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An Alternative Approach to the Problem of Midterm Demands for Contract Renegotiation in the National Football League: The Incentive-Based Contract

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AN ALTERNATIVE APPROACH TO THE PROBLEM OF MIDTERM DEMANDS FOR CONTRACT RENEGOTIATION IN THE NATIONAL FOOTBALL LEAGUE: THE INCENTIVE-BASED CONTRACT

I. INTRODUCTION

In this day of the multipurpose, multiyear, and multimillion dollar contract, the average football fan marvels at how much National Football League ("NFL") players earn to hit the gridiron. As a result of these lucrative contracts, it is only natural for fans to develop certain expectations as to the quality and consistency of the product displayed throughout the grueling seventeen-week regular season and the ensuing playoffs. These expectations go unfulfilled when players strike, either collectively or individually. This Comment addresses the specific situation in which a player, in the middle of his contract term, demands renegotiation.

When popular players hold out due to a demand for contract renegotiation, not only are the fans deprived of watching their favorite players perform, but many also sense a degree of unfairness. How can a player sign a four-year contract and, after playing well for two years, demand a better, more lucrative contract? Surely, it would not be fair for an architect, who contracted to build a four-story building for $4 million, to threaten to walk off the job after completing the first two floors unless the owner promised to pay an additional $2 million.[1]

A basic interpretation of contract law reveals that such a midterm demand for contract renegotiation might constitute a breach of contract. For example, two parties form a contract, during the term of which, one of the parties demands a better deal, effectively holding the other hostage in order to improve the bargain. This Comment contends that all concerned parties are harmed in some way by this midterm demand for contract renegotiation. The controversy harms the athlete who does not perform, the team that loses a player, and the fans who have spent large sums of

1. *See* E. ALLEN FARNSWORTH, CONTRACTS, § 4.21, at 287 (2d ed. 1982); *see also infra* Part IV.B.1. In fact, such a demand may be permissible if prompted by the discovery of unanticipated circumstances. RESTATEMENT (SECOND) OF CONTRACTS § 89 (1981).

money on tickets, concessions, and parking to watch their favorite players perform. The end result is an arguably inferior NFL product.

When a player breaches his contract by demanding a midterm renegotiation and withholding performance, traditional contract remedies require court action.[2] These remedies, however, are either inefficient, ineffective, or cumbersome because the team wants the player on the field immediately while the player is steadfast in his demand for more money. Thus, a solution that ends the stalemate without delay is required to satisfy both parties.

This Comment proposes an alternative to the traditional remedies for dealing with a demand for a midterm contract renegotiation: the incentive-based contract ("IBC"). In its simplest form, the IBC is a contract a team can offer its disgruntled player that is based primarily on the player's on-field performance. An IBC provides the player with the league's minimum base salary and then adds performance incentives. Thus, the better a player performs statistically, the more he will be compensated. Conversely, he is paid less for a poor performance. This system improves upon the fairness of the typical contract renegotiation because with an IBC, both parties take a risk by renegotiating. In the standard renegotiation scenario, the player receives more money and a longer contract term.[3] The player is paid regardless of his performance.[4] Although the team always has the option of cutting the player, that option is not realistically available when the player is of the stature of Jerry Rice, Brett Favre, or Emmitt Smith.[5] In other words, when a team agrees to renegotiate a superstar's contract, it is forced to accept the risk that the player may not meet all expectations.

Both parties assume a degree of risk with the IBC. If the player performs beyond expectations, he will be compensated accordingly; if the player performs below expectations, he is paid less. The team therefore avoids the frustrating situation in which a player has two or three exceptional years, obtains a renegotiated contract that pays him at a level commensurate with the league's elite, and then flounders in mediocrity. With the IBC, everyone has the chance to win. This type of contract potentially compensates the player at the level commensurate with his

2. *See* Alex M. Johnson, Jr., *The Argument for Self-Help Specific Performance: Opportunistic Renegotiation of Player Contracts*, 22 CONN. L. REV. 61, 77–92 (1989) (discussing traditional remedies such as affirmative and negative injunctions and constructive trusts).

3. *Id.* at 94.

4. *Id.* at 117.

5. Such players are indispensable not only to the team's on-field success but also to the team's ability to generate revenue.

accomplishments, ensures that the team receives the player's on-field performance, and delivers to the fans top-level NFL excitement.

Part II of this Comment discusses the fundamental principles of contract law implicated by a midterm demand for a renegotiated contract. Part III reviews the historical evolution of the player-owner relationship in the NFL, focusing on the state of the NFL today, specifically the NFL's hard salary cap and its implications for the IBC. Part IV examines the components of a typical NFL contract, including the absence of guarantees and the use of deferred compensation and escalator clauses. Part V analyzes the current state of contractual negotiations in the NFL by focusing on holdouts, demands for midterm renegotiations, and the problem of "one-year wonders." Part VI presents the IBC, compares it to the typical NFL contract today, and applies it to a recent midterm demand for renegotiation. Part VI also addresses the problems of drafting bonus and incentive provisions. Part VII discusses the viability and the potential disadvantages of implementing the IBC into a NFL player contract. Finally, this Comment concludes that the introduction of the IBC into the NFL may have the indirect effect of diminishing the frequency of midterm demands for renegotiation.

II. IMPLICATIONS OF CONTRACT LAW ON THE IBC

When a player demands renegotiation, various contract law principles are implicated, such as consideration, the pre-existing duty rule, and the law of modification of executory contracts. Therefore, before the IBC can be presented and analyzed, it is important to address how the law of contracts affects the viability of the IBC in the NFL.

A. The Problem of Consideration

One of the fundamental components of any contract is consideration.[6] In the case of a renegotiated contract, consideration given to the team by the player is normally in the form of an extension of the contract period.[7] This extension will fulfill any of the additional requirements raised in contract law.[8] However, because the IBC does not necessarily extend the

6. RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981). "To constitute consideration, a performance or a return promise must be bargained for." *Id.* § 71(1).

7. Johnson, *supra* note 2, at 94.

8. For a complete explanation of the preexisting duty rule, see *infra* Part II.B; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 89 (1981).

length of the player's commitment to the team, the contract may have to provide some other form of consideration to be a valid modification.[9]

The consideration supporting an IBC is the contract's risk allocation to both the player and the team, a matter bargained for between the two. The team risks that the player will perform beyond expectations and be entitled to collect a huge salary. On the other hand, the player risks that he will have an off-season and earn a smaller salary.

Do these mutual risks adequately constitute valid consideration? It is a well-recognized principle of contract law that courts will not examine the adequacy of consideration.[10] Restatement (Second) of Contracts, section 79 expressly provides that "[i]f the requirement of consideration is met [i.e., bargained for mutual inducement], there is no additional requirement of . . . equivalence in the values exchanged."[11] The rationale underlying section 79 is that, in many contracting situations, "there is no reliable external standard of value."[12] Therefore, the courts defer to the judgment of the private, contracting parties to determine the value of the consideration, as they are more qualified to evaluate the circumstances of particular transactions.[13] This difference is particularly applicable when one or both of the values exchanged are difficult to quantify.[14] Thus, so long as the risks taken by the player and the team in the IBC are mutually induced and bargained for, there should be no consideration problems that could potentially void the contract.

9. RESTATEMENT (SECOND) OF CONTRACTS § 73 (1981).

10. Johnson, *supra* note 2, at 95 n.131 (citing Carrol v. Lee, 712 P.2d 923, 926–27 (Ariz. 1986) (en banc) ("[I]t is of no consequence that the parties exchanged 'unlike services'. Any performance which is bargained for is consideration . . . and courts do not ordinarily inquire into the adequacy of consideration."); *see also* Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 325 (1981) (noting the "general contract principle that courts should not inquire into the adequacy of consideration")); Hamer v. Sidway, 27 N.E. 256, 257 (N.Y. 1891) ("Courts will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to any one. It is enough that something is promised . . . by the party to whom the promise is made as consideration for the promise made to him.") (citation omitted); FARNSWORTH, *supra* note 1, § 4.21, at 274 (noting that a court "will not generally inquire into the fairness of the exchange").

11. RESTATEMENT (SECOND) OF CONTRACTS § 79 (1981); *see also* FARNSWORTH, *supra* note 1, § 2.11, at 67 n.4 ("The Restatement Second . . . rejects any requirement of 'adequacy.'").

12. RESTATEMENT (SECOND) OF CONTRACTS § 70 cmt. c (1981).

13. *Id.*

14. *Id.*

B. The Pre-Existing Duty Rule

The pre-existing duty rule[15] provides that if the promisor does not provide something of additional or different value to the promisee, then the modification of the original contract is not supported by consideration and is therefore invalid.[16] The rule was developed "[b]ecause of the likelihood that the promise was obtained by an express or implied threat to withhold performance of a legal duty . . . ."[17]

Although a player's holdout could be classified as an "express threat to withhold performance," the application of the pre-existing duty rule can easily be avoided in the typical contract renegotiation by extending the period of performance.[18] This serves a dual purpose. First, as discussed above, it constitutes additional consideration. Second, a court is unlikely to consider such a modification as a "pretense of bargain" because the extension has value to the team.[19]

However, the lengthening of the player's contractual obligation to the team is rendered irrelevant by the IBC because, by its terms, the IBC satisfies the rule's consideration and bargain requirements.[20] First, the IBC satisfies the consideration requirement by altering the allocation of risk between the team and player: each risks receiving or losing substantial sums of money. Second, the IBC fulfills the bargaining requirements of the pre-existing duty rule.[21] Typically, the consideration and the promise

15. "Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration; but a similar performance is consideration if it differs from what was required by the duty in a way which reflects more than a pretense of bargain." *Id.* § 73 (1981).

16. Angel v. Murray, 322 A.2d 630, 634 (R.I. 1974) ("Under this [preexisting duty] rule an agreement modifying a contract is not supported by consideration if one of the parties to the agreement does or promises to do something that he is [already] legally obligated to do. . . .") (citations omitted); *see also* Alaska Packers' Ass'n v. Domenico, 117 F. 99 (9th Cir. 1902).

17. RESTATEMENT (SECOND) OF CONTRACTS § 73 cmt. a (1981).

18. In other words, in a contract renegotiation not involving an IBC, the parties can avoid the preexisting duty rule by extending the length of the contract. *See* FARNSWORTH, *supra* note 1, § 4.21, at 289; *see also* Johnson, *supra* note 2, at 96.

19. Johnson, *supra* note 2, at 95.

20. RESTATEMENT (SECOND) OF CONTRACTS § 73 (1981). Also, the courts have become very critical of the preexisting duty rule. FARNSWORTH, *supra* note 1, at 290. One of the grounds for the courts' hostility is the idea of express threats to discontinue performance. *Id.* Specifically, the rule fails to distinguish between the situation in which the promisor demands more money because of opportunism and greed and the situation in which the demand is prompted by the occurrence of some unforeseen circumstances that makes the promisor's performance increasingly burdensome. *Id.*

21. RESTATEMENT (SECOND) OF CONTRACTS § 73 (1981). "[B]ut a similar performance is consideration if it differs from what was required by the duty in a way which *reflects more than a pretense of bargain.*" *Id.* (emphasis added).

maintain a reciprocal relationship of motive and inducement: the consideration engenders the making of the promise, and the promise induces the furnishing of the consideration.[22] In a renegotiation involving an IBC, the team agrees to modify the player's compensation structure[23] in order to induce the player's "promise" to return to the playing field. Therefore, although the player's additional consideration[24] will be in the form of "similar performance" for the purposes of the pre-existing duty rule, the performance incentives included in the IBC reflect much more than a "pretense of bargain."[25]

III. THE EVOLUTION OF THE PLAYER-OWNER RELATIONSHIP

A. A Brief History

Prior to the era of free agency and high-priced contracts, the professional athlete was essentially an indentured servant to his team and its owner.[26] In the "good old days," a player's freedom to choose to whom he would provide his services was severely restricted by the owner of his contract rights. Essentially, a player was forced to stay with the same team throughout his career.[27] Rarely did a player ever change teams. When he did, the move was at the discretion of the team or owner.[28]

Player-owner relations have changed dramatically since the no-free-agent days of the 1960s and early 1970s. Throughout the 1970s and 1980s, the players chipped away at the owners' leverage over their freedom to contract by filing various antitrust and labor suits against the league.[29]

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22. RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b (1981).

