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Enforceability of Professional Sports Contracts - What's the Harm in It

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ENFORCEABILITY OF PROFESSIONAL SPORTS CONTRACTS—WHAT'S THE HARM IN IT?

by Bill Whitehill

THE sports pages today[1] contain many stories of professional athletes and their contractual disputes.[2] These disputes often arise when a new sports league is formed to compete with an already existing league.[3] Traditionally the new league offers significantly higher salaries[4] to star athletes during their option year[5] to lure them to the new league and thus attract the attention and dollars of sports fans. Other con-

1. *See, e.g., Bellinger Decides to Rejoin Tornado*, Dallas Morning News, June 6, 1981, § B, at 5, col. 1 (professional soccer player who has signed contracts to play for teams in two different leagues works out arrangement to play for both during different seasons); *Hill Sings Contract Blues; Earl Just Listens*, Dallas Morning News, June 4, 1981, § B, at 1, col. 2 (two professional football players' contract disputes turn in different directions); *Pearson Wants New Contract*, Dallas Morning News, March 22, 1981, § B, at 1, col. 1 (star wide receiver is upset with salary and wants to renegotiate existing contract); *Oiler Assistant Coaches Released by G.M. Herzeg*, Dallas Morning News, Jan. 10, 1981, § B, at 3, col. 1 (football team releases from their contracts six assistant coaches who want to leave team); *Campbell Demands New Oiler Contract*, Dallas Morning News, Jan. 8, 1981, § B, at 1, col. 1 (star football player demands new $1 million per year contract with five years remaining on current contract); *Lions Hoping for Return of English*, Dallas Morning News, Oct. 30, 1980, § B, at 1, col. 1 (football team tries to negotiate contract with star player sitting out season); *Three Ram Veterans End Holdout*, Dallas Morning News, Sept. 3, 1980, § B, at 6, col. 3 (three football players return to team despite contract disputes); *Redskins Retire Riggins*, Dallas Morning News, Sept. 1, 1980, § B, at 3, col. 4 (football team refuses to negotiate with player in contract dispute); Luksa, *NFL Facing Contract Revolt by Players*, The Dallas Times Herald, Aug. 26, 1980, § D, at 1, col. 1 (football league suffers from contract disputes).

2. Contract disputes are by no means a new problem in professional sports. *See, e.g.*, Allegheny Base-ball Club v. Bennett, 14 F. 257 (W.D. Pa. 1882).

3. *See* Washington Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472 (9th Cir. 1969) (newly formed American Basketball Association competing with existing National Basketball Association); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972) (newly formed World Hockey Association competing with existing National Hockey League); Matuszak v. Houston Oilers, Inc., 515 S.W.2d 725 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ) (newly formed World Football League competing with existing National Football League). For a discussion of the context in which cases arise, see J. WEISTART & C. LOWELL, THE LAW OF SPORTS § 4.03 (1979).

4. *See* Cincinnati Bengals, Inc. v. Bergey, 453 F. Supp. 129, 148 (S.D. Ohio 1974) (impact of new league on salaries). Another case illustrating the dramatic impact on players' salaries that a new league may have is Boston Professional Hockey Ass'n v. Cheevers, 348 F. Supp. 261 (D. Mass.), *remanded*, 472 F.2d 127 (1st Cir. 1972). In *Cheevers* a team in the then new World Hockey Association offered a player a contract providing for a salary of $200,000 per year for seven years. The player's previous team in the established National Hockey League had offered him only a one-year contract for $70,000. 348 F. Supp. at 264.

5. The option year is an additional year following the original term of a player's con-

texts in which player contract problems arise include an acquiring team's transfer of a player's contract as compensation for their signing of a free agent[6] from another team[7] or a team's changing its mind after agreeing to assign a player to the other team.[8] Several cases have arisen when teams in competing leagues draft the same player, who signs contracts with both teams.[9] Sports personnel other than players have also been the subject of heated contract disputes.[10]

The professional sports industry is founded upon the basic contract.[11] If the players were allowed to freely disregard their contractual obligations,

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tract for which the club has the option to retain the player. *See generally* J. WEISTART & C. LOWELL, *supra* note 3, § 5.03, at 516.

6. A free agent is a player who is no longer under any existing contractual obligation. *Id.* Free agent compensation is an arrangement whereby the club acquiring the services of a free agent is required to transfer one or more players from its team to the team losing the free agent. *Id.* The purpose of this practice is to protect the relative competitive equality throughout the league. The question of whether this procedure should be implemented in professional baseball was the primary cause of the 1981 players' strike. *Id. See Miller Calls for Strike as Meetings Break Off*, Dallas Morning News, June 12, 1981, § B, at 1, col. 3; *Baseball Players Strike*, Dallas Morning News, June 12, 1981, § A, at 1, col. 6; *Baseball Heading for Strike*, Dallas Morning News, June 11, 1981, § B, at 1, col. 1.

7. *See* McCourt v. California Sports, Inc., 600 F.2d 1193 (6th Cir. 1979) (involves player who was part of compensation for star athlete who was picked up as free agent).

8. *See* Professional Sports, Ltd. v. Virginia Squires Basketball Club Partnership, 373 F. Supp. 946 (W.D. Tex. 1974).

9. *See* Houston Oilers, Inc. v. Neely, 361 F.2d 36 (10th Cir.), *cert. denied*, 385 U.S. 840 (1966); Detroit Football Co. v. Robinson, 186 F. Supp. 933 (E.D. La.), *aff'd*, 283 F.2d 657 (5th Cir. 1960); Los Angeles Rams Football Club v. Cannon, 185 F. Supp. 717 (S.D. Cal. 1960). The court in *Robinson* expressed disgust for the questionable tactics used by the clubs competing for players. Judge J. Skelly Wright noted:

> This case is but another round in the sordid fight for football players, a fight which begins before these athletes enter college and follows them through their professional careers. It is a fight characterized by deception, double dealing, campus jumping, secret alumni subsidization, semi-professionalism and professionalism. It is a fight which has produced as part of its harvest this current rash of contract jumping suits. It is a fight which so conditions the minds and hearts of these athletes that one day they can agree to play football for a stated amount for one group, only to repudiate that agreement the following day or whenever a better offer comes along. So it was with Johnny Robinson.

186 F. Supp. at 934 (footnote omitted). Judge Wright also expressed dislike for the player's own conduct in the matter and gave him the following memorable advice:

> '. . . in four or five, six or eight years, some day your passes are going to wobble in the air, you are not going to find that receiver. If you keep playing around here, with these professionals, and others, and jumping your contracts—you are all right this time, . . . but . . . some day your abilities will be such that [your club] won't even send a twice disbarred attorney from Dogpatch to help you. They sent some dandy ones this time . . . .'

Id. at 935-36 (quoting from Chicago Cardinals Football Club, Inc. v. Etcheverry (D.N.M. June 26, 1956) (unreported)). Similar disapprovals can be found in Washington Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472, 479 (9th Cir. 1969), and Weegham v. Killefer, 215 F. 168, 169 (W.D. Mich.), *aff'd*, 215 F. 289 (6th Cir. 1914).

10. *See* New England Patriots Football Club, Inc. v. University of Colo., 592 F.2d 1196 (1st Cir. 1979). This case involves a university that sought to obtain the coaching services of Coach Fairbanks who then was serving under an existing contract with a professional club.

11. *See* Brennan, *Injunction Against Professional Athletes Breaching Their Contracts*, 34 BROOKLYN L. REV. 61 (1967); Comment, *Professional Athletic Contracts and the Injunctive Dilemma*, 8 J. MAR. J. PRAC. PROC. 437 (1975).

the industry's existence would be threatened.[12] Based on the premise that dollar damages cannot be determined for the services of a lost athlete,[13] the historic remedy available to the aggrieved club for a player's breach of his contract has been the negative injunction.[14] This Comment examines the unique requirements for obtaining a negative injunction against a breaching athlete, including a review of the competing policy considerations that have affected this area of the law. The possibility of recovering money damages from a breaching player is also discussed, along with possible methods of computing such damages.

