to spend than anticipated.⁵⁸ The same is true for amateur players being selected in the NBA draft.⁵⁹ From the owners' perspectives, this unexpected drop would have placed 25 of the 30 teams into the luxury tax⁶⁰ (the consequence for teams spending more than the salary cap). Many of these teams built their rosters in such a way to avoid the luxury tax, and those who were already in the luxury tax would have seen a drastic increase in their penalty. For example, if the salary cap had dropped \$25 million, the Golden State Warriors tax penalty of \$45 million would have ballooned to \$160 million.⁶¹

On November 9, 2020 the NBA and Players Association agreed to a reformed cap structure that would avoid such a significant plummet of the salary cap. Instead of following the standard formula that would have dropped the salary cap to \$90 million, this agreement will keep the salary cap static at \$109 million for the 2021 season.⁶² This is the first time since the 2013 season that the salary cap has not increased.⁶³ This was accomplished by the Players Association agreeing to place a larger share of their salary into escrow.⁶⁴ In a normal season, 10% of the players' salary goes into escrow.⁶⁵ The owners and players split revenue 50/50, and if that number at the end of the season is equal to or greater than expected, the players get their money in escrow back. If that number is less than expected, the owners keep some of it.⁶⁶ In order to give the owners a greater cap to work with, the players agreed to spread out a greater share of their salary in escrow over the next three seasons, with the stipulation that it will not exceed 20%.⁶⁷

While this solution gives teams more breathing room and allows free agents and rookies to get paid their expected value, it does not solve the problem entirely. The 2021 NBA season will have at least 150 fewer games than a normal season, and surely less or no fans will be allowed to attend games.⁶⁸ As of April 5, 2021, no NBA arenas are operating above 25% fan capacity, and it is unknown how much the league's revenue will be significantly diminished this

⁵⁸ Dan Feldman, *Report: NBA Salary Cap Will Be Lowered*, NBC SPORTS (May 9, 2020),

<https://nba.nbcsports.com/2020/05/09/report-nba-salary-cap-will-be-lowered/>.

⁵⁹ *Id.*

⁶⁰ Adrian Wojnarowski, *Sources: NBA, players' union agree for 2nd time to push back window preserving CBA termination rights*, ESPN (Aug. 25, 2020), espn.com/nba/story/_/id/29639338/sources-nba-players-union-agree-2nd-push-back-window-preserving-cba-termination-rights.

⁶¹ *Id.*

⁶² Eric Walden, *NBA, Players Agree to Terms on 2020-2021 Season, Including Salary Cap, Free Agency*, THE SALT LAKE TRIBUNE (Nov. 9, 2020), [https://www.sltrib.com/sports/jazz/2020/11/09/nba-players-agree-terms/#:~:text=The%20salary%20cap%20\(%24109.1,and%20a%20maximum%20of%2010%25](https://www.sltrib.com/sports/jazz/2020/11/09/nba-players-agree-terms/#:~:text=The%20salary%20cap%20(%24109.1,and%20a%20maximum%20of%2010%25).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Bryan Toporek, *NBA's Escrow Battle Over Players' Salaries Has Only Just Begun*, FORBES (April 8, 2020), <https://www.forbes.com/sites/bryantoporek/2020/04/08/nbas-escrow-battle-over-player-salaries-has-only-just-begun/?sh=58ceb14054e3>.

⁶⁶ *Id.*

⁶⁷ Eric Walden, *NBA, Players Agree to Terms on 2020-2021 Season, Including Salary Cap, Free Agency*, THE SALT LAKE TRIBUNE (Nov. 9, 2020), [https://www.sltrib.com/sports/jazz/2020/11/09/nba-players-agree-terms/#:~:text=The%20salary%20cap%20\(%24109.1,and%20a%20maximum%20of%2010%25](https://www.sltrib.com/sports/jazz/2020/11/09/nba-players-agree-terms/#:~:text=The%20salary%20cap%20(%24109.1,and%20a%20maximum%20of%2010%25).

⁶⁸ Greg Heilman, *NBA 2020-2021 Schedule: Season and Playoffs*, AS SPORTS (Dec. 19, 2020), https://en.as.com/en/2020/12/19/other_sports/1608341045_415690.html#menu.

season.⁶⁹ If it is, the salary cap anxiety may return, likely with even more pressure, as smoothing two-seasons worth of decreased revenue will be more difficult than only one season's worth.

⁶⁹ Matt Traub, *Which NBA Teams Allow Fans at Games this Season?*, SPORTS TRAVEL (May 4, 2021), <https://www.sportstravelmagazine.com/which-nba-teams-allow-fans-this-season-covid/>.

C. A History of Wildcat Strikes

A “wildcat strike” is a work stoppage in which the workers do not have approval from their union.⁷⁰ The most notable American wildcat strikes took place during World War I.⁷¹ These ranged across all different types of industries—textile, coal, timber, shipping—and arose out a variety of demands such as the right to organize, employment arbitration, shortened work weeks, and higher wages.⁷² These strikes, combined with the pressure of World War I, compelled President Woodrow Wilson to create the National War Labor Board as a way to rapidly arbitrate the surge of labor disputes across the country.⁷³ This was a short-term solution however, and wildcat strikes continued until President Franklin Roosevelt’s New Deal in the 1930’s alleviated many of the working class’s largest grievances.⁷⁴ Since then, there have been a few wildcat strikes here and there in different fields, but nothing like the wave in the early 1900s.⁷⁵

Perhaps the closest thing to a wildcat strike in sports history occurred at the 1964 NBA All-Star game. Just hours before tipoff, the players took a vote to determine whether they would refuse to play unless the league agreed to implement a pension plan.⁷⁶ The vote was 11-9 to strike, with Boston Celtics star Bill Russell leading the pro-strike faction.⁷⁷ Fifteen minutes before tip-off, NBA commissioner Walter Kennedy agreed to create a pension plan, and the game was played as scheduled.⁷⁸ This was the greatest victory for labor relations in professional sports to date.⁷⁹

D. The Wildcat Strike in the Bubble

After the police shooting of Jacob Blake in Kenosha, Wisconsin, the NBA players initiated their own wildcat strike that threatened the continuance of the playoffs, raising questions for the league’s immediate future.⁸⁰

When the Black Lives Matter protests were sweeping the nation in early June of 2020, some players expressed concern that returning to play would be a distraction from the

⁷⁰ Gregor Gall, Wildcat Strike, BRITANNICA (2007), <https://www.britannica.com/topic/wildcat-strike>.

