

Pace Law Review

Volume 40 | Issue 2

Article 7

July 2020

Holding Out for a Better Deal: How Big Four Professional Sports Franchises Should Handle Hold Outs

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Recommended Citation

Steven R. Vignola, *Holding Out for a Better Deal: How Big Four Professional Sports Franchises Should Handle Hold Outs*, 40 Pace L. Rev. 332 (2020)

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**Holding Out for a Better Deal: How Big Four
Professional Sports Franchises Should Handle Hold
Outs**

Steven R. Vignola*

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I. Introduction

Modern-day professional athletes have the ability to earn extremely high annual salaries. With the average Major League Baseball (“MLB”) and National Basketball Association (“NBA”) franchises being valued at over one-and-a-half billion dollars¹,

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¹ Kurt Badenhausen, *NBA Team Values 2018: Every Club Now Worth at Least \$1 Billion*, Forbes (Feb. 7, 2018, 9:57 AM), <https://www.forbes.com/sites/kurtbadenhausen/2018/02/07/nba-team-values-2018-every-club-now-worth-at-least-1-billion/#7643eb771558>; Mike Ozanian, *Baseball Team Values 2018*, Forbes (Apr. 11, 2018, 9:55 AM), <https://www.forbes.com/sites/mikeozanian/2018/04/11/baseball-team-values-2018/#7e404a6c3fc0>.

the average National Football League (“NFL”) franchise being valued at over two-and-a-half billion dollars², and the average National Hockey League (“NHL”) franchise being valued at almost six hundred million dollars³, there are ample funds from which the professional sports franchises can pay their athletes. As such, a professional athlete is normally able to negotiate a multi-million dollar salary with the professional franchise that owns the player’s playing rights. In many situations, after a player signs a contract with the franchise, the two sides proceed without incident: the player performs under the contract to its term, and the team pays the player pursuant to the contract.

However, circumstances sometimes arise in which either the player believes the contract he signed with the franchise no longer reflects the salary to which he believes he is entitled; the player wishes to extend the term of the contract; or the player no longer wishes to play for the franchise which retains the player’s playing rights.⁴ When a player feels this way, the player usually refuses to play his respective sport under the terms of the original contract in the hope that he can gain the new terms he desires by “holding out.”⁵ Because the players who take such action are important to their team,⁶ the franchise often has no choice but to acquiesce to the new contract terms⁷ or to make an unwanted trade of the player.⁸

² Forbes Staff Leadership, *Forbes Releases 21st Annual NFL Team Valuations*, FORBES (Sept. 20, 2018, 11:48 AM), <https://www.forbes.com/sites/forbespr/2018/09/20/forbes-releases-21st-annual-nfl-team-valuations/#6db0103f7af4>.

³ Mike Ozanian, *The NHL’s Most Valuable Teams 2017*, FORBES (Dec. 5, 2017, 9:26 AM), <https://www.forbes.com/sites/mikeozanian/2017/12/05/the-nhls-most-valuable-teams-4/#593db34017c7>.

⁴ See Basil M. Loeb, *Deterring Player Holdouts: Who Should Do It, How to Do It, and Why It Has to Be Done*, 11 MARQ. SPORTS L. REV. 275, 275 (2001).

⁵ *Id.*

⁶ *Id.* at 276.

⁷ *Id.* at 277.

⁸ See ESPN, *Jimmy Butler Demand Led to ‘Negative Environment,’ Wolves’ Owner Says*, ESPN (Nov. 18, 2018), http://www.espn.com/nba/story/_/id/25283567/glen-taylor-minnesota-timberwolves-owner-addresses-trade-jimmy-butler-philadelphia-76ers (reporting on Minnesota Timberwolves former star player Jimmy Butler, who stated he would no longer play for the Timberwolves—even after the Timberwolves owner attempted to persuade Butler to stay and play for the team—which forced the Timberwolves to reluctantly trade Butler to the Philadelphia 76ers in exchange for Robert Covington, Dario Saric, Jerryd Bayless, and a 2022 second-round draft pick).

The overall purpose of this Article is to determine what recourse a professional sports franchise has when a player under contract with the franchise refuses to play pursuant to their agreement. First, this Article will explain what a player hold out is and the additional underlying factors that lead to players holding out, including the problems the player's hold out creates for the team, the franchise, and the fans. Next, the Article will examine whether a player hold out constitutes a breach of contract, which would permit the franchise to seek recourse. Additionally, if a breach has occurred, this Article will assess the remedies a franchise can seek as a result of the player's breach of contract. This Article will then address which contractual remedy is most realistic at present. Finally, this Article will suggest how the franchises may seek to prevent or mitigate future hold outs, either through the leagues' adoption of a system of binding arbitration to settle disputes or through "self-help specific performance."

II. What Are Player "Hold Outs," Why Do They Occur, and What Problems Do They Create?

The process of "holding out" is refusing to go along with others in a concerted action or failing to come to an agreement.⁹ A "holdout" is an individual who delays signing a contract in hopes of gaining more favorable terms.¹⁰ Thus, for our purposes, a holdout can be understood as a professional athlete who refuses to come to an agreement until the franchise gives the athlete the consideration the athlete seeks. Former NFL head coach and current NBC football analyst, Tony Dungy, indicated his understanding that there are a myriad of reasons modern professional athletes hold out.¹¹ Dungy says that because the careers of NFL players are so short,¹² the players need to "take

⁹ *Hold Out*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/hold%20out> (last visited Feb. 22, 2020).

¹⁰ *Holdout*, DICTIONARY.COM, <https://www.dictionary.com/browse/holdout> (last visited Feb. 22, 2020).

¹¹ Scott Davis, *Tony Dungy Explains the Simple Reason Why NFL players Hold Out for New and Bigger Contracts*, BUSINESS INSIDER (Aug. 9, 2018, 5:19 PM), <https://www.businessinsider.com/tony-dungy-nfl-player-contract-holdouts-2018-8>.

¹² See John Keim, *With Average NFL Career 3.3 Years, Players Motivated to Complete MBA Program*, ESPN (July 29, 2016),

advantage of [their earning capacity] while [they] can.”¹³ At the same time, because of the injury risks inherent in professional sports—especially in the NFL—players are under the constant threat of sustaining a career-ending injury. Sustaining a career-ending injury, or sustaining an injury which may inhibit a player from utilizing an attribute the player brings to the team (e.g., speed, arm strength, shooting ability), may restrict the player from reaching his maximum earning potential if the player can no longer offer value to the franchise.¹⁴ Therefore, because of the ever-present risk of injury, a player is incentivized to hold out so that the player can accrue the highest possible salary.

Another concern players face is that there are a finite number of years in which each player can earn top dollar. One’s “prime” is the most attractive, thriving, or satisfying stage or period of one’s life or career.¹⁵ When a player is said to be in his prime, the player is typically producing at the highest possible level that the player is capable of achieving. Elias Sports Bureau estimates that a player hits his prime at the age of twenty-nine in the MLB, twenty-seven in the NHL, and twenty-six in the NBA and NFL.¹⁶ A player’s prime can be as short as one season¹⁷ or spread across multiple seasons. Of course, there are players who are outliers that can produce at a high level for many years.¹⁸ Nevertheless, in an ideal situation, a player

http://www.espn.com/blog/nflnation/post/_id/207780/current-and-former-nfl-players-in-the-drivers-seat-after-completing-mba-program (citing NFL Players’ Association). To Tony Dungy’s point, the average NFL career lasts 3.3 years.

¹³ Davis, *supra* note 11.

¹⁴ *Id.*

¹⁵ *Prime*, MERRIAM-WEBSTER DICTIONARY (11th ed. 2016).

¹⁶ ESPN Stats & Info, *Average Age in Esports vs. Major Sports*, ESPN (Sept. 17, 2017), http://www.espn.com/esports/story/_id/20733853/the-average-age-esports-versus-nfl-nba-mlb-nhl.

¹⁷ For example, in the 2005–2006 NHL season, San Jose Sharks twenty-five-year-old forward, Jonathan Cheechoo, scored fifty-six goals and won the Maurice “Rocket” Richard Trophy as the league’s top goal scorer. *See Jonathan Cheechoo*, HOCKEY REFERENCE, <https://www.hockey-reference.com/players/c/cheecjo01.html> (last visited Feb. 22, 2020). Due to injuries and decline, however, Cheechoo never got close to his award-winning pace ever again and retired from the NHL after the 2009–2010 season. *See id.*

¹⁸ For example, hockey legend and 1972 Hockey Hall of Fame Inductee Gordie Howe played in the NHL at a high level from the age of twenty-one, when Howe scored sixty-eight points and made his second All-Star appearance, until the age of forty-nine, when Howe accounted for ninety-six points. *See Gordie Howe*, HOCKEY REFERENCE, <https://www.hockey->

would, upon completing his initial contract (whether it be an entry-level contract,¹⁹ a rookie contract,²⁰ or ceasing to be arbitration eligible),²¹ sign a contract with a team in their prime years to attain their maximum earning potential. However, because players hit their primes at different times²²—and because there is a conflict of interest between the team, which

reference.com/players/h/howego01.html (last visited Feb. 22, 2020).