I. THE AGGRIEVED CLUB'S TRADITIONAL REMEDY

As a general rule, personal service contracts will not be specifically enforced.[15] The policy considerations supporting this rule include the difficulty of ensuring proper compliance with a court order,[16] the undesirability of forcing two parties to work together after friction develops between them,[17] and public sentiment against involuntary servitude.[18] Beginning with the nineteenth century English case *Lumley v. Wagner*,[19] courts of equity have granted relief in the form of a negative injunction during the contractual period.[20]

The leading case of *Philadelphia Ball Club v. Lajoie*[21] established the availability of negative injunctive relief in cases involving professional athletes.[22] By offering an increased salary, a competing team in the newly formed American League persuaded the defendant, Napolean Lajoie, to

12. *See* Brennan, *supra* note 11, at 61; Comment, *supra* note 11, at 437.

13. *See, e.g.*, Boston Professional Hockey Ass'n v. Cheevers, 472 F.2d 127, 128 (1st Cir. 1972); Lemat Corp. v. Barry, 275 Cal. App. 2d 671, 80 Cal. Rptr. 240, 246 (1969); Central N.Y. Basketball, Inc. v. Barnett, 19 Ohio Op. 2d 130, 181 N.E.2d 506, 517 (C.P. Cuyahoga County 1961).

14. *See, e.g.*, Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 51 A. 973 (1902); Dallas Cowboys Football Club, Inc. v. Harris, 348 S.W.2d 37 (Tex. Civ. App.—Dallas 1961, no writ). The negative injunction prevents the athlete from performing for any club other than the plaintiff.

15. RESTATEMENT OF CONTRACTS § 379 (1932) [hereinafter cited as RESTATEMENT].

16. *See* 5A A. CORBIN, CORBIN ON CONTRACTS § 1204, at 400-01 (1964); 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1423, at 782-83 (3d ed. 1968); RESTATEMENT, *supra* note 15, § 379, Comment d.

17. *See* 5A A. CORBIN, *supra* note 16, § 1204, at 400-01; 11 S. WILLISTON, *supra* note 16, § 1423, at 783 n.3; RESTATEMENT, *supra* note 15, § 379, Comment d.

18. *See* 5A A. CORBIN, *supra* note 16, § 1204, at 400-01; 11 S. WILLISTON, *supra* note 16, § 1423, at 782-83.

19. 42 Eng. Rep. 687 (Ch. 1852). The case involved a famous opera singer who had contracted to perform a specified number of times in a theatre that the plaintiff had rented. The contract also contained a promise not to perform for anyone else during the contract period. *Id.* at 688. The defendant broke this promise and made a contract to perform for another theatre manager. Plaintiff brought suit to enforce the negative promise and the court granted injunctive relief. *Id.* at 693.

20. The negative injunction prevents the defendant from performing the same contractual duties for anyone other than the plaintiff for the remainder of the contract period. *See* J. WEISTART & C. LOWELL, *supra* note 3, § 4.02, at 340.

21. 202 Pa. 210, 51 A. 973 (1902).

22. *See id.*; Comment, *Enforcement Problems of Personal Service Contracts in Professional Athletics*, 6 TULSA L.J. 40, 47 (1969).

ignore his existing contract to play baseball with the plaintiff club. The trial court refused to grant injunctive relief on two grounds: the plaintiff failed to prove that the defendant possessed such unique ability that it would be impossible to replace him,[23] and the contract lacked the requisite mutuality.[24] The Pennsylvania Supreme Court reversed the lower court on both points.[25] First, the court rejected the restrictive requirement of such unique skills that it would be impossible to replace him.[26] Instead, the court established a broader requirement that the player only have such special knowledge, skill, and ability that his services could not easily be replaced.[27] This lesser standard allows aggrieved teams to obtain the negative injunction against disloyal players more easily,[28] and is compatible with public policy favoring the enforcement of contracts whenever possible.

The *Lajoie* court also found that the contract contained the requisite mutuality despite the fact that the club could bind the player for up to three years, but the player could only bind the team for ten days.[29] Considering the peculiar circumstances of professional baseball, the court noted that the terms were not unreasonable.[30] Furthermore, both parties expressly accepted these terms at the beginning of their contractual relationship. Their inclusion was part of the inducement for the club to contract with this player.[31] Similarly, the fact that both parties did not have the same remedies available for a breach by the other did not destroy mutuality.[32]

Lajoie thus established the necessary prerequisites for obtaining negative injunctive relief against a breaching athlete.[33] These basic elements include a sufficiently unique ability,[34] an inadequate remedy at law, and irreparable harm to the plaintiff.[35] As a practical matter, once a player is shown to be sufficiently unique, the inadequacy of damages is presumed. Furthermore, inadequacy of damages generally is equated with irreparable harm to the aggrieved club.[36] Even if the above elements can be established, injunctive relief is still within the court's discretion and maybe de-

23. 51 A. at 973.
24. *Id.* at 974.
25. *Id.* at 976.
26. *Id.* at 973.
27. *Id.* The court equated an inability to easily replace the athlete with the concepts of inadequate remedy at law and irreparable harm, the essential prerequisites for obtaining injunctive relief. *Id.* at 973-74.
28. *See generally* Comment, *supra* note 11, at 441.
29. 51 A. at 975; *see* notes 152-70 *infra* and accompanying text.
30. 51 A. at 974.
31. *Id.*
32. *Id.* at 975. In case of a breach the club could seek injunctive relief, but the player could only recover damages. *Id.*
33. *See* Note, *Injunctions in Professional Athletes' Contracts—An Overused Remedy*, 43 CONN. B.J. 538, 540 (1969).
34. While the term "unique" is not properly qualified, this Comment reflects the language of many courts that, in deciding such cases, speak of degrees of uniqueness.
35. 51 A. at 973.
36. *See* J. WEISTART & C. LOWELL, *supra* note 3, § 4.08.

nied.[37] In deciding whether to grant this relief the courts consider the differing needs of the clubs, players, and society. The clubs desire stability in contractual relationships[38] and the maintenance of a competitive balance.[39] The players need a competitive market for their services[40] and the opportunity to perform.[41] Society benefits from protecting the sanctity of contracts and preventing restraints of competition.[42] The courts have applied the essential requirements for injunctive relief along with other equity principles such as unclean hands,[43] and lack of mutuality[44] to reach equitable results in the cases before them.

A. Uniqueness

The outcome of many cases where negative injunctive relief is sought against a breaching professional athlete is determined by whether the athlete possesses sufficiently unique knowledge, skill, and ability, the loss of which cannot adequately be remedied by damages.[45] Consequently, the pivotal question is how to decide if a player's skills are sufficiently unique. The *Lajoie* decision established the proper standard for determining if the player has the requisite talents and abilities. The court expressly rejected an impossible-to-replace standard and adopted a lesser standard of not easily replaceable.[46] In deciding that the player's skills were sufficiently unique, the court considered the player's reputation as a professional ath-

37. *See, e.g.*, New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc., 291 F.2d 471 (5th Cir. 1961) (unclean hands of plaintiff); Nassau Sports v. Hampson, 355 F. Supp. 733 (D. Minn. 1972) (promotion of new league and harm to player outweigh harm to club); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972) (harm to plaintiff not irreparable; needs of new league); Minnesota Muskies, Inc. v. Hudson, 294 F. Supp. 979 (M.D.N.C. 1969) (unclean hands of plaintiff); Connecticut Professional Sports Corp. v. Heyman, 276 F. Supp. 618 (S.D.N.Y. 1967) (lack of mutuality and harshness of contracts).

38. *See* Brennan, *supra* note 11; Comment, *supra* note 11, at 61.

39. *See* Goldstein, *Out of Bounds Under the Sherman Act? Player Restraints in Professional Team Sports*, 4 PEPPERDINE L. REV. 285, 286 (1977).

40. *See* Bowman v. National Football League, 402 F. Supp. 754, 756 (D. Minn. 1975); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 515 (E.D. Pa. 1972).

41. *See* Haywood v. National Basketball Ass'n, 401 U.S. 1204 (1971) (Douglas, J.) (stay of order issued by Ninth Circuit); Linseman v. World Hockey Ass'n, 439 F. Supp. 1315, 1319 (D. Conn. 1977); Bowman v. National Football League, 402 F. Supp. 754, 756 (D. Minn. 1975).

42. *See* Cincinnati Bengals, Inc. v. Bergey, 453 F. Supp. 129, 147 (S.D. Ohio 1974); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 515 (E.D. Pa. 1972).

43. *See* notes 171-201 *infra* and accompanying text.

