CHAPTER 5
CONTRACTS AND SPORTS: NEGOTIATION, FORMATION AND INTERPRETATION

I. Introduction

Parts I (Introduction) and II (Negotiating Strategy) of this chapter are intended to provide students with a brief overview of negotiating strategy and to present an example of the boilerplate uniform player contract that applies in most professional sports. The portion devoted to negotiating strategy is largely anecdotal, calling upon personal experiences at the bargaining table. Certainly, this section can be amplified by the professor’s own experiences and available literature in the area. This section may also provide a useful launch point to discuss the ethical considerations that must be a part of all contract negotiations -- particularly in the context of an agent representing more than one athlete on the same club and athletes who are part of a collective bargaining unit.

It is not necessary to address each provision of the sample contract that has been included; however, students should be encouraged to read the language carefully. At various points throughout the remainder of the text, provisions of these contracts will be featured. For example, in the first case of the next section (Billy Cannon), the commissioner approval language is the gravamen of the case. Other paragraphs dealing with injuries, workers’ compensation, special covenants, etc., will occupy center stage in subsequent cases and chapters.

Part III of this chapter returns to the traditional analysis of several cases. They are treated immediately below.

III. Specific Problems in Contract Formation

(A) Offer and Acceptance: Identifying the Offeror

Case: Los Angeles Rams Football Club v. Cannon

Primary reason for inclusion: To illustrate the difficulty in determining the identity of the offeror and offeree in certain contract settings and to present an example of standard player language that may be subject to more than one interpretation.

Points to emphasize:

1) At the time of this litigation, the AFL and NFL were engaged in a bitter bidding war for player services. Often the victims of the stratagems and silly games played by the clubs in each league were young and unsophisticated college athletes. Whether Billy Cannon was one of the naive victims remains unsettled, as discussed in N&Q 8.

2) The commissioner approval language that caused the lion’s share of the confusion in this case has been amended to eliminate the possibility of revocation prior to commissioner approval (see ¶ 18, entitled Filing). Thus, even if the player were deemed to be the offeror, he or she would not be able to revoke once the club has executed the agreement.
3) The option contract argument raised by the club/league was very creative. Students should be referred to the section of Chapter 4 dealing with options. Ultimately, the argument failed because the money involved was not "sufficient" consideration because it was refundable and had not been "converted" in any way by Cannon.

4) The characterization of the commissioner's language as a condition upon acceptance versus a condition on performance is critical. As the Notes and Questions indicate, the former would suggest that the contract is not formed until the commissioner approves. The latter construction would mean that a contract had been formed (thus barring revocation), but that no duties would arise thereunder until the condition had been satisfied. This case is a pertinent launch point for return to the primer chapter to review the basic concepts of formation, validation, and performance. The facts of Cannon, with some embellishment, are fodder for a comprehensive examination question, examples of which are included in the appendix.

Notes and Questions:

N&Qs 1 through 3 address the points raised immediately above. It is worthwhile to discuss the circumstances surrounding the Cannon case. There is little doubt that the judge was influenced by the fact that Cannon had become a pawn (or even a more valuable piece) in the leagues' chess match; he tailored the opinion accordingly.

The answer to N&Q 4 is simply that the option would have rendered the contract irrevocable for an agreed-upon or "reasonable" period of time. Thus, Cannon would have been precluded from withdrawing his offer -- assuming that he was the offeror.

N&Q 5 asks the students to compare the Cannon facts to the current commissioner approval language. The current language (¶ 18, not 19 as listed) would have made it much easier for the club to convince the court that a contract had been fully formed independent of, and without need for, the commissioner's approval.

N&Q 6 requires the students to revisit the avoidance section of the primer chapter. Conceivably, the way in which Cannon was treated could be the predicate for an argument that the contract was voidable on grounds of undue influence, fraud, or other similar avoidance devices.

N&Q 7 asks whether the entire contract (to the extent that one has been formed) is void on consideration grounds. A useful analogy in this regard is the National College Letter of Intent, which contains similar language conditioning the scholarship arrangement upon university approval. (See Chapter 4). It is noteworthy that, although this case centers on contract formation principles, several affirmative defenses were raised. As recommended in N&Q 5, it might be useful to address the fraud, unclean hands, mutuality, and mistake issues raised in the early part of the opinion by relating them to the pertinent parts of the primer. Also, students should be asked to explain the consequences of a finding that there is no consideration (void) versus a finding that the contract is avoidable due to mistake or misrepresentation (voidable).

