

# TAKE ME OUT OF THE BALLGAME, TAKE ME OUT TO THE FREE MARKET: AN ANALYSIS OF MID- TERM CONTRACT RENEGOTIATION IN MAJOR LEAGUE BASEBALL

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## I. INTRODUCTION

This Note analyzes the possibility for mid-term contract negotiation in Major League Baseball (“MLB”) on the legal doctrines of efficient breach, changed circumstance and duress. Specifically, this Note stands for the proposition that where player performance clearly warrants a higher market value, MLB players should be allowed to renegotiate their contracts to meet their current market price. Section II of this Note uses the current second baseman for the Washington Nationals, Daniel Murphy, as a baseline example of a player who would fit the description above. Allowing a player in Murphy’s position to demand a mid-term renegotiation, allows the player to realize his economic value at the time he renders his services rather than being compensated at a later date for past performance. Similarly, owners will compensate players for services rendered for their team rather than services rendered for someone else’s team.

This Note’s analysis does not neglect the owners’ concern in this matter. Understandably, as contracting in the game of baseball is currently constructed, the ire of team owners’ is likely to be raised by this Note’s proposal. From the owners’ point of view, two parties entered into an agreement in which both parties assumed some risk.<sup>1</sup> From their perspective, why should they bear the loss when a player underperforms and not have the same rules apply when the reverse

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<sup>1</sup> See *infra* p. 9 and note 39.

happens?<sup>2</sup> The owners are not without remedy. Looking prospectively, owners will begin changing the way in which they contract by adding team options.<sup>3</sup> In the near term, MLB's Commissioner has broad authority to reprimand the league's players.<sup>4</sup>

Section III gives a brief overview of the way contracting in baseball works prior to free-agency. Specifically, the section addresses the number of years a player must provide his services to the league within a confined market before he may reap the fruit of his labor on the free-agent market.

The analysis then turns to the genesis of this Note's proposal – time value of money. Section IV addresses the time value of money principal. Further, in illustrating the time value of money concept mathematically, this Note uses the recent passing of Miami Marlin's pitcher, Jose Fernandez. A second non-mathematical variant of the concept is presented through another recent tragic baseball death; the death of Kansas City Royals pitcher, Yordano Ventura.

From the legal doctrines mentioned, this Note first explores the possibility of a player breaching his contract through the lens of efficient breach. Several difficulties in using an efficient breach analysis are raised. The second legal issue explored is the doctrine of changed circumstance. Under this doctrine, where a player has never before performed at a certain level, even if such performance might have been within the purview of the parties, there may nevertheless be a claim for changed circumstance. Lastly, from the legal perspective of the owners, the doctrine of economic duress is tackled. Implicated in the discussion of duress is the possible claim by the non-breaching owner under a theory of unjust enrichment. Ultimately, however, the Note examines why economic duress is inapplicable. Consequently, a claim based on unjust enrichment falls as well.

As to the breadth of this Note, in evaluating potential contractual remedies for MLB players, this Note does not evaluate the first several years in which a player is not truly in a free market. The time leading up to free-agency will be explained in greater detail in section III. The time value of money analysis touches on this time period as well and problems that arise therefrom, however, while this Note recognizes the problem of limiting a player's value during that time period, it does not ultimately address the pre-free-agency time period. The Note passes over this period, in part, because the MLB Player's Association and MLB have, through collective bargaining, agreed to this practice.

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<sup>2</sup> See *infra* p. 9 and note 40.

<sup>3</sup> See *infra* pp. 9-12.

<sup>4</sup> See *infra* pp. 12-14.

## II. BACKGROUND

## A. Overview

As the 2015 baseball season came to an end for the New York Mets, Mets fans and baseball fans alike marveled at the playoff performance of the Mets second baseman Daniel Murphy. As one writer put it, “for a player who averaged [ten] home runs a season from 2011 to 2015, hitting [six] in as many games—against some of the best pitchers in baseball—was about as expected as a kangaroo riding the subway.”<sup>5</sup> Players in a position similar to Murphy’s, such as his former teammate Carlos Beltran, have had similar outstanding playoff performances going into their free-agent year.<sup>6</sup> Going into his free-agent year, Beltran was traded mid-season from the Kansas City Royals to the Houston Astros.<sup>7</sup> In the playoffs, Beltran “batted .435 with eight home runs, [fourteen] [R]uns [B]atted [I]n [(“RBI”)] and six steals in [twelve] games.”<sup>8</sup> In twelve games, Murphy hit .328 with seven home runs, eleven RBIs, one stolen base, and an on base percentage of .391.<sup>9</sup> Although outstanding playoff performances by a player going into his free agent-year is usually not commensurate with the player’s standard

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<sup>5</sup> Andrew Beaton, *Here’s How Daniel Murphy Suddenly Became Ted Williams*, WALL ST. J. (May 17, 2016, 7:18 PM), <http://www.wsj.com/articles/heres-how-daniel-murphy-suddenly-became-ted-williams-1463527089>.

<sup>6</sup> MLB free agency is the process under which players who have played in the league for six years or more become free to sign with any team interested in their services. See MLB, 2012-2016 Collective Bargaining Agreement, 84, [https://ipmall.law.unh.edu/sites/default/files/hosted\\_resources/SportsEntLaw\\_Institute/2012MLB\\_MLBPA\\_CBA.pdf](https://ipmall.law.unh.edu/sites/default/files/hosted_resources/SportsEntLaw_Institute/2012MLB_MLBPA_CBA.pdf).

<sup>7</sup> Tim Brown, *Beltran’s 2004 was unbelievable*, L.A. TIMES (Oct. 04, 2006), <http://articles.latimes.com/2006/oct/04/sports/sp-metsrep4>. Subject to some restrictions, a baseball trade occurs when a team assigns its player’s contract to another team in exchange for cash or accepting another player’s contract. See MLB, 2012-2016 Collective Bargaining Agreement, 78, [https://ipmall.law.unh.edu/sites/default/files/hosted\\_resources/SportsEntLaw\\_Institute/2012MLB\\_MLBPA\\_CBA.pdf](https://ipmall.law.unh.edu/sites/default/files/hosted_resources/SportsEntLaw_Institute/2012MLB_MLBPA_CBA.pdf).

<sup>8</sup> Brown, *supra* note 7. For a definition of batting average, see <https://web.archive.org/web/20071031023702/http://www.cosmicbaseball.com/bstats17.html>. (“batting average measures a batter’s ability to hit the baseball to a place on the field where a defensive player is unable to field it and make an out . . . . The batting average is calculated by dividing the number of “hits” (numerator) by the number of “at bats” (denominator).” For a definition of Runs Batted In and Stolen Base, see MLB, *Official Baseball Rules*, [http://mlb.mlb.com/mlb/downloads/y2010/official\\_rules/2010\\_OfficialBaseballRules.pdf](http://mlb.mlb.com/mlb/downloads/y2010/official_rules/2010_OfficialBaseballRules.pdf) (describing an RBI as “a statistic credited to a batter whose action at bat causes one or more runs to score.” A stolen base occurs when a player reaches base and advances one base unaided by some other player’s action).

<sup>9</sup> See BASEBALL REFERENCE, *Daniel Murphy*, <http://www.baseball-reference.com/players/m/murphda08.shtml>. On Base Percentage, as the term connotes, measures statistically how often a player reaches base. BASEBALL REFERENCE, *On base percentage*, [http://www.baseball-reference.com/bullpen/On\\_base\\_percentage](http://www.baseball-reference.com/bullpen/On_base_percentage).

performance level over a course of time;<sup>10</sup> the player, upon reaching free agency, is often compensated based on the recent memory still lingering in the minds of those who are about to pay his next contract. One possible explanation for such seemingly irrational behavior is that “if a baseball team’s fans or sports writers are tired of losing and see that a player who just finished a productive season is available, they may call for their team to sign [that] player. Such pressure could cause the team to alter how it values players.”<sup>11</sup>

Surprisingly, when Murphy signed with the Met’s rivals, the Washington Nationals, he was signed to a three year deal worth a mere \$37.5 million.<sup>12</sup> Although the annual payoff for this contract is greater than most people will earn in a lifetime, and is therefore unlikely to engender feelings of great sympathy for Mr. Murphy, in MLB terms, this contract is nevertheless considered a bargain for the Washington Nationals based on the number of years and dollars received by other players in a position similar to Murphy’s. As described by one baseball columnist, “[t]he [Nationals], who thought they had bought a nice No. 2 or 6 hitter, probably just got a quality No. 4 or 5 hitter who usually would cost more than \$100 million.”<sup>13</sup> As a case in point, although not a perfect comparison in terms of age going into free agency, Carlos Beltran received a seven-year, \$119 million deal after his stellar 2004 playoff performance.<sup>14</sup>

The notion that the Nationals got the better bargain in this case is further capitalized by the fact that, unlike players who often underperform after signing a large multiyear contract or are traded to a

<sup>10</sup> See e.g., BASEBALL REFERENCE, *Carlos Beltran*, <http://www.baseball-reference.com/players/b/beltrca01.shtml> (Over a seven year period, Carlos Beltran had a .298 batting average going into free agency). See also Michael Dinerstein, *FREE AGENCY AND CONTRACT OPTIONS: HOW MAJOR LEAGUE BASEBALL TEAMS VALUE PLAYERS* (May, 11 2007) (unpublished Ph.D. dissertation, Stanford University) (on file with Stanford University), [https://economics.stanford.edu/sites/default/files/publications/dinerstein\\_michael\\_2007honors\\_thesis.pdf](https://economics.stanford.edu/sites/default/files/publications/dinerstein_michael_2007honors_thesis.pdf) (discussing Adrian Beltre, third baseman for the Los Angeles Dodgers in 2004, who “had a fantastic year and received considerable support as the possible Most Valuable Player of the National League. Beltre’s performance proved somewhat unexpected, however, because in the years prior to 2004 his statistics were relatively average compared to the rest of the league.” The change in performance came as “Beltre’s contract was set to expire after the 2004 season, at which point he could become a free agent . . . The Seattle Mariners offer[ed] Beltre a 5-year contract for \$64 million, an amount that would hardly be justified by his performance prior to 2004.”)

<sup>11</sup> Dinerstein, *supra* note 10, at 7.

