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# The NBA's 2011 Collectively Bargained Amnesty Clause-Exploring the Fundamentals

Adam Epstein, *Central Michigan University*  
Kathryn Kisska-Schulze



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**THE NBA'S 2011 COLLECTIVELY BARGAINED  
AMNESTY CLAUSE – EXPLORING THE  
FUNDAMENTALS**

ADAM EPSTEIN\*  
KATHRYN KISSKA-SCHULZE\*\*

**I. INTRODUCTION**

The visibility of contractual issues within the sports genre continues to increase and inevitably plays a role in changing the landscape of amateur and professional sports. The appearance of novel clauses in professional sports employment contracts is not a new phenomenon, and numerous scholarly articles have scrutinized the employment clause variety within the sports arena, to include the hiring authority clause, morals clauses and termination clauses, to name a few.<sup>1</sup>

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\* J.D., M.B.A., Professor, Department of Finance and Law, Central Michigan University.

\*\* J.D., LL.M (taxation), Assistant Professor, Department of Management, School of Business and Economics, North Carolina Agricultural & Technical State University.

<sup>1</sup> See Adam Epstein, *An Exploration of Interesting Clauses in Sports*, 21 J. LEGAL ASPECTS OF SPORT 5 (2011); see also Adam Epstein & Henry Lowenstein, *Promises to Keep? Coaches Tubby Smith, Jimmy Williams and Lessons Learned in 2012*, 24 S. L.J. 165 (2014) (discussing the lawsuit stemming from the 2012 legal decision that arose from an employment-related fiasco in 2007 when Coach Orlando Henry “Tubby” Smith asked coach Jimmy Williams from Oklahoma State University to join him as an assistant coach though Smith’s offer proved not to be a legally binding offer as decided by the Supreme Court of Minnesota).

The purpose of this paper is to address the *amnesty clause* drafted into National Basketball Association's (NBA) 2011 collective bargaining agreement (CBA) which currently represents the relationship between NBA players and management.<sup>2</sup> The amnesty clause presents a unique way to manage a professional sports team from both a tax and team management and investment perspective.<sup>3</sup> This article discusses the development of the amnesty clause provision within NBA CBA, and analyzes the clause's applicability to the NBA's luxury tax.<sup>4</sup>

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<sup>2</sup> See Larry Coon, *Breaking Down Changes in New CBA*, ESPN (Nov. 28, 2011), [http://espn.go.com/nba/story/\\_/page/CBA-111128/how-new-nba-deal-compares-last-one](http://espn.go.com/nba/story/_/page/CBA-111128/how-new-nba-deal-compares-last-one) (summarizing and comparing the acceptance by the NBA player's association of the take-it-or-leave-it offer from the league, the temporary dissolution of the players' union, the filing of a federal antitrust lawsuit, a 15-hour settlement negotiation, allowing teams to resume business on Dec. 9, 2011, and with opening day for the NBA on Christmas. Coon characterized the difference between the 2005 CBA and the 2011 CBA as "sweeping changes"); see also NBA, *CBA 101*, NBA.COM (Sept. 2012), available at [http://www.nba.com/media/CBA101\\_9.12.pdf](http://www.nba.com/media/CBA101_9.12.pdf) (last visited Apr. 2, 2014) (highlighting the 2011 NBA CBA).

<sup>3</sup> See, e.g., Howard Beck, *Poof! Goes a Bad Contract, if Any N.B.A. Team Wishes*, N.Y. TIMES (Nov. 27, 2011), [http://www.nytimes.com/2011/11/28/sports/basketball/each-nba-team-can-waive-one-bad-contract.html?\\_r=0](http://www.nytimes.com/2011/11/28/sports/basketball/each-nba-team-can-waive-one-bad-contract.html?_r=0) (offering humorously that in the NBA bad contracts are more common than lane violations. Beck also notes that the amnesty clause gives teams a "do-over" and a "get-out-of-jail-free card" under the terms of the 2011 amnesty provision in which each team can waive one player and remove him from the salary cap thereby saving millions of dollars in luxury tax penalties, even though the player's contract is still honored in the event another team claims his rights after a release. Beck also points out correctly that teams can only use the amnesty provision once in any off-season during the term of the 2011 CBA, the player also have been signed before July 1, 2011, and must be on the team's current roster at the time the CBA went into effect).

<sup>4</sup> The NBA's luxury tax is discussed further *infra*, and represents a financial penalty that teams have to pay under the CBA to the league for going over the maximum amount that the team can spend on its players in any given year. See Coon, *supra* note 2. See *infra* text accompanying notes 38-53 (pertaining to the luxury tax).

