DO NFL "SIGNING BONUSES" CARRY A SUBSTANTIAL RISK OF FORFEITURE WITHIN THE MEANING OF SECTION 83 OF THE INTERNAL REVENUE CODE?

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INTRODUCTION

Imagine a recently graduated collegiate football superstar who is drafted by, and signs a lucrative contract with, a National Football League ("NFL") team. The contract is for five years and includes a ten million dollar signing bonus. During his rookie season, war breaks out, and the United States is involved. A patriot on the order of Pat Tillman, our star retires from football after only one season, joins the military and departs for the war theater. Unfortunately, he is injured during his tour of duty and is unable to return to professional football. Or, imagine that a current NFL player acts upon his preference to practice medicine or enter a religious order.

The National Football League Management Council ("NFLMC") and the National Football League Players Association ("NFLPA") entered into a collective bargaining agreement (the "CBA") that permits NFL teams to recover the portion of the ten million dollar signing bonus that was not earned on the playing field—eight million dollars in this case.[1] However, after paying say three million dollars in federal income taxes on the receipt of ten million dollars, our football player turned patriot/doctor/priest does not have eight million dollars to return to his NFL team.

In addition, even if the athlete has other sources of funds and can in fact return the eight million dollars, he has already paid taxes on the receipt of funds he was ultimately

1. Article XIV § 9(a) of the NFL Collective Bargaining Agreement 2006-2012 provides "No forfeitures of signing bonuses shall be permitted, except that players and Clubs may agree: (i) to proportionate forfeitures of a signing bonus if a player voluntarily retires or willfully withholds his services from one or more regular season games; and/or (ii) that if a player willfully takes action that has the effect of substantially undermining his ability to fully participate and contribute in either pre-season training camp or the regular season, the player may forfeit [a portion of his signing bonus]".

not allowed to keep. Technically, he will be allowed a deduction for the eight million dollars he returned. But as a practical matter, a tax deduction has no benefit to a taxpayer who does not have sufficient income to absorb the deduction. In the case of our war hero, it is unlikely that he will ever earn enough money during the rest of his life to take advantage of the loss deduction. Moreover, because of the time value of money,[2] the future value of this loss deduction is less than the present value of the taxes paid on those eight million dollars. Even worse, if the taxpayer's tax rate is lower in those later years, which is highly likely in the above scenario, the value of the deduction is even less.

This Article demonstrates how the foregoing tax hardships can be ameliorated by paying NFL players their signing bonuses in the form of property such that they qualify for tax deferral pursuant to § 83 of the Internal Revenue Code ("IRC"). Section 83, originally designed to address the divestiture of employee stock options, permits deferral of the recognition of income until such time as it cannot be divested from the employee by reason of non-performance. Signing bonuses that are earned by the mere signing of a contract and are not contingent upon actual performance on the playing field are taxable upon receipt. However, the CBA permits their forfeiture, and thus places signing bonuses, if paid in the form of property, within the purview of § 83.

A signing bonus is one of several compensation mechanisms used by NFL teams to secure the performance of professional football players. Teams pay the player a monetary sum, often several million dollars, as consideration for signing a long-term contract.[3] If a professional football player refuses, however, to perform while under contract, the team may recover the portion of the signing bonus relating to the period of non-performance.[4] Even if the player is willing

2. Inflation in the national economy means that prices for goods and services rise. Thus, under normal circumstances—that is, when inflation rises at a low but steady rate—one dollar buys more today than it does tomorrow. It also means that a tax benefit received years later will ordinarily not be as valuable as the same tax benefit today.

3. *See, e.g.*, Kiplinger's Personal Finance Magazine, *Game plans from NFL's instant millionaires*, MSN MONEY, http://moneycentral.msn.com/content/Retirementandwills/Escapetheratrace/P100986.asp (discussing NFL player Steve Smith's $25.7 million dollar signing bonus in consideration for a six-year contract extension).

4. See *supra* note 1,

to perform, but is in violation of a team or league rule, the team may recoup that portion of the signing bonus attributable to the games for which the player was suspended. [5] Because the prospect of forfeiting one's signing bonus is "substantial" as defined in § 83(c) of the IRC, an NFL player who is paid in the form of property qualifying under § 83(e) may exclude from his gross income the portion of his signing bonus attributable to future performance.

Generally speaking, § 83 permits a taxpayer to defer the recognition of income where the employee may have to forfeit property initially received as income. An employee who receives stock options immediately receives title and rights relating to those stock certificates as an incentive to perform but with the threat of forfeiture should they fail to fulfill their end of the bargain. Section 83 prevents that employee from being taxed until the risk of forfeiture passes, as it would be anomalous to tax the employee on income that would later be forfeited. Without § 83, the employee would be entitled to a loss deduction at the time of forfeiture; but, for a few reasons, the value of the deduction may be considerably less than the amount of tax already collected.

Options to purchase stock at discount prices are not an uncommon form of compensation. Requiring the employee to work for a certain period of time before title to those stocks fully vests in the employee raises the prospect that the employee may have to forfeit them. Congress could have required the employee to pursue § 165 of the Internal Revenue Code, relating to losses,[6] or to rely on the jurisprudential Tax Benefit Rule.[7] A system of inclusion-then-possible-deduction may cause unintended, inequitable results. Because the taxpayer's applicable tax rate in the year of forfeiture may differ from the rate applicable in the year of inclusion, the value of the inclusion and deduction may differ. Even if equal in raw amount, the deduction is, in accordance with the time value of money, worth less than the taxes paid. Further, in the year of forfeiture, the taxpayer may not have income sufficient to absorb the deduction.

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5. *Id.*

6. IRC § 165.

7. Hillsboro Nat'l Bank v. Commissioner, 460 U.S. 370 (1983) (Despite the rule that taxes are computed based on a yearly 'snapshot', a future tax return may sometimes be used to account for a mistake of fact relating to a previous tax year.)

Deferring the recognition of NFL signing bonuses comports well with § 83's purpose: to avoid the payment of tax on income that could be forfeited later. Had Michael Vick been required to repay twenty million dollars in 2008 after including it in his income in 2005 through 2007, § 165 or the Tax Benefit Rule would permit Vick a deduction in 2008 against the $.12 per hour he makes washing dishes at Leavenworth prison. Because it is unlikely that Vick will be able to continue his NFL career after his release, it matters little if the twenty million dollar loss can be carried forward in perpetuity.

Part I of this Article elaborates on the legal landscape of NFL signing bonuses, including a brief synopsis on their inclusion in football contracts, common law treatment of signing bonuses, and the 2006 CBA's effect on their legal character. Part II applies § 83 to NFL signing bonuses, finding that NFL signing bonuses qualify for deferral treatment so long as they are paid in property. Part III explores this question further by identifying techniques of judicial deliberation—textualism, intentionalism, purposivism, and dynamism—and uses these techniques to address whether the recognition of NFL signing bonuses as income may be deferred. Part IV concludes that NFL signing bonuses, if paid in property, represent income that may be deferred.

I. RULES RELATING TO FORFEITURE OF COMPENSATION IN THE NFL

The initial issue is: what types of NFL compensation are subject to forfeiture or divestiture? The bald legal question of whether forfeiture of signing bonuses may be enforced as a valid liquidated damages clause is not entirely settled.

Ultimately, the *Ricky Williams-Ashley Lelie-Michael Vick* line of cases establishes a firm rule relating to the forfeiture of NFL compensation: all bonuses are salary escalators, but only those expressly designated as "signing bonuses" are subject to forfeiture relating to player conduct.[8] Despite the radically different legal effect, the differences between roster, option, and signing bonuses are slight. Vick's agreement with

8. *Vick*, 533 F.Supp.2d 929; *Lelie*, 2007 U.S. Dist. LEXIS 21536; *Williams*, 356 F. Supp. 2d 1301.

the Atlanta Falcons, in particular, looks like what would otherwise be a signing bonus but for substituting the word "roster" for "signing" and adding the minimal condition that Vick, one of the major faces of the NFL and the premier player on the Falcons at the time, simply make the squad. In other words, Vick's roster bonus was the functional equivalent of a signing bonus, but Vick's agent likely negotiated its characterization as a roster bonus specifically to avoid potential forfeiture.

Although the 2006 CBA, and its subsequent interpretations, presents a negotiated equilibrium on the matter, it is likely to change since the NFL owners opted to terminate the 2006 CBA directly because of recent federal court interpretations of the CBA on the issue of forfeiture.[9]

A. Overview of NFL Compensation Structure

According to David J. Sipusic, signing bonuses in professional football came into vogue in the late 1950s and early 1960s when the NFL and the then-upstart American Football League[10] ("AFL") competed for the rights to talented players.[11] Part of the AFL's strategy to lure players away from the NFL was to offer signing bonuses in addition to their contracted salaries.[12] In 1959, both the NFL's Los Angeles Rams and the AFL's Houston Oilers offered star collegiate running back Billy Cannon a ten thousand dollar signing bonus. Cannon chose the Oilers' deal.[13] Soon after, the AFL's Oakland Raiders secured the services of quarterback Roman Gabriel with a $100,000 signing bonus.[14] And in 1965, the

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9. NFL Opts Out of Collective Bargaining Agreement, http://www.nfl.com/news/story?id=09000d5d80868b78&template=without-video&confirm=true ("There are substantial other elements of the deal that simply are not working. For example, as interpreted by the courts, the current CBA effectively prohibits the clubs from recouping bonuses paid to players who subsequently breach their player contacts or refuse to perform. That is simply irrational and unfair to both fans and players who honor their contracts.").