<sup>12</sup> See *Nats’ 3-Year Deal with Daniel Murphy Pays \$8M in 2016*, ESPN (Jan. 8, 2016), [http://www.espn.com/mlb/story/\\_/id/14515952/washington-nationals-announce-deal-daniel-murphy-pays-just-8m-2016](http://www.espn.com/mlb/story/_/id/14515952/washington-nationals-announce-deal-daniel-murphy-pays-just-8m-2016).

<sup>13</sup> Thomas Boswell, *Where did this Daniel Murphy come from? It’s complicated.*, WASH. POST (Jun. 2, 2016), [https://www.washingtonpost.com/sports/nationals/where-did-this-daniel-murphy-come-from-its-complicated/2016/06/02/17eae186-28cb-11e6-ae4a-3cdd5fe74204\\_story.html](https://www.washingtonpost.com/sports/nationals/where-did-this-daniel-murphy-come-from-its-complicated/2016/06/02/17eae186-28cb-11e6-ae4a-3cdd5fe74204_story.html).

<sup>14</sup> Brown, *supra* note 7.

new team, such as Murphy's former teammate Jason Bay,<sup>15</sup> and recently acquired Mets outfielder Jay Bruce,<sup>16</sup> Murphy is having his best professional year yet.<sup>17</sup> In fact, he is a leading candidate for baseball's coveted Most Valuable Player ("MVP") award.<sup>18</sup>

### B. *Player's Position*

With this newly acquired bargaining leverage, if Daniel Murphy hypothetically played in the National Football League ("NFL"), he would likely attempt to force his team into renegotiating the current terms of his contract by "holding out" at the beginning of next season.<sup>19</sup> "In its most general form [], a midterm demand for contract renegotiation is the means through which a player attempts to correct 'injustices' stemming from prior negotiations."<sup>20</sup> Of course, the better the player, the more clout he has in holding his team's feet to the fire.<sup>21</sup> The player is in high demand because of his exceptional skills, and the team, coaching staff, general manager and owner all understand that this player can shop around his services at almost any asking price.<sup>22</sup>

### C. *Differences Between MLB and the NFL*

With that said, the NFL and MLB have distinct differences and are thus not perfectly comparable. For one, the career length of a NFL player is one of the shortest in all of professional sports.<sup>23</sup> Indeed, the

<sup>15</sup> Andrew Keh, *After Three Seasons of Failure, Bay and the Mets Go Their Separate Ways*, N.Y. TIMES (Nov. 7, 2012), <http://www.nytimes.com/2012/11/08/sports/baseball/mets-and-jason-bay-agree-to-part-ways.html>.

<sup>16</sup> James Wagner, *Mets Lose Second Straight to Braves as Jay Bruce's Struggles Continue*, N.Y. TIMES (Sept. 20, 2016), [http://www.nytimes.com/2016/09/21/sports/baseball/new-york-mets-atlanta-braves.html?\\_r=0](http://www.nytimes.com/2016/09/21/sports/baseball/new-york-mets-atlanta-braves.html?_r=0).

<sup>17</sup> Neil Greenberg, *Red-hot Daniel Murphy on pace for one of the best batting seasons in MLB history*, WASH. POST (Jun. 1, 2016), [https://www.washingtonpost.com/news/fancy-stats/wp/2016/06/01/red-hot-daniel-murphy-on-pace-for-one-of-the-best-batting-seasons-in-mlb-history/?tid=a\\_inl](https://www.washingtonpost.com/news/fancy-stats/wp/2016/06/01/red-hot-daniel-murphy-on-pace-for-one-of-the-best-batting-seasons-in-mlb-history/?tid=a_inl).

<sup>18</sup> *Id.*

<sup>19</sup> See generally Basil M. Loeb, *Deterring Player Holdouts: Who Should Do It, How to Do It, and Why It Has to be Done*, 11 MARQ. SPORTS L. REV. 275 (2001).

<sup>20</sup> Daniel M. Walanka, *An Alternative Approach to the Problem of Midterm Demands for Contract Renegotiation in the National Football League: The Incentive-Based Contract*, 17 LOY. L.A. ENT. L. REV. 771 (1997).

<sup>21</sup> See Loeb, *supra* note 19, at 275. See e.g., Chris Herring, *Revis Unsure Whether He'll Hold Out*, WALL ST. J. (Apr. 23, 2012 9:44 P.M.), <http://www.wsj.com/articles/SB10001424052702303459004577362694262178830>.

<sup>22</sup> Loeb, *supra* note 19, at 276.

<sup>23</sup> Rob Arthur, *The Shrinking Shelf Life of NFL Players: The careers of pro football players are decreasing at an unprecedented rate*, WALL ST. J. (Feb. 29, 2016 12:42 A.M.),

average length of a NFL career has decreased “from 4.99 years to 2.66.”<sup>24</sup> In contrast, as a non-contact sport, a MLB athlete has the potential for one of the longest professional sporting careers.<sup>25</sup> Therefore, a NFL player only has a short window to earn whatever he can while he is at the top of his game. In stark contrast, MLB players can have very productive years into their late thirties and even early forties.<sup>26</sup>

Another striking difference between the two leagues is the way in which players are awarded contracts. In 1966, Sandy Koufax and Don Drysdale, two of the best pitchers in baseball, held out of spring training in order to leverage a higher salary for themselves.<sup>27</sup> The holdout by these pitchers, however, predated free-agency.<sup>28</sup> Prior to free-agency, players were considered bound to the team for which they played.<sup>29</sup> This being the mindset at that time, the holdout by these hall of fame pitchers was considered revolutionary in the efforts of getting a free-agency system implemented in MLB.<sup>30</sup> Today, MLB teams all offer their players guaranteed contracts.<sup>31</sup> Perhaps due to the advent of free-agency and the consequent financial security resulting from a guaranteed income over a fixed number of years, it is highly unlikely, if not impossible, to witness a MLB player hold out in order to renegotiate his contract. By contrast, the NFL has a system where contracts are seldom guaranteed.<sup>32</sup> Further, MLB has no salary cap.<sup>33</sup> In contrast, the effect of the NFL’s salary cap is that “players may not receive their marginal value to a team because the team has an upper limit it can offer [the player].”<sup>34</sup> Moreover, MLB’s free agent system more closely resembles a free market than the way free agency operates in the NFL.<sup>35</sup> NFL free agency “feature[s] franchise tags that allow teams to designate future

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<http://www.wsj.com/articles/the-shrinking-shelf-life-of-nfl-players-1456694959>.

<sup>24</sup> *Id.*

<sup>25</sup> Ben Raby, *Colon’s career outlasts Turner Field*, WASHINGTON’S TOP NEWS (Oct. 3, 2016 2:27 P.M.), <http://wtop.com/mlb/2016/10/colons-career-outlasts-turner-field/>.

<sup>26</sup> *See id.* (discussing the effectiveness of 43-year old pitcher Bartolo Colon).

<sup>27</sup> Bill Shaikin, *Fifty years ago, Dodgers’ Sandy Koufax and Don Drysdale engaged in a salary holdout that would help change baseball forever*, L.A. TIMES (Mar. 28, 2016 7:32 P.M.), <http://www.latimes.com/sports/dodgers/la-sp-koufax-drysdale-holdout-20160329-story.html>.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *See* MLB, MAJOR LEAGUE BASEBALL: GUARANTEED CONTRACT, <http://m.mlb.com/glossary/transactions/guaranteed-contract> (defining the term guaranteed contract).

<sup>32</sup> Walanka, *supra* note 20, at 792; *see also* Paul D. Staudohar, *Salary Caps in Professional Team Sports*, BUREAU OF LABOR STATISTICS, <https://stats.bls.gov/opub/mlr/cwc/salary-caps-in-professional-team-sports.pdf>.

<sup>33</sup> Dinerstein, *supra* note 10, at 4.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*



free agents as ‘franchise players’ and restrict them from entering the free agent market.”<sup>36</sup> MLB, however, has no franchise tag characteristic.<sup>37</sup> As a result, MLB’s “bidding is more competitive and players have less uncertainty about when they will become free agents.”<sup>38</sup> Due to these differences, holdouts are more prevalent in the NFL. The differences highlighted only points to the fact that the NFL’s system of rewarding its players is even less representative of a player’s value than MLB’s system. Of course, that does not mean that MLB’s system should not be improved upon.

#### *D. Proposed Solution*

With full awareness of the fact that most people are not losing sleep on whether we need to further compensate already highly compensated athletes, this Note nonetheless argues, from the principals of contract law, in favor of allowing baseball athletes to renegotiate their contracts mid-term when their performance would clearly warrant a higher value on the free-agent market. Using Daniel Murphy as a baseline example of a player who would especially benefit from this proposal, this Note will explore the option for MLB players to renegotiate their contracts from the contract theories of efficient breach, changed circumstance and duress. Allowing players to renegotiate their contracts is not only an idiosyncratic benefit to the player in Murphy’s position; it is also beneficial to players and teams as a whole. It allows players to be compensated for their current market value instead of being compensated for their past performance. This allows a player to realize his value today instead of waiting to be compensated for his work tomorrow.

#### *E. Owners’ Position*

At the same time, we must recognize the owners’ position in this matter. From their point of view, “the athlete has signed a contract with his team and both parties should honor the original deal, irrespective of the players [sic] performance.”<sup>39</sup>

The argument is based on an equitable notion: it is not fair for a player to demand the renegotiation of his contract to obtain more money because, if the player had performed suboptimally, the team

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<sup>36</sup> *Id.* at 4-5.

<sup>37</sup> *Id.* at 4.

<sup>38</sup> *Id.* at 5.

