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Deterring Player Holdouts: Who Should Do It, How to Do It, and Why It Has to be Done

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COMMENTS

DETERRING PLAYER HOLDOUTS: WHO SHOULD DO IT, HOW TO DO IT, AND WHY IT HAS TO BE DONE*

I. INTRODUCTION

In the 1990s, major league professional team sports in North America will be remembered as a time of widespread player mobility, exponential player salary increases and incessant labor strife. These three characteristics triggered a legitimate threat to the integrity of professional sport, the player holdout. The holdout reflects the clash between the owner and his quest for long-term stability, against the players' mission to be paid their current market value. Owners will sign a marquee player to a long-term deal to please fans and promote team stability. However, certain players elect to try and coerce ownership into renegotiating existing contracts before the contractual term has expired. These players, usually perennial all-stars at the prime of their careers, will announce, likely during the off-season, that they will "hold out" from training camp and the upcoming season unless their contract is modified to reflect their "true value."[1] When negotiations reach a stalemate, the player will follow through on his threat and refuse to participate with the team. The holdout creates a media frenzy, upsets team chemistry, alienates fans and damages the league's reputation. Some holdout players return to action relatively quickly and cause only minimal disruption but others miss substantial parts of the season, or even the entire season.[2]

Alexei Yashin, star center of the Ottawa Senators of the National Hockey League (NHL), unhappy with his $3.6 million annual contract,

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1. This "true value" is what the player believes he is worth.

2. Associated Press, *Yashin Loses First Arbitration Case vs. NHL* (June 28, 2000), *available at* http://espn.go.com/nhl/news/2000/0628/608595.html (last visited Feb. 18, 2001) [hereinafter *Yashin Loses*]. *See also* ESPN.com news services, *Devils Sign Deals with Arnott, Niedermayer, at* http://espn.go.com/nhl/news/2000/1119/890127.html (last visited Feb. 18, 2001) [hereinafter *Devils*] (announcing that the New Jersey Devils had come to terms with holdouts Jason Arnott and Scott Niedermayer after the two star players missed ten regular season games).

held out of training camp and missed the entire 1999-2000 regular season and playoffs.[3] Yashin returned to the Senators on September 9, 2000 after an arbitrator refused to declare him a free agent.[4] During the 1998-1999 season, Yashin led the Northeast Division champion Senators with 44 goals and was a Hart Trophy finalist for the league's most valuable player award.[5]

Yashin's hold out is the worst case scenario where the player misses the entire season. Quite often a hold out will only last a few weeks.[6] Nevertheless, holdout players do share certain common traits.

First, only superstar players have the leverage to stage a successful holdout.[7] These players are in high demand because of their exceptional skills. The superstar, the coaching staff, the general manager and the owner all understand that this player can shop around the league asking almost any price.

Second, holdout players are often integral components of above-average teams and are usually coming off of a banner season where both the team and the superstar had terrific performances. Yashin's 44 goals and 50 assists during the 1998-1999 season, for example, set Ottawa franchise records, while the team itself enjoyed success as Northeast Division champions.[8] National Football League (NFL) running back Jamal Anderson held out of the Atlanta Falcons' training camp after leading them to Super Bowl XXXIII the previous season.[9] Byron Dafoe, goaltender for the NHL's Boston Bruins, held out of training camp and missed part of the regular season after backstopping the Bruins to the second round of the playoffs in 1998-1999.[10] Jason Arnott and Scott

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3. Adrian Dater, *Yashin Benched for Breach of Contract; Veteran Avs Players Side with Senators*, DENVER POST, Nov. 10, 1999, at D-07, LEXIS, News Library, Dpost File.

4. ESPN.com news services, *Yashin Barred from Becoming a Free Agent, at* http://espn.go.com/nhl/news/2000/0901/717134.html (Sept. 5, 2000) (last visited Feb. 18, 2001) [hereinafter *Yashin Barred*]; ESPN.com news services, *Yashin Rejoins Senators Without Remorse, at* http://espn.go.com/nhl/news/2000/0908/729955.html (Sept. 10, 2000) [hereinafter *Yashin Rejoins*].

5. *Wasted Time*, SPORTING NEWS, Nov. 22, 1999, at 62, LEXIS, News Library, Tsn File; Dater, *supra* note 3, at D-07.

6. *Devils*, *supra* note 2.

7. *See, e.g., infra* text accompanying notes 8-10. *See also* Nancy Marrapese-Burrell, *Holding Out Now an NHL Habit*, ESPN.com news services (Sept. 11, 2000), *at* http://espn.go.com/columns/marrapese-burrell_nancy/734632.html (last visited Feb. 18, 2001).

8. Associated Press, *Senators Suspend Yashin for Season* (Nov. 10, 1999), *available at* http://espn.go.com/nhl/news/1999/1109/160875.html (last visited Feb. 18, 2001).

9. Associated Press, *Knee Injury Ends Anderson's Season* (Sept. 22, 1999), *available at* http://espn.go.com/nfl/news/1999/0920/69142.html (last visited Feb. 18, 2001) [hereinafter *Knee Injury*].

10. ESPN.com news services, *Dafoe Agrees to Deal With Bruins, at* http://espn.go.com/nhl/news/1999/1029/140263.html (Oct. 29, 1999) [hereinafter *Dafoe*].

Niedermayer were both important members of the 2000 Stanley Cup Champion New Jersey Devils. Conversely, owners do not demand renegotiation of a player's contract when the player has a sub-par season.

Third, holdout players generally have a negative impact on their team. Ottawa did not repeat as Northeast Division champions and were quickly eliminated in the first round of the Stanley Cup playoffs.[11] Atlanta went from Super Bowl finalist, to a 5-11 record and third place finish in the National Football Conference (NFC) Western Division.[12] Boston failed to make the playoffs.[13] Although Dafoe only missed a month of the season,[14] the goaltender did not play at the same level as he did in 1998-1999.[15]

Fourth, holdout players create tension between leagues and player unions. The NHL recently filed a grievance against the National Hockey League Players Association (NHLPA) for allegedly violating the collective bargaining agreement by supporting Yashin's holdout.[16] The NHL also filed suit on behalf of the Senators requesting $7 million in damages resulting from the financial detriment of Yashin's holdout.[17] This case was settled on December 7, 2000.[18]

Finally, most holdout players often win big financially. Although the player loses a considerable amount of playing time, a lucrative new contract more than makes up for it.[19]

If the new contract is not profitable enough to justify holding out, then the holdout player loses. However, in this scenario, no one else really wins because both parties involved are injured irrespective of the eventual outcome of the holdout. Fans lose the enjoyment of watching the star player in action. Players lose the value of a teammate's talents. The team loses focus on playing because of the publicity generated by a hold out. Owners suffer because the player breached his contract and

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11. *See generally* Tracy Huffman, *FAN-TASTIC*, TORONTO STAR, Apr. 25, 2000, at 1.

12. http://espn-nfl1.factcity.net/factcity/espn-nfl (last visited Feb. 18, 2001).

