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# THIRD AND LONG: THE ISSUES FACING THE NFL COLLECTIVE BARGAINING AGREEMENT NEGOTIATIONS AND THE EFFECTS OF AN UNCAPPED YEAR

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&

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## I. INTRODUCTION

The National Football League (NFL) has enjoyed a lofty position among other professional sports leagues and has claimed its spot as “America’s Game” in recent years.<sup>1</sup> In a July 2009 ESPN poll, the NFL had the highest twelve-month average fan interest compared to all other leagues or sports.<sup>2</sup> Much of the NFL’s popularity can be attributed to its television deals, which provide fans with almost constant NFL programming, and the revenue that such deals have generated for the NFL. Entering the 2007 season, the NFL had television contracts in place with the following television rights holders with annual values as follows: ESPN (\$1.1 billion through 2013),<sup>3</sup> Fox (\$712.5 million through 2011),<sup>4</sup> CBS (\$622.5 million through 2011),<sup>5</sup> NBC

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1. See generally *America’s Game: The Super Bowl Champions* (NFL Network); MICHAEL MACCAMBRIDGE, *AMERICA’S GAME: THE EPIC STORY OF HOW PRO FOOTBALL CAPTURED A NATION* (chronicling the Super Bowl, its rise to popularity, and pinnacle as national holiday status as NFL football has increased in popularity in the United States).

2. *ESPN Sports Poll: NHL Avid Fan Interest at 12-Month High in July*, STREET & SMITH’S SPORTS BUS. DAILY, Aug. 25, 2009, <http://www.sportsbusinessdaily.com/article/132818>.

3. Daniel Kaplan & John Ourand, ‘MNF’ Offer on Table in ESPN-NFL Net Talks, STREET & SMITH’S SPORTS BUS. J., July 7, 2008 at 1, available at <http://www.sportsbusinessjournal.com/article/59503>.

4. Fox extended its deal with the NFL through the 2013 season at an estimated two percent increase per year. Stuart Levine, *CBS, Fox Extend NFL Deals*, VARIETY, May 19, 2009, available at <http://www.variety.com/article/VR1118003970.html?categoryid=1011&cs=1>.

5. *Id.*

(\$600 million through 2011),<sup>6</sup> and DirecTV (\$700 million through 2010 and \$1 billion per year 2011-2014).<sup>7</sup> Furthermore, the proliferation of fantasy football has allowed for avid fans to become even more involved in NFL games and has helped grow interest among casual fans by giving them reasons to become invested in the performance of players throughout the NFL, not just the fans' local team.

Another primary reason for the success of the NFL that cannot be discounted has been the relative labor peace between the National Football League Management Council (NFLMC), the representative body for the NFL clubs with respect to collective bargaining, and the National Football League Players Association (NFLPA), the representative body for the NFL players with respect to collective bargaining. The last work stoppage in the NFL occurred during the 1987 season when the players' union went on strike in an effort to obtain true free agency, among other things.<sup>8</sup> Comparatively, the other three major professional sports leagues in the United States, the National Basketball Association,<sup>9</sup> Major League Baseball,<sup>10</sup> and the National Hockey League,<sup>11</sup> have each undergone at least one work stoppage during that period. In 1987, the NFL players' union was unsuccessful in its strike due to many factors including lack of solidarity among union members and continuance of NFL games played by replacement players.<sup>12</sup>

Following the 1987 strike and bouts of legal proceedings between the

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6. NBC extended its deal with the NFL through the 2013 season at an estimated two percent increase per year. John Eggerton, *NBC, NFL Extend Deal for Two More Years*, BROADCASTING & CABLE, Aug. 19, 2009, available at [http://www.broadcastingcable.com/article/328038-NBC\\_NFL\\_Extend\\_Deal\\_For\\_Two\\_More\\_Years.php](http://www.broadcastingcable.com/article/328038-NBC_NFL_Extend_Deal_For_Two_More_Years.php).

