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# The Evolution of Techniques for Negotiation of Sports Employment Contracts in the Era of the Agent

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# ESSAY

## THE EVOLUTION OF TECHNIQUES FOR NEGOTIATION OF SPORTS EMPLOYMENT CONTRACTS IN THE ERA OF THE AGENT

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### I. INTRODUCTION

Earl Wilson was a hard-throwing starting pitcher for the Boston Red Sox in the sixties. Following a car accident, he sought the assistance of Boston lawyer Bob Woolf. Shortly thereafter, in 1962, Wilson threw a no-hitter and numerous commercial endorsements and requests for appearances by Wilson poured in. Although Wilson could field his position, he found he needed help fielding the requests for his services. Again he turned to Woolf.<sup>1</sup>

"I told him I didn't know the first thing about it, but I'd try,"<sup>2</sup> said Woolf. "Back in 1962 I thought everybody was represented, but nobody was . . . . Everybody said I was a pioneer, but it was just being in the right place at the right time."<sup>3</sup>

Woolf is considered a pioneer. Although football legend Red Grange used a theatrical agent to negotiate a contract in 1925 and baseball great Babe Ruth consulted an agent, sports cartoonist Christy Walsh, for financial advice during the stock market crash of 1929,<sup>4</sup> Woolf's dealings with Wilson are thought to be the birth of sports law.<sup>5</sup>

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1. Lawrence Shulruff, *The Football Lawyers*, A.B.A. J., Sept. 1985, 45, 46.

2. *Id.*

3. *Id.*

4. KENNETH L. SHROPSHIRE, CAREERS IN SPORTS LAW 9-10 (1990); see Craig Neff, *Den of Vipers*, SPORTS ILLUSTRATED, Oct. 19, 1987 at 76.

5. Shulruff, *supra* note 1, at 46.

Woolf is a lawyer, but negotiating a contract for an athlete does not require a law degree. Among the earliest sports agents was a Hollywood producer who represented Los Angeles Dodgers star pitchers Don Drysdale and Sandy Koufax in their million-dollar holdout in 1965.<sup>6</sup>

There is very little law that applies strictly to sports, yet sports law is a legal biosphere, developing its own answers to contract law problems.<sup>7</sup> Just as an opera singer cannot be compelled to perform under a contract,<sup>8</sup> specific performance is also unavailable to a sports club trying to remedy an athlete's refusal to perform under an existing contract while demanding a new, richer contract.<sup>9</sup> In response to this apparent inequity, the biosphere has prescribed such things as shorter-term contracts, salaries tied to the market and incentive bonuses.

It is the agent who has his hand on the biosphere's thermostat. The seventies saw an agent boom,<sup>10</sup> accelerating the evolution of techniques used to negotiate athletes' contracts. This paper will chronicle that evolution.

For the sake of perspective, bear this in mind: it has been suggested that if Babe Ruth played today, his agent could get Ruth the first billion-dollar contract in sports.<sup>11</sup>

## II. NEGOTIATION DEVICES

The devices agents employ in negotiating athletes' contracts reflect a variety of influences. Sports agent Howard Slusher, for example, is often identified as the man most responsible for putting "renegotiation" into the seventies sports page headlines.<sup>12</sup> He has the reputation of being "the most controversial agent in sports."<sup>13</sup> While growing up in New York City, Slusher, a non-Catholic, wanted to play basketball at a Catholic church.<sup>14</sup> "The

6. SHROPSHIRE, *supra* note 4, at 10.

7. *See id.* at 1.

8. Lumley v. Wagner, 42 Eng. Rep. 687 (Ch. 1852).

9. *See* E. ALLAN FARNSWORTH, CONTRACTS § 12.5 (2d ed. 1990).

10. RAY YASSER ET AL., SPORTS LAW 239 (1990) [hereinafter YASSER].

11. Leigh Montville, *It's Back to the Bambino*, SPORTS ILLUSTRATED, Dec. 18, 1989, at 100. The article posits a fantasy wherein the agent, using time travel, offers Ruth to a present-day team. The billion-dollar deal is based on Ruth pitching and playing right field between starts. *Id.*

12. *See, e.g.*, Peter Richmond, *Sport Interview: Howard Slusher*, SPORT, Feb. 1983, at 15; Dave Nightingale, *Slusher Adds New Twist to 'Renegotiation'*, THE SPORTING NEWS, Feb. 13, 1982, at 13.

13. Peter Richmond, *supra* note 12, at 15.

14. *Id.* at 21.

coach said that if I went to church, I could play. I learned to negotiate that very day," Slusher recalled.<sup>15</sup>

Slusher's approach to negotiation reflects a philosophical bent: "The law is an actual, functional arena in which to promulgate the alteration of a society and how you see society being benefitted . . . . [T]he game has served a wrong for too long."<sup>16</sup>

Attorney Jeff Irwin negotiates contracts for athletes including football player Aundray Bruce.<sup>17</sup> His comments regarding the changes in negotiation practice since he started in 1982 present a down-to-earth approach: "You still have, basically, a product that you're selling and there's a market value for that product and you just try to get the maximum value for it."<sup>18</sup>

### A. *Players' Strategies*

#### 1. The Holdout

Eldon Auker, a major league pitcher in the thirties and forties,<sup>19</sup> lamented:

We had no assurance of anything. They could release us anytime they wanted to and we didn't have much to say about it. We just signed a four-page contract and everybody signed it. It didn't make any difference who you were, you signed it. And they could trade you, they could do anything to you until you were in the major leagues ten years. You were just like an automobile. They'd get rid of you anytime they wanted to get a new one.<sup>20</sup>

What little clout the players of Auker's era had came from the holdout. A holdout occurs when a player refuses to play or practice until he comes to an agreement with his team. It is, more or less, an individual strike.

The holdout used to be common during baseball's spring training period.<sup>21</sup> Babe Ruth, in fact, often held out.<sup>22</sup> Veteran sports writer Milton Richman found Ruth's holdouts to be a rite of spring: "Every time I'd see the annual headline saying 'Ruth Holds

15. *Id.*

16. Richmond, *supra* note 12, at 20.

17. Telephone Interview with Jeff Irwin, Sports Agent (Apr. 8, 1992).

18. *Id.*

19. Stan Isaacs, *How About That? Mel Wasn't There*, *NEWSDAY*, July 16, 1991, at 121; *Some Historic Rotations*, *SPORTS ILLUSTRATED*, Aug. 25, 1986, at 17.

20. *When It Was a Game* (HBO television cablecast, Apr. 5, 1992).

21. Milton Richman, *Today's Sport Parade*, *UPI*, Feb. 27, 1984, available in *LEXIS*, Nexis Library, *UPI File*.

22. *Id.*

Out,' I'd automatically know winter was all over and spring was here."<sup>23</sup>

Spring holdouts gave fans something to talk about. Richman recalled, "The late [general manager] Frank Lane realized the publicity value in wrangling over money with a player . . . so he and [player] Minnie Minoso contrived a 'feud' over salary one year with the White Sox when, in fact, Minoso already had agreed to a figure and there was no difference between them whatsoever."<sup>24</sup>

Holdouts are less common today, as sports law has responded with the negotiation of new contracts before current, multi-year contracts expire, leading many players to sign during their playing seasons.<sup>25</sup> It is not common for players today to miss games because of holdouts, as did NBA rookie Jim Jackson, who sat out the Dallas Mavericks' first fifty-four games of the 1992-93 season.<sup>26</sup> Typically, holdouts end before the start of the regular season. For example, rookie football professional Troy Vincent held out during the Miami Dolphins' training camp, but signed before the Dolphins' last pre-season game in 1992.<sup>27</sup> However, lawyer Richard Woods, who broke in as a sports agent in a big way in 1986 by representing two-sport star Bo Jackson, maintains that the holdout is still potent:<sup>28</sup> "The holdout is still the ultimate threat, particularly when you have a good player. If the player holds out, that's what creates the pressure, in many situations, for the team to sign the player."<sup>29</sup>

## 2. Renegotiation

Football star Bobby Humphrey held out from the Denver Broncos for ninety-seven days in 1991. He was in the middle of a four-year contract and demanded renegotiation. Bronco management refused, and Humphrey returned to play in only four games that season.<sup>30</sup> A demand for renegotiation is a tactic by which a

23. *Id.*

24. *Id.*

25. *Id.*

26. Mitch Lawrence, *Big News in Big D; NBA Rookie Jim Jackson Sparks Lowly Mavericks After Ending Long Holdout*, DALLAS MORNING NEWS, Mar. 8, 1993, at C6.