<sup>39</sup> Walanka, *supra* note 20, at 791.



would have been bound to the terms and conditions of the original contract. There is no mechanism pursuant to which the team may adjust the contract to reflect this potential “down side.” Therefore, the club is stuck with its original obligation. Any attempt by the team to modify or terminate that contract resulting from the player’s suboptimal performance should justifiably result in a breach of contract suit brought by the player against the club.<sup>40</sup>

## F. Owners’ Remedy

### 1. Team Options

Under this Note’s proposal, as sophisticated businesspeople, owners will change the way in which they negotiate and draft player contracts. Illustrative of this point is the increased prevalence of team options in contracts in recent years.<sup>41</sup> In essence, a team option lessens the guaranteed nature of MLB contracts.<sup>42</sup> By choosing to insert team options, owners diminish the inherent risk in a long-term deal. Thus, in response to the possibility of a player who over-performs holding out for a renegotiated deal, owners might choose to add additional team option clauses which would allow the team to release a player who underperforms going into the option year. The consequence of additional team options is to bring back the parity in positions between the two contracting parties. And while under the current system, a team, even without a team option, is free to breach a contract so long as it fully compensates the player,<sup>43</sup> this can be very expensive from the team’s perspective.<sup>44</sup> Alternatively, teams may currently choose to insert a team option when originally negotiating a contract.<sup>45</sup> However, this alternative, as currently constructed, although cheaper than releasing the player, is nonetheless quite expensive for the team to exercise. For example, in 2014, the Mets chose to exercise a \$5.5 million option on their star pitcher Johan Santana.<sup>46</sup> If the Mets had

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<sup>40</sup> *Id.* at 791-92.

<sup>41</sup> Dinerstein, *supra* note 10, at 8.

<sup>42</sup> *Id.* at 4.

<sup>43</sup> See MLB, *Release Waiver*, <http://m.mlb.com/glossary/transactions/release-waivers> (last visited March 17, 2018) (defining the option for a team to release a player).

<sup>44</sup> Dinerstein, *supra* note 10 (discussing the Mets having to pay the remaining 21 million dollars left on Jason Bay’s deal after releasing him).

<sup>45</sup> See MLB, *Team Option*, <http://www.m.mlb.com/glossary/transactions/club-option> (last visited March 17, 2018) (defining team options in contracts).

<sup>46</sup> Adam Rubin, *Mets buy out Johan Santana*, ESPN (Nov. 1, 2013), [http://www.espn.com/new-york/mlb/story/\\_/id/9908563/johan-santana-new-york-mets-buy-2014-option](http://www.espn.com/new-york/mlb/story/_/id/9908563/johan-santana-new-york-mets-buy-2014-option).

released him instead, the cost would have been \$25 million.<sup>47</sup> Owners are therefore placed in a difficult situation.

Consequently, especially when a team does not have a team option, fans are often subjected to witness subpar player performance as their team attempts to “squeeze out” whatever value they could possibly get in return for their investment. In reality, though, the player likely can no longer perform. Leading up to his eventual release by the Yankees, Alex Rodriguez is a recent example of one such player.<sup>48</sup> However, under the system proposed by this Note, to counter the risk of a long term-deal, team options are likely to become more prevalent and less costly to teams. Team options are likely to become less costly because of the owners’ new bargaining position in contract negotiations. Whereas, until now, owners who wanted an out from a contract were demanding an exception from most baseball contracts, now, owners can use the players’ newfound “free out” from a contract to negotiate a cheaper out (team option) of the contract from the owner’s perspective. As a result, there is a risk allocation on both ends. “The team risks that the player will perform beyond expectations and be entitled to [demand] a huge salary. On the other hand, the player risks that he will have an off-season and earn a smaller salary”<sup>49</sup> on the free agent market after his team chooses not to pick up its team option.

Indeed, it is the observation of this Note that MLB owners are already beginning to move in the trend this Note proposes. That is, owners appear to be willing to pay a higher salary in the short term in exchange for fewer years guaranteed upfront. Additionally, owners seem to already be using team options more prevalently. For example, in the most recent free-agent class of players, Toronto Blue Jays slugger, Jose Bautista, signed “a one-year deal worth \$18 million.”<sup>50</sup> The contract includes a \$17 million mutual option for 2018 and a \$20 million vesting option for 2019.<sup>51</sup> The \$18 million is likely more than Bautista would receive if the team simply looked to compensate him based on last year’s performance. In 2016, Bautista had an injury-plagued season, “which saw him post a .234 batting average with 22

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<sup>47</sup> *Id.*

<sup>48</sup> David Waldstein, *Alex Rodriguez to Retire and Join Yankees as an Advisor*, N.Y. TIMES (Aug. 7, 2016), <http://www.nytimes.com/2016/08/08/sports/baseball/alex-rodriguez-to-be-released-and-join-yankees-as-an-adviser.html>.

<sup>49</sup> Walanka, *supra* note 20, at 774.

<sup>50</sup> Dhiren Mahiban, *Dome Sweet Dome: Bautista excited to return*, MLB.COM (Jan. 22, 2017), <http://www.mlb.com/news/article/214056364/jose-bautista-excited-to-return-to-toronto/>.

<sup>51</sup> Gregor Chisholm and Jesse Sanchez, *Bautista returns to Blue Jays on 1-year deal*, MLB.COM (Jan. 18, 2017), <http://www.bluejays.mlb.com/news/article/213596024/jose-bautista-signs-1-year-deal-with-blue-jays> (a vesting option automatically vests if certain goals in the contract are met).

home runs and 69 RBIs in 116 games.”<sup>52</sup> In so handsomely compensating Bautista, the Blue Jays, therefore, likely considered Bautista’s six All-Star appearances and MLB leading 249 home runs since 2010 as evidence of his ability.<sup>53</sup> With these facts, there is the possibility that the Blue Jays get a positive return on their short-term \$18 million investment. However, should Bautista continue to underperform, the team can choose not to exercise the mutual option in 2018 with a relatively minimal cost - \$500,000.<sup>54</sup> Moreover, from Bautista’s perspective, he would now have to face the reality of underperforming for two years. With that, teams will likely begin minimizing his overall body of work and focus on his more recent performance levels. Consequently, he will likely be offered a contract earning far less than he would have had the Blue Jays signed him to a multi-year guaranteed deal.

Another prominent example this MLB off-season is Edwin Encarnacion, who signed with the Cleveland Indians and got three years guaranteed with a team option for a fourth year.<sup>55</sup> Not unlike Bautista’s contract, Encarnacion’s contract contains certain bonuses that can add to the overall payout under the contract in the short-term.<sup>56</sup> This illustrates owners’ willingness to pay more upfront if performance warrants such payment. It further illustrates the hesitancy and trend on the part of owners to move away from long-term deals that could negatively affect their team’s ability to remain competitive in the long-run as it gets bogged down with expensive and relatively unproductive players. Players, as of yet, however, have not exercised equal leverage by holding out when they have over performed on a contract. If, as this Note proposes, players did choose to exercise greater leverage and hold out, it is this Note’s contention that owners will counter by increasing the current trend and continuing to add team option clauses.

## 2. Power for the Commissioner to Punish Players

Under the MLB Collective Bargaining Agreement (“CBA”), the MLB Commissioner has the power to discipline players for just cause by means of a fine or suspension.<sup>57</sup> The “players consent to [C]ommissioner authority by signing the uniform player contract which

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<sup>52</sup> Mahiban, *supra* note 50.

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

<sup>54</sup> Chisholm, *supra* note 51.

<sup>55</sup> Mike Axisa, *Edwin Encarnacion’s contract with the Indians includes attendance bonuses*, CBSSPORTS.COM (Jan. 6, 2017), <http://www.cbssports.com/mlb/news/edwin-encarnacions-contract-with-the-indians-includes-attendance-bonuses>.

<sup>56</sup> Mahiban, *supra* note 50; *id.*

<sup>57</sup> See Collective Bargaining Agreement, *supra* note 6, at 48.

legally binds the player and club to all the provisions of the league constitution, league by-laws and the [CBA].”<sup>58</sup> The basis for such discipline is quite broad. The CBA allows the Commissioner to discipline players for conduct he determines to be materially detrimental or prejudicial to baseball, “including, but not limited to, engaging in conduct in violation of federal, state or local law.”<sup>59</sup> Therefore, for the player, there is a deterrent to holdout because if the player is found to be in breach of his agreement, i.e., there’s no changed circumstance or efficient breach, there is a violation of law. Thus, the Commissioner would be in a position to punish the player. But even if a player’s activity is not illegal, the Commissioner may still act if he believes that player activity is materially detrimental or prejudicial to baseball.<sup>60</sup> The Commissioner has exercised such power, for example, in instances of player related domestic violence.<sup>61</sup> Hence, in addition to the risk that another team does not offer the player a higher contract price, the player holdout comes at the risk of a possible dollar cost either by fine or lost salary via suspension.

Moreover, “league and [C]ommissioner power is derived from the owners themselves.”<sup>62</sup> Therefore, there is a strong impetus for the Commissioner to act strongly and swiftly on behalf of the people who write his paycheck.

In fact, a [C]ommissioner who abstains from disciplining a holdout player may be held liable for breaching the common law league-franchise fiduciary relationship. If the league is seen as a corporation, the [C]ommissioner is analogous to the chairman of the Board of Directors and would have duties of diligence and loyalty to the

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<sup>58</sup> Loeb, *supra* note 19, at 290-91.

<sup>59</sup> Collective Bargaining Agreement, *supra* note 6, at 49.

<sup>60</sup> *See id.*

<sup>61</sup> *See* Paul Hagen, *MLB, MLBPA reveal domestic violence policy*, MLB.COM (Aug. 21, 2015), <http://m.mlb.com/news/article/144508842/mlb-mlbpa-agree-on-domestic-violence-policy/> (addressing an agreement between MLB and the Player’s Association that gives the Commissioner power to “decide on appropriate discipline, with no minimum or maximum penalty under the [agreement]. Players may challenge such decisions to [an] arbitration panel”). *See e.g.*, Thomas Harding, *Reyes suspension retroactive, runs through May 31*, MLB.COM, <http://m.mlb.com/news/article/177899060/jose-reyes-suspension-through-may-31/> (illustrating both the Commissioner’s punishment power as well as the cost of such punishment to the player. The Commissioner, Rob Manfred, suspended Jose Reyes for fifty-one regular season games. The suspension came after Reyes was involved in an alleged domestic violence incident with his wife. Police dropped the charges because his wife declined to cooperate, but the policy allows the Commissioner to issue a suspension even if there is no action in the criminal justice system.” The cost of the suspension to Reyes was approximately \$7 million dollars). *See also*, Paul Hagen and Bryan Hoch, *Chapman gets 30-game suspension from MLB*, MLB.COM, <http://m.mlb.com/news/article/165860226/yankees-aroldis-chapman-suspended-30-games/> (using the domestic violence incident involving Yankee closer, Aroldis Chapman. Chapman was suspended for thirty regular season games, and the cost to him was roughly \$2 Million).