7. DirecTV extended its deal with the NFL to have the exclusive right to broadcast the Sunday Ticket Package from 2011-2014 at an annual value of one billion dollars during such period. Matthew Futterman, *NFL, DirecTV Extend Pact in \$4 Billion Deal*, WALL STREET J., Mar. 24, 2009, at B5, available at <http://online.wsj.com/article/SB123786503490122053.html>; *NFL Media Rights Deals for '07 Season*, STREET & SMITH'S SPORTS BUS. DAILY, Sept. 6, 2007, <http://www.sportsbusinessdaily.com/article/114714>.

8. Paul D. Staudohar, *The Football Strike of 1987: A Question of Free Agency*, 111 MONTHLY LAB. REV. 26, 27 (1988).

9. National Basketball Association underwent a 191-day lockout beginning on July 1, 1998. *NBPA History*, NBPA.COM, <http://www.nbpa.com/history.php> (last visited Sept. 3, 2009).

10. Major League Baseball underwent a 32-day spring training lockout in 1990 and a 232-day strike in 1994, including the cancellation of the 1994 post-season. *Don Fehr Announces Retirement*, MLB.COM, June 22, 2009, [http://www.mlb.com/pa/news/article.jsp?ymd=20090622&content\\_id=5470258&vkey=mlbpa\\_news&fext=.jsp](http://www.mlb.com/pa/news/article.jsp?ymd=20090622&content_id=5470258&vkey=mlbpa_news&fext=.jsp).

11. National Hockey League underwent a 103-day lockout during the 1994-95 season and a complete cancellation of the 2004-05 season due to a lockout. Paul D. Staudohar, *The Hockey Lockout of 2004-05*, 128 MONTHLY LAB. REV. 12, 23 (2005).

12. Staudohar, *supra* note 8, at 27.

NFLPA and the NFLMC, the parties negotiated a collective bargaining agreement (CBA) in 1993.<sup>13</sup> This CBA was extended several times and serves as the basis for the most current CBA between the NFLPA and the NFLMC, which was most recently extended in 2006.<sup>14</sup> The 2006 CBA initially was set to expire following the 2012 season;<sup>15</sup> however, the 2006 CBA allows either party to terminate the 2006 CBA early, essentially eliminating the final two years of the 2006 CBA.<sup>16</sup> In March 2008, the NFL owners elected to exercise this early termination option,<sup>17</sup> thus, making the 2010 season the final league year under the 2006 CBA.<sup>18</sup> Consequently, the NFL is in a precarious situation. The NFLMC and the NFLPA must agree on terms to extend or create a new CBA prior to March 1, 2010, (the "2010 League Year") to avoid an uncapped 2010 season and all of the ramifications that an uncapped year would entail.<sup>19</sup> More importantly, the NFLMC and the NFLPA must agree on terms to extend or create a new CBA prior to March 1, 2011, to prevent a work stoppage in the 2011 season.<sup>20</sup>

The CBA negotiations may have an added hurdle to overcome as the respective leaders of the NFLMC, NFL Commissioner Roger Goodell, and the NFLPA Executive Director DeMaurice Smith, are overseeing their first collective bargaining negotiation as leaders of their organizations.<sup>21</sup> Some commentators believe that this new leadership could slow the negotiation process because of the lack of familiarity in working with each other.<sup>22</sup>

The NFLPA and the NFLMC recently have commenced CBA

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13. Nat'l Football League, *NFL Owners Opt Out of CBA*, NFL.COM, May 20, 2008, <http://www.nfl.com/news/story?id=09000d5d80868b78&template=without-video&confirm=true>.

14. *Id.*

15. *Id.*

16. NAT'L FOOTBALL LEAGUE, *NFL COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NFL MANAGEMENT COUNCIL AND THE NFL PLAYERS ASSOCIATION*, art. LVIII § 3(a) (March 8, 2006) [hereinafter *NFL CBA*].

17. Nat'l Football League, *supra* note 13.

18. *NFL CBA*, *supra* note 16, at art. LVIII §3(a).

