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Understanding the Evolution of Signing Bonuses and Guaranteed Money in the National Football League: Preparing for the 2011 Collective Bargaining Negotiations

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# Understanding the Evolution of Signing Bonuses and Guaranteed Money in the National Football League: Preparing for the 2011 Collective Bargaining Negotiations

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I. INTRODUCTION.....	180
II. HISTORY OF FREE AGENCY, COMPENSATION AND THE SIGNING BONUS IN THE NFL .....	183
III. CURRENT FORMS OF PLAYER COMPENSATION IN THE NFL .....	190
A. <i>Negotiated Compensation</i> .....	190
1. Paragraph 5 Salary.....	190
2. Signing Bonuses .....	193
3. Option Bonuses.....	195
4. Incentive Clauses .....	196
5. Roster Bonuses and Workout Bonuses .....	197
B. <i>Non-Negotiated Compensation</i> .....	198
C. <i>“Guaranteed” Compensation</i> .....	200
IV. NON-NFL SIGNING BONUS DISPUTES .....	201
A. <i>Alabama Football Inc. v. Greenwood (1978)</i> .....	201
B. <i>Bryant v. Tanenbaum (1990)</i> .....	202
V. LITIGATION AND ARBITRATION IN THE NFL .....	202

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A.	<i>Pre-Stipulation and Settlement Agreement</i> .....	204
1.	Miami Dolphins, Ltd. v. Cowan (1986) .....	204
2.	McGlasson v. W.C.A.B. (Philadelphia Eagles Football Club) (1989) .....	205
B.	<i>Post-Stipulation and Settlement Agreement</i> .....	205
1.	NFLPA, on behalf of Bobby Hobert, Elvis Grbac v. NFL (1997) .....	206
2.	Carolina Panthers and Kevin Greene (1997).....	209
3.	Denver Broncos and Eddie Kennison (2002) ....	211
4.	Miami Dolphins and Ricky Williams (2004) ....	212
5.	Denver Broncos and Ashley Lelie (2007).....	214
6.	Philadelphia Eagles and Terrell Owens (2007) ...	217
7.	Atlanta Falcons and Michael Vick (2007).....	219
VI.	2006 AMENDMENT TO THE CBA .....	224
VII.	SUMMARY AND CONCLUSION .....	226
A.	<i>The Future</i> .....	227
B.	<i>Possible Solutions</i> .....	227
1.	Wage Scales .....	227
2.	Escrow System.....	228
3.	Collectively Bargained Clarity .....	229

## I. INTRODUCTION

When National Football League (NFL) owners voted 32-0 to opt out of the NFL-National Football League Players Association (NFLPA) collective bargaining agreement (CBA)<sup>3</sup> on May 20, 2008, all sorts of doomsday scenarios for the current state of professional football and its role in America began to spin. As the “Big 4” league that had gone the longest without a work stoppage,<sup>4</sup> the NFL, by most perceptions, had become the preeminent professional sports league in the

<sup>3</sup> National Football League Collective Bargaining Agreement 2006-2012, available at <http://www.nflplayers.com/images/fck/NFL%20COLLECTIVE%20BARGAINING%20AGREEMENT%202006%20-%202012.pdf> [hereinafter NFL CBA].

<sup>4</sup> See The Associated Press, *Lockout over salary cap shuts down NHL*, ESPN, <http://sports.espn.go.com/nhl/news/story?id=1992793> (explaining that a lockout in the NHL cancelled the 2004-05 season); National Basketball Players Association History, <http://www.nbpa.com/history.php> (last visited Mar. 30, 2009) (explaining that a lockout in the NBA led to a shortened 50 game regular season schedule in the 1998-99 season); Mike Lopresti, *Baseball strike of 1994-95 timeline*, CINCINNATI ENQUIRER, Aug. 12, 2004, available at <http://reds.enquirer.com/2004/08/12/STRIKEBOX12-LOPRESTI.html> (explaining that MLB cancelled its first World Series ever in 1994 because of a player strike); National Football League History by Decade 1981-1990, <http://www.nfl.com/history/chronology/1981-1990#1987> (last visited Mar. 30, 2009) (explaining that the last work stoppage in the NFL was during the 1987 season, when a 24-day strike shortened the regular season to 15 games).

United States.<sup>5</sup> Yet, the owners that had voted 30-2 in favor of the current CBA<sup>6</sup> were now opting out of it only 26 months later. What went wrong?

If you were to believe NFLPA attorney Jeffery Kessler, the reason the owners opted out of the CBA was that there was a revenue-sharing dispute among high-revenue and smaller-revenue teams, and the only thing they could agree on was taking away from the players' share.<sup>7</sup> This, despite the fact that, according to Kessler, the NFLPA would insist on receiving an increased percentage of league revenue in a new CBA.<sup>8</sup> Certainly players received a larger share of revenue in the most recent round of CBA negotiations, which were regarded by some as the most successful in the history of the NFLPA.<sup>9</sup> The 2006 CBA extension redefined the pool of money to be divided amongst the players and clubs from Defined Gross Revenue (DGR) to Total Revenue (TR). TR included all stadium revenues related to football, including concessions, parking, local advertising and promotion, signage, magazine advertising local sponsorship agreements, stadium clubs and luxury box income - revenue sources explicitly excluded from DGR previously.<sup>10</sup> The result, before this change, had been large revenue discrepancies between teams that owned their own stadiums, like the New England Patriots, and teams that did not, like their rivals the Indianapolis Colts.<sup>11</sup>

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<sup>5</sup> See Michael McCarthy, *Going out swinging; Usually reserved Tagliabue calls an audible, opens up on league he led to new heights*, USA TODAY, Aug. 22, 2006 at 1C; Christine Brennan, *New NFL boss faces pressure not to fumble*, USA TODAY, Aug. 10, 2006 at 2C; Jonathan B. Goldberg, *No Tying in Football? Reexamining the Sale of NFL Tickets*, 14 SPORTS LAW. J. 1 (2007).

<sup>6</sup> Don Pierson, *There's peace on turf in NFL; 6-year accord raises salary cap, revenue sharing*, CHI. TRIB., Mar. 9, 2006 at C1.

<sup>7</sup> Lester Munson, *Storm clouds gather and lockout looms large in NFL labor strife*, ESPN, Mar. 12, 2008, <http://sports.espn.go.com/nfl/columns/story?id=3288568>.

<sup>8</sup> Matthew Futterman, *NFL Players Seek Bigger Revenue Cut*, WALL ST. J., May 20, 2008 at B9.

<sup>9</sup> See Marc Narducci, *Upshaw visits Eagles to talk labor agreement*, PHILA. INQUIRER, Nov. 18, 2006 at E1; Gary Myers, *An Up-roar Over Gumble*, N.Y. DAILY NEWS, Aug. 27, 2006 at 84.

<sup>10</sup> National Football League Collective Bargaining Agreement 2002-2008, art. XXIV, § 1(a)(iii) [hereinafter Old NFL CBA].

<sup>11</sup> In 2003, the second season of the Patriots Gillette Stadium and when the Patriots beat the Colts in the AFC Championship Game en route to a Super Bowl XXXVIII victory, the Patriots' revenues were \$189 million, NFL Team Valuations: New England Patriots, [http://www.forbes.com/forbes/2003/0915/nfl\\_4.html](http://www.forbes.com/forbes/2003/0915/nfl_4.html) (last visited Mar. 30, 2009). The Colts' 2003 revenue was \$137 million, NFL Team Valuations: Indianapolis Colts, [http://www.forbes.com/free\\_forbes/2003/0915/nfl\\_29.html](http://www.forbes.com/free_forbes/2003/0915/nfl_29.html) (last visited Mar. 30, 2009). Assuming each team spent to the \$75 million salary cap limit as is often the case, the Patriots spent 39.6% of revenue on player payroll while the Colts spent 54.7%.

More importantly to the NFLPA, before the change the players had not been receiving their fair share of the stadium related revenues.<sup>12</sup> As a result of the shift from DGR to TR, the players went from receiving a maximum of 65.5% of DGR to a maximum of 57.5% TR and the salary cap increased from \$85.5 million in 2005 to \$102 million in 2006.<sup>13</sup> While the players' percentage share of revenue decreased, the pool of revenue from which the players received their share increased substantially with the addition of stadium revenues, leading to the increased salary cap.

Two team owners, Ralph Wilson of the Buffalo Bills and Paul Brown of the Cincinnati Bengals, voted against the new arrangement fearing that small market teams like their own were not receiving a large enough share of revenue to maintain financial viability.<sup>14</sup> The financial concerns of NFL clubs were compounded by an overall credit crisis and economic downturn.<sup>15</sup> It was revealed in March 2008 that the NFL and its 32 clubs had over \$9 billion in debt.<sup>16</sup> To protect their credit rating, NFL owners proposed to lower team debt limits from \$150 million to \$120 million. The NFLPA was concerned that lowering the debt limits of clubs would negatively effect the salaries of players, and the proposal was shelved after the NFLPA filed a collusion charge.<sup>17</sup>

NFL clubs utilize debt to finance signing bonuses, which are large sums of money paid upfront to players upon signing with the club or in scheduled installments thereafter. The signing bonus is essentially unearned income for the player, allegedly obligating the player to perform in the future. Historically, the signing bonus served merely as an incentive to sign. However, over the years, clubs have attempted, either through litigation, arbitration or contract language, to obligate (or at least obligate a good faith effort for) future performance. Both the terms of the signing bonuses themselves, as well as the CBA, contain forfeiture provisions which dictate and control remedies in the event

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<sup>12</sup> See Gary Myers, *NFL & Players Huddle in OT. Extend deadline for CBA by 3 days*, N.Y. DAILY NEWS, Mar. 3, 2006 at 78; Rick Westhead, *NFL union head has plenty of leverage*, THE TORONTO STAR, Feb. 7, 2006 at E2.

<sup>13</sup> NFL CBA art. XXIV, § 4(a); Old NFL CBA art. XXIV § 4(a).

<sup>14</sup> Rob Longley, *Big Shoes to Fill, Again*, THE TORONTO SUN, Mar. 21, 2006 at S6; Jarrett Bell, *Haggling ends with compromise; Revenue sharing gets green light*, USA TODAY, Mar. 27, 2007 at 12C.

<sup>15</sup> See Michael M. Phillips & Damian Paletta, *Paulson Sees Credit Crisis Waning – Treasury Secretary Calls Fed's Moves 'Inflection Point'*, WALL ST. J., May 7, 2008 at A2.

<sup>16</sup> Daniel Kaplan, *Court filing: NFL carrying \$9B of debt*, SPORTS BUS. J., Mar. 17, 2008 at 1.

<sup>17</sup> Daniel Kaplan & Liz Mullen, *NFL halts plan to reduce debt*, SPORTS BUS. J., Apr. 7, 2008 at 1.

that a player fails to perform. However, the clubs' and league's inability to enforce the forfeiture provisions has resulted in large amounts of unearned cash remaining in the pockets of players either incapable of or unwilling to continue playing under the terms of their contracts. As a result, bonuses and the related forfeiture provisions will undoubtedly be an important issue in the negotiation of the next NFL CBA.

The debates, legal battles and subsequent decisions over the interpretation of the forfeiture provisions constitute the majority of this article. The article will begin by laying out the history and current forms of compensation for NFL players, including the different types of bonuses that NFL players may earn. Next, the article will summarize a number of cases dealing with the NFL's and other professional football clubs' attempts to recoup money previously paid to players. The article will *not* discuss a consolidated case released close to the publication of this article involving players Plaxico Burress and Larry Johnson.<sup>18</sup> The article will also discuss the NFL and NFLPA's attempt to solve some of the problems with amendments to the 2006 CBA. Finally, recommendations will be offered to prevent future controversies that could allow for a fair and predictable means to bonus forfeiture in the NFL.

## II. HISTORY OF FREE AGENCY, COMPENSATION AND THE SIGNING BONUS IN THE NFL

The history of player compensation in professional sports in the United States is closely tied to the reserve clause, an ingenious contractual invention of professional baseball that allowed teams to keep players under their control in perpetuity, which was first used in 1879.<sup>19</sup> The legality of the reserve clause was upheld when it was determined that baseball was not involved in interstate commerce, and therefore was exempt from antitrust scrutiny.<sup>20</sup> In subsequent years, other major professional sports leagues (basketball, hockey and football) adopted baseball's restrictive covenant that prevented free agency, or the ability of

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<sup>18</sup> See *White v. Nat'l Football League re: Plaxico Burress and Larry Johnson* (2009) (Burbank, Arb.) (on file with NFLPA). In Plaxico's case, Burbank ruled that the New York Giants could not withhold portions of Burress' signing bonus after Burress accidentally shot himself in the leg at a nightclub. Burbank ruled that Burress' actions were not "willful" within the meaning of Article XIV, §9(a). Burbank did however rule that the Kansas City Chiefs could void future Paragraph 5 guarantees for Larry Johnson following his arrest and league-imposed one game suspension.

<sup>19</sup> For more on the history of the reserve clause, see Jonathan B. Goldberg, *Player Mobility in Professional Sports: From the Reserve System to Free Agency*, 15 *SPORTS LAW. J.* 21 (2008).

<sup>20</sup> *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922); Robert P. Woods, *The Development of Baseball's Antitrust Exemption*, 5 *DUQ. BUS. L.J.* 61 (2003).

players to offer their services to the highest bidder. Although baseball's antitrust exemption was continuously and narrowly upheld under *stare decisis*,<sup>21</sup> the other sports were inexplicably differentiated beginning in 1957 by the Supreme Court when former Detroit Lion William Radovich sued the NFL (*Radovich*). The Court ruled that other sports were subject to federal antitrust laws, setting the stage for player freedom in years to come.<sup>22</sup>

Rival leagues have also had a profound impact on player compensation over the years. The NFL, originally the American Professional Football Conference, was built on the understanding that competition of any kind, particularly among teams for players' services, had destroyed previous leagues and thus instituted a salary cap of \$1,200 per game in 1922. Practically, the cap was widely abused.<sup>23</sup> The NFL held its first annual player draft in 1936 to promote parity and establish claims to players but the draft did little to dissuade rival leagues from drafting the same players. The rival leagues offered players drafted into the NFL larger contracts, and players agreed to them.<sup>24</sup>

Leagues called "The American Football League" existed in various forms throughout the first half of the 20th century, though the first sustained competitor to the NFL was the All-America Football Conference (AAFC), which played from 1946 through 1949. At the beginning of the decade star players were earning approximately \$5,000 a year, but during the existence of the AAFC, some players were making upwards of \$20,000.<sup>25</sup> For example, Red Grange, a running back from the University of Illinois, shocked the sports world by agreeing to a professional contract with the NFL's Chicago Bears worth \$100,000 in 1925, when most star players were making only about \$100 per game.<sup>26</sup>

Complicating the NFL's new found exposure to judicial scrutiny was the emergence of a rival league, the newest American Football League (AFL) in 1960. Due to its established status, the NFL was either able to muscle out previous leagues or accept only a few of the rival league teams into the NFL, but in a new era of television the AFL proved a more difficult competitor by obtaining relatively lucrative

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<sup>21</sup> *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356 (1953); *Flood v. Kuhn*, 407 U.S. 258 (1972).

<sup>22</sup> See *Radovich v. Nat'l Football League*, 352 U.S. 445 (1957); GLENN M. WONG, *ESSENTIALS OF SPORTS LAW*, § 10.2.1 (3rd ed. 2002).

<sup>23</sup> ROBERT W. PETERSON, *PIGSKIN: THE EARLY YEARS OF PRO FOOTBALL* 69, 80 (Oxford 1997).

<sup>24</sup> *Id.* at 149-50, 164.

<sup>25</sup> *Id.* at 150-51.

<sup>26</sup> JOHN M. CARROLL, *RED GRANGE AND THE RISE OF MODERN FOOTBALL* ch. 6 (University of Illinois Press 1999); Peterson, *supra* note 23, at 66.

broadcasting agreements.<sup>27</sup> During the 1950s, when roster sizes were limited to 35 players, the average NFL salary was about \$7,500.<sup>28</sup> However, in 1968, eight years after the launch of the AFL, average salaries rose to over \$39,000.<sup>29</sup> The eventual NFL-AFL merger in 1970 alleviated the pressure of escalating salaries, but certainly did not end the league's issues with player compensation.

Soon after *Radovich*, the NFL instituted the Rozelle Rule, a system whereby a team that signed a player from another team was required to pay compensation in the form either of draft picks, players or money.<sup>30</sup> Under this system, then-Commissioner Pete Rozelle retained the right to determine the compensation if the clubs could not agree amongst themselves. As team owners had the power to oust Rozelle from office and the owners disliked player movement, the players believed that Rozelle had an incentive to award excessively high compensation packages for the team losing the player. As a result, this system dissuaded teams from attempting to sign players from other teams for fear that Rozelle would overcompensate the other team. During this time, only four players were signed by other teams after their contracts ended.<sup>31</sup> In the meantime, the NFLPA was officially certified by the National Labor Relations Board (NLRB) as the official bargaining representative of all NFL players in 1970.<sup>32</sup>

In 1975, player and future Hall of Famer John Mackey sued the NFL, claiming that the Rozelle Rule was an unreasonable restraint on player movement, and therefore constituted a violation of antitrust laws.<sup>33</sup> When the courts determined that the Rozelle Rule was not the result of bona-fide arm's length negotiations and was more restrictive than necessary, they ruled in favor of Mackey. As a result, NFL players had their first chance at free agency.<sup>34</sup> Players who played out the standard team option in their contract without signing a new one could then

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<sup>27</sup> MARK YOST, *TAILGATING, SACKS, AND SALARY CAPS: HOW THE NFL BECAME THE MOST SUCCESSFUL SPORTS LEAGUE IN HISTORY* ch. 4 (Kaplan 2006).

<sup>28</sup> Statistical data compiled by sports economist and professor Rodney Fort, National Football League Payroll, <http://www.rodneymfort.com/PHSportsEcon/Common/OtherData/NFLPayroll/NFLPayrolls.html> (last visited Mar. 30, 2009).