27. Peter May, *Despite an Upset Stomach, Dolphins Rookie Cornerback Troy Vincent Made the Chargers Sick Last Sunday When he Came up With a Pair of Interceptions. It Was a Stirring Example of a . . . Gutsy Effort*, BOSTON GLOBE, Jan. 15, 1993, at 37.

28. Telephone Interview with Richard Woods, Sports Agent (Apr. 7, 1992).

29. *Id.*

30. *Eagles Eye Broncos' Humphrey*, UPI, April 2, 1992 available in LEXIS, Nexis Library, UPI File.

player threatens to hold out unless his current contract is changed.<sup>31</sup> No negotiation device stirs up as much controversy as the debate over the ethics of such a demand.

Bruce Allen, an agent and former general manager in the United States Football League,<sup>32</sup> contended, "Both teams and athletes must be able to renegotiate to correct injustices in prior negotiations."<sup>33</sup> Howard Slusher added, "[O]ne of the things the athlete contracts to do is to breach. Inherent in the contract is that very possibility."<sup>34</sup> Slusher pointed out, though, "I have never renegotiated a contract that I personally have negotiated."<sup>35</sup>

On the other side of the debate is Bob Woolf, who said, "I've never blackmailed a club into renegotiating. That's what it is, what else could it be called?"<sup>36</sup> The late sports scholar and tennis great Arthur Ashe also opposed renegotiation. In 1979, Ashe wrote: "Quite a few pro athletes these days erroneously equate their high salaries with a unilateral right to renegotiate their contracts whenever they feel their compensation is not commensurate with their talents."<sup>37</sup>

Most general managers are likely to agree with their anonymous colleague, quoted by sports writer Dave Nightingale: "If you examine it closely, you will see that 'renegotiate' is just a long spelling of the word 'renege.' I can't renege on a contract with one of my athletes. Why should the athlete be able to do it to me?"<sup>38</sup>

Regardless of its ethics, renegotiation is a device that has served some opportunistic athletes.<sup>39</sup> Even if an athlete's agent eschews renegotiation, the athlete has alternative methods. For example, in 1979, basketball star Marques Johnson asked attorney Donald Dell to renegotiate his contract with the Milwaukee Bucks. When Dell refused, Johnson switched agents.<sup>40</sup>

Renegotiation was common during the seventies. Former

31. See Alex M. Johnson, *The Argument for Self-Help Specific Performance: Opportunistic Renegotiation of Player Contracts*, 22 CONN. L. REV. 61 (1989).

32. Bruce Allen, *Shorter-term Deals Offer Best Solution*, USA TODAY, Oct. 29, 1991, at 19C.

33. *Id.*

34. Richmond, *supra* note 12, at 17.

35. *Id.* at 15.

36. Slusher: *Love Him or Loathe Him*, SPORT, Feb. 1983, at 18.

37. Arthur Ashe, *Contracts Made To Be Honored; "Renegotiators" Hurt Everybody*, WASH. POST, Dec. 2, 1979, at F4.

38. Dave Nightingale, *Slusher Adds New Twist to "Renegotiation"*, THE SPORTING NEWS, Feb. 13, 1982, at 13.

39. See Johnson, *supra* note 31, at 62.

40. Ashe, *supra* note 37, at F4.

sports executive Bob Briner recalled:

[O]ne of the top young players in the [American Basketball Association] . . . had a bonus clause that called for him to get a new \$10,000 car. After one year of his old contract he phoned the general manager and said he had to renegotiate. When he got to the office he explained that the car provision had to be liberalized. "You just can't get a decent car for \$10,000," he said.<sup>41</sup>

In the same decade, red-headed Howard Slusher earned the nickname "Agent Orange" as a result of deals he negotiated for athletes including Gus Williams.<sup>42</sup> Slusher advised Williams to holdout the entire 1980-81 basketball season. On the issue of renegotiation, Slusher stated his respect for owners who "don't run to the newspaper to negotiate to the press."<sup>43</sup>

Agent Larry Fleisher agrees that renegotiation should be done privately. "I just finished renegotiating a contract for one of the league's better players,"<sup>44</sup> said Fleisher in 1982, "but the club didn't announce it was done and I'm certainly not going to announce that I did it."<sup>45</sup>

Presently, renegotiation is not so common as it was in the seventies. Attorney Richard Thomas, who has represented the likes of football star Jack Lambert, reasoned that the decline is a result of current higher salaries,<sup>46</sup> so negotiations are more deliberate, making it a greater undertaking to disturb that which has been agreed upon.<sup>47</sup>

In 1979, Arthur Ashe predicted that the breaking of contracts could result in "more short-term contracts to make it easier to dump a player"<sup>48</sup> Shorter-term contracts are now more common, at least in football. Pittsburgh Steelers attorney Arthur Rooney II claims that the shorter-term contracts are directly responsible for the decline in renegotiation in that sport.<sup>49</sup> The source of the re-

41. Bob Briner, *Making Sport of Us All*, SPORTS ILLUSTRATED, Dec. 10, 1973, at 38.

42. Richmond, *supra* note 12, at 15; David Israel, *Sit Up and Take Notice*, SPORTS ILLUSTRATED, Jan. 18, 1982, at 104.

43. Richmond, *supra* note 12, at 18.

44. Nightingale, *supra* note 38, at 14.

45. *Id.*

46. Thomas is concerned that players' salaries are escalating unreasonably: "That's not a very good point of view if you represent players, but I think it is a consuming kind of an escalation. It's going to destroy the . . . industry." Telephone Interview with Richard Thomas, Sports Agent (Apr. 15, 1992).

47. *Id.*

48. Ashe, *supra* note 37, at F4.

49. Telephone interview with Arthur Rooney II, Attorney for the Pittsburgh Steelers

quests for shorter-term contracts does not follow Ashe's forecast.<sup>50</sup> According to Rooney: "The players and the agents are seeking shorter-term contracts at this point, and succeeding, I would say for the most part . . . . Nowadays, we're down to most players starting off wanting a one-year contract and the team is trying to get two or three years."<sup>51</sup> Rooney characterized the change as a major shift in negotiation strategy.<sup>52</sup>

Renegotiation demands are also down in basketball; however, for different reasons. Phoenix Suns president Jerry Colangelo has negotiated every player contract since that National Basketball Association team came into existence in 1968.<sup>53</sup> He believes the NBA's salary cap<sup>54</sup> has checked demands for renegotiation. He stated: "If a team is over the cap, they're restricted from any renegotiation. The agents knowing that . . . have no position to come in and demand anything because they know it's not . . . allowable."<sup>55</sup> Football players' agents can be expected to face a similar obstacle in the NFL's new salary cap.<sup>56</sup>

There is a way for superstar basketball players' agents to get around the obstacle of the salary cap. The allowable solution is a contract extension with "balloon" payments to be made to the athlete in the added years.<sup>57</sup> Boston Celtic legend Larry Bird benefited from this technique. For the 1991-92 season, he collected \$7.1 million, \$4.9 million of which was a deferred bonus.<sup>58</sup>

(Apr. 16, 1992).

50. See Ashe, *supra* note 37, at F4.

51. Rooney, *supra* note 49.

52. *Id.*

53. Telephone Interview with Jerry Colangelo, President, Phoenix Suns (Apr. 17, 1992).

54. The salary cap is part of the collective bargaining agreement between the NBA and the National Basketball Players Association. It went into effect in the 1986-1987 season, limiting team salary payments to

the greater of either (a) a "fixed sum" of \$4.5 million, or (b) 53 percent of the total NBA gross revenues divided by the twenty-three teams in the league. The minimum salary a team may pay its players has been determined by the "fixed sum" allocated for that particular season.

GARY UBERSTINE, *LAW OF PROFESSIONAL AND AMATEUR SPORTS* § 7.06, at 7-19 (1991).

55. Colangelo, *supra* note 53.

56. In their new labor contract, NFL players and owners agreed to a salary cap to be triggered if player salaries reach sixty-seven percent of designated gross revenues. Arnie Stapleton, *NFL, Players Come to Terms*, ALBUQUERQUE J., Jan. 7, 1993, at D1.