¹⁹ An entry-level contract (“ELC”) is signed by players that are younger than twenty-five years old and who seek to play in the NHL. Collective Bargaining Agreement Between National Hockey League and National Hockey League Players’ Association, Art. 9.1(b) (Feb. 15, 2013), https://cdn.nhlpa.com/img/assets/file/NHL_NHLPA_2013_CBA.pdf [hereinafter NHL CBA]. If a player between the ages of eighteen and twenty-one signs an ELC, the contract must be for three years; if a player that is twenty-two or twenty-three years old signs an ELC, the contract must be for two years; and if the player is twenty-four years old or older, the ELC can only be for one year. *Id.*

²⁰ NFL and NBA players each sign rookie contracts after they are drafted to play in each league, respectively. Collective Bargaining Agreement Between National Football League and National Football League Players Association, Art. 7(3)(a) (Mar. 5, 2020), https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFL-NFLPA_CBA_March_5_2020.pdf [hereinafter NFL CBA]. In the NFL, the duration of a rookie contract ranges between three and five years, depending on when (or if) the player was drafted. *Id.* If the player was drafted in the first round of their draft, the contract would be for four years with a fifth-year option; if the player was drafted in rounds two through seven of their draft year, the contract was for four years; if the player was not drafted, the contract would be for three years. *Id.* In the NBA, a player signs a rookie contract for two years with team options to keep the player under contract for the third and fourth years in the NBA. Collective Bargaining Agreement Between the National Basketball Association and the National Basketball Association Players’ Association, Art. 8(1)(a) (Jan. 19, 2017), <https://cosmic-s3.imgix.net/3c7a0a50-8e11-11e9-875d-3d44e94ae33f-2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf> [hereinafter NBA CBA].

²¹ After a player has played in the MLB for six years or more, the player no longer must submit to binding arbitration with his club and can become a free agent. Collective Bargaining Agreement Between Major League Baseball and Major League Baseball Players’ Association, Art. XX(B)(1) (2017), https://d39ba378-ae47-4003-86d3-147e4fa6e51b.filesusr.com/ugd/b0a4c2_95883690627349e0a5203f61b93715b5.pdf [hereinafter MLB CBA].

²² For example, veteran Boston Bruins goaltender Tim Thomas did not hit his prime years until his mid-to-late thirties. *See Tim Thomas*, HOCKEY REFERENCE, <https://www.hockey-reference.com/players/t/thomati01.html>. In fact, Thomas won his first Vezina Trophy, as the NHL’s best goaltender, at the age of 34, which is an age when many other NHL goaltenders begin their decline. *Id.* Thomas later followed this up two years later by again winning the Vezina Trophy, claiming the Conn Smythe trophy as the 2011 NHL Playoffs MVP, and becoming a champion by hoisting the Stanley Cup. *Id.*

seeks to sign the player for the lowest possible sum for the shortest possible term, and the player, who seeks to attain the greatest salary for the longest term²³—such an equilibrium is rarely struck. Thus, it becomes more likely that as the term of a contract progresses, the franchise or the player is likely to want to get out of the agreement: either because the franchise sees the player as too costly for the value that the player provides, or because the player feels he is not being paid enough. In some professional sports leagues, franchises have several options for recourse, including: ending contracts that, in hindsight, turn out to be unwise investments by “buying out” a player’s contract²⁴; cutting a player because the contract is not a guaranteed contract²⁵; or, if a player has a guaranteed contract, a franchise may still cut a player so long as the franchise pays the player the remainder of the money the player is entitled to under the contract.²⁶ While there are steps franchises can take when a contract with a player turns out to be a bad investment, the players have little recourse when they feel undervalued.²⁷ When a player feels this way, his only options essentially become to request a trade or to request a new contract.²⁸ And if the player’s request for a new contract is not granted, the player’s remaining options are to hold out or play under a contract that they feel does not reflect their true value.

A player’s hold out can be felt at various levels of the

²³ Loeb, *supra* note 4, at 275.

²⁴ For example, in the NHL, when a team “buys out” a player either by an “ordinary course” buyout—where the team buys out the player and the bought out player’s salary counts against the cap for twice the remaining length of the contract—or by “compliance” buyout, the team is permitted to pay the bought out player two-thirds of the player’s remaining salary over twice the remaining length of the contract. See NHL CBA, *supra* note 19, at Art. 50.9(i). Compliance buyouts, however, do not count against a team’s salary cap. *Id.* In both “buy out” situations, the buyout team is still mandated to pay the remainder of the buyout player’s salary. *Id.*

²⁵ For example, in the NFL, a player contract can be terminated if the team determines that “the player . . . is anticipated to make less of a contribution to the Club’s ability to compete on the playing field than another player.” NFL CBA, *supra* note 20, at Art. 4(5)(d).

²⁶ For example, in the MLB, players are guaranteed to receive the salary agreed to in the contract regardless of whether the player’s contract is terminated or not. MLB CBA, *supra* note 21, at Appendix A: Major League Uniform Player’s Contract, ¶ 2.

²⁷ See Loeb, *supra* note 4, at 275.

²⁸ *Id.* at 279.

franchise. However, the most affected parties—both in terms of power to end the hold out and the parties who stand to lose the most from the hold out—are the owner and the franchise’s management (collectively, “management”). Management can, of course, end a hold out by acquiescing to the player’s demand of giving the player a new contract or trading the player to a different team. However, these are not attractive options because of the dangerous precedent it sets for the franchise’s future dealings.²⁹ On the other hand, should management refuse to end the hold out, management may suffer other consequences. One such consequence may be speculation by the sports media as to why management has not ended the hold out.³⁰ While the sports media are doing this, they may also be casting a negative image of the franchise to its audience.

Another consequence may include a decrease of fan support and involvement with the franchise. When a player holds out and refuses to play for his team unless his demands are met, that player’s fans are denied the opportunity to watch their star player play for their favorite team.³¹ Because the player who withholds his services is typically valuable to his team,³² the player’s hold out has a negative effect on the team’s performance.³³ Moreover, because the team may not be as good, there is less incentive for fans of the franchise to attend games, follow the team’s progress, or make purchases related to the franchise such as concessions at games and team paraphernalia. The impact of the player hold out spreads through various levels of the franchise: from management, to the team, and, ultimately,

²⁹ See, e.g., Sheil Kapadia, *Kam Chancellor Ends Contract Holdout, Returns to Seahawks*, ESPN (Sept. 23, 2015), http://www.espn.com/nfl/story/_/id/13722598/kam-chancellor-end-contract-holdout-return-seattle-seahawks. (reporting on Seattle Seahawk Kam Chancellor’s hold out from his contract for eight weeks during the 2015 NFL season until he received the new contract he desired); Herbie Teope, *Earl Thomas Rejoins Seattle Seahawks After Holdout*, NFL (Sept. 5, 2018, 12:19 PM), <http://www.nfl.com/news/story/0ap3000000958380/article/earl-thomas-rejoins-seattle-seahawks-after-holdout> (reporting that less than three years later, fellow Seahawk and friend of Kam Chancellor, Earl Thomas, also held out from his contract; unlike Chancellor, though, Thomas did not miss any regular season games).

³⁰ Loeb, *supra* note 4, at 279, n. 24.

³¹ *Id.* at 277.

³² *Id.* at 276.

³³ *Id.* at 277.

to the fans. Thus, when a player holds out, it creates a ripple effect that results in fans suffering the repercussions.

