

## **A Players' League: Short- and Long-Term Solutions to Contract Holdouts in the NBA**

Cameron J. Turkzadeh\*

### **ABSTRACT**

*The business of basketball can be cruel at times. Teams often trade players against the players' wishes, using them like chess pieces to help the team, not the player, reach its goal. However, in recent years, the NBA has become a "players' league" as the balance of power in contract negotiations has shifted from teams to players. More than ever before, players are dictating the terms of their contracts because team owners understand that the public pays top dollar to watch the best players perform, many of whom are considered cultural icons with massive marketability. However, this change in bargaining power has also created incentives for players to participate in opportunistic and strategic behavior. With limited earning-power years and a rare, sought-after skillset, players have increasingly engaged in contractual holdouts with the goal of either being traded to a new team or renegotiating their existing contracts for more money.*

*This Note offers a short- and long-term legal framework to deal with the holdout scenario where players refuse to play pursuant to their original agreements until their contractual demands are accepted. Part I examines the key components of the NBA's structural framework, including the Collective Bargaining Agreement, the Salary Cap, the Uniform Player Contract, Compensation, and Free Agency. Part II defines the player holdout problem, explains the significance of the problem for the NBA and its teams, and clarifies why traditional remedies set by the courts are inadequate to deal with this concern. Part III presents the optimal short-term legal solutions available to teams to address the holdout problem, namely self-help specific performance and liquidated damages, and certain limitations and challenges*

---

\* J.D. Candidate, Columbia Law School, Class of 2022; B.A., University of California, Los Angeles, Class of 2018. My deepest thanks go to Professor Avery W. Katz for his mentorship, guidance, and wisdom throughout the writing process. I would also like to thank the entire staff of Volumes 44 and 45 of the *Columbia Journal of Law & the Arts* for their thoughtful advice and recommendations regarding this Note. Lastly, I would like to give special thanks to my close family and friends for their unwavering support and encouragement. This Note would not have been possible without them.

© 2022 Turkzadeh. This is an open access article distributed under the terms of the Creative Commons Attribution License, which permits unrestricted use, distribution, and reproduction, provided the original author and source are credited.

*in enforcing these solutions. Finally, Part IV introduces a long-term, league-wide strategy to prevent holdouts in the future: Player Escrow Accounts.*

## INTRODUCTION

James Harden is one of the few superstars in the National Basketball Association (NBA) today. During his eight years with the Houston Rockets, he earned eight All-Star nods, received All-NBA Team honors seven times, won the 2018 Most Valuable Player award, and reached the Western Conference Finals twice.<sup>1</sup> Yet, Harden's 2020–21 campaign got off to a rocky start—after a series of trades in the offseason, the Rockets were a fringe playoff team at best, and Harden's window to win a championship was dwindling. With no desire to go through a long and painful rebuilding process, Harden declined his contract extension with the Rockets, turning down the chance to become the first \$50 million-per-year player in NBA history.<sup>2</sup> Instead, he made it clear to management that he wanted to be traded to a championship contender immediately.<sup>3</sup>

With multiple years left on his original contract with the Rockets, Harden was at the mercy of the team's management, who could choose to slow-play the trade negotiation process or simply not trade him at all.<sup>4</sup> In an attempt to gain leverage and force his way out of Houston, Harden resorted to skipping training camp and preseason games; he even flouted the league's COVID-19 protocols on social media.<sup>5</sup> With no hope of changing Harden's mind, the Rockets acquiesced, and Harden was traded to the Brooklyn Nets a few months later.<sup>6</sup>

Holdout situations like Harden's are becoming increasingly commonplace in the NBA.<sup>7</sup> As league-wide revenues, salary caps, and franchise valuations have increased exponentially over the past decade, it is not surprising that teams have been willing to shell out more and more money for their new "franchise players" in the form of long-term, guaranteed multi-million-dollar contracts and bonuses. In fact, in the NBA today, the average player salary is approximately \$7.7 million, with the

---

1. Ben Golliver, *The Rockets Should Trade James Harden After His Indefensible Holdout*, WASH. POST (Dec. 8, 2020), <https://perma.cc/G8AR-KLM3>.

2. Jack Maloney, *James Harden Turned Down Historic \$50M-Per-Year Extension with Rockets, Focused on Trade to Nets, Per Report*, CBS SPORTS (Nov. 17, 2020, 3:28 PM), <https://perma.cc/4XU6-JKAL>.

3. Adrian Wojnarowski, *Sources: James Harden Rejects Rockets Extension; Focus on Trade to Nets*, ESPN (Nov. 16, 2020), <https://perma.cc/F85A-EKZW>.

4. Golliver, *supra* note 1.

5. *Id.*

6. Marc Stein & Sopan Deb, *Houston Rockets to Trade James Harden to the Nets*, N.Y. TIMES (Nov. 23, 2021), <https://perma.cc/8VPP-YZJ9>.

7. For example, Ben Simmons' recent holdout situation during the 2021–22 season garnered many headlines. See, e.g., Bryan Toporek, *Ben Simmons' Holdout Threat with Sixers Could Reshape NBA Landscape*, FORBES (Sept. 22, 2021, 8:30 AM), <https://perma.cc/B9Q4-A2HA>.

highest-paid player, Stephen Curry, receiving over \$43 million per year.<sup>8</sup> In most cases, after a player signs a contract with a team, the parties proceed without conflict: The player performs under the contract for the duration of the term set forth, and the team compensates the player pursuant to the contract.

The Harden situation, however, is representative of a larger trend among players in the NBA who believe their contracts no longer reflect their worth, or who may simply wish to be traded. Many threaten to “hold out” from performing their obligations until their demands are met. Since the public pays top dollar to watch the players perform (and perform well), team revenue is positively correlated to the quality of players on the team: Players influence gate receipts, merchandising and licensing sales, and television, media, and sponsorship deals.<sup>9</sup> The NBA has become a “players’ league” in this way as players now have the influence to dictate their contractual terms due to their revenue-generating power and, consequently, the leverage to stage a successful holdout. As the balance of power in contract negotiations has shifted from teams to players, teams need to be prepared for an increase in contractual holdouts in the future.

The purpose of this Note is to offer guidance to teams about what recourse is available when a player refuses to play pursuant to the original agreement and to propose a league-wide system which might diminish the likelihood of conflicts arising between teams and players in the first place. I argue that contract holdouts justify legal intervention by teams in two forms. First, in the case where a player seeks to renegotiate the terms of his contract before it has expired, “self-help specific performance” is the optimal legal remedy.<sup>10</sup> Under this theory, the team initially accepts the player’s demands for a more lucrative contract.<sup>11</sup> Then, after the player has performed fully under the new contract, the team sues the player to recover the difference in salary between the original contract and the new contract.<sup>12</sup> Second, where a player threatens to sit out until his trade demands are met, the best solution for the team is to trade the player and subsequently sue to recover liquidated damages from the player for the breach. In this case, the league and the players would collectively bargain for a liquidated damages clause in the standard NBA contract that would set forth a predetermined value that a team would recover in the event a player holds out.

---

8. Tom Huddleston Jr., *These Are the Highest Paid Players in the NBA Right Now*, CNBC (Oct. 22, 2019, 1:22 PM), <https://perma.cc/KR3Q-Z355>; see also *NBA Player Salaries 2021–2022*, ESPN, <https://perma.cc/EY2R-FRGE> (last visited Jan. 20, 2022).

9. See Brad R. Humphreys & Candon Johnson, *The Effect of Superstar Players on Game Attendance: Evidence from the NBA*, 21 J. SPORTS ECON. 152 (2020); see also Bailey Brautigam, *Here’s How Every NBA Team Makes Its Money, Visualized*, FORBES (Mar. 21, 2016, 3:31 AM), <https://perma.cc/6ET9-JY8Z>.

10. See generally Subha Narasimhan, *Modification: The Self-Help Specific Performance Remedy*, 97 YALE L.J. 61 (1987) (introducing the concept of self-help specific performance as a means of resolving contractual disputes).

11. Stephen C. Wichmann, *Players, Owners, and Contracts in the NFL: Why the Self-Help Specific Performance Remedy Cannot Escape the Clean Hands Doctrine*, 22 SEATTLE U. L. REV. 835, 836–37 (1999).

12. *Id.*

The legal remedies outlined above can serve as effective deterrents in holdout situations. However, teams generally want to avoid the reputational harm that a suit against a player will bring to the team—even if such a suit is the best legal course of action. Since long-term contracts are the industry standard and franchises are willing to take that risk for fear of losing the player to free agency, league-wide adoption of Player Escrow Accounts is the best long-term solution to the holdout problem. Specifically, the League would mandate in its Collective Bargaining Agreement (CBA) that all teams hold a percentage of each player's agreed-upon salary (perhaps 10%) in an escrow account until the end of the contract period, to be paid out only after the player has fully performed his obligations. Player Escrow Accounts would not only deter contractual holdouts but would also serve as savings vehicles for those players who choose *not* to breach their contracts.

Part I of this Note examines the key components of the NBA's structural framework, including the CBA, the Salary Cap, the Uniform Player Contract, Compensation, and Free Agency. Part II defines the player holdout problem, explains the significance of the problem for the NBA and its teams, and clarifies why traditional remedies set by the courts are inadequate to deal with this concern. Part III presents the optimal short-term legal solutions available to teams to address the holdout problem, namely self-help specific performance and liquidated damages, and identifies certain limitations and challenges in enforcing these solutions. Part IV proposes a long-term, league-wide strategy to prevent holdouts in the future: Player Escrow Accounts.

Although this Note considers these solutions in the context of the NBA, the holdout issue is not exclusive to professional basketball. Player holdouts have gained extensive traction in both the National Football League (NFL) and the National Hockey League (NHL).<sup>13</sup> Player Escrow Accounts could be beneficial to those leagues as well.

## I. BACKGROUND INFORMATION

The NBA is composed of thirty teams, each privately owned by a range of entities, including large corporations, group investors, and wealthy individuals.<sup>14</sup> The business aspect of the league has proceeded rather traditionally: There are various internal rules and regulations set forth by the NBA that govern how teams and players

---

13. See, e.g., Bryan DeArdo, *Ranking the 12 Ugliest Holdouts in NFL History, as Ezekiel Elliott's Absence from the Cowboys Lingers*, CBS SPORTS (Aug. 9, 2019, 9:02 AM), <https://perma.cc/ZGC4-XXW3>; Roger Quiles, *A Solution to Holdouts in the National Football League: How Salary Arbitration Can Limit a Growing Problem*, 13 CARDOZO J. CONFLICT RESOL. 259 (2011); Erin Walsh, *Mathew Barzal Holding Out as Islanders Training Camp Begins*, YARDBARKER (Jan. 3, 2021), <https://perma.cc/XUZ9-ZXPT>.

14. See Kurt Badenhausen, *The NBA's Billionaire Owners 2020: Navigating Shutdowns and Outcries as the Coronavirus Spreads*, FORBES (Mar. 25, 2020, 7:30 AM), <https://www.forbes.com/sites/kurtbadenhausen/2020/03/25/the-nbas-billionaire-owners-2020-navigating-shutdowns-and-outcries-as-the-coronavirus-spreads/>; Matthew Epps, *Full Court Press: How Collective Bargaining Weakened the NBA's Competitive Edge in a Globalized Sport*, 16 MOORAD SPORTS L.J. 343, 351 (2009).

must conduct themselves in the course of employment. To fully understand how and why holdouts occur in the NBA, it is necessary to explore how contracts are negotiated between teams and players within this structural framework. This Part provides an overview of the steps in the contracting process, looking first at how general employment terms are negotiated, how the standard player contract is formulated, how salary limitations are determined, what type of compensation players are eligible to receive, and, finally, what options exist for players once their contracts have lapsed.

### A. THE COLLECTIVE BARGAINING AGREEMENT

Collective bargaining is the process wherein management and a group of employees negotiate the terms of their relationship.<sup>15</sup> Today, most professional sports leagues have player unions that represent the collective interests of the athletes.<sup>16</sup> Such unions are generally the driving force behind players' rights, representing and negotiating on behalf of players for fair and equitable employment conditions and contracts.<sup>17</sup> As the exclusive representative of all NBA athletes, the National Basketball Players Association (NBPA)—governed by players elected to an executive committee—negotiates with the NBA Board of Governors<sup>18</sup> regarding the league-wide Collective Bargaining Agreement (CBA).<sup>19</sup> The subject of these negotiations include, for example, contested topics such as the division of league revenue and age and education requirements.<sup>20</sup>

15. WALTER T. CHAMPION, JR., FUNDAMENTALS OF SPORTS LAW § 18:2 (Jan. 2022 update).

16. While athletes in the NBA, NFL, and MLB are categorized as employees, certain athletes, such as tennis players, are independent contractors. However, some of tennis's top male players, including Novak Djokovic and John Isner, are pushing to form a players' association separate from the existing structure of the Association of Tennis Professionals (ATP), which jointly represents players and tournaments. See Ben Rothenberg, *Djokovic and Other Top Men Are Creating a Players' Association*, N.Y. TIMES (Aug. 28, 2020), <https://perma.cc/S5WL-EQH6>.

17. See *About the NBPA*, NAT'L BASKETBALL PLAYERS ASS'N, <https://perma.cc/R6VY-8FUX> (last visited Jan. 20, 2022). Furthermore, unions and employers must comply with the National Labor Relations Act (NLRA). Specifically, the NLRA guarantees employees the right to unionize for the purpose of collectively negotiating their terms of employment with an employer. Epps, *supra* note 14, at 346–47 (“Therefore, an employer must permit its employees to unionize and collectively negotiate with the union representatives in good faith.”).

18. The NBA Board of Governors is made up of the Commissioner of the NBA and the team owners and their representatives. The Board determines everything from game rules to the relocation and sale of team franchises. The Commissioner markets the league, ensures uniform compliance with the rules, and represents the management and teams in negotiations with players. See Imhotep Royster, *NBA Players Need Seats on the Board of Governors*, CENTURY FOUND. (June 24, 2014), <https://perma.cc/47BY-7AJD>.