⁷¹ Robert Ovetz, *The Forgotten Wildcat Strikes That Swept the Country During WWI*, IN THESE TIMES (Jan. 2, 2019), <https://inthesetimes.com/article/wildcat-strike-world-war-arbitration-textile-westinghouse-electric>.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Robert Rubino, *1964 Stars Threatened to Boycott Game*, THE PRESS DEMOCRAT (Feb. 15, 2014), <https://www.pressdemocrat.com/article/news/1964-stars-threatened-to-boycott-game/>.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Edward Ongweso Jr., *Why the NBA Wildcat Strike Is So Important*, VICE (Aug. 27, 2020), [vice.com/en_us/article/ep47pj/why-the-nba-wildcat-strike-is-so-important](https://www.vice.com/en_us/article/ep47pj/why-the-nba-wildcat-strike-is-so-important).

movement.⁸¹ Ultimately, every team eligible for the bubble appeared on July 30, 2020, and play resumed with messages of social justice on the court and on the back of the players' jerseys.⁸²

On August 26, 2020, players for the Milwaukee Bucks refused to play their playoff game in protest of the police shooting of Jacob Blake in their home state of Wisconsin.⁸³ Instead of taking the court for warm-ups, the players stayed in the locker room and spoke on the phone with Wisconsin's Attorney General and Lieutenant Governor.⁸⁴ Their opponent, the Orlando Magic, joined the strike by refusing to accept the Bucks' forfeit, and within hours all of the teams in the NBA playoffs—and some in other sport leagues—joined by refusing to play their games.⁸⁵ This wildcat strike carried immense risk to players' financial well-being and careers, as the CBA explicitly includes a “no-strike” clause: “During the term of this Agreement, neither the players Association nor its member shall engage in any strikes, cessations or stoppages of work, or any other similar interference with the operation of the NBA or any of its Teams.”⁸⁶ This provision would allow the NBA to terminate the entire CBA, jeopardizing the NBA's existence for the foreseeable future.

In addition to this explicit section of the CBA, the National Labor Relations Board (“NLRB”) ruled in 2019 that wildcat strikes were not protected under the National Labor Relations Act of 1935 (“the Act”).⁸⁷ This meant that if the NBA terminated the CBA, the players would be unable to use the Act or any of its protective provisions in future negotiations or in a court of law.⁸⁸

After emergency meetings the following morning involving both players and owners, the NBA and players agreed to resume games, beginning on August 29, 2020.⁸⁹ Players agreed to continue play after being assured the owners would take concrete steps to help the fight against racial injustice and police brutality.⁹⁰ On August 28, 2020, the NBA unveiled a plan to attempt to utilize all twenty-nine of the NBA stadiums located in the United States as polling places during

⁸¹ Kurt Helin, *Kyrie Irving On NBA Restart: “I Don’t Support Going Into Orlando,”* YAHOO (June 12, 2020), <https://www.yahoo.com/entertainment/kyrie-irving-nba-restart-don-030001673.html>.

⁸² *Social Justice Messages Each NBA Player is Wearing On His Jersey*, THE UNDEFEATED (July 31, 2020), <https://theundefeated.com/features/social-justice-messages-each-nba-player-is-wearing-on-his-jersey/>.

⁸³ Edward Ongweso Jr., *Why the NBA Wildcat Strike Is So Important*, VICE (Aug. 27, 2020), [vice.com/en_us/article/ep47pj/why-the-nba-wildcat-strike-is-so-important](https://www.vice.com/en_us/article/ep47pj/why-the-nba-wildcat-strike-is-so-important).

⁸⁴ Ashish Mathur, *Report: Bucks Host Call with Wisconsin Attorney General and Lieutenant Governor Following Jacob Blake Shooting*, CLUTCH POINTS (Aug. 26, 2020), <https://clutchpoints.com/bucks-news-milwaukee-holds-call-with-wisconsin-attorney-general-and-lieutenant-governor-following-jacob-blake-shooting/>.

⁸⁵ Edward Ongweso Jr., *Why the NBA Wildcat Strike Is So Important*, VICE (Aug. 27, 2020), [vice.com/en_us/article/ep47pj/why-the-nba-wildcat-strike-is-so-important](https://www.vice.com/en_us/article/ep47pj/why-the-nba-wildcat-strike-is-so-important).

⁸⁶ National Basketball Association Collective Bargaining Agreement Section 30.1.

⁸⁷ Amanda J. Fray et.al., *NLRB: Wildcat Strike Loses NLRA Protection Following Employee Knowledge of Union Disavowal, Disapproval*, THE NATIONAL REVIEW (Oct. 25, 2019), [natlawreview.com/article/nlrb-wildcat-strike-loses-nlra-protection-following-employee-knowledge-union](https://www.natlawreview.com/article/nlrb-wildcat-strike-loses-nlra-protection-following-employee-knowledge-union).

⁸⁸ *Id.*

⁸⁹ Andrew Grief, *NBA Players Agree to Resume Season, but Won't Play Thursday*, LOS ANGELES TIMES (Aug. 27, 2020), <https://www.latimes.com/sports/story/2020-08-27/nba-players-agree-to-resume-season#:~:text=NBA%20players%20have%20agreed%20to,knowledge%20of%20the%20decision%20confirmed>.

⁹⁰ Sam Quinn, *NBA players want owners to be proactive, not reactive, in enacting social change, per reports*, CBS SPORTS (Aug 27, 2020), <https://www.cbssports.com/nba/news/nba-players-want-owners-to-be-proactive-not-reactive-in-enacting-social-change-per-reports/#:~:text=In%20discussing%20the%20resumption%20of,to%20The%20Athletic's%20Shams%20Charania>.

the upcoming election on November 4, 2020. This move came in response to the players' wildcat strike.⁹¹ Twenty-one of the 29 arenas ultimately were used, with local officials in some cities—like Milwaukee and Miami—denying the teams' efforts.⁹²

E. An Uncertain Future

The NBA's bubble experiment was a risky endeavor met with skepticism,⁹³ and all things considered, it was a great success. After the wildcat strike, the NBA playoffs continued without a hiccup. No player ever tested positive for COVID-19 in the bubble, and all games continued as scheduled.⁹⁴ However, both the virus and the nation's civil unrest create uneasiness as to how the league will proceed now that the season is over.

Despite the bubble's success, a lot of money was still lost from playing without fans.⁹⁵ More worrisome is that the league is playing the 2021 season without a bubble to protect players from the virus. If players are infected with the virus during the season, it could stir back up all of the force majeure concerns the league had in the summer of 2020. In addition, as of April 5, 2021, every NBA team has played its games without fans or with limited capacity, and no arena has operated above 25% capacity.⁹⁶ This will further cut into earnings, creating more headaches with the salary cap and luxury tax.

It is yet to be seen how the owners plan to make further strides in pleasing the players' calls for more significant action for racial justice. Play in the bubble returned, but there is a simmering tension that many players will not be satisfied unless the owners commit to further significant action in the near future. This tension will only likely increase if more videos of police brutality emerge, or if officers involved in these situations are still not held accountable. The impact of this tension could shape the league's labor relations in the next few years and the way the next CBA is written.

III. DISCUSSION

The near future of the NBA will come with unique challenges as to what the league's owners want and what the players ask in return. Navigating that tension will take creativity, compromise, and mutual respect. Part A is an explanation of what owners expect in the short-term and long-term future. Then, Part B will illustrate how the players might respond to these

⁹¹ Nate Berg, *NBA Stadiums Will Be Voting Centers in 2020. Here's How That Will Work*, FAST COMPANY (Sep. 8, 2020), <https://www.fastcompany.com/90547445/nba-stadiums-will-be-voting-centers-this-fall-heres-how-that-will-work>.