<sup>29</sup> National Football League Player Salaries, <http://www.rodneymfort.com/PHSportsEcon/Common/OtherData/NFLSalaries/NFLSalaries.html> (last visited Mar. 30, 2009).

<sup>30</sup> Wong, *supra* note 22, at § 10.2.1.1.

<sup>31</sup> Brief for The United States as Amicus Curiae in *Powell v. Nat'l Football League* 498 U.S. 1040 (1990) (No. 89-1421), available at <http://www.usdoj.gov/osg/briefs/1990/sg900595.txt>.

<sup>32</sup> See *Kapp v. Nat'l Football League*, 390 F. Supp. 74, 83 (D. Minn. 1974), *aff'd*, 586 F.2d 644 (8th Cir. 1978); NFL Players Association: About us, <http://nflplayers.com/user/about-us.aspx?fmid=182&lmid=182&pid=0&type=1> (last visited January 7, 2009).

<sup>33</sup> *Mackey v. Nat'l Football League*, 407 F. Supp. 1000 (D. Minn. 1975).

<sup>34</sup> *Mackey v. NFL*, 543 F.2d 610 (8th Cir. 1976).



sign with any team. However, some believe the NFLPA made a questionable move in the first legitimate CBA, executed in 1977, when it negotiated away the right to free agency, and instead accepted a Right of First Refusal/Compensation (RFR/C) system in exchange for an increase in pay, pension and other benefits.<sup>35</sup> Under the RFR/C system, the perpetual team option remained, but the player could negotiate it out of the contract.<sup>36</sup> There must have been at least a 10% increase in salary over the player's prior year salary if his contract included the option clause.<sup>37</sup> The compensation system under the CBA was rigidly defined based on a player's experience and salary, eliminating concerns about the arbitrariness of the Rozelle Rule.<sup>38</sup> Ultimately, there was little change in free agent movement under the RFR/C system.<sup>39</sup>

When the CBA expired in 1982, NFL players contemplated getting back the free agency rights they gave up in 1977. The emergence of the United States Football League (USFL) aided in providing the players with leverage, just as the AFL had done decades earlier. The USFL was scheduled to begin play in 1983 and determined to compete against the NFL for players. Yet after a 57 day preseason strike, the players accepted essentially the same free agency restrictions in exchange for a guarantee of 55% of DGR.<sup>40</sup> However, the impact of the USFL on salaries was significant. From 1982 to 1985, the period in which the USFL drafted, actively recruited and competed with the NFL for players, the average total compensation of NFL players increased from \$111,240 to \$217,150, an increase of 95%.<sup>41</sup> During this same period, average signing bonus compensation increased from \$14,050 to a high of \$50,220 in 1984, an increase of 257%.<sup>42</sup> When the USFL ceased play prior to its 1986 season and subsequently lost an important legal battle

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<sup>35</sup> See Scott E. Backman, *NFL Players Fight for their Freedom: The History of Free Agency in the NFL*, 9 SPORTS LAW. J. 1 (2002); Ari Nissim, *The Trading Game: NFL Free Agency, The Salary Cap, and Proposal for Greater Trading Flexibility*, 11 SPORTS LAW. J. 257, 259-60 (2004).

<sup>36</sup> C.T. Rieger & C.J. Lloyd, *The Effect of McNeil v. NFL on Contract Negotiations in the NFL – That Was Then, This Is Now*, 3 MARQ. SPORTS LAW. J. 45, 47 (1992).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> See Larry Weisman, *NFL Players ecstatic for long-awaited labor peace*, USA Today, Mar. 8, 2006, available at [http://www.usatoday.com/sports/football/nfl/2006-03-08-labor-deal-reaction\\_x.htm](http://www.usatoday.com/sports/football/nfl/2006-03-08-labor-deal-reaction_x.htm); Brian E. Dickerson, *The Evolution of Free Agency in the National Football League: Unilateral and Collective Bargaining Restrictiveness*, 3 SPORTS LAW. J. 165 (1996).

<sup>41</sup> See Fort, *supra* note 28.

<sup>42</sup> *Id.*

against the NFL,<sup>43</sup> average total compensation leveled off and signing bonuses decreased.<sup>44</sup>

Finally, when the 1982 CBA expired in 1987, the players were more determined to gain free agency, as it existed in the other three major professional sports. Professional baseball players had earned free agency in 1976 after Dave Messersmith and Andy McNally successfully challenged the reserve clause. Messersmith and McNally filed a grievance claiming that their contracts could not be “optioned” by the team every year. In the arbitration decision, Arbitrator Peter Seitz found in favor of the players, concluding that the one-year option in the Standard Player Contract could not be renewed every year, but rather expired after the first time it was exercised. Following this decision, Major League Baseball (MLB) owners and the Major League Baseball Players Association (MLBPA) negotiated unrestricted free agency for players after six years.<sup>45</sup>

National Basketball Association (NBA) players gained limited free agency in 1976 after Oscar Robertson and the National Basketball Players Association (NBPA) sued the NBA in 1970, claiming that the reserve clause (among other things) violated antitrust laws.<sup>46</sup> Six years after the lawsuit was filed, the two sides settled their differences with the “Robertson Agreement” and submitted the settlement for the court’s approval. The court approved the agreement, which called for a Right of First Refusal/Compensation system of free agency.<sup>47</sup> The NBA and NBPA maintained this system until 1988, when the two sides negotiated a system of restricted, then unrestricted free agency for players based on numbers of years in the league. In 1995, players potentially

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<sup>43</sup> See *US Football League v. Nat’l Football League*, 842 F.2d 1335 (2nd Cir. 1988). Although a jury had found that the NFL unlawfully monopolized professional football in the United States, it rejected the rest of the USFL’s claims, finding “The jury rejected the remainder of the USFL’s claims. It found that the NFL had neither monopolized a relevant television submarket nor attempted to do so; that the NFL did not commit any overt act in furtherance of a conspiracy to monopolize; that the NFL did not engage in a conspiracy in restraint of trade; that the NFL’s television contracts were not unreasonable restraints of trade; that the NFL did not control access to the three major television networks; and that the NFL did not interfere either with the USFL’s ability to obtain a fall television contract or with its spring television contracts.” As a result the jury awarded a total of \$1 in damages, affirmed on appeal, effectively ending any chance of the USFL’s resurrection and competition with the NFL.

<sup>44</sup> Fort, *supra* note 28.

<sup>45</sup> Wong, *supra* note 22, at 515.

<sup>46</sup> *Robertson v. Nat’l Basketball Ass’n*, 389 F. Supp. 867, 872-73 (D.C.N.Y. 1975).

<sup>47</sup> *Robertson v. Nat’l Basketball Ass’n*, 72 F.R.D. 64, 71 (D.C.N.Y. 1976).

earned complete unrestricted free agency, dependent upon whether they played out the terms of their contracts.<sup>48</sup>

The World Hockey Association (WHA), a competitor to the National Hockey League (NHL), successfully challenged the reserve clause in 1972 in *Philadelphia World Hockey Club v. Philadelphia Hockey Club*. The court issued an injunction ruling that the reserve clause was not subject to the labor exemption,<sup>49</sup> and, thus, was a violation of antitrust laws.<sup>50</sup> Subsequent to the ruling, the NHL and National Hockey League Players Association (NHLPA) negotiated a system of free agency in which other teams could sign a player who had finished his contract only if that team compensated the team losing the player with draft picks, players, or cash. If the two teams failed to negotiate a compensation package, an arbitrator determined the compensation. Under this system, which heavily favored the team losing the player, few players signed with other teams at the expiration of their contract. This system, with minor changes, remained in effect into the 1990s.<sup>51</sup>

In the NFL, during the ten-year period after the first CBA in 1977, only one of thousands of eligible players changed teams.<sup>52</sup> Marvin Powell, other players, and the NFLPA sued the NFL, again challenging the player movement restrictions.<sup>53</sup> The Eighth Circuit ruled that because the players were still unionized, the nonstatutory labor exemption from antitrust laws still applied and would continue to apply so long as there was a possibility that proceedings could still be brought before the National Labor Relations Board (NLRB).<sup>54</sup> At the suggestion of the Eighth Circuit,<sup>55</sup> the NFL players decertified the NFLPA as their bargaining representative and filed a new class-action antitrust suit, which purposely listed Jets running back Freeman McNeil and his symbolic

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<sup>48</sup> Alan M. Levine, Note, *Hard Cap or Soft Cap: The Optimal Player Mobility Restrictions for Professional Sports Leagues*, 6 Fordham Intell. Prop. Media & Ent. L.J. 179, 212-13 (1995).

<sup>49</sup> The non-statutory labor exemption provides that "a collective bargaining agreement between a union and employers is exempt from antitrust challengers unless it violates certain criteria." Wong, *supra* note 22, at 473.

<sup>50</sup> *Phila. World Hockey Club, Inc. v. Phila. Hockey Club, Inc.*, 351 F. Supp. 462, 518-19 (E.D. Pa. 1972).

<sup>51</sup> JAMES P. QUIRK & RODNEY D. FORT, *PAY DIRT: THE BUSINESS OF PROFESSIONAL TEAM SPORTS 205-08* (Princeton University Press 1997).

<sup>52</sup> *Powell v. Nat'l Football League*, 678 F. Supp. 778, 780 (D. Minn. 1988). The one player who actually changed teams is not specified in the court's opinion.

<sup>53</sup> *Id.*

<sup>54</sup> *Powell v. Nat'l Football League*, 930 F.2d 1293, 1303-04 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991).

<sup>55</sup> *Id.* at 1303.

first name as the first name in the suit.<sup>56</sup> The McNeil suit successfully challenged the NFL's most recent incarnation of the Rozelle Rule, Plan B free agency system, as an unreasonable restraint of trade paving the way for a new suit, led by future Hall of Famer Reggie White, seeking damages and injunctive relief.<sup>57</sup> The White suit was ultimately settled in 1993 in what became the current NFL CBA by way of a Stipulation and Settlement Agreement (SSA) approved by the District Court of Minnesota. The 1993 CBA granted unrestricted free agency for the first time ever, allowing players with four or more accrued seasons in any Capped Year and not under contract, to offer their services to any and all teams.<sup>58</sup> In exchange, the NFL's first Salary Cap was created, limiting player payroll to 64% of DGR.<sup>59</sup> Finally, as part of the CBA and the SSA, Judge David Doty of the District Court of Minnesota retained jurisdiction over matters relating to the CBA and SSA. In effect, Doty became the permanent judge of labor relations between the NFL and NFLPA.<sup>60</sup>

Amazingly, despite the tremendous labor strife and constant lawsuits, after the brief strike in 1987, there was not and has not been another work stoppage.<sup>61</sup> In addition, the league continued to thrive: in 1990 the NFL signed national television contracts that were worth a total of \$900 million per year.<sup>62</sup> At the same time, during a period in which the players worked without a CBA, NFL player average total compensation increased from \$218,460 in 1987 to \$488,990 in 1992, an increase of 124%.<sup>63</sup> Yet the largest gross increase came with the new CBA in 1993. In just one year average total compensation increased to \$663,010, an increase of 35.8%.<sup>64</sup> In addition, average signing bonus compensation increased from \$110,600 in 1993 all the way to \$324,110

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<sup>56</sup> McNeil v. Nat'l Football League, 790 F. Supp. 871 (D. Minn. 1992).

<sup>57</sup> White v. Nat'l Football League, 836 F. Supp. 1458 (D. Minn. 1993).

<sup>58</sup> NFL CBA art. XIX § 1(a).

<sup>59</sup> Backman, *supra* note 35; NFLPA, <http://www.nflpa.com>. The salary cap amounts are projected over 16 months prior to the start of the season in which the cap is to be in effect. For example, the 2008 Salary Cap was determined by May 1, 2007. See NFL CBA art. XXIV, §10(b)(ii).

<sup>60</sup> White v. Nat'l Football League, 822 F. Supp. 1389, 1436-37 (D. Minn. 1993).

<sup>61</sup> One key component in the extension of the CBA four times is the existence of "poison pills" in the CBA, or changes in the current systems that give each side incentive to continue the agreement. For example, should the CBA expire, there is no salary cap, however, players are required to have six accrued seasons to be an unrestricted free agent. See NFL CBA art. LVI § 1, 2.

<sup>62</sup> Jeff Hardie, *Talk of \$ \$ leaves little room for football*, WASH. TIMES, Sept. 7, 1990, at H16.

<sup>63</sup> Fort, *supra* note 28.

<sup>64</sup> *Id.*

in 1996, a 193% increase in just four seasons.<sup>65</sup> In total, average signing bonus compensation increased from just 10.3% of NFL compensation in 1981 to a high of 51% of compensation in 2000, leveling off to 41.6% in 2005.<sup>66</sup> In 2005, before the most recent extension of the CBA, the average total compensation was \$1,365,078.<sup>67</sup> This period of growth coincided with the NFL becoming America's most popular sports league.<sup>68</sup>

### III. CURRENT FORMS OF PLAYER COMPENSATION IN THE NFL

For purposes of this article, the most common and meaningful forms of compensation for NFL players for football related work will be discussed, excluding: amounts both unique to the football industry as covered in the NFL CBA, and amounts common throughout the United States, such as injury settlements,<sup>69</sup> injury protection,<sup>70</sup> termination pay,<sup>71</sup> player benefits including pension, medical, travel expenses, per-diem,<sup>72</sup> loans,<sup>73</sup> expansion bonuses,<sup>74</sup> tuition assistance,<sup>75</sup> severance pay,<sup>76</sup> disability,<sup>77</sup> and workers' compensation.<sup>78</sup> That said, there are still many different ways in which NFL players are compensated by their teams, in both negotiated and non-negotiated terms.

#### A. *Negotiated Compensation*

##### 1. Paragraph 5 Salary

"Paragraph 5" salary refers to the base compensation paid to players according to Paragraph 5 of their NFL Player Contract.<sup>79</sup> When the average fan thinks of NFL contracts not being guaranteed, he or she is thinking of Paragraph 5 salary. Paragraph 5 minimum salaries are based

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> GLENN M. WONG, *THE COMPREHENSIVE GUIDE TO CAREERS IN SPORTS* 95 (Jones and Bartlett 2008).

<sup>69</sup> NFL CBA, art.X.

<sup>70</sup> NFL CBA, art. XII.

<sup>71</sup> NFL CBA, art. XXIII.

<sup>72</sup> NFL CBA, art. XXIV, § 1(b).

<sup>73</sup> NFL CBA, art. XXIV, § 7(e).

<sup>74</sup> NFL CBA, art. XXXI, § 4.

<sup>75</sup> NFL CBA, art. XLVIII-B.

<sup>76</sup> NFL CBA, art. L.

<sup>77</sup> NFL CBA, art. LI.

<sup>78</sup> NFL CBA, art. LIV.

<sup>79</sup> NFL CBA, app. C, NFL CBA, art. I, § 3(ao).

upon the amount of credited seasons<sup>80</sup> a player has earned; for the 2009 NFL season, the minimum salary of a player with zero credited seasons was \$310,000, while for players with four to six credit seasons the minimum salary was \$620,000.<sup>81</sup>

There are a few caveats to Paragraph 5 compensation, including guaranteed vs. non-guaranteed Paragraph 5, Paragraph 5 escalators and split contracts. It is not uncommon for large free agent contracts or draft picks in the first or second round to have any or all of their Paragraph 5 compensation for some seasons of the contract guaranteed. Generally, if the club is not satisfied with the player's performance, Paragraph 11 of the NFL Player Contract permits clubs to terminate their remaining obligations to the player, except those guarantees made to the player (including Paragraph 5 salary).<sup>82</sup> In addition, if a player is designated as either a franchise or transition player, "the resulting Player Contract shall be fully guaranteed" for skill and injury.<sup>83</sup>

Many free agent contracts and most rookie contracts also contain Paragraph 5 "escalator" provisions. Escalators raise a player's Paragraph 5 salary in a future season if certain performance qualifications are met.<sup>84</sup> However, the word "escalator" does not appear anywhere in the NFL CBA. As a result Paragraph 5 escalators are largely unregulated, likely due to the fact that there has never been any notable dispute over an escalator provision. The major negotiating concerns for escalator provisions are the rule limiting rookie Paragraph 5 salary increases to 25% annually,<sup>85</sup> and the rule limiting Paragraph 5 salary increases that extend into uncapped seasons to 30% annually.<sup>86</sup>

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<sup>80</sup> A "credit season" is earned when a player is on full pay status for three or more regular season games, meaning being on the Club's 80-Man Roster, whether active or on Injured Reserve, except for a few exceptions. See NFL CBA, art. XXXVIII, § 7.

<sup>81</sup> NFL CBA, art. XXXVIII, § 6.

<sup>82</sup> "Player understands that he is competing with other players for a position on Club's roster within the applicable player limits. If at any time, in the sole judgment of Club, Player's skill or performance has been unsatisfactory as compared with that of other players competing for positions on Club's roster, or if Player has engaged in personal conduct reasonably judged by Club to adversely affect or reflect on Club, then Club may terminate this contract. In addition, during the period any salary cap is legally in effect, this contract may be terminated if, in Club's opinion, Player is anticipated to make less of a contribution to Club's ability to compete on the playing field than another player or players whom Club intends to sign or attempts to sign, or another player or players who is or are already on Club's roster, and for whom Club needs room." NFL CBA app. C ¶ 11.

<sup>83</sup> NFL CBA, art. XX, § 2(c).

<sup>84</sup> See *White v. Nat'l Football League re: Ashley Lelie* 4 n.2 (2006) (Burbank, Arb.) [hereinafter *Lelie Arbitration Decision*], available as Exhibit A in *White v. Nat'l Football League*, 2007 WL 939560 (D. Minn. Mar. 26, 2007).

<sup>85</sup> NFL CBA, art. XVII, § 4(e).

<sup>86</sup> NFL CBA, art. XXIV, § 8.

