

# CONCUSSIONS AND CONTRACTS: CAN CONCERN OVER LONG-TERM PLAYER HEALTH PAVE THE WAY TO GREATER GUARANTEES IN NFL CONTRACTS?

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*Guaranteed money in an NFL player contract is often misrepresented when discussing the earnings of professional football players. Whenever an NFL player signs a new contract, purportedly setting a new benchmark and surpassing previous highs for compensation, reports of record guarantees dominate the news coverage. Lost in the reporting, however, is the actual guaranteed take-home pay of the player if the worst were to happen and he were to never play another down of football. In a sport riddled with injuries and short careers compared to other professional sports, the most important contract figure is not total compensation, but total guaranteed compensation. Unlike professional basketball and professional baseball, NFL players do not receive fully guaranteed contracts, meaning they play one of the most dangerous sports and do so with some of the least financial assurances. This is especially troubling in light of the recent revelations, research, and litigation focusing on head trauma in NFL players. Although there is certainly desire among NFL players to obtain larger guarantees in contracts, there has rarely been the will or ability to do so. NFL players are free to attempt to negotiate for larger guarantees on an individual basis with any team interested in their services, but history suggests that large sums of guaranteed money are reserved for only for the most elite players. Even then, guarantees rarely exceed 30–50% of the total compensation. Notwithstanding the foregoing, there is still opportunity for the players to negotiate for larger guarantees in contracts through means of collective bargaining when the NFL–NFLPA Collective Bargaining Agreement expires in 2021. Success in this endeavor, however, requires understanding the balance of power between the NFL and the NFL Players Association, addressing the many structural barriers to guaranteed contracts, harnessing the growing concern over player safety, and capitalizing on the exodus of talent from the NFL.*

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## INTRODUCTION

In an age of media members reporting first and checking later, the value of a National Football League (“NFL”) player contract is often misrepresented when initially reported.<sup>1</sup> The process starts when a source (often an agent) leaks details of a player’s new, lucrative contract to a reporter who breaks the story.<sup>2</sup>

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1. Jason Lisk, *Guaranteed Money in NFL Reporting Doesn’t Mean What It Used to Mean*, BIG LEAD (May 19, 2015, 11:30 AM), <http://thebiglead.com/2015/05/19/guaranteed-money-in-nfl-reporting-doesnt-mean-what-it-used-to-mean/> (“It happened again. Adam Schefter reported that [Miami Dolphins quarterback] Ryan Tannehill was getting \$45 million in guaranteed money. There was a less than one percent chance that this statement was actually going to be accurate. And that slim chance left town with the inevitable reporting on the distinction of ‘fully guaranteed.’”).

2. Ryan Glasspiegel, *Michael Wilbon Excoriates Reporters Who Were Way Off on Colin Kaepernick’s Contract*, BIG LEAD (June 6, 2014, 11:11 AM), <http://thebiglead.com/2014/06/06/michael-wilbon-excoriates-reporters-who-were-way-off-on-colin-kaepernicks-contract/> (discussing misleading reporting about San Francisco 49ers quarterback Colin Kaepernick’s contract value) (“The saga spoke to a general epidemic within the NFL media wherein agents leak numbers, which are proven time and again to be

After the story breaks, the financial figures appear large, but they are often inflated and do not accurately reflect how much money a player actually stands to receive.<sup>3</sup> In a league where a player's contract can be terminated at any time due to injury, performance, personal conduct, or cost, the important dollar figure is not the total amount, but rather the total amount *guaranteed*.<sup>4</sup> In other words, the crucial number is how much money a player will receive even if the team terminates his contract.

NFL players are left far behind compared to their counterparts in Major League Baseball ("MLB") and the National Basketball Association ("NBA"), who enjoy contracts that include full salary guarantees regardless of performance or injury. The commonly cited reasons for the NFL's lag behind other leagues in guaranteed money are varied and several. A hard salary cap,<sup>5</sup> an expansive roster,<sup>6</sup> shorter career lengths,<sup>7</sup> the overall danger of football,<sup>8</sup> customary practice,<sup>9</sup> and

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patently false, to reporters willing to be inaccurate (either completely, as was the case with Kaepernick, or pragmatically when the back-end of the deal is effectively monopoly money) . . . . 'Every time somebody signs one of these contracts, everybody — our colleagues, and some really great reporters — they tweet out . . . . They report immediately, and the next day all they do is Michael Jackson moonwalk as to how little money is guaranteed for real. These ridiculously absurd reckless reports about record guarantees[,] [t]hese contracts, and the reporting of these contracts, are *frauds*.'")

3. *Id.*

4. See NATIONAL FOOTBALL LEAGUE & NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, COLLECTIVE BARGAINING AGREEMENT, art. 4, § 5(d) (2011) [hereinafter CBA] ("[A]ny Player Contract may be terminated if, in the Club's opinion, the player being terminated is anticipated to make less of a contribution to the Club's ability to compete on the playing field than another player or players whom the Club intends to sign or attempt to sign, or another player or players who is or are already on the roster of such Club, and for whom the Club needs Room. *This Subsection shall not affect any Club or Club Affiliate's obligation to pay a player any guaranteed consideration.*" (emphasis added)); see also *id.* at ¶ 11 (permitting NFL teams to terminate a player's contract for skill or ability reasons as well as for misconduct reasons).

5. See Mike Florio, *Fully-guaranteed Contracts Could Cause Problems for Teams, Players*, NBC SPORTS (May 29, 2015, 9:55 AM), <http://profootballtalk.nbcsports.com/2015/05/29/fully-guaranteed-contracts-could-cause-problems-for-teams-players/> (examining the theoretical implications of a guaranteed compensation system in the NFL by examining Minnesota Vikings running back Adrian Peterson's contract and concluding "the Vikings would have far less flexibility to pay other players under the hard-cap system the NFL uses.").

6. Arash Markazi, *Why NBA Beats NFL When it Comes to Guaranteed Contracts*, ESPN (Jul. 13, 2015), [http://espn.go.com/nfl/story/\\_/id/13235398/why-nfl-lags-nba-guaranteed-contracts](http://espn.go.com/nfl/story/_/id/13235398/why-nfl-lags-nba-guaranteed-contracts) (discussing several reasons for lower guarantees in the NFL) ("In the NBA, you're basically dealing with a 13-man roster as opposed to a 53-man roster [in the NFL]. It's much easier to have a higher average of money involved for 13 players rather than 53 players. It's just math.") (quoting labor attorney Jeffrey Kessler).

7. *Id.* ("The systems are completely different . . . . The average career span of the players is completely different . . . .") (quoting labor attorney Jeffrey Kessler).

8. *Id.* ("[T]here is a uniqueness to the [NFL] in that there is an extraordinary injury rate . . . .") (quoting sports agent Tom Condon).

requirements that guaranteed money be set aside for later payment<sup>10</sup> are often cited as reasons for the absence of fully guaranteed contracts in football. Accordingly, more than one approach may be required in order to close the gap.

Despite the many supposed reasons that NFL players are afforded far less guaranteed money than MLB and NBA players, a few players have seen larger guarantees in their contracts.<sup>11</sup> Nonetheless, league-wide growth can only be achieved through collective bargaining that coincides with a player strike and seizes on the rising awareness of player safety concerns. Unfortunately, the historical relationship between the NFL and the National Football League Players Association (“NFLPA”) suggests that the players lack the leverage and the ability to extract meaningful concessions from the owners on a topic like guaranteed money.<sup>12</sup> On the other hand, history also indicates that guaranteed money for NFL players grew at its most significant rate during times of direct competition by rival football leagues that threatened to take away players and revenue from the NFL.<sup>13</sup> Accordingly, the players should seize on the recent exodus of young players, the rise in concerns about player safety, and the mounting turmoil regarding limited guaranteed compensation, and coordinate a player strike in which they are legitimately willing to lose games in the short term to reap benefits for the long term.

This Note argues that greater guarantees can be achieved through collective bargaining in conjunction with a player strike that is resolved to miss games. Part I details the disparity of guaranteed contracts between the NFL and

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9. See Matthew Levine, *Despite His Antics, T.O. Has a Valid Point: Why NFL Players Deserve a Bigger Piece of the Pie*, 13 VILL. SPORTS & ENT. L.J. 425, 440 (2006) (“The lack of guaranteed contracts in the NFL stems from practice, not precedent.”).

10. Mike Florio, *New CBA Should Have Ditched “Funding” Requirement for Guarantees*, NBC SPORTS (Mar. 4, 2012, 4:51 PM), <http://profootballtalk.nbcsports.com/2012/03/04/new-cba-should-have-ditched-funding-requirement-for-guarantees/> (describing the “funding rule” and its procedure for obligating teams to set aside the total amount of all guaranteed compensation upon signing a contract and concluding that “[a]s a result, teams shy away from fully guaranteeing significant future payments.”); see also CBA, *supra* note 4, at art. 26, § 9 (the location of the “funding rule” in the CBA) (“The NFL may require that . . . each Club must deposit into a segregated account the present value . . . of deferred and guaranteed compensation owed by that Club . . .”).

11. See Leigh Steinberg, *A Historic Breakthrough in Guaranteed NFL Contracts*, FORBES (Aug. 12, 2016, 8:03 AM), <http://www.forbes.com/sites/leighsteinberg/2016/08/12/historic-breakthrough-in-guaranteed-nfl-contracts/#2f9949e5712f> (“In 2011 . . . 17 players had their contracts fully guaranteed. [In 2016] it expanded to 20 players . . .”); Conor Orr, *Von Miller Signs Six-Year, \$114.5M Deal with Broncos*, NFL, <http://www.nfl.com/news/story/0ap3000000674882/article/von-miller-signs-six-year-1145m-deal-with-broncos> (last updated July 16, 2016, at 6:59 PM) (noting that Denver Broncos linebacker Von Miller’s contract included a record amount of guaranteed money and exceeded the previous record amount of Miami Dolphins defensive lineman Ndamukong Suh’s contract which Suh signed just a year earlier).

12. See *infra* Part II.

13. *Id.*

other professional sports leagues and establishes the importance and significance of a player's signing bonus when discussing guaranteed money. Part II provides historical perspective on the creation of the signing bonus and the growth of NFL player compensation models during times of direct competition between the NFL and rival leagues. By defining and illustrating the use of "illusory guarantees" in NFL player contracts, Part III demonstrates how supposed "guarantees" in a contract can actually be contingencies beyond a player's control that severely eschew how much money a player is actually likely to earn. Part IV examines the recent history of collective bargaining between the NFL and NFLPA to understand how the circumstances surrounding the 2011 player lockout shape the potential for guaranteed compensation and negotiation leverage for the future. In order to emphasize the importance and need for guaranteed compensation for future players, Part V describes the spike in awareness of the dangers of the sport as well as briefly detailing the concussion litigation which, together, led to early retirements by otherwise youthful NFL players who would rather retire than subject themselves to further physical abuse. Part VI provides a salary cap model that would allow for fully guaranteeing a contract while offsetting the potential negative effects of terminating a fully guaranteed contract. Lastly, Part VII suggests the potential to utilize the growing awareness of football's harmful effects and corresponding early retirements as a means of altering negotiation leverage between the league and its players in order to reach a collectively bargained solution to the dearth of guaranteed compensation in NFL player contracts.

### I. GUARANTEE DISPARITY: A COMPARATIVE EXAMPLE

The 2015 offseasons of the NFL and NBA provide a striking illustration of the guaranteed compensation discrepancies between football players and athletes in other professional sports. On the first day of the NBA's 2015 free agency period, NBA teams reportedly agreed to an estimated \$1.4 billion in player salaries, nearly all of which was guaranteed to the players.<sup>14</sup> Over the following five days, 60 players signed for an estimated \$2.35 billion.<sup>15</sup> One of those players was Khris Middleton, a small forward who had just finished his third year in the NBA.<sup>16</sup> On the first day of NBA free agency, Middleton signed a five-year, \$70-

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14. John Keim, *NBA Spending Frenzy Prompts Duke Ihenacho to Rant on NFL Contracts*, ESPN (July 2, 2015), [http://espn.go.com/nfl/story/\\_/id/13187628/duke-ihenacho-washington-redskins-rants-inequity-nba-nfl-deals](http://espn.go.com/nfl/story/_/id/13187628/duke-ihenacho-washington-redskins-rants-inequity-nba-nfl-deals).

15. See Vincent Frank, *NBA Free Agency Spending Is Absurd, and It's Not Changing*, FORBES (July 6, 2015, 4:31 AM), <http://www.forbes.com/sites/vincentfrank/2015/07/06/nba-free-agency-spending-is-absurd-and-its-not-changing/> (predicting that NBA offseason spending is up and will continue to rise as money from television contracts increases and more marquee players hit the free-agent market).

