

RESTARTING PROFESSIONAL SPORTS DURING A GLOBAL PANDEMIC

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I. ABSTRACT

COVID-19 wreaked havoc on professional sports leagues. By mid-March of 2020, all leagues—including the National Basketball Association and Major League Baseball—had shut down, along with the rest of society. As states began to open back up a couple of months later, professional sports leagues faced the same challenging questions as other businesses of how to restart their operations safely and effectively. However, they also needed to address unique difficulties facing sports that derived from the need for the league and their respective players' union to negotiate and agree upon the terms and conditions under which they would relaunch the sport. The collective bargaining process required this of both sides, and while players and owners alike wanted to bring their sports back, significant legal and business hurdles persisted. While the NBA reached a resolution that was acceptable to the owners and players, MLB's story was quite different. After an initial agreement was reached shortly after the season shut down in March, the two sides could not reach an agreement to restart baseball. MLB Commissioner Rob Manfred eventually exercised his right to restart the season under previously defined terms, but no one saw the result as a success. The contrasting paths of the NBA and MLB illuminate the complex legal, business, and cultural issues that play into the collaborative venture of professional sports. It also highlights the importance of strong—or at least functional—labor relations in a sport. This Article seeks to analyze and better understand these issues and situate these professional sports leagues' journeys to relaunching their seasons in the larger context of professional sports law and business.

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II. INTRODUCTION

The 2019 novel coronavirus (COVID-19)¹ dramatically impacted nearly every aspect of society, including professional sports. On March 11, 2020, the National Basketball Association (NBA) suspended its season indefinitely after a player tested positive for COVID-19.² The next day, Major League Baseball (MLB) suspended spring training and delayed the start of its regular season due to the global health pandemic.³ All other professional sports leagues in the United States whose seasons were underway—or set to start by early summer—suspended or delayed the start of their respective seasons. The economic, cultural, and societal juggernaut of professional sports ground to a halt, much like the rest of the country. Over the course of several months, as society began plans for slowly re-opening after the COVID-19 emergency shutdown orders that spread throughout the country, so too did professional sports begin to plan for a return. The industry faced many of the same concerns and questions facing other businesses: How do you keep your employees and customers safe? Can you restart your operations and maintain social distancing as well as other protective and preventative workplace measures? Is your business model sustainable given the new restrictions and realities of a public health crisis?⁴

While some professional sports leagues launched earlier,⁵ the delay in restarting two major sports leagues demonstrates the particularly unique challenges to relaunching team sports, whether in restarting a season that was more than seventy-five percent complete (the NBA) or beginning a new—

¹ See *COVID-19 (2019 Novel Coronavirus) Research Guide*, CDC, <https://www.cdc.gov/library/researchguides/2019NovelCoronavirus.html> [https://perma.cc/D9X2-WVLV], (last visited Jun. 15, 2020).

² ESPN News Service, *NBA Suspends Season Until Further Notice After Player Tests Positive for the Coronavirus*, ESPN (Mar. 11, 2020), https://www.espn.com/nba/story/_/id/28887560/nba-suspends-season-further-notice-player-tests-positive-coronavirus [https://perma.cc/E7KD-8YGH].

³ Bill Shaikin & Jorge Castillo, *MLB Suspends Spring Training Indefinitely Because of the COVID-19 Pandemic*, L.A. TIMES (Mar. 12, 2020, 10:51 AM), <https://www.latimes.com/sports/story/2020-03-12/mlb-suspends-spring-training-indefinitely-coronavirus-pandemic> [https://perma.cc/XUP5-BXUH].

⁴ While all of these questions are important and worthy of scholarly focus, this Article will focus only on the challenges related to the collective bargaining process in professional sports that proved significant in relaunching the NBA and MLB seasons.

⁵ For example, the Ultimate Fighting Championship and the PGA Tour relaunched competitions before the NBA and MLB. See Bob Harig, *How the PGA Tour Got Through a Pandemic and Finished Its Season*, ESPN (Sept. 8, 2020), https://www.espn.com/golf/story/_/id/29830626/how-pga-tour-got-pandemic-finished-season [https://perma.cc/W23Q-3P2P]; Arash Markazi, *UFC Carried on in Wake of Positive COVID-19 Tests. Will Other Leagues?*, L.A. TIMES (May 10, 2020, 11:54 AM), <https://www.latimes.com/sports/story/2020-05-10/sports-comeback-covid-19-ufc-dana-white-nba-adam-silver-markazi> [https://perma.cc/KG5W-XJ4Q].

albeit truncated—season (MLB).⁶ Specifically, the difficulties that both the NBA and MLB experienced illuminate the legal, economic, and cultural issues between team owners and the players that uniquely drive these professional sports leagues. The anomalous business model of professional team sports derives from the special legal status afforded the collective bargaining process between the leagues—the collective ownership of professional sports teams—and the players (represented by their respective union).⁷ This preferential treatment under the law affords professional sports leagues significant advantages for their business through the granting of antitrust immunity in many favorable settings.⁸ On the other hand, it created a scenario where the leagues needed to reach agreement with their players' unions in order to restart their seasons because the circumstances and assumptions under which each league's collective bargaining agreement (CBA) was negotiated had changed so dramatically.

Indeed, COVID-19 disrupted pretty well all of the underlying economics of the NBA and MLB. Key factors of each league's CBA—such as revenue sharing, free agency, luxury taxes, and even players' salaries—needed to be rethought and renegotiated in the new (ab)normal of life in a global public health pandemic.⁹ This mid-season need for CBA renegotiations highlighted the importance of labor relations in not just the economic health of a sport, but, as it turns out, the logistics of whether games would actually be played again in 2020. In this regard, the contrast between the NBA and MLB could not have been more stark. The NBA and the National Basketball Players Association (NBPA)—the union representing NBA players—reached an agreement rather amicably and collaboratively.¹⁰ This success in agreeing to a path forward to finishing the 2019–2020 NBA season and proceeding to the playoffs was due, at least in large part, to the positive and effective working relationship between the owners and the players. MLB, on the other hand, was ultimately unable to reach a revised agreement with the players, and

⁶ As of the writing of this Article, the National Football League was on track to begin its season on time, so while the league experienced some minor disruptions because of COVID-19, its journey was markedly different than that of the NBA and MLB. Accordingly, this Article will focus almost exclusively on the NBA and MLB to focus on the legal, economic, and other related issues that professional sports leagues faced in attempting to start or restart their seasons.

⁷ See John C. Weistart, *Player Discipline in Professional Sports: The Antitrust Issues*, 18 WM. & MARY L. REV. 703, 705 n.10 (1977).

⁸ See Sean W.L. Alford, *Dusting off the AK-47: An Examination of NFL Players' Most Powerful Weapon in an Antitrust Lawsuit Against the NFL*, 88 N.C. L. REV. 212, 223 (2009).

⁹ See Ross Evans, *What Do (Sports) Unions Do in a Pandemic?*, ONLABOR (May 12, 2020), <https://onlabor.org/what-do-sports-unions-do-in-a-pandemic/> [<https://perma.cc/FFX9-7Y8C>].

¹⁰ See Sheryl Ring, *The NBA is Returning Before MLB*, SB NATION (June 10, 2020, 1:00 PM), <https://www.beyondtheboxscore.com/2020/6/10/21285803/the-nba-is-returning-before-mlb> [<https://perma.cc/C74C-CWY3>].

Commissioner Rob Manfred had to exercise his power to restart the season under certain, limited terms.¹¹ While that result was brought about by a previous agreement that the two sides struck when MLB shut down spring training and delayed the start of the regular season, the inability to make further concessions and agreements by both the owners and players demonstrated a dysfunctional and adversarial relationship between them.¹²

This Article seeks to delve into these complex issues and the ultimate resolutions for both professional sports leagues in restarting their respective seasons to provide new insight into the area of sports law and collective bargaining. Part III explores the special legal status that professional sports law occupies, as it constructs the framework within which to understand how the NBA and MLB reached their different results. Part IV details the various factors that drive each league's CBA and the underlying economics of their professional sport: revenue sharing, salary cap and luxury taxes, free agency, and other player contract limitations. Part V will discuss the importance of labor relations in successful collective bargaining negotiations and how the divergent stories of the NBA and MLB demonstrate how critical the relationship between the league and players' union is. Part VI concludes with some reflections on what the two leagues' stories portend for next season and the collective bargaining thereafter.

III. THE RAREIFIED POSITION OF A PROFESSIONAL SPORTS LEAGUE'S CBA

Professional sports leagues enjoy a special position in the law because of courts' deference to—and special recognition of—the collective bargaining process between the league and its respective players' union. A league's CBA has thus been referred to as the “supreme governing authority” related to all key aspects of the sport, including how the business of the league operates.¹³ Pursuant to the National Labor Relations Act,¹⁴ the league—with the commissioner's office representing the team owners—and the players' union negotiate the terms and conditions of employment and related aspects of the

¹¹ Bob Nightengale, *Commissioner Rob Manfred Has Decided to Schedule 60-Game 2020 MLB Season*, USA TODAY (June 22, 2020, 9:59 PM), <https://www.usatoday.com/story/sports/mlb/columnist/bob-nightengale/2020/06/22/mlb-2020-commissioner-rob-manfred-expected-mandate-60-game-season/3239408001/> [https://perma.cc/544T-3PDM].

¹² *Id.*

¹³ Michael A. Mahone, Jr., *Sentencing Guidelines for the Court of Public Opinion: An Analysis of the National Football League's Revised Personal Conduct Policy*, 11 VAND. J. ENT. & TECH. L. 181, 192 (2008).