19. Vic Carucci, *Commissioner, Owners Preparing for Crucial CBA Discussions*, NFL.COM, <http://www.nfl.com/news/story?id=09000d5d80f6991d&template=without-video-with-comments&confirm=true> (last visited Sept. 7, 2009).

20. See Patrick Patterson, *Oakland Raiders and the Countdown to 2011: The Coming Labor War*, EXAMINER.COM, Feb. 14, 2009, <http://www.examiner.com/x-514-Oakland-Raiders-Examiner~y2009m2d14-Oakland-Raiders-and-the-countdown-to-2011-The-coming-labor-war>.

21. Liz Mullen, *Another Variable: New Leadership*, STREET & SMITH'S SPORTS BUS. J., Aug. 17-23, 2009 at 29 [hereinafter *New Leadership*]; NFL General Counsel, Jeff Pash, is assuming a leading role on behalf of the NFLMC. Liz Mullen, *League Wants to Deduct More Costs from Revenue*, STREET & SMITH'S SPORTS BUS. J., Aug. 17-23, 2009, at 28.

22. See *New Leadership*, *supra* note 21.

negotiations, but there are many issues where the parties have conflicting views. This article will highlight some of the main issues that likely will be disputed topics during the CBA negotiations. Furthermore, this article will discuss in greater detail the ramifications and consequences of a failure to agree on terms to extend or create a new CBA prior to the 2010 League Year.

## II. DISPUTED TOPICS

As the NFLMC and the NFLPA begin negotiations toward a new CBA, the parties face numerous issues that may prevent them from reaching an agreement before the owners have the ability to lock out the players for the 2011 NFL season. The NFLMC and NFLPA must negotiate in good faith on the mandatory subjects of collective bargaining, which include hours, wages, and working conditions.<sup>23</sup> The primary issue between the two bargaining parties relates to the current revenue split between players and owners,<sup>24</sup> which is considered a mandatory subject of collective bargaining regarding wages. Another issue that may be negotiated, which most likely is a mandatory subject of collective bargaining because of its indirect tie to wages,<sup>25</sup> is the NFL Personal Conduct Policy (the "Policy"). Both of these issues will be highlighted below, pointing out each side's optimal result of the negotiations and offering a possible resolution to each issue.

### A. Revenue Sharing-Revenue Split

One of the main points of contention between the NFLMC and the NFLPA is the revenue split between the players and the owners.<sup>26</sup> The owners want to rework the revenue split between the players and the owners agreed to in the 2006 CBA that pays the players almost sixty percent of total revenue.<sup>27</sup> Essentially, players are allocated a percentage of the NFL's total revenue via the salary cap.<sup>28</sup> The salary cap is an adjustable calculation that sets a team's maximum payroll for a league year.<sup>29</sup> The salary cap

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23. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 236 (1996).

24. Len Pasquarelli, *Goodell Facing Another Uphill Climb*, ESPN.COM, July 10, 2009, [http://sports.espn.go.com/nfl/columns/story?columnist=pasquarelli\\_len&id=4318632](http://sports.espn.go.com/nfl/columns/story?columnist=pasquarelli_len&id=4318632).

25. Marc Edelman, *Are Commissioner Suspensions Really Any Different From Illegal Group Boycotts? Analyzing Whether the NFL Personal Conduct Policy Illegally Restrains Trade*, 58 CATH. U. L. REV. 631, 655-57 (2009).

26. Pasquarelli, *supra* note 24.

27. *Smith Trying to Avoid Lockout*, ESPN.COM, July 14, 2009, <http://sports.espn.go.com/nfl/news/story?id=4327298> [hereinafter *Smith*].

