

TACKLING THE ECONOMIC DURESS PROBLEM WITH THE NFL FRANCHISE TAG

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ABSTRACT

Since the National Football League (“NFL”) created the Franchise Tag in 1993, 245 NFL players have been offered a one-year franchise tag contract that prevented them from benefitting from the free agent market to realize their true value. NFL players used to have an avenue of suing the NFL by dissolving their union, the National Football League Players Association (“NFLPA”), and challenging the Collective Bargaining Agreement (“CBA”) under antitrust law. However, the Eighth Circuit Court foreclosed such challenges in *Brady v. NFL* in 2011, removing one of the few tools players had to balance out the bargaining power with NFL Owners.

In this Note, I document the development of the franchise tag and explain its functioning, and discuss the impact of *Brady v. NFL* on antitrust challenges to the CBA. I then suggest a different method players could employ—suing the NFL for franchise tag contracts as a form of economic duress. Alternatively, the NFL and the NFLPA could negotiate to remove the franchise tag or replace it with a less restrictive form, which would restore voluntariness in NFL contracts. I conclude with the contention that until the top players in the NFL can freely test the market, every player in the NFL will suffer from decreased competition, which drives down the overall player market value.

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I. INTRODUCTION

National Football League (NFL) running back Saquon Barkley enjoyed one of his most successful seasons in 2022, bouncing back from underperforming seasons caused by a history of injuries to lead the New York Giants to a playoff position.¹ When Barkley’s contract expired at the end of the 2022 season,² he was ready to hit the open market and capitalize on his performance. Instead, the Giants designated him as their “franchise player,” which forced him to accept a one-year contract instead of entering the open market.³

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1. Nick Shook, *Next Gen Stats’ 10 Most Explosive Runners of 2022: QBs Justin Fields, Lamar Jackson, Josh Allen Can Fly*, NFL: NEXT GEN STATS (May 30, 2023, 8:41 AM), <https://www.nfl.com/news/next-gen-stats-10-most-explosive-runners-of-2022-qbs-justin-fields-lamar-jackson> [<https://perma.cc/T7TS-5Y3G>]. Barkley ended the season with 1,312 rushing yards, 10 rushing touchdowns, and was selected to the Pro Bowl, the National Football League’s All-Star Game. *Saquon Barkley*, PRO FOOTBALL REFERENCE, <https://www.pro-football-reference.com/players/B/BarkSa00.htm> [<https://perma.cc/F8RU-45XM>] [hereinafter *Saquon Barkley*].
 2. See Shook, *supra* note 1 (noting that Barkley’s performance came in a “contract year”).
 3. NFL PLAYERS ASS’N, NFL COLLECTIVE BARGAINING AGREEMENT, [hereinafter NFL CBA], art. 10 (2020) <https://nflpaweb.blob.core.windows.net/website/PDFs/CBA/>

Barkley suffered a sprained ankle in the third game of the 2023 season⁴ and missed the next three games.⁵ The injury, among other factors,⁶ caused his performance to drop off in 2023.⁷ The New York Giants ended the season with a losing record and missed the playoffs; changes to the coaching staff and player roster were imminent.⁸ The 2023 franchise tag left Barkley without the long-term contractual security he might have secured as a free agent, and his injury-plagued performance in 2023 raised many questions as to what kind of contract he might obtain in 2024.

Each NFL team can designate one player as their “franchise player” before the beginning of the NFL league year in March.⁹ This procedure, more commonly referred to as the “franchise tag,” restricts the ability of these players to negotiate with other teams.¹⁰ This Note will argue that the NFL franchise tag is a form of economic duress that the teams employ to force players to sign a contract. The superior bargaining power of NFL teams over NFL players is a crucial underpinning of this argument. Thus, to explain the expanse of this bargaining power, Part II will begin with a brief overview of relevant antitrust law, followed by the development of free agency through lawsuits under antitrust law and the Sherman Act,¹¹ which ultimately led to the Collective Bargaining

March-15-2020-NFL-NFLPA-Collective-Bargaining-Agreement-Final-Executed-Copy.pdf [https://perma.cc/G3MN-GW73]; *NFL CBA: Franchise Tag*, SPOTRAC, https://www.spotracc.com/nfl/cba/franchise-tag [https://perma.cc/YY9C-Q4SF].

4. Ryan Dunleavy, *Saquon Barkley's Injury Absence Shows How Much Giants Miss His Skill*, N.Y. POST: NFL (Sep. 30, 2023, 7:14 PM), https://nypost.com/2023/09/30/saquon-barkleys-injury-shows-how-much-giants-miss-his-skill [https://perma.cc/R9ZX-JRJB].
5. Derek Tate, *Fantasy Injury Update: Saquon Barkley, Aaron Jones, and Rhamondre Stevenson Impacting Week 7 Rankings*, PRO FOOTBALL NETWORK (Oct. 18, 2023, 4:45 PM), https://www.profootballnetwork.com/saquon-barkley-aaron-jones-rhamondre-stevenson-fantasy-injury-update-week-7-2023/ [https://perma.cc/GC6N-U6TR].
6. Other prominent members of the New York Giants, such as quarterback Daniel Jones and tight end Darren Waller, missed significant time with injuries. Patricia Traina, *Three Unexpected Things That Doomed the 2023 Giants Season*, ON SI: NFL N.Y. GIANTS (Dec. 3, 2023), https://www.si.com/nfl/giants/big-blue-plus/three-unexpected-things-that-doomed-the-2023-giants-season [https://perma.cc/D4NF-N4NW]. In fact, this previously productive trio played just forty snaps together in 2023, which likely contributed greatly to the Giants' poor offensive production. *Id.*
7. Barkley ended the 2023 season with less rushing yards, rushing yards per carry, rushing touchdowns, receptions, and receiving yards. *Saquon Barkley*, *supra* note 1.
8. See Tom Canavan, *Four Giants Assistant Coaches Fired After 6–11 Season*, AP NEWS: SPORTS (Jan. 8, 2024, 6:49 PM), https://apnews.com/article/giants-daboll-mcgaughey-johnson-29153684e179b8999162e7872325484f [https://perma.cc/6V8Z-32P6] (discussing what went wrong for the Giants in 2023 and what changes they might make in 2024).
9. NFL CBA, *supra* note 3, art. 10.
10. *Id.*
11. See *Mackey v. Nat'l Football League*, 543 F.2d 606 (8th Cir. 1976) (holding the NFL's restrictions against player free agency violated the Sherman Act); *McNeil v. Nat'l Football League*, 790 F. Supp. 871 (D. Minn. 1992) (refusing summary judgment for the NFL based on their argument that Plan B free agency does not violate the Sherman

Agreement (“CBA”) that allows the franchise tag. Part II will then explain the three forms of the franchise tag before turning to recent suits against the NFL under antitrust law¹² that contributed to an updated CBA preventing similar litigation,¹³ and conclude with an explanation of economic duress. Part III will analyze how the franchise tag can be attacked on grounds of the doctrine of economic duress. Part IV will propose two potential solutions: 1) suing the NFL to prevent enforcement of contracts signed under the franchise tag and 2) negotiating modifications to make the franchise tag more like Major League Baseball’s (“MLB”) Qualifying Offer that benefits both teams and players. Part V will conclude this Note.

II. BACKGROUND

Achieving the competitive level of the NFL is extremely difficult. Only an infinitesimal fraction of high school football players ever reach the NFL—approximately 0.023%.¹⁴ Even if a player is talented and fortunate enough to play in the NFL, the average player’s career lasts only an estimated 3.3 years.¹⁵ Given the slim odds of both reaching and enjoying a multi-contract career in the NFL, players seek financial security while they are still playing. At the same time, a 3.3-year average career means that NFL teams have a challenging time securing players who can sustain high performance levels for extended periods of time, and are therefore motivated to keep talented players on their team for as long as possible. The main goals of teams and players are often at odds, resulting in litigation that determines what rules the parties must play by. This section will briefly overview antitrust law before looking in-depth at how antitrust law shaped the development of NFL free agency, which ultimately has allowed players to secure better financial rights for themselves during their brief careers. Like in other sports, NFL free agency refers to the system by which players can sign contracts with new teams once their contracts with former teams expire. However, this section will also introduce an unfortunate

Act); *White v. Nat’l Football League*, 822 F. Supp. 1389 (D. Minn. 1993) (approving a settlement agreement instituting free agency in the NFL); *Brady v. Nat’l Football League*, 644 F.3d 661 (8th Cir. 2011) (vacating an injunction enjoining a lockout by the NFL because the league held a non-statutory labor exemption from the Sherman Act as the NFLPA was the collective bargaining union for players).

12. *Brady*, 644 F.3d at 681–82.

13. NFL CBA, *supra* note 3, art. 3, § 3.

14. *Football and Concussions: Information to Protect Your Children, Odds of High School Players Going Pro*, THE OHIO STATE UNIV. COLL. OF PUB. HEALTH, <https://u.osu.edu/groupbetaenr2367/junran-add-things-here-for-real> [<https://perma.cc/TZX6-862C>].

15. Patrick Rische, *Tracking NFL Draft Efficiency: How Contingent Is Success to Draft Position?*, FORBES (May 22, 2015, 3:42 PM), <https://www.forbes.com/sites/prishe/2015/05/22/tracking-nfl-draft-efficiency-how-contingent-is-success-to-draft-position/?sh=5c73404a7495> [<https://perma.cc/GLC8-3UVH>].

consequence of NFL free agency, the franchise tag, and explain why antitrust suits are no longer possible before introducing the doctrine of economic duress.

A. *Antitrust Law and the Sherman Act*

Congress enacted the Sherman Antitrust Act in 1890 to make restraints on trade illegal.¹⁶ While the statute could be interpreted broadly to make *all* restraints of trade illegal, the United States Supreme Court in *Standard Oil Co. v. United States* narrowed its application with the “Rule of Reason.”¹⁷ The Rule of Reason limited the Sherman Act to only suppress *unreasonable* restraints of trade, allowing parties to voluntarily restrain trade in ways that are reasonable and beneficial to negotiations.¹⁸ In addition to the Rule of Reason, federal courts also began enforcing a statutory exemption found in the Clayton Act and the Norris-LaGuardia Act that insulated labor organizations from antitrust action.¹⁹ This statutory exemption was necessary because labor organizations naturally seek to restrain trade through actions like picketing and striking in order to secure better wages, benefits, and working conditions for their members.²⁰ In a series of cases in the 1960s, the Supreme Court also began recognizing a non-statutory exemption from the Sherman Act for bona fide, arms-length negotiated bargaining agreements between a labor organization and an employer.²¹ The non-statutory exemption necessarily developed out of the protections granted by the statutory exemption.²² The purpose of the non-statutory exemption is to honor collective bargaining agreements between employee unions and employers, and to bar either party from suing on the terms to which they have collectively agreed.²³

As the NFL emerged concurrently with antitrust law, the Rule of Reason and CBA non-statutory exemptions from the Sherman Act would play a crucial role in the development of NFL free agency, where players began challenging the NFL’s restraints of player movement as unreasonable.²⁴

16. 15 U.S.C. § 1.

17. *Standard Oil Co. v. United States*, 221 U.S. 1, 63–70, 77 (1911).

18. Eleanor M. Hynes, Note, *Unnecessary Roughness: Clarett v. NFL Blitzes the College Draft and Exemplifies Why Antitrust Law is Also a Game of Inches*, 19 ST. JOHN’S J.L. COMMENT. 577, 580 (2005) (first quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4–5 (1958); and then quoting *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911)).

19. See Hynes, *supra* note 18, at 582 (outlining the growth of antitrust law). Hynes discusses the development of antitrust law in greater depth than can be afforded here.

20. Hynes, *supra* note 18, at 581.

21. *United Mine Workers v. Pennington*, 381 U.S. 657, 664–69 (1965); *Amalgamated Meat Cutters v. Jewel Tea*, 381 U.S. 676, 688–91 (1965); *Connell Constr. Co. v. Plumbers & Steamfitters Loc. Union No. 100*, 421 U.S. 616, 621–23 (1975).

22. Hynes, *supra* note 18, at 583.

23. *Id.*

24. See discussion *infra* Part II.B (explaining how NFL free agency developed through antitrust law).

B. *The Development of Free Agency Through Antitrust Law*

The relative bargaining power between NFL players and NFL teams favors the teams. Over time, players have chipped away at the superior bargaining power of NFL teams through lawsuits by the National Football League Players Association (“NFLPA”) for antitrust law and Sherman Act violations.²⁵ The current balance of bargaining power remains tilted in favor of NFL teams with little hope of changing, since NFL players can no longer bring antitrust claims against the NFL to try and shift the bargaining power of the two parties.²⁶

1. The Reserve Clause and the One-Year Option

Upon its founding in 1920–1921, the NFL operated under the “Reserve Clause” rule of player transfers.²⁷ The Reserve Clause prohibited free agency of all kinds, allowing teams to perpetually retain the rights to sign a player to a contract.²⁸ Under this system, if a team did not either offer a player a new contract or trade the player, that player had no other options for playing football.²⁹

The Reserve Clause existed until 1947 when the NFL pivoted to a different, yet still highly restrictive, rule: the “One-Year Option.”³⁰ Under this system, teams could renew a player’s expiring contract for one year at ninety percent of its previous value.³¹ Although players technically had the opportunity to negotiate with teams following their option year, such an opportunity did not materialize until 1962, when R.C. Owens signed a contract with the Baltimore Colts after completing his option year with the San Francisco 49ers.³² San Francisco team owner Vic Morabito was so discontent with losing Owens

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25. See *Mackey v. Nat’l Football League*, 543 F.2d 606, 611–23 (8th Cir. 1976) (holding the NFL’s restrictions against player free agency violated the Sherman Act); *McNeil v. Nat’l Football League*, 790 F. Supp. 871, 874–97 (D. Minn. 1992) (refusing summary judgment for the NFL based on their argument that Plan B free agency does not violate the Sherman Act).
26. See discussion *infra* Part II.D (explaining that the NFL can no longer be attacked on antitrust grounds).
27. Dalton Miller, *The History of NFL Free Agency*, PRO FOOTBALL NETWORK (Mar. 13, 2023, 8:00 AM), <https://www.profootballnetwork.com/history-of-nfl-free-agency/> [<https://perma.cc/S2HN-SJMU>]. The Reserve Clause was based on Major League Baseball’s reserve system. *Id.*
28. *Id.*
29. Alvin Dominique, *NFL History: The Road to Free Agency*, BLEACHER REPORT: NFL (Apr. 17, 2008), <https://bleacherreport.com/articles/18183-nfl-history-the-road-to-free-agency> [<https://perma.cc/ER9Q-RZ8A>].
30. *Id.*
31. See Miller, *supra* note 27 (noting the Rozelle Rule was instituted on top of One-Year Options that could be renewed at ninety percent of the original contract).
32. See *id.* (explaining that no players changed teams until R.C. Owens in 1962). Owens is credited as being the first NFL free agent. Michael Schotter, *How Free Agency Changed the NFL Forever*, BLEACHER REPORT: NFL (Mar. 11, 2013), <https://bleacherreport.com/articles/1561856-how-free-agency-changed-the-nfl-forever> [<https://perma.cc/6E9R-YZ2U>].

that he refused to speak to Baltimore team owner Carroll Rosenbloom again.³³ Morabito proposed a new rule to further restrict player movement that would come to be known as the “Rozelle Rule” after then-Commissioner of the NFL, Pete Rozelle.³⁴ The previous two rules were such deterrents to player movement that a single player’s team change prompted a rule change, starting a new era of player movement.

