1-1-1987

The Enforceability of Sports Contracts: A Practitioner's Playbook

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THE ENFORCEABILITY OF SPORTS CONTRACTS: A PRACTITIONER'S PLAYBOOK*

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I. INTRODUCTION

This Article examines the judicial and non-judicial relief available to both a sports team and an athlete in the event that either of the parties alleges a breach of their standard player contract. The Article will initially examine the jurisdictional requirements applicable to lawsuits initiated in the sports context. After exploring the peculiarities of personal jurisdiction involved in suits between teams and athletes, the Article will next focus on the specific contractual provisions supporting judicial relief.

This Article will identify a firmly entrenched pattern which has emerged regarding the enforceability of sports contracts. When an athlete initiates a civil proceeding based upon the alleged breach of his standard player contract, judicial relief will generally be denied if the team demands that the dispute be submitted to an appropriate arbitration tribunal.[1] On the other hand, when a team initiates a civil proceeding — typically based upon the athlete's "jumping"[2] to a team in another league — courts are more likely to intervene, usually by issuing a negative in-

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* Portions of this Article will appear in a chapter of a forthcoming treatise entitled *The Law of Professional and Amateur Sports*, to be published by Clark Boardman Company, Ltd.

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1. *See infra* text accompanying notes 128-47.

2. The concept of "jumping" refers to the athlete's acceptance of employment with another team and the corresponding repudiation of his existing contract.

junction restraining the athlete from playing for another team during the pendency of the contract.[3] If a team successfully obtains a negative injunction, the athlete is faced with the dilemma of having to retire, "sit out" for the required time, or rejoin his former team. In order to avoid loss of income and potential deterioration of skills, the athlete will usually choose to play for his former team and request that the underlying dispute be resolved through arbitration.

This Article concludes with a discussion of the team's non-judicial remedies should the athlete attempt to "jump" to another team in the same league. As the following discussion makes clear, the various league rules, constitutions, and contracts effectively deter "intra-league jumping," thereby obviating the need for judicial intervention.

II. ESTABLISHING JURISDICTION FOR JUDICIAL RELIEF

In order to establish *in personam* jurisdiction, two threshold requirements must be satisfied. As an initial matter, the exercise of jurisdiction must fall within the scope of the relevant state "long arm" statute. In addition, the exercise of power over the defendant must comport with constitutional limitations defining due process of law. With respect to the former statutory requirement, modern state statutes tend to vest courts with expansive jurisdictional authority.[4] These "liberal" statutes provide that virtually any form of conduct having an impact within the forum state will fall within the purview of the statute. Indeed, some statutes simply provide that state courts may assert jurisdiction provided the exercise of authority is not inconsistent with the federal Constitution.[5] In states with this type of statute, the only relevant inquiry is into the due process standard.

The basic due process standard was comprehensively set forth in *International Shoe Co. v. Washington*,[6] the seminal case addressing a state court's power to exercise personal jurisdiction over an out-of-state defendant.[7] *International Shoe* and its progeny[8] mandate that before a

3. *See, e.g.*, Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 51 A. 973 (1902); Dallas Football Club, Inc. v. Harris, 348 S.W.2d 37 (Tex. Civ. App. 1961).

4. *See, e.g.*, Curtis Publishing Co. v. Golino, 383 F.2d 586, 589 n.4 (5th Cir. 1967). *See also* Munchak Corp. v. Riko Enters., Inc., 368 F. Supp. 1366 (M.D.N.C. 1973).

5. *See* CAL. CIV. PROC. CODE § 410.10 (West 1973) ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States"); R.I. GEN. LAWS § 9-5 (1983) (authorizing jurisdiction where there are "the necessary minimum contacts . . . in every case not contrary to the provisions of the Constitution or laws of the United States.").

6. 326 U.S. 310 (1945).

7. *Id.* at 316.

court may constitutionally exercise personal jurisdiction over a non-resident, the defendant must have sufficient "minimum contacts" with the forum state "such that the suit does not offend traditional notions of fair play and substantial justice."[9] According to the Supreme Court in *Hanson v. Denckla*, the exercise of personal jurisdiction is only proper if the out-of-state defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thereby invoking the benefits and protections of its laws."[10] Moreover, in order to comport with traditional notions of fair play and substantial justice, the defendant must "reasonably anticipate being haled into court [in the forum state]."[11] Although the primary focus should be on the nature and quality of defendant's contacts with the forum state, the state's interest in the litigation and the plaintiff's interest in not having to litigate in another forum should be considered in deciding whether jurisdiction is proper.[12]

A. Suits Against Athletes

As with any lawsuit, when a team institutes a civil action against an athlete, it must first ascertain the appropriate forum. This section initially examines the athlete's residence and the situs of the parties' contract negotiations as an appropriate forum for sports litigation. The section concludes with a discussion of the considerations involved in selecting the most favorable forum when the team has various options available.

1. The Player's Residence As An Appropriate Forum

Although an athlete clearly may be sued in the state of his domicile,[13] the question often arises whether the athlete may be sued in a state where he is only a temporary resident. This question is especially important because athletes often maintain more than one residence. In many instances, residency alone will subject the athlete to jurisdiction in the forum state.[14] However, in assessing the sufficiency of the athlete's "min-

8. *See, e.g.*, Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984); Kulko v. Superior Court, 436 U.S. 84 (1978); Hanson v. Denckla, 357 U.S. 235 (1958).

9. *International Shoe Co.*, 326 U.S. at 316. *See also* Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408 (1984) (quoting *International Shoe Co.*, 326 U.S. at 316).

10. *Hanson*, 357 U.S. at 253.

11. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

12. *See* Note, *Developments in the Law: State-Court Jurisdiction*, 73 HARV. L. REV. 909, 924 (1960).

13. *See, e.g.*, Milliken v. Meyer, 311 U.S. 457, 462 (1940).

14. *See* Myrick v. Superior Court, 256 P.2d 348, *aff'd*, 41 Cal. 2d 519, 261 P.2d 255 (1953); State ex rel. Merritt v. Heffernan, 142 Fla. 496, 195 So. 145 (1940); Camden Safe-

imum contacts," courts have considered the following factors: (1) the length of time the athlete spends in the state; (2) the types of activities the athlete undertakes in the state; and (3) the athlete's living arrangements in the state.[15]

In sports litigation, an inquiry into the nature of the athlete's activities in the forum state is most critical because they evince the significance and permanence of his relationship with the state. If the temporary residence is also located where the athlete's new team is situated, the requisite contacts would clearly seem to exist.[16] Because the athlete's association with the forum state is generally substantial and purposeful under these conditions, a court's exercise of jurisdiction would appear to satisfy the due process requirement.[17]

2. The Place Of Contracting As An Appropriate Forum

Substantial support exists for the general proposition that a defendant-athlete who negotiates and enters into a contract in a particular state thereby subjects himself to the jurisdiction of that state's courts, at least with respect to the enforcement of his contract.[18] This rule is especially important when an athlete's contract is negotiated in a state where neither the athlete nor the team has other permanent contacts (*e.g.*, when a college athlete negotiates a professional contract in the state where he attended college).

Notwithstanding the validity of the above-stated general proposition, most courts would probably decline to exert jurisdiction over an out-of-state defendant-athlete whose sole contact with the forum state involves the negotiation of a sports contract. This is particularly so where the plaintiff-team has no substantial association with the forum state, as the state does not have a significant policy interest in protecting the team's rights under the contract.[19] The courts which have exercised

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Deposit & Trust Co. v. Barbour, 66 N.J.L. 103, 48 A. 1008 (1901); Rawstone v. Maguire, 265 N.Y. 204, 192 N.E. 294 (1934); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 30 (1971).

15. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 30 comment a (1971).

16. *Id.*

17. *See supra* text accompanying notes 4-12.

18. *See* McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Travelers Health Ass'n v. Virginia, 339 U.S. 643 (1950); Clinic Masters, Inc. v. McCollar, 269 F. Supp. 395 (D. Colo. 1967). *See generally* Annot., 23 A.L.R.3d 551 (1969); Comment, *The Isolated Contact as a Basis of Jurisdiction Over Non-Residents*, 22 CHI. L. REV. 674 (1955).