## II. NBA'S AMNESTY CLAUSE PROVISION

The expression *amnesty clause*, used interchangeably in this paper as the *amnesty provision*, made a regular appearance in the NBA starting with the 2005 CBA, but was quite limited until the advent of the 2011 NBA CBA.<sup>5</sup> Very few academic research papers have mentioned the expression *amnesty clause*, per se.<sup>6</sup> In fact, a scholarly investigation of the term *amnesty clause* indicates that use of the expression, prior to its inclusion in the NBA's CBAs, had almost no place in sport but rather referenced international rights and justice as a result of a war.<sup>7</sup>

The amnesty clause is currently incorporated into the CBA between NBA players and team owners, and allows professional teams to release one player from their team's official roster without having it count against such team's salary cap<sup>8</sup> with certain

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<sup>5</sup> See Coon, *supra* note 2 (offering that unlike the 2011 CBA, the 2005 CBA allowed only one player could be waived under the amnesty provision, but it had to be prior to the start of the 2005-06 season).

<sup>6</sup> Based upon our research via Lexis.com, only one law review had even mentioned the word *amnesty* in the context of the NBA, and it was only in a footnote. See Zachary A. Greenberg, *Tossing the Red Flag: Official (Judicial) Review and Shareholder-Fan Activism in the Context of Publicly Traded Sports Teams*, 90 WASH. U. L. REV. 1255 n. 206 (2013) (referencing the 2011 provision). We also conducted a search related to the "amnesty provision" and discovered mention of it in a 1987 law review article, but in an entirely different context. See Deanne L. Ayers, *Random Urinalysis: Violating The Athlete's Individual Rights?*, 30 HOW. L.J. 93, 101 (1987) (noting that amnesty would be given to players who submit to voluntary drug testing).

<sup>7</sup> Based upon our research via the Lexis.com database searching "amnesty clause" and "amnesty provision."

<sup>8</sup> See NBA Salary Cap History, REAL GM BASKETBALL, available at [http://basketball.realgm.com/nba/info/salary\\_cap](http://basketball.realgm.com/nba/info/salary_cap) (last visited Apr. 2, 2014)(organizing a table which lists, *inter alia*, the history of the NBA salary cap, the luxury tax, and maximum and minimum individual player salaries); see also Amnesty Clause, SPORTING CHARTS, available at <http://www.sportingcharts.com/dictionary/nba/amnesty-clause.aspx> (last visited Apr. 2, 2014) (defining and concisely explaining the NBA's amnesty clause).

conditions. The amnesty clause affords NBA teams the opportunity to reduce their luxury tax by waiving one player.<sup>9</sup> Essentially, the clause is designed to protect an NBA team which, in hindsight, believes it made a poor investment in a professional basketball player who did not develop or succeed with that team, regardless of the reason.<sup>10</sup> During the term of the 2011 CBA, which is in place for ten years though either the players or the team owners can opt-out in 2017, a team choosing to exercise their amnesty clause rights must do so before the start of an NBA season.<sup>11</sup> Additionally, an NBA team may amnesty one-and only

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<sup>9</sup> See Tom Ziller, *The NBA Amnesty Clause, Punitive Luxury Tax and the Playing Field*, SBNATION.COM (Jul. 23, 2013, 11:00AM), <http://www.sbnation.com/nba/2013/7/23/4548534/luxury-tax-amnesty-clause-nba-lockout> (offering that the fundamental purpose of the amnesty clause for most teams is not to reduce a high luxury tax bill but to free up cap space with which other players can be signed). See *infra* text accompanying notes 38-53 (pertaining to the luxury tax).

<sup>10</sup> Reasons might include continual injury, team playing style, poor performance, lack of motivation or team chemistry, and the like; see Charlie Zegers, *The NBA CBA, Amnesty Rule and the League's Worst Contracts*, ABOUT.COM (Aug. 2, 2011), <http://basketball.about.com/od/nba-vs-nbapa/a/The-Nba-Cba-Amnesty-Rule-And-The-Leagues-Worst-Contracts.htm> (providing team-by-team examples of bad player contracts and noting that under the 2005 CBA, NBA teams were given the chance to waive a single player contract and teams were still bound to pay the players' salary, the salaries continued to count against the cap, yet teams were freed from any obligation to pay luxury tax on those salaries. Zegers notes that the rule was termed the *Allan Houston Rule* and was based on the assumption that the New York Knicks would use the provision to waive Houston. Zegers also notes, however, that Houston was not waived under the provision); see also Associated Press, *Bucks Use Amnesty Clause to Waive Gooden*, NBA.COM (July 16, 2013), <http://www.nba.com/2013/news/07/16/bucks-waive-gooden-by-amnesty.ap/> (noting that Drew Gooden had two years and about \$13.4 million remaining on his contract. Though he still receives the money, it does not count against the team for salary cap purposes. Gooden signed with the Bucks in 2010, and he averaged 11.3 points and 5.9 rebounds in 107 games over 11 years).