2. The Rozelle Rule

At the behest of Morabito, the NFL adopted the Rozelle Rule alongside the One-Year Option.³⁵ The Rozelle Rule required teams that signed any player from another team, including a player who had not completed a One-Year Option contract, to send draft picks to the player’s former team as compensation.³⁶ If the teams could not agree on compensation, the NFL Commissioner would determine which draft picks would constitute the appropriate compensation.³⁷ This rule essentially operated like a forced trade, and it was so onerous that teams rarely signed players from other teams, with only thirty-four players changing teams in the eleven years between 1963 and 1974.³⁸ For example, when Dave Parks signed with the New Orleans Saints in 1968, the Saints were required to send two first-round picks to Parks’s former team, the 49ers.³⁹ The Rozelle Rule hypothetically allowed for free agency, but none of the players signed during this period were actually “free” because their new team had to compensate their former team in exchange for the right to sign them.⁴⁰

33. Schotthey, *supra* note 32.

34. *Id.*; Miller, *supra* note 27. Morabito’s anger illustrated just how little NFL owners wanted true free agency and player movement in the NFL.

35. Miller, *supra* note 27.

36. John Kendle, *From R.C. Owens to Reggie White, the Evolution of NFL Free Agency*, CANTON REPOSITORY (Mar. 22, 2020, 5:01 PM), <https://www.cantonrep.com/story/sports/pro/pro-football-hof/2020/03/22/from-r-c-owens-to/1480573007> [<https://perma.cc/E5XP-TJQL>].

37. *Id.*

38. *Id.*

39. Dominique, *supra* note 29. Some might say requiring two first round picks as compensation was justified because Parks had shown his talent by leading the NFL in receptions, receiving yards, and receiving touchdowns in 1965. *Dave Parks*, PRO FOOTBALL REFERENCE, <https://www.pro-football-reference.com/players/P/ParkDa00.htm> [<https://perma.cc/N6L2-U3HR>]. However, Parks’s production had dropped off in each of 1966 and 1967 to roughly twenty percent of his league-leading 1965 statistics. *See id.* (showing his production dropped from over 1,300 receiving yards in 1965 to less than 1,000 in 1966 to barely 300 in 1967). Since he had not shown the propensity to be one of the top players in the NFL for more than a single season, two first-round picks seems like an exorbitant price to require of the Saints.

40. Miller, *supra* note 27.

In 1970, tight end John Mackey of the Baltimore Colts was named the first president of the NFLPA,⁴¹ the union that represents NFL players and collectively bargains on their behalf with the NFL.⁴² Although Mackey's playing career concluded after the 1972 season,⁴³ he was the most prominent player involved in—and the lead plaintiff of—*Mackey v. National Football League*, a landmark suit against the NFL that was decided in 1976.⁴⁴ The NFL and NFLPA had not yet agreed to a new Collective Bargaining Agreement, largely because the players' union sought to eliminate the Rozelle Rule so the players could move more freely between teams and obtain increased salaries endowed by a competitive open market.⁴⁵ Since the CBA negotiations were not progressing, Mackey and some fellow players sued the NFL in 1972, claiming that the Rozelle Rule unreasonably restrained trade.⁴⁶ In *Mackey v. NFL*, the Eighth Circuit Court of Appeals addressed two main issues on appeal: (1) whether the presence of a CBA gave the NFL a labor exemption from the Sherman Act and (2) if no exemption existed, whether the Rozelle Rule was an unreasonable restraint of trade in violation of the Sherman Act.⁴⁷ The Court held that (1) no labor exemption existed for the NFL because the National Labor Relations Act required the parties to bargain over the Rozelle Rule and no bona fide arm's-length bargaining occurred over the Rozelle Rule;⁴⁸ and (2) the Rozelle Rule did violate the Sherman Act because, applying the Rule of Reason analysis, the Rozelle Rule was significantly more restrictive than necessary for any legitimate purposes.⁴⁹ Therefore, the Court ruled that the Rozelle Rule was an

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41. Associated Press, *NFL Labor History Since 1968*, ESPN: NFL (Mar. 3, 2011, 4:04 PM), http://sports.espn.go.com/nfl/news/story?page=nfl_labor_history [<https://perma.cc/9GCT-LR6N>]. Mackey originally was encouraged by the NFL to become president of the player's union because they thought they could control him easily, but he was much stronger willed than NFL team owners thought. JOHN MACKEY & THOM LOVERRO, *BLAZING TRAILS: COMING OF AGE IN FOOTBALL'S GOLDEN ERA 170–80* (2003). The award that is given annually to the best tight end in college football is named in Mackey's honor. *See The Legend John "Mack Truck" Mackey*, JOHN MACKEY AWARD, <https://www.johnmackeyaward.com/index.html>, [<https://perma.cc/7STH-6UJX>] (explaining that the "Friends of John Mackey" give the award for the best tight end in college football annually).
 42. *How the NFLPA Works*, NFLPA, <https://nflpa.com/about> [<https://perma.cc/C5H6-LVW6>].
 43. *See John Mackey*, PRO FOOTBALL REFERENCE, <https://www.pro-football-reference.com/players/M/MackJo00.htm> [<https://perma.cc/PT87-5ZME>] (showing the last season John Mackey played was 1972). Mackey was pushed out of the league because of his position as the president of the player's union. MACKEY & LOVERRO, *supra* note 41, at 191–92.
 44. *Mackey v. Nat'l Football League*, 543 F.2d 606 (8th Cir. 1976).
 45. *Id.* at 610–13.
 46. *Id.* at 609, n.2.
 47. *Id.* at 611–23.
 48. *Id.* at 615–16.
 49. *Id.* at 620–22. The Court did reverse the district court's holding that the Rozelle Rule was a *per se* violation of the Sherman Act. *Id.* at 618–20. The Court explained that the

unreasonable restraint of trade in violation of the Sherman Act.⁵⁰ This ruling was a groundbreaking decision for NFL players because, for the first time, they began to swing the balance of bargaining power toward neutral, though it still strongly favored NFL teams and owners. As a result of the Court's ruling, the NFL and NFLPA ratified a new CBA in 1977, which replaced the Rozelle Rule with a similar rule: the Right of First Refusal.⁵¹

3. Right of First Refusal and Plan B Free Agency

NFL free agency was governed by the Right of First Refusal from 1977 to 1988.⁵² Named for the power it granted to NFL teams, the Right of First Refusal empowered a team whose free agent players signed an offer sheet from another team to match that offer and force the player to sign a contract and remain with the original team.⁵³ However, if a team chose not to match the offer and allowed the player sign with the new team, the new team was required to provide compensation for signing that player.⁵⁴ This system operated much like the Rozelle Rule and still greatly restricted player movement. The key difference was that the compensation was predetermined by the CBA, rather than solely by the NFL Commissioner Pete Rozelle.⁵⁵ On its face, a predetermined scaling system of compensation is fairer than an arbitrary system that gives a single person the final say. However, under this system, only three players changed teams between 1977 and 1988.⁵⁶ 56 When compared with thirty-four players changing teams in eleven years under the Rozelle Rule,⁵⁷ the Right of First Refusal was even more restrictive.

Expressing discontent with the new system, the players went on strike two games into the 1987 season to showcase their desire for true free agency.⁵⁸

NFL is too novel and unique to support a *per se* analysis and the reasonableness inquiry was sufficient.

50. *Id.* at 623.

51. NFL, *The History of NFL Free Agency*, NEW ENG. PATRIOTS (Mar. 8, 2021, 5:41 PM), <https://www.patriots.com/news/the-history-of-nfl-free-agency> [<https://perma.cc/TBX7-DAS9>].

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. Timothy W. Smith, *N.F.L. Is Dusting Off Its Shield For Another Free Agency Battle*, N.Y. TIMES, June 14, 1992 (§ 8), at 4.

57. Kendle, *supra* note 36.

58. Associated Press, *supra* note 41. Though many players went on strike, “dozens of veterans cross[ed] the picket lines” to play in games staged by their teams, including future Hall-of-Famers Joe Montana, Lawrence Taylor, Steve Largent, and Tony Dorsett. *Id.* This effectively crippled the strike, which the players voted to end after only 24 days, and the season concluded under the current CBA. The players decided the pursue further legal action rather than the strike. *Id.*

The NFLPA initially sued the NFL as it had in *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976). However, in *Powell v. National Football League*, 930 F.2d 1293, 1303 (8th Cir. 1989), the 8th Circuit upheld the Right of First Refusal as it was agreed

The strike ended after only twenty-four days, and the players instead decided to pursue legal action against the NFL once again.⁵⁹

Faced with suits from individual players and in the absence of a CBA, NFL team owners unilaterally instituted Plan B Free Agency (“Plan B”) in 1989,⁶⁰ although the “free agency” title is misleading. Plan B allowed teams to choose thirty-seven out of the forty-seven players on their rosters to “protect,” meaning those thirty-seven players were subject to Right of First Refusal rules.⁶¹ The NFL’s allowing just ten players per team to negotiate freely each season only marginally increased player movement because demand for the bottom ten players on each team was not high and did not greatly affect the overall market for players.⁶² In the four years the Plan B system was in place, no protected players changed teams.⁶³

During Plan B Free Agency, one of the players who sued the NFL individually was Freeman McNeil, a star running back for the New York Jets who led the league in rushing yards during the strike-shortened 1982 season.⁶⁴ When

to in a good faith, arm’s-length bargaining process by both sides. Because of their defeat, players voted to decertify the union as a tool to attack the rules the owners had unilaterally adopted. Nat’l Football League, *supra* note 51 (“[T]he owners unilaterally imposed Plan B free agency with the absence of a labor agreement[.]”); *cf.* Associated Press, *supra* note 41 (stating that the NFLPA decertified in 1989 so players could bring individual cases against NFL teams).

59. Associated Press, *supra* note 41.

60. Nat’l Football League, *supra* note 51.

61. *Id.*

62. *Cf. Id.* (stating that there was an influx of player movement, but not among the “best” players in the NFL).

63. Some sources state that Wilber Marshall, a linebacker for the Chicago Bears, was a “restricted” player who changed teams under this system. Nat’l Football League, *supra* note 51; Kendle, *supra* note 36. However, Marshall signed a five-year, \$6 million offer sheet from the then-Washington Redskins in 1988, who gave two first-round picks to the Chicago Bears for the privilege of signing Marshall. *Bears Let Free Agent Marshall Go to Redskins*, L.A. TIMES (Mar. 19, 1988), <https://www.latimes.com/archives/la-xpm-1988-03-19-sp-1079-story.html> [<https://perma.cc/H3CC-ZD2K>]. Marshall signing his contract in 1988 would fall under the previous regime of the Right of First Refusal, as Plan B Free Agency was not instituted until 1989. Marshall was one of just three players to change teams under the Right of First Refusal rule. Smith, *supra* note 56. Marshall would unfortunately fall victim to the franchise tag when his contract ended in 1993. Vito Stellino, *Redskins Exploring a Trade for Wilber Marshall/Free Agency Signing Rules a Roadblock*, L.A. TIMES-WASH. POST NEWS SERV. (Jan. 24, 2015), https://greensboro.com/redskins-exploring-a-trade-for-wilber-marshall-free-agency-signing-rules-a-roadblock/article_0c4723e8-3cf2-556f-a320-9505f8cf547f.html [<https://perma.cc/4LDH-9643>]. Marshall challenged the franchise tag in the United States District Court for the District of Minnesota but was unsuccessful. *Id.*

64. See *Freeman McNeil*, PRO FOOTBALL REFERENCE, <https://www.pro-football-reference.com/years/1982/rushing.htm> [<https://perma.cc/23US-Z4R2>] (showing that Freeman McNeil led the NFL in rushing in 1982). See generally Gene Wojciechowski, *NFL Strike 1982: A History Lesson Not Learned*, L.A. TIMES (Sept. 23, 1987, 12:00 AM), <https://www>

his contract expired in 1990, McNeil joined seven other players in an action against the NFL over their lack of freedom to contract under Plan B.⁶⁵ *McNeil v. NFL* was finally decided after more than two years of litigation.⁶⁶ The jury returned a verdict after a ten-week trial, finding that Plan B and the Right of First Refusal substantially harmed the market for player services, were more restrictive than reasonably necessary to achieve competitive balance among NFL teams, and caused economic injury to several of the plaintiffs.⁶⁷

The 1992 *McNeil* verdict signaled the next shift in the bargaining power tug-of-war between teams and players.⁶⁸ Two weeks after the verdict, Federal District of Minnesota Judge David Doty declared four players to be unrestricted free agents.⁶⁹ Although these decisions were favorable for players, the NFL and NFLPA were still in negotiations over a new CBA,⁷⁰ and among the contested issues were Plan B and Unrestricted Free Agency—the system by which players can sign contracts with new teams without restrictions and their new team does not have to compensate their former team.⁷¹ A year later, in the midst of these CBA negotiations, more players sued the league for free agency.⁷² Headlining these suits was one of the greatest defensive linemen of all time, Reggie White.⁷³ It did not take long for the NFL and the players to reach a settlement agreement, which was approved by the Federal District Court of Minnesota.⁷⁴ The 1993 settlement gave the players access to unrestricted free

latimes.com/archives/la-xpm-1987-09-23-sp-6303-story.html [https://perma.cc/RDH5-LN5C] (comparing the 1982 player strike to the 1987 player strike).