⁹² Kate Brumback and Larry Lage, *Stadiums, Arenas, Stadiums Find New Life as Safer Options for Voting*, ASSOCIATED PRESS (Oct. 22, 2020), <https://apnews.com/article/election-2020-nfl-nba-virus-outbreak-primary-elections-36560251b8fa01deca154ffd3d490c84>.

⁹³ Ricardo A. Hazzell, *Dear NBA: The Bubble Wont Work!*, THE SHADOW LEAGUE (July 6, 2020), <https://theshadowleague.com/dear-nba-the-bubble-wont-work/>.

⁹⁴ Kelcie Pegher, *Coronavirus Today: The NBA's Bubble Worked*, LOS ANGELES TIMES (Oct. 12, 2020), <https://www.latimes.com/science/newsletter/2020-10-12/coronavirus-today-nba-bubble-success-covid-lakers-coronavirus-today>.

⁹⁵ Chris Cwick, *NBA Came in Under \$1.5 Billion in Revenue Projections in 2020*, YAHOO (Oct. 24, 2020), <https://sports.yahoo.com/report-nba-came-in-15-billion-under-revenue-projections-in-2020-135356538.html>.

⁹⁶ Matt Traub, *Which NBA Teams Allow Fans at Games this Season?*, SPORTS TRAVEL (April 5, 2021), <https://www.sportstravelmagazine.com/which-nba-teams-allow-fans-this-season-covid/>.

expectations, including requests of their own. Finally, Part C will provide recommendations for compromise to ensure a beneficial agreement for both parties.

A. What Owners Want

Because of lost revenue from COVID-19, the owners have a unique set of pressing issues to resolve. Additionally, the long-term changes they have wanted for many years have not gone away.

i. Short-term Salary Concerns

The most important issue for teams is how to treat the salary cap with the NBA's loss of revenue from the pandemic. The NBA was projected to make around \$8 billion in the 2020 season, and instead only made about \$6.5 billion.⁹⁷ While keeping the salary cap static serves as a band-aid for the 2021 season, this problem will only be compounded if fans are not allowed in arenas for the 2021 season, or if they are allowed in a limited capacity, as about 40% of the NBA's revenue comes from tickets and other in-arena sales.

This lost revenue will create a more complex issue with respect to free agency, roster construction, and revenue sharing. The NBA's salary cap is adjusted on an annual basis based on recent years' revenue.⁹⁸ The yearly changes in the salary cap are generally modest, ranging between 3% and 5%.⁹⁹ Since the CBA was extended in 2016, players and owners split the basketball related interest ("BRI")—the league's general revenue—almost exactly 50/50.¹⁰⁰ If further revenue losses lead to a decreased salary cap in subsequent seasons, it will cost owners even more money and handcuff their ability to make offseason moves. As Adam Silver explained, "There's not a mechanism in it that works to properly set the cap when you've got so much uncertainty, when our revenue could be \$10 billion or it could be \$6 billion. Or less."¹⁰¹

This is not only a problem for owners, but also many players. The majority of players are signed for multiple years, and in most cases, all of their money is guaranteed.¹⁰² Therefore, if the projected salary cap were to drop significantly because of lost revenue, it will be NBA free agents who wear the burden by either not being signed, or being signed for significantly less than their market value.¹⁰³ NBA rookies are paid on a scale measured by the salary cap, so in addition to free agents, every rookie would be earning significantly less than those drafted in recent years.¹⁰⁴

⁹⁷ Kurt Helin, *Report: NBA Missed Revenue Projections by About \$1.5 Billion Last Season*, NBC SPORTS (Oct. 24, 2020), <https://nba.nbcsports.com/2020/10/24/report-nba-missed-revenue-projections-by-1-5-billion-last-season/>.

⁹⁸ Jon Hamm, *NBA Salary Cap 101 - The Cap, the Luxury Tax and the Apron*, THE OKLAHOMAN (May 9, 3014), <https://oklahoman.com/article/4747971/nba-salary-cap-101-the-cap-the-luxury-tax-and-the-apron>.

⁹⁹ NBA Salary Cap History, REAL GM, https://basketball.realgm.com/nba/info/salary_cap.

¹⁰⁰ *Id.*

¹⁰¹ Adrian Wojnarowski, *Sources: NBA, NBPA extend negotiating window on CBA modifications to Oct. 30*, ESPN (Oct. 15, 2020), https://africa.espn.com/nba/story/_/id/30123004/nba-nbpa-extend-negotiating-window-cba-modifications-oct-30.

¹⁰² *Compensation*, CBA BREAKDOWN, <https://cbabreakdown.com/compensation>.

¹⁰³ Dan Feldman, *Report: NBA Salary Cap Will Be Lowered*, NBC SPORTS (May 9, 2020), <https://nba.nbcsports.com/2020/05/09/report-nba-salary-cap-will-be-lowered/>.

¹⁰⁴ *Id.*

The solution agreed to for the 2021 season was to reform the amount of players' money in escrow.¹⁰⁵ In past seasons, 10% of the players' salary is kept in escrow so that if the league's revenue is lower than expected, owners can recoup some of the money to maintain the 50/50 revenue distribution.¹⁰⁶ For the 2020 season, players agreed to put 25% of their money in escrow to make up for the lost regular season games and attendance-free playoff games.¹⁰⁷ Players agreed to this largely because owners had the ability to tear up the CBA via the force majeure clause.¹⁰⁸ Ultimately, players lost about 15% of their 2020 salaries.¹⁰⁹

One league executive suggested that if the salary cap were to plummet after the 2021 season, the league should explore an unlimited escrow.¹¹⁰ This would put the players in a very vulnerable position that is similar to being constantly threatened with owners enforcing the force majeure clause. Michelle Roberts, the Players Association's Executive Director, dismissed this idea as unreasonable in a recent interview with *The Athletic's* Sam Amick. "It's lazy. I think it's two-dimensional. I have too much respect for the league and the governors than to think let's just resolve it that way."¹¹¹

Another proposal from league executives to alleviate future revenue losses was for all 450 players to agree to partially reduce their salaries.¹¹² This solution would simultaneously balance the financial hit among owners and players, evenly distribute the burden felt by all players evenly, and allow teams to maintain something close to their projected salary cap to operate normally. However, this direct slashing of players' salaries is likely a worst-case scenario option for the Players Association. As Michelle Roberts said, "Not everyone enjoys the longevity that someone like LeBron (James) does. Most guys are not going to play 15 years, 16 years, 17 years. Our shelf life is less than five years."¹¹³

The agreement to minor escrow reform for the 2021 season gives hope that these radical solutions will not have to be discussed further. However, if the 2021 season does not go smoothly and revenue takes another large hit, it is easy to imagine these more extreme conversations happening again.

