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FIRST DOWN, GOAL TO GO: ENFORCING THE NFL'S SALARY CAP USING THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

I. INTRODUCTION

In 1993, the owners of the twenty-eight[1] National Football League ("NFL" or "League") teams and the National Football League Players Association ("NFLPA") settled some of their long-standing labor disputes and entered into a collective bargaining agreement ("CBA").[2] The agreement contains a "salary cap" clause limiting the amount of money each team may spend on salaries for both veteran[3] and rookie players.[4]

Initially, the salary cap was greeted with both resentment and acceptance from players, coaches, and management.[5] The NFLPA officially considers the cap a benefit to the players.[6] The spending limits imposed upon teams, however, have forced some high-paid veteran players out of jobs, causing discontent among many players.[7] The initial resentment among several general managers and coaches was so severe

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1. When the agreement was ratified, the National Football League had only 28 teams. *See* THE OFFICIAL NATIONAL FOOTBALL LEAGUE 1996 RECORD & FACT BOOK 277 (Chris McCloskey & Chuck Garrity, Jr. eds., 1996) [hereinafter 1996 RECORD & FACT BOOK]. The Carolina Panthers and the Jacksonville Jaguars joined the NFL in the 1995–96 season, raising the number of teams to 30. *Id.* at 275.

2. NFL COLLECTIVE BARGAINING AGREEMENT 1993–2000 (1993) [hereinafter CBA].

3. *Id.* art. XXIV.

4. *Id.* art. XVII.

5. Ninety-four percent of the NFL players voted "yes" on the 1993 CBA. *See* Gene Upshaw, *Upshaw Taking Pride in NFL Salary Structure*, ORLANDO SENTINEL, May 22, 1994, at C15. Additionally, NFLPA assistant executive director Doug Allen stated, "We think it's going to be a healthy system for the players . . . ." Jeff Babineau, *NFL Seeks to Level the Playing Field with Team Salary Caps*, ORLANDO SENTINEL, Nov. 21, 1993, at C13. Despite the overwhelming vote and support from the NFLPA, however, many players are dissatisfied with the way things have turned out. *See* S.A. Paolantonio, *A Lot of Players Would Just Love to Scrap the Cap Their Union Accepted*, PHILA. INQUIRER, May 8, 1994, at C9 (detailing the frustration of dissatisfied players).

6. NFLPA executive director Gene Upshaw stated that the NFLPA "feel[s] excited about the system. We know that it has worked very well." Larry Weisman, *Union, NFL at Odds over Little These Days*, USA TODAY, Jan. 29, 1996, at 4C.

7. *See* Paolantonio, *supra* note 5, at C9.

that NFL Commissioner Paul Tagliabue warned them that they could be fined $10,000 for complaining about the salary cap.[8]

The salary cap's imperfections and gaping loopholes have since been widely criticized by owners, players, coaches, and observers of the game.[9] Recently, many owners have attacked each other for actions that may violate the "spirit" of the salary cap, rather than its express language.[10] Specifically, owners employing various salary accounting and player management techniques to circumvent the cap's financial limits have been accused of operating contrary to the intent, purpose, and goal of the salary cap. Many fear that these actions, while bringing present individual success to some teams, may eventually cause severe problems for the NFL in the future.[11] Despite these concerns, the practice of circumventing the salary cap continues. In fact, some NFL insiders consider allegations of cap circumvention laughable, contending that there is no such thing as a "spirit" of the agreement.[12]

This Comment contends that a "spirit" does in fact exist in an agreement such as the CBA and that it is embodied in the intent, purpose, and goals which the parties contemplated when they drafted the agreement. Furthermore, this Comment argues that several teams do in fact violate the spirit of the salary cap through various circumvention techniques, and that they should not be allowed to do so with impunity. This Comment suggests that an aggrieved team, or perhaps the League itself, might be able to use a basic tenet of contract law—the "Implied Covenant of Good

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8. *See* Manny Topol, *Tags Gags NFL Team Officials*, NEWSDAY, Apr. 26, 1994, at A71.

9. Former Tampa Bay Buccaneers coach Sam Wyche stated, "All of us are going to have to let go players who should be on our teams . . . ." *Id.* Sports agent Steve Feldman also stated that "[t]he cap is absolutely the worst thing that ever happened to pro football . . . ." Gordon Forbes, *Cap Critics Vent Frustration; Agents, Older Players Say Pay System Unbalanced*, USA TODAY, May 5, 1994, at 10C.

10. The NFL's vice president of player relations stated that "[t]he spirit of the law has been broken . . . . [T]here are six or seven teams taking advantage of the flexibility [of the salary cap provisions] and taking advantage to excess." Len Pasquarelli, *Notebooks; Inside the NFL; Salary Cap Flexibility Can Undermine Intent*, ATLANTA J. & CONST., Oct. 1, 1995, at 10E. Commenting on the signing of Pro Bowl cornerback Deion Sanders in 1995 by the San Francisco Forty-Niners, New Orleans Saints executive vice president Jim Miller said, "I think there's something wrong out there, and it will come out eventually. There's a dozen teams out there who feel the same way we do . . . . The whole thing smells." Brian Allee-Walsh, *Deion's Deal Challenged: Saints Want 49ers Contract Probed*, TIMES-PICAYUNE (New Orleans), Sept. 22, 1994, at D1.

11. *See* Bill Plaschke, *Bad Signs for the NFL; The Furious Free Agent Flurry Has Signaled Warnings That This Is the Eve of Destruction*, L.A. TIMES, Mar. 10, 1996, at C3.

12. Agent Leigh Steinberg stated, "There is no 'spirit of the salary cap.' There is only the salary cap. That's like the IRS saying someone violated the spirit of the tax code." Mike Fisher, *Never Follow Logic: A Review of the '95 Season Not Found in Game Summaries*, FORT WORTH STAR-TELEGRAM, Dec. 28, 1995, at C6.

Faith and Fair Dealing"[13]—to force defiant teams to observe the spirit and the letter of the salary cap.

Part II outlines the basic structures and functions of the NFL, the evolution of the salary cap, and the intent, purpose, and goals of the owners and players when they agreed to a cap. This discussion also includes the current status of the CBA and the effect recent developments may have on teams and players. In addition, Part II explains how teams use various financial and player management techniques to circumvent the salary cap.

Part III briefly chronicles the common law use of the implied covenant of good faith and fair dealing, its use in professional sports, and its possible application to the CBA. Specifically, this Part illustrates how prior federal court rulings involving the NFL may have important implications for the contemporary application of this covenant. This Part suggests that a court may read the implied covenant of good faith and fair dealing into the CBA so as to encourage or even to require a stricter adherence to the intended effect of the salary cap. This Comment concludes that unless the implied covenant of good faith and fair dealing can be used to prevent the use of salary cap circumvention techniques, their continued use could result in a potentially bleak future for the NFL.

II. INSIDE THE NFL SALARY CAP

Before discussing how certain NFL teams may violate the spirit of the CBA, it might be helpful to provide some background information. Specifically, the evolution of the labor/management relationship in American professional football is important to understand, as such information will reveal why the CBA and salary cap exist today. An understanding of the history of the NFL leading up to the CBA and the salary cap are indeed necessary before arguing that their "spirit" has somehow been violated.

A. From the "Galloping Ghost" to "Prime Time"

American professional football has grown in popularity since its inception in 1920.[14] Originally, professional football was a simple pastime

13. *See infra* Part III.

14. The American Professional Football Conference ("APFC") was founded on August 20, 1920, in Canton, Ohio. 1996 RECORD & FACT BOOK, *supra* note 1, at 266. On September 17, 1920, the APFC changed its name to the American Professional Football Association ("APFA"). *Id.* On June 24, 1922, the APFA changed its name to the National Football League. *Id.* at 267.

that allowed heroes of college football to continue performing their awe-inspiring feats of athleticism.[15] However, like other billion dollar sports leagues, the NFL has outgrown its roots as a simple pastime.

Today, the reality is that professional football is consumed by economic forces, market factors, and struggles between labor and management. Once played only by full-time athletes, professional football is now comprised of players who are part athlete and part entrepreneur. Even one of the game's most gifted athletes, Deion "Prime Time" Sanders, recognized that "[s]ports isn't sports anymore. It's all a business. I'm not even thinking about football."[16] The football games enjoyed by millions of fans today are the result of seventy-seven years of growth in the League's popularity, expansion to numerous cities, and the creation of operating rules and procedures intended to preserve the integrity and viability of the game.[17]

For most of its history, the League unilaterally established the terms and conditions under which it would conduct its operations, with little or no input from the players.[18] When players challenged the League's operations and rules regarding their rights, most were in the form of allegations that the League violated section 1 of the Sherman Antitrust

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15. Perhaps the most famous of the early professional football stars was University of Illinois All-American Harold "Red" Grange, given the name "Galloping Ghost" when he ran for four touchdowns in 12 minutes against the University of Michigan. Dave Dorr, *Through the Years: Surprise! Surprise!*, ST. LOUIS POST-DISPATCH, Apr. 28, 1996, at 11D. In 1925, Grange joined the Chicago Bears franchise and was the main attraction in the first NFL games to draw crowds larger than 30,000 people. 1996 RECORD & FACT BOOK, *supra* note 1, at 267. College football stars such as All-Americans Jim Thorpe, Ernie Nevers, Bronko Nagurski, Don Hutson, and Sammy Baugh carried the fledgling League through its first 30 years. *Id.* at 266–68.

16. Ed Bouchette, *NFL NOTEBOOK: Free-Spending DeBartolo Assails Jones' Don't Share-Wealth Stand*, PITT. POST GAZETTE, Aug. 27, 1995, at C7.

17. Gauged by revenues, the NFL is one of the most popular professional sports leagues in American history. In 1995, the NFL's gross revenues (including ticket sales and broadcasting revenues) topped $2 billion. MARTIN J. GREENBERG, 1 SPORTS LAW PRACTICE § 1.07(10) (Cumulative Supp. 1995) [hereinafter SPORTS LAW PRACTICE 1995]. The NFL's paid attendance reached over 18 million in 1994. *Id.* With the inclusion of Fox Sports as one of the NFL's broadcasters, the League's television revenues alone are worth more than $1.6 billion from 1993 to 1997. Barry Horn, *NFC Games Will Air on Fox Stations: Network Reportedly Gets 4-Year, $1.6 Billion Deal*, DALLAS MORNING NEWS, Dec. 18, 1993, at 1A. In 1980, that amount was only $166.5 million. NFL BACKGROUND INFORMATION (National Football League ed., 1993) (on file with the *Loyola of Los Angeles Entertainment Law Journal*). The NFL is televised in more than 60 countries. *Id.* In fact, a 1991 *Sports Illustrated* poll indicated that professional football was the most interesting sport to the American people. *Id.*

18. Gary R. Roberts, *The Evolving Confusion of Professional Sports Antitrust, the Rule of Reason, and the Doctrine of Ancillary Restraints*, 61 S. CAL. L. REV. 943, 950 (1988).

Act.[19] By 1980, however, such claims had been resoundingly defeated in court and were largely obscured by other issues.[20] This was due in part to Congress' decision to grant sports leagues a special statutory exemption from certain claims arising under section 1 of the Sherman Act.[21] Thus Congress gave what amounts to its approval of the use of certain economic anti-competition operating rules for sports leagues.

The current CBA is a product of years of antitrust claims by players against the League, culminating in one of the biggest labor-management clashes in professional sports history.[22] Years of unsuccessful effort by the NFLPA to modify or eliminate rules limiting a player's ability to move voluntarily to another team eventually led to a player strike in 1987.[23] In

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19. Sherman Antitrust Act, 15 U.S.C. § 1 (1994). Section 1 provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *Id.*

20. In 1953, a district court held that the NFL violated 15 U.S.C. § 1 by prohibiting member clubs from selling telecasting rights to their games in the home territories of other member clubs when the other member club was visiting. United States v. NFL, 116 F. Supp. 319 (E.D. Pa. 1953). Seven years later, NFL Commissioner Pete Rozelle decided to abandon the old practice of allowing each club to sell its television rights separately, and proposed instead to have the League sell a single package of the pooled rights to all NFL games. Roberts, *supra* note 18, at 951. In a subsequent lawsuit, the same district court judge ruled that pooled sales violated the terms of his 1953 ruling but did not hold that the contract violated 15 U.S.C. § 1. United States v. NFL, 196 F. Supp. 445 (E.D. Pa. 1961). Subsequently, the NFL obtained from Congress a special statutory exemption for the League's sale of pooled television rights for "sponsored telecasting." *See* 15 U.S.C. § 1291 (1982). Because of this statutory exemption, the substantive effect of the court's 1953 decision and the application of section 1 to league controls over television marketing have been largely forgotten. Roberts, *supra* note 18, at 951. For a full discussion of the League's history with the Sherman Antitrust Act, see Roberts, *supra* note 18, at 951.