16. James Herbert, *Report: Bucks, Khris Middleton Agree to 5-Year, \$70 Million Deal*, CBS SPORTS (July 1, 2015, 9:28 AM), <http://www.cbssports.com/nba/eye-on-basketball/25230079/report-bucks-khris-middleton-nearing-5-year-70-million-deal>. During the course of the 2015–2016 NBA season, Middleton changed positions from small forward to shooting guard. *Khris Middleton Player Profile*, ESPN, [http://espn.go.com/nba/player/\\_id/6609/khris-middleton](http://espn.go.com/nba/player/_id/6609/khris-middleton) (last visited Apr. 28, 2016).

million contract to return to the Milwaukee Bucks.<sup>17</sup> The agreement netted Middleton roughly \$10 million more in guaranteed money than the \$114-million contract of the “prized NFL free agent” of the 2015 offseason, starting defensive tackle of the NFL’s Miami Dolphins, Ndamukong Suh.<sup>18</sup>

Although Middleton’s and Suh’s contract numbers are similar, their careers and productivity, to that point, were very different. Middleton is a small forward who started only 70% of his team’s games in the 2014–2015 season,<sup>19</sup> finished outside the top 10 in points-per-game at his position,<sup>20</sup> outside the top 15 in minutes-per-game at his position,<sup>21</sup> and outside the top 15 in rebounds-per-game at his position.<sup>22</sup> Additionally, Middleton has never garnered more than a smattering of votes for a regular season award and has never been in contention to

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During the 2014–2015 NBA season, Middleton played only 1% of his minutes-per-game at the shooting guard position, compared to 52% at small forward and 46% at power forward. See *James Khristian Middleton*, BASKETBALL REFERENCE, [http://www.basketball-reference.com/players/m/middlk01.html#advanced\\_pbp:none](http://www.basketball-reference.com/players/m/middlk01.html#advanced_pbp:none) (last visited Apr. 28, 2016). As Middleton played small forward prior to signing his new contract in the summer of 2015, I am providing his statistics and comparing them to peers at the position where he played the majority of his minutes.

17. Herbert, *supra* note 16.

18. Keim, *supra* note 14; Chris Mortensen, *Ndamukong Suh to Sign with Fins*, ESPN (Mar. 8, 2015), [http://espn.go.com/nfl/story/\\_/id/12444126/ndamukong-suh-sign-6-year-114-million-deal-miami-dolphins](http://espn.go.com/nfl/story/_/id/12444126/ndamukong-suh-sign-6-year-114-million-deal-miami-dolphins).

19. See *James Khristian Middleton*, *supra* note 16.

20. *Compare NBA Player Scoring Per Game Statistics 2014–2015*, ESPN, [http://espn.go.com/nba/statistics/player/\\_/stat/scoring-per-game/sort/avgPoints/year/2015/seasontype/2/position/small-forwards](http://espn.go.com/nba/statistics/player/_/stat/scoring-per-game/sort/avgPoints/year/2015/seasontype/2/position/small-forwards) (last visited Apr. 28, 2016) (indicating 14 players averaged better than 13.4 points-per-game), with *NBA Player Scoring Per Game Statistics 2014–2015*, ESPN, [http://espn.go.com/nba/statistics/player/\\_/stat/scoring-per-game/sort/avgPoints/year/2015/seasontype/2/position/shooting-guards](http://espn.go.com/nba/statistics/player/_/stat/scoring-per-game/sort/avgPoints/year/2015/seasontype/2/position/shooting-guards) (last visited Apr. 28, 2016) (indicating Middleton averaged 13.4 points-per-game). As a result of Middleton’s position change, ESPN removed Middleton’s name from the statistical list of small forwards and inserted it in the list of shooting guards. Nonetheless, Middleton’s statistics still do not make him a standout at the shooting guard position. As such, I am providing a citation to both statistics pages for comparison.

21. *Compare NBA Player Minutes Statistics 2014–2015*, ESPN, [http://espn.go.com/nba/statistics/player/\\_/stat/minutes/sort/avgMinutes/year/2015/seasontype/2/position/small-forwards](http://espn.go.com/nba/statistics/player/_/stat/minutes/sort/avgMinutes/year/2015/seasontype/2/position/small-forwards) (last visited Apr. 28, 2016) (indicating 16 players averaged better than 30.1 minutes-per-game), with *NBA Player Minutes Statistics 2014–2015*, ESPN, [http://espn.go.com/nba/statistics/player/\\_/stat/scoring-per-game/sort/avgMinutes/year/2015/seasontype/2/position/shooting-guards](http://espn.go.com/nba/statistics/player/_/stat/scoring-per-game/sort/avgMinutes/year/2015/seasontype/2/position/shooting-guards) (last visited Apr. 28, 2016) (indicating Middleton averaged 30.1 minutes-per-game).

22. *Compare NBA Player Rebounds Statistics 2014–2015*, ESPN, [http://espn.go.com/nba/statistics/player/\\_/stat/rebounds/sort/avgRebounds/year/2015/seasontype/2/position/small-forwards](http://espn.go.com/nba/statistics/player/_/stat/rebounds/sort/avgRebounds/year/2015/seasontype/2/position/small-forwards) (last visited Apr. 28, 2016) (indicating 18 players averaged more than 4.4 rebounds-per-game), with *NBA Player Rebounds Statistics 2014–2015*, ESPN, [http://espn.go.com/nba/statistics/player/\\_/stat/rebounds/year/2015/seasontype/2/position/shooting-guards](http://espn.go.com/nba/statistics/player/_/stat/rebounds/year/2015/seasontype/2/position/shooting-guards) (last visited Apr. 28, 2016) (indicating Middleton averaged 4.4 rebounds-per-game).

win one.<sup>23</sup> By contrast, Suh is a former first-round draft pick<sup>24</sup> who, through his five-year career prior to signing his free-agent contract, won the NFL Defensive Rookie of the Year Award,<sup>25</sup> was named a first-team All-Pro three times, and was named to the Pro Bowl four times.<sup>26</sup>

On the surface, Suh's \$114-million contract appears far more lucrative than Middleton's. So long as Suh remains healthy and on the Dolphins roster for the duration of the contract, Suh stands to make nearly twice as much money as Middleton.<sup>27</sup> However, presumptions of health and job security cannot be relied upon in the NFL, a league where the average career for a player is an estimated 3.2 years.<sup>28</sup> In the NFL, as opposed to the NBA, a player's annual base salary (the money he earns for stepping on the field on game day, also known as his "Paragraph 5 Salary" for the location of the salary figure on a player's contract) is not guaranteed.<sup>29</sup> An NFL team may release a player—i.e., terminate his contract—at any time, without further obligation to pay him, if the team feels that there's a better player available or if the team would be more competitive without the soon-to-be released player.<sup>30</sup> After a player signs his contract, the only money

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23. See *2012–2013 NBA Awards Voting*, BASKETBALL REFERENCE, [http://www.basketball-reference.com/awards/awards\\_2013.html](http://www.basketball-reference.com/awards/awards_2013.html) (last visited Nov. 10, 2015); *2013–2014 NBA Awards Voting*, BASKETBALL REFERENCE, [http://www.basketball-reference.com/awards/awards\\_2014.html](http://www.basketball-reference.com/awards/awards_2014.html) (last visited Nov. 10, 2015); *2014–2015 NBA Awards Voting*, BASKETBALL REFERENCE, [http://www.basketball-reference.com/awards/awards\\_2015.html](http://www.basketball-reference.com/awards/awards_2015.html) (last visited Nov. 10, 2015) (indicating Middleton finished tied for 12th in votes received for Most Improved Player).

24. *Ndamukong Suh*, PRO FOOTBALL REFERENCE, <http://www.pro-football-reference.com/players/S/SuhxNd99.htm> (last visited Nov. 10, 2015).

25. *AP Defensive Rookie of the Year Winners*, PRO FOOTBALL REFERENCE, [http://www.pro-football-reference.com/players/award\\_apdroy.htm](http://www.pro-football-reference.com/players/award_apdroy.htm) (last visited Oct. 11, 2015).

26. Mortensen, *supra* note 18.

27. Compare *id.* (estimating the value of Suh's contract as approximately \$114 million), with Herbert, *supra* note 16 (estimating the value of Middleton's contract as approximately \$70 million).

28. Dashiell Bennett, *The NFL's Official Spin on Average Career Length Is A Joke*, BUSINESS INSIDER (Apr. 18, 2011, 5:18 PM), <http://www.businessinsider.com/nfl-spin-average-career-length-2011-4>. For comparison, the average NBA career length is 4.8 years, meaning NBA players have, on average, two additional years of earning capacity compared to NFL players. Which, not surprisingly, means NBA players have, on average, significantly higher average earnings compared to NFL players. Cork Gaines, *The Average NBA Player Will Make a Lot More in His Career than the Other Major Sports*, BUS. INSIDER (Oct. 10, 2013, 4:24 PM), <http://www.businessinsider.com/chart-the-average-nba-player-will-make-lot-more-in-his-career-than-the-other-major-sports-2013-10>.

29. Markazi, *supra* note 6 (noting that NBA contracts are largely guaranteed although nothing in the NBA Collective Bargaining Agreement necessarily obligates them to be guaranteed).

30. CBA, *supra* note 4, at art. 4, § 5(d), app. A, ¶ 11 (2011) (“[A]ny Player Contract may be terminated if, in the Club’s opinion, the player being terminated is anticipated to make less of a contribution to the Club’s ability to compete on the playing field than another player or players whom the Club intends to sign or attempt to sign, or

he is guaranteed to receive is his signing bonus, which is the most common form of so-called “guaranteed money” in an NFL contract.<sup>31</sup> Such is the reality in a sport where only an estimated 57% of money in all player contracts combined is guaranteed.<sup>32</sup>

There does not appear to be a clear or universally accepted explanation for the disparity between the money guaranteed in an NBA player’s contract and an NFL player’s contract. Although revenue streams might be thought to provide an explanation, the disparity is not explained by a difference in the profitability of the two sports. In fact, the NFL is often regarded as the most popular sport in America<sup>33</sup> and generated an estimated \$12 billion in revenue in 2014,<sup>34</sup> while the NBA and its teams generated just under \$5 billion in revenue over roughly the same time period.<sup>35</sup> Some speculate that the disparity is explained by smaller roster sizes in the NBA.<sup>36</sup> Others assert that the lack of guarantees in NFL player contracts is attributable to a combination of roster size, career length, and the nature of injuries within the game.<sup>37</sup>

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another player or players who is or are already on the roster of such Club, and for whom the Club needs Room.”).

31. Chris Deubert & Glenn M. Wong, *Understanding the Evolution of Signing Bonuses and Guaranteed Money in the National Football League: Preparing for the 2011 Collective Bargaining Negotiations*, 16 UCLA ENT. L. REV. 179, 194 (2009). *But see* CBA, *supra* note 4, art. 4, § 9(b) (explaining that a portion of a player’s signing bonus may be subject to forfeiture in the event of a forfeitable breach). I use the phrase “so-called guaranteed money” here to allude to the fact that there are several forms of “guaranteed money” that are far from guaranteed. In fact, it is a common practice to label certain money that is conditioned upon the occurrence of other events as “guaranteed money.” For a more detailed discussion, see *infra* Part III.

32. Markazi, *supra* note 6.

33. Darren Rovell, *NFL Most Popular for 30th Year in a Row*, ESPN (Jan. 26, 2014), [http://espn.go.com/nfl/story/\\_id/10354114/harris-poll-nfl-most-popular-mlb-2nd](http://espn.go.com/nfl/story/_id/10354114/harris-poll-nfl-most-popular-mlb-2nd); *see also* Kent Somers, *Reports of NFL’s Death are Clearly Premature*, ARIZ. REPUBLIC (Aug. 15, 2016, 4:13 PM), <http://www.azcentral.com/story/sports/nfl/cardinals/2016/08/13/reports-nfls-death-clearly-premature/88630530/> (refuting the premonitions that the NFL will soon fall apart and citing continuous growth in popularity and revenue as evidence of the league’s stability).

34. Jackie Wattles, *NFL Sees Big Jump in Revenue*, CNN MONEY (July 20, 2015, 8:42 PM), <http://money.cnn.com/2015/07/20/news/green-bay-packers-revenue/> (totals estimated using financial disclosures from the NFL’s only publicly owned team, the Green Bay Packers).

35. *See NBA Team Values: The Business of Basketball*, FORBES <http://www.forbes.com/nba-valuations/list/> (last visited Oct. 11, 2015) (revenue totals estimated in the millions).

36. Markazi, *supra* note 6; *see also* Michael David Smith, *Odell Beckham: NFL Players Should Get Paid More*, NBC SPORTS (May 18, 2015 12:26 PM), <http://profootballtalk.nbcsports.com/2015/05/18/odell-beckham-nfl-players-should-get-paid-more/> (stating that although the NFL players get a larger share of revenue than NBA players, the revenue is divided up among a larger pool of players).

37. Markazi, *supra* note 6 (quoting labor attorney Jeffrey Kessler).



Further search for possible answers as to why guaranteed money in the NFL is so scarce reveals that the dearth of guaranteed money in the NFL is a result of standard historical practices by team owners—practices that players were never able to overcome on their own.<sup>38</sup> Prior to outside competition from rival leagues, guaranteed contracts were never an option afforded to players.<sup>39</sup> Attempts to obtain guaranteed compensation via litigation and at the bargaining table were unsuccessful and rebuffed.<sup>40</sup> The signing-bonus system became popular and attractive to NFL players because it was the only option for guaranteed compensation when multi-year salaries were essentially nonexistent. Compared to other professional sports leagues, in the NFL the signing bonus plays a significantly larger role in whether a player signs a contract.<sup>41</sup>

Regardless of the reason for the disparity in guaranteed compensation, the NBA's spending spree, highlighted by contracts like Middleton's, caught the attention of sportswriters and casual sports fans and reinvigorated calls from active NFL players for greater guaranteed compensation.<sup>42</sup> One player, Duke Ihenacho of the NFL's Washington franchise, received national media attention for his comments on Twitter pointing out that athletes who are exposed to the greatest risks of injury and long-term health problems—i.e., football players—are saddled with some of the lowest salary minimums and contract guarantees across all professional sports.<sup>43</sup>

While Ihenacho's comments were motivated by the NBA's signing frenzy, they were merely the latest in a lineage of NFL players calling for larger guarantees.<sup>44</sup> Adrian Peterson, a more prominent football player, rarely shies away

38. Levine, *supra* note 9, at 440 (“The lack of guaranteed contracts in the NFL stems from practice, not precedent.”).

39. *See id.* at 450–53.