N&Q 8 provides an interesting postscript to the Cannon affair. It may be worthy of some discussion to consider whether there is a rising incidence of athletes' inability to observe societal norms. One question is whether a disproportionate number of athletes have "legal" problems or whether athletes' problems are simply given greater play by an increasingly intrusive media. Issues such as spousal abuse and drug usage are compelling examples. See further Chapter 3 and Chapter 18.
(B) Contract Duration

Case: Sample v. Gotham Football Club

Primary reason for inclusion: To alert students to the fact that salary guarantee clauses must be drafted scrupulously and to explain that long term (multi-year) contracts can be viewed as either one contract with a number of performances or as a series of one year contracts. As the Sample case demonstrates, this latter distinction can be quite significant.

Point to emphasize:

1) The nature of the documents reflected that there were three separately executed agreements. Many contracts commentators and several courts decry the need for laborious examination of extrinsic factors, favoring an approach that scrutinizes the "four corners" of the relevant documents to derive a plausible interpretation.

2) Often, courts will do somersaults to avoid considering extraneous information in interpreting a contract. Here, Judge Edelstein goes directly to the documents themselves. Thus, while there seems to be ample evidence supporting the idea that Sample had a long term deal, the court construes the arrangement as a set of one year contracts.

3) The court's reliance on the Hennigan decision was handwriting on the wall. The relevance of Hennigan to Sample should be entertained, and students should be asked to assess the prudence of the courts' approaches in these cases.

Notes and Questions:

Again, we are presumably presented with a naive athlete who has negotiated an arrangement that, he assumed, "protected" him for several years. However, it does not appear as though the court was sympathetic to the athlete's plight. The Notes and Questions illustrate that differentiating one contract from a series of contracts can be difficult. In this case, and certainly in the Hennigan case referenced therein, it seems that the court missed the boat. At the very least, it seems as though the contract(s) are beset with ambiguity warranting an interpretation against the contract drafter, in this instance a professional sports team, vis-a-vis an unsophisticated athlete.

(C) Indefiniteness

Case: Eckles v. Sharman

Primary reason for inclusion: To illustrate that vague or ambiguous contract language can doom an agreement even when a severance (or severability) clause is present.

Points to emphasize:

1) The facts may give the impression that Bill Sharman is the type of coach that "goes for the gold" (a la Larry Brown of the Philadelphia 76ers, et al.) -- a person who may not be worthy of sympathy in a close case. This factor could have influenced the district court on the question of liability and the jury on the question of damages.
2) The district court was persuaded that the severance clause would serve to excise the troublesome language and permit the untainted portions of the contract to survive as part of an enforceable agreement. The lower court also found it relevant that the parties had made an earnest effort to clarify the option and pension clauses.

3) The Tenth Circuit found fault with the lower court’s conclusions on several grounds, particularly the finding regarding the parties' good faith efforts to reconcile the indefinite terms and the presumed efficacy of the severance clause. The good faith attempt does not give the agreement any more precision or any greater basis to ascertain the meaning and scope of the language. Moreover, the severance clause in itself does not operate to make the contract divisible and cannot permit a contract to survive if the clauses sought to be severed are "essential."

4) The issues for consideration by the Tenth Circuit involved questions of both law and fact -- or at least mixed questions of law and fact. Thus, the reviewing court had no misgivings about reversing. The court effectively ruled that the language in question was ambiguous, and that it could not be severed unless and until a determination had been made about the materiality of the clauses. Because there had been no clear manifestation of intent in this respect, the court of appeals reversed the directed verdict and remanded the case for a new trial.

Notes and Questions:

N&Q 1 focuses on the nature of the indefiniteness problem presented by this case. The terms in doubt do not simply represent vague language that was the product of the parties' inadvertent or careless omission. Such an oversight may have been viewed as harmless error, correctable by judicial gap-filling. However, the indefiniteness in Eckles reflected an agreement to agree -- often a flaw that is fatal to the contract. The particular problem with the agreement to agree is that it represents an overt manifestation of the parties' intent to agree at a later time -- ergo, the parties have reached no agreement and there is no basis upon which a court can find an enforceable contract.

The severance clause and other language will not *ipso facto* make a contract divisible or operate to sever offensive language absent a clear manifestation of intent. In other contexts, courts have made it abundantly clear that contracts are presumed to be "entire" and non-divisible. It could be argued that the severance clause in Eckles was intended to salvage the remainder of the contract after the ambiguous terms had been excised. The court presumably believed that the severance clause should not be given such significance where the result would be a "contract" bereft of several material terms. Accordingly, it remanded the case for further inquiry into whether the questionnable clauses were essential.