23. *See infra* Part VI.C.

24. Assuming that the player does not bargain for an extension of the contract term, the player's additional consideration will be his on-field performance.

25. RESTATEMENT (SECOND) OF CONTRACTS § 73 (1981).

26. *See* Johnson, *supra* note 2, at 69 ("Players had very little right to contract freely with employers with respect to the terms and the conditions of their employment.").

27. For example, Jim Brown's entire career was with the Cleveland Browns. OFFICIAL NATIONAL FOOTBALL LEAGUE 1996 RECORD & FACT BOOK 260 (Chris McCloskey & Chuck Garrity, Jr. eds., 1996) [hereinafter 1996 RECORD & FACT BOOK].

28. The most obvious example is a voluntary trade. In 1959, the Chicago Cardinals traded future Hall of Fame Member Ollie Matson to the Los Angeles Rams for nine players. BEAU RISSENBURGH, OFFICIAL NFL ENCYCLOPEDIA 132 (3d ed. 1986). Another option at the team's discretion is to allow the player to become a free agent after his performance has deteriorated. An infamous example is the New York Jets allowing Joe Namath to leave to join the Los Angeles Rams. *Id.* at 151.

29. *See* Mitch Truelock, *Free Agency in the NFL: Evolution or Revolution?*, 47 SMU L. REV. 1917 (1994) (analyzing the history of player suits against the NFL).

These suits resulted in the modern sports athlete gaining unprecedented levels of mobility. Through the creation and implementation of the free agency system, many modern NFL players seemingly have the leverage to decide when they will play, for whom, and how much they will earn. However, this freedom has been tempered in recent years by the imposition of new, more subtle restrictions on player mobility, most notably the salary cap.[30] The restrictions of the salary cap upon how much each NFL team can spend on player costs is a crucial factor that must be considered before attempting to implement the IBC.

B. The NFL Today

1. The Salary Cap: What Is it? How Does it Work?

As a result of the players' legal successes in various antitrust and labor suits, free agency was instituted in the NFL in 1993.[31] However, in order to secure free agency for its members, the players union was forced to accept many restrictive provisions limiting the degree to which a player can be considered a "free" agent.[32] Perhaps the most restrictive of the accepted regulations was the introduction of the salary cap.[33] Essentially, a salary cap sets a ceiling on the amount any one team may spend on its players within a given year, effectively limiting the number of teams with which a player may negotiate.[34] The salary cap amount is determined by the NFL's defined gross revenues ("DGR"),[35] which consists of gate

30. *See* Brian E. Dickerson, *The Evolution of Free Agency in the National Football League: Unilateral and Collective Bargaining Restrictiveness*, 3 SPORTS L.J. 165, 182 (Spring 1996).

31. The last in the line of the players' antitrust suits to gain free agency was *White v. National Football League*, 822 F. Supp. 1389 (D. Minn. 1993), *aff'd*, 41 F.3d 402 (8th Cir. 1994). The case was resolved by a settlement agreement between the NFL Players Association ("NFLPA") and the NFL Management Council. Dickerson, *supra* note 30, at 181–82. The *White* settlement agreement became the blueprint for the 1993–2000 National Football League-NFLPA Collective Bargaining Agreement. *Id.*

32. Dickerson, *supra* note 30, at 182.

33. NFL Collective Bargaining Agreement 1993–2000, art. XXIV (1993) [hereinafter CBA]. "The introduction of a salary cap into the NFL is unquestionably the most sweeping change brought by the 1993 CBA." GARY UBERSTINE, LAW OF PROFESSIONAL AND AMATEUR SPORTS § 6.05, at 6-18 (1996).

34. *See* Bridgeman v. National Basketball Ass'n, 838 F. Supp. 172, 177 (D.N.J. 1993).

35. CBA, *supra* note 33, art. XXIV, § 1(a)(i).

receipts,[36] luxury box revenues,[37] and broadcast rights.[38] For example, during the 1995–96 season, the salary cap was approximately $42.05 million per team.[39] The $42.05 million figure was calculated by taking sixty-three percent[40] of the NFL's projected DGR, which was more than $2 billion.[41] Dividing that total by the thirty NFL teams[42] yields the salary cap value of $42.05 million per team.

2. The NFL's Hard Salary Cap

There are two types of salary caps used in professional sports today: a "hard" cap and a "soft" cap.[43] A hard cap establishes a predetermined limit on the amount a team may pay its players; it may not exceed that amount under any conditions.[44] A soft cap sets a maximum amount a team can spend, but permits the team to exceed the cap under specific circumstances.[45] In the NFL, the owners and players have agreed to employ a hard salary cap. However, the rigidity of the hard cap system has been challenged in recent years by owners who have exploited loopholes in the system.[46]

The basic logic underlying the salary cap system assumes a free agent will attempt to maximize his market value by signing with the team that has the most salary cap room. In other words, the team with the most salary cap room will have the resources to offer a free agent the most lucrative contract with the longest term. Therefore, by imposing a salary cap on their respective teams, the owners essentially exploit a free agent's self-

36. *Id.* art. XXIV, § 1(a)(i)(1).

37. *Id.*

38. *Id.* art. XXIV, § 1(a)(i)(2). However, DGR does not include franchise sales, expansion fees, concessions, parking, advertising, corporate sponsorship, or merchandising. *Id.* art. XXIV, § 1(a)(ii).

39. MARTIN J. GREENBERG, 1 SPORTS LAW PRACTICE § 1.07(10), at 86 (Supp. 1996) [hereinafter SPORTS LAW PRACTICE 1996]. The $42 million figure is broken down into $37.1 million for salaries and $4.95 million for benefits. *Id.*

40. CBA, *supra* note 33, art. XXIV, § 4(a)(2).

41. SPORTS LAW PRACTICE 1996, *supra* note 39, § 1.07(10), at 86.

42. 1996 RECORD & FACT BOOK, *supra* note 27, at 275.

43. Alan M. Levine, *Hard Cap or Soft Cap: The Optimal Player Mobility Restrictions for the Professional Sports Leagues*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 243, 246 (1995). *See id.* (examining both the NFL and the NBA salary caps).

44. *Id.* at 245.

45. *Id.* at 245–46.

46. *See infra* Part IV.A.

interest by establishing incentives that encourage a player to negotiate only with teams who have sufficient amounts available under the cap.[47]

3. The Hard Cap and the IBC

The CBA expressly permits the renegotiation of player contracts subject to various restrictions.[48] The first renegotiation of a veteran player[49] contract may take place at any time prior to the expiration of the contract term.[50] However, any subsequent attempt by the veteran player to renegotiate his salary is prohibited for a period of twelve months subsequent to his most recent contract renegotiation.[51]

Relevant to this Comment is the valuation of player contracts, specifically bonuses and incentives, under the hard cap system.[52] Included in the calculation of a team's player costs are base salaries,[53] signing bonuses,[54] roster bonuses, reporting bonuses, workout bonuses, deferred compensation,[55] and any other bonuses that are "likely to be earned."[56] Bonus and incentive clauses are considered "likely to be earned" for salary cap purposes based upon whether the player could have satisfied the same

47. *See generally* Levine, *supra* note 43. Of course, the exploitation of a player's self interest was not the stated purpose of the salary cap as outlined in the CBA. *See also* QUESTIONS AND ANSWERS ON THE NFL PLAYER SYSTEM (NFL Public Relations ed., Nov. 1994), at 1 (on file with the *Loyola of Los Angeles Entertainment Law Journal*) ("The system is designed to . . . [create] a level playing field that [will] enable all clubs to compete effectively for players and ensure some continuity.").

48. CBA, *supra* note 33, art. XXIV, § 9.

49. A veteran player is "a player who has signed at least one Player Contract with an NFL Club." *Id.* art. I, § 2(ai).

50. *Id.* art. XXIV, § 9(a).

51. *Id.* For the purposes of the IBC, these restrictions will not be significant factors. By definition, the players who will use the IBC are those seeking a midterm renegotiation of their contract after playing at least one NFL season. Typically, such players will not demand renegotiation until at least two years after signing their original contract. *See, e.g.*, *infra* Part IV.C for additional discussion.

52. CBA, *supra* note 33, art. XXIV, § 7.

53. *Id.* art. XXIV, § 1(c).

54. *Id.* art. XXIV, § 7(b)(iv)(1). It should be noted that the league uses an expansive definition of "signing bonus." UBERSTINE, *supra* note 33, § 6.05[2], at 6-19. Thus, other than the items listed in the CBA, items such as "guaranteed workout bonuses . . . and reporting or roster bonuses earned or paid before the start of the club's preseason training camp" are considered signing bonuses for the purposes of the salary cap. *Id.*; *see also id.* app. 6B, side letter E, ¶¶ 3, 4, 6. For the purposes of the salary cap, a player's signing bonus is prorated over the term of the contract. CBA, *supra* note 33, art. XXIV, § 7(b)(i).

55. CBA, *supra* note 33, art XXIV, § 7(a)(ii).

56. *Id.* art. XXIV, § 7(c)(i). "Any incentive within the sole control of the player (e.g., non-guaranteed reporting bonuses, off-season workout and weight bonuses) shall be deemed 'likely to be earned.'" *Id.*

clauses in the prior year. If so, then they count toward the team salary in the current year's salary cap.[57] Thus, the team drafting an IBC is confronted with a challenge: create incentives that are not "likely to be earned" so that any money earned by the player will not be counted against the cap, yet still attractive enough so the player believes he can attain the incentive.[58]

For example, if Detroit Lions running back Barry Sanders demanded a midterm contract renegotiation, the team could conceivably draft an IBC providing Sanders with $5 million for rushing 2000 yards in the 1997 season. Because such an incentive is not likely to be earned, Sanders would never realistically agree to such a deal.[59] Instead, Sanders would negotiate for a rushing total more likely to be earned, perhaps 1300 yards, but demand "only" $2.5 million.[60] This example illustrates how the IBC takes advantage of the diametrically opposed interests involved in a midterm demand for contract renegotiation. The player wants as much money as possible, regardless of his productivity. The team, on the other hand, wants to pay as little money for as much performance as it can get from the player. The result of these clashing interests will be a compromised contract with terms agreeable to both parties.

IV. THE TYPICAL NFL CONTRACT TODAY

Each team must sign all of its players to contracts and compensate them without violating provisions of the salary cap. In a typical NFL player contract, a player's compensation can be divided into two major components: the "front end" of the contract and the "back end" of the contract.[61] The front end contains the vast majority of the money,

57. UBERSTINE, *supra* note 33, § 6.05[2], at 6-20.

58. A further concern for the team is the penalty imposed for exceeding the salary cap when performance bonuses are paid at the end of the season. The amount by which the team exceeds the cap is deducted from the team's salary cap for the next League year. CBA, *supra* note 33, art. XXIV, § 7(c)(iii).

59. In the history of the NFL, only two running backs have rushed for 2000 or more yards in a season: O.J. Simpson rushed for 2003 yards in 1973 and Eric Dickerson rushed for 2105 yards in 1984. 1996 RECORD & FACT BOOK, *supra* note 27, at 375.