65. Mike Freeman, *McNeil Suits Up as Agent for Change*, WASH. POST (June 12, 1992), <https://www.washingtonpost.com/archive/sports/1992/06/13/mcneil-suits-up-as-agent-for-change/5b7a1ca0-2f64-461a-923d-d42a68ea23bd> [https://perma.cc/Y8WQ-M53P].
66. *McNeil v. Nat'l Football League*, No. 4-90-476, 1992 WL 315292, at *1 (D. Minn. Sept. 10, 1992) (special verdict form).
67. *Id.* Although four of the plaintiffs received monetary awards, McNeil and three others did not. The justification for awarding damages was supported by the finding that Plan B and Right of First Refusal were unreasonable restraints of trade, just as the Court previously found the Rozelle Rule was. Compare *id.* (finding Plan B and Right of First Refusal were more restrictive than reasonably necessary to achieve competitive balance in the NFL) with *Mackey v. Nat'l Football League*, 543 F.2d 606, 623 (8th Cir. 1976) (ruling the Rozelle Rule constituted an unreasonable restraint of trade under a Rule of Reason analysis).
68. *McNeil*, 1992 WL 315292, at *1 (D. Minn. 1992) (special verdict form) (finding that the NFL's Plan B Free Agency was harmful to the competitive market for football players). The verdict made the NFL susceptible to similar suits and indicated that they would need to modify Free Agency to remove the harmful effect of Plan B.
69. Associated Press, *supra* note 41.
70. *Id.*
71. *Id.* (“[T]hose talks include[d] more open free agency”); see, e.g., NFL CBA, *supra* note 3, art. 9, § 1(a).
72. Dominique, *supra* note 29.
73. Miller, *supra* note 27.
74. *White v. Nat'l Football League*, 822 F. Supp. 1389, 1399 (D. Minn. 1993).

agency for the first time in NFL history.⁷⁵ However, there was a catch: the CBA also contained a rule that allowed each team to designate one of their free agent players as their “franchise” player, preventing that player from negotiating with other teams.⁷⁶

C. *The Franchise Tag*

The franchise tag was originally known as “The Elway Rule” because during CBA negotiations in 1992, Denver Broncos owner Pat Bowlen did not want to lose John Elway (his star quarterback) to free agency.⁷⁷ Although not initially expected to be used for positions other than quarterback, the franchise tag has survived many iterations of the CBA as the NFLPA has little hope of negotiating it away entirely.⁷⁸ The original purpose of the tag was to allow teams more time to negotiate contract extensions with their star players, like the situation between the Broncos and John Elway.⁷⁹ Over time, the franchise tag evolved to be used on players that the teams did not want to lose but also did not intend to sign long-term contracts with, such as role players or star running backs near the end of their careers.⁸⁰

The franchise tag exists in three different forms: the exclusive tag, the nonexclusive tag, and the transition tag.⁸¹ The three different tags offer various levels of restrictions to player negotiations, which impact the likelihood that a team will re-sign that player. The exclusive tag is aptly named, as it gives each team exclusive negotiating rights with one of their free agent players, completely barring that player from negotiating with other teams.⁸² The nonexclusive tag allows players to negotiate with other teams but provides substantial protection to the player’s former team. For example, if the player

75. See Dominique, *supra* note 29. To get the NFL to agree to give them unrestricted free agency, the players had to allow a salary cap that limits how much NFL teams spend on players each season. *Id.* The salary cap has increased at a fairly consistent rate since its institution, and with it so have player salaries. See Ramy Elitzur, *NFL and NFL Salary Caps Have Worked Out Well for Players*, THE CONVERSATION (Aug. 26, 2021, 11:08 AM), <https://theconversation.com/nfl-and-nhl-salary-caps-have-worked-out-well-for-players-165739> [<https://perma.cc/7WZJ-KLHB>].

In addition to the salary cap, the players also allowed for a much more limited form of Plan B free agency to continue that is known today as “Restricted Free Agency.” See Nat’l Football League, *supra* note 51 (explaining that modern restricted free agency developed from Plan B).

76. See Nat’l Football League, *supra* note 51; NFL CBA, *supra* note 3, art. 10, § 1.

77. Jacob Feldman, *From ‘The Elway Rule’ to ‘The Franchise Tag’*, SI: NFL (Feb. 23, 2018), <https://www.si.com/nfl/2018/02/23/nfl-franchise-tag-rule-explanation-history-origin-themmqb-newsletter> [<https://perma.cc/YG4Z-7A4B>].

78. *Id.*

79. *Id.*

80. *Id.*

81. See NFL CBA, *supra* note 3, § 2(a)(i), (ii), (3) (outlining all the provisions of the franchise tag).

82. *Id.* § 2(a)(ii).

signs an offer sheet from another team, the previous team can either match the offer and force the player to sign with them or let the player go and collect two first-round picks from the player's new team.⁸³ In this sense, the nonexclusive tag is essentially a combination of the Right of First Refusal with the harsh penalties of the Rozelle Rule, albeit enforced upon a smaller subset of players as each team can only designate one franchise player per year. The third version of the franchise tag, the transition tag, only grants teams the rights to match the offer they receive from another team.⁸⁴

All three of these franchise designations have some commonalities. A team cannot apply the franchise designation to a single player more than three times total.⁸⁵ Also, each consecutive designation increases the player's salary by a predetermined percentage.⁸⁶ Using the exclusive or nonexclusive tag on a player gives the team until mid-July to work on a contract extension; if no agreement can be reached by then, the only options left for the player are to play under the tag or not play at all.⁸⁷

These different tags can be viewed on a spectrum of exclusivity,⁸⁸ as demonstrated by their associated salary. The most exclusive is, of course, the exclusive tag. By applying the exclusive tag, a team secures a player for the upcoming season, but has to pay him the average of the top five salaries for

83. *Id.* § 2(a)(i).

84. *Id.* § 3. Transition tags have been disfavored by NFL teams in recent years, with only ten players receiving transition tags since 2000, compared to twenty players from 1993 to 1999. See *NFL CBA: Transition Tag*, SPOTRAC [hereinafter *NFL CBA: Transition Tag*], <https://www.spotrac.com/nfl/cba/transition-tag> [<https://perma.cc/34F7-MVZY>] (listing each time the transition tag has been used). This may be because of an infamous “poison-pill” provision in an offer sheet signed by Steve Hutchinson in 2006. See generally Greg Bishop, ‘Poison Pills’ Are No Longer Allowed in NFL Contracts—Here’s Why, SI: NFL (May 20, 2022), <https://www.si.com/nfl/2022/05/20/nfl-poison-pill-contract-holmgren-hutchinson> [<https://perma.cc/Y7H6-MRF7>] (explaining how the use of the transition tag instead of the nonexclusive tag caused the Seahawks to lose Hutchinson to the Vikings). Even though “poison-pill” provisions are no longer allowed in the NFL, teams have preferred to use the nonexclusive tag to guarantee they either retain the player or receive compensation for losing them. Mark Schofield, *The NFL’s Franchise, Transition, and Non-exclusive Tags, Explained*, SBNATION (Feb. 21, 2023, 9:32 AM), <https://www.sbnation.com/2023/2/21/23608375/nfl-franchise-tag-transition-exclusive-rules-salary-lamar-jackson-daniel-jones> [<https://perma.cc/6RB8-YVEK>].

85. NFL CBA, *supra* note 3. Although it is not explicitly stated, many explanations of the tag include three times as the limit, including articles the NFL’s official website. See Kvin Patra, *NFL franchise tag window opens today; Lamar Jackson, Orlando Brown among candidates*, NFL News (Feb. 21, 2023, at 7:49 am), <https://www.nfl.com/news/nfl-franchise-tag-window-opens-today-lamar-jackson-orlando-brown-among-candidate> [<https://perma.cc/KE4C-CUPG>].

86. NFL CBA, *supra* note 3, at art. 10, § 2.

87. *Id.* § 2(k).

88. Cf. Connor J. Menneto, Note, *Using the MLB’s Final Offer Arbitration System to Revamp the NFL’s Franchise Tag*, 17 VA. SPORTS & ENT. L.J. 101, 106–09 (2017) (discussing the three tags along a continuum of restriction rather than a spectrum of exclusivity in negotiations).

the player's position for the current season.⁸⁹ The transition tag is the least exclusive, as it only provides teams with the right to match any contract the player signs, but also only costs the team the average of the top *ten* salaries at the player's position *for the previous five seasons* instead of the top *five* salaries *for the current season*, saving the teams a significant amount of money.⁹⁰ The nonexclusive tag is supposed to be the middle ground of the exclusivity spectrum, as the player can negotiate with other teams who are willing to give up two first-round picks in addition to offering a large contract, while the player costs the tagging team the average of the top five salaries at the player's position *for the past five seasons*.⁹¹ The difference in salaries from the exclusive to nonexclusive tag can be as much as thirteen million dollars.⁹² Teams are also very hesitant to give up two first-round picks for the chance to give out an expensive contract to a player. Since the distinction between the exclusive and nonexclusive franchise tag was formed in the 2011 CBA,⁹³ only four players have received the exclusive tag,⁹⁴ six players received the transition tag,⁹⁵ while 107 players have received the nonexclusive tag.⁹⁶

Currently, the nonexclusive tag is such a strong deterrent to teams negotiating with players that teams are comfortable placing it on any player, knowing

89. NFL CBA, *supra* note 3, art. 10, § 2(a)(ii). Although this author would like to provide numbers to the exclusive franchise tag, as it is both calculated at the end of the Restricted Free Agency Period, *id.*, and very rarely applied, exclusive franchise tag values are not readily available most seasons.

90. *Id.* § 3.

91. *Id.* § 2(a)(ii).

92. Jamison Hensley, *Ravens Use Franchise Tag on QB Lamar Jackson*, ESPN: NFL (Mar. 7, 2023, 3:05 PM), https://www.espn.com/nfl/story/_/id/35805253/ravens-use-franchise-tag-qb-lamar-jackson [<https://perma.cc/PQ52-L68X>].

93. The CBAs that governed the league from 1993–2006 and 2006–2010 only contained “franchise player” and “transition player” designations. See NAT'L FOOTBALL LEAGUE MGMT. COUNCIL & NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, NFL COLLECTIVE BARGAINING AGREEMENT art. XX (1993), available at https://www.dol.gov/sites/dolgov/files/olms/regs/compliance/cba/private_cba_7991.pdf [<https://perma.cc/95LC-S2YZ>] (lacking a distinction between the exclusive and nonexclusive franchise tags); NAT'L FOOTBALL LEAGUE MGMT. COUNCIL & NAT'L FOOTBALL LEAGUE PLAYERS ASS'N, NFL COLLECTIVE BARGAINING AGREEMENT art. XX (2006), available at https://ipmall.law.unh.edu/sites/default/files/hosted_resources/SportsEntLaw_Institute/2006NFL_NFLPA_CBA.pdf [<https://perma.cc/E43F-S2GG>] (lacking a distinction between the exclusive and nonexclusive franchise tags). Despite lacking a distinction between “exclusive” and “nonexclusive” tags, the franchise player designation under these CBAs operated like the nonexclusive tag, allowing teams to negotiate with players and send two first-round picks to their former team if the player signed a contract with the new team. *Id.*

94. Schofield, *supra* note 84.

95. See *NFL CBA: Transition Tag*, *supra* note 84 (listing every time the transition tag was used).

96. See *NFL CBA: Franchise Tag*, *supra* note 3 (listing every time the nonexclusive franchise tag was used).

the tag all but guarantees that the player will return to their team the following year. This was recently demonstrated by Lamar Jackson, quarterback for the Baltimore Ravens and NFL Most Valuable Player in both 2019 and 2023.⁹⁷ One would expect successful quarterbacks to receive the exclusive tag, as the quarterback is arguably the most important position in football. However, the Ravens placed the nonexclusive tag on Jackson, making him available to negotiate with other teams.⁹⁸ They had nothing to fear—no team even offered Jackson a contract and he eventually signed an extension with the Ravens.⁹⁹ In fact, since the inception of the franchise tag in 1993, only one player receiving a nonexclusive tag has ever signed an offer sheet from and ended up with a new team: the 1998 Carolina Panthers were willing to give up two first-round picks for the franchise-tagged Sean Gilbert.¹⁰⁰ For the purposes of the rest of this Note, “franchise tag” refers to the nonexclusive franchise player designation.

D. *The Modern NFL Under Antitrust Law*

One might think that attacking the franchise tag under antitrust law for restraining free trade would be successful, as the current system of NFL free agency developed through suing the NFL under antitrust law for restricting the players from contracting freely with the team of their choice.¹⁰¹ In 2011, the players made this argument after two years of failed CBA negotiations, which concluded with the NFL locking players out.¹⁰² Concurrent with their antitrust claims against the NFL, the players voted to decertify the NFLPA as their union for collective bargaining, attempting to prevent the NFL from claiming a non-statutory labor exemption from antitrust laws.¹⁰³ In *Brady v. National*

97. Jamison Hensley, *Ravens QB Lamar Jackson Wins Second Career NFL MVP Award*, ESPN: NFL (Feb. 8, 2024, 10:46 PM), https://www.espn.com/nfl/story/_/id/39488311/ravens-qb-lamar-jackson-wins-2nd-career-nfl-mvp-award [<https://perma.cc/P6QW-KYMH>].

98. Hensley, *supra* note 92.

99. See Ryan Mink, *Lamar Jackson, Ravens Agree to Five-Year Extension*, BALT. RAVENS (Apr. 28, 2023, 12:02 PM), <https://www.baltimoreravens.com/news/lamar-jackson-ravens-agree-five-year-extension> [<https://perma.cc/9YKJ-2LML>] (giving the contract terms for Lamar Jackson's extension with the Baltimore Ravens).