19. Normally, the place of contracting is important for jurisdictional purposes when the plaintiff-team is a resident of the forum state. *See, e.g.*, Atwood Hatcheries v. Heisdorf & Nelson Farms, 357 F.2d 847 (5th Cir. 1966); Aucoin v. Hanson, 207 So. 2d 834 (La. App. 3d Cir. 1968); Anderson, Clayton & Co. v. Atlas Concrete Pipe, Inc., 41 Mich. App. 58, 199 N.W.2d 531 (1972). *See also* Lone Star Motor Imports, Inc. v. Citroen Cars Corp., 288 F.2d

jurisdiction over a dispute simply because a contract was executed within their state have required that a substantial part of the relationship be completed in that state.[20] Thus, mere preliminary negotiations or the single act of signing the contract in the forum state would not appear to be sufficient "minimum contacts" if the real locus of the relationship exists elsewhere.[21] Consequently, unless the team can establish a more durable or permanent association with a forum state, courts will favor the defendant-athlete and require the plaintiff-team to enforce the contract in a more appropriate forum.

3. Selecting The Forum

In determining which forum to select, the former team should consider various relevant factors, including the convenience of the forum, the existence of favorable precedent, and the existence of local bias. Additionally, a factor which is particularly important to a team attempting to obtain a negative injunction is whether an equitable decree will be enforced by sister-state courts under the full-faith-and-credit clause.[22] Thus, in a typical situation, if the former team institutes a civil proceeding in the state where the franchise is located (State A), and the athlete has already moved to join his new team in another state (State B), the former team should generally attempt to enforce its judgment in State B.

A split of authority exists regarding whether the full-faith-and-credit clause applies to the enforcement of negative injunctions. Although the Supreme Court has not definitively ruled on this issue,[23] some courts have refused to enforce negative injunctions in order to avoid responsibility for modifying and enforcing the decree in the event

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69 (5th Cir. 1961); Clinic Masters, Inc. v. McCollar, 269 F. Supp. 395 (D. Colo. 1967); Compania de Astral, S.A. v. Boston Metals Co., 205 Md. 237, 107 A.2d 357 (1954), *cert. denied*, 348 U.S. 943 (1955).

20. *See, e.g.*, Atwood Hatcheries v. Heisdorf & Nelson Farms, 357 F.2d 847 (5th Cir. 1966); Lone Star Motor Imports Inc. v. Citroen Cars Corp., 288 F.2d 69 (5th Cir. 1961); Clinic Masters, Inc. v. McCollar, 269 F. Supp. 395 (D. Colo. 1967); Henry R. Jahn & Son, Inc. v. Superior Court, 499 Cal. 2d 855, 323 P.2d 437 (1958); Aucoin v. Hanson, 207 So. 2d 834 (La. App. 3d Cir. 1968). *See generally* Annot., 23 A.L.R.3d 551 (1969).

21. *See* National Television Sales, Inc. v. Philadelphia Television Broadcasting Co., 284 F. Supp. 68 (N.D. Ill. 1968); Baughman Manufacturing Co. v. Hein, 44 Ill. App. 3d 373, 194 N.E.2d 664 (1963); Wirth v. Prenyl, 29 A.D.2d 373, 288 N.Y.S.2d 377 (1968).

22. U.S. CONST. art. IV, § 1, cls. 1-2 ("Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.").

23. *See* Reese, *Full Faith and Credit to Foreign Equity Decrees*, 42 IOWA L. REV. 183, 189 (1957). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102 comment c (1971) (refusing to take a position on this issue).

circumstances change.[24] Thus, if a court determines that the burden of retaining jurisdiction over a particular dispute is substantial, a former team might be precluded from enforcing a valid judgment against the athlete in the state where he is currently playing. Because the former team's only alternative would be to institute a new action, it should fully consider this possibility prior to selecting a particular forum.

B. Suits Against Teams

The general *in personam* jurisdiction analysis outlined above should be undertaken in determining whether jurisdiction over a team is proper in a particular forum.[25] Although the requisite "minimum contacts" will always exist in a team's home state, difficulties arise when attempting to establish jurisdiction in a foreign state.[26] In analyzing these jurisdictional problems, certain unique aspects of professional team sports are relevant, including: (1) where games are played; (2) where revenues are derived; and (3) the nature and extent of team broadcasts and recruiting efforts in the forum state.

1. Games Played In The Forum State

The number of games played against other teams in the forum state is a major factor in determining "minimum contacts."[27] Although the number of games played each year in a given state may be small,[28] the significance of these contacts should not be underestimated. Because major team sports are built on interstate competition and rivalry, fan interest and home attendance are increased with these "away-games," evincing significant forum contact. Moreover, broadcasting contracts are

24. *See* Buswell v. Buswell, 377 Pa. 487, 105 A.2d 608 (1954); *Lajoie*, 202 Pa. at 210. *See also* Rich v. Con-Stan Indus. Inc., 449 S.W.2d 323 (Tex. Civ. App. 1969); Allee v. Van Cleave, 263 S.W.2d 276 (Tex. Civ. App. 1953). *But see* Kahrs v. Verde Energy Corp., 604 F. Supp. 879, 880 (S.D. Ohio 1985) (questioning *Lajoie*).

25. *See supra* text accompanying notes 4-12.

26. *See* Manton v. California Sports, Inc., 493 F. Supp. 496 (N.D. Ga. 1980); Munchak Corp. v. Riko Enters. Inc., 368 F. Supp. 1366 (M.D.N.C. 1973); Erving v. Virginia Squires Basketball Club, 349 F. Supp. 709 (E.D.N.Y. 1972), *aff'd*, 468 F.2d 1064 (2d Cir. 1972); Baltimore Football Club, Inc. v. Superior Court, 171 Cal. App. 3d 352, 215 Cal. Rptr. 323 (1985) (in-state activities sufficient to support jurisdiction for cause of action arising out of those activities, but not for a cause of action unrelated to those activities). *See also* Martin v. Detroit Lions, Inc., 32 Cal. App. 3d 472, 108 Cal. Rptr. 23 (1973); Rodwell v. Pro Football, Inc., 45 Mich. App. 408, 206 N.W.2d 773 (1973).

27. Erving v. Virginia Squires Basketball Club, 349 F. Supp. 709 (E.D.N.Y. 1972); Hawkins v. National Basketball Ass'n, 288 F. Supp. 614, 617 (W.D. Pa. 1968); American Football League v. National Football League, 27 F.R.D. 264, 268 (D. Md. 1961).

28. *See Manton*, 493 F. Supp. at 496-97; Erving v. Virginia Squires Basketball Club, 349 F. Supp. 709 (E.D.N.Y. 1972).

dependent upon generating national interest in the sport, and league scheduling ensures that each team will make regular rounds on the national circuit.[29] Thus, games played in the forum state are not isolated insignificant events, but rather are purposeful and continuous activities constituting the very essence of professional sports.[30] However, despite the conceptual validity of this view, whether playing games in the forum state is itself sufficient to establish jurisdiction is unclear, as courts focus on the full array of contacts teams customarily maintain with the forum state.[31]

2. Team Revenues From The Forum State

A team may receive revenues generated in the forum state resulting from playing games within that state.[32] This frequently occurs where the visiting and home teams share gate receipts. If the defendant's activities within the state are economically substantial, a court will most likely conclude that sufficient "minimum contacts" exist to assert personal jurisdiction in the forum state. Moreover, even where a league agreement allocates gate receipts solely to the home team, jurisdiction may nevertheless be proper because the essential business nature of the team's contacts remains unchanged.[33] In other words, because sports teams are by their very nature interdependent, the method of distributing revenue from sporting events should not significantly alter the due process analysis.

3. Team Broadcasts and Recruiting

Teams will often have contacts other than those resulting directly from league games. These contacts may stem from the maintenance of training camps, the playing of exhibition games,[34] or the transmission of television and radio broadcasts into the state.[35] Consideration should also be given to the frequency, continuity and extent of recruiting efforts

29. *See Manton*, 493 F. Supp. at 496-97; Hawkins v. National Basketball Ass'n, 288 F. Supp. 614 (W.D. Pa. 1968).

