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Contractual Rights and Duties of the Professional Athlete-Playing the Game in a Bidding War

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CONTRACTUAL RIGHTS AND DUTIES OF THE PROFESSIONAL ATHLETE—PLAYING THE GAME IN A BIDDING WAR

I. INTRODUCTION

Professional sports[1] are presently undergoing two bidding wars[2] similar to the one fought between the American Football League (AFL) and the National Football League (NFL) in the late 1950's and early 1960's.[3] The National Basketball Association (NBA) nad the American Basketball Association (ABA) compete so fiercely for star players that outstanding collegiate basketball players are commanding million dollar-plus contracts. The World Hockey Association (WHA) is embarking on its first season and is posing a serious threat to the virtual monopoly enjoyed in that sport on a major league level for the past twenty-five years by the National Hockey League (NHL).

As in past bidding wars, the contest has not been confined to the athletic arenas, but has been waged in courtrooms around the country. There have been innumerable suits by clubs against players who have jumped league in violation of their contracts.[4] Player

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1. With the exception of Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 51 A. 973 (1902), no cases involving baseball are discussed in this article. This is due to the fact that baseball is the only sport which is exempt from the antitrust laws. Flood v. Kuhn, 407 U.S. 258 (1972). Because of the unique status enjoyed by baseball, there have been no great bidding wars in the sport in modern times. Additionally, baseball contracts are based upon this freedom from antitrust laws and thus contain provisions such as the true reserve clause, permanently binding a player to a team, which contracts in the major league sports do not contain. The *Lajoie* case is discussed in § IIB, *infra,* because the principle set forth in it has been applied to other cases.

2. Normally an athlete can offer his services only to one team within one league and must accept the price offered by that team or not play. Periodically, however, new leagues have been formed to challenge the older league's monopoly in the sport. With two buyers on the market the athlete finds that he can command a higher price. The competition between the two leagues to get the best athlete by paying the highest prices is referred to as a bidding war.

3. The bidding war between the AFL and NFL ended in 1966 when they were granted exemption from the antitrust laws for the purpose of merging. 15 U.S.C. § 1291 (1967). This exemption was only for the purpose of merger, however, and the NFL remains subject to the antitrust laws for all other purposes. *See* Flood v. Kuhn, 407 U.S. 258 (1972).

4. *See* § II *infra.*

associations have filed suits[5] against leagues to prevent certain alleged violations of the Sherman Antitrust Act.[6] Because of this litigation, the manner in which athletic contracts are written and enforced is undergoing changes in each of the major professional sports. A bill to exempt a proposed merger between the NBA and ABA from the Sherman Act has been reported out of committee in the United States Senate,[7] but it contain sa provision which would make illegal the use of any reserve or option clauses beyond the rookie year.[8] The WHA has become the only major league to introduce a contract which contains neither an option nor a reserve clause.[9] The NFL Players Association has filed suit against the NFL in Minneapolis, contending that the so-called "Rozelle Rule"[10] whereby a player who has played out his option may join a new club only if that new club makes compensation to the old club, is a violation of the Sherman Act.[11]

This Comment will examine the contractual rights and duties of players under the present system of contractual relations between clubs and players and discuss how these rights would be more fully protected if certain proposed changes were to be instituted.

II. Defenses Available to the Player who has Jumped Leagues and is being Sued for Breach of Contract by his Original Club

The success or failure of a professional athletic team may depend upon one or two highly skilled players known in the trade as superstars. The impact that the addition of a single player can have on the fortunes of a team has not gone unnoticed by general managers of teams involved in bidding wars. One of the fundamental aspects of such bidding wars is that not only will the leagues try to outbid each other for the services of a college athlete embarking on his first professional season, but teams in one league will try to induce star players in the other league to join them. The typical method of inducement, of course, is to offer the player

5. *E.g.*, Mackey v. NFL, Civil No. 4-72-277 (D. Minn., filed May 13, 1972).
6. 15 U.S.C. § 1 (1890) [hereinafter referred to as the Sherman Act].
7. S. Rep. No. 92-1151, 92d Cong., 2d Sess. (1972).
8. *Id.* at 3.
9. WHA Uniform Player's Contract (1972).
10. *See* § V *infra.*
11. Mackey v. NFL, Civil No. 4-72-277 (D. Minn., filed May 13, 1972).

substantially more money than he is receiving with his present team.