13. http://www.bostonbruins.com/history/1990s.htm (last visited Feb. 18, 2001).

14. *Dafoe*, *supra* note 10.

15. Pierre McGuire, *In the Crease*, SPORTS ILLUSTRATED, Apr. 17, 2000, at 83.

16. Associated Press, *Yashin's Agent Scoffs at NHL's Grievance* (Feb. 18, 2000), *available at* http://espn.go.com/nhl/news/2000/0218/365072.html (last visited Feb. 18, 2001) [hereinafter *Yashin's Agent*].

17. *Yashin Loses*, *supra* note 2.

18. Associated Press, *Senators Ask for Arbitration Case to be Dropped* (Dec. 7, 2000), *available at* http://espn.go.com/nhl/news/2000/1207/929381.html (last visited Jan. 19, 2001).

19. Associated Press, *Primeau Signs 5-year Deal with Flyers* (Jan. 25, 2000), *available at* http://espn.go.com/nhl/news/2000/0123/309079.html (last visited Jan. 19, 2001) [hereinafter *Primeau Signs*].

the owner is unable to provide the best product to the fans. The league as a whole endures a considerable blow to its reputation. Player unions are hurt because holdouts contribute to an atmosphere of distrust in the labor arena. Furthermore, although easily overlooked, a holdout injures society by suggesting that a person has no obligation to honor a commitment when circumstances change.[20] Society would be outraged, for instance, if owners released a player and refused to honor their existing obligations under a current and valid contract just because the player happened to be performing poorly.

Although holding out is a product of free agency, it is not the problem here. Shopping one's talents around the free agent market looking for the highest salary is neither novel nor inappropriate conduct. However, breaching a contract and demanding re-negotiation is unlawful and improper. No one, including superstar athletes, should be above the law.[21] Exceptional playing ability is no justification for a player to renege on his obligations.

Since holdouts have numerous adverse effects, this trend must be curbed before it spins out of control. This article discusses various ways for fans, owners and leagues to strike back at a holdout player. Potential fan action exists in various civil actions against the holdout player for failing to perform a duty to the fans. The possibility of fan litigation might deter players from holding out because these players would not want to be mired in a plethora of legal actions. Possible owner claims include requests for injunctive relief, which could enjoin a holdout player from playing for another team until the contract term expires. Injunctions have minimal deterrence value because a holdout player is already willing to sit out part of a season to achieve their goals. Commissioners can fine or suspend a holdout, but cannot compel the player to play. Player unions cannot reprimand the holdout player since they have certain duties to all players in the league. Therefore, these injured parties must join forces to corroborate on a solution. Fans cannot realistically help, but owners, commissioners and player unions can attack the

20. Ottawa Senators' season-ticket holder Leonard Potechin, outraged at Yashin's despicable attitude, was the first fan to take a stand against a holdout and he summarized what many people thought but would not say when he stated "[w]hen Yashin said he could do anything he wanted despite a valid contract, we [Potechin and his attorney] decided something must be done." Lester Munson, *Trashin' Yashin*, SPORTS ILLUSTRATED, Jan. 17, 2000, at 30; see *infra* text accompanying note 48.

21. Greg Joyce, *McSorley Sparks Legal Debate*, GLOBE & MAIL (Toronto), Mar. 9, 2000, at S6.

driving force behind a holdout: the ability to become a free agent once one's contract term expires.

This article will not focus on players who hold out *after* their contract expires. Keith Primeau of the NHL's Carolina Hurricanes[22] and the Falcons' Anderson recently held out not to re-negotiate an existing contract, but to gain leverage in negotiating a new contract.[23] This conduct is the equivalent of talking to other teams as a free agent in an attempt to gain leverage in contract negotiations.[24] Dafoe, the Boston Bruin holdout player mentioned earlier, chose this path in dealing with Boston management.[25] The other category of holdouts, including Yashin and NFL wide receiver Joey Galloway of the Seattle Seahawks, are players who seek to renegotiate existing contracts, and these holdouts are a serious threat to the integrity of major league professional sport, and are the topic of this article.

II. WHO CAN DETER HOLDOUTS AND WHY THEY CAN DO IT

A. Season-Ticket Holders/Non-Season-Ticket Holder Fans

1. Introduction

Contrary to the popular cliché, the game is not for the fans anymore. Many of the parties in the upper echelon of professional sports appear more than willing to alienate fans in order to further their own interests. Owners charge high ticket prices and threaten to relocate.[26] Players appear, at times, to be playing for the paycheck and act like they are above the law off the field.[27] Leagues enter into television contracts with provisions entailing that games will be blacked out unless a certain number of (overpriced) tickets are sold.[28] Granted, there are certain individuals who place fans as the highest priority in sports, but they are a minority.

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22. *Primeau Signs, supra* note 19. Primeau ended his five month holdout on January 25, 2001 by signing a five-year, $22.75 million contract with the Philadelphia Flyers.

23. Associated Press, *Primeau,'Canes Appear Deadlocked* (Dec. 28, 1999), *available at* http://espn.go.com/nhl/news/1228/255939.html (last visited Jan. 19, 2001); *Knee Injury, supra* note 9.

24. Players hold out after their contract expires hoping to create a sea of controversy in which fan and media pressures force the owner to give in to their demands.

25. *Dafoe, supra* note 10.

26. *See, e.g., Link Doesn't Exist Between Rising Salaries, Ticket Prices,* SEATTLE TIMES, Apr. 5, 1999, at E2, LEXIS, News Library, Seattm File.

27. Professional athletes' run-ins with the authorities are far too numerous to cite in this paper.

28. *See generally* Blaich v. Nat'l Football League, 212 F. Supp. 319 (S.D.N.Y. 1962); United States v. Nat'l Football League, 116 F. Supp. 319 (E.D. Pa. 1953); PAUL C. WEILER &

A player holdout is a slap in the face of the fans who are important contributors to the player's economic and emotional success. Fans pay for tickets to the games, buy a jersey with the player's name on the back and cheer until they are hoarse. They are rewarded by the holdout player who refuses to play and perform for his fans. While the average season-ticket holder or casual fan goes to work day in and day out, the holdout player sits at home and waits to sign a lucrative contract.

Fans, who are admittedly in a position of dependence, cannot rely on owners or leagues to protect their interests because these entities are severely limited by their own self-interests. Owners do not want to spend too much money on a holdout player since it may open a "Pandora's Box" by encouraging future would-be holdouts. Leagues already have a very fragile labor relationship with the unions, so their hands are somewhat tied. Regrettably, although fans have shown the initiative to take action, they are not in a position to make a difference. This section outlines certain legal and non-legal means available for fan action against a holdout player and concludes that any such efforts would be futile.