19. *About the NBPA*, *supra* note 17. Although the NBPA was formed in 1954, the NBA did not recognize it as “the exclusive collective bargaining representative of all NBA players” until 1964. Andrew M. Jones, Note, *Hold the Mayo: An Analysis of the Validity of the NBA's Stern No Preps to Pros Rule and the Application of the Nonstatutory Exemption*, 26 LOY. L.A. ENT. L. REV. 475, 480–86 (2006).

20. VyShaey Mitchell, *Will NBA Players Go to Europe?*, 6 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 221, 223 (2010). In 1971, the Supreme Court ruled that NBA teams qualify as employers that may be subject to antitrust laws. See *Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204, 1205 (1971) (holding that, because it engages in interstate commerce, the NBA is not exempt from antitrust laws). However, when an athlete who is disappointed with his contract or treatment challenges a provision of the CBA through the antitrust laws, “his suit will be dismissed unless he can prove that the agreement

Approximately every six years, the Board of Governors and the NBPA negotiate new terms for a CBA.<sup>21</sup> The CBA binds all teams and players to a uniform set of rules and regulations, such as a salary cap, minimum and maximum player salaries, rules for free agency and trades, procedures for the NBA draft, and various other matters that need to be resolved for the league to function properly.<sup>22</sup> The current CBA took effect on July 1, 2017 and is set to expire at the end of the 2023–24 NBA season (ending June 30, 2024).<sup>23</sup> However, the NBA and NBPA each have an option to terminate the CBA after the 2022–23 season (which ends June 30, 2023).<sup>24</sup>

## B. UNIFORM PLAYER CONTRACT

All NBA players sign the league's standard contract, known as the Uniform Player Contract (UPC).<sup>25</sup> Most terms in the UPC are non-negotiable during individual player negotiations, as the UPC itself is a product of collective bargaining.<sup>26</sup> Therefore, the UPC is in boilerplate form, and the contract offered to each player is generally the same.<sup>27</sup> However, in limited areas, players can individually negotiate different terms in their contracts regarding Base Compensation and bonuses, Compensation Protection in the event of death, basketball-related or other injury,

---

provision did not relate to 'wages, hours and working conditions'" and was not the product of bona fide negotiation. Cym H. Lowell, *Collective Bargaining and the Professional Team Sport Industry*, 38 L. & CONTEMP. PROBS. 3, 10 (1973).

21. See NAT'L BASKETBALL ASS'N, CBA 101: HIGHLIGHTS OF THE 2017 COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NATIONAL BASKETBALL ASSOCIATION (NBA) AND THE NATIONAL BASKETBALL PLAYERS ASSOCIATION (NBPA), at 4 (2017), <https://perma.cc/T89X-TAFW>.

22. See Tim Bontemps & Adrian Wojnarowski, *NBA, Players' Union Reach Agreement on Amended CBA, with Free Agency Set to Begin Nov. 20*, ESPN (Nov. 9, 2020), <https://perma.cc/DX8R-958G>.

23. NAT'L BASKETBALL ASS'N, COLLECTIVE BARGAINING AGREEMENT, art. XXXIX, § 1 (Jan. 19, 2017) [hereinafter NBA CBA], <https://perma.cc/R2ZS-GQXS> ("This Agreement shall be effective from July 1, 2017 (except with respect to provisions that the parties have specifically agreed herein will commence earlier) and, unless terminated pursuant to the provisions of this Article XXXIX, shall continue in full force and effect through June 30, 2024.").

24. *Id.* art. XXXIX, § 2 ("The NBA and the Players Association shall each have the option to terminate this Agreement on June 30, 2023 by serving written notice of its exercise of such option on the other party on or before December 15, 2022.").

25. *Id.* art. II, § 1.

26. CHAMPION, *supra* note 15, § 16:3.

27. See David Freedman, *Contract Types*, CBA BREAKDOWN: UNDERSTAND THE NBA'S COLLECTIVE BARGAINING AGREEMENT, <https://perma.cc/JDF4-RTB4> (last visited Jan. 20, 2022).

mental disability, or termination for lack of skill,<sup>28</sup> and limitations on when the player can be traded (known as a “no-trade clause”).<sup>29</sup>

Like a typical employee agreement, the UPC delineates requirements for the player—namely, attendance at games and maintaining “good physical condition”—as well as the standard of conduct that is expected of the player both on and off the playing floor.<sup>30</sup> Generally, the league requires that players comply with all team and league rules and refrain from ultra vires activities that could reasonably jeopardize the player’s health.<sup>31</sup> The UPC also includes a subjective clause that requires a player to give his “best services, as well as his loyalty” to the team, that he not do anything materially detrimental to the team or league, and that he “conduct himself . . . according to the highest standards of honesty, citizenship, and sportsmanship.”<sup>32</sup> Therefore, a player refusing to play for any reason beyond injury could be in breach of his contract.<sup>33</sup>

The CBA also provides for certain remedies in the event of a breach by the player. For example, if a player fails or refuses to render the services required by his contract,

his Current Base Compensation can be reduced by (a) 1/145th of the player’s Base Compensation for each missed Exhibition, Regular Season or Playoff game for any suspension of less than 20 games and (b) 1/110th of the player’s Base Compensation for each missed Exhibition, Regular Season or Playoff game for any suspension of 20 games or more.<sup>34</sup>

The player can similarly be fined for failing to attend practice without a reasonable excuse.<sup>35</sup>

---

28. The CBA allows teams to “protect” a player’s Base Compensation in these circumstances, requiring the team to pay the player’s full contract amount in the event the team terminates the player. Thus, for example, if a team decides to terminate a player’s contract because the player has performed poorly and the contract includes Compensation Protection for “lack of skill,” then the player will still be paid his protected Base Compensation. Note, however, that teams and players are permitted to amend the contract to reduce or eliminate a player’s Compensation Protection so that the contract can then be terminated (a “buyout”). David Freedman, *Compensation*, CBA BREAKDOWN: UNDERSTAND THE NBA’S COLLECTIVE BARGAINING AGREEMENT, <https://perma.cc/F5D6-28UQ> (last visited Jan. 20, 2022).

29. Freedman, *Contract Types*, *supra* note 27. A no-trade clause prohibits or limits a team’s right to trade the player to another team. The only players who can prohibit or limit their team’s trade rights are those players with eight years of service in the NBA and who have already played for four or more years with the team that has agreed to the trade prohibition or limitation. *Id.*

30. *National Basketball Association Uniform Player Contract*, in NAT’L BASKETBALL ASS’N, COLLECTIVE BARGAINING AGREEMENT, Exhibit A, § 7 (Jan. 19, 2017) [hereinafter NBA UPC], <https://perma.cc/R2ZS-GQXS>.

31. *Id.* § 12.

32. *Id.* § 5.

33. *See infra* Part III.C.

34. NBA CBA, *supra* note 23, art. VI, § 1.

35. *Id.* art. VI, § 2 (“When a player, without proper and reasonable excuse, fails to attend a practice session scheduled by his Team, he shall be subject to the following discipline: (i) for the first missed practice during a Season—\$2,500; (ii) for the second missed practice during such Season—\$5,000; (iii) for the third missed practice during such Season—\$7,500; and (iv) for the fourth (or any additional) missed practice during such Season—such discipline as is reasonable under the circumstances.”).

### C. SALARY CAP

Fundamentally, the most important function of the CBA is that it internally regulates team spending and player earnings by establishing an artificial limit, known as the Salary Cap, on the total amount teams can pay their players each season.<sup>36</sup> This limit changes from year to year and is subject to a complex set of rules and exceptions, but it is generally calculated as a predetermined percentage of the league's revenue from the previous season, known as Basketball-Related Income (BRI).<sup>37</sup> For the 2020–21 NBA season, the Salary Cap was set at \$109.1 million.<sup>38</sup> Although the Salary Cap has usually increased each year,<sup>39</sup> the 2020–21 Salary Cap remained identical to that of the 2019–20 season due to the financial challenges NBA teams suffered as a result of the ongoing COVID-19 pandemic.<sup>40</sup> The Salary Cap requires teams to think strategically about which players to recruit, which players they can afford, and how much they are willing to expend in salaries per year to build a competitive roster.

The majority of professional sports leagues in the United States, such as the NFL and NHL, have “hard” caps, which prevent teams from exceeding the predetermined limits on salaries set forth in their respective CBAs.<sup>41</sup> However, the main feature of the NBA's Salary Cap is that it is a “soft” cap, meaning that teams can, under certain “exceptions,”<sup>42</sup> spend beyond the Salary Cap while only being subjected to a tax penalty, known as the “luxury tax.”<sup>43</sup> For example, the Qualifying Veteran Free Agent (“Bird”) Exception allows a team to re-sign its own free agent to the maximum

36. See *id.* art. VII, § 2.

37. See *id.* art. VII, § 1. BRI is the aggregate revenue produced by the league and its teams from basketball operations during a given year, such as revenue from ticket sales, concessions, merchandise sales, corporate sponsorships, and national broadcast rights. For the 2020–21 season, the Salary Cap was calculated by multiplying projected BRI by 44.74%, subtracting projected player benefits (e.g., health and welfare benefits), and dividing the result by thirty (the current number of NBA teams). See David Freedman, *Salary Cap Overview*, CBA BREAKDOWN: UNDERSTAND THE NBA'S COLLECTIVE BARGAINING AGREEMENT, <https://perma.cc/YP4M-QV37> (last visited Jan. 20, 2022).

38. Bontemps & Wojnarowski, *supra* note 22.

39. For instance, the Salary Cap for the 2017–18 NBA season was \$99 million, but increased to \$101.8 million for the 2018–19 season, and increased again to \$109.14 million for the 2019–20 season. Jenna West, *NBA Sets \$101.9 Million Salary Cap for 2018–19 Season*, SPORTS ILLUSTRATED (June 30, 2018), <https://perma.cc/2NR5-BE44>.

40. Bontemps & Wojnarowski, *supra* note 22.

41. See Daniel M. Walanka, *An Alternative Approach to the Problem of Midterm Demands for Contract Renegotiation in the National Football League: The Incentive-Based Contract*, 17 LOY. L.A. ENT. L. REV. 771, 778 (1997). However, there is no set salary cap in MLB. Brooks Bryant, *Salary Cap in Major League Baseball*, BLEACHER REP. (Nov. 2, 2009), <https://perma.cc/ZV9D-NRMI>.

42. Salary Cap exceptions include the Traded Player Exception, the Mid-Level Salary Exception, and the Rookie Exception. For a more detailed discussion of these exceptions, see David Freedman, *Salary Cap Exceptions*, CBA BREAKDOWN: UNDERSTAND THE NBA'S COLLECTIVE BARGAINING AGREEMENT, <https://perma.cc/2RNZ-5D4N> (last visited Jan. 20, 2022).

43. Freedman, *Salary Cap Overview*, *supra* note 37. The luxury tax is a tax on each dollar a team spends on team salary that exceeds the predetermined tax threshold set by the NBA. See Frank Urbina, *How Does the NBA's Luxury Tax Work?*, HOOPSHYPE (Oct. 11, 2018), <https://perma.cc/AU26>; Kevin Sigler & William Compton, *NBA Players' Pay and Performance: What Counts?*, SPORT J. (Aug. 2, 2018), <https://perma.cc/4C2M-JB9F> (“The cap at which the luxury tax penalty applies is higher than the actual salary cap because the salary exceptions are included in this limit.”).



player salary allowed under the CBA if he played for the team for some or all of each of the prior three consecutive seasons, even if the team is or would be over the Salary Cap.<sup>44</sup>

Players, especially superstars, generally disfavor salary caps, as the cap hampers a player's maximum potential earnings (although players tend to yield to such a restriction in exchange for employment benefits and guaranteed salaries).<sup>45</sup> Team owners, on the other hand, generally favor salary caps, citing that a cap not only controls rising player salaries, but also maintains some parity across the league by preventing the wealthier, more popular teams from poaching all the premier talent from small-market teams.<sup>46</sup> The luxury tax regime is the NBA's effort to reconcile both views: High-spending teams are punished for going over the Salary Cap in order to achieve league-wide competitive balance, whereas players are liberated from the constraints of a cap and, in theory, are offered the promise of unrestrained salary growth.<sup>47</sup>

#### D. COMPENSATION

A player's compensation can be categorized in several different ways under the CBA, which has implications for both the player (for his own earnings) and for the team (for salary cap purposes). A player's total compensation consists of three primary components: (1) Base Compensation, or "salary"; (2) Incentive Compensation; and (3) a Signing Bonus.<sup>48</sup> First, all players receive Base Compensation, which is generally understood as a regular salary excluding bonuses.<sup>49</sup> Second, the CBA allows players to receive Incentive Compensation, a performance bonus awarded if the player (or his team) achieves certain benchmarks during the season.<sup>50</sup> Third, a Signing Bonus is a lump sum payment to a player who signs a new contract or extends a previous one.<sup>51</sup> Generally, only highly-touted players receive a signing bonus.

---

44. Freedman, *Salary Cap Exceptions*, *supra* note 42.

45. See Epps, *supra* note 14, at 353.

46. See *id.*

47. See Richard A. Kaplan, *The NBA Luxury Tax Model: A Misguided Regulatory Regime*, 104 COLUM. L. REV. 1615, 1617 (2004); see also Jake Fisher, *For NBA Free Agents, the Stretch Provision Comes with Cash and Complication*, SPORTS ILLUSTRATED (Jan. 10, 2019), <https://perma.cc/T43K-WCN3>.

48. Freedman, *Compensation*, *supra* note 28. In general, this Note refers to Base Compensation as "salary."

49. *Id.* NBA contracts are fully guaranteed, meaning that a player's Base Compensation is fully protected in the event the team terminates ("waives") the player. Tommy Beer, *The True Cost of Guaranteed Contracts in the NBA*, BASKETBALL INSIDERS (Apr. 4, 2014), <https://perma.cc/FG53-ETJU>.