57. David DuPree, *NBA Finds Way to Keep Stars Under Caps*, USA TODAY, Nov. 27, 1991, at 1C.

58. *Id.*

### 3. Leverage

#### a. Comparative Salaries

In 1977, NFL player's salaries were based on the player's value to his team. However, since 1989, salaries have been determined by comparing players.<sup>59</sup>

In 1989, attorney Leigh Steinberg used the following comparative-salary tale in negotiations with owner Victor Kiam over quarterback Tony Eason's New England Patriots contract:<sup>60</sup>

Suppose you had a ditchdigger who was one of the best ditchdiggers there is, and through no fault of his own he was covered by a landslide of dirt. He was disabled for two years, then came back ready and healthy to work. He should make what his ditchdigger peers make.<sup>61</sup>

Kiam bit. Eason, who had not played much in the previous two seasons, signed a two-year, \$2.35 million contract.<sup>62</sup>

In 1984, relief pitcher Willie Hernandez was a baseball rarity when he represented himself in contract negotiations.<sup>63</sup> Hernandez proved to be well-schooled in negotiating. He threatened to demand a trade unless the Detroit Tigers gave him a contract extension that would put him on a salary level with comparably talented relievers such as Goose Gossage. Gossage had a five-year, \$6.25 million contract.<sup>64</sup>

Comparative salaries can present a problem for baseball teams with superstars. One sports writer demonstrated the problem when he pondered the demands of José Canseco and Roger Clemons: "If [their teams] can sign [them], the payroll is blown apart and every other player wants more. In the current market, it is no stretch to think Clemons [or Canseco] might be worth \$20-\$25 million, higher than most teams' payrolls."<sup>65</sup>

Comparative salaries can cause other problems. In basketball, Donald Dell was in a dilemma when he negotiated Marques Johnson's rookie contract:

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59. Gordon Forbes, *End Results: White Highest-paid Defensive Lineman*, USA TODAY, Aug. 23, 1989, at 10C.

60. *He's Dialing for Dollars*, SPORTS ILLUSTRATED, Aug. 7, 1989, at 18.

61. *Id.*

62. *Id.*

63. See Murray Chass, *Hernandez Files for Trade*, N.Y. TIMES, Oct. 30, 1984, at B8, col. 4.

64. *Id.*

65. Steve Fainaru, *Can Sox Get Their Rocket to Reenter?*, BOSTON GLOBE, May 27, 1990, at 54.

[W]e were fairly certain he would be drafted number three by the Milwaukee Bucks, who that year also held the number-one draft choice. That represented a problem for us because everyone knew that Indiana all-American Kent Benson would be drafted number one that year. Why was that a problem? Because Benson's agent wasn't very experienced and also had formerly worked for the Bucks organization, we were afraid that Benson was going to end up with a low contract. If they drafted Marques, they would expect him to accept an even lesser contract at the number three position in the NBA draft.<sup>66</sup>

Dell solved the problem by warning Bucks owner Jim Fitzgerald, before the draft, that Johnson was going to cost more than Benson. Fitzgerald ultimately agreed to Dell's demand.<sup>67</sup>

#### b. Other Offers

One of the best ways to gain leverage in negotiations is for the athlete to have an offer from another team. Other offers, however, are not always readily available. In baseball, other offers were virtually unavailable until 1975, when pitchers Andy Messersmith and Dave McNally challenged the system, which automatically renewed a player's contract even if the parties executed no new writing. An arbitrator struck down the system and declared Messersmith and McNally to be free agents thereby making free agency available to other baseball players.<sup>68</sup> Presently, other offers are common. In 1992, the California Angels made an offer to All-Star Bobby Bonilla. Dennis Gilbert, Bonilla's agent, showed the offer to the New York Mets. The Mets bettered the Angels' offer and signed Bonilla.<sup>69</sup>

The NBA's first right of refusal rule restricts a player's freedom to accept an offer from another team. The rule was agreed upon by the team owners and the player's union after the 1975 case of *Robertson v. National Basketball Association*<sup>70</sup> which held the NBA to be in violation of antitrust law.<sup>71</sup> Under the rule, a player who has been in the league for at least five years becomes a

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66. DONALD DELL, MINDING OTHER PEOPLE'S BUSINESS 139-163 (1988), reprinted in YASSER, *supra* note 10, at 298.

67. *Id.* at 298-9.

68. Kevin A. Rings, Note, *Baseball Free Agency And Salary Arbitration*, 3 OHIO ST. J. ON DISP. RESOL. 243, 250 (1987).

69. Murray Chass, *Bidding in the Dark Amid the Free Agent Market*, N.Y. TIMES, Jan. 12, 1992, at sec. 8, p. 6, col. 1 [hereinafter Chass, *Bidding in the Dark*].

70. 389 F. Supp. 867 (S.D.N.Y. 1975).

71. *Id.*

free agent upon the expiration of his contract. However, the player's current team then has a right to match the best offer the player receives from another team.<sup>72</sup>

Jerry Colangelo said the first right of refusal has changed management strategy considerably.<sup>73</sup> "Teams have had to manage player contracts much more closely,"<sup>74</sup> said Colangelo. "You have to operate within the rules and regulations of the [salary] cap much more closely. On one hand, it's much less flexibility. On the other hand, it promotes a much better fiduciary responsibility on the part of management."<sup>75</sup>

League restrictions on offers to players (such as first right of refusal and the draft) do not apply to teams that are not members of that league. Teams from rival leagues have enhanced athletes' leverage by offering them competitive contracts. For that reason, Gary Davidson would have to be considered the professional team player's best friend. As a key organizer of the ABA, the World Hockey Association, and the World Football League, Davidson literally wrote the book on rival leagues.<sup>76</sup> Although all three are defunct, each had a major impact on players' contracts.

"New leagues are the greatest things that could happen to sports,"<sup>77</sup> stated agent Al Ross flatly. "In a competitive situation, the salary offers rise to their highest point. The player commands the most his talent rates."<sup>78</sup>

Football players gained leverage from rival-league offers even before agents came on the scene. In 1959, Heisman Trophy winner Billy Cannon played an offer from the NFL's Los Angeles Rams against an offer from the Houston Oilers of the upstart American Football League.<sup>79</sup> From that moment, the NFL-AFL talent war escalated, culminating with Joe Namath's \$400,000 contract with the AFL New York Jets. The Namath deal is credited with bringing about the merger of the two leagues in 1969.<sup>80</sup>

72. Timothy W. Smith, *N.F.L. Is Dusting Off Its Shield For Another Free Agency Battle*, N.Y. TIMES, June 14, 1992, at sec. 8, p. 4, col. 1.

73. Colangelo, *supra* note 53.

74. *Id.*

75. *Id.*

76. See GARY DAVIDSON WITH BILL LIBBY, *BREAKING THE GAME WIDE OPEN* (1974) [hereinafter *DAVIDSON*].

77. *Id.* at 98.

78. *Id.* at 99.

79. *Los Angeles Rams Football Club v. Cannon*, 185 F. Supp 717, 719-20 (S.D. Cal. 1960).

80. *Festive Weekend for 5 Inductees*, CHI. TRIB., Aug. 2, 1985, at 5 (Sports); *Namath Recalls Showman Werblin*, CHI. TRIB., Nov. 24, 1991, at 3 (Sports).

In the eighties, the United States Football League signed Heisman Trophy winner Doug Flutie, among others, and offered players a competitive alternative.<sup>81</sup> The league went under after winning but \$3 in treble damages in an antitrust suit against the NFL.<sup>82</sup> The USFL's death spelled a decrease in leverage for football players and an immediate impact on salaries. Between 1984, the last year the USFL courted top college players, and 1986, salaries dropped twenty percent, according to the NFL Players Association.<sup>83</sup>

Leigh Steinberg feels that the USFL's absence has put him in a much worse position when negotiating NFL contracts:

Although the Canadian Football League (CFL) offers an athlete another playing option, the CFL is frequently an unsatisfactory alternative since it restricts the number of U.S. players that a team can sign, its pay structure is generally uncompetitive with the NFL's scale, and the Canadian income tax laws subject U.S. players to certain adverse tax consequences. As a result, many players are left with take-it-or-leave-it proposals from their NFL teams.<sup>84</sup>

Despite the disadvantages of the CFL, the group of agents known as "Team Rocket" found it to be useful. "Team Rocket" negotiated Notre Dame speedster Raghbir "Rocket" Ismail's \$18-26 million contract with the Toronto Argonauts. By signing with the Argonauts, Ismail spurned the Dallas Cowboys, who held his NFL rights.<sup>85</sup>

Agent David Fishof orchestrated an innovative use of the CFL as leverage. In 1979, Fishof's client Vince Ferragamo earned \$52,000 from the Los Angeles Rams.<sup>86</sup> Fishof turned to Nelson Skalbani, then the new owner of the CFL's Montreal Alouettes. Skalbani came up with a \$2 million deal for Ferragamo, who played just one season in Canada before Skalbani's financial woes forced him to let Ferragamo out of his contract.<sup>87</sup> Fishof brought Ferragamo back to the Rams, negotiating a five-year contract

81. Shulruff, *supra* note 1, at 49.

82. See *United States Football League v. National Football League*, 644 F. Supp. 1040 (S.D.N.Y. 1986), *aff'd*, 842 F.2d 1335(2d Cir. 1988).