30. *Travelers Health Ass'n*, 339 U.S. at 648.

31. *Id.*

32. *See* Eckles v. Sharman, 548 F.2d 905 (10th Cir. 1977); *Hawkins*, 288 F. Supp. at 617; *American Football League*, 27 F.R.D. at 267.

33. Erving v. Virginia Squires Basketball Club, 349 F. Supp. 709 (E.D.N.Y. 1972).

34. *See Hawkins*, 288 F. Supp. at 617.

35. *See Munchak Corp.*, 368 F. Supp. at 1369. *See also* Eckles v. Sharman, 548 F.2d 905 (10th Cir. 1977) (because sports broadcasts are relatively more important when they are local or regional — and negotiated by the team as opposed to the league — broadcasts help to demonstrate continuing and purposeful interaction with the forum state).

in the forum state,[36] as teams customarily employ scouts in various states for recruiting purposes. Although courts generally do not find jurisdiction on the basis of these secondary factors alone,[37] when combined with other salient factors, they are clearly relevant to the due process analysis and the ultimate exercise of jurisdiction.[38]

III. JUDICIAL ENFORCEMENT OF STANDARD PLAYER CONTRACTS

The various collective bargaining agreements and standard player contracts mandate that arbitration shall be the forum for resolving contract disputes.[39] Despite the fact that non-judicial dispute resolution is contractually required, courts will nevertheless intervene in two main contexts: (1) when an athlete "jumps" from one league to another and the first team tries to restrain him;[40] and (2) when an athlete believes that a team has breached his contract, and he refuses to play for that team.[41]

A. Teams' Restraint of Inter-League "Jumping"

1. Provisions In Standard Player Contracts Which Establish The Team's Exclusive Right To The Athlete's Services

Standard player contracts in the various sports establish the team's exclusive right to the athlete's services. Although the precise language of "exclusivity" clauses vary among leagues, such clauses usually contain the same basic language. Teams customarily insert clauses establishing their right to the athlete's exclusive services to bolster their action for injunctive relief should the athlete attempt to "jump" leagues.

a. Express Covenants

In the typical standard player contract, there are three types of covenants that support the team's exclusive right to an athlete's services.[42]

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36. *See* Martin v. Detroit Lions, Inc., 32 Cal. App. 3d 472, 108 Cal. Rptr. 23 (1973); *Rodwell*, 45 Mich. App. at 415, 206 N.W.2d at 775.

37. *See, e.g.*, Zimmerman v. United States Football League, 637 F. Supp. 46 (D. Minn. 1986) (where a plaintiff's cause of action does not arise from television broadcasts within the state, broadcasts alone do not constitute sufficient contacts for personal jurisdiction).

38. *See Munchak Corp.*, 368 F. Supp. at 1369.

39. *See generally* J. WEISTART AND C. LOWELL, THE LAW OF SPORTS § 4.01 (1979 & Supp. 1984); R. BERRY AND G. WONG, 1 LAW AND BUSINESS OF THE SPORTS INDUSTRIES §§ 5.30-.32 (1986). *But see* Pittsburgh Assocs. v. Parker, No. 86-1084, slip op. at 6-8 (W.D. Pa. Aug. 5, 1986) (LEXIS, Genfed library, Dist file). (The arbitrator is necessarily divested of jurisdiction when a party alleges that the contract is void due to fraud in the inducement).

40. *See, e.g.*, Cincinnati Bengals, Inc. v. Bergey, 453 F. Supp. 129 (S.D. Ohio 1974).

41. *See, e.g.*, Dryer v. Los Angeles Rams, 40 Cal. 3d 406, 709 P.2d 826, 220 Cal. Rptr. 807 (1985).

42. *See, e.g.*, NFL Contract, ¶¶ 2, 5, 8 (1975). *See also* NFL Contract ¶¶ 2-3 (1982).

The first clause consists of the athlete's promise to play for the contracting team. In most instances, the athlete promises to play "only" for the team with which he signs. The second clause limits the athlete's mobility by restricting his right to engage in other athletic activities. Although the primary intent of this provision is to minimize the athlete's exposure to injury, it also rather expansively supports a team's contention that the athlete agreed to provide his services exclusively to the contracting team.[43] The third commonly used "exclusivity" clause specifies that the athlete's services are "unique" and that the team is entitled to seek an injunction if the athlete accepts employment with another team. Needless to say, this clause is most frequently relied upon as the team's primary basis for obtaining injunctive relief.[44]

Courts are willing to enforce express negative covenants only to the extent they satisfy a judicially enunciated test of "reasonableness."[45] In analyzing the "reasonableness" of the covenant, courts typically focus on whether the restriction's duration is equitable under all of the circumstances. Although "reasonableness" issues relating to negative covenants are not frequently litigated in the context of major team sports (primarily because the restriction usually exists only for the contracted period), occasional cases involving individual sports such as boxing and tennis have examined these questions.[46]

b. Implied Covenants

In the rare instance where an express covenant establishing the team's exclusive right to services does not appear in the athlete's contract, the team may seek injunctive relief on the theory that an implied covenant exists. Both the commentators and the courts have provided support for the general proposition that a covenant of exclusive services

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43. Such a clause will restrict a player from competing in an unrelated sport, irrespective of whether such activity is professional or amateur. *See* J. WEISTART AND C. LOWELL, THE LAW OF SPORTS § 4.10 (Supp. 1984) (citing Toronto Blue Jays Baseball Club v. Boston Celtics Corp., No. 81-5263 slip op. (S.D.N.Y. Oct. 19, 1981) (LEXIS, Genfed library, Dist file)).

44. *See, e.g.*, Minnesota Muskies, Inc. v. Hudson, 294 F. Supp. 979, 982 (M.D.N.C. 1969); Connecticut Professional Sports Corp. v. Heyman, 276 F. Supp. 618, 619 n.3 (S.D.N.Y. 1967). *See also* New England Patriots Football Club, Inc. v. University of Colo., 592 F.2d 1196, 1198 n.1 (1st Cir. 1979).

45. *See* Madison Square Boxing, Inc. v. Shavers, 434 F. Supp. 449, 452 (S.D.N.Y. 1977). *See also* Stevens, *Involuntary Servitude by Injunction*, 6 CORNELL L.Q. 235, 263-65 (1921).

46. *See Shavers*, 434 F. Supp. at 452; Machen v. Johansson, 174 F. Supp. 522, 528 (S.D.N.Y. 1959); Madison Square Garden Corp. v. Braddock, 19 F. Supp. 392, 393 (D.N.J.), *aff'd*, 90 F.2d 924 (3d Cir. 1937); Arena Athletic Club v. McPartland, 41 A.D. 352, 58 N.Y.S. 477 (1899). *See generally* Note, *Enforcement of Personal Service Contracts by Injunction*, 34 TUL. L. REV. 621 (1960).

will be implied if the contract language and the intent of the parties sustain such an inference.[47] In determining the intent of the parties, courts characteristically focus on whether the arrangement was intended to be "exclusive."[48] In major team sports, such an inference is easily established, at least with regard to playing other professional sports.

2. Teams' Remedies

When a contract is breached in the commercial context, money damages will usually make the plaintiff "whole," thereby providing an adequate remedy at law which theoretically puts the plaintiff in the same position he otherwise would have been in had the defendant not breached the contract. However, in sports litigation, the adequacy of money damages is questionable because of the "uniqueness" of a particular athlete's services.[49] Accordingly, if a team concludes that money damages will not sufficiently redress the athlete's breach, it will usually seek some form of equitable relief.

a. Equitable Remedies

Notwithstanding occasional pronouncements to the contrary, a team cannot obtain specific performance of a personal service contract.[50] There are two primary justifications for this rule: (1) courts are reluctant to issue an injunction compelling employment because of the inherent logistical problems in effectively supervising and enforcing such decrees; and (2) courts have historically viewed this form of affirmative relief as violating public policy and the thirteenth amendment, as it subjects individuals to a form of involuntary servitude. However, as noted previously,[51] a team can obtain specific performance of a negative covenant, thereby prohibiting the athlete from playing for another team during the pendency of the contract.[52]

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47. RESTATEMENT OF CONTRACTS § 380 (1932); *see also Shavers*, 434 F. Supp. at 452 n.11.