¹⁴ 29 U.S.C. §§ 151–69 (West 2020); see also *Am. League of Prof'l Baseball Clubs v. Ass'n of Nat'l Baseball League Umpires*, 180 NLRB 190 (1969) (establishing the National Labor Relations Board's jurisdiction over professional sports leagues).

sport that impact players.¹⁵ The subjects of required collective bargaining negotiation include wages (player salaries and bonuses), hours (regular season and off-season obligations), and other terms and conditions of employment.¹⁶ They also include various operational and business-related aspects of the league that affect the players' employment.¹⁷ Both the league and players' union must negotiate these terms in good faith and through arms-length negotiations.¹⁸ In fact, if either side refuses or fails to negotiate any of these mandatory subjects, they will have breached their duty to collectively bargain and thus have committed an unfair labor practice.¹⁹ In this regard, the collective bargaining process attempts to ensure that both sides freely engage with one another and agree upon an acceptable set of terms that they seek to memorialize in a CBA.²⁰

Once the league and players' union agree on such negotiated subjects, the CBA—and all that it contains—becomes pretty well sacrosanct under the law as the terms become largely exempt from antitrust scrutiny.²¹ Many CBA terms such as amateur drafts, rookie contracts, and salary restrictions would otherwise constitute unreasonable restraints on trade and thus violate antitrust laws.²² However, because they are negotiated through the collective bargaining process, the law protects both sides for such terms that would otherwise violate existing laws. Indeed, courts give great judicial deference to a CBA's terms because of this hallowed process of labor law.²³ For this reason, leagues cannot change CBA terms or impose new ones without going through the collective bargaining process with the players' union.²⁴ In this

¹⁵ See Christopher R. Deubert et al., *Comparing Health-Related Policies and Practices in Sports: The NFL and Other Professional Leagues*, 8 HARV. J. SPORTS & ENT. L. 1, 30 (2017).

¹⁶ 29 U.S.C. § 158(d) (“[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees . . . with respect to wages, hours, and other terms and conditions of employment.”).

¹⁷ See Brendan H. Ewing, Comment, *MLS Promotion! Can MLS's Single Entity Status Protect It from "Pro/Rel?"* 25 JEFFREY S. MOORAD SPORTS L.J. 359, 381 (2018); Mark J. Coghlan, Note, *Why the NHL's Current Expansion Criteria Will Continue to Deny Canadian Cities NHL Franchises*, 16 VA. SPORTS & ENT. L.J. 267, 284–85 (2017).

¹⁸ See *Brown v. Prof'l Football, Inc.*, 518 U.S. 231, 235–36 (1996).

¹⁹ Brent D. Showalter, *Technical Foul: David Stern's Excessive Use of Rule-Making Authority*, 18 MARQ. SPORTS L. REV. 205, 218 (2007).

²⁰ See Ryan Probasco, *Revisiting the Service Time Quandary: Does Service Time Manipulation of Minor League Baseball Players Violate MLB's Collective Bargaining Agreement?*, 15 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 12 (2019).

²¹ See Alford, *supra* note 8.

²² See Weistart, *supra* note 7, at 705–06.

²³ See Josh Mandel, Note, *Deflategate Pumped Up: Analyzing the Second Circuit's Decision and the NFL Commissioner's Authority*, 72 U. MIAMI L. REV. 827, 866 (2018).

²⁴ Jan Stiglitz, *Player Discipline in Team Sports*, 5 MARQ. SPORTS L.J. 167, 173 (1995). However, a professional sports league may unilaterally impose a term if it does not fall under the NLRA's definition

regard, as courts will hold both the league and players to the terms of the CBA, such terms cannot be changed without the approval of both sides.

IV. THE ECONOMIC FACTORS THAT DRIVE THE COLLECTIVE BARGAINING PROCESS

Many key issues related to the business and operation of a professional sport must be negotiated through collective bargaining, including salary caps, luxury taxes, revenue sharing, free agency, various player contract limitations, and the like.²⁵ Unsurprisingly, given their significant impact on the economics of the sport—and, in particular, player salaries—they also tend to be the most contentious in such negotiations.²⁶ Indeed, each played a role in the negotiations between the NBA and MLB and their respective players' unions in attempting to reach agreements on restarting their seasons after the COVID-19 shutdowns in March of 2020.

A. Revenue Sharing

Most professional sports leagues—including the NBA and MLB—have revenue sharing policies that aim to redistribute revenues within the league to lessen the money gap between large-market and small-market teams.²⁷ Through such revenue redistribution, smaller-market teams are better able to afford a player payroll that will make them competitive, as leagues fear competitive imbalance between higher-revenue and lower-revenue teams will harm the overall business of the sport.²⁸ There are two primary ways in which professional sports leagues share revenue, though one is far more utilized than the other. The leading approach is the pooling of league-wide

of a mandatory subject of collective bargaining. See Colin J. Daniels & Aaron Brooks, *From the Black Sox to the Sky Box: The Evolution and Mechanics of Commissioner Authority*, 10 TEX. REV. ENT. & SPORTS L. 23, 32 (2009) (quoting 29 U.S.C. § 158(d)).

²⁵ See Brad R. Humphreys & Hyunwoong Pyun, *Monopsony Exploitation in Professional Sport: Evidence from Major League Baseball Position Players, 2000-2011*, 4 (W. Va. Univ. Dep't of Econ. Working Paper Series, Working Paper No. 15-48, 2016).

²⁶ See Carl W. Hittinger & Adam D. Brown, *Antitrust Law Looms Over Sports Contracts Analysis*, PITTSBURGH POST-GAZETTE (Feb. 14, 2011, 12:00 AM), <https://www.post-gazette.com/business/legal/2011/02/14/Antitrust-law-looms-over-sports-contracts-analysis/stories/201102140219> [https://perma.cc/6Z96-E53V].

²⁷ See Duane Rockerbie & Stephen Easton, *Revenue Sharing in MLB Baseball: The Moments That Meant So Much*, INT'L J. FIN. STUD. at 1, 2-3 (Aug. 6, 2018).

²⁸ See Derek Thompson, *Why American Sports Are Socialist*, ATLANTIC (June 20, 2016), <https://www.theatlantic.com/business/archive/2016/06/why-american-sports-are-socialist/487640/> [https://perma.cc/FCA9-9FG8].

revenues such as national broadcasting contracts,²⁹ league sponsorships,³⁰ and intellectual property rights.³¹ These are significant revenue sources for both the NBA and MLB. For example, ESPN and Turner Sports paid \$24 billion over nine years for the NBA's national broadcasting rights.³² Even in the midst of the global health pandemic, MLB signed a seven-year, \$3.2 billion media rights deal with Turner Sports beginning in 2022.³³ The NBA and MLB equally divide these lucrative revenues among teams, even though certain teams—for example, the NBA's Los Angeles Lakers and MLB's New York Yankees—bring more proportional value to the pooling than most other teams.³⁴ The second, though much more limited, source of revenue sharing derives from local monies generated by teams, including ticket sales, team sponsorships, ballpark/arena concessions, and local television and radio contracts.³⁵ While most of these revenues are retained by the team—for example, local television revenues in MLB³⁶—a small percentage of these revenues is redistributed through each league's revenue sharing policy.³⁷

These shared revenue sources have become somewhat of a lifeblood for profitable franchises in both the NBA and MLB. More than a decade ago, MLB did not share a robust amount of its revenue,³⁸ while it now shares hundreds of millions of dollars each year among its teams.³⁹ Similarly, in the

²⁹ Howard Bloom, *NFL Revenue-Sharing Model Good for Business*, SPORTINGS NEWS (Sept. 5, 2014), <http://www.sportingnews.com/nfl/news/nfl-revenue-sharing-television-contracts-2014-season-business-model-nba-nhl-mlb-comparison-salary-cap/gu0xok7mphu01x3vu8750eaq6> [<https://perma.cc/3FVN-CH6B>].

³⁰ See Scott Bukstein, *Preparing for Another Round of Collective Bargaining in the National Basketball Association*, 22 JEFFREY S. MOORAD SPORTS L.J. 373, 377–78 (2015).

³¹ Matthew J. Parlow, *In Pursuit of Competitive Balance or Payroll Relief?*, 9 ARIZ. ST. SPORTS & ENT. L.J. 58, 71 (2020).

³² Brandon S. Ross, Note, *The NBA's New Media Rights Deal: A Look Into the Multi-Billion Dollar Cause of What May Become the Next NBA Lockout*, 33 HOFSTRA LAB. & EMP. L.J. 291, 291 (2016).

³³ Jabari Young, *Major League Baseball's New Media Rights Deal with Turner Sports Worth Over \$3 Billion*, CNBC (Jun. 15, 2020, 10:57 PM), <https://www.cnbc.com/2020/06/16/mlb-new-media-rights-deal-with-turner-sports-worth-over-3-billion.html> [<https://perma.cc/TNU6-BBL7>].

³⁴ See Bloom, *supra* note 29.

³⁵ See Rockerbie & Easton, *supra* note 27.

³⁶ Evan Zepfel, *Have MLB's Efforts to Preserve Competitive Balance Done Enough?*, HSAC (Feb. 13, 2015), <http://harvardsportsanalysis.org/2015/02/have-mlbs-efforts-to-preserve-competitive-balance-done-enough/> [<https://perma.cc/BA4Z-XZSW>].

³⁷ Maury Brown, *Revenue Sharing is Making an Impact*, BASEBALL AM. (Mar. 2, 2010), <https://www.baseballamerica.com/stories/revenue-sharing-is-making-an-impact/> [<https://perma.cc/X62B-U2XG>].

³⁸ See John Vrooman, *Theory of the Perfect Game: Competitive Balance in Monopoly Sports Leagues*, 34 REV. INDUS. ORG. 5, 7 (2009).

³⁹ See *MLB Revenue Sharing a Problem for A's, Raiders*, NBC SPORTS (Feb. 29, 2016), <https://www.nbcsports.com/bayarea/athletics/mlb-revenue-sharing-problem-raiders> [<https://perma.cc/G23M-A2N3>].

late 2000s, the NBA shared far less revenue among its teams than it does today.⁴⁰ Indeed, the amount of money the NBA redistributes through its revenue-sharing policy is sufficient to make profitable fourteen teams that would have otherwise lost money in 2017.⁴¹ In this regard, the NBA and MLB revenue sharing approaches have helped teams remain competitive and profitable, making these policies an integral part of the economics of each sport.⁴² Revenue sharing is also critically important to the players, which is why it is a key focus in collective bargaining negotiations. Without revenue sharing, smaller-market teams would likely not have the resources to pay top salaries to their existing players or to attract free agents.⁴³ With fewer teams competing for top talent, players understandably fear that salaries would be depressed because only a few larger-market teams could offer market-rate salaries for star players, with a trickle-down effect on all player salaries. Therefore, for both teams and players, revenue sharing among the teams is a key component of the CBA for the economic health of all stakeholders in the sport.⁴⁴

B. Salary Cap

Salary caps have also been a hotly-debated and controversial topic in the business of professional sports. MLB has never had a salary cap—though, as described further below, its luxury tax essentially serves as one—and the Major League Baseball Players Association (MLBPA) staunchly opposes one.⁴⁵ The NBA has long had a “soft” salary cap that sets the salary cap for a given season based on the previous year’s revenues and anticipated revenue growth for the upcoming season to result in players receiving about fifty percent of the league’s basketball-related income (BRI).⁴⁶ The NBA’s salary

⁴⁰ See Vrooman, *supra* note 38.