<sup>62</sup> Loeb, *supra* note 19, at 290.

members of the corporation: the owners.<sup>63</sup>

Even though there are limitations on the Commissioner's power to reprimand a player, the power is still strong enough to act as a deterrent. Several factors that can be viewed as limiting the Commissioner's power are: the player's union,<sup>64</sup> arbitration proceedings,<sup>65</sup> the notion that punishing a player holdout is unprecedented,<sup>66</sup> due process<sup>67</sup> and the public's reaction to punishing a high-profile player.<sup>68</sup>

### G. Recognition of Player Bargaining Power

Owners must also recognize a player's unique bargaining power. Unlike most professions where an employee is relatively easily replaceable, a professional MLB athlete, especially one who finishes as a finalist for the MVP award, is not easily substitutable. The tremendous annual revenue the owners' reap is a direct result of such employees.<sup>69</sup>

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 291 (discussing the diminished power of the Commissioner since the inception of the player's union). This argument is akin to saying that the President of the United States does not have the same power as the King of Rome once did. True, however, the office of the President comes with tremendous power nonetheless.

<sup>65</sup> *Id.* at 291-292 (discussing the fact that the Commissioner's decision is subject to review). This argument, however, is subject to similar criticism as the previous one. Except for courts of last resort, trial and appellate court decisions are subject to review. Of course, this diminishes the power of the lower court to some extent, however, it is not even nearly diminished to the extent of nonexistence.

<sup>66</sup> Loeb, *supra* note 19, at 292 (discussing the fact that disciplining a player for holding out would be uncharted ground for the Commissioner). *But see, supra* note 49-50 and accompanying text (explaining the Commissioner's broad discretion to punish a player for actions he deems detrimental to the sport).

<sup>67</sup> Loeb, *supra* note 19, at 292-93 (discussing the possibility that there could be a challenge on Due Process grounds on the part of the player). Of course, if the Commissioner does not abide by the procedures for punishment there can be a challenge on Due Process grounds, however, so could almost any other decision made by a court, arbitrator or, in this case, the Commissioner. In other words, the argument is not unique to the Commissioner; it's an argument that can be made regarding almost any legal decision maker. Indeed, in the author's own words, "[w]hen all is said and done, an arbitrator will probably respect a commissioner's decision to discipline a holdout player. As long as the commissioner follows the requisite procedures, the holdout player will not be able to raise a due process defense."

<sup>68</sup> *Id.* at 293 (discussing the fact that the Commissioner's action is often subject to public discourse and criticism. However, as the author himself acknowledges, "commissioner action always sparks public debate and will constantly be viewed under a microscope." *Id.* Indeed it is the very nature of the job of an executive to be under constant public scrutiny. The mere fact that an executive officer is under scrutiny will not necessarily inhibit said person from acting in accordance with his job. In sum, the issues raised as to the restrictions on the Commissioner's power is not without merit, however, not very strong either.)

<sup>69</sup> See Anthony DiComo, *Cespedes, Mets finalize \$110M deal*, MLB.COM (Nov. 30, 2016), <http://m.mets.mlb.com/news/article/209962618/yoenis-cespedes-signs-four-year-deal-with-mets/> (citing Met's COO, Jeff Wilpon, discussing the recent signing of Mets star outfielder Yoenis Cespedes said, "[h]e obviously helps put butts in seats . . . [p]eople want to see him." At the same event, Met's GM Sandy Alderson commented on Cespedes saying, "[w]hen the guy plays, we

Therefore, this is unlike the situation that the owner of a large department store, for example, finds his or herself in. The department store's revenue is unlikely to vary depending on a specific salesperson in the men's shoe department; however, without MLB caliber players, no less MVP caliber players, there is no game of MLB and hence no revenue for the owners deriving therefrom. Indeed, the owners of MLB teams may very well be easier to replace than the players playing on those teams, as there are almost as many billionaires in the U.S. as there are MLB players.<sup>70</sup> With the finite number of MLB teams – thirty – and a great demand to own one of those teams, a MLB player, especially one performing at a MVP caliber level, is in a truly unique bargaining position.

While this Note's proposal may be criticized as one that hurts the older player at the back-end of a long-term deal, as this Note will explore, under the economic principal of time value of money, players will be better off as a whole with this system in place.

### III. CONTRACTING IN BASEBALL

This Note will not go through all the details involved in MLB contracting, however, in the next few subsections, it will address some key factors in the contracting process leading up to free-agency.

#### A. Contracting Prior to Free-Agency

A MLB player reaches free-agency when he has played in the league for six years or more.<sup>71</sup> At that time, the player is free to sign with any team interested in his services.<sup>72</sup> This is also the first time the player can truly market his services in a free market unconstrained by collective bargaining agreements reached by MLB and its players union.<sup>73</sup> However, leading up to free-agency, “[p]layers . . . are cost-controlled.”<sup>74</sup> The CBA limits a player's earnings in his first four seasons to \$1.5 to \$2 million.<sup>75</sup> Thereafter, the player is entitled to

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win . . . [i]t's hard to ignore that. So we didn't.”)

<sup>70</sup> See Chase Peterson-Withorn, *The Full List of Every American Billionaire*, FORBES.COM (Mar. 1, 2016), <http://www.forbes.com/sites/chasewithorn/2016/03/01/the-full-list-of-every-american-billionaire-2016/#2239bde05880> (citing that America had 540 billionaires in 2016).

<sup>71</sup> See Collective Bargaining Agreement, *supra* note 6, at 92.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 93.

<sup>74</sup> See *Service Time*, FANGRAPHS, <http://www.fangraphs.com/library/principles/contract-details/service-time-super-two/> (last updated Mar. 30, 2018).

<sup>75</sup> *Id.*

“some fraction of [his] fair market value.”<sup>76</sup> As illustrated, players’ bargaining power to obtain market value compensation is constrained by MLB’s CBA with the players association.

### B. Service Time

As mentioned, a player must be in the league for at least six years prior to reaching free-agency. For purposes of reaching free-agency, baseball years are measured by service time.<sup>77</sup> It takes 172 days of service to accrue one year of service time.<sup>78</sup> Thus, 4.115 connotes a player “with four years and one hundred and fifteen days of service time.”<sup>79</sup> So long as a player is on his team’s Major League roster, each day is a service day.<sup>80</sup> This is true even if the player is on the team’s disabled list,<sup>81</sup> or a team has an off-day.<sup>82</sup> However, “six full years of service means six *full years* of service.”<sup>83</sup> Therefore, if a player ends a season at 5.171, just one day short of six baseball years, his team controls him “for another entire season under the terms of the [CBA] between the players’ association and the league.”<sup>84</sup>

Generally speaking, this clearly defined cutoff point means that most players spend their first seven major league seasons with their original team (unless they are traded or released, of course) because teams know not to call a player up until they can no longer earn 172 service days in their first year.<sup>85</sup>

Until a player reaches free-agency, he is subject to economic limitations. For the first three years of service, the player has almost no bargaining power and collects the league’s minimum salary.<sup>86</sup> Thereafter, a player becomes eligible for arbitration.<sup>87</sup>

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* A player is placed on the team’s disabled list for short term injuries. For example, a player will not be placed on the disabled list if he needs to undergo elbow surgery. He may be placed on the list if has some temporary elbow inflammation or soreness. When a player is on the disabled list, he holds a place on the team’s roster.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*



### C. Arbitration Eligibility and “Super Two” Status

In years four through six, a player is eligible for salary arbitration.<sup>88</sup> To become arbitration eligible, a player needs “between two and three years of service time.”<sup>89</sup> The variance depends on the amount of service time a player has after two years in the league.<sup>90</sup> The players in the top 22% of time served are crowned “super two” status.<sup>91</sup> A super two player becomes eligible to take his team to arbitration four times instead of three.<sup>92</sup> Consequently, the player is eligible for salary arbitration one year sooner than the remaining 78% of non-free-agent players.<sup>93</sup> Thus, if, based on performance, the team and player cannot agree on the upcoming year’s salary, the player can take the dispute to an arbitrator.<sup>94</sup> Fully conscious of this, “teams do their best to call up players after the ‘[s]uper [t]wo’ date.”<sup>95</sup>

## IV. TIME VALUE OF MONEY

### A. Time Value of Money Defined

The economic principal of time value of money connotes the “premise that a dollar received today is worth more than a dollar received tomorrow.”<sup>96</sup> Time value of money encapsulates the cost and benefit of parties involved in a transaction.<sup>97</sup> It thus considers “the economic benefit of making and the economic cost of receiving a deferred payment.”<sup>98</sup> To bring this economic principle to life, this note uses the recent unfortunate passing of Miami Marlins (“Marlins”) pitcher, Jose Fernandez, and Kansas City Royals (“Royals”) pitcher, Yordano Ventura, as an example. It is important to note that, the issue here is admittedly different than the situation Murphy is in because Fernandez and Ventura, having never reached free agency,<sup>99</sup> could

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

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Stephen F. Gertzman, FEDERAL TAX ACCOUNTING, §11.01, THOMSON REUTERS CHECKPOINT-TAX AND ACCOUNTING (2017).

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

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

<sup>99</sup> See BASEBALL REFERENCE, *Jose Fernandez Stats*, <https://www.baseball-reference.com/players/f/fernajo02.shtml>. See (citing the earliest free agency date in 2019).

never renegotiate a long-term contract. However, these scenarios serve as examples for purposes of illustrating the time value of money principle.