28. See NFL CBA, *supra* note 16, at art. XXIV § 4.

29. See *id.*

theoretically works in favor of both the players and the owners.<sup>30</sup> When the NFL's total revenue increases, the salary cap likewise increases and both the owners and players should make more money.<sup>31</sup> However, when the NFL's total revenue decreases, theoretically, both the players and owners suffer the effects of such decrease.<sup>32</sup> NFL team owners, however, believe the current salary cap structure is not working.<sup>33</sup> The owners currently claim to be losing money per game due to the increased expenses of operating a franchise (e.g. stadium operations), while the NFLPA claims that the owners are not only earning a profit each year, but the values of the NFL franchises are increasing at a rapid rate.<sup>34</sup>

Approximately sixty percent of revenue generated by each team goes to the players, which leaves owners with the remaining forty percent to pay the team's other expenses, such as stadium costs and the team's staff.<sup>35</sup> The owners would like to reduce the revenue number allocated to the players or alter what constitutes total revenue under salary cap calculations so that the owners keep more of the revenue.<sup>36</sup> All is not lost on the money issue however, because it may provide owners what they want and let players maintain or increase their portion of revenues.

One possible way of increasing revenue would be to increase the number of regular season games.<sup>37</sup> By increasing the number of regular season games, the total revenue figure would be increased, thereby allowing the players to maintain their current pay structure, while giving the owners the additional revenue needed to earn a profit to their satisfaction.<sup>38</sup> It is likely that a compromise would need to be made, such as reducing the number of preseason games, which may be too numerous anyway.<sup>39</sup>

An issue to be considered, however, is the additional pay that players may request due to additional regular season games.<sup>40</sup> Additional regular season

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30. See Patterson, *supra* note 20.

31. See *id.*

32. See *id.*

33. Daniel Kaplan, *Goodell Says as Many as 20% of NFL Games May be Blacked Out*, STREET & SMITH'S SPORTS BUS. DAILY, Sept. 4, 2009, <http://www.sportsbusinessdaily.com/article/133093>.

34. See *id.*; see also Smith, *supra* note 27; *Union: No Reason for NFL Lockout*, ESPN.COM, Jan. 29, 2009, <http://sports.espn.go.com/espn/wire?id=3870398&section=nfl>.

35. Smith, *supra* note 27.

36. See *Union: No Reason for NFL Lockout*, *supra* note 34.

37. Mike Klis, *NFL Eyes Extension of Season*, DENVER POST, Aug. 27, 2008, available at [http://www.denverpost.com/sports/ci\\_10310155](http://www.denverpost.com/sports/ci_10310155).

38. *Id.*

39. *Id.*

40. *Id.*

games would increase injury risk to NFL players' careers, which are already relatively short.<sup>41</sup> Players would likely want to leverage this increased injury risk by receiving even higher pay, which may create another conflict between the parties. Consequently, a solution to this issue will not be simple or straightforward. If the owners and players cannot agree on this revenue split issue, the two sides appear headed toward an uncapped 2010 League Year, which, as discussed in more detail below, could have a significant impact on the NFL and ultimately lead the parties into a lockout.<sup>42</sup>

### *B. Personal Conduct Policy*

The Policy received a wholesale revision when then-new NFL Commissioner Roger Goodell overhauled the existing player conduct policy to include off the field conduct.<sup>43</sup> The Policy states, "[a]ll persons associated with the NFL are required to avoid 'conduct detrimental to the integrity of and public confidence in the National Football League.'"<sup>44</sup> The Policy gives the Commissioner the ultimate authority to discipline any violator of the Policy and the power to review any appeal.<sup>45</sup> The Commissioner's absolute authority over the discipline and appeals of players may be a hot topic at the bargaining table.

Unfortunately, the Commissioner has had to enforce the Policy relatively frequently since its inception. In the past several months, the Commissioner suspended Marshawn Lynch for three games for having a concealed firearm, which was his second run-in with the law, and the Commissioner ultimately denied his appeal;<sup>46</sup> punished Michael Vick for his role in a dog fighting operation for up to six regular season games, subsequently reducing this suspension to two games;<sup>47</sup> and suspended Donte Stallworth indefinitely for killing a man while driving intoxicated.<sup>48</sup> The disciplinary decisions in each

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41. *See id.*

42. Barry Wilner, *Union, League to Meet Tuesday*, SEATTLE TIMES, Sept. 28, 2009, available at [http://seattletimes.nwsources.com/html/sports/2009960440\\_apfbnnfllabor.html?syndication=rss](http://seattletimes.nwsources.com/html/sports/2009960440_apfbnnfllabor.html?syndication=rss).