A player is usually eager to accept such an offer, but before he can do so he must extricate himself from contractual obligations to his present club. This is usually done by playing out the option which the club has as part of the contract.[12] There are great risks and expenses involved in playing out an option,[13] however, so players will often simply sign a contract with the new team without playing out their options. This will result in the player having two contracts for the same season and often precipitates suit by the original club against the player for breach of contract. This section of the Comment will discuss the various defenses which the player might raise to such a suit.

A. *An Attack upon the Validity of the Reserve or Option Clause*

Recognizing that very few players attempt to switch leagues in the middle of a playing season, preferring instead to make the switch between seasons, a seemingly valid defense by a player to a suit for breach of contract would be that he is bound by no contract because he has played the season for which he has actually signed and thus is free to join another team. However, this defense is undercut by a clause contained in the standard player contract used by all professional athletic leagues, with the exception of the WHA. This clause is known variously as an option or reserve[14] clause and

12. The basic idea of an option clause is that the club can automatically renew the player's contract by offering the player a stated percentage of his salary for the past season. Normally, however, at contract negotiations, the club will offer the player a raise which he can accept only by signing a new contract for a year with an option to extend for another year. If the player refuses to accept this, he can continue playing under the option clause provisions and will become a free agent at the end of the season. *See* Munchak Corp. v. Cunningham, 457 F.2d 721 (4th Cir. 1972).

13. Because the option clause allows the club to renew the player's contract for another year at a stated percentage of his salary for last season, the cost of playing out the option is often regarded as merely the decrease from the full salary to the percentage of the salary paid to a player under the option clause. It is suggested, however, that this method of calculation assumes the propriety of the option clause whereas the real cost to the player should be measured by the difference between the decreased salary he must take bcause of the option clause and the salary he could make if the option clause had not been forced on him by league rules requiring its inclusion in the standard form contract. Additionally these sums only cover the cost of one year. If the player suffers a chareer-ending injury while playing out his option, the cost will become far higher if the player had been offered a long term contract with another team. If the two leagues merge in the year in which the player is playing out his option, the player will find that he no longer has an opportunity to take the best of two offers and may lose all opportunity for tremendous increase in salary.

14. A true reserve clause binds the player to a club until he either retires or is traded by that club. This is accomplished by allowing the club, by the reserve clause, to renew the player's contract automatically

gives the club the right to automatically renew a player's contract for another season by offering him a stated percentage of his current salary.[15] An example of the option clause is found in paragraph 10 of the NFL Standard Player Contract:

> On or before the date of expiration of this contract, the Club may, upon notice in writing to the Player, renew this contract for a further term until the first day of May following said expiration on the same terms as are provided by this contract, except that (1) the Club may fix the rate of compensation to be paid by the Club to the Player during said period of renewal, which compensation shall not be less than ninety percent (90%) of the amount paid by the Club to the Player during the preceding season, and (2) after such renewal this contract shall not include a further option to the Club to renew the contract. . . .[16]

The validity of this provision has been upheld in the only case directly challenging football's option clause, *Dallas Cowboys Football Club v. Harris*.[17] Harris' arguments that the clause was so harsh and unconscionable as to be unenforceable at equity and that it constituted a violation of the antitrust laws[18] were rejected. Instead, the Texas Court of Civil Appeals held that the option clause should be enforced. The court also upheld a provision tolling the running of the option at any time in which the player announced himself as retired.[19] The wisdom of this decision is questionable because it takes away a player's power to sit out the option season

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each year and thus the player is always under contract and never free to sign with another club. Such a perpetual service contract would clearly restrict the player's ability to sell his services on the market and thus would violate the Sherman Act. Because baseball is the only sport enjoying immunity from the antitrust laws, baseball is the only sport in which the true reserve clause is found. Flood v. Kuhn, 407 U.S. 258 (1972). All other professional sports are limited to the use of an option clause allowing renewal for only one year.

15. The option clause in the NHL declares that the amount of salary to be paid the player may be determined by arbitration. NHL Standard Player's Contract § 10 (1972).

16. NFL Standard Player's Contract, § 10, *as quoted in* Dallas Cowboys Football Club, Inc. v. Harris, 348 S.W.2d 37, 42 (Tex. Civ. App. 1961). The option clause used by the American Basketball Association is essentially the same, allowing the club to renew by offering 90% of the last season's salary and specifically stating that the renewed contract will not contain a further option to renew. ABA Uniform Player Contract, § 15 (1971).

17. 348 S.W.2d 37 (Tex. Civ. App. 1961). There has been one other case interpreting the option clause in football but the player involved was not challenging the clause. Hennigan v. Chargers Football Co., 431 F.2d 308 (5th Cir. 1970).