*B. Time Value of Money Illustrated Through the Recent Deaths of MLB Pitchers Jose Fernandez and Yordano Ventura*

1. Jose Fernandez

After a dominant rookie season, in which he became the first National League (“NL”) Cuban born player to win the Rookie of the Year award,<sup>100</sup> Jose Fernandez was one of baseball’s most promising pitchers.<sup>101</sup> As has unfortunately become the norm in baseball,<sup>102</sup> Fernandez’s career took a short pause in 2014 and 2015 so that he could undergo ulnar collateral ligament reconstruction (also known as Tommy John Surgery).<sup>103</sup> Upon his 2016 return, the young pitching ace was dominant once more.<sup>104</sup>

Though the odds of a young MLB pitcher having to undergo Tommy John surgery are high;<sup>105</sup> unexpected, however, was the announcement of Fernandez’s untimely death at the age of 24.<sup>106</sup> During his short career, Fernandez never reached free-agency.<sup>107</sup> Consequently, the contracts under which he performed between 2013 and 2015 were the MLB minimum, along with some cost of living adjustments.<sup>108</sup> After becoming arbitration eligible in 2016,<sup>109</sup> the Marlins and Fernandez

<sup>100</sup> Dayn Perry, *Marlins’ Jose Fernandez Named 2013 NL Rookie of the Year*, CBS SPORTS (Nov. 11, 2013), <http://www.cbssports.com/mlb/news/marlins-jose-fernandez-named-2013-nl-rookie-of-the-year/>.

<sup>101</sup> Ted Berg, *Jose Fernandez’s earlyyearlyearlyearlyEarly Death Cut Searly death cut hort MLB’s mostmostmostmostMost Promising Pitching Cmost promising pitching areer*, USA TODAY (Sept. 26, 2016 12:29 P.M.), <http://ftw.usatoday.com/2016/09/jose-fernandez-miami-marlins-death-24-greatness-mlb>.

<sup>102</sup> Lindsay Berra, *Force of Habit*, ESPN (Mar. 23, 2012), [http://www.espn.com/mlb/story/\\_/id/7712916/tommy-john-surgery-keeps-pitchers-game-address-underlying-biomechanical-flaw-espn-magazine](http://www.espn.com/mlb/story/_/id/7712916/tommy-john-surgery-keeps-pitchers-game-address-underlying-biomechanical-flaw-espn-magazine).

<sup>103</sup> Clark Spencer, *Miami Marlins Ace Jose Fernandez to Undergo Tommy John Surgery, Miss 2014 Season*, MIAMI HERALD (May 13, 2014 4:41 P.M.), <http://www.miamiherald.com/sports/mlb/miami-marlins/article1964392.html>.

<sup>104</sup> Zachary D. Rymer, *Has Tommy John Surgery Actually Made Jose Fernandez Better?*, BLEACHER REPORT (Aug. 4, 2015), <http://bleacherreport.com/articles/2538345-has-tommy-john-surgery-actually-made-jose-fernandez-better>.

<sup>105</sup> Berra, *supra* note 102.

<sup>106</sup> Jared Diamond, *Miami Marlins Pitcher José Fernández Killed in Boating Accident*, WALL ST. J. (Sept. 25, 2016 5:36 P.M.), <http://www.wsj.com/articles/miami-marlins-pitcher-jose-fernandez-killed-in-boating-accident-1474811796>.

<sup>107</sup> See *Jose Fernandez Stats*, *supra* note 99.

<sup>108</sup> See Collective Bargaining Agreement, *supra* note 6, at 11.

<sup>109</sup> *Marlins Ace Jose Fernandez Agrees to \$2.8 million deal*, USA TODAY (Jan. 15, 2016 3:32

avoided arbitration and reached a one year, \$2.8 million agreement.<sup>110</sup>

Fernandez, in his short lifetime, was unable to reach his full value. To realize his full value, current MLB practice requires that an athlete be in the league for six years before reaching free agency.<sup>111</sup> Fernandez thus had to live and remain in the league for an additional two years before becoming a free agent.<sup>112</sup> At that time, his contract would presumably encompass his full market value. Included in that value, however, is Fernandez's past performance for which he was never compensated.<sup>113</sup> To use tax jargon, although the Marlins realized Fernandez's contributions during his years of service,<sup>114</sup> they, or the team he ultimately signed with, only recognize the cost of his services upon his reaching free agency.<sup>115</sup>

Assuming the Marlins paid Fernandez his full 2016 contract, Fernandez will have earned \$4,576,000 over his four-year career.<sup>116</sup> During this time period, Fernandez posted Earned Run Averages ("ERA") as low as 2.19 and as high as 2.92.<sup>117</sup> When compared to Jon Lester, for example, a fellow player working under a contract negotiated and obtained via free-agency, there seems to be a stark contrast from Fernandez's earnings. Over the last four years, Jon Lester had an ERA range between 2.44 and 3.75.<sup>118</sup> During that time, his total compensation was \$69, 625,000.<sup>119</sup> Lester's ERA was no better than Fernandez's in the preceding years.<sup>120</sup> The earning contrast, however, is stark. With that said, it should be safe to assume that Fernandez, working under a contract negotiated through free agency, would have obtained, at the very least, similar compensation.

## 2. Yordano Ventura

Unfortunately, the American League fared no better this off-

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P.M.), <http://www.usatoday.com/story/sports/mlb/2016/01/15/marlins-ace-jose-fernandez-agrees-to-2016-contract/78860296/>.

<sup>110</sup> *Id.*

<sup>111</sup> See Collective Bargaining Agreement, *supra* note 6, at 86.

<sup>112</sup> See *Jose Fernandez Stats*, *supra* note 99.

<sup>113</sup> Edward Leonard, *Expectancy Theory and Major League Baseball Player Compensation* (Spring 2013) (unpublished B.S.B.A.thesis, University of Central Florida) (on file with University of Central Florida Libraries), <http://stars.library.ucf.edu/cgi/viewcontent.cgi?article=2423&context=honorstheses1990-2015>.

<sup>114</sup> 26 U.S. §1001(b).

<sup>115</sup> *Id.* at §1001(c).

<sup>116</sup> See *Jose Fernandez Stats*, *supra* note 99.

<sup>117</sup> *Id.*

<sup>118</sup> See BASEBALL REFERENCE, *Jon Lester*, <http://www.baseball-reference.com/players/l/lestejo01.shtml>.

<sup>119</sup> See *id.*

<sup>120</sup> See *id.*

season. Within a few months of Fernandez's death, another very young and talented pitcher for the Royals, Yordano Ventura, died at the age of 25 in a motor vehicle accident.<sup>121</sup> Ventura only spent three full seasons in the Major Leagues.<sup>122</sup> During that time, he had a win/loss record of 38-31 with a 3.89 ERA, "and he was poised to be the Royals' No. 2 starter in 2017."<sup>123</sup>

Similar to Fernandez, Ventura never reached free-agency; however, unlike Fernandez, Ventura was signed to a five-year contract.<sup>124</sup> Hence, though under a long-term deal, the contract was not obtained via free-agency. Instead, the team, realizing they had a valuable player on hand, signed Ventura to a five-year, \$21 million contract prior to his reaching free agency.<sup>125</sup> When this happens, the perceived benefit from the player's point of view is that he earns more in the near term than he would under the confines of a pre-free-agency market. Meanwhile, the owner, under the assumption that this player will turn out to be the real deal, ostensibly buys out a few years of the player's free-agent years through this extended contract. In other words, the owner can hold on to the player for a longer time period and at a lower price than the player would presumably demand on the free-agent market. Looking at it from a dollar point of view, Ventura was better off than Fernandez was. Of course, this is true. With MLB's system, the contract was guaranteed unless Ventura's conduct somehow voided the contract.<sup>126</sup> An example of conduct that would void the contract is if Ventura was intoxicated while driving a car.<sup>127</sup> Otherwise, his estate receives the remaining value left on his contract (which is most of it).<sup>128</sup>

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121 See Tyler Kepner, *Baseball Tragedy: Two Players Die in Crashes in the Dominican Republic*, N.Y. TIMES (Jan. 22, 2017), <https://www.nytimes.com/2017/01/22/sports/baseball/yordano-ventura-andy-marte-car-crashes.html>. On the same day as Ventura's death, another MLB player, Andy Marte, died in a separate car accident in the Dominican Republic. *Id.* For the sake brevity, I will not analyze his contract in full. Nevertheless, as an illustration of the real economic effect of not getting paid one's current value can have, it is worth mentioning his untimely death as yet another example.

122 See Jeffrey Flanagan, 'Great kid with a big heart. We lost a brother.', MLB.COM, <http://m.mlb.com/news/article/214108926/royals-pitcher-yordano-ventura-dies-in-crash/>.

123 *Id.*

124 See MLB.COM, <http://m.mlb.com/news/article/116329450/royals-yordano-ventura-agree-to-5-year-contract/c-116329450>.

125 See Ken Rosenthal, *\$20M owed to Yordano Ventura likely hinges on his toxicology report*, FOX SPORTS (Jan. 24, 2017), <http://www.foxsports.com/mlb/story/yordano-ventura-contract-royals-toxicology-report-012317>. Oftentimes, in an attempt to cut off some of the early years in which a player is eligible to partake in the free-agency process, teams will sign a player to a guaranteed contract that gives the player more money today than he would otherwise receive, and in the team's estimation, gives the player less money than he would likely receive via the free-agency process on the back-end of the contract. In other words, the contract allows the team to hold on to a player it deems valuable for a few more years before the player reaches free-agency.

126 See *id.*

127 *Id.*

128 *Id.*

Nevertheless, his value was abated by the fact that, at least until he became a free-agent, his value was pretty much fixed. Therefore, if he got even one dollar above MLB's minimum, he was better off. However, his estate is still not collecting on a contract that was fully based on his fair market value.

The examples of Fernandez and Ventura illustrate the time value of money principal. Additionally, they raise issues of players being economically constrained during their years of service prior to free-agency. However, the constraint is one that the players association and MLB agree to in their CBA. It is beyond the scope of this Note to discuss the merits or concerns of collective bargaining. Instead, the remedial action this Note proposes focuses on a player who has already signed a multi-year contract during free-agency and seeks compensation commensurate with his performance.