48. *See supra* note 47.

49. Some courts have concluded that money damages are adequate compensation for the loss of an athlete. *See Heyman*, 276 F. Supp. at 621; Brooklyn Baseball Club v. McGuire, 116 F. 782, 783 (E.D. Pa. 1902); Columbus Baseball Club v. Reiley, 11 Ohio Dec. 272, 275 (1891); Linseman v. World Hockey Ass'n, 439 F. Supp. 1315 (D. Conn. 1977). *See also* Comment, *Enforceability of Professional Sports Contracts — What's the Harm in It?*, 35 SW. L.J. 803, 811-13 (1981).

50. RESTATEMENT OF CONTRACTS § 379 (1932).

51. *See supra* text accompanying notes 42-48.

52. Lumley v. Wagner, 42 Eng. Rep. 684 (Ch. 1852). *See also* Nassau Sports v. Peters, 352 F. Supp. 870, 875 (E.D.N.Y. 1972); Long Island Am. Ass'n Football Club, Inc. v. Manrodt, 23 N.Y.S.2d 858 (Sup. Ct. 1940); American League Baseball Club of Chicago v. Chase, 86 Misc.

Although money damages may be available, a negative injunction is usually the team's preferred remedy. In order to qualify for this form of equitable relief, the team must satisfy the following threshold requirements of equity jurisdiction: (1) the "unique services" requirement; (2) the "irreparable harm" requirement; and (3) the "economic competition" requirement.

(1) The "Unique Services" Requirement

Equitable relief is generally unavailable unless a plaintiff-team can demonstrate that its remedies at law are inadequate.[53] If an athlete's knowledge, skill, and ability are "unique," money damages will be deemed inadequate. This conclusion is predicated on the view that no two athletes are identical in terms of what they provide to a team. Accordingly, because money damages may be unobtainable due to the difficulty in precisely quantifying the value of the athlete's services, uniqueness is an important characteristic in establishing a basis for equitable relief.[54]

While the issue of uniqueness received considerable attention under early case law,[55] the proposition that all athletes possess unique knowledge, skill, and ability appears to be universally accepted today.[56] Courts typically[57] conclude that "[p]rofessional players in the major baseball, football and basketball leagues have unusual talents and skills or they would not be so employed. Such players . . . are not easily replaced."[58] Indeed, a review of the existing case law in this area reveals that not a

441, 149 N.Y.S. 6 (Sup. Ct. 1914); Metropolitan Exhibition Co. v. Ward, 9 N.Y.S. 779 (Sup. Ct. 1890); *Lajoie*, 202 Pa. at 210, 51 A. at 973; Comment, *supra* note 49, at 805-07.

53. 1 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 216-22 (5th ed. 1941).

54. *See* Comment, *supra* note 49, at 806; Comment, *Enforcement Problems of Personal Service Contracts in Athletics*, 6 TULSA L.J. 40 (1968).

55. *See* Allegheny Baseball Club v. Bennett, 14 F. 257 (W.D. Pa. 1882); Columbus Baseball Club v. Reiley, 11 Ohio Dec. 272 (1891). Modern courts continue to address the issue, although they almost always conclude the athlete is unique. *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"); *Peters*, 352 F. Supp. at 876 ("The primary requisite for enforcing . . . the contract . . . is that the player be an athlete of exceptional talent."); *Harris*, 348 S.W.2d at 42 (player must be "a person of exceptional and unique knowledge, skill and ability"). *See generally* Comment, *supra* note 49, at 807-11.

56. *Peters*, 352 F. Supp. at 876; Central New York Basketball, Inc. v. Barnett, 19 Ohio Op. 2d 130, 141, 181 N.E.2d 506, 517 (1961). *See generally* L. SOBEL, PROFESSIONAL SPORTS AND THE LAW (1977 & Supp. 1981). *See also* Brennan, *Injunction Against Professional Athletes Breaching Their Contracts*, 34 BROOKLYN L. REV. 61, 70 (1967).

57. *See, e.g., Barnett*, 19 Ohio Op. 2d at 141.

58. *Id.* Barnett was a better than average player — he ranked 19th (out of 100) in scoring, but did not make the East-West All Star Game or the U.S. Basketball Writers' All-NBA Team

single reported decision has permitted an athlete to "jump" leagues on the basis that he lacked unique skill. One court has even gone so far as to hold that two rookies who had not yet obtained any professional experience possessed sufficiently unique skills to justify an injunction in favor of the former team.[59] Thus, satisfying the requirement of "uniqueness" is a virtual *fait accompli* in cases involving professional athletes.[60]

(2) The "Irreparable Harm" Requirement

Before a court will grant equitable relief, the plaintiff-team must also demonstrate the likelihood of "irreparable harm"[61] absent the issuance of an injunction. Irreparable harm is essentially a requirement that the plaintiff not have an adequate remedy at law.[62] If a plaintiff-team is "irreparably harmed," the amount of damages will probably be too speculative and uncertain for a court to award money damages.[63] Thus, because legal remedies are inadequate, courts consider the availability of injunctive relief.[64]

As a general proposition, the "irreparable harm" requirement in the sports context is mere surplusage because it is satisfied by virtue of the athlete's possession of unique skills.[65] However, in *Boston Professional Hockey Ass'n, Inc. v. Cheevers*,[66] the district court disregarded this shorthand analysis and instead assessed the effect of the loss of the athlete's services on the former team's general economic position.[67] In *Cheevers*, the district court failed to find irreparable harm, notwithstanding the fact

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for 1961. Nevertheless, the court concluded that he possessed skills sufficiently "unique" to justify the imposition of equitable relief. *Id.*

59. Winnipeg Rugby Football Club v. Freeman, 140 F. Supp. 365 (N.D. Ohio 1955). *See also Harris*, 348 S.W.2d at 42.

60. *Peters*, 352 F. Supp. at 876; Safro v. Lakofsky, 184 Minn. 336, 238 N.W. 641 (1931). *See generally* Comment, *Professional Athletic Contracts and the Injunctive Dilemma*, 8 J. MAR. J. PRAC. & PROC. 437, 440-44 (1975).

61. *See Bergey*, 453 F. Supp. at 138; Professional Sports, Ltd. v. Virginia Squires Basketball Club Partnership, 373 F. Supp. 946, 948 (W.D. Tex. 1974); *Lajoie*, 202 Pa. at 210; Comment, *supra* note 49, at 811-13.

62. *Lajoie*, 202 Pa. at 210 (holding that irreparable harm exists where there is no accurate measure for assessing money damages).

63. *Id.* at 213.

64. *Id.*

65. *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 (N.D. Cal. 1969), *aff'd*, 419 F.2d 472 (9th Cir. 1969). *See also Professional Sports Ltd.*, 373 F. Supp. at 948-49.

66. 348 F. Supp. 261 (D. Mass. 1972), *remanded on other grounds*, 472 F.2d 127 (1st Cir. 1972).

67. *Id. See also* Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972).

that the athletes possessed "unique skills."[68]

In spite of the *Cheevers* court's departure from the prevailing trend, the decision does not appear to represent a permanent change in the law. Additionally, *Cheevers* appears to be of dubious precedential value because the appellate court strongly questioned the validity of the lower court's irreparable harm analysis.[69] This interpretation of the effect of the decision appears sound, as subsequent cases have expressly "balked" on the *Cheevers* analysis and have continued to endorse the traditional irreparable harm/unique skills test.[70] Thus, the "irreparable harm" requirement is probably a mere formality in the sports context since athletes' skills are universally deemed unique.

(3) The "Economic Competition" Requirement

Numerous courts require a showing that the athlete "jumped" to a team in direct economic competition with the original team before an injunction will be issued.[71] This requirement stems from the theory that an injunction should be granted only when damages are caused by breach of the negative covenant, and not solely from breach of the affirmative promise to play for the team.[72] However, a majority of courts have rejected this theory and will issue a negative injunction for breach of the affirmative covenant so long as there is no adequate remedy at law.[73]

It is important to note that courts frequently ignore the "economic competition" requirement because the athlete has "jumped" to a rival team in the same sport. Major sports leagues are considered as operating in a national, as opposed to a regional market, so even if the rival league

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68. Boston Professional Hockey Ass'n, Inc. v. Cheevers, 348 F. Supp. 261 (D. Mass. 1972), *remanded on other grounds*, 472 F.2d 127 (1st Cir. 1972).