18. Dallas Cowboys Football Club, Inc. v. Harris, 348 S.W.2d 37, 47 (Tex. Civ. App. 1961).

19. *Id.* at 46.

and then join any other team which he chooses. The court in upholding this clause gave Harris the choice of either playing another season with his original club or never playing again. This seems to conflict both with the established policy of our courts against forcing one to perform personal services against his will and with several subsequent decisions which have held that the reasonableness of an option clause lies in the fact that the player retains the right not to play for his option season.[20]

The so-called reserve clause is exemplified by paragraph 22 of the NBA Uniform Player Contract:

> (a) On or before September 1st (or, if a Sunday, then the next preceding business day) next following the last playing season covered by this contract, the Club may tender to the Player a contract for the term of that season by mailing the same to the Player at his address following his signature hereto, or if none be given, then at his last address of record with the Club. If prior to November 1 next succeeding said September 1, the player and the Club have not agreed upon the terms of such contract, then on or before 10 days after said November 1, the Club shall have the right by written notice to the Player at said address to renew this contract for the period of one year on the same terms, except that the amount payable to the Player shall be such as the Club shall fix in said notice; provided, however, that said amount shall be an amount payable at not less than 75% of the rate stipulated for the preceding year.[21]

The distinguishing feature of the above clause from the option clause is that no mention is made of whether the contract as renewed by the club shall contain a further option to renew. There are two possible interpretations: (1) that the contract is merely extended for one year and then is terminated as would be the case under football's option clause; or (2) that the new contract also contains an option clause and thus is a self-perpetuating reserve clause similar to that used in baseball. When the Syracuse Nationals sued Dick Barnett to prevent his jumping to the Cleveland club of the American Basketball League,[22] Barnett noted the ambiguity of the clause. Barnett claimed that under the second interpretation the contract would provide for perpetual service and thus would be void. Further, as the contract had been written by the club, Barnett urged that the interpretation most unfavorable to it should be adopted, and therefore the reserve clause was illegal.

20. Munchak Corp. v. Cunningham, 457 F.2d 721 (4th Cir. 1972); Washington Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472 (9th Cir. 1969); Lemat Corp. v. Barry, 275 Cal. App. 2d 671, 80 Cal. Rptr. 240 (Ct. App. 1969).

21. NBA Uniform Player Contract, § 22, *as quoted in* Central N.Y. Basketball, Inc. v. Barnett, 88 Ohio L. Abs. 40, 49, 181 N.E.2d 501, 509 (C.P. 1961).

22. Central N.Y. Basketball, Inc. v. Barnett, 88 Ohio L. Abs. 40, 181 N.E.2d 506 (C.P. 1961).

The court rejected this argument on the policy that, where a contract is capable of two meanings one of which would render it valid and the other of which would render it invalid, the court should interpret the contract so as to uphold its validity.[23] This reasoning was adopted by the court in *Lemat Corp. v. Barry*.[24] Although it seems to condone intentionally ambiguous draftsmanship on the part of the NBA, it would seem to be the proper interpretation of the clause under the Restatement view.[25]

Thus, while the option clause used by football and the reserve clause used by basketball are worded differently there has come to be no difference in the way they are interpreted by the courts. Both have come to be called option clauses by the courts and have been interpreted as giving the club the power to prevent a player from playing for anyone else for one year beyond the termination of the original contract.

It would seem that the best attack on the option clause would lie in alleging that it violates the Sherman Act because of its tendency to freeze the labor pool within each league.[26] However, courts have been reluctant to allow violation of the Sherman Act as a defense to a suit for breach of contract:[27] "the federal courts should not be quick to create a policy of non-enforcement beyond that which is clearly the requirement of the Sherman Act."[28] The reluctance of the courts in this area is reflected in the fact that even those courts which have agreed that the reserve clause is of doubtful validity have nonetheless interpreted it as effectively renewing the player's obligations to the club.[29]

B. *Why Injunctive Enforcement Should be Denied*

The player attempting to defend a suit for breach of contract must realize that an attack on the reserve or option clause of his