The escalator qualifications in rookie contracts typically must be met in several years of the contract, while a veteran free agent contract may stipulate that the qualifications be met in only one prior season. The principal qualifier of an escalator provision is playing time: that the player must participate in a requisite percentage of plays during the season. The remaining qualifications are often based on the player's statistical performance, the team's statistical performance, the team reaching the postseason, and/or the player making the Pro-Bowl team (see Exhibit A).

However, escalators come with one significant downside for the player: an increased salary cap charge for the following season. For example, assume a player has a terrific 2009 season, and as a result his Paragraph 5 salary is escalated from \$1 million to \$1.5 million for the 2010 season. This increased cap charge makes it more likely that the club will cut the player prior to the season and not have to pay any of the Paragraph 5. Despite this one potential downside, escalators do provide reasonable advantages to players. Escalators give players increased control over their own compensation. Since the additional escalator compensation depends largely upon the player's individual performance, the player has the ability to increase his own salary by playing well.

Undrafted rookies and those drafted in the third round or lower are often given "split" contracts. A split contract lists two Paragraph 5 salaries: the league minimum for the relevant amount of credited seasons,<sup>87</sup> and the minimum for a player not on the club's Active/Inactive List.<sup>88</sup> In the regular season, the player earns 1/17th of the higher salary amount each week that he is on the club's Active/Inactive 53-Man Roster in a 17 week regular season. However, for each week the player is on Injured Reserve, the Physically Unable to Perform list, Non-football Injury list or other list preventing him from participating in practice and games, he will earn 1/17th of the lesser salary. These terms are set forth in an addendum to the standard contract. Splits can encompass the pre-season, one regular season or two regular seasons. A player with two full-season splits could play all 16 games in his rookie season, but if he is injured in training camp prior to his sophomore campaign, he will earn the lesser salary called for every week he can't participate. For example in 2008, Tashard Choice, running back out of Georgia Tech, the 23rd pick of the 4th round and 122nd overall by the Dallas Cowboys in the 2008 NFL Draft, may have had a full 2-year split contract,

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<sup>87</sup> NFL CBA, art. XXXVIII, § 6.

<sup>88</sup> *Id.*

calling for \$295,000,<sup>89</sup> with an asterisk, and \$200,000 listed underneath for his 2008 Paragraph 5. In addition, his 2009 Paragraph 5 would be listed as \$385,000\*,<sup>90</sup> and \$225,000 underneath that. The asterisks would then explain that for each regular season week that the player is on the Inactive List he will be paid the lesser salary.

## 2. Signing Bonuses

Signing bonuses are probably the best known and most controversial form of compensation. Most fans mistakenly lump other bonus provisions, explained below, into the term “signing bonus.” A problem with signing bonuses is that their meaning is unclear. Although the CBA does not specifically define a “signing bonus”, it does list “Amounts Treated as Signing Bonuses.”<sup>91</sup> However, signing bonus is also a term commonly used outside the football or sports world. Many cases and legal scholars have stated that in times of confusion, words should be given their “plain and ordinary meaning.”<sup>92</sup> Previous cases have held that a signing bonus can be consideration for entering into a transaction,<sup>93</sup> or a “one-time bonus.”<sup>94</sup>

The traditional view is that signing bonuses are an inducement for signing into the contract. While often in the context of a tax dispute, courts have held that signing bonuses in sports are “given in consideration. . . [for] executing the contract.”<sup>95</sup> This view gains strength from the AFL-NFL wars beginning in the late 1950s until the two leagues’ merger in 1970.<sup>96</sup> For example, in 1959, the AFL’s Houston Oilers convinced Billy Cannon, a star running back from LSU, to sign with them over the NFL’s Los Angeles Rams by providing a \$100,000 guaranteed contract and a \$10,000 gift for Cannon’s mother.<sup>97</sup> Next, when NC State quarterback Roman Gabriel was drafted #1 overall in the 1962 AFL Draft by the Oakland Raiders and #2 overall by the Los Angeles Rams in the NFL Draft, the AFL induced Gabriel to join the Raiders with a

<sup>89</sup> \$295,000 was the league minimum for a player with Zero Credit Seasons in 2008.

<sup>90</sup> \$385,000 was the league minimum for a player with One Credited Season in 2009.

<sup>91</sup> NFL CBA, art. XXIV § 7(b)(iv).

<sup>92</sup> *McAbee Constr. Inc. v. U.S.*, 97 F.3d 1431 (Fed. Cir. 1996), *See also* *The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180 (1959) and James P. Nehf, *Writing Contracts in the Client’s Interest*, 51 S.C. L. REV. 153 (1999).

<sup>93</sup> *See Halper v. Halper*, 164 F.3d 830 (3rd Cir. 1999).

<sup>94</sup> *Cooper v. Cooper*, No. CA2003-05-038, 2004 N.E. 2d. WL 549784 (Ohio App. 12d. Mar. 22, 2004).

<sup>95</sup> *Clark v. N.Y. State Tax Comm’r*, 86 A.D.2d 691, 692 (N.Y. App. Div. 1982).

<sup>96</sup> David J. Sipusic, *Instant Repay: Upon Further Review, the National Football League’s Misguided Approach to the Signing Bonus Should Be Overturned*, 8 SPORTS LAW. J. 207, 212-215 (2001).

<sup>97</sup> *Id.*



\$100,000 signing bonus.<sup>98</sup> Also, in 1965, in what might have proved to be its most successful move, the AFL persuaded Alabama quarterback Joe Namath to join the New York Jets rather than the NFL's St. Louis Cardinals by providing a \$200,000 signing bonus.<sup>99</sup>

Signing bonuses are the most common form of guaranteed compensation, and the most important in terms of salary cap calculations. When a team gives a player a signing bonus, it prorates, or amortizes, the bonus over the term of the contract, for salary cap purposes, for a period not to exceed six years.<sup>100</sup> For example, if a player signs a 5-year deal with a \$10 million signing bonus, the bonus is prorated at an annual value of \$2 million. The player's resulting cap charge for each season of the contract would be \$2 million, plus his Paragraph 5 salary and any other bonuses or incentives for that season.

The difficulty with signing bonuses for salary cap calculations comes when a player is cut from the team pursuant to Paragraph 11 (described above).<sup>101</sup> In its simplest form, when a player is cut from the team, the remaining prorated portions of his signing bonus "accelerate" forward into the season in which the player is cut.<sup>102</sup> So in the previous example, if a player had played two years of the five-year contract but is cut prior to the third season, the salary cap charge related to his signing bonus would be \$6 million in the third year of the deal: the typical \$2 million annual proration, plus the remaining \$4 million in prorated signing bonus money for the final two years of the contract "accelerated" forward (see example below). However, again, the club would have no obligation to pay the player's Paragraph 5 salaries for the years remaining on the player's contract and they would not count towards the club's salary cap. Acceleration also occurs when a player is traded.<sup>103</sup>

	Year 1	Year 2	Year 3	Year 4	Year 5
<b>Original Salary Cap Charge</b>	\$2m	\$2m	\$2m	\$2m	\$2m
<b>Salary Cap Charge if cut before Year 3</b>	\$2m	\$2m	\$6m	\$0	\$0

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> NFL CBA, art. XXIV § 7(b)(i).

<sup>101</sup> *Supra* note 82 and NFL CBA, app. C, ¶ 11.

<sup>102</sup> NFL CBA, art. XXIV § 7(b)(ii).

<sup>103</sup> NFL CBA, art. XXIV § 7(b)(ii)(3). See also Ari Nissim, *The Trading Game: NFL Free Agency, The Salary Cap, and a Proposal for Greater Trading Flexibility*, 11 SPORTS LAW. J. 257 (2004).

Signing bonuses are extremely important in the NFL compensation scheme because they represent actual payment when very few contracts guarantee future payment. In general, there are far fewer guaranteed contracts in the NFL as compared to MLB, the NBA and the NHL. So while signing bonuses were originally intended to guarantee players a certain amount of money, they later became tools for creating and adding salary cap flexibility by shifting compensation amongst the years of the contract.

In addition to issues of guarantees and salary cap management, signing bonuses are also problematic in cases where a player retires, is disciplined, or violates the contract or CBA. The forfeiture of signing bonuses and similar payments is a contentious and litigated issue in the NFL. Both of these issues will be examined at length later in this article. See Exhibit B for an example of a Signing Bonus Addendum.

### 3. Option Bonuses

Option bonuses are lump-sum or scheduled payments paid upon exercise of the option by the Club. In consideration for the lump-sum payment, the player’s contract with the Club is extended, typically for one season. For salary cap purposes, option bonuses are treated as signing bonuses.<sup>104</sup> As a result, when an option bonus is exercised, the bonus is prorated over the remaining years on the contract, up to a maximum of six years.<sup>105</sup> Using the example from earlier (where a player signed a five-year deal with a \$10 million signing bonus), if a Club exercises an \$8 million option bonus after the player’s second season for one additional season, the \$8 million bonus is prorated over the now four years remaining on the contract, increasing the salary cap charge for each of those years by \$2 million (see example below).

	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6
<b>Original Salary Cap Charge</b>	\$2m	\$2m	\$2m	\$2m	\$2m	NA
<b>Salary Cap Charge upon exercise of \$8m Option Bonus after 2nd season</b>	\$2m	\$2m	\$4m	\$4m	\$4m	\$2m

Teams use option bonuses to convince players to agree to a team option in the contract. Many players prefer to offer their services on the open market when their contract expires because they are able to obtain larger salaries that way. Teams, however, want the option to extend

<sup>104</sup> NFL CBA, art. XXIV § 7(b)(iv)(3, 4).

<sup>105</sup> NFL CBA, art. XXIV § 7(b)(i).

a player's contract if that player is performing well on the field. Thus, option bonuses can satisfy both sides because the player receives guaranteed compensation in the form of the option bonus and the team retains the player's rights for an additional year. See Exhibit C for an example of an Option Bonus Addendum.

#### 4. Incentive Clauses

Amounts that are neither Paragraph 5 salary nor treated as signing bonuses can be classified as "incentives."<sup>106</sup> Incentives are categorized either as "likely to be earned (LTBE)" or "not likely to be earned (NLTBE)." The amount of a LTBE incentive is included in the club's salary cap calculation during the season in which the incentive can possibly be earned.<sup>107</sup> A NLTBE incentive does not count against the salary cap for that season. At the conclusion of the season, accounting is done to determine which incentives were actually earned. If as a result of the incentives the club exceeded the salary cap, the excess amount is subtracted from the club's salary cap for the following season.<sup>108</sup> Conversely, if the payout of incentives was actually less than what was included in the season's salary cap, the team receives a salary cap credit for the next season.<sup>109</sup>

There are over thirty different rules and fifteen pages of exhibits to determine whether incentives are LTBE or NLTBE and how much of the incentive should count against the salary cap.<sup>110</sup> In general, an incentive is LTBE if the incentive is "within the sole control of the player", i.e. reporting on time and participating in off-season workouts.<sup>111</sup> Many incentives are tied to playtime percentages and team statistical performance - if the team met or exceeded the specified performance in the prior season, the incentive is deemed LTBE, whereas if the team did not meet the specified performance in the prior league year, the incentive is deemed NLTBE.<sup>112</sup> Exhibits A through D of the NFL CBA Article XXIV, §7 list the allowable statistical categories upon which incentives may be based. For example, team incentives may include points scored by offense and interceptions among many others; individual and rookie incentives may include total rushing yards and sacks; and other incentives can be based on "Honors and Recog-

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<sup>106</sup> NFL CBA art. XXIV § 7(c).

<sup>107</sup> NFL CBA art. XXIV § 7(c)(i).

<sup>108</sup> NFL CBA art. XXIV § 7(c)(ii).

<sup>109</sup> NFL CBA art. XXIV § 7(c)(iii).

<sup>110</sup> NFL CBA art. XXIV § 7(c)(ix).

<sup>111</sup> NFL CBA art. XXIV § 7(c)(i).

<sup>112</sup> NFL CBA art. XXIV § 7(c)(iv).

nized Media” awards, such as NFL Offensive Player of the Year or making Pro Football Weekly’s All-Rookie Team.

Quite commonly, when “guaranteed money” is being calculated in a player’s deal, a “One Time Incentive” (a type of NLTBE incentive) is included. Used primarily in rookie contracts, a One Time Incentive is a one time bonus paid at the conclusion of the season when a player and/or Club reach certain statistical performance levels. The language of One Time Incentives is very similar to escalator provisions except that escalators change the Paragraph 5 for some future season while One Time Incentives are bonuses paid at the conclusion of the season. From the player’s standpoint, the significant advantage of One Time Incentives over escalators is that One Time Incentives are paid out when they are earned, whereas an escalator is a promise of future money which the player may not receive if they are cut before the escalated salary is due.

The analysis of “guaranteed money” in an NFL contract is often subjective. Though it may seem misleading to declare a NLTBE incentive as “guaranteed”, some football insiders have taken to calling One Time Incentives the “falling off the log” bonus,<sup>113</sup> because of the perceived ease with which players can earn the bonus in that the bonus is as easy to earn as falling off a log. See Exhibit D for example of a One Time Incentive.

## 5. Roster Bonuses and Workout Bonuses

Roster bonuses are lump-sum or scheduled payments paid when a player is on the team’s roster on a specific date, often the fifth day of the League Year.<sup>114</sup> Roster bonuses are almost always considered LTBE,<sup>115</sup> and count against the salary cap in the year in which they are paid so long as the bonus is agreed to prior to the start of training camp.<sup>116</sup> The issue of when roster bonuses are “earned” is debated later in this article. Roster bonuses are best used by clubs in years in which a team has salary cap room and can absorb the larger salary cap hit, as opposed to a signing bonus of the same amount which would be prorated over the years of the contract. For example, if a team gives a player a \$10 million signing bonus for a five-year contract, that bonus

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<sup>113</sup> ProFootballTalk.com, written and maintained mainly by attorney Mike Florio, is the leading website for analyzing all aspects of professional football and frequently uses the term “falling off the log” bonus.

<sup>114</sup> *White v. Nat’l Football League re: Michael Vick 2 (2007) (Burbank, Arb.)* [hereinafter *Vick Arbitration Decision*].

<sup>115</sup> NFL CBA art. XXIV § 7(c)(i).

<sup>116</sup> NFL CBA, art. XXIV § 7(b)(iv)(7).

will count against the salary cap at an annual charge of \$2 million (\$10 million  $\div$  5 = \$2 million per year). Whereas if the team signs a player on March 1 (often the first day of free agency), and gives him a \$10 million roster bonus for being on the roster on March 5 of that year, all \$10 million of the roster bonus will count against the salary cap for that season. Some teams might realize that they have a lot of salary cap not for this season but for next, and give the player a large roster bonus for being on the roster the next season, as opposed to a signing bonus.

Veteran contracts often call for roster bonuses in later years, presenting teams with difficult decisions. If a player performs marginally in the third year of his contract and is due a \$5 million roster bonus in the fourth year of his contract, the team may decide to cut the player instead of absorbing the additional \$5 million salary cap charge. Roster bonuses are typically not subject to forfeiture provisions, an issue discussed later in this article.

Workout bonuses are lump-sum or scheduled payments paid when a player timely reports and participates in the requisite off-season workouts, weight lifting sessions, organized team activities or training camps at the team's training facility. Due to the ease with which a player can earn a workout bonus, they are considered LTBE.<sup>117</sup> All players are paid a per diem for participation in off-season workouts and training camp (\$130 per day in the 2009-2010 seasons).<sup>118</sup> While training camp is mandatory and players can be fined for not participating, there are several other optional mini-camps during the off-season. Workout bonuses are incentives for players to stay and workout at the team's facility, where they can be monitored and hopefully develop team camaraderie and a sense of community. Teams prefer their players to remain in the area for the off-season and use the team's weight room and training room facilities, as opposed to returning to their hometown and training (or not training) there.

## B. *Non-Negotiated Compensation*

Paragraph 5 salaries, signing bonuses, option bonuses and incentives are all payment structures that can be individually negotiated by the player and/or his agent with the team, so long as the negotiated figures conform to the rules set forth in the CBA. The CBA also sets forth other forms of substantial compensation that cannot be altered by agents and individual teams.

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<sup>117</sup> NFL CBA art. XXIV § 7(c)(i).

<sup>118</sup> NFL CBA art. XXXV § 3.

One largely overlooked component of NFL teams is practice squads. Practice squads generally consist of eight players who practice with the team and are paid according to a schedule determined in the CBA.<sup>119</sup> In the 2008 season, the weekly practice squad player salary was \$5,200 per week.<sup>120</sup> In contrast, a player with a Paragraph 5 salary of \$1 million would have earned \$58,824 per week. Players are limited to three seasons on a practice squad, regardless of team, though during their time on the practice squad they are free to sign with any other NFL team at any time if that team is going to place him on their active roster for at least three games.<sup>121</sup>

Players on the active roster, as opposed to the practice squad, also receive pre-determined amounts for participating in the playoffs and the Pro Bowl. The amount a player receives for participating in the playoffs increases with each playoff game the team participates in, culminating in a \$78,000 payment to each player of the winning Super Bowl team.<sup>122</sup> Players and their agents may also negotiate individual bonuses for reaching certain rounds of the playoffs. For example, Eli Manning, the quarterback of the New York Giants, had playoff bonuses structured in his contract that earned him a total of \$1.5 million: \$250,000 for reaching the Divisional Round, \$250,000 for reaching the Conference Championship, \$500,000 for reaching the Super Bowl and \$500,000 for winning the Super Bowl in 2008.<sup>123</sup> With regards to Pro Bowl bonuses, during the 2008 season, the members of the winning Pro Bowl team received \$45,000, twice that of the members of the losing team.<sup>124</sup>

Lastly, an important but overlooked component of player compensation is the Performance-Based Pool, which provides players the potential to earn a bonus equal to nearly 50% of their base salary.<sup>125</sup> The Performance-Based Pool equals a little over \$3 million per club and is distributed to players at the end of each season using a formula that depends on their playing time, compensation and playing time relative to compensation.<sup>126</sup> Essentially, a low paid player who ends up being an important player on the team can earn in excess of \$200,000. Con-

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<sup>119</sup> NFL CBA art. XXXIV.