100. Adam Schefter (@AdamSchefter), X (Mar. 11, 2024, 1:42 PM), <https://twitter.com/AdamSchefter/status/1767259701186543678> [<https://perma.cc/LJ96-5GAV>]; Larry Keech, *Panthers Work Out Deal to Sign Gilbert*, GREENSBORO NEWS & REC. (Jan. 25, 2015), https://greensboro.com/panthers-work-out-deal-to-sign-gilbert/article_31d97e76-32b9-5795-9a90-b04cb462cdfd.html [<https://perma.cc/5AYC-46HS>].

101. See discussion *supra* Part II.B (explaining how NFL free agency developed through antitrust law).

102. *Brady v. Nat'l Football League*, 644 F.3d 661, 663 (8th Cir. 2011).

103. *Id.* at 667. By decertifying the NFLPA, the players were attempting a tactic that had previously been successful, hoping to circumvent a nonstatutory labor exemption from antitrust law for the NFL. *Id.* at 664–65; see also discussion *supra* note 58 (explaining the decertification strategy employed by the players to give them standing for an antitrust suit). A nonstatutory labor exemption from antitrust law would have given the league much more power in the bargaining process.

Football League, the United States District Court for the District of Minnesota ruled that the decertification of the NFLPA left the players without a union that could collectively bargain on their behalf.¹⁰⁴ The court required the NFL to comply with antitrust law in their negotiations with players and granted an injunction to prevent the NFL from locking the players out.¹⁰⁵

On appeal by the NFL, the Eighth Circuit analyzed the language of the Norris-LaGuardia Act (“NLGA”) Section 4(a),¹⁰⁶ finding the District Court’s interpretation of “labor dispute” requiring the existence of a union to be incorrect. It also ruled that the players’ negotiations with the NFL, which transformed into litigation before the Court, were within the scope of the statutory meaning of “labor dispute.”¹⁰⁷ Since the players were ruled to still be involved in a labor dispute without the representation of a union, the Appeal Court analyzed NLGA Section 4 to determine whether the District Court had jurisdiction to issue the injunction,¹⁰⁸ and ruled that such an injunction exceeded the District Court’s authority.¹⁰⁹ The Eighth Circuit vacated the injunction, reinstated the NFL’s lockout of the players, and remanded the case for further proceedings.¹¹⁰

The Eighth Circuit’s ruling in *Brady* undermined the players’ previously successful strategy of decertifying the NFLPA to sue the NFL under antitrust law.¹¹¹ The players were locked out of the league as a result of the ruling, thus preventing them from participating in practice and games, and drawing paychecks from their teams until a new CBA was in place.¹¹² Another significant drawback of the lockout for the players was the disruption of the free agent market, as players could not enter into new contracts with teams until a new CBA was adopted.¹¹³ The reinstatement of the lockout by the Eighth Circuit

104. *Brady v. Nat’l Football League*, 779 F. Supp. 2d 992, 1032 (D. Minn. 2011).

105. *Id.* at 1006, 1032–43.

106. The NLGA is codified at 29 U.S.C. §§ 101–15. The disputed language is found in 29 U.S.C. § 104(a).

107. *Brady*, 644 F.3d at 673.

108. *Id.* at 673–80.

109. *Id.* at 680–81.

110. *Id.* at 682.

111. See discussion *supra* notes 58, 103 (explaining the decertification strategy by the players to give them standing for an antitrust suit).

112. See *Brady v. Nat’l Football League*, 779 F. Supp. 2d 992, 1034–38 (D. Minn. 2011) (finding the players had suffered and would continue to suffer irreparable harm due to the lockout), *rev’d*, 644 F.3d 661 (8th Cir. 2011). Although the Eighth Circuit reversed the injunction of the lockout, it did not address the district court’s finding of irreparable harm to the players as it was moot. *Id.*

113. *Brady*, 779 F. Supp. 2d at 1036–37.

gave the NFL a leverage advantage in CBA discussions¹¹⁴ and the two sides ultimately reached an agreement at the end of July, concluding negotiations that had been ongoing since NFL owners opted out of the previous CBA in 2008.¹¹⁵ Although the franchise tag was one of the disputed provisions in the negotiations, the players were not successful in removing it from the CBA.¹¹⁶

The current CBA was negotiated and adopted in 2020.¹¹⁷ Though many players were not pleased with the CBA,¹¹⁸ no attempt was made to decertify the NFLPA and pursue antitrust litigation against the league. Further, the 2020 CBA includes an article in which the NFLPA and the players agreed not to sue the league or any of its teams under antitrust law or about actions specifically authorized in the CBA, including the franchise tag.¹¹⁹ This provision has effectively ended the period of players attempting to even out the bargaining power with the NFL through antitrust lawsuits. Since an antitrust lawsuit is no longer a viable option for the NFL players, they will need a new strategy to attack the franchise tag.

E. *Economic Duress*

The common law of contracts has long required three basic ingredients to form a binding contract: offer, acceptance, and consideration.¹²⁰ A core tenet of contract law is the freedom of parties to contract and the voluntariness of mutual assent by both parties.¹²¹ Thus, when one party wrongfully pressures

114. Dashiell Bennett, *The NFL Owners Just Got A Boost In The Lockout Fight—Will It Matter?*, BUS. INSIDER (July 8, 2011, 7:39 AM), <https://www.businessinsider.com/nfl-lockout-8th-circuit-2011-7> [<https://perma.cc/AR76-HE48>].

115. *NFL Lockout*, ESPN: NFL (Dec. 5, 2012, 4:08 PM), https://www.espn.com/nfl/topics/_page/nfl-labor-negotiations#section-3 [<https://perma.cc/RJ5C-Z4MY>].

116. John Clayton, *What New CBA Means in Football Terms*, ESPN: NFL (July 25, 2011, 3:00 AM), https://www.espn.com/nfl/story/_id/6790759/what-new-nfl-cba-means-football-terms [<https://perma.cc/CH56-ND9D>].

117. Grant Gordon, *NFL Player Vote Ratifies New CBA Through 2030 Season*, NFL: AROUND THE NFL (Mar. 15, 2020, 3:14 AM), <https://www.nfl.com/news/nfl-player-vote-ratifies-new-cba-through-2030-season-0ap3000001106246> [<https://perma.cc/DP8E-PURW>].

118. Jabari Young, *NFL Players Union Approves New Agreement That Includes Pay Increases and Extra Regular Season Game*, CNBC (Mar. 15, 2020, 10:21 AM), <https://www.cnbc.com/2020/03/15/nfl-players-group-approves-labor-deal-that-includes-pay-increases.html> [<https://perma.cc/2GCT-5F3Y>]. Although many prominent players were outspoken against the agreement, it was narrowly ratified by a player vote of 1,019 to 959. *Id.*

119. NFL CBA, *supra* note 3, art. 3, § 3(a)–(b).

120. *See, e.g.*, RESTATEMENT (SECOND) OF CONTS. §§ 24, 35, 50, 71 (AM. L. INST. 1981) (outlining the basic ingredients for a legally enforceable contract).

121. *E.g., id.* at ch. 8, intro. note (“The principle of freedom of contract is itself rooted in the notion that it is in the public interest to recognize that individuals have broad powers to order their own affairs by making legally enforceable promises . . . [R]ules . . . that [deal with] misrepresentation, duress and undue influence, serve to insure [sic] that bargaining has taken place in a suitable climate.”).

another into assenting to a contract, the voluntariness of the contract is called into question. One defense supporting voluntary contracts is economic duress, which developed as an extension of the common law defense of duress.¹²² Duress allows a party who was physically coerced to unilaterally rescind the contract for lack of mutual assent.¹²³ Economic duress is a similar principle, but rather than physical coercion, the dominant party uses economic pressure to coerce the other party.¹²⁴ Economic duress often involves a vast disparity in bargaining power, and some scholars even argue the defense was created to correct abuses of superior bargaining power.¹²⁵ Economic duress is rarely used because of the difficulty in proving the power disparity, but it is still a viable defense. The remedy for a successful duress defense is the ability to rescind the contract.¹²⁶

Economic duress varies by jurisdiction. When evaluating NFL contracts for economic duress, it is best to consider the approach in the federal jurisdiction that governs NFL lawsuits. The District of Minnesota in the Eighth Circuit has served as the battleground for claims between the NFL and its players since the 1970s.¹²⁷ The seminal case on economic duress in the Eighth Circuit is *Oskey Gasoline & Oil Co. v. Continental Oil Co.*¹²⁸

In 1969, Oskey Gasoline & Oil Company (“Oskey”) set up as a distributor of heating oil and gas products in the upper midwestern United States.¹²⁹ In March 1969, Oskey orally contracted with Continental Oil Company (“Conoco”) to draw petroleum from Conoco’s reserves to supply their distribution needs.¹³⁰ After performing for part of March 1969, Conoco abruptly

122. See generally John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947) (explaining the emergence of economic duress as an expansion of the duress doctrine).

123. See RESTATEMENT (SECOND) OF CONTS. §§ 174–75 (AM. L. INST. 1981) (outlining the broader doctrine of duress).

124. See John Dalzell, *Duress by Economic Pressure II*, 20 N.C. L. REV. 341, 361–62 (1942) (explaining various courts’ usage of economic pressure as the “wrongful act” in duress cases).

125. Orit Gan, *Contractual Duress and Relations of Power*, 36 HARV. J.L. & GENDER 171, 200 (2013) (citing Dawson, *supra* note 122, at 253); M. H. Ogilvie, *Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract*, 26 MCGILL L.J. 289, 289 (1981)).

126. The section of the Restatement covering economic duress is titled “When Duress by Threat Makes a Contract Voidable.” RESTATEMENT (SECOND) OF CONTS. § 175 (AM. L. INST. 1981) (emphasis added).

127. Jay Weiner, *How Minnesota Became the Center of the NFL Labor Universe*, MINNPOST (Mar. 2, 2011), <https://www.minnpost.com/politics-policy/2011/03/how-minnesota-became-center-nfl-labor-universe> [<https://perma.cc/D8YD-9KB2>].

128. *Oskey Gasoline & Oil Co., Inc. v. Cont’l Oil Co.*, 534 F.2d 1281 (8th Cir. 1976).

129. *Id.* at 1282.

130. *Id.*

informed Oskey that they were canceling their sales, effective immediately.¹³¹ Oskey, pressured by the demand of their distribution contracts and the sudden lack of supply, sought to enter a new contract with Conoco to regain access to Conoco's petroleum stores.¹³² Oskey and Conoco entered into a new agreement that would allow Oskey to purchase ten million gallons of petroleum and mutually release claims against each other arising prior to June 6, 1969.¹³³ Oskey sued for breach of the original contract and antitrust violations of the Clayton and Sherman Acts.¹³⁴ The District Court of Minnesota dismissed the claims for the original contract under the written requirements of the Statute of Frauds,¹³⁵ and found that the contractual release of claims prior to June 6, 1969 did not result from economic duress or coercion.¹³⁶ On appeal, Oskey raised the defense of economic duress once again, and the Eighth Circuit outlined their analysis of duress: "one challenging a release as invalid because of economic coercion or duress must establish three elements: (1) one side involuntarily accepted the terms of another; (2) circumstances permitted no other alternative; and (3) said circumstances were the result of coercive acts of the opposite party."¹³⁷ In applying these elements, the Eighth Circuit affirmed the District Court's rulings: there were unexplored alternatives available to Oskey to meet its need for petroleum¹³⁸ and there was no improper conduct on the part of Conoco sufficient to support a ruling of economic duress.¹³⁹

In the Eighth Circuit, all three elements of economic duress must be present for a claim to succeed; the case will be dismissed if any of these elements are lacking. The District Court of Minnesota, applying *Oskey*, further emphasized how essential these elements are in *McLellan v. Allstate Ins. Co.*¹⁴⁰ In 2000, Jo McClellan, who began work for Allstate Insurance in 1978, was informed that she would transition from an agent to an independent contractor because of company restructuring.¹⁴¹ In return for waiving all claims she had against Allstate, McClellan was required to choose between three options: (1) convert to independent contractor status and keep her book of business; (2) convert to independent contractor status and sell her book of business to

131. *Id.*

132. *Id.* at 1283.

133. *Id.*

134. *Id.* at 1282.

135. *Id.*

136. *See id.* at 1285–86 (explaining that the release of claims was valid and not coerced).

137. *Id.* at 1286 (quoting *W. R. Grimshaw Co. v. Nevil C. Withrow Co.*, 248 F.2d 896, 904 (8th Cir. 1957)). These are the three elements of duress in most jurisdictions. *See* RESTATEMENT (SECOND) OF CONTS. § 175 (AM. L. INST. 1981).

138. *Oskey Gasoline & Oil Co., Inc. v. Cont'l Oil Co.*, 534 F.2d 1281, 1286 (8th Cir. 1976).

139. *Id.* at 1286–88.

140. *McLellan v. Allstate Ins. Co.*, No. 01-596, 2001 WL 1636497, at *1 (D. Minn. Sept. 24, 2001).

141. *Id.* at *1–2.

Allstate; or (3) receive enhanced severance pay.¹⁴² If she chose not to waive any claims against Allstate, she would receive a severance package that was less than one-third of the value of the third option.¹⁴³ Several months after electing option two, McClellan sued, *inter alia*, to invalidate her waiver of claims on the grounds of economic duress.¹⁴⁴ McClellan argued that: (1) she involuntarily accepted the second of Allstate's options and waived her claims against them; (2) her only alternative of taking the severance package and not releasing her claims against Allstate was not an alternative at all because it would deprive her of the value she had spent twenty-two years building with Allstate; and (3) her circumstances were the result of Allstate's wrongful conduct, discriminatory practices.¹⁴⁵ Allstate argued that McClellan had multiple options available to her and pointed to cases holding that the choice between one alternative and a less attractive alternative does not establish the defense of duress.¹⁴⁶ However, the Court distinguished those cases from the one at hand because McClellan alleged actual wrongful conduct on the part of Allstate (age discrimination) that caused her duress.¹⁴⁷ Therefore, as McClellan alleged that "the duress resulted from defendant's wrongful and oppressive conduct and not by plaintiff's necessities," the Court denied Allstate's motion to dismiss.¹⁴⁸

III. ANALYSIS: THE FRANCHISE TAG AS ECONOMIC DURESS

If the franchise tag were challenged under a theory of economic duress, the Eighth Circuit's elements of economic duress would likely be applied to analyze the franchise tag because all of the landmark cases against the NFL related to free agency have been litigated in the Eighth Circuit.¹⁴⁹ As previously

142. *Id.* at *2.