Finally, there is an issue of scheduling a season while an uncertain pandemic progresses. Normally, the NBA begins in late October. On November 9, 2020, the NBA and Players Association agreed to begin the 2021 season on December 22, 2020.¹¹⁴ Because the regular

¹⁰⁵ Eric Walden, *NBA, Players Agree to Terms on 2020-2021 Season, Including Salary Cap, Free Agency*, THE SALT LAKE TRIBUNE (Nov. 9, 2020), [https://www.sltrib.com/sports/jazz/2020/11/09/nba-players-agree-terms/#:~:text=The%20salary%20cap%20\(%24109.1,and%20a%20maximum%20of%2010%25](https://www.sltrib.com/sports/jazz/2020/11/09/nba-players-agree-terms/#:~:text=The%20salary%20cap%20(%24109.1,and%20a%20maximum%20of%2010%25).

¹⁰⁶ Bryan Toporek, *NBA's Escrow Battle Over Player Salaries Has Only Just Begun*, FORBES (April 8, 2020), <https://www.forbes.com/sites/bryantoporek/2020/04/08/nbas-escrow-battle-over-player-salaries-has-only-just-begun/?sh=58ceb14054e3>.

¹⁰⁷ Shams Charania, *What comes after the bubble?: One on one with NBPA boss Michelle Roberts*, THE ATHLETIC (Oct. 6, 2020), https://theathletic.com/2118672/2020/10/06/what-comes-after-the-bubble-one-on-one-with-nbpa-boss-michele-roberts/?article_source=search&search_query=what%20comes%20after%20the%20bubble.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Eric Walden, *NBA, Players Agree to Terms on 2020-2021 Season, Including Salary Cap, Free Agency*, THE SALT LAKE TRIBUNE (Nov. 9, 2020), [https://www.sltrib.com/sports/jazz/2020/11/09/nba-players-agree-terms/#:~:text=The%20salary%20cap%20\(%24109.1,and%20a%20maximum%20of%2010%25](https://www.sltrib.com/sports/jazz/2020/11/09/nba-players-agree-terms/#:~:text=The%20salary%20cap%20(%24109.1,and%20a%20maximum%20of%2010%25).

season will be played without a bubble, the league will have to track how the virus is affecting the country throughout 2020 and 2021.¹¹⁵ Other leagues that have continued play without a bubble, such as Major League Baseball (“MLB”), National Football League (“NFL”), and college football, all saw dozens of players and coaches contract COVID-19 and had various teams experience complete outbreaks.¹¹⁶ Multiple NFL games were postponed, while dozens of college football games have been canceled.¹¹⁷

On top of the direct effect of the virus, players’ physical recovery and preparation from an unconventional offseason has the league’s health officials concerned the risk for injury could be higher.¹¹⁸ The MLB saw a 22% increase in injuries in 2020 compared to the 2019 season.¹¹⁹ The NFL and college football have both seen a significant uptick in soft-tissue injuries this year as well.¹²⁰ One NBA team’s health official said, “This is going to be another period of uncharted territory. As uncharted as the [Orlando] bubble was [this summer], this is the bubble times three or four or five [because we’re] trying to extend it to that period of time with a minimal ramp-up.”¹²¹ Not only did the bubble protect players from the virus, but it also removed travel as a factor in their health. “‘I’d be more worried about travel, because we saw in the bubble, not having travel really helped guys recover,’ said one official intimately involved with player health.”¹²²

¹¹⁵ *NBA Unveils Game and National Television Schedules for the First Half of 2020-21 Season*, NBA (Dec. 4, 2020), <https://www.nba.com/news/2020-21-nba-schedule-first-part-official-release>.

¹¹⁶ Mark Maske, *NFL, Faced with Another League’s Outbreak, Says it Knows ‘This is Going to Be Hard,’* WASHINGTON POST (July 27, 2020), <https://www.washingtonpost.com/sports/2020/07/27/nfl-cautiously-optimistic-despite-mlb-coronavirus-outbreak/>.

¹¹⁷ Matt Traub, *The Latest on Sports and COVID-19: NFL Strengthens Anti-Virus Protocols to Finish Season*, SPORTS TRAVEL (Nov. 22, 2020), <https://www.sportstravelmagazine.com/sports-canceled-covid-nba-nhl-nfl-ncaa-nascar-soccer-league-season-tournament/>.

¹¹⁸ Baxter Holmes, *NBA’s Short Offseason, Quick Restart Concern Health Officials Around the League*, ESPN (Nov. 9, 2020), https://www.espn.com/nba/story/_/id/30286275/nba-short-offseason-quick-restart-concern-health-officials-league.

¹¹⁹ Akshaj Guar, *MLB Shortened Spring Training Correlates to 22% Increase in Injuries*, LAST WORD ON SPORTS (Aug. 23, 2020), <https://lastwordonsports.com/baseball/2020/08/23/2020-mlb-injuries/>.

¹²⁰ Eric Edholm, *Why So Many NFL Injuries This Year? One Sports-medicine Doctor Thinks He Knows Why*, YAHOO (Oct. 30, 2020), <https://www.yahoo.com/now/why-so-many-nfl-injuries-this-season-one-sportsmedicine-doctor-thinks-he-knows-why-141643231.html>.

¹²¹ Baxter Holmes, *NBA’s Short Offseason, Quick Restart Concern Health Officials Around the League*, ESPN (Nov. 9, 2020), https://www.espn.com/nba/story/_/id/30286275/nba-short-offseason-quick-restart-concern-health-officials-league.

¹²² *Id.*

ii. Long-term Desires

Even with the pandemic creating new challenges for owners to overcome, there are other issues they have wanted to address for years.

Most notably, owners are dissatisfied with the level of mobility that star players have flexed in recent seasons.¹²³ Owners have been fighting player mobility for decades, and reportedly wish to limit the newfound player freedom that recent stars have found.¹²⁴

The 2016 CBA attempted to address this issue by creating the “supermax” contract option for teams to re-sign star players.¹²⁵ This option allowed teams to extend players who hit a certain level of “star criteria”—as measured by All-NBA appearances and MVP’s—by offering them 35% of the entire team’s salary cap.¹²⁶ However, the supermax did not lead to the change for which owners had hoped. Owners did not expect players to turn down that amount of extra money.¹²⁷ Yet in just the last two years, star players Kawhi Leonard and Anthony Davis demanded trades from the teams that drafted them after being eligible for the supermax, with Leonard declining an extra \$70 million in total salary.¹²⁸ Not only was Davis traded, but he also managed to be traded to his preferred destination of Los Angeles, where he won a title in his first year with the team.¹²⁹

If the NBA can stabilize its salary cap through the pandemic and configure a healthy schedule for the next few seasons, expect owners to turn their focus to reforming or abolishing the supermax, or creating new restrictions to inhibit players’ ability to choose where they play.