44. *See* notes 152-70 *infra* and accompanying text.

45. *See* Cincinnati Bengals, Inc. v. Bergey, 453 F. Supp. 129, 140 (S.D. Ohio 1974) (outcome of players' contract cases "usually turns on whether the player is possessed of certain unique knowledge, ability and skill"); Nassau Sports v. Peters, 352 F. Supp. 870, 876 (E.D.N.Y. 1972) ("[t]he primary requisite for enforcing . . . the contract . . . is that the player be an athlete of exceptional talent"); Dallas Cowboys Football Club, Inc. v. Harris, 348 S.W.2d 37, 42 (Tex. Civ. App.—Dallas 1961, no writ) (player must be "a person of exceptional and unique knowledge, skill and ability").

46. Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 51 A. 973, 973 (1902); *see* Comment, *supra* note 11, at 441.

lete,[47] and his value to the team in terms of economics and the effect that his absence would have on the team's standings.[48] Thus, the court's finding of uniqueness in *Lajoie*, although facilitated by the player's status as a star athlete,[49] was based on the player's relative value to the team and not simply his past record or reputation as a professional athlete. In more recent cases, however, the courts have been criticized for ignoring the *Lajoie* analysis and finding uniqueness based solely on the fact that the player is a professional athlete.[50] This broad view of uniqueness may not be objectionable when a star athlete is involved and the parties concede the point, as was the case in *Nassau Sports v. Peters*.[51] Problems arise, however, when the athletes involved are less than stellar performers.

In *Central New York Basketball, Inc. v. Barnett*[52] the court determined that the player was sufficiently unique despite the fact that he was not chosen to play in the NBA All Star game, was not named in the U.S. Basketball Writers' All-NBA Team, and was only a first year professional.[53] The court noted that mere engagement as a basketball player in the National Basketball Association, or American Basketball League, should carry with it recognition of his excellence and extraordinary abilities.[54] Some evi-

47. 51 A. at 974; *see* Brennan, *supra* note 11, at 64.

48. 51 A. at 974.

49. *Id.* ("He may not be the sun in the baseball firmament, but he is certainly a bright particular star."); *see* Brennan, *supra* note 11, at 64-65 ("Lajoie was one of the leading stars of his day . . . . Lajoie was rather clearly a person of unique or exceptional skill . . . ."). When the player is a star athlete the policy considerations generally tend to weigh heavier on the side of the aggrieved team. First, the team may have planned its strategy around the player and the player may be a major gate attraction. Secondly, the player's need for exposure and opportunity to play will be met. Of course, star athletes tend to receive higher salaries.

50. *See Brennan, supra* note 11, at 70 ("Personally, I see little justification and no proof for this assumption."); Comment, *Contractual Rights and Duties of the Professional Athlete—Playing the Game in a Bidding War*, 77 DICK. L. REV. 352, 360 (1972-1973) (the better analysis requires an examination of all factors); Comment, *supra* note 11, at 441 (recent courts have emasculated *Lajoie* test). This position was expressly stated in Nassau Sports v. Peters, 352 F. Supp. 870, 876 (E.D.N.Y. 1972), and Central N.Y. Basketball, Inc. v. Barnett, 19 Ohio 2d 130, 181 N.E.2d 506, 514 (C.P. Cuyahoga County 1961). Winnipeg Rugby Football Club v. Freeman, 140 F. Supp. 365 (N.D. Ohio 1955), and Dallas Cowboys Football Club, Inc. v. Harris, 348 S.W.2d 37 (Tex. Civ. App.—Dallas 1961, no writ), have also been discussed as supporting this proposition. *See* Comment, *supra* note 11, at 442; Note, *supra* note 33, at 544. A closer analysis of both *Freeman* and *Harris*, however, indicates that neither case is compatible with that position. *See* notes 57-72 *infra* and accompanying text.

51. 352 F. Supp. 870, 876 (E.D.N.Y. 1972).

52. 19 Ohio Op. 2d 130, 181 N.E.2d 506 (C.P. Cuyahoga County 1961).

53. 181 N.E.2d at 513-14.

54. *Id.* at 514. The court broadly applied this analysis to all major sports. *Id.* at 517. This and similar language found in Nassau Sports v. Peters, 352 F. Supp. 870, 876 (E.D.N.Y. 1972), suggests that some courts have applied an abstract theory in determining the player's uniqueness. Under this theory the courts look only at the player's past performance, or merely the player's status as a professional athlete in making the determination of uniqueness. This type of analysis promotes the clubs' interest in stability as an injunction is easier to obtain using this standard. Similarly, the public's interest in protecting the sanctity of contracts is benefited. The player's interests, however, suffer under this analysis. If all players are presumed to be unique, then player mobility and the competitive market for salaries will be stifled. The presumption that all star athletes are of high value to their teams is not necessarily valid. A team might include a large number of star athletes, the loss of any one having very little impact. This analysis also ignores the fact that many players can be re-

dence of unique skills was present, however, as the defendant was ranked nineteenth out of one hundred players in the league in scoring.[55] Similarly, the court considered the fact that both teams offered the player a substantial pay raise to be indicative of special value.[56] Thus, the statements in both *Barnett* and *Peters*, that professional athletes possess the requisite uniqueness merely because they are professional athletes, should be limited in light of the evidence of unique ability in *Barnett* and the concession of the issue in *Peters*.

Both *Winnipeg Rugby Football Club v. Freeman*[57] and *Dallas Cowboys Football Club, Inc. v. Harris*[58] have been criticized for expanding the *Lajoie* decision beyond its original limits or abandoning its standards altogether.[59] A closer analysis of those cases, however, indicates that they are consistent with *Lajoie*. *Winnipeg* involved two athletes who, while under contract to play for a team in the Canadian Football League, attempted to jump to the Cleveland Browns, a team in the National Football League. The court granted the plaintiff's claim for injunctive relief.[60] Although the evidence tended to show that the players possessed little more than ordinary talent by National Football league standards, they did possess exceptional ability based on the standards of the Canadian League.[61] Furthermore, evidence was presented that the plaintiff club had designed its team around the abilities of the defendants and that their services could not easily be replaced.[62] This court, therefore, did evaluate the players' skills in light of their value to the aggrieved club,[63] and not by abstract reputation standards.

Dallas Cowboys Football Club, Inc. v. Harris also involved an average player attempting to jump his contract. At trial the jury expressly found that the player did not possess unique skills and abilities.[64] On appeal, however, the court determined that the evidence was insufficient to support the jury finding.[65] In making this determination, the court rejected the

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placed from the minor leagues or the annual crop of college athletes. The standard measure of damages, therefore, is readily available. *See* Comment, *supra* note 11, at 444.

55. 181 N.E.2d at 513-14.

56. *Id.* at 514.

57. 140 F. Supp. 365 (N.D. Ohio 1955) (two players with only average ability prevented from jumping contracts).

58. 348 S.W.2d 37 (Tex. Civ. App.—Dallas 1961, no writ) (defensive back with only average ability prevented from jumping contract).

59. *See* Comment, *supra* note 11, at 441-43; Note, *supra* note 33, at 544-46. *See generally* Nassau v. Peters, 352 F. Supp. 870, 876 (E.D.N.Y. 1972). *But see* Comment, *supra* note 50, at 360-61.

60. 140 F. Supp. at 367.

61. *Id.* at 366-67.

62. *Id.* at 367.

63. *See* Comment, *supra* note 50, at 360-61.

64. 348 S.W.2d at 42.

65. *Id.* at 44. The contract that gave rise to the dispute contained the following language: "The Player hereby represents that he has special, exceptional and unique knowledge, skill and ability as a football player, the loss of which cannot be estimated with any certainty and cannot be fairly or adequately compensated by damages . . . ." *Id.* at 42. The court expressly rejected the plaintiff's claim that this provision estopped Harris to deny the fact that he possessed sufficiently unique ability. *Id.* at 43. The basis for the court's

narrow definition of unique used in the trial court.[66] Instead, the court expressly adopted the broader rule established in *Lajoie*,[67] and under this standard, found the defendant to be sufficiently unique.[68] The fact that the defendant was the most skilled athlete at his position available to the plaintiff (a new expansion club) at that time was of considerable significance to the court's finding of sufficient uniqueness.[69] This court, like the courts in *Lajoie* and *Freeman*, determined the player's uniqueness relative to his value to the team and did not rely on his status as a professional athlete.