21. Congress amended 15 U.S.C. § 1291 in 1996 (Act of Nov. 8, 1966, Pub. L. No. 89-800, U.S.C.C.A.N. (80 Stat.) 1515, § 6(b)(1)) specifically to authorize the NFL-AFL merger. This amendment effectively overruled the decision in United States v. NFL, 116 F. Supp. 319 (E.D. Pa. 1953).

22. Most of the challenges related to rules such as the right of first refusal/compensation components of the League's rules, the college draft, the lack of free agency, player contracts, and preseason pay rules. *See, e.g.*, Smith v. Pro Football, Inc., 593 F.2d 1173, 1183–89 (D.C. Cir. 1978) (holding that the NFL draft violates the rule of reason); Mackey v. NFL, 407 F. Supp. 1000 (D. Minn. 1975) (holding that, although not *per se* illegal, the Rozelle Rule violates the rule of reason); Kapp v. NFL, 390 F. Supp. 73, 82–83 (N.D. Cal. 1974) (holding that the NFL draft and the Rozelle Rule are not justified by the rule of reason); *see also* Brown v. Pro Football, Inc., 116 S. Ct. 2116 (1996) (holding that the League's conduct in unilaterally imposing fixed salary for developmental squad players within the CBA fell within the scope of nonstatutory labor exemption from antitrust liability).

23. *See* Bob Oates & Rich Roberts, *With No Talk of Settlement, NFL Players Taking a Walk*, L.A. TIMES, Sept. 22, 1987, at C3; *see also Strike Chronology*, DALLAS MORNING NEWS, Oct. 16, 1987, at 13B (detailing the 1987 NFL players' strike).

response, the team owners fielded replacement players ("scabs"),[24] losing millions of dollars in television and ticket sale revenues but playing the games nonetheless.[25]

Disheartened by the owners' willingness to field scab teams and thwarted by courts in their attempts at judicial relief, the players returned to work without a labor agreement.[26] From 1987 to 1993 the League operated under a unilaterally imposed set of rules that greatly limited mobility, much to the dismay of the NFLPA.[27] Further efforts by the NFLPA were defeated by a non-statutory labor exemption to the Sherman Act which was carved out by the courts in rejecting players' challenges to the League-imposed rules.[28]

In 1989, individual player antitrust challenges culminated in the Eighth Circuit Court of Appeals' decision in *Powell v. NFL*.[29] The suit was filed by NFLPA president Marvin Powell on behalf of both the NFLPA and individual players challenging virtually every element of the League's player restraint system on antitrust grounds.[30] The court held, however, that the "ongoing collective bargaining relationship" between the

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24. *See* Gary Myers, *NFL '87: It Was a Very Bad Year: Replacement Season Would Be Fitting After Strike-Torn Campaign*, DALLAS MORNING NEWS, Dec. 28, 1987, at 6B; Bob Oates, *Pro Football; The Replacement Games Are Now Looming Bigger and Bigger*, L.A. TIMES, Nov. 25, 1987, at C3.

25. *See* P.J. Bednarski, *'Replacement' Football Games Bad News for TV*, CHI. SUN-TIMES, Oct. 19, 1987, at Financial (reporting on the drastic decline in television ratings for games featuring replacement players as well as the financial losses suffered by teams and TV networks); *see also* Mark Asher & Michael Wilbon, *NFL Strikers Return, but Can't Play; Management Sets Another Weekend of Replacement Games*, WASH. POST, Oct. 16, 1987, at A1.

26. Robert A. McCormick, *Interference on Both Sides: The Case Against the NFL-NFLPA Contract*, 53 WASH. & LEE L. REV. 397, 400 (1996).

27. *Id.*

28. The Supreme Court has held that in order to properly accommodate the congressional policy favoring free competition in business markets with the congressional policy favoring collective bargaining under the National Labor Relations Act, 29 U.S.C. §§ 151–169, certain union-employer agreements must be accorded a limited nonstatutory exemption from antitrust sanctions. Connell Co. v. Plumbers & Steamfitters, 421 U.S. 616, 621–22 (1975); Meat Cutters v. Jewel Tea, 381 U.S. 676 (1965). Furthermore, restraints agreed to by players' unions and incorporated into a collective bargaining agreement negotiated in good faith and at arms length are within the nonstatutory labor exemption. *See* Roberts, *supra* note 18, at 952; *see, e.g.*, Reynolds v. NFL, 584 F.2d 280 (8th Cir. 1978) (approving the settlement and implicitly approving the collective bargaining agreement discussed in Alexander v. NFL, 1977–2 Trade Cas. (CCH) ¶ 61,730 (D. Minn. 1977)); Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976); Zimmerman v. NFL, 632 F. Supp. 398 (D.D.C. 1986).

29. 930 F.2d 1293 (8th Cir. 1989).

30. This suit challenged virtually every element of the League's player restraint system, including the college draft, the right of first refusal/compensation scheme, and the standard player contract, alleging that each provision unlawfully restrained trade in the market for players' services. *Id.* at 1295.

League and the NFLPA rendered the rules exempt from antitrust scrutiny.[31] The practical effect of the Eighth Circuit's ruling was to solidify the non-statutory antitrust exemption that the League enjoyed, further obstructing individual player challenges as long as the "ongoing collective bargaining relationship" existed.[32] To combat the effect of the non-statutory exemption, the NFLPA officially decertified itself as the players' representative in 1992, thus terminating the "ongoing collective bargaining relationship" with the NFL. This action cleared the way for individual players to bring suit.[33]

The first such suit was *McNeil v. NFL*,[34] an action similar to *Powell*.[35] In *McNeil*, eight players claimed that the League's "Right of First Refusal/Compensation Rules" under the "Plan B Rules"[36] limited the movement of football players after their contracts expired.[37] The players alleged that these restrictions constituted an agreement among the NFL and its then twenty-eight member clubs to unreasonably restrain competition for the services of professional football players, thus violating section 1 of the Sherman Antitrust Act.[38] The district court sided with the players and ruled that when not protected by the non-statutory exemption for an ongoing bargaining relationship, eradicated when the NFLPA decertified itself, the League's rules indeed violated antitrust laws.[39] Four of the eight players in the *McNeil* suit were awarded damages and each was declared an unrestricted free agent.[40]

The result in *McNeil* led defensive end Reggie White and four other players to file a similar class action suit against the NFL seeking damages

31. *Id.* at 1303.

32. McCormick, *supra* note 26, at 401.

33. *Id.* at 415.

34. 2 Trade Cas. (CCH) ¶ 69,982 (D. Minn. Sept. 10, 1992).

35. 930 F.2d 1293 (8th Cir. 1989).

36. Under this system, a player's current team could retain him when his contract expired by matching any offer made by another team. McCormick, *supra* note 26, at 403. If the current team elected not to match the offer, it was still entitled to "compensation" from the new team in the form of draft choices. *Id.* at 403–04. While the *Powell* case was pending, the NFL unilaterally implemented its "Plan B" system, an attempt to water down the existing system, presumably in recognition that the first refusal/compensation scheme was vulnerable to an antitrust attack. *Id.* at 416. "Plan B" allowed teams to "protect" 37 of their 55 players by applying the first refusal/compensation system only to those players. *Id.* The remaining players were accorded free agency status and were permitted to negotiate freely for their services. *Id.*

37. *McNeil*, 2 Trade Cas. (CCH) ¶ 69,982, at 68,769.

38. *Id.*

39. McCormick, *supra* note 26, at 402.

40. *Id.*

and free agency.[41] Cognizant of the likely result after *McNeil*, the NFL and NFLPA settled the case on February 26, 1993.[42] The settlement created a large fund from which certain players were to receive damages, provided free agency for the first time to many players, reduced the college draft, increased the minimum pay scales, and instituted a veteran and rookie salary cap system.[43] It also became the blue print for the League and NFLPA's new collective bargaining agreement, which was ratified when the NFLPA officially recertified itself as the players' representative.[44]

That agreement sets out the basic entitlements and limitations available to players and owners. Most notable among the 200 pages of "therefores" and "whereases" is the "salary cap" provision, a clause which limits the amount of money each team may spend on player salaries.[45] The NFL has benefited from the CBA in many ways, not the least of which was the end to bitter and protracted litigation involving the League and its players.[46] The security of having a CBA in place at least through the year 2000[47] provides a strong foundation for the League's expansion to new cities.[48] The CBA is responsible for creating more than 100 new jobs for players in the NFL as well as adding more than eighty million dollars annually in player salaries and benefits.[49] Additionally, the CBA is credited with aiding the development of the "World League of Professional Football," an international league of teams playing American football, which created 200 more player jobs outside the NFL.[50] The CBA

41. *See* White v. NFL, 822 F. Supp. 1389, 1395–96 (D. Minn. 1993); McCormick, *supra* note 26, at 402.

42. *White*, 822 F. Supp. at 1395.

43. *Id.* at 1412–16.

44. McCormick, *supra* note 26, at 402.

45. CBA, *supra* note 2, art. XXIV.

46. Commissioner Paul Tagliabue said, "I think everyone is relieved to put an end to protracted litigation, which is time-consuming, tedious and a diversion of energy from more constructive pursuits." Larry Weisman, *NFL, Players End Five-Year Fight; Free Agency, Salary Cap Major Issues*, USA TODAY, Jan. 7, 1993, at 1C.

47. CBA, *supra* note 2, art. LVIII, § 2. The NFL and NFLPA have recently agreed to extend the CBA, possibly as far as the year 2002. Dave Sell, *NFL Notebook*, WASH. POST, Oct. 2, 1996, at F6.

48. QUESTIONS AND ANSWERS ON THE NFL PLAYER SYSTEM (National Football League Public Relations ed., Nov. 1994), at 1 (on file with the *Loyola of Los Angeles Entertainment Law Journal*) [hereinafter QUESTIONS AND ANSWERS].

49. *Id.*

50. *Id.*

also helped the NFL secure lucrative long-term contracts with television networks for the rights to broadcast NFL games.[51]

The *White* settlement and resulting CBA was heralded as "radically alter[ing] the NFL's system of player restraints and provid[ing] unprecedented free agency to NFL players."[52] The players gained the free agency for which they had fought for many years. The owners, on the other hand, were able to implement a salary cap, a mechanism whereby each team could control player costs.

B. The "X's and O's" of the Salary Cap

Giving players free agency in 1993 meant, for some, the opportunity for increased salaries.[53] The League and players recognized that in a system with unrestricted free agency, teams with greater revenue potential would consistently outbid less affluent teams for talented players. Accordingly, a "hard" salary cap[54] was thought necessary to protect the competitive balance.[55] The CBA therefore included two distinct mechanisms limiting the amount of money teams could spend on player salaries and benefits, and a third mechanism to enforce the salary cap. Each works hand-in-hand with the system of restraining player movement in an effort to decrease the economic advantage enjoyed by some teams.

1. Article XXIV: Guaranteed League-Wide Salary, Salary Cap and Minimum Team Salary

Article XXIV creates a league-wide salary system that includes a minimum and maximum amount teams may spend on player salaries and benefits.[56] In effect, it divides up the NFL pie, determining how much of

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51. *Id.* In December 1993, Fox Television Network paid the NFL $1.58 billion for the rights to televise NFC games for four years, while NBC agreed to pay $880 million per year to broadcast AFC games. Jerry Magee, *Fox Will Be Feather in the NFL's New Salary Cap*, SAN DIEGO UNION-TRIB., Dec. 22, 1993, at D1.

52. *White*, 822 F. Supp. at 1396.