<sup>11</sup> See Coon, *supra* note 2.

one-player during any season so long as the current CBA remains in place.<sup>12</sup>

### **III. FUNDAMENTALS OF THE AMNESTY PROVISION**

Based on a summary of the 2011 CBA as prepared by the NBA itself, each team may waive one player and subsequently remove his contract value from the salary cap during a one-week window coinciding with the beginning of the NBA free agency period, provided that the player had signed with the amnestying team before July 1, 2011, as per the CBA.<sup>13</sup> Thus, such requirement includes those players who were signed to contracts prior the end of the 2005 CBA.<sup>14</sup> Other teams can then claim the

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<sup>12</sup> *Id.*; see also Kelly Scaletta, *NBA Teams Who Still Have Their Amnesty Clause and How Each Should Use It*, BLEACHER REPORT (Apr. 25, 2013), <http://bleacherreport.com/articles/1618167-nba-teams-that-still-have-their-amnesty-clause-and-how-they-should-use-it> (noting that as of April 25, 2013, there were 15 teams which had their amnesty remaining; however, one team, the New Orleans Pelicans, had no amnesty eligible players. Scaletta notes that all players who were amnesty eligible will have their contracts run out by the end of the 2015-16 season, the player must have been on his current team and under his contract when the new CBA was signed, and contract extensions with the same team are not amnesty eligible). Teams are ranked here according to the likelihood of using their amnesty, not according to the quality of the players; *but see* Beck, *supra* note 3 (offering that the player also has to have been signed before July 1, 2011, and must be on the team's current roster at the time this CBA went into effect).

<sup>13</sup> See Ira Winderman, *Amnesty Week Approaches for Heat, Miller*, SUN SENTINEL (July 6, 2013), [http://articles.sun-sentinel.com/2013-07-06/sports/sfl-ira-nba-column-s070713\\_1\\_amnesty-move-mike-miller-luxury-tax](http://articles.sun-sentinel.com/2013-07-06/sports/sfl-ira-nba-column-s070713_1_amnesty-move-mike-miller-luxury-tax) (offering that under the terms of the 2011 CBA, there is a one-week period in the offseason for teams to make amnesty moves. In 2013, this window ran from July 11 to July 17 and immediately followed the July 1 to July 10 free agency signing period); *see also* Coon, *supra*, note 2 (breaking down changes in the new CBA and noting that the 2005 NBA did have an amnesty provision as well, but teams had to use it prior to the 2005-06 season, and noting that that 2011 CBA allows a team to “kick one bad contract to the curb” throughout the term of the CBA).

<sup>14</sup> See, e.g., Darnell Mayberry, *Breaking Down the NBA's Amnesty Provision*, News OK (May 18, 2013), <http://newsok.com/breaking-down-the-nbas->

rights to (and sign to a contract) a waived amnestied player, leaving the waiving team (i.e., the now former team) responsible for paying the balance of the player's contract in accordance with the contract's term.<sup>15</sup>

#### IV. WAIVED PLAYERS

Generally speaking, players whose rights have been waived outright by a team become free agents.<sup>16</sup> NBA players waived

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amnesty-provision/article/3826854 (offering that the amnesty provision offers each of the 30 NBA teams a one-time opportunity to release a player via the league's waiver process without the player's salary counting toward the team's salary cap or potential luxury tax computations, and that this one-time provision is for use only once total, not once per season. Mayberry also offers that any player who was signed before the 2011-12 season can be waived via the amnesty provision, and NBA teams cannot designate any player traded after July 1, 2011 or any player whose contract has been extended, renegotiated or otherwise amended after July 1, 2011).

<sup>15</sup> See NBA, *CBA 101: Highlights of the 2011 Collective Bargaining Agreement Between the National Basketball Association (NBA) and the National Basketball Players Association (NBPA)*, NBA.com (Sept. 2012), available at [http://www.nba.com/media/CBA101\\_9.12.pdf](http://www.nba.com/media/CBA101_9.12.pdf) (last visited Apr. 4, 2014) (Per the 2011 NBA CBA summary: "C. Amnesty. (1) Each team will be permitted to waive one "amnesty" player prior to any one of the first five seasons of the CBA (only for contracts in place at the inception of the CBA) and have 100% of the player's salary removed from Team Salary for Salary Cap and tax purposes. (Alternatively, a team that previously waived a player prior to the inception of the CBA whose guaranteed salary continues to be included in the team's payroll for future seasons is permitted to designate that player's salary for removal from its Team Salary for Salary Cap and tax purposes.)").