2. Non-Legal Courses of Action: Boycotts

Ironically, in light of the weaknesses that will be described *infra*, fans played an integral role in the modernization of major league professional sports in North America. Fan interest catalyzed new stadium construction, the progression of all-sport cable television networks, owner's economic prosperity and, indirectly, the exponential growth in player salaries.[29] Logically, fans should be able to influence owner and player behavior by refraining from attending games and refusing to watch games on television or listen to them on the radio.[30]

Boycotts would require local media support. Negative publicity, complemented by fan protests[31] and demonstrations, along with radio and television depictions of the dishonest holdout player might deter other players who may be contemplating a holdout in the near future. In

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GARY R. ROBERTS, SPORTS AND THE LAW 549-92 (2d ed. 1998); Stephen F. Ross, *An Antitrust Analysis of Sports League Contracts with Cable Networks*, 39 EMORY L.J. 463 (1990).

29. 1 MARTIN J. GREENBERG & JAMES T. GRAY, SPORTS LAW PRACTICE § 10.06 (1)(c), at 957 (2d ed. 1998).

30. L. Patrick Auld, *Ownership Control Over Professional Sports Teams' Payrolls: Could Anyone Have Stopped Tom Werner from Dismantling the San Diego Padres?*, 12 U. MIAMI ENT. & SPORTS L. REV. 129, 133-34 (1994-95).

31. Fans in San Diego, for instance, protested inside and outside of Jack Murphy Stadium after Padres' ownership traded or released ten quality players. *See* Dave Sheinin, *Fire Sale in San Diego Leaves Players, Fans Steaming*, WASH. POST, July 5, 1993, at C1.

an ideal world, the possibility of a fan boycott would deter players from holding out because if athletes alienate their fans, they are eliminating their meal ticket. If fans do not financially support the team, owner and league revenue decreases and player salaries shrink. However, although the boycott and mass protest seems like an ideal solution, any possible effectiveness is unrealistic.

First and foremost, a boycott will probably hurt the owner more than the player because reduced attendance lowers owner revenue, and the holdout player will end up signing somewhere else because his original team cannot afford him.

Second, a total boycott is difficult to organize and implement. With the increased access to games on television, superstar athletes are no longer merely celebrities in their home cities: they have fans across North America. These fans might root for their local team but also follow the league in general, and would, therefore, not have any interest in a boycott. They might even support the player's decision to hold out. Moreover, boycotting would be economically harmful to the city's team. For example, if hockey fans in Toronto refused to watch Maple Leafs-Senators games because Yashin was holding out, the boycott would harm the Leafs as well as the Senators because television ratings would decrease and sponsors might not renew the teams' contracts.

Third, a group boycott is a desperate measure considering the unique nature of the professional sports industry. There are no reasonable substitutes for major league professional sports.[32] Some fans simply would not be able to justify paying such a severe price simply because the team is missing an important player. Senators hockey, for instance, remained entertaining even without Yashin on the ice.

Finally, even should a boycott materialize, its economic impact will be minimal. Local fan attendance is insignificant to the overall economic prosperity of a professional sports team. Teams have fixed revenues through television and radio contracts, food and merchandise agreements and, in some leagues, prosperous revenue sharing.[33] If a boycott lasted two or three years, perhaps revenues from television, radio and concession deals would diminish, but the potential for a long-term boycott is not promising. Additionally, a league-wide boycott would never materialize. Thus, although fans arguably possess power in the profes-

32. Auld, *supra* note 30, at 135.

33. 1997 MAJOR LEAGUE BASEBALL BASIC AGREEMENT art. XXV [hereinafter MLBBA]; 1995 NATIONAL HOCKEY LEAGUE COLLECTIVE BARGAINING AGREEMENT art. 28 [hereinafter NHLCBA].

sional sports industry, the threat of a fan boycott will not deter a player from holding out.

3. Legal Courses of Action

a. Contract Law

The elements of a valid contract are an offer, acceptance and consideration.[34] Casual fans, who do not hold season-tickets to the games, certainly do not have any type of enforceable contract. Season-ticket holders, although they can rationally assert that they entered into a contractual relationship with the owner and the team when they purchased the season-ticket package, cannot reasonably argue that a player is privy to this contract. This section outlines the ineffectiveness of a fan contract action against an owner and the inability of a fan contract action against a holdout player.

Historically, courts do not classify a season-ticket package, which includes tickets, parking and a personal seat license, as a valid contract between the season-ticket holder and the team. Certain courts hold that a season-ticket is a license,[35] and revocable as long as the revocation is not based upon a discriminatory reason infringing upon a person's civil rights.[36] An Ohio appellate court did consider a season-ticket package as a contract because all of the requirements of a contract- offer, acceptance and consideration- were met.[37]

The Court of Appeals of Texas recently adjudicated various claims brought by Dallas Cowboys' season-ticket holders, including a claim for breach of contract.[38] The court's opinion specifically notes during its discussion of the breach of contract allegation that "the Cowboys conclude

34. CLAUDE D. ROHWER & GORDON D. SCHABER, CONTRACTS IN A NUTSHELL 8 (1997).

35. Soderholm v. Chicago Nat'l League Ball Club, Inc., 587 N.E.2d 517, 520 (Ill. App. Ct. 1992) (holding that a ticket "grants the licensee a right to enter upon the licensor's land and use it for a specific purpose, without giving up the licensor's legal possession and control over the property."); Walsh v. St. Louis Nat'l Baseball Club, Inc., 822 S.W.2d 559, 565 (Mo. Ct. App. 1992) (recognizing that a game ticket grants a revocable license to enter property). *See also* Stern v. Cleveland Browns Football Club, Inc., No. 95-L-196, 1996 Ohio App. LEXIS 5802, at *16 (Dec. 20, 1996) (reversing trial court and holding that Browns' season-ticket holder held only a revocable license); Pace v. Cleveland Browns Football Club, Inc., No. 95-L-195, 1996 Ohio App. LEXIS 5798, at *11 (Dec. 20, 1996); Reed v. Cleveland Browns Football Club, Inc., 1996 Ohio App. LEXIS 5797, at *9-10 (Dec. 20, 1996) (holding that there was no contract between season-ticket holder Reed and the Browns).

36. Bickett v. Buffalo Bills, Inc., 472 N.Y.S.2d 245, 247 (App. Div. 1983).

37. Beder v. Cleveland Browns, Inc., 717 N.E.2d 716, 720 (Ohio Ct. App. 1998).

38. Chaussee v. Dallas Cowboys Football Club, Ltd., No. 05-96-00429-CV, 1997 Tex. App. LEXIS 6143, at *10 (Dec. 2, 1997) (mentioning specific "contractual obligations" of the Cowboys toward the season-ticket holders).

that they have not breached their contractual obligations [to the season-ticket holders] under the seat options."[39] The Cowboys admitted there was a contract between the team and season-ticket holders.[40]

Not only will prospective season-ticket holder plaintiffs have the burden of proving that there is a valid contract, they also must show a material breach of this contract. Courts appear unwilling to punish team owners for circumstances beyond their control, such as a player holdout.[41] In this respect, the season-ticket holder "assumes the risk" that that the team will field a particular product and cannot complain when unforeseeable events downgrade that product. In other words, a reasonable season-ticket holder should recognize that there are certain circumstances, beyond anyone's control, that may influence the value of the season-ticket package: holdouts, trades, retirements and injuries.[42] On a similar note, certain courts hold that season-ticket holders "assume the risk" that a team might relocate,[43] that players may go on strike,[44] or that owners may initiate a lockout.[45] Therefore, only rarely will a season-ticket holder recover damages under a breach of contract claim for a decline in the value of his tickets.[46] Furthermore, damage recoveries from owners or teams do not deter holdouts because holdout players are not paying the awards.