60. Sanders would be able to cut his demand in half because the amount lost would be offset by the extra money earned from his other bonus and incentive clauses. *See infra* Part V.C for more examples of performance incentives.

61. UBERSTINE, *supra* note 33, § 6.04[2], at 6-8.

including the signing bonus, base salary, roster bonus, and reporting bonus.[62] The back end contains the incentive clauses.[63]

A. The Front End of the Contract

1. The Signing Bonus

The signing bonus is the amount of money received by the player for merely executing a contract with the team.[64] The player and his agent will always attempt to maximize the signing bonus because it is not based on the player's performance and is typically the only guaranteed payment the player receives.[65] Thus, if a player has insufficient skill or is injured and not able to remain with his NFL team, the signing bonus is not forfeited or diminished in value.[66]

The signing bonus is often amortized over the course of the player's contract.[67] For example, in his most recent four-year, $19 million contract with the Denver Broncos, quarterback John Elway received a $6 million signing bonus.[68] The bonus is paid in the following manner: $600,000 immediately upon signing the contract, $650,000 in 1995, $4.25 million in 1996, and $500,000 in 1997.[69] For a rookie player, the signing bonus is determined as a function of his draft status and the length of the contract.[70] For example, Ki-Jana Carter, the first player selected in the 1995 NFL draft, was given a $7.125 million signing bonus.[71] In comparison, the last

62. *Id.*; *see also* MARTIN GREENBERG, 1 SPORTS LAW PRACTICE § 4.08(5)(c), at 320 (1993) [hereinafter SPORTS LAW PRACTICE 1993]. An illustrative example of a front end weighted player contract is Jerry Rice's new seven-year, $32 million contract with the San Francisco 49ers signed in 1996. Rice's deal included a $4 million signing bonus with reporting and roster bonuses worth approximately $10 million. Over the term of the contract, Rice's base salaries are worth nearly $18 million. *New Rice Contract Worth $32 Million*, L.A. TIMES, Aug. 29, 1996, at C7. Rice's contract is unusual in that all of the money is in the front end.

63. *See supra* Part III.B.

64. UBERSTINE, *supra* note 33, § 6.04[2][b], at 6-9; *see also* SPORTS LAW PRACTICE 1993, *supra* note 62, § 4.08(5)(c)(i)(A), at 320.

65. SPORTS LAW PRACTICE 1993, *supra* note 62, § 4.08 (5)(c)(i)(A), at 320.

66. UBERSTINE, *supra* note 33, § 6.04[2][b], at 6-9.

67. An amortization plan for the payment of a bonus is one in which partial payments of the principal are made at stated periods for a definite time. At the expiration of the stated period, the entire bonus will have been paid. BLACK'S LAW DICTIONARY 83 (6th ed. 1990).

68. SPORTS LAW PRACTICE 1996, *supra* note 39, § 4.08(1), at 162 n.57 (citing Larry Weisman, *Elway Receives $6M Just to Sign*, USA TODAY, Mar. 17, 1993, at 3C).

69. *Id.*

70. SPORTS LAW PRACTICE 1993, *supra* note 62, § 4.08(5)(c)(i), at 321; UBERSTINE, *supra* note 33, § 6.04[2][b], at 6-10.

71. SPORTS LAW PRACTICE 1996, *supra* note 39, § 4.08(1)(b), at 178 (citing *Comparing Pay*

player selected in the first round of the 1995 draft, Craig Newsome, received "only" an $825,000 signing bonus from the Green Bay Packers.[72]

2. The Base Salary

A player's base salary,[73] set forth in every NFL Player Contract,[74] is the amount the team pays the player on a weekly or biweekly basis.[75] Because the base salary is paid in periodic installments, and there is always a possibility that the player will be cut from the team, there is no assurance that he will receive the entire salary until he successfully completes the season.

3. The Reporting Bonus

The reporting bonus is the payment made upon the player's reporting to training camp.[76] From the team's perspective, a reporting bonus serves to reduce the temptation for players to hold out, demand renegotiations, or strike.[77] From the player's viewpoint, a reporting bonus is one of his most important payments, second only to the signing bonus, in terms of security.[78] Should the player perform poorly during preseason training camp and subsequently be released, he will, at the minimum, collect any signing and reporting bonuses included in his contract.[79]

4. The Roster Bonus

The roster bonus is the amount of compensation the player receives if he fulfills the team's roster requirements.[80] Generally, a player receives a one-time bonus for spending a predetermined number of games during the season on the team's active or playing roster.[81]

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by Draft Position, USA TODAY, Aug. 7, 1995, at 8C).

72. *Id.*

73. For clarity, the base salary should be distinguished from the general term salary. "As used in the CBA, salary generally refers to the total compensation a player receives in the particular year that will count toward the overall salary cap." UBERSTINE, *supra* note 33, § 6.04 [2][a], at 6-9; *see also* CBA, *supra* note 33, art. I, § 1(k).

74. CBA, *supra* note 33, at app. C, ¶ 5 (NFL Player Contract).

75. *Id.* app. C, ¶ 6.

76. UBERSTINE, *supra* note 33, § 6.04[2][c], at 6-10; SPORTS LAW PRACTICE 1993, *supra* note 62, § 4.08(5)(c)(i)(B), at 324.

77. SPORTS LAW PRACTICE 1993, *supra* note 62, § 4.08(5)(c)(i)(B), at 324.

78. UBERSTINE, *supra* note 33, § 6.04[2][c], at 6-10.

79. *Id.*

80. *Id.* § 6.04 [2][d], at 6-10.

81. *Id.*

B. The Back End of the Contract

The back end of the contract will often include incentive clauses based upon actual playing-time, statistical performance, and honors or awards received.[82] The number of incentive clauses and their respective values are a function of various factors, including: the individual club, the player's leverage, his expected and past contributions to his club, his salary, and the player's years of service.[83] Typically, rookie and reserve players' contracts contain more incentive clauses because these players are expected to make less of a contribution to the team.[84] Accordingly, as a player's salary increases, the number of incentive clauses will usually decrease because the base salary theoretically reflects those contributions that were covered previously by the incentive package.[85]

1. Playing-time Incentives

A playing-time incentive rewards a player for the amount of time he is on the field.[86] Performance can be measured by games started or by a percentage of the team's total number of plays on offense, defense, and/or special teams.[87] A playing-time incentive clause is a strategic tool for a team especially when dealing with a player recovering from an injury. For example, after he suffered a herniated disc in January of 1993, the Green Bay Packers signed Johnny Holland to a one-year contract that provided him with a playing-time incentive of $200,000 if he participated in fifty percent of the team's defensive plays.[88] Generally, however, playing-time incentives are most common in younger players' contracts, when predictions of the player's on-field participation are less certain.[89]

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82. *Id.* § 6.04[2], at 6-8; *see also* SPORTS LAW PRACTICE 1993, *supra* note 62, § 4.08(5)(c)(ii)–(iv), at 328–33.

83. GARY UBERSTINE, LAW OF PROFESSIONAL AND AMATEUR SPORTS, § 6.07[4][a], at 6-16 (1995).

84. *Id.*

85. *Id.*

86. UBERSTINE, *supra* note 33, § 6.04[2][g][i], at 6-12; *see also* SPORTS LAW PRACTICE 1993, *supra* note 62, § 4.08(5)(c)(ii), at 328.

87. SPORTS LAW PRACTICE 1993, *supra* note 62, § 4.08(5)(c)(ii), at 328.

88. Tom Silverstein, *Holland Signs Contract*, MILWAUKEE SENTINEL, July 19, 1993, at B1.

89. UBERSTINE, *supra* note 33, § 6.04[2][g][i], at 6-12. "A[n] added complication . . . is the salary cap rules for 'likely to be earned' incentives, which have discouraged [playing-time] incentives in rookie contracts." *Id.* at n.35.

2. Statistical Performance Incentives

A statistical performance incentive rewards a player's on-field performance within various statistical categories based on terms and conditions set forth in the contract for a particular year.[90] The scope of these clauses is limited only by the creativity and ingenuity of the negotiators.[91] For example, the Detroit Lions could reward wide receiver Herman Moore with $50,000 if he leads the NFL in receptions, or the Green Bay Packers could offer Brett Favre $75,000 if he ends the season with the highest quarterback rating in the NFL.[92] While such clauses are commonplace in the typical NFL contract, they have been criticized for favoring the so-called skill position players.[93]

A hybrid of the statistical performance incentive clause appears to address the skill position bias. The hybrid incentive rewards the "behind the scenes" players based on the performance of their skill position players. An example of such a hybrid incentive is found in Barry Sanders' contract with the Detroit Lions. The contract includes a $10,000 bonus for each offensive lineman if Sanders rushes for more than 1000 yards in any season.[94] Furthermore, the NFL rules do not prohibit using unofficial league statistics as the basis for incentives.[95] Thus, other categories for "non-skill" position players, such as sacks allowed, forced fumbles, tackles, and batted-down passes, can be incorporated into the back end of these players' contracts.

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90. SPORTS LAW PRACTICE 1993, *supra* note 62, § 4.08(5)(c)(iii), at 328; *see also* UBERSTINE, *supra* note 33, § 6.04[2][g][i], at 6-12.

91. SPORTS LAW PRACTICE 1993, *supra* note 62, § 4.08(5)(c)(iii), at 328–29.

92. Statistical performance incentives such as these are also known as "leader bonuses" as they reward a player for leading the league, conference, or team in a statistical category. 1 ROBERT C. BERRY & GLENN M. WONG, LAW AND BUSINESS OF THE SPORTS INDUSTRIES 249 (1986). *See* UBERSTINE, *supra* note 33, app. 6B, side letter L, Exhibit B (listing all official league statistics that can be used for team or individual incentives).

93. UBERSTINE, *supra* note 33, § 6.04[2][g][i], at 6-12. Such criticism is based upon the fact that league statistics focus primarily on what offensive players do. *Id.* The "skill positions" are quarterback, running back, wide receiver, punter and kicker. BERRY & WONG, *supra* note 92, at 244.

94. SPORTS LAW PRACTICE 1993, *supra* note 62, § 4.08(6)(k), at 337. Although this sort of incentive solves the bias in favor of the high-profile players, the drafter of an IBC must remember that such a bonus will be considered "likely to be earned." UBERSTINE, *supra* note 33, app. 6B, side letter L3.

95. UBERSTINE, *supra* note 33, § 6.04[2][g][i], at 6-12.

3. Honors Incentives

Honors or awards incentives reward players for exceptional individual achievements.[96] Such incentives are often agreeable to clubs because relatively few players, regardless of their ability, will earn such incentives in any given season.[97] Some of the awards include: NFL Most Valuable Player ("MVP"), NFL Defensive Player of the Year, All-NFL First or Second Team, selection to the Pro-Bowl, and Rookie of the Year.[98] Furthermore, players may receive bonuses if they are selected for certain media-sponsored awards.[99]

4. Rollovers

Another incentive often seen in the back end of the contract is a "rollover," which is used to raise a player's compensation when he is underpaid in the front end of his contract.[100] A rollover occurs when a player achieves predetermined incentive levels (e.g., fifty percent playing-time).[101] The amount earned from such incentives, or some percentage thereof, is added to the next season's base salary.[102] The most illustrative use of a rollover is in the contract of a back-up quarterback. In 1993, Jim McMahon signed a two-year contract with the Minnesota Vikings for $3.2 million in base salaries ($1.6 million each season), plus numerous incentives.[103] Because there was a chance that McMahon would gain the starting quarterback job, which would have left his base salary seriously under-compensated relative to other veteran starting quarterbacks in the league, the Vikings included a rollover provision allotting up to $1.6 million in 1993 incentives, if earned, to be rolled into his base salary for the 1994 season.[104]

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96. *Id.* § 6.04[2][g][i], at 6-13; SPORTS LAW PRACTICE 1993, *supra* note 62, § 4.08(5)(c)(iv), at 330.