Player hold outs are divisive and affect not only the relationship between the player and the franchise's management, but also the player's teammates and the franchise's fans. When a player holds out from his contract, the player creates a tumultuous atmosphere that affects the overall team dynamic and the other players on the team. An example of this can be seen from the handling of a former star player, Jimmy Butler, by the NBA's Minnesota Timberwolves in 2018. Prior to the Timberwolves trading Butler, who was holding out from his contract, Butler made an appearance at the Timberwolves' practice on October 10, 2018.³⁴ During that practice, Butler gathered members of the Timberwolves third team players to play on his team,³⁵ faced off against high-profile members of the Timberwolves in mini, inter-squad scrimmages, and proceeded to berate young stars Karl-Anthony Towns and Andrew Wiggins.³⁶ During the scrimmage, Butler told Towns and Wiggins that "[Towns and Wiggins] ain't [sic] [expletive]!"; and, referring to Towns specifically, said, "[Towns] can't do [expletive] against me!"³⁷ On top of Butler's negative comments, Butler also continued acting in an antagonistic manner that was not conducive to building positive team chemistry.³⁸ As the practice continued, it became apparent that Butler's comments bothered Towns and added additional vitriol to Butler's hold out situation with Timberwolves' management.³⁹ Butler intentionally created this negative atmosphere, and the effect of his comments and demeanor towards his teammates was to let the Timberwolves know that, if the team did not acquiesce to Butler's trade demand, Butler would continue his negative,

³⁴ Jon Krawczynski & Shams Charania, *Jimmy Butler Returns to Bring More Chaos to the Wolves, Just as He Promised*, ATHLETIC (Oct. 10, 2018), <https://theathletic.com/580655/2018/10/11/jimmy-butler-return-timberwolves-chaos-tom-thibodeau-trade-request/>.

³⁵ *Id.*

³⁶ Chris Haynes, *Sources: Karl-Anthony Towns, Andrew Wiggins Primary Targets of Jimmy Butler's Practice Insults*, YAHOO SPORTS (Oct. 10, 2018, 6:06 PM), <https://sports.yahoo.com/sources-karl-anthony-towns-andrew-wiggins-primary-targets-jimmy-butlers-practice-insults-220611226.html>.

³⁷ *Id.*

³⁸ See Krawczynski & Charania, *supra* note 34.

³⁹ *Id.*

antagonistic behavior.⁴⁰ This example illustrates that while a holdout is still participating with the team, he can create an environment that is detrimental to the team atmosphere and essentially force the organization's hand: either acquiesce to the player's demands, or suffer the negativity the player may bring to the team culture. In the Butler example, Butler was traded to the Philadelphia 76ers in return for three players and a draft pick, which did not accurately reflect Butler's value as a player.⁴¹

III. When a Player Holds Out, Does That Constitute a Breach of Contract?

For there to be an enforceable contract, there must be a manifestation of mutual assent,⁴² consideration,⁴³ and no defenses that can affect the enforceability of the contract.⁴⁴ The bargain struck between the franchise and the player is an exchange of promises⁴⁵: the franchise promises to pay the player for the term of the contract in exchange for the player's promise to play pursuant to the terms of the contract. When a player holds out from his contract, the hold out affects the manifestation of assent of the original agreement between the player and the franchise.⁴⁶ When performance of a duty under

⁴⁰ *Id.*

⁴¹ See ESPN, *supra* note 8.

⁴² RESTATEMENT (SECOND) OF CONTRACTS § 18 (AM. LAW INST. 1981). See also *Embry v. Hargadine, McKittrick Dry Goods Co.*, 105 S.W. 777, 778–79 (Mo. Ct. App. 1907) (“[I]t is said that the meeting of minds, which is essential to the formation of a contract, is not determined by the secret intention of the parties, but by their expressed intention, which may be wholly at variance with the former.”).

⁴³ RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. LAW INST. 1981). See, e.g., *Ala. Football, Inc. v. Wright*, 452 F. Supp. 182 (N.D. Tex. 1977) (holding that a football player's contracted-for performance is valuable consideration in a sports contract).

⁴⁴ Common defenses against an otherwise enforceable contract include: illegality of the subject matter; incapacity; mistake (both mutual and unilateral); fraud; duress; undue influence; impossibility; violation of statute of frauds; and public policy concerns. See RESTATEMENT (SECOND) OF CONTRACTS §§ 12–16, 110, 151–53, 159–64, 174–78, 208, 261 (AM. LAW INST. 1981).

⁴⁵ RESTATEMENT (SECOND) OF CONTRACTS § 3 (AM. LAW INST. 1981). See generally *Wright*, 452 F. Supp. at 182.

⁴⁶ The two parties (the player and the franchise) would have already manifested their assent to comply with the terms of the contract when the contract is signed. See RESTATEMENT (SECOND) OF CONTRACTS § 3 (AM. LAW

a contract is due, any non-performance is a breach.⁴⁷ The “performance of a duty,” in the context of a player contract, would be for the player to play for the franchise for the term of the contract. When this performance fails to occur at the time it becomes due, the player is in breach of contract.

Furthermore, the player’s breach may be a material breach. Determining if a material breach has occurred is significant because, if the player’s breach of contract with his franchise is a material breach, the uncured material performance not only entitles the non-breaching party to recover damages, but permits the non-breaching party *to suspend its own performance* due under the contract.⁴⁸ When determining whether a material breach has occurred, the injured party (here, the franchise) considers circumstances including: the extent to which the injured party is deprived of the benefit the party reasonably expected to receive; and the extent to which the injured party can be adequately compensated for the part of the benefit which he will be deprived.⁴⁹ The party failing to perform (here, the holdout) evaluates circumstances including: the extent to which the party failing to perform will suffer forfeiture; the likelihood that the party failing to perform will cure his failure; and the extent to which the behavior of the party failing to perform comports with the standard of good faith and fair dealing, which is implied in every contract.⁵⁰ When a hold out occurs, the

INST. 1981).

⁴⁷ RESTATEMENT (SECOND) OF CONTRACTS § 235 (AM. LAW INST. 1981). *See* Kehm Corp. v. United States, 93 F. Supp. 620, 625 (Ct. Cl. 1950) (holding that defendant’s failure to timely procure an essential component of plaintiff’s product constituted breach of contract).

⁴⁸ RESTATEMENT (SECOND) OF CONTRACTS § 237 (AM. LAW INST. 1981). *See also* Jacob & Youngs, Inc. v. Kent, 129 N.E. 889 (N.Y. 1921) (where a construction company installed “Cohoes” pipes instead of “Reading” pipes in part of a house, and the pipes are similar in nearly every aspect except for the name, the homeowner breached the contract with the construction company by refusing to pay the remaining balance after the house was constructed. The New York Court of Appeals held that, though the construction company breached the contract by failing to install “Reading” pipe, the breach was not material, and since the construction company substantially performed the rest of the contract, the homeowner was ordered to pay the balance.).

⁴⁹ RESTATEMENT (SECOND) OF CONTRACTS § 241 (AM. LAW INST. 1981). *See* N. Helix Co. v. United States, 455 F.2d 546, 553 (Ct. Cl. 1972) (stating that, in determining loss of benefit to the injured party, all relevant circumstances must be considered).

⁵⁰ RESTATEMENT (SECOND) OF CONTRACTS § 241 (AM. LAW INST. 1981). *See* Prescott & Co., Ltd. v. J.B. Powles & Co., 193 P. 680, 681-82 (Wash. 1920)

franchise: (1) is completely deprived of the player's promised performance under the contract, due to the player's abstinence from playing for the franchise; and (2) cannot be compensated by the holdout, except to the extent that the franchise may be able to withhold payments the player would have been entitled to had the player performed pursuant to the contract. The player holding out, conversely: (1) may suffer salary forfeiture which the franchise would otherwise be obligated to pay the player under the contract; (2) is unlikely to cure his failure to perform until the player either obtains his new contract or is traded to a team that will give the player such a contract; and (3) is not behaving in a way that comports with the standards of good faith and fair dealing that are implied in the contract because the player is refusing to play for the term of the contract until his demands are met. While the player may stand to forfeit the salary he would otherwise be entitled to if the player did not hold out, in the analysis of whether a breach of contract is material, most of the significant factors suggest that the hold out has a negative effect on the franchise. Furthermore, because the player's contract is a performance contract (for the player to play for the franchise), the player's failure to render his performance when his performance would be due would force the franchise to forfeit the benefit of its bargain and leave the franchise with an uncured failure by the player (the breaching party). Thus, when a player holds out from his contract, the hold out is a material breach of contract.

Professor Alex M. Johnson, Jr. argued that player hold outs constitute a breach of contract, and that the theory of "opportunistic behavior," which has not been recognized to encompass breaches of contract, should be expanded to include professional athlete hold outs.⁵¹ Professor Johnson notes that the theory of opportunistic behavior has traditionally been

(demonstrating that the party who committed material breach was not entitled to payment under the contract after the non-breaching party refused to pay for the goods contracted for; the breaching party thereby suffered the forfeiture of the goods).