23. *Id.* at 509-510.
24. 275 Cal. App. 2d 671, 80 Cal. Rptr. 240 (Ct. App. 1969).
25. RESTATEMENT OF CONTRACTS § 236 (1932).
26. The purpose of the option clause is to prevent players from changing clubs each year. The result, however, is that very few players change teams without being traded. The type of labor market, where employees cannot readily switch employers has been described as a labor freeze and practices leading to such a freeze have been held in violation of the Sherman Act. Nichols v. Spencer Int. Press, Inc., 371 F.2d 332 (7th Cir. 1967); Union Circulation Co. v. FTC, 241 F.2d 652 (2d Cir. 1957); *see* § VA, *infra*.
27. Kelly v. Kosuga, 358 U.S. 516 (1959). *See generally* Annot. 3 L. Ed. 2d 1798 (1959).
28. Kelly v. Kosuga, 358 U.S. 516, 519 (1957).
29. Minnesota Muskies, Inc. v. Hudson, 294 F. Supp. 979 (M.D.N.C. 1969).

contract with the original club will probably not be successful. He should, therefore, argue alternatively that even if the contract has been renewed by its own terms, there are other reasons why it should not be enforced. The original club cannot gain an injunction ordering the player to play for it, because of the basic policy of the law against specific enforcement of personal service contracts.[30] There are several reasons for this policy. First, such an order would result in involuntary servitude which would be repugnant to our society.[31] Furthermore, any decree ordering a person to play ball for a club would be impossible to enforce[32] and equity will generally refuse to grant an injunction that is unenforceable or would require continuous supervision.[33] Finally, courts are unwilling to grant an injunction which would force the player and the club into a continuing personal relationship which may be undesirable under strained circumstances.[34]

The clubs, however, are cognizant that they cannot gain an injunction forcing the athlete to play and have included in all standard form professional athletic contracts two clauses which are designed to give the club the power to indirectly achieve this result by putting the player in the position where he either plays for the club holding his contract or does not play at all. The first of these clauses is known as a negative covenant and consists of a promise by the player that he will not perform for any other team during the term of the contract: "The Player promises and agrees . . . (c) to give his best services, as well as his loyalty, to the Club, and to play basketball only for the Club unless released, sold or exchanged by the Club. . . ."[35]

Negative covenants have been construed in the landmark case of *Lumley v. Wagner*[36] as entitling the person to whom the nega-

30. *See* RESTATEMENT OF CONTRACTS § 379 (1932).

31. Arthur v. Oakes, 63 F. 310 (7th Cir. 1894).

32. For example, if a basketball player were averaging thirty points per game before breaching his contract and after such an injunction ordering him to play, the same player was averaging only twenty points per game, the club might argue that the player was not obeying the injunction while the player could argue that he was in an honest slump. This would put the court in the position of judging a performer's work under coercion by standards he achieved when his concentration was unbothered by court orders. In a somewhat analagous case involving a singer, it was held that no performer's work should be so judged. DeRivafolini v. Corsett, 4 Paige Ch. 264 (N.Y. 1833).

33. Marble Co. v. Ripley, 77 U.S. 339 (1870).

34. Poultry Producers v. Bartow, 189 Cal. 278, 208 P. 93 (1922); CORBIN ON CONTRACTS § 1204, at 401 (1964).

35. NBA Uniform Player Contract, § 5, *as quoted in* Central N.Y. Basketball, Inc. v. Barnett, 88 Ohio L. Abs. 40, 42, 181 N.E.2d 506, 508 (C.P. 1961). The negative covenants contained in the standard contracts used by the other sports all consist basically of this same promise by the player not to perform for anyone else during the term of his contract. NFL Standard Player Contract, § 5 (1972); WHA Uniform Player's Contract, § 2 (172); NHL Standard Player's Contract, § 2 (1971).

36. 42 Eng. Rep. 687 (Ch. App. 1852).

tive covenant was made to an injunction restraining the performer from appearing for anyone else. Modern authorities have generally adopted this principle with the provision that the promisee must also show that the promisor was possessed of such unique skill that he cannot be readily replaced, and therefore damages caused by his breach are unascertainable.[37] In order to bring the player's contract within these narrow bounds, the clubs have inserted a second clause in which the player asserts that he is the type of performer for whom injunctive relief to the club would be most appropriate:

> 9. The Player represents and agrees that he has exceptional and unique skill as a basketball player; that his services to be rendered hereunder are of a special, unusual and extraordinary character which gives them peculiar value which cannot be reasonably or adequately compensated for in damages at law, and that the Player's breach of this contract will cause the Club great and irreparable injury and damage. The Player agrees that, in addition to other remedies, the Club shall be entitled to injunctive and other equitable relief to prevent a breach of this contract by the Player, including, among others, the right to enjoin the Player from playing basketball for any other person or organization during the term of this contract.[38]

A preliminary injunction will be granted to restrain the player from playing elsewhere pending hearing of the original club's suit for breach of contract[39] and this injunction will be extended for the length of the contract, including the option year, with the original club if the original club wins its suit for breach of contract.[40] Any defense which the player might raise to a suit by his original club for injunctive relief for breach of contract, then, must consist basically of a showing why these two clauses should not be enforced.