Under the *Lajoie* analysis, a player is unique if he cannot easily be replaced.[70] As illustrated by both *Harris* and *Freeman*, this test does not mean that an average athlete can never be considered unique. Naturally, it is easier to show a greater degree of difficulty of replacement when the athlete is a star, but certain circumstances do exist in which the average player cannot readily be replaced. The value-to-the-team theory,[71] which

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conclusion was that the statement was merely an expression of opinion. *Id. See also* Comment, *supra* note 50, at 358-62. For an indication of how different courts have treated these provisions *compare* Central N.Y. Basketball, Inc. v. Barnett, 19 Ohio Op. 2d 130, 181 N.E.2d 506, 508-13 (C.P. Cuyahoga County 1961) (question of fact despite contract language), *and* Matuszak v. Houston Oilers, Inc., 515 S.W.2d 725, 727-29 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ) (case clearly raises fact question as to uniqueness despite contract language), *with* Nassau Sports v. Hampson, 355 F. Supp. 733, 736 (D. Minn. 1972) (player acknowledged uniqueness in contract), *and* Boston Professional Hockey Ass'n v. Cheevers, 348 F. Supp. 261, 264 (1972) (player acknowledged uniqueness in contract), *remanded*, 472 F.2d 127 (1st Cir. 1972). Despite the fact that these representations in the contracts appear to carry little weight with the courts, most standard player contracts still contain this language. *See* North American Soccer League, Club-Player Agreement art. III, § 3.1 (Oct. 1979) ("Player represents that he possesses unique knowledge and skill as a soccer player and that his services to be rendered hereunder are of an unusual and extraordinary character which gives them peculiar value which cannot be adequately compensated for in damages at law."); The National League of Professional Baseball Clubs, Uniform Player's Contract ¶ 4.1 (Jan. 1, 1976) ("The Player represents and agrees that he has exceptional and unique skill and ability as a baseball player . . . ."); National Basketball Association, Uniform Player Contract ¶ 9 (June 1976) ("The Player represents and agrees that he has extraordinary and unique skill and ability as a basketball player . . . ."); National Hockey League, Standard Players Contract ¶ 6 (1974) ("The Player represents and agrees that he has exceptional and unique knowledge, skill and ability as a hockey player . . . ."). The National Football League appears to have recognized the fact that these representations are not determinative of the player's uniqueness and, for the sake of brevity, has eliminated them from their standard player's contract. *See* NFL Player Contract. Copies of professional athletic contracts can be found in REPRESENTING THE PROFESSIONAL ATHLETE (PLI 1978).

66. 348 S.W.2d at 44. The definition of unique that was introduced at trial required the player to have unparalleled or unequal skills and abilities. *Id.* at 43.

67. *Id.; see* notes 46-48 *supra* and note 70 *infra* and accompanying text.

68. 348 S.W.2d at 45.

69. *Id.*

70. Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 51 A. 973 (1902) ("[T]he services of the defendant are of such a unique character, and display such a special knowledge, skill, and ability, as renders them of peculiar value to the plaintiff, and so difficult of substitution that their loss will produce ['damages which are estimated only by conjecture, and not by any accurate standard']."). 51 A. at 973-74 (quoting Commonwealth v. Pittsburgh & Connellsville R.R., 24 Pa. 159, 160 (1854)). For a case that reaches a result similar to that in *Harris* and *Freeman*, see Long Island Am. Ass'n Football Club v. Manrodt, 23 N.Y.S.2d 858 (Sup. Ct. 1940) (not capable of replacing with a player of equal or better talent).

71. *But see* notes 50-54 *supra* and accompanying text.

emerged from the *Lajoie*, *Freeman*, and *Harris* decisions, is desirable because it allows for the best balancing of the competing interests. If the player is of significant value to the aggrieved team, then the club's need for stability and its interest in retaining the player will be protected. On the other hand, if the player is not of significant value to that particular team, then the player's need for exposure and a competitive market are met by allowing him to seek out another team for which his services may have great value.[72]

Additionally, the public's interest in protecting the sanctity of contracts and prohibiting restraints of trade is furthered. Although a finding of uniqueness is essential to the granting of the negative injunction, it alone is not determinative.

B. Irreparable Harm and Inadequate Remedy at Law

A finding that the aggrieved team will suffer irreparable harm as a result of the player's breach is a prerequisite for the granting of injunctive relief.[73] In the area of sports contracts, irreparable harm is equated with inadequacy of damages at law,[74] the underlying principle being that a court of law will not award damages that are too speculative in nature.[75] Due to the many variables present in the sports context, the awarding of damages in these cases generally is considered to be speculative, uncertain, and as a practical matter, impossible to ascertain.[76] In many instances, however, the services of a player may be easily replaced; consequently, the club does not suffer irreparable harm, and damages are ascertainable. Some cases do suggest, however, that once the uniqueness test is passed, the determination of irreparable harm is automatic.[77]

One decision controverting the proposition that the aggrieved club necessarily suffers irreparable harm due to the loss of a star player is *Boston*

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72. *See* Comment, *supra* note 50, at 360-61.

73. Cincinnati Bengals, Inc. v. Bergey, 453 F. Supp. 129, 138 (S.D. Ohio 1974); Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 51 A. 973 (1902); Professional Sports, Ltd. v. Virginia Squires Basketball Club Partnership, 373 F. Supp. 946, 948 (W.D. Tex. 1974).

74. This relationship can be traced back to Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 51 A. 973, 973-74 (1902), in which the court held that irreparable harm is present if there is no accurate pecuniary standard for the determination of the damages. *See* J. WEISTART & C. LOWELL, *supra* note 3, § 4.07, at 364 (1st ed. 1979).

75. *See* 5A A. CORBIN, *supra* note 16, § 1142, at 117.

76. *See* Boston Professional Hockey Ass'n v. Cheevers, 472 F.2d 127, 128 (1st Cir. 1972); Lemat Corp. v. Barry, 275 Cal. App. 2d 671, 80 Cal. Rptr. 240, 246 (1969); J. WEISTART & C. LOWELL, *supra* note 3, § 4.02, at 337-38.

77. *See* Nassau Sports v. Hampson, 355 F. Supp. 733, 736 (D. Minn. 1972); Washington Capitols Basketball Club, Inc. v. Barry, 304 F. Supp. 1193, 1197-98 (N.D. Cal.), *aff'd*, 419 F.2d 472 (9th Cir. 1969). *See generally* Professional Sports, Ltd. v. Virginia Squires Basketball Club Partnership, 373 F. Supp. 946, 948-49 (W.D. Tex. 1974). This result appears to be what the court in *Lajoie* intended. The logical implication of *Lajoie* is that a finding of uniqueness is equated with a finding of an inadequate remedy at law. Stated differently, if an adequate remedy exists at law, *i.e.*, a suitable replacement is readily available and the only real difference will be that of salary, then the defendant player is not sufficiently unique. *See* Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 51 A. 973, 973-74 (1902); note 70 *supra* and accompanying text.

Professional Hockey Association v. Cheevers.[78] *Cheevers* involved two hockey players, entering their option year with the Boston Bruins, who wanted to jump from that team in the National Hockey League to new teams in the World Hockey Association.[79] The Bruins sought a preliminary injunction against the players. The court denied such relief on the basis that the club failed to show it would otherwise suffer irreparable harm.[80] Although it noted that the plaintiff was a popular sports team, the court considered it to be primarily a corporate entity formed for the purpose of making a profit.[81] The court's only concern, therefore, was with the potential harm to the team's financial health, and not whether the team's standings or its chances of winning the Stanley Cup would be harmed by the loss of these particular players.[82] The issue was simply whether the club would suffer any irreparable financial harm.[83] After reviewing the plaintiff's financial statements, the court concluded there was no showing that the club would suffer the requisite irreparable harm.[84] Furthermore, the evidence showed that the financial impact, if any, of the players' departure on the plaintiff club was unknown and could not be proven.[85] Despite this conclusion, the court stated that if the defendants had breached a valid contract, the plaintiff had a complete and adequate remedy at law in the form of a suit for money damages.[86]

Cheevers is different from other sports contract cases in that the court rested its decision solely upon the potential impact of the player's breach on the club's financial position.[87] The court did not consider how easily or adequately the players could be replaced.[88] The burden imposed on aggrieved clubs by this type of analysis is more difficult than that required by prior cases because it requires a showing of actual financial harm, instead

78. 348 F. Supp. 261 (D. Mass.), *remanded*, 472 F.2d 127 (1st Cir. 1972).

