THE ARGUMENT FOR SELF-HELP SPECIFIC PERFORMANCE: OPPORTUNISTIC RENEGOTIATION OF PLAYER CONTRACTS

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INTRODUCTION

It is hornbook law that "a promise to render personal service . . . will not be specifically enforced by an affirmative decree." The adoption of this position by the Restatement of Contracts, for very practical as well as legal reasons, has caused serious problems in the sports arena (pardon the pun). Because player contracts by their nature call for the performance of personal services, clubs are limited in the relief that is available to them if a player refuses to perform pursuant to the terms and conditions of a valid contract. These remedies are, however, of limited effect and may have no impact in controlling certain types of strategic or opportunistic behavior on the player's part. Thus, traditional contract law may be ineffective to monitor and control some inefficient behavior.

In particular, a club is left with few viable options when faced with a threat by a player who refuses to perform under an existing contract unless certain changes (usually financial, resulting in increased compensation for the athlete) are made. The club can refuse to accede to the player's demands and, as a result, lose access to presumably very

1. Restatement of Contracts § 379 (1932).
2. See infra notes 74-77 and accompanying text.
3. See infra notes 79-82 and accompanying text.
valuable and unique services. More importantly, because the services of the player are extremely difficult to value and impossible to prove, the club may not be compensated adequately for its loss in the face of the player’s blatant breach of contract. The remedy provided by a negative injunction, which prohibits the player from performing for anyone else, is the club’s only effective legal option to enforce its contract. This remedy, however, may not be viable if no other club is bidding for the services of the player. On the other hand, the club can yield to the player’s demand and renegotiate the player’s contract, notwithstanding that the new contract is substantially without new consideration. This article illustrates that there is a remedial strategy which has been underutilized by clubs in controlling opportunistic behavior by “superstar” players who are in the unique position to breach their contracts at will by exploiting defects in the legal system. The remedy, self-help specific performance, is novel and unfamiliar to many and, even at this introductory stage, requires some brief explanation. In an interesting article, Professor Narasimhan has posited a theory that in certain situ-

4. For a discussion of the difficulty in proving and recovering damages in breaches of this variety, see infra notes 59-62 and accompanying text.

5. See J. WEISTART & C. LOWELL, THE LAW OF SPORTS, §§ 4.04-06 (1979); see also infra section II.B.2.

6. Although this statement seems counterintuitive, it is not because of the type of cases in which players seek to renegotiate existing contracts. Players seek to renegotiate when one of two fact situations occurs: either there is a competing league bidding for the player’s services or the player believes that he is so valuable to his current team, he can engage in strategic behavior to improve his compensation. In the latter situation, the player is, in effect, playing a risk free game in which the only down side is the possibility of performing pursuant to the terms and conditions of the original valid contract. The player incurs no penalty for engaging in potentially opportunisti-

7. Although I am unable to define “superstar” athlete with preciseness, most would agree that there are certain players for whom the designation is appropriate. Paraphrasing Justice Stewart’s definition of obscenity in Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define [hard core pornography]. . . . [b]ut I know it when I see it. . . .”): I know a superstar when I see one.
ations the courts have erroneously enforced what she terms "self-help" specific performance.8

In particular, she complains that a party may initially and deceptively agree to demands to modify an existing contract in order to obtain contractual performance instead of, and as they should, pursuing contract damages when faced with illegal demands for modification.9 Following such performance, the party consenting to the demand for modification or renegotiation (the promisee)10 repudiates his agreement and seeks to enforce the terms of the original contract. If the promisee consenting to the modification prevails at what I will subsequently define as "Stage II litigation"11 and, in effect, rescinds the modification in favor of enforcing the original agreement against the promisor, Professor Narasimhan contends that the promisee has received the benefits of self-help specific performance.12 Moreover, for various reasons concerning the effective use of resources and the proper incentive structure which should be implemented by contract law, she contends that self-help specific performance should only be allowed in certain contracts which are difficult or impossible to enforce.13

I concur and contend that the use of self-help specific performance is exactly the type of behavior courts should encourage when the law fails to provide a viable remedy in situations involving opportunistic threats to renegotiate contracts.

In Part I of this article, I briefly describe the cases and facts that motivate attempts to renegotiate an existing contract. I further demonstrate that these attempts to renegotiate are strategic attempts to engage in unproductive, opportunistic behavior which should be severely discouraged by the law. In Part II, I discuss the traditional remedies used by promisees to resist attempts by promisors to illegally and impermissibly modify existing contracts. By illustrating that traditional remedies are unduly deficient in encouraging productive and efficient

9. Her basic thesis is that if the demand to modify is agreed to, then the later attempt to rescind the modification is wrongful in most situations in which there is an effective remedy available for enforcing the original agreement. Id. at 61-64.
10. Following Professor Narasimhan's lead and terminology, the party (athlete) seeking modification is referred to herein as the "promisor," and the party (club) consenting to the modification and subsequently seeking enforcement of the original promise is referred to herein as the "promisee." Id. at 62 n.4.
11. See infra text accompanying notes 206-07.
12. Narasimhan, supra note 8, at 69-70.
13. Id. at 81-82.
behavior, I set the stage for Part III. Therein I allege that the self-help specific performance remedy is available and should be used by promis- ees who are subject to opportunistic demands to modify existing agree- ments. Notwithstanding a potential claim of “unclean hands” by promisors, I assert that this novel remedy is proper and should be fa- vored in certain easily identifiable situations as a means of deterring inefficient behavior.

In Part IV, I conclude by briefly sketching a regime in which self- help specific performance is unavailable for one of two reasons: first, as a result of lack of appropriate judicial enforcement; or second, the parties’ strategic adaptations to the use of self-help specific performance resulting in a failure by the parties to adequately address ex ante tae remedial issues of long-term personal service contracts. Questions are thus raised, but not answered, regarding the efficacious use of “ir- remedial” long-term contracts if the parties cannot efficiently design and enforce long-term contracts through traditional contracts remedies or the use of self-help specific performance. If my tentative conclusions are correct, the failure of the judicial system to develop a remedially efficient long-term personal service contract may indicate that such contracts should normatively be disfavored and discouraged. Perhaps parties should be encouraged to engage in short-term, sequential con- tracting, with its admitted higher transaction costs, because of the myr- iad of changed conditions that can occur ex post and impact the highly flexible, interactive relationship that is represented by a personal ser- vice contract.

In this light, recent claims by players and players’ organizations that owners are collusively restricting the length of contracts may be erroneous and ill-conceived. Instead, the shortening average term of player contracts, and perhaps other contracts in analogous areas, may reflect recognition that long-term contracts are normatively unacceptable and unenforceable in our society when they are used to bind the perceived “weaker party” to a long-term contract.

I. An Examination of Relevant Sports Law Cases

Although sports law cases are the focus of this particular article, the “sports law cases” (for want of a better term) discussed herein are merely indicative of a larger category of cases in which traditional con- tract remedies may be partially or totally ineffective to produce the desired goal of contract law: efficiently to produce an enforceable
agreement.\textsuperscript{14} Such cases are unique because they conclusively illustrate the futility of certain contract principles once you assume away the existence of a relevant market in which fungible goods are exchanged. However, the problems raised by uniqueness are no doubt prevalent in many transactions.

A. The Contract

The scenario that leads to the problems addressed in this article is familiar to every sports fan: a highly touted college athlete is drafted\textsuperscript{15} and subsequently signs a lucrative long-term contract with a professional club.\textsuperscript{16} There are four important components of the player’s initial contract with his club: the signing bonus,\textsuperscript{17} the annual salary, the

\begin{footnotesize}
\begin{enumerate}
\item “Draft” is a term of art pursuant to which the professional sports franchises allocate entering talent among the member clubs on an annual basis. The logistics of drafting can be described thusly:

All of the leagues involved in major team sports utilize a draft system to allocate new players among existing teams. In most cases, the players eligible for the draft are those who have not previously signed a professional contract and thus are usually athletes who are rising from the amateur ranks. The ostensible purpose of the draft is to equalize playing talent among the clubs within the league and the selection process is structured to enable the least successful clubs to secure the best of the new talent coming into the league. Thus, selections from the draft pool are made in the reverse order of the club’s standings in league competition.

Once a club drafts a player, its right to contract with him was exclusive. The duration of this right varied among leagues. In a few leagues, it lasted only until the next draft was held. . . . In most leagues, however, the right to negotiate with the player was perpetual.

J. WEISTART \& C. LOWELL, supra note 5, § 5.03, at 504 (emphasis added) (footnotes omitted).

\item In 1987, National Football League (NFL) first-round draft picks received annual salaries ranging from a high of $1,366,000 (Vinny Testaverde, Quarterback, Tampa Bay Buccaneers, 1st pick) to a low of $311,250 (Mark Ingram, Wide Receiver, New York Giants, 28th pick) per year. Top Draftees Contracts 1984-87, The Sporting News, Dec. 14, 1987, at 16. Indeed, salaries have continued to rise at an astronomical pace; witness Troy Aikman’s recent $11.2 million dollar contract over six years with the Dallas Cowboys. Aikman received a 2.75 million dollar signing bonus and an average annual salary of $1.84 million dollars. Wangrin, Cowboys’ Pick Cuts $11.2-Million Deal, Austin American-Statesman, April 21, 1989, at D1, col. 1.

\item The “signing bonus” is usually a lump-sum amount received by the player upon his initial signing with a professional team. It “is ostensibly intended to reward the player for signing a contract with the team.” J. WEISTART \& C. LOWELL, supra note 5, § 3.11, at 274. The legal
\end{enumerate}
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length of the contract, and whether the contract is guaranteed.\textsuperscript{18} Of course, the player has the option of refusing to contract with the club that drafts him and finding other employment, or sitting out the year and reentering the draft the following year. Football, the specific professional sports industry which is exclusively examined herein and which provides the background for this article, is no exception.\textsuperscript{19} Be-

status of the bonus payment, that is, whether it is salary, a gift, or some other form of irregular compensation, is beyond the scope of this article. For a discussion of this issue, see id. \textsuperscript{41} at 274-79; see also Alabama Football, Inc. v. Wright, 452 F. Supp. 182 (N.D. Tex. 1977), aff'd, 607 F.2d 1004 (5th Cir. 1979) (now defunct club sued unsuccessfully to recover player's signing bonus when the World Football League (WFL) folded prior to the player's performance of services); Alabama Football, Inc. v. Stabler, 294 Ala. 551, 319 So. 2d 678 (1975) (a failing WFL team attempted unsuccessfully to prevent athlete's attempt to rescind contract on grounds that the team did not recover the "bonus" it had paid to the athlete).

18. Approximately one in sixteen professional football contracts has some type of guarantee clause. \textit{How NFL Players Compare to Those in Other Leagues}, USA Today, Sept. 28, 1987, at 11C, col. 3. Although there is no definite legal definition on what constitutes a guaranteed contract, see J. Weisart & C. Lowell, supra note 5, \textsuperscript{42} at 309, "guaranteed contract" in football normally means a contract that includes the following no-cut provision:

[The club, so long as the Player fulfills his representation and warranty that he has and will continue to have excellent physical condition and fulfills his agreement that he will perform services hereunder as directed by the Club and its Head Coach . . . , agrees that it will, not prior to the first day of May following the close of the football season beginning in the calendar year 19—, terminate this contract because of the Player's lack of skill or capacity to play professional football of the caliber required by the League and by the Club or because the Player's work or conduct in the performance of this contract is unsatisfactory as compared with the work and conduct of other members of the Club's squad of players.

\textit{Id.} \textsuperscript{43} \textsuperscript{44} at 250 (footnotes omitted).

19. Section 3 of Article XIII (and you thought they only used Roman numerals for designating Super Bowls) of the most recent National Football League (NFL) Collective Bargaining Agreement (CBA) (1982) states:

A club which drafts a player will, during the period from the date of such college draft (hereinafter "initial draft") to the date of the next college draft (hereinafter "subsequent draft"), be the only NFL club which may negotiate for or sign a contract with such player. If within the period between the initial and subsequent draft, such player has not signed a contract with the club which drafted him in the initial draft, such club loses the exclusive right, which it obtained in the initial draft, to negotiate for a contract with the player and the player is then eligible to be drafted by another NFL club in the subsequent draft.

R. Berry & G. Wong, 1 \textit{THE LAW AND BUSINESS OF THE SPORTS INDUSTRIES}, \textsuperscript{45} \textsuperscript{46} at 178 (1986) (quoting the most recent NFL-CBA).

There are sundry other provisions that cover situations which immediately come to mind. Hence, if a player is drafted a second time and refuses to sign with the drafting team before the next (now third) draft, the player becomes a free agent, eligible to sign with any club. \textit{Id.} \textsuperscript{47} at 178-79. Moreover, if a player signs with a club in another professional league, i.e., the Canadian Football League, the club which drafted him retains its exclusive right to sign the player for a maximum of four years. However, after the four years have elapsed, the player is free to sign with any club and the drafting club merely has the right of first refusal. \textit{Id.} \textsuperscript{48} at 179.
cause the one highly prized skill the player possesses is his youth and ability to play the game at the time the player is drafted, most drafted athletes do sign with the drafting club. It is the rare player, indeed, who will sit out an entire year and thereby forego a year's income, and also incur a year's aging and a year's inactivity that may dull his otherwise valuable playing skills.\(^{20}\)

Contracts are employed in all professional sports to bind the athlete to the club and vice versa.\(^{21}\) Football is no exception. This is not unique or surprising; there are many personal service arrangements that are reduced to contract.\(^{22}\) An agreement to play professional football is nothing more than a highly specialized personal service contract pursuant to which the athlete agrees to perform in exchange for compensation (consideration).\(^{23}\) Like contracts employed in other sports, the interesting fact about professional football contracts is that the service performed by the athlete pursuant to the agreement is a "unique" one which is incapable of valuation.\(^{24}\) The uniqueness of the player's ability to perform is recognized in football's standard player contract.\(^{25}\)

These restraints raise obvious antitrust issues that are addressed herein. See infra notes 26-27 and accompanying text.

20. The player has, depending on his skill and negotiating position, some leverage in selecting which club will draft him or, better yet, for which club he will play. A case in point is John Elway who when drafted by the then Baltimore Colts, now Indianapolis Colts (Colts), publicly stated that he would never play for them and demanded to be traded. The club acceded to his demands and traded him to Denver. In fact, some of the consequences of that trade impacted the Colts' decision to trade for Eric Dickerson. See Murphy, Break Up the Colts!, SPORTS ILLUSTRATED, Nov. 9, 1987, at 18.

21. For a discussion of the issues raised regarding the formation of contracts of professional athletes, see J. WeisTart & C. Lowell, supra note 5, § 3.02.

22. See, e.g., Lumley v. Wagner, 42 Eng. Rep. 687 (Ch. 1852) discussed infra at note 78.


24. "Unique" is used in this manner as a term of art that allows the normal promisee to seek in equity a decree of specific performance of the contract. See infra notes 25 and 73 and accompanying text.

25. Paragraph 3 of the National Football League Standard Player Contract (NFL-SPC) (contract on file at the Connecticut Law Review) states, in part: "Player represents that he has special, exceptional and unique knowledge, skill, ability, and experience as a football player, the loss of which cannot be estimated with any certainty and cannot be fairly or adequately compensated by damages." A more typical clause reads as follows:

The Player represents to Club as follows: Player has exceptional and unique skill and ability as a baseball player, and Player's services to be rendered hereunder are of a special and extraordinary character which gives Player his peculiar value which cannot be reasonably or adequately compensated for in damages at law. Therefore, Player's breach of this Uniform Player Contract will cause Club great and irreparable injury and damage. Accordingly, the Player agrees that, in addition to other remedies, Club shall be entitled to injunctive and other equitable relief to prevent a breach of this Uniform Player Contract by Player, including the right to enjoin Player from playing professional
More importantly, it is this very "uniqueness" which leads to the enforcement problems that are the subject of this article.

B. Historical Perspective

One issue needs to be addressed before I detail the specific fact situation which encompasses the problems that led to this article. Many of the cases and theories discussed herein arose at a time when football players were, in certain respects, treated like cattle. These cases and theories are thus colored by that fact. Players had very little right to contract freely with employers with respect to the terms and the conditions of their employment. Moreover, player mobility from one club to another, either intraleague or interleague, was constricted by such one-sided contractual devices as "option" and "reserve" clauses. Thus, it is not hard to imagine that courts, especially equitable courts, strained existing legal principles in order to provide some relief to players from the overreaching attempts of clubs to suppress competition for players.

Those one-sided, pro-management days are, however, over. In fact, one tenet of this article is that the pendulum may have swung too far in the other direction, in favor of player rights. Due to the efficacious utilization of antitrust suits and labor statutes, the business of professional sports has been revolutionized in the last score of years. No longer are players tied to one team in perpetuity. And, in the event that player mobility and employment opportunities are limited, the limitations were placed on the player and agreed to by the player's labor representatives—the player's union—the National Football Player's Association. Although twenty years ago players were likened to well-paid

baseball for any other person or organization during the term of this Uniform Player Contract.


slaves,²⁷ today they are well-paid employees governed by applicable labor and antitrust laws.

C. The Hypothetical

Hypotheticals are frequently used in articles fully to develop the theories within. I am most fortunate to base my hypothetical, in part, upon a well-publicized contract dispute. I add my own conclusions to further illustrate the problems created by the current legal treatment of the enforceability of professional sports contracts.

Eric Dickerson is a highly skilled and, by most standards, highly paid professional football player. At the time of the writing of this article, and presumably for the foreseeable future, Dickerson performs for and is paid (very well, I might add) by the Indianapolis Colts.²⁸ How he came to be a Colt is the stuff of which legend is made.