10. David J. Sipusic, *Instant Repay: Upon Further Review, the National Football League's Misguided Approach to the Signing Bonus Should be Overturned*, 8 SPORTS L.J. 207, 213-14 2001).

11. Signing bonuses had been used as early as the 1940s in baseball, *see* Brooklyn Nat'l League Baseball Club, Inc. v. Pasquel, 66 F. Supp. 117 (E.D. Mo. 1946); Sipusic, *supra* note 10, at 210-12.

12. Sipusic, *supra* note 10, at 213-16.

13. *Id.* at 213.

14. *Id.*

New York Jets paid All-American quarterback Joe Namath a $200,000 signing bonus, who, only a few years later, would prove in SuperBowl III that the AFL had talent on the playing field commensurate with the NFL.[15]

There are at least two reasons why paying a signing bonus is a high risk-high reward affair for sports franchises. First, a team may miscalculate its ability to garner revenue sufficient to cover its expenses, including salaries and bonuses. While the AFL successfully used signing bonuses as a means to compete with the NFL for talented players, the World Football League of the 1970s and the United States Football League of the 1980s bankrupted themselves, in part, by guaranteeing large signing bonuses to players.[16] Second, a player may not perform as well as expected for a variety of reasons, including: injury; degenerating skills; poor fit with team schematics; and suspension for misconduct. Signing bonuses are not recoupable for player injury or generally poor playing performance, both of which are extremely common events in professional football. The only conditions upon which a team may recover a signing bonus are governed by the CBA.[17]

Further, cutting an injured or poorly performing player who has previously received a signing bonus has adverse consequences on the calculation of the team's yearly salary cap.[18] Still, NFL teams regularly dole out signing bonuses

15. *Id.* at 213-14.

16. *Id.* at 214.

17. *Id.* at 215.

18. When a player who received a signing bonus fails to perform as expected, the team may cut the player. But in addition to sunk costs, the team must endure so-called "salary cap" ramifications, as outlined in the CBA. Due to a successful anti-trust lawsuit by the players in 1993, White v. National Football League, 533 F.Supp.2d 929 (D. Minn. 2008), a decree was entered that provided that application of the CBA is supervised by United States District Court Judge for the District of Minnesota, the Honorable David S. Doty. With an eye to promoting greater competition between teams on the playing field, the CBA provides for a Team Salary Cap, prohibiting, with some exceptions, teams from paying players an aggregate amount exceeding an annually-determined ceiling (the cap). Crucial to this calculation is the determination of the relationship between the annual cap and players' salary. The CBA provides that, with respect to the determination of one's salary for cap purposes, a signing bonus is prorated over the life of the player's contract. Article XXIV § 7(b)(i) of the NFL Collective Bargaining Agreement 2006-2012.Thus, an NFL team agreeing to pay to a player a ten million dollar signing bonus, in addition to a salary over five years, counts two million dollars of that player's signing bonus toward each year's salary cap. If the contract is terminated by either party prior to completion of the contract, that portion of the contract which has yet to be applied to the team's salary cap is accelerated and

and other forms of guaranteed money.

B. Earning Signing Bonuses Merely By Signing a Contract

Under the common law, a signing bonus, properly so called, is money earned for the mere act of signing a contract.[19] It is a unilateral contract representing a team's promise to pay money in consideration for a player's signature on a services contract.[20] Signing bonus vesting rights are not contingent on performance on the playing field. Because bonuses vest immediately, they are clearly income to the recipient. Remember, however, that recognition of realized income may be deferred if Congress so allows.

State decisions confirm the nature of a signing bonus as the product of a unilateral contract requiring only that the player attach his name to a separate contractual obligation. For example, a New York court found that the New York State Tax Commissioner could not tax a hockey player's signing bonus due to his performance of services in New York because the player earned that bonus by the mere act of signing his contract in Boston, Massachusetts.[21] Additionally, Pennsylvania courts, twice excluded signing bonuses from the calculation of annual salary in worker's compensation cases because the bonuses are obligations independent of salary, relating only to the mere act of signing a contract.[22]

Federal courts confirmed that the consideration for a signing bonus is the mere act of signing a contract. In *Alabama Football Inc. v. Greenwood*, the court held that defensive lineman L.C. Greenwood need not forfeit fifty thousand dollars of the signing bonus paid to him by the Birmingham Americans of the World Football League[23] even though the team folded before Greenwood had a chance to

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applied in whole to the year of termination. *Id.*

19. WALTER T. CHAMPION, JR., FUNDAMENTALS OF SPORTS LAW § 16:4 (2d ed. 2007).

20. Alabama Football, Inc. v. Greenwood, 452 F.Supp. 1191, 1200 (W.D. Pa. 1978).

21. Clark v. N.Y. State Tax Comm'r, N.Y.S.2d 518, 520 (1982).

22. Station v. Workmen's Comp. Appeal Bd., 608 A.2d 625, 629 (Pa. Commw. Ct. 1992) [hereinafter "*Pittsburgh Steelers Sports Inc.*"]; McGlasson v. Workmen's Comp. Appeal Bd., 557 A.2d 841 (Pa. Commw. Ct. 1989) [hereinafter "*Philadelphia Eagles Football Club*"].

23. *Greenwood*, 452 F. Supp. at 1192; Alabama Football, Inc. v. Stabler, 319 So.2d 678, 681 (Ala. 1975).

play for it.[24] The team contended that Greenwood's signing bonus was an advance on his salary, which he had not earned.[25] The court sided with Greenwood, finding that signing bonuses in professional sports are paid merely for executing a contract.[26] Under the same theory, Kelvin Bryant of the now-defunct USFL's Philadelphia Stars successfully sued for the unpaid portion of his signing bonus even after the USFL ceased operations.[27]

Since rights in the signing bonus vest upon signing, it is considered income at that time. The next section, however, determines whether an athlete may ultimately be divested of his rights in the signing bonus. If the signing bonus is subject to forfeiture, then, it may qualify for deferral under § 83.

C. *Forfeiture of Signing Bonuses as an Unenforceable Penalty*

In 1993, with no rival leagues challenging the NFL for professional football supremacy, the NFLMC and NFLPA executed a CBA which specifically contemplated teams and players negotiating signing bonuses as well as forfeiture clauses relating to voluntary nonperformance and misconduct.[28] Years later, arbitrators dealing with the cases of Barry Sanders[29] and Eddie Kennison[30] enforced the forfeiture clause. But the validity of forfeiture as enforceable liquidated damages clauses instead of unenforceable penalty clauses did not reach an Article III court until *Williams v. Miami Dolphins* in 2005.[31] However, neither that case nor subsequent cases decided whether forfeiture of a signing bonus outside of a collective bargaining arrangement is an enforceable liquidated damages clause or an unenforceable contractual penalty.

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24. *Greenwood*, 452 F.Supp. at 1193; *Stabler*, 319 So.2d 678.
25. *Greenwood*, 452 F.Supp. at 1193; *Stabler*, 319 So.2d 678.
26. Sipusic, *supra* note 10, at 228.
27. *Id.*
28. *Id.* at 207.
29. *Id.*
30. Robert Forbes, *Call on the Field Reversed: How the NFL Players Association Won Big on Salary Forfeiture at the Bargaining Table*, 6 VA. SPORTS & ENT. L.J. 333, 350-52 (2007).
31. *See generally* Miami Dolphins v. Williams, 356 F. Supp. 2d 1301 (S.D. Fla. 2005).

1. Barry Sanders

The first instance of an NFL team attempting to recover a portion of a player's signing bonus occurred between the Detroit Lions and Barry Sanders. Sanders had a chance to break the all-time rushing record for an NFL running back had he not retired near the peak of his career in 1999.[32] His retirement came only two years after he signed a contract with the Detroit Lions which contained an eleven million dollar signing bonus.[33] The Lions sought to recover half of the eleven million dollars based on contract language which provided for forfeiture of the bonus due to willful non-performance.[34]

Barry Sanders' situation differs from the *Greenwood-Bryant* cases in that the Lions conceded that Sanders earned his signing bonus, but argued that he agreed in a signing bonus "rider" to forfeit it under specified conditions, including willful retirement.[35] An arbitrator validated the rider and ordered the forfeiture.[36] The *Sanders* case thus ushered in the modern analysis of NFL signing bonuses: signing bonuses are earned upon signing but may be forfeited as liquidated damages resulting from a willful breach of contract.