⁴¹ Brian Windhorst & Zach Lowe, *A Confidential Report Shows Nearly Half the NBA Lost Money Last Season. Now What?*, ESPN (Sept. 19, 2017), https://www.espn.com/nba/story/_/id/20747413/a-confidential-report-shows-nearly-half-nba-lost-money-last-season-now-what [<https://perma.cc/LJA6-DSNU>].

⁴² See Kevin Clark, *The NFL’s Parity Myth Has Become a Reality*, RINGER (Oct. 17, 2017, 10:30 AM), <https://www.theringer.com/nfl/2017/10/17/16488320/parity-myth-dynasty-roger-goodell-collective-bargaining-agreement> [<https://perma.cc/6DJE-BAGJ>].

⁴³ See Aliyaho Pearce, *NBA Revenue Sharing: Small-Market Teams to Benefit from New Sharing Structure*, BLEACHER REPORT (January 25, 2012), <https://bleacherreport.com/articles/1039092-nba-revenue-sharing-small-market-teams-to-benefit-from-new-sharing-structure> [<https://perma.cc/54EB-X6S3>].

⁴⁴ *Id.*

⁴⁵ Derek Taylor, *Splitting the Uprights: How the Seventh Circuit’s American Needle Holding Created a Circuit Split and Exempted the NFL from Antitrust Scrutiny, and Why the Supreme Court Should Overturn the Seventh Circuit*, 6 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 143, 148 (2010).

⁴⁶ Bukstein, *supra* note 30, at 383.

cap permits teams to spend more robustly on player salaries if their overall payroll is under the salary cap amount and greatly limits a team's spending on player salaries if their payroll exceeds that threshold.⁴⁷ In this regard, while there are various exceptions that NBA teams may use to spend money on player salaries when they are above the salary cap, those narrow and defined opportunities are well below market rate and thus limit a team's ability to spend disproportionately to other teams.⁴⁸

The NBA's salary cap seeks to keep team payroll spending within a reasonable bandwidth to attempt to maintain parity within the league by not allowing larger-market teams to dramatically outspend smaller-market teams.⁴⁹ Indeed, courts have found this justification particularly compelling in holding that salary caps do not violate antitrust laws even though they have a negative and anticompetitive effect on player salaries and restrain players' ability to sign with other teams.⁵⁰ NBA owners favor salary caps because they limit team payroll while keeping a reasonable competitive balance bandwidth between the lowest and highest team payrolls. MLB owners have tried in vain in the past to implement a salary cap, only to be met with staunch opposition by the MLBPA.⁵¹ Players' unions generally oppose salary caps as they limit player mobility, create artificial markets that depress player salaries, and generally limit the overall amount of money that teams spend on players. To ensure that NBA teams did not minimize payroll when they anticipated not being especially competitive—as many MLB teams have done—the NBPA negotiated a salary floor into the NBA CBA to ensure that all teams had a minimum collective payroll as a defined percentage of the salary cap threshold.⁵²

C. Luxury Taxes

Luxury taxes function much like salary caps in professional sports, as they impose a monetary penalty for every dollar a team's payroll exceeds the

⁴⁷ See Deubert et al., *supra* note 15, at 182–83.

⁴⁸ See Larry Coon, *Larry Coon's NBA Salary Cap FAQ*, SPORTS BUS. CLASSROOM (Nov. 15, 2020), <http://www.cbafaq.com/salarycap.htm#Q2> [<https://perma.cc/6R33-38NX>].

⁴⁹ D'Bria Bradshaw, Comment, *Has the National Basketball Association Lost Its Competitive Touch?: Increasing Competitive Balance and Parity and Avoiding Litigation Through the New NBA Collective Bargaining Agreement*, 4 ST. THOMAS J. COMPLEX LITIG. 54, 58 (2017).

⁵⁰ See Nat'l Basketball Ass'n v. Williams, 857 F. Supp. 1069, 1079 (S.D.N.Y. 1994).

⁵¹ Maury Brown, *MLB Wanted a Salary Cap for Decades; Now with Soaring Revenues, They'd Likely Reject One*, FORBES (May 22, 2018, 7:00 AM), <https://www.forbes.com/sites/maurybrown/2018/05/22/mlb-wanted-a-salary-cap-for-decades-now-with-soaring-revenues-theyd-likely-reject-one/?sh=27f930302676> [<https://perma.cc/MCE3-2NRP>].

⁵² See Deubert et al., *supra* note 15, at 182.

threshold amount.⁵³ The NBA's luxury tax works in concert with its salary cap and is set at an amount above the salary cap threshold.⁵⁴ As described above, MLB does not have a salary cap but does impose a luxury tax, which it refers to as the competitive balance tax, to achieve its parity goals.⁵⁵ Each league's luxury tax sets an overall payroll amount above which teams are charged a financial penalty.⁵⁶ Those penalties are set at different progressive amounts depending on how far above the luxury tax threshold the team's payroll is.⁵⁷ Teams exceeding the luxury tax threshold also face non-monetary penalties such as picking later in the draft (in MLB) or being precluded from using certain exceptions to the salary cap (in the NBA).⁵⁸

Similar to salary caps, luxury taxes aim to keep larger-market teams from disproportionately outspending smaller-market ones.⁵⁹ Team owners do not object to luxury taxes—indeed, they embrace them—as they provide such a strong financial disincentive to spending too much on payroll that it helps limit their costs.⁶⁰ Moreover, in doing so, team payrolls stay within a certain competitive range that ensures no teams are perpetually winning while others have persistent losing seasons. Players, on the other hand, have transitioned from begrudgingly accepting luxury taxes to outwardly opposing them.⁶¹ Luxury taxes inhibit owner spending on player salaries and thus limit lucrative contracts for individual players and overall spending on team

⁵³ See Thompson, *supra* note 28.

⁵⁴ See Richard A. Kaplan, Note, *The NBA Luxury Tax: A Misguided Regulatory Regime*, 104 COLUM. L. REV. 1615, 1617 (2004).

⁵⁵ Brett Pollard, Note, *Creating Economic Equality Among Major League Baseball Franchises: The Removal of Major League Baseball's Archaic Antitrust Exemption*, 18 TEX. REV. ENT. & SPORTS L. 49, 50–51 (2016).

⁵⁶ See Kaplan, *supra* note 54, at 1628.

⁵⁷ Frank Urbina, *How Does the NBA's Luxury Tax Work?*, HOOPS HYPE (Oct. 11, 2018), <https://hoopshype.com/2018/10/11/nba-luxury-tax/> [<https://perma.cc/3Z7D-SGT4>] (detailing the NBA's luxury tax); *Competitive Balance Tax*, MLB, <http://m.mlb.com/glossary/transactions/competitive-balance-tax> [<https://perma.cc/WJ8X-W3MJ>] (last visited Feb. 1, 2021) (explaining MLB's competitive balance tax) (last visited July 14, 2020).

⁵⁸ See R.J. Anderson, *MLB Luxury Tax: Breaking Down Baseball's Competitive Balance Tax and How It Affects Hot Stove Season*, CBS SPORTS (Nov. 11, 2019, 11:12 AM), <https://www.cbssports.com/mlb/news/mlb-luxury-tax-breaking-down-baseballs-competitive-balance-tax-and-how-it-affects-hot-stove-season/> [<https://perma.cc/SQB2-R4TC>]; Ross, *supra* note 32, at 308.

⁵⁹ See Dan Messeloff, Note, *The NBA's Deal With the Devil: The Antitrust Implications of the 1999 NBA-NBPA Collective Bargaining Agreement*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 521, 563–64 (2000); Matt Mullarkey, Note, *For the Love of the Game: A Historical Analysis and Defense of Final Offer Arbitration in Major League Baseball*, 9 VA. SPORTS & ENT. L.J. 234, 240–42 (2010).

⁶⁰ Jack Blakely, *Luxury Tax in Football, What Can the NBA Teach Us?*, SQUIRE PATTON BOGGS (Feb. 6, 2018), <https://www.sports.legal/2018/02/luxury-tax-in-football-what-can-the-nba-teach-us/> [<https://perma.cc/SP6C-9VWD>].

⁶¹ See Prashob Menon, *Pay to Play: Why It's Time to End the NBA's Luxury Tax*, REDEF (Mar. 30, 2016), <https://redef.com/original/pay-to-play-why-its-time-to-end-the-nbas-luxury-tax> [<https://perma.cc/38AG-4ZSQ>].

rosters. In MLB, for example, teams have begun to treat the luxury tax threshold as a hard salary cap, thus impacting the free agent market, overall team payrolls, and individual player contracts.⁶²

D. Free Agency and Other Contractual Limitations

Another area of intense disagreement regarding collective bargaining within professional sports are player rookie contracts and the path to free agency.⁶³ Amateur players and/or international athletes join the NBA and MLB through each league's amateur draft.⁶⁴ Players can only sign with the team that drafts them, and when they do, they can only agree to the standard rookie contracts that the players' union and the leagues negotiate as part of the CBA.⁶⁵ These rookie contracts provide for salaries that are well below fair market value⁶⁶ and keep players under the control of their drafting teams for a certain number of years before reaching free agency.⁶⁷ In the NBA, first-round draft picks receive two-year guaranteed contracts with the team holding options for the subsequent two years, at which point the player becomes a restricted free agent.⁶⁸ Players drafted into MLB must log six full years of playing time in the major leagues before they reach free agency.⁶⁹ To delay players reaching six full years of service (and thus free agency), MLB teams sometimes engage in "service time manipulation."⁷⁰ These teams will send a player back and forth to the minor leagues or will delay a player

⁶² See Tom Verducci, *Seven Reasons Why the Free Agent Market is So Incredibly Slow*, SPORTS ILLUSTRATED (Jan. 11, 2018), <https://www.si.com/mlb/2018/01/11/free-agency-hot-stove-slow-pace> [<https://perma.cc/U5R9-L9YX>].