⁵¹ See generally Alex M. Johnson, Jr., *The Argument for Self-Help Specific Performance: Opportunistic Renegotiation of Player Contracts*, 22 CONN. L. REV. 61 (1989) (arguing, generally, that professional sports franchises should be able to acquiesce to a holdout's demand and later sue the holdout for the difference between the original salary and the holdout's new salary, under the theory of economic duress.).

defined as behavior that does not rise to a breach of contract, but occurs when a party acts in a manner that is “contrary to the other party’s understanding of their contract, but not necessarily contrary to the agreement’s explicit terms, leading to a transfer of wealth from the other party to the performer”⁵² In Professor Johnson’s view, this is the type of behavior that courts and society should endeavor to curtail.⁵³ Professor Johnson uses the example of Eric Dickerson, the former star running back for the Los Angeles Rams in the NFL, to illustrate how opportunistic behavior by a player leaves essentially no remedy to the other party to the contract, the team who employs the player.⁵⁴ Dickerson held out twice from the Rams: once in 1985, and, again, from 1987 through October of 1988.⁵⁵ Both times, he used his position as a star player to leverage better contract terms.⁵⁶ Professor Johnson argued that, though this behavior is of the variety that society would not find acceptable, there is, presently, no effective remedy whereby the franchise can effectively counteract the holdout’s behavior.⁵⁷

Professor Johnson adds further credence to the view that when a player holds out from his contract, he has breached his contract. In each of the major professional sports league’s present collective bargaining agreements, the sample contracts attached to those agreements indicate that the player must play for the team which holds the player’s playing rights.⁵⁸ Therefore, when the player fails to play, or the player does not perform when the player promised to, a breach of contract has occurred.⁵⁹ And because the performance was an essential term of the contract, the failure to perform makes the nonperformance a material breach because the franchise, as the injured party, is

⁵² *Id.* at 74 (citing Timothy Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521, 522 (1981)).

⁵³ Johnson, *supra* note 51, at 73.

⁵⁴ *Id.* at 70–72.

⁵⁵ *Id.* at 71–72.

⁵⁶ *Id.* When Dickerson held out the second time, the Rams were left no other choice than to trade Dickerson to the Indianapolis Colts after Dickerson “implied that his dispute with Los Angeles had taken such a toll on him that he might not be able to give his all on the field.” *Id.* at 71.

⁵⁷ *Id.* at 73–74.

⁵⁸ See generally MLB CBA, *supra* note 21, at Appendix A, cl. 1; NBA CBA, *supra* note 20, at Exhibit A, cl. 2; NFL CBA, *supra* note 20, at App. A, cl. 2; NHL CBA, *supra* note 19, at Exhibit 1, cl. 2.

⁵⁹ See RESTATEMENT (SECOND) OF CONTRACTS § 3 (AM. LAW INST. 1981).

completely deprived of the player's performance as a result of the hold out, and the franchise has no recourse aside from withholding the player's salary.

The player's breach of contract by engaging in a hold out may also be a partial breach, which would still allow the franchise to recover. A partial breach of contract is less significant than a material breach because a partial breach does not necessarily render the entire contract inoperable but, instead, gives the aggrieved party a right to damages by a small reduction in payment or other adjustment.⁶⁰ A partial breach claim is for damages based on only part of the injured party's remaining rights to performance.⁶¹ This means that if the injured party elects to, or is required to, await the balance of the other party's performance under the contract, the injured party's claim is said instead to be one for damages for partial breach.⁶² The injured party can maintain a partial breach action at once, but the party is not permitted to stop further performance by the wrongdoer and get damages for the anticipated future non-performance, as well as for the past non-performance constituting the partial breach.⁶³ Section 236 of the Second Restatement of Contracts provides a helpful demonstration of a partial breach:

A contracts with B to build a building on B's land, work to commence on May 1 and to be completed by October 1. On May 10, A has not yet commenced work. If the court concludes that A's breach, although material, has not continued for such a length of time that B is discharged, B has a claim against A for damages caused by the delay, but this is not a claim for damages based on all of B's remaining rights to performance. B's claim is one for damages for partial breach.⁶⁴

⁶⁰ *Partial Breach Law and Legal Definition*, USLEGAL.COM, <https://definitions.uslegal.com/p/partial-breach> (last visited Feb. 24, 2020).

⁶¹ RESTATEMENT (SECOND) OF CONTRACTS § 236(2) (AM. LAW INST. 1981).

⁶² *Id.* at § 236, cmt. b.

⁶³ 10 CORBIN ON CONTRACTS § 53.4 (2019).

⁶⁴ RESTATEMENT (SECOND) OF CONTRACTS § 236, illus. 1 (AM. LAW INST. 1981).

Here, the franchise, as the injured party, is entitled to the holdout's full performance under the contract. So, when the player holds out, the franchise instantly has a cause of action against the holdout because the holdout's delay in performance will have harmed the franchise. The franchise may choose to wait before suing the holdout, even though the franchise is entitled to recovery once the breach occurs, because, if the player commits total breach,⁶⁵ the franchise would be discharged from its remaining promises made to the player under the contract.⁶⁶ A total breach is defined as "one that so substantially impairs the value of the contract to the injured party at the time of the breach that it is just in the circumstances to allow him to recover damages based on all his remaining rights to performance."⁶⁷ Furthermore, if the contract is repudiated and the player refuses to perform,⁶⁸ the franchise is able to successfully bring an action for total breach. However, very few professional athlete holdouts would ever rise to the level of a total breach. Players who have contracts with their franchise typically would commit a total breach only if they are seeking to breach their contract and play in another league in another country.⁶⁹ But even then, the franchise can seek a negative injunction against the player to restrict the player's ability to play elsewhere.⁷⁰ In sum, generally, when the player holds out by simply not performing when performance becomes due, the franchise is instantly entitled to recover for the player's partial breach, should the franchise elect to do so.⁷¹

⁶⁵ *Id.* at § 243, cmt. B.

⁶⁶ *See id.* at § 243(1).

⁶⁷ *First Annapolis Bancorp, Inc. v. United States*, 89 Fed. Cl. 765, 799 (Fed. Cl. 2009).

⁶⁸ *See Fox v. Dehn*, 116 Cal. Rptr. 786, 790-91 (Cal. Ct. App. 1974) (holding that a total repudiation combined with the nonperformance by the breaching party necessitated the injured parties to bring action immediately while the breaching party was still alive; once the breaching party died, the injured parties no longer had a cause of action for either total or partial breach).

⁶⁹ *See, e.g., Mike Mazzeo, Ilya Kovalchuk Leaves \$77M on Table*, ESPN (July 11, 2013), http://espn.go.com/new-york/nhl/story/_id/9470677/ilya-kovalchuk-new-jersey-devils-announces-retire (reporting on then-NHL star Ilya Kovalchuk's total breach of his fifteen-year contract after playing under the contract's terms for only three seasons; Kovalchuk "retired" from the NHL so that he could play in the KHL, a league in Kovalchuk's native Russia).

⁷⁰ *See infra* notes 88–93.

⁷¹ RESTATEMENT (SECOND) OF CONTRACTS § 378 (AM. LAW INST. 1981).

IV. What Remedy is Available to the Franchise When a Player Holds Out?

As it has been established that the actions of a professional athlete who holds out from his contract can give rise to either a material or partial breach, it is next necessary to determine what remedy or remedies the franchise can seek as damages. There are three main contractual “interests” available when a party breaches: (1) expectation; (2) reliance; and (3) restitution interests.⁷² Recovering expectation damages would entitle the injured party to receive the “benefit of his bargain,” or, in other words, to be put in as good a position as he would have been in had the contract been performed.⁷³ Reliance damages, on the other hand, reimburse the injured party for any losses caused by relying on the contract.⁷⁴ This is achieved by putting the injured party in as good a position as he would have been had the contract not been made.⁷⁵ The final contractual remedy available to the non-breaching party is restitution damages, which restores to the injured party any benefit the injured party conferred on the breaching party.⁷⁶

Expectation damages, though the most desirable remedy to the franchise who possesses the holdout’s playing rights, are unlikely to be awarded to the franchise in a breach of contract action. As stated above, in a player’s contract, the franchise promises to pay the player a specified amount of money in exchange for the player’s promise to play pursuant to the contract. Thus, the franchise’s benefit of its bargain, as it relates to player contracts, is for the player to play under the terms of the original agreement. However, there are multiple issues facing the franchise if it were to seek expectation damages when a player holds out. First, there is a lack of reasonable certainty as to what the value the franchise would receive under the contract had the contract been performed. The term “consequential damages” is often used with respect to harm suffered as a “consequence” of the breach of duty, but not as a

⁷² *Id.* at § 344. See § 344, illustration 2 for an example on how each interest is computed.