40. *See id.* at 450–51.

41. *See id.* at 455–56.

42. *See* Keim, *supra* note 14; Smith, *supra* note 36.

43. Keim, *supra* note 14; Duke Ihenacho (@NachoLyfe), TWITTER (July 1, 2015, 12:00 PM), [https://twitter.com/NachoLyfe/status/616320507089039360?ref\\_src=twsrc%5Etfw](https://twitter.com/NachoLyfe/status/616320507089039360?ref_src=twsrc%5Etfw) (“All this guaranteed money NBA throwing. Meanwhile the NFL, which generates the most money wont even make the league minimum \$1M [sic][.]”); Duke Ihenacho (@NachoLyfe), TWITTER (July 1, 2015, 12:06 PM), [https://twitter.com/NachoLyfe/status/616322075825844224?ref\\_src=twsrc%5Etfw](https://twitter.com/NachoLyfe/status/616322075825844224?ref_src=twsrc%5Etfw) (“Yes \$1M minimum. That means every single player's salary in the NFL should start there. Highest risk of injury..brain trauma, richest league [sic][.]”). Ihenacho later expressed his feelings beyond social media platforms by authoring an article on *The Players Tribune*. Duke Ihenacho, *No Guarantees*, PLAYERS' TRIB. (Oct. 8, 2015), <http://www.theplayerstribune.com/nfl-contracts-guaranteed-money/>.

44. *See* Keim, *supra* note 14 (revealing that Ihenacho's Washington teammate, Andre Roberts, recently expressed discontent with contract guarantees and openly inquired as to whether another player strike was in order); Andre Roberts (@AndreRoberts), TWITTER (Feb. 1, 2015, 12:54 AM) [https://twitter.com/AndreRoberts/status/561794647492546560?ref\\_src=twsrc%5Etfw](https://twitter.com/AndreRoberts/status/561794647492546560?ref_src=twsrc%5Etfw) (“When are we goin on strike again!! It's a about that time!!! Time to stand up!! #serious #timeforachange [sic]”).

from opining about the inequities within the professional football world, whether they are real or perceived.<sup>45</sup> After skipping offseason workouts in 2011, Peterson discussed his willingness to return to his current team, the Minnesota Vikings, indicating that he did not want to return unless his future was “secured.”<sup>46</sup> Peterson also criticized the circumstances of NFL contract negotiations where a player is expected to uphold his end of a contract while a team may terminate him at will with limited financial consequences.<sup>47</sup> Unfair as the circumstances may seem, they exist and persist with the permission of the players themselves.<sup>48</sup>

## II. THE DEVELOPMENT OF THE SIGNING BONUS SYSTEM

If guaranteed money is so important to the players, or if the disparity between guaranteed money for NBA players and NFL players is so great, why has it not been addressed before? Why have the players not been able to resolve this problem already if it truly is so concerning? The history of free agency and guaranteed money in the NFL lends a partial explanation to these questions. The NFL’s larger history tells a story of labor rights developing in fits and starts. Throughout the league’s history, the NFL has, for the most part, held a monopoly over professional football, and labor rights expanded only when the NFL faced direct competition from rival professional football leagues.

### A. AFL Competition Boosts Player Salaries

Although it may surprise modern football fans, the NFL did not always embrace free player mobility.<sup>49</sup> On the contrary, in the NFL’s early days, when it was still known as the American Professional Football Conference, competition for players’ services between teams was considered detrimental to professional sports leagues.<sup>50</sup> Rather than teams within a league engaging in bidding wars to sign a player, teams across rival leagues would do so, offering players larger contracts in order to garner their talent.<sup>51</sup> Historically, the NFL was strong enough to overtake competing leagues.<sup>52</sup> The rival league would either fail on its own, or the NFL would poach the best franchises from the rival league and adopt them into the NFL, leaving the rival league without its best teams (and likely without its best

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45. See Stephen Smith, *Adrian Peterson: NFL like “Modern-Day Slavery”*, CBS NEWS (Mar. 15, 2011, 5:04 PM), <http://www.cbsnews.com/news/adrian-peterson-nfl-like-modern-day-slavery/> (explaining that Peterson compared the NFL to slavery because the NFL owners were asking for a greater percentage of NFL revenues to be kept by owners rather than distributed and shared among the players).

46. James Brady, *Adrian Peterson Threw a Tantrum About NFL Contracts on Twitter*, SB NATION (May 28, 2015, 7:50 PM), <http://www.sbnation.com/nfl/2015/5/28/8682507/adrian-peterson-nfl-contract-vikings-suspension>.

47. *Id.*

48. The governing document between the NFL and its players is one negotiated by, and agreed to by, the members of the NFLPA. See generally CBA, *supra* note 4.

49. See Deubert & Wong, *supra* note 31, at 184.

50. *Id.*

51. See *id.*

52. *Id.*

players).<sup>53</sup> Then came the American Football League (“AFL”), providing an entirely new challenge for the NFL.<sup>54</sup>

Rival leagues often financially failed shortly after forming, but the AFL challenged the NFL’s dominance, forced the NFL to increase salaries, and aided in the creation of the signing bonus. The AFL emerged in 1960 and secured financially lucrative broadcasting agreements, providing financial stability for the AFL and enabling it to threaten the NFL’s superiority.<sup>55</sup> Unlike previous NFL challengers that lacked financial stability, the AFL could fund itself for the long-term and simultaneously poach NFL talent.<sup>56</sup>

Poaching talented players by offering high-salary deals to both current NFL players and incoming college players became the AFL’s business model.<sup>57</sup> The AFL was so successful at this tactic that the average NFL player’s salary rose as NFL owners tried to hold on to their players.<sup>58</sup> In fact, there was such fierce competition for players that an NFL team offered the first signing bonus in the league’s history to an incoming college running back—before the AFL had even begun its inaugural season.<sup>59</sup> Although some NFL owners, like Art Modell of the Cleveland Browns, thought the NFL had “another 30 years” before the AFL posed a real threat, there was a sentiment among AFL ownership that the league could overtake the NFL far sooner.<sup>60</sup> Soon, player price tags and poaching were getting out of hand. Ownership in the NFL recognized that the AFL was there to stay.<sup>61</sup> Rather than continue to engage in “senseless” competition until a true victor was found, the two leagues merged in the late 1960s.<sup>62</sup> After the merger, the poaching ceased and the rise of player compensation slowed.<sup>63</sup>

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53. *Id.* at 184–85.

54. *Id.* at 184.

55. *Id.* at 184–85.

56. *See id.*

57. *See id.* at 185.

58. *Id.*

59. Levine, *supra* note 9, at 452.

60. Ken Rappoport, *The AFL-NFL Merger was Almost Booted . . . By a Kicker*, NFL (Aug. 20, 2009, 4:26 PM), <http://www.nfl.com/news/story/09000d5d81206b90/article/the-aflnfl-merger-was-almost-booted-by-a-kicker>.

61. *Id.* (“The AFL was not about to fold. None of its franchises, not even the financially strapped ones in Boston or Denver, was about to disappear. In fact, the league was about to grow, with an expansion team in Miami beginning play in 1966[.]”).

62. *Id.* The two sides avoided antitrust litigation primarily because the two leagues successfully lobbied and petitioned Congress to authorize the merger and restore the NFL’s monopoly over professional football. Nathaniel Grow, *Regulating Professional Sports Leagues*, 72 WASH & LEE L. REV. 573, 642 n.334 (2015). In exchange for Congress granting the merger antitrust exemption, the NFL agreed to expand the number of teams and founded franchises in Atlanta and New Orleans. Thomas A. Piraino Jr., *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U. L. REV. 889, 909 & n.108 (1999).

63. Deubert & Wong, *supra* note 31, at 185.

### *B. USFL Competition Drives Up Signing Bonuses*

Although the AFL's success pushed the NFL to increase average player salaries, players still possessed little ability to shop their services to other teams within the NFL due to the "Rozelle Rule" adopted in 1963.<sup>64</sup> Under the Rozelle Rule, named after the NFL commissioner who first implemented it, Pete Rozelle, players were free to sign with other teams, but doing so would require the new team to compensate the old team—either with draft picks, money, or other players—in an amount and manner arbitrarily determined by the NFL Commissioner.<sup>65</sup> A court later struck down the Rozelle Rule in 1975 as unduly restricting player mobility, but the NFLPA was unable to thereafter successfully bargain for truly open free agency.<sup>66</sup>

In the meantime, a new rival league, the United States Football League ("USFL"), emerged in 1982 providing leverage for the NFLPA to attempt to get closer to true free agency.<sup>67</sup> Unfortunately, even with the competing USFL and a 57-day player strike, the NFLPA did not achieve greater player mobility, although it did acquire a greater share of league revenue for the players.<sup>68</sup> Nonetheless, as the AFL had done before, the USFL forced the NFL to change its compensation percentages, and average signing bonuses increased by 257%.<sup>69</sup> The USFL, like the AFL before it, was short-lived. In 1986, the USFL folded and signing bonus amounts correspondingly dropped off.<sup>70</sup> Nonetheless, the signing-bonus concept was here to stay, much to the dismay of the NFL owners and some commentators.<sup>71</sup>

While outside competition has proven to be helpful to the growth of compensation for NFL players, it has not been an absolute requisite for growth.

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64. See *id.*; see also Scott E. Backman, *NFL Players Fight for Their Freedom: The History of Free Agency in the NFL*, 9 *SPORTS LAW J.* 1, 10–11 (2002).

65. Deubert & Wong, *supra* note 31, at 185 (explaining the Rozelle Rule and the chilling effect it had on player mobility due to fears that Commissioner Rozelle would overcompensate a player's former team). Rozelle served as the NFL Commissioner from 1960 until 1989 and is credited with instituting changes that significantly benefitted the NFL. William N. Wallace, *Pete Rozelle, 70, Dies; Led NFL in its Years of Growth*, N.Y. TIMES (Dec. 7, 1996), <http://www.nytimes.com/1996/12/07/sports/pete-rozelle-70-dies-led-nfl-in-its-years-of-growth.html>.

66. Deubert & Wong, *supra* note 31, at 185–86 (explaining the NFLPA's acceptance of a Right of First Refusal/Compensation ("RFR/C") System); see also Mackey v. Nat'l Football League, 407 F. Supp. 1000, 1011 (D. Minn. 1975); Levine, *supra* note 9, at 441–42 ("Once again, the NFLPA bargained away another hard-fought legal victory' by agreeing to a modified reserve system . . .").

67. Deubert & Wong, *supra* note 31, at 185–86.

68. *Id.* at 186–87.

69. *Id.* at 186.

70. *Id.* at 186–87.

71. See Bob O'Donnell, *To NFL's Dismay, Signing Bonuses are Here to Stay*, CHI. TRIB. (Oct. 2, 1988), [http://articles.chicagotribune.com/1988-10-02/sports/8802040309\\_1\\_bonus-signing-big-league/2](http://articles.chicagotribune.com/1988-10-02/sports/8802040309_1_bonus-signing-big-league/2) ("The bonus system is like crabgrass. It appeared and flourished during times when the league had to compete for young talent. Now that it has taken hold, it is almost impossible to get rid of.").

After multiple lawsuits and more limited player mobility, the 1993 Collective Bargaining Agreement (“CBA”) between the players and the owners finally granted unrestricted free agency.<sup>72</sup> One season after the implementation of unrestricted free agency, average total compensation increased 35.8%. And in 1996, signing-bonus compensation skyrocketed by 193%<sup>73</sup>—but this time, not in response to competition from a rival league.<sup>74</sup> Perhaps most interestingly, the introduction of unrestricted free agency and the resulting boom in guaranteed money did not “ruin pro football” as some owners hypothesized.<sup>75</sup> On the contrary, the mobility and competition for players among teams within the NFL coincided with the NFL becoming the most popular sport in America.<sup>76</sup>

The historical development of the bonus system reveals persistent resistance to guaranteed compensation, but also illustrates the benefits of outside competition and the ability for growth when competition for talent comes not only from outside the league but also from within. Although denying guaranteed compensation seems to be a longstanding practice of NFL ownership, the prognostications that guaranteeing greater amounts of money will bankrupt the league or ruin the sport seem baseless and have been consistently wrong. Given the rise in guaranteed compensation, not only in amount but also in kind (as discussed in Part III), and the increasing attention to the guaranteed money in a contract, the NFL owners seem to be keenly aware that they can no longer expect to simply reply “no” in negotiations for increases in guaranteed compensation.

### III. ILLUSORY GUARANTEES

As discussed above,<sup>77</sup> the signing bonus became prominent in the NFL primarily during bidding wars between the NFL and rival leagues as a means to guarantee money to a player prior to the player stepping on the field for the first time under his contract.<sup>78</sup> As familiarity with the signing bonus increased, players

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72. Deubert & Wong, *supra* note 31, at 188–89. I use the term “unrestricted free agency” here to mean free agency without the need to compensate the player’s former team or give the player’s former team a right of first refusal. An “unrestricted” free agent can negotiate with any team and sign any contract offer with acceptable terms. However, a “restricted” free agent is free to negotiate with any team but may not sign a contract with a new team without first offering his former team a right to match the offer of the new team. Likewise, any team who signs a restricted free-agent player must also compensate the player’s former team in some manner. CBA, *supra* note 4, at art. 9, §§ 1–3.