Upon finishing his collegiate eligibility to play football at the renowned Southern Methodist University,²⁹ Dickerson was eligible for, and was drafted in, the NFL’s 1983 draft.³⁰ Dickerson was drafted by the Los Angeles Rams (the “Rams”)³¹ in the first-round. In keeping with Dickerson’s status as a first-round selection, the Rams subse-

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²⁷. Jacobs & Winter, supra note 26, at 3 n.3.
³⁰. For a discussion of the draft procedure, see supra note 19.
³¹. This entity, it should be duly noted, left the comfy confines of the Los Angeles Coliseum to pursue, with the National Football League’s approval, the greener pastures of Anaheim, California. That left the opening for Al Davis to move the Oakland Raiders franchise to the Los Angeles Coliseum, which lead to the lawsuit that some contend changed sports and sports law forever. See Comment, The Constitutionality of Taking a Sports Franchise by Eminent Domain and the Need for Federal Legislation to Restrict Franchise Relocation, 13 FORDHAM URB. L.J. 553 (1985); Note, The Professional Sports Community Protection Act: Congress’ Best Response to Raiders, 38 HASTINGS L.J. 345 (1987); Note, Controlling Relocations, supra note 28; Case-note, Eminent Domain and the Commerce Clause Defense: City of Oakland v. Oakland Raiders, 41 U. MIAMI L. REV. 1185 (1987); see also Fimrite, Unmoved by an NFL Move, SPORTS ILLUSTRATED, Feb. 15, 1988, at 188.
quently signed him to a very lucrative four-year contract that would expire naturally at the end of the 1986 playing season. Dickerson’s subsequent performance on the playing field proved that he was worth every dime of his lofty salary. In 1983 he gained a rookie record 1808 yards and was named Rookie of the Year. In 1984 “he broke the NFL single-season rushing record with 2105 yards.”

However, trouble in paradise arose before the 1985 season. Although Dickerson had signed a four-year contract, he felt he was underpaid due to his prodigious accomplishments during his first two years in the league. As a result, in an attempt to renegotiate his contract he “held out,” that is, he refused to perform pursuant to his contract for the first 46 days of the 1985 season. The Rams refused his request to renegotiate the terms of his existing contract as it pertained to the remaining two years covered by the agreement. However, the Rams agreed to extend the original contract by adding three years to it. The extension, beginning in the 1987 season, would pay Dickerson a total of $2.55 million for the three-year period covered by the extension. An express promise by Dickerson that he would not seek to renegotiate his contract was included in the contract extension.

All went well until the start of the 1987 season when Dickerson complained, once again, that he was significantly underpaid (although his salary for the first year of the contract extension was $682,000). The Rams were upset about Dickerson’s claims that he wished to renegotiate his contract because he was underpaid. The situation reached a head when Dickerson “implied that his dispute with L.A. had taken such a toll on him that he might not be able to give his all on the field.” Things deteriorated to such a point that Dickerson failed to start a game for the first time in his career. In that same game, Dickerson removed himself from the game claiming that he had injured a thigh. Soon thereafter, the Rams’ coach effectively suspended Dickerson with pay by placing him on the inactive list claiming that he was “physically and mentally unable to play.”

32. Murphy, supra note 20, at 21.
33. Id. at 22.
34. Id.
36. Murphy, supra note 20, at 22.
37. Id.
38. Id.
39. Id. More recently, the facts that led to Dickerson’s trade to the Colts were summarized as follows:
On October 30, 1988, four days after being placed on the inactive list, Dickerson was traded by the Rams to the Colts in a blockbuster trade that involved three teams, draft choices and other running backs. When the dust settled, the Rams received three first-round draft picks, three second-round draft picks plus two running backs, Greg Bell and Owen Gill. The Colts received Eric Dickerson. The third party to the trade, the Buffalo Bills, who parted with Greg Bell, two first-round draft picks and one second-round pick (which were subsequently sent to the Rams by the Colts), received from the Colts the rights to a rookie linebacker, Cornelius Bennett (who quickly signed a reported five-year contract worth four million dollars).

More important is that Dickerson “almost immediately signed his name to a reported four-year, $5.7 million contract that [made] him the highest-paid running back in football. . . .” The four-year contract covered and supplanted the three years remaining on the “extended” original contract and tacked on an additional year that was not covered by any previous contract. This extra year was very important for it provided the additional or new consideration necessary for a valid renegotiated contract. The Rams had apparently only offered Dickerson the paltry sum of $975,000 per annum for the years in question, which Dickerson refused to accept. The thigh injury that caused Dickerson’s removal from the game preceding the trade healed in time for him to start his next game with his new teammates; this did not go unnoticed by his old teammates.

When Dickerson was not among the highest paid running backs in the league in ‘86, he bitched and moaned and finally insulted his way out of L.A. . . . He pulled himself out of a Monday Night game with the Cleveland Browns saying his leg muscles were too tight. When the money loosened up the next week with the trade to Indianapolis, so did his muscles. The Colts gave him the fattest pay check—$1.45 million per year—of any running back in the league.


40. This complicated trade is discussed in Murphy, supra note 20, at 20 and Seeholzer, supra note 35, at 15. Actually, Bennett’s contract may total $5.8 million dollars. See Reilly, supra note 39, at 63.

41. Seeholzer, supra note 35, at 15.

42. See infra notes 128-32 and accompanying text.

43. Murphy, supra note 20, at 22.

44. It was reported that:

Jim Everett [the Rams' quarterback] got in a subtle shot at how Dickerson’s thigh injury seemed to miraculously heal once the trade was made.

‘I think I have to give our trainers a lot of credit for getting him well so quickly,’ Everett said. ‘I think we’ve got the best trainers in the world.’

Seeholzer, supra note 35, at 15; see also Reilly, supra note 39, at 63.
Thus ends the saga of Eric Dickerson. But note what has happened and its relevance to the thesis put forth in this article: in certain types of contracts, the threatened or actual breach by the promisor is irremedial pursuant to traditional doctrines. As a result, the promisee should be allowed, and perhaps encouraged, to engage in a form of "self-help" specific performance in order to obtain the previously contracted for performance by the promisor.

Hence, although Dickerson had expressly agreed not to seek a renegotiation of his contract, he still sought to renegotiate his contract. In spite of his agreement to perform for three years for a total of $2.55 million, he was able to replace that contract by signing a contract for $5.7 million that covered the same three years of his extended original contract, plus an additional year. Assuming he received an equal amount of money for each year of performance under each contract, Dickerson improved his annual salary for the first three years of his contract from an average of $850,000 per annum to $1,425,000 per annum, a gain of $575,000 per annum for the three years in question.

Technically, no breach of contract occurred because Dickerson never refused fully to perform the terms of his extended original contract (the old contract). Dickerson's situation demonstrates, however, that in the future a superstar player ("the player") may engage in a species of opportunistic behavior or wealth transfer that can result in a new, better contract. This can occur when the player has sufficient leverage to breach his contract by forcing the club to renegotiate the contract in express violation of the terms of that contract. This situation will be referred to herein as "the hypothetical."

This type of opportunistic behavior, however, should not be countenanced by the courts and by society. Traditional theory holds that opportunistic behavior is behavior that does not rise to the level of a breach of an agreement or contract, but is wrongful nevertheless and should be prohibited. The thesis set forth in this article is that this

45. An erroneous assumption perhaps, since most clubs would prefer to weight the contract more heavily in its last year or two or to defer a percentage of the contract in order to reduce the present value of the contract at the time it is signed.

46. One perhaps can make an argument that Dickerson's public statements demonstrating his dissatisfaction with the old contract may be viewed as an attempt to renegotiate his contract in violation of his express promise contained in that old contract not to do so. Although one may make this argument, I choose not to pursue it because the club's remedies, even assuming an express breach of the promise, are inefficient to compensate the club. Moreover, such remedies would, as a practical matter, prevent the club from pursuing a cause of action based on the breach. See infra notes 61-66 and accompanying text.
traditional definition of opportunistic behavior may be too narrowly confined. Opportunistic behavior may include behavior that does constitute an express breach of an agreement and behavior that, contrary to the traditional theory, may be very easy to detect. This species of opportunistic behavior, however, is as deleterious as the traditional variant of opportunistic behavior because there are no effective remedies available to the party victimized by the opportunistic behavior. The lack of an effective remedy in our judicial system, then, leads to a species of opportunistic behavior—the irremediable opportunistic breach—that has not been sufficiently identified and discussed in the legal literature.

II. OPPORTUNISTIC BEHAVIOR BEGOTTEN BY INEFFECTIVE REMEDIES

In an excellent article, Professor Muris demonstrates that certain legal principles, particularly implied terms in contracts like the implied covenant of good faith and fair dealing, are low-cost methods of deterring costly opportunistic behavior.\(^{47}\) Opportunistic behavior is defined as behavior of a performing party to an agreement that is “contrary to the other party’s understanding of their contract, but not necessarily contrary to the agreement’s explicit terms, leading to a transfer of wealth from the other party to the performer . . . .”\(^ {48}\) More importantly, such behavior is often costly to detect and, as a result, costly to deter.\(^ {49}\) Hence, Muris’s article focuses on the methods used to control opportunistic behavior which is ambiguous in character and exceedingly difficult to detect.\(^ {50}\)

Opportunistic behavior, which is not to be confused with conduct which constitutes a breach,\(^ {51}\) is behavior which is not prohibited by the

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48. Id. at 521-22.
49. Id. at 522. Opportunistic behavior which is easily detected, and hence subject to deterrence, is unlawful.
50. Id. Professor Muris’s article is not unique in its use of opportunism as a vehicle to control and regulate inefficient behavior. Professor Muris focused primarily on identifying opportunistic behavior in the context of modifying preexisting contractual arrangements. Professor Narasimhan has extended Muris’s theory of opportunism to contend that the party that consents to a modification and later sues to enforce the original agreement may be engaging in a type of opportunistic behavior. See Narasimhan, supra note 8, at 61-63.
51. Professor Muris illustrates the differences between opportunistic behavior and breach: First, the concepts of opportunism and breach should be distinguished. Although opportunism provides a basis for condemning as a breach certain conduct that does not violate explicit contractual language, not all breaches involve opportunism. For example, one party may gain sufficiently from the breach to compensate the nonbreacher for any losses
contract and that results in a wealth transfer from one party to another that was not bargained for ex ante. In one sense, it represents a party's strategic response to a situation that was not contemplated or anticipated by the parties ex ante and which was therefore not addressed in the agreement between the parties. 52 Technically speaking, therefore, no express breach of the contract necessarily occurs when a party to the contract acts opportunistically. Yet, deterring opportunistic behavior should be a primary goal of contract law because of the substantial costs incurred if opportunistic behavior is not prevented. Simplistically stated, opportunistic behavior should be deterred because it is not productive and, hence, is not cost efficient. 53

Ex ante, parties are aware of the possibility of opportunistic behavior occurring. Yet, opportunistic behavior is often ambiguous, subtle, and hard to detect. Therefore, the cost of deterring all forms of opportunistic behavior is prohibitive, requiring the parties to draft an agreement whose breadth and scope could cost more than the agreement is worth. 54 Moreover, in many transactions, parties are forced by costs to use form contracts and contracts that for a variety of reasons, are ill-suited to customization. 55

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and still benefit. Without a wealth-transfer, no opportunism exists although a breach still occurs. In addition, when exogenous circumstances render performance within the terms of the contract impossible, a breach exists, but opportunism does not.

Muris, supra note 47, at 525 (footnotes omitted).

52. As a result, opportunistic behavior is frequently present in relational contracts. See infra notes 54-56 and accompanying text.

53. As Professor Muris explains:

Any condemnation of opportunism based simply on this wealth transfer would first require that the victim be legally entitled to the wealth that it loses. Placement of the entitlement is, after all, the issue at hand. The wealth transfer is significant not because of its mere existence, but because the transferring act itself does not produce a beneficial product nor promote the productive goal of the contract; yet both perpetrating and protecting against such a transfer are costly.

Muris, supra note 47, at 526.

54. Professors Goetz and Scott explain that parties are discouraged from forming complete contingent contracts—allocating all of the risk ex ante, including the risk that a party may act opportunistically—by the costs of negotiating and actually writing the terms. See Goetz & Scott, The Mitigation Principle: Toward a General Theory of Contractual Obligation, 69 Va. L. Rev. 967, 971 (1983) [hereinafter Goetz & Scott, A Theory of Contractual Obligation]; see also Johnson, Correctly Interpreting Long-Term Leases Pursuant to Modern Contract Law: Toward a Theory of Relational Leases, 74 Va. L. Rev. 751, 754 n.9 (1988).

55. Such contacts, however, do provide certain benefits:

[T]he law supplies standardized and widely suitable risk allocations which enable parties to take an implied formulation 'off the rack,' thus eliminating certain types of costs and errors arising from individualized specification of terms. . . . [A]typical parties are invited to formulate express provisions that redesign or replace ill-fitting implied rules.
The hypothetical situation presents a predicament that at first glance cannot be called opportunistic behavior pursuant to the traditional definition. Although one cannot quibble with the fact that an opportunistic wealth transfer did occur from the club (promisee) to the player (promisor),\textsuperscript{86} it is inconceivable to assert that the wealth transfer occurred as a result of activities not contemplated by the parties which are difficult to detect and police ex ante. In my opinion, the player took action that would normally be characterized as an express breach of contract. Notwithstanding his express promise to perform at the best of his ability for the consideration stated in his extended original contract, and his express promise not to seek renegotiation of the contract, he did.

Thus, state-supplied terms provide parties with time-tested, relatively safe provisions that minimize the risk of unintended effects.

Goetz & Scott, The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms, 73 Calif. L. Rev. 261, 266 (1985) [hereinafter Goetz & Scott, The Limits of Expanded Choice]. Professors Goetz and Scott also discuss the efficiency of using such form contracts:

The following model is suggested for the application of the flexibility principle: In a costless environment, the sole principle of market exchange would be flexibility. The parties would negotiate deals without constraints, and renegotiate upon non-performance with the only role of legal institutions being to enforce the private agreement, including sanctions, according to its terms. Facing positive transactions costs, however, the legal system provides ready-made rules based on common assumptions about typical contracting behavior. These "off the rack" contract rules reduce the costs of exchange by specifying the legal consequences of typical bargains where the expected cost of explicit negotiation exceeds the utility derived from individualized exchange. It is only where idiosyncratic value exceeds negotiating costs, therefore, that contractual flexibility induces privately concocted alternative arrangements.


56. The critical challenge for any definition of good faith breach is:

[W]hether it can distinguish between the normatively acceptable decision to breach and pay compensatory damages, and the kinds of strategic contracting behavior that are normatively undesirable. Focusing on the welfare effects of the behavior may provide a principled distinction. A decision to breach and allocate resources to alternative uses is efficiency-enhancing conduct so long as the breacher "buys" out of the contract by paying the appropriate quantum of damages. . . . On the other hand, strategic behavior designed to exploit a contractually created monopoly position—for example, a professional athlete threatening nonperformance in order to extort a larger compensation—has no socially optimizing effects. Rather, such opportunistic behavior only redistributes portions of an already allocated contractual pie. . . . Thus, at least in this context, bad faith can be defined as intentional efforts to use contractually created discretion or other strategic opportunities to secure a larger share of the anticipated gains from an existing contract.

exactly the opposite. I will assume for the sake of discussion that the player may also intentionally perform suboptimally during the terms of the “old contract,” while negotiations are ongoing, in order to obtain a renegotiated contract.

Yet, how can this alleged breach be characterized as a species of opportunistic behavior when it contains none of the unique attributes of opportunistic behavior discussed by Muris in his influential article? To comprehend why I characterize the player’s behavior as opportunistic in the hypothetical, one must first understand that the wealth transfer occurred not because the player took action that was difficult to detect or police, but the opportunistic behavior occurred because the player can take advantage of an inefficient judicial system to shift the risk of loss of his breach or nonperformance to the club. Faced with no effective remedy, the club is confronted with two choices: surrender to the player’s demands or lose his performance pursuant to the contract, with no effective compensation for the loss of that performance. I contend that the player can manipulate the defects in the legal system, which are detailed below, to exploit his threatened breach of contract to obtain a wealth transfer—to act opportunistically.

A. Damages

Faced with the player/promisor’s threat not to perform his contract unless that contract is renegotiated, the club can seek damages if

57. See supra notes 47-53 and accompanying text.
58. I am not the first to note the remedial problems encountered by the courts when it must adjudicate the fate of a non-performing athlete. A colleague, Professor Robert Scott, is renowned for using the “renegotiation scenario” as a hypothetical in his first-year Contracts class to demonstrate opportunism:

Courts also express concern with bad faith extortion through the rules restraining economic duress. Such cases arise when the obligor has performed the modified contract, but the “injured party” seeks restitution of the value of his performance because economic duress forced his agreement to the modified terms. . . . Because a market for substitutes will effectively control a defendant’s behavior with no need for legal rules, a prima facie claim of economic duress thus requires a plaintiff to show a specialized environment.

It is difficult to police such bad faith behavior, however, because the distinction between legitimate requests for renegotiation and bad faith threats lies entirely in the honesty of a party’s assertion that a readjustment contingency made performance less attractive than quasi-performance (breach with damages). When a professional athlete requests renegotiation because he now prefers lying in the sun (and paying appropriate compensation) to playing football or basketball, the issue turns on whether that claim is true or represents a bluff designed to obtain additional compensation. Because such a claim is almost impervious to accurate proof, the law must choose between no legal regulation and crudely devised rules of thumb.