83. Joel Sherman, UPI, Aug. 4, 1987, available in LEXIS, Nexis Library, UPI File.

84. Leigh W. Steinberg, *Negotiating Contracts in the National Football League*, C627 ALI-ABA 617, June 6, 1991, at 5.

85. Rick Matsumoto, *\$18 MILLION ROCKET: Argos Expect Notre Dame Speedster to Increase Gates by 17,000*, TORONTO STAR, Apr. 22, 1991, at C1.

86. DAVID FISHOF & EUGENE SHAPIRO, *PUTTING IT ON THE LINE* 77 (1983).

87. *Id.* at 95-100.

starting at \$300,000 per year, increasing to \$500,000 per year.<sup>88</sup>

The latest "rival" football league turned out not to be a rival at all, as NFL veteran Mike Rozier found out. In 1991, he approached the Birmingham Fire of the World League of American Football only to be told that the WLAF would not accept NFL players. The WLAF was affiliated with the NFL and decided, in Rozier's case, to respect residual rights held by the NFL's Atlanta Falcons.<sup>89</sup>

WLAF president Mike Lynn's decision brought a threatening response from Rozier's agent Art Wilkinson: "What's his basis? He'll have to tell me . . . or maybe tell a judge."<sup>90</sup> The WLAF did not operate in 1993 but plans to return for a 1994 season.<sup>91</sup>

Jerry Colangelo remembered the ABA as "the beginning of a whole different twist to negotiations in basketball."<sup>92</sup> Case law tells the story of the fierce fighting between the NBA and the ABA for players,<sup>93</sup> fighting that gave the players unprecedented leverage.

The ABA is dead, but its effect is still felt in basketball. The *Robertson* suit was the result of the players' anticipation of a decrease in bargaining power upon the ABA's death.<sup>94</sup> Also, European basketball shows signs of affecting NBA player negotiations in a fashion similar to the ABA. Increasingly, newspapers are printing reports such as: "The Denver Nuggets signed forward Andre Moore of Loyola. Moore had reportedly been set to sign a contract to play in Europe."<sup>95</sup>

"European basketball has definitely become a viable alternative for many players,"<sup>96</sup> noted Colangelo. "Five to ten years ago, European basketball did not present itself as a big-time opportunity financially . . . . [Today] many American players are using that [European basketball] in leverage regarding negotiations."<sup>97</sup>

88. *Id.* at 102.

89. See *Football*, WASH. POST, Apr. 5, 1991, at D2.

90. *Id.*

91. Richard Wetherell, *US Anti-monopoly Ruling Puts Europe on Hold*, THE TIMES (LONDON), Sept. 19, 1992, Sport sec.

92. Colangelo, *supra* note 53.

93. See, e.g., *Washington Capitols Basketball Club, Inc. v. Barry*, 419 F.2d 472 (9th Cir. 1969) (dispute between the ABA Washington team and NBA San Francisco team over the services of Rick Barry); *Minnesota Muskies, Inc. v. Hudson*, 294 F. Supp. 979 (M.D.N.Y. 1969) (dispute between ABA Minnesota team and NBA St. Louis team over services of Lou Hudson); *Munchak Corp. v. Cunningham*, 457 F.2d 721 (4th Cir. 1972) (dispute between ABA Carolina team and NBA Philadelphia team over services of Billy Cunningham).

94. See 389 F. Supp. 867 (S.D.N.Y. 1975).

95. *Briefs*, CHI. TRIB., Oct. 15, 1987, at 2 (Sports).

96. Colangelo, *supra* note 53.

97. *Id.*

When top prospects Danny Ferry and Brian Shaw chose Italian teams over the NBA in 1989, one sports writer surmised, they "left players dreaming of big contracts and agents dreaming of the ultimate bargaining tool."<sup>98</sup> Whether that dream will come true remains to be seen.

Even major league baseball, which encounters far fewer challenges from rival leagues than the NFL or NBA, can be affected by this form of leverage. In 1989, number one draft pick Ben McDonald was offered \$2 million by a proposed new league, backed by investor Donald Trump, agent Dick Moss and others.<sup>99</sup> McDonald's agent Scott Boras parlayed the offer into a \$1.1 million deal with the Baltimore Orioles.<sup>100</sup> The proposed new league never hatched.

A new variation on offers from rival leagues involves offers from other sports. However, only a few athletes can take advantage of it. It is an approach played to its full effect by Bo Jackson. Jackson started his professional career with the Kansas City Royals, then joined the NFL's Los Angeles Raiders during baseball's off-season. The two-sport combination increased Jackson's bargaining leverage in both sports.<sup>101</sup>

Earlier, John Elway used the tactic to beat the restrictions of the NFL draft. Elway was drafted by the Baltimore Colts. He did not want to play for the Colts, so he threatened to play baseball for the New York Yankees. Elway had already played in the Yankees' minor league system. The threat worked, and the Colts traded Elway's rights to the Denver Broncos, who signed him to a five-year, \$1 million-per-year contract. Before Elway, the NFL's highest-paid quarterback had been veteran Archie Manning, whose annual salary was \$600,000.<sup>102</sup>

Deion Sanders played football for the Atlanta Falcons and baseball for the Atlanta Braves when the seasons for those sports overlapped in 1991 and 1992. The result was big money from a collateral source: Nike, the athletic shoe company, paid Sanders \$1 million per year for playing both sports at the same time of year.<sup>103</sup>

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98. Jackie MacMullan, *A Warming or Warning? Players, Clubs Increasingly Find Seas Choppy Between Here and Europe*, BOSTON GLOBE, Oct. 28, 1990, at 55.

99. Richard Justice, *McDonald Would Accept An Offer From Orioles; For \$400,000 More He'd Reject New League*, WASH. POST, Aug. 7, 1989, at D1.

100. Tim Kurkjian, *Power Hitter*, SPORTS ILLUSTRATED, Aug. 12, 1991, at 59.

101. Telephone Interview with Denny Thum, Assistant General Manager, Kansas City Chiefs (Apr. 8, 1992).

102. Shulruff, *supra* note 1, at 49.

103. Dave Nightingale, *Sanders Refires the Braves' Ire*, THE SPORTING NEWS, Oct. 19, 1992, at p. 11.

### c. Free Agency

Whenever free agency looms for a valuable athlete, his agent commands a potent tool. Free agency allows an athlete to enjoy increased leverage even when he does not want to change teams as the threat of an athlete being free to negotiate with any team can force the athlete's current team to give the athlete a new, richer contract.<sup>104</sup>

Free agency's impact is best illustrated by the numbers: Before baseball's 1977 adoption of free agency, an average major leaguer earned about \$52,000 per year. Four years later, the average salary was \$130,000.<sup>105</sup> The NFL's lack of free agency is a fundamental reason why that league's average salary in 1991 (\$203,000 per year) was less than half that of major league baseball (\$412,500) and the NBA (\$500,000).<sup>106</sup>

"Free agency made the pendulum swing whereby it was a true negotiation,"<sup>107</sup> said agent Gary Walker, who negotiated Reggie Jackson's contracts during Jackson's stellar baseball career.<sup>108</sup> "Before, when they couldn't go anyplace, it wasn't really a level playing field."<sup>109</sup> Expect similar results for football players with the coming of free agency to the NFL.<sup>110</sup>

### d. College Ball

While the compensation differential is great,<sup>111</sup> some athletes who have not signed their first professional contracts can use college for leverage. Some top pitching prospects have recently found the threat of playing college baseball to be compelling.<sup>112</sup>

104. UBERSTINE, *supra* note 54 at § 7.07[2], at 7-21 (1991).

105. HOWARD RAIFFA, *THE ART & SCIENCE OF NEGOTIATION* 102 (1982).

106. Steinberg, *supra* note 84, at 2.

107. Telephone Interview with Gary Walker, Sports Agent (Apr. 7, 1992).

108. *Id.*

109. *Id.*

110. In their new labor contract, NFL players and owners agreed to free agency for players with expired contracts and at least five years service in the league. The required years of service drops to four if player salaries reach sixty-seven percent of designated gross revenues. Stapleton, *supra* note 56, at D1.