97. UBERSTINE, *supra* note 33, § 6.04[2][g][i], at 6-13.

98. SPORTS LAW PRACTICE 1993, *supra* note 62, § 4.08(5)(c)(iv), at 330.

99. *Id.* Some of the more notable awards come from The Associated Press, United Press International, USA Today, and Pro Football Weekly. *Id.*

100. UBERSTINE, *supra* note 33, § 6.04[2][g][ii], at 6-13. The front end of the contract can be underpaid when a player's compensation is based upon one projected role on the team, but the player contributes more than what was projected. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* § 6.04[2][g][ii], at 6-13 to 6-14.

104. *Id.*

5. Team Incentives

Finally, the players are often provided bonuses contingent upon the performance and success of their team.[105] Team performance incentives provide bonuses based on the team's statistical performance or ranking.[106] Examples of performance categories include the NFL's top-ranked offense or defense. Also, a team can reward each player with a progressively higher amount of money if the team advances into the playoffs or wins the division, conference championship, or Super Bowl.[107]

The most notable example of a player cashing in on team incentives was Rickey Jackson of the 1994 San Francisco 49ers. Jackson spent the previous thirteen years of his career with the perennial loser New Orleans Saints.[108] Upon joining the 49ers, Jackson signed an intriguing contract: he accepted the league's minimum base salary of $162,000[109] along with an $838,000 bonus if the 49ers won the NFC Championship.[110] When the 49ers beat the Dallas Cowboys to advance to Super Bowl XXIX, Jackson's salary rose to an even $1 million.[111]

When all of the bonus and incentive provisions are pooled together into one contract, it becomes clear that in the typical NFL contract, the vast majority of a player's compensation is derived from the front end of his contract. Hypothetically, a highly touted first-round quarterback could receive a contract with the front end constructed as follows: (1) a signing bonus of $2 million; (2) a base salary of $1.5 million; (3) a roster bonus of $25,000; and (4) a reporting bonus of $50,000. In the back end of the contract, the player could receive: (1) $50,000 in volume of playing-time incentive; (2) $100,000 in statistical performance clauses; (3) $200,000 in potential honors and awards incentives; and (4) $300,000 in team incentives.[112]

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105. *Id.* § 6.04[2][g][i], at 6-13; SPORTS LAW PRACTICE 1993, *supra* note 62, § 4.08(2), at 307.

106. UBERSTINE, *supra* note 33, § 6.04[2][g][i], at 6-12.

107. SPORTS LAW PRACTICE 1993, *supra* note 62, § 4.08(2), at 307.

108. Jim Donaldson, *Charger Miracle Only Thing in 49ers' Way; Jackson's Gamble Pays Off Big*, PROVIDENCE J.-BULL., Jan. 29, 1995, at 1C. The Saints have won eight or more games in only nine of the twenty-nine years of the team's existence. 1996 RECORD & FACT BOOK, *supra* note 27, at 256. Furthermore, the Saints and the Arizona Cardinals are the only two NFL teams who have never won a playoff game. *Id.* at 250.

109. Donaldson, *supra* note 108, at 1C. The acceptance of the base salary was a huge pay cut from the $1.2 million Jackson earned with the Saints in 1993. *Id.*

110. *Id.*

111. *Id.*

112. SPORTS LAW PRACTICE 1993, *supra* note 62, § 4.08(2), at 307; *see also infra* Part VI for discussion of how the IBC will alter the typical NFL contract.

C. Guarantees in NFL Contracts

There are two primary contract guarantees in an NFL player contract: skill and injury guarantees.[113] A skill guarantee obligates the club to continue paying pursuant to the contract even if the player has insufficient skill to make or remain with the club.[114] An injury guarantee ensures full payment to the player in the event that he is unable to satisfy the team's physical exam requirements or becomes physically unable to perform as a result of on-field injuries suffered during the contract period.[115]

While such guarantees are attractive and essential components of any contract negotiation, very few NFL contracts have guarantees that provide for payment to players if they are released for insufficient skill or injury.[116] Only one-half of one percent of players in the NFL have skill guarantees and less than five percent have injury guarantees.[117]

Generally, when a player has a six-year, $20 million contract, the entire $20 million is not guaranteed to the player. In fact, if one considers that the average career of the NFL player is approximately five years,[118] an average player with a six-year contract will never see the benefits of the sixth year of his contract. Because the largest payments in many high-priced NFL contracts are deferred until the last years of those contracts,[119] the lack of a skill or injury guarantee provision potentially deprives the player of the bulk of the contract's value.

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113. UBERSTINE, *supra* note 33, § 6.04[4], at 6-16.

114. *Id.*

115. *Id.*

116. *Id.* Players who had skill and injury guarantees in their past contracts include Warren Moon, Dan Marino, and John Elway. *Id.* § 6.04[4], at 6-17. However, the imposition of the salary cap will likely have the long-term effect of contributing to the elimination of guarantees in player contracts. Under the terms of the current salary cap, guaranteed salaries are included in team salary, resulting in a charge against the team's cap despite the player's absence. CBA, *supra* note 33, art. XXIV, § 7(d)(iii). Thus, the recent contracts signed by Dan Marino and John Elway no longer contain guarantees. UBERSTINE, *supra* note 33, § 6.04[4], at 6-16.

117. SPORTS LAW PRACTICE 1993, *supra* note 62, § 4.08(4), at 310 (citing Letter from Mike Yaras, Director of Benefits, NFLPA, to NFLPA Member Agents (Mar. 14, 1991)). However, upon the effective date of execution of the CBA, all qualified players obtained a limited form of "injury protection." CBA, *supra* note 34, art. XII. If qualified, an injured player will receive an amount equal to 50% of his contract salary for the year following the season of injury. *Id.* art. XII, § 2. Importantly, the CBA expressly caps a player's injury protection for the 1997–99 league years at $200,000. *Id.*

118. Larry Dignan, *Planning His Future; Injury Alerts Bengals Star of Need for Financial Advice*, PITT. POST-GAZETTE, Aug. 4, 1996, at D1.

119. *See supra* Part III.D.

D. Deferred Compensation

Deferred compensation is a strategic method used by teams to defer payment of portions of a large signing bonus or salary to some specified period after they are earned and normally would be due.[120] However, the CBA restricts the degree to which compensation may be deferred.[121] For example, Troy Aikman's original contract with the Dallas Cowboys was a six-year, $11.3 million deal.[122] According to the provisions of the contract, Aikman received a $2.75 million signing bonus with the first $1.2 million paid in the first year of the contract and the remaining $1.55 million of the bonus payable over the next eleven years.[123] Although Aikman received his 1989 salary of $788,000 in 1989, most of the remaining base salary was deferred.[124]

E. Escalator Clauses

An escalator clause is potentially one of the most rewarding incentives a team can offer because it is designed to reward a player's extraordinary performance by automatically raising the value of the player's contract to a level commensurate with the NFL's elite performers at that player's position.[125] What distinguishes an escalator clause from other incentives is that the amount of the bonus is not predetermined as a term of the contract.[126]

For example, in 1989, Warren Moon agreed to a five-year, $10 million deal with the Houston Oilers, making Moon the league's highest paid player.[127] Anticipating that other teams' future deals with their quarterbacks would raise quarterback compensation even higher, Moon

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120. UBERSTINE, *supra* note 33, § 6.04[2][h], at 6-14.

121. CBA, *supra* note 33, art. XXXVIII, § 7. "A Player Contract may provide for deferral of no more than 50% of the player's Salary up to and including a total of the first $1 million, and may provide for deferral of no more than 75% of the player's salary in excess of $1 million." *Id.*

122. UBERSTINE, *supra* note 33, § 4.08[6][a], at 333.

123. *Id.*

124. *Id.* Aikman's contract paid out his 1990 salary of $1 million over three years; his 1991 salary of $1.25 million is paid out over six years; his 1992 salary of $1.5 million is paid out over seven years; his 1993 salary of $1.75 million is paid out over eight years; and his 1994 salary of $2 million will not begin to be paid until 1998, when it will be dispersed over three years in increments of $400,000, $800,000, and $800,000. *Id.*

125. UBERSTINE, *supra* note 33, § 6.04[2][g][iii], at 6-14. The player's salary is augmented by directly adjusting his base salary or by paying a one-time bonus. *Id.*

126. *Id.*

127. *Id.*

was able to include an escalator clause in his contract.[128] The clause provided that if Moon led the Oilers to the Super Bowl or if he finished as one of the top three rated passing quarterbacks, he would receive a bonus equal to the difference between his salary and the average salary of the three highest paid quarterbacks for that year.[129]

V. WHAT IS WRONG WITH THE WAY THINGS ARE?

A. Holdouts

One problem with today's NFL contracts are holdouts. A holdout is essentially an individual strike where a player refuses to play or practice until he comes to an agreement with his team.[130] The holdout represents a similar problem to the midterm demand for contract renegotiation because, in both cases, the player withholds performance as leverage to negotiate a better deal. Unlike a renegotiation, with a holdout, the player's previous contract has ended and the player and the team are negotiating a new deal. Although a holdout does not involve the same legal problems as a midterm renegotiation demand,[131] a basic understanding of why an athlete elects to hold out provides insight into why other athletes take it one step further and demand a midterm renegotiation of their contract.

The most illustrative example of a holdout took place between running back Emmitt Smith and the Dallas Cowboys. Smith was drafted by the Cowboys with the seventeenth pick in the 1990 NFL draft.[132] He signed a three-year contract for $2.175 million.[133] Over the course of the three year deal, Smith won two rushing titles and the Cowboys won one Super Bowl their first since 1978.[134]

The championship season of 1994 marked the end of Smith's rookie contract with the Cowboys.[135] During that off-season, Smith and the

128. *Id.*; *see also* SPORTS LAW PRACTICE 1993, *supra* note 62, § 4.08(6)(d), at 335. In 1990, Moon finished as the second most efficient passer in the league and was given a bonus of approximately $1.5 million. UBERSTINE, *supra* note 33, § 6.04[2][g][iii], at 6-14.

129. UBERSTINE, *supra* note 33, § 6.04[2][g][iii], at 6-14.

130. 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).

131. *See supra* Part IV.C.

132. Leigh Montville, *A Man of Vision*, SPORTS ILLUSTRATED, Feb. 14, 1994, at 142.

133. *Id.*

134. 1996 RECORD & FACT BOOK, *supra* note 27, at 272, 325.

135. Montville, *supra* note 132, at 142.

Cowboys were unable to agree on a contract.[136] The Cowboys offered Smith $9 million over four years, but he wanted $15 million.[137] A further complicating factor was that Smith was a restricted free agent, meaning that the Cowboys could match any offer made by another team.[138] Consequently, no team showed any interest in Smith because the consensus from around the League was that Jerry Jones, the owner of the Cowboys, would make Smith the Cowboys' designated "franchise player" and match the offer.[139] However, if Smith and the Cowboys did not come to terms by the third game of the regular season, Smith was prepared to sit out the season.[140]

The defending Super Bowl Champion Cowboys promptly opened up the season with two consecutive defeats: first to division rival Washington Redskins and second to the Buffalo Bills, in a rematch of the 1994 Super Bowl.[141] After the second loss, Jerry Jones relented to the pressure and effects of Smith's holdout, signing him to a four-year, $13.6 million contract. The results of having Smith on the field speak for themselves. With Smith back, the Cowboys became the first team in NFL history to win the Super Bowl after opening the season with two losses, while Smith became only the fourth player in NFL history to win three consecutive rushing titles.[142]

From the player's perspective, the Emmitt Smith–Dallas Cowboys saga was the ideal situation with the ideal ending. The holdout revealed how valuable Smith was to the Cowboys' success and consequently, he received a very lucrative contract. However, the rationale underlying this

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136. *Id.*

137. *Id.*

138. *Id.* A restricted free agent is a veteran player with three or more accrued seasons during uncapped years or, during an uncapped year, four accrued years. CBA, *supra* note 33, art. XIX, § 2(a). A restricted free agent is completely free to negotiate and sign a contract with any team. However, any team the restricted free agent signs with is subject to the restrictions set forth in the CBA. *See id.* art. XIX, § 2.