50. Freedman, *Compensation*, *supra* note 28. Such incentive clauses can be based on statistical accomplishments (e.g., scoring a certain number of points during the season), league-wide recognized honors (such as receiving the NBA's Most Valuable Player award), physical conditions (like meeting a specified weight), or performance of the team at the end of the season (e.g., the team winning a specified number of games). *Id.*

51. *Id.* The standard NBA contract limits a player's Signing Bonus to 15% of the Base Compensation called for by the contract. *Id.*

It is important to note, however, that there are some overall parameters set by the NBA that can affect player compensation, namely the “Escrow Rules.” Under the CBA, players and owners have bargained to split between 49% and 51% of Basketball-Related Income (BRI), the exact percentage contingent upon how much revenue the league generates that given year.<sup>52</sup> To ensure that the split is equitable, the Escrow Rules dictate that every team withhold 10% of a player’s total compensation and place it into a league-wide escrow account. If, after the NBA has finalized its calculation of that season’s BRI, final team salaries, and player benefits, it is determined that aggregate player salaries have exceeded the collectively bargained-for percentage of league revenue for that season, then the escrow funds are used to reimburse the team owners of the difference.<sup>53</sup> Any remaining funds in the escrow account are then returned to the players in proportion to their individual contributions.<sup>54</sup> The escrow system thereby acts like a form of “insurance” against player salaries rising above a specified percentage of league revenue.

Through the use of a hard cap on individual players’ salaries, the NBA indirectly constrains the freedom to contract between teams and players by placing maximum and minimum limits on the salary a player can earn in any one season. The severity of this limitation depends on several factors, such as how long a player has been in the NBA and the type of contract he is eligible to sign.<sup>55</sup> Rookies, for example, are subject to the strictest floor and ceiling guidelines regarding their potential income. Only players picked in the first round of the NBA draft receive guaranteed salaries, limited to a two-year contract with a team option to extend it for two additional years.<sup>56</sup> The “Rookie Salary Scale” set forth in the CBA provides a maximum salary for each first-round draft pick based on the player’s draft position.<sup>57</sup>

After a rookie’s contract expires, the maximum salary he can receive is based on a predetermined formula that factors in the number of NBA seasons he has played and his prior earnings.<sup>58</sup> During the term of the contract, player salaries may increase

---

52. Freedman, *Compensation*, *supra* note 28.

53. *Id.*

54. *See* Kaplan, *supra* note 47, at 1633.

55. *Id.*

56. Freedman, *Contract Types*, *supra* note 27. A team option gives the original team the right to keep a player for another year. For example, if a player has a three-year contract with a team option for a fourth season, the team can decide to exercise the option and extend the contract through the fourth season. If the team option is not exercised, then the contract ends after the third season. Similarly, a player option grants a player the right to play for the team for another year. AJ Neuharth-Keusch, *NBA Free Agency Explained: Answering All Frequently Asked Questions*, USA TODAY (June 27, 2019, 6:00 AM), <https://perma.cc/8C9P-HHJP>.

57. Khadrice Rollins, *NBA Rookie Pay Scale: How Much They Make Depending on Draft Position*, SPORTS ILLUSTRATED (June 21, 2018), <https://perma.cc/BT93-WDAQ>. Teams may sign their first-round draft pick for up to 120%, or as little as 80%, of his Rookie Salary Scale amount. *Id.* For instance, the maximum first-year salary for Anthony Edwards, the first pick in the 2020 NBA Draft, was \$9,757,440, compared to the salary of \$7,275,200 for James Wiseman, the second pick in the draft. Luke Adams, *Rookie Scale Salaries for 2020 NBA First-Round Picks*, HOOPSRUMORS (Nov. 20, 2020, 3:09 PM), <https://perma.cc/B7LX-TQW7>; *see also* NBA CBA, *supra* note 23, Exhibit B-3.

58. Freedman, *Contract Types*, *supra* note 27. Thus, the maximum salary of a player with six or fewer years of experience is the greater of 25% of the Salary Cap for that season or 105% of the player’s previous year’s salary. For any player between seven and nine years of experience, the maximum

each season by up to 5% of the first year's salary.<sup>59</sup> Today, the median player salary in the NBA is nearly \$4 million, while the average salary is roughly \$8 million.<sup>60</sup> Indeed, the current labor market in the NBA is more lucrative than ever, and although team owners must split more of their profits with players, they are splitting a much larger profit overall: NBA revenues exceeded \$8 billion in 2019–20, compared to just \$3.96 billion in 2010–11.<sup>61</sup>

Team owners have become much more aggressive in signing elite players. However, capping the maximum salary of players diminishes the importance of money in big name free-agency decisions—nearly every team will be able and willing to spend the maximum amount to sign a superstar.<sup>62</sup> For example, Kevin Durant, who left the Oklahoma City Thunder to sign with the Golden State Warriors, did so in part because playing for the Warriors—who just set a league record for wins in a season—provided a better opportunity for him to win a championship, even though the Thunder could have offered him slightly more money.<sup>63</sup>

With a growing number of superstars leaving their original teams in free agency, the NBA has now given “home teams” a better chance at re-signing their star players. The Designated Veteran Player Contract, better known as a “supermax contract,” permits teams to offer their star soon-to-be free agent a longer, more lucrative deal than any other team can offer.<sup>64</sup> “Home teams” can re-sign their star players to up to five-year contracts worth up to 35% of the salary cap with an 8% year-over-year salary escalation.<sup>65</sup> Thus, motivated by signing the most lucrative deal possible, players who are unhappy with their current team (due to the team's poor performance, unfavorable location, or other external factors) may decide to re-sign with hopes of later holding out and being traded to a better team.

---

increases to the greater of 30% of the Salary Cap or 105% of his previous year's salary. Finally, for any player who has completed ten or more years in the NBA, the maximum salary is the greater of 35% of the cap or 105% of his previous season's salary. *Id.*

59. *Id.*

60. 2020–21 NBA Contracts, BASKETBALL REFERENCE, <https://perma.cc/LQ9Q-ZPQD> (last visited Feb. 17, 2022); see also Dimitrije Curcic, *The Ultimate Analysis of NBA Salaries (1991–2019)*, RUNREPEAT (Mar. 2, 2021), <https://perma.cc/ANA6-FPWP>.

61. Christina Gough, *National Basketball Association Total League Revenue From 2001/02 to 2019/20*, STATISTA (Feb. 17, 2021), <https://perma.cc/BL2B-CRN4>.

62. See Tyler Lauletta, *The 28 Highest-Paid Players in the NBA for the 2019–20 Season*, BUS. INSIDER (Jan. 23, 2020, 3:32 PM), <https://perma.cc/EB9H-Z2K3>.

63. James Surowiecki, *How the N.B.A.'s Salary Cap Favors Talent-Rich Teams*, NEW YORKER (July 9, 2016), <https://perma.cc/XFW4-A5AT>.

64. Brian Windhorst, *Answering Your Questions About the New Collective Bargaining Agreement*, ESPN (Dec. 20, 2016), <https://perma.cc/W76Q-8XRJ>.

65. *Explained: What Is an NBA Supermax Contract and How Does It Work?*, NBC SPORTS (May 22, 2019), <https://perma.cc/B6EQ-V64Q>. The length of the supermax deal depends on the player's years of service in the NBA as well as the number of years remaining on his current contract. For example, a qualified player who has spent seven or eight years in the NBA and has two years left on his contract is eligible for a four-year supermax, whereas a qualified *free agent* who has spent eight or nine years in the NBA is eligible for a five-year supermax. *Id.*

### E. FREE AGENCY

At the expiration of a player's contract, he becomes a free agent, giving him the opportunity to sign a new contract with either the same team or a new team.<sup>66</sup> However, the CBA curtails this right to a certain extent through the establishment of two classifications of free agency: restricted and unrestricted.<sup>67</sup> Whereas an unrestricted free agent is free to sign with any team that has the available cap space to tender an offer, a restricted free agent can sign a contract offered by another team, known as an "offer sheet," but the player's original team can match the terms of that offer.<sup>68</sup>

A free agent is classified as "restricted" if he is a first-round draft pick who just completed the fourth year of his rookie contract or if he has played in the NBA for fewer than three seasons.<sup>69</sup> All others are considered "unrestricted" free agents. If a team seeks to retain its restricted free agent by extending the player a qualifying offer, the player has several options: (1) accept the team's offer, play out the season, and become an unrestricted free agent the following year; (2) negotiate a new contract with his original team that is independent of the qualifying offer; (3) sign an offer sheet with another team, which his original team has the right to match; or (4) negotiate a sign-and-trade if he has not signed with another team.<sup>70</sup>

## II. PLAYER HOLDOUTS

### A. WHAT ARE PLAYER HOLDOUTS AND WHY DO THEY OCCUR?

Contract "holdouts" have become commonplace in American sports today, including in the NBA, as the career trajectory of an athlete is muddled with uncertainties, including the ever-present risk of injury and the limited "prime" years during which a player can earn top dollar. Specifically, a holdout is an individual strike whereby a professional athlete refuses to play or practice for his team until the franchise gives him the consideration he seeks.<sup>71</sup> The threat of a holdout gives the player leverage to coerce his team's General Manager—who controls player transactions and is primarily responsible for contract negotiations with players—to accede to his demands as soon as possible, because the longer the holdout lasts, the greater the external negative effects on the team and its fan base.<sup>72</sup> Generally, only

66. Neuharth-Keusch, *supra* note 56.

67. See Epps, *supra* note 14, at 356.

68. *Free Agency Explained*, NBA.COM (Mar. 16, 2021, 10:46 AM), <https://perma.cc/V5MH-8EFE>. In other words, the original team has the "right of first refusal."

69. David Freedman, *Free Agency*, CBA BREAKDOWN: UNDERSTAND THE NBA'S COLLECTIVE BARGAINING AGREEMENT, <https://perma.cc/2RNZ-5D4N> (last visited Jan. 20, 2022).

70. *Free Agency Explained*, *supra* note 68. A sign-and-trade occurs when the team signs a contract with its own player and simultaneously trades that player. David Freedman, *Trades*, CBA BREAKDOWN: UNDERSTAND THE NBA'S COLLECTIVE BARGAINING AGREEMENT, <https://perma.cc/2RNZ-5D4N> (last visited Jan. 20, 2022).

71. Daniel M. Faber, *The Evolution of Techniques for Negotiation of Sports Employment Contracts in the Era of the Agent*, 10 U. MIAMI ENT. & SPORTS L. REV. 165, 167 (1993).

72. Quiles, *supra* note 13, at 259; see *infra* Part III.B.

superstar players, or players with a certain scarce skillset (such as a player with great defensive ability or an experienced veteran with a high “basketball IQ”) have the leverage to hold out.<sup>73</sup> “These players are in high demand because of their exceptional skills” and remarkable popularity, whereas the average NBA player lacks any sort of bargaining power to stage a successful holdout, particularly because he is often easily replaceable by a free agent.<sup>74</sup>

There are two primary situations where a player may decide to withhold performance. The first, what I will call the “midterm contract renegotiation scenario,” occurs when a player signs a long-term contract with a team, during the midst of which his performance or skillset increases substantially, and then seeks to renegotiate his existing contract to take into account his “true value” (a rate commensurate with his elevated on-court performance). Because the NBA Salary Cap generally increases year-over-year, the player’s presently “competitive” contract becomes outdated in two or three years, as new contracts can be more lucrative. With multiple years remaining on his original contract, the player, who is now extremely valuable, finds himself being paid less than other comparably skilled players in the league. The midterm contract renegotiation reflects the longstanding clash between team owners’ quest for long-term stability and players’ goal to be paid their market value.<sup>75</sup>

The second holdout situation, what I will call the “trade scenario,” occurs when a player is under contract (usually long-term) with a rebuilding or poorly-performing team and seeks a trade to a championship-contending team. The player, who is unhappy with his situation and who has multiple years remaining on his contract, forces ownership’s hands by demanding a trade or else threatening to hold out. This scenario is quite familiar to sports fans, as it occurs most often. A recent example of such a holdout took place between NBA veteran Andre Iguodala and the Memphis Grizzlies.<sup>76</sup> The Grizzlies traded for Iguodala following the 2019–20 season, but Iguodala made it clear that he would not play for a young rebuilding team.<sup>77</sup> Instead, he hoped to play for a team contending for an NBA championship. Ultimately, his demands were met—he was traded to the Miami Heat that season.<sup>78</sup>

It is important to note that reverse holdouts are highly uncommon. In cases where a player has signed a lucrative contract and performs worse than expected, the team has an incentive to negotiate a player’s salary downward, with leverage coming from

---

73. Basil M. Loeb, *Deterring Player Holdouts: Who Should Do It, How to Do It, and Why It Has to Be Done*, 11 MARQ. SPORTS L. REV. 275, 276 (2001).

74. *Id.*

75. See Loeb, *supra* note 73, at 275. Some have characterized the midterm contract renegotiation as “the means through which a player attempts to correct ‘injustices’ stemming from prior negotiations.” Daniel M. Walanka, *An Alternative Approach to the Problem of Midterm Demands for Contract Renegotiation in the National Football League: The Incentive-Based Contract*, 17 LOY. L.A. ENT. L. REV. 771, 791 (1997).

76. See Charles Curtis, *Grizzlies’ Andre Iguodala Situation Is Ugly, But This Is How the Trade Game Is Played*, USA TODAY (Feb. 4, 2020, 7:22 AM), <https://perma.cc/6LPH-HA6C>.

77. *Id.*

78. Des Bieler, *Andre Iguodala Wants Off the Grizzlies, and Some Memphis Players Aren’t Thrilled with Him*, WASH. POST (Feb. 4, 2020, 4:00 AM), <https://perma.cc/SC3A-NVM3>.

the team's power to bench or cut the player. However, a player will generally never agree to reduce his salary because NBA contracts are fully guaranteed and a player is presumably more than happy to receive his entire salary without having to step foot on the court.<sup>79</sup> A trade is even more unlikely because other teams are unwilling to pay the player's remaining salary.<sup>80</sup> Since reverse holdouts are very rare for these reasons, they are not examined in this Note.