79. Their original contract contained the standard reserve clause whereby the plaintiff was allowed to retain the players' services for an additional year after the expiration of the original contract. 348 F. Supp. at 264. The Bruins, in compliance with the terms of their contracts, had tendered new contracts to the players. *Id.*

80. 348 F. Supp. at 270. The motion was also denied on the grounds that the Bruins failed to show a probability of success on the merits. *Id.* at 265-67. This requirement does not mean that the plaintiff must show that he necessarily will win. Rather, the courts generally require some evidence of a legitimate claim. *See* Washington Capitols Basketball Club, Inc. v. Barry, 304 F. Supp. 1193, 1197 (N.D. Cal.), *aff'd*, 419 F.2d 472 (9th Cir. 1969) (plaintiff must show probability of success in order to win preliminary injunction); Matuszak v. Houston Oilers, Inc., 515 S.W.2d 725, 728 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ) (plaintiff must show probable right to permanent injunction on final hearing); World Football League v. Dallas Cowboys Football Club, Inc., 513 S.W.2d 102 (Tex. Civ. App.—Dallas 1974, writ ref'd, n.r.e.) (plaintiff must show only that he has cause of action).

81. 348 F. Supp. at 269.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* Interestingly, the court's remarks concerning the uncertain nature of the potential damages to the plaintiff should indicate the appropriateness of granting the injunction. *See* notes 80-81 *supra* and accompanying text. J. WEISTART & C. LOWELL, *supra* note 3, § 4.08, at 366.

86. 348 F. Supp. at 269.

87. *See* J. WEISTART & C. LOWELL, *supra* note 3, § 4.08, at 365.

88. *See id.*

of the mere loss of an important player.[89] The efficacy of this approach, however, is questionable[90] because the appellate court remanded the case and seriously questioned the lower court's position on the question of damages.[91] In any event, this case indicates the possibility that courts may be receptive to the argument that an adequate remedy at law is available to the aggrieved club when a player breaches his contract.

II. A POTENTIAL NEW REMEDY—DAMAGES

A. Actual and Consequential Damages

For purposes of obtaining an injunction, once an athlete is shown to be sufficiently unique, irreparable harm and an inadequate remedy at law generally are presumed due to the speculative nature of the damages.[92] In some cases, however, the presumption that damages are indeterminable may not be valid. Moreover, a team may desire damages rather than an injunction for several reasons. If a player is successfully enjoined from playing for another team, he still may be content to sit out for the period of the injunction.[93] If this occurs, the club not only loses the services of the player but also receives no compensation for his loss. Additionally, the prospect of having to pay damages to the aggrieved club may deter some athletes from breaching their contracts.

The availability of money damages gives the aggrieved club greater flexibility.[94] It can seek an injunction hoping that if granted, the player would be persuaded to finish his contractual obligation to the club.[95] If, however, the club believed that the odds of obtaining an injunction were small, that the player was likely to sit out if the injunction was granted, or that it really did not want the player back, it could wait and recover the damages.[96]

In deciding whether to allow recovery of money damages for the breach of a professional sports contract, the courts must decide whether the damages suffered by the team are ascertainable or are too speculative and uncertain to be determined. This decision requires consideration of what specific items would be recoverable and the amount to be awarded for

89. *See* note 77 *supra* and accompanying text. The type of analysis is favorable to a player because it makes obtaining the negative injunction more difficult for a club. This tends to promote both increased player mobility and a more competitive market for player salaries. The club's position, however, would be adversely affected because its stability would be harmed if a considerable number of players were allowed to ignore their obligations. Public concerns for the sanctity of contracts would also suffer.

90. *See* J. WEISTART & C. LOWELL, *supra* note 3, § 4.08, at 366.

91. *See* Boston Professional Hockey Ass'n v. Cheevers, 472 F.2d 127, 128 (1st Cir. 1972). The case was remanded for determination of certain issues raised on appeal but not dealt with at the trial. *Id.* at 127-28.

92. *See* notes 73-77 *supra* and accompanying text.

93. *See* Lemat Corp. v. Barry, 275 Cal. App. 2d 671, 80 Cal. Rptr. 240, 243 (1969) (player accepted new team's offer to pay salary even if he was enjoined).

94. *See* J. WEISTART & C. LOWELL, *supra* note 3, § 4.09, at 367.

95. *See id.* § 4.02, at 340.

96. *See id.* § 4.09, at 367.

each.[97] The first item that should be considered is the cost of substitution.[98] When dealing with an athlete who is replaced, any salary in excess of the defendant's that the club must pay to obtain a replacement is readily determinable by the club and, accordingly, can be established in court.[99] Similarly, the expenses incurred while searching for and negotiating with a replacement can be substantiated.[100] In such situations, damages should be recoverable. In fact, obtaining an injunction would be unlikely because the player was replaceable and, therefore, the club was not irreparably harmed by his breach.

Problems arise, however, when the defendant is a star player. The general objection to awarding damages in this situation is that they would be too uncertain and speculative.[101] This notion, however, involves a broader view of the aggrieved club's injury than is necessary. It is the possible consequential damages, such as loss of revenues from a decline in fan attendance and potential playoff rewards, that are speculative. The loss of a player, however, creates a vacant spot on the team that will be filled with the best player available. The club may be able to obtain the services of another star athlete who is available, but at a higher price than the defendant. Even if the cost of the replacement player does not exceed the cost of the defendant's contract, the costs incident to his hiring should be recoverable.[102] Although these damages may not fully compensate the club, they are both ascertainable and better than no compensation at all, which is the result when injunctive relief is applied.

Few cases have considered the questions of what items of damages might be available or how to calculate the amounts to be awarded. In *Lemat Corp. v. Barry*[103] the club sought to recover lost ticket revenues that it claimed were a result of the defendant's sitting out the injunction against him.[104] Although the damages were denied because the team was not entitled to both an injunction and damages,[105] the method of calculation may be a possibility for other plaintiffs. The trial court concluded that the

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97. *See id.* § 4.09, at 367-69.

98. *See id.* § 4.09, at 367.

99. *See id.* § 4.07, at 360. *See generally id.* § 4.02, at 337; U.C.C. § 2-713.

100. *See generally* U.C.C. §§ 2-713 to -715.

101. *See* notes 75-76 *supra* and accompanying text.

102. *See generally* U.C.C. § 2-715.

103. 275 Cal. App. 2d 671, 80 Cal. Rptr. 240 (1969). This case did not discuss the cost of substitution issues. Rick Barry scored 2,059 points in his rookie year in the NBA for an average of 25.7 points per game. His rebounds added up to 850. He was named rookie of the year for the 1965-1966 season and went on to become one of the best basketball players of all time. *See* THE MODERN ENCYCLOPEDIA OF BASKETBALL 285 (1969).

104. 80 Cal. Rptr. at 243.

105. *Id.* at 246. The appellate court affirmed the lower court's denial of damages stating:

> The record clearly indicates that the [trial] court's denial of damages was based on its view that the remedies sought [both damages and an injunction] should be considered as alternatives. Lemat's claim for damages could acquire significance only if its request for injunctive relief was denied or was found to be not appropriate under the circumstances.