<sup>120</sup> NFL CBA art. XXXIV § 3.

<sup>121</sup> NFL CBA art. XXXIV §§ 4-5.

<sup>122</sup> NFL CBA art. XLII.

<sup>123</sup> See Liz Mullen, *Contract pays Eli \$1.5M for title*, SPORTS BUSINESS JOURNAL (Feb. 11, 2008) available at <http://www.sportsbusinessjournal.com/article/58011>.

<sup>124</sup> NFL CBA art. XLIII.

<sup>125</sup> See Thomas George, *Tagliabue Still Supports A Super Bowl in the North*, N.Y. TIMES, Mar. 19, 2002 at D2.

<sup>126</sup> NFL CBA art. XLIII § 5.

versely, high paid players that do not perform well may receive only a few thousand dollars.

### C. *“Guaranteed” Compensation*

In any NFL contract negotiation, an agent’s chief concern is the amount of “guaranteed” compensation the player will receive. As discussed earlier, among the forms of negotiated compensation, several could potentially be “guaranteed,” including Paragraph 5 salary, signing bonuses, option bonuses and roster bonuses. The term “guaranteed” is not as clear as it would seem. Agents and clubs have several methods that would seem to ensure a player receives certain amounts of money, whether it be now or in the future. What happens when teams attempt to recover or not pay “guaranteed” money and on what grounds will be discussed later in this article, but an understanding of how teams guarantee money is important.

Signing bonuses, paid within a certain date of signing, represent the most traditional form of guaranteed money as the player receives the money relatively quickly. However, Paragraph 5 salaries, option bonuses and roster bonuses to be paid in future seasons might also be guaranteed. Typically, these categories of compensation can be guaranteed against “skill,” “injury” and/or “cap.” When a club terminates a player’s contract it must indicate what its reason are for doing so. The acceptable reasons can be nullified by these guarantees: a “skill” guarantee provides that a player’s contract cannot be terminated if in the club’s opinion he does not have the requisite skill; an “injury” guarantee protects a player’s contract from being terminated if he is injured; and a “cap” guarantee prohibits a club from terminating a player’s contract when his salary cap charge may have become too large. So while reports may often cite the “guaranteed” money of a newly signed player, the particular guarantees are much more involved.

In larger contracts, second or third-year roster bonuses are often guaranteed for skill and injury so that even if the player is injured or performs poorly in the first or second season, the team still must pay the bonus. If the club were to guarantee a roster bonus for skill, injury and cap, the roster bonus is considered a signing bonus and is prorated over the life of the contract accordingly. Option bonuses are often offset by larger guaranteed Paragraph 5 salaries in future years, which are then adjusted downward upon exercise of the option (see Exhibit C and below).

<b>Change in Paragraph 5 Salaries with \$8m Option Bonus exercised after Year 2</b>	<b>Pre-Exercise Paragraph 5 Salaries</b>	<b>Post-Exercise Paragraph 5 Salaries</b>
<b>2009</b>	\$2m	\$2m
<b>2010</b>	\$5m	\$2m
<b>2011</b>	\$5m	\$2m
<b>2012</b>	\$6m	\$2m
<b>2013 (Option Year)</b>	NA	\$2m

#### IV. NON-NFL SIGNING BONUS DISPUTES

##### A. *Alabama Football Inc. v. Greenwood (1978)*

In the early 1970s American entrepreneur Gary Davidson began an attempt to challenge the existing leagues in America's major professional sports by creating his own. Ultimately his American Basketball Association and World Hockey Association were mildly successfully as the NBA and NHL were forced to accept some of the teams into their leagues. Davidson attempted to venture into the sport of football with the World Football League (WFL), which played two ill-fated seasons from 1974 to 1975. In an attempt to add legitimacy to the league, the WFL sought to entice successful and well-known NFL players to its league with the use of large signing bonuses.<sup>127</sup>

Following the conclusion of the 1973 season, L.C. Greenwood, a defensive end and Pro Bowler on the Pittsburgh Steelers, signed a three-year deal with the Birmingham Americans of the WFL, owned by Alabama Football Inc.<sup>128</sup> The contract was set to begin in the 1975 season, once Greenwood played out his team option with the Steelers.<sup>129</sup> The contract included a \$75,000 signing bonus to be paid in three installments of \$25,000.<sup>130</sup> On January 22, 1975, just ten days after Greenwood helped the Steelers to their first ever Super Bowl title, the WFL announced that Birmingham was in default on its payments to the league and would not play a 1975 season.<sup>131</sup> Birmingham had already paid \$50,000 of the bonus but did not pay the final installment due to uncertainty both regarding the team's funds, future and in Greenwood's willingness to play on the team.<sup>132</sup>

<sup>127</sup> See Sipusic *supra* note 96, at 226-27.

<sup>128</sup> See *Alabama Football, Inc. v. Greenwood*, 452 F. Supp. 1191, 1192 (D.C. Pa. 1978).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 1193.

<sup>132</sup> *Id.* at 1194.



In 1978, when Greenwood's contract would have expired, Alabama Football sued Greenwood for breach of contract seeking to recover the \$50,000 in bonus money paid.<sup>133</sup> In ruling against Alabama Football, the District Court of Pennsylvania upheld the traditional view of the signing bonus, holding that "[t]he bonus was intended as the agreed exchange for performance expected of Greenwood prior to the time he began playing football, namely, execution of the contract."<sup>134</sup>

### B. *Bryant v. Tanenbaum* (1990)

From 1983 to 1985, the NFL was again forced to deal with a rival league, this time the United States Football League (USFL). Kelvin Bryant was a first-team All-ACC running back three times at the University of North Carolina, but he was barely drafted as he was the last pick of the seventh round by the Washington Redskins in the 1983 NFL Draft. Bryant instead chose to sign five one-year contracts with the USFL's Philadelphia Stars, including a \$1 million signing bonus to be paid over eight years.<sup>135</sup> In 1986 the league was forced to cancel further play as a result of financial difficulty, but Bryant had only been paid half of his signing bonus.<sup>136</sup> Bryant sued Stars' owner Myles Tanenbaum for the remainder, and the Eastern District of Pennsylvania ruled that Bryant "earned [the] \$1,000,000 signing bonus when he executed the signing bonus and the player's contracts on February 8, 1983."<sup>137</sup> This case upheld the traditional view of the signing bonus as an inducement to sign the contract.

## V. LITIGATION AND ARBITRATION IN THE NFL

In the period of time prior to the existence of a negotiated CBA (with provisions and agreements provided to resolve disputes privately), plaintiffs sought the courts to resolve signing bonus related disputes. In both *McGlasson v. W.C.A.B.* and *Miami Dolphins v. Cowan*, two cases decided by the courts, at issue was the interpretation and impact of the signing bonus. In *McGlasson*, the court decided that a signing bonus was in fact for signing the contract. In *Cowan*, the court of appeals referred the matter to arbitration.

In the post-SSA period (after 1993), the CBA between the NFL and NFLPA has governed the many disputes between players and clubs

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<sup>133</sup> *Id.* at 1191.

<sup>134</sup> *Id.* at 1200.

<sup>135</sup> *Bryant v. Tanenbaum*, 1990 WL 26693 (E.D. Pa. Mar. 12, 1990) *aff'd*, 928 F.2d 1131 (3d Cir. 1991).

<sup>136</sup> *Id.* at \*4.

<sup>137</sup> *Id.*

with regard to the interpretation and impact of signing bonuses. In this section, seven cases dealing with the signing bonus issue are discussed. All of the cases after 1993 were initially filed and decided through the arbitration process.<sup>138</sup> In addition, several cases were decided by the Special Master.<sup>139</sup> The Special Master is an arbitrator that has exclusive jurisdiction over disputes arising out of a wide range of articles in the CBA, including “Definitions” in the CBA,<sup>140</sup> the “NFL Player Contract”,<sup>141</sup> the “College Draft”,<sup>142</sup> “Veteran Free Agency”,<sup>143</sup> “Franchise and Transition Players”,<sup>144</sup> “Guaranteed League-Wide Salary, Salary Cap, & Minimum Team Salary”,<sup>145</sup> and “Anti-Collusion”.<sup>146</sup> As of 2009, the current Special Master is University of Pennsylvania Law School professor Richard Burbank. In the past, Fordham Law School professor John D. Feerick also served as Special Master. In addition to the Special Master, the NFL and NFLPA have used several other arbitrators to decide disputes as outlined in the CBA.<sup>147</sup> These arbitrators have included Richard Bloch, a Washington D.C. attorney, the late attorney and arbitrator Sam Kagel and arbitrators Shyam Das and Carol Wittenberg of the National Arbitration Center.

It is important to note that several cases have been appealed from arbitration or a Special Master decision to the courts.<sup>148</sup> Special Master decisions can be appealed to a court, while the CBA states that in non-injury grievances not involving the Special Master, “[t]he decision of the arbitrator will constitute full, final and complete disposition of the grievance, and will be binding upon the player(s) and Club(s) involved and the [NFL and NFLPA].”<sup>149</sup> This clause reflects the general rule that arbitration decisions are reviewable only in limited circumstances and for specific reasons.<sup>150</sup>

Once an arbitration decision is challenged in court, the arbitration decision is typically filed as an affidavit and therefore becomes availa-

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<sup>138</sup> NFL CBA art. IX.

<sup>139</sup> NFL CBA art. XXXVI. (*The Hobert & Grbac*, *Lelie* and *Vick* were decided before the Special Master).

<sup>140</sup> NFL CBA art. I.

<sup>141</sup> NFL CBA art. XIV.

<sup>142</sup> NFL CBA art. XVI.

<sup>143</sup> NFL CBA art. XIX.

<sup>144</sup> NFL CBA art. XX.

<sup>145</sup> NFL CBA art. XXIV.

<sup>146</sup> NFL CBA art. XXVIII.

<sup>147</sup> NFL CBA art. IX, § 6.

<sup>148</sup> *Hobert & Grbac*, *Williams*, *Lelie* and *Vick*.

<sup>149</sup> NFL CBA art. IX, § 8.

<sup>150</sup> Wong, *supra* note 22, at 521-526. Arbitration decisions will not usually be disturbed unless the court “uncover[s] an egregious procedural error or if the decision is inconsistent with the National Labor Relations Act.”

ble to the public. There are three cases discussed below which were not brought to court (V(B)(ii) Carolina Panthers and Kevin Greene, V(B)(iii) Denver Broncos and Eddie Kennison and V(B)(vi) Philadelphia Eagles and Terrell Owens) and are discussed below.

Since arbitration is a private alternative dispute mechanism, NFL-NFLPA arbitration decisions are generally not matters of public record. Therefore, there are many other arbitration decisions on signing bonuses which are not discussed in this article. In addition, there have been several cases that were settled prior to arbitration.

#### A. *Pre-Stipulation and Settlement Agreement*

##### 1. *Miami Dolphins, Ltd. v. Cowan (1986)*

In 1986, Paul Cowan, the administrator ad litem for the estate of David Overstreet, brought suit against the Miami Dolphins to recover a signing bonus owed to Overstreet.<sup>151</sup> Overstreet, a running back, was the 13th overall pick out of the University of Oklahoma in the 1981 NFL Draft. However, a contract dispute with the Dolphins caused Overstreet to play in the Canadian Football League during 1981 and 1982. Overstreet returned to the Dolphins prior to the 1983 season and signed three one-year contracts for the 83-84, 84-85 and 85-86 seasons.<sup>152</sup> The contracts included a signing bonus paid in two installments: \$150,000 upon execution of the agreement and \$100,000 on May 1, 1986.<sup>153</sup>

Overstreet tragically died in a car accident in June of 1984. When the Dolphins failed to make the May 1, 1986 payment, Cowan brought suit on behalf of Overstreet's estate. The trial court granted summary judgment for the plaintiff, denying the Dolphins' request that the matter be submitted to arbitration pursuant to the NFL Contract and the 1982 Collective Bargaining Agreement.<sup>154</sup> The trial court's decision reflects the traditional view of the signing bonus.

The District Court of Appeals for the Third District of Florida reversed, noting that "national labor policy favors arbitration."<sup>155</sup> In directing the dispute to arbitration, the court stated there was no showing

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<sup>151</sup> *Miami Dolphins, Ltd. v. Cowan*, 601 So.2d 301 (Fla. App. 3 Dist. 1992).

<sup>152</sup> *Id.* at 301.

<sup>153</sup> *Id.*

<sup>154</sup> NFL CBA, app. C, Standard NFL Player Contract, ¶ 19:

"DISPUTES: During the term of any collective bargaining agreement, any dispute between Player and Club involving the interpretation or application of any provision of this contract will be submitted to final and binding arbitration in accordance with the procedure called for in any collective bargaining agreement in existence at the time the event giving rise to any such dispute occurs." (Note, in 1986 it was ¶ 20).

<sup>155</sup> *Miami Dolphins, Ltd. v. Cowan* at 302.

of prejudice to Overstreet's estate, the party opposing arbitration.<sup>156</sup> The District Court did not consider the legal meaning of the signing bonus and the ultimate outcome of the case is unknown.

## 2. McGlasson v. W.C.A.B. (Philadelphia Eagles Football Club) (1989)

In 1989, the Commonwealth Court of Pennsylvania denied former NFL player Edward McGlasson's appeal from the Workmen's Compensation Appeal Board's decision that his signing bonus should not be included in the computation of his average weekly wage for the purpose of compensation benefits.<sup>157</sup> McGlasson, an offensive tackle, received a \$7,500 signing bonus when he signed with the Eagles for the 1983 season. In July 1983, during training camp, McGlasson suffered a career-ending knee injury and subsequently filed for disability benefits.

Originally a referee for the Workers Compensation Board included McGlasson's signing bonus in determining his benefits, but the Appeals Board reversed that decision. The Appeals Board reasoned that the signing bonus was "an exceptional cause which [did] not fairly reflect the total wages of [McGlasson]."<sup>158</sup> In affirming the Appeals Board's decision, the Commonwealth Court ruled that "the signing bonus is an independent contractual obligation" that should not be included in any salary computations.<sup>159</sup> In addition, the Signing Bonus rider specifically stated that "[i]t is expressly understood that no part of the bonus herein is part of any salary in the contract(s) specified above."<sup>160</sup> This case reflects the traditional interpretation of the signing bonus.

### B. *Post-Stipulation and Settlement Agreement*

The CBA and SSA agreed upon by the NFL in 1993 was a momentous arrangement. Not only did it end the dispute between the players and teams over free agency and bring labor relations back into harmony between the two sides, but it also permanently lodged the District Court of Minnesota between the two parties: in *White v. NFL*, Judge Doty concluded that "[t]he court shall. . . retain jurisdiction over

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<sup>156</sup> *Id.*

<sup>157</sup> McGlasson v. W.C.A.B. (Philadelphia Eagles Football Club), 557 A.2d 841 (Pa. Commw. 1989).

<sup>158</sup> *Id.* at 842.

<sup>159</sup> *Id.* at 843.

<sup>160</sup> *Id.* at 842.

this action to effectuate and enforce the terms of the injunctions and SSA."<sup>161</sup>

As stated earlier, certain non-injury grievances cannot be appealed pursuant to the CBA.<sup>162</sup> These grievances are typically of a relatively minor nature, such as club discipline or player benefits. More important disputes, especially those involving the salary cap, contract interpretation and signing bonuses are under the exclusive jurisdiction of the Special Master and can only be appealed to the Minnesota District Court and Judge David Doty in the manner set forth in the CBA.<sup>163</sup> Article XXVI, §2(b) states that "[t]he court shall accept the Special Master's findings of fact unless clearly erroneous and the Special Master's recommendations of relief unless based upon clearly erroneous findings of fact, incorrect application of the law, or abuse of discretion."

1. NFLPA, on behalf of Bobby Hobert, Elvis Grbac v. NFL (1997)

In 1997, the NFLPA challenged the Special Master's<sup>164</sup> ruling that two players' contracts violated the anti-circumvention provisions of the SSA and the CBA.<sup>165</sup> Article XV(2) of the SSA and Article XXV, § 2 contain the "Circumvention Rule," which states that no player or club shall enter into an agreement designed to circumvent the salary cap, entering player pool or minimum team salary.<sup>166</sup> Based on these anti-circumvention provisions, the NFL Management Council (NFLMC) refused to approve deals signed by quarterbacks Bobby Hobert and Elvis Grbac.

Hobert signed a four-year contract with the Oakland Raiders prior to the 1996 season that included a \$700,000 signing bonus. Hobert was traded to the Buffalo Bills prior to the 1997 season and agreed to renegotiate his contract.<sup>167</sup> Hobert agreed to lower his 1997 Paragraph 5 salary from \$760,000 to \$235,000. In exchange for this, the Bills would pay Hobert a signing bonus of \$525,000 immediately. This lowered Hobert's 1997 salary cap number<sup>168</sup> from \$760,000 (his original Paragraph 5 salary) to \$410,000 (his new Paragraph 5 salary plus a prorated portion of the \$525,000 signing bonus equaling \$175,000 annually over

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<sup>161</sup> White v. Nat'l Football League, 822 F. Supp. 1389, 1436-7 (D. Minn. 1993).

<sup>162</sup> NFL CBA, art. IX, § 8.

<sup>163</sup> NFL CBA, art. XXVI.

<sup>164</sup> For more information on the Special Master see NFL CBA, art. XXVI.

<sup>165</sup> White v. Nat'l Football League, 972 F. Supp. 1230 (D. Minn. 1997).

<sup>166</sup> *Id.* at 1230, 1235.

<sup>167</sup> *Id.* at 1232.