43. *See* Edelman, *supra* note 25, at 632.

44. *See* NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, PERSONAL CONDUCT POLICY 1, 1 (2008), available at <http://www.nflplayers.com/user/template.aspx?fmid=181&lmid=336&pid=0&type=n>.

45. *Id.* at 2-3.

46. Michael Smith, *Bills RB Lynch Suspended First 3 Games*, ESPN.COM, Apr. 9, 2009, <http://sports.espn.go.com/nfl/news/story?id=4054396>; *Lynch's Suspension Upheld*, ESPN.COM, Aug. 4, 2009, <http://sports.espn.go.com/nfl/news/story?id=4374980>.

47. *Vick Eligible to Play in Third Week*, ESPN.COM, Sept. 4, 2009, <http://sports.espn.go.com/nfl/news/story?id=4442627>.

48. *Stallworth Suspended for 2009*, ESPN.COM, Aug. 13, 2009, <http://sports.espn.go.com/nfl/news/story?id=4396130>.

of these situations could have been handled differently by the Commissioner in light of the severity of each of the offenses and punishments given for each situation.

Ways to reduce the scrutiny relating to the Commissioner's disciplinary decisions regarding players' off-the-field transgressions would be to adopt disciplinary guidelines for punishment, let the Commissioner retain his initial authority, but also have an independent review panel oversee all player appeals to ensure fairness and to avoid arbitrary and capricious punishment. This suggestion would impart more objectivity into the NFL disciplinary process and likely reduce any potential claims of partiality.

### III. EFFECT OF 2010 UNCAPPED YEAR

In the event that the NFLMC and the NFLPA do not reach an agreement prior to March 1, 2010, certain provisions of the 2006 CBA will be enacted that will have a different effect in an uncapped 2010 League Year. The changes caused by an uncapped year will be discussed further below.

#### *A. Salaries*

A failure to reach an agreement by March 1, 2010, would primarily affect players' salaries and team payroll.<sup>49</sup> If no agreement is reached by March 1, 2010, then 2010 will be the final league year with an existing agreement.<sup>50</sup> In such event, the 2010 League Year will be uncapped, meaning no salary cap would be in effect for 2010.<sup>51</sup> Accordingly, in the 2010 League Year, teams would not be restricted as to the amount of payroll that they could carry. Therefore, hypothetically, a team that greatly values a certain free agent may outbid other teams for that player's services without the restrictions of the salary cap. In such event, big market teams or free-spending owners could potentially acquire much of the top free agent talent and effectively sway the competitive balance in the NFL.

Conversely, no-minimum-team-salary requirement would exist in an uncapped 2010 League Year.<sup>52</sup> The minimum-team-salary requirement is the amount of payroll that a team is required to have at the end of each year in which the salary cap is in effect.<sup>53</sup> The minimum-team-salary is calculated as

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49. Daniel Kaplan & Liz Mullen, *NFL Sides Prepare for Uncapped Year*, STREET & SMITH'S SPORTS BUS. J., Sept. 7, 2009 at 1, available at <http://www.sportsbusinessjournal.com/article/63447>.

50. NFL CBA, *supra* note 16, at art. LVIII §3(a).

51. *Id.* at art. LVI § 1.

52. *Id.* at art. XXIV § 5(a).

53. *Id.*



a certain percentage of that year's salary cap, which had a base year value of 84% in 2006, and the required amount increases each year by 1.2% but never to exceed 90%.<sup>54</sup> For example, in the 2009 league year, teams have a minimum-team-salary requirement of 87.8% of the salary cap.<sup>55</sup>

In the event of an uncapped year with no salary cap and no-minimum-team-salary, the possibility exists that teams will utilize an uncapped year to lower players' salaries.<sup>56</sup> Operating without a minimum salary requirement would allow the owners to set the market for free agents and rookies without any artificial salary floors.<sup>57</sup> In such event, the NFL offseason would become a true free market governed by the economic principle of supply and demand.