⁶³ Jenny Vrentas, *When the Draft Ends, the Chaos Begins With Undrafted Free Agency*, SPORTS ILLUSTRATED (Apr. 25, 2020), <https://www.si.com/nfl/2020/04/25/undrafted-free-agency-will-be-chaos-after-virtual-nfl-draft> [<https://perma.cc/G3NV-MZ9B>].

⁶⁴ See Michael Tannenbaum, *A Comprehensive Analysis of Recent Antitrust and Labor Litigation Affecting the NBA and NFL*, 3 SPORTS L.J. 205, 205–06 (1996); see also Russell Yavner, *Minor League Baseball and the Competitive Balance: Examining the Effects of Baseball's Antitrust Exemption*, 5 HARV. J. SPORTS & ENT. L. 265, 280–83 (2014) (providing an in-depth analysis of MLB's first-year player draft).

⁶⁵ See Humphreys & Pyun, *supra* note 25.

⁶⁶ See Michael A. McCann, *Illegal Defense: The Irrational Economics of Banning High School Players from the NBA Draft*, 3 VA. SPORTS & ENT. L.J. 113, 119–20 (2004). For the NBA, salaries are set on a fixed, descending scale for first-round draft picks. See *id.* For MLB, rookie players are generally paid on a standard salary for their first three years of service time in the major leagues before they reach their "arbitration years" during their fourth through sixth years. See Probasco, *supra* note 20, at 5.

⁶⁷ See *id.*

⁶⁸ See Derek J. Rowe, *It's Time to Retire the NBA's Rookie Salary Scale*, 24 SPORTS L.J. 123, 132–33 (2017).

⁶⁹ Connor J. Menneto, Note, *Using the MLB's Final Offer Arbitration System to Revamp the NFL's Franchise Tag*, 17 VA. SPORTS & ENT. L.J. 101, 109 (2017).

⁷⁰ See Probasco, *supra* note 20, at 5.

debuting in the major leagues in order to gain a seventh year of the player's service under his rookie contract (at an under-market salary).⁷¹

Even once players reach free agency, each league has further inhibitors to a player maximizing his contract value on the open market. In the NBA, a player's current team can match an offer made by another team after a player's fourth year, as he is considered a restricted free agent.⁷² Due to the drafting team's right of first refusal, many other teams do not offer contracts to restricted free agents at market value because they are not guaranteed to secure their services as they would if the player was an unrestricted free agent.⁷³ This system results in restricted free agents either choosing to accept a one-year qualifying offer to play an additional (fifth) year with the team that drafted them in order to gain unrestricted free agency, or remaining with their team at an under-market salary on a multi-year contract when their team matches an offer they received in free agency.⁷⁴ In MLB, whether players enter free agency after their sixth or seventh year due to any potential service-time manipulation, they do not meet an entirely unencumbered market for their services. If a player is classified as a more elite free agent and is offered a qualifying offer by their current team, the team that signs him must give his former team a draft pick to compensate for their loss.⁷⁵ This compensatory draft pick understandably depresses both the market for such players and what new teams are willing to pay given what they must relinquish in return for signing them.

Professional sports team owners favor such delays and limitations on player free agency for a variety of reasons. To begin, they extend team control over players at affordable, sub-market rates due to restricted free agency in the NBA and the qualifying offer compensatory draft pick in MLB.⁷⁶ Moreover, these free agency restrictions lower competition for these players'

⁷¹ See, e.g., Bill Shaikin, *Baseball's Compensation System is Broken. Owners and Players Will Discuss Building a New One This Winter*, L.A. TIMES (Sept. 29, 2018, 10:00 AM), <https://www.latimes.com/sports/mlb/la-sp-mlb-column-20180929-story.html> [<https://perma.cc/RL4N-KCKY>] (using the examples of Ronald Acuna of the Atlanta Braves and Vladimir Guerrero, Jr., of the Toronto Blue Jays to demonstrate service time manipulation).

⁷² See Matthew Epps, Comment, *Full Court Press: How Collective Bargaining Weakened the NBA's Competitive Edge in a Globalized Sport*, 16 JEFFREY S. MOORAD SPORTS L.J. 343, 356 (2009); see also *Free Agency Explained*, NBA, <https://www.nba.com/free-agency-explained#restricted> [<https://perma.cc/ADQ3-VNJ2>] (last visited Feb. 1, 2021).

⁷³ See Epps, *supra* note 72.

⁷⁴ See Noah J. Goodman, *The Evolution and Decline of Free Agency in Major League Baseball: How the 2012-2016 Collective Bargaining Agreement is Restraining Trade*, 23 SPORTS L.J. 19, 46 (2016).

⁷⁵ See *id.*; see also *Qualifying Offer*, MLB, <http://m.mlb.com/glossary/transactions/qualifying-offer> [<https://perma.cc/R9ZC-YZH2>] (last visited Feb. 1, 2021).

⁷⁶ See Goodman, *supra* note 74.

services.⁷⁷ This chill in the market also enables a player's existing team to have a better chance to retain him on a multi-year contract at a lower cost than if the player were an unrestricted free agent.⁷⁸ Players, understandably, strongly dislike such restrictions on their free agency and ability to maximize their contract length and value. In particular, MLB players have pushed for reforms in service-time manipulation and the free agency system more generally.⁷⁹ These free agency concerns—along with the issues of revenue sharing and salary and luxury taxes—were already points of contention between the leagues and their players' unions before the global health pandemic. COVID-19 only exacerbated these issues when both sides attempted to negotiate a relaunching of their 2020 season.

V. THE IMPORTANCE OF LABOR RELATIONS AND THE DIFFERENT PATHS TO RESTARTING THE NBA AND MLB SEASONS

Even in normal times, the process of collective bargaining is highly contentious and creates strife between professional sports leagues and their respective players' unions. The history of professional sports is understandably marked by labor strife as owners have sought to maximize their revenues and investments, while players have sought monetary gains and greater control over their own careers (largely through gains in free agency).⁸⁰ When millions—and now billions—of dollars are at stake to be divided between the two sides, conflict and discontent is to be expected. Such tensions have even led to strikes,⁸¹ lockouts,⁸² and numerous grievances being filed.⁸³

However, even with such conflict, the two sides have been able to reach satisfactory resolutions in recent years. For example, MLB has experienced labor peace for more than twenty-five years following an acrimonious

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See *Pro Sports Lockouts and Strikes Fast Facts*, CNN (June 4, 2020), <https://www.cnn.com/2013/09/03/us/pro-sports-lockouts-and-strikes-fast-facts/index.html> [<https://perma.cc/A7CJ-CTG3>].

⁸¹ Allan H. ("Bud") Selig & Matthew J. Mitten, *Baseball Jurisprudence: Its Effects on America's Pastime and Other Professional Sports Leagues*, 50 ARIZ. ST. L.J. 1171, 1199 (2018) (noting the baseball player strikes of 1972, 1980, 1981, 1985, and 1994–95).

⁸² See, e.g., Tim Cato et al., *The NBA Should Avoid a Lockout With a New CBA for the First Time in 2 Decades*, SB NATION (Dec. 14, 2016, 8:46 PM), <https://www.sbnation.com/2016/12/14/13810746/nba-lockout-history-cba-adam-silver-deal> [<https://perma.cc/5ESA-NXEV>] (detailing the five NBA lockouts since 1995).

⁸³ See generally Marc Edelman, *Moving Past Collusion in Major League Baseball: Healing Old Wounds, and Preventing New Ones*, 54 WAYNE L. REV. 601 (2008).

players' strike in 1994 that almost mortally wounded the game of baseball.⁸⁴ During that time, MLB has experienced unprecedented revenue growth, exceeding \$10 billion in recent years.⁸⁵ In fact, in 2016, MLB and the MLBPA reached an agreement to extend the MLB CBA from 2017–2021.⁸⁶ At the time, both sides seemed quite pleased with their ability to reach an agreement on the terms of the CBA. While the NBA team owners locked out the players after the 2010–2011 season,⁸⁷ the NBA and NBPA signed a new CBA in December 2011 to end the lockout and then agreed to another new CBA in December 2016 that lasts through the 2023–2024 season.⁸⁸

The evolution between the NBA and the NBPA over the past decade has been significant. After the 2011 CBA was signed, most commentators and analysts agreed that the players' union had lost badly in the negotiations and had regressed in terms of their financial gains from the previous CBA.⁸⁹ Understandably, the players were unhappy with their own union representation and blamed the league for the suboptimal terms to which they ultimately agreed to end the 2011 lockout.⁹⁰ However, after the union changed its executive director, replacing Billy Hunter with labor lawyer Michelle Roberts, the NBPA and NBA built a strong working relationship that enabled the two sides to reach agreement on the new CBA in 2016. Indeed, it was this collaboration and partnership that enabled the NBA and NBPA to agree to the revised terms of the CBA and relaunch their 2020 season.

In contrast, after twenty-five years of labor peace, MLB and the MLBPA seem headed in the opposite direction. While the two sides agreed in 2016 to extend the MLB CBA through 2021, the fallout from the implementation of

⁸⁴ See Tom Haudricourt, *Retiring MLB Commissioner Bud Selig Proudest of Achieving Labor Peace*, MILWAUKEE J. SENTINEL (Oct. 18, 2014), <http://archive.jsonline.com/sports/brewers/retiring-mlb-commissioner-bud-selig-proudest-of-achieving-labor-peace-b99371260z1-279626212.html> [<https://perma.cc/5AF7-DYNA>].

⁸⁵ Jeff Passan, *Here's Why Baseball's Economic System Might Be Broken*, YAHOO! SPORTS (Jan. 16, 2018), <https://sports.yahoo.com/heres-baseballs-economic-system-might-broken-224638354.html> [<https://perma.cc/25S6-DE4Y>].

⁸⁶ Maury Brown, *Breaking Down MLB's New 2017-21 Collective Bargaining Agreement*, FORBES (Nov. 30, 2016, 11:10 PM), <https://www.forbes.com/sites/maurybrown/2016/11/30/breaking-down-mlbs-new-2017-21-collective-bargaining-agreement/#46e7a60e11b9> [<https://perma.cc/7QW9-WKQU>].