73. Deubert & Wong, *supra* note 31, at 189–90 (attributing the largest gross increase in player compensation to the adoption of the new CBA in 1993 and indicating that average signing bonus compensation experienced a 193% increase in just four seasons after the adoption of the 1993 CBA). The AFL and USFL had both folded well before adoption of the 1993 CBA.

74. *Id.*

75. Bob Oates, *Al Davis Said to Be NFL’s Deal Breaker*, L.A. TIMES (Jan. 1, 1993), [http://articles.latimes.com/1993-01-01/sports/sp-3011\\_1\\_al-davis](http://articles.latimes.com/1993-01-01/sports/sp-3011_1_al-davis) (quoting Davis as saying, “[L]arge numbers of free agents would ruin [pro football]”).

76. Deubert & Wong, *supra* note 31, at 190.

77. *See supra* Part II.

78. Deubert & Wong, *supra* note 31, at 195.

became more aware of the importance of guaranteed money and demanded larger sums. In response, teams have developed alternative contractual means of “guaranteeing” money to players.<sup>79</sup> Unfortunately, these are guarantees in name only and are dependent on various contingencies, some of which are outside the control of the player himself.<sup>80</sup> It is entirely possible that a player may never have the opportunity to satisfy a required contingency, making these “illusory guarantees.”<sup>81</sup>

#### A. Defining Illusory Guarantees

While a signing bonus is the most common form of “guaranteed money,” additional means of “guarantees” exist, although they are often more fleeting than a signing bonus.<sup>82</sup> I refer to all guarantees other than the signing bonus as “illusory guarantees” because payment is not “guaranteed” and the player is not entitled to receive any compensation. Instead, these illusory guarantees are dependent on one or more contingencies occurring in order for the player receives compensation.

One common form of an illusory guarantee is an “option bonus.” Option bonuses are paid upon the exercise of a team option to extend a player’s contract for a number of years. An option bonus incentivizes a player to grant a team the option to retain the player for an additional year without having to renegotiate the terms—financial or otherwise—of the contract.<sup>83</sup> When a team exercises its option to retain the player for an additional year or years, an option bonus acts like a signing bonus would for a regular contract: if the team exercises the option, not only does the player have a job and a salary for another year, he also gets a bonus to compensate him for forfeiting the ability to renegotiate or test the free-agent market.<sup>84</sup> Importantly, the player has no control over the exercise of the option. If

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79. See generally Deubert & Wong, *supra* note 31, at 193–201 (discussing the definitions and calculation of the salary-cap implications of signing bonuses, option bonuses, incentive clauses, roster bonuses, and workout bonuses). Today, the signing bonus is also used as a means to creatively adjust a team’s salary-cap figure from year to year. *Id.* at 198. A player’s signing bonus money is amortized over the term of the contract for purposes of salary-cap consideration. This enables a team to “restructure” a player’s contract when the team wants to lower a player’s impact on their salary cap. In essence, turning a player’s Paragraph 5 salary into a “signing bonus” converts otherwise unguaranteed money into guaranteed money that the player receives instantly. The benefit to the team is that they can then spread that salary-cap figure out over the duration of the player’s remaining contract term. See Andrew Brandt, *Salary Cap . . . Explained!*, MMQB (Feb. 26, 2014), <http://mmqb.si.com/2014/02/26/nfl-salary-cap-explained> (explaining salary-cap considerations and strategies for reconstructing pricey veteran contracts to spread a player’s cap number over several seasons to increase salary-cap space).

80. See *infra* Sections III.A–B.

81. For an illustration of a contingency outside of a player’s control, see *supra* Section III.B.

82. See generally Deubert & Wong, *supra* note 31, at 193–201.

83. *Id.* at 195. For further discussion of team options in the context of rookie wages under the 2011 CBA, see *infra* Section IV.C.

84. See Deubert & Wong, *supra* note 31, at 195.

the team declines to exercise the option, the player receives zero compensation thus making the bonus an illusory guarantee.

A second form of an illusory guarantee is a “one time incentive clause,” which guarantees a sum of money upon completion of a team or player statistical performance level.<sup>85</sup> The “guaranteed” element at play here is that, upon achievement of the statistical performance level, the incentive is due to be paid out at the end of the season.<sup>86</sup> So, as long as the goal is met, the money is paid out to the player—there is nothing more to be done.<sup>87</sup>

“Roster bonuses” and “workout bonuses” are two more examples of illusory guarantees. Respectively, they provide compensation to players for being on the roster as of a certain date, and for attending and participating in voluntary offseason activities.<sup>88</sup> Again these bonuses are included in the “guaranteed money” calculus despite being contingent on certain events—both outside of the player’s control to some extent.<sup>89</sup> Again, the “guaranteed” element here is presumptive of performance because the player will receive the money so long as the condition is met.<sup>90</sup>

### ***B. Illustrating Illusory Guarantees***

Ndamukong Suh’s contract (see Table 1, below) provides a revealing look at how bonuses beyond the signing bonus can be elusive. Suh’s deal is unique not only because it guaranteed the largest amount of money in an NFL player contract to date, but also because it guaranteed three years of Suh’s salary.<sup>91</sup> Suh’s signing bonus, workout bonus, and guaranteed salary for the first three years total \$60,045,000 in “guaranteed money.” However, Suh’s ability to earn the workout bonuses depends entirely on the Miami Dolphins’ decision to keep him on the roster. In other words, if after the 2017 season, the Dolphins decide to cut Suh—which is quite possible because of the dramatic escalation between his 2017 salary and 2018 salary—he cannot earn \$45,000 of that “guaranteed” money; the workout bonus operates as an illusory guarantee. In total, the only fully guaranteed money Suh can rely on is his 2015–2017 salary, plus his signing bonus (a total of \$59,955,000). But, far from every NFL player gets that kind of historic deal.

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85. *Id.* at 196–97.

86. *Id.*

87. *Id.*

88. *Id.* at 197–98.

89. A player has little to no direct control over whether or not he will remain on a team’s roster, meaning the player cannot control whether he receives a roster bonus. With regard to workout bonuses, a player can choose to attend the voluntary offseason workout program, however if he is released from his contract prior to the workout, his ability to perform under his contract is frustrated, and he cannot receive the bonus as he would not be permitted to attend an offseason workout of a team he no longer plays for. For more discussion, see *infra* Section III.B.

90. *See id.*

91. *NFL Contracts*, OVER THE CAP, <http://overthecap.com/contracts/> (last visited Apr. 28, 2016); *Ndamukong Suh*, OVER THE CAP, <http://overthecap.com/player/ndamukong-suh/1816/> (last visited Apr. 28, 2016).

Year	Base Salary (Amount Guaranteed)	Prorated Signing Bonus (Amount Guaranteed)	Roster Bonus	Workout Bonus (Amount Guaranteed)	Other Bonus
2015	\$985,000 (\$985,000)	\$5,100,000 (\$5,100,000)	\$0	\$15,000 (\$0)	\$0
2016	\$3,485,000 (\$3,485,000)	\$9,100,000 (\$9,100,000)	\$0	\$15,000 (\$0)	\$0
2017	\$9,985,000 (\$9,985,000)	\$9,100,000 (\$9,100,000)	\$0	\$15,000 (\$0)	\$0
2018	\$16,985,000 (\$0)	\$9,100,000 (\$9,100,000)	\$0	\$15,000 (\$0)	\$0
2019	\$18,985,000 (\$0)	\$9,100,000 (\$9,100,000)	\$0	\$15,000 (\$0)	\$0
2020	\$18,360,000 (\$0)	\$4,000,000 (\$4,000,000)	\$0	\$15,000 (\$0)	\$0
Total	\$68,785,000 (\$14,455,000)	\$45,500,000 (\$45,500,000)	\$0	\$90,000 (\$0)	\$0

**Table 1:** Ndamukong Suh Miami Dolphins Contract<sup>92</sup>

To further illustrate how this creative labeling of “guaranteed” money misrepresents what a player is actually guaranteed to make, examining Seattle Seahawks Quarterback Russell Wilson’s contract is helpful. Wilson signed a four-year, \$87.6 million contract in August 2015, and the deal was considered to be on par with or better than other recently signed quarterback contracts.<sup>93</sup> Notably, the contract reportedly guaranteed \$61.5 million.<sup>94</sup> However, beyond the \$31 million signing bonus Wilson received shortly after signing the contract, all remaining money on the contract is either nonguaranteed Paragraph 5 Salary, or some form of an illusory guarantee—such as a roster bonus, which Wilson will receive only if he remains on the roster as of the roster bonus date.<sup>95</sup> Unlike Suh’s deal, where the discrepancy between actual guaranteed compensation and the illusory guarantees was only \$45,000, Wilson’s deal illustrates a difference of an estimated \$30

92. *Ndamukong Suh*, OVER THE CAP, *supra* note 91. Note that the entire signing bonus amount is paid to Suh shortly after signing his contract. However, for the purposes of the signing bonus counting toward the Miami Dolphins’ salary cap, the amount is amortized over the term of the contract.

93. Cork Gaines, *Russell Wilson’s Monster Deal is the Latest Evidence that NFL Contracts Are a Joke*, BUS. INSIDER (Aug. 3, 2015, 10:40 AM), <http://www.businessinsider.com/russell-wilson-contract-guarantees-2015-8>.

94. *Id.*

95. *Id.*



million between his actual guaranteed compensation and his contract's illusory guarantees. Furthermore, the use of illusory guarantees in the contract results in a difference of over \$50 million between truly guaranteed money and the total value of the contract reported by the media. In other words, Wilson's contract appears to guarantee almost 70% of the total compensation but, after identifying illusory guarantees, Wilson's contract actually guarantees only about 35% of the total contract value.

The effect of these illusory guarantees is that a player never really knows how much money he will have the opportunity to secure should his season end abruptly due to termination of his contract, talent drop-off, or injury. He is essentially operating under a contract of numerous contingencies—if he reaches a given milestone before a given date, he'll receive some set dollar amount in bonus compensation; if he remains on the roster and then attends a given number of practices with a given weight, he'll receive some set dollar amount in bonus compensation. In a sport with a high rate of injury and short career lengths, whether a player will be healthy enough to play from week to week is arguably a contingency in itself. Moreover, a player could theoretically be just short of meeting the contingency and have his contract terminated without receiving any of the supposed "guaranteed" compensation.

#### IV. NFL & NFLPA: RECENT COLLECTIVE BARGAINING HISTORY

NFL player compensation, in general, has experienced healthy growth even while the NFL remains the only game in town for professional football. Although the NFL's monopolistic structure advantages the owners and disadvantages the players, the players are not entirely powerless when it comes to the labor structure between the two parties. Through the use of the CBA, the NFLPA and the NFL owners create a labor relationship that bears the badge of being the most litigious of the four major American sports.<sup>96</sup> Litigation notwithstanding, collective bargaining in the NFL has been a beneficial process for players in the past, as former iterations of the CBA brought free agency and served as the foundation for future agreements to help ensure labor harmony.<sup>97</sup> Thanks to collective bargaining, NFL franchises are required to spend greater percentages of their total revenue on their team's player salaries, thereby ensuring that more money is distributed to the players via contracts.<sup>98</sup> There is even speculation that the most recent 2011 CBA, with its rookie pay scale, may provide the foundation

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96. Chris Deubert et al., *All Four Quarters: A Retrospective and Analysis of the 2011 Collective Bargaining Process and Agreement in the National Football League*, 19 *UCLA ENT. L. REV.* 1, 6 (2012). The "four major American sports" as used here refers to professional football, basketball, baseball, and hockey. *Id.* at 5.

97. *Id.* at 12.

98. *Id.* at 12–14. The 2006 CBA changed the defined term and included more sources of revenue into the definition of "total revenue" which resulted in a smaller percentage share for the players but increased the salary cap overall because it was a smaller slice of a bigger pie. *Id.*

for greater salary guarantees in future player contracts.<sup>99</sup> Unfortunately, though, the 2011 CBA falls short of the progress that its predecessors produced, and it favors the owners more than the players.<sup>100</sup> This is likely due to timing as well as the atmosphere that developed during the bargaining process and preceded the new agreement's finalization, which came after a player lockout.<sup>101</sup>

#### A. *Lead-up to a Lockout*

Two years after signing the 2006 CBA, the owners complained of significantly reduced profits.<sup>102</sup> The owners opted out of the 2006 CBA in May 2008 in order to begin negotiating a new one.<sup>103</sup> NFL Commissioner Roger Goodell cited three reasons for the early termination: labor costs, rookie wages, and teams' inability to recoup player bonuses when players breached their contracts.<sup>104</sup> The owners' opt-out resulted in voiding the final two years of the agreement and created a "poison pill" designed to force the two sides to come to an agreement.<sup>105</sup> The poison pill created a season free of a salary cap, modified the requirements for a player to become an unrestricted free agent,<sup>106</sup> and limited which teams would be able to sign unrestricted free agents.<sup>107</sup>

The poison pill did not work and a series of events and tensions arose which completely inhibited the two sides from agreeing on a new deal.<sup>108</sup> The NFLPA's executive director died unexpectedly, the two sides dragged their heels to address the negotiations, and owners talked down to and disrespected players in negotiations.<sup>109</sup> A lack of progress on negotiating how much revenue the players would receive overshadowed progress on secondary issues.<sup>110</sup> The two sides could not agree and litigation ensued.<sup>111</sup> The NFL filed unfair labor practice charges with

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99. Mike Florio, *Rookie Wage Scale Could Be the First Step Toward Guaranteed Veteran Contracts*, NBC SPORTS (July 28, 2011, 10:16 PM), <http://profootballtalk.nbcsports.com/2011/07/28/rookie-wage-scale-could-be-the-first-step-toward-guaranteed-veteran-contracts/>.