As previously discussed in this article, a primary reason for the owners opting out of the CBA is the perceived breakdown of the current financial model.<sup>58</sup> The NFLMC believes that the current financial model is harming them by providing the players with too large of a revenue share.<sup>59</sup> Anthony Noto, NFL Executive Vice President and Chief Financial Officer stated, "for every dollar of new revenue generated by the league since the CBA was renewed in '06, the league has lost \$0.06 and the players have reaped \$0.75."<sup>60</sup> Consequently, the owners could address this financial concern by driving down players' salaries by offering lower value-contracts to free agents and rookies. Owners, however, need to be cautious to avoid acting in concert by lowering salaries and thus, acting in collusion, which would violate antitrust law.<sup>61</sup>

### *B. Player Movement*

An uncapped 2010 League Year also could affect the movement of players throughout the NFL. The uncapped 2010 League Year would alter the free agency eligibility qualifications for the players.<sup>62</sup> Generally, in any league year where the salary cap is effective, a player that has four or more accrued seasons is eligible for unrestricted free agency at the expiration of his player

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54. *Id.*

55. *See id.*

56. Kaplan, *supra* note 49.

57. Patterson, *supra* note 20.

58. *See generally*, Pasquarelli, *supra* note 24; Kaplan, *supra* note 32.

59. Kaplan, *supra* note 33.

60. *Id.*

61. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 263 (1996).

62. *See* J.I. Halsell, *How Clubs Have Unprecedented Leverage by the Looming Uncapped Year*, INSIDE THE CAP WITH J.I. HALSELL, Aug. 24, 2009, <http://insidethecap.blogspot.com.2009/08/why-vince-wilfork-is-perplexed-how.html>.

contract.<sup>63</sup> Unrestricted free agency is highly beneficial for a player because he is completely free to negotiate and sign with another team, and any team can negotiate and sign that player without penalties or restrictions.<sup>64</sup> In unrestricted free agency, teams essentially bid on a player's services in an open marketplace, and the player goes to the team that pays the most money. In an uncapped year, however, a player is not eligible for unrestricted free agency until he has six or more accrued seasons at the expiration of his player contract.<sup>65</sup> Consequently, in an uncapped year, a player would not be eligible for unrestricted free agency until such player is entering his seventh NFL season, instead of being eligible prior to his fifth NFL season in a capped year.<sup>66</sup>

Players that would feel the effects of the uncapped year directly would be those players with four or more, but less than six accrued seasons that have contracts expiring in an uncapped 2010 League Year or any other uncapped year.<sup>67</sup> In an uncapped 2010 League Year, these players would be restricted free agents,<sup>68</sup> which is less favorable for players because if certain procedures are followed, their prior teams have the right of first refusal and the right to receive draft choice compensation regarding any contracts that players would sign with another team.<sup>69</sup>

To receive the right of first refusal, draft choice compensation, or both, a restricted free agent's prior team must tender the restricted free agent a qualifying offer on or prior to the first date of the restricted free agent's signing period.<sup>70</sup> By tendering a qualifying offer, the prior team receives a right of first refusal to match any contract offer that a restricted free agent receives; if the prior team chooses not to exercise its right of first refusal, then the prior team may receive draft choice compensation from the team that the restricted free agent signs with depending on which qualifying offer the prior team tendered to the restricted free agent.<sup>71</sup> For example, if the prior team

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63. NFL CBA, *supra* note 16, at art. XIX § 1(a)

64. *Id.*; Unrestricted free agents are subject to franchise and transition player designations from the player's previous club, which would effectively chill the player's chances of signing a contract with another team. See NFL CBA, *supra* note 16, at art. XIX § 1(a), XX.

65. *Id.* at art. LVI § 2.

66. See J.I. Halsell, *How Clubs Have Unprecedented Leverage by the Looming Uncapped Year*, INSIDE THE CAP WITH J.I. HALSELL, Aug. 24, 2009, <http://insidethecap.blogspot.com/2009/08/why-vince-wilfork-is-perplexed-how.html>.