143. *Id.*

144. *Id.* at *2–3. McLellan's other complaint against Allstate was "age discrimination under the Age Discrimination in Employment Act . . . Title VII of the Civil Rights Act of 1964 . . . the Minnesota Age Discrimination Act . . . and the Minnesota Human Rights Act." *Id.* (citations omitted). McLellan argued that Allstate's discriminatory actions produced economic duress. *Id.* at *3.

145. *Id.* at *5–6.

146. *Id.* at *6.

147. *Id.*

148. *Id.* (quoting *W.R. Grimshaw Co. v. Nevil C. Withrow Co.*, 248 F.2d 896, 904 (8th Cir. 1957)).

149. *Mackey v. Nat'l Football League*, 543 F.2d 606 (8th Cir. 1976); *Brady v. Nat'l Football League*, 644 F.3d 661 (8th Cir. 2011). In addition to the Eighth Circuit Court of Appeals, the United States District Court for the District of Minnesota, part of the Eighth Circuit, has handled other landmark NFL free agency cases. *McNeil v. Nat'l Football League*, 790 F. Supp. 871 (D. Minn. 1992); *White v. Nat'l Football League*, 822 F. Supp. 1389 (D. Minn. 1993). This phenomenon does not seem to have an explanation other than the original NFL antitrust cases were tried in Minnesota and subsequent litigation has followed suit. WEINER, *supra* note 127.

stated, these elements are: (1) one side involuntarily accepted the terms of another, (2) circumstances permitted no other alternative, and (3) said circumstances were the result of coercive or wrongful acts of the opposite party.¹⁵⁰

A. *Involuntary Acceptance*

In establishing a claim for economic duress, a party must show that they involuntarily accepted the terms of the other party. It is well-documented that most NFL players do not like the franchise tag.¹⁵¹ If players were given the choice between the franchise tag and free agency, players would choose free agency every time, but players are not given that choice. The main reason that players are not enticed by the franchise tag's one-year contract is the lack of financial security granted by the franchise tag.¹⁵² Players who are franchise-tagged are among the best players in their positions in the NFL. If their contract expired, they would hit the open market. On the free agent market, players would be able to engage teams in a bidding war for their services, which would increase the chance the player can sign a multi-year contract with a large amount of guaranteed money. However, when they are franchise-tagged, they can only negotiate with a single team, which decreases the chance that they sign a multi-year, top-dollar contract. A franchise tag contract is a one-year, fully guaranteed contract that pays them commensurate to a top-five or top-ten player at their position.¹⁵³ The franchise tag contract presents distinct monetary disadvantages to players: less guaranteed money than they could receive on the open market and the risk of injury harming their future earnings without the security of a long-term contract.

150. *Oskey Gasoline & Oil Co. v. Cont'l Oil Co.*, 534 F.2d 1281, 1286 (8th Cir. 1976) (quoting *Grimshaw*, 248 F.2d at 904).

151. Chase Darden, *Austin Ekeler Doubles Down on Franchise Tag Comments, Talks Saquon Barkley's Deal*, YAHOO! SPORTS (Jul. 27, 2023), <https://sports.yahoo.com/austin-ekeler-doubles-down-on-franchise-tag-comments-talks-saquon-barkleys-deal-200122004.html> [<https://perma.cc/LE4J-78P6>] (“Ekeler called the franchise tag ‘detrimental’ . . . and ‘one-sided’ . . . [With the franchise tag,] ‘we’re gonna get dragged through the dirt and we’re gonna get controlled.’”); Jon Benne, *NFL Players Hate the Franchise Tag, Even If It Means a Big Paycheck*, SBNATION (Feb. 15, 2017, 9:00 AM), <https://www.sbnation.com/nfl/2017/2/15/14584704/nfl-players-hate-franchise-tag-salary-holdout-eric-berry-kirk-cousins> [<https://perma.cc/L8MM-DRCM>]; Joe Kozlowski, *Why Don't NFL Players Want To Be Franchise Tagged?*, SPORTSCASTING (Mar. 2, 2020), <https://www.sportscasting.com/why-dont-nfl-players-want-to-be-franchise-tagged/> [<https://perma.cc/N8KU-FRGP>]; Matt Dolloff, *Do NFL Players Have To Accept the Franchise Tag?*, 98.5 THE SPORTS HUB: NEW ENG. PATRIOTS (Mar. 4, 2021, 11:15 AM), <https://985thesportshub.com/2021/03/04/nfl-franchise-tag-do-players-have-to-accept/> [<https://perma.cc/6B7H-3V6E>]; cf. SHAUN ALEXANDER & CECIL MURPHY, *TOUCHDOWN ALEXANDER* 167–69 (1st ed. 2006). Although Alexander found peace with being franchise-tagged through his faith, many other players told him that he was not being fully appreciated by the Seahawks when they franchise-tagged him. *Id.*

152. Benne, *supra* note 151.

153. NFL CBA, *supra* note 3, art. 10, §§ 2(a), 4(a).

The amount of guaranteed money that a player earns from a multi-year contract can be more than double what they earn on a single-year franchise tag. For example, when defensive tackle Javon Hargrave became a free agent after playing for the Philadelphia Eagles during the 2022 season, he signed a four-year contract with the San Francisco 49ers worth eighty-four million dollars, with forty million dollars fully guaranteed.¹⁵⁴ If Hargrave had been franchise-tagged, he most likely would have played under a one-year deal worth about nineteen million dollars, all fully guaranteed.¹⁵⁵ For Hargrave, that is a difference of twenty-one million dollars in guaranteed money.¹⁵⁶ Guaranteed money is important because if the team ever decides to release the player from their contract,¹⁵⁷ they lose out on potential money in the future. Hargrave also was able to secure a contract that averages two million dollars more per year than the franchise tag was worth for defensive tackles in 2023.¹⁵⁸

On the other hand, if a player is injured while playing on the franchise tag, the lack of security combined with the uncertainty of their future play can affect their overall career earnings from the open market. An excellent example is Anthony Spencer, a former pass rusher for the Dallas Cowboys. After solid performances under his five-year rookie contract that paid a total of seven and a half million dollars, Spencer was franchise-tagged prior to the 2012 season.¹⁵⁹ Spencer produced his best season yet in 2012, recording eleven sacks and being named to the Pro Bowl.¹⁶⁰ Instead of cashing in on his success, Spencer was rewarded by being franchise-tagged for a second consecutive off-season; he played in 2013 under a one-year contract worth about ten million

154. Jason Owens, *NFL Free Agency: 49ers To Reportedly Sign Ex-Eagles Pro Bowl DT Javon Hargrave to \$84M Deal*, YAHOO! SPORTS (Mar. 13, 2023), <https://sports.yahoo.com/nfl-free-agency-49ers-to-reportedly-sign-ex-eagles-pro-bowl-dt-javon-hargrave-to-84m-deal-172313207.html> [<https://perma.cc/XN43-8MMT>].

155. See *NFL CBA: Franchise Tag*, *supra* note 3 (listing the values of the franchise tag each year).

156. Though some believe NFL players should not make millions of dollars, an analysis of the market forces in a capitalist society that results in such salaries is beyond the scope of this Article.

157. Teams will release players for a variety of reasons, from injury to a decline in play to saving money against the NFL's salary cap. "For example, in February of 2025, the Dolphins released running back Raheem Mostert for all three reasons: he could not stay healthy in 2024, he struggled to be effective when he did play, and they needed to save money against the 2025 salary cap. Alain Poupard, *Dolphin Saying Goodbye to Mostert*, SPORTS ILLUSTRATED (Feb. 14, 2025), <https://www.si.com/nfl/dolphins/onsi/news/dolphins-saying-goodbye-to-mostert-01jm2ydtwjty> [<https://perma.cc/QZ5U-ENF5>].

158. Compare Owens, *supra* note 154 with *NFL CBA: Franchise Tag*, *supra* note 3 (listing the values of the franchise tag for each position each year).

159. See *Anthony Spencer: Contract Details*, SPOTRAC, <https://www.spotracc.com/nfl/new-orleans-saints/anthony-spencer-2453/> [<https://perma.cc/K38Z-H3Q9>] (listing Anthony Spencer's contract history in the NFL).

160. *Anthony Spencer*, PRO FOOTBALL REFERENCE, <https://pro-football-reference.com/players/S/SpenAn99.htm> [<https://perma.cc/5QWX-6WQY>].

dollars.¹⁶¹ This time, the lack of security hurt Spencer. He was injured and needed preseason surgery that prevented him from playing in all but one of the Cowboys' games in 2013.¹⁶² Since there was no guarantee he would be the same player he had been before his injury, Spencer was only able to negotiate a one-year deal worth two million dollars for the 2014 season.¹⁶³ He was not able to return to his productive form in 2014 either, so the best contract he could secure for the 2015 season was a one-year deal from the New Orleans Saints worth less than 900,000 dollars with only 230,000 dollars guaranteed.¹⁶⁴ After Spencer was injured again in the 2015 preseason, he was placed on injured reserve¹⁶⁵ and never played another down in the NFL.¹⁶⁶ Spencer's tale is an unfortunate example of how quickly injuries can derail a promising NFL career and reinforces the importance of players securing guaranteed money when they have the chance.¹⁶⁷

The franchise tag takes away a player's best opportunity to secure a multi-year contract with more guaranteed money on the open market, so they do not want to accept a one-year contract under the franchise tag. This means star players' acceptance of franchise tag contracts is not voluntary. When players are franchise-tagged, they do not want to agree to the single-year contract offered because it lacks security in terms of years and guaranteed money, and they risk their future value if they are injured under such a contract. However, they involuntarily accept the contract anyway because they have no reasonable alternative available to them should they wish to continue playing in the NFL, a goal they have likely worked toward their entire lives.

161. *Anthony Spencer: Contract Details*, *supra* note 159.

162. *Anthony Spencer*, *supra* note 160.

163. *Anthony Spencer: Contract Details*, *supra* note 159.

164. *Id.*

165. Mike Triplett, *Saints to Place DE Anthony Spencer on Injured Reserve*, ESPN: NFL (Sep. 1, 2015, 1:51 PM), https://www.espn.com/nfl/story/_/id/13558116/new-orleans-saints-place-anthony-spencer-injured-reserve [<https://perma.cc/384P-SQ9M>].

166. *Anthony Spencer*, *supra* note 160.

167. Some might argue a football player should not be paid by their team if they are too injured to play. However, most other professional sports fully guarantee their contracts. Tom Dart, *Injury Pay Cuts and Limited Leverage: Five Brutal Truths About NFL Contracts*, THE GUARDIAN: NFL (Jan. 17, 2023, 4:30 PM), <https://www.theguardian.com/sport/2023/jan/17/nfl-football-contracts-guaranteed-money-pensions-salary-cap> [<https://perma.cc/EY48-EHV7>]. Although injury rates in the NFL are higher than other sports because it is a contact sport, one could argue NFL teams have *more* reason to guarantee player contracts against injury because the player's injury derives from the service they are providing the team. *Id.* For further discussion of why injury guarantees in NFL contracts is proper, see Mason Storm Byrd, *Concussion and Contracts: Can Concern Over Long-Term Player Health Pave the Way to Greater Guarantees in NFL Contracts?*, 59 ARIZ. L. REV. 511 (2017).

B. *No Reasonable Alternative*

The second element of a duress claim is that there is no reasonable alternative available to the offeree. When a player is given the franchise tag, it might appear like he has options other than accepting the franchise tag available to him in playing for another professional football league, such as the United Football League,¹⁶⁸ or simply refusing the franchise tag altogether. However, the standard by which the options are judged is whether they are *reasonable* under the circumstances,¹⁶⁹ and under the circumstances facing the players, both alternative options are unreasonable. These options are explored further in the following sections.

1. First Alternative: Play For Another Football League

The first alternative route players could take is to play for another football league, but this path is not a reasonable alternative for them. Franchise-tagged players are some of the best players at their positions. Under the 2024 tag, players would have earned between twelve million and thirty-eight million dollars, depending on what position they play.¹⁷⁰ If they sought employment with another league, they would certainly find a job given that the NFL is much tougher to play in than the other leagues. However, they would not be paid nearly as much as they would in the NFL. In 2023, XFL players earned an average of \$60,000,¹⁷¹ while the United States Football League (“USFL”) paid every player \$4,500 per game, which would add up to between \$45,000 and \$70,000 per year, depending on how successful their team was.¹⁷² Alternatively,

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168. The United Football League is a new merger of smaller spring football leagues, the XFL and the United States Football League. Richard Stuter, *Which 8 Teams Will Play in the XFL-USFL Merger?*, YAHOO! SPORTS (Dec. 6, 2023), <https://sports.yahoo.com/8-teams-play-xfl-usfl-005115259.html> [<https://perma.cc/FR53-9RSQ>]. The leagues merged due to their lack of financial security and success alone. See Ty Roush, *USFL-XFL Merger: What To Know About The New United Football League*, FORBES (Dec. 31, 2023, at 02:35 PM EST), <https://www.forbes.com/sites/tyleroush/2023/12/31/usfl-xfl-merger-what-to-know-about-the-new-united-football-league/> (on file with *UCLA Entertainment Review*) (explaining that the USFL and XFL merged to establish substantial resources following several failed spring football leagues, including the XFL, which lost an estimated \$60 million in its inaugural season).
169. *Pochat v. State Farm Mut. Auto. Ins. Co.*, 772 F. Supp. 2d 1062, 1066 (D.S.D. 2011) (quoting *Dunes Hosp., L.L.C. v. Country Kitchen Int’l, Inc.*, 623 N.W.2d 484, 489–90 (S.D. 2001)).
170. *NFL CBA: Franchise Tag*, *supra* note 3. These numbers do not include kickers and punters, who would have earned about six million dollars on the tag. *Id.*
171. Kevin Seifert, *XFL 2023: Rules, Player Salaries and Everything You Need To Know*, ESPN: XFL (Feb. 21, 2023, 1:26 PM), https://www.espn.com/xfl/story/_/id/35660230/xfl-football-2023-primer-rules-player-salaries-coaches-expectations [<https://perma.cc/ED4X-QY6S>].
172. Bryan DeArdo, *How Much Do USFL Players Make? Breaking Down the League’s Salary Structure for 2022*, CBS SPORTS: USFL (Apr. 18, 2022, 1:24 PM), <https://www.cbssports.com/ufi/news/how-much-do-usfl-players-make-breaking-down-the-leagues->

players could take their talents to the Canadian Football League (“CFL”), where there are high-end salaries of around \$600,000, but the average salary is somewhere between \$70,000 and \$100,000.¹⁷³ No other football league can offer top players a comparable salary to the NFL. Therefore, playing in another league is not a legitimate, reasonable alternative to playing under the franchise tag.