53. Larry Weisman, *Free Agency Drives Players' Salaries Up*, USA TODAY, Sept. 29, 1995, at 6C.

54. A "hard" salary cap prescribes an absolute ceiling on the amount of money a team can pay out in all player costs, whether signing new players or resigning current ones, and a team may not exceed this amount, supposedly, under any circumstance. A "soft" salary cap, by contrast, allows the team to exceed the cap amount when resigning their own players. *See* Alan M. Levine, *Hard Cap or Soft Cap: The Optimal Player Mobility Restrictions for the Professional Sports Leagues*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 243, 246 (1995).

55. QUESTIONS AND ANSWERS, *supra* note 48, at 2.

56. CBA, *supra* note 2, art. XXIV. Player salaries include base salaries, all bonuses, and deferred compensation. *Id.* art. XXIV, § 1(c). Benefits can include pension funding, group

the League's defined gross revenues ("DGR") will be spent on all player costs in a given season.[57] The DGR is calculated by adding the revenue generated League-wide from ticket sales and broadcast rights to NFL games.[58]

Although the CBA was in effect for the 1993 season,[59] the salary cap and minimum salary provisions were specifically excluded from operation during that season.[60] Instead, the parties anticipated activation of those provisions only if the aggregate amount spent by all teams on player costs in a given season equaled or surpassed sixty-seven percent of the DGR.[61] However, with the possibility of a cap looming, the uncapped year of 1993 saw massive spending on free agents.[62] Teams spent an incredible seventy percent of the DGR on player costs.[63] Thus, 1994 became the first "capped" season.[64]

The actual amount of the cap is determined as an agreed-upon percentage of the DGR.[65] The cap amount is determined by projecting the DGR for a given season (based on the DGR for the previous season), subtracting therefrom the projected amount to be spent League-wide on player benefits, multiplying that number by the agreed-upon percentage, and dividing the result by the number of teams playing in the League that year.[66] For example, the projected DGR for 1994 was $1.7 billion.[67] The agreed-upon number in the CBA for the first year during which the cap was in effect was sixty-four percent of the DGR.[68] With twenty-eight NFL teams that season, the aggregate amount allocated for player salaries and benefits was a little more than $1.09 billion, or about $39 million per club ($34.6 million for salaries, $4.4 million for benefits).[69] In 1995, the CBA allowed teams to spend only sixty-three percent of the DGR on player

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insurance programs, injury protection, workers compensation, per diem amounts, moving and travel expenses, post-season pay, medical costs, and severance pay. *Id.* art. XXIV, § 1(b).

57. *Id.* art. XXIV, § 1(a).

58. *Id.*

59. *Id.* art. LVIII, § 1.

60. *Id.* art. XXIV, § 2.

61. *Id.*

62. *See* Brian E. Dickerson, *The Evolution of Free Agency in the National Football League: Unilateral and Collective Bargaining Restrictiveness*, 3 SPORTS LAW. J. 165, 184 (Spr. 1996).

63. *Id.*

64. *See* Magee, *supra* note 51, at D1.

65. CBA, *supra* note 2, art. XXIV, § 4(a).

66. *Id.*

67. SPORTS LAW PRACTICE 1995, *supra* note 17, § 1.07(10), at 78.

68. CBA, *supra* note 2, art. XXIV, § 4(a)(1).

69. SPORTS LAW PRACTICE 1995, *supra* note 17, § 1.07(10), at 78.

CBA will be the greater of (1) $2 million per team; (2) 3.5% of the DGR; or (3) the amount of the previous year's rookie cap.[81] The CBA further restricts the salary potential of new players by limiting salary increases to twenty-five percent of the first-year salary, exclusive of bonus amounts,[82] and prohibiting renegotiation of new player contracts for one year following the initial signing.[83]

3. Article XXV: Enforcement of the Salary Cap and Entering Player Pool

The possibility that teams would find ways to circumvent the salary cap was not unforeseen by the parties who drafted these provisions. The CBA contains a separate article specifically governing the enforcement of the salary cap and entering player pool restrictions, addressing circumvention as well.[84] In general, article XXV (1) prohibits teams from entering into contracts with undisclosed terms or unreported payments[85] (2) states the understanding that teams not enter contracts with players designed to defeat the purposes of the parties;[86] and (3) establishes a mechanism to review and punish such transgressions.[87]

Perhaps the most intriguing section of this article is the second section anticipating possible attempts to circumvent the salary cap. The Circumvention Clause[88] prohibits teams from entering into player contracts with "terms that are designed to serve the purpose of defeating or circumventing the intention of the parties as reflected by (a) the provisions . . . with respect to [DGR], Salary Cap, Entering Player Pool, and Minimum Team Salary, and (b) any other term or provision of [the] Agreement."[89] Furthermore, the same paragraph states that "any conduct permitted by [the] Agreement shall not be considered to be a violation of this provision."[90]

At first glance, the section seems logical. The teams agreed not to circumvent the salary cap, and it is not circumvented if the rules allow the

81. CBA, *supra* note 2, art. XVII, § 3(a).
82. *Id.* art. XVII, § 4(e).
83. *Id.* art. XVII, § 4(f).
84. *Id.* art. XXV.
85. *Id.* art. XXV, § 1.
86. *Id.* art. XXV, § 2.
87. CBA, *supra* note 2, art. XXV, §§ 3–7.
88. *Id.* art. XXV, § 2.
89. *Id.*
90. *Id.*

costs.[70] That year, the DGR rose to more than $2 billion, creating a cap of approximately $42 million ($37.1 million for salaries and $4.9 million for benefits) for the League's expanded slate of thirty teams.[71]

In a season during which the salary cap is in effect, the CBA also provides a guaranteed League-wide minimum salary of at least fifty-eight percent of the actual DGR.[72] More precisely, the players, in the aggregate, must receive at least fifty-eight percent of the NFL revenue pie. In addition, the CBA provides that each team must pay not less than fifty percent of the projected DGR (less projected benefits) in a capped year.[73] This provision creates a minimum amount that teams must spend in player costs. The practical effect of this requirement is to force the teams that historically have paid lower salaries to pay higher individual salaries and maintain higher team salaries.[74]

2. Article XVII: Entering Player Pool

A second salary-limiting mechanism created by the CBA is the "Entering Player Pool," or rookie salary cap.[75] The rookie salary cap is a League-wide limit on the amount of money teams can spend to sign drafted and undrafted rookies in a given year.[76] The amount is determined by the CBA and is also included in the total amount available for player costs under the salary cap provision of Article XXIV.[77]

Unlike the League-wide salary cap, the rookie salary cap provision went into effect for the 1993 season.[78] That year the teams could spend no more than $2 million each to sign entering players.[79] Unless the rookie cap is abolished by the League,[80] the amount in the remaining years of the

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70. CBA, *supra* note 2, art. XXIV, § 4(a)(2).

71. SPORTS LAW PRACTICE 1995, *supra* note 17, § 1.07(10), at 78. The League expanded to 30 teams in 1995. 1996 RECORD & FACT BOOK, *supra* note 1, at 275.

72. CBA, *supra* note 2, art. XXIV, § 3.

73. *Id.* art. XXIV, § 5(a).

74. Gene Upshaw, responding to criticism of CBA's salary system, stated, "We designed this system to force historically cheap teams such as Cincinnati, Tampa Bay, New England, Pittsburgh and Seattle to spend more on veteran players . . . ." Upshaw, *supra* note 5, at C15.

75. CBA, *supra* note 2, art. XVII.

76. *Id.* art. XVII, § 1(a).

77. *Id.* art. XXIV, § 1(c)(i).

78. *Id.* art. XVII, § 2.

79. *Id.* art. XVII, § 3(a).

80. The NFL may remove the Entering Player Pool at its option in any capped or uncapped year upon 60 days notice to the NFLPA prior to the draft date. *Id.* art. XVII, § 2. Additionally, in a capped year, if a club spends more than the amount allocated to rookies that year, it must pay an equal amount to its veteran players. *Id.*

conduct. However, this section may be a mere tautology, as the two clauses may operate to cancel one another. The first clause is aimed at the state of mind of a team[91] when it enters into a contract, prohibiting conduct undertaken with the "purpose" of avoiding the intention of the parties to the CBA. The second clause, however, disregards state of mind and holds not voidable any conduct allowed by the terms and provisions of the CBA. The problem is that a contract can follow the terms and provisions of the CBA, yet still have been motivated by the goal of circumventing the spirit, or intent, of the salary cap.

Ironically, applying this section to conduct that is technically permitted but effectively circumvents the salary cap means that little "enforcement" power actually exists. Indeed, by attempting to avoid the possibility that teams would seek to circumvent the cap, the parties may have provided impunity for the teams who do. Therefore, it is not surprising that a phrase as amorphous and uncertain as "the spirit of the salary cap" has been used to define alleged violations. As will be discussed in this comment, the conduct that has become the basis for claiming the "spirit" of the CBA has been violated is arguably the product of this section.

4. Extension of the CBA

Recently, the NFL and NFLPA agreed to a two-year extension of the CBA with an option for another two years.[92] The extension received near unanimous approval from both the teams[93] and the NFLPA,[94] likely because each considers the CBA vital to preserving the growing popularity of the NFL.[95] Equally important to players and teams, the DGR percentage was raised from sixty-two percent in 1996, the third year of the

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91. The "state of mind" of a team refers to that of the team's owner (or other person or persons responsible for making the team's salary and player decisions) when negotiating contracts with players and planning for the team's salary cap commitments.

92. Len Pasquarelli, *NFL Labor Extension Is Reached; Tentative Agreement Needs Approval of Owners, Union*, ATLANTA J. & CONST., Dec. 20, 1995, at C1.

93. The teams approved the extension by a vote of 25 to 5. Ed Werder, *Owners Agree to '99 Salary Cap, Jones Says Extension of Bargaining Agreement Important*, DALLAS MORNING NEWS, Feb. 10, 1996, at 7B. Even over-extended owners such as Jerry Jones agreed it was "in the best interests of the NFL . . . to extend the labor agreement . . . ." *Id.*

94. NFLPA President Gene Upshaw stated, "We were trying to provide the league with the tools it needed to get the job done [in negotiations with TV networks] and the extension is one of those tools." Sell, *supra* note 47, at F6.

95. *See id.*; *see also* Werder, *supra* note 93, at 7B, reporting that the NFL considers the extension of the CBA a "pivotal component in maintaining the strength of the league . . . substantially improv[ing] the NFL's leverage in negotiating long-term television contract after the 1997 season."

cap,[96] to sixty-three for each year until 2000.[97] The new agreement has the possibility of extending the CBA as far as the year 2002, although each side has the option of canceling the deal in December of either 1997 or 1998.[98]

Perhaps the most interesting development of the new agreement is that the 1999 season will no longer be "uncapped" as originally planned, forcing teams to re-work contracts that commit large salaries and bonuses to players that season.[99] Forty-Niner president Carmen Policy commented that teams who were planning on paying out huge amounts in 1999 were treating that year as a "toxic dump site."[100] Accordingly, these "dump sites" will have to be cleaned up.

C. Intent, Purposes, and Goals

It is evident from the provisions of the *White* settlement that were ultimately incorporated into the CBA that the players and owners had distinct and even conflicting reasons for entering into the CBA. The stated purpose of the salary cap and player restraint system in the CBA was to "strike a fair and reasonable balance between the interests of the players, clubs, and fans."[101] The players wanted a larger piece of the NFL revenue pie, which they gained by increasing the minimum salaries and the percentage of the League's total revenues allotted to player costs.[102] In addition, the players gained increased freedom to choose a team through the institution of free agency.[103] The owners, on the other hand, sought a level playing field that would enable all clubs to "compete effectively for players and ensure some continuity."[104] The owners sought to strike a

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96. CBA, *supra* note 2, art. XXIV, § 4(a)(3).

97. Pasquarelli, *supra* note 92, at 1C.

98. Sell, *supra* note 47, at F6.

99. Pasquarelli, *supra* note 92, at 1C.

100. Werder, *supra* note 93, at 7B. The Dallas Cowboys, for example, have a League-leading $33.65 million committed to seven players in 1999. *Id.* Almost $17 million of the Cowboys' "toxic waste" is dedicated to quarterback Troy Aikman and cornerback/wide receiver Deion Sanders alone. *Id.*

101. QUESTIONS AND ANSWERS, *supra* note 48, at 1.

102. Under the 1993 CBA, NFL players were scheduled to receive at least 58% of the League's DGR. CBA, *supra* note 2, art. XXIV, § 3. Players received 63% in 1994 and 1995, and will receive as much as 64% under the terms of the new extension. Pasquarelli, *supra* note 92, at C1. By comparison, Major League Baseball players receive only 52% of its League's revenues, and National Basketball Association players receive only 53%. Upshaw, *supra* note 5, at C15.