<sup>168</sup> For more information on the computation of player's salary for salary cap purposes, see NFL CBA art. XXIV, § 7.

three years).<sup>169</sup> The rearrangement raised Hobert's 1998 salary cap number from \$1,250,000 to \$1,425,000 and his 1999 salary cap number from \$1,500,000 to \$1,665,000.<sup>170</sup> The renegotiation guaranteed Hobert \$525,000, whereas before he was not guaranteed any compensation.<sup>171</sup> It also served as a disincentive for the Bills to cut him because doing so at any point would accelerate the remaining prorated portions of the signing bonus, which would count against the salary cap for the league year in which he was cut.<sup>172</sup> Meanwhile, the renegotiation provided the Bills with \$350,000 in salary cap space for the 1997 season.<sup>173</sup>

The District Court of Minnesota framed the issue in the Hobert case as "whether a Player Contract that is restructured to decrease Paragraph 5 compensation and to increase a Signing Bonus without being extended constitutes circumvention."<sup>174</sup> The Court recognized that "[t]he first renegotiation of a Veteran Player Contract. . . may take place at any time."<sup>175</sup> In addition, the court determined that a signing bonus may be used as compensation in renegotiations.<sup>176</sup> Therefore, the court held that renegotiating a Player Contract to include a signing bonus for the upcoming season is allowed.<sup>177</sup>

While the NFLMC asserted that the agreement violated the SSA and CBA and requested that Hobert agree to add an additional year to his contract,<sup>178</sup> the NFLMC claimed that "a Signing Bonus [could] not be paid for a contract renegotiation because it is commonly understood that [s]igning bonuses are paid to induce a player to enter into a new contractual relationship."<sup>179</sup> The court rejected this argument and instead deferred to the broad definition of a signing bonus used in the CBA, upholding the use of the signing bonus.<sup>180</sup>

Grbac signed a five-year contract with the Kansas City Chiefs, including a signing bonus of \$3.5 million prior to the 1997 season.<sup>181</sup> The fifth year of the contract, 2001, was voidable by Grbac upon the occur-

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> NFL CBA, art. XXIV, § 7(b)(ii).

<sup>173</sup> Pierson, *supra*, note 6 (Pursuant to the formula noted in note 6, Hobert's original 1997 salary cap number was \$760,000, his Paragraph 5 salary. His renegotiated 1997 salary cap number equaled \$410,000, a \$235,000 Paragraph 5 salary plus the prorated portion of the \$525,000 bonus equally \$175,000.)

<sup>174</sup> *Id.* at 1235.

<sup>175</sup> NFL CBA art. XXIV § 9(a)(i).

<sup>176</sup> NFL CBA, art. I § 1(k).

<sup>177</sup> *White*, 972 F. Supp. at 1237.

<sup>178</sup> *Id.* at 1233.

<sup>179</sup> *Id.* at 1237.

<sup>180</sup> NFL CBA, art. XXIV § 7(b)(iv).

<sup>181</sup> *White*, 972 F. Supp. at 1233.

rence of certain events, including if Grbac is on the Active/Inactive 53-man roster for the last game of the 2000 season, and any of the following contingencies are met during the 1997, 1998, 1999 or 2000 NFL regular seasons: Grbac participates in at least 20% of offensive plays, Grbac passes for at least 800 yards in any season of the contract, Grbac throws at least nine touchdown passes in any season of the contract, Grbac's quarterback rating is at least 73 in any season of the contract and the Chiefs qualify for the playoffs at least once during the contract.<sup>182</sup>

The NFLMC believed that the fifth year would be too easily voided and that the contract circumvented the salary cap by effectively giving the Chiefs an extra season over which to prorate the \$3.5 million bonus, even though it was extremely unlikely that Grbac would be contractually obligated to play the fifth year of the contract.<sup>183</sup> As a result, the NFLMC told the Chiefs that unless Grbac agreed to change the terms under which he could terminate the contract, they could only prorate the \$3.5 million bonus over the first four years of the deal at a value of \$875,000 annually.<sup>184</sup> Grbac refused the NFLMC's proposed changes.<sup>185</sup>

In considering the Grbac situation, the Court strove to determine "whether it is circumvention for a Signing Bonus to be prorated, for Salary Cap purposes, over a year of a Player Contract that is voidable by the player based upon events which are not within the player's sole control even though such a right is likely to be earned."<sup>186</sup> The CBA stipulates that a signing bonus cannot be prorated over a contract year that the player has the right to terminate based upon events within his sole control.<sup>187</sup> Because Grbac necessarily had to rely on his teammates to reach his performance contingencies, the court determined that he did not have sole control over the events upon which he could void the contract.<sup>188</sup> Therefore, the court held, "Grbac's contract did not violate the Circumvention rule."<sup>189</sup> The Court then explained that regardless of whether or not the bonus was "likely to be earned," "sole control" was the "bargained-for rule."<sup>190</sup>

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 1235.

<sup>187</sup> NFL CBA, art. XXIV § 7(c)(i).

<sup>188</sup> *White*, 972 F. Supp. at 1238.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

The NFLMC argued that the added contract year was a technicality aimed at circumventing the salary cap.<sup>191</sup> However, stressing the importance of deference to a negotiated agreement, the Court noted the SSA was a lengthy and carefully crafted document whose provisions should be given their plain and ordinary meaning.<sup>192</sup>

It should be noted that in both of these cases, Judge Doty overruled the Special Master.

## 2. Carolina Panthers and Kevin Greene (1997)

In 1997 the Carolina Panthers filed a grievance against linebacker Kevin Greene to recoup money from fines and a roster bonus.<sup>193</sup> Prior to the 1996 season, Greene signed a two-year contract with the Carolina Panthers, who had just completed their inaugural season. Greene played splendidly during his first season in Carolina: he played in all 16 games, led the NFL with 14.5 sacks and was an integral player in the Panthers run to the NFC Championship Game, where they lost to the Green Bay Packers.<sup>194</sup> For his performance, Greene was named NFC Defensive Player of the Year by United Press International, NFL Linebacker of the Year by NFL Alumni and was selected to his fourth Pro Bowl. Greene's total compensation for 1996 totaled \$1,553,000, consisting of a \$350,000 training camp bonus, \$650,000 in Paragraph 5 salary, \$500,000 in incentives, \$43,000 in postseason pay, and \$10,000 for making the Pro Bowl.<sup>195</sup>

On February 20, 1997, pursuant to Addendum B, Paragraph 28 of his contract, Greene received a scheduled \$350,000 roster bonus. In June, Greene refused to report to the team's mandatory mini-camp in hopes of renegotiating his contract, but was instead fined \$6,250 for his failure to report.<sup>196</sup> Greene's scheduled compensation for 1997 included a \$650,000 Paragraph 5 salary and \$500,000 in LTBE incentives.<sup>197</sup> Prior to the beginning of training camp, Panthers' General

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<sup>191</sup> *Id.* at 1239.

<sup>192</sup> *Id.*

<sup>193</sup> In the Matter of Arbitration between the Nat'l Football League Mgmt. Council on Behalf of the Carolina Panthers, and Nat'l Football League Players Ass'n on Behalf of Kevin Greene, 638 PLI/Pat 579 (2001). [hereinafter *Arbitration Between Panthers and Greene*].

<sup>194</sup> SCOTT FOWLER, *TALES FROM THE CAROLINA PANTHERS SIDELINE*, 157-60 (Sports Publishing 2004).

<sup>195</sup> *Arbitration Between Panthers and Greene*, *supra* note 193, at 581.

<sup>196</sup> Pursuant to Article VIII, Section 1(a) of the 1993 NFL CBA, the maximum fine for failing to report was \$1,000. The amounts set forth in 1(a) increased 25% in 1996 and 25% more in 1997, making the maximum daily fine \$1,562.50. \$1,562.50 times 4 missed days of training camp equals \$6,250.00 in fines.

<sup>197</sup> *Arbitration Between Panthers and Greene*, *supra* note 193, at 581.



Manager Bill Polian offered<sup>198</sup> to change the \$500,000 in LTBE incentives to Paragraph 5 compensation. As Paragraph 5 compensation, the \$500,000 would be guaranteed to Greene so long as he performed his promises under the contract.<sup>199</sup> In addition, Polian offered an additional \$500,000 in incentives. Dissatisfied with the offer, Greene did not report to the team's mandatory pre-season training camp on July 19, at which point the Panthers began fining him \$5,000 per day.<sup>200</sup>

On August 24, after fining Greene a total of \$289,191.16 for missing all of training camp and pre-season games, the Panthers cut Greene, terminating any further financial obligation to him.<sup>201</sup> On August 27, four days before the start of the regular season, Greene signed a six-year, \$12.45 million contract (including a \$750,000 signing bonus) with the San Francisco 49ers.<sup>202</sup> The Panthers subsequently initiated a non-injury grievance against Greene in October.<sup>203</sup>

The NFLPA contended that the act of cutting Greene was "the ultimate form of punishment" that superseded the fines.<sup>204</sup> In addition, it stated that Greene rightfully earned and was entitled to the February 1997 roster bonus by being on the Panthers' active roster at the designated time of payment and "was not subject to any condition subsequent."<sup>205</sup> According to the NFLPA, in the absence of specific language in Greene's contract that required Greene to return the money, there was no basis for such a claim.<sup>206</sup>

In ruling that Greene return the \$350,000 roster bonus, arbitrator Sam Kagel reasoned that the paragraph discussing Greene's roster bonus could not be read independently, but must be read to include the totality of the agreement including a provision which states that the "Player" agrees to promptly report to all mandatory training camps, practices and games.<sup>207</sup> Kagel ruled that the \$350,000 bonus was in consideration for Greene's professional services for the 1997 season and, by failing to perform pursuant to his 1997 contract Greene breached his contract.<sup>208</sup> In determining that Greene's breach cause the Panthers damage, the arbitrator considered that team attempted to replace him

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<sup>198</sup> *Id.* at 587.

<sup>199</sup> NFL CBA, app. C, Standard NFL Player Contract, ¶ 5.

<sup>200</sup> *Arbitration Between Panthers and Greene*, *supra* note 193 at 583.

<sup>201</sup> NFL CBA, app. C, Standard NFL Player Contract, ¶ 12.

<sup>202</sup> *Arbitration Between Panthers and Greene*, *supra* note 193 at 584.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 585.

<sup>206</sup> *See generally*, NFL CBA, app. C, Standard NFL Player Contract.

<sup>207</sup> *Arbitration Between Panthers and Greene*, *supra* note 193 at 591.

<sup>208</sup> *Id.* at 594.

with two rookies. Polian also testified as to the positive value Greene would have had on the 1997 Panthers.<sup>209</sup>

However, the arbitrator ruled that Greene did not have to pay the \$289,191.16 in fines because the contract stipulated that fines can only result as a deduction from a player salary. Therefore, because Greene did not play for Carolina in 1997, he did not collect a player salary from which a fine could be deducted. Thus, he did not owe any money.<sup>210</sup>

The rule resulting from the Greene case is that roster bonus payments can be subject to forfeiture if the player refuses to promptly report to all mandatory training camps, practices and games in the season during which the bonus is paid. This case would most likely be decided differently today, as explained later in this article.

### 3. Denver Broncos and Eddie Kennison (2002)

Prior to the 2001 season, wide receiver Eddie Kennison, a five year veteran, signed a three-year deal with the Denver Broncos worth \$6.85 million, including a \$500,000 signing bonus.<sup>211</sup> Kennison abruptly left the team on November 11, only hours before the Broncos were to play the San Diego Chargers the next day, announcing to head coach Mike Shanahan his intent to retire the next day, having only played eight games in the 2001 season.<sup>212</sup> An irate Shanahan told Kennison to leave and cut him from the team. Kennison later had a change of heart and signed with the Kansas City Chiefs on December 5.<sup>213</sup> The Broncos subsequently filed a grievance, requesting that Kennison return the unearned portions of his signing bonus.

In March 2002, arbitrator Carol Wittenberg ordered Kennison to repay about \$416,000.<sup>214</sup> Wittenberg found that “[t]he default language clearly require[d] the return of the proportionate amount not earned at the time of the default.”<sup>215</sup> Kennison had only played one-sixth of his contract, requiring him to return five-sixths of his signing bonus, or approximately \$416,000. Wittenberg ruled that “[t]he player is required to repay the Club for the period of time he made himself unavailable pur-

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<sup>209</sup> *Id.* at 592.

<sup>210</sup> *Id.* at 596.

<sup>211</sup> Len Pasquarelli, *Kennison must repay \$400K of Broncos' bonus*, ESPN (Mar. 24, 2003), available at [http://assets.espn.go.com/nfl/columns/pasquarelli\\_len/1528652.html](http://assets.espn.go.com/nfl/columns/pasquarelli_len/1528652.html) (last visited Mar. 30, 2009).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> Pasquarelli, *supra* note 211.

<sup>215</sup> In the Matter of Arbitration between the Miami Dolphins and Nat'l Football League Mgmt. Council vs. Ricky Williams and The Nat'l Football League Players Ass'n., 10 (2004) (on file with NFLPA) [hereinafter *Arbitration between Dolphins and Williams*].

suant to the performance requirements of his contract; to refund the proportionate share of the bonus that he did not earn by virtue of his breach."<sup>216</sup> This rule was affirmed in later arbitration decisions.<sup>217</sup> Wittenberg also stated that these portions of the signing bonus were "not earned."<sup>218</sup> Although not the case here, players that are released merely for skill or salary cap purposes can almost always keep their signing bonuses.<sup>219</sup>

#### 4. Miami Dolphins and Ricky Williams (2004)

Following the 2003 regular season, in which he rushed for 1,372 yards, running back Ricky Williams abruptly retired from the Miami Dolphins. It was later revealed<sup>220</sup> that Williams had violated the NFL's substance abuse policy for a third time and faced a four-game suspension.<sup>221</sup>

Williams was drafted with the fifth pick of the 1999 NFL Draft by the New Orleans Saints and subsequently signed a seven-year incentive laden contract worth a maximum of \$68.4 million, including an eighth-year team option.<sup>222</sup> The contract, negotiated by rapper Master P's company, based Williams' ability to earn 26 incentives off of Denver Broncos running back Terrell Davis' 1995-1998 seasons, in which Davis ran for 6,413 yards and 56 touchdowns.<sup>223</sup> The highly criticized contract included a signing bonus of \$8.843 million.<sup>224</sup>

Prior to the 2002 season, Williams was traded to the Dolphins for two first round draft picks and a fourth round draft pick.<sup>225</sup> Shortly thereafter, Williams and his new agent Leigh Steinberg renegotiated his existing contract with the Dolphins.<sup>226</sup> About a month after Williams retired, the Dolphins filed a grievance to recover \$8.616 million paid to

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<sup>216</sup> *Id.*

<sup>217</sup> Robert Forbes, *Call on the Field Reversed: How the NFL Players Association Won Big On Salary Forfeiture at the Bargaining Table*, 6 VA. SPORTS & ENT. L.J. 333, 337 (2007) (citing *New Orleans Saints v. Keyou Craver* (2004) (Kagel, Arb.)).

<sup>218</sup> *Arbitration between Dolphins and Williams*, *supra* note 215, at 10.

<sup>219</sup> Forbes, *supra* note 217, at 337 (citing *Curtis Whitley v. Carolina Panthers* (2000)).

<sup>220</sup> John McClain, *Williams' sympathizers now jumping ship; Comments about masking agents, Raiders spark ire*, HOUS. CHRON., Aug. 8, 2004, at 6.

<sup>221</sup> National Football League Policy and Program for Substances of Abuse §I(E)(2)(b) (June 1, 2007).

<sup>222</sup> Carter Gaddis, *Williams' deal brings criticism of agent*, TAMPA TRIB., July 4, 1999, at 14.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Arbitration between Dolphins and Williams*, *supra* note 215, at 11.

<sup>226</sup> Alex Marvez, *Williams Gets New Contract*, SUN-SENTINEL, Sept. 8, 2002, at 12D.

Williams in a signing bonus and incentives.<sup>227</sup> Arbitrator Richard Bloch heard the grievance in September of 2004.<sup>228</sup>

The Saints signing bonus addendum included a number of circumstances under which Williams would be required to repay a portion of his signing bonus,<sup>229</sup> including “Voluntary Breach or Failure to Perform after January 31, 2004 and before or during the 8th game of the 2004 regular season: 37.50% (\$3,316,343).”<sup>230</sup> Williams’ retirement fit this description, and, as a result Williams was “clearly obligated to return \$3,316,343.00 of the signing bonus to the Miami Dolphins,”<sup>231</sup> to whom the Saints contract had been legally assigned.<sup>232</sup>

In addition to the signing bonus amount, the Dolphins also requested that Williams return \$5,300,000 in performance bonuses.<sup>233</sup> The contract specifically stated that if Williams “defaulted”<sup>234</sup> on the contract, he would be obligated to “return and refund” or “relinquish and forfeit” salary escalators or incentives, earned or unearned, regardless of when they were paid.<sup>235</sup>

In response, Williams and the NFLPA contended that the return of these bonus amounts amounted to “liquidated damages that [bore] no proportion to the damages suffered by the Club, and as such, should be set aside as an unenforceable penalty.”<sup>236</sup> In support of his position, Williams cited both Louisiana and Florida case law that reflected “the commonly-accepted principle that a liquidated contract provision must bear some reasonable relationship to the anticipated loss.”<sup>237</sup> Nonetheless, Bloch ruled that the clauses were not liquidated damage provisions, but instead were specific provisions outlining the terms of the signing bonus payment, including the terms under which the money would be paid and could be taken away.<sup>238</sup> In contrast, a liquidated damages provision would have outlined the “contractual consequences

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<sup>227</sup> *Arbitration between Dolphins and Williams, supra* note 215, at 1.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 4.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 7.

<sup>232</sup> *Id.* at 5. Addendum 1 of the Miami contract states, in relevant part:

“Player and Club acknowledge and agree that the terms and conditions contained in the document entitled “Additional Considerations Signing Bonus” dated May 14, 1999 [the New Orleans Signing Bonus], a copy of which is attached hereto as Attachment 1 and by this reference is incorporated herein, shall remain in full force and effect.”

<sup>233</sup> *Id.* at 8.

<sup>234</sup> *Id.* at 7 (stipulating that “default” included the Player’s failure or refusal to report to the Club).

<sup>235</sup> *Id.* at 7-8.

<sup>236</sup> *Id.* at 9.

<sup>237</sup> *Id.* at 11.