2. Second Alternative: Sit Out the Entire Season

The other option available to franchise-tagged players is to refuse to sign the one-year contract and hold out for an entire year. However, this is also not a reasonable alternative. The player cannot freely negotiate with any other teams if the team who has placed the tag does not rescind it. If the player does not sign the one-year franchise tag contract by the Tuesday after week ten of the NFL season, they are ineligible to play for the last eight weeks of the season,¹⁷⁴ and they forfeit money for missing mandatory practices and games.¹⁷⁵ The potential benefit for players is gaining leverage for contract negotiations the next offseason if the player in their replacement performs poorly, as they might further demonstrate the value they bring to the field. However, this strategy can backfire, as they might lose leverage for a big contract the next offseason if the replacement plays well. Additionally, taking a year off from playing football can erode a player’s skills and decrease their impact on the field upon returning, costing them more future value.

An excellent example of this is former Pittsburgh Steelers running back Le’Veon Bell. After Bell was franchise-tagged in the 2017 and 2018 offseasons, he chose to sit out the entire 2018 season,¹⁷⁶ and did not receive any of the fourteen and a half million dollars that he could have earned on the franchise tag in 2018.¹⁷⁷ During his absence, backup running back James Conner filled in well and the Steelers decided they would rather not re-sign Bell and keep James Conner as the starter, as Conner was younger and just as effective.¹⁷⁸ Bell left

salary-structure-for-2022/ [https://perma.cc/UC47-QU2E].

173. Bryan Murphy, *How Much Do CFL Players Make? Zach Collaros, Bo Levi Mitchell Headline List of Highest Salaries in 2023*, THE SPORTING NEWS (Jun. 8, 2023), <https://www.sportingnews.com/ca/cfl/news/cfl-players-salaries-zach-collaros-bo-levi-mitchell-headline-list/ot460k8rn3lcej901moqpf> [https://perma.cc/S6AV-DYZL]. These are estimated figures, as the CFL does not publicize their salaries. *Id.*

174. *Le’Veon Bell Can Stay Away Through Week 10*, NBC SPORTS: PRO FOOTBALL TALK (Sep. 5, 2018, 10:28 AM), <https://www.nbcsports.com/nfl/profootballtalk/rumor-mill/news/leveon-bell-can-stay-away-through-week-10> [https://perma.cc/7W2R-48NC].

175. *Id.*

176. *Everything You Need To Know About Le’Veon Bell’s Breakup with the Steelers*, SBNATION: NFL (Jan. 3, 2025, 3:55 PM), [hereinafter *Everything You Need To Know About Le’Veon Bell*], <https://www.sbnation.com/nfl/2018/11/5/18065634/leveon-bell-steelers-contract-standoff-explained> [https://perma.cc/3342-NF2T].

177. *Id.*

178. *Id.*

the Steelers in the 2019 offseason when he signed a four-year contract worth fifty-two million dollars with the New York Jets with twenty-seven million dollars fully guaranteed.¹⁷⁹ However, very early in his second season with the Jets, Bell was released for poor performance and bad team fit,¹⁸⁰ and he received barely more than the fully guaranteed money during his brief stint with the Jets.¹⁸¹ Following his release, Bell signed a one-year, one-million-dollar contract with the Kansas City Chiefs.¹⁸² Unfortunately, Bell's play dropped off and he never again reached the heights of his time with the Steelers.¹⁸³

Bell would go on to say he regretted holding out and missing a season with the Steelers because it negatively impacted his career.¹⁸⁴ Bell's salaries from his 2018 holdout season and 2019–20 contracts totaled twenty-eight million dollars.¹⁸⁵ However, if he had played under the 2018 franchise tag, he would have made fourteen million and a half dollars and been in line for a third and final franchise tag at twenty-five million dollars¹⁸⁶ or a free agent contract similar to what he had signed with the Jets that guaranteed him twenty-seven million dollars.¹⁸⁷ Bell cost himself at least fourteen to sixteen million dollars, and possibly more given his drop-off in play from missing a full season of football. Bell is a cautionary tale, as he bet on himself by sitting out the season and his gamble backfired. He was only the third player to sit out the entire season after being franchise-tagged and the first since Dan Williams in 1998.¹⁸⁸ Bell's experience demonstrates that refusing to sign the franchise tag is not a viable option, as sitting out involves substantial monetary costs, the risk of being replaced by other well-performing players, and the potential decreased level of play upon return. Therefore, neither alternative available to franchise-tagged players is reasonable.

179. Jason Owens, *Le'Veon Bell Regrets Holding Out, Leaving Steelers: 'I Should Have Never Left'*, YAHOO! SPORTS (Jul. 17, 2023), <https://sports.yahoo.com/leveon-bell-regrets-holding-out-leaving-steelers-i-should-never-have-left-200521933.html> [<https://perma.cc/2ZU8-U72T>].

180. *Id.*

181. *Le'Veon Bell*, OVER THE CAP, <https://overthecap.com/player/leveon-bell/2258> [<https://perma.cc/MAT5-YGNV>].

182. *Id.*

183. Owens, *Bell*, *supra* note 179.

184. *Id.*

185. *Le'Veon Bell*, *supra* note 181.

186. *Everything You Need To Know About Le'Veon Bell*, *supra* note 176.

187. *Le'Veon Bell*, *supra* note 181.

188. Jamison Hensley, *NFL Nonexclusive Franchise Tag: Biggest Questions Facing Ravens, Lamar Jackson*, ESPN: NFL (Mar. 7, 2023, 3:40 PM), https://www.espn.com/nfl/story/_/id/35776986/nfl-non-exclusive-franchise-tag-biggest-questions-ravens-lamar-jackson [<https://perma.cc/SP9R-FYJP>].

C. *Coercive Acts of the Opposing Party*

The third element of economic duress is that the circumstances surrounding the duress were caused by the coercive acts of the opposing party. The franchise tag is *per se* coercive. Despite their reluctance, franchise-tagged players are strongly pressured to accept the one-year contract because the franchise tag backs them into a corner.¹⁸⁹ These circumstances are a direct result of the team placing the franchise tag on them. First, the team removes the player's right to freely negotiate with other teams,¹⁹⁰ which makes it unlikely the player will secure a better offer from somewhere else. Then, the risk of injury and a decline in performance is heightened by the single-year franchise tag because the player has no long-term security.¹⁹¹ Though the team does not directly injure the player or cause his performance to decline, the damage the player could receive from an injury or poor performance is increased by the franchise tag employed by the team. If the player were able to negotiate a long-term contract, any injury or decline in performance might lead to their release, but they would make more in guaranteed money than they would from a single year of the franchise tag. Thus, the removal of other teams for negotiation and the lack of reasonable alternatives available to the player coerce the player to accept the franchise tag. Therefore, placing a franchise tag on a player is *per se* coercive conduct.

When one analyzes the current system, they will find that players involuntarily accept the franchise tag contract, they have no reasonable alternatives to accepting it, and the franchise tag itself directly creates coercive circumstances. Thus, the franchise tag satisfies all the elements of economic duress. The franchise tag should be changed, as it is violative of a key tenet of contract law by withholding players' freedom to contract with teams of their choosing.

IV. PROPOSED SOLUTIONS

Most scholars and laypeople with an understanding of the franchise tag would like to see its elimination.¹⁹² The best chance for the NFLPA to do this

189. See discussion *supra* Part III.A–B.2 (explaining that players do not want to accept the franchise tag, but have no other reasonable option).

190. Under the nonexclusive franchise tag, players are able to negotiate with teams, but it is not done freely—any team that signs the player to a contract must give up two first-round picks. See discussion *supra* pp. 18–22 (explaining the nonexclusive tag allows negotiations with other teams, but other teams are not willing to engage). This is almost always a price teams are not willing to pay. See discussion *supra* pp. 18–22.

191. See discussion *supra* Part III.A–B.2 (explaining that players do not want to accept the franchise tag, but have no other reasonable option).

192. Both scholars and laypeople have been calling for the complete elimination of the franchise tag. See, e.g., Joseph Spadoni, *The Unconscionability of the NFL's Franchise Tag*, 25 U. DENV. SPORTS & ENT. L.J. 1, 17–18, 21–22 (2022); Brad Gagnon, *The NFL Franchise Tag Must Go Away and Never Come Back*, BLEACHER REPORT: NFL (Jun. 21, 2016), <https://bleacherreport.com/articles/2647399-the-nfl-franchise-tag-must-go-away-and-never-come-back> [<https://>

would have been through antitrust litigation, but that path is now foreclosed by the article preventing antitrust litigation against the league in the most recent CBA.¹⁹³ Though expected to be difficult,¹⁹⁴ removing the economic duress from the franchise tag should be pursued via other avenues. Two potential solutions are (1) players suing to void contracts signed under duress of the franchise tag and (2) the NFLPA negotiating to make the franchise tag resemble the MLB's Qualifying Offer to remove the economic duress. To ensure their future stability as an entertainment and service provider, the NFL should seek to resolve popularly critiqued issues like the economic duress that they currently allow through the franchise tag.

A. *Sue Franchise Tag Contracts*

The most straightforward way to attack the franchise tag was through litigation, but suing the NFL is much more complicated now. In the pre-CBA and early CBA eras, the NFL lost key lawsuits to the NFLPA and individual players and hence lost some of the bargaining power they held over players. To counter this, the NFL included an article in the 2020 CBA barring lawsuits by the NFLPA or its members for anything the league or the teams are authorized to do therein.¹⁹⁵ This includes, *inter alia*, the franchise tag.¹⁹⁶ Franchise-tagged players will have to pursue other avenues if they want to sue to invalidate the contract.

One path for these players is to sue both the team that franchise-tagged them for rescission of the contract based on economic duress *and* the NFLPA for breaching their duty of fair representation when they negotiated the CBA.¹⁹⁷ The players can allege that the NFLPA did not look out for the needs of all member players because they allowed a handful of the top players to be franchise-tagged every year, which negatively impacts the players' value and indirectly decreases the value of contracts for players at their position, harming the rest of the league. If this claim is successful, the players can then

perma.cc/S4M2-5S3D]. *But see generally* Shelly Kendricks, *The NFL Franchise Player Rule: Legal and Economic Justifications*, 5 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 1 (2008) (justifying the franchise tag under antitrust law because it is economically efficient).

193. See discussion *supra* Part II.D (explaining that the NFL can no longer be attacked on antitrust grounds).

194. The NFL and NFL team owners are not keen on getting rid of the franchise tag altogether anytime soon. See James Kratch, *The NFL Franchise Tag is Not Going Anywhere*, ELITE SPORTS NY (Jul. 18, 2023), <https://elitesportsny.com/2023/07/18/the-nfl-franchise-tag-is-not-going-anywhere> [<https://perma.cc/AR8F-BFXB>].

195. NFL CBA, *supra* note 3, art. 3, § 3(a)–(b).

196. *Id.*

197. These claims against the league and the Players Association are possible, but they are difficult to win. See Jeff Birren, *NFL Player Lane Johnson Sues Nearly All Concerned and Loses*, SPORTS LITIG. ALERT (Jul. 31, 2020), <https://sportslitigationalert.com/nfl-player-lane-johnson-sues-nearly-all-concerned-and-loses/> [<https://perma.cc/6C76-3RTE>] (explaining that Lane Johnson sued both the NFL and the NFLPA, but lost).

assert a claim against the NFL, as the players did not agree to the CBA individually. The players' claims against their teams for economic duress¹⁹⁸ could proceed and the Court could find that by placing the franchise tag on the players, the teams coerced them into involuntarily accepting a contract to which there were no reasonable alternatives and caused them millions of dollars in damages. While courts rarely find duress,¹⁹⁹ the disparity in bargaining power between multi-billion-dollar NFL teams²⁰⁰ and players who have very limited time playing football²⁰¹ signify that the league-player relationship is exactly the kind that supports a finding of economic duress. Even if these suits are unsuccessful in Court, they could pressure both the league and the NFLPA to modify the franchise tag through negotiations to avoid further litigation and negative publicity.

B. *Negotiate Modifications to the Franchise Tag*

As an alternative to litigation, the NFL and the NFLPA could prioritize negotiating an alteration to the franchise tag. While many modifications could be pursued, the NFL could craft a new version of the franchise tag based on a similar provision in the MLB: the Qualifying Offer.

The MLB allows each team to extend a Qualifying Offer to one of their players if the player's contract expires and the player qualifies for free agency.²⁰² The Qualifying Offer is an offer of a one-year contract to the player based on the average salary of the 125 highest-paid MLB players,²⁰³ which closely resembles the franchise tag as a one-year offer based on the top players in the sport.²⁰⁴ However, the Qualifying Offer also possesses an element that

198. See discussion *supra* Part III (explaining that the franchise tag is a form of economic duress).

199. See Grace M. Geisel, *A Realistic Proposal for the Contract Duress Doctrine*, 107 W. VA. L. REV. 443, 463–64 (stating that lower state courts found in favor of duress claims in only nine out of eighty-eight state cases, with only two of these nine decisions being affirmed at the higher appellate level).