### B. PLAYER HOLDOUTS ARE A PROBLEM FOR TEAMS AND THE NBA

Player holdouts have adverse effects that are felt at various levels of the NBA and within individual teams. First, long and drawn-out player holdouts decrease fan support and involvement with the affected franchise.<sup>81</sup> When a player refuses to play until the team acquiesces to his demands, fans are denied the enjoyment of watching their star player in action. Public support for a team is generally tied to the presence of the team's star, so holdouts result in "less incentive for fans of the franchise to attend games, follow the team's progress, or make purchases related to the franchise such as concessions at games and team [merchandise]."<sup>82</sup> While public perception and consumer attitudes are important factors in any industry, the success of professional sports leagues and franchises is particularly dependent on public reaction.<sup>83</sup> In fact, in most cases, fan attraction serves as the catalyst for new stadium construction and league expansion to other cities, the development of all-sports television networks, owners' economic success, and, indirectly, the exponential growth of player salaries.<sup>84</sup> Therefore, superstar athletes who hold out in an attempt to further their own economic interests—and, consequently, alienate fans—do so at the expense of the average player in the league.<sup>85</sup>

Furthermore, bitter player holdouts can lead to internal dysfunction that affects overall team cohesion and chemistry. Specifically, when a player withholds performance, the team as a whole loses focus on playing because of the negative

---

79. Even if the team cuts the player, the team would still be on the hook for the entirety of the player's remaining salary. See Gagan Singh, *To Guarantee or Non-Guarantee?*, BLEACHER REP. (Feb. 27, 2010), <https://perma.cc/5Q2G-KNRN>.

80. If the player is truly adamant that he wants to play, the parties could mutually decide to part ways by reaching a buyout agreement, in which the player surrenders an agreed-upon amount of his guaranteed salary, and, in exchange, is released and allowed to sign with any other team as a free agent. See Jasmyn Wimbish, *Five Underrated Rookies to Keep an Eye on During the Second Half of the NBA Season*, CBS SPORTS (Mar. 12, 2021, 12:00 PM), <https://perma.cc/J37M-K3H6>.

81. Steven R. Vignola, *Holding Out for a Better Deal: How Big Four Professional Sports Franchises Should Handle Hold Outs*, 40 PACE L. REV. 332, 338 (2020).

82. *Id.*

83. Peter B. Kupelian & Brian R. Salliotte, *The Use of Mediation for Resolving Salary Disputes in Sports*, 2 T.M. COOLEY J. PRAC. & CLINICAL L. 383, 390 (1999).

84. MARTIN J. GREENBERG & JAMES T. GRAY, 1 SPORTS LAW PRACTICE § 11.01 (2020).

85. In theory, if fan support decreases, owner and league revenue also decrease, and player salaries shrink. However, in reality, league-wide fan support will always exist as there is no reasonable substitute for major league professional sports. More importantly, NBA teams have fixed revenues through television and radio contracts, sponsorship agreements, merchandise and licensing agreements, concessions, and prosperous revenue sharing. See *id.*

publicity generated by the holdout.<sup>86</sup> Such repercussions were felt when star player Jimmy Butler held out of his contract with the Minnesota Timberwolves in 2018 and sought a trade to another team. During that dispute, Butler made a surprise appearance at one of the Timberwolves' practices and participated in team scrimmages, openly berating his teammates.<sup>87</sup> Butler's antagonistic behavior not only hindered team chemistry but also added to the vitriol surrounding his holdout situation with the team's management. It became very clear that, if the Timberwolves did not acquiesce to Butler's trade demand, he would continue with his antics. The Timberwolves traded Butler a month later to the Philadelphia 76ers in return for three players and a future draft pick, a trade that created considerable public backlash due to the consensus view that the Timberwolves received an inadequate return for a player of Butler's caliber.<sup>88</sup> Ultimately, Butler's situation demonstrates that a holdout can create internal dysfunction and thereby force the organization's hand to comply with the player's demands.<sup>89</sup>

Team owners are perhaps the most-affected parties when a player holds out, as the situation sets a dangerous precedent for the franchise's future dealings. At a basic level, the owners suffer because they are unable to provide the best product to the fans.<sup>90</sup> However, more importantly, when the relationship between the player and the franchise's management frays due to a holdout, the owners are generally cast as the scapegoat for being unwilling to compromise—partially due to the perception that team owners have big egos and even bigger pockets compared to the players, many of whom come from modest backgrounds—and the team's reputation endures a significant blow.<sup>91</sup>

For owners, a strong reputation in the league as trustworthy, fair, and dependable is everything: In every industry, people prefer to contract with a partner who is known to complete his promises promptly and without contentiousness.<sup>92</sup> In this case, the negative press coverage of the team's holdout situation can affect future transactions with other players, who may become more skeptical about signing with the team given its sullied reputation for not being "player-friendly." Perhaps this impacts small-market teams in modest locations more than big-market teams located in geographical hotspots like Los Angeles or New York; regardless, a team's

86. See Loeb, *supra* note 73, at 277.

87. Chris Haynes, *Sources: Karl-Anthony Towns, Andrew Wiggins Primary Targets of Jimmy Butler's Practice Insults*, YAHOO SPORTS (Oct. 10, 2018), <https://perma.cc/VQ3T-M2YY>. Butler taunted his teammates, including the team's two other star players, Karl-Anthony Towns and Andrew Wiggins, calling them "soft," among other things. *Id.*

88. *It's Done: Jimmy Butler Trade to Philadelphia Completed*, ESPN (Nov. 12, 2018), <https://perma.cc/24EB-NCH2>. Butler was traded for Robert Covington, Dario Saric, Jerryd Bayless, and a 2022 second-round draft pick. *Id.*

89. The team could indeed choose to bench or suspend a player who fails to comply with team rules and negatively interferes with the performance of other players. See *infra* Part III.C for additional detail.

90. See Loeb, *supra* note 73, at 277–78.

91. *Id.* at 287.

92. Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341, 347 (1984) ("The importance of reputation in consumer-business relations arises from two sources: the possibility of repeat purchases and of inter-consumer information exchange.").

inability to attract marquee free agents or retain its superstar players directly impacts fan attraction and overall BRI for the team.

### C. PLAYER HOLDOUTS CONSTITUTE A BREACH OF CONTRACT

It is neither novel nor inappropriate for a player to test the free agency market, looking for the right team to join or the most lucrative contract to sign. Withholding performance and demanding a trade or renegotiation once a contract has been signed, on the other hand, is in derogation of the player's contract and ultimately an unlawful and improper abuse of power.<sup>93</sup> "Exceptional playing ability is no justification for a player to renege on his obligations."<sup>94</sup> The athlete has signed a contract with a team, and, if he holds out without any accountability or repercussions, his behavior would set a bad example for the league as there would be virtually no deal certainty in player signings.

Player holdouts constitute a breach of contract for two reasons.<sup>95</sup> First, the bargain struck between a team and a player is an exchange of promises: The team promises to pay the player's salary throughout the term of the contract in exchange for the player's promise to perform pursuant to the terms of the contract.<sup>96</sup> When a player accepts and signs a deal, then later holds out by refusing to perform for his team, he acts in contrast to his manifested assent to the original agreement.<sup>97</sup> Specifically, the NBA's UPC details the services players are expected to provide, including reporting to training camp, attending "practices, meetings, workouts, and skill or conditioning sessions conducted by the Team during the Season," and showing up for all scheduled games.<sup>98</sup> A player's failure to play or practice for the agreed-upon length of his original contract in hopes of securing a trade or renegotiation constitutes non-performance and, therefore, an express breach of contract.<sup>99</sup>

In addition, since the player's performance was an essential term of the contract—perhaps even the whole point of the bargain—a holdout is likely to be considered a material breach. Factors supporting a finding of materiality include: (1) that "the

---

93. See Loeb, *supra* note 73, at 278.

94. *Id.*

95. For there to be an enforceable contract, there must be a manifestation of mutual assent and consideration between the parties to the transaction. See RESTATEMENT (SECOND) OF CONTRACTS § 17 (AM. L. INST. 1981).

96. See Vignola, *supra* note 81, at 340. Consideration requires a bargained-for exchange of performances or promises between the parties to the transaction. See RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. L. INST. 1981); see also, e.g., *Ala. Football, Inc. v. Wright*, 452 F. Supp. 182, 185 (N.D. Tex. 1977) (finding that a football player's contracted-for performance constituted valuable consideration in a sports contract).

97. Manifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance. RESTATEMENT (SECOND) OF CONTRACTS § 18 (AM. L. INST. 1981). In this case, the player and the team would have already manifested their assent to comply with the terms of the contract when the contract was signed. See *id.* § 3.

98. NBA UPC, *supra* note 30, § 2.

99. When performance of a duty under a contract is due, any non-performance is a breach. Non-performance includes defective performance and absence of performance. See RESTATEMENT (SECOND) OF CONTRACTS § 235 cmt. b (AM. L. INST. 1981).



franchise, as the injured party, is completely deprived of the player's performance as a result of the hold out"; (2) that "the franchise has no recourse aside from withholding the player's salary"; and (3) that the player is unlikely to cure the breach until the team accedes to his demands for a trade or renegotiation.<sup>100</sup> Such a material breach not only entitles the team to recover damages but also allows the team to suspend its own performance under the contract (that is, cease paying the player's salary).<sup>101</sup> The player will also likely face disciplinary action by the team and the NBA for violating his contract and the league rules.<sup>102</sup>

A player's refusal to play subject to the terms of the original contract can also be considered a breach of the implied covenant of good faith and fair dealing. Based on public policy grounds, every contract imposes a duty that the parties to a contract deal with each other honestly, fairly, and in good faith when performing and enforcing the terms of the contract.<sup>103</sup> Courts often make it difficult to obtain relief for breaches of this duty, with judges expressing the need for caution in its application.<sup>104</sup> Nevertheless, a player who threatens non-performance in order to obtain an increase in compensation or to secure a trade acts contrary to this equitable principle of contract law. In the holdout context, the player acts in *bad faith* by opportunistically coercing the team to modify the terms of their original arrangement, thereby securing the for player a larger share of the anticipated gains of the existing

100. Vignola, *supra* note 81, at 343–44. The test for determining whether a breach is material is whether the failure or deficiency in performance is so central to the contract that it substantially impairs its value and deeply disappoints the reasonable expectations of the promisee. See BRIAN A. BLUM, EXAMPLES & EXPLANATIONS: CONTRACTS 510 (7th ed. 2017). Courts often use the following factors in deciding whether a breach is material: the extent to which the injured party will be deprived of the benefit that he reasonably expected, the extent to which the injured party can be adequately compensated for the deprivation, the extent to which the breaching party will suffer forfeiture, the likelihood that the breaching party will cure the breach, and the extent to which the behavior of the breaching party comports with the standards of good faith and fair dealing. RESTATEMENT (SECOND) OF CONTRACTS § 241 (AM. L. INST. 1981).

101. BLUM, *supra* note 100, at 509.

102. Section 5(d) of the UPC recognizes that, under Article 35(d) of the NBA Constitution, the Commissioner may unilaterally suspend a player or fine the player up to \$50,000 (or both) if he determines the player is "guilty of conduct that does not conform to standards of morality or fair play, that does not comply at all times with all federal, state, and local laws, or that is prejudicial or detrimental to the Association." NAT'L BASKETBALL ASS'N, CONSTITUTION AND BY-LAWS, art. 35(d); NBA UPC, *supra* note 30, § 5(d). Furthermore, for a player's violation of any team rule or breach of contract, "the Team may reasonably impose fines and/or suspensions on the Player in accordance with the terms of the CBA." *Id.* § 5(c). The Team may also terminate a player if he "at any time fail[s], refuse[s], or neglect[s] to render his services" under the terms stipulated in the UPC or if he materially breaches the contract in any other manner. *Id.* § 16(a)(iv).

103. RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. L. INST. 1981). "Good faith" has generally been defined to require honesty in a person's conduct during the agreement, *id.* cmt. a, and "bad faith" has been found when a party acts contrary to the "spirit" of the contract, *id.* cmt. d.

104. See, e.g., *Cincinnati SMSA Ltd. P'ship v. Cincinnati Bell Cellular Sys. Co.*, 708 A.2d 989, 992 (Del. 1998) ("[I]mplying obligations based on the covenant of good faith and fair dealing is a cautious enterprise."). In some contexts, courts require plaintiffs to establish bad faith or some other form of egregious conduct by the defendant in order to show a breach of this duty. See, e.g., *Unishippers Global Logistics, LLC v. DHL Express (USA), Inc.*, 526 F. App'x 899, 910 (10th Cir. 2013) (finding that the freight service company's conduct in terminating a long-term services agreement "[did] not rise to the level of action so egregious as to constitute a breach of good faith" under Utah law).

contract.<sup>105</sup> Therefore, regardless of the theory used, a holdout is clearly a breach of contract and ought to be curbed before it spins out of control.

#### D. TRADITIONAL CONTRACT REMEDIES ARE INADEQUATE TO DEAL WITH HOLDOUTS

Once a player has been found to be in breach of his contract by holding out, it is then necessary to determine what relief can be granted to the team. Unfortunately, there is a lack of universal agreement as to the most suitable or effective remedy in such cases.<sup>106</sup> The NBA's CBA and UPC mandate arbitration as the forum for resolving all disputes arising from the contract.<sup>107</sup> Despite such non-judicial recourse being contractually required, courts have nevertheless intervened in the context of professional sports where the parties cannot settle their dispute and arbitration cannot be used or has been circumvented.<sup>108</sup>

Courts traditionally consider three types of remedies for a breach of a personal service contract: (1) direct enforcement of the contract through specific performance; (2) indirect enforcement via negative injunction; or (3) money damages to the injured party.<sup>109</sup> This Section will explore the bases for establishing relief under these traditional remedies and ultimately why they are each inadequate to deal with the holdout issue.

#### 1. Specific Performance

Specific performance is an equitable remedy whereby a court orders a breaching party to fully perform the terms of the contract.<sup>110</sup> In the context of sports, athletes—especially superstars—perform unique services that cannot be easily replaced. Their teams could therefore have a potential claim to specifically enforce the players'

105. A determination as to bad faith is subject to the discretion of the courts, but courts have found the following to constitute bad faith: inaction, evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (AM. L. INST. 1981).