<sup>238</sup> *Id.*

of a breach.”<sup>239</sup> Therefore, the Dolphins were entitled to reclaim the performance bonus money.<sup>240</sup>

In February 2005, Judge James Cohn of the Southern District of Florida upheld the arbitration award, ruling that Bloch was acting well within his authority to grant the award.<sup>241</sup> This case stands for the rule that forfeiture provisions do not constitute liquidated damages clauses and are therefore enforceable. This case would most likely be decided differently today, as will be explained later in this article.

### 5. Denver Broncos and Ashley Lelie (2007)

In March 2007, the Minnesota District Court affirmed the arbitration decision of Special Master Stephen Burbank forcing the Broncos to repay Ashley Lelie \$220,000.<sup>242</sup> Prior to the 2002 season, the Denver Broncos signed wide receiver Ashley Lelie to a five-year contract that included a team option for a sixth season.<sup>243</sup> Exercising the option required the Broncos to pay Lelie an “option bonus”<sup>244</sup> of \$1.1 million.<sup>245</sup> Payment of the option was conditioned upon Lelie’s compliance with Section II of the Attachment to the contract which stated:

In the event Player fails or refuses to practice or play with Club at any time for any reason other than due to injury or death . . . or leaves Club without its consent during the contract years, then Player shall be in default, and upon demand by the Club, Player will return the proportionate amount of the bonus for the period of time effected [sic] by the default. Club shall have a right of setoff and recoupment with respect to any amounts owed to Club.<sup>246</sup>

The Broncos exercised the option before the 2003 season and paid Lelie the \$1.1 million in two installments in 2003.<sup>247</sup> The bonus was to be prorated at \$220,000 per season through 2007.<sup>248</sup> Lelie refused to report to mandatory training camp in the summer of 2006. The Broncos agreed to trade Lelie to the Atlanta Falcons so long as he signed an “Acknowledgement and Agreement” (A and A).<sup>249</sup> By signing it, Lelie acknowledged that he breached his contract and that he owed the

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<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 12.

<sup>241</sup> *Miami Dolphins Ltd. v. Williams*, 356 F. Supp.2d 1301 (S.D. Fla. 2005).

<sup>242</sup> *White v. Nat’l Football League*, No. 4-92-906(DSD), 2007 WL 939560 (D. Minn. March 26, 2007).

<sup>243</sup> *Id.* at \*1.

<sup>244</sup> NFL CBA, art. XV, § 1.

<sup>245</sup> *White*, 2007 WL 939560, at \*1.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> NFL CBA, art. XXIV, §

<sup>249</sup> *White*, 2007 WL 939560, at \*1.

Broncos money, including \$220,000 from the option bonus.<sup>250</sup> Lelie agreed to immediately repay the \$220,000, other portions of his original \$3.3 million signing bonus and other fines.<sup>251</sup>

After Lelie returned \$220,000 to the Broncos, the NFL Management Council (NFLMC) initiated a non-injury grievance on behalf of the Broncos to recover the remaining money.<sup>252</sup> The NFLPA refused the NFLMC's request and then asked Special Master Stephen Burbank to declare the A and A void under the Stipulation and Settlement Agreement (SSA) and the recently added NFL CBA Article XVII, §9(c), and to have the Broncos return the \$220,000 to Lelie.<sup>253</sup> Special Master Burbank agreed that the Attachment and the A and A violated § 9(c) and that Lelie's forfeiture was forbidden.<sup>254</sup> Section 9(c) states that "No forfeitures permitted (current and future contracts) for signing bonus allocations for years already performed, or for other salary escalators or performance bonuses already earned."<sup>255</sup> The NFLPA claimed that the option bonus was a salary escalator that became earned when the Broncos exercised the option.<sup>256</sup> Because an escalator is not defined in the SSA, the NFLMC claimed that it should be "given its plan and ordinary meaning," i.e. that it is simply a formula that stipulates increases and decreases in compensation.<sup>257</sup> The court agreed with the NFLPA, stating that each word of §9(c) should not be read in isolation.<sup>258</sup>

Judge Doty attempted to explain the difference between "signing bonus allocations" performed and "other salary escalators" earned as follows:

Only 'signing bonus allocations' hinge on player performance, and the deliberate use of two different terms – 'performed' versus 'earned' - demonstrates that the drafters intended two different standards. Thus, if not 'performed,' a team can demand repayment or forfeiture of a signing bonus allocation without running afoul of §9(c).<sup>259</sup>

The court drew a distinction between bonuses "performed" versus bonuses "earned," stating that if, pursuant to the contractual language, a bonus is not "performed," it may be recouped. However, if a bonus is

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<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at \*2.

<sup>253</sup> *Lelie Arbitration Decision, supra* note 84, at 1.

<sup>254</sup> *White*, 2007 WL 939560, at \*2.

<sup>255</sup> *Lelie Arbitration Decision, supra* note 84, at 3.

<sup>256</sup> *White*, 2007 WL 939560, at \*3.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at \*4.

“earned” it cannot be recouped.<sup>260</sup> Lelie’s option bonus was “earned” upon exercise of the option. As a corollary, it should be noted that signing bonuses are not considered “earned” upon signing of the contract.<sup>261</sup> Instead, it has been ruled that signing bonus amounts serve as a club’s insurance against a player’s breach.<sup>262</sup>

In ordering the Broncos to return the \$220,000 to Lelie, the court determined that “salary escalators” include option bonuses and are therefore subject to the anti-forfeiture provision of §9(c). The option bonus served as consideration for holding the option open, and the Broncos reaped benefits merely by exercising the option. The benefits included flexibility with the salary cap, the rookie allocation pool, a delay in Lelie’s free agency and leverage in Lelie’s eventual trade to the Falcons.<sup>263</sup> However, the court noted the Broncos were still free to recover over \$800,000 from Lelie in non-performed signing bonus money and fines.<sup>264</sup>

There are two rules that come out of the Lelie case: (1) option bonuses become earned upon exercise, and (2) while bonuses deemed to be have been “already earned” cannot be forfeited, unperformed bonuses can be forfeited. This ruling differentiates the forfeiture treatment of option bonuses from signing bonuses. Despite the fact that both bonuses must be prorated over the term of the contract, option bonus defaults do not require a proportionate return of the bonus in the case of default while signing bonuses do. The creation of two schemes, one for forfeiture and one for salary cap purposes, was surprising to many interested parties and set the stage for future disputes. As a result of this ruling, some NFL teams refuse to use option bonuses.

It is important to recognize that the terms “performed” or “performance” do not relate to levels of on-field success, such as 1,000 yards rushing or ten sacks. Instead, a year of a signing bonus allocation is “performed” if a player attends all mandatory workouts, complies with all team rules and otherwise gives his best effort to contribute to the team for the entire season. Adding to the confusion, §9(c) mentions “performance bonuses” that may be already earned. Performance bonuses are typically thought of as bonuses in which a player receives additional money for a certain level of on-field performance. The NFL

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<sup>260</sup> *Id.*

<sup>261</sup> Forbes, *supra* note 218, at 338 (citing Cincinnati Bengals v. J.J. Rowlett (1997) (Kagel, Arb.)).

<sup>262</sup> *Id.* at 339 (citing NFLPA v. Cincinnati Bengals (2001) (Bloch, Arb.)).

<sup>263</sup> FL CBA, art. XXIV § 18(c) Exhibit C.

<sup>264</sup> *Id.*

CBA more specifically calls such bonuses incentives, either “likely to be earned” or “not likely to be earned” as described above.<sup>265</sup> For example, a rookie player may earn a \$50,000 bonus for reaching six touchdowns in a year, an incentive to be counted at 66% of its value against the salary cap in that season for a rookie chosen in the first three rounds of the NFL Draft.<sup>266</sup> It is extremely unlikely that a team would attempt to recoup incentive money paid where the player earned the incentive, nor would the claim be particularly hard to rule against under §9(c).

#### 6. Philadelphia Eagles and Terrell Owens (2007)

Prior to the 2004 season, wide receiver Terrell Owens was traded to the Philadelphia Eagles. The San Francisco 49ers, Owens’ former team, contended that Owens and his former agent, David Joseph, had failed to void the final year of his contract with the 49ers by the required deadline. Joseph asserted that the 49ers were not referring to the proper deadline.<sup>267</sup> The problem was that the 49ers considered Owens a 49er and traded him to the Baltimore Ravens for a second round draft pick. However, Owens believed he was a free agent and had been in negotiations with the Philadelphia Eagles. Prior to a grievance hearing, the teams reached a settlement whereby the Ravens got their second round pick back and the 49ers received a conditional fifth round draft pick plus defensive end Brandon Whiting from the Eagles in exchange for the rights to Owens.<sup>268</sup> Owens subsequently signed a six-year deal with the Eagles, with a team option for a seventh year, worth approximately \$49 million.<sup>269</sup> The deal also included a \$2.3 million signing bonus.<sup>270</sup> The Eagles reached the Super Bowl in 2004.<sup>271</sup>

Prior to the 2005 season Owens made known his desire to have his contract renegotiated.<sup>272</sup> Owens was scheduled to make \$3.25 million in Paragraph 5 salary in 2005.<sup>273</sup> During the 2004 season, Owens received

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<sup>265</sup> NFL CBA, art. XXIV § 18(c).

<sup>266</sup> *Id.* Exhibit C.

<sup>267</sup> Mark Maske and Leonard Shapiro, *Agent Awareness in the NFL; Union Considers Screening Process After Costly Mistakes*, WASH. POST, May 2, 2004, at E1.

<sup>268</sup> Mark Maske, *Special Master’s Trump Card; Burbank Knew NFL Didn’t Have Strong Case to Keep Owens in Baltimore*, WASH. POST, Mar. 18, 2004, at D1.

<sup>269</sup> Mark Maske, *For Restricted Free Agents, a Bullish Market*, WASH. POST, Apr. 15, 2005, available at <http://www.washingtonpost.com/ac2/wp-dyn/A56337-2005Apr15?language=printer> (last updated Apr. 15, 2005).

<sup>270</sup> *Id.*

<sup>271</sup> Rick Braun, *Owens plays even bigger than his mouth*, MILWAUKEE J. & SENTINEL, Feb. 10, 2005, at 4.

<sup>272</sup> Maske, *supra* note 270.

<sup>273</sup> *Id.*



a base salary of \$660,000 and a roster bonus of \$6.2 million.<sup>274</sup> Owens' total compensation of \$12.41 million for the 2004 and 2005 seasons left Owens outside of the top ten highest paid wide receivers.<sup>275</sup> The Eagles refused to renegotiate Owens' contract with his new agent, Drew Rosenhaus.<sup>276</sup> Meanwhile, Owens continued to make headlines for criticizing Eagles management, coaches, ownership and quarterback Donovan McNabb.<sup>277</sup>

When Owens failed to report to an April 2005 mini-camp, the Eagles requested that Owens repay \$1.725 million of his original \$2.3 million signing bonus.<sup>278</sup> The requested amount may be derived by calculating the number of seasons or games Owens had and would default on the signing bonus and multiplying it by the signing bonus amount. Owens played or performed what was required of him in only 23 games (16 in 2004 and seven in 2005) out of the 96 (six seasons multiplied by 16 games per season) he was contracted for, meaning he defaulted on 73 games (73/96 multiplied by the \$2.3 million signing bonus equals roughly \$1.75 million). The Eagles may have contended that Owens defaulted in even more games of the 2005 season. Owens did not return the money at that time, but eventually reported to training camp where he got into an argument with head coach Andy Reid, provoking a one-week suspension.<sup>279</sup> During the season Owens continued to cause controversy with his comments and ongoing feud with the Eagles.<sup>280</sup>

On November 3, 2005, Owens and former Eagle Hugh Douglas got into a fight before practice.<sup>281</sup> The Eagles suspended Owens for four games without pay and announced they would deactivate him for the five games remaining in the season.<sup>282</sup> The four-game suspension cost Owens \$764,706 in salary.<sup>283</sup> Owens was owed \$955,882 over the final

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<sup>274</sup> *Id.*

<sup>275</sup> *Owens Technicality Gave Wide Receiver Negotiating Power*, PITTSBURGH POST-GAZETTE, Apr. 17, 2005, at C-11.

<sup>276</sup> Gary Myers, *Owens' Request Is Sacked In Eagle Huddle*, N.Y. DAILY NEWS, Aug. 3, 2005, at 66.

<sup>277</sup> In the Matter of the Arbitration Between: Terrell Owens and Nat'l Football League Players Ass'n and Phila. Eagles and NFL Mgmt. Council (2005) (Bloch, Arb.), available at <http://sports.espn.go.com/nfl/news/story?id=2234819> [hereinafter *Arbitration between Eagles and Owens*].

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 5-7.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 10.

<sup>282</sup> *Id.* at 8.

<sup>283</sup> 1/17th of his \$3.25 million Paragraph 5 salary (\$191,176) multiplied by the four games.

five games during which he was deactivated.<sup>284</sup> Pursuant to Article VIII, Section 1 of the CBA, a team can suspend a player a maximum of four games without pay for conduct detrimental to the team. The NFLPA filed a grievance on behalf of Owens claiming that the Eagles were in violation of the CBA by effectively suspending Owens for nine games.<sup>285</sup> Arbitrator Richard Bloch ruled that the Eagles could deactivate Owens for each individual game once his original four game suspension was up, so long as he was paid for each game in which he was deactivated (which he was not).<sup>286</sup> Bloch's ruling was overruled in the NFL CBA amended March 8, 2006, stating that the maximum suspension for a player for conduct detrimental to club is four games, including deactivation.<sup>287</sup>

The Eagles eventually released Owens in March of 2006, days before he would have been owed a \$5 million roster bonus.<sup>288</sup> The NFLPA filed a grievance with regards to the Eagles repayment demand of \$1.725 million.<sup>289</sup> A hearing was held in April 2007 before arbitrator Shyam Das, who ruled in January 2008 that Owens owed the Eagles \$796,117.65.<sup>290</sup> The amount owed was calculated by subtracting \$955,882, the amount Owens should have been paid over the final five games of the 2005 season, from the \$1.75 million demanded by the Eagles. When Owens did not pay the award or move to vacate, modify or challenge it, the Eagles sought enforcement in U.S. District Court.<sup>291</sup> The case was settled in August 2008 when Owens agreed to pay the outstanding balance.<sup>292</sup>

## 7. Atlanta Falcons and Michael Vick (2007)

On December 10, 2007, Atlanta Falcons quarterback Michael Vick was sentenced for up to 23 months in prison after having pled guilty to one felony count of conspiracy to operate an interstate dogfighting

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<sup>284</sup> 1/17th of his \$3.25 million Paragraph 5 salary (\$191,176) multiplied by the five remaining games.

<sup>285</sup> *Arbitration between Eagles and Owens*, *supra* note 278.

<sup>286</sup> *Id.*

<sup>287</sup> NFL CBA, art. VII, § 1.

<sup>288</sup> Len Pasquarelli, *Barring unforeseen twist, Eagles to release T.O.*, ESPN, Mar. 14, 2006, <http://sports.espn.go.com/nfl/news/story?id=2367738>.

<sup>289</sup> Complaint of Plaintiff at ¶16, *Phila. Eagles LLC and NFLMC v. Terrell Owens and NFLPA*, 08-1982 (E.D. Pa. Apr. 28, 2007).

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> Aaron Kuriloff, *Terrell Owens Agrees to Pay Eagles \$769,118 to Settle Lawsuit*, Bloomberg, Aug. 15, 2008, <http://www.bloomberg.com/apps/news?pid=20601079&sid=aINdj4Kbb4wc&refer=home>.

ring.<sup>293</sup> Vick, the number one overall pick in the 2001 NFL Draft, had completed two years of an eight-year extension of his rookie contract that could have potentially kept Vick as a Falcon through the 2015 Super Bowl.<sup>294</sup> The renegotiated and extended contract, signed December 23, 2004, had a total potential value of \$130 million, including a \$7.5 million signing bonus, a \$22.5 million 2005 roster bonus and a \$7 million 2006 roster bonus.<sup>295</sup> Vick earned the roster bonuses when he remained on the Falcons' 80-man roster on the fifth day of the 2005 and 2006 League Years, respectively, and the bonuses were paid accordingly.<sup>296</sup> The contract, which actually became new contracts upon Vick's earning the roster bonuses, also

contained clauses specifying grounds of default and providing that in the event of default, upon demand by Club, Player shall forfeit and shall immediately return and refund to Club the amount of said bonus proportionate to the number of regular season games of Club during the term of this contract remaining at the time of Player's default.<sup>297</sup>

The possible grounds of default included failure or refusal to report to the Club without written consent and suspension by the NFL or Club for conduct detrimental or for violating any of the NFL's disciplinary policies or programs, including the NFL Personal Conduct Policy.<sup>298</sup> On August 23, 2007, Vick signed a plea agreement in which he admitted to his involvement in a dogfighting ring.<sup>299</sup> The next day NFL Commissioner Roger Goodell suspended Vick indefinitely without pay, effective immediately, for conduct detrimental to the NFL and for violating the NFL's Personal Conduct Policy.<sup>300</sup>

On August 27, 2007, the Falcons sent Vick a "Demand for Repayment" for a total of \$19,970,000, including \$3.75 million of the \$7.5 million signing bonus, \$13.5 million of the \$22.5 million 2005 roster bonus and \$2.72 million of the \$7 million 2006 roster bonus.<sup>301</sup> The demand amount was derived as follows:

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<sup>293</sup> *Judge slaps Vick with 23 months; Ex-NFL star's term lengthy for lying about dogfighting activities*, NEWSDAY, Dec. 11, 2007, at A68.

<sup>294</sup> Ken Sugiura, *FALCONS NOTEBOOK: Vick's deal pays off in the details*, ATLANTA J. & CONST., May 13, 2001 at 18D (Vick was the #1 overall selection in the 2001 NFL Draft and signed the largest rookie contract in NFL history: a six-year deal worth a possible \$62 million, including \$15.3 million guaranteed.).

<sup>295</sup> *Vick Arbitration Decision*, *supra* note 114, at 3.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 2.