B. What Players Want

The owners’ expected demands to account for lost revenue presents obvious drawbacks for the players. However, it offers them a unique negotiating opportunity, as they can demand the league must “give a little to get a little.” For example, the players could agree to partially reduce their salaries for the sake of the teams’ salary caps only if the owners back off on their attempts to deter player mobility. Beyond that simple counter, there are several other foreseeable demands players could make as compensation for their cooperation of playing during a pandemic.

¹²³ William C. Rhoden, *Will the NBA’s Superstar Players Exert Power When it Really Matters?*, THE UNDEFEATED (July 9, 2019), <https://theundefeated.com/features/will-the-nbas-superstar-players-exert-power-when-it-really-matters/>.

¹²⁴ *Id.*

¹²⁵ Haley O’Shaughnessy, *The NBA’s Supermax Isn’t Doing What Was Supposed to Do*, THE RINGER (July 17, 2019), <https://www.theringer.com/nba/2019/7/17/20696975/nba-supermax-chris-paul-russell-westbrook>.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Evan Dammarell, *With Anthony Davis’s Latest Trade Demand, It Is Clear the Supermax is a Failure*, FORBES (Feb. 1, 2019), <https://www.forbes.com/sites/evandammarell/2019/02/01/with-anthony-daviss-trade-demand-it-is-clear-the-supermax-is-a-failure/?sh=62fd9182743a>.

¹²⁹ Ben Cohen, *The Los Angeles Lakers Win the NBA Title*, WALL STREET JOURNAL (Oct. 12, 2020), <https://www.wsj.com/articles/the-los-angeles-lakers-win-the-nba-title-11602468191>.

i. Medical Care

Playing a professional sport for extended years can take an extreme toll on the human body.¹³⁰ In 2016, the new CBA included a provision that the league would cover many medical expenses for retired players.¹³¹ This long overdue benefit was seen as a major victory for the Players Association. However, constant traveling and playing basketball in a pandemic creates an entire new set of circumstances that are largely unknown. The long-term effects of COVID-19 are still a mystery, and players are risking their future health to play in the 2021 season.

Beyond the direct impact of the virus, it is plausible that injuries will be more common in the 2021 season because of the unique offseason. There has been a significant uptick in injuries in both the MLB¹³² and NFL seasons.¹³³ This concern is on top of the fact that some players are at constant risk of missing out on millions of dollars by suffering a career-altering injury just before they were due for a new contract.

ii. Addressing Racial Injustice

Probably the most rapid development between owners and players has been the ways the league has spoken out for racial equality. “Two years ago, you think you would have been interviewing NBA people about racism and racial equality and to be able to say it openly and confidently and to put ‘Black Lives Matter’ on the court?” Atlanta Hawks coach Lloyd Pierce asked. “Those things were impossible in any sport two years ago because of the difficulty to confront racism and racial equality. The necessary side of having these conversations has at least gotten us to this point.”¹³⁴ Even with that progress, the message from players throughout the bubble was clear: they want the owners to take a more proactive approach in this fight, instead of a reactive one.¹³⁵

Before the bubble even began, the owners dedicated a combined \$300 million over the next ten years to promote economic empowerment in the Black community.¹³⁶ Some players,

¹³⁰ Dr. David Geier, *Long Seasons and Travel Take Their Toll on NBA Players*, <https://www.drdauidgeier.com/nba-schedules-fatigue/>.

¹³¹ Ohm Youngmisuk, *Retired NBA Players Get Added Benefits In New CBA*, ESPN (Dec. 23, 2016), https://www.espn.com/nba/story/_/id/18332488/retired-nba-players-benefit-new-cba.

¹³² Akshaj Guar, *MLB Shortened Spring Training Correlates to 22% Increase in Injuries*, LAST WORD ON SPORTS (Aug. 23, 2020), <https://lastwordonsports.com/baseball/2020/08/23/2020-mlb-injuries/>.

¹³³ Eric Edholm, *Why So Many NFL Injuries This Year? One Sports-medicine Doctor Thinks He Knows Why*, YAHOO (Oct. 30, 2020), <https://www.yahoo.com/now/why-so-many-nfl-injuries-this-season-one-sportsmedicine-doctor-thinks-he-knows-why-141643231.html>.

¹³⁴ Andrew Grief, *LeBron James and Lakers take lead in NBA Activism for social justice*, LOS ANGELES TIMES (Oct. 13, 2020), <https://www.latimes.com/sports/lakers/story/2020-10-13/lakers-lebron-james-nba-social-justice-activism>.

¹³⁵ Sam Quinn, *NBA Players Want Owners to be Proactive, Not Reactive, in Enacting Social Change, per Reports*, CBS SPORTS (Aug 27, 2020), <https://www.cbssports.com/nba/news/nba-players-want-owners-to-be-proactive-not-reactive-in-enacting-social-change-per-reports/#:~:text=In%20discussing%20the%20resumption%20of,to%20The%20Athletic's%20Shams%20Charania>.

¹³⁶ Jeff Zillgitt and Mark Medina, *NBA Owners Commit \$300 Million to New Foundation Dedicated to Economic Empowerment in Black Community*, USA TODAY (Aug. 6, 2020),

like Brooklyn Nets Kyrie Irving, felt uncomfortable with the NBA continuing as protests were happening across the country. "I don't support going into Orlando. I'm not with the systematic racism and the bullshit. Something smells a little fishy."¹³⁷ Later, Irving told his fellow players "I'm willing to give up everything I have" for social reform.¹³⁸ This level of sacrifice should not be understated, as it would have cost Irving \$33.3 million if the bubble had not happened.¹³⁹ Ultimately, enough players felt the bubble could be an effective platform for their message and play continued... until the wildcat strike.

Despite lasting less than 24 hours, the strike compelled the NBA to create a social justice commission this offseason with players, coaches, and owners.¹⁴⁰ The league also made efforts for all twenty-nine American arenas to be used as voting centers in November for the election, and twenty-one of them succeeded.¹⁴¹

In spite of these actions, there are cautionary signs some executives are hoping that the focus on racial justice will not be as bright in the near future. Adam Silver said in an interview in early October:

I would say, in terms of the messages you see on the court and our jerseys, this was an extraordinary moment in time when we began these discussions with the players and what we all lived through this summer. My sense is there'll be somewhat a return to normalcy, that those messages will largely be left to be delivered off the floor. And I understand those people who are saying, "I'm on your side, but I want to watch a basketball game."¹⁴²

The sentiment shared by Silver here is likely one he is passing on from at least a few owners. Some media members have also shared concerns about the league's social justice polarizing some fans and hurting the league's revenue.¹⁴³ However, there is overwhelming evidence that the NBA's social justice statements had no effect on the league's ratings or revenue.¹⁴⁴ Finals ratings were down primarily because it was the first time in history they were competing with the NFL.¹⁴⁵ As more people are cutting cable and using streaming services and

<https://www.usatoday.com/story/sports/nba/2020/08/05/nba-owners-pledge-300-million-economic-empowerment-black-community/3304737001/>.