<sup>16</sup> See Larry Coon, *NBA Salary Cap FAQ*, CBAFAQ.COM (July 9, 2013), <http://www.cbafaq.com/salarycap.htm> (discussing the differences between the 2005 and 2011 NBA and CBA in great detail. Coon notes that there are two types of free agency: unrestricted and restricted. "An unrestricted free agent is free to sign with any other team, and there's nothing the player's original team can do to prevent it. Restricted free agency gives the player's original team the right to keep the player by matching a contract the player signs with another team.").

under the amnesty clause waiver process are not immediately considered unrestricted free agents; they must partake in a bidding process over a forty-eight hour period during which teams falling under the NBA's salary cap have the opportunity to bid on the player for his services.<sup>17</sup> Each bidding team has the ability to assume the player's full salary contract.<sup>18</sup> The team with the highest bid earns the rights to the player.<sup>19</sup> In the event of matching high bids, the team with the inferior winning record signs the amnestied player.<sup>20</sup>

Also, amnestied players are prohibited from re-signing with the team that originally amnestied him.<sup>21</sup> Teams which exceed their allowed salary cap may only acquire the rights to an amnestied player if that player is a free agent. If the player signs onto another team, the amount of his new contracted salary is deducted from what his original (amnesty) team owes under the terms of the contract. As of July 17, 2013, fifteen teams have utilized the amnesty clause provision.<sup>22</sup>

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<sup>17</sup> See Chris Sheridan, *Amnesty Program Includes Secondary Waivers*, SHERIDAN HOOPS (Nov. 28, 2011), <http://www.sheridanhoops.com/2011/11/28/amnesty-program-includes-secondary-waivers/> (discussing the bidding process).

<sup>18</sup> See Mayberry, *supra* note 14. Amnesty is different from the normal waiver process in that it allows teams to make either a *full* or *partial* waiver claim. When a team makes a full waiver claim it acquires the player, assumes his full contract, and pays all remaining salary obligations (and the waiving team has no further salary obligation to the player). Full waiver claims have precedence over partial waiver claims. If more than one team makes full waiver claims, the player is awarded to the team with the worst record.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See Sean Deveney, *NBA Amnesty Clause Update: Rules, Players Let Go Thus Far*, SPORTING NEWS (July 10, 2013), <http://www.sportingnews.com/nba/story/2013-07-10/nba-amnesty-clause-candidates-heat-lakers-thunder-bulls-mike-miller-world-peace> (outlining the process and noting which teams are no longer eligible for the amnesty clause because they already exercised their rights).

<sup>22</sup> See Nancy Kercheval, *Metta World Peace Let Go by Lakers Under NBA Amnesty Clause*, BLOOMBERG NEWS (July 12, 2013),



As mentioned, the amnesty provision under the 2011 CBA provides a single, one-time opportunity for NBA teams to release one player from their team roster via the waiver process.<sup>23</sup> To be eligible for amnesty, the basketball player must have been on the team's roster continuously from July 1, 2011 until the amnesty date without any new contract, extension, renegotiation or amendment to his original contract.<sup>24</sup> NBA teams cannot amnesty any players which they sign, receive by trade, or contractually extend, renegotiate, or otherwise amend after July 1, 2011.<sup>25</sup> The following table lists those players who have been waived under the

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<http://www.bloomberg.com/news/2013-07-12/metta-world-peace-let-go-by-lakers-under-nba-amnesty-clause.html>; *see also* Luke Adams, *Potential 2014 Amnesty Candidates*, HOOPS RUMORS (July 17, 2013), <http://nba.si.com/2013/06/11/which-players-could-be-released-via-the-amnesty-clause-this-summer/>; *see also* Dave McMenamin, *Lakers Amnesty Metta World Peace*, ESPN LOS ANGELES.COM (July 11, 2013), [http://espn.go.com/los-angeles/nba/story/\\_id/9471444/](http://espn.go.com/los-angeles/nba/story/_id/9471444/); *but see* Marc Stein, *Last Two Players at Risk of Being Amnestied*, ESPN.COM (Dec. 10, 2013), [http://espn.go.com/blog/marc-stein/tag/\\_name/amnesty-clause](http://espn.go.com/blog/marc-stein/tag/_name/amnesty-clause) (noting that Carlos Boozer and Kendrick Perkins are realistically the last two who might be amnestied until the next NBA collective bargaining agreement).