111. Colleges are limited to awarding only scholarships to athletes. See Yasser, *supra* note 10, at 1.

112. Using college baseball for leverage is really a double-barreled tactic. It presents professional teams with the possibility that the athlete will (1) go to college now, and (2) be drafted by another team later. Professional baseball teams retain rights to players they draft for only one year.

A change may be on the horizon, though: "The players association has filed a grievance against the so-called Brien Taylor Rule, which would allow clubs to retain draft rights until one year after that player's class graduates college." Notes, ALBUQUERQUE J., May 18, 1992,

Scott Boras plays the negotiation game as well as his client, Sandy Alomar Jr., throws out would-be base stealers.<sup>113</sup> In 1990, Boras parlayed high school righthander Todd Van Poppel's staunch desire to play for the University of Texas into a \$1.2 million contract with the Oakland Athletics.<sup>114</sup>

The University of Texas is a college baseball power. But the school does not have to be prominent to provide leverage for the agent. In 1991, the mother of high school pitching marvel Brien Taylor insisted her son would attend Louisburg College in North Carolina unless he got the right money. Boras used Bettie Taylor's stand to get Brien a \$1.55 million deal with the New York Yankees.<sup>115</sup>

NBA and NFL rules allow collegians who have not completed four years of college to declare themselves draftable.<sup>116</sup> Doing so costs the athlete any intercollegiate eligibility he has left,<sup>117</sup> but the move often results in increased leverage. The reason, according to Richard Woods, is "because you've had some extraordinary talents come out early and they commanded higher salaries, then that raised everyone else's salary around them."<sup>118</sup>

#### e. Arbitration

Baseball is unique among American professional team sports in that it allows certain players to submit their salary disputes to arbitration.<sup>119</sup> Players who can take advantage of the arrangement generally have at least three years of major league experience, but

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at C3, col. 5.

113. Alomar is the catcher for the Cleveland Indians.

114. Kurkjian, *supra* note 100, at 59.

115. *Id.*; Jon Heyman, *Boras Pays Way, Gets 2 Cents In; Banished George Holds Court in Stands*, *NEWSDAY*, March 23, 1992, at 94.

116. Colangelo, *supra* note 53; See *Gaines v. National Collegiate Athletic Ass'n*, 746 F. Supp. 738 (M.D. Tenn. 1990).

117. NCAA Bylaw 12.2.4.2. The rule is:

DRAFT LIST. An individual loses amateur status in a particular sport when the individual asks to be placed on the draft list or supplemental draft list of a professional league in that sport, even though:

- (a) The individual asks that his or her name be withdrawn from the draft list prior to the actual draft,
- (b) The individual's name remains on the list but he or she is not drafted, or
- (c) The individual is drafted but does not sign an agreement with any professional athletics team.

*id.*

118. Woods, *supra* note 28.

119. YASSER, *supra* note 10, at 321.

less than six.<sup>120</sup> Arbitration has turned out to be player-favorable because players taking advantage of it usually get big raises.<sup>121</sup> If the end of a player's contract is approaching, and he is eligible for arbitration, he has a good bargaining tool for negotiating a new contract.

Imminent arbitration gave pitcher Orel Hershiser the leverage he needed to get a \$7.9 million contract with the Los Angeles Dodgers in 1989. The parties were in the room where the arbitrator was to have heard their arguments, when a settlement was reached.<sup>122</sup>

"We were on the verge of having a hearing,"<sup>123</sup> explained players union official Eugene Orza. "There's always an effort made before a hearing to reach a settlement. That's what happened . . . ."<sup>124</sup>

Often, an arbitrator would welcome a settlement. For instance, midway through infielder Tim Lincecum's 1989 arbitration hearing with the New York Mets, arbitrator Richard Bloch announced, "I've never done this before,"<sup>125</sup> and stopped the proceedings. Bloch took both sides into an adjacent room and told them, "It seems to me you guys really can settle this thing, so why don't you try to settle it now?"<sup>126</sup> Bloch then left Mets' negotiator Joe McIlvaine and Tony Attanasio, Lincecum's agent, to negotiate.<sup>127</sup> McIlvaine and Attanasio made some progress before a stalemate required Bloch's return for a decision.<sup>128</sup>

#### f. Publicity Value

An athlete who takes advantage of the publicity value of his signing may gain increased leverage while the team makes headlines. Joe Namath's \$400,000 contract in 1965 was less the result of agent hardball than of New York Jets' owner Sonny Werblin's desire to pay a record price for the publicity value.<sup>129</sup>

120. *Id.* at 322.

121. Class lecture by Professor Alfred Mathewson, University of New Mexico School of Law Sports Law Class (Mar. 23, 1992).

122. Richard Justice, *Hershiser to Get \$7.9 Million for Three Seasons; Could Be First \$3 Million-a-Year Player*, WASH. POST, Feb. 17, 1989, at F1.

123. *Id.*

124. *Id.*

125. Murray Chass, *Teufel, By Decision*, N.Y. TIMES, Feb. 19, 1989, at sec. 8, p. 1, col. 1.

126. *Id.*

127. *Id.*

128. *Id.*

129. Pete Axthelm, *The Men Behind The Men Who Make Money In Sports*, VOGUE,

Nearly two decades later, Franco Harris may have overestimated his publicity value to the Pittsburgh Steelers. Harris was chasing the NFL's all-time rushing record. He thought the Steelers would see his run at the record as a way to get a great deal of ink and air time. Although Harris was a thirteen-year veteran, he sought a raise and a two-year deal.<sup>130</sup> To Harris's surprise, the Steelers waived him. Harris was not finished with football, though, as he signed a one-year contract estimated at \$500,000 with the Seattle Seahawks.<sup>131</sup>

#### 4. Player-Favorable Terms

##### a. Length of Contract

Generally, if a player is early in his career and his skills are improving, he is likely to want a shorter contract than if he is in his prime, or if his skills are diminishing. That is so his salary can rise commensurate with his ability. Because of the high chance of injury in football, though, NFL contracts are usually limited to one year to allow severability.<sup>132</sup>

The case of *Sample v. Gotham Football Club, Inc.*,<sup>133</sup> is a good example. Johnny Sample signed a series of three one-year contracts with the New York Jets covering the years 1968, 1969 and 1970.<sup>134</sup> Sample suffered an injury before the 1969 season, and the Jets terminated his contracts for 1969 and 1970. Sample tried to get paid for those two seasons, under the theory that the three one-year contracts really constituted one three-year contract.<sup>135</sup> The court found that the intent of the parties, which was controlling, was for the contracts to be separate.<sup>136</sup>

In baseball and basketball, players can negotiate the length of their contracts so that they expire when the players are eligible to take advantage of free agency or arbitration. Previously, free agency did not exist in the NFL in the way it did in baseball and basketball, therefore football players were much more restricted from switching teams. That, however, has changed, and anticipa-

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May 1971, at 193.

130. UPI, July 22, 1984 available in LEXIS, Nexis Library, UPI File.

131. *Harris Fulfills a Rush Order*, N.Y. TIMES, Sept. 12, 1984, at sec. D, p. 26, col. 1.

132. YASSER, *supra* note 10, at 314.

133. 59 F.R.D. 160 (S.D.N.Y. 1973).

134. *Id.* at 162.

135. *Id.* at 164.