139. Montville, *supra* note 132, at 142. A "franchise player" is one who would otherwise be an unrestricted free agent, but is prevented from negotiating with any team other than his designating team. *See* CBA, *supra* note 33, art. XX, § 1.

140. Montville, *supra* note 132, at 142.

141. *Id.*

142. *Id.* Notably, the Cowboys, in an attempt to avoid a repeat of this debacle, recently gave Smith a new, eight-year contract extension worth $48 million. Bryan Burwell, *Smith's Contract as Much for Past as for the Future*, USA TODAY, Aug. 15, 1996, at 10C. The other three players to win three consecutive rushing titles are Earl Campbell (1978–80), Jim Brown (1957–60) and (1963–65), and Steve Van Buren (1947–49). 1996 RECORD & FACT BOOK, *supra* note 27, at 410.

holdout has enticed players to take the next logical step: the demand for midterm contract renegotiation.

B. Demands for Midterm Contract Renegotiation

In a demand for the midterm renegotiation of a contract, a player who is presently fulfilling the terms of his current contract threatens to hold out unless his contract is changed.[143] The scenario is familiar to most sports fans. A star player signs a long-term, multimillion dollar contract making him one of the league's top-paid, elite performers. That contract, in turn, stimulates other players to demand, and other teams to create, compensation packages at a rate equal to or higher than that of the first player. After about two years, and with multiple years remaining on his original contract, the first player finds himself being paid, on average, less than the top players at his position. During periods of escalating salaries, a presently competitive payment package becomes outdated in two or three years.[144] Therefore, a player is typically driven to demand a midterm renegotiation of his contract because he feels he is no longer being paid at a rate commensurate with his on-field performance.[145] In its most general form then, a midterm demand for contract renegotiation is the means through which a player attempts to correct "injustices" stemming from prior negotiations.[146]

Midterm demands for contract renegotiation are frequently criticized. The primary criticism is that the athlete has signed a contract with his team and both parties should honor the original deal, irrespective of the players performance.[147] The argument is based on an equitable notion: it is not fair for a player to demand the renegotiation of his contract to obtain more money because, if the player had performed suboptimally, the team would have been bound to the terms and conditions of the original contract.[148] There is no mechanism pursuant to which the team may adjust the contract to reflect this potential "down side."[149] Therefore, the club is stuck with its original obligation. Any attempt by the team to modify or terminate that

143. Faber, *supra* note 130, at 168–69.

144. Leigh Steinberg, *Negotiating Contracts in the National Football League*, *available in* WESTLAW, C627 ALI-ABA 617, *623 (1991).

145. *See* Faber, *supra* note 130, at 169 (quoting Arthur Ashe, *Contracts Made To Be Honored; "Renegotiators" Hurt Everybody*, WASH. POST, Dec. 2, 1979, at F4).

146. Bruce Allen, *Shorter-term Deals Offer Best Solution*, USA TODAY, Oct. 29, 1991, at 10C.

147. Faber, *supra* note 130, at 169.

148. Johnson, *supra* note 2, at 117.

149. *Id.*

contract resulting from the player's suboptimal performance should justifiably result in a breach of contract suit brought by the player against the club.[150]

Such a "fairness" argument, however, fails to recognize that a team can cut a player who performs poorly or refuses to pay him if he is injured on the field.[151] Few teams guarantee player contracts precisely so they can cut the team's salary or release players who are unproductive. Consider the situation in which a team decides that a player is not worth his salary. The team may release the player and, therefore, not be obligated to pay the balance of his contract. Sometimes the team will then re-sign the player for less money than was due to the player under the original contract. Essentially, such a scenario constitutes a contract renegotiation.[152] Alternatively, a team may not realistically have the option to cut a player who is either holding out or having a sub par year, especially a player of the caliber of Jerry Rice, Brett Favre, or Emmitt Smith.

An IBC would resolve the inequities of the current contractual relations in the NFL by paying a player his worth during each season. During the years that a player performs at a superior level, he will earn a commensurate salary. However, for the years he performs at less than an elite standard, he will be paid proportionately. In essence, then, the IBC is "self-renegotiating." Each year, the player's compensation will be based on his on-field performance. The result is that both sides' interests are protected. A player will be able to reap the benefits of his extraordinary performance without being bound to a contract that pays him at the same level no matter how well he performs. The team will only have to pay the player at a superior level if the player performs at that level. In other words, the team will no longer be bound to pay top dollar for subpar performance.

1. Errict Rhett: Potential Superstar

Recently, the NFL has seen many of its players demand that their contracts be renegotiated to include more lucrative terms. An illustrative example was the recent standoff between the Tampa Bay Buccaneers and running back Errict Rhett. Rhett was the Buccaneers' second round pick in the 1994 draft, the same year the Buccaneers drafted highly-touted quarterback Trent Dilfer from Fresno State University.[153] During Rhett's

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150. *Id.*

151. Mark Woods, *Rhett's Beef: Bad Numbers*, FLA. TODAY, Aug. 12, 1996, at 1C.

152. *Id.*

153. 1996 RECORD & FACT BOOK, *supra* note 27, at 369. The Buccaneers signed Dilfer to

first two years in the league, he was the "go-to-again-and-again guy" of then head coach Sam Wyche's offense.[154] During that time, Rhett also had some noteworthy accomplishments: (1) he became only the thirteenth player in NFL history to rush for more than 1000 yards in each of his first two seasons;[155] and (2) in the 1995 season he rushed for 1207 yards and scored eleven touchdowns[156] on a team that averaged only fourteen points per game.[157] However, the general appraisal of Rhett was that his 3.6 yard per carry average[158] was mediocre and that he rarely broke loose for long runs, exemplified by the fact that the longest run in his NFL career is only twenty-one yards.[159]

Rhett was to make a base salary of $336,000 during the 1996-97 NFL season, but he elected not to report to training camp, instead demanding a new, more lucrative contract.[160] Although the Buccaneers had traditionally refused to renegotiate contracts, they were prepared to make an exception in Rhett's case.[161] According to various reports, the Buccaneers were reportedly offering Rhett a six-year contract averaging $2.35 million per year.[162] Rhett's primary complaint with the Tampa Bay offer was that the majority of the money was not guaranteed and was pushed back to the last years of the contract.[163]

> How often do you see football players taking pay cuts? It always happens . . . . You have one bad year, and if all your money is backloaded [sic]? Football is not like basketball. It's not guaranteed contracts . . . . Say I'm going to give you $14-million over six years. I can break that down so that it looks like you're only getting $500,000 a year. I can backload that so far. Who's guaranteed that you're going to be around six years,

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a eight-year, $16.5 million contract, in addition to a $4.5 million signing bonus. SPORTS LAW PRACTICE 1996, *supra* note 39, § 4.08(1)(b), at 176. Due to Dilfer's lucrative contract, little was left for the team to pay other rookies under the rookie salary cap. Woods, *supra* note 151, at 1C.

154. Woods, *supra* note 151, at 1C.

155. Rodney McKissic & Ron Newberry, *Morning Report*, NEWS TRIB. (Tacoma, WA), Aug. 27, 1996, at C2.

156. 1996 RECORD & FACT BOOK, *supra* note 27, at 145.

157. Mike Fisher, *NFL Report*, FORT WORTH STAR-TELEGRAM, Aug. 11, 1996, at 13.

158. 1996 RECORD & FACT BOOK, *supra* note 27, at 145.

159. Peter Kerasotis, *Rhett Cashing in Devotion?*, FLA. TODAY, Aug. 10, 1996, at 1C.

160. Rick Stroud, *Rhett: Contract Not What it Seems*, ST. PETERSBURG TIMES, Aug. 8, 1996, at 8C.

161. Woods, *supra* note 151, at 1C.

162. *Id.*; George Diaz, *Rhett Could Learn a Lot from Cowboys' Smith*, ORLANDO SENTINEL, Aug. 13, 1996, at D1; Kerasotis, *supra* note 159, at 1C.

163. Stroud, *supra* note 160, at 8C.

when I play a position when four to five years is the average career of a running back?[164]

While various commentators dismissed Rhett for being "selfish," "spoiled," and a man who "continue[d] holding out to squeeze every cent possible out of the Bucs' coffers,"[165] his argument should not be summarily dismissed.[166] Rhett's first and biggest problem with the contract he rejected was that it offered him relatively little up-front money.[167] Assuming the offer Rhett rejected did not include a signing bonus, all of the front end money would have come from his base salary. Furthermore, if the money was back-loaded towards the end of the six-year deal, then conceivably, Rhett may never have seen the bulk of the money.

Nonetheless, many still consider the midterm holdout of a second year player, such as Errict Rhett, to be in bad faith. Although, Rhett's demand for renegotiation had some merit, demands for midterm contract renegotiation are often abused under the current contract system in the NFL.[168]

2. Marvin Jones: How the IBC Deals with the Self-Proclaimed Superstar

Consider the case of Marvin Jones, selected by the New York Jets as the fourth overall pick in the 1993 NFL draft.[169] After being injured during his first three NFL seasons with the Jets, Jones believed 1996 would finally be the year that he lived up to his potential.[170] Jones conceded, "This is the year for me to go out and show people what I haven't been able to do from being hurt."[171] Despite acknowledging his lack of production during the first three years of his NFL career, Jones showed he had not lost his courage. In May 1996, he expressed his desire to renegotiate his contract, although two years remained on his original five-year, $5.99 million deal, which included a $3.25 million signing bonus.[172] However, the Jets'

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164. *Id.* (quoting Errict Rhett).

165. Diaz, *supra* note 162, at D1.

166. *See supra* Part III.C–D.

167. Recall the discussion of the typical construction of an NFL contract today: the majority of the money comes in the "front end" of the deal, normally a huge signing bonus and a modest base salary. *See supra* note 62 and accompanying text.

168. *See infra* notes 169–77.

169. 1996 RECORD & FACT BOOK, *supra* note 27, at 368.

170. Dave Hutchinson, *LB Jones Set to Fill Potential*, STAR-LEDGER (Newark, N.J.), July 22, 1996, at 47.

171. *Id.* (quoting Marvin Jones).

172. Rich Cimini, *Jets Won't Hand Douglas Starting Job*, NEWSDAY, May 22, 1996, at A73.

management would not discuss a new contract until after the 1996 season.[173]

The Marvin Jones example shows just how ludicrous demands for midterm renegotiation can be. In the past, only the recognized superstars sought renegotiation to make their pay commensurate with other top performers.[174] Today, however, both *potential* superstars and players with self-proclaimed superstar potential hold out and/or demand the renegotiation of their current contracts.[175]

C. *"One-Year Wonders"*

"One-Year Wonders" initially provide a great advantage for a team. A player who is under a relatively small contract comes out of obscurity to have an extraordinary year, placing him among the league's best at his position for that year. The team, in essence, received a high-level performer for a bargain price. From the team's perspective, the problem arises during the following off-season, when the player demands to be paid at a level commensurate with the league's elite. The team, expecting the player to continue performing at the previous year's extraordinary level, and fearing a potential holdout, elects to increase the player's salary substantially. The frustration occurs during the following season when the player's performance returns to its mediocre level. The team is left with an over-paid, mediocre player who cannot be traded because no other team is willing to inherit his inflated contract.