<sup>23</sup> *See* Coon, *supra* note 16 (discussing the amnesty provision in its entirety, in question #67). For the 2011-2012 NBA season, the provision was available from December 9-16, 2011. For the 2012-13 through 2015-16 seasons it is available for the first seven days that follow the July "moratorium." Coon states, "It is a period during the month of July in which teams may not sign most free agents or make trades. Free agents become free on July 1, but the salary cap is not set until the league's audit is completed later in the month. Teams and players must wait for the salary cap to be set before trades and most free agent signings can commence. Teams may negotiate with free agents beginning July 1, but they have to wait until the moratorium ends before signing a contract.").

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* (noting that the 2011 season was blemished by a league lockout which began July 1, 2011. It lasted 161 days. For the 2012-2013 through 2015-2016 seasons it is available for the first seven days that follow the July moratorium).

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2011 NBA CBA's amnesty provision, as of the time of our research.<sup>26</sup>

*Amnestied NBA Players (2011 – 2014)*

<u>Season</u>	<u>Team</u>	<u>Player</u>	<u>Next team</u>	<u>Bid amount</u>
<i>2011–12<sup>27</sup></i>				
	<i>Orlando Magic</i>	<i>Gilbert Arenas</i>	<i>Memphis Grizzlies</i>	<i>N/A</i>
	<i>Golden State Warriors</i>	<i>Charlie Bell</i>	<i>Italy Juvecaserta Basket</i>	<i>N/A</i>
	<i>New York Knicks</i>	<i>Chauncey Billups</i>	<i>Los Angeles Clippers</i>	<i>\$2,000,032</i>
	<i>Cleveland Cavaliers</i>	<i>Baron Davis</i>	<i>New York Knicks</i>	<i>N/A</i>
	<i>New Jersey Nets</i>	<i>Travis Outlaw</i>	<i>Sacramento Kings</i>	<i>\$12,000,000</i>
	<i>Indiana Pacers</i>	<i>James Posey</i>	<i>N/A</i>	<i>N/A</i>
	<i>Portland Trail Blazers</i>	<i>Brandon Roy</i>	<i>Minnesota Timberwolves</i>	<i>N/A</i>
 <i>2012–13</i>				
	<i>Philadelphia 76ers</i>	<i>Elton Brand</i>	<i>Dallas Mavericks</i>	<i>\$2,100,000</i>
	<i>Minnesota Timberwolves</i>	<i>Darko Miličić</i>	<i>Boston Celtisc</i>	<i>N/A</i>
	<i>Dallas Mavericks</i>	<i>Brendan Haywood</i>	<i>Charlotte Bobcats</i>	<i>\$2,000,500</i>
	<i>Houston Rockets</i>	<i>Luis Scola</i>	<i>Phoenix Suns*</i>	<i>\$13,500,000</i>
	<i>Phoenix Suns</i>	<i>Josh Childress</i>	<i>Brooklyn Nets</i>	<i>N/A</i>
	<i>Washington Wizards</i>	<i>Andray Blatche</i>	<i>Brooklyn Nets</i>	<i>N/A</i>

<sup>26</sup> See generally Wikipedia, NBA SALARY CAP (last visited Apr. 3, 2014), [http://en.wikipedia.org/wiki/NBA\\_salary\\_cap](http://en.wikipedia.org/wiki/NBA_salary_cap) (discussing the amnesty clause, luxury tax, and providing examples).

<sup>27</sup> See NBA News, *2011-12 Amnesty Tracker* (July 18, 2012), <http://www.nba.com/news/amnesty-tracker/>.

<i>Denver Nuggets</i>	<i>Chris Andersen</i>	<i>Miami Heat</i>	<i>N/A</i>
<i>Los Angeles Clippers</i>	<i>Ryan Gomes</i>	<i>Germany Artland Dragons</i>	<i>N/A</i>

2013–14<sup>28</sup>

<i>Los Angeles Lakers</i>	<i>Metta World Peace</i>	<i>New York Knicks</i>	<i>N/A</i>
<i>Charlotte Bobcats</i>	<i>Tyrus Thomas</i>	<i>N/A</i>	<i>N/A</i>
<i>Milwaukee Bucks</i>	<i>Drew Gooden</i>	<i>N/A</i>	<i>N/A</i>
<i>Toronto Raptors</i>	<i>Linas Kleiza</i>	<i>Turkey Fenerbahçe Ülker</i>	<i>N/A</i>
<i>Miami Heat</i>	<i>Mike Miller</i>	<i>Memphis Grizzlies</i>	<i>N/A</i>