136. *Id.* at 165. *But cf.* *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265 (3d Cir. 1979) (parties intended three one-year instruments to function as one three-year contract).

tion of the change affected contract negotiation strategy. In 1991, the NFL Players Association began encouraging players to avoid contracts covering 1993 or later. The reason for that advice was that the NFL faced several antitrust suits and wider free agency was foreseeable.<sup>137</sup>

#### b. Guarantees

Over the twelve years that Denny Thum has been negotiating contracts for the Kansas City Chiefs, one thing has remained constant:<sup>138</sup> "[The agents] are all still trying to negotiate guaranteed contracts, which, in our business, there are very few of, unlike baseball and basketball."<sup>139</sup>

One of those agents is Leigh Steinberg. "[G]uarantees are always an absolute goal of a negotiation,"<sup>140</sup> stated Steinberg. "Although a function of leverage, skill guarantees (where a player is paid even if he is cut for lack of skill) are extremely difficult to obtain due to the feeling of NFL teams that such agreements are detrimental to the game."<sup>141</sup>

An injury guarantee may be within reach "since the risk of injury can be insured by either side."<sup>142</sup> However, some career ending injuries to football superstars such as Joe Theisman, Billy Sims and Lee Roy Selmon have greatly driven up premiums on injury disability policies. NFL teams are now more reluctant to fully insure players. Therefore, in negotiations for injury guarantees, "the issue is essentially who pays the disability policy premium."<sup>143</sup>

#### c. No-Cut and No-Trade Clauses

Similar to guarantees are no-cut and no-trade clauses, which can be negotiated into the athlete's contract if he has enough lev-

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137. Frank Litzky, *Agent Johnson Reports for Duty*, N.Y. TIMES, Aug. 16, 1991, sec. B, p. 12, col. 1. Free agency came into existence in the NFL in March, 1993. Players with expired contracts and at least five years experience may declare free agency. If the NFL adopts a salary cap in 1994 or later, the experience requirement will drop to four years. Each team may designate one "franchise player," who cannot become a free agent, and two "transition players" in 1993 and one in 1994. Transition players may be retained by their teams if they are paid the average salary of the ten best-paid players at the transition players' positions. Bob Glauber, *What Does It All Mean?*, NEWSDAY, Feb. 28, 1993, at 11.

138. Thum, *supra* note 101.

139. *Id.*

140. Steinberg, *supra* note 84, at 6.

141. *Id.*

142. *Id.*

143. *Id.*

erage.<sup>144</sup> There are at least three types of no-cut clauses. The first, illustrated in *Munchak Corp. v. Cunningham*,<sup>145</sup> prevents a player from being cut from a team for lack of skill. The team probably would be allowed to cut the player for bad physical or mental condition. The standard NFL no-cut is the second type. It is much like the *Cunningham* no-cut, except it is more specific in requiring the player to maintain excellent physical condition.<sup>146</sup> The third type of no-cut, and the best from a player's viewpoint, uses language such as "salary payable to employee in any event."<sup>147</sup> In these cases even if a player's contract includes a no-cut clause, the team can still suspend the player for disciplinary reasons, and release the player for lack of a good faith effort.<sup>148</sup>

Standard player contracts allow assignability by the team, so a player who is well-settled in a city may want to be protected against a trade.<sup>149</sup> Such a player's agent may negotiate for a no-trade or limited-trade clause. A no-trade clause only allows the player to be traded if the player approves. A limited-trade clause allows the player to submit a list of teams to which he would be willing to be traded. For either type of clause to be won in negotiations requires sufficient bargaining power. Usually the athlete must give up something from another part of the contract.<sup>150</sup>

#### d. Salary Tied to That of Peers

The latest, state-of-the-art, player-favorable term for star athletes allows the player's salary to rise with the market. Leigh Steinberg used the technique with Warren Moon. Moon's 1989 contract with the Houston Oilers contained a clause that required Moon to be one of the three highest-paid quarterbacks in the NFL. If Moon was not in the top three, the Oilers would have to pay Moon the difference between his salary and the average of the combined salaries of the top three.<sup>151</sup> In 1991, Steinberg found it was time to enforce the clause, as *Sports Illustrated* reported:

Steinberg knows that Dan Marino's contract [with the Miami Dolphins], with its new five-year extension, comes to \$4.43 million per season and that Joe Montana has a contract [with the

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144. See WALTER CHAMPION, FUNDAMENTALS OF SPORTS LAW § 22.3 (1990).

145. 457 F.2d 721 (4th Cir. 1972).

146. CHAMPION, *supra* note 144, at § 22.3.

147. *Id.*

148. *Id.*

149. *Id.*

150. See *id.*

151. Peter King, *To the Moon, Warren*, SPORTS ILLUSTRATED, Sept. 9, 1991, at 62.

San Francisco 49ers] that will pay him \$3.25 million annually. Steinberg also thinks John Elway has a new deal—which the [Denver] Broncos have yet to disclose—that averages at least \$3.25 million a year. Even if he can't prove Elway has a new contract, Steinberg still has Jim Kelly [of the Buffalo Bills], at \$2.86 million, to make his argument. The Marino-Montana-Elway average annual intake is \$3.64 million. Moon's pay for 1991 is \$1.5 million. Bottom line, according to Steinberg: Houston owes Moon about \$2.1 million. "It might be in the Oilers' best interest just to do a new contract with Warren," Steinberg says.<sup>152</sup>

Arthur Rooney II called such a clause "a game of leapfrog,"<sup>153</sup> and foresaw problems: "You may have fifteen players who have that clause that say they have to be in the top five players."<sup>154</sup> How would such a question be resolved? "I don't think it can work, quite frankly,"<sup>155</sup> said Rooney. "That particular type of clause is one we try to stay away from."<sup>156</sup>

### B. Management Strategies

Hardball tactics have always been used by professional team management people. Before the era of the agent, a simple refusal to renegotiate or a withholding of pay during a holdout usually sent a strong, and sometimes insurmountable, message.

The hired-gun element of sports agency, though, allowed athletes to fight back more impersonally. So, with greater frequency today, management hires specialists to deal with agents.<sup>157</sup> "One agent to negotiate with another," summarized a sports writer.<sup>158</sup>

Not every team, though, employs a negotiation specialist. Jerry Colangelo, who is not a lawyer, handles all the NBA's Phoenix Suns' player negotiations, and always has. Colangelo says eighty to ninety percent of NBA players negotiated their own contracts when he started with the Suns at the age of twenty-eight. He likes today's setting better.<sup>159</sup>

"It was very uncomfortable dealing with a player because, be-

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152. *Id.*

153. Rooney, *supra* note 49.

154. *Id.*

155. *Id.*

156. *Id.*

157. Richman, *supra* note 21.

158. *Id.*

159. Colangelo, *supra* note 53.

ing an ex-athlete myself<sup>160</sup> and I wasn't that far removed age-wise, . . . players were not equipped to deal with a player contract,"<sup>161</sup> remembered Colangelo. "I felt more comfortable dealing with agents when they came into being."<sup>162</sup>

## 1. Leverage

### a. Pleading Poverty

The NBA's salary cap requires a team's payroll to be between minimum and maximum totals.<sup>163</sup> Those negotiating NBA player contracts must keep those restrictions in mind. Conversely, the NFL is financially sound, but past league restrictions on player movement have diminished players' leverage.<sup>164</sup> Some baseball teams, though, appear to be justified in pleading poverty in response to an athlete's demand for big money.<sup>165</sup>

In 1990, Carl Barger, then the Pittsburgh Pirates general manager, surveyed the possibility of his division championship team's disintegration and said: "The way baseball is now, you almost can't afford to win."<sup>166</sup> Indeed, the Pirates were confronting free agency and salary arbitration for many of their stars.<sup>167</sup> The Pirates, in fact, told Bobby Bonilla that if they paid him his fair open-market value, the team would go broke.<sup>168</sup> Bonilla signed with the rival New York Mets for \$29 million.<sup>169</sup>

Pleading poverty is a tactic that does not seem to work. I found no examples of players signing with a team for less than that which they were seeking just because they were convinced of the team's financial straits. In fact, athletes are usually unconvinced, seeing attendance and general fan interest increase.<sup>170</sup>

Outfielder Darryl Strawberry graciously accepted his team's sentiments regarding player salaries. Still, those sentiments did not influence Strawberry's choice of a team with which to sign. When

160. Colangelo played intercollegiate basketball at the University of Illinois.

161. Colangelo, *supra* note 53.

162. *Id.*

163. See Ashe, *supra* note 37, at F4.

164. See Steinberg, *supra* note 84, at 2.

165. See Bruce Newman, *Pirate on the Plank*, SPORTS ILLUSTRATED, Oct. 14, 1991, at 34.

166. *Id.*

167. *Id.*

168. *Id.*

169. Murray Chass, *Tartabull Negotiations Centering on Angels*, N.Y. TIMES, Dec. 26, 1991, sec. B, p. 21, col. 5.

170. Bobby Abrams, *Take Me Out of the Ballgame*, 16 J. BEVERLY HILLS B. ASS'N 163 (1982).

his contract with the New York Mets was up, and the Mets did not approach the other offers he received, Strawberry reacted this way: "I don't think the front office was making an attempt to say, 'You're a big part of the club.' I think they believe their [contract] policy is more important than any player."<sup>171</sup>

Although Strawberry saw the Mets use a similar approach in negotiations with pitcher Dwight Gooden, he says he understands the team's strategy.<sup>172</sup> "This is the way they chose it,"<sup>173</sup> said Strawberry. "It was a great organization. I mean that. It was built well."<sup>174</sup> Strawberry signed with the Los Angeles Dodgers.