⁸⁷ Scott Cacciola & Sam Schechner, *NBA Owners Lock Out Players*, WALL STREET J. (July 1, 2011), <https://www.wsj.com/articles/SB10001424052702304584004576417752764625330> [<https://perma.cc/4E4D-T9YG>].

⁸⁸ See Tim Cato & Jesus Gomez, *The NBA Has a New CBA. Here's What You Need to Know About It*, SB NATION (Dec. 23, 2016, 6:58 PM), <https://www.sbnation.com/nba/2016/12/14/13198978/nba-cba-new-details-changes-differences-lockout> [<https://perma.cc/PZ5L-YJYR>].

⁸⁹ See generally Matthew J. Parlow, *Lessons from the NBA Lockout: Union Democracy, Public Support, and the Folly of the National Basketball Players Association*, 67 OKLA. L. REV. 1, 23–30 (2014).

⁹⁰ See *id.*

those terms has significantly soured an already contentious and suspicion-filled relationship between the two.⁹¹ The CBA extension was predicated on historical understandings of the game that were evolving during the period leading up to that agreement, and such changes accelerated rapidly thereafter. In particular, players experienced dramatic shifts in the free agent market, further service-time manipulation, and payrolls not rising at the same levels as overall league revenues.⁹² The rise of data analytics and other trends led teams to be more efficient with their spending to maximize their goals of winning and/or profit maximization.⁹³ These changes signaled a fundamental change in the economics of baseball, and while they were permissible within the CBA, the players viewed these changes as being inconsistent with the long-held understanding between owners and the union regarding player remuneration.⁹⁴ Players felt betrayed by what they saw as a bait-and-switch, and that distrust was brewing even before the global health pandemic disrupted the MLB season. Once COVID-19 shut down baseball in March of 2020, the conflict between the two sides played a significant role in their inability to reach an agreement to restart the season on mutually-agreeable terms, despite months of negotiations.⁹⁵ The juxtaposition of the NBA and MLB experiences in restarting their respective seasons illuminates the importance of labor relations within the collective bargaining process.

A. The NBA Agreement

When the NBA suspended its season on March 11, 2020,⁹⁶ it was unclear when the league might be able to restart regular season and/or playoff games. There was far more clarity on the need for the league and players' union to address some of the core structural financial issues in the CBA—those described above in Part IV—in order to recommence the season: player pay, salary cap, luxury tax, and revenue sharing. From the team owners'

⁹¹ See Gabe Lacques, *MLB Players are Ready to 'Burn the Whole System Down.' Here's What They Want to Avoid a Strike*, USA TODAY (Feb. 22, 2019, 2:24 PM), <https://www.usatoday.com/story/sports/mlb/columnist/gabe-lacques/2019/02/22/mlb-collective-bargaining-agreement-strike/2948101002/> [<https://perma.cc/DH7S-FTJ9>].

⁹² See generally Matthew J. Parlow, *Hope and Faith: The Summer of Scott Boras's Discontent*, 10 HARV. J. SPORTS & ENT. L. 85 (2019).

⁹³ See *id.* at 93–96.

⁹⁴ See *id.* at 116–18.

⁹⁵ See Jack Baer, *Timeline: How MLB Reached an Agreement for a 2020 Season After 3 Frustrating Months*, YAHOO! LIFE (June 23, 2020), <https://www.yahoo.com/lifestyle/timeline-on-how-mlb-season-has-been-pushed-to-the-brink-coronavirus-013338726.html> [<https://perma.cc/ESM4-NYNV>].

⁹⁶ See Brian Windhorst & Tim Bontemps, *What We Know and Don't Know About the NBA's Suspension of Play*, ESPN (Mar. 12, 2020), https://www.espn.com/nba/story/_/id/28888995/what-know-know-nba-suspension-play [<https://perma.cc/8FSG-CRKV>].

perspective, they were anticipating a reduction in both television revenue and ticket and concession sales (with fans likely not allowed to attend any games in the restarted season).⁹⁷ This looming revenue shortfall for the 2019–2020 season would not only result in financial losses for most, if not all, teams, it would also impact revenue sharing within the league, the salary cap, and the luxury tax for the next season.⁹⁸ The players were obviously primarily concerned about any salary changes for the current season and any potential negative impacts, such as future salary caps and luxury tax thresholds, that changes to the league's revenue would have on their contracts in upcoming seasons.⁹⁹

The NBA owners certainly had the ability to leverage certain advantages in the CBA and the financial structuring of the sport to exact more concessions from the players. For example, the NBA CBA provides that if BRI for a season substantially decreases and the players wind up receiving more than the approximately fifty percent in BRI to which they are entitled, both sides must negotiate in good faith to find an adjustment satisfactory to both sides.¹⁰⁰ In addition, the NBA CBA contains a force majeure provision that anticipates if an occurrence like a global health pandemic occurs and renders games impossible to be played, teams would not have to pay players for those games missed.¹⁰¹ The NBA CBA's force majeure clause also gave the team owners the option of reopening and renegotiating the CBA within sixty days of the force majeure event.¹⁰² However, there was never any meaningful discussion about triggering the force majeure provision.¹⁰³ In

⁹⁷ See Associated Press, *NBA Lays Out Ground Rules for Family, Friends to Enter Restart Bubble*, NBC SPORTS (Aug. 12, 2020, 11:56 AM), <https://nba.nbcsports.com/2020/08/12/nba-lays-out-ground-rules-for-family-friends-to-enter-restart-bubble/> [https://perma.cc/UZT6-C7ME]. As it turned out, no (paying) fans were allowed for the NBA regular season and playoff games once the season recommenced. *Id.* Only a limited number of team personnel and/or family members who accompanied players to the NBA bubble in Orlando, Florida were allowed to attend games, having gone through the strict protocols the league promulgated. *Id.*

⁹⁸ Adrain Wojnarowski & Zach Lowe, *NBA Revenue for 2019-2020 Season Dropped 10% to \$8.3 billion*, *Sources Say*, ESPN (Oct. 28, 2020), https://www.espn.com/nba/story/_/id/30211678/nba-revenue-2019-20-season-dropped-10-83-billion-sources-say [https://perma.cc/2NU4-K5UP].

⁹⁹ Corey Hansford, *NBA, NBPA Agree to Salary Cap & Luxury Tax For 2021 Season*, LAKERS NATION (Nov. 11, 2020), <https://lakersnation.com/nba-nbpa-agree-to-salary-cap-luxury-tax-for-2021-season/2020/11/11/> [https://perma.cc/QER4-NNBP].

¹⁰⁰ See Bobby Marks, *NBA Suspension Ramifications: Max Contracts, Tax Teams and Transition Rules*, ESPN (Mar. 18, 2020), https://www.espn.com/nba/insider/story/_/id/28918755/nba-suspension-ramifications-max-contracts-tax-teams-transition-rules [https://perma.cc/N5BA-MF9F].

¹⁰¹ Windhorst & Bontemps, *supra* note 96. Article XXXIX, section 5 of the NBA CBA explains that players lose 1/92.6 of their salary for every game missed due to such a force majeure event. *Id.*

¹⁰² See Adrian Wojnarowski, *NBA to Pay Players Full Salaries Due April 1; Uncertain After*, ESPN (Mar. 20, 2020), https://www.espn.com/nba/story/_/id/28933602/nba-pay-players-full-salaries-april-1-uncertain-after [https://perma.cc/995R-MG2E].

¹⁰³ Adrian Wojnarowski, *NBA Players' Union Details Doomsday Pay Provision in Memo to Players*,

fact, by the end of March 2020, the NBA team owners had signaled that they were not interested in attempting to take back money from players if games were cancelled, and the result was an overpayment of salaries to players under the NBA's 50/50 BRI agreement.¹⁰⁴ Instead, both sides educated each other on the potential financial ramifications, talked through various scenarios, and worked to find a resolution to relaunch and complete the 2019–2020 NBA season.

An obvious issue that both sides quickly realized when it became apparent that fans would not be able to be in arenas for any games in the restarted season was that there would be significant financial impacts from loss of ticket revenue, game concessions, and, potentially, television contracts. The average NBA game generates \$1.2 million in ticket revenue,¹⁰⁵ ranging from as low as \$500,000 per game for smaller-market teams¹⁰⁶ to \$3.5 million per game for larger-market teams.¹⁰⁷ If the league played no more regular-season games, it faced losing \$500 million for the 2019–2020 season.¹⁰⁸ The league and the NBPA also saw the challenge with television contracts. For example, without playoff games, the NBA faced the possibility of losing approximately \$900 million from its lucrative national ESPN/TNT television contract.¹⁰⁹ Just as importantly, each team made significant amounts of money from their local television contracts—oftentimes from regional sports networks—that required teams to reach a seventy game threshold in order to maximize the benefits under the contract (and not be in breach or have their revenue dramatically reduced).¹¹⁰ Without this revenue, the league as a whole, and some individual teams in particular,

ESPN (Mar. 13, 2020), https://www.espn.com/nba/story/_/id/28897933/nba-players-union-details-doomsday-pay-provision-memo-players [<https://perma.cc/W5HU-X3EH>].

¹⁰⁴ See Wojnarowski, *supra* note 102. If games were cancelled and the players received more than fifty percent of NBA BRI for the season, they would need to pay the league back the salary later based on a formula contained in the NBA CBA. Adrian Wojnarowski, *NBA, Players Discuss Withholding Pay if Regular Season Games Cancelled*, ESPN (Mar. 31, 2020), https://www.espn.com/nba/story/_/id/28979171/nba-players-discuss-withholding-pay-regular-season-games-canceled [<https://perma.cc/74RK-4RJ4>].

¹⁰⁵ See Marks, *supra* note 100.

¹⁰⁶ Kurt Helin, *If NBA Season is Cancelled How Much Ticket Revenue is the NBA Out? Roughly \$500 Million*, NBC SPORTS (Mar. 14, 2020, 11:00 PM), <https://nba.nbcsports.com/2020/03/14/nba-season-is-cancelled-nba-out-roughly-500-million/> [<https://perma.cc/K36S-9ZMV>].

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See Sam Amick, *More Than a Billion Concerns: The Risks, Locations and Finances NBA is Weighing*, ATHLETIC (May 15, 2020), <https://theathletic.com/1815837/2020/05/15/more-than-a-billion-concerns-the-risks-locations-and-finances-nba-is-weighing/> [<https://perma.cc/7S6Z-ZL9U>].