69. *Cheevers*, 472 F.2d at 128.

70. *See Hampson*, 355 F. Supp. at 736. *See also* Matuszak v. Houston Oilers, Inc., 515 S.W.2d 725 (Tex. Civ. App. 1974).

71. Harrisburg Base-Ball Club v. Athletic Ass'n, 8 Pa. C. 337, 341-42 (1890). *See* Frederick Bros. Artists Corp. v. Yates, 61 N.Y.S.2d 478, 480 (Sup. Ct. 1946), *rev'd on other grounds*, 271 A.D. 69, 62 N.Y.S.2d 714 (1946). *See also New England Patriots Football Club, Inc.*, 592 F.2d at 1200; Toronto Blue Jays Baseball Club v. Boston Celtics Corp., No. 81-5263 slip op. (S.D.N.Y. Oct. 19, 1981) (LEXIS, Genfed library, Dist file); RESTATEMENT OF CONTRACTS § 380 comment g (1932); Comment, *Injunctions in Professional Athletes' Contracts — An Overused Remedy*, 43 CONN. B.J. 538, 552-54 (1969).

72. *See* Pound, *The Progress of the Law, 1918-1919 Equity*, 33 HARV. L. REV. 420, 438-40 (1919-20); Tannenbaum, *Enforcement of Personal Service Contracts in the Entertainment Industry*, 42 CALIF. L. REV. 18, 20 (1954); 5 WILLISTON, CONTRACTS § 1450 (rev. ed. 1937); RESTATEMENT OF CONTRACTS § 380(1)(a) (1932) (co-authored by Williston). *See also Harrisburg Base-Ball Club*, 8 Pa. C. at 337; Comment, *Professional Athletic Contracts and the Injunctive Dilemma*, 8 J. MAR. J. PRAC. & PROC. 437, 445-46 (1975).

73. Nassau Sports v. Peters, 352 F. Supp. 870 (E.D.N.Y. 1972).

is on the other side of the country, the teams will necessarily be viewed as competitive.[74] Accordingly, the absence of local rivalry is not considered an appropriate basis for the denial of equitable relief.[75]

Even where the athlete "jumps" to a team in a different sport, an injunction may properly be issued. Thus, in *Toronto Blue Jays Baseball Club v. Boston Celtics Corp.*,[76] the Toronto Blue Jays successfully obtained an injunction preventing Danny Ainge from negotiating to play for the Boston Celtics, notwithstanding the fact that the teams garnered revenue from distinct markets. The court concluded that because various sports teams compete for fans' entertainment dollars, teams may be deemed in direct economic competition even though they perform in different cities and participate in different sports.

However, where an athlete "jumps" to a team in another country — other than Canada — courts will probably deny injunctive relief on the basis of lack of economic competition. If the athlete "jumps" to a Canadian team, the question whether an injunction will issue is wholly contingent upon the particular sport implicated in the suit. Thus, because the market for hockey presumably includes both the United States and Canada,[77] direct competition would likely be held to exist and the athlete could be enjoined. In determining whether Canada should be included in the relevant market for sports other than hockey, courts will be forced to proceed on a case-by-case basis.

b. Legal Remedies — Money Damages

Although in most instances teams are only interested in obtaining athletes' professional services, there are circumstances where teams will be forced to settle for money damages. A typical example involves cases where athletes, having successfully been enjoined from "jumping" to another team, decide to "sit out" for the period of the injunction or retire. Similarly, money damages may be desired as the exclusive remedy where a dispute has engendered sufficient negative publicity to result in the athlete's loss of popularity. A court might also order an award of money damages where it is the only form of relief which will protect the rights of both the team and the athlete.[78]

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74. American Football League v. National Football League, 205 F. Supp. 60, 65 (D. Md. 1962), *aff'd*, 323 F.2d 124, 129-30 (4th Cir. 1963).

75. *Id.*

76. Toronto Blue Jays Baseball Club v. Boston Celtics Corp., No. 81-5263 slip op. (S.D.N.Y. Oct. 19, 1981) (LEXIS, Genfed library, Dist file).

77. San Francisco Seals, Ltd. v. National Hockey League, 379 F. Supp. 966, 969 (C.D. Cal. 1974).

78. *See supra* note 49. *See also Cheevers*, 348 F. Supp. at 269.

It should be emphasized that in actions for money damages, recovery may be obtained only where the team can prove damages with reasonable certainty.[79] Although this proposition is easily understood in the abstract, valuation questions in the sports context are fraught with difficulty due to the "uniqueness" of athletes' services. Nevertheless, there are three distinct but related theories plaintiff-teams may employ to adequately quantify their losses.

The first theory would permit teams to seek damages for expenses incurred in connection with securing a substitute athlete. Damages would consist of the contractual salary differential between the existing athlete and the substitute performer, and whatever incidental costs the team incurred in locating and signing the substitute performer. In addition, the team would presumably be entitled to consequential damages foreseeably related to the athlete's breach.[80] The primary difficulty with this damage formula relates to whether the substitute athlete will be viewed as "comparable" to the original performer. Because athletes are not fungible, a court might conclude that any salary differential resulted from the hiring of a more gifted substitute, thereby resulting in no net loss to the team. Alternatively, a court might conclude that the team simply paid more than market value for the replacement athlete. Thus, damages may be limited solely to the cost of locating and signing the substitute performer.

A second methodology for measuring damages focuses on a team's *overall* economic loss resulting from an athlete's departure.[81] This formula is similar to the differential value theory, except damages would be limited to reduced gate, concession, and broadcast revenues, rather than the cost of obtaining a substitute performer. Although this damage formula may have considerable appeal to a particular team, it obviously presents causation difficulties relating to whether such losses were proximately caused by the athlete's "jump" to another league.

A third measure of damages focuses on the salary differential between the athlete's original contract and his present contract. While this theory avoids the quantification problems discussed above,[82] there is little case support for its applicability in the sports context.[83] Moreover, this

79. *See* Comment, *supra* note 49, at 813-18.

80. *Eckles*, 548 F.2d at 910.

81. *See* Lemat Corp. v. Barry, 275 Cal. App. 2d 671, 675, 80 Cal. Rptr. 240, 245 (1969) (trial court used this measure of calculating damages, although damages were eventually denied because the team obtained an injunction).

82. *See supra* text accompanying notes 80-81.

83. *See* Roth v. Speck, 126 A.2d 153 (D.C. Mun. App. 1956); Triangle Waist Co. v. Todd, 223 N.Y. 27, 119 N.E. 85 (1918). *See also* Annot., 61 A.L.R.2d 1008, 1015-16 (1958).

methodology may be undesirable from the team's standpoint since its losses will typically exceed the net differential between the original and present contract. Nevertheless, this measure of damages should be considered because its application will deter athletes from "jumping" to other teams solely for financial benefit.[84]

3. Athletes' Defenses

Any defect which could otherwise be raised as a defense to a breach of contract action should be evaluated in the sports context. For example, the athlete may assert that his standard player contract is invalid owing to technical deficiencies in valid formation. If no valid offer and acceptance have been tendered,[85] or if the parties merely "agreed to agree,"[86] the contract will be held unenforceable. Similarly, if the offer made to an athlete is devoid of certainty and definiteness of terms (*e.g.*, salary or length of service), or the team failed to comply with the applicable Statute of Frauds, the contract will be deemed voidable.[87] The athlete may also assert defenses of fraud, duress, undue influence, incapacity or unconscionability, and any additional contract defenses established under applicable state law.[88]

a. Equitable Defenses

Even when a former team can establish the necessary prerequisites for equitable relief, courts nevertheless have wide discretion in deciding whether to grant such relief.[89] In determining whether an injunction should issue, courts balance the competing needs of teams, players, and

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84. Notwithstanding the above, it should be emphasized that even if the team is willing to accept money damages, the remedy may still be unavailable due to the difficulty of proving damages with sufficient certainty.