103. QUESTIONS AND ANSWERS, *supra* note 48, at 1.

104. *Id.*

"competitive balance" between the teams, both athletically and economically.[105]

Indeed, it was thought that a salary cap would allow all clubs to compete "on a level financial playing field with equal opportunities to build a winning team."[106] Team owners thought a cap would "control costs" and halt "escalating salaries."[107] Although not officially represented in the negotiations but an important component nonetheless, the concern on behalf of the fans was to provide "high quality competition, close games, and exciting divisional races."[108]

The salary cap was thought to be the mechanism to accomplish these goals, and was therefore one of the most sought-after provisions by team owners during the settlement negotiations.[109] The salary cap was so important that the owners were willing to give the players free agency for the first time in order to get it.[110] However, clubs would not have agreed to such a radical change without a system that also protected competitive balance.[111] The idea was that if each team was allowed to spend only a defined, financially feasible amount, the less profitable teams would be able to compete with the more profitable teams for the best players.

In sum, the purpose of the salary cap, from the owners' perspective, was three-fold: (1) increase on-field competition; (2) decrease the off-field economic advantage enjoyed by large revenue-producing teams; and (3) create a product that would grow in popularity and ensure the long term viability of the game.[112]

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105. *Id.* at 2. In fact, even before the institution of the salary cap, the League was defending its unilaterally imposed operating procedures and player restraint system from antitrust attacks on the grounds that they were necessary to maintain this competitive balance. *See* McNeil, 1992-2 Trade Cas. ¶ 69,982, at 68,770.

> According to defendants, competitive balance means that all of the NFL teams are of sufficiently comparable playing strength to provide competitive and high quality games that are close, exciting and well-played, and thus interesting to the fans. Defendants claim that the challenged Plan B rules, in conjunction with other NFL rules, strengthen the appeal of the NFL's football product; otherwise, a less attractive NFL product would cause fans to lose interest in watching NFL football, and as a result, the revenues generated by live attendance and television rights fees would decline.

Id.

106. QUESTIONS AND ANSWERS, *supra* note 48, at 2.

107. Jeff Legwold, *In NFL, It Sometimes Doesn't Pay to Stay*, TENNESSEAN, Nov. 12, 1995, at 7C.

108. QUESTIONS AND ANSWERS, *supra* note 48, at 1.

109. Legwold, *supra* note 107, at 7C.

110. *Id.*

111. QUESTIONS AND ANSWERS, *supra* note 48, at 1.

112. Legwold, *supra* note 107, at 7C.

These lofty goals were undoubtedly inspired in part by the long-standing notion that teams from "large football markets" such as New York, Chicago, Los Angeles, Dallas, and San Francisco had a competitive advantage when it came to generating revenue and attracting players.[113] Originally, the teams located in these highly populated areas had a larger potential fan base, possibly leading to more revenue from ticket sales and television rights.[114] In a free market for player services, the effect of such an economic advantage is that the best players would always go to the most affluent teams. As a result, these teams would consistently beat the "small market teams" on and off the field. To some degree, this theory held true for many years as the largest source of team revenue was television rights to home games, sold by each club individually.[115] When the NFL pooled its sales of television rights and began dividing the revenues equally among each franchise, the problem of the disparate distribution of these revenues seemed to be alleviated.[116] The NFL's revenue sharing policy that distributes the income generated from ticket sales and NFL licensed films and merchandise has helped to minimize the revenue generating incongruity among teams.[117]

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113. Sportswriter Jim Souhan, discussing the effects of free agency without a cap on salaries, adeptly recognized that "[t]he combined weight of all the star players flocking to [teams in] California and New York would topple those states into the sea . . . . The New York (large-market) Giants would beat the Green Bay (small-market) Packers the way the U.S. basketball team beat Cuba." Jim Souhan, *Players Appear to Hold Big Lead in Trial with NFL*, STAR-TRIB. (Minneapolis-St. Paul), June 30, 1992, at 1C.

114. Determining a team's fan base is unpredictable. It is a function of many factors, including the city's population, the current roster of players, the owner, team marketing, and perhaps most importantly, the team's on-field success. For example, despite the fact that Los Angeles is one of the largest cities by population, the Raiders' fickle fan base was often described as "modest to low;" 90,000 could be expected to show up for a playoff game, but less than 30,000 might show up to see a game against the Tampa Bay Buccaneers. Jim Murray, *Al Proves Them Wrong: You Can Go Home Again*, L.A. TIMES, June 25, 1995, at C1.

115. The League's television revenues totaled $1.08 billion in 1995, with each team receiving $38.6 million, and $1.14 billion in 1996, with each team receiving $40.7 million. *Prepared Statement of Paul Tagliabue Comm'r of the Nat'l Football League Before the Senate Comm. on the Judiciary, Tuesday, January 23, 1996*, Fed. News Serv. Cong. Hearing Testimonies, 1996 WL 735236 (Jan. 23, 1996).

116. Green Bay Packers President Bob Harlan said, "The Packers are competitive . . . because of revenue sharing," referring to the fact that 63% of the teams' income is from the TV money shared by the League members. Bruce Adams, *The NFL Team of the People; There Are Large-Market Teams, Small-Market Teams, and There Are the Green Bay Packers, a Throwback to the 1920s*, STAR-TRIB. (Minneapolis-St. Paul), Oct. 20, 1996, at 11C.

117. *See* Pete Dougherty, *Packers Want Luxury Revenue Sharing*, GANNETT NEWS SER., Feb. 14, 1996; Curt Brown, *For Love of Money; Jones Irks Others with Side Deals*, STAR-TRIB. (Minneapolis-St. Paul), Sept. 13, 1995, at 1C. Revenue sharing has been credited with leading to "roughly even prosperity for most clubs." Bob Oates, *NFL Loses Architect; He Made Football Modern*, L.A. TIMES, Dec. 7, 1996, at C1.

Today, the distinction between large and small market teams with regard to revenue generating potential seems less indicative of on-field success. "Small market teams" are no longer necessarily at a disadvantage, and market size plays a decreasing role in determining a team's potential to generate revenue.[118] The San Diego Chargers, Kansas City Chiefs, and the Green Bay Packers, for example, are considered small market franchises (at least in comparison to teams in Los Angeles or New York) but each has enjoyed historic and recent on-field success.[119] Meanwhile, the largest market by population, New York, has produced two of the League's poorest performing teams over the past few seasons.[120] The second largest market, Los Angeles, does not currently have an NFL team, and the League has no immediate plans to expand or relocate there.[121]

Other competitive disparities exist that are not attributable solely to market size. The on-field success of a team and its resulting popularity, regardless of the size of the team's market, may give some teams an advantage in attracting and retaining the best players.[122] Players may actually accept less money than they could get elsewhere to stay with or go to a winning team, a team located in a large city, or a team with a respected owner.[123] The cumulative effect of years of on-field success in a

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118. One reason the "large-market" theory may no longer hold true is because the on-field success of the Cowboys and Forty-Niners may itself be responsible for making Dallas and San Francisco into "large football markets," rather than the market size leading to their success.

119. The Chargers appeared in Super Bowl XXVIII and have a respectable record of 20-12 over the past two seasons. 1996 RECORD & FACT BOOK, *supra* note 1, at 254. The Chiefs played in two Super Bowls, winning one, and in three AFL Championships (one as the "Dallas Texans"), winning each. *Id.* at 325, 332. The Chiefs had a regular season record of 22-10 between 1994–95 and 1995–1996. *Id.* at 253. The Packers are perhaps the most successful "small-market" team in history, winning the first two Super Bowls and eight of the nine NFL Championship games in which they played from 1936 to 1969. *Id.* at 325, 333. In the 1996 playoffs, the Packers defeated the defending Super Bowl Champion Forty-Niners en route to the NFC Championship game, and also won Super Bowl XXXI in 1997. *Id.* at 334; Bob Oates, *Super Bowl: Green Bay Packers 35, New England 21*, L.A. TIMES, Jan. 27, 1997, at S3.

120. The New York Giants were 39-41 between 1991 and 1996, while the New York Jets' record was even worse at 29-51. 1996 RECORD & FACT BOOK, *supra* note 1, at 253–56.

121. T.J. Simers, *Los Angeles Officials Walk Right into League's Trap*, L.A. TIMES, Nov. 2, 1996, at C6.

122. For example, the Dallas Cowboys lured Deion Sanders away from the defending Super Bowl champion San Francisco Forty-Niners in 1995 with a signing bonus of nearly $13 million. Bill Plaschke, *Sanders Joins Cowboys for a Prime $25 Million*, L.A. Times, Sept. 10, 1995, at C1.

123. In signing with the Forty-Niners in 1994, Sanders rejected a higher paying offer from the New Orleans Saints in favor of a better chance at a Super Bowl title, the ability to continue his professional baseball career, and the higher visibility of the San Francisco sports market.

system without a salary limitation has helped some teams offer consistently higher salaries.[124] Arguably, teams such as the Dallas Cowboys and San Francisco Forty-Niners can partially attribute their successes on and off the field to the enormous amounts of money they spend on player salaries, made possible by their unmatched revenue generating potential.[125]

Just as the market size distinction is less indicative of on-filed success, it is equally unsettled that the more a team spends on player salaries, the better the team will perform. For example, the Oakland/Los Angeles Raiders, the Miami Dolphins, and the Cleveland Browns/Baltimore Ravens each have spent liberally on players over the past few years with little on-field success to show for it.[126] On the other hand, one of the League's newest franchises, the Carolina Panthers, followed the example set by the Cowboys and Forty-Niners, spent liberally

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Peter Finney, *49ers Mortgage Future for Present*, TIMES-PICAYUNE (New Orleans), Sept. 23, 1994, at D1.

124. According to the NFLPA, the San Francisco Forty-Niners had a payroll (including salaries and bonuses) of more than $44 million in 1993, more than $34 million in 1994, and more than $38 million in 1995. *See* Ira Miller, *NFL's No-Cap Salary Cap: Most Teams Exceed Limit*, S.F. CHRON., Jan. 1, 1996, at B1; David Aldridge, *What Cap? Redskins Have Top Payroll: $42.6 Million*, WASH. POST, Sept. 22, 1994, at B1; Jack Brennan, *Rebuilding the Bengals*, CIN. ENQUIRER, Dec. 26, 1993, at C1. During this time, the Forty-Niners added Pro Bowl veterans Ricky Jackson, Richard Dent, Ken Norton, Jr., and Deion Sanders. *See* Rick Gosselin, *Prevent Defense: Points, Room to Run Are Scarce Against 49ers' Top-Rated Unit*, DALLAS MORNING NEWS, Nov. 8, 1995, at 14B.

125. On-field success is demonstrated by the teams' records between 1993 and 1996. Forty-Niners: 34-14, one Super Bowl win; Cowboys: 36-12, three Super Bowl wins. 1996 RECORD & FACT BOOK, *supra* note 1, at 255–57, 325. Part of this success must be credited to their ability to attract and pay for the highest priced and most talented players. The Cowboys and Forty-Niners each have had a disproportionate number of players selected to the NFC's Pro Bowl team over the past three seasons. In 1996–97, the Cowboys led the League with nine selections, while the Forty-Niners had four. *See* Dave Goldberg, *Again, the Pro Bowl Balloting Is by Rote*, L.A. TIMES, Dec. 22, 1996, at C2. In 1995–96, seven Cowboys were selected, along with ten Forty-Niners. *See* 1996 RECORD & FACT BOOK, *supra* note 1, at 340. In 1994–95, the Cowboys led the League with eleven selections, while the Forty-Niners were second with nine. *AFC No Pro Bowl Pushover*, HOUSTON POST, Feb. 5, 1995, at B3. The off-field success of these teams is demonstrated by the value of each franchise in 1996, with the Cowboys valued as the most valuable sports franchise in the world at $272 million, and the Forty-Niners at nearly $200 million, fourth in the NFL. *See* Michael K. Ozanian & Pablo Galarza, *How to Buy a Sports Team*, FIN. WORLD, May 20, 1996, at 53.