106. See, e.g., Geoffrey Christopher Rapp, *Affirmative Injunctions in Athletic Employment Contracts: Rethinking the Place of the Lumley Rule in American Sports Law*, 16 MARQ. SPORTS L. REV. 261, 263 (2006) (advocating for specific performance as the most effective remedy in athletic employment arrangements). But see Quiles, *supra* note 13, at 284 (arguing in favor of salary arbitration to prevent holdouts in the NFL).

107. See NBA UPC, *supra* note 30, § 17; NBA CBA, *supra* note 23, art. XXXI, § 1(a)(i).

108. When deciding whether a matter must be submitted to arbitration, courts must (1) determine "whether the parties agreed to arbitrate their claims," and (2) "whether the specific dispute falls within the scope of the arbitration agreement." *Childs v. Meadowlands Basketball Assocs.*, 954 F. Supp. 994, 998 (D.N.J. 1997). For an in-depth discussion on arbitration in the NBA, see Roger I. Abrams, *Sports Arbitration and Enforcing Promises: Brian Shaw and Labor Arbitration*, 20 MARQ. SPORTS L. REV. 223 (2009).

109. Kevin W. Yeam, *New Remedial Developments in the Enforcement of Personal Service Contracts for the Entertainment and Sports Industries: The Rise of Tortious Bad Faith Breach of Contract and the Fall of the Speculative Damage Defense*, 7 LOY. ENT. L.J. 27, 27–28 (1987).

110. See RESTATEMENT (SECOND) OF CONTRACTS § 357 cmt. a (AM. L. INST. 1981). Specific performance is not used if damages would be adequate to remedy the injured party. *Id.* § 359(1).

obligations to perform pursuant to their contracts since substitution is nearly impossible in these cases.<sup>111</sup> Historically, however, courts have refused to order specific performance of personal service contracts on public policy and constitutional grounds.<sup>112</sup> Such reluctance is primarily due to three concerns: (1) inherent logistical difficulties in supervising and ensuring proper compliance with the court order; (2) the undesirability of obligating two parties with mutual distrust to work together; and (3) violation of the Thirteenth Amendment by subjecting individuals to a form of involuntary servitude.<sup>113</sup>

However, even if a court granted an order of specific performance against a player, practical issues would make such a remedy undesirable. For instance, a player who is forced to play for the team may intentionally perform sub-optimally, as he has little incentive to give his best efforts or perform to his fullest capacity. The team may call upon the court to adjudge the player's compliance with the order, but "[i]t would be difficult, if not impossible, to ascertain whether the athlete's less-than-satisfactory performance represented a refusal to abide by the judicial decree or whether it was, in fact, the result of totally unrelated physical or emotional problems."<sup>114</sup> As a result, the player may engage in opportunistic behavior by performing lackadaisically to punish the team for its failure to acquiesce to his demands, while also collecting his full paycheck.<sup>115</sup> Therefore, due to the possibility of never-ending litigation, specific performance would not be a suitable remedy even if available.

## 2. Negative Injunction

Beginning with the landmark English case *Lumley v. Wagner*, courts have most commonly granted relief for breach of a personal service contract in the form of a negative injunction.<sup>116</sup> In this context, a negative injunction would prohibit an athlete from playing for another team for the duration of the contractual term.<sup>117</sup> The

---

111. In cases involving personal service contracts where the services are of a unique or special nature so as to make substitution impossible (and thus monetary damages inadequate as a remedy), then specific performance may be considered as a remedy at law. 12 CORBIN ON CONTRACTS § 63.1 (2021).

112. See *id.* § 367.

113. See *id.* § 367 cmt. a; U.S. CONST. amend. XIII. See generally JAMES T. GRAY, SPORTS LAW PRACTICE § 2.05(2) (summarizing how courts have traditionally been reluctant to specifically enforce professional sports contracts).

114. JOHN C. WEISTART & CYM H. LOWELL, THE LAW OF SPORTS 338 (1979). Indeed, a player's level of performance is not entirely within his control but could be the result of external factors (e.g., playing against a good defensive team).

115. Alex M. Johnson, Jr., *The Argument for Self-Help Specific Performance: Opportunistic Renegotiation of Player Contracts*, 22 CONN. L. REV. 61, 84 (1989).

116. Gary A. Uberstine & Richard J. Grad, *The Enforceability of Sports Contracts: A Practitioner's Playbook*, 7 LOY. L.A. ENT. L. REV. 1, 10 (1987); see, e.g., *Lumley v. Wagner* (1852) 42 Eng. Rep. 687 (holding that a negative injunction was the appropriate remedy for an opera singer who breached her contract with a theater by attempting to perform at another theater); *Harry Rogers Theatrical Enters., Inc. v. Comstock*, 232 N.Y.S. 1, 4 (1928) (negative covenant not to compete implied in every personal service contract).

117. See RESTATEMENT (SECOND) OF CONTRACTS § 367 cmt. c (AM. L. INST. 1981) ("A contract for personal service is usually exclusive in the sense that it imposes not only a duty to render the service

seminal case establishing the availability of a negative injunction to enforce a professional sports contract is *Philadelphia Ball Club v. Lajoie*.<sup>118</sup> Napoleon Lajoie, a star professional baseball player for the Philadelphia Ball Club, breached his contract with the plaintiff club when a rival club offered him more money for his services.<sup>119</sup> The Philadelphia Ball Club sought a negative injunction to prohibit Lajoie from playing for the rival club. The court assessed Lajoie's value to a team, examining his reputation, his skillset, his drawing power at the game (that is, the effect of his presence on ticket sales), and the effect of his absence on the team's standing.<sup>120</sup> The court ultimately enjoined Lajoie from playing for another team during the contract term, finding that replacing him and obtaining damages for any quality difference would be inadequate because Lajoie had unique skills that "could not easily be obtained from others."<sup>121</sup> The court also noted that Lajoie would certainly choose to perform for his original club if he were precluded from playing for any other team.<sup>122</sup>

*Lajoie* set forth the test for securing a negative injunction in the context of a breaching athlete: (1) the athlete must have a "sufficiently unique ability"; (2) the team must have an inadequate remedy at law; and (3) the team must be likely to suffer irreparable harm if an injunction is denied.<sup>123</sup> However, as a practical matter, once a player's ability is shown to be sufficiently unique, it follows that damages are inadequate as a remedy, and, consequently, that the team will be irreparably harmed.<sup>124</sup> Although *Lajoie* found a player unique based on his relative value to the team in terms of skill, reputation, and popularity,<sup>125</sup> subsequent courts have interpreted and applied the test with greater latitude, finding that all professional

---

to the other party but also a duty to forbear from rendering it to anyone else. Because specific performance of the duty to render the service is precluded . . . the availability of injunctive relief to enforce the duty of forbearance takes on special importance.").

118. James T. Brennan, *Injunction Against Professional Athletes Breaching Their Contracts*, 34 BROOK. L. REV. 61, 63 (1967).

119. *Philadelphia Ball Club v. Lajoie*, 51 A. 973, 973 (Pa. 1902).

120. *Id.* at 974.

121. *Id.* at 973 (internal quotation marks omitted). The Court stated:

The services of the defendant are of such a unique character, and display such a special knowledge, skill and ability as renders them of peculiar value to the plaintiff, and so difficult of substitution, that their loss will produce "irreparable injury," in the legal significance of that term, to the plaintiff.

*Id.* at 974.

122. *Id.* at 975.

123. *Id.* at 973–74. However, even if the prerequisites are satisfied, injunctive relief is still left to the court's discretion. *See, e.g., Nassau Sports v. Hampson*, 355 F. Supp. 733, 737 (D. Minn. 1972) (denying an injunction because promotion of a new league and harm to the player outweighed harm to the club); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 518 (E.D. Pa. 1972) (granting an injunction because harm to the plaintiff was irreparable given needs of new league).

124. Bill Whitehill, *Enforceability of Professional Sports Contracts—What's the Harm in It?*, 35 SW. L.J. 803, 806 (1981).

125. *Lajoie* expressly rejected an impossible-to-replace standard and adopted a lesser standard that the player not be *easily* replaceable. *Lajoie*, 51 A. at 973.

athletes are “prima facie unique” or else they would not be employed (and also because no two athletes are identical).<sup>126</sup>

For this reason, in the case of a player holdout, a team can easily meet the *Lajoie* standard. The uniqueness element is practically presumed by the player’s employment in the NBA.<sup>127</sup> In fact, the contract signed by every NBA player includes a “unique services” clause which states that the athlete’s services to his team are “extraordinary and unique” and cannot be adequately replaced or sufficiently compensated for in money damages.<sup>128</sup> Some courts have held that the modern boilerplate language in the UPC attesting to a player’s uniqueness and irreplaceability is generally not controlling.<sup>129</sup> However, along with the holdings in *Lajoie* and its progeny, these clauses present additional evidence that a negative injunction can be used as a remedy in the event of a player holdout.<sup>130</sup>

Nevertheless, there are several limitations which restrict the usefulness of negative injunctions in the context of player holdouts. First, in either the trade scenario or midterm contract renegotiation scenario, a negative injunction would only prove fruitful in the limited number of cases where another team is actively seeking the player’s services.<sup>131</sup> When a court bars the player from providing services to another team, but no other party actively seeks the player’s employment—possibly to avoid being subjected to the league’s anti-tampering rules or as not to bear the brunt of the negative reputational side effects of poaching the

---

126. Casey Duncan, *Stealing Signs: Is Professional Baseball’s United States-Japanese Player Contract Agreement Enough to Avoid Another “Baseball War”?*, 13 MINN. J. GLOB. TRADE 87, 107 (2003). One court has gone so far as to find that two rookies without professional experience possessed sufficiently unique skills to meet the first requirement of the *Lajoie* test. *Winnipeg Rugby Football Club, Ltd. v. Freeman*, 140 F. Supp. 365, 367 (N.D. Ohio 1955) (enjoining two rookies from playing for the NFL’s Cleveland Browns due to breaching their existing contracts with the Winnipeg Rugby Football Club of the Canadian Football League (CFL)); *see also* *Dallas Cowboys Football Club, Inc. v. Harris*, 348 S.W.2d 37, 43–44 (Tex. Civ. App. 1961); *Cent. N.Y. Basketball, Inc. v. Barnett*, 181 N.E.2d 506, 517 (C.P. Ohio 1961) (holding that professional athletes satisfy the “uniqueness” test on a per se basis, merely by being employed as professional athletes: “Professional players in the major baseball, football, and basketball leagues have unusual talents and skills or they would not be so employed.”).

127. JAMES T. GRAY, *SPORTS LAW PRACTICE* § 2.05(1) (Matthew Bender, 3d ed. 2020).

128. *See* NBA UPC, *supra* note 30, § 9.

129. *See* *Arias v. Soli*, 754 F. Supp. 290, 294 (E.D.N.Y. 1991) (determining a boxer’s abilities to be “unique and extraordinary” by reference to external evidence and not solely by virtue of contractual stipulation); *see also* *Barnett*, 181 N.E.2d at 514 (Although the court did not rely upon Barnett’s contractual representations that he had exceptional and unique skill as a basketball player, the court did see fit to quote these representation clauses from his contracts, noting: “The aforesaid provisions are contained in uniform players’ contracts and it would seem that mere engagement as a basketball player in the N.B.A., or A.B.L., carries with it recognition of his excellence and extraordinary abilities.”).

130. *See* *Rapp*, *supra* note 106, at 167–68. The UPC provides that “the Team . . . shall have the right to obtain from any court . . . such equitable relief as may be appropriate, including a decree enjoining the Player from any further such breach of this Contract, and enjoining the Player from playing basketball for any other [team].” NBA UPC, *supra* note 30, § 9.

131. *See* *Wichmann*, *supra* note 11, at 841.

player<sup>132</sup>—the remedy is useless. This is especially true in the midterm renegotiation context, where there is no competing entity at all.<sup>133</sup>

Furthermore, even in the case where a negative injunction is granted, it is unlikely that such a remedy truly protects the plaintiff-team's interest. In the eyes of ownership, a team is in the business of making money, and "management's primary concern is an economic return on the personal service contract and not in preventing the talent's performance for others."<sup>134</sup> A negative injunction, however, would only prevent an increase in direct competition that would occur if the athlete played on another team.<sup>135</sup>

Finally, the negative injunction is too weak at deterring player holdouts from occurring in the first place. Although the negative injunction would prohibit a player from signing with any other team, the prohibition is only for the length of the contract.<sup>136</sup> Any salary that is lost, or escalating fines that accumulate over the course of the holdout, will be more than adequately offset by a subsequent, multi-million-dollar contract from a new team—again, the player holding out is generally a superstar with high demand in the marketplace.<sup>137</sup> Although, per the CBA, a team has the right to restrict its player's future free agency movement if the player fails to complete his current contract, as of this writing, teams have never enforced this provision.<sup>138</sup> Courts would likely be unwilling to uphold a provision inhibiting a player's freedom to pursue a livelihood.<sup>139</sup> Therefore, if a player is truly adamant

132. Articles 35 and 35A of the NBA Constitution provide that no general manager, coach, scout or player may attempt to persuade a person employed by another team to join the tampering team. A team that contravenes these rules can be fined up to \$5 million. NAT'L BASKETBALL ASS'N, CONSTITUTION AND BY-LAWS, art. 35(e); *id.* art. 35A(e); *see also* Michael McCann, *Breaking Down the New NBA Tampering and Compliance Rules*, SPORTS ILLUSTRATED (Sept. 23, 2019), <https://www.si.com/nba/2019/09/23/adam-silver-nba-tampering-compliance-salary-cap-stricter-rules>.

133. In this case, the player only wants a more lucrative deal, be it with his current team or not.

134. Yeam, *supra* note 109, at 29.

135. Fred Kaplan, *Professional Athletic Contracts and the Injunctive Dilemma*, 8 J. MARSHALL J. PRAC. & PROC. 437, 454 (1975).