Goetz & Scott, A Theory of Contractual Obligation, supra note 54, at 1007 n.106.
the player carries out his threat and refuses to perform pursuant to the
original agreement. However, this remedy is ineffective in the hypotheti-
cal presented above for two reasons. First, damages are incapable of
valuation in these situations. Second, even assuming damages can be
fixed, the promisor can perform suboptimally and cheat the promisee
out of the agreed upon performance.\footnote{59} Damages are an ineffecti
remedy because they cannot be recov-
ered by the promisor due to the speculative nature of the loss incurred
by the club as a result of the player's breach. It is well-settled that the
"right to a player's services is . . . not a right for which there is a
specific compensating remedy."\footnote{60} Thus:

When the club goes to court to enforce its right to the player's
performance, it will usually find that the normal remedy of
money damages is unavailable. The services of star players are
unique, and money damages would not enable the club to
"buy" an equivalent performance from someone else, since, by
definition, no exact equivalent is available.\footnote{61}

More importantly, even if the club is willing to accept damages for
the player's lack of performance as compensation for the breach, the
club is faced with yet another legal hurdle. Damages in this context are
impossible to calculate because it is exceedingly burdensome to estab-
lish what the loss of one player, even a superstar player, will have on
the club's performance and its financial condition.\footnote{62}

For the sake of argument, assume that the Rams, instead of ac-
ceding to Dickerson's request to be traded, refused to trade Dickerson
and he refused to play, admittedly a total breach of his contract. Even
if the Rams demonstrate that the club lost money in the 1988 football
season over and above any amounts lost in 1987, how can the Rams
prove the loss was attributable to Eric Dickerson's failure to perform in
whole or in part? What if the quarterback, Jim Everett, another integ-
ral part of the club's success or failure, had, as he did in my opinion, a

\footnote{59. This is the traditional view of opportunistic behavior, that the player will not use his best
efforts to perform. This is exactly the sort of behavior that is difficult to detect and police ex ante
and which such amorphous concepts of "good faith" and the "implied" covenant of good faith and
fair "dealing" are designed to police. If the parties cannot control expressed opportunistic behav-
ior that is easy to detect, it is assumed that the parties cannot contractually control "traditional"
opportunistic behavior that is exceedingly difficult to detect.}
\footnote{60. J. Weis\footnote{61. Id. §4.02, at 337 (footnotes omitted).} t\footnote{62. R. Berry & G. Wong, supra note 19, §2.10, at 68.}
suboptimal year? Alternatively, what if the defensive players, because of age and retirement, allowed more points to be scored against them than defensive players on comparable clubs? Moreover, assuming that all these exogenous factors to any hypothetical breach can be discarded, how do the Rams go about showing a loss attributable to a breach when they operate in an environment that many compare to a joint venture? Because clubs share approximately ninety percent of the revenues generated by professional football, including the lucrative payments received from the league-negotiated television contract, the club’s financial success is based, in large part, on the league’s overall performance and profitability.63

Perhaps that is the answer to our inquiry; the Rams suffered no compensable damages by any hypothetical breach and should receive none. This simple assertion, however, ignores the fact that although significant revenue sharing does take place between NFL clubs, an equally significant amount of the revenues derived from professional football, that is, gate receipts, is not shared equally among all member clubs.64 Despite the fact that clubs share a considerable portion of revenues, I find it difficult to believe that a court would deny the Rams’ damage claim merely because the club is a member of a revenue sharing joint venture.65 If that is the case, however, our level of inquiry would simply shift to calculate the damages incurred by the joint venture as a result of the player’s refusal to perform pursuant to the original contract.66

64. Instead, gate receipts are shared on a 65-35 split, between the home and the visiting club, with the home club receiving 65 per cent of the gate receipts. See R. BERRY & G. WONG, supra note 19, § 1.32 exhibit 1-19 & methodology note, at 59-60. Thus, it is the drawing ability of two clubs, as opposed to the financial health of the member clubs, that will determine, in part, the revenue received by any one club. See Roberts, supra note 63, at 234 n.41. According to National Football League Players Association figures, as of 1980 gate receipts account for approximately 46% of each team’s gross revenues ($6,600,191/$14,310,191). See R. BERRY & G. WONG, supra note 19, §1.32, at 57, Exhibit 1-16. Moreover, each team retains all revenue generated by local radio, preseason television and luxury box seat sales. See Note, Eminent Domain and the Commerce Clause Defense: City of Oakland v. Oakland Raiders 41 U. MIAMI L. REV. 1185, 1205 (1987).
65. This is not to assert that the NFL should be treated as a joint venture for antitrust or other purposes. In fact, there is a plethora of scholarship analyzing the form of business enterprise which is the NFL. See Roberts, supra note 63, at 238-60 and sources cited therein.
66. Damages may be incurred by the joint venture if the player refuses to perform for the
For all intents and purposes, the relationship between the player and the club is defined on the club level and should be analyzed at that level. The player signs a contract to play and perform for the club, not for the league. Moreover, the primary obligor of the obligation to pay the player's salary and perform the other covenants in the contract that run in favor of the player is the club. In the articles that have been written analyzing the club's remedies in the event of player breach, there is no mention in the cases or the scholarship that the club is not harmed because it shares revenues with other members.67

It remains that no club has successfully pursued a damage claim against an athlete or reduced a judgment to money damages. Contrary to "entertainment" personal service contracts,68 it is also interesting to note that no club has sought to enforce a liquidated damages clause. One reason for this anomaly may be a lack of familiarity with the remedy. More realistically, the nonuse of liquidated damages clauses stems from a fear that if a valid liquidated damages clause is used it will detrimentally establish that the athlete's breach may be compensated with money damages, thus destroying the club's right to receive a negative injunction (the player's services would no longer be viewed as unique).69 The club's loss of the right to receive a negative injunction when confronted with the loss of the player to a competing league or entity may be more detrimental than the club's loss of the right to receive liquidated damages when a superstar player refuses to perform or threatens to renegotiate.70


68. See Rubin, supra note 14, at 6; Yeam, supra note 14, at 29.

69. Rubin, supra note 14, at 6. For a discussion on the efficacious use of liquidated damages clauses, see generally Goetz & Scott, Liquidated Damages, supra note 55.

70. Practical reality may dictate the club's nonuse of liquidated damages, assuming such clauses are enforceable as drafted and inserted in the contract. In other words, the club is faced with a dilemma if it uses such a clause. The club may be able to recover the specified damages, but it may lose very valuable components—players—to competitors in another league. The compensation received via the liquidated damages clause may not match the economic harm inflicted by the survival of a competing league stocked with players who have breached their contracts. As a result, the club may choose to ignore its right to liquidated damages in order to preserve its rights to a negative injunction. For a discussion of methods to assess the club's loss in the event
Moreover, liquidated damages clauses are only viable as deterrents to breach when the breach is induced by third parties and when the breach is total, that is, the player refuses to perform. It is assumed that if the player has sufficient leverage to extort a renegotiated contract, that same player will have sufficient leverage to force the club to “waive” its right to enforce the liquidated damages clause if the player breaches by seeking to renegotiate his contract. Similarly, if the player acts opportunistically by failing to perform in good faith, by “dogging it”—giving less than his best good faith effort on the playing field—liquidated damages are remedially ineffective.

In any event, liquidated damages clauses in personal services contracts, which present unique questions, are seldom used to enforce the club’s right to receive performance pursuant to valid contracts.71 To serve as a meaningful deterrent to breach, such clauses would have to provide for very large damages and may run afoul of the prohibition on penalty clauses.72

B. Injunctive Relief

1. Affirmative Injunction

Left without an effective money damages remedy at law, the club is forced to seek relief in equity. Because the player performs unique services that cannot be replaced easily,73 the club has a legitimate claim to specific performance of the player’s obligation to perform pursuant to the contract. Unfortunately, it is axiomatic that a personal service contract is not specifically enforceable by the club.74 Due to problems encountered in enforcing the affirmative decree of specific performance,75 and the concern that the use of such a remedy would be tantamount to forcing involuntary servitude,76 courts have been unwilling-

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the club decides to seek damages rather than injunctive relief, see J. WeisTArt & C. Lowell, supra note 5, § 4.09. The “cost” of the failure to use liquidated damages clauses in all contracts may be the hypothetical discussed in this article.

71. J. WeisTArt & C. Lowell, supra note 5, § 4.09, at 366.


73. For a discussion of the uniqueness of the player’s performance obligation, see supra note 25 and accompanying text.

74. See Restatement of Contracts § 379 (1932); 5A A. CorBIN, CorBIN On Contracts § 1204 (1964). There are even express statutory prohibitions on the specific enforceability of such contracts. See, e.g., Cal. CIV. Proc. Code § 526(5) (West 1979).

75. See Restatement of Contracts, § 379 comment d (1932); A. CorBIN, supra note 74, § 1204, at 400-01

76. See A. CorBIN, supra note 74, § 1204, at 401.
ing to grant specific performance to enforce personal service contracts. 77

2. Negative Injunction

The traditional remedy afforded a contracting party faced with a breach of a personal service contract is the negative injunction made famous by Lumley v. Wagner. 78 The negative injunction was first used to enforce a professional sports contract in Philadelphia Ball Club v. Lajoie. 79 In that case, the court established the standards that continue to govern the appropriate use of negative injunctions to enforce personal service contracts involving athletes:

Lajoie thus established the necessary prerequisites for obtaining negative injunctive relief against a breaching athlete. These basic elements include a sufficiently unique ability, an inadequate remedy at law, and irreparable harm to the plaintiff. As a practical matter, once a player is shown to be sufficiently unique, the inadequacy of damages is presumed. Furthermore, inadequacy of damages generally is equated with irreparable harm to the aggrieved club. Even if the above elements can be established, injunctive relief is still within the court's discretion and maybe [sic] denied. In deciding whether to grant this relief the courts consider the differing needs of the clubs, players, and society. . . . The courts have applied the essential requirements for injunctive relief along with other equity principles such as unclean hands, and lack of mutuality to reach equitable results in the cases before them. 80

All would agree that the player's ability to perform is unique, that damages are an inadequate remedy in this situation, 81 and that the con-

77. See Brennan, supra note 67, at 61; Whitehill, supra note 67, at 805; Yeam, supra note 14, at 28.

78. 42 Eng. Rep. 687 (Ch. 1852). Lumley was an action for breach of contract for an exclusive singing engagement by a famous opera singer and a concert promoter. The Lord Chancellor held that although he was unable to grant specific performance because he could not force the singer to sing, he could (and did) enjoin her from singing elsewhere. For a brief discussion of this infamous case, see Whitehill, supra note 67, at 805 n.19.

79. 202 Pa. 210, 51 A. 973 (1902) (Owner of baseball team who executes an exclusive contract with star second baseman may enjoin ballplayer from playing with another club, although he may not force him to play).

80. Whitehill, supra note 67, at 806-07 (footnotes omitted); see also Brennan, supra note 67, at 63-65.

81. See supra notes 61-62 and accompanying text.
tract meets the requisite mutuality test. The granting of the injunction, however, is not automatic. Yet, assuming for the sake of argument that the club (the promisee) is able to get a negative injunction preventing the player from performing football-related duties for another employee, how beneficial is this remedy to the club? I conclude not at all.

First, in our hypothetical no third party is involved; the player is not seeking to breach his contract to perform for another club. The threat of a negative injunction is most effective when the player is pursuing other opportunities with other promisees (clubs). There is no evidence that any other promisee is attempting to engage the player's services for the period in question. Thus, if the player is seeking to evade his contractual obligations in order to perform for another club, the negative injunction may be a useful remedy, along with others perhaps.

Second, and more importantly, a superstar player can easily evade the threat and imposition of the use of the negative injunction merely by performing suboptimally, or implicitly threatening to do so. This is where the traditional notion of opportunistic behavior comes into play. As discussed, opportunistic behavior has traditionally been defined as that behavior that does not rise to the level of breach of contract, that is difficult to detect, and that violates an implied or express covenant to perform the contract in good faith to the best of the promisor's ability. The traditional species of opportunistic behavior is represented by the player's efforts to evade his contractual obligation by performing suboptimally. For all the reasons the club cannot obtain an affirmative injunction forcing the player to perform, the club also cannot obtain an injunction forcing him to perform pursuant to the contract—to the best

82. There are two restrictions which hinder the negative injunction's usefulness:
First, courts highly scrutinize requests for negative injunctions because of their reluctance to inhibit the [player's] freedom to pursue a livelihood. In California, the negative injunction is even more difficult to obtain because of statutory prerequisites as well as the standard Lumley requirements. This results in the courts denying many such injunctions.
Yeam, supra note 14, at 29 (footnotes omitted).
83. Lumley v. Wagner, 42 Eng. Rep. 687 (Ch. 1852), and Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 51 A. 973 (1902), are perfect examples of this. See supra notes 78-80 and accompanying text.
84. If this hypothetical situation involved a third party's attempts to engage the player while under contract to a club, the tort of interference of contractual relationship would be appropriate and would be discussed herein. For a discussion of the applicability of the tort, see J. Weiswurt & C. Lowell, supra note 5, § 4.14, at 397. This topic, however, is beyond the scope of this article.
85. See supra notes 47-58 and accompanying text.
of his ability."86 The player can thus engage in opportunistic behavior by engaging in conduct that is euphemistically known as "doggling it." In other words, he can give less than his best efforts on the playing field, and thereby punish the club for its failure to acquiesce to his demands, while collecting his full salary as provided by the contract. He can even go so far as to save his best efforts, and his body—a precious and finite commodity with a limited useful life (once again, pardon the pun)—for the next contract.

Assuming that the use of the negative injunction is, on the contrary, an enforceable remedy that the club can obtain and wants to obtain, the question still remains, is it an effective remedy? The answer again appears to be a resounding no! By utilizing the negative injunction the club prohibits the player from performing for another club. This may be effective in the limited number of cases in which the player is interested in breaching his contract in order to pursue employment with clubs in other leagues.87 The negative injunction is of limited utility when the player is desirous of renegotiating his contract and threatens to perform suboptimally or not at all unless his demands are met. "[M]anagement's primary concern is [and should be] an economic return on the personal service contract and not in preventing the talent's performance for others."88

The negative injunction is not designed to give the injured promisee substitute performance or damages for the performance lost as a result of the promisor's breach. At best, the use of a negative injunction in this situation is proof of the futility of traditional remedies employed to enforce personal service contracts. The preferred remedy—the negative injunction—does not cause performance to occur, or shift compensation from the breaching party to the injured party to allow for the

86. The NFL-SPC contains a provision that explicitly requires the player "to give his best efforts and loyalty to the club." See NFL-SPC supra note 25, ¶ 2.
87. The club does not have to worry about intraleague competition for the player's services. Player restraint mechanisms prohibit a club from tampering with a player from another club in the NFL. This is a standard arrangement in all professional sports. The opportunities for competition for player talent among clubs are severely circumscribed both at the entry level and throughout the player's career. Although such intraleague restraints were the subject of numerous antitrust suits, see, e.g., Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976) (although the NFL's "Rozelle Rule," which allowed the league's commissioner to require a club acquiring a free agent to compensate the player's former club, was not a per se violation of antitrust laws, the rule as applied was an unreasonable restraint of trade in violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1982)), most restraints were legitimized by the labor exemption to antitrust law discussed in J. Weisart & C. Lowell, supra note 5, ¶ 5.05, at 541-68.
88. Yeam, supra note 14, at 29 (footnotes omitted).
efficient breach;\textsuperscript{89} instead, the negative injunction penalizes the promisor/player for his breach by preventing the performance.

There is a punitive nature about the use of the injunction. It is odd to have a remedy that is effective because it prevents the performance of the original obligation, a productive activity, for a substitute promise. This may be one of the rare situations in which the incentive structure of the law may be counterintuitive; it promotes and allows the use of a remedy that results in the nonperformance of the beneficial activity. Because the productive activity is not performed, no one is benefited by the use of the remedy, not the player, the club, or society.

On the other hand, I have thus far intentionally ignored the alleged coercive nature of the remedy. The remedy is not employed for spiteful reasons, but to compel the promisor to perform the original contract. In fact, it may be persuasively argued that the club’s best remedy in these situations is suspending the athlete without pay for nonperformance. It is believed that such a strong stand will prevent the athlete from threatening to breach. The weakness in this assertion is that if the player does not totally refuse to perform, he can perform suboptimally and prevent the imposition of suspension.\textsuperscript{90}

Moreover, even if the club has grounds for suspension, the remedy may be ineffective for practical reasons.\textsuperscript{91} The coercive nature of the negative injunction remedy may result in performance in certain situations. Nevertheless, how is the party benefited when he receives performance solely because of the threat of the negative injunction in an industry like professional football where the promisor’s optimal performance is largely based on his good faith and best efforts? Further, if a negative injunction is such a viable and effective remedy, why hasn’t it been used against players like Dickerson in the type of dispute in which he was embroiled? I am aware of no case in which a club threatened to or actually did suspend a player, or employ a negative injunction to compel a player to sit out the remainder of his contract

\textsuperscript{89}. For a discussion of efficient breach, see infra notes 100-03 and accompanying text.

\textsuperscript{90}. Suspension without pay is not a method that the club may employ unilaterally against the defaulting promisor. The club must have a justifiable, verifiable reason for suspending the athlete pursuant to the terms of most collective bargaining agreements that, in large part, govern the employer-employee relationship in professional sports, including football. See R. BERRY & G. WONG, supra note 19, § 3.38, at 176-77. On collective bargaining agreements in sports generally, see J. WEISTART & C. LOWELL, supra note 5, § 6.01, at 777-86.

\textsuperscript{91}. The applicable Collective Bargaining Agreement may, for example, limit the club’s power to suspend the athlete. The most recent NFL-CBA limits the club’s authority to discipline the player, including suspension, depending upon the alleged player infraction. See NFL-CBA, supra note 19, Art. VI, § 2 at 14 (December 11, 1982) (copy on file at the Connecticut Law Review).
because of the player's threat to renegotiate or to perform suboptimally. 92

C. Tortious Breach of Contract

In an interesting article, Professor Kevin Yeam has put forth a novel theory to control the opportunistic behavior of players. 93 In essence, he argues that the club should utilize the implied covenant of good faith and fair dealing implicit in every contract in order to allege "tortious breach of a personal service contract" when the promisor fails to perform:

[T]he courts have recurrently held four types of conduct by breaching defendants to be tortious. They are: (1) oppressive; (2) egregious; (3) willful; [and,] (4) coercive. . . . The courts' stated policy for bad faith breach of contract decisions remains constant. Generally, the courts seek to deter others similarly situated, provide a remedy for damages which otherwise might go uncompensated, and protect plaintiffs from serious wrongs, tortious in nature, even though not predetermined torts. 94

Yeam argues that the tort may, and should, be extended to situations wherein promisees refuse to perform personal service contracts. There are, however, two major problems with the use of such a remedy with respect to personal service contracts. First, the expansive reading of the implied covenant of good faith and fair dealing to commercial contracts that would be needed to support the tort may be uniquely limited to California courts. 95 Only time will determine whether the

92. A student in my 1988 Sports Law Seminar, Kenton Edelin, emphatically made the point that if at least one club suspends a superstar player due to his wrongful conduct, and if that suspension is upheld by the League and by the courts through the use of a negative injunction or the collective bargaining agreement, other players will be sufficiently deterred from engaging in this sort of opportunistic behavior. The trouble with this assertion is that it has not happened and it will not happen because of problems caused by externalities. In other words, any attempt to discipline a superstar player by prohibiting him from playing will involve certain costs to the club; the club will lose the very valuable services of a superstar player without corresponding compensation. Yet any benefit gained by the message given to the players that this sort of behavior will not be countenanced inures to the other clubs in the league—it is external to the suspending club—creating benefit externalities. Thus, it is never in one club's interest to discipline a player and bear the total cost of that action while conferring benefits on the other clubs in the league.