100. See Deubert et al., *supra* note 96, at 44 (noting that players received 57.5% of all total revenue under the 2006 CBA and closer to 50% under the 2011 CBA).

101. *Id.* at 12.

102. *Id.* at 14.

103. *Id.*

104. Aaron Shepard, *Football's Stormy Future: Forecasting the Upcoming National Football League Labor Negotiations*, 33 COLUM. J.L. & ARTS 527, 529 (2010).

105. Deubert et al., *supra* note 96, at 14.

106. *Id.*; see also Shepard, *supra* note 104, at 536–37 (providing an example of how changes to unrestricted free-agency eligibility could dramatically decrease Shawne Merriman's salary in an offseason in which he otherwise would have been able to become an unrestricted free agency).

107. Shepard, *supra* note 104, at 537 (explaining the "Final Eight Plan" which limits the ability to sign unrestricted free agents if a team is one of the final eight teams remaining in the NFL playoffs).

108. Deubert et al., *supra* note 96, at 14.

109. *Id.* at 14–15.

110. *Id.* at 20.

111. *Id.* at 20, 22.

the National Labor Relations Board.<sup>112</sup> In response, the NFLPA decertified and the players commenced litigation against the league.<sup>113</sup> The owners then imposed a lockout, resulting in the first work stoppage in the NFL since 1987.<sup>114</sup>

### ***B. The Lockout and Avoiding Lost Games***

The lockout became an on-again, off-again occurrence.<sup>115</sup> Forty-four days after the instatement of the lockout, a district court judge lifted the lockout and issued an injunction.<sup>116</sup> A mere four days later, the Eighth Circuit Court of Appeals reinstated the lockout and granted a request for a temporary stay while the NFL conducted its annual first-year-player draft.<sup>117</sup> On July 8, 2011, the Eighth Circuit Court of Appeals held that the district court, as a federal court, lacked the power to issue an injunction prohibiting a party (the NFL) from implementing a lockout of its employees (the players) during a labor dispute.<sup>118</sup> The lockout continued.<sup>119</sup>

The Eighth Circuit ruling did not immediately help the ongoing negotiations.<sup>120</sup> The timing of the opinion raised eyebrows, as some believed the two sides were drawing nearer to an agreement.<sup>121</sup> Nonetheless, six days after the Eighth Circuit's ruling, optimism for an end to the lockout resurfaced.<sup>122</sup> As the league and players passed the final hurdles, attention turned to constructing a new league schedule that would compress an entire four-to-five month offseason into a matter of weeks.<sup>123</sup> Just 13 days before the first scheduled preseason game, with the possibility of canceling regular season games approaching, the two sides reached a new agreement.<sup>124</sup>

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112. *Id.* at 39.

113. *Id.* at 22.

114. *Id.*

115. Seth Wenig, *NFL Lockout Timeline*, USA TODAY (July 21, 2011), [http://usatoday30.usatoday.com/sports/football/nfl/2011-07-21-lockout-timeline\\_n.htm](http://usatoday30.usatoday.com/sports/football/nfl/2011-07-21-lockout-timeline_n.htm).

116. *Id.*; *Brady v. NFL*, 779 F. Supp. 2d 992, 1042–43 (D. Minn. 2011), *vacated*, 644 F.3d 661 (8th Cir. 2011); Wenig, *supra* note 115.

117. *Brady*, 779 F. Supp. 2d at 1005; Wenig, *supra* note 115.

118. *Brady v. NFL*, 644 F.3d 661, 680–82 (8th Cir. 2011).

119. *Id.*

120. Albert Breer, *Latest Talks Accomplish Little, but Parties to Meet Again Monday*, NFL (July 8, 2011), <http://www.nfl.com/news/story/09000d5d820ae1ca/article/latest-talks-accomplish-little-but-parties-to-meet-again-monday>.

121. Lester Munson, *NFL Lockout Ruling Raises Timing Issues*, ESPN (July 9, 2011), <http://sports.espn.go.com/espn/commentary/news/story?page=munson-110708> (questioning the timing of a ruling that could potentially shift the leverage and strength of a party mid-negotiation).

122. Judy Battista, *With Deal on Rookie Wages, N.F.L. Lockout Nears the End*, N.Y. TIMES (July 15, 2011), <http://www.nytimes.com/2011/07/15/sports/football/deal-reached-on-nfl-rookie-wage-scale.html>.

123. *See id.*; Adam Schefter, *Sources: Deal to End Lockout Reached*, ESPN (July 24, 2011), [http://espn.go.com/nfl/story/\\_id/6797238/2011-nfl-lockout-owners-players-come-deal-all-points-sources-say](http://espn.go.com/nfl/story/_id/6797238/2011-nfl-lockout-owners-players-come-deal-all-points-sources-say).

124. Schefter, *supra* note 123 (the NFLPA approved the deal and only one preseason game was canceled).

*C. Rookie Compensation: A Guarantee Model*

Ultimately, the 2011 CBA has been a loss for the players in terms of revenue sharing, as they actually now receive less revenue than they did under the 2006 CBA: several revenue categories are now exempt from the revenue-sharing calculation; there is no longer a floor to the salary cap; and bonuses are no longer protected from forfeiture.<sup>125</sup> The players doubled down on a lockout and walked away with less than they had before.<sup>126</sup> Deficiencies aside, the 2011 CBA addressed one large issue that may pave the road to greater guarantees: rookie compensation.<sup>127</sup>

By all accounts, rookie contracts under the 2006 CBA were out of hand.<sup>128</sup> A rookie player, before ever stepping on a professional football field, could essentially hold a team hostage and extract millions of dollars both guaranteed and non-guaranteed.<sup>129</sup> Even NFLPA President, Kevin Mawae, agreed that rookie pay was out of balance and the salary that rookies were tying up should be spread around to veterans who had proven themselves (or at least played a professional football game).<sup>130</sup> Rookie contracts are now very strictly structured with regard to length and salary amount, removing the flexibility of franchises and player agents to inflate rookie compensation.<sup>131</sup> However, this rigidity ultimately rewards prospectively elite rookies—those selected in the first round—by guaranteeing the majority of their total compensation.<sup>132</sup> Additionally, nearly all second-round picks receive one year of guaranteed compensation.<sup>133</sup> Additionally, a unique option is now included in contracts for first-round draft picks:<sup>134</sup> a fifth-

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125. See Deubert et al., *supra* note 96, at 44–50, 52 (indicating that the 2011 CBA results in players receiving a smaller revenue share).

126. *Id.* at 44, 61 (“[T]he 2011 CBA was a clear win for the NFL Clubs[.]”).

127. *Id.* at 56.

128. *Id.* at 52–53.

129. *Id.*

130. *Id.* at 53.

131. *Id.* at 54–55.

132. *Id.* at 61.

133. *Id.* (“As already mentioned, most of the compensation to be paid to 2011 first round picks is guaranteed. Not surprisingly, that trend trickled into the second round where nearly all of the players had at least one year’s salary guaranteed against skill, injury, and the Salary Cap.”).

134. Under the 2011 CBA, incoming rookie players could no longer receive massive compensation upon entering the league like the rookie classes of previous years. The trade-off to accepting this new reality was that rookie deals were mandated by the 2011 CBA to be shorter than in years past so as to enable a rookie to seek unrestricted free agency sooner (thereby enabling free-market bidding for a player’s services, ideally resulting in the player receiving his second contract sooner, which would usually mean greater compensation). Ross Tucker, *The Only Good Option Is to Extend Fifth-Year Options*, SPORTING NEWS (Apr. 24, 2014), <http://www.sportingnews.com/nfl-news/4581837-nfl-fifth-year-option-rookies-2011-contracts-trade-draft-picks-team-advantage-fairley-smith-pouncey>. However, because first-round picks are thought of as the rookies in the draft that are most likely to succeed and tend to have longer careers, first-round picks are considered the most objectively valuable rookies to an NFL team. See

year option, which, if exercised by the NFL franchise, guarantees the players' salaries against injury or poor performance throughout the option year.<sup>135</sup> While still a far cry from fully guaranteed contracts, the rookie-compensation modification lays the groundwork for future guarantees and may indicate a larger scheme to achieve that very goal.<sup>136</sup>

If the players want to move toward guaranteeing a larger portion of contracts, it is imperative that they attempt to do so through the collective-bargaining process. Although there is skepticism that the guaranteed-money problem can be addressed via a CBA,<sup>137</sup> many of the supposed roadblocks to greater guarantees—salary cap, rules requiring NFL teams to immediately have guaranteed funds available, the ability to prorate a signing bonus over the course of the contract, workers' compensation structure for a dangerous occupation, and roster sizes—can only be addressed in the CBA. However, in assessing the viability of achieving greater guarantees through the collective-bargaining process, it is difficult to ignore the fact that the NFLPA has not been able to secure greater aggregate guarantees for players across all contracts—veteran, rookie, or otherwise.

If there was any significant takeaway from the 2011 CBA regarding the power dynamic between the parties, it was that the NFL owners appeared to hold the power with respect to bargaining ability. After the Eighth Circuit overturned the district court, the NFL appeared to have the upper hand in the legal arena, as the courts could not prohibit the lockout. At the bargaining table, the owners received just about everything they wanted when they opted out of the 2006 CBA—exemptions from the revenue sharing that enable the owners to take home more money, a modification of the players' share of the total revenue, and an overhaul of the rookie pay scale. The players, on the other hand, did not achieve any concrete victories from the labor dispute. While the rookie pay-scale modification and increased mandatory minimums on veteran salary theoretically enable teams to spend more on veterans, they do not assure that the teams will, in turn, guarantee any more money to veterans.

With the owners consistently holding the upper hand, and the NFLPA caving before any games were lost in 2011, there seems to be little teeth to any demands or threats of work stoppage by the NFLPA. The owners have consistently held the NFLPA at bay and expansion of labor rights has been historically slow

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Bennett, *supra* note 28. Thus, they are the only players that receive the special fifth-year option protection. *Id.*

135. Deubert et al., *supra* note 96, at 56.

136. *Id.* at 61.

137. Levine, *supra* note 9, at 456. *But see* Andrew Brandt, *The CBA at Halfway, Part II*, MMQB (Sep. 29, 2016), <http://mmqb.si.com/mmqb/2016/09/29/nfl-cba-halfway-point-part-two> (listing compensation for players as an absolute priority that the NFLPA needs to address in upcoming CBA negotiations) (“[H]ere is the core issue of this CBA: teams are getting away with larceny on their most important expense, player costs. Simply, they are not spending or guaranteeing enough.”).

moving between the two sides. At present, the NFLPA does not appear to possess the leverage to change the dynamic.

## V. CONCUSSION LITIGATION AND THE PLAYER RESPONSE: THE LEVERAGE NEEDED TO TIP THE SCALES

### A. *Turner v. NFL: Concussions in the Spotlight*

While the NFL and NFLPA continued to hammer out the 2011 CBA, a crisis that had been building for years finally came to a head.<sup>138</sup> Former NFL players filed a class-action lawsuit against the NFL for breach of duty to the players by failing to take action to protect them from chronic risks created by concussive and sub-concussive head injuries.<sup>139</sup> In that case, *Turner v. NFL*, players further alleged that the NFL concealed risks of blows to the head and the potential for development of chronic traumatic encephalopathy (“CTE”).<sup>140</sup> Before and throughout the legal proceedings, former players expressed concerns about their mental health and the effects of multiple concussions suffered while playing in the NFL.<sup>141</sup> The subsequent suicides by some of those same players magnified the national concerns and put the NFL under the national microscope.<sup>142</sup>

The plaintiff players in *Turner* settled the lawsuit and, in April 2015, a federal judge approved the settlement.<sup>143</sup> The NFL agreed to set up a monetary award fund to compensate former players diagnosed with certain mental disorders, fund a baseline-assessment program for retired players, and establish an education fund to promote safety and prevent head injuries for football players at all levels of competition.<sup>144</sup> During the ongoing litigation, two sportswriters published *League of Denial*, an investigative book examining the discovery of CTE and the NFL’s history with concussions and concussion research.<sup>145</sup> Concussions and the vulnerability of NFL players were no longer merely the topic of research reports or court filings; they were thrust into the national spotlight.<sup>146</sup>

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138. *Turner v. NFL*, 307 F.R.D. 351, 362 (E.D. Pa. 2015).

139. *Id.*

140. *Id.*

141. See Greg Bishop & Rob Davis, *Junior Seau, Famed N.F.L. Linebacker, Dies at 43; Suicide Is Expected*, N.Y. TIMES (May 2, 2012), <http://www.nytimes.com/2012/05/03/sports/football/junior-seau-famed-nfl-linebacker-dies-at-43-in-apparent-suicide.html> (detailing the circumstances of three recent suicides by former NFL players).

142. See *id.*

143. *Turner*, 307 F.R.D. at 365, 423.

144. *Id.* at 365–66.

145. MARK FAINARU-WADA & STEVE FAINARU, LEAGUE OF DENIAL (2014).

146. See Jason M. Breslow, *Coming Soon on FRONTLINE: “League of Denial”*, PBS (Aug. 6, 2013), <http://www.pbs.org/wgbh/frontline/article/coming-soon-on-frontline-league-of-denial/>.