⁷³ *Id.* at § 344(a).

⁷⁴ *Id.* at § 344(b).

⁷⁵ *Id.*

⁷⁶ *Id.* at § 344(c).

direct, immediate, and foreseeable consequence.⁷⁷ Consequential damages differ from “direct” damages in that direct damages are foreseeable to any reasonable person in the position of the parties, whereas consequential damages are sometimes considered “special” damages because they may only be recovered if the breaching party (the holdout) is aware of special circumstances.⁷⁸ When evidence cannot establish with reasonable certainty what the damages should be, the damages are not recoverable.⁷⁹ In *Atlantic City Associates, LLC v. Carter & Burgess Consultants, Inc.*,⁸⁰ the Third Circuit held that the difference between direct and consequential damages depends on whether the damages represent: (1) a loss in value of the other party’s performance, which are direct damages; or (2) collateral losses following the breach, which are consequential damages.⁸¹

Here, the damages sustained by the franchise are consequential and not direct damages under the *Atlantic City Associates* test.⁸² While it is true that the franchise loses the value of the player’s performance, the player also loses the benefit of his salary. Since both the franchise and the player lose their bargained for consideration when a hold out occurs, the hold out therefore constitutes a consequential breach. This is because both the franchise and the holdout stand to lose something of value originally promised to each party under the contract: the franchise is forced to do without the player’s performance while the holdout is forced to go without his promised compensation. However, the franchise would not be able to prove with reasonable certainty that the player holding out would be responsible for, say, a certain number of wins, which would subsequently contribute a certain sum of funds to the franchise’s coffers, had the player not held out. Additionally, such a remedy, relating to a player’s absence to monetary damages sustained by the franchise, would also not be the “probable result of the breach when the contract was made”⁸³

⁷⁷ 11 CORBIN ON CONTRACTS § 56.6 (2018).

⁷⁸ *Id.*

⁷⁹ RESTATEMENT (SECOND) OF CONTRACTS § 352 (AM. LAW INST. 1981).

⁸⁰ 453 Fed. Appx. 174, 179 (3d Cir. 2011).

⁸¹ *Id.*

⁸² *Id.*

⁸³ RESTATEMENT (SECOND) OF CONTRACTS § 351(1) (AM. LAW INST. 1981).

because: (1) neither the player nor the franchise would have been able to anticipate how many wins the franchise would secure resulting from the player signing the contract; and (2) neither the player nor the franchise would have been able to anticipate how much money the franchise would be able to gain resulting from the player's performance in securing each win at the time of the formation of the contract. Similarly, it would be impossible for the franchise to prove with "reasonable certainty," as the Restatement (Second) of Contracts requires, which profits were forfeited or which losses the franchise sustained resulting from the hold out.⁸⁴ Thus, expectation damages, beyond some number measured by the player's salary, cannot be awarded to the franchise when the potential damages are not reasonably certain *or* do not arise naturally out of the player's breach⁸⁵ (by holding out).

The franchise could, however, pursue a negative injunction when a player holds out. Courts have recognized that when an athlete threatens not to perform under their contract, a court may order a negative injunction to restrict the athlete from playing for another team.⁸⁶ Under the *Lumley v. Wagner* doctrine, though employees cannot be forced to "produce as nearly as is practicable the same effect that the performance due under a contract would have produced,"⁸⁷ the employees may be enjoined from working for a competitor.⁸⁸ In *Lumley*, plaintiff Benjamin Lumley signed Johanna Wagner, an opera singer, to a performance contract for Wagner to perform at Lumley's opera house in London.⁸⁹ Wagner was later enticed to perform at the Royal Italian Opera, Covent Garden, by its owner, Frederick Gye.⁹⁰ Wagner's breach of contract prompted Lumley to sue, seeking to bar Wagner from appearing "anywhere on the London stage, rather than simply . . . [seeking] damages for breach of

See also *Hadley v. Baxendale* (1854) 156 Eng. Rep. 145.

⁸⁴ RESTATEMENT (SECOND) OF CONTRACTS § 352 (AM. LAW INST. 1981).

⁸⁵ See *Hadley*, 156 Eng. Rep. at 150.

⁸⁶ Geoffrey Christopher Rapp, *Affirmative Injunctions in Athletic Employment Contracts: Rethinking the Place of the Lumley Rule in American Sports Law*, 16 MARQ. SPORTS L. REV. 261, 262 (2006).

⁸⁷ See RESTATEMENT (SECOND) OF CONTRACTS § 357, cmt. a. (AM. LAW INST. 1981).

⁸⁸ See *Lumley v. Wagner* (1852) 42 Eng. Rep. 687.

⁸⁹ *Id.* at 688.

⁹⁰ *Id.*

contract.”⁹¹ The *Lumley* court refused to implement an affirmative injunction, stating it was “[b]eyond all doubt this Court could not interfere to enforce the specific performance of the whole contract.”⁹² However, the court stated a negative injunction—meaning a court-ordered restriction from Wagner singing at Gye’s theater—may be appropriate because the court “will not suffer the parties to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which the jury may give.”⁹³

Applying *Lumley* to professional athlete contract hold outs, courts cannot order players threatening to hold out to abide by the terms of their contract. However, if the player holds out, the courts can order that the player cannot play for another team. Like Johanna Wagner in *Lumley*, professional athletes offer skills and attributes that are not easy to obtain, especially when a player produces at a high level. This has led courts to treat professional athletes as “*prima facie* unique.”⁹⁴ Accordingly, American courts have ordered negative injunctions on professional athletes seeking to breach their contract for more lucrative, enticing offers.⁹⁵ Those courts have reasoned that because normal contractual remedies would be insufficient to protect the aggrieved party when a player under contract agrees to play for a rival team, a negative injunction can be awarded so that the team does not suffer great damage.⁹⁶ The obvious

⁹¹ Lea S. VanderVelde, *The Gendered Origins of the Lumley Doctrine: Binding Men’s Consciences and Women’s Fidelity*, 101 YALE L. J. 775, 792 (1991).

⁹² *Lumley*, 42 Eng. Rep. at 688.

⁹³ *Id.*

⁹⁴ Casey Duncan, *Stealing Signs: Is Professional Baseball’s United States-Japanese Player Contract Agreement Enough to Avoid Another “Baseball War”?*, 13 MINN. J. GLOBAL TRADE 87, 107 (2003).

⁹⁵ See Rapp, *supra* note 86, at 266–67 (citing Phila. Ball Club, Ltd. v. Lajoie, 51 A. 973 (Pa. 1902) (holding that a star player like Lajoie cannot sign a contract with a rival team when his current team owns his rights and Lajoie’s salary demands were not met)). See also Cent. N.Y. Basketball, Inc. v. Barnett, 181 N.E.2d 506, 517 (Ohio Ct. Common Pleas, Cuyahoga Cty. 1961) (holding that “professional players in the major baseball, football, and basketball leagues have unusual talents and skills or they would not be so employed. Such players, the defendant Barnett included, are not easily replaced.” Thus, when a rival basketball team sought to “woo” Barnett after he had already agreed to terms with the team who obtained his playing rights, the court issued a negative injunction from Barnett joining the team that subsequently wooed him).

⁹⁶ See *Lajoie*, 51 A. at 975; *Barnett*, 181 N.E.2d at 517.

drawback with negative injunctions, from management's perspective, is that though the player cannot play for a *rival* franchise, the negative injunction does not necessitate the player to play for *your* franchise. Therefore, while negative injunctions may be a useful tool for management when a holdout seeks to either play on another team or in another league, an injunction does not resolve the issues that come with a hold out because the player may still choose to not play at all.

The franchise may also contend that, due to the uniqueness of the performance the player is contractually obligated to render, specific performance should be granted to protect the benefit of the franchise's bargain. Specific performance is a drastic remedy⁹⁷ and is typically only granted when no other appropriate remedy is available.⁹⁸ Generally, specific performance is granted only when the injured party has contracted for a unique good, such as real estate.⁹⁹ Courts do not specifically enforce a contractual promise to render personal service,¹⁰⁰ however, nor will courts enforce an injunction "against serving another if its probable result will be to compel a performance involving personal relations the enforced continuance of which is undesirable."¹⁰¹ The refusal is based in part upon the "undesirability of compelling the continuance of personal association after disputes have arisen and confidence and loyalty are gone."¹⁰² Further, compelling an individual to provide personal service raises public policy issues because an order to provide personal service violates the Thirteenth Amendment.¹⁰³ Thus, the franchise will likely not be awarded specific performance when a player holds out from their contract because of constitutional concerns and the general position of

⁹⁷ See, e.g., *LocusPoint Networks, LLC v. D.T.V. LLC*, No. 14-cv-01278-JSC, 2015 U.S. Dist. LEXIS 113356, at *57 (N.D. Cal. Aug. 25, 2015) (citing *Estate of Osborn v. Kemp*, 991 A.2d 1153, 1158 (Del. 2010)).

