

# PROFESSIONAL SPORTS

November-December 2012 • Volume 3, Issue 5

and the **LAW**

## Deadlines and Delays – Why Waiting Until the Last Minute Is a Bad Negotiation Strategy

By Bob Wallace, Sports Law Group  
Chair, Thompson Coburn LLP

How many times, and especially recently, have we heard “nothing will get done until they’re at the deadline”? We heard it during the NFL labor dispute, and now we are hearing it during the NHL work stoppage.

Despite the fact that hundreds of NHL games have been cancelled as of this writing, and the whole season is in jeopardy for the second time in eight years, the power brokers for both the NHL and the NHL Players’ Association apparently have not reached the point where they feel they are at a deadline. Who cares that millions of entertainment dollars are not being spent on NHL hockey or that thousands of people who make a living on

the periphery of the sport are being harmed by their inability to reach an agreement to resume play? If we accept the deadline strategy premise, arguably there is still time left before the league and the players’ association reach the drop-dead point and finally reach the point where negotiators will sit down with an earnest desire to reach an agreement.

More troubling is the fact that our legislators in the federal government are also apparently subscribing to this eleventh-hour negotiating strategy. On CNN, Fox, MSNBC, and the network news shows, we tick off the days until the U.S. economy falls off the fiscal cliff. The president, senate and congressional leaders stand before us and pontificate on the perils the economy will face if we do not address our national debt and budget problems. But also they acknowledge that both sides are playing a game of chicken to see who blinks before we reach the end of the year. In fact, both sides are questioning the agreed-upon fiscal cliff deadline date so they can continue to play this game of brinkmanship and extract more concessions from each other. It does not matter

that this waiting game dampens enthusiasm in investing in our future and negatively affects the economy, our world credit rating, and consumer confidence. These consequences are not in our collective best interests, but they appear inevitable if we go past the deadline.

This deadline dynamic is not a new phenomenon by any means. It is a tried and true negotiation strategy that is employed by everyone from leaders in the highest levels of government to elementary student asking for additional time to complete a project. In 30 years of negotiating contracts in the sports industry, I have utilized the brinkmanship negotiating technique and been subject to it. I have witnessed the benefits of the strategy and seen harmful consequences as a result of it. I have come to recognize that there are times when waiting is a useful and effective strategy to achieve your best result. But I have also realized that one can also make a good deal — and sometimes a better deal — by striking early.

As a result, I have come to question why this brinkmanship strategy now seems to be the only strategy

---

*Bob Wallace is a partner at Thompson Coburn LLP. He is a past president of the Sports Lawyers Association and former general counsel for the St. Louis Rams. He can be reached at [rwallace@thompsoncoburn.com](mailto:rwallace@thompsoncoburn.com)*



ever employed. Is there ever a time when delaying negotiations to the last minute is not the appropriate strategy? Or, put another way, is there ever a time when parties can sit across from each other and exchange constructive ideas to reach an agreement before the eleventh hour?

### **Different sports, different techniques**

As mentioned above, for many years I negotiated NFL player contracts on behalf of teams. These negotiations, like all NFL negotiations, are subject to great media interest. In fact, one columnist referred to the annual negotiating ritual as a mating game between two hippopotamus. In other words, slow and predictable are the rhythm of those talks.

George Young, the late great general manager of the New York Giants, used to say that the NFL negotiating period for signing NFL rookies didn't begin until after Bastille Day (July 14). Many NFL executives take the month of June off and do not even begin negotiating until after or around Bastille Day. The start of training camp also acts as an artificial deadline, while the playing of games (maybe the last preseason games and definitely the first regular season game) is really the deadline. But by waiting, players and teams risk several unwanted consequences. Players lose a chance to make an impact on the field and risk early injuries. Teams lose useful early play time for a player at great expense. Both the players and the team suffer career setbacks that cannot be made up, due to short average playing careers and coaches'

tendencies to coach the players that are present, not the ones sidelined because of contract negotiations.