One such defense would be to assert that the reasons given in

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37. RESTATEMENT OF CONTRACTS § 380 (1932).

38. NBA Uniform Player Contract, § 9 (1970). The unique skill clauses used by the NFL and the NHL are substantially the same. NFL Standard Player Contract, § 8 (1972); NHL Standard Player's Contract, § 6 (1971). The unique skill clause used in the World Hockey Association is basically the same but contains an additional agreement by the player to waive any right to trial by jury and also to waive any counterclaim or set-off. WHA Uniform Player's Contract, § 6 (1972).

39. Washington Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472 (9th Cir. 1969).

40. Minnesota Muskies, Inc. v. Hudson, 294 F. Supp. 979 (M.D.N.C. 1969); Dallas Cowboys Football Club, Inc. v. Harris, 348 S.W.2d 37 (Tex. Civ. App. 1961).

the clause necessitating injunctive relief simply do not exist. In *Dallas Cowboys Football Club, Inc., v. Harris*,[41] the club challenged the ability of a player to raise such a defense, arguing that estoppel should prevent the player from denying the unique skill he asserted at contract formation. The court rejected this argument, however, on the grounds that the assertion by the player that he is possessed of unique skill is merely a statement of opinion which he is free to show was erroneous.[42]

The key obstacle to the player in raising this defense lies in the landmark holding that the club need not show that the player would be impossible to replace but merely that the value of the player was incapable of precise determination and that, therefore, he would be difficult to replace.[43] Modern cases have expanded upon this early holding to the point that the phrase "unique skill" has become almost meaningless. Dick Barnett was not on the all-NBA team[44] nor did he play in the East-West All-Star Game[45] the year before he attempted to jump to Cleveland of the American Basketball League from Syracuse. Nonetheless the court held that he was of sufficient skill and ability to warrant the granting of an injunction to restrain his playing for anyone but Syracuse: "[I]t would seem that mere engagement as a basketball player in the N.B.A., or A.B.L., carries with it recognition of his excellence and extraordinary abilities."[46] This reasoning seems circular at best[47] and destroys the narrowly defined boundaries within which specific enforcement of negative covenants has usually been granted.[48] Nonetheless, other courts have held that the mere signing of a contract to play professional sports is evidence of unique skill.[49]

The better view of the question of unique skill is expressed by those cases holding that the issue must be resolved only after an

41. 348 S.W.2d 37 (Tex. Civ. App. 1961).

42. *Id.* at 43. This view of the unique skill clause as merely a statement of opinion is further supported by the fact that all standard contracts containing a unique skill clause also contain a provision allowing the club to terminate the contract if the player should, in the opinion of the club, fail to have sufficient skill; *see, e.g.*, NFL Standard Player Contract, § 6 (1972).

43. Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 51 A. 973 (1902).

44. The All-NBA team is a mythical team selected each year by the United States Basketball Writers as representing the best players in the NBA.

45. A game held each year between the best players from each division in the league. The game referred to was played on January 17, 1961.

46. Central N.Y. Basketball, Inc. v. Barnett, 88 Ohio L. Abs. 40, 55, 181 N.E.2d 506, 514 (C.P. 1961).

47. The reasoning is circular in that the purpose of the court's inquiry into the amount of skill possessed by the player is to determine whether the player is sufficiently skilled to warrant an injunction authorized by the contract and the courts take the signing of that contract as proof that the player is sufficiently skilled to warrant the injunction.

48. RESTATEMENT OF CONTRACTS § 380(2) (1932).

49. *E.g.*, Washington Capitols Basketball Club v. Barry, 304 F. Supp. 1193 (N.D. Cal. 1969).

examination of all factors involved. Thus, in *Winnipeg Rugby Football Club v. Freeman*,[50] the District Court for the Northern District of Ohio noted that the level of competition varied greatly from the National Collegiate Athletic Association to the Canadian Football League to the NFL. Accordingly, the court reasoned that Freeman's denial of unique skill must be considered in light of the skill level of the Canadian Football League of which Winnipeg was a member. Even though Freeman may have been just another player in the NFL, the court held that he did possess unique ability for a player of the Canadian Football League and thus would be restrained from playing outside of it.[51] Following this reasoning it would seem that a player who is not of all-star caliber in a well established league would not be restrained from jumping to a new league where the caliber of play is lower and the same player would, perhaps, be an all-star.[52]