⁹⁸ See *Van Wagner Advert. Corp. v. S & M Enters.*, 492 N.E.2d 756, 759 (N.Y. 1986) (holding that when there are other adequate remedies available, specific performance will not be the remedy; however, it is possible for specific performance to be granted for real property).

⁹⁹ See *Willard v. Tayloe*, 75 U.S. 557, 571–72 (1869); *Ash Park, LLC v. Alexander & Bishop, Ltd.*, 783 N.W.2d 294, 303–04 (Wis. 2010).

¹⁰⁰ RESTATEMENT (SECOND) OF CONTRACTS § 367(1) (AM. LAW INST. 1981).

¹⁰¹ *Id.* at § 367 cmt. b.

¹⁰² *Id.* at § 367 cmt. a.

¹⁰³ See *Loeb*, *supra* note 4, at 287, n. 64 (quoting U.S. CONST. amend. XIII).

courts not to grant specific performance of personal service contracts.

Like expectation damages, reliance damages are also unlikely to be awarded to a franchise when a player holds out from his contract. Reliance damages are calculated by identifying the expenditures made in preparation for performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.¹⁰⁴ An injured party is likely to pursue this remedy when he cannot prove his profit with reasonable certainty.¹⁰⁵ As discussed in Section II, *supra*, when a player holds out, there will be effects on the franchise's management, fans, and the team itself. In this situation, it would be difficult to discern which expenditures were made in preparation specifically for the holdout, which would permit the franchise to recover reliance damages. For example, assume an NHL franchise is expecting a player to serve as its starting goaltender. Goaltender is an important position in hockey because having a quality goaltender can be the difference between missing the playoffs, making the playoffs, or winning the Stanley Cup. Should that goaltender hold out from his contract, the NHL franchise would be unable to prove with reasonable certainty which expenditures the franchise made in relying on that player to be its goaltender in relation to the general expenditures the franchise would be making for the team. As in the analysis for uncertainty with expectation damages, reliance damages are also unlikely to be awarded to the franchise because of the difficulty associated with determining the franchise's expenditures made in preparation for the holdout's performance. Similarly, determining how a franchise would be "put in as good a position as [it] would have been in had the contract not been made" would be an equally difficult exercise because it cannot be said that all of the franchise's expenses going into the season are made for the holdout.

The final contractual remedy that may be available to a franchise when a player holds out is restitution damages. Restitution requires the party who received a benefit from the

¹⁰⁴ RESTATEMENT (SECOND) OF CONTRACTS § 349 (AM. LAW INST. 1981).

¹⁰⁵ *Id.* at §349 cmt. a.

injured party to return that benefit to the injured party.¹⁰⁶ When a player holds out from his contract, the player is breaching his contract and injuring the franchise. The computation of restitution in that case would be simple: by refusing to play, the benefit conferred on the player (the player's salary) is to be returned to the franchise while the player is holding out.¹⁰⁷ The reasoning makes sense: because the player is withholding his services to the franchise, the franchise is entitled to withhold paying the player his salary. And, in the event the franchise has already paid the player either a portion or the entirety of his salary, the franchise is entitled to have the salary returned. In fact, each major professional sports league in the United States—the MLB, NFL, NHL, and NBA—has such a rule stated either in its uniform player contracts¹⁰⁸ or in the league's collective bargaining agreement.¹⁰⁹ It is therefore evident that the current, easiest-to-measure contractual remedy available to professional sports franchises is to withhold a player's salary—or to be granted the right to have the salary the franchise has conferred on the holdout returned to the franchise—when the player holds out from his contract, because otherwise the player would be unjustly enriched.

V. What Are Some Potential Actions Professional Sports Franchises Can Take to Deter or Mitigate Player Hold Outs?

Though professional sports franchises may have the right to have the salary the franchise would otherwise be obligated to pay the player returned to the franchise's coffers when the player holds out from his contract, or potentially receive a negative injunction prohibiting the holdout joining another franchise, this is far from ideal for the franchise. The franchise

¹⁰⁶ *Id.* at § 370.

¹⁰⁷ *Id.* at § 371 cmt. a (“[A] party who is liable in restitution for a sum of money must pay an amount equal to the benefit that has been conferred upon him. If the benefit consists simply of a sum of money received by the party from whom restitution is sought, there is no difficulty in determining this amount.”).

¹⁰⁸ See MLB CBA, *supra* note 21, at Appendix A: Uniform Player's Contract, ¶ 4(a); NBA CBA, *supra* note 20, at Exhibit A: National Basketball Association Uniform Player Contract, ¶ 9; NHL CBA, *supra* note 19, at Exhibit 1: Standard Player's Contract, ¶ 6.

¹⁰⁹ See NFL CBA, *supra* note 20, at Art. 4(9)(a).

would prefer the player to play for the franchise, help improve the performance of the team, and generate greater revenue for the franchise. A hold out is not an ideal situation for the player either, considering that the player is not entitled to his salary because of his refusal to play; moreover, the player cannot play the sport in which he is a professional because doing so would result in the holdout's acquiescence to his current rate of pay. There must be an alternative that could assist both parties to resolve their labor dispute and permit each party to receive at least a portion of the consideration each party would otherwise sacrifice as a result of a player hold out. The best alternatives to a player hold out would be to either: (1) institute a system of binding arbitration when a player seeks to hold out from his current contract with the franchise that owns the player's playing rights; or (2) implement a self-help specific performance remedy for the franchise. Under a system of binding arbitration, the player and team would each submit its perceived value of the player to the arbitrator or arbitrators who would then choose one party's proposal; and that decision would be binding on both parties.¹¹⁰ Under the self-help specific performance remedy, the franchise may acquiesce to the player's new contract demand, and, subsequent to the full performance of the player, the franchise may challenge the modification by the player either on the basis that the modification was not supported by consideration or that the player made the franchise agree to the modification through economic duress.¹¹¹

A. Binding Arbitration

Before delving into what a system of binding arbitration would look like in practice in professional sports, it is necessary to note that binding arbitrations will not have any effect unless these methods of dispute resolution become part of the collective bargaining agreement ("CBA") between the league and the players' association of that league. Regarding a labor dispute between the East Coast Hockey League and the Professional Hockey Players' Association, the Fourth Circuit held that

¹¹⁰ *Arbitration*, A.B.A. https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/arbitration/ (last visited Mar. 2, 2020).

¹¹¹ See Johnson, *supra* note 51, at 92–102.

“arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”¹¹² Therefore, because the CBA is the governing document between management and the labor union, it is necessary for each side to adopt the binding arbitration and self-help specific performance provisions into each league’s next CBA. Once adopted, those provisions would assist in resolving future hold outs, should hold outs remain a persistent problem in the future.

When an arbitration provision has been adopted into a league’s CBA by a professional sports league and the players’ union, the parties agree in advance that any dispute between them that arises under the CBA will be submitted to an arbitrator instead of a court.¹¹³ Hence, both parties relinquish their rights to resort to the courts.¹¹⁴ Arbitration has become the dispute resolution process of choice within the professional sports industry because it is more informal, more expedient, allows for confidentiality of decisions, allows for input from both parties as to who will hear the case, and is less expensive than other forms of dispute resolution.¹¹⁵ The arbitration process is typically initiated when a player or the union notifies the club that they have a grievance against it.¹¹⁶ The term “grievance” is generally limited—either in practice or by contractual definition—to complaints involving conditions or conduct alleged to violate the contract.¹¹⁷ Under the typical grievance procedure, complaints unresolved at the first stage progress up through various levels of management and union representatives.¹¹⁸ The final step of the grievance procedure is typically arbitration, meaning a resolution of the dispute by an impartial third party.¹¹⁹ When arbitration is binding, the decision is final, can be enforced by a court, and can only be

¹¹² *E. Coast Hockey League v. Prof'l Hockey Players Ass'n*, 322 F.3d 311, 314 (4th Cir. 2003) (citing *AT&T Techs. Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986)).