¹¹⁰ Kurt Helin, *If NBA Resumes in June Expect Some Regular Season Games. Why? Local Television*, NBC SPORTS (Mar. 16, 2020, 5:53 PM), <https://nba.nbcsports.com/2020/03/16/if-nba-resumes-expect-regular-season-games/> [<https://perma.cc/XX5Q-RUT4>].

faced even more painful financial losses. Accordingly, both sides saw the advantage of attempting to play some regular season games to reach this seventy game threshold before moving forward with the playoffs.¹¹¹ In short, the NBA teams and players agreed that finishing the 2019–2020 regular season in some form would optimize television revenue and help minimize some of the fallout from the financial structuring of the NBA CBA.¹¹²

The Coronavirus-fueled financial fallout for the NBA also placed the issues of salary cap and luxury tax for the 2020–2021 season at the forefront of negotiations. A reduction in BRI for the 2019–2020 season, which was inevitable, would necessarily impact the salary cap and luxury tax for the 2020–2021 season.¹¹³ Given that both teams and players planned on both numbers increasing for the next season, a looming reduction posed significant concerns and challenges throughout the league.¹¹⁴ For players, a reduction in the salary cap and luxury tax would translate to less lucrative salary amounts for free agent contracts and contract extensions—key opportunities for players to earn closer to their market value after playing on under-market rookie contracts.¹¹⁵ For example, some players finishing their rookie contracts faced receiving at least \$8.5 million less over the course of a contract extension due to such a decreased salary cap.¹¹⁶ In addition, many teams that planned to have room under the salary cap might well find themselves over the salary cap, thus unable to sign free agents as competitively on the open market.¹¹⁷ Even more worrisome, some teams that were on track to be under the luxury tax—and therefore would not need to pay any monetary penalties—could now find themselves over the luxury tax and paying penalties during a time when they were already losing significant amounts of anticipated revenues.¹¹⁸ Finally, both sides had concerns about the global health pandemic's effect on revenue sharing within the league. With such financial losses, many of the larger-market teams that paid into the NBA's revenue-sharing system would likely have far less money to contribute, which would impact smaller-market teams that depended on such shared monies to help fund their payroll and avoid losses in their operational

¹¹¹ *See id.*

¹¹² *See* Dan Feldman, *Report: NBA Increasingly Open to Delaying Next Season*, NBC SPORTS (Apr. 28, 2020, 2:47 PM), <https://nba.nbcsports.com/2020/04/28/report-nba-increasingly-open-to-delaying-next-season/> [<https://perma.cc/E9QP-8RQ2>].

¹¹³ Windhorst & Bontemps, *supra* note 96.

¹¹⁴ *See* Marks, *supra* note 100.

¹¹⁵ *See id.*

¹¹⁶ *See id.*

¹¹⁷ *Id.*

¹¹⁸ *See id.*

budgets.¹¹⁹ In this regard, there was an alignment of interest to avoid the dramatic and negative effects the drop in BRI would have on teams and players alike for the 2020–2021 season.

Perhaps unsurprisingly, then, the teams' owners and the NBPA worked together to craft and agree upon solutions that furthered their separate—though synergistic—goals and the collective interest of the sport. They were able to do so because during the months-long negotiations, the league and the players' union demonstrated mutual respect and understanding of each other's issues, as well as a collaborative approach to finding a resolution that worked for both sides in restarting the season. An important milestone occurred on May 11, 2020, when the two sides agreed to extend the sixty day window within which the league could terminate the CBA under the force majeure clause through September.¹²⁰ By extending this window, the NBA owners and the NBPA could get a better sense of the league's economic losses and thus bargain effectively on crucial financial issues that impact both sides. The extension also demonstrated mutual understanding and focus on the importance of maximizing the league's revenue for the 2019–2020 season. Not long after, the two sides were able to complete their negotiations on a plan to restart the NBA season with twenty-two of the league's teams for a truncated schedule of the remainder of the regular season, coupled with a full playoff schedule.¹²¹

B. The Dysfunction of the MLB Negotiations

When former President Donald Trump invoked the Stafford Act and declared a national emergency on March 13, 2020, his action triggered a clause in the MLB CBA—and, thus, every players' contract—that enabled Commissioner Rob Manfred to suspend player contracts in the case of such a national emergency like the COVID-19 global health pandemic.¹²² This potential option inspired the league and the MLBPA over the course of the

¹¹⁹ See Bobby Marks, *Eight Proposed Rule Changes to Make NBA Salaries and Free Agency Work*, ESPN (May 14, 2020), https://www.espn.com/nba/insider/story/_/id/29171073/eight-proposed-rule-changes-make-nba-salaries-free-agency-work [https://perma.cc/6Q37-H4HF].

¹²⁰ Dan Feldman, *Report: NBA Owners, Players Agree to Extend League's Window to Suspend CBA*, NBC SPORTS (May 11, 2020, 11:02 AM), <https://nba.nbcsports.com/2020/05/11/report-nba-owners-players-agree-to-extend-leagues-window-to-suspend-cba/> [https://perma.cc/QDC8-2BV3].

¹²¹ See Jeff Zillgett, *NBA, NBPA Support Plan to Resume Season in Florida*, USA TODAY (June 26, 2020, 6:04 PM), <https://www.usatoday.com/story/sports/nba/2020/06/26/nba-nbpa-support-decision-restart-season-disney-orlando-covid-19/3267395001/> [https://perma.cc/W93T-FCWE].

¹²² Ken Rosenthal & Evan Drellich, *Behind the Scenes as Baseball Scrambles to Resolve Issues Related to COVID-19*, ATHLETIC (Mar. 14, 2020), <https://theathletic.com/1675636/2020/03/14/behind-the-scenes-as-baseball-scrambles-to-resolve-the-many-issues-related-to-covid-19/> [https://perma.cc/ZQJ6-ACTA].

next two weeks to reach an agreement on March 26, 2020 regarding the suspension of the 2020 season and aspects related to relaunching the season when the league was able to do so.¹²³ In particular, the two sides focused their negotiations around service time, player salaries, and health and safety.¹²⁴ Players—especially those in their final year of contracts—were very concerned that a shorter season would reduce their service time in a manner where they would fail to meet the threshold to enter free agency or arbitration.¹²⁵ The possibility of the season being entirely cancelled also raised concerns for players.¹²⁶ Given the limited duration of their careers, the players argued that they should not be penalized for a cancelled season, as they would not gain any service time and would be thus delayed in reaching free agency or arbitration.¹²⁷ While the owners initially expressed concern over their ability to negotiate arbitration and free agency contracts after a cancelled season, the two sides ultimately agreed to give players a full year of service regardless of how many games were played in 2020 or if the season was cancelled.¹²⁸

The issue of player salaries was seemingly handled in two parts. First, the March 26, 2020, agreement between the team owners and the players' union provided for a guaranteed \$170 million to players.¹²⁹ The two sides also agreed that players would be paid their prorated salaries for however many games were played during a shortened season.¹³⁰ However, the second part related to a provision of the agreement that became a point of unresolvable contention. The agreement stated that the league and the MLBPA would “discuss in good faith the economic feasibility of playing games in the absence of spectators” before agreeing to a modified schedule

¹²³ See Bill Baer, *MLB, MLBPA Reach Agreement on Service Time, Pay, Draft*, NBC SPORTS (Mar. 26, 2020, 9:18 PM), <https://mlb.nbcsports.com/2020/03/26/mlb-mlbpa-reach-agreement-on-service-time-pay-draft/> [<https://perma.cc/FM29-FXHD>].

¹²⁴ See Ken Rosenthal, *MLB and Its Players Dive into the Many Details of What-If Scenarios*, ATHLETIC (Mar. 18, 2020), <https://theathletic.com/1683897/2020/03/18/rosenthal-mlb-and-its-players-dive-into-the-many-details-of-what-if-scenarios/> [<https://perma.cc/4KVT-V3XU>] (hereinafter Rosenthal, *MLB and Its Players*) (using the example of Los Angeles Dodgers star player Mookie Betts, who was 108 games away from obtaining free agent status, which would—in ordinary times—be easy to meet during the course of the standard MLB 162-game season).

¹²⁵ See *id.*

¹²⁶ See *id.*

¹²⁷ See Jayson Stark, *Memo to Baseball—Don't Drive Off This Cliff*, ATHLETIC (May 29, 2020), <https://theathletic.com/1843384/2020/05/29/stark-memo-to-baseball-dont-drive-off-this-cliff/> [<https://perma.cc/T2YF-FBYJ>].

¹²⁸ Ken Rosenthal & Evan Drellich, *Priorities, Not Perfection: Baseball's Deal Addresses Service Time, Cash Flow*, ATHLETIC (Mar. 26, 2020), <https://theathletic.com/1704718/2020/03/27/priorities-not-perfection-baseballs-deal-addresses-service-time-cash-flow/> [<https://perma.cc/2248-RX4W>].

¹²⁹ *Id.*

¹³⁰ *Id.*

at a later time.¹³¹ Players retained final approval over any scheduling, but they gave Commissioner Manfred the ability to unilaterally implement the 2020 MLB season if good faith discussions did not yield an agreement between the two sides.¹³² The agreement also required that the league use its “best efforts to play as many games as possible.”¹³³ These specific provisions in the March 26, 2020 agreement around player pay, the potential inability for fans to buy tickets and watch games in stadiums, and the requirements of good faith for both sides ultimately created an insurmountable disagreement between the team owners and the players’ union.¹³⁴

The players believed that this agreement entitled them to their full prorated salary for as many games as were ultimately played during the 2020 season.¹³⁵ The owners viewed the language of the agreement as requiring the two sides to renegotiate the terms of player pay if ticket revenue was no longer possible for some or all of the season.¹³⁶ In particular, the owners viewed the phrase “economic feasibility” as creating the need to renegotiate player salaries if ticket revenue became unavailable.¹³⁷ Teams pointed out that in addition to lost ticket and concession sales, they faced pre-existing debt and less revenue in terms of other monies normally derived from a full season, including television revenues, sponsorship deals, etc.¹³⁸ The league

¹³¹ Sheryl Ring, *It's Time for the MLBPA to Walk Away from the 2020 Season*, SB NATION (Apr. 22, 2020, 3:00 PM), <https://www.beyondtheboxscore.com/2020/4/22/21230165/its-time-for-the-mlbpa-to-walk-away-from-the-2020-season> [https://perma.cc/7MWY-GL89].