Id.

plaintiff had been injured in the amount of $365,000.[106] This figure represents the difference between the actual gross receipts for the season that Barry did not play and a projected amount that would have been received had he participated.[107] The amount of the projected receipts was calculated by multiplying the immediately preceding year's gross receipts by the average percentage growth rate of receipts for the entire National Basketball Association during the year in question, less additional costs that would have been incurred had Barry played. The result was a $365,000 decline in revenues.[108] The appellate court neither rejected nor approved this method of calculating damages.[109] The court remarked by way of a dictum, however, that damages in these cases were speculative, uncertain, and practically impossible to prove.[110]

A different approach to the damages of an injured team is illustrated in *Tomjanovich v. California Sports, Inc.*[111] The club sought to recover business losses resulting from the player's absence during one season.[112] Recovery was sought not only for losses incurred during the year that Tomjanovich missed but also for losses incurred in the immediately succeeding year.[113] The current year losses included lost revenues due to a decline in fan attendance and the loss of playoff participation rewards.[114] The plaintiff calculated the current year loss caused by the decline in fan attendance[115] by subtracting the average per game walk-up sales receipts

106. *Id.* at 243.
107. *Id.*
108. *Id.* The rate used was 25%.
109. *See id.* at 246.
110. *Id.*
111. No. 78-243 (S.D. Tex. Oct. 10, 1979).
112. The case involved two plaintiffs. Rudy Tomjanovich brought suit on his own behalf for injuries received from a blow to his face during a basketball game with the Los Angeles Lakers. The owner of the Houston Rockets, the team for which Tomjanovich played at the time, sued the Lakers to recover damages that it suffered as a result of the injured Tomjanovich's absence for the majority of the season. Although this is a tort case, the Rockets were seeking compensation for injuries sustained due to the player's absence from the team. Thus, many of the methods of calculating damages should be applicable to contract cases. Both cases were consolidated for the trial of liability issues. For the purposes of this Comment references to the plaintiff in this case refer to the Houston Rockets. In each of the three seasons since his injury, Tomjanovich's performance has failed to equal his pre-injury standards. *See* Casstevens, *Rudy T's New World*, Dallas Morning News, Mar. 25, 1981, § B, at 1, col. 2.
113. *See* Houston Rockets Summary of Business Loss Exhibits, exhibit I, Tomjanovich v. California Sports, Inc., No. 78-243 (S.D. Tex. Oct. 10, 1979) [hereinafter cited as Summary of Business Loss Exhibits]. The information and materials used to discuss the damage issues in this case were provided by the accounting firm of Touche Ross & Co., Carl Taylor accountant. The evidence concerning the damages in this case was calculated primarily by Carl Taylor and presented at trial by Pat Loconto, also an accountant with Touche Ross & Co., Dallas, Texas.
114. Interview with Carl Taylor, Accountant, Touche Ross & Co., in Dallas, Texas (Sept. 29, 1980) [hereinafter cited as Taylor Interview]; *see* Summary of Business Loss Exhibits, *supra* note 113, exhibits VII & VIII. The decline in fan attendance involves only the drop in walk-up ticket sales. Season ticket revenues were not affected during the current year.
115. To illustrate a noticeable decline in fan attendance, the club compared the average number of paid admissions per game before the injury with the average number of paid admissions per game after the injury. The result was a 10.3% decline in average paid admissions. *See* Summary of Business Loss Exhibits, *supra* note 113, exhibit I. Plaintiff also com-

for games in which Tomjanovich did not play from the average per game receipts for games that he did play,[116] multiplying the difference by the number of games in which he did not play,[117] and subtracting additional expenses that would have been incurred if the fan attendance had been at the higher level.[118] The resulting figure was the loss in net walk-up sales receipts.[119] These calculations differ[120] from those used in *Lemat*. *Lemat*'s basis for projecting revenues was based on the positive growth in attendance throughout the league,[121] whereas in *Tomjanovich* the calculations focused on the specific negative impact on the club. Which method is less speculative is certainly arguable. The *Tomjanovich* method, however, may approach actual damages more closely because it takes into account more factors specifically affecting the aggrieved club.

In *Tomjanovich* the club also sought to recover for lost revenues in the subsequent year due to a decline in the growth of season ticket sales,[122] allegedly due to the poor season that the Rockets had without Tomjanovich.[123] The plaintiff calculated these damages by multiplying the actual number of tickets sold in the subsequent year by an additional growth rate[124] that would have been realized had Tomjanovich not been injured.[125] To justify the use of the growth rate, the club relied on the fact that season ticket sales for the current year had grown more than 100 percent over the prior year, but grew only one percent in the subsequent year.[126] Multiplying the projected number of additional tickets that would have been sold by the average price of season tickets resulted in the amount of additional season ticket subscription revenues that would have been realized.[127] Finally, by subtracting the additional related expenses that would have been incurred had Tomjanovich played, the loss of net

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pared the change in total walk-up sales revenues from the preceding year to the current year, and the current year to the subsequent year. Total walk-up sales in the current year declined 33.6% compared with the preceding year. The total sales increased 38.1% in the subsequent year compared with the current year. *See id.*

116. *See* Summary of Business Loss Exhibits, *supra* note 113, exhibit VII. Although the figures used for comparison were from the same year, it would be possible to make similar comparisons using prior year and current year numbers.

117. *See id.* These losses were adjusted downward to compensate for portions of losses that were attributable to periodic games missed by other important players during the season. Taylor Interview, *supra* note 114.

118. *See* Summary of Business Loss Exhibits, *supra* note 113, exhibit VII.

119. *Id.*

120. They are similar in that both recognize that the club is injured by a decline in fan attendance. If the player is of lesser ability, then this element will not be recoverable. Whether fan attendance is affected also should be reflected in statistics. The percentages in *Tomjanovich* indicate that the loss of the player had a significant impact on fan attendance. *See* note 115 *supra*.

121. *See* note 108 *supra* and accompanying text.

122. *See* Summary of Business Loss Exhibits, *supra* note 113, exhibits I, IV, V. The growth from the prior year to the current year was 164.20%. The growth in the subsequent year was 1.25%. *See id.* exhibit IV.

123. Taylor Interview, *supra* note 114.

124. The figure used, 10%, was considered to be a conservative estimate. *Id.*

125. Summary of Business Loss Exhibits, *supra* note 113, exhibit V.

126. *Id.* exhibit IV.

127. *Id.* exhibit V.

season ticket subscription revenue was determined.[128] Although this element of damages does have some degree of uncertainty, the statistics show that the team's performance in one year has a substantial impact on season ticket sales the following year.[129] Where the evidence clearly indicates that the plaintiff team did in fact suffer this type of harm, the aggrieved club should be able to recover some damages.

A third form of damages sought by the club involved the lost revenues resulting from the inability to increase the price of tickets in the subsequent year.[130] Although the policy in the past was to increase ticket prices each year,[131] the club felt that because of the poor season during the current year, the club could not justify any significant price increases in the subsequent year.[132] To compute these damages, the plaintiff multiplied a projected percentage increase in prices[133] that otherwise would have been justifiable by the total ticket revenues in the subsequent year,[134] and adjusted the product for additional related expenses that would have been incurred.[135] This resulted in the projected net revenues, from which actual net revenues in the subsequent year were subtracted.[136] Although the failure to increase prices was a conscious business decision, the reason for the decision was the team's poor performance in the current year, which management claimed resulted from the loss of Tomjanovich.[137]

Perhaps the most speculative type of damages that the plaintiff sought to recover were those resulting from lost playoff participation.[138] First, the club determined that Tomjanovich's net scoring contribution was slightly more than five points per game.[139] Fifteen games in the current year were lost by five points or less after Tomjanovich's injury.[140] If those games had been won, the Rockets would have qualified for the first round of the playoffs.[141] The club sought to recover lost ticket sales and media coverage revenues that would have been received had the Rockets played in the first round.[142]

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128. *Id.*

129. *See* notes 122, 126 *supra* and accompanying text.

130. *See* Summary of Business Loss Exhibits, *supra* note 113, exhibits I, II, III.

131. Taylor Interview, *supra* note 114. The average increase in the price of tickets for the prior year was 12.53%. The increase for the current year was 19.85%. The growth for the subsequent year was 0.77%. In the second subsequent year the increase was 7.68%. *See* Summary of Business Loss Exhibits, *supra* note 113, exhibit II.

132. Taylor Interview, *supra* note 114.

133. The figure used, 9%, was considered to be a conservative estimate. *Id.*

134. *See* Summary of Business Loss Exhibits, *supra* note 113, exhibit III.

135. *Id.*

136. *Id.*

137. Taylor Interview, *supra* note 114.

138. *See* Summary of Business Loss Exhibits, *supra* note 113, exhibits I, VIII.