¹³⁷ Kurt Helin, *Kyrie Irving On NBA Restart: "I Don't Support Going Into Orlando,"* YAHOO (June 12, 2020), <https://www.yahoo.com/entertainment/kyrie-irving-nba-restart-don-030001673.html>.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ NBA, *NBPA Issue Joint Statement on Social Justice and Racial Equality*, NBA (Aug. 28, 2020), <https://www.nba.com/news/nba-nbpa-joint-statement-social-justice>.

¹⁴¹ Kate Brumback and Larry Lage, Staidums, *Arenas, Stadiums Find New Life as Safer Options for Voting*, ASSOCIATED PRESS (Oct. 22, 2020), <https://apnews.com/article/election-2020-nfl-nba-virus-outbreak-primary-elections-36560251b8fa01deca154ffd3d490c84>.

¹⁴² Chase Hughes, *Silver: NBA to Scale Back Social Justice Messaging Next Season*, NBC SPORTS (Oct. 8, 2020), <https://www.nbcsports.com/washington/wizards/adam-silver-nba-scale-back-social-justice-messaging-next-season>.

¹⁴³ Ethan Strauss, *Why the NBA Has a Serious Viewership Problem it Needs to Fix*, THE ATHLETIC (Aug. 17, 2020), <https://theathletic.com/1997343/2020/08/17/strauss-why-the-nba-has-a-serious-viewership-problem-it-needs-to-fix/>.

¹⁴⁴ Chris Haynes, *Why the Narrative About Declining NBA Ratings is Wrong*, YAHOO, (Oct. 9, 2020), <https://sports.yahoo.com/why-the-narrative-about-declining-nba-ratings-is-wrong-172402656.html>.

¹⁴⁵ *Id.*

the Internet, nearly every single live sporting event has seen a steady drop in ratings over the last few years.¹⁴⁶ Sports with apolitical subtext like horse racing and hockey have seen steeper ratings declines than the NBA, despite no message of social justice coming with their broadcasts.¹⁴⁷

Silver's comments give rise to genuine concern whether or not the league was serious about committing to fight for racial equality, or just saying what they needed to in order to restart the playoffs.

iii. Drug Testing Policy

Despite leagues like the National Hockey League ("NHL") and MLB practically removing all punishments for smoking marijuana,¹⁴⁸ the NBA still reprimands players for failed drug tests in the form of required counseling, a fine, or a suspension (based on the number of violations).¹⁴⁹ Players are randomly drug tested four times per season.¹⁵⁰ Some expect this practice to be abolished soon. "Honestly, I think pot becomes legal in the next collective bargaining agreement," said The Ringer's Bill Simmons on the Zach Lowe podcast.

iv. The NBA Draft and Rookie Contracts

Every year, new players join the league via the NBA draft. Under the current system, the worst NBA teams are rewarded with the best choices among incoming players for the sake of competitiveness.¹⁵¹ Contrasting this process with most industries, one can see how this system is unique. The smartest law students are not forced to work for struggling firms, but instead tend to go work for the best.¹⁵² It is fair to wonder whether a court of law would find forcing new employees into a specific location for labor to be unconscionable, or even illegal.¹⁵³ If an incoming player has preferences for where he wants to live or the type of team he believes he can best fit with to develop his skill, those preferences are ignored. There are fundamental differences between professional sports and other industries that make it arguably mutually beneficial for this unique employment format—most notably, that the entire league makes more money from being competitive—but the point remains that without a CBA, players could gain

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Anthony Witrado, *MLB's New Marijuana Policy Could Spark Change in NFL and NBA Policy*, FORBES (Dec. 16, 2019), <https://www.forbes.com/sites/anthonywitrado/2019/12/16/mlbs-new-marijuana-policy-could-spark-change-in-nfl-and-nba-policy/?sh=6bea897f42a1>.

¹⁴⁹ *Id.*

¹⁵⁰ Ken Belson, *N.F.L. Bows to Marijuana's New Status*, NEW YORK TIMES (April 13, 2020), <https://www.nytimes.com/2020/04/13/sports/football/nfl-marijuana-policy.html>.

¹⁵¹ *Basketball 101: NBA Draft*, (2010), NBA, https://web.archive.org/web/20101101195037/http://www.nba.com/bobcats/draft_basketball_101.html.

¹⁵² Anayat Durrani, *Does Law School Rank Determine Success*, LAW CROSSING, <https://www.lawcrossing.com/article/693/Does-Law-School-Rank-Determine-Success/>.

¹⁵³ Chad D. Mcevoy, *NBA May Have No Legal Defense in Pursuit of Age-Eligibility Standard*, ATHLETIC BUSINESS (Sep. 2001), <https://www.athleticbusiness.com/nba-may-have-no-legal-defense-in-pursuit-of-age-eligibility-standard.html>.

leverage by threatening litigation to abolish the draft, in order to coerce the NBA to merely reform it to the players' benefit.¹⁵⁴

In addition to the draft itself, players have a set salary their first few years in the league that is solely dependent on where they are selected in the draft.¹⁵⁵ The first pick is paid the most money, the second pick is paid the second most money, etc. While this regression is arguably a fair system when only comparing players selected in the same class, it gives zero negotiating flexibility to young players, both with respect to salary and the length of their contract. Not all first overall picks are worth the same value, and players on their rookie deal are commonly the most underpaid players in the league relative to their value on the court.¹⁵⁶ Though the rookie scale's advertised intent is to fairly distribute pay based on talent, it acts primarily as salary suppression for a large portion of the NBA's workforce.

C. Potential Compromises and Recommendations

For owners and players to be satisfied with the future of the league, it will take creativity, compromise, understanding, and mutual respect. When discussing the compromises the league made this summer, Michelle Roberts said "We worked it out by being flexible, being nimble, waiting and seeing."¹⁵⁷

If the NBA's revenue drops to the point of forcing the salary cap to plummet, the solution could be a combination of players placing a greater percentage of their salaries in escrow and possibly reducing their salaries. However, owners need to understand that such a move would be a major setback to hundreds of players. "Not everyone enjoys the longevity that someone like LeBron (James) does. Most guys are not going to play 15 years, 16 years, 17 years. Our shelf life is less than five years."¹⁵⁸ Therefore, owners may have to be willing to give up some ground in other areas.

The following sections provide recommendations for the league to simultaneously satisfy the players with significant benefits, while maintaining the NBA's successful business model. They are as follows: (1) compensating players who opt out or are injured before a contract extension; (2) reform the schedule to optimize players' health; (3) take tangible steps to fighting racial injustice – such as through greater player representation, political spending, and targeted boycotts; (4) abolish testing for marijuana; and (5) abolish salary suppression for players on their rookie contracts.

i. Compensating Players Who Opt Out or Are Injured Before a Contract Extension

¹⁵⁴ Jabari Young, *NBA's strong relationship with its players could prevent collective bargaining issues*, CNBC (Aug. 29, 2020), [cnbc.com/2020/08/29/nbas-strong-relationship-with-its-players-could-prevent-collective-bargaining-issues.html](https://www.cnbc.com/2020/08/29/nbas-strong-relationship-with-its-players-could-prevent-collective-bargaining-issues.html).