¹³² See Jeff Passan, *MLB Mulls Shorter Season, Full Prorated Salaries for Players*, ESPN (June 1, 2020), https://www.espn.com/mlb/story/_/id/29252811/sources-mlb-mulls-shorter-season-full-prorated-salaries-players [https://perma.cc/LHU6-RH27].

¹³³ Ken Rosenthal & Evan Drellich, *Players Association Plans to Propose Longer Season, Insist on Full Prorated Salaries*, ATHLETIC (May 27, 2020), <https://theathletic.com/1841542/2020/05/28/players-association-plans-to-propose-longer-season-insist-on-full-prorated-salaries/> [https://perma.cc/38W3-J9EF] (hereinafter Rosenthal & Drellich, *Players Association Plans*).

¹³⁴ *Id.*

¹³⁵ See Ken Rosenthal & Evan Drellich, *After Heated Meeting on Player Pay, MLB Threatens 50-Game Schedule*, ATHLETIC (June 1, 2020), <https://theathletic.com/1849609/2020/06/02/after-heated-meeting-on-player-pay-mlb-threatens-50-game-schedule/> [https://perma.cc/5Z3Z-XY9G].

¹³⁶ Ken Rosenthal & Evan Drellich, *If 2020 Baseball Games Have No Fans, MLB May Ask Players to Take Less Pay*, ATHLETIC (Apr. 16, 2020), <https://theathletic.com/1752070/2020/04/16/if-2020-baseball-games-have-no-fans-mlb-may-ask-players-to-take-less-pay/> [https://perma.cc/VW5H-EE7T] (hereinafter Rosenthal & Drellich, *If 2020 Baseball Games Have No Fans*).

¹³⁷ See Ken Rosenthal & Evan Drellich, *Salary Staredown: Inside the High-Stakes Negotiation to Restart the MLB Season*, ATHLETIC (May 18, 2020), <https://theathletic.com/1821460/2020/05/18/salary-staredown-inside-the-high-stakes-negotiation-to-restart-the-mlb-season/> [https://perma.cc/3W9R-J3K7] (hereinafter Rosenthal & Drellich, *Salary Staredown*).

¹³⁸ See Ken Rosenthal & Jayson Stark, *Baseball Needs a New Labor Agreement to Stabilize the Sport—and Soon*, ATHLETIC (Mar. 25, 2020), <https://theathletic.com/1698564/2020/03/25/baseball-needs-a-new-labor-agreement-to-stabilize-the-sport-and-soon/> [https://perma.cc/GK56-WN4F]. These types of revenue losses are generally not protected by insurance carried by MLB and/or its teams. See Rosenthal, *MLB and Its Players*, *supra* note 125.

claimed that approximately forty percent of its revenue was generated from ticket sales, concession purchases, and other revenues affiliated with fans sitting in stadiums during games.¹³⁹ The players were skeptical of the owners' claims of financial exigency and asked the league to be more transparent in sharing various financial data for teams and the league.¹⁴⁰ In response, the league provided heavily-redacted financial documents which showed little relevant information and only served to deepen player skepticism.¹⁴¹

Players had long felt that owners had not been honest with them during the 2016 CBA extension negotiations and that they violated trust between the two sides by moving away from long-standing league norms in terms of player pay once the extension was signed.¹⁴² Players were understandably skeptical about the owners' claims of financial losses since player salaries remained relatively stagnant while MLB revenues continued to grow in recent years.¹⁴³ Players saw the owners retain more of the league money when it enjoyed record revenues year after year, but when times became difficult, the owners, in the players' view, were seeking to "privatize the gains and socialize the losses."¹⁴⁴

Owners, on the other hand, argued that if players did not negotiate further salary cuts—down from their prorated salary per game played—then teams would spend more money each game than they gained in revenue.¹⁴⁵ In fact, teams argued they would lose more than \$1 billion if they played games than if they did not have a 2020 season, due to players' pay, losses in local revenue, and the increased Coronavirus-related health and safety costs.¹⁴⁶ MLB owners also noted that, because of the global health pandemic,

¹³⁹ See Ken Rosenthal, *An Inside Look at the Possibilities, and Risks, of an MLB Start*, ATHLETIC (Apr. 28, 2020), <https://theathletic.com/1779886/2020/04/28/rosenthal-an-inside-look-at-the-possibilities-and-risks-of-an-mlb-restart/> [<https://perma.cc/MY97-22Y3>].

¹⁴⁰ See Rosenthal & Drellich, *Salary Staretdown*, *supra* note 137.

¹⁴¹ See *id.*

¹⁴² See Parlow, *supra* note 92, at 116–18.

¹⁴³ See Dayn Perry, *Scott Boras Criticizes MLB Over Revenue-Sharing Proposal for 2020 Season*, CBS SPORTS (May 14, 2020, 6:13 PM), <https://www.cbssports.com/mlb/news/scott-boras-criticizes-mlb-over-revenue-sharing-proposal-for-2020-season/> [<https://perma.cc/B4MF-VCJT>].

¹⁴⁴ *Id.* MLB is the only major professional sports league that does not have a defined revenue split between owners and players. Jeff Passan, *Sources: Owners Approve MLB Season Protocol, Plan for July Start as Players' Union Preps to Weigh In*, ESPN (May 11, 2020), https://www.espn.com/mlb/story/_/id/29162217/owners-approve-mlb-season-proposal-plan-july-start-players-union-preps-weigh-it [<https://perma.cc/AUR9-GA4Y>].

¹⁴⁵ See Ken Rosenthal, *Latest Details on Baseball's Plan to Return*, ATHLETIC (May 9, 2020), <https://theathletic.com/1804433/2020/05/09/rosenthal-latest-details-on-baseballs-plan-to-return/> [<https://perma.cc/4WS9-SS59>].

¹⁴⁶ Rosenthal & Drellich, *Salary Staretdown*, *supra* note 137.

they anticipated team debt to increase from \$5.2 billion to \$7.3 billion.¹⁴⁷ If games were played, owners favored a shorter regular season schedule, as they viewed it as improving the chances of completing those games before a second potential COVID-19 wave occurred.¹⁴⁸ With a completed regular season, MLB could then proceed with its postseason games, which accounted for up to \$787 million in revenue—a significant source of league funding.¹⁴⁹ Moreover, ending the regular season around the same time as a traditional year ensured that the MLB postseason would not unnecessarily compete with the start of college and professional football, as well as the November general election, which many worried would diminish the value of their television contracts.¹⁵⁰ During negotiations, the players' union offered to expand the playoffs in exchange for more regular season games at their prorated salaries to increase revenues for the league and the players, but the owners ultimately saw games being played into November as too risky given the possibility of a second wave of COVID-19.¹⁵¹

The two sides continued to talk past one another during the months-long negotiations, and the bitterness between them only deepened along the way. The MLBPA contended that the league should honor the terms of the March 26, 2020 agreement and schedule as many games as possible, with players receiving their full prorated salary.¹⁵² The players did not view the term “economic feasibility” of playing without fans as signaling any willingness, much less obligation, to change player pay.¹⁵³ Absent the league providing “hard evidence” of teams’ alleged financial distress, the players were unwilling to take further cuts; they were uncharacteristically united on this point.¹⁵⁴ The owners even tried to divide union membership by making a proposal that contemplated sliding scale salary cuts—pitting most players against those superstar players making exponentially more than they did—but the MLBPA remained united.¹⁵⁵ Indeed, the more owners tried to divide

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Ken Rosenthal & Evan Drellich, *Dueling Letters from MLB, Players Association Lay Out Gulf Between Sides*, ATHLETIC (June 5, 2020), <https://theathletic.com/1857388/2020/06/05/dueling-letters-from-mlb-players-association-lay-out-gulf-between-sides/> [<https://perma.cc/5JV7-ADKS>].

¹⁵⁰ See Ken Rosenthal & Evan Drellich, *Sides Deadlocked After MLB Rejects Latest Players Association Proposal*, ATHLETIC (June 3, 2020), <https://theathletic.com/1852820/2020/06/03/sides-deadlocked-after-mlb-rejects-latest-players-association-proposal/> [<https://perma.cc/V332-BS8X>].

¹⁵¹ See *id.*

¹⁵² Rosenthal & Drellich, *Players Association Plans*, *supra* note 133.

¹⁵³ Rosenthal & Drellich, *If 2020 Baseball Games Have No Fans*, *supra* note 136.

¹⁵⁴ See Ken Rosenthal & Evan Drellich, *MLB Proposal Made, Players Now Have Say Over Restart*, ATHLETIC (May 26, 2020), <https://theathletic.com/1839004/2020/05/27/rosenthal-and-drellich-with-proposal-made-players-now-have-say-over-restart/> [<https://perma.cc/3HPF-4YW6>].

¹⁵⁵ See *id.*

players and attempted to shame them in the press, the more resolved the union became.¹⁵⁶ As two commentators pointed out, “[i]f the league was happy with the system when times were good, why should players make an extra sacrifice and accept a second reduction in salary now that circumstances are worse?”¹⁵⁷

Ultimately, with the owners and players at an impasse, on June 22, 2020, MLB Commissioner Rob Manfred exercised his unilateral right to implement a truncated season and reopen baseball.¹⁵⁸ Commissioner Manfred scheduled a sixty-game season with players set to receive their full prorated salaries—thirty-seven percent of their regular-season salary, assuming all sixty games were played.¹⁵⁹ Notably, both the league and the players’ union retained the right to file a grievance regarding unfair labor practices in the failed negotiations.¹⁶⁰ Many commentators and analysts expected both sides to file grievances. The MLBPA openly questioned whether the owners ever intended to negotiate as many games as possible given that the league did not submit its first proposal to the players until the end of May.¹⁶¹ The owners, on the other hand, had a potential grievance claim that the players failed to negotiate in good faith about the “economic feasibility” clause regarding playing without fans contained in the March 26, 2020 agreement. While both sides had compelling counterarguments to overcome a grievance filed against them, the discussion alone of potential grievances only exacerbated tensions between the two sides.