It would be next to impossible to argue that there is a contract between a season-ticket holder and a player. Player contracts establish contractual duties for a player to his team, but make no mention of any

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39. *Id.*

40. *Id.*

41. Owners sign players to long-term contracts to avoid the hassle of contract negotiations and minimize personnel turnover. They reasonably believe that once a player signs a contract, that player will perform the required obligations. Therefore, it is the contention of this author that holdouts are beyond owner control.

42. Strauss v. Long Island Sports, Inc., 401 N.Y.S.2d 233, 238 (App. Div. 1978) (mentioning that since fan should have realized that Dr. J. might not have played for the Nets in the upcoming season, he has no claim for diminished value of his ticket).

43. Charpentier v. Los Angeles Rams Football Co., 89 Cal. Rptr. 2d 115, 120 (Ct. App. 1999) (arguing that "plaintiff cannot reasonably claim the moving of the team itself broke any promise").

44. *Bickett,* 472 N.Y.S.2d at 247-48 (holding that Bills are excused from any nonperformance of contractual obligations because they had no control over the 1982 player strike).

45. Although no one has argued that an owner lockout constitutes a breach of a season-ticket contract, *Bickett* and *Charpentier* suggest that this argument would not pass muster.

46. *Beder,* 717 N.E.2d at 721; *see also* Seko Air Freight, Inc. v. Transworld Sys. Inc., 22 F.3d 773, 774 (7th Cir. 1994). The court cleverly pointed out "that the Chicago Cubs turning out to be the doormat of the National League would not entitle the ticket holder to a refund for the remaining games, any more than the star tenor's laryngitis entitles the opera goer to a refund when the understudy takes over the role." *Id.*

obligations toward season-ticket holders or other fans.[47] Even if a court were to recognize this season-ticket holder-team contract, professional athletes are not, and cannot, be held privy to this contract as this would subject the player to seemingly endless liability. If such a contract existed, a season-ticket holder could theoretically sue a player under such theories as lack of performance or lack of effort.

The Yashin situation represented the first time a fan sued a player for breach of contract. The season-ticket holder and his lawyers quickly came to their senses and dropped the claim, choosing to focus on various tort allegations.[48] Seeking remedies under tort law is a more appropriate course of action for season-ticket holders who suffer injuries from a player holdout.

b. Tort Law

The elements of a tort claim are duty, breach, causation and damage.[49] Fans, along with season-ticket holders, could better argue that they have standing to sue in a tort action than in a contract action. The basic argument is that the player had a duty to play for the team and fans, that the player breached both of these duties by holding out, and that the fan suffered damages because of this breach. However, as in contract claims, courts are generally reluctant to find owners responsible for circumstances that are largely beyond their control.[50] This section will illustrate that tort actions, either against the team or the holdout player, are ineffective deterrents to holdouts, because they are difficult to prove.

Possible tort actions against the team include various theories of misrepresentation (fraud, false advertising), breach of warranty or breach of fiduciary duty.[51] Season-ticket holders could feasibly argue that they were promised a certain product, but instead received an "arguably inadequate substitute."[52] Recently, for example, outraged San Diego Padres' and Florida Marlins' fans filed suit alleging, *inter alia*, fraud, negligent misrepresentation and false advertising.[53] In these cases, fans became

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47. MARTIN J. GREENBERG, SPORTS LAW PRACTICE 132-35 (1993).

48. Potechin v. Yashin, No. 99-CV-11500 CP (Ont. Sup. Ct. 2000), *at* http://www.sportslawnews.com/current/yashincasetext.htm (last visited Feb. 18, 2001).

49. DAN B. DOBBS, THE LAW OF TORTS 1 (2000).

50. *See supra* notes 40-44 and accompanying text.

51. Auld, *supra* note 30, at 140.

52. *Id.* at 142.

53. *Fans Sue Marlins Over Dismantling Team*, COM. APPEAL (Memphis), May 19, 1998, at D2, LEXIS, News Library, Comapp File; Karen Testa, *Season Ticket Holders Sue*, DAYTON DAILY NEWS, May 19, 1998, at 4D, LEXIS, News Library, Daydnw File; *see also Memo Says*

incensed when owners slashed payrolls by releasing or trading marquee players. Therefore, the season-ticket holders did not believe the owner satisfied his duty of putting an entertaining and competitive product on the field.[54] Fans felt lied to because of the positive advertising and promotional material sent to them during the off season suggesting that their respective teams would be competitive in the upcoming season.[55]

Fans also feel they have rights when a season is cut down by a player strike. New York Yankees' fans filed suit alleging that the Yankees "led fans down the garden path by selling advanced season tickets knowing full well a players' strike was imminent."[56]

These theories are feasible only if a court holds that an owner has a duty to field the best possible team. Therefore, when the owner refuses to renegotiate the salary of a potential holdout player, he or she breaches that duty. The breach causes the fan to suffer from a diminished value of enjoyment.

Notwithstanding the feasibility of these claims, tort actions against the team are useless deterrents. First, fan damage recoveries will not deter future holdouts. A holdout player has no reason to even pay attention to a lawsuit between a fan and his team. One exception could be the possibility of the owner filing a claim naming the holdout player as a third party defendant to provide contribution.

Second, just like when season-ticket holders attack an owner under a breach of contract theory, most likely the result of the suit will punish the team, not the player. If a team is ordered to pay significant damage awards, they will have less money to spend on acquiring and resigning players. On the other hand, the threat of a lawsuit may encourage the owner to be more amiable to a holdout player's demands, and renegotiate the contract in order to avoid being sued by the fans.

Fan tort action against the holdout player will also be fruitless, albeit for different reasons. In the Yashin situation, season-ticket holder Leonard Potechin pleaded numerous tort claims: intentional interference with contractual relations, conspiracy, breach of fiduciary duty and negli-

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Padres Will Offer Refunds, L.A. TIMES, June 27, 1993, at C10, LEXIS, News Library, Lat File. The Padres offered refunds to season-ticket holders who thought they were deceived by a letter written by team president Dick Freeman indicating that the team planned to keep the core of the team intact. *Id.* The outcome of the Marlins' suit is still unknown at this time.

54. *See, e.g.*, Alan Snel, *Huge Trade Presents Bigger PR Challenge*, SUN-SENTINEL (Ft. Lauderdale), May 19, 1998, at 1C, LEXIS, News Library, Sunsen File; *Marlins' Season-Ticket Holders Fight Back*, TAMPA TRIB., May 19, 1998, at 4, LEXIS, News Library, Tamtrb File.