126. At one point, the Raiders had on their roster three Heisman Trophy winners: Marcus Allen, Bo Jackson, and Tim Brown. *See* Chris Dufresne, *Raiders Get an 'A' for Plan B Pickups*, L.A. TIMES, Dec. 21, 1990, at C1. Despite exceptional talent, the Raiders have had only four winning seasons in the past 10 years. 1996 RECORD & FACT BOOK, *supra* note 1, at 253. Likewise, the Browns/Ravens had the seventh largest payroll in 1995, doled out the second most in bonuses, but finished 5-11 and failed to make the playoffs. Miller, *supra* note 124, at B1. The Dolphins had the sixth largest payroll in 1995, shelled out more than $20 million in bonuses, but finished 9-7 and failed to advance past the first round of the playoffs. *Id.*

on draft choices and veteran free agents, and won its division in only its second season.[127]

If this trend were allowed to continue, the NFL would be dominated by a few popular teams, with fans perhaps losing interest in their local, but noncompetitive, franchises. The same teams winning every year, as well as the lack of interesting rivalries, would likely lead to an aggregate decline in fan support and eventually the demise of the League itself. To avoid such a fate, the owners devised the salary cap, hoping to stop the more affluent teams from consistently outbidding less affluent teams for the best and highest priced players, thereby increasing on-field competition.[128] Cap proponents theorized that, as a result of the increase in competition, the popularity of the League and individual teams would increase as well.[129]

Regardless of whether the most important factor is market size or the amount of money spent on players, the teams and the NFLPA have sought to create a competitive balance, increase on-field competition, and off-field economic equality by agreeing to the salary cap as part of the *White* settlement and CBA in 1993.[130] Ironically, teams have since found creative ways to circumvent the very mechanism they so desperately sought. As a result, the practices used by teams to circumvent the cap may further diminish the possibility of league-wide economic and athletic parity.

D. Cap Circumvention Techniques: Personal Fouls

Three techniques to circumvent the salary cap are widely used and regularly criticized. The first technique is the practice of paying players large signing bonuses and either prorating the entire bonus amount against the cap over the life of the contract or deferring payment of the bonus, along with cap liability, until later years. Related to the signing bonus

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127. *See* Richard Justice, *Panthers, Jaguars Draft Plans, Expand to Playoffs; Carolina's Success is Timeless*, WASH. POST, Jan. 1, 1997.

128. NFL spokesman Greg Aiello said "[t]he idea is to have a level playing field, and from there, let [the] talent settle things . . . ." Babineau, *supra* note 5, at C13.

129. *See* QUESTIONS AND ANSWERS, *supra* note 48; *see also* David Rothstein, *The Salary Cap: A Legal Analysis of and Practical Suggestions for Collective Bargaining in Professional Basketball*, 11 U. MIAMI ENT. & SPORTS L. REV. 251, 275 (1994).

130. NFL spokesman Greg Aiello said,

> The cap will create a level playing field for all the clubs . . . . We don't want every team in our league to finish 8-8 . . . [but] [w]e're looking to create a balance that gives all the teams the equal opportunity to compete. We don't want perpetual winners and losers because of . . . [the] system.

Babineau, *supra* note 5, at C13.

problems, and perhaps largely responsible for their inequitable use, is the accusation that "renegade" team owners use unfair tactics to increase their own non-shared profits at the expense of the rest of the League and its DGR. The second dubious technique is the practice of prorating signing bonuses over extended contracts that include "voidable years," or seasons not expected to be played by the player. The third technique involves manipulating player rosters during the pre-season roster cuts to keep veterans and rookies. A fourth technique, only alleged to be practiced, involves the funneling of money to players through corporate sponsors.

1. Signing Bonuses

The most widely used technique to circumvent the salary cap is to offer large signing bonuses to players. The bonus is prorated over the life of the contract for salary cap purposes.[131] In other words, the total bonus amount is divided by the number of years in the player's contract and, under the terms of the CBA, only the prorated amount is applied toward a given year's salary cap calculation.[132] For example, in 1994 the Washington Redskins gave rookie quarterback Heath Shuler an eight-year, $19.25 million contract that included a $5 million signing bonus.[133] The actual salary counted against the team's 1994 cap, however, was only $1.57 million, rather than the close to $6 million actually paid out by the Patriots.[134] Other deals are structured so as to count the largest portion of the up-front bonus in the final years of the contract. Deion Sanders' 1995 contract with the Dallas Cowboys, for example, deferred most of his $13 million signing bonus to 1999.[135]

A player is enticed by the large amount of up-front money because the bonus will provide financial security should he suffer a career ending injury or a decline in skills before reaping the rewards of a lucrative but long-term contract. Quarterbacks Bernie Kosar and Randall Cunningham are examples of players with declining skills who benefited from signing bonuses. Each player signed a contract with a $3 million bonus in 1989,[136] an amount neither one would likely earn if he negotiated with a team

131. *See, e.g.*, Ozanian & Galarza, *supra* note 125, at 64.

132. CBA, *supra* note 2, art. XXIV, § 7(b)(i).

133. *Switzer, Johnson Feud Irks Cowboy Players*, PITT. POST-GAZETTE, Sept. 23, 1994, at B6.

134. This figure represents a base salary of $945,000 plus $625,000 as a pro rata portion of the bonus. *Id.*

135. Ozanian & Galarza, *supra* note 125, at 64.

136. MARTIN J. GREENBERG, 1 SPORTS LAW PRACTICE § 1.07(10) (1993), at 324. [hereinafter SPORTS LAW PRACTICE (1993)].

today.[137] Even owners are skeptical of the effectiveness of bonuses, recognizing that they may mortgage the future of the franchise.[138] However, most teams are willing to take the risk. In 1995, twenty-five teams spent more than the $37.1 million cap when bonuses were counted in full, an average of approximately $42 million league-wide.[139] The Dallas Cowboys spent $40 million in bonuses alone in 1995.[140]

The San Francisco Forty-Niners may have started this "gold rush" in 1994 with the highly publicized signing of Deion Sanders.[141] Although the basic deal was a $1.134 million salary, incentives could have increased the deal to $2 million.[142] The "hidden" part of the deal, complained other owners, was an option year worth an extra $5 million: a $3 million bonus and a $2 million second year salary.[143] When questioned whether having $5 million committed to one player for a possible second year threatened the stability of the franchise, the Forty-Niners responded, "we'll cross that bridge when we come to it."[144]

In the end, the Forty-Niners signed Sanders, who in turn helped the team win its fifth Super Bowl title.[145] New Orleans Saints owner Tom Benson, who had offered Sanders $17.1 million over four years said, "This is a farce. The New Orleans Saints live by the book, and everyone else should live by the book, including the San Francisco 49ers."[146] Saints executive vice president Jim Miller added that "[t]he whole thing smells," but also recognized that he was not sure if it was a "matter of the 49ers not disclosing the entire deal or the mechanics of the salary cap failing us."[147] Perhaps the latter was closer to the truth. Forty-Niner president Carmen Policy argued that what his team did was legal and that "[e]very team

137. In 1996, Cunningham was not even on a NFL roster, having been released by the Philadelphia Eagles after the 1995–96 season. *Cunningham to Announce Retirement*, L.A. TIMES, Aug. 30, 1996, at C8. Kosar, on the other hand, was demoted to third-string quarterback in 1996 with the Miami Dolphins. Jonathan Curiel, *NFL Notes; Falcons Extend QB's Suspension, Dolphins Tab Erickson as Starter*, S.F. CHRON., Oct. 1, 1996, at E3.

138. *See* Ed Werder, *49ers May Fall out of Deion Race; Policy: Cowboys Set to Mortgage Future*, DALLAS MORNING NEWS, Aug. 20, 1995, at 1B; Finney, *supra* note 123, at D1.

139. Ozanian & Galarza, *supra* note 125, at 64.

140. *Id.*

141. Finney, *supra* note 138, at D1.

142. *Id.*

143. *Id.*

144. *Id.*

145. 1996 RECORD & FACT BOOK, *supra* note 1, at 326.

146. Finney, *supra* note 138, at D1.

147. *Id.*

could have done what [the Forty-Niners] did. There are 10 to 12 teams deferring more cap money to the future than we are."[148]

When teams are allowed to pay players large signing bonuses without having to count it against the salary cap that year, the purpose behind limiting teams' spending with a salary cap is rendered nugatory. Affluent teams are still at an advantage in attracting talent because they can offer the largest bonuses to players. In some instances, teams have promised a large bonus to a player and then paid him the league minimum over the life of the contract, planning to defer the actual payment of some or all of the bonus to later, uncapped years.[149] In other words, the player receives the security of a lump sum payment in the future, enticing him to sign with the team, but the bonus is not counted against the cap until later. Ideally, the player is traded before the season in which his bonus would count against the cap, as long as another team is willing and able to assume that cap liability.

For example, in 1995, Deion Sanders signed a $35 million contract with the Dallas Cowboys that included a $13 million signing bonus.[150] The deal included Sanders making the league minimum for third year players, $178,000, each year for three years.[151] It was thought that the Cowboys would defer approximately $16 million remaining on the deal, as well as a $6 million bonus, to 1999 (presumed at the time to be an uncapped year). Alternatively, Sanders could exercise his option to leave, taking his salary cap baggage with him after three seasons, effectively beating the system.[152] The underlying assumption was that many teams would be willing to devote that much cap space to a player of Sanders' caliber.[153]

The League intervened, however, and required a contract modification that would charge the Cowboys $6.2 million against the cap

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148. *Id.*

149. The Dallas Cowboys and San Francisco Forty-Niners have used this method to circumvent the salary cap, extending contracts and deferring payments until 1999, the year they expected to be uncapped. Denne H. Freeman, *Deion on the Defensive; Cowboys Say Ankle Injury a 'Non-Issue,'* ARIZ. REPUBLIC, Sept. 12, 1995, at C1.

150. Will McDonough, *Cowboys off the Hook, NFL Sidesteps Court Battle over Sanders*, BOSTON GLOBE, Nov. 2, 1995, at 79.

151. *Id.*

152. *Id.*

153. Sanders was the 1994 NFL Defensive Player of the Year and has been selected to five Pro Bowls in his eight seasons (one as a Dallas Cowboy, one as a San Francisco Forty-Niner, and three as an Atlanta Falcon). Goldberg, *supra* note 125, at C2; Steve Rushin, *Catch-21 (Deion Sanders)*, SPORTS ILLUSTRATED, July 31, 1995, at 54; Ira Miller, *Sanders Will Sign With 49ers One-Year, $1 Million Deal and Will Be in Uniform for Sunday's Game at Los Angeles*, FRESNO BEE, Sept. 15, 1994, at D1.

if Sanders was released in 1998.[154] Additionally, the Cowboys were charged another $411,000 against each year's cap.[155] Although the action taken by the League was a step in the right direction, many thought the required modification was insufficient.[156] To prevent these actions in the future, the League and the NFLPA agreed that in cases where there is a substantial disparity between the signing bonus and the player's salary, a formula will be used to limit the application of the signing bonuses to uncapped years.[157] This problem has also been partially addressed by the League and NFLPA's agreement to extend the CBA through the year 2000, and to apply the salary cap to the 1999 season.[158] However, teams that relied on unfettered spending during that season will be forced to restructure many deals.

The League's main problem with large bonuses is that, despite pooled television, stadium, and merchandise revenues, some teams still have greater opportunities to make money than others.[159] The Sanders/Cowboys deal, for example, was made possible largely by cash paid to Jones from side deals with Nike, Pepsi, and American Express (a combined total of $57.5 million over ten years) to sponsor Texas Stadium (the Cowboys home field), also owned by Jones.[160] Carmen Policy, Forty-Niners' president, voiced his concerns about the situation, saying, "[w]hen you're talking about the salary cap, cash is king. Left unchecked, his (Jones') actions will not only put the salary cap out of control but will let the competitive balance get out of control."[161]

These side deals increased the ability of Jones and the Cowboys to pay bonuses to players, more than $40 million in 1995 alone.[162] Other team owners who do not own their stadiums simply lack this opportunity.[163] Stadium revenues from luxury suites, sponsorship, parking

154. McDonough, *supra* note 150, at 79.

155. *Id.*

156. *Id.*

157. *Id.*

158. Pasquarelli, *supra* note 92, at C1.

159. Sports writer John Helyar noted that in 1996 "[t]he NFL continues its drift toward one class of teams with big stadium revenues and big competitive advantages and an underclass of all the rest." John Helyar, *Luxury Stadiums Draw Fans and Players, Too*, WALL ST. J., Aug. 30, 1996, at B5.