136. *See* discussion of *Lajoie supra* notes 118–126 and accompanying text.

137. The CBA provides the following:

If a player, without reasonable cause, fails or refuses to render the services required by [his contract], or is, for proper cause, suspended by his team or the NBA in accordance with the terms of [his contract], his Current Base Compensation can be reduced by (a) 1/145th of the player's Base Compensation for each missed Exhibition, Regular Season or Playoff game for any suspension of less than 20 games and (b) 1/110th of the player's Base Compensation for each missed Exhibition, Regular Season or Playoff game for any suspension of 20 games or more.

NBA CBA, *supra* note 23, art. VI, § 1.

138. The CBA stipulates that any player "who withholds playing services called for by a Player Contract for more than thirty (30) days after the start of the last Season covered by his Player Contract shall be deemed not to have 'complet[ed] his Player Contract by rendering the playing services called for thereunder.'" If a player fails to complete his existing contract, technically he cannot sign a new one: "Such a player shall not be a Veteran Free Agent and shall not be entitled to negotiate or sign a Player Contract with any other professional basketball team unless and until the Team for which the player last played expressly agrees otherwise." NBA CBA, *supra* note 23, art. XI § 3.

139. *See* Yeam, *supra* note 109, at 29. "In most cases, the athlete would suffer significant financial detriment if he chose not to rejoin the team, since his nonathletic endeavors are not likely to generate a salary comparable to that which he would have earned as an athlete." GRAY, *supra* note 113, § 2.05(2)(b)(i).

about being traded—likely because he values his happiness on a winning team more than the value of his current contract or because he has already made significant earnings from his previous contractual seasons—the negative injunction would be of limited remedial use to teams.

### 3. Money Damages

In the event of a player holdout, the club may attempt to recover money damages as relief.<sup>140</sup> A team may desire damages over a negative injunction for several reasons. First, as discussed in the previous Subsection, even if a player is successfully enjoined from playing for another team, he may continue to withhold performance until the injunction period has lapsed. If this occurs, the team loses the services of the player without receiving any compensation for its loss.<sup>141</sup> Second, money damages give the aggrieved club greater flexibility.<sup>142</sup> If the team believes that the likelihood of obtaining an injunction is small, that the player is likely to continue to withhold performance even if the negative injunction is granted, or that they are better off without that player, the option of receiving damages is a silver lining.<sup>143</sup> Finally, the prospect of the player having to pay damages to the team may deter some athletes from breaching their contracts in the first place.<sup>144</sup>

If a team decides to pursue money damages, recovery may only be obtained where the team can establish damages with reasonable certainty.<sup>145</sup> To quantify the loss suffered by a team, courts use three different methods of calculation.<sup>146</sup> First, the “differential theory” allows teams to recover the cost of finding and acquiring a substitute player.<sup>147</sup> The second way courts calculate money damages is by examining the team’s overall economic loss resulting from the player’s holdout.<sup>148</sup> In this case, damages would be “limited to the reduced gate or ticket, concession, and broadcast revenues of the team.”<sup>149</sup> Lastly, disgorgement damages—applicable here only in the trade scenario of a player holdout—allow the aggrieved team to recover the salary differential between the player’s original contract and the contract with his new team.<sup>150</sup>

140. See Johnson, *supra* note 115, at 77–78.

141. See Whitehill, *supra* note 124, at 813.

142. WEISTART & LOWELL, *supra* note 114, at 366.

143. See Whitehill, *supra* note 124, at 813.

144. *Id.*

145. See Uberstine & Grad, *supra* note 116, at 15.

146. GRAY, *supra* note 113, § 2.05[d].

147. *Id.* Therefore, the damages here would include the difference in contractual salaries between the original player and a substitute one, as well as any incidental costs related to searching for and negotiating with the substitute. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*; RESTATEMENT (SECOND) OF CONTRACTS § 344 cmt. a (AM. L. INST. 1981) (“In some situations a court will recognize yet a third interest and grant relief to prevent unjust enrichment. This may be done if a party has not only changed his own position in reliance on the contract but has also conferred a benefit on the other party by, for example, making a part payment or furnishing services under the contract. The court may then require the other party to disgorge the benefit that he has received by returning it to the party who conferred it.”).

However, as mentioned previously, the primary issue with awarding money damages in the context of player holdouts is that the amount of damages would be far too uncertain and speculative.<sup>151</sup> For instance, in applying the differential theory, it is often extremely difficult, if not impossible, to place a value on the services of the holdout player or those of a substitute player.<sup>152</sup> After all, every athlete “renders different skills and services that no other athlete could perform in precisely the same way.”<sup>153</sup> Similarly, under the second method of calculation, there are obvious issues with causation relating to the impact of the breaching player’s absence on the team’s revenue and profits: How would one determine with reasonable certainty which of the franchise’s financial losses resulted from the holdout and which were the result of other exogenous factors?<sup>154</sup> And even if one could measure the player’s impact on team revenue, what would be the best way to measure the team’s lost profits as a result of the player’s holdout?<sup>155</sup> NBA teams earn money from a combination of sources, including television rights, merchandising, corporate sponsorship agreements, concessions, and ticket sales.<sup>156</sup> It would be far too difficult to reach a consensus on how best to estimate financial losses from a single player’s holdout.

Finally, although there are likely no quantification issues under the disgorgement theory since the contract amount with the new team is readily ascertainable, this method of calculation may be undesirable from the team’s standpoint because “its losses will typically exceed the net differential between the original and [new] contract.”<sup>157</sup> Indeed, this method of calculation seems paltry in comparison to the considerable time, effort, and money invested by the team in training and developing the athlete. Also, it would not discourage the repudiation of player contracts since

---

151. Whitehill, *supra* note 124, at 814.

152. Johnson, *supra* note 115, at 77–79.

153. GRAY, *supra* note 113, § 2.05[d]. Such an objection is based on the premise that there is no substitute when the contracted-for item or service is unique.

154. See Vignola, *supra* note 81, at 348; see also Yeam, *supra* note 109, at 30.

155. For example, in *Lemat v. Barry*, the San Francisco Warriors sought to recover lost ticket revenues that it claimed were a result of Rick Barry’s player holdout, calculating damages by comparing the difference between the team’s actual gross receipts for the season Barry withheld performance and a projected amount the team would have received had Barry played for the team pursuant to his contract. *Lemat Corp. v. Barry*, 80 Cal. Rptr. 240, 243 (1969). Alternatively, the settlement amount in *Tomjanovich v. California Sports*, No. 78-243, 1979 WL 210977 (S.D. Tex. Oct. 10, 1979), was reached using a completely different method from *Lemat* to calculate losses incurred by the team from player Rudy Tomjanovich’s absence during one season. Specifically, whereas *Lemat* determined the damages owed by calculating the projected revenue the team would have received due to a positive growth in attendance throughout the league, the *Tomjanovich* calculations were based on the negative impact of decreased fan attendance on the club from the games Tomjanovich did not play. Whitehill, *supra* note 124, at 816 (providing in-depth discussion on how damages were calculated in *Tomjanovich*).

156. See Harvey Carr, *The Multiple Revenue Streams of the NBA*, BUSINESSING MAG. (Dec. 18, 2019), <https://perma.cc/8XCA-3N4L>. In fact, television agreements account for most of the NBA’s revenue. For the 2016–17 season, the NBA reached a new nine-year media rights deal with ESPN and TNT worth an estimated \$24 billion in total. See Nathan Reiff, *How the NBA Makes Money*, INVESTOPEDIA (Sept. 18, 2020), <https://perma.cc/5S6W-NDXZ>; *NBA Announces 9-Year TV Deal with ESPN, Turner Sports*, SPORTS ILLUSTRATED (Oct. 5, 2014), <https://perma.cc/G7VD-KQNY>.

157. Uberstine & Grad, *supra* note 116, at 15–16.



the relative difference in salaries is likely very small anyways.<sup>158</sup> Thus, money damages, like specific performance and negative injunctions, are inadequate to effectively compensate teams when a player holds out.

### III. SHORT-TERM SOLUTIONS: SELF-HELP AND LIQUIDATED DAMAGES

The player has different objectives under the trade scenario and the midterm contract renegotiation scenario. In the trade scenario, the player seeks a trade from his current, likely poor-performing team to a championship contender. In the midterm contract renegotiation scenario, the player is simply looking for a more lucrative contract, regardless of whether that is with his current team or with another team. Since the underlying objectives are different under each scenario, I argue that self-help specific performance is the optimal legal remedy in the case of the midterm contract renegotiation. I also propose that in the trade scenario, the most efficient remedy for the team is to accept the player's trade request and receive liquidated damages from the player for the breach. Although neither theory is foolproof, each is significantly better than traditional contract remedies at overcoming many of the challenges of holdouts.

#### A. MIDTERM CONTRACT RENEGOTIATION SCENARIO: SELF-HELP SPECIFIC PERFORMANCE

Given the absence of an effective traditional remedy in the sports context, one available recourse for a team facing a player holdout—specifically with a player who seeks a midterm contract renegotiation—is to agree to the player's terms for modification (usually a hike in salary and/or a contract extension) and then, once the player has fully performed, “contest the modification and seek to recover any payments made in excess of those called for under the original contract.”<sup>159</sup> This is the essence of “self-help specific performance.”<sup>160</sup> The promisee has, in effect, received the benefits of specific performance without a court's interference.<sup>161</sup>

The paradigmatic case illustrating this situation is *Alaska Packers' Ass'n v. Domenico*, wherein a group of seamen signed contracts with the defendant to catch salmon during the short Alaska fishing season.<sup>162</sup> Originally, they were each to be compensated \$50 for the season, but upon arrival in Alaska, the seamen refused to

---

158. Again, the player in a holdout situation is a highly touted superstar who could potentially even negotiate with his new team to indemnify his losses.

159. Johnson, *supra* note 115, at 92. Professor Alex Johnson, Jr. adapted the self-help specific performance remedy to the context of professional sports contracts.

160. The “self-help specific performance” remedy was first posited by Professor Subha Narasimhan in response to her belief that, in certain situations, damages fail to adequately compensate a party for their losses and specific performance is typically only an extraordinary remedy. *See* Narasimhan, *supra* note 10, at 63.

161. *Id.* at 61–64. However, Professor Narasimhan argues that self-help specific performance is wrongful in situations where there is an effective remedy available for enforcing the original agreement. *Id.*

162. *Alaska Packers' Ass'n v. Domenico*, 117 F. 99, 100 (9th Cir. 1902).

work unless their wages were increased to \$100.<sup>163</sup> With no other replacement workers available in time for the job, the defendant acceded to the seamen's demands.<sup>164</sup> At the end of the season, when the men had completed their work and demanded their extra wages, the defendant refused to honor the modifications.<sup>165</sup> The Ninth Circuit held that the modifications were unenforceable on the grounds that they were based upon a preexisting duty to render the exact same services as the original contract and therefore lacked additional consideration.<sup>166</sup> Thus, the defendant circumvented formalistic judicial constraints—which would have limited his recovery to money damages—and benefitted from the use of self-help specific performance in obtaining full performance by the seamen.<sup>167</sup>

Following the court's reasoning in *Alaska Packers'*, a party facing similar circumstances can only contest a contract modification on the grounds of the preexisting duty rule or the doctrine of economic duress.<sup>168</sup> The basic notion of the preexisting duty rule is that an agreement to modify an existing contract requires additional consideration, separate from the consideration given under the original contract.<sup>169</sup> Indeed, a party does not provide additional consideration by promising to do nothing more than what he is already bound to do under the original contract.<sup>170</sup>

In the context of a midterm contract renegotiation holdout, this rule has a serious shortcoming as it can be easily circumvented if the player demanding the modification undertakes some form of new legal detriment—even a detriment of relatively small value compared to the gain to be received.<sup>171</sup> For example, the athlete will almost always request a contract extension as part of his demand for a renegotiation.<sup>172</sup> On a basic level, this is because the length of the contract is the only component of the player's bargained-for service that can be changed. On a practical level, the extension also coincides with the player's desires for long-term financial security and protection.<sup>173</sup> Either way, the extension passes muster for adequate additional consideration because the lengthened term of service is valuable to the team: Nearly all players seeking renegotiation are either superstars or players who performed surprisingly well the previous season.<sup>174</sup> Thus, the preexisting duty rule is ineffective in contesting a modification.

---

163. *Id.* at 100–01.

164. *Id.* at 101.

165. *Id.*

166. *Id.* at 104–05. However, the opinion made it clear that one of the bases for the holding was that the demand for more money was extortionate and unjustified.

167. In other words, the defendant was able to achieve what he otherwise would not have been able to achieve had he sought to enforce the original contract under a theory of specific performance.

168. See Wichmann, *supra* note 11, at 838.

169. RESTATEMENT (SECOND) OF CONTRACTS § 73 (AM. L. INST. 1981). The consideration doctrine has traditionally been defined as benefit to the promisor and detriment to the promisee, so if the promisor in a modification does not provide something of additional value, the modification lacks consideration and is thus invalid. See *Alaska Packers' Ass'n v. Domenico*, 117 F. 99, 100 (9th Cir. 1902).

170. See Blum, *supra* note 100, at 457.

171. *Id.* at 193.

172. See Johnson, *supra* note 115, at 94.

173. *Id.* at 95.

174. *Id.*

The team may instead bring an action against the player under the doctrine of economic duress.<sup>175</sup> Under this theory, a contractual modification is unenforceable if “the one party’s assent to provide increased compensation was induced by the other’s improper threat to otherwise withhold his promised performance.”<sup>176</sup> The team would claim that it was induced to accept the modification by the player’s threat of breach.<sup>177</sup> In order to succeed on such a claim, the team would bear the burden of showing: (1) an improper threat; (2) the lack of a reasonable alternative; and (3) the inadequacy of ordinary remedies for breach.<sup>178</sup>

A threat is improper if it constitutes a breach of the duty of good faith and fair dealing.<sup>179</sup> As discussed in Part II.C, a player holdout fits nicely within this category of breach.<sup>180</sup> The player’s sole objective in such a holdout is to extract more money from the team despite having expressly promised performance under the original terms.<sup>181</sup> The final two elements of economic duress are also likely satisfied.<sup>182</sup> *Lajoie* provided the foundation for courts to find that athletes provide unique services—no two players are the same and therefore no true substitute performer exists (especially since the player holding out is most likely an established or up-and-coming superstar). For this same reason, any other type of remedy, such as damages or a negative injunction, will fail to adequately compensate the team for its loss.<sup>183</sup> Therefore, a team facing a holdout can very likely use economic duress as the underlying theory in enforcing self-help specific performance.