#### b. Outspending the Competition

The other side of the poverty coin, and a method that definitely nabs players, is simply to outspend the competition. Atlanta Braves owner and communications magnate Ted Turner has been a proponent of this method.<sup>175</sup>

Writer Murray Chass, quoting an anonymous New York Mets official, described how Turner works: "Ted goes to the agent and says tell me what you want. I'll give it to you. The agent works it out and Turner says O.K. . . . When he decides he wants a guy, the price is irrelevant."<sup>176</sup>

Other baseball team owners with reputations for free-spending include George Steinbrenner of the New York Yankees and Gene Autry of the California Angels.

#### c. Hardball

Red Auerbach, the legendary general manager of the Boston Celtics, used to do short television features on basketball skills entitled *Red on Roundball*.<sup>177</sup> Not only does Auerbach know "roundball," he knows hardball, too.

"Negotiating with Red is so hard because he starts off with a figure, which he thinks is fair, and then he's hurt if you dare think otherwise,"<sup>178</sup> said Bob Woolf. "And worse, for me, I always believe

171. Joe Gergen, *Darryl in Search of Peace*, NEWSDAY, March 3, 1991, at 5 (Sports).

172. *Id.*

173. *Id.*

174. *Id.*

175. Murray Chass, *Yankees Meet With Winfield, Discuss Deal on His Charity Work*, N.Y. TIMES, Nov. 16, 1980, sec. 5, p. 51, col. b.

176. *Id.*

177. *Red on Roundball* aired at halftime of network NBA game telecasts during the seventies.

178. Frank Deford, *A Man For All Seasons*, SPORTS ILLUSTRATED, Feb. 15, 1982, at 52.

that he's completely sincere."<sup>179</sup>

Another NBA front-office negotiator with a reputation for playing hardball is Andy Roeser of the Los Angeles Clippers. Roeser once reportedly tried to give a player two season tickets instead of the five-hundred dollars the player wanted.<sup>180</sup> "Negotiating with Andy is like talking to a wall,"<sup>181</sup> claimed one agent who preferred to remain anonymous. "He'll give you one figure and he won't budge from that."<sup>182</sup> Presumably, Auerbach and Roeser have counterparts in other professional sports.

#### d. The Surroundings

Often, a key factor that convinces a player to sign is not the money, but the team or the city in which it plays. For hockey legend Gordie Howe, the chance to play alongside his two sons with the now-defunct Houston Aeros motivated Howe to come out of retirement in 1973 at the age of forty-five.<sup>183</sup>

More typical is the reason second baseman Willie Randolph gave for choosing a Los Angeles Dodgers offer over the Montreal Expos: "I . . . liked the organization itself, the Dodgers' tradition of winning. I wanted to be in a situation where I could win."<sup>184</sup>

One who plays his team's winning tradition to the hilt is Auerbach. "Red Auerbach is the most cunning negotiator of them all,"<sup>185</sup> conceded Howard Slusher, who told the story of one rookie who was overcome by the Boston Celtic's tradition, as expounded by Auerbach:

Auerbach [was] dangling a key chain with a Celtic emblem on it in front of [Paul] Westphal. 'This is not just a keychain [sic], this is the Celtics, this is Celtic tradition.' He didn't tell him that you could buy one downstairs for \$2.50. Paul almost became the first kid to sign for a keychain [sic].<sup>186</sup>

Sometimes, when planning for a client, an agent will consider the surroundings. Before the 1991 NFL draft, Leigh Steinberg

179. *Id.*

180. Chris Baker, *Baylor Tries to Mold Clippers in His Image; But He May Have to Win Over Front Office Before He Can Get to Fans*, L.A. TIMES, Oct. 21, 1986, part 3, p. 4, col. 1.

181. *Id.*

182. *Id.*

183. DAVIDSON, *supra* note 76, at 234-37.

184. Murray Chass, *Randolph Finds a Job With Dodgers*, N.Y. TIMES, sec. 8, p. 2, col. 2.

185. Richmond, *supra* note 12, at 17.

186. *Id.*

called the Dallas Cowboys, trying to curtail the Cowboys' interest in his client, Dan McGwire.<sup>187</sup> "I don't want Dan to sit behind a young Pro Bowl quarterback,"<sup>188</sup> explained Steinberg. "Instead, we need to be on a team with an aging superstar, where he can learn."<sup>189</sup> Perhaps the real reason Steinberg did not want McGwire to play for Dallas was that its "young Pro Bowl quarterback" was Troy Aikman, another Steinberg client.

During the seventies, athletes were attracted to New York because, for one thing, it is a media center. That attraction may now be a thing of the past. In 1991, the Yankees asked Alan Meersand about his client, third baseman Steve Buechele.<sup>190</sup> Meersand was asked if Buechele has any aversion to New York, to which he replied, "Doesn't everybody? I'm from the Bronx, and I have an aversion to New York."<sup>191</sup> Responded an anonymous Yankees official, "It seems like every player nowadays has one thing in common, and that is that they don't want to play in New York."<sup>192</sup>

#### e. Taking Advantage of Inexperience

With the multitude of agents that exists, team negotiators are often looking at new faces across the table.<sup>193</sup> The opportunity is there for an experienced general manager to take advantage of an inexperienced agent.

"If it was a player that you didn't expect to make your team [with an inexperienced agent], yeah, I'm sure you would try to sign him for the least amount of money as you can,"<sup>194</sup> admitted Denny Thum. Thum warned, though, "If it's a first-round pick and he's got a new representative that doesn't have any experience, it's probably better to take the time with him and try to bring the guy along so that he has confidence in you and his client has confidence in you."<sup>195</sup>

Gary Walker said the days are over of pulling the wool over the rookie agent's eyes: "I think there's a basic integrity in every

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187. Samantha Stevenson, *N.F.L. Draft; As the Big Day Nears, It's the Agent Who Does the Signal-Calling*, N.Y. TIMES, sec. B, p. 5, col. 2.

188. *Id.*

189. *Id.*

190. Jon Heyman, *Yanks Might Spend Bundle For Buechele*, NEWSDAY, Nov. 13, 1991, at 117.

191. *Id.*

192. *Id.*

193. Thum, *supra* note 101; Walker, *supra* note 107; Colangelo, *supra* note 53; Woods, *supra* note 28.

194. Thum, *supra* note 101.

195. *Id.*

negotiation process . . . We're trying to do what's best for everybody and try to not have it [us] against them."<sup>196</sup>

## 2. Management-Favorable Terms

The following are management-favorable terms which teams try to substitute for base salary. Players' agents would prefer establishing higher base salaries.<sup>197</sup>

### a. Incentive Bonuses

The professional sports industry needed a flexible means of structuring contracts to pay athletes salaries that closely track performance. Sports law responded with incentive bonuses. Gary Walker said one of the biggest changes in athlete's contracts during the era of the agent is that "there are all kinds of incentives, where before there were very few, if any."<sup>198</sup> In 1992, Walker negotiated a contract for pitcher Bob Walk with the Pittsburgh Pirates.<sup>199</sup> That contract provided Walk with bonuses for innings pitched and pitching appearances.<sup>200</sup>

When Reggie Jackson was with the California Angels, Walker negotiated a deal in which Jackson would get an attendance bonus: Jackson would collect fifty cents for every person in attendance over the Angels' attendance the previous year.<sup>201</sup>

In 1989, Eric Davis's Gold Glove Award<sup>202</sup> was transformed into \$100,000, thanks to an incentive clause in his contract.<sup>203</sup> A 1991 Associated Press survey revealed that thirty-three of the first fifty-seven players named to baseball's All-Star Game received incentive bonuses ranging from \$15,000 to \$50,000.<sup>204</sup>

Running back Mike Rozier's 1990 contract with the Atlanta Falcons was structured like this: on top of the base salary, Rozier earned \$30,000 for rushing for 200 yards, \$30,000 for rushing for 400 yards, and \$40,000 for reaching 600 yards. Rozier gained 675