2.Ricky Williams

Ricky Williams' career began the year Sanders' ended. A star running back out of the University of Texas, Williams was selected in the 1999 NFL Draft by the New Orleans Saints, at the behest of newly hired head coach Mike Ditka.[37] Ditka and Williams appeared together on the cover of Sports Illustrated as if they were at the altar to get married, complete with the 230-pound, dreadlocked Williams in a wedding dress.[38]

Though talented on the football field, Williams experienced problems relating to his conduct which included

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32. Sipusic, *supra* note 10, at 207.
33. *Id.*
34. *Id.*
35. This is misunderstood by some commentators. *See id.* at 230.
36. Sipusic, *supra* note 10, at 207.
37. Hannah Gordon, *In the Replay Booth: Looking at Appeals of Arbitration Decisions in Sports through Miami Dolphins v. Williams*, 12 HARV. NEGOT. L. REV. 503, 507 (2007).
38. *Id.*

several suspensions by the NFL for violating its substance abuse policy relating to marijuana use.[39] Williams also had a social anxiety disorder, which manifested itself during, and was exacerbated by, the many media interviews a player of Williams' caliber is required to honor.[40] In 2002, the New Orleans Saints traded Williams to the Miami Dolphins.[41] Williams and the Dolphins negotiated a contract with signing and incentive-based bonuses.[42] However, in 2004, with several years left on this contract, Williams decided to retire from football.[43]

In the event Williams failed to perform his contract for specified reasons, including retirement, the 2002 contract required Williams "to return and refund" previously paid bonus money to the Miami Dolphins.[44] Due to his abrupt retirement, the Dolphins demanded the return of 8.6 million dollars.[45] An NFL arbitrator ruled in the Dolphins' favor and that ruling was subsequently approved by the United States District Court for the Southern District of Florida.[46]

During arbitration, Williams argued that the forfeiture provision in his contract was invalid as against Florida law and public policy relating to liquidated damages.[47] Under Florida law, liquidated damages clauses in contracts are enforced when they are reasonable estimates of likely damages should a breach occur; they are invalid when they operate to coerce performance imposing a penalty for breach that is unrelated to the likely damages caused by that breach.[48] To be enforceable, liquidated damages must resemble the actual damages parties would likely suffer should there be a breach and the actual damages must not be t readily ascertainable when the breach does occur.[49] The arbitrator considered whether the forfeiture clauses were penalty provisions, but did not decide that question.

39. *Id.*
40. *Id.*
41. *Williams*, 356 F.Supp.2d at 1302.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Williams*, 356 F.Supp 2d at 1304.
48. Coleman v. B.R. Chamberlain & Sons, Inc., 766 So.2d 427, 429 (Fla. Dist. Ct. App. 2000).
49. H.D. Hutchison v. Tompkins, 259 So.2d 129, 132 (Fla. Dist. Ct. 1972).

Ultimately, the arbitrator concluded that the forfeiture clauses were enforceable because the "incentive and default mechanism" was bargained for.[50]

Williams' appeal to the district court accused the arbitrator of manifestly disregarding state law relating to liquidation clauses and claimed that enforcing the clauses was against public policy.[51] He argued that, by not deciding whether the forfeiture clause in Williams' contract served as a penalty provision, the arbitrator disregarded state law. Further, he claimed that, if the forfeiture clauses were in fact penalty provisions, the arbitrator's decision to enforce them was contrary to public policy. The district court, however, approved the arbitrator's decision based on the strong statutory and jurisprudential preference for deference to the arbitration process.[52] Judge Cohn held that the arbitrator's "punt" on the liquidated damages question constituted a permissible "misstatement, misinterpretation or misapplication" of the law.[53] The court acknowledged that "under Florida law, agreements between parties to apply liquidated damages upon default can be deemed unenforceable as penalty provisions by a court" and that "the default provisions of the Dolphins-Williams contract could be construed [either] as valid liquidated damages or as an unenforceable penalty."[54]

The court credited the NFLMC's contention that the forfeiture clauses were valid liquidated damages because actual damages were not readily ascertainable at the time of contract.[55] Yet, the court left open the question of whether the same forfeiture clause outside of a collective bargaining relationship would constitute liquidated damages or an unenforceable contractual penalty. The court stated, "the fact

50. Miami Dolphins v. Williams, pg. 3 (2004) (Bloch, Arb.) (on file with author).

51. Miami Dolphins v. Williams, 356 F.Supp.2d 1301, 1304 (S.D. Fla. 2005).

52. *Id.* at 1306.

53. But in fact the arbitrator made no statement, interpretation or application of Florida law. Instead, he disregarded it. Thus, it is more likely that the district court, in approving the arbitrator's decision, was relying on a loose jurisprudential principle of non-interference in matters relating to sport than on any statutory or common law command. *See, e.g.*, SCHULYER M. MOORE, TAXATION OF THE ENTERTAINMENT INDUSTRY 222 (1999) ("A recurrent theme throughout taxation of the sports industry is that Congress, the courts, and the Service are astounding in their favoritism of the industry...[The author] refers to this influence as the 'sports factor.' ")

54. *Williams*, 356 F.Supp.2d at 1305.

55. *Id.* at 1306 n.3.

that the arbitrator construed the contract in a manner that avoided consideration of whether the actual damages were proportional to the default provisions does not render his decision. . .against public policy."[56] This is true. The fact that the arbitrator avoided the question does not render the decision against public policy; only an authoritative finding that the clauses serve as penalties renders the decision against public policy. But neither the arbitrator nor the district court made such a finding. Instead, it appears that the court relied surreptitiously on a hazily developed jurisprudential principle of non-interference in sports matters.[57]

It is unsettled whether the same forfeiture clause outside of a collective bargaining agreement is a valid liquidated damages clause or an unenforceable penalty clause.[58] However, the 2006 CBA specifically provides for the forfeiture of signing bonuses and, as such, functions as a concession or acquiescence by the players on the legal enforceability of forfeiture clauses. As in *Williams v. Miami Dolphins*, forfeitures consistent with the CBA will be enforced in a court of law.

D. Signing Bonus Forfeiture under the 2006 CBA

In 2006, the NFLMC and the NFLPA agreed to include a provision in the CBA relating specifically to forfeiture of

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56. *Id.* at 1306.

57. There are federal statutory and non-statutory doctrines relating to judicial non-interference into antitrust matters relating to unionized sports. Clarett v. National Football League, 306 F. Supp. 2d 379 (S.D.N.Y. 2004*), rev'd in part and vacated in part*, 369 F.3d 124 (2d Cir. 2004).There is a popular belief that state officials tend not to interfere with the major sports industries with respect to torts and crimes. *See, e.g.,* C. Antoinette Clark, *Law and Order on the Courts: The Application of Criminal Liability for Intentional Fouls During Sporting Events*, 32 ARIZ. ST. L.J. 1149 (2000). The refusal of two district court judges to opine on whether signing bonus forfeiture represents valid liquidated damages clause or unenforceable penalties suggests an extension of this non-interference doctrine into contract interpretation. To the extent any industry includes strong union representation and is committed to arbitration, non-interference is somewhat normal. However, it seems exaggerated with respect to sports. *See, e.g.,*. Moore, *supra* note 53 at 222.

58. It might be argued that the transfer from athlete to the team is neither a penalty nor liquidated damages, but rather s an alternative means for the athlete to perform his duties under the contract. *See* Benjamin Alarie & James Dinning, *Remedies and Alternative Contracts*, 44 AM. BUS. L. J. 639 (2007). To date, the NFLMC has not deployed this argument.

compensation.[59] Article XIV, section 9(c) declares that, "[n]o forfeitures permitted (current and future contracts) for signing bonus allocations for years already performed, or for other salary escalators or performance bonuses already earned."[60] Predictably, disputes ensued over the scope of this clause's language. Teams contended that many types of bonuses are "signing bonuses," or their functional equivalent, such that they can be recovered for non-performance. The players contend that all bonuses not specifically designated as a signing bonus are "other salary escalators" which may not be recovered after legal rights to the money vest in the player by virtue of signing, making the team's roster or some other contractual condition.[61]

The 2006 CBA changed the legal landscape of, though not the legal treatment of, signing bonuses and the parameters relating to their contractual forfeiture. By expressly incorporating forfeiture authorization in the CBA, the NFLMC and NFLPA placed the matter within the longstanding oversight of Judge David S. Doty, of the District of Minnesota, who is authorized to review, *de novo,* disputes over the interpretation of the agreement.[6263] Because Ricky Williams' case dealt with a dispute relating only to his particular contract, it was reviewable by any federal district court of competent jurisdiction, but only under a comprehensively deferential standard, one that privileges finality over legal accuracy or even reasonableness.[64] *De novo* review, on the other hand, permits a judge to review a case afresh, with no deference at all to prior decision makers, the arbitrator in this case.[65] In 2007, Ashley Lelie and the Denver Broncos brought a dispute before Judge Doty which required an interpretation of the forfeiture provision relating to an "option bonus."[66] This case was followed by a dispute in 2008

59. Forbes, *supra* note 30, at 333-34.

60. White v. NFL, 2007 U.S. Dist. LEXIS 21536 at *13 (D. Minn. 2007) [hereinafter "*Lelie*"].

61. *Id.*; White v. NFL, 533 F.Supp.2d 929, 930 (D. Minn. 2008) [hereinafter "*Vick*"].