160. Brian Allee-Walsh, *Corporate Steamroller Picking up Steam*, TIMES-PICAYUNE (New Orleans), Sept. 24, 1995, at C4.

161. *Id.*

162. *Id.*

163. The Carolina Panthers, for example, are expected to generate $30 million in stadium revenues in 1996, second only to the Dallas Cowboys. Erik Spanberg, *Panthers Field a Big Winner*, BUS. J. CHARLOTTE, June 24, 1996. The Panthers' high ranking may be a direct result

and concessions are not split with other franchises, and are also excluded from DGR calculation,[164] giving teams that generate money in this manner an unfair competitive edge.[165] The additional revenue, for example, allows teams such as the Cowboys, Forty-Niners, Dolphins, Panthers, and other teams that own their stadiums, to stretch salary cap limits by paying hefty player signing bonuses that can be prorated over the life of a contract.[166] As the Forty-Niners did in 1994–95, Jones' manipulation of the cap helped the Cowboys win their fifth Super Bowl title.[167]

2. Voidable Years

The signing bonus problem surfaces again in the area of the rookie salary cap[168] combined with the "new rage" in negotiations: "voidable years."[169] Voidable years are extra years added to the end of a player's contract that are eliminated upon the player's fulfillment of purposely easy performance goals, making the player a free agent. Such a contract enables a team to pay out a larger signing bonus and stay within the limits of the CBA's rookie salary cap.[170] The rookie's signing bonus is paid to the player up-front but is prorated over the artificially increased length of the agreement when calculating the team's rookie salary pool.[171]

Although immediately recognized as a "major loophole," voidable years have been widely used since the creation of the CBA.[172] For example, in 1993, the New England Patriots signed quarterback Drew Bledsoe to a six-year, $14.5 million contract with certain performance goals that could void the final three years.[173] The contract included a $4.5 million signing bonus.[174] Under the terms of the contract, only one-sixth of the bonus, or about $750,000, counted against the team's available salary pool for rookies. His contract included a clause that would void the

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of their decision to forgo public financing of the stadium, enabling them to sell permanent seat licenses and retain all revenue they generate. *Id.* By comparison, most NFL teams have to negotiate revenue distributions with the public agencies that own their stadiums. *Id.*

164. CBA, *supra* note 2, art. XXIV, § 1(a)(iii).

165. Spanberg, *supra* note 163.

166. *Id.*

167. 1996 RECORD & FACT BOOK, *supra* note 1, at 325.

168. CBA, *supra* note 2, art. XVII.

169. Rich Cimini, *Coslet Warns Jones of Consequences*, NEWSDAY, Aug. 3, 1993, at 101.

170. Tony Grossi, *Bengals Do Battle Against the 'Void,'* PLAIN DEALER (Cleveland), Aug. 8, 1993, at 9D.

171. *Id.*

172. *Id.*

173. Cimini, *supra* note 169, at 101.

174. Grossi, *supra* note 170, at 9D.

final three years if he started fifty-five percent of the team's games or participated in fifty-five percent of the team's offensive plays.[175] Reaching either goal will void the final three years of the contract. Without voidable years, $1.5 million of his bonus should have counted against the team's rookie salary pool, leaving considerably less money to sign other players.[176]

Some owners initially thought the voidable year concept was contrary to the purpose of the rookie salary cap pool. Cincinnati Bengals general manager Mike Brown, referring to requests by agents of rookies in 1993, said, "[W]e're going to fight for the rules as we believe they were intended to apply . . . to us, the validity of the collective bargaining agreement is more important than any one player."[177] Even before he drafted the team's first player, Carolina Panthers owner Jerry Richardson said, "I think the problems of voidable-year contracts are humongous. If you ask me whether we'd let [a rookie] sit out all year if the agent insists on voidable years, the answer is yes."[178] Other owners are not as categorically opposed to the concept, such as Arizona Cardinals owner Bill Bidwell, who simply describes the use of the loophole as one of the many "nuances" one must learn with a new system.[179] In some instances, Commissioner Paul Tagliabue has exercised his authority to void a contract he considers a violation. He rejected the Seattle Seahawks' original contract with quarterback Rick Mirer, ruling that the incentives were so "easily attainable that they violated the spirit of the salary cap."[180]

Voidable years can creep into veteran contracts as well, albeit impliedly. For example, in 1996 the Dallas Cowboys extended Pro Bowl running back Emmitt Smith a new contract that paid him $48 million over eight years, including a $15 million up-front signing bonus.[181] For Smith to fulfill the contract, he will have to play a total of fourteen years, a rare feat for any player.[182] Regardless of whether he plays the length of the contract, the Cowboys will only be charged a prorated amount against the cap, rather than the $15 million bonus and one-eighth of the salary in 1996, and the full remaining amount on the contract if Smith retires. Smith, the

175. *Id.*

176. *Id.*

177. *Id.*

178. Peter King, *First and Long*, SPORTS ILLUSTRATED, May 1, 1995, at 44.

179. Jack Magruder, *Hearst Deal Adds an Ace to Card Deck*, ARIZ. DAILY STAR, Aug. 28, 1993, at 1C.

180. *Id.*

181. Terry Bannon, *Smith Gets Cowboys' Latest Mega-Deal; Running Back Signs for 8 Years, $48 Million*, CHI. TRIB., Aug. 13, 1996, at § 4.

182. *Id.* The 1996-97 season was already Smith's seventh in the League. *Id.*

League and Super Bowl Most Valuable Player in 1993 and four-time rushing champion, was undoubtedly persuaded by the lucrative offer to stay in Dallas.[183]

Like signing bonuses for veteran players, the combination of bonuses and voidable years for rookies or veterans renders the salary cap useless. Teams can effectively pay new and current players whatever they can afford and award larger contracts to keep up with the increasing salaries demanded by first year players and players needing to be re-signed. Voidable years are also less risky for the teams because if they cannot afford a player's salary when he has reached the incentive, they can let him go to another team via free agency.

3. Roster Roulette

"Roster Roulette" is one of the least criticized but most widely used techniques.[184] It developed from a loophole in the CBA[185] that allows teams to place a veteran player with four years experience on waivers when rosters must be cut from sixty to forty-seven players during the pre-season.[186] The released veteran becomes an unrestricted free agent and can sign with any team, including the one that released him.[187] With that in mind, teams strike pre-cut deals with qualified four-year veterans, convincing them not to sign with another team.[188] The teams then use the extra roster slots for younger players they covet, and re-sign the veterans once the roster limit is raised to fifty-three players just twenty-four hours later.[189]

Again, the possibility of inequitable results looms large. Teams with winning records, the best chance at the Super Bowl, or in popular cities seem to have veteran players willing to undergo the sometimes embarrassing situation of being unsigned.[190] These teams are better able

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183. *Id.*

184. Ira Miller, *Roster Roulette, NFL Style, May Be Played out Monday*, FRESNO BEE, Aug. 29, 1993, at D2.

185. "Roster Roulette" is actually a combination of the effects of article XXII (provisions regarding the waiver system) and article XXXIII (provision relating to roster size).

186. Miller, *supra* note 184, at D2.

187. CBA, *supra* note 2, art. XXII, § 1(a).

188. *See, e.g.*, Miller, *supra* note 184, at D2; Mike Chappell, *Act of Trimming Roster a Difficult Task for Colts*, INDIANAPOLIS STAR, Aug. 30, 1993, at B4.

189. Article XXXIII provides that NFL rosters, including active and inactive players, shall not exceed 53 players and not go below 42, and the dates and actual numbers can be determined by the clubs. *See* CBA, *supra* note 2, art. XXXIII §§ 1, 2 and 4; Miller, *supra* note 184, at D2.

190. *See* Miller, *supra* note 184, at D2.

to maintain a number of young talented players as well as experienced veterans.

4. Corporate Endorsement of Players

Corporate endorsement of players, although only alleged, represents the darker side of cap circumvention, and it can occur in many ways. For example, a team may make a "donation" to a large company like Nike or Reebok (not counted against the cap); a player sought by that team then receives an equal amount from the corporation for endorsement purposes. A team could also simply emphasize to both the corporation and the player the mutual benefit each could receive from the player signing with the team.

These tactics are currently mere allegations from anonymous owners and conspiracy-minded sports writers.[191] When Deion Sanders received a $1 million dollar raise from Nike after signing with San Francisco in 1994, some accused Forty-Niner owner Eddie DeBartolo of foul play.[192] Likewise, the accusations shifted to Jerry Jones and the Cowboys when Sanders signed with Dallas the same season that Nike outfitted Texas Stadium with "more swooshs than a downhill ski race."[193]

III. THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING GAME PLAN

To the chagrin of many team owners, the cap-controlled environment they envisioned has simply not materialized. The goals of economic and athletic parity, thought achievable if the League adopted a salary cap, are far from realized. Much of the blame is being laid on teams employing the above-mentioned techniques to avoid the very salary cap they fought to obtain. The problem facing the League is that until actual technical violations of the CBA are documented, or the teams agree to ban the circumvention techniques, aggrieved owners will be left with little to argue but that the "spirit" of the agreement has been violated. This Comment, however, contends that another avenue of enforcement exists in the "Implied Covenant of Good Faith and Fair Dealing."

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191. *See* Sam Donnellon, *From CPA to Swoosh King*, FORT WORTH STAR-TELEGRAM, Sept. 19, 1995, at C1; Mike Fisher, *NFL Report*, FORT WORTH STAR-TELEGRAM, Oct. 17, 1995, at C16.

192. Mike Fisher, *Cowboys Report*, FORT WORTH STAR-TELEGRAM, Oct. 2, 1994, at C16.

193. Brown, *supra* note 117, at 1C.

A. Common Law Creation

The use of this covenant to enforce the "spirit" of the CBA is made possible in part by the broad application and interpretation historically given to it by courts. It is well established that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement."[194] Even, when not expressed in the contract, courts have often found the term by implication.[195] The duty is based on fundamental ideals of fairness and equity, and its scope varies according to the nature of the agreement.[196] However, to what extent this duty could require a party to adhere to an agreement's "spirit" is uncertain.

The requirement of good faith and fair dealing has been described as requiring a party to act or refrain from acting to achieve certain goals that formed the impetus for the agreement.[197] Looking to the impetus for and goals of the agreement to define the parties' duties dictates that perhaps duties exist beyond those enumerated in the text. The drafters of the Uniform Commercial Code ("U.C.C.") recognized that "[g]ood faith performance or enforcement of a contract emphasizes faithfulness to an agreed *common purpose* and consistency with the justified expectations of the other party . . . ."[198] Additionally, the drafters of the U.C.C.'s good faith requirements recognized that:

> [s]ubterfuges and evasions violate the obligation of good faith in performance *even though the actor believes his conduct to be justified.* But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: *evasion of the spirit of the bargain . . . .*[199]

This requirement of faithful adherence to goals of an agreement is perhaps the most important feature for application of the covenant to the CBA. Accordingly, some support exists for the proposition that if there is a spirit of a contract, it is embodied in, and perhaps enforced as a function

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194. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 (1979); *see also* U.C.C. § 1-203 (1978).

195. E. ALLAN FARNSWORTH, CONTRACTS § 7.17, at 550 (2d ed. 1990).

196. *Id.* at 551.

197. *Id.*

198. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1979) (emphasis added).

199. *Id.* at cmt. d (emphasis added).

of, the intentions, goals, and the justified expectations of the parties when the agreement was made.

Under this broad interpretation of the good faith and fair dealing duty, each team that agreed to the CBA also agreed to perform in a manner consistent with the intent, purposes, and goals of that agreement as well. The CBA, when viewed simply as a contract between sophisticated parties, is logically subject to these general principles of contract law. Thus it is perhaps possible to equate actions that are inconsistent with the intent of the parties to an agreement with a violation of that party's duty to perform in good faith and to deal fairly. If so, the League may use this implied covenant to enjoin the use of the various circumvention techniques.