55. Testa, *supra* note 53, at 4D.

56. *New York*, UPI, Aug. 10, 1981, LEXIS, News Library, UPI.

gence.[57] Justice Charbonneau of the Ontario Superior Court of Justice initially dismissed all allegations except the intentional interference with contractual relations claim.[58] In his second ruling, Judge Charbonneau dismissed the rest of the case.[59]

There were two main obstacles to Potechin's claim. First, the elements of an intentional interference with contract claim require that the season-ticket holder and the team are parties to a valid contract.[60] Second, the primary motive behind holding out is money; interfering with season-ticket holder-team contractual relations is incidental.[61] Season-ticket holders will have difficulty proving that the holdout player intended to cause a contractual breach. They might be better off going after Yashin's agent for interfering with the contractual relationship between Yashin and the Senators since the agent might have exerted influence over Yashin's decision to hold out or might have failed to inform Yashin of the consequences of a holdout. Regardless of whatever legal action is endorsed, until a case on point is decided, we cannot reasonably determine whether a professional athlete has an affirmative duty to season-ticket holders, fans, or both.

4. Conclusion

Boycotts, season-ticket contract actions and fan tort suits will not work to deter holdouts. A boycott is too difficult to organize and would barely make a chink in the armor of the sports industry. Contract and

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57. *Potechin*, No. 99-CV-11500 CP, *at* http://www.sportslawnews.com/current/yashincasetext.htm.

58. *Id.* The relevant test in Ontario for an intentional interference with a contractual relations claim is

(1) an enforceable contract;
(2) knowledge of the plaintiff's contract;
(3) an intentional act on the part of the defendant to cause a breach of that contract;
(4) wrongful interference on the part of the defendant; and
(5) resulting damage.

Ont. Store Fixtures Inc. v. Mmmuffins, Inc., 70 O.R.2d 42 (1989) (quoting Potechin v. Yashin, No. 99-CV-11500 CP (Ont. Sup. Ct. 2000)).

59. Donna Casey, *Judge Dismisses Fans' $27.5M Lawsuit Against Senators' Holdout,* OTTAWA SUN, May 12, 2000, *at* http://www.canoe.ca/HockeyOttawa/may12_jud.html (last visited July 12, 2000); *Fans Suit Against Yashin Dismissed* (May 11, 2000), *at* http://www.sportslawnews.com/Archive/Articles%202000/Yashinfanssuit.htm (last visited Feb. 18, 2001).

60. The prospects of a contract existing between the season-ticket holder and the team was discussed *supra* Part II.A.3.a.

61. The court stated that "a generous reading of the statement of claim indicates that although the real motive of the defendants' [Yashin and his agent] action was self-enrichment, the target of the defendants' conduct was the season-ticket holder." *Potechin*, 99-CV-11500 CP, *at* http://www.sportslawnews.com/current/yashincasetext.htm.

tort suits, even if they are heard by the courts, provide primarily money damages that might make a few fans rich, but will not impact any future player in his contemplation of a holdout.

B. Owners/Teams

1. Introduction

For people who believe that holdout players are victims, owners are the scapegoats. Owners seem to take the blame for everything these days. It is perhaps ironically fitting then, that owners have strong legal arguments at their disposal should they decide to litigate against a holdout player. In seeking redress, however, owners have various obstacles standing in their way.

2. Legal Courses of Action

a. Contract Law

Owners clearly have an action for breach of contract. Yashin, for example, agreed to a five-year contract, but refused to play his final year when Ottawa would not renegotiate.[62] This is a clear breach. A potential obstacle emerges in the arbitration clause of the standard player contract. Under most professional athlete contracts in North America, all disputes go to arbitration.[63] The owner could argue that the contractual provision is inapplicable since the player breached the contract and, thus, waived the right to arbitration.

Greater stumbling blocks in reaching the ultimate goal of deterring a holdout lie in the remedies involved. Neither a court nor an arbitrator can order a player holding out to play.[64] Therefore, just like in any fan lawsuit, the holdout player is only going to be liable for money damages, which this paper has already determined will be only a minimal deterrent.

A final consideration is the damaging publicity of a lawsuit. Owners who actually litigate against a holdout player risk alienating the fans, discouraging players from signing with the team and generating a generally negative atmosphere surrounding the franchise.

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62. *Yashin Loses, supra* note 2.

63. WALTER T. CHAMPION, SPORTS LAW 50 (1993).

64. Ordering an individual to play constitutes involuntary servitude in violation of the Thirteenth Amendment. *See* U.S. CONST. amend. XIII.

b. *Injunctive Relief*

Owners, by seeking injunctive relief, will be able to preclude any player who holds out from playing for another team until that player's contract expires. Owners historically have prevailed in obtaining negative injunctions against players who breach an existing contract.[65] Usually owners enter specific language into the contract detailing the player's special and unique skills.[66] The contractual provision entitles the owner to injunctive relief, enjoining the player from playing for another team should the player breach the contract.[67] Filing injunctions will deter holdouts, because, if players hold out, they will be unable to play with any other team until their contract expires. Owners will probably wish to file a preliminary injunction in hopes that temporary relief and punishment to the holdout player might persuade the player to return to action.[68] Therefore, if a player has multiple years remaining on a contract, he is unlikely to hold out when he knows that he would either

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65. *See generally* Nassau Sports v. Peters, 352 F. Supp. 870, 882 (E.D.N.Y. 1972) (granting preliminary injunction enjoining defendant hockey player from playing for anyone but the plaintiff team); Central New York Basketball, Inc. v. Barnett, 181 N.E.2d 506, 517 (Ohio C.P. [Cuyahoga County] 1961) (awarding injunctive relief because player had unusual skills and talents and damages at law would be speculative and uncertain); Winnipeg Rugby Football Club, Ltd. v. Freeman, 140 F.Supp. 365, 367 (N.D. Ohio 1955) (enjoining two players from playing for the NFL's Cleveland Browns in breach of an ongoing contract with the Winnipeg Rugby Football Club of the Canadian Football League (CFL)); Philadelphia Ball Club, Ltd. v. Lajoie, 51 A. 973, 976 (Pa. 1902) (granting injunction preventing superstar second baseman Napoleon Lajoie from playing for anyone other than Philadelphia). Recently a Phoenix court refused to grant an injunction allowing quarterback Keith Smith out of his CFL contract which would have allowed Smith to play with a team in the Xtreme Football League (XFL). *See* Dan Ralph, *CFL Scores Legal Win over XFL*, CANADIAN PRESS, Dec. 20, 2000. Courts will usually grant injunctive relief unless the owners themselves are also guilty of unlawful conduct. *See* New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc., 291 F.2d 471, 473, 474-75 (5th Cir. 1961) (refusing to grant injunction because "he who comes into equity must come with clean hands"); Minnesota Muskies, Inc. v. Hudson, 294 F. Supp. 979, 990 (M.D.N.C. 1969) (refusing to grant injunction because plaintiffs interfered with player's original contract). For other 'unclean hands' doctrine cases, *see generally* Los Angeles Rams Football Club v. Cannon, 185 F. Supp. 717 (S.D. Cal. 1960); Detroit Football Co. v. Robinson, 186 F. Supp. 933 (E.D. La. 1960). *But see* Houston Oilers, Inc. v. Neely, 361 F.2d 36 (10th Cir. 1966) (declining to invoke the 'unclean hands' doctrine to refuse to grant the injunction).