85. *See* Detroit Football Co. v. Robinson, 283 F.2d 657 (5th Cir. 1960); Los Angeles Rams Football Club v. Cannon, 185 F. Supp. 717 (S.D. Cal. 1960).

86. *See* Metropolitan Exhibition Co. v. Ewing, 42 F. 198, 201-02 (S.D.N.Y. 1890); Allegheny Baseball Club v. Bennett, 14 F. 257 (W.D. Pa. 1882).

87. *See* Houston Oilers, Inc. v. Neely, 361 F.2d 36, 42-43 (10th Cir.), *cert. denied*, 385 U.S. 840 (1966).

88. *See* Pittsburgh Assocs. v. Parker, No. 86-1084, slip op. at 6-8 (W.D. Pa. Aug. 5, 1986) (LEXIS, Genfed library, Dist file) (the court implicitly ruled that all standard contract defenses, including "fraudulent inducement" and "material failure of consideration," may apply).

89. *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; focus on 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

society at large.[90] In attempting to challenge the propriety of equitable relief, athletes should invoke the following equitable defenses which historically have thwarted the granting of injunctive relief: (1) unclean hands (2) lack of mutuality (3) perpetuality or illegality; and (4) unconscionability.

(1) Unclean Hands

A fundamental principle of equity is that "he who comes into equity must come with clean hands."[91] Because the primary focus of the doctrine is on the party requesting relief, the defense may be raised even though the defendant is also guilty of inequitable conduct.[92] In sports litigation, the unclean hands defense is typically asserted in two situations: (1) where an athlete "jumps" to another team and subsequently rejoins his original team; and (2) where the team has engaged in improper conduct at the time of the original contract.

When an athlete defects to another team and subsequently attempts repatriation, the second team will often institute an action to enforce its negative covenant guaranteeing the athlete's exclusive services.[93] The athlete will typically defend on the ground that the second team is precluded from equitable relief because it impermissibly interfered with the original employment agreement.[94] Courts will generally uphold the unclean hands defense in this situation.[95] However, where the new contract requires the athlete's services to begin after his original contract expires, the court will uphold the countervailing public policy supporting free

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mutuality and harshness of contracts). *See also* 1 R. BERRY AND G. WONG, LAW AND BUSINESS OF THE SPORTS INDUSTRIES § 2.14 (1986).

90. *See* New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc., 291 F.2d 471 (5th Cir. 1961). *See also* Comment, *Enforceability of Professional Sports Contracts — What's the Harm in It?*, 35 SW. L.J. 803, 807 (1981).

91. *See* Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806, 814 (1945); 2 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE, §§ 397-404 (5th ed. 1941).

92. *See, e.g.*, New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc., 291 F.2d 471 (5th Cir. 1961); Washington Capitols Basketball Club, Inc. v. Barry, 304 F. Supp. 1193, 1199 (N.D. Cal. 1969), *aff'd*, 419 F.2d 472 (9th Cir. 1969) (impropriety of defendant's conduct does not aid the case of an otherwise culpable plaintiff).

93. *See, e.g.*, Minnesota Muskies, Inc. v. Hudson, 294 F. Supp. 979 (M.D.N.C. 1969).

94. *See* Munchak Corp. v. Cunningham, 331 F. Supp. 872 (M.D.N.C. 1971), *rev'd*, 457 F.2d 721 (4th Cir. 1972); Washington Capitols Basketball Club, Inc. v. Barry, 304 F. Supp. 1193 (N.D. Cal. 1969), *aff'd*, 419 F.2d 472 (9th Cir. 1969); Minnesota Muskies v. Hudson, 294 F. Supp. 979 (M.D.N.C. 1969); Weegham v. Killefer, 215 F. 168 (W.D. Mich. 1914), *aff'd*, 215 F. 289 (6th Cir. 1914).

95. Munchak Corp. v. Cunningham, 331 F. Supp. 872 (M.D.N.C. 1971), *rev'd*, 457 F.2d 721 (4th Cir. 1972).

competition and disallow the defense.[96] Additionally, one court disallowed the defense where the new team paid the athlete to "sit out" his option year, concluding that an athlete always has the right to sideline himself and not play at all.[97]

A team's "improper conduct" need not amount to criminality or provide a basis for a legal claim to support a charge of unclean hands.[98] Virtually any form of dishonesty or improperly motivated behavior will provide a basis for precluding the granting of equitable relief.[99] For example, the defense may be asserted where a professional team signs an athlete before his college season has ended — thereby resulting in the loss of college eligibility — and the athlete finishes the college season and plays in post-season tournaments.[100] If both parties agree to keep the contract secret, and the athlete later signs a more lucrative contract with another team, the original team's request for injunctive relief may be denied.[101]

A collateral issue which may arise in connection with the unclean hands defense is whether an assignment of the contract to a new team vitiates the athlete's defense. If the unclean hands defense is based on an alleged contractual defect (such as requiring the services of the athlete before the original contract expired), then it appears that the athlete's defense will survive the assignment.[102] However, if the defense is predicated on the theory that the contract was secured by improper means,

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96. *Id.* (where the new agreement does not require that the player perform under the new contract until after the expiration of the original contract, the new club has not acted with "unclean hands"); Washington Capitols Basketball Club, Inc. v. Barry, 304 F. Supp. 1193 (N.D. Cal. 1969), *aff'd*, 419 F.2d 472 (9th Cir. 1969); Minnesota Muskies v. Hudson, 294 F. Supp. 979 (M.D.N.C. 1969) (even if the former team has not yet exercised its option, the new club would be acting with "unclean hands" if it signed the athlete to play during the option-year of the original contract); World Football League v. Dallas Cowboys Football Club, Inc., 513 S.W.2d 102 (Tex. Civ. App. 1974).

97. Munchak Corp. v. Cunningham, 457 F.2d 721 (4th Cir. 1972).

98. *See* New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc., 291 F.2d 471 (5th Cir. 1961) (conduct need not be criminal nor need it give rise to a legal claim).

99. *Id.*

100. *See* NCAA Manual of the National Collegiate Athletic Association, CONST. art. 3-1, rules 12-13 (1986).

101. This was the precise fact situation in *New York Football Giants, Inc.*, 291 F.2d at 472-74, where the court concluded that deceitful conduct was sufficient to give rise to the defense. However, on similar facts, the court in Houston Oilers, Inc. v. Neely, 361 F.2d 36 (10th Cir. 1966), granted an injunction holding that neither the early signing nor the failure to publicize the contract was illegal or inequitable. A court's expansive discretion in equitable matters is perhaps the best explanation for this inconsistency, although the *Giants* case doctrinally offers the better rule. *See* Comment, *Contractual Rights and Duties of the Professional Athlete — Playing the Game in a Bidding War*, 77 DICK. L. REV. 352, 371-79 (1972-73).

102. *See Hudson*, 294 F. Supp. at 990.

the answer is uncertain.[103] Although the case law in this area is not uniform, the better view is that the assignee of a contract is not a wrongdoer, and the athlete should not be permitted to successfully assert the defense against the assignee.[104]

(2) Lack Of Mutuality

Although mutuality has numerous meanings in various contexts, the term most frequently refers to the required reciprocal exchange of consideration between the promisor and the promisee to a bilateral contract. In the sports context, mutuality has a specialized meaning which denotes a required mutuality of remedy[105] or obligation.[106] Notwithstanding the fact that lack of mutuality was a primary defense in early sports cases,[107] today the doctrine is all but dead.[108] The modern focus in sports cases is not on mutuality *per se*, but rather on whether equity will enforce an unfair bargain.[109]

(3) Perpetuality And Illegality

Professional sports contracts frequently bind the athlete to a term of years, while the team is vested with the right to terminate on a few days notice.[110] Standard player contracts also typically provide the team with a unilateral option to renew the contract. From the athlete's standpoint, if no limit is set on the number of times the renewal option may be exercised, the team effectively has a perpetual right to the athlete's services.[111] Because of the oppressive nature of such clauses, option

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103. *Id.*

104. *See Washington Capitols Basketball Club, Inc.*, 304 F. Supp. at 1199.

105. Lack of mutuality of remedy is present when the club can obtain specific performance of the player's negative covenant, but the player cannot obtain specific performance of the club's obligations owing to its power to terminate the contract.