93. See generally Yeam, supra note 14, at 36-38.
94. Id. at 36-37 (footnotes omitted).
95. Id. at 38-42. For an example of the California courts' expansive reading of the covenant, see Johnson, Correctly Interpreting Long-Term Leases Pursuant to Modern Contract Law: To-
implied covenant and the concomitant tort will be generally accepted beyond California's boundaries.96

Second, and more importantly, the imposition of the implied covenant of good faith and fair dealing appears to be limited to situations in which the court is concerned with overreaching or inequitable behavior on the part of the party with superior bargaining power.97 In other words, the implied covenant and the tort used to enforce it appear to be used as a vehicle to correct adhesion contracts or to impose penalties when a party is guilty of unconscionable behavior.98 The implied covenant of good faith and fair dealing may become the "unconscionability doctrine" of the 1990s.99 Even if the scope of the covenant is expanded, it is hard to envision a situation in which the court will apply it against a player and in favor of a club given the history of the bargaining relationship between the player and the club.

D. Constructive Trust

There are many compelling reasons why the law in most instances allows a party to breach his contract and pay money damages to compensate the injured party. The theory of efficient breach has been detailed in numerous articles,100 and requires no detailed explanation herein. Suffice it to say, there are multitudinous situations in which it is efficient to allow a party to breach a contract and pay damages rather than compelling the breaching party to perform pursuant to the contract as a result of an injunction issued by the court for specific performance of the contract.

Thus, as explained by Professor Anthony Kronman in his article

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96. For a discussion of the use of the implied covenant of good faith and fair dealing to support a tort remedy for breach of contract, see Comment, Tort Remedies for Breach of Contract: The Expansion of Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing Into the Commercial Realm, 86 COLUM. L. REV. 372, 390 (1986) [hereinafter Tort Remedies for Breach of Contract] (concluding that "[m]ost jurisdictions have refused to apply the bad faith tort to the commercial context, limiting the tort to its application in the insurance context").

97. Johnson, supra note 95, at 796-99; see also Comment, Tort Remedies for Breach of Contract, supra note 96, at 390.

98. See Johnson, Lender Liability: A Paradigmatic Approach Based on the Bargain Principle and Relational Contracts (copy on file at the Connecticut Law Review) (arguing that the use of the implied covenant in commercial lending relationships represents a thinly disguised attempt to regulate what has traditionally been characterized as "unconscionable" behavior).

99. Id.

Specific Performance, the law protects most contract entitlements, using Calabresian terminology, through the use of appropriate liability rules. In other words, parties are allowed to breach and pay money damages to the injured party in an amount set by some impartial arbiter assigned to that task by our judicial system. Conversely, property rules, those resulting in fines and imprisonment if the entitlement is wrongfully misappropriated, also protect certain contract entitlements. The right to entitlements which are deemed unique is protected by the remedy of specific performance.

Pursuant to Calabresian terminology, property rules are very different from liability rules because certain entitlements or rights to entitlements protected by property rules cannot easily be valued by the market. Thus, “[a]n entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller.” Consequently, if the entitlement is protected by property rules, the seller may veto any attempt by the buyer to purchase the right simply by refusing to sell it. To prevent the property rule from becoming a liability rule—when someone may take an entitlement by paying an objectively determined value for it set by an impartial third party, the court—the right to the entitlement is protected by fines and imprisonment if the property right is misappropriated. To do otherwise would allow a wrongdoer to convert a property rule into a liability rule by wrongfully appropriating the entitlement and forcing a court later to determine the amount of damages payable to the injured party (with the concomitant error costs inherent in the court’s valuation of a right or entitlement with no readily or easily accessible market value). Simply put, the concept of property rules presupposes that there are certain entitlements or rights to entitlements that cannot be protected by liability rules; the award of damages is inadequate because of difficult valuation problems. Furthermore, the parties themselves can eliminate any transaction costs that arise from an attempt to value unique goods by negotiating a transfer at a very low transaction cost because only two interested parties are

103. See Kronman, supra note 101, at 355-65.
104. Calabresi & Melamed, supra note 102, at 1092.
105. Id.
involved in the transaction.

The reverse situation is also true. When the promisee claims to have a contract right in an entitlement protected by property rules, the court is faced with a difficult dilemma if the breaching party refuses to transfer the entitlement pursuant to a valid, preexisting contract. If the only remedy available is damages, the contract right to the entitlement which is unique and therefore should be protected by property rules, is nevertheless protected by liability rules when damages may not adequately compensate the promisee for the breach. Indeed, damages may overcompensate or undercompensate the aggrieved party. The key, however, is that there is a higher probability that the court will get it wrong. Hence, the need arises for the remedy of specific performance to protect the promisee's right to an entitlement of an unique, non-fungible good.

Determining which contract entitlements should be protected by liability or property rules is the subject of Professor Kronman's article. More importantly, in certain situations in which uniqueness requires that the promisee's contract entitlement be protected by property rules instead of liability rules (in other words, where specific performance is otherwise appropriate), courts may also employ constructive trusts to prevent the conversion of property rules to liability rules. Indeed, the constructive trust may be employed in limited situations in which it is preferable to employ a property rule to protect an entitlement, but where it may be inefficient or administratively impossible to employ such a rule.

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106. See Kronman, supra note 101, at 355-69.
107. Professor Kronman explains this theory:
Under a constructive trust approach, the conversion problem is less serious. Since it eliminates any profit the promisor might make by selling the property to someone other than his original promisee, imposition of a constructive trust should greatly weaken the promisor's incentive to breach the original contract without having first negotiated a release. But a constructive trust is not inherently penal: it does not always require a taker to pay more than is necessary to compensate the owner of an entitlement for his loss. On the other hand, the cost imposed on a breaching party by a constructive trust is not measured by the estimated harm suffered by the promisee (as is the case with an award of money damages). In this latter respect, a constructive trust resembles the injunctive remedies that are commonly used to prevent conversion of property rules to liability rules.
Id. at 380 (footnotes omitted).
108. Professor Kronman also notes the constructive trust's hybrid character:
The use of such a trust remedy seems more consistent than an ordinary damages remedy with the initial decision to protect the entitlement in question with a property rule. . . . The right to insist that a trust be imposed on the money realized from the sale of the promised property is more than a right to money damages and less than a right to pursue
A constructive trust is an equitable invention that arises by operation of law in certain situations to prevent unjust enrichment:

When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. A constructive trustee is under a duty to convey the property to another on the ground that retention of the property would be wrongful. "The usual requirements for imposition of a constructive trust are: (1) a confidential or fiduciary relationship, (2) a promise, express or implied, (3) a transfer of property in reliance on the promise, and (4) unjust enrichment of the transferee."¹⁰⁹

Accordingly, I have often thought it quite odd that a club has never attempted to impose a constructive trust in situations in which the remedy of specific performance would normally be allowable were it not for enforcement problems created by that remedy.¹¹⁰ Although there are a number of technical hurdles,¹¹¹ any artful pleader should be able to state a cause of action for the imposition of a constructive trust against a breaching athlete with a satchel full of ill-gotten booty acquired through his breach. Of course, it might seem odd to allow a club to pursue an unjust enrichment remedy against a player following that club's explicit agreement to modify the contract. If that modification is, however, a product of duress, there appears to be no valid objection to the remedial use of a constructive trust.¹¹² I can only conclude that the equitable remedy of constructive trust has not been used for one of two reasons. First, club lawyers may lack imagination. Second, and more likely, the same objections that apply to the remedy of self-help specific

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¹¹⁰. See supra notes 73-77 and accompanying text.
¹¹¹. For example, the parties are not in a traditional, fiduciary relationship, and, historically, players have lacked bargaining power. Such is not the case, however, with superstars. Further, it is no longer true generally given the advent of player unions and negotiated collective bargaining agreements. Cf. supra note 26 and accompanying text.
¹¹². See infra notes 147-66 and accompanying text.
performance,\textsuperscript{113} apply to the use of the constructive trust remedy: unclean hands and the odor of impropriety.\textsuperscript{114} However, perhaps the remedy of constructive trust should be available in limited situations where the benefits to be gained by promoting efficient breaches are consequential because the entitlement is unique and therefore protected by property rules rather than liability rules.

E. \textit{A Proposed Solution}

This concatenation of remedial shortcomings may lead one to wonder why multi-year professional service contracts are employed at all in professional sports and why they are not breached with impunity by player/promises? Most of these contracts do not create problems because the player lacks sufficient leverage to engage in opportunistic behavior. Similarly, not all players possessing the requisite leverage seek to exact a renegotiated agreement. As in other contractual relationships, many promisees act in compliance with the contract, perform in good faith, and “voluntarily” remain bound by the terms of the contract.\textsuperscript{115}

That most athletes do perform their contracts, however, should not lead us to excuse opportunistic behavior that occurs in the situation in which the player possesses both the leverage and the inclination to exact a renegotiated contract. It is the absence of remedial deterrence that allows the player to act opportunistically. Without an effective remedy, the club is left with very little choice in dealing with the superstar athlete who chooses to breach his contract by seeking to exact a modification or renegotiation of his original contract. Thus, by taking advantage of the shortcomings in our judicial system, the player can expressly breach his contract and act opportunistically to shift wealth from the club to the player. In the long run, this activity will be as detrimental and costly to the club-player relationship as is traditional opportunistic behavior which is normally difficult to detect.\textsuperscript{116}

Long-term contracts in professional sports are assumed to be a desideratum promoting stable relationships and reducing transaction costs

\textsuperscript{113} These objections are detailed \textit{infra} at notes 189-201 and accompanying text.

\textsuperscript{114} See \textit{infra} notes 202-06 and accompanying text.

\textsuperscript{115} In a long-term relational contract, or a relationship in which the parties will negotiate many short term contracts, the parties have a strong incentive to engage in cooperative \textsuperscript{*} behavior and refrain from cheating or acting opportunistically to promote good will in order to benefit the relationship. \textit{See} R. COOTE\textsc{er} & T. ULEN, \textsc{Law and Economics} 243-45 (1988).

\textsuperscript{116} \textit{See supra} notes 47-52 and accompanying text.
occasioned by the negotiation of short-term contracts. The lack of an effective, enforceable remedy, therefore, is inefficient and troubling. Self-help specific performance, which I contend has the potential of thwarting the opportunistic behavior of the player while eliciting full performance, has not yet been discussed.

III. SELF-HELP SPECIFIC PERFORMANCE: AN EFFECTIVE REMEDY

Perhaps one intuitively obvious course for a club faced with the player's demand to renegotiate is to agree to the player's opportunistic demand for renegotiation and then, after the player has fully performed, contest the modification and seek to recover any payments made in excess of those called for under the original contract. Professor Narasimhan has termed such conduct by promisees as a "self-help specific performance remedy." She has argued that in many instances current law improperly allows a promisee to achieve what he could not achieve in an action for specific performance of the contract by successfully later contesting a modification. However, she also argues that self-help specific performance should be allowed in certain situations where the damages remedy is inadequate and specific performance is denied for reasons having to do with inadequacies in the system of judicial administration.

I contend that the context of player renegotiation of sports con-

117. For reasons both practical and tied to various contractual doctrines, virtually every renegotiated player contract will increase the term of the player's service beyond that called for in the original contract. See infra notes 123-32 and accompanying text. Obviously, the club would seek recovery of "excess" payments only for that term of years covered in the original contract. Even if the club could somehow prove that it agreed to the extension at the stated salary only under duress (that is, it agreed to a second contract only upon a threat by the other party to breach the first contract), there is no way to assess damages (no base line or mutually agreed upon figure exists from which to calculate any extorted excess for the extended period). Thus, if a player after completing the second year of a five year contract paying him $500,000 per year renegotiated for $1,000,000 per year for the remaining three years and for an added year, the club would only seek to recover $500,000 for each of the three years covered in the original contract (a total of $1,500,000). It is more likely that the salary for the added year would be characterized by a court as representing a reassessment by the parties of the player's increased value, and would consequently be left undisturbed. But see infra notes 218-21 and accompanying text for a discussion of when such a reassessment might be rejected. Of course, the club may seek to terminate the contract after the third year and not accept performance under the fourth year pursuant to the extorted modification. Thus, implicit in the club's decision to accept the player's performance in the fourth year of the extorted contract is the club's acquiescence to the terms and conditions agreed to for that additional year.
118. See Narasimhan, supra note 8, at 62.
119. See generally id. at 65-77.
120. Id. at 86-89.
tracts clearly presents such a scenario: damages are inadequate,\textsuperscript{121} and the chief bar to specific enforcement derives from the inability of courts to evaluate and police promisor performance.\textsuperscript{122} Before turning to this argument, it may be helpful to briefly discuss modern modification doctrine, the related concept of duress, and the theoretical framework they may provide for a club to enforce a self-help specific performance remedy.

A. The Law of Modification

1. Modifications Not Backed By Consideration

Traditionally, courts would not enforce a contract modification obligating the promisor to do nothing more than what was required under the original contract. This notion flows directly from the basic contractual doctrine of modification, traditionally defined as benefit to the promisor and detriment to the promisee; if the promisor in a modification did not provide something of additional value, the modification was not supported by consideration and was thus invalid. This is commonly known as the pre-existing duty rule: the performance or a promise to perform a pre-existing duty is not consideration sufficient to support a contract or a modification.\textsuperscript{123} The Restatement (Second) of Contracts ostensibly adopts the pre-existing duty rule,\textsuperscript{124} though later sections of the same treatise rob it of much of its force.\textsuperscript{125}

Because the pre-existing duty rule is an explicit offshoot of formalistic consideration doctrine, it has the potential to be somewhat inflexi-

\textsuperscript{121} See supra text accompanying notes 60-61.

\textsuperscript{122} See infra text accompanying notes 169-71 and 177-79. In the sports context, as in any personal services contract, there may also be a concern for infringing the liberty interests of the promisee if he is compelled to perform. I conclude that the self-help specific performance remedy does not impermissibly violate the liberty interests of the promisee. See infra notes 182-83 and accompanying text.

\textsuperscript{123} For cases applying the traditional rule, see, e.g., City of Miami Beach v. Fryd Construction Corp., 264 So. 2d 13 (Fla. App. 1972) (contractor could not modify contract to receive additional compensation for providing item called for in original contract); Rhoades v. Rhoades, 40 Ohio App. 2d 559, 562, 321 N.E.2d 242, 245 (1974) ("It is elementary that neither the promise to do a thing, nor the actual doing of it will constitute a sufficient consideration to support a contract if it is merely a thing which the party is already bound to do, either by law or a subsisting contract with the other party."). For a general discussion of the pre-existing duty rule, see E.A. Farnsworth, Contracts § 4.21 (1982).

\textsuperscript{124} "Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration; but a similar performance is consideration if it differs from what was required by the duty in a way which reflects more than a pretense of bargain." Restatement (Second) of Contracts § 73 (1981) [hereinafter Restatement (Second)].

\textsuperscript{125} See id. § 89, discussed infra notes 137-44 and accompanying text.
ble in its application. In other words, easy techniques for avoiding its application exist. The most obvious is simply for the promisor to agree to do slightly more than that called for under the original contract, thus providing additional consideration that would circumvent the pre-existing duty rule.\footnote{See E.A. Farnsworth, supra note 123, § 4.21, at 273.} The only "Restatement limitation" on this potential method of avoidance is that the new performance must differ from the originally promised performance in a way that reflects more than a "pretense of bargain."\footnote{Restatement (Second) § 73.}

In the sports context, a player will almost invariably request a contract extension as part of his demand for renegotiation. This is true for two simple reasons, one legal and one practical. On the legal side, players as a class (and particularly those likely to be renegotiating their contracts) are almost invariably represented by counsel in negotiations; any competent lawyer will be aware of the pre-existing duty rule and be absolutely sure to avoid it. Because a player has already contracted to perform to the utmost of his ability, and because performance is difficult to measure in any event, the player cannot agree to "perform better" or "try harder"; thus, the only component of his bargained-for service that can readily and objectively be increased is its term. Therefore, a lawyer renegotiating a player's contract will (if for no other reason than to protect himself from a malpractice suit) virtually always seek to extend the term of the contract.\footnote{This is essentially what happened in Dickerson's case; the three year extension he had agreed to with the Rams became a four year contract when he signed with the Colts. See supra text accompanying notes 41-42.}

This legal pressure to extend a contract almost certainly coincides with the practical desires of the player. Nearly all players seeking renegotiation are either superstars or previously mediocre players who are coming off a good year (or series of years).\footnote{Eric Dickerson arguably straddled both categories: a star player coming off a series of exceptional (even record-breaking) years. See supra text accompanying note 32. An example of a player purely in the latter category might be wide receiver Ricky Sanders of the Washington Redskins. After a record-setting 193 yard receiving performance in Super Bowl XXII, Sanders renegotiated his contract (which had one year remaining on it) to a new "long-term" deal worth substantially more than the $200,000 he was to make in 1988. See Redskins' Sanders Gets New Deal On Contract, Wash. Post, April 12, 1988, at E2, col. 1.} For their own security and protection, players in these categories (at the height of their bargaining power) will want to lock the club into a long-term relationship at a high salary (they will also seek such factors as a guaranteed salary or a no-trade clause). Renegotiated contracts are therefore almost inva-
riably negotiated for an extended term, even absent the legal need to escape the pre-existing duty rule. Also, it is extremely unlikely that a court would consider this extension as merely a “pretense of bargain.” For one thing, the added term of service probably is valuable to the club. Furthermore, it is a hallowed axiom of contract law that courts will not inquire into the adequacy of consideration. Because a lengthened term of service can hardly be called sham consideration, courts would have difficulty holding that the presence of extra years reflect no more than a pretense of bargain. Thus, it is both simple, and consistent with the player’s selfish interests, to seek a renegotiated contract for a longer term, and thus provide added consideration that will avoid the pre-existing duty rule.