*B. A Youthful Exodus*

While the *Turner* case resulted in help for retired players, current NFL players are still exposed both physically and financially.<sup>147</sup> Although the NFL has taken action in the form of rule changes and funding concussion research, the players themselves have responded to the physical and financial exposure by leaving the game altogether.<sup>148</sup> Some players are retiring at an early age, rather than risk further brain damage.<sup>149</sup> Some former players believe that the 2015 offseason alone signaled a cultural shift wherein player awareness of the dangers of concussions began impacting career decisions.<sup>150</sup> Of course, not everybody in the world of professional football believes the early departures threaten the game.<sup>151</sup>

In the span of a few offseasons, the NFL (and more specifically, the San Francisco 49ers) witnessed an exodus of young players who chose to leave the league and salvage what they could of their bodies and minds.<sup>152</sup> Most notably, Patrick Willis,<sup>153</sup> Calvin Johnson,<sup>154</sup> Eugene Monroe,<sup>155</sup> Jake Locker,<sup>156</sup> Anthony

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147. See generally, Deubert & Wong, *supra* note 31; Shepard, *supra* note 104.

148. See e.g., Dan Hanzus, *San Francisco 49ers' Chris Borland Retiring from NFL*, NFL (Mar. 16, 2015, 11:13 PM), <http://www.nfl.com/news/story/0ap3000000479460/article/san-francisco-49ers-chris-borland-retiring-from-nfl>; Paul Gutierrez, *Anthony Davis Becomes 4th Member of 49ers to Retire this Offseason*, ESPN (June 5, 2015), [http://espn.go.com/nfl/story/\\_id/13020855/anthony-davis-becomes-fourth-member-san-francisco-49ers-retire-offseason](http://espn.go.com/nfl/story/_id/13020855/anthony-davis-becomes-fourth-member-san-francisco-49ers-retire-offseason); Henry McKenna, *Dan Connolly Alludes to Concussions in Retirement Statement*, BOSTON.COM (Jul. 16, 2015, 1:47 PM), <https://www.boston.com/sports/new-england-patriots/2015/07/16/dan-connolly-alludes-to-concussions-in-retirement-statement>.

149. See e.g., Hanzus, *supra* note 148; McKenna, *supra* note 148.

150. David Steele, *Anthony Davis' Decision Signals NFL Culture Shift, Former Players Say*, SPORTING NEWS (June 10, 2015), <http://www.sportingnews.com/nfl-news/4646828-anthony-davis-49ers-offensive-tackle-retirement-retired-concussions-nfl-culture-shift-ben-utecht-brain-injury>.

151. See Robert Klemko, *Why Early Retirements Aren't a Threat to Football*, MMQB (Apr. 19, 2016), <http://mmqb.si.com/mmqb/2016/04/19/nfl-concussions-head-trauma-player-safety-early-retirements-aj-tarpley-dbrickashaw-ferguson-chris>.

152. *Id.*

153. Ryan Wilson, *Patrick Willis, 30, on NFL Retirement: 'It's My Health First'*, CBS SPORTS (Mar. 10, 2015), <http://www.cbssports.com/nfl/eye-on-football/25101340/patrick-willis-30-on-nfl-retirement-its-my-health-first>.

154. Michael Rothstein, *Calvin Johnson Retires: 'I Have Played My Last Game of Football'*, ESPN (Mar. 8, 2016), [http://www.espn.com/nfl/story/\\_id/14927247/calvin-johnson-detroit-lions-retiring-nfl-nine-seasons](http://www.espn.com/nfl/story/_id/14927247/calvin-johnson-detroit-lions-retiring-nfl-nine-seasons); see also Michael Rothstein, *Former Lions WR Calvin Johnson: 'Things are Going Good Right Now'*, ESPN (Jun. 25, 2016), [http://www.espn.com/nfl/story/\\_id/16510394/former-detroit-lions-receiver-calvin-johnson-says-content-retirement](http://www.espn.com/nfl/story/_id/16510394/former-detroit-lions-receiver-calvin-johnson-says-content-retirement) (“I wouldn’t just quit because we were losing . . . [j]ust [my] body, man, I was tired of it. I was fed up. Had enough.”); Laken Litman, *Calvin Johnson Admits He Has No Idea How Many Concussions He's Had*, USA TODAY (Jul. 7, 2016, 12:17 PM), <http://ftw.usatoday.com/2016/07/calvin-johnson-concussions>.

155. Eugene Monroe, *Leaving the Game I Love*, PLAYERS’ TRIB., <http://www.theplayerstribune.com/eugene-monroe-nfl-retirement/> (last visited Nov. 28,

Davis,<sup>157</sup> Jonathan Martin,<sup>158</sup> Chris Borland,<sup>159</sup> A.J. Tarpley,<sup>160</sup> and Colin McCarthy<sup>161</sup> each called it quits and cited long-term health concerns—brain-related or otherwise—as a reason.<sup>162</sup> Another young player, Eric Reid, revealed that he considered retirement after suffering three documented concussions in just two full seasons in the NFL.<sup>163</sup> Even college athletes are hanging up their spikes before attempting a professional career.<sup>164</sup>

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2016) (“I’m only 29 and I still have the physical ability to play at a very high level, so I know that my decision to retire may be puzzling to some. But I am thinking of my family first right now—and my health and my future.”).

156. Kevin Patra, *Jake Locker Announces Retirement from NFL*, NFL (Mar. 10, 2015, 4:32 PM), <http://www.nfl.com/news/story/0ap3000000477807/article/jake-locker-announces-retirement-from-nfl>.

157. Steele, *supra* note 150. Anthony Davis briefly returned to the NFL before retiring again. Nick Wagoner, *49ers OL Anthony Davis Retires Again*, ESPN (Sep. 26, 2016), [http://www.espn.com/nfl/story/\\_/id/17647295/anthony-davis-san-francisco-49ers-retires-again-nfl](http://www.espn.com/nfl/story/_/id/17647295/anthony-davis-san-francisco-49ers-retires-again-nfl). Davis rejoined the San Francisco 49ers prior to the start of the 2016 season and became a reserve offensive lineman. *Id.* Davis was diagnosed with another concussion just one week into the 2016 season and again retired. *Id.*

158. James Dator, *Jonathan Martin Posts Powerful Piece About His Life and Decision to Retire from the NFL*, SB NATION (Aug. 26, 2015, 2:28 PM), <http://www.sbnation.com/lookit/2015/8/26/9211293/jonathan-martin-facebook-post-nfl-retirement-dolphins>.

159. Hanzus, *supra* note 148.

160. A.J. Tarpley, *A.J. Tarpley: Why I Walked Away from Football at 23*, MMQB (Apr. 12, 2016), <http://mmqb.si.com/mmqb/2016/04/12/nfl-aj-tarpley-buffalo-bills-retirement> (“The decision I made to retire from football is about coming to terms with the totality of my concussion history and what is asked of me as a linebacker.”).

161. Josh Alper, *Colin McCarthy Announces His Retirement*, NBC SPORTS (June 4, 2015, 11:32 AM), <http://profootballtalk.nbcsports.com/2015/06/04/colin-mccarthy-announces-his-retirement/>.

162. Jonathan Martin, Patrick Willis, and Jake Locker did not explicitly state that fear of concussions motivated their individual retirements. However, an investigation of a bullying scandal within the Miami Dolphins organization revealed that Martin previously had fears that concussions could affect his long-term health. Andrew Bunting, *Jonathan Martin Considered NFL Exit over Concussion Worries*, GIVEMESPORT, <http://www.givemesport.com/431348-jonathan-martin-considered-nfl-exit-over-concussion-worries> (last visited Nov. 9, 2015). Additionally, Locker had a documented history of injuries that included evaluation for a concussion after receiving a hard hit—one that raised concerns of a possibly ignored previous concussion. Dan Diamond, *Jake Locker Suffers Possible Concussion—But Titans Put Him Back In Game After Scary Headshot*, FORBES (Oct. 5, 2014, 2:36 PM), <http://www.forbes.com/sites/dandiamond/2014/10/05/jake-locker-takes-scary-hit-to-head-titans-keep-him-in-the-game/>.

163. Brandon Schlager, *49ers DB Eric Reid Pondered Retirement out of Fear of Concussions*, SPORTING NEWS (June 9, 2015), <http://www.sportingnews.com/nfl-news/4646781-eric-reid-concussion-san-francisco-head-injury-retirement>.

164. See, e.g., Brian Bennett, *Repeated Concussions Drive Matthew Harris to Retire*, ESPN (Oct. 24, 2016), [http://www.espn.com/college-football/story/\\_/id/17875237/matthew-harris-northwestern-wildcats-retires-football-due-concussions](http://www.espn.com/college-football/story/_/id/17875237/matthew-harris-northwestern-wildcats-retires-football-due-concussions).



Chris Borland's retirement, in particular, was highly interesting and alarming because of Borland's rising prominence at the time of his retirement.<sup>165</sup> After the retirement of linebacker standout and teammate Patrick Willis, Borland was expected to be a key player in the 49ers 2015 defense.<sup>166</sup> Borland had already replaced an ailing Willis during Borland's 2014 rookie campaign and received praise for his performance, earning an NFL Defensive Player of the Week Award and receiving a vote for the NFL Defensive Rookie of the Year Award.<sup>167</sup> But, after sustaining two diagnosed concussions before starting his NFL career, and possibly sustaining an undiagnosed concussion during training camp of his rookie season, Borland wanted to be proactive about his mental health.<sup>168</sup>

Long before Borland and others retired rather than subject themselves to head trauma, there was Merrill Hoge. Hoge was a tenth-round draft pick and was known as a running back who pushed for every yard and never quit.<sup>169</sup> He also liked to use his head to ram into his opponents, often to his detriment.<sup>170</sup> One time, Hoge launched himself headfirst into a three-man wall of defenders and bore the brunt of the impact.<sup>171</sup> The impact was so intense, Hoge thought his internal organs shot out of his body when, in reality, the impact caused Hoge to defecate.<sup>172</sup> Another time, after a headlong collision with a defender, Hoge found himself unable to remember the play or a snap count and ultimately burst into uncontrollable tears.<sup>173</sup>

Hoge's problems intensified when, during an exhibition game in Kansas City, Missouri, Hoge lost his physical bearings.<sup>174</sup> After sustaining a helmet-to-helmet blow to the earhole of his helmet, Hoge remained down on the ground.<sup>175</sup> He could not stand up because the ground felt as though it were shaking.<sup>176</sup> Eventually, Hoge got up and a trainer asked Hoge where he was; he replied "Tampa Bay."<sup>177</sup> As Hoge stood there in the City of Fountains, the trainer asked Hoge why he thought he was in Florida.<sup>178</sup> His response? "Because I can hear the ocean."<sup>179</sup> Hoge had just signed a three-year, \$2.4-million contract to play for the

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165. Mark Fainaru-Wada & Steve Fainaru, *SF's Borland Quits over Safety Issues*, ESPN (Mar. 17, 2015), [http://espn.go.com/espn/otl/story/\\_/id/12496480/san-francisco-49ers-linebacker-chris-borland-retires-head-injury-concerns](http://espn.go.com/espn/otl/story/_/id/12496480/san-francisco-49ers-linebacker-chris-borland-retires-head-injury-concerns).

166. *Id.*

167. *Id.*

168. *Id.*

169. FAINARU-WADA & FAINARU, *supra* note 145, at 27, 39–40.

170. *Id.* at 40–41.

171. *Id.* at 40.

172. *Id.*

173. *Id.* at 40–41.

174. *Id.* at 41–42.

175. *Id.*

176. *Id.*

177. *Id.* at 42.

178. *Id.*

179. *Id.*

Chicago Bears and although he would play several more downs that season, Hoge was not well.<sup>180</sup> Hoge retired at the age of 29 in 1994.<sup>181</sup>

As player-safety concerns rise, youth football numbers decrease,<sup>182</sup> and NFL players are more aware of the dangers and are willing to walk away from the game, the bargaining leverage in CBA negotiations may finally be ready to swing back in favor of the players. On the one hand, the greater awareness of the dangers of the game could cut against the players when making their claim for greater guaranteed compensation. The owners could point to the harmful effects of the game and use that as a justification for their unwillingness to provide guaranteed compensation—the owners do not want to bear the risk. On the other hand, however, the NFLPA can—and should—use these concerns as a means of leveraging its bargaining power.

The harmful effects of the game are causing an exodus of talent. Players are either retiring altogether before starting their careers, or they are departing the NFL at younger ages despite still being able to perform at peak competitive levels. If the talent pool continues to shrink at the youth levels, the NFL cannot stand idly by and watch as incentives to play other sports become more attractive. The NBA and MLB already present greater guaranteed contracts, longer careers to earn more guaranteed money, and a career path with significantly less long-term health concerns. Unless the NFL attempts to tip the cost-benefit analysis, more and more players could depart the NFL or very young athletes could be drawn to other more lucrative and less dangerous sports and avoid pursuing a football career altogether.

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180. *Id.* at 42–43.