62. *Lelie*, 2007 U.S. Dist. LEXIS 21536 at *12.

63. Application of the CBA is supervised by Judge Doty, and reviewed de novo under a decree entered in an antitrust suit filed by the players. White v. National Football League, 899 F.Supp. 410,, 413 (D.Minn. 1995). *See also* Collective Bargaining Agreement, Article XXVI.

64. *Williams*, 356 F. Supp. 2d at 1301.

65. BLACK'S LAW DICTIONARY (8th ed. 2004).

66. *Lelie*, 2007 U.S. Dist. LEXIS 21536 at *11.

over Michael Vick's roster bonus.[67]

1. Ashley Lelie's Option Bonus

Ashley Lelie played wide receiver for the Denver Broncos after being selected in the first round of the 2002 NFL draft and signing a five year contract.[68] The contract gave the Broncos the option to secure Lelie's services for a sixth year for an additional 1.1 million dollars.[69] The Broncos exercised this option in 2003, and paid Lelie the 1.1 million dollar option bonus.[70] However, in 2006, after four years of service to the Broncos, Lelie refused to report to the Broncos' mandatory mini-camp and preseason training camp, presumably because he believed he outperformed and would continue to outperform his compensation package and was therefore "holding out" for a better deal.[71]

As is fairly customary in the NFL, a player who "holds out" for more money is often traded—his contract re-assigned—to another NFL team who needs the player's skills more than his current team. In Lelie's case, the Broncos sought to assign his contract to the Atlanta Falcons.[72] However, as a precondition to the assignment, the Broncos required Lelie to acknowledge in writing that he had breached his contract and was in debt to the team in the amount of $220,000, representing one fifth of the $1.1 million option bonus.[73]

After Lelie paid the $220,000, the NFLPA initiated a proceeding against the Atlanta Falcons and the NFLMC to recover that amount on his behalf, claiming that the forfeiture violated Article XIV, section 9(c) of the CBA.[74] Special Master Stephen Burbank decided that section 9(c) prohibited forfeiture of the option bonus and declared the repayment agreement between Lelie and the Broncos void.[75] Judge Doty affirmed Burbank's decision regarding section 9(c) that the CBA prohibited forfeiture of any portion of the option

67. *Vick*, 533 F.Supp.2d at 929.
68. *Lelie*, 2007 U.S. Dist. LEXIS 21536 at *9.
69. *Id.*
70. *Id.*
71. *Id.* at *10.
72. *Id.*
73. *Id.*
74. *Lelie*, 2007 U.S. Dist. LEXIS 21536 at *11.
75. *Id.*

bonus..[76]

The ultimate issue in Lelie's case was whether the option bonus constituted, pursuant to section 9(c), an "other salary escalator" that was "already earned."[77] Section 9(c) prohibits forfeiture of signing bonus allocations for years already performed, or other salary escalators or performance bonuses already earned.[78] Clearly, the option bonus was neither a signing bonus nor a performance bonus since rights to the bonus did not vest upon signing or performance. The player was entitled to compensation only if the team exercised the option. However, if it was an "other salary escalator" that was "already earned," section 9(c) forbade its forfeiture.

The NFLMC contended that an option bonus could not be an "other salary escalator" because it had nothing to do with Lelie's yearly salary.[79] New York law governs the terms of the CBA, and requires the decisionmaker to discern the intent of the parties.[80] In doing so, Judge Doty examined the meaning of "other salary escalator" in the context of the words surrounding the phrase. He held that the term "other" in "other salary escalator" included a signing bonus and all other bonuses, and further, he determined that only those salary escalators whose forfeiture section 9(c) permits due to non-performance are "signing bonuses."[81] Counter to the NFLMC's argument, the court ruled that a payment's relationship to yearly salary was irrelevant. If a signing bonus is a salary escalator (having nothing to do with yearly salary), then the option bonus is an "other salary escalator" (also having nothing to do with yearly salary).

The NFLMC contended further that, if the option bonus was an "other salary escalator," it was not "already earned."[82] But, according to the court, "[f]orfeiture of other salary escalators. . .is not dependent upon performance but rather upon whether they have been 'earned.'"[83] The Broncos' claim for $220,000 rested on the argument that Lelie's performance

76. *Id.* at *12
77. *Id.* at *14.
78. *Id.*
79. *Id.*
80. *Lelie*, 2007 U.S. Dist. LEXIS 21536 at *12.
81. *Id* at *13.
82. *Id* at *16.
83. *Id.* at *18.

was required to earn that portion.[84] Instead, the court held that the "option bonus was instead 'earned' upon exercise of the option."[85] Therefore, since the Broncos exercised the option, which actually helped the team trade Lelie to the Atlanta Falcons,[86] Lelie earned the bonus.

Judge Doty's decision harmonized Article XIV, section 9(c) with the common law of contracts. A signing bonusis earned upon the mere act of signing the contract.[87] Thus, Ricky Williams, for example, had earned his signing bonus. The issue in the case, then, was Williams' contractual agreement to forfeit his signing bonus. The arbitrator and the federal court determined that Williams' contract permitted the forfeiture of funds to the extent he refused to perform on the field, even if those funds were already legally earned.[88] Like the *Williams* case, Lelie was obligated to return over $800,000 with respect to a portion of his *signing bonus*, even though he was not required to return any portion of his *option bonus*. After *Lelie*, it is clear that with respect to both the common law and the CBA a signing bonus is earned by the mere act of signing a contract but may be forfeited as liquidated damages pursuant to a collective bargaining agreement.I[89] Only under the CBA, and not the common law, is it clear that bonuses other than signing bonuses may not be forfeited.

2. Michael Vick's Roster Bonus

In January 2008, Judge Doty refused to force Michael Vick to forfeit a substantial portion of a "roster bonus."[90] The Vick decision confirms and elaborates the rule established in the

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84. *Id.* at *17.

85. *Id.* at *18.

86. *Lelie*, 2007 U.S. Dist. LEXIS 21536 at *19 (stating that "[t]he option bonus served as consideration for holding the option open, and the Broncos reaped benefits merely by exercising the option. First, exercise of the option adjusted Lelie's pay scale and allowed the team to work more freely with its Rookie Allocation and Salary Cap. Second, the option exercise extended Lelie's contract with the team, delaying Lelie's free agency. This delay proved important given the eventual trade with the Falcons. Had the Broncos not exercised the option in 2003, Lelie would have been a free agent in 2006, and he could have signed with another team without the Broncos realizing any benefit from his departure. Instead, the Broncos received two high-round draft selections in return for assigning Lelie's contract to the Falcons.").

87. *Williams*, 356 F. Supp. 2d at 1301.

88. *Id.*

89. *Lelie,*, 2007 U.S. Dist. LEXIS 21536 at *20.

90. *Vick*, 533 F. Supp. 2d at 930.

Lelie case that bonuses designated specifically as signing bonuses are the only type of NFL compensation subject to forfeiture, a risk of forfeiture ultimately substantial enough to support deferral as income pursuant to § 83(b) of the IRC.[91]

In 2004, Michael Vick, the first pick in the 2001 NFL draft, and the team that drafted him, the Atlanta Falcons, agreed to extend his player contract. This contract extension included a bonus of $22.5 million should he be a member of the team in 2005 and another seven million dollars should he make the team again in 2006.[92] The agreement required the Falcons to guarantee to Vick that they would make the payments should Vick attempt to make the team.[93] If the team no longer wished for Vick to tryout for the team, they would not guarantee the bonus, leaving Vick to determine whether he would try to continue as a member of the Falcons without the bonus or attempt to play for another team.[94] The contract also provided that Vick would forfeit portions of his roster bonuses if, after the Falcons guaranteed the roster bonus, Vick failed to report to the team, practice for the team, play for the team, or was suspended by the NFL and/or the Falcons for violating rules relating to player conduct or illegal substances, including steroids.[95]

The Falcons guaranteed the payment, Vick made the team's roster, and the bonuses for 2005 and 2006 were paid.[96] However, on August 20, 2007, Vick pled guilty to conspiracy to travel in interstate commerce in furtherance of an illegal dog-fighting venture.[97] Vick and his co-conspirators established kennels for the purpose of participating in pit bull fighting competitions.[98] Vick provided funds for purchasing pit bulls and the real property used to house and train them,

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91. The *Williams-Lelie-Vick* line of cases also permits the forfeiture of salary by way of allowable fines. However, the distinction between deferring the inclusion in gross income of salary and bonuses stems from the § 83(a) requirement that the compensation be paid in property, which is more amenable to bonuses than to salaries. *Vick*, 533 F. Supp. 2d at 929; *Lelie*, 2007 U.S. Dist. LEXIS 21536; *Williams*, 356 F. Supp. 2d 1301.

92. *Vick*, 533 F. Supp. 2d at 929-30.

93. *Id* at 930-31.

94. *Id.*

95. *Id.*

96. *Id.* at 931.