### 3. Using Future and Present Value Formulas as an Illustration

To illustrate the point using a simple future value ("FV") formula, I will use the Fernandez contract in comparison to Lester's. Let's assume the Fernandez family invests their late son's earnings in a thirty-year U.S. government bond making a 3% annual coupon payment ("PMT"). I will begin first by calculating the investment's FV. FV is expressed as: present value ("PV") \* (1+R)<sup>T</sup>, where "R" represents the annual interest rate, and "T" represents the number of years. For a government bond, the interest is paid on a semi-annual basis. Therefore, in one year, interest is earned upon the interest earned within the first six months. To capture that, "R" and "PMT" are divided by two, and "T" is multiplied by two. In the case of Fernandez, therefore:

Principal Investment ("PI") = 4,576,000 (The sum of his MLB earnings),

PV= 99.55 (PV of U.S. Bond – face value),

Coupon Payment = 3.00% (3% of the bonds face value),

R= 3.02%<sup>129</sup> (The yield on a thirty-year U.S. government bond),

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<sup>129</sup> See Bloomberg, <https://www.bloomberg.com/markets/rates-bonds/government-bonds/us> (for US government bond quotes).

$$T = 30.^{130}$$

The FV of the bond the Fernandez family hypothetically invests their late son's earnings in is as follows:

$$PV = \$99.55$$

$$R = 3.02/2 = 1.51\%$$

$$PMT = 3.00/2 = 1.5\%$$

$$T = 30 * 2 = 60$$

FV = \$389.47 (This is the bond's FV in thirty years).

This calculation represents a single bond. The Fernandez family, however, has over \$4 million to invest. Therefore, the FV of their investment is as follows.

(PI)  $\$4,576,000 / (PV) 99.55 = 45,966.85$  (Number of bonds hypothetically invested in by Fernandez family).

$45,966.85$  (Number of bonds based on PI) \*  $\$389.47$  (FV of a single bond) =  $\$17,902,709.39$  (FV of the Fernandez' PI).

In contrast, using the same formula as above, if Lester made the investment, the FV of his earnings over the last four years is:

(PI)  $\$69,625,000 / (PV) 99.55 = 699,397.29$  (Number of bonds needed to be purchased)

$699,397.29 * \$389.47 = \$272,394,261.7$  (FV of Lester's earnings in

thirty years).

In either event, the compensation is more than “fair.” The premise thus is not whether or not one can live comfortably off of close to \$18 million, but rather that Fernandez’s true market value was significantly higher. And while in many circumstances, unlike those of Fernandez and Ventura, a player is compensated based on his past performance when he reaches free agency, the full value will nonetheless never be realized for two reasons. For one, an athlete loses the opportunity to invest his earnings during the years in which he is not being fully compensated (time value of money). In the less likely circumstance, a sudden death or career ending injury can lead to an even smaller realization of value for the player (the Jose Fernandez and Yordano Ventura scenarios).

## V. EFFICIENT BREACH THEORY

### A. *Efficient Breach Theory Defined*

Under the theory of efficient breach as described by Judge Posner, even if a party deliberately breaches a contract, the breaching party “is not necessarily blameworthy” as he may have discovered that his services are more valuable to another party.<sup>131</sup> From an efficiency standpoint, therefore, “whenever the breach would leave no party worse off, while leaving at least one party better off”<sup>132</sup> allowing the breaching party to breach his current contract and provide his services to someone else promotes economic efficiency; provided, however, that the breaching party makes the other party whole again.<sup>133</sup> If he does, the law not only permits, but encourages a contracting party to breach under such circumstances because we do not want to deter efficient results.<sup>134</sup>

### B. *Efficient Breach Applied to MLB Players*

In the context of Daniel Murphy’s contract, as an MVP finalist,<sup>135</sup> if he were on the free-agent market, a team would presumptively place a

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<sup>131</sup> 11 Joseph M. Perillo, *Corbin on Contracts* §55.15 (2016).

<sup>132</sup> Gil Lahav, *Principle of Justified Promise-Breaking And Its Application to Contract*, 57 N.Y.U. ANN. SURV. AM. L. 163 (2000).

<sup>133</sup> Perillo, *supra* note 131.

<sup>134</sup> Lahav, *supra* note 132, at 163.

<sup>135</sup> Jamal Collier, *Murphy Finishes 2<sup>nd</sup> in NL MVP Voting*, MLB.COM (Nov. 17, 2016), <http://m.mlb.com/news/article/209081300/daniel-murphy-2nd-in-nl-mvp-award-voting/>.



higher dollar value than the \$12 million dollars he is set to earn in 2017.<sup>136</sup> In fact, the Nationals would likely place a higher dollar value on Murphy. Under an efficient breach analysis, Murphy should be allowed to go to the team placing the highest bid for his services as long as he makes the Nationals whole again.<sup>137</sup> Therefore, if the Nationals, for example, offered Murphy \$18 million and another team offered him \$22 million, Murphy could make the Nationals whole again by paying them the increased value they have placed on him resulting from his performance, with the remainder belonging to Murphy.<sup>138</sup> As a result, Murphy would walk away with a \$22 million contract from his new team allocated in the following manner: to make the Nationals whole, he would pay them \$6 million on top of the \$12 million they were paying him so as to give them the benefit of their bargain ( $18-12 = \$6$  million benefit of the National's bargain), and the \$4 million left over would be his own as a result of his rationally motivated economic decision.

The result is fair to both the players and owners. From the owners' perspective, owning a team is an economic investment in what may be called a baseball portfolio. The players' services are the financial instruments making up this portfolio. Without the players, therefore, this investment option no longer exists. Baseball owners would thus have to invest their money elsewhere. Additionally, player performance, that is, the performance of the financial instruments making up the portfolio, will contribute to the portfolio's overall investment return. For example, if these "instruments" perform exceptionally well, the "portfolio" will make it to the playoffs, which will result in a higher return for the owner.

Let us further assume that MLB players are the issuers of the financial instruments making up the owner's portfolio, that is, they are the issuers of their service. In a company setting, if, for example, a company could borrow at a lower cost today, it is free to do so by issuing bonds at a lower interest rate, while at the same time, buying back its outstanding bonds that pay a higher interest rate. The company chooses this option because borrowing at a higher rate is, of course, inefficient if the same dollar could be had at a lower interest rate. As the owner of his company's bonds, why shouldn't a baseball player then be able to "buy back" his services, which are essentially his outstanding debt at an inefficient price, for a more efficient result available on the market? The simple answer is that the company recalling its debt likely owns a call option allowing it to do so. In exchange for that option

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<sup>136</sup> ESPN, *supra* note 12.

<sup>137</sup> Perillo, *supra* note 131.

<sup>138</sup> E-mail from Mitchell L. Engler, Professor of Law at the Benjamin N. Cardozo School of Law, to author (Aug. 2, 2016, 21:22 DST) (on file with author).

though, the company pays the lender a higher interest rate. Hence, in recalling its bond, the borrower does not need the remedy of efficient breach. The baseball player who doesn't have the equivalent of a call option in his contract, that is, a player option, is left to the remedies available to him under the theory of efficient breach.

In essence, this relates back to the time value of money argument mentioned earlier. Under this Note's proposal, players are compensated more today for services rendered today. Where the market clearly demands a more efficient result, players will recall their services where economic reality will compensate them at a higher dollar value. The player who is without a player option will rely on efficient breach only in obvious circumstances demanding such a remedy. As mentioned earlier as well, owners will respond by inserting team options that are exercisable when economic reality on their side calls for them to release a player and invest their resources in a financial instrument yielding a higher return.

### *C. Limitations on Applying Efficient Breach to MLB Contracts*

#### 1. Availability of Player Options

There are, however, several limitations to the efficient breach argument. The first is the very point that players, if they choose and the team agrees, could have a player option inserted in their contract. Players are, for the most part, represented by sophisticated agents who are fully aware of this option. While there is validity to this argument, it is not without limitation. While it is true that a player could have inserted a player option that might have remedied his current situation, it is unlikely that the player option would be exercisable every year in which the player is under contract. Consequently, in the Murphy example, the option could have arguably only become available to him next year; a year too late if he wishes to cash in for his services this year.

#### 2. Difficulty in Determining Non-Breaching Party's Value Upon Breach –Using Wins Above Replacement to Estimate Value

Another issue under an efficient breach analysis is determining the team's value of the player at the time of the breach. This issue could be remedied to some degree, however, as teams rely more heavily on

advanced sabermetric statistics in evaluating a player's value.<sup>139</sup> Hence, approximating a player's market value should be more readily ascertainable. One such advanced statistic, Wins Above Replacement ("WAR"), measures "a player's total contributions to their team in one statistic."<sup>140</sup> WAR attempts to evaluate what the cost, in terms of wins, replacing Player A with Player B would be to a team.<sup>141</sup> Therefore, a team might "say that Player [A] is worth +6.3 wins to their team while Player [B] is only worth +3.5 wins, which means it is highly likely that Player [A] has been more valuable than Player [B]."<sup>142</sup> The statistic works, not as a precise value, but as an approximation of a player's win contribution.<sup>143</sup> Therefore, "[a] 6 WAR player might be worth between 5.0 and 7.0 WAR, but it is pretty safe to say they are at least an All-Star level player and potentially an MVP."<sup>144</sup> There are two leading websites that calculate this statistic, each, however, uses a different methodology in calculating "offensive, defensive, and pitching value, so their results differ in some cases."<sup>145</sup> For the 2016 season, Daniel Murphy's WAR was evaluated as 4.6<sup>146</sup> and 5.5<sup>147</sup> by the two respective websites. In evaluating Murphy's value going into the 2017 season, a team would use these WAR numbers. In contrast, going into the 2016 season, a team would have used Murphy's 2015 WAR. In 2015, Murphy's WAR according to the same websites was 1.4<sup>148</sup> and 2.5.<sup>149</sup>

One site has determined a way of converting a player's WAR into a dollar value on the open market by calculating the amount "teams spend per projected WAR in a given season and then [applying] that "market price" to each player's output at the end of the season."<sup>150</sup> For 2016, averaging the two sites' numbers, teams were willing to pay about \$7.7 million for every additional WAR.<sup>151</sup> Assuming the following

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<sup>139</sup> See *The Great Analytics Rankings*, ESPN, [http://www.espn.com/espn/feature/story/\\_/id/12331388/the-great-analytics-rankings](http://www.espn.com/espn/feature/story/_/id/12331388/the-great-analytics-rankings) (last visited Mar. 29, 2018).

<sup>140</sup> See e.g., FANGRAPHS, *What is War*, <http://www.fangraphs.com/library/misc/war/> (last updated Mar. 29, 2018) (using the following formula to calculate a position player's WAR as the following: "WAR = (Batting Runs + Base Running Runs + Fielding Runs + Positional Adjustment + League Adjustment + Replacement Runs) / (Runs Per Win)").