¹⁵⁵ Luke Adams, *Hoops Rumors Glossary: Rookie Scale*, HOOPS RUMORS (Sep. 2, 2019), <https://www.hoopsrumors.com/2019/09/hoops-rumors-glossary-rookie-scale.html>.

¹⁵⁶ Daniel Leroux, *First-round NBA Draft Picks Are About to Be the Most Underpaid Players in the League*, SPORTING NEWS (Oct. 15, 2015), <https://www.sportingnews.com/us/nba/news/salary-cap-rookie-contract-structure-first-round-pick-2016-nba-draft/ziazm8rg6xvr1lfs779he0e92>.

¹⁵⁷ Shams Charania, *What comes after the bubble?: One on one with NBPA boss Michelle Roberts*, THE ATHLETIC (Oct. 6, 2020), https://theathletic.com/2118672/2020/10/06/what-comes-after-the-bubble-one-on-one-with-nbpa-boss-michele-roberts/?article_source=search&search_query=what%20comes%20after%20the%20bubble.

¹⁵⁸ *Id.*

The league should partially compensate any player who chooses to opt-out of a season from concern of a pandemic, and any player who is significantly injured just before an expected contract extension.

Players are risking their long-term-health to play a regular season with travel during a viral pandemic, and might choose to opt out of the 2021 season for health concerns.¹⁵⁹ The Players Association should negotiate with the owners to retroactively compensate these players with a portion of their expected salary.

Beyond the direct impact of the virus, it is plausible that injuries will be more common in the 2021 season because of the unique offseason. There has been a significant uptick in injuries in both the MLB and NFL seasons.¹⁶⁰ If a player suffers a career-altering injury just before they were due for a new contract, they could miss out on tens of millions of dollars. If the NBA is serious about protecting its players' best interests, it should establish a slush fund for players whose careers are derailed by injury right before they were due for a payday.

ii. Schedule Reform to Optimize Player Health

The NBA can optimize its players' health with more careful scheduling and transitioning to a "series" style of games.

Despite playing about half the number of games as the MLB, NBA teams are burdened with more travel during the regular season than any major American sports league.¹⁶¹ This results in severe hardship on their bodies,¹⁶² and the results can be seen in the playoffs. It is difficult to find an NBA post-season in which no significant player missed games due to injury, especially recently.¹⁶³ While many media members and some players have accurately pointed out that fewer games in the regular season would certainly help this problem,¹⁶⁴ this solution also results in decreased revenue, a symptom that would hurt both owners and players.

An alternative solution is for the NBA to more carefully consider its regular season schedule with respect to travel. Every year, multiple teams travel across the country multiple times within the span of weeks to play opponents.¹⁶⁵ As Dr. David Geier highlights, it would not take an onerous effort for the league to schedule games in a way that they can remain in one region of the country for an extended period of time, playing opponents in that region for

¹⁵⁹ Quinton Mayo, *Report: NBA Players Have Dec. 1 Deadline to Opt Out of Season*, NBC SPORTS (Nov. 21, 2020), <https://www.nbcsports.com/washington/wizards/report-nba-players-opting-out-2020-21-season-must-notifiy-teams-dec-1>.

¹⁶⁰ Andrew Grief, *LeBron James and Lakers take lead in NBA Activism for social justice*, LOS ANGELES TIMES (Oct. 13, 2020), <https://www.latimes.com/sports/lakers/story/2020-10-13/lakers-lebron-james-nba-social-justice-activism>.

¹⁶¹ Dr. David Geier, *Long Seasons and Travel Take Their Toll on NBA Players*, <https://www.drdauidgeier.com/nba-schedules-fatigue/>.

¹⁶² *Id.*

¹⁶³ Tom Haberstroh, *2020 NBA Champion Will Join Long List of Titles with Asterisks*, NBC SPORTS (June 26, 2020), <https://www.nbcsports.com/philadelphia/nba-insider-tom-haberstroh/2020-nba-champion-will-join-long-list-titles-asterisks>.

¹⁶⁴ Hunter Felt, *To Improve Basketball the NBA Should Shorten the Regular Season*, THE GUARDIAN (Oct. 22, 2014), <https://www.theguardian.com/sport/2014/oct/22/improve-basketball-nba-shorten-regular-season>.

¹⁶⁵ Dr. David Geier, *Long Seasons and Travel Take Their Toll on NBA Players*, <https://www.drdauidgeier.com/nba-schedules-fatigue/>.

weeks.¹⁶⁶ Additionally, the NBA should move to a “series” model of regular season play similar to the MLB. Baseball teams play the same opponent two or three times in a row in the same city so that they do not have to travel more than once or twice a week.¹⁶⁷ The NBA should consider imitating a version of this model by making a great portion of a team’s schedule composed of double-headers.

iii. Tangible Steps Towards Fighting Racial Injustice

Owners can show greater support to the players’ fight for racial justice by giving the players more representation in the social justice coalition, reprioritizing their political spending, and refusing to provide play to parts of the country whose policies are not acceptable.

The league’s internal social justice coalition is made up of more owners than players.¹⁶⁸ The commission is the owners’ way of compromising to meet the players demands for concrete action, but some in the media are concerned the commission has too much owner representation—and not enough players—to see anything substantial accomplished.¹⁶⁹ If the commission is not effective in the first year of its existence, players should demand a greater share of its representation. Another possible expansion to the commission would be hiring outside professionals to assist in creating and executing avenues for the league to make a greater impact. Owners and players may have good intentions, but possibly lack the expertise or savvy strategy that activists or consultants could provide to ensure a greater impact.

As billionaires, NBA owners are some of the most influential people on the planet.¹⁷⁰ This influence can be used to impact both local and national policy. For example, Dallas Mavericks owner Mark Cuban often speaks on news networks to discuss his opinions on politicians and economic policies.¹⁷¹ Los Angeles Clippers owner Steve Ballmer joined Mark Zuckerberg and Bill Gates to lobby for a bill meant to promote more jobs in the tech industry.¹⁷² Over the past six years, NBA owners have combined to donate over \$8 million to Republican campaigns and over \$2 million to Democratic campaigns.¹⁷³ Players should compel the owners to shift their efforts in ways that better reflect the values and issues that are pressing to their employees.

¹⁶⁶ *Id.*

¹⁶⁷ Andrew Simon, *MLB’s 60-game Schedule for 2020 Unveiled*, MLB (July 6, 2020), <https://www.mlb.com/news/2020-major-league-baseball-schedule-released>.

¹⁶⁸ *Report: NBA Announces Board of Newly-Formed Social Justice Coalition*, SPORTSNET (Nov. 9, 2020), <https://www.sportsnet.ca/nba/article/report-nba-announces-board-newly-formed-social-justice-coalition/>.