97. *Id.*

98. *See* Vick Indictment *in* WALTER T. CHAMPION, JR., CHAMPION'S FUNDAMENTALS OF SPORTS LAW (2d ed. 2008).

and he personally participated in the killing of eight dogs that did not perform well enough.[99] On August 24, 2007, the NFL suspended Vick for violating the NFL's Personal Conduct Policy.[100] On August 27, 2007, the Falcons demanded that Vick repay $19.97 million, comprised of $3.75 million from his signing bonus and $16.22 million from his roster bonuses.[101]

The NFLMC sought enforcement of the demand through an arbitration conducted by Stephen Burbank, the same arbitrator who decided *Lelie*.[102] According to an ESPN report, most experts expected Burbank to rule as he did in the *Lelie* case; that a roster bonus was like an option bonus and, thus, a salary escalator not forfeitable due to non-performance of the player.[103] Surprisingly, Burbank found Vick's roster bonus distinguishable from Lelie's option bonus.[104] He found that it was a signing bonus, and ordered Vick to repay the full 19.97 million dollars.[105] After finding the term "signing bonus" to be vague enough to admit differing interpretations, he concluded that, because the team guaranteed the roster bonus in a manner consistent with provisions in the CBA for guaranteeing a signing bonus, Vick's roster bonus should be categorized as a signing bonus.[106]

The NFLPA appealed the case to Judge Doty, who reviewed Special Master Burbank's decision de novo under the decree governing the the CBA.[107] Doty rejected Burbank's decision viewing the roster bonus as the equivalent of a signing bonus. Such a view was inconsistent with the court's decision in *Lelie*. Doty held that roster bonuses, like option bonuses, were "salary escalators" "earned" by fulfilling

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99. *Id.*

100. *See* Vick Indictment, *supra* note 98.

101. *Id.*

102. *Lelie*, 2007 U.S. Dist. LEXIS 21536 at *8.

103. Len Pasquarelli, Arbitrator *tells Lelie to repay $600,000 in bonus money*, ESPN.com (Apr. 27, 2007), *available at* http://sports.espn.go.com/nfl/news/story?id=2849934.

104. *Vick*, 533 F. Supp. 2d at 932.

105. *Id.*

106. *Id.* at 932-33.

107. *Id.* at 932. *Article XXVI of the NFL Collective Bargaining Agreement § (2)(b) provides "The Court shall accept the Special Master's findings of fact unless clearly erroneous and the Special Master's recommendations of relief unless based upon clearly erroneous findings of fact, incorrect application of the law, or abuse of discretion; except that, as to any finding concerning Article XXVI (Anti-Collusion), and imposition of a fine of $1 million or more, or any finding that would permit termination of this Agreement, review shall be de novo."*

the express terms of the roster bonus provision: being a member of the team on a certain date.[108] Once earned, section 9(c) prohibits forfeiture despite any contrary agreement between Vick and the Falcons.[109]

Doty concluded that Burbank erred by determining the meaning of signing bonus "exogenously," that is, using indicia of meaning outside of the provision where the term "signing bonus" appears.[110] Burbank had examined language from Article XXIV, section 7(b), dealing with the determination of Team Salary for purposes of administering the NFL Salary Cap.[111] Burbank may have thought that using such textual context was proper, since Doty himself used textual context in *Lelie* to determine the meaning of "other salary escalator."[112] However, in *Lelie* Doty resorted to text within the same provision, whereas in *Vick* Burbank imported text from a provision irrelevant to forfeitures.[113] Where consideration of context is proper, it is also limited by relevance, and Doty found the provisions relied on by Burbank, namely Article XXIV, section 7(b), to have almost no relevance on the meaning of words found in Article XIV, section 9(c).

Doty also concluded that Burbank's decision, especially its reliance on Article XXIV, section 7(b), was inconsistent with the precedent Doty and Burbank established in *Lelie,*[114] where they both concluded that an option bonus was a salary escalator earned in ways other than by player performance.[115] Article XXIV, section 7(b) treats as a signing bonus "any consideration, when paid, or guaranteed, for option years."[116] Because section 7(b) specifically considers option bonuses like the ones Ashley Lelie received to be signing bonuses, section 7(b) is flatly inconsistent with the court's decision that such option bonuses are not signing bonuses, but "other salary escalators."[117] This is because relying on section 7(b) to determine the definition of a signing bonus would overturn

108. *Id.* at 933.
109. *Vick*, 533 F. Supp. 2d at 933.
110. *Id.* at 932-33.
111. *Id.*
112. *Lelie*, 2007 U.S. Dist. LEXIS 21536 at *13.
113. *Id.*; *Vick*, 533 F. Supp. 2d at 932.
114. *Vick*, 533 F. Supp. 2d at 932-33.
115. *Lelie*, 2007 U.S. Dist. LEXIS 21536 at *12.
116. *Vick*, 533 F. Supp. 2d at 933.
117. *Id.* at 932-33.

Lelie: if section 7(b) makes Vick's roster bonus a signing bonus, then it also makes Lelies' option bonus a signing bonus.[118] The NFL may seek to overturn the *Lelie* and *Vick* cases at the bargaining table.[119] At the time of the Ricky Williams decision, the CBA did not address forfeitures. The 2006 CBA, however, ratified the *Williams* case, providing under Article XIV, section 9(c), that a portion of signing bonuses, like the one Williams received, could be forfeited to the extent that a player refuses to perform during the term of the contract.[120] The CBA specifically allows for the forfeiture of a signing bonus attributable to years not performed. The NFLMC could have negotiated for other salary escalators to be forfeitable to the extent they are attributable to years not performed, but it was obviously unsuccessful in such efforts. Instead, only signing bonuses are under a substantial risk of forfeiture, as other types of bonuses cannot be recovered by NFL teams after the player satisfies relevant contractual contingencies.[121] In May 2008, the NFLMC exercised its option under the 2006 CBA to terminate the agreement, opening the door for further negotiation on this issue.[122]

E. NFL Signing Bonuses Carry a Substantial Risk of Forfeiture

There is now an incentive for players to refuse salary escalators in the form of signing bonuses, instead preferring to receive a roster, option, performance or other kind of bonus. Teams, on the other hand, will seek to label many salary escalators as signing bonuses. If the status quo is maintained, NFL teams might encourage players to agree to signing bonuses by making forfeiture less onerous on the

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118. *Id.*

119. NFL Opts Out of Collective Bargaining Agreement, http://www.nfl.com/news/story?id=09000d5d80868b78&template=without-video&confirm=true ("There are substantial other elements of the deal that simply are not working. For example, as interpreted by the courts, the current CBA effectively prohibits the clubs from recouping bonuses paid to players who subsequently breach their player contacts or refuse to perform. That is simply irrational and unfair to both fans and players who honor their contracts.").

120. Forbes, *supra* note 30.

121. *Lelie*, 2007 U.S. Dist. LEXIS 21536 at *18; *Vick*, 533 F. Supp. 2d at 933.

122. NFL Opts Out of Collective Bargaining Agreement, http://www.nfl.com/news/story?id=09000d5d80868b78&template=without-video&confirm=true.

player. One such way is to pay the player a signing bonus in the form of property – as opposed to cash—so that the player may defer inclusion of it as gross income until respective portions of the signing bonus are no longer subject to a substantial risk of forfeiture within the meaning of § 83(b) of the IRC.

II. APPLYING SECTION 83 OF THE INTERNAL REVENUE CODE TO NFL SIGNING BONUSES

A. Tax Anomalies Relating to Forfeitable Signing Bonuses

Receipt of a signing bonus is income no matter how one slices, hides, or obscures it.[123] Under *Glenshaw Glass*, income is any accession to wealth, clearly realized, over which the taxpayer has dominion and control.[124] If an athlete were to instruct the team to pay the signing bonus to someone other than himself, he has exercised dominion and control over the wealth and will be taxed.[125] There is no "getting around" the characterization of the signing bonus as income to the athlete, and that is true even if the athlete may later have to return it to the team[126]

123. *See* N. Am. Oil Consol. v. Burnet, 286 U.S. 417 (1932).

124. Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 430 (1955).