106. Lack of mutuality of obligation occurs when the player is bound for some definite period of time (*e.g.*, one year with an option on the part of the club to renew for another year) while the club can terminate its obligation at any time or upon short notice (*e.g.*, ten days).

107. *See* Brooklyn Baseball Club v. McGuire, 116 F. 782 (E.D. Pa. 1902); Cincinnati Exhibition Co. v. Johnson, 190 Ill. App. 630 (1914); American Base Ball & Athletic Exhibition Co. v. Harper, 54 CENT. L.J. 449 (Cir. Ct. St. Louis 1902); American League Baseball Club of Chicago v. Chase, 86 Misc. 441, 149 N.Y.S. 6 (Sup. Ct. 1914); Metropolitan Exhibition Co. v. Ward, 9 N.Y.S. 779 (Sup. Ct. 1890); Harrisburg Base-Ball Club v. Athletic Ass'n, 8 Pa. C. 337 (1890); Philadelphia Ball Club, Ltd. v. Hallman, 8 Pa. C. 57 (1890).

108. *See* RESTATEMENT OF CONTRACTS § 372 (1932), which suggests that the requirement of mutuality of remedy be abandoned: "The 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." *Id.*

109. *See* Connecticut Professional Sports Corp. v. Heyman, 276 F. Supp. 618 (S.D.N.Y. 1967); *Manrodt*, 23 N.Y.S.2d at 860.

110. *See, e.g., Chase*, 86 Misc. at 466-67, 149 N.Y.S. at 20; *Ward*, 9 N.Y.S. at 783.

111. *Compare* Central New York Basketball, Inc. v. Barnett, 19 Ohio Op. 2d 130, 134, 181

arrangements of this sort have been attacked on grounds of illegality.[112] Thus, a contract may be held illegal because it subjects the athlete to perpetual, involuntary servitude, or otherwise operates as an unlawful restraint of trade.[113] However, changes in standard player contracts resulting from litigation and collective bargaining have reduced the usefulness of the illegality defense.[114] Thus, current standard player contracts are much less susceptible to a claim of involuntary servitude or restraint of trade.[115]

(4) Unconscionability

As in any other contractual setting, an athlete may assert unconscionability as an affirmative defense.[116] Modern courts scrutinize the fundamental fairness of contracts, requiring that terms fairly proportion the rights and duties of the contracting parties. In sports litigation, unconscionability has particular applicability in challenging reserve or option clauses, which are common in standard player contracts. If contract terms are sufficiently harsh and oppressive, modern courts will simply refuse to enforce those terms.[117] Although an attack on option or reserve clauses predicated on illegality may fail, an appeal to the fairness of the court may still succeed, as courts retain discretion to deny enforcement of unconscionable agreements.[118]

When courts take action to enjoin a "jump," some authority exists for the proposition that the defendant-athlete's rights will be protected by examining whether the former team will satisfy all of its obligations

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N.E.2d 506, 510 (1961) (interpreting such a contract to be renewable for one year only) *with* Nassau Sports v. Hampson, 355 F. Supp. 733, 735 (D. Minn. 1972) (professional hockey contract found to be for perpetual services).

112. *See Harper*, 54 CENT. L.J. at 454; *Chase*, 86 Misc. at 466-67, 149 N.Y.S. at 20. *See also* Flood v. Kuhn, 316 F. Supp. 271, 281-82 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd on other grounds*, 407 U.S. 258 (1972). *See generally* Schneiderman, *Professional Sports: Involuntary Servitude and the Popular Will*, 7 GONZ. L. REV. 63 (1971); Note, *Reserve Clauses in Athletic Contracts*, 2 RUT.-CAM. L.J. 302 (1970); Comment, *Injunctions in Professional Athletes' Contracts — An Overused Remedy*, 43 CONN. B.J. 538, 550-52 (1969).

113. Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462 (E.D. Pa. 1972) (Sherman Act, 15 U.S.C. § 2 (1973), applied to bar hockey reserve clause).

114. *See Harris*, 348 S.W.2d at 42 (option clause delimited by provision stating that "after such renewal this contract shall not include a further option to the club to renew the contract").

115. *See, e.g.*, Flood v. Kuhn, 316 F. Supp. 271 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd on other grounds*, 407 U.S. 258 (1972).

116. *See supra* text accompanying notes 85-88. *See also* Connecticut Sports Corp. v. Heyman, 276 F. Supp. 618 (S.D.N.Y. 1967).

117. *See supra* note 116.

118. *Id.*

under the contract — the most important of which are the former team's ability and willingness to continue paying the athlete's salary.[119] Some courts will ensure this protection by issuing a conditional injunction.[120]

b. Other Defenses

(1) Lack Of Commissioner's Approval

Athletes have been successful in the past in avoiding their contracts when the Commissioner's signature was a condition precedent to its enforceability, and the signature was not obtained.[121] However, current standard player contracts provide that the contract is enforceable immediately, although a condition subsequent is provided whereby the Commissioner can invalidate the contract within a specified period of time.[122] Thus, this defense is currently of little use.

(2) Team Concurrently Requests An Injunction And Arbitration

Teams may enforce the parties' agreement to arbitrate contractual disputes,[123] and many courts will also grant a preliminary injunction to maintain the status quo until arbitration is completed.[124] However, when both types of relief are requested, some courts will order arbitration but forego granting equitable relief, usually on the ground that the issuance of a temporary injunction is prohibited by the Federal Arbitration Act[125] which expressly limits judicial intervention until after arbitration is completed.[126] Obviously, this interpretation of the Federal Arbitration Act may potentially result in the athlete continuing to breach the contract during the pendency of the arbitration proceeding.[127]

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119. *See Manrodt*, 23 N.Y.S.2d at 860-61; RESTATEMENT OF CONTRACTS § 373 (1932).

120. *See supra* note 119.

121. Detroit Football Co. v. Robinson, 186 F. Supp. 933 (E.D. La. 1960), *aff'd*, 283 F.2d 657 (5th Cir. 1960); Los Angeles Rams Football Club v. Cannon, 185 F. Supp. 717 (S.D. Cal. 1960).

122. *See, e.g.*, NFL Standard Player Contract § 19 (1982).

123. Cincinnati Bengals, Inc. v. Thompson, 553 F. Supp. 1011 (S.D. Ohio 1983); Nassau Sports v. Peters, 352 F. Supp. 870 (E.D.N.Y. 1972).

124. *See supra* note 123.

125. 9 U.S.C. § 3 (1982).

126. *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. McCollum, 469 U.S. 1127 (1985) (memorandum decision denying certiorari on precisely this issue; White and Blackmun, JJ., dissenting).

127. Albatross S.S. Co. v. Manning Bros., 95 F. Supp. 459 (S.D.N.Y. 1951). *But see* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Shubert, 577 F. Supp. 406 (M.D. Fla. 1983) (court indicated that while it would normally not grant both remedies, such relief might be available if the employment contract specifically contemplated both remedies).

B. Athletes' Remedies Against Breaching Teams

Athletes have occasionally attempted to resort to the courts when alleged breaches involve improper removal of the athlete from the roster,[128] wrongful termination,[129] enforcement of injury provisions,[130] and fraud.[131] Teams usually respond by requesting that the court compel arbitration and stay or dismiss the action.[132] Upon a request for judicial intervention, the court must initially determine whether a valid arbitration clause exists and whether the dispute falls within the parameters of that clause. Additionally, a recent district court decision held that since the right to arbitration is dependent upon the existence of a valid contract, courts possess jurisdictional authority to determine whether the contract compelling arbitration is void *ab initio*.[133] Because federal law generally preempts state law on questions of arbitration, federal courts may assert jurisdiction to determine arbitrability even if a similar state court action is pending.[134] Insofar as courts are obligated to follow federal policy favoring arbitration, the parties will be directed to settle through the agreed upon manner unless the arbitration clause cannot be construed in any manner to cover the dispute in question.[135]

A dispute will be viewed as excluded from a broad arbitration provi-

128. Dryer v. Los Angeles Rams, 40 Cal. 3d 406, 709 P.2d 826, 220 Cal. Rptr. 807 (1985).

129. Kings Professional Basketball Club, Inc. v. Green, 597 F. Supp. 366 (W.D. Mo. 1984); Davis v. Pro Basketball, Inc., 381 F. Supp. 1 (S.D.N.Y. 1974).

