

## NBA Impasse: It's Bound to Wrap Up Soon

Let's not create false drama. I am not really talking to the media. That's how they make their living. True, the entire NBA preseason and all games through Nov. 28 are gone and counting. According to the NBA owners, 22 of the 30 franchises are losing money. Lots of money in the aggregate: an average of \$330 million in each of the last two seasons. Some owners reportedly say they would forfeit the season if necessary, in essence saying fewer games means fewer losses. The NBA's Commissioner calls the extent of the impasse a "gulf." No new talks have been scheduled and if the owners renew the request for a 50-50 split, the head of the NBA Players Association called it a "non-starter". That appears objectively speaking to define a stalemate.

But back in the 1998-1999 season, a deal was not worked out until very early January, and a 50 game season wasn't so bad. In fact, the most basic economic principle was in play – fewer games (lower supply) created more demand for the scarce resource of games. Isn't that part of why football has broader appeal

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tract. They could do what Bo Schembechler and the University of Michigan did – put it on a napkin. But once you view the correspondence between the general counsel of the NFL and NFLPA, attached as Exhibits to the Brady or Eller lawsuits against the NFL, you readily see the trust factor was not Maize and Blue. We should expect nothing different during the NBA negotiations. In both cases, the players' counsel suspect the owners are not completely honest in their representations of profits and losses, and that League discloses only incomplete books and records to intentionally obscure the whole truth. That battle alone is waged over years of time.

The NFL collective bargaining agreement is over 400 pages. I have dealt with sophisticated corporate deals before, but nothing – nothing – was as complex as this. The complexity is not really because of the lack of trust per se, or closing loopholes for contingencies. It has mostly to do, in my

nothing illegal or lacking in good faith about aggressively pursuing your client's interests. So negotiators on both sides are legitimately competing in an arena quite apart from, and longer in duration than the players on the field or court.

My point is that the NBA is going through an arduous process that is underpublicized and under-

And the NFL negotiation had the benefit of having another issue to counterbalance against revenue sharing – player safety in a brutal sport. In other words, players could sacrifice more on the revenue split because they could win on safety issues (fewer contract practices, more funds into health benefits, etc.). The NBA players

will employ a strategy includes this: "even if we have to concede on an issue, we either delay the implementation or start it now, and phase it out over time." Our laws too are negotiated with the same dynamics in play. Republicans and Democrats for over a century have had sunset provisions, phase in and phase out clauses. It is the nature of what we consider mature skilled negotiation. We should expect no less in the current labor sweepstakes of professional sports in America.

So instead of shaking our collective heads in disgust, with acid-tongue comments like players are too dumb to understand it, or owners are too greedy to share it, we should simply recognize that although it would be better to sit at the kitchen table and hash it out like a honest principled family, this is just the day in the life of reality transactional law.

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appreciated. It is in some ways more complex than the NFL negotiation. There is only one league and one venue – NFL in the USA. Approximately 15 percent of the NBA players already have overseas contracts, because unlike American football, NBA-styled basketball is truly international. But 85 percent of the players know where home is, where the best life style in the world is, and home is where family resides. That distraction will play itself out.

do not have that same trade off issue.

But even at this contentious point, the NBA issues appear narrowing to these five: the revenue split, duration of the CBA, how hard (punitive) the salary cap, whether to continue the loophole to the salary cap called the "midlevel exception", length of individual player contracts, and whether to reduce the cap on maximum raises.

And just like the NFL, I suspect both sides in this NBA negotiation

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than baseball – getting revved up all week for that one game for only 16 weeks versus being able to pick over 160 games almost any day of the from spring to fall?

And let's be real. All the professional sports are too long anyway. Why, because the club owners demanded it. Players, the ones who actually experience the pain of playing, didn't volunteer for it. The owners operated under the assumption at the time that more games meant more profit. Now that it is not working out as envisioned, they are in no hurry to resume until they legislate a fix. And let's also admit football is the King, not LeBron, in this country through the last game played on January 1, so until then a substantial part of the hoops fan base is not overly concerned.

But the single biggest reason for a long tortured negotiation is not so obvious to most of us. We say, "Why does it take so long to agree on how to split \$4 billion? There's enough there for 415 players and 30 owners?" What we cannot read in the paper or see from a 30-second sound bite is that we have an increasingly sophisticated group of players who selected tall cotton representatives that matches the legal skill set of the owner and League. In major corporate transactions, highly sophisticated lawyers are trained to envision everything that could go wrong, and protect their client's interest if it does. The more thoughtful and imaginative the respective counsel, the more clauses the contract contains.

Now if everybody trusted everybody, there would be no need to cover every contingency by con-

opinion, with the desire of owners to create exemptions and exceptions in their favor. For example, both the NFL and NBA know they are going to share revenue. The real battle is how they define the "revenue" that will be shared. The owners try to exclude items from the definition. The NFL agreement has a mind-boggling way of defining "All Revenue". It is on par with defining and calculating capital gains under the internal revenue code. After deductions and exclusions are considered, "All" does not mean "All". Yet that is what it is called. The NFL owners knew that the more exclusions they create from All Revenue, the less they have to share because the item is no longer in the pot from which sharing occurs. The excluded items are retained by the NFL so they keep more of the total revenue. I am willing to bet my 401(k) that same process is a major part of the NBA negotiation right now.

And then the NFL owners were savvy enough to create various categories for salary. There is not just one type of income to NFL players. There are over 30 types of compensation. The more categories one creates, the more opportunities to create exceptions to the obligation to make payment. So the game is not to always argue about whether there is a right to a revenue split, or salary. The devilish detail is whether there are ways to stop payment because the definition requires certain qualifiers. I fully expect counsel for NBA owners to utilize the same strategy employed by the NFL. There is

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