125. Old Colony Trust Co. v. Comm'r, 279 U.S. 716 (1929).

126. The Claim of Right Doctrine, one of many jurisprudential glosses over the IRC, establishes the IRS's authority to tax citizens on monies they receive but may have to later forfeit. Consider an embezzler who attempts to avoid taxation on his ill-gotten gains by claiming that he has no proper title to the currency or property he has commandeered and that a court may someday require him to return the same. Claim of Right also applies to less nefarious situations, like the receipt of some kinds of monetary deposits. *See* N. Am. Oil. Consol. v. Burnet, 286 U.S. 417 (1932). Should the taxpayer be required to forfeit the money in a later tax year, another jurisprudential doctrine, the Tax Benefit Rule, trumps the Code again and generally provides the taxpayer with a deduction. According to *Skelly Oil*, the amount and character of the deduction available through the Tax Benefit Rule is subject to administrative and judicial concepts of fairness. United States. v. Skelly Oil, Inc., 394 U.S. 678 (1969). That Congress has not legislatively overturned *North American Storage*, *Skelly Oil* or any other major cases relating to the scope of either the Claim of Right Doctrine or the Tax Benefit Rule suggests that it approves of these equitable doctrines.
By enacting § 83, relating to stock options, a form of compensation subject to forfeiture, Congress essentially ratified the judicial and administrative treatment of monies received subject to forfeiture. But § 83 extracts from these jurisprudential doctrines the receipt of property subject to a substantial risk of forfeiture. The receipt of cash with a substantial risk of forfeiture is still governed by the Claim of Right Doctrine, but the receipt of property with the same risk seems to be covered under § 83. One of the

However, utilizing § 83 allows the athlete to defer recognition of that income until such time when he will never have to forfeit it back to his employer.[127] Section 83 was designed to ameliorate hardships associated with reporting income one may eventually lose.[128] Its greatest force and application is with respect to compensatory stock options, which may be forfeited should the employee prematurely discontinue his employment with the company.[129] Otherwise, the employee would have a gain upon exercising the stock option, and a loss deduction (hopefully) if the stocks were eventually forfeited. Several features of tax law, however, prevent this situation from being a simple tax "wash." Thus, Congress enacted § 83 as a means of preventing confusion and hardship associated with the forfeiture of compensatory property.[130] While originally intended to apply to employee stock options, its plain terms and purpose apply to the receipt and possible forfeiture of NFL signing bonuses.

B. Section 83 of the Internal Revenue Code

An NFL signing bonus, if paid in the form of property, may be deferred pursuant to § 83 of the IRC, which requires taxpayers to include such property in their gross income only when their interest in such property is not subject to a substantial risk of forfeiture.[131] Thus, an NFL player should receive his signing bonus in property and report that portion as gross income only after he has earned it on the playing field.

Section 61 of the IRC provides that gross income includes income from whatever source derived, which specifically applies to compensation for services.[132] However, § 61 does not by itself determine when a taxpayer must report income

functions of this Article is to pose the question whether § 83 is limited in its application such that NFL signing bonuses do not fall within its scope. This Article argues that no such limitation exists, and that if NFL teams pay players their signing bonuses in the form of property, the player may defer inclusion of that property in their gross income until such time as they have earned that respective portion on the playing field.

127. I.R.C. § 83(a) (2008).

128. Centel v. Comm'r, 92 T.C. 612, 628-30 (1989); Alvares v. Comm'r, 79 T.C. 864, 875-77 (1982).

129. *Centel*, 92 T.C. 612; *Alvares*, 79 T.C. 864.

130. *Centel*, 92 T.C. 612; *Alvares*, 79 T.C. 864.

131. I.R.C. § 83(a).

132. I.R.C. § 61(a).

he has received as gross income. In the case of property transferred in connection with performance of a service, Congress has specifically declared in § 83(a) that such income is not to be reported until the property received is no longer subject to a substantial risk of forfeiture.[133] According to § 83(b), the taxpayer can elect to include the property in gross income upon receipt,[134] but he can also defer inclusion when the conditions of the section are satisfied. The crux of the matter for those interested in deferral is: what constitutes a substantial risk of forfeiture?[135]

Section 83(c)(1) declares that the rights of a person in property are subject to a substantial risk of forfeiture if such person's rights to full enjoyment of such property are conditioned upon the future performance of substantial services by any individual.[136] The question addressed by this section is whether an NFL signing bonus is conditioned upon a player's future performance of substantial services, or whether it is indeed a bonus merely for signing a contract. *Williams*, *Lelie*, and *Vick* stand for the proposition that NFL signing bonuses (and only signing bonuses), being conditioned on future performance, carry a substantial risk of forfeiture.

1.Substantial Risk of Forfeiture

NFL teams recovered portions of signing bonuses given to Barry Sanders, , Ricky Williams, Ashley Lelie, Michael Vick, and others. Barry Sanders and Ricky Williams retired from football before their contract terms expired.[137] Ashley Lelie held out for a better contract and eventually forced a trade to another team.[138] And the NFL and the Atlanta Falcons suspended Vick for his role in an illegal dog-fighting operation.[139] In each case, either a player's refusal to perform (Sanders, Williams, and Lelie) or a team's refusal to allow the player to perform (Vick) triggered the forfeiture of a portion of their signing bonuses, the portion yet to be earned on the playing field (despite its

133. I.R.C. § 83(a).
134. I.R.C. § 83(b).
135. *See* I.R.C. § 83(c)(1).
136. *Id.*
137. *Williams*, 356 F. Supp. 2d at 1302.
138. *Lelie*, 2007 U.S. Dist. LEXIS at *11.
139. *Vick*, 533 F. Supp. 2d at 929.

having vested upon the mere act of signing).

The Treasury Regulations under § 83 suggest that NFL player signing bonuses are subject to a substantial risk of forfeiture. Section 1.83-3(c)(2) declares that "requirements that the property be returned to the employer if the employee is discharged for cause or for committing a crime will not be considered to result in a substantial risk of forfeiture."[140] At first blush, it suggests that Michael Vick's signing bonus was not subject to a substantial risk of forfeiture. But the regulation excludes contracts only where the risk of forfeiture is due solely to criminal prosecution or for-cause discharge. Forfeiture of an NFL signing bonus not only follows criminal prosecution or suspensions, but also retirement. Moreover, the same regulation presents an example of a substantial risk of forfeiture that suggests an extraordinarily low standard: "[w]here an employee receives property from an employer subject to a requirement that it be returned if the total earnings of the employer do not increase, such property is subject to a substantial risk of forfeiture."[141] So long as NFL players receive signing bonuses which may be forfeited due to willful retirement or otherwise refusal to play, section 1.83-3(c)(2) contains nothing that would prevent NFL players from excluding their signing bonuses until they are earned on the playing field, so long as they are paid in property.

2. Property

Currently, NFL players cannot take advantage of § 83 because they receive their signing bonuses in cash, rather than property. Section 83 clearly applies only to compensation in the form of property.[142] Therefore, to the extent that signing bonuses are paid in cash, signing bonuses are ineligible for advantageous treatment under § 83. In order to take advantage of § 83's tax deferral scheme, players must demand to receive signing bonuses in the form of property.

Fortunately for the athlete, very few forms of property are ineligible for § 83 tax deferral. Items that are ineligible for deferral treatment include: (1) transactions relating to

140. I.R.C. § 83(c)(2).
141. *Id.*
142. I.R.C. § 83(a).

incentive stock options, as defined in § 422 and employee stock purchase plans as defined by § 423; (2) transfers to or from certain types of employer-related trusts and annuities; (3) transfers of options with no ascertainable value; (4) transfers of property pursuant to the exercise of a marketable option; and (5) certain types of life insurance.[143] Therefore, an agent for an NFL player should have no trouble devising a payment scheme that avoids these limited ineligible categories.

To illustrate, an NFL player might demand to receive his signing bonus in the form of shares or an interest in a newly formed business. NFL players are typically highly marketable individuals for endorsement and advertising purposes. Part of an NFL agent's job is usually to secure these types of business opportunities In service of both this endeavor and tax deferral, an NFL player might demand to receive his signing bonus in the form of an interest in a business designed to promote and market his image and likeness for commercial purposes.Alternatively, the player (or club) might demand that a business concern be created solely for the purpose of investing capital. Creating a business concern restricted to investing may better accommodate the NFL team in the case of a subsequent forfeiture. It should not matter whether such the interest is in the form of corporate stock or a partnership or limited liability company interest because both qualified for § 83(e) protection.[144] Convincing the NFL that the payment in property is not a device to circumvent the salary cap is another issue, one not investigated here.

C. Restricting Section 83's Application to Stock Options

An argument against applying § 83 to NFL player bonuses, even if paid in the form of property, is that § 83 was never intended to cover NFL player bonuses; rather it was intended to apply only to stock options and like forms of compensation. However, Congress chose a very general term, "property," rather than a specific term like "stock option" or "business interest" when it enacted § 83.[145] Furthermore,

143. I.R.C. § 83(e).
144. I.R.C. § 83(e).
145. I.R.C. § 83(a).

Congress, in § 83(e), specifically exempts a number of transactions, none of which are essential to a legitimate NFL compensation scheme.[146] The Treasury's only administrative limitation relates to dismissals for cause and crime.[147] Consequently, even if Congress did not have arrangements such as NFL signing bonuses in mind when it enacted § 83., the text of § 83 does not prevent it from being applied to such bonuses.

III. SECTION 83 AND STATUTORY CONSTRUCTION TECHNIQUES

This Part discusses how different judicial deliberative techniques would be applied to an NFL player's attempt to defer recognition of his signing bonus if paid in the form of property pursuant to § 83(a). When proposing that a transaction be structured in a way that elicits tax benefits, the tax practitioner should account for the ways in which the text of the statute, the intent behind it, the purposes guiding it, and the policies around which it operates may affect its judicial evaluation.[148] In that vein, this Part explores whether the deferral of NFL signing bonuses, if paid in the form of property, is compatible with text-based, intent-based, purposive or dynamic constructions of § 83.