To further understand the effects of the amnesty clause provision, consider Miami Heat player Mike Miller.<sup>29</sup> In July 2013, Mike Miller was designated as the team’s amnesty player.<sup>30</sup> Such move saved the Heat almost seventeen million dollars in luxury taxes, and reduced its \$33 million dollar tax bill by half.<sup>31</sup> Although the Heat is still required to pay Miller the remaining salary under his contract-\$12 million-such salary amount will not

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<sup>28</sup> See NBA News, *2013-14 Amnesty Tracker* (July 17, 2013), <http://www.nba.com/news/2013-14-amnesty-tracker/>; see also Marc Stein, *supra* note 22 (noting that Detroit, New Orleans, Sacramento and Utah are the four teams that did not use the amnesty clause, which could only be applied to players under their contracts at the time of the NBA’s new CBA in December 2011).

<sup>29</sup> See Ethan Skolnick, *5 Hidden Risks of Miami Heat Using Amnesty Clause on Mike Miller*, BLEACHER REPORT (July 18, 2013), <http://bleacherreport.com/articles/1708157-5-hidden-risks-of-miami-heat-using-amnesty-clause-on-mike-miller> (discussing whether or not his replacement would work out well, and whether or not he could come back to haunt them with another team, inter alia).

<sup>30</sup> *Id.*

<sup>31</sup> See Brian Windhorst, *Heat Waive Veteran Mike Miller*, ESPN.COM (July 17, 2013), [http://espn.go.com/nba/truehoop/miamiheat/story/\\_/id/9482980/miami-heat-waive-mike-miller-amnesty-clause](http://espn.go.com/nba/truehoop/miamiheat/story/_/id/9482980/miami-heat-waive-mike-miller-amnesty-clause).

count against the Miami Heat's salary cap space or add to future luxury tax bills.<sup>32</sup>

Under his original contract with the Heat, Miller would have earned \$6.2 million during the 2013-14 season, and another \$6.6 million during the 2014 season.<sup>33</sup> Miller is still entitled to this salary amount; however, this salary will not count against Miami Heat's team salary cap, nor will it count against a luxury-tax that could exceed \$30 million during the 2013-14 season alone.<sup>34</sup>

A week after being waived, Miller signed with the Memphis Grizzlies as a free agent, a team which he played for from 2003-2008, having cleared the amnesty waiver period.<sup>35</sup> The Heat still owed Miller \$12.8 million in salary over the next two seasons as part of the original contract he signed with the team in 2010.<sup>36</sup> For the 2012-13 NBA season, the Heat paid \$13.3 million in luxury tax.<sup>37</sup>

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<sup>32</sup> *Id.*; see also Roy Burton, *Pros and Cons of Miami Heat Using Amnesty Clause on Mike Miller*, BLEACHER REPORT (June 28, 2013), <http://bleacherreport.com/articles/1682544-pros-and-cons-of-miami-heat-using-amnesty-clause-on-mike-miller>.

<sup>33</sup> See Tom Haberstroh, *Heat in Free Agency: 3 Things to Know*, ESPN.COM (July 1, 2013), [http://espn.go.com/blog/truehoop/miamiheat/post/\\_/id/18216/heat-in-free-agency-3-things-to-know](http://espn.go.com/blog/truehoop/miamiheat/post/_/id/18216/heat-in-free-agency-3-things-to-know).

<sup>34</sup> See Tim Reynolds, *Heat Designate Former Grizzly Mike Miller as Amnesty Player*, COMMERCIAL APPEAL (July 16, 2013), <http://www.commercialappeal.com/news/2013/jul/16/heat-designate-former-grizzly-mike-miller-amnesty/?print=1>.

<sup>35</sup> See, e.g., Ira Winderman, *Grizzlies Sign Mike Miller after Release from Heat*, SUN SENTINEL (July 24, 2013), [http://articles.sun-sentinel.com/2013-07-24/sports/sfl-miami-heat-mike-miller-s072413\\_1\\_amnesty-release-miami-heat-mike-miller](http://articles.sun-sentinel.com/2013-07-24/sports/sfl-miami-heat-mike-miller-s072413_1_amnesty-release-miami-heat-mike-miller).

<sup>36</sup> *Id.*

<sup>37</sup> See Windhorst, *supra* note 31.