139. *Id.* exhibit VIII. On the average the opponents outscored the Rockets by 5.17 points more without Tomjanovich than they did with him in the game. *Id.* In calculating these figures they did not include games in which Moses Malone, another important player, did not participate. *Id.*

140. *See id.*

141. Taylor Interview, *supra* note 114. The information was based on the Rockets Official Media Information Booklet and the Official NBA Guide. *Id.*

142. *See* Summary of Business Loss Exhibits, *supra* note 113, exhibit IX. The club only

All of the preceding types of damages are illustrative of those a club may suffer as a result of the loss of a star player. Arguably, many of these calculations are speculative, but they are a starting point for future plaintiffs. Although the plaintiff actually presented the evidence concerning these damages at trial, the defendant agreed to a settlement before any holdings were made concerning the accuracy or availability of any of these damages. Thus, predicting how this or any other court would rule on these claims is difficult.

B. Alternative Forms of Damages

Liquidated damages are a possible alternative to actual damages, although case law only suggests that such a provision might be enforceable against the player.[143] The availability of liquidated damages would allow the club to recover some of the damages it suffers from the loss of a player,[144] and would serve as a deterrent against the player's breaching of his contract.[145] On the other hand, liquidated damages would provide the player with greater mobility and opportunity to perform.[146]

Another proposed remedy is to award the aggrieved team the difference in salary between the player's then existing contract and his new contract with a different club.[147] One significant advantage of this remedy is that the amounts are readily available.[148] In addition, this approach approximates the standard measure of contract damages.[149] Several policy reasons favor this approach. First, the club is benefitted because it will receive some compensation for the lost player.[150] Additionally, any immediate financial incentive for the player to abandon his contract is eliminated.[151] Finally, the player's mobility and opportunity for exposure are increased because he is not faced with the prospect of the negative injunction. One drawback is the potential adverse affect on the stability of player contracts. The negative injunction, however, would still be available to the club; the club simply would have a broader choice of remedies to pursue.

III. PLAYER DEFENSES

The fact that the aggrieved club may prevail on the uniqueness and irreparable injury issues does not necessarily guarantee that a negative in-

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claimed to make it to the first round because they thought it too speculative to go beyond that point. Taylor Interview, *supra* note 114.

143. *See* Connecticut Professional Sports Corp. v. Heyman, 276 F. Supp. 618, 619-20 (S.D.N.Y. 1967). *See generally* Comment, *supra* note 22, at 59; Comment, *supra* note 11, at 455-56.

144. *See* Comment, *supra* note 11, at 455.

145. *Id.* at 455-56.

146. *Id.*

147. *See* J. WEISTART & C. LOWELL, *supra* note 3, § 4.09, at 368-69.

148. *See id.* § 4.09, at 368.

149. *See id.*

150. *See id.* at 368-69.

151. *See id.*

junction will be granted. The player still has several defenses available. These defenses include lack of mutuality and unclean hands.

A. Mutuality

In the early sports contracts cases, lack of mutuality was the most frequently attempted defense to the club's suit for a negative injunction.[152] Two basic mutuality theories have been used in the sports context. The first theory involves lack of mutuality of obligation.[153] Under this theory the courts are concerned with the fact that the player might be bound to perform for the team for many years, but the team is only obligated for a minimal amount of time.[154] The second mutuality theory involves lack of mutuality of remedy.[155] The concern here is that although the club may obtain specific performance of the player's negative promise, as a practical matter, the remedy of specific performance is not available to the player.[156] Both of these problems arose in *Philadelphia Ball Club v. Lajoie*.[157] In *Lajoie* the court found that the contract contained the requisite mutuality of obligation despite the fact that the club could bind the player for up to three years while the player only could bind the club for ten days.[158] Considering the peculiar nature and circumstances of professional baseball, the court found that these terms were not unreasonable.[159] Furthermore, both parties expressly accepted the terms at the beginning of their contractual relationship, and they constituted a part of the inducement for the club to contract with the player.[160] The court disposed of the mutuality of remedy problem by holding that the fact that both parties did not have the same remedies available in case of a breach by the other did not destroy mutuality.[161]

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152. *See* Weegham v. Killefer, 215 F. 168 (W.D. Mich.), *aff'd*, 215 F. 289 (6th Cir. 1914); Brooklyn Baseball Club v. McGuire, 116 F. 782 (E.D. Pa. 1902); Metropolitan Exhibition Co. v. Ward, 9 N.Y.S. 779, 781 (Sup. Ct. 1890); J. WEISTART & C. LOWELL, *supra* note 3, § 4.11, at 373; Comment, *supra* note 11, at 448; Note, *supra* note 31, at 546.

153. *See* American League Baseball Club v. Chase, 86 Misc. 441, 149 N.Y.S. 6 (Sup. Ct. 1914); J. WEISTART & C. LOWELL, *supra* note 3, § 4.11, at 376-77.

154. *See* J. WEISTART & C. LOWELL, *supra* note 3, § 4.11, at 376-77. The authors discuss *Chase* as a leading case on this point. In *Chase* the court stated that "the negative covenant, under such circumstances, is without a consideration to support it, and is unenforceable by injunction." American League Baseball Club v. Chase, 86 Misc. 441, 452, 149 N.Y.S. 6, 14 (Sup. Ct. 1914).

155. *See* J. WEISTART & C. LOWELL, *supra* note 3, § 4.11, at 377-81; Comment, *supra* note 10, at 448. The same judicial remedy should be available to both parties; if one party seeks specific performance, the other party must also be able to receive specific performance before a court of equity will grant injunctive relief. *See* J. WEISTART & C. LOWELL, *supra* note 3, § 4.11, at 377-78.

156. *See* Weegham v. Killefer, 215 F. 168 (W.D. Mich.), *aff'd*, 215 F. 289 (6th Cir. 1914); J. WEISTART & C. LOWELL, *supra* note 3, § 4.11, at 377-78; Comment, *supra* note 11, at 448. The club's ability to terminate the contract on short notice effectively prevents the player from obtaining specific performance, thus there is no real mutuality of remedy. *See* J. WEISTART & C. LOWELL, *supra* note 3, § 411, at 377-78.

157. 202 Pa. 210, 51 A. 973 (1902); *see* notes 29-32 *supra* and accompanying text.

158. 51 A. at 975.

159. *Id.* at 974.

160. *Id.*

161. *Id.*

Although not immediately adopted as the majority rule,[162] *Lajoie* effectively marked the end of the mutuality defense in sports contracts cases.[163] The *Restatement of Contracts* strengthened this position by stating that "[t]he fact that the remedy of specific enforcement is not available to one party is not a sufficient reason for refusing it to the other party."[164]

A subsequent case indicates, however, that the issue of mutuality is not dead.[165] In *Connecticut Professional Sports Corp. v. Heyman*[166] the court found that the contract in dispute lacked the requisite mutuality because the club easily could avoid any obligation to the player.[167] Several factors were determinative. First, the contract contained a provision allowing the club to end the contract whenever it desired. Additionally, the contract entitled the player to participate only in those games in which the club requested his services. This fact was significant because the player received compensation only for those games in which he participated or dressed for. Furthermore, the club had no obligation to compensate the player if he was injured. Finally, the contract did not specify any minimum number of games to be scheduled.[168] Although discussed as a mutuality case,[169] *Heyman* also may be viewed as an example of the unconscionability defense.[170] Lack of mutuality, however, is not the only defense available to the player.

B. Unclean Hands

In some cases, players have successfully used the principle of unclean hands in defending against suits for negative injunction.[171] The thrust of this doctrine is that a court of equity will not grant relief to a plaintiff who has acted inequitably or in bad faith regarding the matter being liti-

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162. *See* Weegham v. Killefer, 215 F. 168 (W.D. Mich.), *aff'd*, 215 F. 289 (6th Cir. 1914); Brooklyn Baseball Club v. McGuire, 116 F. 782 (E.D. Pa. 1902); American Base Ball & Athletic Exhibition Co. v. Harper, 54 CENT. L.J. 449 (Cir. Ct. St. Louis 1902); J. WEISTART & C. LOWELL, *supra* note 3, § 4.11, at 380; Note, *supra* note 33, at 546.

163. *See* Central N.Y. Basketball, Inc. v. Barnett, 19 Ohio Op. 2d 130, 181 N.E.2d 506, 512 (C.P. Cuyahoga County 1961) (fact that club could bind player to contract longer than player could bind club did not mean that there was no mutuality); J. WEISTART & C. LOWELL, *supra* note 3, § 4.11, at 380; Comment, *supra* note 50, at 363; Note, *supra* note 33, at 546.