A recent example of this situation involved running back Gary Brown and the Houston Oilers. Brown was an eighth-round draft choice from

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173. Rich Cimini, *Another Setback for Jones*, NEWSDAY, July 14, 1996, at B9.

174. *See* Johnson, *supra* note 2, at 70–73 (discussing Eric Dickerson); *see also Smith Considers Walkout on Bills*, CHI. SUN TIMES, Aug. 27, 1996, at 93; Gary Picknell, *Smith Still Steamed, but Will Not Sit Out*, FIN. POST, Aug. 29, 1996, at 45 (discussing Buffalo Bills defensive lineman Bruce Smith).

175. To provide closure to these examples, consider the following developments in the cases of Errict Rhett and Marvin Jones. After holding out for 94 days, and being fined $480,000, Rhett returned to the Buccaneers without getting a renegotiated deal. Rick Gosselin, *Professional Football Teams*, DALLAS MORNING NEWS, Oct. 27, 1996, at 6B. The team agreed to pay his contracted salary of $336,000 and deduct the fines from the salary Rhett will receive upon negotiating a new contract after the current one expired. *Id.* The contract also included a $2 million disability policy and a $156,000 bonus if Rhett scored seven touchdowns in the remaining games. Gordon Forbes, *$10M Request*, USA TODAY, Oct. 31, 1996, at 9C. In his first game back, Rhett rushed 12 times for only 29 yards. *The Day in Sports*, L.A. TIMES, Oct. 28, 1996, at C14. As for Marvin Jones, five weeks into the 1996–97 NFL season, the New York Jets were 0-5, and it was reported that he would be on the disabled list for five to six weeks because of a sprained right knee. Houston Mitchell, *Pro Football Spotlight*, L.A. TIMES, Sept. 30, 1996, at C4.

Penn State who served as the Oilers' backup running back. He earned the league's minimum salary of $150,000.[176] In week eight of the 1993–94 season, the Oilers' starting running back Lorenzo White injured a hamstring and could not play.[177] Brown replaced White and proceeded to dominate opposing defenses over the second half of the season.[178] In the final eight games, Brown rushed for 1002 yards on only 195 carries, leading the American Football Conference with a 5.1 yard per carry average.[179] Brown's performance was so amazing that only eight times in the history of the NFL had a player gained 1000 yards with fewer carries.[180]

Unfortunately for the Oilers, the 1993–94 season was the end of Brown's contract.[181] During the off-season, the Oilers signed Brown to a three-year, $5.25 million contract that included a $1.5 million signing bonus.[182] The following season, Brown's on-field performance was dramatically inferior.[183] At the start of the 1995–96 season Brown was fifteen pounds overweight and was averaging a paltry 2.9 yards per carry.[184] Later in the season, the Oilers lost Brown for the remainder of the year when he tore a knee ligament.[185] By the end of the 1995–96 season, Brown was expected to be waived or asked to accept a big pay cut.[186] At the beginning of the 1996–97 season, Brown was cut from the Oilers.[187]

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176. Gerry Dulac, *Brown Makes Rapid Run to Fame After Obscure Start with Oilers*, PITT. POST-GAZETTE, Aug. 22, 1994, at D4.

177. *Id.*

178. John McClain, *Grading the Oilers*, HOUSTON CHRON., Nov. 1, 1994, at 7.

179. 1996 RECORD & FACT BOOK, *supra* note 27, at 399.

180. *Id.* The eight performances that eclipsed Brown's accomplishments were those of Bettie Feathers (1934), Joe Perry (1953–54), John David Crow (1960), Paul Lowe (1963), Eugene (Mercury) Morris (1972), Franco Harris (1972), and Stump Mitchell (1985). *Id.* at 399–400.

181. Dulac, *supra* note 176, at D4.

182. *Id.*

183. McClain, *supra* note 178, at 7.

184. Charles Bricker, *Week 3*, SUN-SENTINEL (Fort Lauderdale, Fla.), Sept. 15, 1995, at 7C.

185. Ed Bouchette, *Houston GM: Don't Believe Foster's Plea for Minimum Wage*, PITT. POST-GAZETTE, Oct. 1, 1995, at D5.

186. *Houston Oilers Team Notes*, SPORTS NETWORK, Jan. 26, 1996, *available in* LEXIS, News Library, Wires File.

187. *American Football Conference Preview*, PRESS-ENTERPRISE (Riverside, Cal.), Aug. 28, 1996, at D5.

D. Observations

One can make two observations regarding the current renegotiation procedures. First, the success of any midterm contract renegotiation can be placed on a sliding scale. The closer the player is to being an irreplaceable part of a team's success, the more likely he is to receive a renegotiated deal.[188] Second, when the contract is renegotiated, the deal overwhelmingly favors the player because the team is the party accepting the majority of the risk for the player performing suboptimally.[189] When the renegotiation involves a superstar, or even an integral player, the option of releasing the player is not realistic. Consequently, the team is contractually bound to pay the player the negotiated amount. Essentially, the midterm contract renegotiation strategy is a no-risk deal for the player.[190] The worst case scenario is a rejection by the team, as the New York Jets did with Marvin Jones.[191] Otherwise, the team is compelled to meet the player's demands.

The IBC would solve the abuse of the renegotiation process. It would alleviate the current imbalance in contract renegotiations by leveling the playing field relative to the risks taken by the team and player. Both the team and the player take a chance when they agree to draft a contract that offers the majority of the money through back end incentives. The team risks that the player will perform beyond expectations and be entitled to more money.[192] More importantly, under an IBC, the player assumes the risk that he will not perform up to his expectations and will be compensated at a lower rate. Ultimately, increased player risk furthers the overall goal of the IBC: the drastic reduction in the number of players demanding midterm contract renegotiations.

Thus, if Marvin Jones was to renew his renegotiation demand with the Jets, an opportunity would arise for both sides. The Jets would have the chance to rescind the final part of Jones' five-year, $5.99 million deal,[193] and Jones would have the occasion to prove that he is a top-flight NFL performer deserving of a higher salary. Assuming such a scenario existed, the Jets would have saved a large amount of money on the contract as

188. Johnson, *supra* note 2, at 94.

189. *Id.* at 116–17.

190. *Id.* at 117.

191. Cimini, *supra* note 173, at B9.

192. For example, it is also true that if the player performs beyond expectations, the team will benefit from the added exposure the player brings to the team.

193. After all, the Jets are paying a substantial salary to a player who has spent most of his career on the injured list. Cimini, *supra* note 172, at A73.

Jones suffered a severe knee injury during the fifth game of the season.[194] Had the Jets renegotiated Jones' deal with an IBC, they would have paid Jones only the League's minimum salary ($178,000) plus any incentives Jones attained in his five games. Instead, the Jets paid Jones $638,000 plus incentives.[195]

VI. APPLICATION OF THE IBC TO A MIDTERM DEMAND FOR CONTRACT RENEGOTIATION

A. A New Player Contract

The IBC will create a parallel universe of sorts, by dramatically changing the typical NFL contract. Instead of a large front end and relatively smaller back end, the IBC will substantially decrease front end payments and inflate the back end incentives.

1. The Front End of the IBC

The front end of the IBC is where the dramatic change will occur. The IBC reduces the amount of money in the front end by significantly reducing the player's base salary and the various bonuses typically found in the front end of player contracts.

a. The Signing Bonus

As the most coveted part of the contract from the player's perspective,[196] the IBC should include a sizable signing bonus. However, in light of the Dallas Cowboys' recent signing of Deion Sanders, the league appears poised to establish serious restrictions on the use of signing bonuses in player contracts.[197]

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194. Mitchell, *supra* note 175, at C4.

195. Hutchinson, *supra* note 170, at 47.

196. The money is essentially guaranteed from the player's perspective because it is not contingent upon his athletic performance. SPORTS LAW PRACTICE 1993, *supra* note 62, § 4.08(5)(c)(i)(a), at 320.

197. Gordon Forbes, *Owners Meet, Focus on Revenue, Fret About Salary Cap, Bonuses*, USA TODAY, Mar. 11, 1996, at 8C. Ironically, after coming out on the short end in the Deion Sanders derby, one of the teams leading the charge to fight for a true hard cap is the San Francisco 49ers. *Id.* Forty-Niners President Carmen Policy is campaigning for a true hard cap, wherein each bonus will count in the year it is paid instead of being prorated. *Id.*

b. The Base Salary

With the IBC, a player making a midterm demand for contract renegotiation is paid the league's minimum base salary for that year, and all subsequent years, until the expiration date of the original contract. For example, a third-year player making a midterm demand for renegotiation during the 1995–96 NFL season would have received a base salary of \$178,000.[198]

c. The Reporting Bonus

When a player makes a midterm demand for a renegotiated contract, he has two types of leverage. First, the player uses his past performance as the basis for his demand. Second, he uses the threat of a holdout to place the team in the precarious position of having to play without him. If the player accepts the IBC, he will forfeit any reporting bonus due under his original contract. The purpose of a reporting bonus is to reward a player who has reported to training camp.[199] By threatening a holdout, the player should not be rewarded with a contract that pays him as if he had reported on time. Considering that reporting bonuses have exceeded \$1 million,[200] this provision of the IBC serves as a deterrent to demanding renegotiation in the first place.

d. The Roster Bonus

The IBC will probably leave the roster bonus untouched. However, if the player continues his holdout into the season, the roster bonus will be reduced by a percentage representing each game in which the player is not a member of the active roster or is on the injured reserve list.[201]

2. The Back End

The back end of the IBC is where the player stands to make the vast majority of his money each year. The effect of constructing the contract with the majority of the money in the back end will be to create a "super-escalator" clause. However, the player should be forewarned: while an escalator clause can work to raise a player's salary, an IBC can cause the

198. Kurt Badenhausen, *Salary Cap? What Cap?*, FIN. WORLD, May 20, 1996, at 64.

199. *See supra* Part III.B.3.

200. UBERSTINE, *supra* note 33, § 6.04[2][c], at 6-10.

201. SPORTS LAW PRACTICE 1993, *supra* note 62, § 4.08(5)(c)(i)(C), at 325.

escalator to take the player's salary on a downward ride with a subpar performance.

The statistical performance incentive is typically used today as a compromise to break an impasse in negotiations.[202] Thus, if a player wants $500,000 and a club is offering $400,000, a frequent method of breaking the deadlock is to agree to a $450,000 salary with a $50,000 performance bonus based on the statistics the player should achieve in a normal year.[203] In this way, the value of a typical incentive will be relatively low.[204]

With an IBC, however, statistical performance incentives will be the primary means through which the player will be compensated. The IBC will have a payment structure similar to Barry Sanders' rookie contract with the Detroit Lions, in which Sanders was to receive $50,000 for rushing 750 yards and up to $200,000 if he rushed for 2000 yards.[205] These performance incentives were based on a contract that paid him a base salary of $400,000 for that year.[206]

However, an IBC would invert Sanders' compensation structure. Assuming Sanders had demanded the renegotiation of his contract after his rookie season, the IBC would have automatically reduced Sanders' base salary to the league minimum of approximately $178,000. Hypothetically, to compensate for the decrease in base salary, the IBC could have a statistical performance incentive of perhaps $2 million if Sanders rushed for over 1000 yards. If Sanders met the incentive, he would be paid in a manner commensurate with the elite running backs in the league for that year. If he did not reach the 1000-yard incentive, he would be paid at a prenegotiated level.[207]

B. Drafting Problems to Be Avoided

In drafting an IBC both the team and player must be wary of the pitfalls that accompany formulation of bonus and incentive provisions.[208] The most prevalent problem with player contracts is ambiguous and

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202. *Id.* § 4.08(5)(c)(iii), at 328–29.