66. *See, e.g., Hudson*, 294 F. Supp. at 982-83.

67. *Id.* at 983.

68. There are four elements applied to preliminary injunction hearings:
(1) likelihood of success on the merits;
(2) plaintiff has suffered irreparable harm;
(3) balancing of the equities; and
(4) public interest at stake.

Boston Celtics Ltd. P'ship v. Shaw, 908 F.2d 1041, 1048 (1st Cir. 1990); DAN B. DOBBS, REMEDIES 108-11 (1984).

have to rejoin his original team or wait on the sidelines until his contract expires. The greater the ability to get an injunction, the greater the likelihood of an owner refusing to renegotiate with a holdout player. The effectiveness of a negative injunction turns on whether the contract expires when the contract year ends regardless of whether the player participates for that year, or if a contract period tolls until the player reports back to the team.[69]

c. *Tort Law*

Owner tort actions against holdout players also raise the possibility of alienating fans, who, at the end of the day, are the owner's true meal ticket. Moreover, like a contract action, suing in tort will not affect the owner-player contractual relationship. An owner may receive damages, but will not get specific performance or nullification of the contract. Even if a court of law is not precluded from hearing the case because of a contractual provision in the player's contract,[70] courts are often unwilling to interfere in disputes involving members of a private association.[71]

3. What Else Can an Owner Do?

If holdouts continue to be a problem, owners should refrain from committing to long-term contracts. Although this would result in fewer opportunities for holding out, it would greatly increase the free-agent market. Choosing between having an absurd number of holdouts or an outrageously large free-agent pool is choosing between two evils. Suspending the player is useless since the player is already refusing to play.[72] Agreeing to a renegotiation clause in the player's contract puts the owner at risk should the player's ability suffer a considerable drop-

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69. For example, Yashin played four seasons under his five year contract. *Yashin Loses*, *supra* note 2. Although the contract technically expired, Yashin owed another season to the Senators according to the arbitrator. *Yashin Rejoins*, *supra* note 4.

70. CHAMPION, *supra* note 63, at 50.

71. *See, e.g.*, Carr v. St. John's Univ., N.Y., 231 N.Y.S.2d 410, 414 (App. Div. 1962).

72. Player contracts have provisions granting the team authority to suspend the player for conduct that is deemed detrimental to the club. The Senators, for instance, suspended Yashin indefinitely after he failed to report to the team by November of the 1999-2000 season. *Yashin's Agent, supra* note 16. The New York Rangers suspended defenseman Stephane Quintal for the remainder of the 1999-2000 season for "conduct deemed detrimental to the hockey club." Associated Press, *Quintal's Season Ends on a Sour Note* (Apr. 1, 2000), *available at* http://espn.go.com/nhl/news/2000/0401/458886.html (last visited Feb. 18, 2001). The Rangers suspended Quintal after he made remarks to a Montreal newspaper indicating his desire to be traded back to the Canadians. *Id.*

off, and creates a greater likelihood of owner-player tension when it comes time for the renegotiation.

4. Conclusion

The owners' best remedy is to file for injunctive relief. Although they will not receive money damages, an injunction serves two important purposes. First, it ends the controversy and allows the team to focus on playing. Second, the injunction deters players from holding out because if a court or arbitrator grants an injunction, the player will be unable to play for anyone else. This would preclude the holdout player from forcing a trade until the player's contract expires. Furthermore, players who hold out will be forced to seriously consider the fact that they might not get to play for a lengthy period of time. Tort suits, even though they may provide monetary relief to the owner, are difficult to prove, expensive to litigate and are not the long-term answer.

C. Internal Regulation

Commissioner discipline of a holdout player is certainly permissible under the current structure of major league professional sports. In Major League Baseball (MLB), for example, owners established the commissioner's office to ensure competitive balance, uphold the integrity of the league and "to safeguard the public's interest in obtaining the best possible sports product at the highest level of play governed by an objective third party."[73] Additionally, league and commissioner power is derived from the owners themselves.[74] In fact, a commissioner who abstains from disciplining a holdout player may be held liable for breaching the common law league-franchise fiduciary relationship.[75] If the league is seen as a corporation, the commissioner is analogous to the chairman of the Board of Directors and would have duties of diligence and loyalty to the members of the corporation: the owners. Finally, players consent to commissioner authority by signing the uniform player contract which legally binds the player and club to all the provisions of the

73. John K. Harris, Jr., *Fiduciary Duties of Professional Team Sports Franchise Owners,* 2 SETON HALL J. SPORT L. 255, 259 (1992).

74. *Id.*

75. Professional Hockey Corp. v. World Hockey Ass'n, 191 Cal. Rptr. 773, 776 (Ct. App. 1983) (maintaining that, after reviewing a World Hockey Association league-franchise relationship, the directors and/or trustees owed duties of obedience, diligence, loyalty and good faith).

league constitution, league by-laws and the Collective Bargaining Agreement (CBA).[76]

Disciplining holdout players internally through commissioner power has four formidable obstacles. First, commissioners do not enjoy the same powers as they did forty years ago.[77] Extremely powerful and influential players' associations are a formidable obstacle. Unlike the 1950s and 1960s when leagues and teams did as they pleased, powerful unions represent today's players.[78] As one writer wrote concerning commissioner power in baseball, "his powers are hardly absolute."[79] Another writer argues that, in light of the restructuring of power in baseball, "as far as labor relations are concerned, the commissioner's best interest powers have all but vanished."[80]

Second, commissioners do not have the final say in disciplinary proceedings because third party neutral arbitrators scrutinize their decisions.[81] The MLB CBA, for example, severely limits commissioner authority by providing grievance procedures requiring disputes to go to arbitration.[82] Although courts traditionally give commissioners great discretion to regulate internal conduct,[83] arbitrators do not show similar

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76. PAUL M. ANDERSON, SPORTS LAW: A DESKTOP HANDBOOK 110 (1999).

77. *See generally* Matthew B. Pachman, Note, *Limits on the Discretionary Powers of Professional Sports Commissioners: A Historical and Legal Analysis of Issues Raised by the Pete Rose Controversy,* 76 VA. L. REV. 1409 (1990).

78. GREENBERG & GRAY, *supra* note 29, at 959-61.

79. Michael Farber, *The Man Who Would be Pope: Can the Commissioner's New Powers Heal Baseball?,* SPORTS ILLUSTRATED, Jan. 31, 2000, at 27.

80. Ted Curtis, *In the Best Interests of the Game: The Authority of the Commissioner of Major League Baseball,* 5 SETON HALL J. SPORT L. 5, 33 (1995).