A. Major Statutory Construction Techniques: Textualism, Intentionalism, Purposivism and Dynamism

Textualism and intentionalism concern meaning, while purposivism and dynamism identify consequences.[149] Textualism proposes that judges ascribe to a word or phrase in a statute the meaning most people would think of when they encounter it.[150] Plain meaning and statutory context are two components of textualism.[151] Between two proposed meanings, the textualist chooses that which is most

146. I.R.C. § 83(e).

147. Treas. Reg. § 1.83-3(c)(2) (2005).

148. Richard Lavoie, *Subverting the Rule of Law: The Judiciary's Role in Fostering Unethical Behavior*, 75 U. COLO. L. REV. 115, 167 (2004).

149. Andre L. Smith, *Deliberative Stylings of Leading Tax Law Scholars*, 61 TAX LAW. 1, 30 (2007).

150. Stanley S. Fish, *There is No Textualist Position*, 42 SAN DIEGO L. REV. 629, 645 (2005).

151. Lawrence Zelenak, *Thinking about Nonliteral Interpretations of the Internal Revenue Code*, 64 N.C. L. REV. 623, 638 (1986).

consistent with the understanding of interpretive communities (perhaps lawyers, the general public or some other subset) and with related statutory text.[152] Intentionalism, on the other hand, asks judges to identify the meaning intended by the author of the text.[153] An intentionalist might consider legislative history in the form of committee reports, both successful and failed attempts to amend the statute, judicial and administrative constructions of a statute.[154] Indicia of intent may include the plain meaning of the statutory text, if the author intended for words in a text to be read literally.[155]

Purposivism and dynamism concern different types of consequences, though it is extraordinarily difficult, if not impossible theoretically, to actually distinguish the two.[156] Purposive consequences are those which a judge believes the legislature intends for her to consider,[157] while dynamic consequences are those not tethered to legislative expectations.[158] Consideration of dynamic consequences by judges is usually derided as "judicial activism."[159] However, within the realm of purposive consequences, there exists the concept of objective purposes, or those purposes judges believe any rational and reasonable legislature would want them to consider—governmental bureaucratic efficiency, for

152. *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2391-93 (2003) (proposing that textualists pay more attention to statutory context); John F. Manning, *What Divides Textualists from Purposivists*, 106 COLUM. L. REV. 70, 91-96 (2006).

153. *See* Fish, *supra* note 150.

154. Smith, *supra* note 149, at 27-36.

155. LINDA D. JELLUM & DAVID CHARLES HRICIK, MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES 119 (2006) ("The intention of the Legislature is first to be sought from a literal reading of the act itself").

156. AHARON BARAK, PURPOSIVE INTERPRETATION OF THE LAW (Sari Bashi trans., Princeton University Press) (2005). (Objective purposes are practically indistinguishable from dynamic consequences).

157. *Id.*; Michael Livingston, *Practical Reason, "Purposivism," and the Interpretation of Tax Statutes*, 51 TAX L. REV. 677, 680-81 (1996) ("[C]ourts determine the "mischief" to which a statute is directed and interpret the statute so as to suppress that mischief.").

158. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 56 (Harvard University Press) (1994).

159. *See, e.g.*, Steven G. Calabresi, The Congressional Roots of Judicial Activism, 20 J.L. & Pol. 577, 577 (2004) (suggesting that Congress knowingly and sometimes approvingly permits courts to determine cases based on a consideration of social policies).

example.[160] These objective purposes are practicably indistinguishable from consequences judges themselves believe are reasonable to consider, the essence of dynamism. Thus, since purposivism is perceived to be more legitimate, judges sometimes mask their dynamic tendencies with purposive rhetoric, as illustrated in *Bob Jones v. United States*, where the Court found ending racial discrimination to be a legislative purpose, rather than its own policy perspective.[161] Regardless, there are several distinct consequences the Court tends to consider in tax cases, including bureaucratic efficiency, tax avoidance, compliance costs, horizontal and vertical equity, and certain aspects of so-called "tax logic."[162]

With respect to NFL signing bonuses, textualism supports the pro-taxpayer approach, intentionalism has little to say about it, and purposivism and dynamism are somewhat equivocal on this matter.[163] And when textualism produces a clear choice between competing legal constructions, the Supreme Court generally eschews resort to intent, purpose and policy.[164]

B. Textualism

Textualism suggests that under § 83 an NFL player may defer recognition of his signing bonus until it is earned on the playing field, so long as it is received in the form of property. Section 83(a) has two essential elements: 1) the receipt of "property" with a 2) "substantial risk of forfeiture."[165] The plain meaning of property certainly includes a business interest in a newly formed concern. Plus, § 83(e) disqualifies types of property having nothing to do with a business

160. For a discussion of subjective and objective purposes, *see* Barak, *supra* note 149.

161. Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (tax definition of charitable deduction excludes facially discriminatory institutions); *cf.* Livingston, *supra* note 147, at 704. ("Indeed, traditional purposive analysis would have reached an opposite conclusion, since the prevention of racial discrimination was probably far from the minds of the original, enacting legislature.").

162. Andre L. Smith, *Formulaically Expressing 21st Century Supreme Court Tax Jurisprudence*, 8 HOUS. BUS. & TAX J. 37, 83-89 (Fall 2007).

163. *Id.*

164. Gitlitz v. Comm'r, 531 U.S. 206 (2001).

165. I.R.C. § 83(a) (2004).

interest in a newly formed concern.[166] As to whether the property is subject to a substantial risk of forfeiture, § 83(c)(1) provides that the risk of forfeiture is substantial if the "rights to full enjoyment of such property are conditioned upon the future performance of substantial services by any individual."[167] An NFL player's right to full enjoyment of his signing bonus, according to the *Williams-Lelie-Vick-Owens* examples, is conditioned upon actually performing the entire contract to which the signing bonus is attributed.[168] Thus, an NFL signing bonus paid in the form of property, such as an equity interest in a newly formed business concern, qualifies for deferral until it vests by way of performance on the playing field.

In *Gitlitz v. Commissioner*, the Court preferred a legal construction that was more consistent with statutory text than the competing construction which was more consistent with both so-called "tax logic" and the minimization of tax avoidance.[169] The Court declared that, where text clearly favors one choice over the other, it will not resort to considering intents and purposes and policies.[170] If this is the case, the text of § 83 clearly favors deferral of an NFL signing bonus received in the form of property.

C. Intentionalism

An intentionalist examination of § 83 suggests that NFL players may defer the recognition of signing bonuses paid in the form of property. Nothing in § 83's legislative history, whether comprised of legislative work papers like committee and conference reports, , failed and successful amendments, or judicial and administrative precedents, points to any legislative intention disqualifying NFL signing bonuses paid in the form of an interest in a business concern. In fact, Professor Lawrence Zelenak's approach would suggest that intentionalism has nothing to say at all about NFL signing bonuses paid in the form of an equity interest in a newly formed business concern since such bonuses were likely

166. I.R.C. § 83(e).
167. I.R.C. § 83(c)(1).
168. *Vick*, 533 F. Supp. 2d 929; *Lelie*, 2007 U.S. Dist. LEXIS 21536; *Williams*, 356 F. Supp. 2d 1301.
169. *Gitlitz*, 531 U.S. at 219-20.
170. *Id.*

beyond the contemplation of the Congress that enacted the statute, as well as ones who amended..[171]

But Zelenak's claim goes too far on two accounts. First, congressional work papers relating to § 83, while they do not consider anything resembling NFL signing bonuses, do suggest that Congress intended for judges to interpret the words of the statute literally.[172] Second, Zelenak does not include as probative indicia of intent subsequent administrative and judicial precedents in his concept of legislative history, decisions of which a court might presume legislative awareness and acquiescence.[173] These items of legislative history could and, in the case of § 83, do contemplate odd types of property.

For instance, in both *Alvares v. Commissioner*[174] and *Centel Communications v. Commissioner*[175] the Tax Court found that Congress intended for the text of § 83 to be read literally, holding in each case that transfers of property comporting with the text of the statute could only be disqualified under § 83, even if untoward consequences were to result.[176] Both *Alvares* and *Centel* dealt specifically with the question of whether the receipt of property was in connection with the performance of services, not whether a

171. Zelenak, *supra* note 151, at 639.

172. *But see* ANTONIN J. SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997) (arguing that text should control over legislative material such as committee reports).

173. Congressional inaction is probative though not conclusive proof of legislative intent. Flood v. Kuhn, 407 U.S. 258, 269-74, (1972); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982). Like other indicia of legislative intent, such as committee reports for example, academics and judges disagree as to the relative emphasis judges ought to place on congressional inaction. Patterson v. McLean Credit Union, 491 U.S. 164, 175 n.1, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989) (discussing the weight to be accorded to congressional inaction vis-à-vis prior judicial interpretations of a statute in construing that statute). Some scholars contend that judicial deference to congressional inaction is inconsistent with separation of powers. Supreme Court cases suggest, on the other hand, that congressional inaction is but one factor to consider towards reconstructing legislative intent, and that it is emphasized most when attempts to overturn previous administrative or judicial decisions are proposed but fail to pass. Bob Jones University v. U.S., 461 U.S. 574 (1983); Department of Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1 (2001). Ultimately, "the fact that inaction may not always provide crystalline revelation, however, should not obscure the fact that it may by probative to varying degrees." Johnson v. Transp. Agency, 480 U.S. 616, 629-30 n.7 (1987).