<sup>298</sup> *Id.* at 2-3.

<sup>299</sup> NEWSDAY, *supra* note 294.

<sup>300</sup> *Vick Arbitration Decision*, *supra* note 114, at 3.

<sup>301</sup> *Id.*

### **\$3.75 Million of the \$7 Million 2004 Signing Bonus**

The NFL CBA limits proration of signing bonuses to six years.<sup>302</sup> Vick had already played out three years (2004-2006), or half of the six years over which the \$7.5 million signing bonus was prorated. Half of \$7.5 million is \$3.75 million.

### **\$13.5 Million of the \$22.5 Million 2005 Roster Bonus**

The Falcons had the right to guarantee all or part of the roster bonuses for skill,<sup>303</sup> and on February 26, 2005, upon exercising this right, Vick was obligated to sign a new contract.<sup>304</sup> Therefore, when the Falcons opted to guarantee all \$22.5 million of Vick's 2005 roster bonus, in accordance with NFL CBA article XXIV, §7(b)(i)(1)(a), the bonus was prorated at an annual cap charge of \$4.5 million over five years.<sup>305</sup> Typically a roster bonus would not be prorated, but NFL CBA article XXIV, §7(b)(iv)(15) states that:

In a Player Contract executed on or before September 28, 2005, any roster bonus or Paragraph 5 Salary that the Club had the right to guarantee for skill, when the Club subsequently exercises the right to guarantee such bonus or Paragraph 5 for skill" should be treated as a signing bonus.

Vick only played two years, or two-fifths (2005-06) of the prorated \$22.5 million roster bonus. \$13.5 million represented the remaining three-fifths of the \$22.5 million roster bonus the Falcons attempted to recoup.

The provision in question is obviously unique to the 2006-2012 NFL CBA and the involved subsection has a number of rules specific to contracts "executed on or before September 28, 2005." Typically a roster bonus is only considered a signing bonus if it is guaranteed for skill, injury and salary cap purposes; if it is guaranteed for only one or two of those three conditions, the bonus value would not be prorated.<sup>306</sup> The intended purpose of this provision is debatable - perhaps the NFLPA requested the unique treatment so that there would be more salary cap

<sup>302</sup> NFL CBA, art. XXIV, § 7(b)(i).

<sup>303</sup> NFL Player Contracts are not guaranteed, in particular Paragraph 11 of the NFL Player Contract, NFL CBA app. C, states in part:

"this contract may be terminated if, in Club's opinion, Player is anticipated to make less of a contribution to Club's ability to compete on the playing field than another player or players whom Club intends to sign or attempts to sign, or another player or players who is or are already on Club's roster, and for whom Club needs room."

<sup>304</sup> *Vick Arbitration Decision*, *supra* note 114, at 2.

<sup>305</sup> NFL CBA, art. XXIV, § 7(b)(i)(1)(a) states: "Maximum proration shall be five years. . . for contracts entered into during the period after the last regular season game of the 2005 League Year through the last regular season game of the 2006 League Year."

<sup>306</sup> E-mail from Mark Levin, Director, Salary Cap and Agent Administration, NFLPA, (Jan, 8, 2009, 3:24 p.m. EDT) (on file with author).

space in the years of the new CBA as a result of the proration. Coupled with an increasing salary cap, this treatment might have aided NFL players in signing record contracts.

### **\$2.72 Million of the \$7 Million 2006 Roster Bonus**

Prior to the 2006 season, the Falcons opted to guarantee \$3.4 million of the \$7 million roster bonus.<sup>307</sup> Although the new 2006 contract was not executed prior to September 28, 2005, the roster bonus still qualified as a signing bonus under NFL CBA article XXIV, §7(b)(iv)(3), which states that “[a]ny consideration, when paid, or guaranteed. . . for contract extensions [or] contract modifications” should be treated as a signing bonus. Now considered a \$3.4 million signing bonus, it was necessarily prorated over five years, or \$680,000 annually.<sup>308</sup> Vick only played one year (2006) of the five years over which the bonus was prorated. As a result, the Falcons attempted to recoup the \$3.4 million bonus less the \$680,000 that they believed Vick earned.

About a week after the Falcons demanded the money from Vick, the NFLMC initiated a grievance on behalf of the Falcons seeking enforcement of the default provisions carried forward in Vick’s 2006 contract.<sup>309</sup> Vick and the NFLPA did not challenge the forfeiture of the \$3.75 million of the \$7.5 million signing bonus. The decision by Special Master Stephen Burbank hinged, as it had in *Lelie*, on the interpretation of Article XIV, §9(c): “No forfeitures [are] permitted ([in] current and future contracts) for signing bonus allocations for years already performed, or for other salary escalators or performance bonuses already earned.”

The issue at hand was whether a roster bonus is an “other salary escalator,” “performance bonus” or “signing bonus allocation” within the meaning of §9(c).<sup>310</sup> It seems fairly easy to determine that the roster bonuses are not a “performance bonus” because Vick’s receipt of the money was not dependent on his passer rating or completion percentage for example.<sup>311</sup> Relying in part on the *Lelie* decision, Burbank stated that the “question is important” because if the roster bonuses were found to be an “other salary escalator” they would be subject to the “already earned” test, in which case they would be immune from forfeiture. On the other hand, if the roster bonuses were considered “signing bonus allocation(s),” they would be subject to the “years already performed” test, in which case the Falcons would be entitled to

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<sup>307</sup> *Vick Arbitration Decision*, *supra* note 114, at 3.

<sup>308</sup> See III.A.ii. Signing Bonuses, earlier in this article.

<sup>309</sup> *Vick Arbitration Decision*, *supra* note 114, at 3.

<sup>310</sup> *Id.* at 4.

<sup>311</sup> NFL CBA, art. XXIV § 7(c) Exhibit B.

forfeiture in proportion to the future contract years in which Vick did not perform or play with the team.<sup>312</sup> It is important to note that *Lelie* dealt with an option bonus where as the Vick case dealt with a roster bonus, therefore *Lelie* did not represent binding authority on the issue.<sup>313</sup>

In arguing that the roster bonuses are “signing bonus allocations” subject to the “years already performed test,” the NFLMC relied on Article XXIV, §7(b)(iv)(15), which states that when a roster bonus is guaranteed, it should be treated as a signing bonus. The NFLPA countered that the definition of “signing bonus” used by the NFLMC is applicable only for determining Team Salary, but is not relevant for the interpretation of §9(c).<sup>314</sup>

Burbank agreed with the NFLMC, stating, as he had in *Lelie*, that the term “signing bonus allocation” must be determined “exogenously”<sup>315</sup> and “most likely from the scheme for proration.”<sup>316</sup> In addition, Burbank noted that when calculating signing bonuses in order to determine Team Salary, nowhere does it state that that definition is applicable for “only” that section.<sup>317</sup> In ruling that the Falcons were entitled to the \$19.97 million dollars in bonuses, Burbank repeatedly expressed his frustrations with the procedure and the “strategic ambiguity” of the forfeiture provisions.<sup>318</sup>

The NFLPA appealed the arbitration decision to Judge Doty of the District Court of Minnesota.<sup>319</sup> Doty affirmed in part and reversed in part Burbank’s ruling, allowing Vick to keep \$16.22 million of the \$19.97 million in previously paid bonus money, representing the two roster bonuses. Vick was still obligated to return the \$3.75 million of the signing bonus. Doty disagreed with Burbank’s reliance on Article XXIV, §7(b)(iv)(15) for purposes of determining forfeiture.<sup>320</sup> Doty pointed out that §7(b)(iv) states that the described amounts treated as signing bonuses are “[f]or purposes of determining Team Salary,” not for interpreting forfeiture clauses.<sup>321</sup> Also, §7(b)(iv) is controlled by a

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<sup>312</sup> *Vick Arbitration Decision*, *supra* note 114, at 4.

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* at 6.

<sup>315</sup> See Lester Munson, *Trouble understanding Vick arbitration ruling? Get a dictionary*, ESPN, Oct. 10, 2007, [http://sports.espn.go.com/nfl/columns/story?columnist=munson\\_lester&id=3057565](http://sports.espn.go.com/nfl/columns/story?columnist=munson_lester&id=3057565).

<sup>316</sup> *Vick Arbitration Decision*, *supra* note 114, at 6.

<sup>317</sup> *Id.* at 7.

<sup>318</sup> *Id.* at 8, n. 13.

<sup>319</sup> *White v. Nat’l Football League*, 533. F. Supp.2d 929 (D. Minn. 2008) [hereinafter *Vick Doty Decision*].

<sup>320</sup> *Id.* at 930.

<sup>321</sup> *Id.* at 932.

different article of the CBA: Guaranteed League-Wide Salary, Salary Cap, & Minimum Team Salary, as opposed to §9(c)'s placement in article XIV, NFL Player Contract.<sup>322</sup> Lastly, Doty noted that because the Falcons had guaranteed Vick's roster bonuses for skill and injury, the amounts should be considered "signing bonus allocations" subject to the "years already performed" test, and therefore forfeitable.<sup>323</sup> However, Doty pointed out that regardless of whether or not the Falcons guaranteed the bonuses, Vick could not earn the bonuses until he was "a member of the Club's 80-Man Roster on the fifth (5th) day of the . . . League Year."<sup>324</sup> Although it was unlikely Vick would not be on the roster on the requisite date, Vick would have no legal claim to the money until then.<sup>325</sup>

Doty also denied alternative relief to the NFLMC and the Falcons. Doty, agreeing with Burbank, argued that "Section 9(c) bars all forfeitures – whether described in the contract or not."<sup>326</sup> Furthermore, Doty concluded that "it is well established that state law does not exist as an independent source of private rights to enforce collective bargaining agreements," effectively arguing that the CBA preempts state laws regarding collection of monetary damages.<sup>327</sup> In sum, Doty made it impossible for the Falcons to use any other means to recover their money.

It is important to note that this decision has limited impact moving forward. In this case, one of the provisions Burbank and Doty interpreted was Article XXIV, §7(b)(iv)(15) of the NFL CBA, which pertained only to contracts executed on or before September 28, 2005. The provisions pertaining to the signing bonus and the second roster bonus are still relevant, making the resulting decisions persuasive and potentially binding authority.

## VI. 2006 AMENDMENT TO THE CBA

In the 2006 extension to the CBA, for the first time the NFL and NFLPA put a provision into the CBA dealing with signing bonus forfeitures. Article XIV, §9 Limitations on Salary Forfeitures, reads,

(a) no forfeitures of signing bonuses shall be permitted, except that players and Clubs may agree: (i) to proportionate forfeitures of a signing bonus if a player voluntarily retires or willfully withholds his services from one or more regular season games; and/or (ii) that if a player

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<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> *Id.* at 933.

<sup>325</sup> *Id.*

<sup>326</sup> *Id.* at 934.

<sup>327</sup> *Id.*

willfully takes action that has the effect of substantially undermining his ability to fully participate and contribute in either pre-season or training camp or the regular season (including by willfully withholding his services in either pre-season training camp or during the regular season or willfully missing one or more games), the player may forfeit the greater of: (a) 25% of the prorated portion of his signing bonus for the applicable League Year for the first time such conduct occurs after the beginning of the training camp until the end of the season for his club, and the remaining 75% prorated portion of his signing bonus for the applicable year for the second time such conduct occurs during that period that year; or (b) the proportionate amount of his signing bonus allocation for each week missed (1/17th for each regular season week or game missed).

§9 goes on to list other limitations on forfeitures including that there may be no provisions conditioning reception or retention of a signing bonus on participation in voluntary off-season programs or for refraining from making adverse public statements.<sup>328</sup> This restriction overturned an unsuccessful NFLPA grievance against the Cincinnati Bengals in 2000.<sup>329</sup> The Bengals forfeiture provisions long-contained a so-called “loyalty clause” which required forfeiture of all or part of a player’s signing bonus, if

Player makes any public comment to the media, including but not limited to the newspaper, magazines, television, radio or internet that breaches Player’s obligation of loyalty to Club and/or undermines the public’s respect for the Club, Club coaches, or Club management under Paragraph 2 of Player’s NFL Player Contract and Article LV, Section 6 of the Collective Bargaining Agreement.

The NFLPA claimed the loyalty clauses violated Article VIII of the CBA, which controls “Club Discipline” and limits penalties for conduct detrimental to the Club to a “maximum fine of an amount equal to one week’s salary and/or suspension without pay for a period not to exceed four (4) weeks.”<sup>330</sup> Arbitrator Bloch upheld the clauses, stating that typical Club fines are deducted from salaries whereas the forfeiture provisions relate to additional bonuses for which “players and Clubs are free to negotiate precisely such additional incentives and proscriptions.”<sup>331</sup>

Also added to §9 is a restriction that signing bonuses cannot be conditioned on possible violations of the NFL’s steroid or drug testing

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<sup>328</sup> NFL CBA, art. XIV, § 9(d).

<sup>329</sup> Forbes, *supra* note 218, at 353.

<sup>330</sup> *Id.* at 354.

<sup>331</sup> *Id.*



policies.<sup>332</sup> While the CBA states that these “policies will address this issue,” there is still a lack of unambiguous and reliable language. The NFL Steroid Policy<sup>333</sup> only discusses the permissible length of suspensions, and while the NFL Drug Policy<sup>334</sup> places limits on maximum fine amounts (no more than one-half of the player’s gross salary), neither policy mentions signing bonus forfeitures.

## VII. SUMMARY AND CONCLUSION

The cases and litigation show a pattern that reflects the industry’s views and use of the signing bonus, as well as a reaction to litigation. Prior to the 1993 CBA, the courts resolved disputes over signing bonuses. After the landmark SSA, arbitration became the key dispute resolution mechanism. Over time, clubs have moved away from the classical notion that a signing bonus is merely an inducement for signing the contract. While signing bonuses retain their traditional name, they have become a tool for guaranteeing player money, creating salary cap flexibility and, in some instances, giving a salary advance. In the example below, disregarding the time value of money, both players are paid the same amount, but the use of the signing bonus allows the player to receive the money more quickly.

	Player A	Player B
<b>Signing Bonus</b>	\$0	\$5m
<b>Year 1 Salary</b>	\$5m	\$3m
<b>Year 2 Salary</b>	\$5m	\$3m
<b>Year 3 Salary</b>	\$5m	\$4m
<b>TOTAL:</b>	\$15m	\$15m

Over the years, clubs have added more and more language to signing bonuses. As a result, they function less like traditional signing bonuses and more like an advance and guarantee of money. While the money in signing bonuses is “guaranteed,” there are certain provisions in the contract or CBA which do not make the money an absolute guarantee. For example, retirement and misconduct will affect the ability of a player to keep his signing bonus payout, similar to provisions in MLB

<sup>332</sup> NFL CBA, art. XIV, § 9(e).

<sup>333</sup> NATIONAL FOOTBALL LEAGUE POLICY ON ANABOLIC STEROIDS AND RELATED SUBSTANCES (2008), available at [http://www.nflplayers.com/images/fck/2008%20Steroid%20Policy%20\\_Final%20Version\\_.pdf](http://www.nflplayers.com/images/fck/2008%20Steroid%20Policy%20_Final%20Version_.pdf).

<sup>334</sup> NATIONAL FOOTBALL LEAGUE POLICY AND PROGRAM FOR SUBSTANCES OF ABUSE (2008), available at [http://www.nflplayers.com/images/fck/2008%20Substances%20of%20Abuse%20Policy%20\(FINAL\).pdf](http://www.nflplayers.com/images/fck/2008%20Substances%20of%20Abuse%20Policy%20(FINAL).pdf).

or the NBA. Clubs, having experienced the dangers of signing bonuses (especially with the traditional formulation), have realized that even with contractual protections not all situations will be covered. Therefore, clubs have responded in three ways: (a) giving option bonuses, which allow teams to evaluate behavior and performance before giving a large bonus; (b) giving roster bonuses, which often provide a player who has suffered a serious, but not career threatening injury incentive to return; and (c) giving workout bonuses, which encourage players to participate in team activities at the team's facility, allowing the team to monitor the player's physical conditioning and possible behavioral issues. However, as we have seen, these bonuses have also been plagued by a myriad of challenges.

### A. *The Future*

It is important to understand that the current practice is a compromise between player-agents, the League and the union through the CBA and individual contracts. Use of signing bonuses and other contract provisions are a compromise between the interests of the parties within the hard salary cap system that is in place.

After the expiration of the current CBA on March 1, 2011, a new CBA will be negotiated. The provisions of this new CBA will be critical in determining how contracts and individual clauses are negotiated and structured. If the system remains similar, the parties will have a large, though confusing, experience base and history of litigation to guide them to hopefully mutually beneficial and "not likely to be litigated" compensation clauses. However, the interpretation and weight of the grievance and court decisions is far from settled, and likely to be a continuous and contentious issue.

If there are substantial changes to the system, there will probably be a revival of trial and error as parties attempt to interpret, circumvent and look for advantages in the new system. If the new CBA does not have a salary cap system (an unlikely scenario), then signing bonuses may take on a more traditional nature and smaller amounts will be given as an inducement for signing.

### B. *Possible Solutions*

#### 1. *Wage Scales*

All of the contested bonuses discussed earlier were veteran contracts. Nevertheless, as bonuses and guaranteed money grows for rookies, teams are increasingly concerned about their ability to recoup portions of that money. While the late NFLPA Executive Director

Gene Upshaw strongly stated that there would be no rookie wage scale,<sup>335</sup> many veteran stars do favor such a system, feeling that large rookie bonuses and other forms of guaranteed compensation have eaten up salary cap space that could have been used for veteran contracts.<sup>336</sup> There is currently an “Entering Player Pool,”<sup>337</sup> in effect a Rookie Salary Cap, but the pool effectively limits a rookie’s compensation only in his first year - a problem agents and teams easily circumvent to guarantee a player more money in later years with other bonuses and poison pills in the event of non-exercise.