In addition to the ease with which the traditional pre-existing duty rule can be evaded by including minimal additional consideration, concerns may be raised that the rule is both underinclusive and overinclusive. It is underinclusive in that its formalism may keep it from

130. Certainly the service of a healthy Eric Dickerson would have been of great value to the Rams, who missed the playoffs in 1987. His service was of great value to the Colts, who made the playoffs (as a wild card team) for the first time since their move to Indianapolis.

Too long a commitment is, of course, dangerous to the club. Witness the case of relief pitcher Dan Quisenberry and the Kansas City Royals. Quisenberry, who has been relatively ineffective the past several years, is still set to earn $1.1 million per year through 1990 (presumably agreed to in anticipation of performance), not to mention six and seven figure compensation potentially running through 2025 (although that would be mostly in the form of deferred compensation). See Quiz Questions, Sports Illustrated, April 25, 1988, at 97.

131. See, e.g., Carroll v. Lee, 148 Ariz. 10, 13-14, 712 P.2d 923, 926-27 (1986) (en banc) (“[I]t is of no consequence that the parties exchanged ‘unlike services’. Any performance which is bargained for is consideration . . . and courts do not ordinarily inquire into the adequacy of consideration.”); Pugh v. See’s Candies, Inc., 116 Cal. App. 3d 311, 325, 171 Cal. Rptr. 917, 925 (1981) (noting the “general contract principle that courts should not inquire into the adequacy of consideration”); E.A. Farnsworth, supra note 123, § 4.21, at 274 (a court “will not generally inquire into the fairness of the exchange”).

132. Another commonly accepted way to avoid the pre-existing duty rule is for the parties to rescind their former contract, leaving them free to enter into a new contract on the desired terms. See E.A. Farnsworth, supra note 123, § 4.21, at 274. Courts will not generally weigh the fairness of the rescission or the new agreement. Id. Because the player is likely in practice to demand a term exceeding that in the original contract (to lock in the higher salary for as long as possible) even if this route to renegotiation is chosen, the resulting “new” contract will look very much like the modified contract. The difference is one of form only; functionally, the player will have achieved the same thing (avoidance of the pre-existing duty rule while securing a higher price for the same performance). The club’s only possible remedy, some sort of duress claim, would be available whether the original contract is modified or torn up and replaced.

The Restatement (Second) rejects as fictitious and possibly inadequate the formalistic rule that the parties may rescind an existing contract and simultaneously enter into a new contract calling for similar performance on one side, with the new promises furnishing consideration for each other. See Restatement (Second) § 89 comment b.
deterring precisely the kind of activity it is designed to prevent—opportunistic (or even breaching) behavior by promisors.\textsuperscript{133} It takes no effort at all to imagine a case where a promisor threatens, expressly or impliedly, to breach a contract in order to extract concessions from a promisee; indeed, it can be argued that the renegotiation of a superstar’s contracts often presents precisely such a scenario. In these cases, all the extorting promisor need do is agree to some minor increase in his own performance and the pre-existing duty rule of the Restatement (Second), section 73, is rendered impotent.\textsuperscript{134} If the promisor truly has enough leverage to extort a modification, he can almost certainly dictate its terms, particularly regarding his own performance. Thus, the promisor can ensure that his own increased obligation is substantial enough to escape the toothless “pretense of bargain” standard but not so substantial as to impose an unwanted burden. Accordingly, the pre-existing duty rule may be ineffective in deterring the kind of opportunistic behavior it is meant to stop.

The rule also may be overinclusive, functioning (and thus voiding modifications) in cases where considerations of fairness suggest that a modification should be allowed.\textsuperscript{135} Unforeseen circumstances may conspire to render untenable performance by the promisor at the agreed-upon price.\textsuperscript{136} In such circumstances, it is fair and appropriate to enforce a freely agreed-upon modification whereby the promisor receives increased compensation for rendering the same performance. Such reasoning has led to the erosion of the pre-existing duty rule\textsuperscript{137} and to the

\textsuperscript{133} See Restatement (Second) § 73 comment c (“an unscrupulous promisor may threaten breach in order to obtain such a bonus. . . . the lack of social utility in such bargains provides what modern justification there is for the rule that performance of a contractual duty is not consideration for a new promise”). Cf. Muris, supra note 47, at 529-30 (enforcing a formal consideration rule might void some modifications based on opportunism while allowing some modifications where no opportunism occurred).

\textsuperscript{134} The promisee still has the potential defense of claiming duress and seeking to avoid the contract. This remedy is discussed infra notes 148-63 and accompanying text.

\textsuperscript{135} See Restatement (Second) § 73 comment c (“the rule has not been limited to cases where there was a possibility of unfair pressure, and has been much criticized as resting on scholastic logic”).

\textsuperscript{136} See id. § 89 comment b, illustration 1 (modification increasing promisor’s compensation after he unexpectedly encountered solid rock while excavating a cellar enforceable).

\textsuperscript{137} See id. § 73 comment c (“in some states the [pre-existing duty] rule has simply been repudiated”); E.A. Farnsworth, supra note 123, § 4.21, at 274 (“Courts have become increasingly hostile to the pre-existing duty rule.”), § 4.22, at 277 n.5 (Wisconsin, Minnesota, and New Hampshire have abandoned the rule). But see Robison, Enforcing Exorted Contract Modifications, 68 Iowa L. Rev. 699, 748 n.178 (1983) (older pre-existing duty rule and pure consideration analysis still prevalent in many jurisdictions).
adoption by section 89 of the Restatement (Second) of a rule that coun-
tenances certain "fair and equitable" modifications not supported by consideration.\footnote{138}

Although it represents an important evolution in mainstream con-
tact doctrine, section 89\footnote{139} should not overly concern us because few renegotiated sports contracts will fall within its confines. Most such contracts will contain additional consideration in the form of an exten-
sion of the promisor's period of service,\footnote{140} thus falling entirely outside the purview of section 89 (which deals only with contracts lacking consider-
ination). If for some reason the contract lacked this additional con-
ideration, a player could conceivably argue that the modification should nevertheless be enforced under section 89 rather than invalid-
dated under section 73. But such an argument is likely to run into at least one serious roadblock: the section 89 requirement that the modifi-
cation be "fair and equitable in view of circumstances not anticipated by the parties when the contract was made."\footnote{141}

Even if, as some have argued, the Restatement (Second) is fairly liberal in enforcing modifications by focusing on circumstances not re-
listically foreseen,\footnote{142} rather than those not foreseeable,\footnote{143} it is difficult to imagine any such circumstances being present in the sports context. Most players could be expected to demand increased salaries for one of two reasons: either they have performed "surprisingly" well (presumably, had their level of performance been anticipated when the original contract was signed, a higher price would have been agreed on), or a

\footnote{138. The rule adopted by the Restatement (Second) provides that:
A promise modifying a duty under a contract not fully performed on either side is bind-
ing . . . if the modification is fair and equitable in view of circumstances not anticipated
by the parties when the contract was made . . . .}

\footnote{139. I concentrate on the Restatement (Second) approach throughout this article because it both represents emerging trends from among the crazy quilt of state approaches to contract law, and because it helps shape future trends. See, e.g., Angel v. Murray, 113 R.I. 482, 493, 322 A.2d 630, 636 (1974) (The Restatement (Second) reflects a modern trend regarding the pre-existing duty rule).}

\footnote{140. See supra notes 123-28 and accompanying text.}

\footnote{141. Restatement (Second) § 89(a) (emphasis added).}

\footnote{142. See Mather, supra note 138, at 619 n.16.}

\footnote{143. See Restatement (Second) § 89 comment b ("a frustrating event may be unantic-
pated for this purpose if it was not adequately covered, even though it was foreseen as a remote possibility").}
competing league has been formed and in general driven salaries up (through increased competition for limited talent, which occurred during the brief life of the United States Football League). Neither of these situations would seem to be within the scope of the "unanticipated circumstances" envisioned by the drafters of the Restatement (Second). They seemed more concerned with traditional doctrines, such as impossibility or frustration of purpose, that realistically prevented the promisor from completing his performance within the parameters specified in the contract.  

In addition, this would seem a potentially dangerous argument for the players to make. It would seem to open the door, at least in principle, for a converse argument by the owners: if salaries generally are experiencing a downward trend (an admittedly rare trend in recent years), or if a competing league folded (thus reducing competition for player talent), "unanticipated circumstances" would justify contractual modifications that reduce salaries. Therefore, it seems likely that few, if any, of the renegotiated sports contracts lacking consideration (which may itself be a virtually null set) could be considered binding under section 89; most would undoubtedly be covered by section 73 and thus be invalidated.

In short, a modification of an athletic contract unsupported by new consideration is likely to be void. But most modifications will be supported by new consideration, outside the gambit of sections 73 and 89, and thus open to challenge only on other grounds. Moreover, a club is unlikely to contest a modification, whether supported by consideration or not, until after performance has been rendered. Doing otherwise would prevent the club from receiving the services of the player. The club would thus be in the position to seek restitution for payments already made, rather than merely seeking to avoid a modification. In this situation, courts apply the standards of duress because that is the

144. See id. comment b, illustrations 1-4.

145. In theory, there is another unrelated challenge a club could make to a player's claim that a modification should be validated under section 89 (or analogous state law principles). The club could argue that the contract did not fall into the category of those "not fully performed on either side," as required by section 89. The argument would be that the club, by regularly and promptly paying installments of the player's salary as required under the contract, had performed as fully as it was able at the time of the breach, even though there was time (and payments) still remaining on the contract. If this argument prevailed, section 89 would not apply at all (the contract would not be executory). Such an argument is unlikely to succeed, however, because a contract is generally considered executory until payment of the final installment. See, e.g., Ellis v. Butterfield, 98 Idaho 644, 651, 570 P.2d 1334, 1341 (1977) (Bristline, J., dissenting).

146. Narasimhan, supra note 8, at 67 n.30; cf. E.A. Farnsworth, supra note 123, § 4.22, at
chief available grounds of challenge to a modified sports contract supported by consideration. I now turn to a brief discussion of the doctrine of duress.

2. Consideration-Backed Modifications: The Defense of Duress

The only realistic alternative for a club faced with an opportunistic player who extorts a modification backed by consideration is a claim of duress, more specifically, in the modern parlance, "economic duress." The Restatement (Second) recognizes a rather broad (and rather vague) category of duress. A manifestation of assent induced by an "improper threat" that leaves the victim "no reasonable alternative" renders a contract voidable due to duress; a threat is improper if it represents a "breach of the duty of good faith and fair dealing." Under this formulation, a successful claim of duress requires a showing of three elements: an improper threat, the lack of a reasonable alternative, and the inadequacy of ordinary remedies for breach.

Regarding the impropriety of the threat, the modern trend recognizes a threat to breach a contract as improper. A threat by a highly

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278 (whereas the pre-existing duty rule merely allows a victim to avoid performing on a new promise, a duress standard allows a victim to seek restitution for any performance already rendered pursuant to that promise).

147. The two other traditional methods of avoiding a contract would seem inapplicable to the type of contract under discussion. The doctrine of undue influence developed to protect persons who were suffering from a weakness and were subsequently subjected to improper persuasion by those in a special position to exploit that weakness. For a brief discussion of the doctrine of undue influence, see J. DUKE MINER & S. JOHANSON, WILLS, TRUSTS, AND ESTATES 150-52 (3d ed. 1984).

Unconscionability is a broad concept that allows courts to police agreements and remedy grossly unfair terms:

The unconscionability doctrine represents an ambitious effort to bring the traditional categories of unfairness—fraud, duress, incapacity—under a single analytical umbrella.

... [U]nconscionability represents the subjective reactions of the particular decision-maker to the unfairness of a particular transaction.

Goetz & Scott, Relational Contracts, supra note 56, at 1136 n.111. Neither doctrine is applicable in the current sports context.

148. See Restatement (Second) § 176 comment a ("The rules stated in this Section recognize as improper both the older categories [of threats of physical violence or seizure or detention of goods] and their modern extensions under developing notions of 'economic duress' or 'business compulsion.' "). For a representative modern treatment of economic duress, see Totem Marine Tug & Barge, Inc. v. Ayleska Pipeline Serv. Co., 584 P.2d 15 (Alaska 1978) (recognizing economic duress as a product of the law's increasing role in policing inequitable or unfair exchanges).

149. See Restatement (Second) § 175(1).

150. Id. § 176(1)(d).

151. Mather, supra note 138, at 621 & n.20.

152. Restatement (Second) § 176 comment e. A threat not to perform is not per se improper; it must violate the duty of good faith. Id.; see also Amoco Oil Co. v. Ashcraft, 791 F.2d
tallent player, the sole object of which is to extort more money from his employer for what is essentially little more than his already promised performance, seems to fit this category quite nicely. A sophisticated player, however, might not overtly threaten a breach of contract; he might instead merely imply that unless compensated at a higher rate he would "dog it," or not put forth his best effort.\textsuperscript{153} The threat need not be explicit to constitute duress, "it may be inferred from words or other conduct."\textsuperscript{154} And even if "dogging it" were not a technical breach of contract (though it probably would be, because most player contracts, including the NFL-SPC, contain a "best efforts" clause), it would still constitute opportunistic behavior, and perhaps be sufficient to constitute duress under the \textit{Restatement} test.\textsuperscript{155}

The second and third (related) elements necessary to show duress are the lack of reasonable alternatives for the victim to secure replacement performance and the inadequacy of ordinary remedies for breach. The mere availability of some legal remedy will not suffice if it will not afford effective relief to the victim.\textsuperscript{156} Such would seem to be the case in sports contracts, where the only remedy traditionally available upon breach may be a negative injunction, which does not provide adequate recompense to the club.\textsuperscript{157} The presence of a non-legal remedy (substitute performance) is generally thought a reasonable alternative.\textsuperscript{158} The type of personal service called for in a sports contract, however, is the quintessential example of a unique good for which no true substitute exists. No one player performs quite like another. A plausible case can thus be made that no true substitute performer exists and that ordinary remedies are inadequate to compensate a club in the event of the player's threat to breach. This lack of an effective remedy, combined with the impropriety of the player's threat, establishes a prima facie case of duress.

\textsuperscript{519, 523 (7th Cir. 1986) ("To extract a concession by threatening a deliberate breach of a clear contractual undertaking can be duress.") (Posner, J.); J. CALAMARI & J. PERILLO, \textit{CONTRACTS}, § 9.6, at 346-47 (3d ed. 1987) ("recent cases have held that a threat to breach a contract constitutes duress if the threatened breach would, if carried out, result in irreparable injury because of the absence of an adequate legal or equitable remedy or other reasonable alternative").

\textsuperscript{153} Such a maneuver is easily imaginable given the parameters of the hypothetical. \textit{See supra} notes 28-46 and accompanying text.

\textsuperscript{154} \textit{Restatement (Second)} § 175 comment a.

\textsuperscript{155} \textit{See id.} § 176 comment e ("a threat may be a breach of the duty of good faith and fair dealing under the contract even though the threatened act is not itself a breach of the contract").

\textsuperscript{156} \textit{Id.} § 175 comment b.

\textsuperscript{157} \textit{See supra} notes 59-116 and accompanying text.

\textsuperscript{158} \textit{Restatement (Second)} § 175 comment b.
A club would have to overcome at least two other obstacles to succeed with a duress claim. First, it would have to overcome a possible reluctance by a court to find that a sophisticated, wealthy corporate defendant could be the victim of duress by an individual player. This would be primarily a matter of stressing the particular context, or highlighting the considerable bargaining power of a superstar player (due in some measure to the intense pressure exerted by fans to have a successful club). The cases of a club not acceding to a superstar’s demand for renegotiation are few and far between. Second, the club would have to show it did not affirm the modification; in the context of a club seeking restitution for “excess” payments, this obligation would be transformed into an affirmative one to disaffirm the modified contract within a reasonable time. However, this time does not commence until after the threat has ceased, and a club should have little difficulty proving that it faced a withholding by the player of his services if it disaffirmed at any time prior to the expiration of the contract. Neither the nature of the victim nor the requirement of disaffirmance would thus seem to preclude a club from asserting the duress defense.

The concept of duress thus focuses equally on the conduct of both the promisor (via the improper threat inquiry) and the promisee (via

159. Cf. E.A. Farnsworth, supra note 123, § 4.28, at 314 (courts reluctant to apply the doctrine of unconscionability in favor of sophisticated corporations).
160. Id. § 4.19, at 267.
161. Id.
162. See Ise, & Assocs. v. New Eng. Mut. Life Ins. Co., 801 F.2d 536, 548 (1st Cir. 1986) (Maletz, J., dissenting in part) (“Of course, there can be no affirmation unless the duress has ended.”); Austin Instrument Co. v. Loral Corp., 29 N.Y.2d 124, 272 N.E.2d 533, 324 N.Y.S.2d 22 (1971) (delay in disaffirming by contractor tolerated because it feared further withholding of performance by its subcontractor, which would put the contractor in an intolerable position; notice of intent to seek recovery not given until after subcontractor had rendered performance). It might be argued that this reasoning completely vitiates the requirement of disaffirmance in this context. Perhaps it does, but the near impossibility of finding a substitute performer would result in a club being left without an effective remedy if the disaffirmance requirement were more strictly enforced. The limits on player movement, voluntarily agreed to by the players in every major sport in their respective collective bargaining agreements, add to the difficulty of finding a substitute. Even if an acceptable substitute existed, he would not be realistically available on what passes for the “open market.” See supra note 26 and accompanying text.
163. An idea conceptually related to the disaffirmance requirement is that of protest. At least one court has required that in order to be later able to challenge a modification, a promisee must protest that modification before consenting. See United States ex rel. Crane Co. v. Progressive Enters., Inc., 418 F. Supp. 662, 664 (E.D. Va. 1976). This seems ridiculous. A promisee can protest an equitable amendment or silently agree to an inequitable one. Moreover, if the promisor is truly exercising duress, he could easily compel a promisee to not protest a modification, thus foreclosing the promisee from later challenging the duress. See Mather, supra note 138, at 629 n.39.
the lack of reasonable alternative/adequacy of remedy inquiry). Conversely, the pre-existing duty rule and section 89 focus largely on the acts and motives of the promisor. This difference seems to make duress the preferable alternative when policing opportunism because it theoretically allows courts to deter overtly both promisor and promisee opportunism.\footnote{164} Moreover, because "the principal economic function of duress has been to redress unjust enrichment,"\footnote{165} it seems the ideal vehicle by which clubs could attempt to recover payments extorted from them by players threatening a breach of contract. Therefore, duress is the most likely over-arching legal theory under which a club will contest a modification.\footnote{166} Because a club is in effect achieving self-help specific performance if it successfully contests a modification, however, a series of other issues relating to the general propriety of specific performance in that context are raised.