200. See Max Molski & Logan Reardon, *Full 2023 NFL Franchise Values: Which Team Is Worth the Most?*, NBC Bos.: NFL (Aug. 31, 2023), <https://www.nbcboston.com/news/sports/nfl/full-2023-nfl-franchise-values-which-team-is-worth-the-most/3125311/> [<https://perma.cc/3HJT-VRBH>] (listing the values of NFL teams). The most valuable team is the Dallas Cowboys at \$10.1 billion and the least valuable team is the Cincinnati Bengals at \$4.1 billion. Justin Teitelbaum, *The NFL's Most Valuable Teams 2024*, FORBES (Aug. 29, 2024, 06:00 AM EDT), <https://www.forbes.com/sites/justintitelbaum/2024/08/29/the-nfls-most-valuable-teams-2024/> (on file with *UCLA Entertainment Law Review*).

201. See Rische, *supra* note 15 (noting the average NFL player's career is only 3.3 years).

202. MLB PLAYERS ASS'N, *MLB COLLECTIVE BARGAINING AGREEMENT*, [hereinafter *MLB CBA*], art. XX, § B(1), (3) (2022), https://www.mlbplayers.com/_files/ugd/4d23dc_d6dfc2344d2042de973e37de62484da5.pdf [<https://perma.cc/GVJ5-BMZM>]. Players are qualified for free agency if they have six or more years of Major League service. *Id.* at art. XX, § B(1).

203. *Id.* at art. XX, § B(3).

204. See NFL CBA, *supra* note 3 (explaining the provisions of the franchise tag).

the franchise tag lacks—voluntariness. If a team makes a Qualifying Offer to a player, that player can choose either to accept the one-year contract *or decline it and become a free agent*.²⁰⁵ If the player chooses to decline the Qualifying Offer and become a free agent, other teams are immediately free to negotiate a contract with them.²⁰⁶ The player's new team forfeits a draft pick in the following season's rookie draft, but the highest pick they could lose is their second-highest draft pick,²⁰⁷ while the franchise tag forces teams to lose two first-round draft picks.²⁰⁸ On the other side of the transaction in the Qualifying Offer, the player's former team receives a compensatory pick at the end of the first round of the following season's rookie draft as restitution for losing the player's services.²⁰⁹

If the NFL patterns the franchise tag after the Qualifying Offer, the balance of bargaining power would substantially improve. The player would have the choice to accept or decline the contract; the new team would only forfeit their second-highest pick in the designated rookie draft;²¹⁰ and the former team would gain a first-round selection. This new franchise tag would fulfill one of the main functions of the current tag: to ensure adequate compensation for the player's former team if the player signs with a new team. In addition, it would be a vast improvement for both franchise-tagged players and new teams wishing to sign them. The new teams would be much more likely to give up a second-round draft pick than two first-round draft picks to sign a franchise tag-caliber player. The players would regain their ability to contract freely and voluntarily because they would be able to negotiate with other teams if they decline the franchise tag, which is a legitimate alternative to accepting the one-year contract offer. This new tag would adhere to the contract tenet of mutual

205. MLB CBA, *supra* note 202, at art. XX, § B(3).

206. *Id.* at art. XX, § B(2)(c).

207. *Id.* at art. XX, § B(4)(c). The draft choice(s) the team loses does vary depending on the size of the team's payroll from the previous season. *Id.* This is due in large part to the fact that the MLB is a soft cap league rather than a hard cap league because teams can spend as much as their owner is willing to on player salaries (unlike the hard salary cap of the NFL), but any amount above three separate thresholds is subject to the Competitive Balance Tax (also referred to as the "luxury tax"). See Kyle Irving, *Does MLB Have a Salary Cap? How Baseball's Luxury Tax Compares with NFL, NBA, NHL Limitations*, SPORTINGNEWS: MLB (Dec. 22, 2023, 10:20 AM), [https://www.sportingnews.com/us/mlb/news/mlb-salary-cap-luxury-tax-nfl-nba-nhl-contracts/4b84e9dcb056cb3c9685ace1\[https://perma.cc/P7QP-5DAV\]](https://www.sportingnews.com/us/mlb/news/mlb-salary-cap-luxury-tax-nfl-nba-nhl-contracts/4b84e9dcb056cb3c9685ace1[https://perma.cc/P7QP-5DAV]).

208. NFL CBA, *supra* note 3, art. 10, § 2(a)(i).

209. MLB CBA, *supra* note 202, at art. XX, § B(4)(b).

210. The forfeit and gain of a draft pick in different rounds would present an issue to rookie salaries because contract lengths and values are predetermined by the draft slot they are chosen with. NFL CBA, *supra* note 3, art. 7. The most likely solution is that the draft picks would be forfeited and gained for the following offseason's rookie draft; thus, if a player is signed in the 2024 offseason, the draft picks forfeited and gained would be in the 2025 rookie draft.

assent because the players would either voluntarily assent to the franchise tag contract or decline it in pursuit of other contracts, thereby eliminating the economic duress coercing assent under the current tag.

On the other hand, this franchise tag modification comes with certain downsides. First, the original intent of the franchise tag was to allow teams more time to work out contract extensions with their star players.²¹¹ Under the new structure, players would be less likely to re-sign with their teams because they have a more realistic chance of realizing their full value on the open market. Alternatively, one might view this as positive, since the higher likelihood of a star player testing free agency encourages teams to sign contract extensions with players sooner to ensure the players' retention. Teams would have more certainty for the future, instead of wondering if they will lose a high-caliber player. Second, the NFL teams will be reluctant to yield their current level of control through the franchise tag. However, they could also benefit from a reduced price for franchise tag acquisitions, which allows them to sign high-caliber players rarely available on the free agent market. Despite the negatives of this altered franchise tag, the overall benefits for all parties are much greater.

Therefore, if the NFL and the NFLPA modified the franchise tag to resemble the MLB Qualifying Offer, the player's former team obtains some benefits, while the new team and the player realize substantial improvement. Most importantly, it would introduce voluntariness to the franchise tag by allowing the player to choose between two alternatives: signing the franchise tag contract or declining it and negotiating with teams on the open market.

C. *Why the NFL Should Care*

The NFL has grown into a multi-billion dollar international business²¹² whose mission is to be "stewards of football . . . [and] deliver[] the world's most exciting sports and entertainment experience."²¹³ In doing so, they also provide many wide-ranging benefits. First, they create an estimated 116,000 jobs for players, coaches, support staff, medical trainers and doctors, front office personnel, seasonal stadium employees, and league staffers.²¹⁴

211. See discussion *supra* Part II.C, pp. 16–17 (explaining the origin of the franchise tag as the "Elway Rule" to sign long-term extensions with star players).

212. See, e.g., Eben Novy-Williams, *Booming NFL Looks Ahead With 'Healthy Paranoia' After Media Deals*, SPORTICO: FOOTBALL (Feb. 6, 2023), <https://www.sportico.com/leagues/football/2023/nfl-revenue-whats-next-1234708609/> [<https://perma.cc/JM4Q-M73P>] (breaking down the NFL's current media deals valued over \$130 billion, their goal to increase revenue to \$25 billion per year by 2027, and their efforts to increase international interest in the sport).

213. *Mission and Values*, NAT'L FOOTBALL LEAGUE (May 30, 2019, 1:59 PM), <https://www.nfl.com/news/mission-and-values> [<https://perma.cc/6Y92-7J4C>].

214. It is not clear how many people the NFL employs, as they are a private company and are not required to release exact numbers. However, there are estimates available. Teams

They also create economic boosts around the world with practically anything they touch: regular season and playoff games, international games, even the annual rookie draft and combine. NFL teams make a huge economic impact on the cities they call home—in the 2011 season, NFL teams were projected to bring in over \$5 billion each for their host cities.²¹⁵ The NFL has also been recently making forays into the international market, playing several games in other countries each year. These international games greatly benefit the foreign cities where they are played.²¹⁶ Hosting the NFL Rookie Draft is also lucrative for cities—in 2023, the Draft generated over 160 million dollars in economic impact and 16 million dollars in state and local taxes for Kansas City.²¹⁷ Similarly, the 2024 NFL Combine, where draft-eligible rookies undergo physical testing to showcase their talents, brought in an estimated 10 million dollars for Indianapolis, where it is hosted each February.²¹⁸

employ players, coaches, medical staff, front office staff, support staff, stadium workers, and more. In a 2010 evaluation of the impact of a potential lockout and play-stoppage, Edgeworth Economics estimated a total of over 115,000 jobs, including roughly 2,800 NFL players and coaches, would be lost because of the lockout. *Edgeworth Economics Uses NFL Teams' and Stadiums' Studies to Estimate Economic Activity Lost During 2011 Lockout*, EDGEWORTH ECON., [https://web.archive.org/web/20101223193606/https://www.edgeworththeconomics.com/LinkClick.aspx?fileticket=NYziVdSEUOc%3d&tabid=39] [hereinafter *Edgeworth Economics*]. The NFL League office also employs about 1,100 of its own staff. Jessica Golden, *NFL Offers Buyouts to More Than 200 Employees*, CNBC (Jan. 9, 2024, 2:52 PM), <https://www.cnbc.com/2024/01/09/nfl-offers-buyouts-to-more-than-200-employees.html> [https://perma.cc/U9E2-NWCQ].

215. *Edgeworth Economics, supra* note 214. Successful teams can bring in even more money for their home cities. The Detroit Lions 2024 Divisional Playoff game against the Tampa Bay Buccaneers was projected to net Detroit over \$52 million. *Detroit Lions NFL Divisional Playoff Game Estimated to Net City \$50 million in Economic Impacts*, ABC 13 (Jan. 17, 2024, 4:40 PM), <https://www.wzzm13.com/article/sports/nfl/lions/detroit-lions-nfl-divisional-playoff-game-estimated-net-city-50-million-economic-impacts/69-11b3b665-2944-4c40-897f-ee1fa3ea5fef#:~:text=DETROIT%20-%20The%20Detroit%20Lions%20NFL,%2450%20million%20in%20economic%20impacts> [https://perma.cc/82M7-SVW8].
216. *NFL's Inaugural Germany Game Generated Economic Impact of More Than 70 Million Euros for Munich*, NFL: FOOTBALL OPERATIONS (May 3, 2023), <https://operations.nfl.com/updates/football-ops/nfl-s-inaugural-germany-game-generated-economic-impact-of-more-than-70-million-euros-for-munich/> [https://perma.cc/34HT-2TKC].
217. Blair Kerkhoff, *Kansas City's NFL Draft Exceeded Economic-Impact Estimates, City Says in New Report*, KAN. CITY STAR: CHIEFS (Aug. 25, 2023, 5:00 PM), <https://www.kansascity.com/sports/nfl/kansas-city-chiefs/article278609479.html> [https://perma.cc/U4AH-M4ZH]. The NFL Draft was held at Radio City Music Hall in New York until 2015, when sites began to bid to host the event. *NFL Chooses Chicago Over Los Angeles for 2015 Draft*, CBS NEWS: LOS ANGELES (Oct. 2, 2014, 5:56 PM), <https://www.cbsnews.com/losangeles/news/nfl-spurns-los-angeles-slates-2015-draft-in-chicago/> [https://perma.cc/YHP5-SFFL].
218. Michael Van Schoik, *NFL Combine Brings Estimated Economic Impact of \$10 Million*, Fox 59 (Mar. 1, 2024, 11:19 PM), <https://fox59.com/news/nfl-combine-brings-estimated-economic-impact-of-10-million/> [https://perma.cc/8LZK-MQH4].

Though the NFL is a very profitable business, its impact brings economic benefits to all around it.

The NFL also supports various charitable endeavors. The NFL and its teams donated more than \$500 million to community impact organizations in 2024.²¹⁹ Some of its broader initiatives include cancer awareness through a partnership with the American Cancer Society, supporting veterans and their families, and annual recognition of an NFL player for his “excellence on and off the field” with the Walter Payton Man of the Year Award, among others.²²⁰ The NFL also strives to positively impact children across America with its Play 60 initiative to help children stay active and healthy. In addition, it provides funding and education for youth football to ensure the future of the NFL receives proper and safe training as well as mentorship and guidance, and the NFL players visit schools to educate children about character and healthy relationships.²²¹ The NFL uses its power to do good and improve society.

However, the NFL is not without its share of controversies. Discovery of the traumatic brain condition called Chronic Traumatic Encephalopathy (“CTE”) manifesting after players’ careers causing depression and suicide devastated former players and their families.²²² Although there are known presenting symptoms of CTE during life, it is currently impossible to diagnose without studying the brain tissue after death and there are no known treatments.²²³ The symptoms include memory loss, depression, and paranoia, driving many former players to suicide.²²⁴ This is a frightening potential future for current and former NFL players. Thousands of players sued the NFL to address CTE; in a class-action settlement, the NFL, while denying liability, agreed to pay former and future NFL players who suffered from specific symptoms.²²⁵ Each player is eligible to receive up to five million dollars, depending

219. *NFL in the Community*, NFL: CMTY., <https://web.archive.org/web/20240312011352/https://www.nfl.com/community/> [https://perma.cc/P6WM-CPEA].

220. *Id.*

221. *Id.*; *Giving Back to NFL Communities*, NFL OPERATIONS: CMTY. IMPACT, <https://operations.nfl.com/inside-football-ops/community-impact/giving-back-to-nfl-communities/> [https://perma.cc/75P3-YKBK].

222. CTE occurs in “athletes and others who have been exposed to concussions and repetitive head impacts.” *What is Chronic Traumatic Encephalopathy (CTE)?*, IND. UNIV. SCHOOL OF MED.: AREAS OF EXPERTISE, <https://medicine.iu.edu/expertise/traumatic-brain-injury/what-is-chronic-traumatic-encephalopathy> [https://perma.cc/YL5M-9BJS].

223. *Id.*

224. See Brian Burnsed, *They’re the Toughest of the Tough. But When Their NFL Teammates Started Dying, These Men Grew Afraid.*, SI: NFL (Jan. 31, 2023), <https://www.si.com/nfl/2023/01/31/nfl-fear-marques-harris-ray-crockett-daily-cover> [https://perma.cc/SNV9-2Z74].