Another factor which must be considered in determining whether or not the player is possessed of sufficiently unique skill to warrant the issuance of a restraining order is the degree to which the success of the club has come to depend on that player's functioning as a member of that team. Thus, in *Long Island American Association Football Club, Inc. v. Manrodt*,[53] the fact that the defendant did not attempt to jump leagues until the training camp was over carried great weight in the court's decision to grant the restraining order:

> Once the team is organized and the football season begins, it may be extremely difficult to find adequate replacements for players about whom plays have been planned. This is so by reason of the brevity of the season (three months) and also by reason of the fact that after the start of the season, most of the desirable players have already been hired by other clubs.[54]

In line with this reasoning, a player who jumps leagues between seasons might argue that the club has plenty of notice that he will

50. 140 F. Supp. 365 (N.D. Ohio 1955). Upon graduation from college, Freeman and Jack Locklear had signed to play with the Winnipeg team of the Canadian Football League. Each then changed his mind and signed with the Cleveland Browns of the NFL. The case reported is the suit by the Winnipeg team to prevent the two from playing for anyone but Winnipeg.

51. *Id.* at 367.

52. For a comparison of the quality in the NHL and the WHA which suggests that an average player in the former may be a star in the latter, see SPORTS ILLUSTRATED, Oct. 9, 1972, at 73.

53. 23 N.Y.S.2d 858 (Sup. Ct. 1940).

54. *Id.* at 860.

have to be replaced. If there were some other player on the same club who could perform as well,[55] it would seem that the club in reality will suffer no damage that warrants injunctive relief. Occasionally a team may be able to pick up an established player of equal ability who has been waived by another team.[56] If this is the case, then, the only possible damage would be any greater salary that the newly acquired player would have to be paid. Although such damage might give rise to a suit for damages against the breaching player it would seem that the club would be precluded from obtaining injunctive relief.

In most cases, however, the type of player who becomes a defendant in a suit arising during a bidding war is neither the type who is merely an average ball player compared to the other athletes in his original league, nor is he the type who can readily be replaced by another member of his original team or by a player on waivers. The type of player involved in league jumping is an established star in his league and a key figure on his team. Thus, even under the better view of determining unique skill only after careful consideration of all factors involved, it seems unlikely that a player of the caliber of Rick Barry would be able to persuade a court that he was of so little skill as to warrant the denial of an order restraining him from jumping leagues.

The so-called unique skill clause also states, as a reason for injunctive relief in the event of breach of contract by the player, that damages caused by the breach are incapable of determination. The argument that damages are determinable has little or no chance of success, however, due to the nature of damage caused by the player's breach. The usual consequence of a team's loss of its star player is a decline both in league standings and in attendance, but there is no guarantee that this will happen and if it does there is no exact dollar amount which may be said to have been caused by the player's breach. Even liberal courts which allow an esti-

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55. The usual damages though to flow from the loss of a star are a decline both in attendance and in league standings. It should be remembered, however, that any breach on the player's part is not in leaving the team but merely in leaving the team one year earlier than he would by playing out his option. It is suggested, therefore, that if the team performed as well that year without his services as they would have had the player played out his option, the club has not only not suffered damages but has benefited by not having to pay that player's salary. An example of how a team has been able to carry on successfully with a substitute is found in the Baltimore Colts who won the NFL Championship in 1969 with Earl Morrall, a much travelled veteran quarterback, replacing John Unitas for the entire season.

56. For example, in 1962, the San Diego Chargers placed quarterback Jack Kemp on waivers and he was claimed by the Buffalo Bills. Kemp went on to lead the Bills to two league championships. For an illustration as to how waivers are used in a sport, see N.Y. Times, Aug. 22, 1971, § V, at 2.

mate of the dollar loss occasioned by a player's breach refuse to allow a recovery of this amount.[57]

Thus, unless the player is a marginal ball player, he will not be able to prevent the granting of a restraining order merely by showing that the reasons given as necessitating it in the contract are invalid. However, the granting or refusal of such a restraining order is discretionary with the court[58] and the player may attempt to show why, in spite of the language of the contract, the remedy is inappropriate. Most athletic contracts may be terminated by the club at any time the club feels the player is not playing up to the skill level required for the sport, but are binding upon the player for a minimum of one year with an option to the club to renew for another year. Lack of mutuality[59] would seem to be a valid reason for denying the equitable relief of specific enforcement of the negative covenants contained in the contract. In *Connecticut Professional Sports Corporation v. Heyman*,[60] lack of mutuality was held to be a valid reason for denying an injunction to prevent Heyman from playing in the ABA while his contract with the Hartford Capitols of the Eastern Professional Basketball League was still in its option season.