B. Specific Performance Issues

1. Scope of the Remedy

The remedy of specific performance is traditionally only available at the discretion of the court,\footnote{167} a discretion that is seldom exercised. In most circumstances, the legal remedy of damages must inadequately protect the promisee before this equitable remedy is deemed proper.\footnote{168} I have already contended that the damage remedy will not protect a club when the player seeks renegotiation (indeed, no practical damage remedy exists at all),\footnote{169} and that no substitute is available on the "market." This basic hurdle would thus seem easily cleared, and specific performance might seem the only adequate remedy in the situation described. Even if specific performance seems to be the theoretically appropriate remedy, however, it will not be awarded if any of a series of

\footnote{164} The topic of promisee opportunism occupies the bulk of Professor Narasimhan's time. \textit{See generally} Narasimhan, \textit{supra} note 8.

\footnote{165} J. CALAMARI & J. PERILLO, \textit{supra} note 152, § 9.8, at 349.

\footnote{166} One further objection in equity to the club's claim of duress may be raised—that the club had "unclean hands" when it agreed to the modification knowing it would later contest that modification. Thus, the objection is that the club violated the duty of good faith in the performance of the contract mandated by section 205 of the Restatement. The "unclean hands" notion is discussed \textit{infra} at notes 202-05 and accompanying text.

\footnote{167} \textit{See} RESTATEMENT (SECOND) § 357(1). \textit{See generally} J. CALAMARI & J. PERILLO, \textit{supra} note 152, §§ 16-17.

\footnote{168} \textit{See} RESTATEMENT (SECOND) § 359(1) ("Specific performance . . . will not be ordered if damages would be adequate to protect the expectation interest of the injured party.").

\footnote{169} \textit{See supra} notes 59-72 and accompanying text.
other circumstances are present. These circumstances may collectively be thought of as defenses to specific performance, although not all of them reflect burdens on the party from whom performance is sought, and at least three would seem to be present in the hypothetical.

First, specific performance will not be granted unless the terms of the contract are sufficiently definite to provide a basis for an appropriate judicial order. Most sports contracts, which call for little more than a player's "best efforts," are sufficiently indefinite so as to preclude enforcement of the contract by judicial order. The potential for injury, the ability of opposing clubs to "control" (to some extent) a player's performance (through outstanding defense, for example), and game circumstances affecting a player's use are all factors which conspire to render absurd any court order to gain a certain number of yards or carry the ball a certain number of times. In short, the player's performance is not wholly within his control.

Second, specific performance will not be available if the burden of supervision or enforcement is onerous. The two factors most relevant here are difficulty in measuring the quality of performance rendered and the burden imposed by supervision over an extended period of time. Difficulties in assessing the performance of an athlete are obvious; sub-par performance might have been caused by a nagging injury, other clubs "having his number" defensively, or deliberate suboptimal performance designed to secure a contract modification. The performance will also generally have to be monitored over an extended period: most athletes seek to renegotiate in the off-season, meaning they have at least one year left on their contracts.

Third, and perhaps most significantly, courts have traditionally been adamant in refusing specifically to enforce personal service contracts because of concerns both with the aura of involuntary servitude this would create and with the perceived undesirability of compelling the continuance of personal association after disputes have

170. See Restatement (Second) § 362.
171. Id. § 366 comment a.
172. A player who had only a short time remaining on a contract (say, one year) might be tempted to perform for that year and just seek a higher salary when it comes time to negotiate the new contract (unless he fears an inability to replicate his good performance and therefore anticipates a loss in bargaining power before the new contract can be negotiated). It thus seems likely that most players seeking to renegotiate will have extended terms remaining on their original contracts, thus exacerbating the difficulty of supervision.
173. See Restatement (Second) § 367(1); Stevens, Involuntary Servitude by Injunction: The Doctrine of Lumley v. Wagner Considered, 6 Cornell L.Q. 235, 239-47 (1921).
arisen. These liberty concerns seem equally present in athletic contracts. Thus it would seem that liberty concerns, as well as problems of indefiniteness and judicial supervision, all work to prevent specific performance of a sports contract.

2. The Virtues of Self-Help Specific Performance

The remedy of self-help specific performance has the potential to make the promisee club whole, avoid all the defenses that would preclude the specific performance of a personal service contract, and, more generally, police opportunism. Self-help entails the club agreeing to a modification and then, after performance has been rendered, suing (under what I believe to be the only theory open to it, duress) to recover payments made for the years covered under the original contract that exceeded the original contract price. It seems clear that traditional legal remedies are inadequate to compensate a club should a superstar player breach his contract. Equitable specific performance might be theoretically appropriate, but that remedy is precluded by concerns of judicial administration and fears of infringing on a promisor’s liberty.

One commentator has argued that, as a general matter, promisors who could not compel specific performance under a contract for such reasons should be allowed the remedy of self-help specific performance. The notion is simple. Specific performance is in theory the only remedy that can make a promisee whole, but it will not be awarded ex ante for practical or ideological reasons. Thus, allowing promisees the option of self-help specific performance ex post will, because of the timing of that remedy, compensate the promisee while avoiding the problems associated with ex ante enforcement. The logic of such an argument translates fairly well into the sports context, although that scenario may present a few wrinkles not present in many other contractual relationships.

Turning first to the issue of the definiteness of contract terms, Professor Narasimhan proposes a sensible distinction based on the nature of the uncertainty. If the modification is made in the process of defining the performance due pursuant to a good faith disagreement, it

174. See Restatement (Second) § 367(1) comment a.
175. See supra notes 147-66 and accompanying text.
176. See supra notes 170-74 and accompanying text; see also Narasimhan, supra note 8, at 86, 91.
177. See Narasimhan, supra note 8, at 86-89, 91-94.
should be enforced. But if the modification does not resolve a valid disagreement about the scope of performance, "the promisee should have a right to receive self-help specific performance, even if the terms would have been uncertain for the purposes of awarding specific performance." 178 A modification in the former category is likely to reflect merely a resolution of confusion; one in the latter category is more likely to be the product of opportunism.

Although Professor Nakasimham does not give an example, one is easy to formulate: in a contract for the painting of a portrait, a modification covering who pays for the necessary supplies or when the final product is due, if not covered in the original contract, would be enforced because it further defined the performance due; a modification quadrupling the price for no apparent reason, when the work was half done and it was too late to acquire a substitute in time to have the finished work ready when it was needed, would not be enforced. Renegotiations of athletes' contracts fall into the latter category. The performance due (a player's "best efforts") is clearly set out in the original contract; the real problem is measuring the performance rendered. The indefiniteness bar to specific performance thus collapses into the difficulty of a supervision bar.

Because of the timing of the self-help specific performance remedy, problems with judicial supervision will probably disappear. In essence, courts will award specific performance after the fact, so problems of extended periods of supervision and difficulty of measuring performance are simply not present. 179 The promisor has already willingly rendered performance, and there will be no reason to believe it was anything but the player's promised "best effort." 180 The problems of judicial supervision and performance valuation are totally avoided when self-help specific performance is awarded. 181

178. *Id.* at 87.
179. The difficulty of measuring performance is particularly troublesome in team sports because one player's performance is so dependent on that of his teammates and even opponents.
180. See Narasimhan, *supra* note 8, at 87 ("[T]he court is involved in the remedy at the stage when performance is satisfactorily completed.").
181. *Id.* ("The court does not have to enforce and oversee the contract's performance. It simply refuses to enforce the modification."). Some have argued that specific performance should be more routinely awarded, suggesting that the appointment of special masters (financed by the parties) would help reduce the increased judicial costs of overseeing specific performance. See Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 293-94 (1979). This would not really be of help in the sports context; the problem is not so much the cost of supervision as the difficulty of valuation, which is incredibly difficult even for an expert.

A related argument against awarding specific performance more generally is that the prestige
Finally, self-help specific performance largely avoids infringing upon a promisor's liberty interests. The aura of forced association and involuntary servitude will be avoided because at the time of the judicial action, the promisor already will have rendered voluntarily full performance.\textsuperscript{182} Also, it seems odd to trumpet the sanctity of promisor freedom when the law is perfectly willing greatly to infringe upon that freedom through the issuance of a negative injunction.\textsuperscript{183} Thus, the concerns of personal liberty that generally preclude specific performance do not seem compelling in the case of self-help specific performance.

There are only two factors in the sports context that appear contrary to the use of self-help specific performance remedy. First, the club will invariably be seeking partial restitution of payments already made, rather than merely asking a court to refuse to enforce a modification. In this context, courts have traditionally applied the fairly strict standards of duress.\textsuperscript{184} But, because a claim of duress can plausibly be made out by a club, the fact pattern presented by the hypothetical should not preclude the use of self-help specific performance.\textsuperscript{185}

Second, one of the reasons self-help specific performance does not infringe upon liberty interests is because it is not judicially enforced until the contractual relationship between the parties has ended. In the case of athletes whose movement is hindered by various restrictions on free agency, however, it is commonly expected that a player will remain with a club for an extended period, often signing several contracts over that period. Resort by the club to self-help specific performance can reasonably be expected to preclude (or at least greatly chill) any future contractual relationship between the parties (unless the modified contract was the player's last before retiring). This puts a burden on both the player, who cannot freely move to another club, and the club, who will lose the future services of the player and probably be forced, in practice, to cut him—terminate the relationship between the club

\textsuperscript{182} See Narasimhan, supra note 8, at 92.

\textsuperscript{183} Id. at 92-93; see also Kronman, supra note 14, at 373 & n.73 (1978). The availability of a negative injunction in sports cases is discussed supra notes 78-92 and accompanying text.

\textsuperscript{184} See Narasimhan, supra note 8, at 67 n.30.

\textsuperscript{185} See supra notes 147-66 and accompanying text for a discussion of duress in the sports context.
and the player by releasing the clubs claim to the player's services, thus rendering him a "free agent," free to sign with any other club--or to trade him. In a trade, however, the club might be forced to accept less than fair value in return, since potential trading partners will be aware of the club's need to trade the unhappy player. This preclusion of future relationships seems unavoidable, and is a small price to pay for a means of deterring promisee opportunism stemming from the inadequacy of legal remedies.\textsuperscript{186} The chilling of the parties' future contractual relationship that would occur if self-help specific performance were available to a club may be little more than that already occurring between a player who constantly makes inflated salary demands and a club that lacks an adequate remedy to prevent extorted modifications.

Moreover, this chilling effect does not occur if the contract being specifically enforced is the parties' terminal contract. The parties have a strong incentive to cheat and act opportunistically when engaged in "end-game" strategy.\textsuperscript{187} In other words, in long-term contracts parties have mutual incentives not to cheat and to cooperate with each other in order to maintain a viable working relationship.\textsuperscript{188} In a short-term, contingent contract, the last contract in a series of contracts, or at the end of a long-term relationship, parties possess incentives to cheat or to behave opportunistically since cooperative behavior goes unrewarded.\textsuperscript{189} Although there is no supporting empirical evidence, it is thus presumed that professional athletes will not engage in opportunistic behavior at the beginning of their careers. Instead, it is assumed that players who act opportunistically do so at the end of the game, the end of their short-lived careers, and that the contractual relationship between the club and the athlete is over at the time the self-help remedy of specific performance is enforced ex post.

\textsuperscript{186} It might also be worth noting in this regard that the law will sometimes force parties to continue an employment relationship even though their antagonism has led to litigation. This is the case, for example, whenever a court orders an employee reinstated upon proof of a discriminatory firing or violation of a collective bargaining agreement. See Linzer, \textit{supra} note 100, at 128 & nn.115-16 (1981). It may be true that the authority to do this is statutory, and the rights violated are constitutional or rooted in principles of labor law; my point is merely that the parties' incompatibility need not \textit{necessarily} preclude any future relationship between them.

\textsuperscript{187} \textit{See supra} notes 47-52 and 115-16 and accompanying text.

\textsuperscript{188} \textit{See} Goetz & Scott, \textit{Relational Contracts, supra} note 56, at 1148-49.

\textsuperscript{189} \textit{See} R. Cooter & T. Ulen, \textit{supra} note 115, at 244-45.
3. Theoretical Objections to Self-Help Specific Performance

It is well-settled that contract law is generally structured to allow a promisor a choice between performing and breaching and paying damages. The refusal routinely to award specific performance, particularly if monetary damages are deemed adequately compensatory, reflects this notion. Stated simply, the economic justification for this rule is the attempt to approach Pareto optimality, that state of affairs where no change can make a party better off without making another party worse off. Allowing a party to breach a contract may be Pareto-efficient: it may leave the breacher better off while leaving the victim of the breach (if compensated) indifferent. If the breacher is allowed to transfer enough of his gain to the victim so as to leave the latter indifferent between performance and breach (usually the cost of obtaining substitute performance), while still retaining enough to be better off by breaching, a legal rule allowing him to breach and pay damages will be, at a crude level of generality, efficient.

The damage remedy may often be undercompensatory, however; it may not (or not fully) include, for example, search costs in locating a substitute, litigation costs, or the idiosyncratic value attached by the victim of the breach to performance. If routinely awarded, specific performance compensates for these costs. Such routine application, however, has the disadvantage of forcing the parties to negotiate anew to avoid the remedy of specific performance. This would allow the party subject to the breach (the promisee) to extract from the other (the promisor) "damages" up to the value gained by the promisor from the breach, minus one dollar, to consent to the release from the imposition of the remedy of specific performance. Higher transaction costs associated with establishing the "release figure" will inflict a deadweight loss on society. The Coase Theorem, however, adequately explains that the outcome will be the same in either situation: the entitlement will move to the highest bidder or the party who places the highest value on it.

190. For a discussion of the theory of efficient breach, see supra text accompanying note 100.
191. See Linzer, supra note 100, at 113 & n.11.
192. In economic parlance, this is known as the "Kaldor-Hicks Compensation Principle." See id. at 113-14 & n.12.
193. See generally Schwartz, supra note 181, at 276.
194. In this two-party bargaining situation, the Coase Theorem suggests that "in an environment where there are no obstacles to transacting, legal rights will tend ultimately to be allocated through trade if necessary, to the party that values them most highly, regardless of their initial assignment." C. GOETZ, LAW AND ECONOMICS: CASES AND MATERIALS 52 (1984); see Coase, The
Enforcing self-help specific performance in the sports context does not really implicate these concerns because it is unlikely that efficient breaches are precluded. The notion of efficient breach is predicated on the availability, and at least rough adequacy, of the damage remedy, which is itself largely dependent on the availability of a substitute performance. In the sports context, damages are largely unavailable and substitutes, because of the limited amount of talent and restrictions on player movement, are extraordinarily limited. It is thus impossible to make a club indifferent to whether a player performs or breaches, one of the key requirements for a transaction to be Pareto-efficient. The player is simply demanding, at virtually no cost or risk to himself, a wealth transfer from the club. At best, the player’s demand is based on a potential (though hard to measure) increase in his market value since he signed his contract.

If this is the case, it does not seem unreasonable to require the player to wait until his next contract renegotiation to realize his increased market value. It is also quite common for a club voluntarily to renegotiate the contracts of new stars. It is thus very difficult to

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Problem of Social Cost, 3 J.L. & ECON. 1 (1960); see also Hoffman & Spitzer, Experimental Law and Economics: An Introduction, 85 COLUM. L. REV. 991, 1009-13 (1985) (experiment supports the contention that parties who can negotiate will bargain to an efficient outcome in interactive harm problem, regardless of the legal rules).

195. See supra notes 59-73 and accompanying text.

196. Functionally, there may be no substitute at all. At least for superstar players, the personal services rendered are truly unique. How can it be determined, for example, whether Joe Montana is an adequate substitute for Dan Marino? Both are great quarterbacks, but each has different strengths and weaknesses, and each has adapted to (and been made better by) his teammates. It would not be unreasonable to expect each player to suffer a drop-off in performance if he went to a new team. Sports history is replete with examples of great players on one team who were busts when they moved to another team (and vice versa: marginal players on one team who became stars in a new environment). Measuring the adequacy of “substitute” athletes is, as a practical matter, impossible.

197. The player can make the claim that it is unreasonable to require him to wait until the expiration of the current contract to realize his increased market value given the relatively short length of his career and the potential for career ending injuries. These factors, on the contrary, should and are taken into account ex ante at the time the initial contract is negotiated. Thus, the length of the original contract, its terms, and the possibility of renegotiation should be addressed expressly in that contract. Furthermore, one can surmise that the relatively large signing bonuses that players receive upon signing their initial contract reflect the short term of their career and the possibility of a career ending injury.

198. Although query whether this is a result of owner altruism or a response by owners to stave off “involuntary” renegotiation in order to build goodwill and purchase the player’s services at lower costs. For example, the Washington Redskins renegotiated contracts with several stars of their recent Super Bowl victory. See Wash. Post, supra note 129 (receiver Ricky Sanders’s contract voluntarily renegotiated upwards; similar actions expected for quarterback Doug Williams.
categorize the holdouts of players as attempts to commit an efficient breach.

Even if the player’s actions could be characterized as in some way efficient, it should be stressed that the solution suggested herein does not give clubs a unilateral, ex ante right to compel specific performance (a property right, in Calabresian terminology). If that were the case, there might be legitimate concerns that a promisee, when “selling” the right for the promisor to breach and realize a higher payday elsewhere, would demand not merely the amount needed to make him indifferent between performance and breach, but an amount greater than that (theoretically, up to within $1 of the profit the promisor could make by breaching). This would represent merely an undesirable transfer of wealth in the other direction. But self-help specific performance is an ex post remedy that would avoid this problem and prevent any wealth transfer at all. A club’s remedy would be limited to what would, ex ante, have made it indifferent (the agreed-on performance at the agreed-on price) by restricting the club’s restitution to the difference between the original price and the modified price for the unexpired term of the original contract. The timing and nature of the remedy help prevent too great a concentration of power in the club’s hands.