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* (citing the two leading websites as FanGraphs.com and Baseball-Reference.com).

<sup>146</sup> See BASEBALLREFERENCE, *Daniel Murphy*, <http://www.baseball-reference.com/players/m/murphda08.shtml>.

<sup>147</sup> See FANGRAPHS, *Daniel Murphy Washington Nationals*, <http://www.fangraphs.com/statss.aspx?playerid=4316&position=2B>.

<sup>148</sup> *Supra* note 146.

<sup>149</sup> *Supra* note 147.

<sup>150</sup> Neil Paine, *Bryce Harper Should Have Made \$73 Million More*, FIVETHIRTYEIGHT (Nov. 19, 2015), <http://fivethirtyeight.com/features/bryce-harper-nl-mvp-mlb/>.

<sup>151</sup> *Id.*

numbers, if we apply the above analysis to approximate Murphy's current market value, the calculation is as follows:

\$7.7 million value per 1WAR

Daniel Murphy 2016 WAR of 5 (To keep it simple, I will use approximate WARs).

$7.7 * 5 = \$38.5$  million. Essentially, therefore, this represents the approximate hindsight value of the Nationals bargain.

In contrast, if we used Murphy's WAR going into his free-agent year, his value at the time was approximately:

$7.7 * 2 = \$15.4$  million;

a number very much within the range of the average \$12.5 million he receives per year.<sup>152</sup> Murphy's increase in value is staggering. Indeed, it is an increase of about \$23 million dollars. Using WAR as a measure, therefore, should allow for a close approximation of the National's value for Murphy's services at the time of his breach.

Furthermore, it is reasonably likely that Murphy would attempt to renegotiate with the Nationals before he shops his services around to other teams. In his attempt to renegotiate with the Nationals, he is likely to learn of the team's maximum value placed on his future services. However, the Nationals might change their value on Murphy depending on who the other bidders for his services are.<sup>153</sup> For example, if a team within the division is bidding on Murphy, for the sake of not having one of their best players go to a direct competitor, the Nationals might increase their value.<sup>154</sup> Whereas if a team in the American League was the highest bidder, the loss to the Nationals is not as great.<sup>155</sup> Consequently, the team may place a lower value on Murphy. Aided by his agent, however, it is not out of the realm of possibilities for Murphy to discover the National's differing values in the several hypothetical scenarios listed above, but it is also unlikely that the Nationals will be in the most accommodating mood when a star player under contract wants to know their value so that he could more easily breach. Thus, because of the uncertainty involved, a practical shortcoming of the efficient breach analysis is evaluating the National's precise value at the time of the breach so that Murphy could compensate them accordingly.

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<sup>152</sup> See generally ESPN, *supra* note 12 (The term average is used because, in fact, Murphy's contract is back-ended. Murphy only received 8 million in 2016.).

<sup>153</sup> Engler, *supra* note 138.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

*D. Efficiency Without a Breach: Trade Possibility*

As long as a player's contract is transferrable, there is the possibility of reaching an efficient result, that is, a result that leads to resources being utilized to their highest value, without addressing who is entitled to the excess value.<sup>156</sup> Going back to the earlier example, suppose the Nationals now value Murphy at \$18 million and another team values him at \$22 million. Further assume, that the team trading for Murphy agrees to pay the Nationals \$8 million for Murphy. The Nationals just increased their value by \$2 million above the value they placed on Murphy (\$18 million + \$2 million). Moreover, the team on the receiving end of the trade comes out on top too because they're getting Murphy's services for \$2 million less than they valued his services (\$22 million - \$20 million). Of course, Murphy does not partake in this feast. Instead, he merely watches as the two teams have greatly benefited from his increased value. Thus, the result is definitely efficient in terms of Murphy performing for the highest bidder for his services without breaching a contract in reaching the efficient result; however, in doing so, the question of equity is not resolved in who is rightly entitled to the increased value.

## VI. CHANGED CIRCUMSTANCE

A better option for Murphy, therefore, might be an argument based on changed circumstance. Although contracts are typically viewed as binding throughout the term of an agreement, there are times where "supervening circumstances are such that they lead to a fundamental alteration of the equilibrium of the contract."<sup>157</sup> Early common law did not recognize a change of circumstance as an excuse for performance of a contractual obligation.<sup>158</sup> The textbook example for this proposition is *Paradine v. Jane*.<sup>159</sup> The full extent of the courts hostility toward a

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<sup>156</sup> E-mail from Mitchell L. Engler, Professor of Law at the Benjamin N. Cardozo School of Law, to author (Aug. 5, 2016, 12:22 DST) (on file with author).

<sup>157</sup> See Int'l Inst. for the Unification of Private Law (UNIDROIT), UNIDROIT Principles of International Commercial Contracts 212 (3rd ed. 2010), <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf>.

<sup>158</sup> BRIAN A. BLUM & AMY C. BUSHAW, CONTRACTS CASES. DISCUSSION AND PROBLEMS 694, (Wolters Kluwer Law & Business, 3rd ed. 2012).

<sup>159</sup> 82 Eng. Rep. 897 (K.B. 1647). See Blum & Bushaw, *supra* note 158, at 694. In this case, a German prince who had ejected a tenant from land he owned due to military occupation. *Id.* The tenant sought relief from having to pay rent. *Id.* The court held that no relief was available to the tenant, even on the basis of impossibility, because there was nothing actually preventing the tenant from paying rent. *Id.* If the tenant wanted to protect himself from the landlord's ejection, he could have contemplated this scenario and protected himself during formation of the contract.

claim based on changed circumstance was illustrated by the following passage:<sup>160</sup>

When the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore if the lessee covenant to repair a house, though it be burnt by lightening, or thrown down by enemies, yet he ought to repair it.<sup>161</sup>

In 1863, the English court changed its direction in *Taylor v. Coldwell*,<sup>162</sup> and allowed a party out of a contract where performance was deemed not merely impracticable, but impossible.<sup>163</sup> Since the *Taylor* decision, courts as well as the Restatement (Second) no longer insist on absolute impossibility but rather “impracticability” or “commercial impracticability.”<sup>164</sup>

Today, the doctrine of changed circumstance comes into play where one of the parties claims that a contract should not be enforced according to its terms because performance would be significantly different from what the parties originally expected.<sup>165</sup> As to continued performance of the contract, where such “supervening circumstances” have occurred, a party will claim “impracticability.”<sup>166</sup> In other words, “a profound change of circumstances has defeated its legitimate expectations under the contract.”<sup>167</sup> When a party claims impracticability, it does not mean a contract is literally impracticable. Quite the contrary, impracticability connotes a scenario “where performance is literally possible but is so radically different from that contemplated by the parties as to become impracticable.”<sup>168</sup> Impracticability further assumes that a contingent event “whose nonexistence was a basic assumption of the contract” intervened mid-

*Id.*

<sup>160</sup> Blum & Bushaw, *supra* note 158 at 694.

<sup>161</sup> *Paradine v. Jane*, 82 Eng. Rep. 897 (K.B. 1647). See Blum & Bushaw, *supra* note 158 at 694.

<sup>162</sup> 122 Eng. Rep. 309 (K.B. 1863). See Blum & Bushaw, *supra* note 158 at 694.

<sup>163</sup> *Taylor v. Coldwell*, 122 Eng. Rep. 309 (K.B. 1863). See generally, Blum & Bushaw, *supra* note 158, at 694. Here, a music hall burned down before a performance which was to occur took place. *Id.* The court held that there was an implied term in the agreement that the hall would be standing at the time performance was due. *Id.* Therefore, the hall’s destruction, caused by no fault of its owner, made performance of the contract impossible. *Id.* As a result, the owner was excused under the contract was excused of performance or from having to pay damages to the other party. *Id.*

<sup>164</sup> See Blum & Bushaw, *supra* note 158, at 694. See also RESTATEMENT (SECOND) OF CONTRACTS (2D) §89 cmt. b, (Am Law. Inst. d (1981).

<sup>165</sup> Blum & Bushaw *supra* note 158 at 693.

<sup>166</sup> *Id.*

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

<sup>168</sup> Paula Walter, *Commercial Impracticability in Contracts*, 61 ST. JOHN’S L. REV. 225, 226 (2012).

contract.<sup>169</sup> The intervening event does not have to be completely unforeseen, it could be that the parties considered the event but thought it unlikely to occur.<sup>170</sup>

In this regard Section 89 of the Restatement (Second) of Contracts states that:

“A promise modifying a duty under a contract not fully performed on either side is binding

if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made . . . .”<sup>171</sup>

In evaluating a purposed modification due to changed circumstance, Comment (b) lists some items to consider. For example, “the relative financial strength of the parties, the formality with which the modification is made, the extent to which it is performed or relied on and other circumstances may be relevant to show or negate imposition or unfair surprise.”<sup>172</sup>

Applied to Murphy’s situation, it is arguable that when the parties entered the contract at the beginning of the 2016 season, neither party anticipated that Murphy would have an MVP caliber season.<sup>173</sup> Even though Murphy had a strong 2015 season and even better post-season, going into his free-agent year, the parties likely deemed that to be an aberration. For if that were not the case, and the parties and free-agent market anticipated a top three MVP finalist contender, surely the demand and hence the compensation for Murphy’s services would have exceeded his current contract. However, even if the parties could arguably have foreseen a scenario where Murphy would far outperform the agreement, as mentioned earlier, the contingent intervening event, here, an MVP like season, does not have to be completely unforeseen.<sup>174</sup> Instead, as mentioned earlier, it could be that the parties considered the event but thought it unlikely to occur.<sup>175</sup> For the first year of the contract, the Nationals are, of course, the beneficiaries of a tremendous bargain. The doctrine of changed circumstances, however, should allow Murphy to demand a renegotiated agreement (perhaps backed by a threat of withholding performance by sitting out should a new deal not

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

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

<sup>171</sup> Restatement (Second) of Contracts (2D) §89 (Am. Law Inst. 1981).

<sup>172</sup> *Id.* at cmt. b.