¹¹³ JAMES T. GRAY, 1 SPORTS L. PRAC. § 1.09(1)(a) (citing J. WEISTART & C. LOWELL, *THE LAW OF SPORTS* 408 (1979)).

¹¹⁴ GRAY, *supra* note 113, at § 1.09(1)(a).

¹¹⁵ *Id.* at § 1.09(1)(b) (citing WEISTART & LOWELL, *supra* note 113, at 410).

¹¹⁶ *Id.* at § 1.09(2)(a).

¹¹⁷ *Id.* at § 1.09(2)(b).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

appealed on very narrow grounds.¹²⁰ Each of the four main sports already has binding arbitration provisions in its CBA.¹²¹

Since arbitration disputes in professional sports arise from grievances between professional athletes and the franchises who owns the athletes' playing rights,¹²² the disputes pertaining to the players' contracts to play implicate labor law. Under labor law, the players have the right to unionize under the National Labor Relations Act ("NLRA").¹²³ Section VI of the NLRA recognizes that each professional players' union has: (1) the right to self- organization; (2) the right to bargain collectively through representatives of the employees' own choosing; and (3) the right to engage in concerted activities for employees' mutual aid or protection.¹²⁴ Each professional sports league has its own players' union: the Major League Baseball Players' Association ("MLBPA") for the MLB; the National Basketball Players' Association ("NBPA") for the NBA; the National Football League Players' Association ("NFLPA") for the NFL; and the National Hockey League Players' Association ("NHLPA") for the NHL.¹²⁵ Though there are provisions regarding arbitration in each major professional sports league's CBA, most of the salary disputes that go to arbitration occur when a player is *without* a contract, not when the player has a contract which the player does not deem reflective of his true value.¹²⁶ For example, in the MLB and NHL, there is a period in each player's career where each player is "arbitration eligible," meaning that the player must go to arbitration with his team to resolve what the player's salary will be for the upcoming season.¹²⁷ There are currently no provisions in any professional sports league's CBA pertaining to how a league will handle a player hold out. Only one of the four

¹²⁰ See GRAY, *supra* note 113, at § 1.09.

¹²¹ See MLB CBA, *supra* note 21, at Art. VI(E); NBA CBA, *supra* note 20, at Art. XXXI, XXXII; NFL CBA, *supra* note 20, at Art. 9(4), 26(4), 41(3), 43(6), 44(7); NHL CBA, *supra* note 19, at Art. 17.5.

¹²² GRAY, *supra* note 113, at § 1.09(3)(a).

¹²³ *Id.* at § 1.09(3)(b)(ii).

¹²⁴ 29 U.S.C. § 157 (2012).

¹²⁵ See generally MLB CBA, *supra* note 21; NBA CBA, *supra* note 20; NFL CBA, *supra* note 20; NHL CBA, *supra* note 19.

¹²⁶ See MLB CBA, *supra* note 21, at Art. XX(B)(1); NBA CBA, *supra* note 20, at Art. XI, § 5(p); NFL CBA, *supra* note 20, at Art. 9(4); NHL CBA, *supra* note 19, at Art. 12.

¹²⁷ See MLB CBA, *supra* note 21, at Art. VI(E)(1); NHL CBA, *supra* note 19, at Art. 12.

major sports leagues, the NFL, even refers to a “hold out” (the process itself) or a “holdout” (the player conducting the hold out) in its most recent CBA.¹²⁸ So while there are provisions which pertain to determining a player’s salary, those arbitration provisions apply only after the previous contract has expired—not when a player disputes the amount of his salary.

A major hurdle to incorporating into the CBA a provision which calls for binding arbitration when a player holds out is that professional athletes do not like going to arbitration. For example, in early 2017, the New York Yankees of the MLB completed arbitration proceedings with star relief pitcher Dellin Betances.¹²⁹ A relief pitcher is any pitcher who pitches in any inning—other than the ninth inning—after the starting pitcher leaves the game. Closing pitchers, on the other hand, are normally the pitchers pitching in the ninth inning with the hopes that the pitcher will close out a win for his team. Betances, though he was not a closing pitcher, believed he was entitled to earn five million dollars—which is normally a closing pitcher’s salary—in the upcoming 2017 season. Betances believed his value as a relief pitcher was akin to the value of what a closing pitcher would normally be. The Yankees, on the other hand, believed Betances’ services were worth only three million dollars, which is on the higher-end of relief pitcher salaries.¹³⁰ After a tumultuous arbitration process, the arbitrator ruled that Betances would be paid three million dollars for the 2017 season, thereby adopting the Yankees’

¹²⁸ See sources cited *supra* note 126. But see NFL CBA, *supra* note 20, at Art. 4(9)(a) (stating that a player commits Forfeitable Breach (i.e., the player forfeits a portion of the salary the player would otherwise be entitled to) when the player holds out from, or refuses to participate in practices or games). See also Art. 43 §§ 1, 6, 7 (stating that arbitration is to be conducted when there is a grievance “involving the interpretation of, application of, or compliance with, any provision of this Agreement, the NFL Player Contract, the Practice Squad Player Contract, or any applicable provision of the NFL Constitution and Bylaws or NFL Rules pertaining to the terms and conditions of employment of NFL players,” making it possible that player hold outs could be included as an arbitrable issue under the auspice of “interpretation of . . . the NFL Player Contract”).

¹²⁹ Billy Witz, *Yankees’ Dellin Betances Loses in Arbitration, and a War of Words Begins*, N.Y. TIMES (Feb. 18, 2017), <https://www.nytimes.com/2017/02/18/sports/baseball/yankees-dellin-betances-arbitration-.html>.

¹³⁰ *Id.*

salary request.¹³¹ After the arbitrator made his ruling, Yankees President Randy Levine told the media that Betances earned the correct salary because Betances was not a closing pitcher.¹³² Levine stated, “[i]t’s like me saying, ‘I’m not the president of the Yankees; I’m an astronaut.’ No, I’m not an astronaut, and Dellin Betances is not a [closing pitcher].”¹³³ Levine’s comments, combined with the arbitration process, made Betances upset. Betances said, “[t]hey take me in a room, and they trash me for about an hour and a half. I thought it was unfair for me. I feel like I’ve done a lot for this organization.”¹³⁴ Betances’ 2017 plight shed light on the divisiveness of the arbitration process and illustrated how arbitrations can lead to negative feelings by either the organization or the player. Current MLB players are so arbitration-averse that many star players are signing contracts with their teams through their arbitration years¹³⁵ to avoid the process.¹³⁶ For these reasons, presenting a provision that mandates binding arbitration to a player’s union may not be a popular choice for resolving the labor disputes that arise when a player holds out.

However, binding arbitration which would end a player’s hold out is clearly distinguishable from the current salary arbitrations that take place in professional sports. Though it is true that binding arbitration to end a hold out and binding arbitration when a player does not have a contract both

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Under the current MLB CBA, the franchise that owns the player’s playing rights retains six years of arbitration eligibility with that player. MLB CBA, *supra* note 21, at Art. XX(B)(1). After the player has accrued six years or more in MLB service time, the player no longer must submit to binding arbitration with his franchise and can become a free agent. *Id.*

¹³⁶ For examples of notable MLB stars that have signed lucrative contracts to avoid arbitration, see Katherine Acquavella, *Yankees, Luis Severino Avoid Arbitration With Four-Year, \$40 Million Contract Extension, Reports Say*, CBS SPORTS (Feb. 15, 2019, 12:12 PM), <https://www.cbssports.com/mlb/news/yankees-luis-severino-avoid-arbitration-with-four-year-40-million-contract-extension-reports-say/>; Associated Press, *Blake Snell, Rays Agree to \$50 million, 5-Year Contract*, WASH. POST (Mar. 21, 2019), <http://stats.washingtonpost.com/mlb/story.asp?i=20190321153630838520708>; Greg Johns, *Segura Inks Five-Year Contract Extension*, MLB.COM (June 6, 2017), <https://www.mlb.com/news/mariners-sign-jean-segura-to-5-year-extension-c234786126>.

necessarily involve the possibility of a player earning a new salary, binding arbitration that ends a hold out would end the labor dispute over a *current* contract that the player has with the franchise and permit the player to play with his team again. This would make arbitration important—and potentially even necessary—when the player holding out is doing so as the new season approaches because arbitration would be the most expedient way of resolving the player's salary dispute. While the franchise may seek to maintain the position that the player should abide by the current contract, there is nothing to prevent the franchise from putting forth such a position in a binding arbitration proceeding. There is a chance, though, that if the franchise takes that position, the arbitrator may deem that the player's proposed salary is more reflective of the player's value at the time of the arbitration. Binding arbitration would therefore protect both management and the player when a player holds out. The player would be protected because, if the player is truly deserving of a pay increase, the arbitrator will likely side with the player and award the player the salary the player desires. Conversely, binding arbitration protects the franchise by giving a player one opportunity to make his case as to why he is deserving of a higher salary and, if the arbitrator does not accept the player's proposal for a salary increase, then the franchise's proposal for the player's salary must be accepted. Thus, binding arbitration would bring both an expedient end to the hold out and remedy the player's material breach.