In a situation like the hypothetical, the player has more opportunity to exploit the contractual relationship than does the club. The club’s exploitation consists merely of seeking self-help specific performance, which amounts to securing what it was owed under the original contract but could not compel via an order for specific performance due largely to problems of enforcement.199 In addition, it seems apparent that, when it comes to enforcing self-help specific performance, the potential benefits to the promisee club—receiving an irreplaceable service it had contracted for in good faith—are likely to greatly exceed the costs to the promisor/player of specifically performing.200 These latter costs are nonexistent; nothing has happened since the execution of the

and running back Timmy Smith, as well as defensive end Dexter Manley and perhaps other players as well). These actions are also partly in response to the acquisition of free agent linebacker Wilber Marshall, who signed a hefty five-year, six million dollar contract; but that too shows that clubs are often sensitive to perceived inequities in their own salary structures.

199. Cf. Narasimhan, supra note 8, at 89 (where damages inadequate but specific performance unavailable, the legal system cannot prevent exploitation and must select a second best solution; since the promisor has greater potential to exploit the contract, promisee should be given the option of self-help specific performance).

200. See id. at 88-89 (benefits to promisee likely to exceed costs to promisor in cases where damages inadequate to compensate promisee and specific performance denied due to imperfections in judicial administration).
contract to increase the cost of the player performing (this situation is not analogous to the fairly common commercial situation where the promisor's cost of obtaining supplies needed for performance has unexpectedly increased). Allowing a club the self-help specific performance remedy under these circumstances is entirely justified. 201

There is, perhaps, one major impediment to the effective utilization of self-help specific performance by clubs: the "clean hands" doctrine. "The clean hands doctrine allows courts to refuse relief to any plaintiff who has acted inequitably." 202 Imagine a situation in which the promisor/athlete is faced with an action by the club to enforce the original contract and recoup payments made in excess of that amount. One can easily envision that the promisor/athlete will maintain that he was unfairly induced to sign the modified or renegotiated contract by representations made by the promisor-club that the new contract would be honored. In fact, the athlete may go so far as to claim that the club is estopped from repudiating the modified performance. 203 Perhaps, there is something odious about the club agreeing to renegotiate when

201. Professor Kronman, in defending the law's reluctance to award specific performance, suggests that the sparing use of that remedy nevertheless covers nearly all situations in which the parties, bargaining ex ante, would agree to give a promisee an absolute right to specific performance. Such sparse use of that remedy is thus desirable because it frees the parties from having to negotiate that point and thereby reduces transaction costs. Focusing on the uniqueness of the contracted for good (unique meaning that, although a substitute in the economic sense may theoretically exist, it is too expensive for a court to find and value), he argues that specific performance is correctly allowed for unique goods. This is so because the promisor is unlikely ex ante to believe he will want to breach in the future and will therefore not object to being forced to perform. The more unique the service, the less likely another buyer will want to purchase it before the expiration of the contract. Kronman, supra note 14, at 362-68. In the sports context, at least theoretically, this assumption is unlikely to hold: the player, ex ante, probably would like the opportunity to breach and resell his services. These services are unique, but the market of potential buyers, though small (currently there are 28 NFL teams and no competing leagues), is quite competitive. But there is in sports one very important and unusual factor not normally present in employment relations: the presence of a collective bargaining agreement severely restricting player movement. Thus, although the player would like to be able to sell his services freely, he is precluded by an external labor constraint from doing so. He therefore fits Kronman's view of a provider of unique services. Even under economic analyses that favor restrictive use of specific performance, then, a self-help specific performance would seem unobjectionable.


203. As a practical matter, after the first renegotiated contract is nullified through the use of self-help specific performance, any athlete represented by able counsel will no doubt seek to include a clause in the renegotiated contract by which the club promises or represents that it will not repudiate the renegotiated contract or seek self-help specific performance. For various reasons, such a clause should be ignored by the courts as the product of economic duress. See infra notes 224-25 and accompanying text.
it intends subsequently to seek recision of that agreement. Thus, the player may argue that it is inequitable and fraudulent to allow the club first to consent to the renegotiated contract and later to repudiate that consent.204

However, any claim that self-help specific performance should be barred through the use of the clean hands doctrine, estoppel, or some other equitable device, ignores that it is the player’s wrongful and opportunistic behavior in seeking the renegotiated contract that precipitates the club’s actions to agree to and later seek recission of the modified agreement. The clean hands doctrine and other such equitable devices are flexible devices designed to promote justice and the public interest.205 The use of self-help specific performance in the hypothetical addressed in this article promotes the public interest in sanctity of contracts and allows for the efficient utilization of judicial resources. No new burden is placed on the judicial system by a club’s employment of the self-help specific performance remedy. In fact, it is argued herein that if the exercise of the self-help remedy is subsequently determined to be “wrongful” by the club, no harm to the judicial system or the parties is occasioned by its use. Indeed, just the opposite results.

In any claim on the player’s part to modify his existing contract, a threshold question must be addressed: Is the demand opportunistic, or is it reflective of changed conditions that the parties did not foresee ex ante and which therefore results in the valid negation of the original contract? As a practical matter, due to time constraints and other remedial problems, the issue cannot and will not be litigated in a timely fashion.206 The club cannot engage in what I term “Stage I litigation” to litigate this dispute in an appropriate manner. If our remedial system were perfect, the promisor could go to court once the demand is made to renegotiate—Stage I—and have the court determine at that point whether the demand for modification is appropriate or wrongful. If the demand for renegotiation is appropriate, it is assumed that the court would enforce the modified agreement. On the other hand, if the demand to modify is wrongful, the aggrieved party could assert his

204. This argument goes to the very heart of the clean hands doctrine:
The clean hands doctrine demands that a plaintiff seeking equitable relief come into court having acted equitably in that matter for which he seeks remedy. . . . The inequitable conduct which causes the [clean hands] doctrine to be invoked must be wilful, and usually involves fraud, illegality, unfairness, or bad faith.

Note, supra note 202, at 674 (footnotes omitted).
205. Id. at 675.
206. See supra notes 160-63 and accompanying text.
rights at that time. But this assumes that there is an effective legal means for the assertion of those rights, which I have posited is not true in certain easily identifiable situations, such as personal service contracts.

Thus, I contend that the effective utilization of judicial resources occurs only if the action is brought after the modified agreed-to performance is completed, at Stage II. Although a claim may be made that certain error costs are incurred or shifted to the promisor by the promisee's agreement to modify and later repudiation of that modification, I am not convinced of the validity of that claim. More importantly, even if certain error costs are shifted to the promisor, I cannot comprehend how they are increased at the later stage of the litigation. In other words, the same enforcement and error costs that are applicable at the earlier litigation, Stage I, to determine if the demand for modification is viable, should similarly be present at Stage II litigation, after performance is given. The only change which occurs following the promisee's agreement to modify and the subsequent repudiation is that the agreed upon performance has been accomplished with the litigation following the productive and efficient performance of the services contracted for under either one of two valid agreements (the original agreement or the modified agreement).

The completion of that performance has a positive value which, in the aggregate, outweighs any negligible costs occasioned by the later determination of those rights. In any event, I contend the unclean hands issue is not relevant in the situation in which it is impossible at an early stage of litigation—Stage I litigation—to fix those rights with any certainty because there are no viable enforceable remedies. Instead I contend that it is desirable to encourage performance with a determination of liability at the later stage—Stage II litigation—after performance.

Thus, the clean hands doctrine or any equitable device should not be utilized to thwart the promisee's use of self-help specific performance. The court should not bar the promisee's use of the judicial system and leave the parties where it finds them. That would accomplish very little, if anything, and would result in the promisor's opportunistic behavior being rewarded as a consequence of remedial defects in the judicial system.

It may be argued that extension of the self-help specific performance remedy into the sports context would have the drastic, concededly undesirable consequence of preventing all contract renegotiations, thus precluding a player who had developed into a superstar but signed an ill-advised contract (long term, low salary) from earning his fair market value. This is unlikely to be the case for two reasons. First, as already noted, clubs are often perfectly willing, sometimes even eager, to renegotiate player contracts upwards.207 It would be a mistake to assume that management and players are always at each others' throats, with clubs always unwilling to pay players their true value. Some organizations are well known for their stinginess, but others have equally widespread reputations for fairness.

Second, if a club did contest a modification based on duress, it would have to meet the relatively strict criterion of that test—an improper threat that left the club with no reasonable alternative. In cases where a player does not breach, threaten to breach, or obviously "dog it," this will be a difficult showing to make. This difficult standard is only proper; the self-help specific performance remedy is designed only to deter opportunistic players who seek to take advantage of a club's current lack of viable remedial options, not to eliminate a player's chance to renegotiate. The framework I have outlined for contesting a modification is just that, a framework. It is a means whereby a club with no other alternative may secure relief, but it can only be applied after a careful examination of the facts of each case, and I suspect only a minority of situations would call for such relief. The harm to the club in that minority of cases is great enough, however, to justify recognition of the self-help specific performance remedy.

Another obvious point is that the remedy will not be invoked often. After one or more successful club challenges to modifications, players who wish to behave opportunistically will quickly learn that the favorable modification they agree to could turn out to be illusory. This is particularly true where the group affected—the players—is relatively small, unionized, and the focus of intense public scrutiny. Commentators have argued, as a general matter, that the potential loss of modification would encourage promisors to breach outright rather than mod-

207. See supra note 198 and accompanying text. The owner of the Washington Redskins, after their recent Super Bowl victory, sought out one of the heroes of the game in the locker room and on the spot promised favorable renegotiation. See Wash. Post, supra note 129.
ify. 208 But this is not true in the sports context because players have little to gain by breaching. A negative injunction may be available to prevent their performance elsewhere, so outright breach simply means that the player does not play and does not get paid. Outright breach is thus not a very viable alternative; an athlete simply does not have the option to breach and pay damages as a normal promisor does. More likely than outright breach are tactics such as signing a second or supplemental contract, rather than modifying the original one, thus avoiding modification law altogether. 209 In this situation, a club could still claim duress; conditioning performance of one contract on the signing of another may clearly constitute duress, 210 and the measurement of the remedy would still be the same.

More interesting is the effect that the availability of the self-help specific performance remedy would have on sports contracts ex ante. The possibilities are numerous, and one can only speculate as to which would be most likely to occur. One possibility is that there would be a move to very short, perhaps even one year, contracts that by definition are renegotiated very frequently. This would eliminate midstream extortion by players, but is unlikely for several reasons. On management's side, it would dramatically increase negotiating costs to negotiate a new contract with every player every year. On the players' side, yearly contracts would eliminate the opportunity to achieve long-term security by signing a lucrative multi-year contract. A related possibility is a mandatory salary scale implemented through collective bargaining, which management would love (it would tend to keep salaries down and eliminate individual negotiating costs) but which players would never accept (for largely the same reasons).

A more likely trend is toward lucrative performance bonuses that reward a player for excellent performance; this is already widespread in player contracts. It is even possible something like this could be implemented collectively, but the cumbersomeness of drafting a uniform performance bonus scale makes it unlikely (as does the likely opposition of clubs that cherish their right to be cheap). The most probable trend is that superstars, realizing that their chance to renegotiate has been

208. See Muris, supra note 47, at 535; Narasimhan, supra note 8, at 89.

209. See Narasimhan, supra note 8, at 83 n.110. See supra text accompanying notes 218-21 for a fuller treatment of this possibility.

210. See Restatement (Second) § 175 comment b, illustration 3; see also Austin Instrument Co. v. Loral Corp., 29 N.Y.2d 124, 272 N.E.2d 533, 324 N.Y.S.2d 22 (1971) (threat by subcontractor to breach subcontract unless awarded a second subcontract amounted to duress).
somewhat limited, will simply demand more money in their original contracts. This is an entirely logical response, and can be left to the parties to negotiate in the course of arms length, good faith bargaining.\footnote{211}

More importantly, failure effectively to utilize the self-help specific performance remedy may have an opposite and detrimental impact on player's rights in this rather unique situation. Lacking an effective remedy, clubs will have little incentive to enter into future long-term contracts. In situations in which the opportunistic player can extort modification with impunity, the clubs will eventually discontinue the use of long-term contracts for practical, as well as legal, reasons. The loser in this situation will be the athlete who is willing to honor the provisions of a long-term contract. He will be unable to obtain a long-term contract because there is no mechanism pursuant to which he can "bond" his promise to the promisee that he will not engage in opportunistic behavior and subsequently seek renegotiation.\footnote{212}

Since there is no effective mechanism by which the player can "bond" his promise if his performance exceeds the parties' expectations, the club finds itself in an unacceptable position regarding the use of long-term contracts. In other words, if the player performs suboptimally the clubs are bound to the terms and conditions of the original

\footnote{211. Another interesting option is indirect incentives not to modify reached through collective bargaining, as reflected in the National Basketball Association's new collective bargaining agreement. The agreement expands free agency by limiting or eradicating the clubs' right of first refusal on players with a certain number of years experience, or those who have completed their first two contracts or a negotiated extension of their first contract. \textit{See NBA Pact Aids Free Agency, Cuts Draft}, Wash. Post, Apr. 27, 1988, at C1, col. 3. Beyond probably causing entering players to seek a shortening of contract periods, this scheme limits a player's incentive to renegotiate a contract extension by making a cost of any extension an added period when the player is not eligible for free agency. The player may be more likely, if he feels his value has increased, to wait until his contract expires and then shop his services on the newly opened market.

212. This is already occurring in professional football. The chart below indicates that over three relevant "draft years" (1985-1987), long-term contracts (those in excess of three years) have declined substantially for entering players.

<table>
<thead>
<tr>
<th>Number of Contracts</th>
<th>Percentage of Contracts</th>
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<tbody>
<tr>
<td>YEARS</td>
<td></td>
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<tr>
<td></td>
<td>2 3 4 5 6</td>
</tr>
<tr>
<td>1985</td>
<td>46 133 82 17 0</td>
</tr>
<tr>
<td>1986</td>
<td>76 139 103 6 0</td>
</tr>
<tr>
<td>1987</td>
<td>117 153 52 2 1</td>
</tr>
</tbody>
</table>

Telephone interview with Howard Shatsky, National Football League Players' Association representative (May 27, 1988).
contract. There is no mechanism pursuant to which they may adjust the contract to reflect this "down side." The club is stuck with its original obligation. Any attempt to modify or terminate that contract due to suboptimal performance should rightfully result in a breach of contract suit brought by the player against the club. On the other hand, if the player's performance exceeds the parties' expectations and the player renegotiates to reflect this increased performance and benefit to the club, long-term contracts make little sense. In effect, these long-term contracts serve as a "no-risk" deal for the player who is able to obtain it. If he performs suboptimally, for whatever reason, the club is contractually bound to pay him the amount in the agreement. Conversely, if the player performs at a Pareto-optimal level, the player can engage in opportunistic behavior by seeking successfully to renegotiate his contract.

Consequently, most athletes are net losers in the current situation. The availability of opportunistic renegotiation is injurious to the vast majority of athletes in two distinct ways. First, assurance of long-term stability in player services is diminished each time a club is forced to renegotiate. Because clubs realize none of the benefits, while bearing all of the risks of a long-term deal, there is very little incentive for the club to continue to enter into these long-term contracts. Thus, athletes should find it more difficult to enter into long-term contracts. Clubs should turn to short-term contingent contracts to structure their relationship with players.

213. An interesting case that raises this issue, and will no doubt lead to other articles, is Pittsburgh Assocs. v. Parker, Civ. No. G.D. 86-7096 (Ct. of Common Pleas, Allegheny County, Pa.) (filed Apr. 21, 1986). In that case, the entity which owns the Pittsburgh Pirates baseball club brought suit against former Pirate Dave Parker, whom they traded to the Cincinnati Reds. (Parker recently signed a free agent contract with the Milwaukee Brewers for the 1990 season after successfully toiling for the 1989 World Champion Oakland Athletics.). Their suit alleged, in part, that they are not responsible for making substantial deferred payments to Parker pursuant to the contract between the parties because Parker performed suboptimally during the contract and breached the contract due to drug use. The case has since been settled. Although this issue can be regarded as the "flip-side" of the issue presented herein, that is, can the promisee seek modification of the contract when the promisor performs suboptimally, it is beyond the scope of this paper because of the allegations and implications regarding drug use.

214. Although the threat of "end-game" strategy (cheating) is available when short-term contingent contracts are used, see supra notes 187-89, at least both parties are placed on equal footing by the use of short-term contracts: both parties have an incentive to cheat. In long-term contracts, due to the remedial defects detailed herein, only the club is bound and the player is allowed to cheat or act opportunistically by demanding renegotiation if promisor bargaining power is gained subsequent to execution of the contract. This situation is untenable and poses inefficient costs ex ante which could lead to the demise of certain beneficial long-term contracts.
On a more subtle level, it is assumed that renegotiation has a detrimental and deflating effect on the salary level of players who do not possess the requisite leverage or inclination to renegotiate existing agreements. As potential victims of opportunistic behavior, it is assumed that clubs have implicitly adjusted the terms of the contract to reflect the risk of forced renegotiation. Removal of the risk should remove the incentive to make this adjustment, thus the contracts of all athletes should more accurately reflect the true value of the athlete.216

Self-help specific performance may seem like a drastic remedy; it may appear unfair and it may even look like unseemly “trickery.” But situations like the hypothetical, though admittedly uncommon, have vividly demonstrated the inadequacy of the current legal system to deal with an opportunistic player. One commentator has recently written: “Until it is possible to effectively police the entire spectrum of modification, including modifications with consideration and follow-up contracts, little can be done to produce truly unique (including relationally unique) services.”217 Sadly, this is all too true in the area of athletic contracts. Extralegal sanctions have not worked. Public disapproval, even when present, has not deterred some players. And, even though each professional sport is a small, closed society in which one might expect a player to be worried about his reputation as a troublemaker, there is always likely to be some owner, desperately seeking to improve a club, who will be willing to take a risk on a moody superstar. Thus, a superstar is provided leverage for his renegotiation battle with the current club (“renegotiate or trade me to Club X”). The prospect of a self-help specific performance remedy, even if rarely available, would help police egregious examples of opportunistic behavior and give clubs a viable remedy where none now exists. Courts would be indirectly compelling specific performance where it could not directly be ordered, but that is not a unique situation.217 And it is clear that the benefits of such a rule in deterring extortionate, opportunistic behavior far outweigh its minimal costs.