67. *Id.*

68. *Id.*; see also, NFL CBA, *supra* note 16, at art. XIX § 2.

69. See NFL CBA, *supra* note 16, at art. XIX § 2.

70. *Id.* § 2(b).

71. See Halsell, *supra* note 63.

tenders a restricted free agent a qualifying offer at an amount that qualifies for a right of first refusal, first and third round draft choice compensation, and if another team signs the restricted free agent to a contract that the prior team does not match, then the new team must compensate the prior team with first and third round draft choices in that year's NFL draft.<sup>72</sup> Accordingly, restricted free agency has a chilling effect on player movement because additional costs potentially exist in the form of draft choice compensation that depresses the marketplace for the services of restricted free agents.

Another provision enacted in the event of an uncapped 2010 League Year that could limit player movement is the Final Eight Plan.<sup>73</sup> The Final Eight Plan limits the unrestricted free agents that the top four teams in each conference from the previous year may sign to a contract.<sup>74</sup> The four teams that played in the NFC and AFC Championship games may only sign unrestricted free agents that (a) are acquired via the NFL waiver system; (b) were previously under contract with such team; or (c) are signed after such team loses one of its own free agents to another team.<sup>75</sup> The four teams that lost in the playoff games immediately prior to the NFC and AFC Championship games are subject to the same limitations discussed immediately above; however, these teams also may sign one unrestricted free agent that has a first-year salary of \$4,925,000 or more, any number of unrestricted free agents that have a first-year salary of "no more than \$3,275,000 and an annual increase in any future contract years of no more than 30% of the first contract year [s]alary . . . [,]" "or both."<sup>76</sup>

The Final Eight Plan affects player movement by prohibiting, in certain circumstances, twenty-five percent of the teams in the NFL from signing a certain class of unrestricted free agents. This limitation eliminates competitors from the marketplace for the services of unrestricted free agents, which may not only limit player movement, but may also reduce player salaries due to fewer teams bidding on unrestricted free agents' services.

### *C. Benefits*

Another consequence of an uncapped 2010 League Year is the effect on player benefit programs. An uncapped year could have a significant impact on

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72. NFL CBA, *supra* note 16, at art. XIX § 2.

73. See NFL CBA, *supra* note 16, at art. XXI.

74. See *id.*

75. NFL CBA, *supra* note 16, at art. XXI §§ 2, 4.

76. NFL CBA, *supra* note 16, at art. XXI § 3.

the application of the benefit programs to both active and retired players.<sup>77</sup> In an uncapped year, teams are not required to contribute monetarily to certain player benefit programs, except to the extent required by the Internal Revenue Code.<sup>78</sup> Such programs include the Second Career Savings Plan, the Player Annuity Program, the Severance Pay Plan, the NFL Player Supplemental Disability Plan, the Health Reimbursement Account, the NFL Player Benefits Committee, the Workers' Compensation Time Offset Fund, the Performance Based Pool, and the Tuition Assistance Plan (collectively, the "Benefit Programs").<sup>79</sup>

An uncapped year could preclude a player from being eligible for certain programs. Under the 88 Plan, the program that provides medical benefits to eligible former players determined to be suffering from dementia, one of the eligibility requirements is that a former player must qualify for the program during a year in which the salary cap was in place.<sup>80</sup> The 88 Plan continues operating during uncapped years and after the expiration of the 2006 CBA; however, former players may only qualify during capped years.<sup>81</sup> Accordingly, if a former player does not qualify for the 88 Plan prior to an uncapped 2010 League Year, such former player may never be eligible for the 88 Plan unless a new CBA is agreed to that includes a salary cap or the terms of the 88 Plan are amended. An uncapped year also could affect the funds available under the Benefit Programs. The NFL Players Health Reimbursement Account, the program that reimburses eligible players and their dependents for medical expenses, could have a limited existence in uncapped years as it would continue until all nominal accounts in such program have been paid or have been forfeited.<sup>82</sup> If the NFL teams exercise their right to not contribute to the program during an uncapped year, then players conceivably would have a lesser amount of funds to draw from, with the potential risk of exhausting the funds in the program.