81. In the NBA, for instance, any player fined for more than $25,000 or disciplined to "preserve the games integrity, or maintain public confidence in the game" may bring a grievance in front of an arbitrator "mutually chosen by the league and the players association." ANDERSON, *supra* note 77, at 107. *See also* 1999 NATIONAL BASKETBALL ASSOCIATION COLLECTIVE BARGAINING AGREEMENT art. XXXI [hereinafter NBACBA]; NHLCBA art. 17.

82. MLBBA art. XI.

83. Atlanta Nat'l League Baseball Club, Inc. v. Kuhn, 432 F. Supp. 1213, 1222 (N.D. Ga. 1977); Milwaukee Am. Ass'n v. Landis, 49 F.2d 298, 303 (N.D. Ill. 1931) (noting that "the commissioner is given almost unlimited discretion in the determination of whether or not a certain state of facts creates a situation detrimental to the national game of baseball"). The *Kuhn* court acknowledged that

> [t]he Commissioner has general authority, without rules or directives, to punish both clubs and/or personnel for any act or conduct which, in his judgment, is "not in the best interest of baseball" within the meaning of the Major League Agreement. What conduct is "not in the best interests of baseball" is, of course, a question which addresses itself to the Commissioner, not this court.

Id. at 1222.

deference and they are rarely reversed by a court on appeal.[84] An arbitrator, for instance, significantly reduced two recent high-profile suspensions involving National Basketball Association (NBA) player Latrell Sprewell and MLB pitcher John Rocker.[85]

Third, since he arguably has no explicit authority to act, commissioner action can be challenged on several grounds.[86] Disciplining holdout players is unprecedented. Since it is a novel area, it is unclear as to what an appropriate punishment would be. Some might argue that a commissioner has no authority to discipline a holdout player because it is a contractual issue that should be ultimately resolved between the holdout player and team and that disciplining holdout players is an abuse of authority. A further option would be to challenge the discipline on due process grounds.[87]

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84. The traditional common law deference to arbitration awards emerged out of the Steelworkers Trilogy. United Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 564 (1960). In the sports context, the leading case illustrating the court's refusal to overturn an arbitration award is Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 532 F.2d 615, 631 (8th Cir. 1976) (refusing to overturn an arbitration award granting free agency status to baseball players McNally and Messersmith).

85. National Basketball Players Ass'n on behalf of Latrell Sprewell & Warriors Basketball Club and National Basketball Ass'n, Opinion and Award (1998) (arbitration hearing before John D. Feerick); Associated Press, *Braves Say They're Ready to Move On* (Mar. 2, 2000), *available at* http://espn.go.com/mlb/news/2000/0301/391897.html (last visited Jan. 19, 2001). Until 1994, the commissioner of Major League Baseball was the ultimate arbiter of disputes. 1990 MAJOR LEAGUE BASEBALL BASIC AGREEMENT, art. VII, 1. Moreover, clubs waived any right of recourse in the courts. 1990 MAJOR LEAGUE BASEBALL BASIC AGREEMENT, art. VII, 2. The implementation of a third-party neutral arbitrator severely curbs commissioner authority in disciplining teams and players. The vast judicial precedent of courts adhering to commissioner action is now moot since courts are now reviewing the award of an independent arbitrator. For further discussion of the 'disempowered commissioner' in Major League Baseball, see Jonathan M. Reisdorf, *The Powers of the Commissioner in Baseball*, 7 MARQ. SPORTS L.J. 211 (1996); Craig F. Arcella, Note, *Major League Baseball's Disempowered Commissioner: Judicial Ramifications of the 1994 Restructuring*, 97 COLUM. L. REV. 2420 (1997).

86. For an overview of the debate over the limits of commissioner power see Matthew Conway, *Sports Commissioners or Judges: Who Should Make the Call When the Game is Over?*, 24 SUFFOLK U. L. REV. 1043 (1990); Pachman, *supra* note 77.

87. Virgin v. Am. Coll. of Surgeons, 192 N.E.2d 414, 422-23 (Ill. App. Ct. 1963) (holding that for private associations, due process entails fundamental fairness, including good faith proceedings, adherence to by-laws and procedures, a lack of prejudice or bias, notice to accused parties, and an opportunity to respond). The Florida Supreme court ruled that a court would not interfere with the affairs of a private association unless the plaintiff could prove (1) that the association acted with malice or bad faith; or (2) the association did not follow or provide adequate and fair procedures. NCAA v. Brinkworth, 680 So. 2d 1081, 1084 (Fla. Dist. Ct. App. 1996). *See also* Jan Stiglitz, *Player Discipline in Team Sports*, 5 MARQ. SPORTS L.J. 167, 175-76 (1995).

Fourth, punishing high-profile players (as most holdouts are) generates widespread public criticism. Commissioners and league presidents of the four major sports increasingly struggle to find punishments that fit the crime when disciplining today's players, coaches and teams. The media circus surrounding Sprewell's attack on coach P.J. Carlisemo and Rocker's derogatory comments toward ethnic minorities show how the commissioner as league disciplinarian is often left isolated while the person being punished receives overwhelming support from the media, the other players and the fans.[88] Therefore, the commissioner is going to take the likely public reaction into account before he decides to take action, and will probably be influenced into giving a more lenient punishment or deciding not to act at all. While disciplining holdout players does appear to be less controversial than the Sprewell and Rocker situations, commissioner action always sparks public debate and will constantly be viewed under a microscope.

When all is said and done, an arbitrator will probably respect a commissioner's decision to discipline a holdout player. As long as the commissioner follows the requisite procedures, the holdout player will not be able to raise a due process defense. Depending on the punishment, internal discipline may have an effect on future holdouts. However, since commissioner action is imposed on a case-by-case basis, there is the possibility of inconsistent treatment of player holdouts. Therefore, the best way of approaching the holdout problem is to implement changes in the CBA.

III. COLLECTIVE BARGAINING: THE MOST EFFECTIVE MEANS OF DETERRING HOLDOUTS

A. Why Rule Changes are Necessary

Injunctive relief or commissioner discipline are solutions limited to the specific case that they apply to. While these courses of action will provide at least minimal precedent for future cases or arbitration hearings, they do not set forth a clear principle of law. Rule changes establish clear ground rules and could help deter holdouts in two ways.

First, a new by-law, constitutional amendment or CBA provision giving the commissioner explicit authority to discipline holdout players

88. *See, e.g.*, Rod Beaton, *Rocker Returns with Scoreless Inning for Braves*, USA TODAY, Apr. 19, 2000, at 1C, LEXIS, News Library, Usatdy File; *Sprewell Knows 2nd Chances*, USA TODAY, Dec. 29, 1999, at 10C, LEXIS, News Library, Usatdy File; *The Ruling*, BOSTON GLOBE, Dec. 5, 1997, at C6, LEXIS, News Library, Bglobe File; *The Vent*, ATLANTA J. & CONST., June 11, 2000, at 2E, LEXIS, News Library, Atljnl File.

removes any doubt over whether disciplining holdout players is within the scope of commissioner power. Commissioners will then be able to take swift action when a player begins a hold out. The new rule might proscribe the amount of time the league should await until imposing discipline.