Presently there are no limits on the amount of an NFL player’s signing bonus or the resulting salary cap charge. On the other hand, the NBA-NBPA and NHL-NHLPA CBAs have maximum salary limits based on service time. The NBA CBA limits a player’s contract length,<sup>338</sup> the maximum salary,<sup>339</sup> and how much of the compensation can be deferred.<sup>340</sup> As a result of the rigid wage scales imposed, many NBA players have foregone the services of an agent.<sup>341</sup> The NFL-NFLPA system represents a much stronger affinity for the freedom of contract, a fundamental policy of the National Labor Relations Act.<sup>342</sup> The NFL would obviously favor a system that would decrease bonus amounts, but it would come at a philosophical cost. A strict wage scale on rookie contracts, veteran contracts or the use of bonuses would greatly limit the free market system that the NFLPA has fought so hard to obtain. While limits on veteran player contract length or bonus amounts is unlikely, increased restrictions on the amounts guaranteed and paid to rookies is reasonably likely at some point.

## 2. Escrow System

The NBA’s salary cap system requires a certain percent of player salaries (9% in 2008-09) to be held in escrow and returned at the end of

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<sup>335</sup> Gene Upshaw, *100 Words From Gene Upshaw for April 28*, (Apr. 28, 2008) <http://www.nflplayers.com/user/content.aspx?fmid=178&lmid=443&pid=892>.

<sup>336</sup> See Michael David Smith, *Tomlinson Favors Rookie Cap*, PRO FOOTBALL TALK, (June 20, 2008) <http://www.profootballtalk.com/2008/06/20/tomlinson-favors-rookie-cap/>; Mike Florio, *Mawae Doesn’t Like Rookie Windfalls*, PRO FOOTBALL TALK, (May 21, 2008) <http://www.profootballtalk.com/2008/05/21/mawae-doesnt-like-rookie-windfalls/>.

<sup>337</sup> NFL CBA, art. XVII.

<sup>338</sup> National Basketball Association Collective Bargaining Agreement, art. IX, *available at* <http://www.nbpa.org/cba.php> [hereinafter NBA CBA].

<sup>339</sup> NBA CBA, art. II, § 7.

<sup>340</sup> NBA CBA, art. XXV.

<sup>341</sup> Marc J. Spears, *NBA Stars Flying Solo, Denver’s McDyess, Van Exel Part of Trend to Shed Agents*, DENV. POST, Nov. 28, 2001 at D-01.

<sup>342</sup> *Brown v. Pro Football, Inc.*, 518 U.S. 231, 265 (1996) (citing *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970)).

the season, with interest.<sup>343</sup> While the NBA salary cap equals 51% of Basketball Related Income (BRI), if total player salaries exceed 57% of BRI (via loopholes in the salary cap), the money is instead returned to the teams.<sup>344</sup> The NHL has a similar system.<sup>345</sup> One possible way for NFL clubs to continue to pay out large bonuses without fear that they will not be able to recover the “unearned” portions in the case of breach or default is to place the unearned or prorated portions of the signing or option bonus into an escrow account. The player would then receive his prorated portion of the signing bonus, with interest, each year that he satisfies the conditions of the bonus. Any contests to that season’s payout would be heard by the Special Master. This type of system is contrary to the traditional definition of a signing bonus (that the bonus is an inducement for signing). Players and the NFLPA would undoubtedly strongly oppose this system - guaranteed money and how quickly the player will receive that money are among the most important factors in any contract negotiation.

### 3. Collectively Bargained Clarity

It is not uncommon for legislatures, governing bodies, regulatory agencies or other lawmaking bodies to amend or create new legislation or rules after court decisions reflect an unwanted or unintended result. For example, after arbitrator Richard Bloch ruled the Eagles were within their right to effectively suspend Terrell Owens nine games for conduct detrimental to the team, the NFL and NFLPA overruled the decision in the 2006 CBA extension by limiting the maximum suspension for conduct detrimental to the team to four games.<sup>346</sup>

Consequently, the best way for clubs, the league, players, agents, the union, arbitrators and the courts to properly understand the intention of each bonus and its concomitant forfeiture provisions is to collectively bargain for clarity. In the post-SSA era, with the creation of the salary cap, the NFL abandoned the traditional notion of the signing bonus and began installing forfeiture provisions. The earlier and less complex post-SSA cases (*Kennison*, *Williams* and others<sup>347</sup>) seem fairly

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<sup>343</sup> NBA CBA, art. VII, § 12.

<sup>344</sup> *Id.*

<sup>345</sup> National Hockey League Collective Bargaining Agreement 2005, § 50.4 & § 50.11, available at <http://www.nhlpa.com/CBA/index.asp>.

<sup>346</sup> NFL CBA, art. VIII § 1(a).

<sup>347</sup> See *Sanders Repays Lions Part of Signing Bonus*, WASH. POST, July 9, 2000 at D04 (discussing Barry Sanders and the Detroit Lions); Scott Reynolds, *Bucs Win Grievance vs. McCardell*, PEWTER REPORT, Oct. 4, 2005, <http://www.pewterreport.com/articles/view/1765> (discussing dispute between the Tampa Bay Buccaneers and Keenan McCardell); Roy Cummings, *Bucs Settle Their Dispute With Plummer*, TAMPA TRIB., June 11, 2008 at S3 (discuss-

straightforward - the amortized portions of the signing bonus that correspond to years in which the player defaults must be paid back. This rule does not conflict with the all-important §9(c) of the CBA which states: "No forfeitures [are] permitted ([in] current and future contracts) for signing bonus allocations for years already performed, or for other salary escalators or performance bonuses already earned."

The 2006 amendment stood with little controversy until the *Lelie* case, which attempted to interpret the second clause of §9(c): "other salary escalators or performance bonuses already earned." In *Lelie*, both Special Master Burbank and Judge Doty treated the option bonus forfeiture provision differently from the scheme for proration - even though the option bonus is prorated over a number of years for salary cap purposes, it is deemed earned for forfeiture purposes when the team exercises the option.

This ruling and the creation of a dual-system confused and frustrated many people in the industry. While the decisions of Burbank and Doty in this case are persuasive, they should be overturned in the CBA. The NFL system is already probably the most difficult to understand among the "Big 4," and a dual system is unnecessary and counterintuitive.

The most recent ruling that makes the most intuitive sense is *Vick*. Vick was required to return the portions of the signing bonus for the years in which he would not play, but was allowed to keep the roster bonus payments which are paid once and hit the salary cap once. The NFL CBA is over 300 pages in length but devotes about one page to its most contentious and oft-litigated issue: forfeitures. A newly amended §9 should explain all the different types of bonuses and the relevant forfeiture rules. These rules should follow, as closely as possible, the same scheme used to determine the annual salary cap charges of the bonuses. In other words, §9(c) of the SSA and of Article XIV of the CBA should be eliminated or greatly amended, with Judge Doty's approval.

The NFL, NFLPA and the CBA provide for a Standard Player Contract and other standard (but not required) forms, including Signing Bonus and Forfeiture riders. Clubs should be required to use standard forms for *all* types of bonuses that are potentially subject to forfeiture, with minimal and mutually approved variation. The forms would lay out all the relevant conditions, including payment, the condi-

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ing dispute between the Tampa Bay Buccaneers and Jake Plummer) (These cases were not discussed in detail because arbitration decisions or settlement agreements could not be obtained.).

tions of and amounts of forfeiture. Indeed the NFL would prefer that this compensation be looked at as “conditional” rather than “subject to forfeiture.” Importantly, new rules and forms could dictate that there be only one scheme for both bonus forfeitures and salary cap calculations. Although these provisions have already existed, they have not been collectively bargained with the NFLPA and the interpretations firmly established. Although these rules might limit the freedom and creativity of contract teams might exercise in the drafting of contracts, it does not limit in any way the amount of bonuses that may be paid out. Ultimately, by listing a finite amount of bonuses, of which there would still be plenty, and their relevant forfeiture rules, there would be increased clarity and certainty about the potential forfeiture of portions of that bonus. The end result would be more predictable results with fewer grievances filed and fewer cases litigated.

### **EXHIBIT A: ESCALATOR PROVISION**

#### **2013 Escalator:**

If player participates in 60% or more of the defensive plays, excluding special teams, according to the NFL playtime report, in any of the 2009-2012 NFL regular seasons and in the same regular season Club achieves one of the following:

- (a) Club improves its League ranking in points allowed by defense over the previous regular season, provided that Club ranks better than fifth from the bottom in the League, or Club ranks 5th or higher in the League in points allowed by defense; **OR**
- (b) Club improves its League ranking in Total Defense (Net Yards) over the previous regular season, provided that Club ranks better than fifth from the bottom in the League, or Club ranks 5th or higher in the League in Total Defense (Net Yards); **OR**
- (c) Club improves its League ranking in average net yards given up per passing play over the previous regular season, provided that Club ranks better than fifth from the bottom in the League, or Club ranks 5th or higher in the League in average net yards given up per passing play;

#### **THEN:**

1. For each of the 2009-2012 NFL regular seasons that Player participates in sixty (60%) or more of the Club’s defensive plays during the NFL regular season, excluding special teams and according to the NFL playtime report, Player’s 2013 paragraph 5 salary shall be increased \$100,000; **OR**
2. For each of the 2009-2012 NFL regular seasons that Player participates in seventy (70%) or more of the Club’s defensive plays during the regular season, excluding special teams and according to the NFL playtime report, Player’s 2013 paragraph 5 salary shall be increased \$250,000; **OR**

3. For each of the 2009-2012 NFL regular seasons that Player participates in eighty (80%) or more of the Club's defensive plays during the regular season, excluding special teams and according to the NFL playtime report, Player's 2013 paragraph 5 salary shall be increased \$375,000; OR

4. For each of the 2009-2012 NFL regular seasons that Player participates in ninety (90%) or more of the Club's defensive plays during the regular season, excluding special teams and according to the NFL playtime report, Player's 2013 paragraph 5 salary shall be increased \$500,000.

Player may earn only the highest of the above escalators. The maximum paragraph 5 salary earnable for the 2013 season pursuant to this Escalator above is \$2,000,000.

### **EXHIBIT B: SIGNING BONUS ADDENDUM**

#### **Signing, Reporting and Playing Bonus Addendum to NFL Player Contract**

This Signing, Reporting and Playing Bonus Addendum (the "Agreement") dated as of July 28, 2009, is between \_\_\_\_\_ ("Player") and \_\_\_\_\_ ("Club") and is attached and made a part for all purposes of the NFL Player Contract of even date herewith between Player and Club (the "Contract") for the League Years 2009-2012 (the "Contract Years").

1. As additional consideration for the execution of the Contract for the Contract Years, for Player's adherence to all provisions of the Contract, for Player's receiving medical clearance to practice and play after taking Club's initial examination, and for Player's reporting, practicing and playing exclusively for Club without unexcused interruption during all said Contract Years, Club agrees to pay Player the sum of **Four Hundred Thirty Thousand Seven Hundred Fifty and No/100 Dollars (\$430,750)** as a signing, reporting and playing bonus (the "Signing Bonus") payable as follows:

**Amount:**  
**\$430,750**

**Due and Payable:**  
**On or before August 15, 2009,**  
**provided that Player has passed**  
**Club's physical examination**

2. Player's entitlement to receive the Signing Bonus shall be governed exclusively by the terms and conditions of this Agreement and Player's obligation to forfeit and return (or relinquish and forego) the Signing Bonus shall be governed exclusively by the terms hereof; provided, however, that the NFL Policy on Anabolic Steroids and Related Substances and the NFL Policy and Program for Substance of Abuse will

address possible forfeiture in the event of Player's violations of these policies.

3. It is expressly understood that no part of the Signing Bonus is part of any salary specified in the Contract, that the Signing Bonus shall not be deemed part of any salary specified in the Contract if Club exercises any option for Player's services in a Contract Year subsequent to the final Contract Year, and that such obligations of Club are not terminable if the Contract is terminated for skill or injury via the NFL Waiver System, provided that Player has not defaulted under or breached the terms of the Contract or this Agreement prior to such Contract termination.

4. Forfeiture of Signing Bonus:

A. In the event Player, in any Contract Year, without Club's prior written consent, voluntarily retires or willfully withholds his services from one or more regular season games, then Player shall be in default of his obligations under this Agreement and shall forfeit and return to Club (or relinquish and forgo entitlement to unpaid portions of) a Proportionate Amount (as defined in subsection 4(B)(ii) below) of the Signing Bonus; and/or

B. In the event Player, in any Contract Year, without Club's prior written consent, willfully takes action that has the effect of substantially undermining his ability to fully participate and contribute in either preseason training camp or the regular season (including by willfully withholding his services in either preseason training camp or during the regular season or willfully missing one or more regular season games), then Player shall be in default of his obligations under this Agreement and shall forfeit and return to club (or relinquish and forgo entitlement to unpaid portions of) the *greater* of the amounts specified in subsections B(i) and B(ii) below:

i. An amount equal to 25% of the prorated portion of the Signing Bonus for the applicable Contract Year, for the first time such conduct occurs after the beginning of training camp until the end of the season for Club, and the remaining 75% of the prorated portion of the Signing Bonus for such Contract Year, for the second time such conduct occurs after the beginning of training camp until the end of the season for Club; *or*

ii. An amount equal to 1/17th of the applicable Contract Year's Signing Bonus allocation for each regular season week or regular season game missed ("Proportionate Amount").

C. Player agrees that an act shall be deemed to be "voluntary" or "willful" as used herein if it results from an act within Player's reasonable control.

5. Additional Forfeiture for Voluntary Retirement. In the event Player voluntarily retires and misses the remainder of the season, and Player then reports back to Club in the subsequent season, then Player shall forfeit and return to Club (or relinquish and forgo entitlement to



unpaid portions thereof) an amount equal to any remaining portion of the Signing Bonus allocated to further Contract Years, provided that Club releases Player upon his return to Club.

6. NFL Football-Related Injury. Player shall not be in breach of this Agreement by virtue of Player's failure to report, practice with or play for Club is the result of a Player's injury (or death resulting therefrom) incurred while performing services under the Contract, provided that Player has promptly and fully disclosed his physical condition to Club and undergoes whatever reasonable and customary rehabilitation or treatment Club requires of him.

7. Deductions. It is understood and agreed that Player's waiver of rights to certain unpaid amounts and Player's obligation to repay certain portion of the Signing Bonus in the event Player defaults hereunder are express conditions of the Contract and this Agreement, and, but for these conditions, Club would not have executed the Contract and this Agreement. Player hereby expressly authorizes Club, in its sole discretion, to deduct and offset, at any time and from time to time, all or part of any sums owed by Player to Club from any current, future or deferred wages, salaries, bonuses, severance pay and/or additional compensation owed to Player by Club.

No term or condition of this Agreement, and no breach thereof, shall be waived, altered or modified except by written instrument signed by Player and Club.

**To the extent any of the terms set forth above are deemed unenforceable under the Collective Bargaining Agreement, as amended by the 2006 CBA extension agreement, any forfeiture by Player under this Agreement shall be the maximum amount permitted by the terms of this Agreement and the Collective Bargaining Agreement, as amended.**

## EXHIBIT C: OPTION BONUS ADDENDUM

### I. OPTION

Club, at its sole discretion, will have the option ("Option") to extend the Player's Contract for the 2012 Season (the "Option Year") by providing written notice to the Player on or before the fifteenth day of the 2009 League Year.

In the event the Club exercises the Option, Club shall pay Player the sum of \$4,000,000 (less usual, customary and/or required deductions), such amount to be paid \$2,000,000 on or about March 31, 2009 and \$2,000,000 on or about March 31, 2010. In the event the Option is exercised pursuant to this section, the paragraph 5 salaries for the 2009, 2010, and 2011 season shall be adjusted to the following amounts:

2009: \$385,000  
2010: \$475,000  
2011: \$565,000

The paragraph 5 for the option year 2012 shall be \$665,000.

## II. VOLUNTARY BREACH/FAILURE TO PERFORM

In the event Player fails or refuses to report to Club, fails or refuses to practice or play with Club, other than for a football related injury incurred while under the supervision and control of Club, leaves Club without its consent, retires or if Player is suspended by NFL or Club for Conduct Detrimental, or if Player is suspended for violations of the NFL Policy and Program for Substances of Abuse, the NFL Policy on Anabolic Steroids and related substances, and the NFL Personal Conduct Policy, or otherwise intentionally breaches any provision of this Contract (any of the above shall be referred to as a “Voluntary Breach of Failure to Perform”), upon demand by Club, Player shall forfeit and shall immediately return and refund to the Club that amount of the bonus herein provided as follows:

- A. Voluntary Breach or Failure to Perform on or before March 1, 2009: 100%
- B. Voluntary Breach or Failure to Perform on or before March 1, 2010: 75%
- C. Voluntary Breach or Failure to Perform on or before March 1, 2011: 50%
- D. Voluntary Breach or Failure to Perform on or before March 1, 2012: 25%

Player hereby expressly authorizes Club, in its sole discretion, to deduct and set off at any time and from time to time all or part of any sums owed by Player to Club, specifically including but not limited to amounts pursuant to this addendum, from any current or deferred wages, salaries, bonuses and/or additional consideration owed to Player by Club pursuant to this Contract or otherwise.

## **EXHIBIT D: ONE-TIME INCENTIVE PROVISION**

### **ONE TIME INCENTIVE BONUS**

Player will earn a one time bonus in the amount of \$250,000 if the following criteria are met:

- (1) Player must have participated in at least 35% of the Club’s defensive plays in the 2009 NFL regular season or 45% of the Club’s defensive plays in the 2010, 2011 or 2012 NFL regular seasons, excluding special teams; **and**

A. During the same season in which the player has achieved the required playtime, Club must have improved compared to the respectively immediately preceding regular season in:

(a) Overall NFL ranking, Overall Conference Ranking or Team statistical performance in:

i. Interceptions;

ii. Total Defense (net yards); or

iii. Average Net Yards Given up per Rushing Play;

[Club will only deemed to have “improved” if it has improved from a former NFL ranking or statistical performance and ranks better than fifth from the bottom of the League or from a former Conference ranking or statistical performance and ranks better than third from the bottom of the Conference.]