## V. 2011 CBA AND THE NBA'S LUXURY TAX

Academics and others have examined the manner in which professional sports leagues *tax* themselves by instituting caps on team spending, whether a *hard cap* or a *soft cap*.<sup>38</sup> The purpose of instituting these *luxury taxes* is to promote competitive balance among teams by penalizing high-spending teams and redistributing money to teams that managed to control their costs under the salary cap limits.<sup>39</sup> Caps set limits on what each team is allowed spend, and at certain predetermined levels above the cap requires teams to pay a luxury tax of one dollar for each dollar spent above the specified threshold.<sup>40</sup>

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<sup>38</sup> See Kathryn Kisska-Schulze and Adam Epstein, 14 TEX. REV. ENT. & SPORTS L. 95, 97 (2013); see also Richard A. Kaplan, *The NBA Luxury Tax Model: A Misguided Regulatory Regime*, 104 COLUM. L. REV. 1615, 1631-35(2004) (presenting the history of the NBA luxury tax).; see also Adam Epstein, *An Exploration of Interesting Clauses in Sports*, 21 J. LEGAL ASPECTS OF SPORT 5 (2011) (exploring clauses including the reserve clause, "best interests" of baseball clause, and others); see also Ronald Blum, *Yanks' Luxury Tax Increases \$400k to \$19.3 Million*, YAHOO! SPORTS (Dec. 18, 2012), <http://sports.yahoo.com/news/yanks-luxury-tax-increases-400k-151952634--mlb.html> (discussing Major League Baseball's luxury tax).

<sup>39</sup> Kaplan, *supra* note 38, at 1617 (stating, "Pioneered by Major League Baseball (MLB) in the mid-1990s and recently adopted by the National Basketball Association (NBA), the luxury tax as it currently exists is a penalty imposed on teams that spend above a collectively bargained level.").

<sup>40</sup> Simon Bernestein, *Salary Caps in Professional Sports: Closing the Kovalachuk Loophole in National Hockey League Player Contracts*, 29 CARDOZO ARTS & ENT. L. J 375, 379 (2011) (stating, "In the major North American sports leagues there are two types of salary caps: soft caps and hard caps. A soft cap, such as the one implemented by the National Basketball Association, sets the limit on what a club may spend, with a few exceptions, which permit a club to spend in excess of the cap. In addition, at a certain predetermined level above the cap, a club is required to pay a luxury tax of one dollar for each dollar spent above the predetermined level. This means that upon reaching the predetermined tax level, the cost of signing additional players doubles. The second type of salary cap is a hard cap, which is what the National Hockey League instituted in 2005. This system generally does not allow clubs to spend in excess of the cap ceiling, referred to as the upper limit.").

While the luxury tax model was built on the premise that its institution would help achieve a sense of balance among team spending, encouraging some teams to spend less, and offer players freedom from a salary cap while promising unlimited salary growth, it also penalizes teams which spend above the soft cap.<sup>41</sup> And like any other tax model where taxpayers seek avenues to minimize the impact of paying the tax, NBA teams have sought opportunities to reduce the penalty associated with the luxury tax: hence the amnesty clause.<sup>42</sup>

Under the 2005 CBA, which was originally for seven years but the NBA invoked a league opt-out in 2011 under the terms of the agreement,<sup>43</sup> the luxury tax forced teams to pay a flat one dollar in tax for every dollar they spent over the luxury tax line.<sup>44</sup> Under the 2011 CBA, teams pay one dollar for every dollar their salary is above the luxury threshold for 2011-12 and 2012-13.<sup>45</sup> However, starting in 2012-13, teams then pay an incremental tax for every \$5 million above the tax threshold.<sup>46</sup>

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<sup>41</sup> See Kaplan, *supra* note 38, at 1617.

<sup>42</sup> See THE SPOKESMAN-REVIEW, *Heat Use Amnesty Clause On Miller To Save On Luxury Tax* (July 17, 2013), <http://www.spokesman.com/stories/2013/jul/17/heat-use-amnesty-clause-on-miller-to-save-on/>; see also Jeff Zillgitt & J. Michael Falgoust, *NBA Amnesty Provision Provides Teams With Flexibility*, USA TODAY (Dec. 14, 2011, 2:49AM), <http://usatoday30.usatoday.com/sports/basketball/nba/story/2011-12-13/nba-amnesty-provision-provides-teams-with-flexibility/51892272/1>; see also Rob Mahoney, *Which Players Could Be Released Via The Amnesty Clause This Summer?*, SPORTS ILLUSTRATED (July 17, 2013), <http://nba.si.com/2013/06/11/which-players-could-be-released-via-the-amnesty-clause-this-summer/> (noting that teams can waive one player and remove the contract value from the salary cap during a one-week window that coincides with the beginning of free agency, provided that player signed with the team before July 1, 2011).