> The primary reason for denying relief is the fact that plaintiff seeks to enforce a contract that purports to bind defendant for a one year period and at the same time permit plaintiff to terminate at will. While this Court does not adhere to a wooden mutuality rule, the existence of a provision entitling plaintiff to end the contract whenever it chooses is an important factor in determining whether injunctive relief is appropriate.[61]

Most courts have rejected the defense of lack of mutuality, however, following the reasoning in *Philadelphia Ball Club v. Lajoie*.[62]

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57. Lemat Corp. v. Barry, 275 Cal. App. 2d 671, 80 Cal. Rptr. 240 (Ct. App. 1969).

58. Minnesota Muskies, Inc. v. Hudson, 294 F. Supp. 979 (M.D.N.C. 1969); Dallas Cowboys Football Club, Inc. v. Harris, 348 S.W.2d 37 (Tex. Civ. App. 1961).

59. *See, e.g.*, NFL Standard Player Contract § 6 (1972). Lack of mutuality is used here both as it refers to mutuality of remedy in that the club can get specific enforcement of the player's negative covenant but the player cannot get specific enforcement of the club's promises because of the club's power to terminate, RESTATEMENT OF CONTRACTS § 377 (1932), and as it refers to mutuality of obligation in that the player is bound for a minimum of one year, with an option to the club for another year, whereas the club can terminate its obligation at any time.

60. 276 F. Supp. 618 (S.D.N.Y. 1967).

61. *Id.* at 621.

62. 202 Pa. 210, 51 A. 973 (1902).

Napoleon Lajoie had signed a contract on April 18, 1900 to play baseball with the Philadelphia Ball Club, granting the club the option to renew for two years and allowing the club to terminate by giving him ten days written notice, paying the salary then due, and paying his expenses home. When Lajoie signed a conflicting contract with the Philadelphia American League Baseball Club, the Philadelphia Ball Club brought suit to enforce the negative covenant contained in Lajoie's contract. The Philadelphia Common Pleas Court refused to grant an injunction on the grounds that the contract was lacking in mutuality and, therefore, could not be enforced in equity.[63] On appeal, the Supreme Court of Pennsylvania reversed, ordering Lajoie not to play for anyone other than the Philadelphia Ball Club.[64]

The court first noted that the right to seek injunctive relief had been specifically granted to the club in Lajoie's contract, and that Lajoie had partially performed under that contract. From these two facts the court suggested that the ball club had acquired an equitable right in complete performance which might even be enforced without regard to mutuality.

> The relation between the parties has been so far changed, as to give the plaintiff an equity arising out of the part performance, to insist upon the completion of the agreement according to its terms by the defendant. This equity may be distinguished from the original right under the contract itself, and it might well be questioned whether the court would not be justified in giving effect to it by injunction without regard to the mutuality or nonmutuality in the original contract.[65]

The court did not, however, rule that there was no requirement of mutuality in order for specific enforcement of the negative covenant to be granted. Instead the court declared that there was no lack of mutuality in the contract and therefore specifically enforced the negative covenant.

> We are not persuaded that the terms of this contract manifest any lack of mutuality in remedy. Each party has the possibility of enforcing all rights stipulated for in the agreement. It is true that the terms make it possible for the plaintiff to put an end to the contract in a space of time much less than the period during which defendant has agreed to supply his services; but mere difference in the rights stipulated for does not destroy mutuality of remedy. Freedom of contract covers a wide range of obligation and duty as between the parties, and it may not be impaired, as long as the bounds of reasonableness and fairness are not transgressed.[66]

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63. Philadelphia Ball Club v. Lajoie, 10 Pa. Dist. 309 (Phila. C.P. 1901), *rev'd*, 202 Pa. 210, 51 A. 973 (1902).
64. Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 51 A. 973 (1902).
65. *Id.* at 218-19, 51 A. at 974.
66. *Id.* at 219, 51 A. at 975.