Second, the new rule could specifically define a holdout player's status with regards to free agency. The new by-law, constitutional amendment or CBA provision would state that players who do not honor contracts cannot be granted free-agency status until they honor their existing contract. Since the threat of leaving the team via free agency is an important bargaining chip for players, they might refrain from holding out since their only way to gain free-agency status would be to start playing again and finishing the existing years of their contract. In other words, players who hold out have their contracts tolled until they return to action. This is a clause in the NFL collective agreement.[89] Although the NHL CBA had no similar provision, arbitrator Lawrence Holden ruled that Yashin owed the Senators another year of service before he could attain free agency status.[90] The NHL won at arbitration, but the league, along with MLB and the NBA need to follow the NFL's example and specifically prohibit holdout players from becoming free agents.

B. Why Rule Changes Should be Implemented Through Collective Bargaining

A rule change stating guidelines for commissioner discipline of holdout players should not trigger any substantial labor strife. Even if the owners fail to implement this provision, the commissioner will still have his "best interest of the game" authority.[91]

However, changing free agency rules will probably generate significant controversy, whether the changes are unilaterally implemented or whether leagues and owners choose to engage in collective bargaining to try and achieve their means. Under the first scenario, if leagues and owners were to unilaterally change by-laws without consulting the players' unions, their action can and will be invalidated as an antitrust viola-

89. 1995 NATIONAL FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT art. XVIII 1(b) [hereinafter NFLCBA].

90. *NHL Scores Major Victory in Yashin Arbitration* (June 29, 2000), *available at* http://www.sportslawnews.com/current/Yashinloses.htm (last visited Feb. 18, 2001); *Yashin Loses, supra* note 2. On appeal, the court affirmed the arbitration decision; *Yashin Barred, supra* note 4.

91. Curtis, *supra* note 80 and accompanying text.

tion.[92] On the other hand, under the second scenario, if the leagues and owners were to bring this issue to the bargaining table, they run the risk of a work stoppage. This latter option, however, represents the most effective deterrent to holdouts because in this context, leagues and owners are better off with labor law governing professional sports rather than antitrust law.

Free agency restrictions are arguably a restraint of trade and a violation of the Sherman Antitrust Act.[93] Labor law, however, trumps antitrust law if certain conditions exist.[94] As long as the alleged restraint of trade is a product of bona fide collective bargaining, courts will recognize the non-statutory labor exemption from antitrust.[95] Further, some courts hold that the exemption applies even after collective bargaining reaches an impasse.[96] Labor laws, therefore, weaken individual players bargaining power. However, since labor law preempts antitrust, labor law "makes the [CBA] the supreme governing authority regarding the terms and conditions of employment. . . . [and] precludes an employer from changing those terms and conditions without engaging in collective bargaining."[97]

Turning to the facts of the first scenario presented earlier, unilateral league/owner action changing free agency rules would face two formidable obstacles. First, the conduct is an outright violation of the labor laws because the changes were not implemented through collective bargaining. Second, the changes will be subject to antitrust attack since they are not the product of bona fide arm's length bargaining. Labor law policy only protects the bilateral management-labor relationship. Leagues and

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92. *See* sources cited *infra* notes 94-98.

93. 15 U.S.C. § 1 (1999).

94. Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 691 (1965) (holding that collective bargaining under the labor laws preempts conflicting antitrust policy).

95. *See, e.g.*, Powell v. Nat'l Football League, 930 F.2d 1293, 1298 (8th Cir. 1989) (allowing the NFL to invoke the exemption where there has been an agreement between management and labor); Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 959 (2d Cir. 1987); Mackey v. Nat'l Football League, 543 F.2d 606, 614-16 (8th Cir. 1976) (noting that "the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining"); Bridgeman v. Nat'l Basketball Ass'n, 675 F. Supp. 960, 964-67 (D.N.J. 1987); *see generally* Ethan Lock, *The Scope of the Labor Exemption in Professional Sports*, 1989 DUKE L.J. 339 (1989).

96. *See, e.g.*, Brown v. Pro Football, Inc., 518 U.S. 231, 250 (1996) (affirming court of appeals decision holding that players may not claim fixed salary imposed by the NFL is an antitrust violation even though negotiations had reached an impasse); Nat'l Basketball Ass'n v. Williams, 45 F.3d 684, 692-93 (2d Cir. 1995) (holding that non-statutory labor exemption precludes antitrust attack despite impasse in negotiations).

97. Stiglitz, *supra* note 87, at 173.

owners cannot argue the changes as acceptable on commissioner authority grounds because commissioner power cannot conflict with the CBA.

By now it is obvious that the CBA governs labor relations in professional sport. The dominance of the CBA in the current labor structure of major league professional sports protects holdout player conduct. First, CBAs do not expressly authorize the commissioner to take disciplinary action against a holdout player. Second, CBA language governs free agency rules that provide the motivation for the holdout.[98] Third, owners cannot unilaterally amend the CBA until an impasse in bargaining occurs.[99] The labor agreements in baseball, football and basketball all contain language that serve to prevent a player from getting around a contract by sitting out.[100] Since changing free agency requirements would be the strongest deterrent to holdouts, the NHL would have to put the proposed changes on the bargaining table, declare an impasse, unilaterally implement the proposal and hope that a court or arbitrator will follow *Brown*[101] and rule that the labor exemption extends beyond impasse. Meanwhile, the proposal might spark such tension that a work stoppage would be inevitable. This risk is always present during collective bargaining. Additionally, perhaps the players' union would be sympathetic toward the proposal. Holdouts can be detrimental to other players by aggravating owners and discouraging them from entering into long-term contracts.

IV. CONCLUSION

All holdout players, even those who return to the team after one day, feel their contract should be renegotiated to reflect salary market changes in their respective sport. Yet, a changing market effects daily life, not only sports, and ordinary citizens do not renege on a contract when circumstances change. In fact, your boss is probably not going to reduce your salary because the firm has a rough month.

Holdouts harm numerous parties inside and outside of the sport industry. Additionally, under the status quo, players have and will continue to get away with this. Fan or owner lawsuits are only temporary, case-specific solutions. Commissioner power does not include the authority to discipline players who hold out. Even if a commissioner took action under the catch all "best interests" provision, discipline would be

98. *See, e.g.*, NBACBA art. XI; NFLCBA art. XIX; NHLCBA art. 10.
99. DOUGLAS L. LESLIE, LABOR LAW 190 (1992).
100. *See supra* note 89 and accompanying text.
101. 518 U.S. at 231.

imposed on a case-by-case basis. Unlike unique situations of a player choking his coach or a player making disgraceful derogatory remarks, the holdout is absolutely capable of repetition. Moreover, holdouts have become so numerous and frequent so that a case-by-case approach is impracticable and a drain of resources. Collective bargaining, therefore, is the means to reach the end of the elimination of the player holdouts. Since players obviously are unwilling to fulfill their valid contractual obligations, this new CBA language must make holding out wholly undesirable. Then no player in his right mind will try to be "above the law" and will simply go out and play the game.

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