225. Class Action Settlement Agreement at Recitals H, K, *Turner v. Nat’l Football League*, https://www.nflconcussionsettlement.com/Documents/Class_Action_Settlement_Agreement_with_Exhibits.pdf.

on their age and diagnosis.²²⁶ To date, the NFL has paid over 1.2 billion dollars to more than 1,600 former players and their families, which is much more than experts predicted at the time of the settlement.²²⁷

The NFL has also received backlash for the lack of discipline for players arrested for domestic violence.²²⁸ This phenomenon also extends to players who are accused of sexual assault and harassment but not arrested. For example, Deshaun Watson was accused of sexual assault and harassment by more than two dozen women who he paid to provide massage therapy on separate occasions.²²⁹ However, because he was a highly regarded quarterback, the Cleveland Browns were willing to trade three first-round picks to the Houston Texans for the right to sign Watson to a five-year, 230 million dollar, fully guaranteed contract.²³⁰ Watson served an eleven-game suspension and paid a fine of five million dollars, but he will ultimately receive the remainder of his contract as it is fully guaranteed and cannot be forfeited.²³¹

The NFL also faced embarrassment for findings of sexual harassment and a toxic workplace environment against the former owner of the Washington Commanders. Tiffani Johnston, former marketing manager and cheerleader for the then-Washington Football Team, testified before the House Oversight and Reform Committee that team owner Dan Snyder inappropriately placed his hand on her thigh at a work dinner, tried to force her to get in his limo with him, and kept without her consent unedited, revealing photos of her taken for a calendar fundraiser.²³² Five other former employees testified to a similar cul-

226. *Id.*

227. Will Hobson, *The Broken Promises of the NFL Concussion Settlement*, WASH. POST (Jan. 31, 2024, 6:30 AM), <https://www.washingtonpost.com/sports/interactive/2024/nfl-concussion-settlement/> [<https://perma.cc/X2YP-3JE6>].

228. In a 2015 study, NFL players were arrested for violent crimes at rates significantly higher than the general population in six of the fourteen years analyzed. Wanda Leal et al., *The National Felon League?: A Comparison of NFL Arrests to General Population Arrests*, 43 J. CRIM. JUST. 397, 397, 400 (2015). Players arrested for violence against women face negligible consequences to their playing careers, especially if they are a talented, valuable player. Daniel Sailofsky, *More Talent, More Leeway: Do Violence Against Women Arrests Really Hurt NFL Player Careers?*, 29 VIOLENCE AGAINST WOMEN 1227, 1241–42 (2023).

229. Rob Maaddi, *Analysis: Giving Deshaun Watson \$230 Million Guaranteed Has Become a Disaster for the Browns*, AP NEWS: SPORTS (Nov. 15, 2023, 6:00 PM), <https://apnews.com/article/deshaun-watson-contract-browns-andrew-berry-2f4c8e0ede9a15a884d1b5d6d1bab754> [<https://perma.cc/S8R7-S5TL>].

230. *Id.*

231. *Id.*

232. Andrea Hsu, *Ex-Washington Football Employee Brings New Harassment Claim Against Owner Dan Snyder*, NPR (Feb. 3, 2022, 1:24 PM), <https://www.npr.org/2022/02/03/1077636343/nfl-washington-football-team-workplace-sexual-harrassment-capitol-hill> [<https://perma.cc/TQE7-YAGT>]; see also Debevoise & Plimpton LLP, *Report of Findings of the Investigation Regarding Daniel Snyder and the Washington Commanders* 5–6 (July 20, 2023), available at <https://int.nyt.com/data/documenttools/>

ture within the organization.²³³ The NFL hired a private law firm to investigate the extent of the toxic culture, and the firm found Johnston's allegations were largely substantiated.²³⁴ The firm also reported Snyder withheld at least eleven million dollars in revenue that should have been shared with other NFL teams and did not cooperate with their investigation.²³⁵ Snyder eventually sold the Washington Commanders for a record six billion dollars.²³⁶ Many, including Johnston's attorneys, believe that the NFL forced this sale,²³⁷ and the NFL fined Snyder 60 million dollars to resolve the conflict.²³⁸ The franchise tag is lurking among these controversies, as it is largely unpopular, as players, fans, and most scholars believe it should be removed.²³⁹ These controversies bring negative press to the NFL and harm its authority and means of conducting business.

The NFL is not the only sports organization that has faced problems posing a threat to its way of life. The National Collegiate Athletics Association ("NCAA") held "unchecked authority" over college athletics for most of its history.²⁴⁰ It has faced numerous issues in recent years that have eroded its legitimacy. First, there was a substantial push to ease restrictions on student-athlete movement via transfers. This resulted in the NCAA announcing they would allow all student athletes to transfer once and play immediately with no restrictions.²⁴¹ This rule has received some pushback, as players want more and more ability to move teams.²⁴²

Also, and perhaps most notably, they were forced to allow compensation via name, image, and likeness ("NIL"). The NCAA was opposed to NIL for a long time but lost key court battles now is forced to allow it.²⁴³ Not only

[dan-snyder-washington-commanders-report/ddb6fa3406c98db8/full.pdf](https://www.espn.com/nfl/story/_/id/39123456/dan-snyder-washington-commanders-report/ddb6fa3406c98db8/full.pdf).

233. Hsu, *supra* note 232.

234. Debevoise & Plimpton LLP, *supra* note 232, at 5-6.

235. *Id.* at 6.

236. Ben Nuckols, *Commanders' Dan Snyder Fined \$60 Million for Sexually Harassing Employee, Financial Improprieties*, AP NEWS: SPORTS (July 20, 2023, 4:57 PM), <https://apnews.com/article/dan-snyder-investigation-sexual-harassment-revenue-withheld-bf6a2ec478e15355e0bd026cf24dfb65> [<https://perma.cc/S5E9-ZEYA>].

237. *Id.*

238. *Id.*

239. *See supra* notes 151, 192.

240. Stewart Mandel, *The NCAA and its Dwindling Power: 10 Key Moments That Led to its Precarious Status*, THE ATHLETIC (Feb. 6, 2024), <https://theathletic.com/5253722/2024/02/06/ncaa-violations-lawsuits-timeline/> [<https://perma.cc/NSN2-W4UM>].

241. *See* Michelle Brutlag Hosick, *DI Council Adopts New Transfer Legislation*, NCAA (Apr. 15, 2021, 4:41 PM), <https://www.ncaa.org/news/2021/4/15/di-council-adopts-new-transfer-legislation.aspx> [<https://perma.cc/MNR2-WFNY>].

242. *See* Ohio v. Nat'l Collegiate Athletic Ass'n, No. 1:23-CV-100, 2023 U.S. Dist. LEXIS 224874, at *1, *4-5 (N.D.W. Va. Dec 18, 2023) (issuing an injunction preventing the NCAA from restricting transfers for the rest of the 2023-24 school year).

243. *See generally, e.g.,* Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69 (2021) (striking down the NCAA's compensation restrictions as violative of antitrust law). In his concurring opinion in *Alston*, Justice Kavanaugh notes that "[t]he NCAA's business

are schools now able to allow players to receive money through NIL deals, they are also challenging NCAA authority over the remaining restrictions and regulations.²⁴⁴ This culminated with the recent National Labor Relations Board ruling that the Dartmouth men's basketball team could unionize, striking another blow to the NCAA's authority.²⁴⁵

Finally, gender inequality persists in college athletics and is subject to much ongoing debate.²⁴⁶ Despite apparent progress at leveling the playing field, there is still a huge disparity in the coverage and support of women's and men's athletics under the purview of the NCAA.²⁴⁷ The NCAA is struggling to determine how to handle transgender athletes and has been sued by current and former athletes over its decisions.²⁴⁸ The NCAA has had many recent setbacks in courts and public opinion, and its authority has suffered as a result.²⁴⁹ The NCAA has lost the ability to enforce its own rules to the point that it has been deemed a "once-powerful national amateur organization now left near shambles."²⁵⁰

The NCAA presents a cautionary tale for the NFL. Both organizations occupy a prominent social space, providing important services to the public and opportunities for athletes to continue their playing careers in sports that they love. However, if the NFL does not handle its problems more effectively

model would be flatly illegal in almost any other industry in America." *Id.* at 109 (Kavanaugh, J., concurring).

244. David Ubben, *Tennessee, Virginia AGs File Lawsuit Against NCAA Over Restrictions on NIL for Recruiting*, THE ATHLETIC (Jan. 31, 2024), <https://theathletic.com/5241006/2024/01/31/tennessee-virginia-ncaa-nil-lawsuit/> [<https://perma.cc/A9CW-XV4S>].
245. Chris Vannini & Nicole Auerbach, *Dartmouth Men's Basketball Players Are Employees, Can Unionize, NLRB Regional Director Rules*, THE ATHLETIC (Feb. 5, 2024), <https://theathletic.com/5253390/2024/02/05/dartmouth-basketball-nlr-b-ruling-union/> [<https://perma.cc/T9TN-ZVXM>]. For a deeper discussion of the amateur status of collegiate players, see Alexis C. Hivner, *Clock-Out or Time-Out: Alston's Game-Changing Impact on Student Athletes' Employment Status*, 54 U. MEM. L. REV. 692 (2024).
246. Gender inequality has long been a problem at the collegiate sport level. For a thorough review of the history of gender inequity at the collegiate level, as well as how it intersects with the male-only sport of college football, see Robert C. Farrell, *Title IX or College Football?*, 32 HOUS. L. REV. 993 (1995).
247. E.g., Dan Wolken, *The NCAA Faces So Many Serious Questions But Doesn't Have a Clue How to Solve Anything*, USA TODAY: SPORTS (Apr. 1, 2022, 2:40 AM), <https://www.usatoday.com/story/sports/college/columnist/dan-wolken/2022/03/31/ncaa-mark-emmert-no-clue-solve-myriad-problems/7238781001/> [<https://perma.cc/SVJ9-JMTG>].
248. *College Swimmers, Volleyball Players Sue NCAA over Transgender Policies*, AP NEWS: COLLEGE SPORTS (Mar. 15, 2024, 12:53 PM), <https://apnews.com/article/transgender-ia-thomas-swimming-lawsuit-b7df63108a03100f36b2e4364d585cdc> [<https://perma.cc/R3RK-89F2>].
249. Dennis Dodd, *With the NCAA's Authority Quickly Eroding, Significant Change is Ahead for Major College Sports*, CBS SPORTS (Jul. 18, 2021, 1:11 PM), <https://www.cbssports.com/college-football/news/with-the-ncaas-authority-quickly-eroding-significant-change-is-ahead-for-major-college-sports/> [<https://perma.cc/4CYK-ZGQF>].
250. *Id.*

than the NCAA, it could find itself in a similar position—devoid of authority and left in the cold. The NFL should resolve the controversy with the franchise tag before it costs them much-needed legitimacy. “Therefore, let anyone who thinks that he stands take heed lest he fall.”²⁵¹

V. CONCLUSION

For the entire existence of the NFL, football teams owned and operated by rich, powerful men have had a distinct bargaining advantage over the players they have employed to take the field for their organizations. When John Mackey was president of the NFLPA, all he wanted was to bring NFL owners and players to more balance where “all of [them would] have it pretty good.”²⁵² Though advancements have been made,²⁵³ these two sides are still vastly unequal.

When Saquon Barkley was asked about potentially being franchise-tagged by the New York Giants for a second consecutive offseason, Barkley said he was “numb” to the prospect and had “no idea” if they would employ the tag to make him play for them again in 2024.²⁵⁴ Barkley’s comments show the players’ lack of choice in deciding their future under the current franchise tag due to economic duress. The Giants were still considering using the franchise tag to keep Barkley in the fold as late as February 2024.²⁵⁵ Fortunately, Barkley was not franchise-tagged a second time, “pav[ing] the way for Barkley to become an unrestricted free agent for the first time in his career.”²⁵⁶ The open market proved beneficial for Barkley, as he signed a three-year contract with the Philadelphia Eagles worth up to \$46.75 million with twenty-six million dollars fully guaranteed,²⁵⁷ a significant improvement from the twenty-three million dollars in guarantees the Giants reportedly offered him in 2023 while he played under the franchise tag.²⁵⁸ Had Barkley been franchise-tagged again, he would not have realized his true market value.

251. 1 *Corinthians* 10:12 (English Standard).

252. MACKAY & LOVERRO, *supra* note 41, at 178.

253. See discussion *supra* Part II.B (explaining how NFL free agency developed through antitrust law).

254. Field Level Media, *Giants’ Saquon Barkley ‘Numb’ to Idea of Being Franchised Again*, ESPN: NFL (Jan. 8, 2024, 12:27 PM), https://espn.com/nfl/story/_/id/39265978/giants-saquon-barkley-numb-idea-being-franchised-again [<https://perma.cc/8L6M-T28H>].

255. Jordan Raanan, *Giants GM: Higher Cap Means Saquon Barkley Tag Still Possible*, ESPN: NFL (Feb. 27, 2024, 12:12 PM), https://www.espn.com/nfl/story/_/id/39609534/giants-gm-higher-cap-means-saquon-barkley-tag-possible [<https://perma.cc/E7AF-UMHP>].

256. *Giants Won’t Use Franchise Tag on Saquon Barkley, Sources Say*, ESPN: NFL (Mar. 5, 2024, 11:06 AM), https://www.espn.com/nfl/story/_/id/39658823/giants-use-franchise-tag-saquon-barkley-sources-say [<https://perma.cc/RZE9-MV3F>] [hereinafter *Giants Franchise*].

257. Adam Schefter (@AdamSchefter), X (Mar. 11, 2024, 1:42 PM), <https://twitter.com/AdamSchefter/status/1767259701186543678> [<https://perma.cc/LJ96-5GAV>].

258. *Giants Franchise*, *supra* note 256.

As long as the franchise tag exists unchanged in form, the balance of bargaining power will remain tilted greatly in favor of NFL teams. Thus, players must sue to invalidate these involuntary contracts while the NFL and the NFLPA negotiate an amendment to modify the franchise tag to resemble the Qualifying Offer. This would benefit both the NFL teams and players alike and remove the economic duress from the current franchise tag. Otherwise, players will continue to be held prisoner economically, and the NFL will lose its legitimacy.