130. Hennigan v. Chargers Football Co., 431 F.2d 308 (5th Cir. 1970); Chuy v. Philadelphia Eagles Football Club, 431 F. Supp. 254 (E.D. Pa. 1977); Brinkman v. Buffalo Bills Football Club - Division of Highwood Service, Inc., 433 F. Supp. 699 (W.D.N.Y. 1977); Sample v. Gotham Football Club, Inc., 59 F.R.D. 160 (S.D.N.Y. 1973). *See also* Pittsburgh Assocs. v. Parker, No. 86-1084, slip op. at 6-8 (W.D. Pa. Aug. 5, 1986) (LEXIS, Genfed library, Dist file).

131. Erving v. Virginia Squires Basketball Club, 468 F.2d 1064 (2d Cir. 1972).

132. *See, e.g.*, Kings Professional Basketball Club, Inc. v. Green, 597 F. Supp. 366 (W.D. Mo. 1984). *But see* Hennigan v. Chargers Football Co., 431 F.2d 308 (5th Cir. 1970); Chuy v. Philadelphia Eagles Football Club, 431 F. Supp. 254 (E.D. Pa. 1977); Sample v. Gotham Football Club, Inc., 59 F.R.D. 160 (S.D.N.Y. 1973). In all three cases, the courts looked at various injury provisions in the NFL contract with no mention of arbitration. These exceptions to the general rule mandating arbitration may have been overruled by the addition of an exclusive injury grievance section to the NFL Standard Player Contract (*see* NFL Standard Player Contract § 13 (1982)). The *Brinkman* court seemed to acknowledge this in declining to examine an "injury" complaint owing to plaintiff's failure to follow mandatory procedures. *Brinkman*, 433 F. Supp. at 702-04.

133. *See* Pittsburgh Assocs. v. Parker, No. 86-1084, slip op. at 6-9 (W.D. Pa. Aug. 5, 1986) (LEXIS, Genfed library, Dist file).

134. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); Kings Professional Basketball Club, Inc. v. Green, 597 F. Supp. 366 (W.D. Mo. 1984).

135. United Steelworkers of Am. v. Warrior & Gulf Navigation Corp., 363 U.S. 574, 582-83 (1960); Dryer v. Los Angeles Rams, 40 Cal. 3d 406, 709 P.2d 826, 220 Cal. Rptr. 807 (1985). *See also supra* note 133.

sion only where: (1) an express clause excludes the matter, or (2) an ambiguous provision exists along with "the most forceful evidence" showing an intention to exclude the issue.[136] Because federal law dictates all-encompassing coverage and typical arbitration clauses are expansive in scope, courts frequently find that arbitration should be ordered and the civil action merely stayed.[137] Nevertheless, a team may be estopped from requiring arbitration if it waives the clause either expressly, or impliedly through undue delay in making its request.[138]

Once arbitration is ordered, the court will take a strict "hands off" approach, requiring both procedural and substantive questions to be arbitrated.[139] Courts are even powerless to examine the "fairness" of the agreed upon arbitration arrangement.[140] The only exception to this laissez-faire approach occurs when the court concludes that the athlete's representatives have breached their duty of "fair representation" in the arbitration process.[141] However, in reviewing fair representation questions, courts give substantial deference to the union's actions, requiring that the athlete prove that the union's conduct was "arbitrary, discriminatory, or in bad faith."[142] Mere negligence is not sufficient.[143]

Review of an arbitrator's decision is also very limited, and all doubts will be resolved in favor of upholding the award.[144] The critical question on review is whether the arbitrator's decision "draws its essence from the collective bargaining agreement,"[145] and the court will not review *de novo* the general merits of the case.[146] Moreover, although courts will refuse to uphold arbitration awards which are illegal or against public

136. Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 532 F.2d 615, 621 (8th Cir. 1976).

137. *See, e.g.*, Erving v. Virginia Squires Basketball Club, 468 F.2d 1064 (2d Cir. 1972). *But see* Johnson v. Green Bay Packers, 272 Wis. 149, 74 N.W.2d 784 (1956) (former NFL arbitration clause much more restricted in scope; controversy falling outside of the provision was not arbitrable).

138. Spain v. Houston Oilers, Inc., 593 S.W.2d 746 (Tex. Civ. App. 1979).

139. Kings Professional Basketball Club, Inc. v. Green, 597 F. Supp. 366 (W.D. Mo. 1984).

140. Dryer v. Los Angeles Rams, 40 Cal. 3d 406, 709 P.2d 826, 220 Cal. Rptr. 807 (1985).

141. *Id. See also* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 563-64 (1976).

142. Peterson v. Kennedy, 771 F.2d 1244, 1253 (9th Cir. 1985) (quoting Vaca v. Sipes, 386 U.S. 171, 190 (1967)).

143. *Peterson*, 771 F.2d at 1253.

144. American and National Leagues of Professional Baseball Clubs v. Major League Baseball Players Ass'n, 59 Cal. App. 3d 493, 130 Cal. Rptr. 226 (1976).

145. United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960); Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass'n, 532 F.2d 615 (8th Cir. 1976).

146. *See supra* note 145.

policy, they are extremely reluctant to make such declarations.[147]

IV. TEAMS' RESTRAINT OF INTRA-LEAGUE "JUMPING"

The various league rules, constitutions and contracts operate, *inter alia*, to regulate athletes' movement between teams in the same league during the contract period.[148] Any action by an athlete, team, or league employee soliciting "intra-league jumping" is considered "tampering." A "tampered" contract will not receive the required approval of the respective league commissioners, and those involved may be suspended and/or fined.[149] The tampering provisions may even prohibit discussions that relate to employment after the contract expires, unless the team's consent is first obtained.[150]

The tampering provisions are designed to preserve harmonious relations among league members,[151] but are only effective when the players are under contract to a team in the league.[152] Once a team has breached its contract with an athlete, the athlete can terminate his contract according to the provisions thereof, and he may thereby become a free agent. As soon as free agency is declared, the athlete may freely enter into contracts with other league members.[153] Should the former team object, the athlete will most likely be required to prove the breach through arbitration.[154] Of course, any athlete who is already a free agent due to the expiration of his contract will also be insulated from the tampering provisions.

V. CONCLUSION

This Article has attempted to provide a conceptual framework for analyzing legal issues which commonly arise in sports contract litigation. An implicit component of this framework is that "sports law" is nothing more than a specialized application of traditional legal principles. Accordingly, sports practitioners should evaluate the full array of legal is-

147. *American and National Leagues of Professional Baseball Clubs*, 59 Cal. App. 3d at 498-99, 130 Cal. Rptr. at 628-29.

148. *See, e.g.*, NBA CONST. ¶ 35(g) (1984); Major League Baseball Rule 3(g) (1986); NHL Standard Player's Contract § 10 (1982).

149. *See, e.g.*, NBA CONST. ¶ 35(g) (1984).

150. *See, e.g.*, NHL Standard Player's Contract § 10 (1982).

151. Major League Baseball Rule 3(g) (1986).

152. American and National Leagues of Professional Baseball Clubs v. Major League Baseball Players Ass'n, 59 Cal. App. 3d 493, 130 Cal. Rptr. 626 (1976).

153. *Id. See also* S. Heiner, *Post-Merger Blues: Intra-League Contract Jumping*, 18 WM. & MARY L. REV. 741 (1977) (providing a more detailed discussion of the strategies and defenses involved in such actions).

154. *See supra* text accompanying notes 128-47.

sues which relate to the propriety of jurisdiction, the theoretical bases supporting relief, the availability of legal and/or equitable relief, and the applicable contract defenses.

Additionally, practitioners must consider the effect of the applicable collective bargaining agreement, as it may significantly alter the common law result. Similarly, the appropriateness of arbitration as the forum for dispute resolution must be determined. Nonetheless, practitioners are well-advised to adhere to the general proposition that fundamental common law concepts should not be overlooked in sports litigation.