One of the criticisms to the binding arbitration approach is that there are no safeguards proposed which would prevent each player from holding out during a successful season or at the conclusion of a successful season. The counter argument to the system proposed above would be that, once a player is achieving success, he will hold out and demand a higher salary and submit for binding arbitration. However, additional language can be added to the binding arbitration provision which would either limit the frequency at which the players can hold out, by limiting the number of arbitrations each player is entitled to seek, or make it mandatory that a player must wait a certain amount of time before the player can seek binding arbitration again. It is also worth noting that the arbitrator is not obligated to accept the player's proposal when the player goes to binding arbitration. Both the player and the franchise must make their

case as to why their side's salary proposal best reflects the player's salary. Therefore, because there are alternatives available which would prevent potential abuses of the binding arbitration system, the system remains a viable option for professional sports leagues to adopt in their CBA. Again, until the current CBAs for the MLB, NBA, NFL, and NHL expire, none of the leagues can adopt a binding arbitration system. However, the benefits that both the franchises and the players stand to gain from such a system being in place to resolve hold outs would outweigh the current system that essentially leaves one side, the franchise, without an adequate remedy.

B. "Self-Help Specific Performance"

Another adequate alternative is Professor Johnson's suggestion of a "self-help specific performance" remedy, which he set forth in his article, *The Argument for Self-Help Specific Performance: Opportunistic Renegotiation of Player Contracts*.¹³⁷ The self-help remedy calls for the franchise to agree to the player's opportunistic demand for renegotiation and then, after the player has fully performed, contest the modification and seek to recover any payments made in excess of those called for under the original contract.¹³⁸ For agreements unsupported by additional consideration, Professor Johnson argues that his proposal for a self-help remedy would be effective because of the pre-existing duty rule.¹³⁹ This rule provides that if the promisor in a modification did not provide something of additional value, the modification was not supported by consideration and was thus invalid.¹⁴⁰ In applying the pre-existing duty rule to sports contracts, any contract where the player essentially forces the franchise to agree to the contract by leveraging his situation and threatening to hold out can be challenged by the franchise at a later time if the contract is not supported by additional consideration.¹⁴¹

¹³⁷ Johnson, *supra* note 51, at 92.

¹³⁸ *Id.*

¹³⁹ *Id.* at 93.

¹⁴⁰ See RESTATEMENT (SECOND) OF CONTRACTS § 73 (AM. LAW. INST. 1981).

¹⁴¹ See *id.* at § 89(a) (stating that "[a] promise modifying a duty under a contract not fully performed on either side is binding if the modification is fair and equitable in view of circumstances not anticipated by the parties when the

Though it may be argued that for a franchise to acquiesce to the holdout's demand, only to later seek to recover the difference between the original contract and modified contract, is a breach of the duty of good faith and fair dealing implied for every contract, this is not necessarily true. First, and most importantly, the franchise's maneuvering in acquiescing to the holdout's demand is *a direct result of the holdout's breach of contract*. If the holdout's breach is deemed to be a material breach, then, as mentioned earlier, the franchise is permitted to take steps in response, such as suspending its own performance.¹⁴² Second, for such a contract modification to take place, there must first be a contract to modify. Even if the first contract has been breached, the contract may still be modified because a breach of contract does not necessitate a rescission of the contract, being that rescission requires both parties to agree to a discharge of the duties called for in the contract.¹⁴³ The importance of there being a contract already in place is significant because in contesting the assertion that the franchise agreed to the modification in bad faith, the franchise can counter that the holdout negotiated in bad faith, because the holdout either withheld or threatened to withhold his unique skills until he was able to obtain the modification he desired. With this being the case, the holdout's bad faith challenge to the franchise's later recourse may be dismissed by a court.

Even if the modified contract was supported by additional consideration, such as the holdout's contract getting extended, it is still possible for franchises to bring an action against the holdout after the holdout has fully performed through a claim of economic duress.¹⁴⁴ To constitute duress, a manifestation of assent must be induced by an "improper threat" that leaves the victim "no reasonable alternative."¹⁴⁵ A threat is improper if it represents a breach of the duty of good faith and fair dealing.¹⁴⁶ Thus, economic duress would render the contract voidable.¹⁴⁷ A successful claim of duress requires a showing of three elements:

contract was made").

¹⁴² See *id.* at § 237.

¹⁴³ See *id.* at § 283(1).

¹⁴⁴ Johnson, *supra* note 51, at 99. See also RESTATEMENT (SECOND) OF CONTRACTS § 176 (AM. LAW INST. 1981).

¹⁴⁵ RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (AM. LAW INST. 1981).

¹⁴⁶ *Id.* at § 176(1)(d).

¹⁴⁷ Johnson, *supra* note 51, at 99.

(1) an improper threat; (2) the lack of a reasonable alternative; and (3) the inadequacy of ordinary remedies for breach.¹⁴⁸ When a player holds out from his contract, the impropriety of the threat element is met because the “object [of the threat] is to extort more money from his employer for what is essentially little more than his already promised performance.”¹⁴⁹ Further, even if the player does not explicitly threaten to breach his contract, duress can still be inferred from words or other conduct.¹⁵⁰ Therefore, even if the player merely threatens to hold out, this could be enough for the franchise to bring an economic duress claim.

Much like the improper threat element, the next two elements of economic duress are also likely met during a player holdout. The lack of a reasonable alternative element is likely met because the type of personal service called for in a sports contract is the quintessential example of unique performance for which no true substitute exists, as no one player performs quite like another.¹⁵¹ In this manner, player contracts, due to their uniqueness, are akin to the performance contract Johanna Wagner signed, and later breached, which precipitated *Lumley v. Wagner*.¹⁵² Similarly, the inadequacy of ordinary remedies element is met because the only remedy traditionally available upon breach may be a negative injunction.¹⁵³ However, the negative injunction does not provide adequate recompense to the club because the injunction merely prohibits the player from playing elsewhere.

This resolution to the hold out dilemma is not without its obstacles. With self-help specific performance, Professor Johnson identifies two main issues franchises may face: (1) the reluctance of the court to find that a sophisticated, wealthy, corporate defendant could be the victim of duress by an individual player; and (2) that the franchise did not affirm the modification of the player’s contract.¹⁵⁴ The first obstacle can be

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 100.

¹⁵⁰ RESTATEMENT (SECOND) OF CONTRACTS § 175, cmt. a (AM. LAW INST. 1981).

¹⁵¹ Johnson, *supra* note 51, at 100–01.

¹⁵² *Lumley v. Wagner* (1852) 42 Eng. Rep. 687, 687–99.

¹⁵³ *See Rapp, supra* note 86, at 262.

¹⁵⁴ Johnson, *supra* note 51, at 100-01.

overcome, however, through emphasizing the particular favorable circumstance the player finds himself in or highlighting the considerable bargaining power of a superstar player.¹⁵⁵ Through this heightened bargaining power, premier players are typically able to get the contracts they want because the franchise does not want to risk those players withholding their services or demanding to play for a different franchise. Similarly, the second obstacle, the non-affirmance of the modification, can be overcome by the franchise showing that the franchise only briefly affirmed the contract and gave in to the player's demand until the threat of the player withholding his services had subsided.¹⁵⁶ In other words, the franchise can seek restitution for the "excess" payments as long as the franchise "disaffirms the modified contract within a 'reasonable time.'"¹⁵⁷ While the term "reasonable time" is ambiguous, it likely means that the franchise can bring its economic duress claim against the player shortly after the time of the holdout's threat has subsided.¹⁵⁸

A provision necessitating binding arbitration between the holdout and the franchise would be a topic that would be worthwhile considering during the next negotiating period for each league's CBA because of the expedited—and fair—resolution process that would take place between the player and the franchise. However, if the players' associations and the leagues are unable to agree to such a provision, the self-help specific performance remedy may be the best alternative for franchises to begin to shift the balance of power in professional athlete contract hold outs.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *See id.*