But if a court would deny traditional specific performance as a remedy to a team facing a holdout problem, why would it permit the use of self-help specific performance? First, self-help secures what the team was owed under the bargain of the original contract and nothing more. Second, the remedy is not awarded entirely after the fact, like traditional remedies. This is beneficial to the team since the player has willingly agreed to perform before he knows he will be brought to court (and

175. *Id.* at 99–102.

176. *See* BLUM, *supra* note 100, at 457–58.

177. *See* *Austin Instrument Co. v. Loral Corp.* 272 N.E.2d 533 (N.Y. 1971) (applying the theory of economic duress to a personal service contract). In that case, Loral had been awarded a contract to supply radar equipment to the Navy and subcontracted Austin for the supply of the parts. When Austin realized that it had underbid the subcontract, it threatened to cease delivery of the equipment unless Loral agreed to a substantial price increase. Unsuccessful in finding another supplier, Loral ultimately acquiesced to Austin’s demands. However, after performance was completed, Loral refused to pay the extra price. The court held that the contract modification was voidable on grounds of duress because Loral was faced with no other reasonable alternative but to accept Austin’s modification or else risk liability for breaching the Navy contract. *Id.*

178. RESTATEMENT (SECOND) OF CONTRACTS § 175 (AM. L. INST. 1981).

179. *Id.* § 176.

180. *See supra* notes 103–105 and accompanying text.

181. A shrewd player may attempt to avoid making such an explicit overture so as to not threaten a *per se* breach of contract; instead, he may merely imply to the team that without a renegotiation, he will not play to his fullest capacity. However, an improper threat need not be explicit—it may also “be inferred from words or other conduct.” *Id.* § 175 cmt. a. Since the UPC contains a “best efforts” clause, the player will have a difficult time dodging liability for a breach of contract in this way.

182. *See supra* Part III.D.

183. Specific performance, again, would be unavailable to the team in this situation due to public policy reasons. *See supra* Part III.D.1.

there will be no reason to believe the player's performance was anything but his best efforts). More importantly, because of such timing, self-help specific performance does not burden limited judicial resources.<sup>184</sup> The player's contractual performance has already been completed so as to avoid the problem of extended judicial supervision and the difficulty of measuring performance.<sup>185</sup> Finally, self-help would eliminate the constitutional concern about involuntary servitude: A court did not force the player to perform under threat of contempt; rather, the player performed according to his own free will, even if he incorrectly believed the contract had been modified in an enforceable way.<sup>186</sup> While this may impinge somewhat on the player's liberty interest, "the [team] should have an equivalent liberty right that protects [it] from being subject to a [player's] opportunistic attempts to extract more for the promised performance."<sup>187</sup>

In the context of the midterm contract renegotiation, self-help specific performance would help police opportunistic behavior and provide teams with a feasible remedy. Of course, such a remedy is only a short-term solution since, after one or more successful enactments by teams, players will quickly learn that a favorable modification could turn out to be illusory. Nevertheless, self-help specific performance has minimal costs and, for the time being, ought to be enforced by courts to deter player holdouts.

### B. TRADE SCENARIO: LIQUIDATED DAMAGES

The trade scenario is different from the midterm contract renegotiation because, rather than seeking to exploit the team for increased pay, the player wants to improve his professional situation via a trade.<sup>188</sup> Self-help specific performance is unavailable as a remedy in this situation since there is no contractual modification at play—nothing will persuade the player to continue playing for the team as the player has already decided that he wants to be traded. Therefore, in such a context, I argue that the optimal remedy for a team is to accede to the player's trade demand, then obtain liquidated damages from the player for the breach.

Liquidated damages are a form of stipulated damages that the player and team agree to during contract negotiations should either party breach.<sup>189</sup> The contract can have a clause that specifies the damages due from each party in the event of a breach or it can provide for liquidated damages for only one party.<sup>190</sup> The benefit of

184. See Narasimhan, *supra* note 10, at 87.

185. *Id.* "When the promisee achieves self-help specific performance, the court is involved in the remedy at the stage when performance is satisfactorily completed. The court does not have to enforce and oversee the contract's performance. It simply refuses to enforce the modification." *Id.*

186. *Id.* at 92.

187. *Id.*

188. The trade scenario is a developing theme that occurs once a player is a few years into his contract. Otherwise, if the player's team was at the bottom of the rankings and the player was already aware that he did not want to play on a poor performing team, he never would have signed a contract with the team to begin with.

189. GRAY, *supra* note 113, § 2.05[d].

190. See BLUM, *supra* note 100, at 579.

liquidated damages in the trade scenario is that it would allow the team to recover some monetary compensation for losses it suffers due to the loss of a superstar player.<sup>191</sup> The amount of damages would need to be fixed by a set formula beforehand, likely as a predetermined percentage of the contractual amount—perhaps 20% of the entire contract value.<sup>192</sup> Generally, the greater the percentage of the damages as a total of the contractual amount, the more the liquidated damages clause will serve as a deterrent against the player breaching his contract in the first place.<sup>193</sup>

Liquidated damages would not be contracted for at the individual level. Since the NBA uses a standardized contract (i.e., the UPC), the development of a liquidated damages clause would require approval by the league and the NBPA during CBA negotiations. Such a provision should not be difficult to implement, however, as it has multiple advantages. When both the player and the team sign a contract, both parties want deal certainty and would like to avoid breaches by the other side. The liquidated damages clause would provide some compensation, potentially significant, to protect *both* parties from the risk of a breach. Furthermore, the implementation of a liquidated damages clause reduces the expense of litigation for the parties should a lawsuit ensue and conserves judicial resources by setting forth a predetermined amount in damages. Finally, liquidated damages enable the defendant to better predict the costs of breaching.<sup>194</sup>

Courts will generally uphold a liquidated damages clause so long as the amount specified is reasonable in light of the anticipated or actual harm caused by the breach.<sup>195</sup> In deciding whether the clause is reasonable, courts consider two primary factors: (1) the difficulty of proving and calculating the anticipated or actual loss; and (2) the degree to which the estimate of harm was a reasonable advance estimate of that loss (i.e., a genuine and methodical attempt to predict likely loss).<sup>196</sup> If a court finds that the liquidated damages amount is unreasonable or was not a genuine

191. See Whitehill, *supra* note 124, at 818.

192. See, e.g., *Miami Dolphins Ltd. v. "Ricky" Williams*, 356 F. Supp. 2d 1301, 1302 (S.D. Fla. 2005) (confirming arbitration award based on a liquidated damages clause requiring football player Errick "Ricky" Williams to refund the team 37.5% of his total contract amount for withholding performance).

193. Note that an unreasonably large liquidated damages clause is unenforceable on public policy grounds as a penalty. "The central objective behind the system of contract remedies is compensatory, not punitive." RESTATEMENT (SECOND) OF CONTRACTS § 356 (AM. L. INST. 1981). See *infra* notes 195–197 and accompanying text.

194. See BLUM, *supra* note 100, at 579.

195. RESTATEMENT (SECOND) OF CONTRACTS § 356 (AM. L. INST. 1981); see, e.g., *Barrie School v. Patch*, 933 A.2d 382, 393 (Md. App. 2007) (holding that a full school year's tuition was a reasonable pre-estimate of the likely harm that would be suffered by the school if the student withdrew); *Red & White Distribution, LLC v. Osteroid Enters., LLC*, 38 Cal. App. 5th 582, 588–89 (holding that a liquidated damages clause was unenforceable because it bore no reasonable relationship to the range of actual damages the parties could have anticipated from a breach of the contract).

196. RESTATEMENT (SECOND) OF CONTRACTS § 356 (AM. L. INST. 1981); see, e.g., *Vanderbilt Univ. v. DiNardo*, 174 F.3d 751, 757 (6th Cir. 1999) (holding that a liquidated damages clause between a university and its football coach was reasonable because the school hired the coach "for a unique and specialized position, and the parties understood that the amount of damages could not be easily ascertained should a breach occur").

attempt by the parties to settle damages in advance, the related contract provision will be considered a “penalty” and therefore void.<sup>197</sup>

The NBA and the NBPA will likely have no issue meeting the factors set forth above in their negotiations. This is because generally, the more uncertain and speculative the nature of the loss, the less rigorous the court will be in examining the reliability of the pre-estimate.<sup>198</sup> Since a player’s performance is a unique service that is nearly unquantifiable, courts will likely give greater deference and latitude to the parties’ approximation.<sup>199</sup> Therefore, any liquidated damages clause set forth in the CBA that shows a reasonable effort to fix a plausible amount of agreed-upon damages based on best estimates will likely be upheld as valid.<sup>200</sup>

A liquidated damages clause is the most efficient short-term solution to the trade scenario holdout. A team can suffer a huge financial loss when it loses a superstar. However, it is virtually impossible to gauge the precise amount of those damages (although the parties in *Lemat* and *Tomjanovich* made a decent attempt). The inclusion of a liquidated damages clause in the UPC protects the team against the risks of a player holdout. No undue hardship is imposed on the player if he holds out, as he was highly compensated during his tenure with the team and will likely be highly compensated with his new team. At a practical level, the player gets what he wants: a trade to a different team.<sup>201</sup> Similarly, the team, although hoping to receive the performance of their superstar, in return receives liquidated damages and a host of other valuable assets for trading the player, generally in the form of draft picks, rising young talent with high ceilings, and expiring contracts that provide the team with future cap flexibility to stage a rebuild or attract new free agents.<sup>202</sup>

A significant possibility remains that players will ultimately attempt to bargain to have the clause removed from their contracts based on the theory that it is punitive or else threaten a league-wide strike and withhold total performance. Nevertheless, trading a player and receiving liquidated damages is the most efficient short-term solution to the trade scenario holdout: The team is recompensed for its loss and the player receives his desire for a new beginning.

---

197. BLUM, *supra* note 100, at 579. A penalty is a provision having the effect or purpose of punishing a breach of contract by imposing liability on a party beyond reasonably anticipated loss. *Id.*

198. RESTATEMENT (SECOND) OF CONTRACTS § 356 (AM. L. INST. 1981).

199. *See id.*

200. *See, e.g.,* Kent State Univ. v. Ford, 26 N.E.3d 868, 878 (Ohio Ct. App. 2015) (holding that a liquidated damages clause which required a university’s head basketball coach to pay his salary for each year remaining under his contract was enforceable and was not a penalty because the damages were difficult to determine and the contract provision was not unreasonable).

201. The inherent risk here is, of course, that a team may spite the player and trade him to another, equally poor-performing team, or a team that the player dislikes. Such was the case when the San Antonio Spurs traded Kawhi Leonard to the Toronto Raptors after he had made it clear he was seeking a trade to Los Angeles. *See Reports: Kawhi Leonard Demands Trade from San Antonio Spurs*, NBA.COM (June 15, 2018, 1:33 PM), <https://perma.cc/S8UT-WB2R>. However, such cases tend to be limited as teams generally hope to uphold their reputation with the public and the other players.

202. For example, during the Kawhi Leonard holdout saga, the San Antonio Spurs ultimately acceded to Leonard’s demands and traded him to the Toronto Raptors. In return, however, the Raptors received DeMar DeRozan (an All-Star caliber player), Jakob Poeltl (a young, developing player), and a protected 2019 first-round draft pick. Adrian Wojnarowski, *Raptors Acquire Spurs’ Kawhi Leonard for DeMar Derozan*, ESPN (July 18, 2018), <https://perma.cc/UL2Q-VEBH>.

### C. LIMITATIONS OF SELF-HELP SPECIFIC PERFORMANCE AND LIQUIDATED DAMAGES

Self-help specific performance and liquidated damages will only be effective for teams in the short-term. Most obviously, resorting to self-help specific performance can reasonably be expected to preclude, or at least greatly weaken, any future contractual relationship between the parties. A player who is sued or brought to arbitration by the team after completing performance of his contract subject to an incorrect belief that there was a contract modification will likely refuse to re-sign with the team due to the belief that the team engaged in deception. This puts a burden on the team, who will lose the services of the player and probably face some negative reputational side effects that could affect the team's ability to lure other potential free agents in the future.

If, in the trade scenario, a team resorts to trading the player, the most obvious limitation is that the team, in its trade talks with other clubs, might have no choice but to accept less than fair value in return. Specifically, "potential trading partners will be aware of the [team's] need to trade the unhappy player."<sup>203</sup> If the team faces such a stumbling block, the liquidated damages provision itself may seem under-compensatory, as the team failed to receive adequate assets in the trade.

More interesting, however, is the effect that such remedies could have going forward. One possibility is that, once players become aware that teams have the benefits of self-help specific performance and liquidated damages, there will be a gradual shift in the NBA labor market toward shorter-term contracts that are renegotiated more frequently.<sup>204</sup> Although this would eliminate any demands by the player for a trade or a midterm contract renegotiation—and thus preclude holdouts in general—this is unlikely for several reasons. At the team level, short-term renegotiations would dramatically increase negotiating costs as the team would need to sign new contracts with each player every year (or every two years). At the player level, especially for players in the prime of their careers, short-term contracts would eliminate the opportunity to achieve the long-term security granted by signing a supermax (or near-supermax) contract.<sup>205</sup>

Another possibility is that superstars, realizing that their power to bargain for a renegotiation or trade is limited, may attempt to bargain for more money in their original contracts. This possibility is limited, however, by the fact that superstars, who are generally the ones holding out, are likely already receiving the maximum

---

203. Johnson, *supra* note 115, at 107. Such was the case when the Minnesota Timberwolves traded Jimmy Butler to the Philadelphia 76ers.