Consistent with the notion that the good faith and fair dealing duty may require a party to refrain from certain conduct,[200] as well as require "faithfulness to an agreed common purpose,"[201] it is arguable that teams have breached this duty by purposefully seeking ways to avoid the purpose of the salary cap. Bonuses, voidable years, and roster shuffling, each described as legal "circumvention techniques" by the teams who employ them, are certainly the kind of "[s]ubterfuges and evasions . . . of the *spirit* of the bargain" proscribed by the common law's view of the good faith duty.[202] Use of circumvention techniques and loopholes with impunity were not likely part of that common plan.

For example, by paying bonuses that other teams simply cannot offer—money that does not count against the salary cap—some teams are able to operate as if there was no cap at all. When teams use bonuses to structure deals to lure and retain better players, teams that cannot offer such bonuses are left without a chance to compete for the upper echelon players. The "justified expectations" of the parties did not include a situation where the Dallas Cowboys could spend more than $62 million in one season,[203] effectively buying a Super Bowl victory. In fact, it is hardly a coincidence that the two teams accused most of violating the spirit of the cap, the Cowboys and Forty-Niners, have won four of the five Super Bowls since the adoption of the salary cap in 1993.[204] These results alone, considering the extent to which each team used circumvention techniques

200. FARNSWORTH, *supra* note 195, § 7.17, at 551.

201. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1979).

202. *Id.* at cmt. d (emphasis added).

203. This figure represents $40.5 million in bonuses alone, and an additional $22.1 million in player salaries and benefits. Dougherty, *supra* note 117. In fact, the next-highest paying team was the Carolina Panthers at $48.7 million, with 10 teams at less than $40 million. *Id.*

204. Cowboys in 1993, 1994, and 1996; Forty-Niners in 1995. 1996 RECORD & FACT BOOK, *supra* note 1, at 325–27.

and CBA loopholes, may be evidence that a breach of the implied covenant of good faith and fair dealing has occurred.

Other support exists for the use of this covenant in agreements between parties such as the NFL and its member teams. In regard to contractual undertakings with a franchise organization, one commentator recognized that "it is black letter law that a partner or joint venture member . . . [has] a fiduciary duty not to act unilaterally to the detriment of the venture."[205] Indeed, a franchisor (and franchisee) owes a duty of good faith and fair dealing.[206] Sports teams or member clubs have in fact been found to owe "traditional fiduciary duties" to the other teams and to the league as a whole.[207]

Today, the NFL consists of thirty franchised entities. As such, each franchise owes a fiduciary duty to the other franchisees and also to the franchisor, the NFL. The negative effect on League-wide athletic and economic competitiveness resulting from a team's circumvention of the salary cap may be considered a breach of that franchise's "traditional fiduciary duties"[208] owed to the League and the other teams. This duty, along with the requirement of good faith and fair dealing, proscribes conduct by a franchise that is a "detriment to the venture."[209] Certainly, actions that allow some teams to get richer—on and off the field—at the expense of the other teams, are detrimental to the long term viability of the League. Specifically, allowing a team to generate revenue in a way that other teams cannot, such as the sponsorship deals Jerry Jones obtained with Nike, Pepsi, and American Express, creates an NFL of "haves" and "have-nots" which the CBA and salary cap system were designed to avoid.

B. Common Law Defenses

The likely targets of a claim that circumvention techniques breach the implied covenant of good faith and fair dealing are the Dallas Cowboys and San Francisco Forty-Niners, the two teams accused most of violating the spirit of the salary cap. Enforcing the salary cap through this external means goes beyond requiring the teams to abide by the letter of the law and actually includes seeking "performance" on the intent, purpose and

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205. Roberts, *supra* note 18, at 977.
206. Dunfee v. Baskin-Robbins, Inc., 720 P.2d 1148, 1151 (Mont. 1986).
207. Professional Hockey Corp. v. World Hockey Ass'n, 143 Cal. App.3d 410, 415 (1983).
208. *Id.*
209. Roberts, *supra* note 18, at 977.

goals of the CBA.[210] This relief, equitable in nature, will be subject to numerous objections.

1. Blitzing The Doctrine of "Unclean Hands"

One possible obstacle to the League's ability to force performance of the CBA's intent, purpose and goals will be the doctrine of "unclean hands." Courts have held that "he who comes into equity must come with clean hands."[211] The doctrine played a role in an early professional baseball dispute where the court explained that the doctrine of clean hand forbids relief to "[h]e who has acted in bad faith, resorted to trickery and deception, or been guilty of fraud, injustice, or unfairness . . . even though . . . he may have kept himself strictly within the law . . . ."[212]

The doctrine of unclean hands has been applied to sports primarily in two situations: (1) conduct of players; and (2) conduct of teams.[213] The second category is relevant here, where "improper conduct" has been held to include any conduct stemming from dishonesty or improperly motivated behavior.[214] Teams may use the doctrine to fend off the League's attacks in two ways.

First, even assuming that a team can be shown to have breached the implied covenant of good faith and fair dealing when it employs the aforementioned circumvention techniques, most (if not all) of the other teams in the League have also employed similar techniques. Therefore, each team that employs such tactics will be individually barred from seeking specific performance by the doctrine of unclean hands. Second, because the majority of the teams will be barred by the clean hands doctrine, the League, as representative of each team, may itself be barred by the doctrine. Thus, the League, as a representative of teams who have acted in bad faith, may be barred from challenging specific teams who have acted in bad faith.

2. The "Pro Bowl of Lawyers" Defense

The Circumvention Clause is perhaps to blame for the toothless enforcement ability of the CBA. However, it is uncertain whether a court

210. *See supra* Part II.C.

211. Precision Instrument Mfg. Co. v. Automotive Maint. Mach. Co., 324 U.S. 806, 814 (1945).

212. Weegham v. Killefer, 215 F. 168, 171 (W.D. Mich.), *aff'd*, 215 F. 289 (6th Cir. 1914).

213. SPORTS LAW PRACTICE (1993), *supra* note 136, § 2.06(1), at 164–65.

214. New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc., 291 F.2d 471 (5th Cir. 1961).

will imply the covenant to undo its nugatory effect. Success on this claim will rely heavily on a finding that the alleged violations were not anticipated by the two sides of the agreement, a finding not likely in the face of the term's very existence. In other words, if the use of the decried circumvention techniques were not part of the parties' intention, they would have been specifically banned. Surely the veritable pro bowl of lawyers (for the League, players, and twenty-eight individual teams) assembled for such a process would not have overlooked these important considerations. Instead, the seemingly vague Circumvention Clause was included, tacitly approving their use.

Courts have not always hastened to imply covenants to redefine the parties' rights and obligations. In *Triangle Mining Co. v. Stauffer Chemical Co.*,[215] the Ninth Circuit refused to imply the duty of good faith and fair dealing, in part because the parties to the agreement were represented by sophisticated agents, lacking the possibility that one party had "unequal bargaining power."[216] Additionally, the Second Circuit has stated that it does "not believe that the [good faith] requirement abrogates the effect of the contractual terms" and that "parties may rely on the express terms of their contract."[217] Accordingly, a court may be reluctant to imply the covenant of good faith and fair dealing to give the parties any real enforcement power over the salary cap because each side was adequately represented, reducing the possibility that one party had "unequal bargaining power" over the other.[218] Indeed, the CBA, born of the *White* settlement, received judicial approval in settling the class action lawsuit.[219] If the parties wanted to prohibit the specific acts complained of provisions (bonuses, stadium licensing agreements, etc.), they would have done so in the CBA. Implying a covenant to ban their use after the fact will be a difficult task for the League to accomplish.

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215. 753 F.2d 734 (9th Cir. 1985).

216. *Id.* at 740.

217. Grand Light & Supply Co., Inc. v. Honeywell, Inc., 771 F.2d 672, 679 (2d Cir. 1985) (*citing* Zullo v. Smith, 427 A.2d 409, 412 (Conn. 1980)).

218. *See* Triangle Mining Co. v. Stauffer Chem. Co., 753 F.2d 734, 740 (9th Cir. 1985); Cardinal Stone Co. v. Rival Mfg. Co., 669 F.2d 395, 396 (6th Cir. 1982); Corenswet, Inc. v. Amana Refrigeration, Inc., 594 F.2d 129, 138 (5th Cir. 1979)).

219. *White*, 822 F. Supp. at 1390.

C. *The NFL's Experience with the Implied Covenant*

As early as 1890, courts recognized that sports franchises may in fact owe a duty to perform their contracts in good faith.[220] Nearly one hundred years later in *Los Angeles Mem'l Coliseum Commission v. NFL*,[221] the Ninth Circuit Court of Appeals recognized that the NFL and its member teams owe a duty of good faith to one another.[222] That case may be an important legal precedent for challenges on a claim that certain teams have breached the implied covenant of good faith and fair dealing. It arose at a time when the salary cap was but a glimmer in the eyes of the owners, and the League had bigger problems at hand.

1. The *Raiders* Cases

In 1978, the Los Angeles Rams moved from the Los Angeles Memorial Coliseum ("Coliseum") to Anaheim Stadium,[223] leaving the Coliseum without a major sports tenant. Coliseum officials inquired of the League Commissioner about a possible expansion franchise and also began negotiations with existing teams in the hope of attracting one to Los Angeles.[224] The Coliseum ran into a major obstacle, however, in the form of Rule 4.3 of Article IV of the NFL Constitution.[225]

In 1978, Rule 4.3 required *unanimous* approval of all twenty-eight NFL teams whenever a team (or in the parlance of the League, a "franchise") sought to relocate to the home territory of another team.[226] As defined by the rules, Los Angeles was still home territory of the Rams.[227]

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220. SPORTS LAW PRACTICE (1993), *supra* note 136, § 202(2), at 135 (*citing* American Ass'n Base Ball Club of Kansas City v. Pickett, 8 Pa. Cty. Ct. 232 (1890)).

221. 791 F.2d 1356 (9th Cir. 1986) [hereinafter *Raiders II*].

222. *Id.*

223. *See* Los Angeles Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1384 (9th Cir. 1984) [hereinafter *Raiders I*].

224. *Id.*

225. Rule 4.3 originally read:

> Any transfer of an existing franchise to a location within the home territory of any other club shall only be effective if approved by a unanimous vote; any other transfer shall only be effective if approved by the affirmative vote of not less than three-fourths or 20, whichever is greater, of the member clubs of the League.

Raiders I, 726 F.2d at 1385 n.1.

226. *Id.*

227. *Id.* at 1385. "Home territory is defined in Rule 4.1 as the city in which [a] club is located and for which it holds a franchise and plays its home games, and includes the surrounding territory to the extent of 75 miles in every direction from the exterior corporate

The Coliseum viewed Rule 4.3 as an unlawful restraint of trade, in violation of section 1 of the Sherman Act[228] and sued the League in 1978.[229] The district court concluded, however, that a present justiciable controversy did not exist because no NFL team had committed to moving to Los Angeles.[230] The NFL nevertheless saw the Coliseum's suit as a sufficient threat to warrant amending Rule 4.3.[231] In late 1978, the Executive Committee of the NFL, comprised of a voting member from each of the 28 teams, met and changed the rule to require only *three-quarters* approval by the members of the League for a move into another team's home territory.[232]

Shortly afterwards, Al Davis, managing general partner of the Oakland Raiders franchise, expressed his desire to move to Los Angeles.[233] His lease with the Oakland Coliseum expired in 1978 and he believed the facility needed substantial improvements.[234] Unable to persuade Oakland officials to agree to his terms, Davis instead turned to the Los Angeles Coliseum.

Davis and Coliseum officials began discussing the possibility of relocating the Raiders to Los Angeles in 1979.[235] In January, 1980, the Coliseum believed an agreement with Davis was imminent and reactivated its lawsuit against the NFL, alleging again that Rule 4.3 was an unlawful restraint of trade and seeking a preliminary injunction to enjoin the League from preventing the Raiders' move.[236] The district court granted the injunction, but the Ninth Circuit Court of Appeals reversed, finding that the district court abused its discretion in granting the injunction because the Coliseum had made no showing of irreparable injury if the Raiders were not allowed to relocate.[237]

On March 1, 1980, Al Davis and the Coliseum signed a memorandum of agreement outlining the terms of the Raiders' move to Los Angeles.[238] At an NFL meeting on March 3, 1980, Davis announced his intention to

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limits of such city." *Id.* at 1384. The Big "A" in Anaheim is within the 75 mile limit. *Id.* at 1385.