181. *Id.* at 45. Hoge subsequently sued a Chicago Bears team doctor for not informing him of the dangers of playing through a concussion and for not providing adequate care by allowing Hoge to play when he was still visibly showing signs of a concussion. *Id.* at 119–21. Hoge initially received a jury award of \$1.55 million—the amount owed on the final two years of the contract he could not play out—and \$100,000 for pain and suffering, but the matter later settled out of court. *Id.*

182. See Steve Fainaru & Mark Fainaru-Wada, *Youth Football Participation Drops*, ESPN (Nov. 14, 2013), [http://espn.go.com/espn/otl/story/\\_/page/popwarner/popwarner-youth-football-participation-drops-nfl-concussion-crisis-seen-causal-factor](http://espn.go.com/espn/otl/story/_/page/popwarner/popwarner-youth-football-participation-drops-nfl-concussion-crisis-seen-causal-factor) (revealing a drop in Pop Warner football, in which pre-high-school children participate). But see Bob Cook, *Youth Football, Despite Reported Declines, Is About as Popular as Ever*, FORBES (Sept. 25, 2014, 1:21AM), <http://www.forbes.com/sites/bobcook/2014/09/25/youth-football-despite-reported-declines-is-about-as-popular-as-ever/> (indicating that high school football numbers have grown after a four-year decline). An NFL funded program, Heads Up Football, claims to be successful at teaching effective ways to play football at the youth level and reduce head injuries. Alan Schwarz, *N.F.L.-Backed Youth Program Says It Reduced Concussions. The Data Disagrees.*, N.Y. TIMES (Jul. 27, 2016), [http://www.nytimes.com/2016/07/28/sports/football/nfl-concussions-youth-program-heads-up-football.html?smid=tw-share&\\_r=0](http://www.nytimes.com/2016/07/28/sports/football/nfl-concussions-youth-program-heads-up-football.html?smid=tw-share&_r=0). The research done by Heads Up Football has been questioned and criticized. *Id.*

## VI. NFLPA PATHS TO GREATER GUARANTEES

As previously noted, the best means of addressing the guaranteed-compensation structure is through the collective bargaining process, although the NFLPA appears to be at a disadvantage with regard to bargaining power and leverage.<sup>183</sup> In order to alter the balance of power between the parties and capitalize on the increased awareness of player health discussed above,<sup>184</sup> the NFLPA will need to shake its reputation as a lesser players' union<sup>185</sup> and take a cohesive, and possibly dramatic, stance to gain concessions from the NFL owners.<sup>186</sup>

Changing the dynamic between the parties will be an uphill battle for the NFLPA—the bargaining table has been the domain of the NFL owners for years. Nonetheless, the NFL gave in to pressure before in order to preserve profitability and stability.<sup>187</sup> Unfortunately for the NFLPA, no viable competing football league exists to challenge the NFL.<sup>188</sup> The last direct competitor, the United Football League, ceased operations in 2012.<sup>189</sup> Without the threat of losing players or bidding against a rival league, the NFL owners have little incentive to institute a league-wide increase in guaranteed money. However, outside competition does not appear entirely necessary as other professional sports leagues have operated

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183. See *supra* Section IV.C.

184. See *supra* Part V.

185. See Levine, *supra* note 9, at 435–36 n.49.

186. The players, even those making the largest amounts, are cognizant of the need for a unified front in upcoming negotiations. Mike Reiss, *Tom Brady Urges Players to 'Stand Together' in CBA Negotiations*, ESPN (Sep. 9, 2016), [http://www.espn.com/nfl/story/\\_/id/17500382/tom-brady-new-england-patriots-urges-players-come-together-collective-bargaining-agreement-negotiations-future](http://www.espn.com/nfl/story/_/id/17500382/tom-brady-new-england-patriots-urges-players-come-together-collective-bargaining-agreement-negotiations-future) (“I think we as players need to stand together, so collectively we can be as strong as possible, and the NFL can continue to thrive and be the great game it is.”). Some players also understand the potential need for dramatic action. Pittsburgh Steelers NFLPA representative Ramon Foster recently advised fellow players to financially prepare for a work stoppage. Jeremy Fowler, *Ramon Foster Expects 2021 Work Stoppage Over Drug Policy*, ESPN (Aug. 22, 2016), [http://www.espn.com/nfl/story/\\_/id/17366384/pittsburgh-steelers-player-rep-nfl-players-save-2021-lockout](http://www.espn.com/nfl/story/_/id/17366384/pittsburgh-steelers-player-rep-nfl-players-save-2021-lockout) (“[Foster] said he is disenchanted by several issues with the drug policy . . . [b]ut insurance, post-career care and revenue are more pressing, which means the players must be willing to sit out games in 2021 . . . . Hit [the owners] in the pocket . . . . For us to do that, we have to save on our end.”).

187. See *supra* Part II.

188. At present, a limited number of professional or semi-professional football leagues exist, including the Arena Football League, the Canadian Football League, the Fall Experimental Football League, and the Spring Experimental Football League. However, none of these leagues are considered a direct competitor to the NFL.

189. Michael David Smith, *UFL Calls Off Its Season*, NBC SPORTS (Oct. 20, 2012, 12:17 PM), <http://profootballtalk.nbcsports.com/2012/10/20/ufl-calls-off-its-season/>. The UFL suffered the fate of many previous competitors who hit financial trouble as the UFL failed to pay salaries of several players and faced litigation. Darren Heitner, *Seventy-Eight Football Players File Lawsuit Against United Football League*, FORBES (Mar. 7, 2013, 8:28 AM), <http://www.forbes.com/sites/darrenheitner/2013/03/07/seventy-eight-football-players-file-lawsuit-against-united-football-league/#2715e4857a0b533b502929c5>.

largely without outside competition and have since seen fully guaranteed contracts.<sup>190</sup> A player strike could be an effective measure to get discussions started between the parties and signal the seriousness of this matter to the NFL owners.

#### A. *The Necessity of a Player Strike*

Without a rival league to help their cause, the only option for the players appears to be drastic action: another player strike—or at least the credible possibility of one. Although the CBA can be amended at any time with the approval of both parties,<sup>191</sup> there seems to be little impetus for a significant amendment while the current CBA is in effect. Given the limited positive results of the 2011 lockout and its resulting CBA, it is difficult to be optimistic about the potential yields of a strike. Then again, the NFLPA is no stranger to work stoppages around the expiration of a CBA. Since the formation of the NFLPA, every time the NFL and NFLPA needed to negotiate a new labor deal, one party or the other took action to induce a work stoppage.<sup>192</sup> In fact, after a strike in 1982 yielded insufficient results, the players again went on strike in 1987.<sup>193</sup> The effectiveness of a strike is questionable, and in order to successfully strike the NFLPA must hold a cohesive front. There are some early indications that the players are aware of the need for—and might even be willing to execute—a strike.<sup>194</sup>

A successful strike would require the players to be committed to the concept of missing regular season games rather than just practices or access to team facilities. During the 2011 lockout, the two sides reached an agreement at the closing of July 2011, and only a few days of offseason mini-camp and training camp practice were missed. That cannot be the case should the players seek another strike. A work stoppage is a black eye for an employer, but if the work stops during a period where the consumer is not buying the product—like a lockout when zero NFL games are played and the only NFL date on the calendar is the first-year-player draft—it is unlikely that there will be any financial harm to

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190. See Levine, *supra* note 9, at 433.

191. CBA, *supra* note 4, at art. 70, § 9 (“This Agreement may not be changed, altered, or amended other than by a written agreement signed by authorized representatives of the parties.”).

192. See Alexandra Baumann, *Play Ball: What Can Be Done to Prevent Strikes and Lockouts in Professional Sports and Keep the Stadium Lights On*, 32 J. NAT’L ASS’N ADMIN. L. JUDICIARY 251, 260–70 (2012).

193. *Id.* at 264.

194. Pittsburgh Steelers NFLPA representative, Ramon Foster, recently advised fellow players to personally financially prepare for a work stoppage by saving money now. Fowler, *supra* note 186. Foster added that players must be willing to strike and miss out on regular season games. *Id.* Foster also acknowledged that players must be financially prepared this time around, because during the 2011 lockout, too many players faced too much financial debt to potentially miss games. *Id.* (“[M]oney always talks . . . [f]or us to (strike) we have to save on our end. We can’t just be blowing money and not realize what’s coming, especially [rookies].”).

the employer and thus unlikely to encourage employer action. Missing games, however, poses the threat of lost revenue from games, and owners are more likely to take action to prevent that loss.<sup>195</sup> If the players pursue a strike again, they need to pose a threat to the NFL's pocketbook, not just its public relations reputation.

A strike requires significant cooperation and sacrifice by the players as well as offsetting compensation from the NFLPA. NFL players do not receive year-round salaries and therefore are likely to be resistant to missing any games. Missing games asks players to surrender not only pay (from the estimated five months out of a calendar year where they are earning the majority of their income) but also playing time from their potentially limited careers. Players who are paid at or just above the league minimum may not be motivated to surrender what limited income and career length they have. Fortunately, the NFLPA established a "war chest" that enables the union to pay an estimated \$60,000 per player in the event of a lockout or strike.<sup>196</sup> Even players with limited career prospects stand to benefit from a strike because, although they would lose out on playing time, they would receive not only the immediate compensation from the NFLPA but also greater overall compensation during what may ultimately end up as a very short career. Guaranteed compensation can provide stability for life after football even if it means missing a few games up front. Nonetheless, players will also likely need to be fiscally responsible prior to the strike in order to stay financially afloat. A successful strike could deliver financial blows to the owners and bring a more balanced negotiation to the bargaining table.

### ***B. Modeling Veteran Compensation***

Once the players balance the bargaining power with the league, they must be willing to sacrifice larger overall contract totals if they want to receive larger guaranteed amounts.<sup>197</sup> The players might not ultimately have to make such a sacrifice, but they need to be willing to approach this possibility. This may seem counterintuitive—a player who would be willing to sign a deal that is worth less overall just to be promised more guaranteed compensation—but because NFL salaries are weighted heavily toward the latter years of a contract, a player likely

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195. However, it's worth noting that, during the 2011 lockout, NFLPA Executive Director DeMaurice Smith estimated that the NFL's broadcast deal with DIRECTV guaranteed the NFL \$5 billion even if no games were played during the 2011 season. Robert H. Lattinville et al., *Labor Pains: The Effect of a Work Stoppage in the NFL on its Coaches*, 20 MARQ. SPORTS L. REV. 335, 344 (2010).

196. *Id.*

197. Not everyone agrees that players will need to give up more overall compensation to get greater guaranteed compensation. *See* Brandt, *supra* note 137 ("Some further argue another myth: that collective player compensation would decrease with an increase in guaranteed contracts. NFL teams routinely shed millions of nonguaranteed dollars by releasing veterans, often replacing them with younger (and cheaper) labor and incurring a leftover cap charge. [NFL teams] would continue to do that with guaranteed contracts; they would simply have to pay real cash along with their cap accounting issue. There has been no data indicating anything other than continued growth in MLB and NBA player compensation despite guarantees regularly paid to released players.").

will never see the large salaries in his contract anyway.<sup>198</sup> As illustrated by Suh's contract, the guaranteed compensation is the only reliable compensation, especially because Suh's salary number balloons later in his career, at a time when his talent—and thereby his worth and bargaining leverage—is likely to be decreasing. Of course, agents already take this approach when negotiating individual contracts. The agent knows his player may never get the opportunity to earn the double-digit million-dollar figures toward the final years of the contract and the agent negotiates for guarantees accordingly. However, if league-wide change is to occur, the players need to include language in the CBA that either necessitates fully guaranteed salaries or obligates a certain percentage of a contract to be guaranteed in the form of a signing bonus.

The NFL owners will undoubtedly push back against such a proposition and argue that injury risks and “dead money”<sup>199</sup> concerns will cause salary-cap problems, with the potential to derail a successful franchise that signs a player who is injured early into a high-dollar contract. The NFLPA can address these concerns through the CBA as well. Changing the calculation for how guaranteed money paid to a released player impacts a team's salary cap would enable teams the flexibility to guarantee compensation to a player who turns out to be a bust. A player who is ultimately not worth the contract he signed could be released and his remaining salary-cap figure could be reduced by a percentage (only for salary-cap accounting purposes) and spread over a certain time period, thereby lessening the salary-cap harm to his former team. The player would receive the full guaranteed amount; the team would just be able to spread out the accounting of that expense over several years when making salary-cap calculations.<sup>200</sup>

Under this proposal, if a team opted to release a player for skill reasons, his remaining salary would still count against the salary cap for every year left on his contract, which would make it very difficult for his former team to sign a replacement player—the former team would essentially be paying two players with only one on the roster. In an effort to offset the harm, the team would be permitted to reduce the salary-cap figure for salary-cap accounting purposes by a certain percentage and then spread that amount over twice the duration of the years

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198. To borrow the words of NFL agent Leigh Steinberg, “The total value of the deal is just an illusion because the numbers are so inflated on the back end that the player will either have to renegotiate or he'll be cut.” Levine, *supra* note 9, at 455. In other words, the overall total is quite insignificant if the player never gets the opportunity to earn it, which is often how contracts play out.

199. *Dead money* is a term for salary-cap space that is occupied by a team's obligation to account for guaranteed compensation paid to a player who is no longer on the roster. For example, if the Dolphins release Ndamukong Suh before the end of his contract, the remaining prorated signing bonus still counts against the Dolphins salary cap despite the fact that Suh is no longer on the team and the money has already been paid to him.

200. This process is similar to the NBA's “stretch provision,” however a direct comparison of the proposals is beyond the scope of this Note. *See generally*, HIGHLIGHTS OF THE 2011 COLLECTIVE BARGAINING AGREEMENT BETWEEN THE NATIONAL BASKETBALL ASSOCIATION (NBA) AND NATIONAL BASKETBALL PLAYERS ASSOCIATION (NBPA), art. I, § T (2014).

remaining on the contract. This is very similar to how teams prorate a signing bonus's effect on the salary cap.