174. 79 T.C. 864 (1982).

175. 92 T.C. 612 (1989).

176. *Alvares*, 79 T.C. 864; *Centel*, 92 T.C. 612.

certain type of property is eligible for disqualification under § 83 in the first place.[177] Still, the Tax Court made clear that Congress expects to be understood literally and that the consideration of purposes and policies are to be ignored.[178] If purposes and policies are ignored, which according to the realist school of legal thought is not guaranteed or even likely, NFL signing bonuses paid in the form of property will qualify for § 83 treatment.

D. Purposivism and Dynamism

Purposivism and dynamism are equivocal on whether NFL signing bonuses paid in the form of property qualify for § 83 deferral of recognition as income (which illustrates what some suggest is the most obvious, important and intractable failure of both purposivism and dynamism as deliberative techniques). Section 83's immediate purpose, alleviating concerns relating to the forfeiture of employee stock options, is neutral toward NFL signing bonuses. Applying section 83 to NFL signing bonuses does not seem to offend several objective purposes found to be important by the courts and tax scholars, and nor does it seem to be add odds with public policies. Since text and intent seem to clearly support the applicability of § 83, while neither purpose nor modern dynamics clearly weighs against it, NFL players can likely defer recognition of their signing bonuses until after they have earned it on the field, so long as it was paid in the form of property.

The immediate purpose of § 83 was to equate restricted stock plans with other types of deferred compensation, with respect to both income to the employee and deductions for the employer.[179] NFL player signing bonuses have little to no relation or likeness to stock plans or forms of deferred compensation available in 1969 when § 83 was enacted. An NFL signing bonus, even if paid in the form of stock in a newly formed business concern, is not part of a restricted stock plan where employees are generally eligible to receive or purchase stock of the company at a discount subject to its forfeiture upon prematurely leaving the company. Nor is an

177. *Centel*, 92 T.C. 612; *Alvares*, 79 T.C. 864.
178. *Centel*, 92 T.C. 612; *Alvares*, 79 T.C. 864.
179. *Centel*, 92 T.C. 612; *Alvares*, 79 T.C. 864.

NFL signing bonus akin to a deferred compensation plan where the employee receives cash or property at some time after performance of services. Apparently, an NFL signing bonus is effectively a deposit securing future performance. Therefore, it is not income to the extent it is held in an escrow account that could be terminated by the employer, just as clearly as it is income to the extent it is actually received in cash. However, whether an NFL signing bonus paid in the form of property subject to forfeiture presents a question under § 83. This question can only be answered by resorting to general purposes and generally prevailing policies, if one is to consider consequences at all.

NFL signing bonuses are consistent with some of § 83's general purposes, inconsistent with some, and irrelevant to others. The Treasury's bureaucratic efficiency and the taxpayers' compliance costs are objective purposes that courts consider when deliberating over tax statutes, but applying § 83 to NFL signing bonuses, or not, has little to no impact on either concern.[180] Because an NFL player receiving a singing bonus is such a rare phenomenon, it would cost the taxpayer a de minimis amount in terms of compliance costs and the Treasury in terms of bureaucratic efficiency.

The infrequent occurrence of signing bonus forfeiture also suggests that permitting § 83 deferral is not likely to become a general program of tax avoidance.[181] It is true that allowing NFL players to defer recognition of their signing bonuses as income surely benefits them, but they do not escape taxation because it is only deferred until all rights in the bonus fully vest. The advantage has only to do with the time value of money, and the slim possibility that deferral results in a lower tax bracket in one or more years covered by the contract. Plus, NFL signing bonuses and the circumstances surrounding their possible forfeiture are extraordinary and likely cannot be replicated in other industries without substantial interference with otherwise settled business practices.

For the same reasons, allowing NFL players to defer recognition of their signing bonuses until they are earned on the playing field does not offend the concepts of horizontal

180. *See* Smith, *supra* note 162, at 83-89.
181. Lavoie, *supra* note 148.

and vertical equity.[182] Horizontal equity is not violated because NFL players are similarly situated to virtually no one except perhaps other unionized, professional athletes who receive signing bonuses subject to later forfeiture. In addition, the infrequency with which an NFL player will either avoid tax altogether or lower his actual tax rate suggests that vertical equity is not seriously offended.

Moreover, in the case of signing bonus forfeiture, respecting the "integrity of the tax year" leads to inequitable results.[183] Currently, NFL players report their signing bonuses when received. When an NFL team successfully recovers a portion of the signing bonus, as in the *Williams, Lelie, Vick* and *Owens* cases, the taxpayer-athlete should be entitled to a loss under § 165. However, such losses are useless where the taxpayer is unlikely to ever have sufficient income to absorb it; for example, someone such as Michael Vick, who is in federal prison and unlikely to resume a lucrative football career. Essentially, the NFL player risks paying taxes on money he will not be allowed to keep, the essence of what § 83 was designed to prevent.

E. Substance over Form

Something also must be said about the substance over form doctrine, an equitable jurisprudential doctrine which can be described either as purposive or dynamic.[184] When the IRS seeks to avoid the mechanical application of the tax law because it believes that doing so would unduly favor the taxpayer, it asks courts to re-characterize the transaction into one that elicits more tax for the fisc.[185] Whether this

182. Richard J. Wood, *Supreme Court Jurisprudence of Tax Fairness*, 36 SETON HALL L. REV. 421 (2006).

183. The IRS requires each taxpayer to report their income (and deductions) on an annual basis. When a taxpayer receives property that he must include in gross income but loses such property after the end of the year, the taxpayer may not ordinarily take the loss in the year he reported income. Instead, the taxpayer reports income in the first year and a loss in the second. On some occasions, judges will suspend the annual return concept, i.e., violate the integrity of the tax year. *See* Bittker & Kanner, *The Tax Benefit Rule*, 26 UCLA L. Rev. 265, 266 (1978).

184. Allen D. Madison, *The Tension Between Textualism and Substance-Over-Form Doctrines in Tax Law*, 43 SANTA CLARA L. REV. 699 (2003)..

185. *Compare* Allen D. Madison, *The Tension Between Textualism and Substance-Over-Form Doctrines in Tax Law*, 43 SANTA CLARA L. REV. 699 (2003) *with* Richard Lavoie, *Subverting the Rule of Law: The Judiciary's Role in Fostering Unethical Behavior*, 75 U. COLO. L. REV. 115 (2004). The term "fisc" commonly refers to the state

represents dynamic or purposive legal construction depends on whether one believes judges are applying the doctrine in furtherance of legislative objectives or applying their own sense of justice or "smell" test.[186] Here, if NFL players were paid in property, especially in the form of a business interest in a newly formed concern, the IRS might ask courts to find the athlete constructively in receipt of cash which was then, ostensibly, used by the athlete to purchase or form a business concern. The constructive receipt of cash would be immediately taxable, just as it is today with respect to NFL signing bonuses.[187] But courts are more likely to adopt the substance over form doctrine where the transaction is shown to provide a basis for widespread tax avoidance, which is a circumstance not presented by the case of NFL signing bonuses.

CONCLUSION

NFL signing bonuses are earned upon the execution of a contract between the player and the team. Clauses that permit NFL teams to recoup a portion of the player's signing bonus due to various reasons for non-performance are respected by the courts as a means of securing the player's performance. However, the CBA between the players and the NFL teams, as interpreted by an arbitrator and a federal judge, only permits the forfeiture of bonuses specifically denoted as signing bonuses, and not to any other bonuses like roster bonuses or option bonuses.

Because signing bonuses may be involuntarily forfeited by the player, players do not have to report them as income until the risk of forfeiture passes (so long as the bonus is paid in the form of property). Section 83 of the Internal Revenue Code, which ordinarily applies to stock options, permits a taxpayer to defer the inclusion of property carrying a substantial risk of forfeiture. The taxpayer must report the property as income once the risk of forfeiture passes. The risk that an NFL player's signing bonus will be recouped by the team is substantial, not because forfeiture is more likely than

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treasury.

186. *See, e.g.*, Billman v. Commissioner, 73 T.C. 139, 144 (1980) (Goffe, J., dissenting).

187. WALTER T. CHAMPION, JR., FUNDAMENTALS OF SPORTS LAW (2d ed. 2007).

not, but because the Treasury regulations find that forfeiture due to retirement or other willful non-performance is a "substantial risk."

However, NFL player bonuses as currently paid do not qualify for section 83 deferral, because they are not paid in the form of property. Section 83 does not limit the type of property NFL teams could use to pay their players. As an example, an NFL team could pay the player his signing bonus in the form of stock in a corporation or other business entity dedicated to exploiting the athlete's name and likeness. The NFL would also have to agree that such payment in the form of property was not a device for circumventing the salary cap. Thus, the NFL should implement a signing bonus scheme which includes payments to athletes in the form of property so that these athletes can take advantage of § 83 of the IRC in to protect themselves from the potential tax consequences of a recouped signing bonus.