203. *Id.* at 329.

204. For example, most players receive a bonus in the $10,000 to $50,000 range for selection to the Pro Bowl game. UBERSTINE, *supra* note 33, § 6.04[2][g][i], at 6-13.

205. *NFL Talk*, USA TODAY, Sept. 11, 1989, at 11C.

206. *Id.*

207. *See infra* Part VI.C.

208. SPORTS LAW PRACTICE 1993, *supra* note 62, § 4.08(5)(a), at 312. *See* Martin J. Greenberg, *Drafting of Player Contracts & Clauses*, 4 MARQ. SPORTS. L.J. 51, 57–65 (1993) [hereinafter Greenberg, *Contracts & Clauses*] (discussing the typical problems and potential disputes that can arise from poor drafting of bonus provisions).

obscure language.[209] Therefore, before drafting an IBC, it is critical to address the typical problems in team-player contracts.[210]

1. Intervening Factors

In drafting the bonus and incentive clauses of an IBC, the team and player must be careful to account for potential and foreseeable intervening factors. The first and most troubling factor from the player's perspective is the likelihood that he will be injured. Injuries are the most serious threat to the player's compensation under the IBC because they directly influence whether the player has the opportunity to earn his bonuses and incentives.[211] Therefore, the bonus and incentive clauses must be drafted to contain provisions that provide compensation to the player even though he cannot meet his incentives for that particular year.

The best way to account for the possibility of injuries is for the bonus and incentive clauses to be drafted on a staggered basis. For example, rather than drafting a clause that reads, "If Player plays at least one down in eight or more regular season games, Player shall receive a bonus of $50,000," the incentive should read, "If Player plays at least one down in any three games, Player shall receive a bonus of $10,000; in any four to seven games, $20,000; and for any eight or more games, $50,000." Whereas the former clause is in an "all or nothing" format, the staggered incentive clause allows a player to earn money even if he is injured on the first play of the regular season. Therefore, the staggered incentive motivates the player concerned about potential injuries to enter into an IBC.

However, the glaring problem with a staggered incentive format is that it does not account for the situation in which a player is injured in the preseason and never plays a down during the regular season.[212] Therefore, the IBC should have some sort of injury guarantee[213] contingent upon the player suffering a season-ending injury during the preseason.[214] If the player does not have enough leverage to command an injury guarantee,

209. BERRY & WONG, *supra* note 92, at 248 (quoting NFL, Contract Language Discussion, Negotiation Seminars, Harvard University, Feb. 10–12, 1981).

210. Greenberg, *Contracts & Clauses*, *supra* note 208, at 57–65.

211. BERRY & WONG, *supra* note 92, at 252 n.1.

212. *Id.*

213. *See supra* Part IV.C.

214. The player's leverage will determine the value of the guarantee; that value should be a provision of the IBC. Such an individually negotiated injury guarantee is expressly permitted by the CBA. *See* CBA, *supra* note 34, art. XII, § 2. The guarantee can go beyond the pre-determined value set forth in the CBA. *Id.*

another option is to negotiate with the team for a disability insurance policy to cover the risk of a season- or career-ending injury.[215] While the IBC is meant to shift some of the risk of contract renegotiation from the team to the player, it would be unconscionable to compel the player to bear the entire risk of a season-ending injury.

A second potential complicating factor is the possibility that the player could be traded during the course of the season. If a player with an IBC is traded, there are two important factors to consider. The primary concern is whether the player's current or former team should have to pay the player's remaining signing bonus.[216] If the player has a signing bonus prorated over future years, any unpaid part of the signing bonus will be included in the trading team's salary for the league year.[217]

Another concern is the salary cap; specifically, which team should pay the remaining value of the player's contract. According to the CBA, the player's new team only applies that portion of the player's salary to its cap that remains unpaid and for which it may be obligated.[218] The player's previous team applies the amount already paid to its payroll during that year and any salary for which the team remains obligated.[219]

2. Shorthand Drafting

The shorthand style of drafting incentive clauses often involves the use of words with no readily ascertainable definition.[220] Such terms are commonly used words or phrases in the sports world but are incomprehensible to a reader unfamiliar with football.[221] For example, terms such as "cut," "roster," "season," and "plays" have drastically different meanings, depending on the context in which they are used.[222] Such ambiguity may create a problem if there is ever a conflict over the meaning of the terms of the contract.

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215. UBERSTINE, *supra* note 33, § 6.04[5], at 6-17. However, whether the player can persuade the club to pay the premiums on such a policy is a matter of negotiation. *Id.*

216. Recall the discussion, *supra* Part IV.A.1 (definition of what constitutes a player's signing bonus).

217. CBA, *supra* note 33, art. XXIV, § 7 (b)(ii)(3). The process of counting the remaining part of a player's signing bonus against the trading team's salary cap is known as "acceleration." *Id.* § 7(b)(ii). The year in which the remaining part of the signing bonus is paid is determined by whether the trade is made before or after June 1. *Id.* § 7(b)(ii)(1),(2).

218. *Id.* art. XXIV, § 7(f).

219. *Id.*

220. Greenberg, *Contracts & Clauses*, *supra* note 208, at 58.

221. *Id.*; *see also* BERRY & WONG, *supra* note 92, at 248.

222. Greenberg, *Contracts & Clauses*, *supra* note 208, at 58.

3. Ambiguous Drafting

One of the most commonly used incentives is a "leader bonus."[223] Leader bonuses reward a player for leading the team, conference, or league in a statistical category.[224] Although teams and players have significant experience in drafting these bonuses, the parties frequently draft them ambiguously. To illustrate how leader bonuses can be plagued with vagueness, consider the following examples:

> *Ex. 3. Player shall receive a bonus in the amount of $____ if he leads the Conference in punt returns.*
>
> Looks reasonably harmless. But there are lots of ways to rate punt returners: average return, number of returns, total yardage, etc. We assume, of course, that a clause like the one above aims to reward the player for leading in average return. If so, it should clearly state that fact.
>
> . . .
>
> *Ex. 9. $____ bonus if player is among the top three receivers in yardage gained by receptions.*
>
> The statistical category is unambiguous, but we aren't told whether this performance is to be achieved on a club, Conference, or League level.
>
> *Ex. 10. Player shall receive the additional sum of $____ if he gains 1,000 yards during the regular season.*
>
> An extremely common mistake. One thousand yards by what means? Rushing? Receiving? Punt returns? Kickoff returns? A combination?[225]

Drafting problems[226] are common in incentive bonuses, but they may be alleviated by defining terms specific to football.[227] Although the IBC

223. BERRY & WONG, *supra* note 92, at 249.

224. *Id.*

225. *See id.* at 249–50 (emphasis in original).

226. Certainly, there are other problems that affect the bonus provisions of team-player contracts, including: failure to state whether the particular bonus provision is subject to a

can be an effective tool in alleviating the problems of midterm demands for renegotiation, by its nature an IBC is completely dependent upon the diligent drafting of each clause. Therefore, the team and the player should take every precaution to avoid these pitfalls.

C. The IBC in Practice

The application of the IBC can best be illustrated by drafting a hypothetical IBC. As a basis for this hypothetical, reconsider the recently concluded contractual dispute between Errict Rhett and the Tampa Bay Buccaneers.[228] Rhett was to earn a base salary of $336,000 for the 1996–97 NFL season, but instead held out and demanded a renegotiated contract.[229] The Buccaneers offered a six-year, $2.35 million deal, but Rhett wanted $3 million per year and more up-front money.[230] The impasse resulted in Rhett missing the first seven games of the 1996–97 season.[231] By the time Rhett stepped onto the field, the Buccaneers' had lost six of seven games and were all but eliminated from the playoffs.[232]

If Rhett and the Buccaneers had an IBC at their disposal, perhaps the dispute could have been resolved before it affected the season. For the purposes of this hypothetical, the Buccaneers could have offered Rhett a contract including a payment structure like the following:

	Front End
Signing Bonus:	$1,500,000
Base Salary:	$178,000 (the League's minimum)
Reporting Bonus:	0 (forfeited by definition)
Roster Bonus:	____ reduced proportionally by each game missed

qualifying standard; failure to state what happens to the contract provision in the event that the player is traded or assigned; failure to state which records will constitute the official records to determine achievement of a performance bonus, such as conference, league, or team records; failure to state what effect, if any, injuries may have upon the player's opportunity to either achieve or earn bonuses. Greenberg, *Contracts & Clauses*, *supra* note 208, at 59. All of these issues should be accounted for when drafting the IBC.

227. BERRY & WONG, *supra* note 92, at 251–52.

228. *See supra* notes 153–167 and accompanying text.

229. Stroud, *supra* note 160, at 8C.

230. *Id.*

231. Charean Williams, *Rhett Produces Little Yardage in Return*, ORLANDO SENTINEL, Oct. 28, 1996, at B6.

232. T.J. Simers, *Stewart Hasn't Punctuated His Season Yet*, L.A. TIMES, Oct. 27, 1996, at C5.

Back End

Rushing: During the course of the regular season:

1) If Player rushes for 250–749 yards, Player shall receive a bonus of $250,000.
2) If Player rushes for 750–999 yards, Player shall receive a bonus of $500,000.
3) If Player rushes for 1000–1249 yards, Player shall receive a bonus of $750,000
4) If Player rushes for 1250–1499 yards, Player shall receive a bonus of $1,000,000.
5) If Player rushes for 1500–2000 yards, Player shall receive a bonus of $1,250,000.
6) If Player rushes for 2000+ yards, Player shall receive a bonus of $1,750,000.

Receiving: During the course of the regular season:

1) If Player has 10–20 receptions, Player shall receive a bonus of $100,000.
2) If Player has 21–30 receptions, Player shall receive a bonus of $125,000.
3) If Player has 31–40 receptions, Player shall receive a bonus of $150,000.
4) If Player has 41–50 receptions, Player shall receive a bonus of $175,000.
5) If Player has 51–60 receptions, Player shall receive a bonus of $200,000.
6) If Player has 61–70 receptions, Player shall receive a bonus of $225,000.
7) If Player has 70+ receptions, Player shall receive a bonus of $500,000.

Honors and Awards:

1) If Player is awarded the NFL's Most Valuable Player Award, Player shall receive a bonus of $300,000.
2) If Player is voted to his Conference's Pro Bowl Team, Player shall receive a bonus of $100,000.

Team Incentives:

1) If the Buccaneers win 7 or more regular season games and Player is on the team's active list or injured/reserve list at the end of the season, Player shall receive a bonus of $50,000.

Although this payment structure is simplified beyond practical application,[233] had Errict Rhett repeated his 1995–96 performance[234] during the 1996–97 NFL season, he would have been entitled to $2.528 million.[235] The hypothetical demonstrates how the IBC might have resolved the $650,000 impasse that cost the Buccaneers their starting running back for the preseason and nearly half of the regular season.[236]

The IBC's effect on the salary cap must also be considered. The Errict Rhett hypothetical provides a helpful illustration. His $178,000 base salary would count against the cap along with a prorated percentage of the $1.5 million signing bonus.[237] Because Rhett ran for 1207 yards in 1995–96,[238] $750,000 would be considered "likely to be earned" for the purposes of the 1996–97 salary cap. His fourteen receptions in 1995–96[239] would make a $100,000 receiving bonus "likely to be earned." In addition, the Buccaneers won seven games during the 1995–96 season, which makes the $50,000 team incentive "likely to be earned."[240] However, because Rhett did not win the MVP award,[241] the $300,000 bonus would not be characterized as "likely to be earned." Finally, Rhett was not voted to the

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233. For example, this payment structure does not contain any "leader bonuses." When these bonuses are included in the IBC, the drafters would compensate for any extra bonus offered by decreasing the amount given to the player in these categories.