<sup>43</sup> See Coon, *supra* note 2.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* (noting that it is a ten year deal, but there is a mutual opt-out provision in which either side may opt out in 2017 (Coon, breaking down changes in the new CBA).

<sup>46</sup> *Id.*

For example, a team pays \$1.50 in tax for every dollar spent over the line up to \$5 million over, then \$1.75 in tax for every dollar spent between \$5 million and \$10 million, then \$2.50 in tax for every dollar spent between \$10 million and \$15 million, and \$3.25- for every dollar spent from \$15-\$20 million.<sup>47</sup> The 2013-2014 luxury tax line was set at \$71.7 million. Interestingly, the tax figure is not calculated until the date of the team's final regular season game.<sup>48</sup> These luxury tax revenues are normally redistributed evenly among non-tax-paying teams.<sup>49</sup> For comparative purposes, the following chart offers the luxury tax thresholds for the NBA seasons from 2008 to current.

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<sup>47</sup> See Brian Kamenetzky, *How the New CBA Impacts the Lakers*, ESPN LA.COM (Nov. 28, 2011), [http://espn.go.com/blog/los-angeles/lakers/post/\\_/id/23419/how-the-new-cba-impacts-the-lakers](http://espn.go.com/blog/los-angeles/lakers/post/_/id/23419/how-the-new-cba-impacts-the-lakers) (discussing the luxury tax and amnesty provisions of the 2011 CBA and how it might affect the Los Angeles Lakers).

<sup>48</sup> See Coon, *supra* note 16.

<sup>49</sup> *Id.*

NBA Luxury Tax (2008-2014)<sup>50</sup>

NBA Season	Luxury Tax
2008 – 2009	\$71.15
2009 – 2010	\$69.92
2010 – 2011	\$70.307
2011 – 2012	\$70.307
2012 – 2013	\$70.307
2013 – 2014	\$71.748

Beginning with the 2013-2014 NBA season, however, the term *repeat offenders* refers to teams who have to pay an even higher penalty (i.e., tax) which have paid the luxury tax in previous seasons.<sup>51</sup> These teams paid luxury taxes in four out of the last five years.<sup>52</sup> The following chart represents the current tax rates for repeat offenders:<sup>53</sup>

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<sup>50</sup> *Id.*; see also Wikipedia, *supra* note 26.

<sup>51</sup> See Coon, *supra* note 16; see also Eric Pincus, *Lakers Limited by Luxury Taxes*, LOS ANGELES TIMES (Aug. 8, 2013), <http://articles.latimes.com/2013/aug/08/sports/la-sp-lakers-finances-20130809>.

<sup>52</sup> See Coon, *supra* note 16; see also Ben Golliver, *NBA Sets 2013-14 Salary Cap, Luxury Tax Figures* (July 10, 2013), <http://nba.si.com/2013/07/09/nba-salary-cap-luxury-tax-figures-2013-14/>; (announcing that the NBA announced



<b>Amount over Tax</b>	<b>Standard Tax Per Excess Dollar</b>	<b>Repeat Offender Tax Per Excess Dollar</b>
\$Less than \$5M	\$1.50	\$2.50
\$5M - \$9,999,999M	\$1.75	\$2.75
\$10M - \$14,999,999M	\$2.50	\$3.50
\$15M - \$19,999,999M	\$3.25	\$4.25
Over \$20M	\$3.25+\$0.50 per \$50M	\$4.25 + \$0.50 per \$5M

## VII. CONCLUSION

The purpose of this article is to fundamentally introduce the *amnesty clause*, a relatively new provision in sports contract and labor and employment law discussions. The expression *amnesty clause* or *amnesty provision* is a new and unique clause found in the 2011 NBA CBA. To date, any academic reference to *amnesty clause* within the sport genre is virtually non-existent. The amnesty clause provides NBA teams a tool to release players from

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Tuesday that the 2013-14 salary cap will be \$58.7 million, the luxury tax line will be \$71.7 million and the salary cap floor will be \$52.8 million).

<sup>53</sup> See Coon, *supra* note 16; see also Wikipedia, *supra* note 26.

their contracts if they feel that the player turned out to be a bad investment, regardless of the reason.

Additionally, by releasing a player under an amnesty clause provision, the team exercising the clause may have the ability to reduce its luxury tax bill. Because NBA players continue to be paid under their originally-signed contracts by the team that waived them under the amnesty provision, such provision will likely carry on into the next CBA and could serve as a successful model for other leagues as well. In sum, the amnesty clause gives a team a free pass for a poor decision without any financial penalty to the player.