196. Walker, *supra* note 107.

197. CHAMPION, *supra* note 144, at § 22.1.

198. Walker, *supra* note 107.

199. *Id.*

200. *Id.*

201. *Id.*

202. The Gold Glove is awarded annually for fielding excellence.

203. Ben Henkey, *Davis Turns Fielding Excellence Into Gold*, THE SPORTING NEWS, Dec. 11, 1989, at 49.

204. Bill Jauss, *For Stars, It's Time for Bonus Round*, CHI. TRIB., July 9, 1991, at 5 (Sports).

yards, thus earning \$100,000 in bonuses.<sup>205</sup>

Another new type of incentive clause in football pays a bonus to the player for working out during the off-season. Such a clause allows the team to require the player to work out in the team's city, under the team's program.<sup>206</sup>

Agents must be alert when negotiating incentive clauses. Pitcher Al Leiter's agent negotiated a \$50,000 bonus if Leiter were to win the Associated Press comeback-player-of-the-year award. The Toronto Blue Jays agreed to the clause, knowing they would never pay the bonus - because the award was given by United Press International.<sup>207</sup>

#### b. Perks

Leigh Steinberg has made a name for himself by negotiating donations to charities by teams on behalf of Steinberg's clients.<sup>208</sup> Along those lines, Jeff Irwin negotiated a contract for defensive back Mark Carrier with the Chicago Bears that included a donation to Carrier's high school football program.<sup>209</sup> Donations to charity are but one of the perks for which an agent can bargain.

A sports law response to multinational taxation appears in the contracts of some members of baseball's Montreal Expos. It is a tax equalization clause, providing those players with extra money to make up for the higher taxes in Canada.<sup>210</sup> Similarly, agent Peter Johnson negotiated a \$1.25 million bonus for football star Herschel Walker when Walker was traded from the Dallas Cowboys to the Minnesota Vikings. The bonus was to replace money lost through taxes (Texas lacks a state income tax), and endorsements.<sup>211</sup>

Probably the two perks most commonly included in player contracts are the roster bonus and the signing bonus. The player

205. Howard Balzer, *NFL Makes Effort to Appease College Coaches*, THE SPORTING NEWS, Jan. 14, 1991, at 12.

206. Thum, *supra* note 101.

207. Jerry Crowe, *Morning Briefing: Playgrounds Gave Hurley Winning Edge*, L.A. TIMES, Apr. 3, 1991, at C2, citing SPORTS ILLUSTRATED.

208. Thum, *supra* note 101.

209. Irwin, *supra* note 17.

210. Murray Chass et al., *Expo Bonuses Help Lessen The Bite of Canadian Taxes*, THE SPORTING NEWS, June 19, 1989, at 74. The value difference between American and Canadian dollars is not an issue as all Expos and Toronto Blue Jay players are paid in American dollars. Interview with Danny J. Kaufer, Labor Lawyer with the firm of Heenan Blaikie, Montreal, Canada, in Leesburg, Virginia (Mar. 26, 1993).

211. Elizabeth Comte, *A Million-Dollar Day In the Life of An Agent*, SPORT, June, 1990, at 78.

must earn a spot on the team's regular season active roster to get his roster bonus.<sup>212</sup> The signing bonus is paid for, simply, signing the contract.<sup>213</sup> Quarterback Troy Aikman's signing bonus from the Dallas Cowboys, negotiated by Leigh Steinberg, was \$1.6 million, after taxes.<sup>214</sup>

Basketball player Bobby Gross once called upon Howard Slusher to bargain for an unusual perk. Slusher was up to the task, getting the Trail Blazers to pay for a membership for Gross in a Portland country club.<sup>215</sup>

### C. Both Sides of the Court

Donald Dell plays both sides of the court, enriching both. Dell is a lawyer and a former tennis professional. Dell represents many of tennis' biggest stars. He is also a former member of the Grand Prix committee, which oversees tennis' major men's tournament circuit, and Dell's firm directs five tournaments. It is no wonder that Dell has been able to multiply greatly tournament prize money.<sup>216</sup>

There are many tools common to agents on both sides (or either side) of the court. This section will discuss those tools.

#### 1. Communication

"Information is power,"<sup>217</sup> summed up M.J. Duberstein, the director of research for the NFL Players Association in 1987. Negotiators on both sides have various ways of getting necessary information.

Nineteen eighty-seven was an important year for the National Football League Players Association (NFLPA), as salaries for draft picks increased for the first time since 1984.<sup>218</sup> According to Duber-

212. CHAMPION, *supra* note 144, at § 22.1.

213. Steinberg, *supra* note 84, at 4.

214. Elizabeth Comte, *Inside a Quarterback's Checkbook: How the Money Comes In and Goes Out*, SPORT, June, 1990, at 90.

215. Richmond, *supra* note 12, at 17.

216. *Raising The Net*, FORBES, Dec. 1, 1975, at 39. In football, and presumably other team sports, an arrangement similar to Dell's would be an impermissible conflict of interest. Such an issue arose in the case of Detroit Lions, Inc. v. Argovitz, 580 F. Supp. 542 (E.D. Mich. 1984).

In *Argovitz*, the defendant represented a player, Billy Sims, and owned an interest in a team, the Houston Gamblers of the USFL. Argovitz negotiated with the Gamblers on Sims' behalf. The court held an agent to be a fiduciary, and thereby prohibited from self-dealing. *Id.* at 547-48.

217. Sherman, *supra* note 83.

218. *Id.*

stein, the increase was directly related to information: "We worked very closely with agents and there was an intricate network . . . . Agents who had a draftee would be able to keep in contact with all other agents. That allowed them to be able to find out management's line and sense different offers by round."<sup>219</sup>

For agents, information provided by the NFLPA is invaluable. In 1991, law student Kevin Grenadier helped linebacker Pepper Johnson prepare to negotiate his own contract with the New York Giants. Grenadier got comparative salary information from the NFLPA.<sup>220</sup>

On the other side of the court, baseball team owners operated an information bank during the mid-eighties. The bank collected information on offers teams made to free agents. When a team asked about a player, the bank provided details of offers.<sup>221</sup> The bank was shut down, though, as it apparently violated anti-collusion provisions of major league baseball's collective bargaining agreement.<sup>222</sup>

## 2. High-Tech

"Ultramodern negotiations"<sup>223</sup> is how Leigh Steinberg described his dealings with the Dallas Cowboys when negotiating Troy Aikman's contract. For the final session, Steinberg and Aikman were in Thousand Oaks, California, while Cowboys owner Jerry Jones was in Dallas. The sides talked via satellite television.<sup>224</sup>

"We used to overnight things more . . . and now we fax [proposals] back and forth so things can move a lot more swiftly,"<sup>225</sup> said Richard Woods of another example of the move toward high-tech.

Still, the most-used negotiation conduit is far older than any agent. "You can get . . . a lot done with the phone," contended Gary Walker, "and then if you need to be there, then obviously, you've got to be there. But I've found that the majority of negotiations take place over a phone."<sup>226</sup>

219. *Id.*

220. Frank Litzky, *Football; Agent Johnson Reports for Duty*, N.Y. TIMES, Aug. 16, 1991, Sec. B, p. 12, col. 1.

221. Hal Bodley, *Free-agent Data Bank Scrapped*, USA TODAY, Nov. 7, 1989, at 4C.

222. Chass, *Bidding in the Dark*, *supra* note 69, at sec. 8, p. 6, col. 1.

223. *He's Dialing for Dollars*, SPORTS ILLUSTRATED, Aug. 7, 1989, at 18.

224. *Id.*

225. Woods, *supra* note 28.

226. Walker, *supra* note 107.

### III. CONCLUSION

Much has changed since the wide use of agents by athletes began in the sixties. As sports law responds to contract law problems in its own way, new negotiation devices and strategies have emerged: comparative salaries, other offers, college ball and the threat of arbitration. Some old strategies are still around (hardball), and one old strategy may have all but disappeared (the holdout). One new device seems to have already come and gone: renegotiation.

Agents are now negotiating for creative, new terms, such as salary tied to the market and incentive bonuses. The length of the term of the contract is more readily negotiated. Management has had to adapt to player's agents, and has sometimes done so by hiring its own negotiation experts.

Preparation by both sides is critical. To become prepared, communication with other negotiators is important. To communicate with the other side, high-tech gear may be needed.

Forecasting the future evolution of athletes' contract negotiations is difficult. It is certain, though, that the future of the sports agency field depends on the success of the professional sports industry.

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