In contrast to the NFL method, Major League Baseball employs a salary arbitration system that calls for an arbitrator to pick between two submitted salary figures, a system that's engineered to encourage settlement. However, it still closely mirrors traditional litigation, where last-minute settlement often occurs on the "court-house steps." In baseball arbitration cases, like in true litigation, the true deadline is when someone other than the parties to the eventual agreement is set to determine the result. Like a jury trial, your fate is outside your control, so the deadline risk becomes real and tangible.

### **The pace of negotiations**

When negotiations occur between parties that have no previous history negotiating with each other, it is predictable and commonplace to find negotiations moving slowly. Unfamiliar parties may not know each other's styles and may not be able to pick up on subtle clues regarding deal points that are critical or not so critical to a respective party. Simply because their history working together is so limited, they may be unable to read when a party is making a real concession or a move that indicates a willingness to make a deal. They have not built up the necessary trust that fosters productive relationship negotiations. This dynamic may have affected the NFL labor dispute and could be at work now in the hockey labor dispute, as in both cases new lead negotiators

are at the helm. (Don Fehr for the hockey players' association, and Roger Goodell and DeMaurice Smith in the NFL dispute).

Time becomes a critical factor in other types of negotiations, particularly if circumstances change the dynamic of the deal for one or both parties. It's also a factor when the economics of a dispute force the parties to adjust their preconceptions about what they can accept as a reasonable outcome.

If we look again at the NHL dispute, as more games get cancelled, teams have less revenue to generate and the money pie becomes smaller to divide. Additionally, players lose paychecks and, given those players' limited career lengths, the owners gain the upper hand. Time becomes their ally and they use delays and waiting to their advantage. (We've seen this same technique in congressional budget negotiations and debt ceiling debates when elections or stock market fluctuations change the dynamic of those negotiations.)

### **Continuing relationships**

Sports negotiations (and political party negotiations, by the way) are not normally negotiations between strangers. The parties have a relationship before the negotiation begins and in most instances have worked together in some manner before the "big" negotiation takes place. Additionally, sport negotiations are normally between parties that will have a continuing relationship even after the agreement is reached. These parties, unlike in a traditional litiga-

tion negotiation (such as “courthouse steps” settlement negotiations), are not going their separate ways after the conclusion of the negotiation. Whether it is in the collective bargaining setting or individual player negotiations, the parties are going to have to interact with each other and hopefully work together to solve problems, grow the product, and achieve desired competitive results.

In these types of continuing relationship negotiations, the best result is when a “win-win” situation is achieved. Neither side wins when there is a one-sided agreement that totally favors one side to the detriment of the other. When such a condition exists, the parties lose trust and lose the ability to work together to solve issues for the benefit of the collective sport. It seems fairly obvious that this circumstance is not in the sports industry’s best interest.

Therefore, the question is this: What are negotiators in a continu-

ing relationship achieving when they avoid negotiating in earnest until a deadline starts to loom? Are they looking to create a favorable, one-sided deal to the detriment of the other party? Are they not looking to grow the sport or to field a winning team? Are they intentionally discouraging cooperation in favor of creating an adversarial relationship? Common sense would conclude that these cannot be the goals of negotiators in this type of relationship.

### **Time is an asset, so use it well**

I would argue that there is one negotiation strategy that makes more sense. It’s the strategy where negotiations start and end in a time frame that doesn’t favor one party more than the other. In this way, neither party gains an unfair advantage and negotiation talks don’t result in an unfair agreement.

When parties reach a contractual agreement that requires continued

cooperation, I believe that a negotiation with the goal of placing one side at a serious disadvantage is a recipe for a poor agreement. It clearly makes more sense for the negotiation to be conducted with enough time to have reasonable discussion about and consideration of important issues. It is counter-intuitive to believe that better results are achieved when parties rush to make decisions. Procrastination is not an asset in achieving good results. Sufficient lead time to make a deal should be asset, and solving problems or fashioning a system that fosters growth or productivity should be the goal of the negotiators.

Recent disputes illustrate that when the deadline strategy is used, it often leads to distrust, work stoppages, and negative effects for the industry. I, for one, would like to see another approach used, one that avoids the predictable result (work stoppage or shutdown) and actually benefits the collective good. ●