<sup>173</sup> Thomas Boswell, *Where did this Daniel Murphy come from? It’s complicated.*, WASH. POST (Jun. 2, 2016), [https://www.washingtonpost.com/sports/nationals/where-did-this-daniel-murphy-come-from-its-complicated/2016/06/02/17eae186-28cb-11e6-ae4a-3cdd5fe74204\\_story.html](https://www.washingtonpost.com/sports/nationals/where-did-this-daniel-murphy-come-from-its-complicated/2016/06/02/17eae186-28cb-11e6-ae4a-3cdd5fe74204_story.html).

<sup>174</sup> Walter, *supra* note 168, at 226.

<sup>175</sup> *Id.*



be reached).<sup>176</sup> Comment (b), illustration three of the Restatement (Second) says that a renegotiated deal resulting from such a ploy would be a valid contract. It states that where:

A is employed by B as a designer of coats at \$90 a week for a year beginning November 1 under a written contract executed September 1. A is offered \$115 a week by another employer and so informs B. A and B then agree that A will be paid \$100 a week and in October execute a new written contract to that effect, simultaneously tearing up the prior contract. The new contract is binding.<sup>177</sup>

## VII. DURESS

### A. *Economic Duress*

Another contractual issue that arises as a result of a demand for contract renegotiation is the doctrine of duress. The question, therefore, is even if the Nationals were to agree to renegotiate Murphy's contract, could they later avoid the agreement on the basis of economic duress? That is to say, that if otherwise left alone, the contract is valid and stands.<sup>178</sup> Instead, however, the contract may be voidable by the Nationals if they choose to challenge its validity on the basis of duress.<sup>179</sup>

The general rule for duress is that "any wrongful act or threat which overcomes the free will of a party constitutes duress."<sup>180</sup> Of course, this leaves open the question as to what constitutes "wrongful" and "free will."<sup>181</sup> Though most contractual scenarios that require a determination of one's mindset use a subjective test, where there is economic duress, courts use an objective test in making that determination.<sup>182</sup> In this case, if the Nationals claimed duress, it would be on the basis of economic duress, as no physical harm is being threatened against the team. The Nationals may claim that Murphy, by withholding rights that they are entitled to under the agreement, i.e., his performance as a professional athlete, is placing the team under

<sup>176</sup> Perillo, *supra* note 131.

<sup>177</sup> Restatement (Second) of Contracts §89 cmt. b, illus. 3 (Am. Law Inst. 1981).

<sup>178</sup> 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS §1:20 (4th ed. 2017).

<sup>179</sup> *Id.* (explaining that a contract is said to be voidable if one of the parties was in some way unable to properly fully consent to the agreement. In this case, it is due to economic duress. In other cases, it could be due to infancy or the doctrines of fraud and mistake.).

<sup>180</sup> Joseph M. Perillo, *Corbin on Contracts* §28.2 (2016).

<sup>181</sup> *Id.*

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

economic duress to renegotiate the terms of his deal.<sup>183</sup> Consequently, the Nationals may argue that the “wrongful” withholding of performance and not their “free will” is what induced them to enter this renegotiated deal.<sup>184</sup>

### B. Standard for an Economic Duress Claim

To make a claim of economic duress, the Nationals must meet the following three elements. There needs to be a showing of:

- (1) wrongful acts or threats;
- (2) financial distress caused by the wrongful acts or threats; and
- (3) the absence of any reasonable alternative to the terms presented by [Murphy].<sup>185</sup>

However, pressure resulting from business circumstances is not considered economic duress.<sup>186</sup> Additionally, the mere threat to breach an agreement is generally not deemed duress, unless, “if carried out, [the breach would] result in irreparable injury because of the absence of an adequate legal or equitable remedy or other reasonable alternative”<sup>187</sup> to the non-breaching party. Further, the doctrine of duress is generally enforced only where it can be shown that the breaching party (Murphy) was “unjustly enriched” as a result of his behavior.<sup>188</sup> To show that Murphy was unjustly enriched, the Nationals would have to prove that there was:

- (1) a benefit conferred on [Murphy] by the [Nationals];
- (2) an appreciation or knowledge by [Murphy] of the benefit; and
- (3) the acceptance or retention by [Murphy] of the benefit under such circumstances as to make it inequitable for [him] to retain the benefit without payment of its value.<sup>189</sup>

Finally, the Restatement (Second) requires that a request for contract modification or release be made in good faith, otherwise, the threat to breach is deemed duress.<sup>190</sup> The Restatement (Second) gives

<sup>183</sup> 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS §2:22 (4th ed. 2017).

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

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

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

<sup>187</sup> 7-28 *Corbin on Contracts* §28.6.

<sup>188</sup> *Id.*

<sup>189</sup> 26 *Williston on Contracts* §68:5 (4th ed.).

<sup>190</sup> 7-28 *Corbin on Contracts* §28.6 (c. iting the Restatement (Second) of Contracts § 176(1)(d)).

the following illustration of what a good faith request for contract modification or release looks like.

*A* [c]ontracts to excavate a cellar for *B* at a stated price. *A* unexpectedly encounters solid rock and threatens not to finish the excavation unless *B* modifies the contract to state a new price that is reasonable but is nine times the original price. *B*, having no reasonable alternative, is induced by *A*'s threat to make the modification by a signed writing that is enforceable by statute without consideration. *A*'s threat is not a breach of his duty of good faith and fair dealing, and the modification is not voidable by *B*.<sup>191</sup>

The above illustration by the Restatement is very similar to the example given earlier in this writing by the Restatement in the context of changed circumstance.<sup>192</sup> The takeaway in both these examples is that, where there is a changed circumstance in the middle of a contractual agreement and the market dictates that a renegotiated contract is warranted at a higher price than originally agreed, a threat to withhold performance of an agreement until such an agreement is met is not an action in bad faith. Therefore, in relation to the doctrine of economic duress, there is no imposition, in this case, of such duress by Murphy upon the Nationals. As a result, the Nationals would not be entitled to avoid the renegotiated contract with Murphy.

Additionally, there would be no claim by the Nationals for unjust enrichment by Murphy. For the Nationals to claim unjust enrichment in this case, unjust enrichment would come only after the new agreement was ratified by the two parties; Murphy would be playing and the Nationals would be paying him under the new terms. The Nationals might at that point attempt to say that the excess of the old contract is an unjust enrichment by Murphy. However, once an agreement is ratified, the party who had the power of avoidance extinguishes that power.<sup>193</sup> Therefore, even if, hypothetically, there was an avoidance power under a claim of economic duress, the Nationals lose their avoidance power once the contract between the parties is ratified.<sup>194</sup> At that point, the contract is deemed valid.<sup>195</sup> If that is the case, it would no longer make sense for the Nationals to claim that Murphy was unjustly enriched. In other words, the Nationals have essentially assented to the new agreement and the value derived therefrom by Murphy. Hence, the agreement and the enrichment Murphy gains is valid. As such, if the

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<sup>191</sup> See Restatement (Second) of Contracts Illustration 1 to § 89 Restatement Second (Am. Law Inst. 1981).

<sup>192</sup> See Restatement (Second) of Contracts Illustration 3, Comment (b) (Am. Law Inst. 1981).

<sup>193</sup> 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS §1:20 (4th ed. 2017) (citing the Restatement (Second) of Contracts §7).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

duress doctrine is enforced only where unjust enrichment can be shown, the Nationals would not be able to demonstrate unjust enrichment in this scenario.

### VIII. PROPOSED SOLUTION

In one vein, this writing can be seen as an argument for making the rich richer, and the even richer, a little poorer. Ultimately, however, this writing's proposals, while focused on the player's right to renegotiate mid-term, is about efficiency for both parties. In achieving economic efficiency, players will occasionally attempt to renegotiate their contracts. As surrounding considerations dictate, this remedy will be sought by players only in limited circumstances. The situation in which this will occur is where player performance has greatly changed from the parties' initial expectations under the agreement. As discussed, the risks associated with exercising this remedy will assure that it is not loosely exercised. Although the theory of efficient breach is intriguing, it is ultimately likely to fail. The difficulty in calculating a precise value to the non-breaching party makes it difficult to make the non-breacher whole again – a necessary predicate for the theory to hold. Therefore, this writing posits that it is the remedy under the doctrine of changed circumstance that is ultimately likely to prevail for a MLB player attempting to renegotiate his contract. Under this remedy, where a middle of the pack player suddenly performs at a MVP level, a "profound change in circumstances" may be said to have occurred.<sup>196</sup> Consequently, a renegotiated agreement is warranted.

Hence, from a MLB player's point of view, this Note's impetus is the concept of time value of money. On the one hand, MLB players are able to have long and prosperous careers. Regardless of this point, this Note emphasizes the simple truism that a dollar today is worth more than a dollar tomorrow. Thus, players should get paid for work they perform today. Unlike other professions, a surgeon, for example, where the more time and experience a surgeon procures, the more valuable his or her experience. In sports, in most instances, the younger the athlete, the more durable and talented he or she is. In the extreme scenario, a young MLB player, whose talents are at their peak, will have his work and talent heavily under-realized by an unexpected death or injury. In most circumstances, however, a MLB player's opportunity to capitalize on his talents presents itself when he reaches free-agency. Nevertheless, the foregone earnings represent a lost opportunity to invest and realize a return.

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<sup>196</sup> Blum & Bushaw, *supra* note 158, at 693.

From the owner's perspective, this Note is about the ability to pay players at a rate commensurate with their performance. Consequently, it is about efficiently investing in player "assets" who currently yield a positive return to the team owner. Owners are protected by internal limitations surrounding a player's ability to breach – the MLB Commissioners authority to punish players. Broad Commissioner authority will make a player strongly consider the benefit of potentially breaching before doing so. Further, there are external contractual protections that owners can exercise in mitigating the risk of having to be responsible for paying players who no longer meet their investment expectations. The already increasing prevalence of team options will continue to find their way into player contracts. The team option subsidizes the enormous risk owners undertake when signing players to long-term deals.

## IX. CONCLUSION

Will this Note's proposals lead to perfect efficiency? Certainly not. Of course, there will be times where owners do not have a team option available and are thus forced to overpay players who underperform. Likewise, risk averse to the potential downside of their decision to breach, players will often be paid less than their market value warrants. However, on a whole, a more efficient outcome should ensue. In the limited circumstance in which the doctrine of changed circumstance will be exercised in MLB contracts, increased contract flexibility on both ends should lessen the need for its exercise to an even greater degree.