204. Such a trend may already be in its infancy, with players like LeBron James, who seek flexibility to move teams or benefit from larger contracts (since overall salaries generally increase every year), already signing two-year contracts with teams toward the end of their careers. See Grant Hughes, *LeBron James' Short-Term Contract is Latest Proof He's in a Class by Himself*, BLEACHER REP. (July 9, 2015), <https://perma.cc/B288-TAP6>.

205. See Johnson, *supra* note 115, at 115.

compensation allowed per year under the Salary Cap. Also, market forces may already be in play to implicitly adjust the price of the contracts to reflect the team's risk of a player holdout.<sup>206</sup> Ultimately, teams do not have the inherent ability to demand collectively lower contract values since there will always be one team that is willing to pay the full market value (a "max contract") for the holdout player in order to increase fan attendance or simply to build a championship-level roster. In the end, such negotiations are left to the parties to decide through good-faith bargaining.

#### IV. A LONG-TERM SOLUTION: PLAYER ESCROW ACCOUNTS

The player holdout conundrum can only be solved by leveling the playing field between players and teams relative to the risks undertaken by both parties when a contract is signed. If player holdouts continue their current trajectory, bargaining costs in the NBA will rise significantly. The threat of opportunistic behavior requires "the parties to draft an agreement whose breadth and scope could cost more than the agreement is worth."<sup>207</sup> Hedging against the possibility of an opportunistic holdout, teams could pursue self-help specific performance or liquidated damages. However, in the long-run, the use of both remedies will likely face major impediments as the NBPA will attempt to restrict their use—thereby making bargaining impassable and potential lockouts more likely.<sup>208</sup> Instead, a long-term solution is required that accounts for the needs of both parties in a holdout, has limited transactional costs (including reputational side effects), and is administratively simple to implement.

I propose that player contracts be drafted to provide for a funded Player Escrow Account that will avoid the drawbacks of the short-term remedies and, more importantly, will deter holdouts in the future. Under this proposal, a percentage of the player's salary—perhaps 10% of the player's Base Compensation per year—would be set aside by the team in an escrow account every year and applied exclusively to any future contractual damages suffered by the team as a result of a holdout.<sup>209</sup> It is only once the player has fully performed his obligations (that is, complied with the terms of the contract for its entire duration) that the team will release the full amount held in escrow back to the player.

This strategy attempts to approach Pareto efficiency in bargaining: that state of affairs where no change can make a party better off without making another party

---

206. The Coase Theorem states that under ideal economic conditions, when there is a conflict of property rights, the involved parties can bargain or negotiate terms that will accurately reflect the full costs and underlying values of the property rights at issue, resulting in the most efficient outcome. See Jodi Beggs, *Introduction to the Coase Theorem*, THOUGHTCO (Jan. 17, 2019), <https://perma.cc/2SM5-TCGW>. In other words, if transaction costs are zero, "parties will bargain to an efficient result regardless of the law's initial assignment of entitlements." Lee Anne Fennell, *The Problem of Resource Access*, 126 HARV. L. REV. 1471, 1478 (2013).

207. Johnson, *supra* note 115, at 75.

208. See Rapp, *supra* note 106, at 284–85; see also William B. Gould IV, *The 2011 Basketball Lockout: The Union Lives to Fight Another Day—Just Barely*, 64 STAN. L. REV. ONLINE 51 (2012) (discussing the labor-management conflict behind the 2011 NBA lockout).

209. Considering the existing taxes and fees players are already subject to, as well as another escrow withholding, 10% seems reasonable.



worse off.<sup>210</sup> The player is effectively deterred from holding out as a relatively significant portion of his salary is withheld to ensure proper compliance with the contract. More importantly, the ever-present risk that a player will hold out is spread evenly among the parties to the transaction: Players will continue to receive their desired protection and security by signing the long-term, multi-million-dollar contracts offered to them in the market, while teams will be protected from a holdout since the inherent risk of nonperformance is accounted for in the contract up front.

Naturally, the Player Escrow Account has significantly more deterrent power nearing the end of the contractual term than at the beginning, particularly because the player's withholdings have accumulated quite significantly by that point. For example, a player entering the final year of his five-year contract and who has had his earnings withheld for the previous four seasons will likely choose to play out the final season to retain his entire contractual salary amount.<sup>211</sup> However, a player with a similar contract but who is instead entering the third year of its term will only have had two years' worth of salary withheld. In the latter case, the player is still financially better off playing out the remaining years on his contract rather than holding out. If he holds out, not only will he be entitled to merely a portion of the earnings for the seasons in which he did play, but he will also be preempted from receiving his salary for the years remaining on his contract.<sup>212</sup> This means the team will have effectively received his services for the years in which he played at a discounted rate compared to what the market would have offered him. Since the player's opportunity cost is significant here, he will likely choose to finish out his existing contract.<sup>213</sup>

There is also less need for a team to withhold a player's salary in an escrow account when the contract term is short, since a player will choose to play out the few remaining years left on his contract to retain his full salary amount. Player Escrow Accounts should therefore only be applied to contracts greater than two or three years in length, after which the accumulation of the player's withheld salary is significant enough to deter the player from holding out. Of course, the Player Escrow Account would need to be mandated league-wide in the CBA and UPC to preclude teams that choose not to adopt the provision—and that are consequently willing to take the risk of a player holding out—from having a significant bargaining advantage in attracting and recruiting free agents compared to teams that voluntarily adopt the model. In addition, league-wide implementation further prevents opportunistic

---

210. Peter Linzer, *On the Amoralty of Contract Remedies—Efficiency, Equity, and the Second Restatement*, 81 COLUM. L. REV. 111, 113 (1981). For more information regarding Pareto efficiency, see Ally Mintzer, *Rethinking Pareto Efficiency*, BERKELEY ECON. REV. (Dec. 3, 2020), <https://perma.cc/VED4-A2VH>.

211. Athletes do not generally hold out during the first two years of their contracts. This is mainly because when a player decides to sign a long-term deal, he does so after considering all the circumstances, including the team's future outlook and his future earning capacity. See Matt Bowen, *Seven Factors That Affect Where Free Agents Sign*, ESPN (Mar. 8, 2016), <https://perma.cc/ZBH6-68YD>.

212. See *supra* Part III.C as to why holdouts constitute a breach of contract.

213. Opportunity cost refers to “the value of the next-highest-valued alternative use of [a] resource.” David R. Henderson, *Opportunity Cost*, LIBRARY OF ECONOMICS & LIBERTY, <https://www.econlib.org/library/Enc/OpportunityCost.html>.

demands by the players' agents to negotiate the term out of the contract, as doing so would require amending the CBA, which is generally negotiated only once every six years.<sup>214</sup>

The Player Escrow Account model is based on the assumption that teams and players will bargain in good faith. However, circumstances may arise wherein superstars will be unwilling to accept Player Escrow Accounts during CBA negotiations on the basis that superstars are a group identifiably different from the average players and would (perhaps unfairly) be subject to much larger withholdings than non-superstars.<sup>215</sup> Despite this reality, the NBPA has successfully reconciled conflicting interests between the elite and non-elite before, namely every time a new CBA is negotiated. For example, the Salary Cap places the financial interests of superstars—who want to be paid their market value—at odds with other players,<sup>216</sup> yet superstars yield to such restrictions for the same reason as non-superstars: to receive employment benefits and guaranteed salaries.<sup>217</sup>

Therefore, I do not anticipate that a conflict of interest between superstars and non-superstars will preclude the implementation of Player Escrow Accounts. It is true that the NBPA must ultimately rely on the unselfish attitude of star players during CBA negotiations since they are the ones attracting fans and drawing in revenue for teams and the league. However, the NBPA represents the interests of *all* players and enough common factors exist to unify the players for purposes of bargaining with owners, such as the universal need for pension plans, insurance plans, adequate schedules and working conditions, and proper travel arrangements.<sup>218</sup> Player Escrow Accounts are likewise beneficial to superstars and non-superstars alike, as well as to owners and the NBA, in achieving deal certainty and accountability.

Furthermore, there is an indirect benefit to Player Escrow Accounts that could facilitate its implementation in the CBA and UPC.<sup>219</sup> Specifically, a funded escrow account would not only deter holdouts due to a player's loss aversion, but it would also serve as a savings vehicle for players who choose not to breach their contracts

214. The current CBA contains a mutual opt-out provision after six years. See David Aldridge, *NBA, NBPA Reach Tentative Seven-Year CBA Agreement*, NBA.COM (Dec. 14, 2016 8:18 PM), <https://perma.cc/ZE46-HT72>.

215. For example, under the 10% Player Escrow Account model I propose, Stephen Curry would be subject to a withholding of over \$4.3 million for the 2020–21 NBA season whereas rookie Anthony Edwards would only be subject to approximately \$957 thousand in withholdings.

216. As one author has framed the issue:

Rules that determine how teams must spend within the salary cap have historically hurt superstar players. At their true market value, players like LeBron James are worth much more than thirty-five percent of the salary cap. The salary cap and related provisions artificially devalue superstar players, but the implementation of policies like maximum contracts enables teams to pay their non-superstar players higher salaries.

Grace Fenwick, *Conflicts of Interest and the NBA's Collective Bargaining Agreement*, BOWDOIN REV. (May 3, 2017), <https://perma.cc/VJX2-LFP3>.

217. Epps, *supra* note 14, at 353.

218. Note, *The Balance of Power in Professional Sports*, 22 ME. L. REV. 459, 474–75 (1970).

219. See generally J. Haskell Murray, *Morality Clauses and Escrow Accounts in Sports Contracts*, 17 VA. SPORTS & ENT. L.J. 119, 131–32 (2018).

by holding out.<sup>220</sup> The personal finances of professional athletes have recently become a topic of widespread discussion due to the high rates of personal bankruptcy, especially in the NBA, where an estimated 60% of former NBA players face financial distress within five years removed from the league.<sup>221</sup> The funded escrow account would therefore protect against some of these vulnerabilities, as a player will, by nature of the withholding, understand that he has less disposable income to spend after signing a new contract.<sup>222</sup> The Player Escrow Account indirectly promotes financial responsibility in this way, as players must be more conscious about how much they spend over the course of their contracts.

The Player Escrow Account may appear very similar to liquidated damages, as both are remedial attempts to provide team protection from a contractual breach via a predetermined amount in damages. However, the main advantage of the escrow account is its timing. Whereas the liquidated damages clause requires *ex post* recovery after the breach has occurred, the escrow account is administratively simpler to enforce since a portion of the player's salary has already been withheld from the date the contract was signed. Litigation can practically be avoided so long as the percentage withheld in escrow is reasonable—again, this would require bargaining at the CBA level and approval from both the NBA and the NBPA.<sup>223</sup> Thus, Player Escrow Accounts avoid the threatening perception that “damages” carry and the negative reputational side effects resulting from a team suing a player.<sup>224</sup>

## V. CONCLUSION

The inadequacy of the current remedial structure of our judicial system in dealing with holdouts has made it quite simple for athletes to engage in opportunistic behavior. Holdouts have become more common in professional sports recently and players have generally been able to get away with such behavior, with the team acceding to their requests for a trade or a midterm contract renegotiation. League-wide sanctions are ineffective and create an unfriendly working relationship between the league and the NBPA. Public condemnation, when present, has historically failed

---

220. See Ed Flynn, *Bankruptcy by the Numbers: Bankrupt Professional Athletes*, 33 AM. BANKR. INST. J. 52 (2014) (exploring the cases of various well-known, highly paid athletes who have filed bankruptcy due to the poor management of earnings throughout their careers).

221. Chris Dudley, *Money Lessons Learned from Top Pro Athletes' Financial Fouls*, CNBC (May 14, 2018, 7:53 AM), <https://perma.cc/27QH-KMAC>; see also Dave Feschuk, *NBA Players' Financial Security No Slam Dunk*, TORONTO STAR (Jan. 31, 2008), <https://perma.cc/E38W-XJSH>.

222. Players are subject to several hidden costs that significantly reduce the true value of their deals. These costs include payment of federal and state income taxes, taxes on nonresident athletes (i.e., the “jock tax”), and agency fees (which can range from 1% to 4% of a player's contract). See Nathan Ocampo, *How Much NBA Players Actually Make After Taxes and Agent Fees*, CLUTCHPOINTS.COM (June 12, 2020), <https://perma.cc/LUG6-3TBN>.

223. A player may still opt to litigate the issue for the same reason as in the liquidated damages context. The sheer fact is no player wants to give up a portion of their salary, even if they know they are in breach of their contract.

224. See generally John Hollinger, *How Escrow and Smoothing Can Help Manage the NBA's Salary Cap Problem*, ATHLETIC (May 18, 2020), <https://perma.cc/V9J8-C8EN>.

to deter most players from holding out.<sup>225</sup> And, although teams can pursue traditional remedies within the courts, such solutions generally fail to make teams whole or prevent future holdouts from occurring.

This Note advocates for simple short- and long-term solutions to the player holdout complex. Self-help specific performance and liquidated damages can be used to thwart players from exploiting their bargaining positions to benefit from an unseemly wealth transfer different than the one originally agreed upon. These remedies will likely prove successful in the short-term, after which players will leverage their popularity to negotiate such terms out of the CBA.

The Player Escrow Account overcomes many of the drawbacks of the short-term solutions through efficient use of resources. Its ability to leverage loss aversion at the time of contractual signing serves as a significant deterrent against holdouts. More importantly, the escrow account avoids many of the logistical implementation issues of other remedies because the clause is advantageous to both teams and players: Teams receive downward protection from a holdout and players receive their desired long-term, multi-million-dollar contracts.

---

225. For example, Kawhi Leonard was harshly criticized by commentators and fans for how he handled his holdout situation with the San Antonio Spurs, with many casting him as a “traitor.” However, this did not deter him from holding out and, ultimately, being traded to the Toronto Raptors. See Tim Cato, Kristian Winfield & Mike Pradas, *A Complete Timeline of How the Relationship Between Kawhi Leonard and the Spurs Fell Apart*, SBINATION.COM (Jan. 3, 2019, 10:38 PM), <https://perma.cc/X84E-B74F>.