Similarly, the operation of the NFL Player Benefits Administration, if established, could deplete funds from certain programs of the Benefit Programs.<sup>83</sup> The NFL Player Benefits Administration is the administrative service provider of the labor-management committee jointly established by the

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77. Kaplan, *supra* note 50.

78. NFL CBA, *supra* note 16, at art. XLVI § 6.

79. *Id.*

80. NFL CBA, *supra* note 16, at art. XLVIII-D § 4.

81. *Id.*

82. NFL CBA, *supra* note 16, at art. XLVIII-C § 7.

83. *See id.* at art. XLVIII-E § 4.

NFLMC and NFLPA and the NFL Player Benefits Committee.<sup>84</sup> During an uncapped year, the NFL Players Benefits Administration would be funded by the Bert Bell-Pete Rozelle NFL Player Retirement Plan, the NFL Player Supplemental Disability Plan, the NFL Player Second Career Savings Plan, the NFL Player Annuity Program, the 88 Plan, and the Health Reimbursement Plan proportionately in accordance with the services provided to each such plan, or otherwise to the extent the parties agree.<sup>85</sup>

Therefore, during an uncapped year, the operations of the NFL Player Benefits Administration could deplete the funds of the respective plans listed above, which would detrimentally affect the players. Such actions could have a significant detrimental effect if such plan funds are lower in the event that the teams have exercised their right not to contribute to the Benefit Programs.

An uncapped 2010 League Year likely would have a significant impact on all parties related to the NFL. In an uncapped year, there would be far less salary guidelines and restrictions, so the free agent marketplace would be much more like a free market system.<sup>86</sup> This less restrictive marketplace, however, does not guarantee players will be able to earn higher salaries as many teams may take advantage of the no-minimum-team-salary exception in an uncapped year to drive down players' salaries.<sup>87</sup> Additionally, an uncapped year could depress the number of players moving between teams due to the increased accrued season requirement for unrestricted free agent eligibility, as well as the Final Eight Plan.<sup>88</sup> Furthermore, an uncapped year could have a significant detrimental effect on Benefit Programs for active and former players.<sup>89</sup> An uncapped year could affect player's eligibility for certain of the Benefit Programs and the funds available for some of the Benefit Programs.<sup>90</sup>

#### IV. CONCLUSION

The NFL is faced with a very serious situation regarding the CBA negotiations. The conflict between the NFLMC and the NFLPA regarding the split of the NFL's total revenues likely will be the primary issue of the CBA negotiations. Both parties will be looking to ensure that the health of their wallets is well-protected in any new deal. The other likely topics of the CBA

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84. *Id.* at art. XLVIII-E § 2.

85. *Id.* at art. XLVIII-E § 4.

86. *See* Halsell, *supra* note 67.

87. *See* Patterson, *supra* note 20.

88. *See* Halsell, *supra* note 67; *see* NFL CBA, *supra* note 16, at art. XXI.

89. *See* NFL CBA, *supra* note 16, at art. XLVIII-E § 4.

90. *See generally id.* at art. XLVIII-D §§ 4, 6 (detailing differences in eligibility and funding in uncapped years).

negotiations, the NFL Personal Conduct Policy, additional regular season games, and a rookie salary cap or slotting system, also cannot be discounted as factors driving the success of the CBA negotiations. An uncapped 2010 League Year appears to be a greater possibility, as Commissioner Goodell has more readily accepted this likelihood.<sup>91</sup> Many people will be monitoring the progress of the CBA negotiations with their eyes focused on March 1, 2011, with the hope of avoiding the worst-case scenario: A 2011 season without NFL football.

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91. Barry Wilner, *Goodell Sees NFL with Uncapped 2010 Season*, FANHOUSE.COM, Sept. 4, 2009, <http://www.fanhouse.com/news/main/goodell-sees-nfl-with-uncapped-2010/655936>.