Indeed, many MLB analysts believed that it was this erosion in trust between the two sides, which had been worsening in recent years, that precluded any deal to restart the season.¹⁶² The MLBPA’s distrust of owners—despite twenty-five years of labor peace since 1994—dated back

¹⁵⁶ See Ken Rosenthal, *A July 4 Return is All but Gone, With Baseball as Far from a Deal as Ever*, ATHLETIC (June 6, 2020), <https://theathletic.com/1857108/2020/06/06/rosenthal-a-july-4-return-is-all-but-gone-with-baseball-as-far-from-a-deal-as-ever/> (hereinafter Rosenthal, *A July 4 Return*) [<https://perma.cc/W5MP-QPKJ>].

¹⁵⁷ Rosenthal & Drellich, *Salary Staredown*, *supra* note 137.

¹⁵⁸ See Ken Rosenthal & Evan Drellich, *MLB Moves to Play 60 Games as Players Reject Last Offer; Strange Season Takes Shape*, ATHLETIC (June 22, 2020), <https://theathletic.com/1887298/2020/06/23/mlb-moves-to-play-60-games-as-players-reject-last-offer-strange-season-takes-shape/> [<https://perma.cc/3HZ2-A5GM>].

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

¹⁶¹ See Ken Rosenthal & Evan Drellich, *Ability of MLB, Union to Compromise—or Not—Will Determine Shape of 2020 Season*, ATHLETIC (June 8, 2020), <https://theathletic.com/1861223/2020/06/08/ability-of-mlb-union-to-compromise-or-not-will-determine-shape-of-2020-season/> [<https://perma.cc/6F88-7UN9>].

¹⁶² Jeff Passan, *The Clock is Ticking on 2020 MLB Season Talks. Here’s What Could Make a Deal Work—or Fall Apart*, ESPN (May 23, 2020), https://www.espn.com/mlb/story/_/id/29207203/the-clock-ticking-2020-mlb-season-talks-here-make-deal-work-fall-apart [<https://perma.cc/GH4U-CEWS>].

decades to several collusion decisions against the owners and the original fight for free agency that changed MLB and professional sports generally.¹⁶³ The past few years, however, have seemed to worsen what was, for the most part, a functioning partnership over the past twenty-five years. In fact, as one commentator described, baseball was “theoretically relatively well insulated from risk due to its expansive outdoor spaces,” as compared to other sports, but it was arguably “in the worst position among the leagues [to relaunch its season] on account of its labor squabbles.”¹⁶⁴ The distrust was so deep that players even feared owners would retaliate against them for not agreeing to salary cuts for the 2020 season by slashing offseason spending in the future.¹⁶⁵ With those kinds of views between the two sides, it is no wonder the league and the players’ union could not reach agreement on restarting the season.

VI. CONCLUSION

With both the NBA and MLB, the significant financial terms contained in each league’s CBA played a large role in the negotiations between league owners and their players’ unions for restarting their respective seasons. Professional sports league CBAs are negotiated on the assumption that various revenue streams will be constant and likely rise each year. A global health pandemic like that which swept across the world due to COVID-19 in 2020 disrupts all of the base assumptions in such agreements. Rather than invoke force majeure provisions in their CBAs, the NBA and MLB wisely engaged their players’ unions in an attempt to find a middle ground for making the necessary changes to restart their seasons. Both leagues successfully restarted and concluded their truncated and altered 2020 seasons. The NBA restarted its season with twenty-two of its thirty-two teams

¹⁶³ See Rosenthal, *A July 4 Return*, *supra* note 156.

¹⁶⁴ Ethan Strauss, *NFL, NBA, MLB or NHL: Which Major Sports League Will Return Successfully First?*, ATHLETIC (May 22, 2020), <https://theathletic.com/1831458/2020/05/22/nfl-nba-mlb-or-nhl-which-major-sports-league-will-return-successfully-first/> [<https://perma.cc/D65W-VSVU>].

¹⁶⁵ See Ken Rosenthal & Evan Drellich, *MLB Plans to Offer an Alternative Proposal to Players on Salaries*, ATHLETIC (May 24, 2020), <https://theathletic.com/1834388/2020/05/24/mlb-plans-to-offer-an-alternative-proposal-to-players-on-salaries/> [<https://perma.cc/W5WM-CAKZ>]. The record number of players who were not tendered contracts by the non-tender deadline suggests there may be some validity to these fears. Emma Baccellieri, *Making Sense of This Year’s Record Number of Non-Tendered Players*, SPORTS ILLUSTRATED (Dec. 4, 2020), <https://www.si.com/mlb/2020/12/04/understanding-non-tendered-players-free-agency> [<https://perma.cc/35QY-66T5>]. On the other hand, this milestone may be explained by the economic realities faced by small market teams, as opposed to a widespread retribution by owners due to the conflict stemming from the negotiations to restart the 2020 season. See Jayson Stark, *The Non-Tender Deadline’s ‘Central’ Issue*, ATHLETIC (Dec. 4, 2020), <https://theathletic.com/2238551/2020/12/04/stark-central-division-nontenders/> [<https://perma.cc/Y2PY-VTCY>].

completing seventy-two or seventy-three of its normal eighty-two game season.¹⁶⁶ The top eight teams in each conference competed in the playoffs with the Los Angeles Lakers winning the championship.¹⁶⁷ MLB completed its sixty game schedule and expanded playoff format with the Los Angeles Dodgers winning the championship.¹⁶⁸

The differing paths for the two leagues demonstrate the importance of labor relations. The NBA—which had a very fractured relationship with the NBPA as recently as 2011—built a strong foundation of trust with its players' union and was able to successfully navigate an agreement for the 2020 season. While the NBA lost approximately ten percent of its anticipated revenues for the 2019–2020 season, the league, team owners, and players generally viewed the season as a success in light of the global health pandemic.¹⁶⁹ MLB, on the other hand, has seen its partnership with the MLBPA dramatically erode in recent years. Unsurprisingly, the two sides could not reach agreement and likely soured their relationship further for future negotiations. Consequently, MLB lost more than \$3.1 billion for the 2020 season, leading many teams to lay off a significant number of employees.¹⁷⁰

Indeed, the stories of the NBA and MLB reflect the challenges and opportunities for their owners and players as both leagues look ahead to what will be a similarly difficult 2021 season. Like the 2020 season, any changes to each league's CBA for 2021 will need to be collectively bargained. Players will be keenly focused on their salaries and, in the case of MLB, service time. Owners will worry about the possibility—perhaps even likelihood—that there will not be fans in their stadiums or arenas for the 2021 season, thus creating greater financial stress.¹⁷¹ Building off their effective, collaborative

¹⁶⁶ See Tadd Haislop, *NBA Return Plans: What to Know About 22-Team Format, Standings for 2020 Playoffs & More*, SPORTING NEWS (June 8, 2020), <https://www.sportingnews.com/us/nba/news/nba-return-2020-standings-teams-playoffs/18ohl6blwizb31rswd4b51wau8> [<https://perma.cc/2V3K-Y2XF>].

¹⁶⁷ See David K. Li, *Los Angeles Lakers Win NBA Title, Capping League's Coronavirus Bubble Season*, NBC NEWS (Oct. 11, 2020, 10:47 PM), <https://www.nbcnews.com/news/sports/los-angeles-lakers-win-nba-title-capping-league-s-coronavirus-n1242423> [<https://perma.cc/B9X2-HTKB>].

¹⁶⁸ See Connor Grossman, *Everything You Need to Know for the 2020 MLB Season*, SPORTS ILLUSTRATED (July 23, 2020), <https://www.si.com/mlb/2020/07/23/baseball-preview-mookie-betts-dodgers> [<https://perma.cc/VJ5W-8ZWD>] (detailing the revised regular season and playoff schedules); Jill Martin, *Los Angeles Dodgers Win World Series for the First Time Since 1988, Defeat Tampa Bay Rays in Six Games*, CNN (Oct. 28, 2020, 11:38 PM), <https://www.cnn.com/2020/10/27/sport/world-series-game-6-dodgers-rays-spt-intl/index.html> [<https://perma.cc/H2XU-6D4Q>].

¹⁶⁹ See generally *supra* note 98.

¹⁷⁰ Brett Taylor, *MLB Reportedly Lost \$3.1 Billion in 2020*, BLEACHER NATION (Oct. 26, 2020), <https://www.bleachernation.com/cubs/2020/10/26/mlb-reportedly-lost-3-1-billion-in-2020/> [<https://perma.cc/HS3H-TVBE>].

¹⁷¹ See Buster Olney, *Tony Clark, MLB Players Might Be Able to Break Standoff by Thinking Big Picture*, ESPN (May 17, 2020), https://www.espn.com/mlb/insider/story/_/id/29184521/tony-clark-mlb

relationship—including relaunching the 2020 season—the NBA and the NBPA were able to successfully agree on revised CBA terms for a seventy-two game season for the 2020–2021 season that addressed both team and player concerns.¹⁷² MLB and the MLBPA face a much more daunting task. As one analyst noted, by not coming together for the 2020 season restart, the two sides merely deferred the labor fight “with escalation in some form all but assured because of the unresolved issues.”¹⁷³ Looking even further down the road, this reality does not portend well for a new MLB CBA after the 2021 season, while the NBA looks well-positioned (if it continues with its work with the NBPA) to build toward a successful extension or new NBA CBA after the current one expires. With the special legal status of collective bargaining in professional sports, and with the complex and high-stakes financial terms that drive each sport, both the NBA and MLB would be wise to learn from the lessons of the experiences of the 2020 season in looking ahead as both sports try to navigate unprecedented and uncharted circumstances.

players-able-break-standoff-thinking-big-picture [<https://perma.cc/YV7X-ZC8X>].

¹⁷² Shlomo Sprung, *2020-21 NBA Season Will Be 72 Games and Begin December 22: Report*, FORBES (Nov. 5, 2020, 11:01 PM), <https://www.forbes.com/sites/shlomosprung/2020/11/05/nba-2020-2021-season-starts-december-22-with-72-game-regular-season-report/?sh=649d02b31e66> [<https://perma.cc/3279-K3R3>].

¹⁷³ Buster Olney, *It's Not Just the 2020 Season at Stake, but the Future of MLB*, ESPN (May 31, 2020), https://www.espn.com/mlb/story/_/id/29241941/future-mlb-not-just-2020-season-stake [<https://perma.cc/V5NT-VJ87>].