164. RESTATEMENT, *supra* note 15, § 372.

165. *See* Nassau Sports v. Peters, 352 F. Supp. 870, 876 (E.D.N.Y. 1972) (mutuality basic requirement for enforcement of sports contracts); Connecticut Professional Sports Corp. v. Heyman, 276 F. Supp. 618, 621 (S.D.N.Y. 1967) (finding that contract lacked mutuality due to harshness of terms).

166. 276 F. Supp. 618 (S.D.N.Y. 1967).

167. *Id.* at 621.

168. *Id.*

169. *See* Comment, *supra* note 50, at 363; Comment, *supra* note 11, at 449-50.

170. *See* J. WEISTART & C. LOWELL, *supra* note 3, § 4.11, at 381-83.

171. *See* New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc., 291 F.2d 471 (5th Cir. 1961); Minnesota Muskies, Inc. v. Hudson, 294 F. Supp. 979 (M.D.N.C. 1969); Weegham v. Killefer, 215 F. 168 (W.D. Mich.), *aff'd*, 215 F. 289 (6th Cir. 1914); J. WEISTART & C. LOWELL, *supra* note 3, § 4.12, at 388; Comment, *supra* note 50, at 369-71; Comment, *supra* note 11, at 450-51; Note, *supra* note 33, at 549.

gated.[172] Because the doctrine only considers the behavior of the plaintiff,[173] a defendant may raise this defense regardless of his own conduct.[174] The issue of unclean hands usually arises in two situations.[175]

The first situation is when a player abandons[176] one team for another, later returns to the original team, and the second team brings suit to enforce its contract.[177] In *Weegham v. Killifer*[178] the plaintiff club persuaded the player to jump his existing contract and sign with it.[179] Later the player changed his mind and re-signed with his original team.[180] The plaintiff sought a negative injunction challenging the enforceability of the first contract with the original club.[181] The court refused to grant the injunction on the grounds of unclean hands,[182] noting that even if the player did not have a legal obligation to play for the original club during the years in dispute, he at least had a moral obligation to play for them during that time.[183] Signing the player to a contract for those years and knowing of his obligation, marked the plaintiff club with unclean hands.[184] In the more recent case of *Minnesota Muskies, Inc. v. Hudson*,[185] involving essentially the same facts,[186] the court adopted the reasoning of *Weegham* and denied the negative injunction.[187]

Both *Weegham* and *Hudson* involved plaintiffs who had signed players to contracts to be performed while the player had time remaining on his original contract. A different situation is presented, however, if the player's new contract does not obligate him to begin with the new team

172. *See* Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806, 815 (1945).

173. *See id.* at 815; J. WEISTART & C. LOWELL, *supra* note 3, § 4.12, at 383-84.

174. *See* Minnesota Muskies, Inc. v. Hudson, 294 F. Supp. 979, 990 (M.D.N.C. 1969) (allowing unclean hands defense despite fact that player had jumped two successive contracts). *But see* Washington Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472, 479 (9th Cir. 1969). The court in *Barry* rejected the player's unclean hands defense after it noted that his inconsistency and contract jumping overshadowed any questionable activities on the plaintiff's part. *Id.* This case, however, involved a future service contract. Courts have held that the negotiation of a future service contract does not mark the plaintiff with unclean hands. *See* notes 188-89 *infra* and accompanying text.

175. *See* J. WEISTART & C. LOWELL, *supra* note 3, § 4.12, at 384.

176. The player may be under a current obligation to play for the original club. *See* Minnesota Muskies, Inc. v. Hudson, 294 F. Supp. 979 (M.D.N.C. 1969); Weegham v. Killefer, 215 F. 168 (W.D. Mich.), *aff'd*, 215 F. 289 (6th Cir. 1914). He may simply sign, however, a future services contract with a different team. *See* Munchak Corp. v. Cunningham, 457 F.2d 721 (4th Cir. 1972).

177. *See* J. WEISTART & C. LOWELL, *supra* note 3, § 4.12, at 384; Comment, *supra* note 11, at 450.

178. 215 F. 168, 168-73 (W.D. Mich.), *aff'd*, 215 F. 289 (6th Cir. 1914).

179. 215 F. at 170.

180. *Id.*

181. The original contract was probably unenforceable due to a lack of mutuality.

182. 215 F. at 173.

183. *Id.* at 172-73.

184. *Id.*

185. 294 F. Supp. 979 (M.D.N.C. 1969).

186. *Id.* at 980-86.

187. *Id.* at 990.

until his first contract expires.[188] Although only a few cases have presented this question, the courts generally have decided that negotiating with and signing players to future service contracts does not mark a club with unclean hands.[189]

The unclean hands problem may arise when contracts are signed in secret.[190] In *Houston Oilers, Inc. v. Neely*[191] and *New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc.*[192] the clubs signed players to contracts after their last collegiate regular season game, but before remaining bowl games were to be played.[193] Under existing National Collegiate Athletic Association rules a player lost his eligibility to play at the college level if he signed a professional contract.[194] In order to allow the players to play in their bowl games, both plaintiffs agreed to keep the signings secret.[195] In both cases the players changed their minds, signed contracts with other teams, and sought to avoid their original contracts.[196] The court in *New York Football Giants, Inc.* denied the negative injunction on the grounds that the secret signing impugned the plaintiff with unclean hands.[197] In this case, however, the plaintiff broke its promise not to submit the contract for approval before the bowl game.[198] In *Neely* the court rejected the unclean hands defense, noting that although secret signing is a regrettable practice, negotiating the contract at any time is not illegal, and this conduct does not allow athletes the right to ignore their contracts.[199] The decision in *Neely* indicates a strong desire by some courts to protect the sanctity of these contracts. A major distinction, however, appears to be that in *Neely* the plaintiff kept its promise of secrecy,[200] whereas, in *New York Football Giants, Inc.* the plaintiff broke its promise to the player.[201]

The defense of unclean hands may be available to the player in an action for negative injunction. The situations in which this defense is applicable, however, are limited to cases wherein the plaintiff club itself has

188. *See* J. WEISTART & C. LOWELL, *supra* note 3, § 4.12, at 385-86; Comment, *supra* note 50, at 370.

189. *See* Munchak Corp. v. Cunningham, 457 F.2d 721, 724 (4th Cir. 1972); Washington Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472, 477 (9th Cir. 1969); World Football League v. Dallas Cowboys Football Club, Inc., 513 S.W.2d 102, 105 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.). Interestingly, in both *Cunningham* and *Barry* the plaintiff had agreed with the player that he could begin playing with the club during his option year, but he was not obligated to do so.

190. *See* J. WEISTART & C. LOWELL, *supra* note 3, § 4.12, at 384.

191. 361 F.2d 36 (10th Cir.), *cert. denied*, 385 U.S. 840 (1966).

192. 291 F.2d 471 (5th Cir. 1961).

193. 361 F.2d at 39; 291 F.2d at 473.

194. 361 F.2d at 39; 291 F.2d at 472; J. WEISTART & C. LOWELL, *supra* note 3, § 4.12, at 389 (a general discussion of the rule and these cases).

195. 361 F.2d at 39; 291 F.2d at 473.

196. 361 F.2d at 39; 291 F.2d at 473.

197. 291 F.2d at 474. The court was concerned with the deceptive practices used by the plaintiff to induce the player to sign. *Id.* at 472, 474.

198. *Id.* at 473.

199. 361 F.2d at 41-42.

200. *Id.* at 40, 42.

201. 291 F.2d at 473.

acted inequitably with regard to the contract in dispute. Thus, in the ordinary case the player will not be able to use this defense.

IV. CONCLUSION

The existence of the professional sports industry is dependent upon the contractual relationship between a club and its players. The historic remedy available to the aggrieved club for a player's breach of his contract has been the negative injunction. In deciding whether a negative injunction is proper, courts should not look solely to the player's status as a professional athlete or other abstract factors, but rather should consider the athlete's value relative to the needs of the aggrieved club. By using this method of analysis, the needs of the aggrieved club, the player, and the public can best be protected.

Although the traditional remedy in these cases is the negative injunction, recent decisions indicate the possibility of an aggrieved club's recovering damages resulting from a player's breach of his contract. The methods used to calculate damages in these cases may be considered speculative, but they provide a basis from which future plaintiffs can build. The availability of the damages remedy gives the aggrieved club greater flexibility in dealing with a breaching player and further protects the needs of all interested parties.