215. See Muris, supra note 47, at 530.
216. Narasimhan, supra note 8, at 83 n.110.
217. See, e.g., Linzer, supra note 100, at 133 & n.152 (courts willing to condition receipt of alimony and child support on performance of a contract to obtain a get, a Jewish religious divorce; such indirect compulsion has effect of achieving specific performance where an explicit order for specific performance would traditionally be improper).
5. Self-Help Specific Performance: The Burden of Proof

In preceding sections of this article, I have set forth a theoretical framework for the use of self-help specific performance as a method to deter opportunistic behavior. At one end of the spectrum are those cases in which it is clear that the player seeking renegotiation of his contract is acting opportunistically. A clear example would be an aging quarterback on a football team who, with one year remaining on his contract, threatens to walk out of training camp the week before the first game of the season unless his contract is renegotiated and his salary for the last year of his contract is substantially increased. At the other end of the spectrum, is the owner who voluntarily agrees to renegotiate a player’s contract following that player’s exceptional performance.218

It follows that the owner’s action in either case is not opportunistic behavior. The owner is gaining something by his “altruistic” act of renegotiating the young player’s contract. At the very least, the owner is purchasing the goodwill of the athlete. Further, he may be acting strategically by attempting to “lock” the potential superstar into a long-term contract that in the long-run would cost less than if the club waits to negotiate following the expiration of the operative contract. Moreover, the prospect of unlimited free agency in some sports (although not in football) may motivate owners to bind players to long-term contracts that remove the threat of the free market operating to gauge the player’s true value.219

The problem, and it is an extremely difficult one, is adequately defining opportunistic behavior in those cases that fall between the two extremes. Although no hard and fast rule can easily be applied, there are a couple of practical limitations that should guide the parties and the courts in defining opportunistic behavior. First, the parties themselves will frequently decide that no opportunistic behavior occurred by performing, without complaint, pursuant to the renegotiated contract. In other words, the owner who accedes to a player’s demand to renegotiate is faced with a couple of options that will determine if the issue of opportunism is raised.

The second practical limitation arises following the execution of the renegotiated contract, if it is assumed that the parties will resume their “normal” relationship and performance will be given by the ath-

218. For just such an example, see supra note 198 and accompanying text.
219. See supra note 211.
lete. At the expiration of the term of the original contract the owner or club that is the victim of the opportunistic behavior should repudiate and rescind the renegotiated contract and seek restitution for any payments made in excess of the amount due in the original contract. As a practical matter, any owner seeking restitution at this point will, no doubt, imperil the club’s right to receive future performance from the athlete. However, this is the strongest case for the imposition of self-help specific performance. The owner’s disavowal of the renegotiated contract, along with the concomitant risk that the player will refuse to perform in the future or perform suboptimally, is the strongest evidence that the player’s demands to renegotiate the existing contract were opportunistic. In this situation, a heavy burden should be placed on the player seeking to enforce the renegotiated contract that he provided new consideration and was not acting opportunistically.

Conversely, a different result obtains when the owner seeks restitution following performance of the term, in whole or in part, of the renegotiated contract. There, the burden should be placed on the owner seeking rescission to show that he acceded to opportunistic demands on the part of the players. In other words, accepting any new benefits pursuant to the renegotiated contract establishes some evidence that the renegotiated contract provides some additional consideration for the owner and club. It is up to the club to disprove this by showing that there was no other way to secure the performance of the athlete for the time beyond the expiration of the term of the original contract except by acceding to the player’s opportunistic demands. Due to the fungible nature of player skills, arguments may be made that acceding to the player’s opportunistic demands, and then subsequently litigating the issue, is the only way to deal with a player seeking an opportunistic renegotiation. After all, this is not the same situation as when the player’s contract expires and the club and the owner agree on a new contract. In this situation, any claim that the player is acting opportunistically is ludicrous because the owner has no right to the future services of the player following the expiration of the initial entitlement.

Yet, I can easily envision a situation in which the player opportunistically and successfully seeks to renegotiate an existing contract, and the club does nothing to void the new renegotiated contract until its expiration in order to obtain the player’s services. In other words, the player runs the risk by seeking renegotiation that he will not only lose the benefit of the extorted performance for the years that he was bound by the original contract, but he will also lose some amount for
the years of the new contract. However, the burden in this situation should be on the owner—the party receiving performance, in whole or in part—to prove that the player was acting opportunistically. Moreover, it should be a heavy burden given that the owner is, in effect, trying ex post facto to convert a property rule into a liability rule by having a court determine the amount the player will be paid.

IV. PRACTICAL LIMITATIONS OF SELF-HELP: A NORMATIVE APPROACH

A. Strategic Adaptations to Self-Help Specific Performance

As I was circulating the penultimate draft of this article to colleagues for review and comments, I received a barrage of hypotheticals designed to test the limits of the applicability of self-help specific performance. Numerous scenarios were put forth based on the assumption that self-help specific performance should be allowed and enforced by the courts. In particular, predictions were made that parties would adapt to the availability of the remedy and respond strategically to negate the efficacious utilization of the remedy. Two specific strategies were raised repeatedly.

First, it was predicted by almost everyone that players' agents would respond to the use of self-help specific performance by placing a clause in the superstar's contract forbidding the use of self-help specific performance on the part of the club. The timing of the placement of that clause in the contract was, however, different, and leads to different conclusions. Many predicted that the wise agent will place a clause in the initial and every subsequent contract that the club cannot seek to rescind or cancel any renegotiated contract. The club would thereby waive its right to the remedy of self-help specific performance. My response to this specific hypothetical is "great, fantastic"—that is exactly

220. It is assumed that if this scenario occurs, and the owner seeks to rescind the renegotiated contract following performance, the owner will have to pay the player the fair market value of that player's performance. This may be less than, equal to, or more than (in rare cases) the amount set forth in the renegotiated contract.

221. See supra notes 100-13 and accompanying text. The reverse is true when the owner seeks to enforce the original contract by claiming that the renegotiated contract is the product of opportunism. In that case the court is called on to enforce an agreement that the parties have already made and there are no error or opportunity costs incurred by enforcing that agreement. The court is merely prohibiting an opportunistic wealth transfer.

222. Some of these hypotheticals concerning the timing and the enforceability of the remedy appear supra text accompanying notes 218-21, in my discussion of the application of the remedy and the proper use of the burden of proof.
the sort of behavior we want to *encourage* in this context.

Placing a clause in the contract that the parties may not use self-help specific performance does not constitute opportunistic behavior. Indeed, the reverse is more than likely true. By agreeing to such a clause in a contract, valuable information is being conveyed by the parties to the contract that reduces the possibility that the parties are acting opportunistically. Moreover, since the entitlement is being released ex ante by the owner, without any claim or threat of duress, any later claim by the owner that his consent to the clause is the product of duress is ineffectual. In other words, by requesting such a clause ex ante, the player is informing the club that should his performance subsequently warrant it, he will seek to renegotiate his contract to extract more money from the club. The club, by acceding to his request for such a clause, is consenting to the possible renegotiation of the player's contract should his performance warrant it. In effect, any agreement ex ante by player and the club that the club may not exercise its rights to enforce that contract, reduces that contract, at best, to something akin to an option contract—a contract that may be performed at the option of the player for the amount stated therein.

If, on the contrary, the player believes he is underpaid pursuant to the initial contract containing the renegotiation clause, and that the owner has received, in effect, a windfall in the form of the athlete's performance at a disproportionate price, the athlete is given the right to negotiate for a portion of the windfall. In this situation, the player has two options. He can perform at what he perceives to be a less than equitable amount and seek to "make up the difference" in the next contract. Or, he can seek renegotiation pursuant to an express clause in the contract allowing renegotiation or a clause prohibiting the club from pursuing its right to self-help specific performance. The player holds a valuable right ex ante to force the owner to negotiate with him to gain all or a proportionate amount of the windfall granted to the owner ex ante.

This valuable right to negotiate is not, however, the product of opportunistic behavior. There is no wealth transfer which occurs ex post that was not contemplated by the parties at the time they entered into the initial contract.\textsuperscript{223} Compare, however, the second situation in which a clause may be used ex post allegedly to prevent the club from

\textsuperscript{223} For a discussion of the definition of opportunistic behavior, see *supra* notes 47-52 and accompanying text.
pursuing its remedy of self-help specific performance. The question that immediately comes to mind is how the courts should address a clause prohibiting the use of self-help specific performance when that clause is inserted in the renegotiated contract. In other words, what should the courts do when the owner or club subsequently waives the right to self-help specific performance ex post facto. If the waiver is ex post facto, the burden should be placed on the player to show that it was not the product of duress and opportunistic behavior on the player's part.

For essentially the same reasons that the renegotiated contract is deemed to be a product of duress, the clause waiving the right to challenge the contract as a product of duress should be ignored. Moreover, for the reasons expressed elsewhere herein, in this latter situation, a heavy burden of proof should be placed on the player to establish that any such waiver was voluntary.

The second "common" hypothetical raises more difficult issues. I was asked, "What if the player, instead of renegotiating an existing contract, seeks to obtain a new guaranteed contract that begins after the expiration of the initial contract? Does that constitute opportunistic behavior that should be the subject of self-help specific performance?"

My initial response is no; any new contract for any new period of time should presumptively constitute a new agreement which both parties should honor. However, that is too facile a distinction and would entail, perhaps, validating the renegotiation of all player contracts as long as an additional period is tacked on to the term of the original contract.

If a player threatens nonperformance or suboptimal performance of the original agreement in order to receive the extended or new contract, that contract is the product of duress and should be treated accordingly.

Hence, extended or "new" contracts, guaranteed or not, should be treated like any other contract when the claim is made that it is the product of duress. If the extended or new contract is repudiated before the performance is given, the burden should be on the player to prove that this new agreement is not the product, in whole or in part, of duress. If, however, a portion or all of the extended or new agreement is performed, the burden should be placed on the party receiving performance to demonstrate and prove that the agreement was the product of

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224. See supra notes 209-10 and accompanying text.
225. See supra notes 217-21 and accompanying text.
226. For a discussion of attempts to create such contracts that seek to avoid the sanction of no new consideration, see supra notes 123-46 and accompanying text.
duress and it had no viable alternative but to receive performance and subsequently to litigate the matter.

There are many other scenarios that test the limits of self-help specific performance and how the parties may respond to its use by the court.\textsuperscript{227} What is interesting, though, is not so much the imagination and cunning that produces these scenarios, but the almost dogged, stubborn attempts to thwart the use of the remedy in this situation. I was and am fascinated by the effort put forth to negate what I perceive to be a very effective, efficient remedy as applied in this context. This caused me to reexamine the situation in which the remedy would be applied and to raise, inferentially, some questions that do not have answers at this point.

B. Normative Implications of the Unavailability of Self-Help

There are perhaps a number of reasons why a court may refuse to enforce self-help specific performance. The discussion of the “unclean hands” doctrine,\textsuperscript{228} represents one of many reasons why a court may decline to exercise its powers to aid an owner or club claiming to be a victim of opportunistic behavior. In addition, the parties may adapt to the availability of self-help in a strategic fashion (by agreeing to a clause ex ante that allows the player to renegotiate the contract) to negate any benefits engendered by its use.\textsuperscript{229} Finally, it may simply be too difficult to distinguish in tough cases whether renegotiated contracts are the product of duress. As a result, it is definitely possible that the use of self-help specific performance, if at all, may be short-lived.

If self-help specific performance cannot or will not be used by courts to police opportunistic behavior, this raises some questions that must be addressed in future articles. If remedies cannot be developed to enforce long-term (in excess of two years) personal service contracts, questions must be raised regarding the validity of their use. At best, they serve as option contracts that bind the parties, at a minimum, to the terms of the contract. At worst, they serve as chimerical devices that may be breached at the will of one or both of the parties to the agreement.

Thus, the failure to date of the judicial system to develop an effective remedy to enforce this type of contract may not reflect a defect in

\textsuperscript{227} A recitation of all such scenarios would probably be impossible and not worth the effort given the failure to date of contracting parties to use self-help specific performance.

\textsuperscript{228} See supra notes 202-05 and accompanying text.

\textsuperscript{229} See supra notes 222-23 and accompanying text.
the remedial structure of the law. Rather, this failure may reflect dis-

enchantment with long-term personal service contracts that bind one

door to performance in highly interactive, complex relationships in

which it is impossible to predict ex ante the performance capabilities of

the parties and the worth of that performance.\footnote{230} In short, if the

remedy of self-help specific performance is found lacking in this situation,

that may indicate that long-term contracts should normatively be disfa-
vored and discouraged. The error costs imposed by long-term personal

service contracts may be too high a price to pay for the these unique

contractual relationships.\footnote{231}

In other words, it may be preferable to encourage the parties to

this sort of agreement to engage in short-term sequential contracting,

even with its higher transaction and potential error costs.\footnote{232} This is so

because of the changed conditions that can occur ex post facto that

may cause one party to regret the compensation package negotiated in

the original agreement.\footnote{233} By limiting the remedies available to promis-
eses in long-term contracts, courts may be placing the risk of loss and

regret on the promisees. There may be no upside gain or benefit to

these long-term contracts if they are easily evaded by promisors.\footnote{234}

Perhaps judicial reluctance to enforce these long-term contracts

indicates concern that these agreements are adhesive. However, if that

is the case, the initial bargaining relationship between the parties\footnote{235}

needs to be analyzed to establish the inequality of bargaining power

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\footnote{230}{The condemnation of certain long-term contracts may be found in statutes which limit the length of personal service contracts. For example, California has a statute that limits the length of personal service contracts to seven years. \textit{See Cal. Labor Code} § 2855 (West 1989).}

\footnote{231}{As Professors Goetz and Scott explain: "One response to increasing levels of complexity or uncertainty is to limit the temporal scope of the contract. By negotiating a series of recurring contingent contracts, the parties can reduce the error costs of specifying fixed obligations. Goetz & Scott, \textit{Relational Contracts}, supra note 56, at 1100 (footnotes omitted).}

\footnote{232}{\textit{See id.} at 1100-01.}

\footnote{233}{\textit{Id.} at 1143. ("A sequential or indefinite term contract permits either party to adjust to events that may cause regret over the original compensation arrangement.")}

\footnote{234}{Of course, this is not to say that some promisees will not honor these contracts, notwithstanding the lack of legal sanction.

Many contractual provisions are honored even where there is no effective legal sanction for their breach. In some circumstances, this is due to the existence of informal, extra-legal sanctions, including a sense of commercial ethics. Notwithstanding practical difficulties of securing legal enforcement, therefore, a contractual provision also has value simply as a communication of understanding between the parties as to their mutual rights and duties. \textit{Id.} at 1116-17 (footnotes omitted).

\footnote{235}{This relationship has changed dramatically in recent years due to the advent of collective bargaining. \textit{See supra} notes 26-27 and accompanying text.}
that causes adhesion contracts.\textsuperscript{236} Moreover, perhaps it is the characterization of these agreements as unconscionable that may account for the courts' reluctance, if any, to enforce long-term personal service contracts.\textsuperscript{237}

At this point, it is difficult to speculate whether courts will enforce the remedy of self-help specific performance. One thing is clear, if courts fail to enforce a positive remedy for the breach of long-term contracts, long-term contracts will not be used. Of what benefit is a contract that cannot be enforced? More importantly, how beneficial and desirable is a contract that can be enforced only by one party to the agreement, the player. Thus, when it is in the player's interest to do so—when he has a good contract—he will sue the club to enforce the contract even if his performance is admittedly suboptimal. Conversely, when it is in the player's interest to repudiate the contract—when he has undervalued his capabilities as a performer and finds himself performing for less than his services are worth—he can do so with impunity.

In light of this development, it is not hard to see why the average length of player contracts has been shrinking in recent years.\textsuperscript{238} Thus, claims made by players' organizations that owners are collusively restricting the length of player contracts may be ill-conceived. Instead, the decreasing terms of player contracts may result directly from the players' collective success at avoiding the burden of long-term contracts while reaping all of the benefits. You cannot have it both ways, or can you?

**CONCLUSION**

Through the effective use of self-help specific performance, a promisee may be able to achieve a desirable and efficient result that is otherwise unavailable. Due to defects in the remedial structure of our

\textsuperscript{236} An adhesion contract is defined as a standard form contract offered to the weaker party on a "take-it-or-leave-it" basis. The weaker party is forced to agree, or "adhere," to the terms and conditions presented by the party with the superior bargaining power. See Johnson, *supra* note 95, at 796 n.142, for a discussion of adhesion contracts.

\textsuperscript{237} Goetz & Scott define unconscionability as follows: "The unconscionability doctrine represents an ambitious effort to bring the traditional categories of unfairness—fraud, duress, incapacity—under a single analytical umbrella. . . . 'U

\textsuperscript{238} See *supra* note 212 and accompanying text.
judicial system, a promisor can often engage in a species of opportunistic behavior which has heretofore gone largely unnoticed. Instead of engaging in subtle, hard-to-detect behavior that results in a wealth transfer, the promisor, by exploiting remedial defects, can blatantly engage in behavior that results in an opportunistic wealth transfer. To prevent this species of inefficient behavior, self-help specific performance should be allowed and utilized in situations involving certain personal service contracts when demands for renegotiation are made by the promisor.

In the long run, the efficacious use of self-help specific performance will result in the efficient use of resources, and promote the use of long-term contracts in beneficial situations. This is advantageous for both promisors and promisees because it prevents opportunistic promisors from imposing costs on those promisors who rightfully honor the terms and conditions of the original agreement. Thus, the proper emendation for our remedial system is the limited use of self-help specific performance to police opportunistic attempts to renegotiate long-term personal service contracts if these contracts are a desideratum.

Conversely, the continued lack of an effective remedy to enforce long-term personal service contracts may presage judicial, and hence societal, disenchantment with long-term personal service contracts. The rejection of self-help specific performance, should it occur, by the parties or the courts, may be symptomatic of a greater problem: the inherent flaws of long-term personal service contracts as a vehicle for governing the performance obligations of parties in a flexible, interactive relationship in which performance standards cannot be fixed ex ante. If so, long-term personal contracts may go the way of the dinosaur and be headed for extinction. Only time will tell.