234. Rhett rushed for 1207 yards and had 14 receptions. 1996 RECORD & FACT BOOK, *supra* note 27, at 145.

235. This amount breaks down as follows: $1.5 million signing bonus, $178,000 base salary, $750,000 bonus for 1000–1249 rushing yards, and $100,000 for 10–20 receptions. However, Rhett did not win the NFL's Most Valuable Player Award for the 1996 season nor was he elected to the National Football Conference's 1997 Pro Bowl Team. *Pro Bowl Aloha Again for Favre, Bledsoe*, L.A. TIMES, Feb. 2, 1997, at C12. The Buccaneers finished the 1996 season with a 6-10 record; therefore, Rhett would not have earned his team incentive. *1996 Buccaneers Give Sneak Preview*, L.A. TIMES, Dec. 23, 1996, at C6.

236. Williams, *supra* note 231, at B6.

237. Assuming that Rhett had a four-year contract and the signing bonus was prorated in equal amounts, $375,000 would count against the Buccaneers' salary cap each year.

238. 1996 RECORD & FACT BOOK, *supra* note 27, at 145.

239. *Id.*

240. *Id.*

241. *Id.*

1996 Pro Bowl,[242] which would make the $100,000 incentive not "likely to be earned." Thus, if the Buccaneers had used this simplistic form of an IBC, $1.45 million would have counted against their 1996–97 salary cap.

D. Advantages of the IBC

The greatest advantage of the IBC is that it caters to the contracting motivations of the player and the team. It advances a player's motive to achieve long-term security through a multiyear contract because it will be valid for the same length of time as the original contract.[243] The IBC promotes the team's motive of reducing the potential transaction costs of renegotiating new contracts[244] because it is in essence self-renegotiating. That is, each year, the player will be compensated based on his performance in that year. Consequently, the player retains his long-term contractual security and is paid at a rate relative to other players at his position, while the team foregoes yearly renegotiation costs. Thus, by utilizing an IBC, neither teams nor players would have an incentive to renegotiate to correct any perceived "injustices" in prior negotiations.[245]

E. Summary

The IBC will be an effective tool when dealing with midterm demands for contract renegotiation because both team and player interests are advanced. Under the IBC, the team will no longer absorb all the risks of a long-term deal. When a player has an off-year, the team pays that player less money. The player essentially receives a long-term contract with the benefits of a short-term contract. The long-term security is derived from the length of the contract's validity, but the contract itself is basically a series of one-year deals providing the player with the opportunity to negotiate a new contract every year according to his on-field performance. Thus the team and player receive the mutual benefits of a long-term contract, and the fans are rewarded with top-level NFL talent.

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242. *Id.* at 340.

243. Johnson, *supra* note 2, at 115.

244. *Id.*

245. Allen, *supra* note 146, at 10C.

VII. PRACTICAL IMPLICATIONS OF THE IBC IN THE NFL

A. *Who Would Sign an IBC?*

The allocation of contractual risk established by the IBC makes it highly unlikely that a proven superstar such as Emmitt Smith, Jerry Rice, or Brett Favre would ever sign such a contract. Players of this stature have enough leverage to demand lucrative contracts with a significant portion of the money earned in the front end.[246] In other words, once a player achieves "superstar status," he would never realistically sign a contract requiring him to perform as a superstar year in and year out. Thus, the IBC would be ill-suited to such players. Instead, the practical application of the IBC will likely be limited to two situations: midterm demands for renegotiation involving potential superstars and those involving players with insufficient leverage to compel a team to renegotiate immediately.

1. Dealing with a Player's Unknown Potential

The IBC will be an effective tool in renegotiating the contracts of potential superstars, such as Errict Rhett, who believe that their past performance compels the immediate renegotiation of their contracts. In this situation, the team is placed in a defensive posture because a player integral to the team's success and prowess is threatening to hold out. However, because the player has not yet reached "superstar" status, he does not have the leverage to command the immediate renegotiation of a high-priced, long-term contract. Thus, both sides must negotiate based on an unknown factor: will the player continue to perform at his previous level, or was his past performance a fluke?

The IBC is beneficial to both the team and player in this situation because the variability of the player's performance is inherently factored into the formulation of the incentive provisions. If the player continues to perform at an elite level, he will be paid accordingly; however, if his post-renegotiation performance deteriorates, he will be paid less. Although such a contractual paradigm may be unthinkable for an Emmitt Smith or Jerry Rice, it is a more viable alternative when negotiating with a player who has not proven himself over the course of time.

246. *See, e.g.*, *New Rice Contract Worth $32 Million*, L.A. TIMES, Aug. 29, 1996, at C7 (discussing Jerry Rice's 1996 contract extension with the San Francisco 49ers in which all of the money is contained in the front end of the contract).

2. Where the Team Is in an Offensive Posture

The IBC also may be realistically applied when renegotiating a contract in a situation like the one involving the New York Jets and Marvin Jones.[247] The Jets were in a much more favorable position because Jones had little or no leverage to pressure the team into renegotiating. Although the scenario is significantly different from that of potential superstars, both sides are again dealing with an unknown factor. Specifically, Jones had not played in a sufficient number of games to evaluate his past performance accurately. However, Jones believed that he was presently worth more than when he was originally signed, and the Jets were waiting for him to fulfill the potential for which he was originally drafted and signed.

Such a situation invites the team to use the IBC in an offensive rather than a defensive posture. If the player performs at an unexpectedly high level, then he will be paid accordingly. However, in the much more likely event that the player continues to be hampered by injuries or perform below expectations, the team will be able to escape a bad deal. Although it is true that using the IBC in this situation would be quite advantageous for the team, those benefits may dissuade the player from making such a demand in the first place. Such a reduction of midterm demands for renegotiation will likely result in less tension between players and management.

B. Does the IBC Disproportionately Benefit the Owners?

1. Owners Ordering the Coach to Keep a Player out of a Game

If a player is to subject himself to the bright-line standards set forth in his IBC, what assurances does the player have that his team's owner will not order the coach to keep him out of a game in order to prevent the player from reaching a higher incentive platform? Such a scenario is one of the most potentially vulnerable aspects of the IBC because it would undermine the integrity of the incentive-based system. Therefore, if a player is willing to enter into an IBC in good faith, the team should reciprocate by adding a provision to the IBC calling for an independent arbitrator to govern any and all disputes over the incentive provisions.

For example, if former Arizona Cardinal quarterback Boomer Esiason was playing under an IBC during the 1996–97 season, he may have had an addressable complaint for an arbitrator. During the November 10, 1996

247. *See supra* Part V.B.2.

game against the Washington Redskins, Esiason passed for 522 yards,[248] doubling his season total in passing from 512 to 1034 yards.[249] However, by December 15, Esiason had been replaced at quarterback by Kent Graham.[250] If Esiason had an IBC calling for him to earn a $350,000 bonus if he passed for 2000 yards during the course of the regular season, he may have been able to bring a claim against the Cardinals that he was replaced in order to prevent him from earning the higher incentive. It would be for the independent arbitrator to review the decision and determine whether it was reasonable under the circumstances or if it was made in bad faith.

2. Owners Getting More Than Their Fair Share of the Revenue

Assuming that most players who enter into IBCs fall short of their expectations and consequently receive less compensation, the owners ultimately reap a net monetary gain. This result will likely trouble critics of the IBC. Many would argue that in light of the limited length of an athlete's career, it is unfair to deny players as much up-front money as possible, as soon as possible. However, the net savings to the teams may have widespread benefits for the fans.

It is often the fans who are forgotten in the conflict between the teams and players. In recent years, NFL fans have seen ticket prices soar as a result of the rising player costs. If the burden of player compensation packages on teams can be diminished, there will be little justification for passing off the prohibitive costs of running a NFL franchise to the fans. Thus, if the IBC reduces the owners' player costs, the fans should expect and demand lower ticket, concession, and parking prices. In this way, the IBC could remove the burdensome prices on fans, while continuing to compensate the players and still leave the teams with the ability to make money.

248. Lee Shappell, *Running Start Sought vs. Redskins*, ARIZ. REPUBLIC, Dec. 14, 1996, at C7.

249. Sam Adams, *Silver and Black—But Blue All Over*, ROCKY MTN. NEWS, Nov. 17, 1996, at 4N.

250. Shappell, *supra* note 248, at C7.

C. *Would an IBC Create Intra-Team Tension?*

1. Individual Incentives versus Team Objectives

Whenever a player signs a contract with individual incentive clauses, an immediate concern is whether such clauses undermine the spirit and cohesiveness of the team. An IBC may exacerbate the situation because almost the entire contract consists of individual incentive clauses. The primary way to combat this conflict is to include a sufficient amount of attractive team incentives in the IBC. Team incentives will operate to mitigate the tension between the player's motivation to earn money for himself and his responsibility to play for the success of his team.

2. Teammate versus Teammate

A potential conflict may also arise if two players on the same team and at the same position have IBCs. While such a scenario is not inconceivable, it is not likely to develop because, in general, midterm demands for renegotiations are sought by superstars or formerly mediocre players following a good year.[251] If for no other reason than the restraints of the hard salary cap, it is unlikely that a team would have two such players at the same position at once.

However, a potential way for the scenario to come about is if a superstar player with an IBC suffers a season-ending injury. If the backup player becomes a "one-year wonder," demands a midterm renegotiation, and negotiates an IBC, a team could then conceivably have two players at the same position with IBCs. The result may be competitive and economic tension between those players, and may even have a deleterious effect on the team as a whole.

However, these conflicts already exist. Many players currently have incentive clauses in their contracts that may not be reached because other players on the same team have similar incentives. For example, there is a finite number of passes that can be caught in a season. With limited reception opportunities, a team with several highly talented wide receivers—such as the Detroit Lions with Herman Moore, Brett Perriman, and Johnnie Morton[252]—will inevitably experience a conflict. Although the IBC may contribute to conflicts between teammates, at the very worst, the IBC could be seen as exacerbating the tensions that already are present.

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251. Johnson, *supra* note 2, at 94; *see also supra* Part V.C.

252. 1996 RECORD & FACT BOOK, *supra* note 27, at 114.

VIII. CONCLUSION

It is important to emphasize that this Comment limits the application of the IBC to midterm demands for contract renegotiation. Although broadening the application of the IBC to a player's original contract may be appealing, there are further and more complicated difficulties to consider.[253] Accordingly, the IBC is not intended to be a panacea for all that is wrong with contracts in the NFL. It is designed to address one specific situation: midterm demands for contract renegotiations.[254]

Used as a tool for dealing with midterm demands for renegotiation, the IBC may also have the indirect effect of discouraging players from demanding midterm renegotiations of their contracts. Because there can only be a few elite players, salaries on average will drop. Therefore, if teams adopt the IBC as their means of dealing with players with star potential and self-proclaimed superstars, many will be dissuaded from making such demands to begin with. Therefore, the IBC will serve a simultaneous, dual function: as a mechanism to bring holdouts to a quick resolution and to diminish such holdouts from occurring in the first place.

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253. Such issues are beyond the scope of this Comment.

254. Thus, the IBC is not foreseen as serving as a base contract when signing free agents, draft choices, or undrafted free agents.

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