228. 15 U.S.C. § 1 (1994).

229. Los Angeles Mem'l Coliseum Comm'n v. NFL, 468 F. Supp. 154 (C.D. Cal. 1979).

230. *Id.*

231. *Raiders I*, 726 F.2d at 1385.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. Los Angeles Mem'l Coliseum Comm'n v. NFL, 484 F. Supp. 1274 (C.D. Cal. 1980).

237. Los Angeles Mem'l Coliseum Comm'n v. NFL, 634 F.2d 1197, 1203–04 (9th Cir. 1980).

238. *Raiders I*, 726 F.2d at 1385.

move without seeking League approval pursuant to Rule 4.3.[239] Over Davis' objection and in spite of his allegation that Rule 4.3 still violated antitrust laws, the NFL teams voted 22-0 against the move, with five teams abstaining.[240] As a result, the Coliseum, joined by the Oakland Raiders as a cross-claiming plaintiff, renewed its action against the NFL and each member club.[241] What followed was appropriately dubbed the "Super Bowl of Litigation."[242]

The first trial ended in a hung jury, and the case was then bifurcated.[243] In the first portion, a jury found the NFL and its clubs liable to the Coliseum and the Raiders for antitrust violations (based on Rule 4.3) and separately liable to the Raiders for breach of the implied covenant of good faith and fair dealing.[244] The jury specifically found that the covenant was implied under California law and thus read into the NFL Constitution and By-Laws, and that the League breached it by not allowing the Raiders to move to Los Angeles.[245]

On appeal, the Ninth Circuit reversed, finding that the Raiders and Coliseum breached the covenant by not seeking permission from the League and that the League breached by not authorizing the Raiders' move.[246] The court determined that the Raiders could not recover under a breach of the implied covenant of good faith and fair dealing claim because the covenant "is 'reciprocal' [and] a 'two-way street' which demands compliance from the contracting parties."[247] The court held that neither the Coliseum, the Raiders, nor the League fulfilled this duty.[248]

Important in the court's discussion was the recognition that the implied covenant binds the parties to the NFL's contracts.[249] Quoting the California Supreme Court, the Ninth Circuit held "[i]t is well settled that, in California, the law implies in every contract a covenant of good faith

239. *Id.*

240. *Id.*

241. *Id.* at 1381.

242. Ken Hoover, *Burlingame Lawyer Nominated for Bench*, S.F. CHRON. Aug. 13, 1994, at A19.

243. *Raiders II*, 791 F.2d at 1359.

244. *Id.*

245. *Id.*

246. *Id.* at 1361.

247. *Id.* (*quoting* Commercial Union Assurance Cos. v. Safeway Stores, 610 P.2d 1038, 1041 (Cal. 1980)).

248. *Id.* at 1361.

249. *Raiders II*, 791 F.2d at 1361.

and fair dealing."[250] The court further recognized that the "covenant not only 'requires each contracting party to refrain from doing anything to injure the right of the other to receive the benefits of the agreement . . . but also [imposes] the duty to do everything that the contract presupposes that he will do to accomplish *its purpose*.'"[251] In the context of the *Raiders* dispute, neither the team nor the League adhered to the purpose behind the rules regarding relocation, namely the fair and orderly operation of the League.

2. What the *Raiders* Cases Mean Today

The precedential value of the *Raiders* cases to future challenges to League and team action is not certain. The *Raiders II* court made clear, however, that the covenant of good faith and fair dealing may require the League and its franchises to perform in accordance with this common law duty, at least as far as the League's Constitution and By-Laws are concerned.[252] A logical extension of that rationale to other contracts and accords between the same parties would be expected.

If the covenant is to be implied into the CBA, important questions not answered by the *Raiders* cases must be examined. First, the *Raiders* litigation involved an agreement between the League members. The CBA, however, is an agreement between the players and the NFL. Because the salary cap is found within the CBA, the question is whether each team owes a duty of good faith in regard to its performance, or whether a duty is only required by the League itself, in its contracting capacity as the teams' representative.

Complicating the matter further, the position to be taken by the NFLPA in an action to ban cap circumvention techniques is uncertain. The players may take the position that, overall, they have benefited from the cap circumvention techniques.[253] If so, teams that have circumvented the cap will not have breached any good faith duty owed to the players because the teams' actions will have actually fulfilled one of the NFLPA's

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250. *Id.* (*quoting* Seaman's Direct Buying Serv. v. Standard Oil Co., 686 P.2d 1158, 1166 (Cal. 1984)).

251. *Id.* at 1359 (emphasis added) (*quoting* Berkeley Lawn Bowling Club v. City of Berkeley, 42 Cal. App. 3d 280, 286–87 (1974)).

252. *Id.* at 1361.

253. Despite the fact that salaries vary under the 1993 CBA, NFL players certainly gained financial securities they lacked before the agreement, most notably the improved benefits package, pension plan funded by the owners, and League-wide minimum salaries for teams and individuals. Upshaw, *supra* note 5, at C15.

goals: securing a larger piece of the League's DGR for the players.[254] On the other hand, many players have been released or asked to take pay cuts for lack of salary cap room.[255] The NFLPA may, therefore, take the position that cap circumvention techniques actually hurt the players and work contrary to the NFLPA's goals of full employment and increasing aggregate player salaries. Thus, it will be crucial to determine whether individual teams owe a duty that may require them to refrain from using the cap circumvention techniques.

The likely answer is that each team owes an individual duty to the League and the players to perform the terms of the CBA in good faith. It is well recognized that a franchised organization, partner, or joint venture member has a fiduciary duty not to act unilaterally to the detriment of the venture.[256] This duty has been extended specifically to member clubs as well.[257] Logically then, if the CBA or the League is considered a "joint venture," individual NFL franchises are bound to act in accordance with their "fiduciary duty not to act unilaterally to [its] detriment . . . ."[258] If the League is damaged as a result of the circumvention techniques, then these renegade teams are certainly acting to its detriment. Regardless of these concerns, the NFL may owe an independent duty to its contracting counterpart, the NFLPA. The NFL, independent from what teams or the NFLPA desire, may have to enforce the salary cap as a function of its own good faith and fair dealing duty.

The next question left unanswered by the *Raiders* cases is whether the Ninth Circuit's use of the implied covenant is binding on future cases since it is only interpreting California contract law. The CBA has expressly selected the state of New York for its governing law.[259] Importantly, New York law implies the duty of good faith and fair dealing into every contract as well,[260] and may in fact imply a broader duty. One court has held that "implicit in every contract is a covenant of good faith and fair dealing . . . which encompasses *any* promises that a reasonable

254. Pasquarelli, *supra* note 92, at 1C.

255. *See* Upshaw, *supra* note 5, at C15.

256. Roberts, *supra* note 18, at 977.

257. "The law requires . . . [that] when [team] representatives sit on the board of directors . . . they have a duty to make decisions for the benefit of the . . . league as a whole." Professional Hockey Corp. v. World Hockey Ass'n, 143 Cal. App. 3d 410, 415 (1983).

258. Roberts, *supra* note 18, at 977.

259. CBA, *supra* note 2, art. LIX.

260. Jaffe v. Paramount Comm. Inc., 222 A.D.2d 17 (N.Y. 1996); *see also* Carvel Corp. v. Diversified Mgmt. Group Inc., 930 F.2d 228 (2d Cir. 1991).

promisee would understand to be included . . ."[261] New York law recognizes that the duty is "breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement."[262] Under this broad interpretation, a court may find that the circumvention techniques deprive the League and teams of the benefits of the salary cap: athletic and economic parity.

On the other hand, the Second Circuit has followed the reasoning in *Triangle Mining*, as well as the decisions of the Fifth and Sixth Circuits, holing that the good faith provision may not be used to override explicit contractual terms.[263] Such a reliance on the express terms of the contract could emasculate the "spirit of the contract/good faith and fair dealing" argument, especially in the face of the Circumvention Clause's tacit approval of the vilified cap circumvention techniques.

IV. CONCLUSION

If the NFL is to continue its current growth, both economically and in popularity, a more faithful adherence to the CBA will surely be required. If the past four seasons are any indication, the current approach to salary cap enforcement is likely to lead to a league with only a few teams having a realistic chance of winning the Super Bowl, fewer meaningful and exciting games, resulting in a substantial loss of fan support. To be sure, teams like the Cowboys and Forty-Niners have each used the circumvention techniques to their fullest, creating two of the most powerful and profitable sports franchises in the world.[264] In the process, they have confirmed the fears of the CBA's drafters that teams will follow

261. New York Univ. v. Continental Ins. Co., 662 N.E.2d 763, 769 (N.Y. 1995) (emphasis added) (*citing* Dalton v. Educational Testing Serv., 206 A.D.2d 402 (N.Y. 1994); Van Valkenburgh, Nooger & Neville v. Hayden Publ. Co., 281 N.E.2d 142 (N.Y. 1972)).

262. *Jaffe*, 222 A.D.2d at 47.

263. Grand Light & Supply Co, 771 F.2d at 679 (*citing* Triangle Mining Co. v. Stauffer Chem. Co., 753 F.2d 734, 740 (9th Cir. 1985); Cardinal Stone Co. v. Rival Mfg. Co., 669 F.2d 395, 396 (6th Cir. 1982); Corenswet, Inc. v. Amana Refrigeration, Inc., 594 F.2d 129, 138 (5th Cir. 1979)).

264. The on-field power of the Forty-Niners and the Cowboys is evidenced by the fact that the two have combined to win four of five Super Bowls since 1993, winning more games than any other team during that time. 1996 RECORD & FACT BOOK, *supra* note 1, at 251–57, 325–31. Off the field, the Dallas Cowboys are the most valuable sports franchise in the world at $272 million, while the Forty-Niners are valued at nearly $200 million. Ozanian & Galarza, *supra* note 125, at 66.

the letter of the agreement but that their conduct will be motivated by the goal of circumvention.

The lack of athletic and economic parity among teams and the concentration of on-field success and financial power in the hands of only a few teams has many NFL observers and fans concerned. Many teams face substantial economic losses and competitive ineptitude year after year, and as a result lack the financial and intangible ability to put a winner on the field. The financial inequity among teams can be blamed, at least in part, for causing many teams to become as fickle as their fans. The notion that "cash is king" has led franchises lacking the ability to generate that cash to relocate to football-craving cities on the promise of greater economic prosperity. When relocation is not available, teams instead operate from a purely business perspective, where the bottom line is more important than the goal line. Both franchise relocation and teams lacking a commitment to winning turn the fans away, either because their team has left town or because it is so bad they wish it would. If this trend continues, and teams are allowed to ignore the purpose of the salary cap, the overall impact on the popularity of the game could be drastic.

Unfortunately, until the CBA is modified or replaced, the Circumvention Clause will remain an obstacle to strict enforcement of the salary cap, and further diminish the chances of absolute economic and athletic parity in the NFL. The extension of the CBA, as well as recent modifications in response to the Cowboys' 1995 signing of Deion Sanders, are perhaps a recognition that the system is fundamentally beneficial, but that its current incarnation is less than perfect. In simply modifying the current system rather than pursuing the uncertain and expensive plan of enforcement litigation or renegotiation, the League has effectively punted. Absent further agreements, perhaps the only way to enforce the cap will be to look beyond the CBA, to general contract principles such as the implied covenant of good faith and fair dealing. If successful, use of the covenant could require teams to adhere to the intent, purpose, and goals, as well as the express provisions of the CBA.

The enforcement of the CBA through the implied covenant of good faith and fair dealing may be one avenue to fulfill the goals of the salary cap. Until the current CBA is modified to stop these practices, such a course of action may indeed be the only possibility. What is clear,

however, is that absent some effective enforcement mechanism, teams will continue to run roughshod over the CBA and its salary cap leading to what many predict will be the downfall of one of America's greatest pastimes.[265]

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265. *See* Plaschke, *supra* note 11, at C3.

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