For a visual example of how this proposal works, refer to Table 2 which illustrates the breakdown for a theoretical player who signed a 6-year contract worth a total of \$18 million (\$3 million per year) before the start of the 2014 season and is entering the 2017 season. Assume that his team is considering releasing him prior to starting the 2017 season. The player is still owed \$3 million each of the three remaining years on his contract (a total of \$9 million). Under this Note's proposal, if the team were to release the player, the remaining salary owed to the player could be reduced, for salary cap accounting purposes only, each year by 10% and then amortized, for salary cap accounting purposes only, over six years (twice the amount of time remaining on the contract). This would allow the team to spread the negative salary cap hit more evenly while still compensating the player the full amount owed. The player still receives \$3 million each of the next three years, and the team still pays the player a total of \$9 million, but the team only accounts for a total of \$8.1 million under the salary cap. What would have been a \$3-million salary-cap hit each of the next three seasons becomes a \$1.35-million hit over the next six seasons. Admittedly, this could result in a team strategically releasing a player and then signing him back at a cheaper amount in order to spread his salary-cap figure out, but the practice could be checked by instituting salary-cap penalties that negate any potential salary-cap benefits when such behavior occurs.

<b>Proposed Player-Contract Breakdown</b>			
<i>(Remaining Salary – 10 %) ÷ (2 × Years Remaining on Contract When Released)</i>			
<b>Year</b>	<b>Salary</b>	<b>Salary Cap Hit if Player Remains on Roster</b>	<b>Adjusted Cap Hit if Player Released</b>
2017	\$3,000,000	\$3,000,000	\$1,350,000
2018	\$3,000,000	\$3,000,000	\$1,350,000
2019	\$3,000,000	\$3,000,000	\$1,350,000
2020	\$0 (contract expires in 2019)	\$0	\$1,350,000
2021	\$0 (contract expires in 2019)	\$0	\$1,350,000
2022	\$0 (contract expires in 20)	\$0	\$1,350,000

**Table 2:** Proposed salary cap calculation and year-by-year contract breakdown

NFL owners may also argue that maintaining the existing signing bonus structure—wherein guaranteed money is paid almost immediately to the player—and adopting proposals, like the one above, that call for all or nearly all of a player’s contract to be guaranteed would force a team to spend considerable amounts of money up front and could potentially bankrupt a franchise when a player fails to meet expectations. In other words, the owners might complain that they would be stretched too thin financially by having to pay a large signing bonus upon signing a player only to wind up cutting him for performance reasons a few years later while still paying the full amount of his contract. This, however, ignores the fact that paying guaranteed money in the form of a signing bonus is the current method for paying players guaranteed money; it is not the only method. As discussed previously, the signing bonus merely emerged and ballooned as the only means of guaranteeing compensation to a player. As indicated before,<sup>201</sup> and as pundits have pointed out,<sup>202</sup> NFL teams are creatures of custom and habit when it

201. See *supra* notes 9, 38, and accompanying text.

202. Andrew Brandt, *An Inside Look at How Andrew Luck Got Paid*, MMQB (Jul. 7, 2016), [http://mmqb.si.com/mmqb/2016/07/07/nfl-andrew-luck-contract-indianapolis-colts-andrew-brandt-the-mmqb?xid=nl\\_mmqb](http://mmqb.si.com/mmqb/2016/07/07/nfl-andrew-luck-contract-indianapolis-colts-andrew-brandt-the-mmqb?xid=nl_mmqb) (discussing how a theoretical negotiation between Andrew Luck and Indianapolis Colts leadership would go if Luck were to request terms that the Colts do not usually include in players’ contracts: “Were Luck and his agent to have pushed the issue of a full guarantee, the Colts’ natural reaction would have been to point to the precedent of no one getting guarantees beyond the third or even a portion of the fourth year of a five- or six-year contract.”).



comes to contract negotiations. If an agent tried to do something different from what the team does in its normal practice, there would be significant pushback from the team.

Amending the CBA to enable fully guaranteed salaries would result in the NFL mirroring other professional sports leagues where signing bonuses are significantly smaller figures when compared to a player's annual salary. The signing bonus structure is currently the only option for fully guaranteed money, and the ability to spread the salary-cap impact over several years is what makes it attractive to a team. Guaranteeing player salaries and enabling the negative impacts of a bad deal to be spread over the course of several years would significantly reduce the need for large signing bonuses, enable players to receive fully guaranteed compensation over the course of a contract, and finally bring NFL players on par with their peers in other professional sports.

### VII. CTE: THE THIRD MAN AT THE TABLE

Despite the desire of players to receive fully guaranteed contracts and the ability of teams to adjust the salary-cap figure of a player whose contract is terminated, there will still be significant pushback from NFL owners when it comes to fully guaranteeing a player's contract. The owners simply will not want to stomach the financial obligation to pay out the entirety of a player's contract. However, the ongoing concerns regarding the long-term mental health of concussed players, coupled with the beginning of a talent exodus, provides added leverage for the NFLPA to utilize in an effort to overcome this opposition to guaranteeing contracts.

While there is no extant rival professional football league that can lure players away or push the NFL to make financial concessions, there is an outside influence that can play a role: CTE. As indicated previously,<sup>203</sup> there has been a significant exodus of players who would rather walk away from the game than continue playing. It seems that with each passing week, another current or former player comes forward to share his story involving CTE or other concussion-related injury.<sup>204</sup> Nonetheless, in the 2015 season, concussion diagnoses reached a four-year high at 199,<sup>205</sup> and the number of games missed by NFL players due to a concussion reached its highest total since 2011.<sup>206</sup> Promisingly though, the 2015 season saw what some call a watershed moment in the concussion crisis when

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203. See *supra* notes 152–64 and accompanying text.

204. See, e.g., Zac Jackson, *Hurns Cleared, Has No Memory of Play That Sent Him to Hospital*, NBC SPORTS (Dec. 9, 2015), <http://profootballtalk.nbcsports.com/2015/12/09/hurns-cleared-has-no-memory-of-play-that-sent-him-to-hospital/>; J. Brady McCollough, *Former Steelers receiver Antwaan Randle El: 'If I Could Go Back, I Wouldn't [Play Football]'*, PITTSBURGH POST-GAZETTE (Jan. 9, 2016 4:00 PM), <http://www.post-gazette.com/sports/steelers/2016/01/19/If-I-could-go-back-I-wouldn-t-play-football/stories/201601190177>.

205. *Concussion Watch*, PBS: FRONTLINE, [http://apps.frontline.org/concussion-watch/#players\\_2015](http://apps.frontline.org/concussion-watch/#players_2015) (last visited Jan. 19, 2016).

206. Adam Scheffer, *Could Russell vs. Cam Be the New Brady vs. Manning?*, ESPN (Jan. 14, 2016), [http://apps.frontline.org/concussion-watch/#players\\_2015](http://apps.frontline.org/concussion-watch/#players_2015).

starting quarterback for the Pittsburgh Steelers, Ben Roethlisberger, self-reported a concussion during a game.<sup>207</sup> At the very least, such events point toward a shift in the mindset of NFL players. Players are more aware of the dangers, and some are considering the harm before it happens or, at least, before it gets worse.

While concussions and CTE are not rivals of the NFL's in the same sense that the former AFL was, the two are working in a tragic way to siphon off NFL talent, in large part because the public and NFL players realize that the risk is real. Whether it is through voluntary means or injury, players are leaving the NFL in droves because of head trauma. As CTE becomes a larger part of the American dialogue, awareness grows and our collective thought process changes. Concussion research and the dangers of playing football are no longer thought of as sham science and paternalism. The dramatic shift in public opinion regarding football mirrors the change in public opinion on tobacco usage.<sup>208</sup> Some have speculated that if only 10% of American mothers conceive football as a dangerous game, it will be the end of the NFL.<sup>209</sup> Such a proclamation is likely far-fetched, but to suggest that many parents are going to turn their kids away from the game altogether is certainly reasonable and, so far, fairly accurate. If youth participation continues to dwindle and the talent pool that the NFL can draw from continues to deteriorate, the NFL could be facing a problem similar to the one it faced when the AFL poached players. If there are fewer players willing to play, those willing to ask for more guaranteed money for the assumption of the well-known and well-documented risks of playing football are less likely to be rebuffed when they demand greater financial security in exchange for their commitment to play the game.

Of course, increased financial compensation does not cure CTE or somehow stop football from being a dangerous sport. But, there's no reason why it cannot have the effect of altering the cost-benefit analysis of those interested in

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207. *Id.* (“Earlier this season . . . Ben Roethlisberger self-reported a concussion, which was considered a watershed moment in how players handle head injuries.”). For the sake of full disclosure, Roethlisberger left the game with his team trailing by nine points and just over two minutes remaining in the game. A comeback victory was unlikely at that point.

208. *See* FAINARU-WADA & FAINARU, *supra* note 145, at 280–83.

209. *Id.* at 206 (“If only 10 percent of mothers in America begin to conceive of football as a dangerous game, that is the end of football.”). Arizona Cardinals Head Coach Bruce Arians recently received criticism after he commented on the changing perception of the NFL in the minds of parents. Arians said: “[T]his is our sport, it’s being attacked. We have to stop it at the grass roots . . . [W]e have to make sure that moms get the message, because that’s who’s afraid of our game right now . . . Our job is to make sure the game is safe, at all levels. The head really has no business being in the game . . . [W]hen I was taught how to tackle, and how to block . . . [y]ou did it with your shoulder pads. That’s still the best way to do it.” *Arians Statement on Moms and Football*, ARIZ. CARDINALS (Apr. 10, 2016), <http://www.azcardinals.com/news-and-events/article-2/Arians-Statement-On-Moms-And-Football/49e35652-937f-46e2-b81c-899fa17a9979>. Arians later clarified his point stating, “[w]e have to make sure that they’re getting the message about everything being done to make the game as safe as possible. [Mothers are] the ones we have to influence . . . . Everybody involved with the sport has a responsibility to make that happen.” *Id.*

participating. Money will not prevent an athlete from suffering a concussion, but it can affect his motivation to continue to play once he recovers from that concussion. Ultimately, stronger guarantees give a player a more stable financial foundation and alter the analysis a player undertakes when he asks himself whether the continued risks are worthwhile.

### CONCLUSION

The disparity of guaranteed compensation between the NFL and its peer professional sports organizations is something that has bothered players for some time and that strikes outside observers as confusing. At a time when professional sports are at their most popular and profitable, player compensation seems to also be at a record high. However, a closer look at the contract numbers for NFL players reveals discrepancies between what players reportedly earn and what they actually earn. Determining how much a player earns is not as simple as looking at the total value of his contract. Instead, ascertaining the actual money paid to a player requires recognizing that a modern-day NFL player contract acts more like a series of one-year agreements, with very little guaranteed, rather than one comprehensive long-term deal.

Guaranteed money in NFL contracts was the product of competition. It was born out of a conflict where rivals to the NFL poached veteran talent and lured young talent away from the longstanding professional football league. But, as competitors came and went, so too did the increases in compensation for players—guaranteed or otherwise. As competitors faded, progress slowed. While other professional sports leagues have fully guaranteed contracts, NFL players have been left behind; the growth of NFL contract guarantees seems to have ceased when the last serious competitor to the NFL collapsed. In fact, in the present NFL, guaranteed money has become more illusory than an actual “guarantee.” As player contracts now contemplate a series of contingencies that must be met before a player receives a bonus, the only thing “guaranteed” is a player’s signing bonus, which he receives shortly after agreeing to a deal.

While collective bargaining provides an opportunity to address this problem, the litigation- and work-stoppage-filled history of the NFL and the NFLPA suggests that collective bargaining may not be the most successful means of successfully addressing this issue. Although the most recent CBA took strides to improve the potential for greater guarantees in player contracts, it was far from a victory for the players. Adjustments were made to rookie compensation, which frees up considerable cap space to be spent on veteran players, but the rookie wage scale does nothing to ensure that owners will guarantee any greater amount in veteran-player contracts. Furthermore, the history of collective bargaining between the two parties suggests that the NFL owners hold the ultimate trump card over the NFLPA unless or until the NFLPA can organize a strike and actually follow through on it. There needs to be a legitimate and actionable threat of missing games. Otherwise, the NFL owners will approach any future labor negotiations the way they did most recently—by locking out the players and waiting for the NFLPA to cave at the last minute.

There is a chance, however, that action by an outside force can drive change in the dynamic between the two parties. Following the concussion-related

litigation, the general public's awareness of the dangers of football has grown dramatically. Furthermore, and perhaps more importantly, the players are not only more aware of the danger, but they are actually responding to it. As more and more young players retire during or before their prime years, the NFL faces the problem of a shrinking talent pool. On a smaller scale, youth-participation levels also show signs of shrinking, meaning that the NFL players of not only today, but also tomorrow, are cognizant of the danger and would rather walk away from the game than risk injury. Granted, there will likely always be people willing to sign up to play professional football, but if more and more athletes remove themselves from the talent pool, the quality of talent likely will decrease. The NFL currently has, without a doubt, the most talented football players in the world. Arguably, that is the reason why the NFL was able to consistently fend off competition. However, if the talent pool continues to shrink, resulting in a decrease in the overall talent of players, the quality of entertainment product on the field decreases and risks the popularity and financial success of the league long-term. Also lurking in the background is the possibility of losing talent to other sports. This is particularly important for the long-term future of the NFL. The MLB and NBA offer several favorable benefits—financial and otherwise—that the NFL simply does not at the moment.

If the NFLPA can properly seize upon the growing concern over player safety, both inside and outside of the league, and organize a legitimate player strike, perhaps it can use this leverage to shift the balance of power with the NFL. If the power shifts, greater guarantees become a real possibility. At that point, the NFLPA could utilize a model like the one proposed by this Note in order to achieve greater guarantees and bolster the financial incentives to play football.