N&Qs 2, 3, and 4 consider modern approaches to indefiniteness issues with emphasis upon a legislative and judicial predilection for the preservation rather than destruction of the contract. Students should be asked whether the Tenth Circuit's decision is reflective of a dated approach to contract indefiniteness or whether the plaintiff's action would be infirm under any regime.

N&Q 5 becomes relevant due to the evolving prominence of revenue sharing in most league sports. Baseball is the latest professional sport to adopt a revenue sharing plan. This question has no definitive answer, but it could raise some interesting issues about damage recovery and source of liability.
N&Q 6 provides an introduction to the material that will be covered in greater detail in Chapter 6. For purposes of this question, we would ask the students to consider the basic elements of a claim for equitable relief, the prerequisites for injunctive relief, and the possible available defenses (including "unclean hands").

(D) Salary Guarantees and the Duty to Mitigate Damages

Case: NFL Players Ass’n v. NFL Management Council

Primary reason for inclusion: To introduce students to the notions of guaranteed contracts, waiver provisions, and mitigation of damages.

Points to emphasize:

1) The court has jurisdiction over the matter by virtue of Section 301 of the NLRA.

2) The court was called upon to review a decision of a reputable arbitrator. As will be discussed in Chapters 14 and 15, it is rare for a court to disturb a well-reasoned arbitration decision -- this case provides no exception to that general assumption.

3) The language of Pastorini's contract contained a salary guarantee, but no offset language. In and of itself, this factor might not have sounded the death knell for the league's offset language. However, as discussed below, the contract's silence on this issue together with other indicators discounted the validity of the league's contentions.

4) Pastorini was placed on waivers and no club claimed him. Accordingly, Pastorini's contract was not assumed by any other club. When Pastorini was released, he became a free agent, in effect, and any deal that he negotiated was independent of the guarantees provided under his prior contract.

5) The club attempted to demonstrate that league policy called for an offset whenever a player under a guaranteed contract was signed by a new club after his unconditional release. The part of this case that the students seem to enjoy is the NFL's straight-faced argument to this effect despite the personnel director's acknowledgement that the alleged policy was not in writing, had not been communicated to the NFLPA, and was not part of the union contract!

6) Existing precedent in the Smith and Davis cases reinforced the idea that a team wishing to impose "offset obligations" upon a player who negotiates a new deal after a release should make this obligation known to the player. Arbitrator Kagel explained that the league even provided such offset language to the clubs in the wake of the Smith decision.

7) The basic explanation of mitigation of damages is accurate, but somewhat misleading. [See discussion in Notes and Questions, below.]

Notes and Questions:

N&Qs 1 and 2 revisit the decision itself and address some of the Points to emphasize covered above. N&Qs 3 through 6 attempt to clarify the mitigation of damages issue. Simply stated, there is no mitigation issue in this case. In the abstract, given the exclusive nature of the
standard player contract, mitigation would apply in the event of a breach -- absent any guarantee. In this case, the salary was absolutely guaranteed -- in contemplation of events such as the ones that transpired. Thus, mitigation has no relevance to this case whether Pastorini's termination resulted either from a legitimate management decision based upon insufficient skills or from a blatant, heinous breach of contract.

N&Qs 6 and 7 point out the perils of a "guarantee" or "no-cut" clause that is not explicit. Often, adjudicators will attempt to interpret what the parties meant and what would be a fair result in a given situation. But careful drafting avoids placing one at the mercy of a potentially inhospitable decisionmaker. The Billy Martin question at the end of the Notes and Questions raises an interesting issue in terms of the connotation attached to a guarantee and the degree to which a club can satisfy its obligation simply by following the letter of the agreement. We would argue that there is an implied promise of good faith that attends the guarantee clause and that Holtzman's exile is tantamount to a breach. We would probably lose!

(E) Salary, Bonuses, and Incentive Awards -- The Club's Failure to Pay as a Material Breach

Case: Alabama Football, Inc. v. Stabler

Primary reason for inclusion: To illustrate the variety of bonus provisions and the possible impact of a clause characterized as a signing bonus as opposed to merely a salary advance.

Points to emphasize:

1) Kenny Stabler signed a contract with a team in a fledgling rival football league. The league had no history to "trade on" and, to some extent, hoped that the name recognition of "renegade" players from the established league would "sell" the product.