¹⁶⁹ Dan Feldman, *NBA and Players Establish Social Justice Coalition, Agree to Promote Voting*, NBC SPORTS (Aug. 28, 2020), <https://nba.nbcsports.com/2020/08/28/nba-and-players-establish-social-justice-coalition-agree-to-promote-voting/>.

¹⁷⁰ *Election 2020: Inside the Political Donation History of Wealthy Sports Owners*, ESPN and FIVETHIRTYEIGHT (Oct. 28, 2020), https://www.espn.com/nba/story/_/id/30155186/election-2020-political-donation-history-wealthy-sports-owners.

¹⁷¹ *Id.*

¹⁷² Tom Warren, *Mark Zuckerberg adds Bill Gates and Steve Ballmer to his FWD.us lobbying group*, THE VERGE (Apr 26, 2013), <https://www.theverge.com/2013/4/26/4269228/bill-gates-steve-ballmer-join-mark-zuckerbergs-fwd-us-group>.

¹⁷³ *Election 2020: Inside the Political Donation History of Wealthy Sports Owners*, ESPN and FIVETHIRTYEIGHT (Oct. 28, 2020), https://www.espn.com/nba/story/_/id/30155186/election-2020-political-donation-history-wealthy-sports-owners.

Just recently the league has shown its willingness to take a firm, adversarial stand against states that enact policies that are deemed unconscionable by players. The 2018 All-Star game was scheduled to take place in Charlotte, North Carolina. However, North Carolina passed a bill that forced transgender individuals to use the restroom of their sex assigned at birth.¹⁷⁴ In response, the league canceled the event in Charlotte and moved the All-Star game to New Orleans, Louisiana.¹⁷⁵ This precedent paves the way for the league to do something similar for cities or states that do not enact significant police reform.

iv. Abolishing Testing for Marijuana

Ending the practice of testing players for marijuana offers immediate upside to the league, with no foreseeable risk.

The MLB and NHL have stopped punishing players for marijuana, and there is no reason to believe the quality of play has suffered as a result.¹⁷⁶ With many states recently legalizing marijuana,¹⁷⁷ and some players claiming it helps their body recover,¹⁷⁸ this would be a relatively safe benefit for owners to give the players that would not cost owners an extra dime. No players were tested for marijuana in the bubble,¹⁷⁹ and that can be seen as a trial run for what a complete abolition of marijuana testing would look like. As The Ringer's Bill Simmons said on the Zach Lowe podcast, "That was another lesson we learned from this bubble. They weren't testing for pot. Could that have been one of the factors [why] quality of play was better? Maybe? Recovery?"¹⁸⁰

v. Abolishing Rookie-Scale Salary Suppression

By removing the scaled salary suppression of players signed to their rookie contracts, the NBA can more justly compensate a significant portion of its work force.

The NBA draft creates inherent labor disadvantages by forcing employees to play for certain teams. This pigeonholes incoming players into team situations and/or cities where they do not want to play. While some media members have proposed abolishing the draft altogether, and

¹⁷⁴ Michael Gordon, Mark S. Price, Katie Peralta, *Understanding HB2: North Carolina's Newest Law Solidifies State's Role in Defining Discrimination*, THE CHARLOTTE OBSERVER (March 26, 2016), <https://www.charlotteobserver.com/news/politics-government/article68401147.html>.

¹⁷⁵ Brian Windhorst via ESPN, *NBA Moving All-Star Game from Charlotte Over NC Bill*, THE UNDEFEATED (July 21, 2016), <https://theundefeated.com/features/nba-exploring-other-cities-to-hold-2017-all-star-game/>.

¹⁷⁶ Anthony Witrado, *MLB's New Marijuana Policy Could Spark Change in NFL and NBA Policy*, FORBES (Dec. 16, 2019), <https://www.forbes.com/sites/anthonywitrado/2019/12/16/mlbs-new-marijuana-policy-could-spark-change-in-nfl-and-nba-policy/?sh=6bea897f42a1>.

¹⁷⁷ Lauren Dezenski, *Montana, Arizona, New Jersey, South Dakota and Mississippi Approve Marijuana Ballot Measures*, CNN Projects, CNN (Nov. 5, 2020), <https://www.cnn.com/2020/11/04/politics/marijuana-legalization-2020-states/index.html>.

¹⁷⁸ Candace Buckner, *With Cannabis Use an Open Secret in the NBA, this Ex-player is Pushing for the League to Allow CBD*, THE WASHINGTON POST (Dec. 27, 2019), <https://www.washingtonpost.com/sports/2019/12/25/nba-cbd-marijuana-al-harrington-weed/>.

¹⁷⁹ *NBA's Next CBA Could Allow Players to Use Marijuana Without Penalty*, REAL GM (Oct. 20, 2020), <https://basketball.realgm.com/wiretap/259943/NBAs-Next-CBA-Could-Allow-Players-To-Use-Marijuana-Without-Penalty>.

¹⁸⁰ *Id.*

while this is likely the most just resolution in the long-run,¹⁸¹ this is very unlikely to be accomplished in the next few years. The owners believe the competitive advantage of leveling the playing field among the thirty teams outweighs the constraints placed upon young players, and will refuse to end it entirely. However, the inflexible scale for draft selections is an outdated practice, and its abolishment will not hurt the competitiveness of the league. The NBA should allow incoming players to negotiate their contracts in a more similar fashion to veteran players to achieve more fair, proportionate pay to the value they bring to a team.

This solution will require not only a concession from the owners, but from the majority of players, too. If incoming players are able to negotiate for a larger portion of a team's salary cap, that money will inherently eat into salaries of veteran players. It is natural for the Players Association to primarily look out for the employees already in its union, and not prospective players who are yet to join, but a selfless act from them will result in more fair labor practices, and a more unified union.

IV. Conclusion

Between COVID-19 and the social unrest across the nation, 2020 has added new complications to the landscape of labor relations in the NBA, and accelerated conversations to some of the underlying issues that already existed. Though this creates uncertainty to the stability of the league, it also presents an opportunity for quicker and more substantial change.

The article recommends: (1) compensating players who opt out or are significantly injured before a contract extension; (2) reforming the schedule to optimize players' health; (3) taking tangible steps to fighting racial injustice – such as through greater player representation, political spending, and targeted boycotts; (4) abolishing testing for marijuana; and (5) abolishing salary suppression for players on their rookie contracts.

The Players Association should carefully consider its most important concerns. Perhaps it is abolishing testing for marijuana, or affirming the increasing player mobility, or achieving greater medical benefits. After weighing the importance of these options, the players should not pass up this unique opportunity to flex their power in a way that is beneficial to them and simultaneously not detrimental to the league's larger goals. The owners, for their part, should only support reasonable changes that continue the league's recent ascent to the forefront of worldwide entertainment, while also showing strong support for the workforce that allows their league to exist.

¹⁸¹ Howard Bryant, *Why All NBA Players Should Be Free Agents, and the Draft Should Be Abolished*, ESPN (July 10, 2019), https://www.espn.com/nba/story/_/id/27155377/why-all-nba-players-free-agents-draft-abolished.