2) Stabler attempted to rescind the contract based on the material breach of the Alabama Football Club -- its failure to pay monies due. There was some discussion in the case regarding Stabler's alleged failure to give the club a chance to perform. It might be useful here to refresh the students' memory -- or make them aware -- of the section in the primer chapter dealing with material breach, particularly the fact that a late payment alone may not constitute a material breach justifying rescission.

3) The court correctly stated the law that the inability to perform may constitute a material breach justifying the other party's repudiation of the contract. However, the court at no point explained its decision to leave the parties exactly where it found them -- with no adjustment in the status quo in terms of return of money expended, good will lost, etc.

Notes and Questions:

N&Qs 1 through 3 raise the threshold issues that must be addressed in cases like this one. Is the bonus truly a bonus -- compensation above and beyond straight salary? If so, what is the recipient obligated to do to "earn" the bonus? Is his signature and the attendant publicity value enough? If not, is Stabler in this case entitled to the money that he retained without playing a game? Is he entitled to any more compensation? The facts of this case simply do not provide enough information to answer these questions, and the court's cavalier handling of the money issue does little to enlighten us. The language from the Greenwood case at least gives us some idea
of the differentiation between a signing bonus and an advance on salary, and the consequences of such differentiation.

N&Q 4 sets the stage for the *Catfish Hunter* case and clarifies the free agency terminology in the context of a breach of contract case. Simply put, the victim of a material breach is the same in any situation -- he or she is a free agent, so to speak, liberated from all contractual duties to the breaching party.

**Case:** *American and National Leagues of Professional Baseball Clubs v. MLB Players Ass'n* (Catfish Hunter)

**Primary reason for inclusion:** To demonstrate that in the context of a standard player contract, the typical material breach by the club is the failure to pay and by the player is the failure to perform on the field.

**Points to emphasize:**

1) Catfish Hunter gave owner Charlie Finley ample opportunity to provide the promised annuity payments (loosely characterized in N&Q 4 as insurance coverage). Correspondence from Hunter's representative made it clear to Finley that a failure to make the payments to the life insurance carrier would result in termination of the agreement.

2) The deferred compensation that Finley was supposed to pay to the insurance carrier for Hunter's annuity comprised half (50%) of Hunter's salary -- and there was no denial that the funds had not been paid. Thus, there is little doubt that the breach was material.

3) Typically, the party obligated to pay money is given a limited grace period to perform. Courts are reluctant to forfeit an agreement based on a *de minimis* delay in payment. *See E. Allan Farnsworth* at 8.14. Yet, in this case, Finley could find no safe harbor here, because numerous opportunities have been given to comply.

**Notes and Questions:**

N&Q 1 reinforces the idea that an owner's material breach could provide the player an escape hatch from his contractual obligations. The question arising is whether enough time was given for Finley to comply with his promise to funnel the deferred compensation to the insurance company.

N&Q 2 again illustrates the potential problems that can arise when bonus provisions and regular salary are not clearly demarcated. In this situation, the parties are at the mercy of an arbitrator or other adjudicator to ascertain how the various types of compensation should be allocated. The right result probably obtained in the *Horner* case, but a contrary result easily could have occurred.

N&Q 3 is a glowing example of how the bonus/compensation dichotomy rears its head in the context of salary caps and other mechanisms that circumscribe a player's right to negotiate a higher compensation package.

N&Q 4 points out the various approaches to incentive payments, with baseball providing the most circumscribed approach. The hypotheticals posed in N&Q 5 raise questions about the enforceability of incentive provisions tied to performances that are purely within the discretion
of management (e.g., number of appearances by a pitcher). The analysis of these hypotheticals entails a consideration of promises versus conditions and the theories of "excuse" that may serve to dispense with one party's need to satisfy the condition. For example, in N&Q 5(A) the number of appearances is arguably an express condition precedent to the club's duty to pay. Thus, the club would argue that the player is not entitled to any extra remuneration because he has failed to comply strictly with the condition. The player could respond in several ways. First, the bonus clause is not an expressed condition but a promise. It only requires substantial performance to trigger the club's duty to pay. Alternatively, and perhaps more persuasively, the player could argue that the club has a duty to exercise good faith and the failure to assign the player to any pitching duties during the month of September constituted interference or non-cooperation with the condition, excusing the other side from compliance. In all likelihood, the player will lose given the prevailing assumptions regarding the need to give manager's virtual carte blanche in the area of on-the-field decisions. [Contemplate the slippery slope if courts and arbitrators had the hubris to question a manager's strategic decisions]. The solution probably lies in the negotiation of a clause that, if possible, anticipates the hypothetical eventuality and addresses it in the contract.