Although the *Lajoie* case's rejection of lack of mutuality as a defense to injunctive relief has been widely followed, the reasons why courts reject lack of mutuality as a defense have varied greatly. Some courts are merely following local law that there is no need for mutuality of remedy for specific enforcement.[67] This is the position taken by the Restatement of Contracts, "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."[68] In *Central New York Basketball Inc. v. Barnett*[69] the court cited the *Lajoie* case as authority for the proposition that the lack of mutuality of remedy will not prevent an injunction after the contract has been partly performed.[70] This would seem to be an adoption by the *Barnett* court of a position which was merely a dictum in the *Lajoie* case.[71] That after partial performance by the athlete the club acquires an equitable interest in a complete performance, enforceable without regard to mutuality of remedy, is to be criticized because it penalizes an athlete for partial performance by taking away the defense of lack of mutuality which he would have had if he had not performed at all.

An additional reason for rejecting lack of mutuality as a defense is put forth by those courts holding that the player cannot now object to clauses in the contract which give the club the right to injunctive relief because they were granted for adequate consideration.[72] Although this best reflects the holding of the *Lajoie* case, it is suggested that courts which uphold negative covenant and unique skill clauses on the grounds that they were freely bargained for completely disregard the true nature of contract formation between the ball player and the club. The ball player does not pick and choose which clauses of a contract he will accept in return for a certain amount of compensation for each clause. Rather, the ball player is handed a standard form contract which cannot be altered in any material way,[73] and which contains these

67. *E.g.*, Long Island American Ass'n. Football Club v. Manrodt, 23 N.Y.S. 858 (Sup. Ct. 1940).

68. RESTATEMENT OF CONTRACTS § 372(1) (1932).

69. 88 Ohio L. Abs. 40, 181 N.E.2d 506 (C.P. 1961).

70. *Id.* at 49, 181 N.E.2d at 515.

71. *See* note 65 and accompanying text *supra.*

72. *E.g.*, Lemat Corp. v. Barry, 275 Cal. App. 2d 671, 679, 80 Cal. Rptr. 240, 243 (1969).

73. League rules usually require that all player contracts be on the standard form provided by the league. Any changes from this form must be approved by the commissioner. *See, e.g.*, NFL Constitution and By-Laws, Art. V, § 15.1 (1972). The fact that even a player of proven talent, who should have great bargaining power, cannot simply write his own contract by picking and choosing which clauses to include in his agree-

clauses giving the club the extraordinary power of preventing him from playing for anyone else by means of injunctive relief. The player then is faced simply with the choice of accepting the contract as it is or not playing. The fact that he can go to another league, if in fact there is another league, is of scant help because all leagues use standard form contracts containing basically the same provisions. Thus, the courts, by refusing to allow lack of mutuality as a defense are not enforcing a contract which was freely entered into by the player and the club, but are enforcing the power of the owners to dictate terms to the players.[74]

III. Defenses Available to a Player Who Has Changed His Mind About Jumping Leagues and is being Sued for Breach of Contract

The instability of teams in a newly established league is a standard facet of bidding wars. Thus a player on a team in a well established league may eagerly sign with a team in the newer league for a greatly increased salary only to find that there is every prospect that the team or league will fold before he is paid or that the city in which he believed he would be playing no longer has a franchise in that league and his contract is to be performed in an entirely different location. A consideration of these factors will often cause the player to change his mind about jumping to the new league and sign a new contract with his original team.[75] The team of the newer league, however, may not be willing to let the player change his mind and may sue to enforce the player's contract with it. This section will examine the rights and liabilities of the player involved in such a suit.

A. *A Bargain Involving Breach of Existing Contract is Void*

It is a principle of contract law that "a bargain, the making or

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ment with a club is illustrated by the case of Joe Kapp. In the 1969-70 season, Kapp led the Minnesota Vikings to the NFL championship before the team was upset by the Kansas City Chiefs in the Super Bowl. Unhappy with the Vikings, Kapp was traded to the Boston Patriots before the 1970-71 season. Kapp reached agreement with the club for $500,000 for 3 years. In July, 1971 it was discovered that Kapp's agreement with the Patriots had not been on the standard form of the league. The club was informed by the commissioner, Pete Rozelle, that Kapp would not be able to play until he signed such an agreement. On advice of his attorney, Kapp refused to sign such a standard form contract and has not been allowed to play in the NFL since this refusal. N.Y. Times, July 17, 1971, at 15, col. 2.

74. For this reason it is suggested that courts should take a new approach and treat athletic contracts as adhesion contracts. *See* § VI, *infra.*

75. An additional consideration which may be motivating the player is an offer from his original team which is greater than that of the new team but which comes after the player has signed the contract with the new team. Brief for Defendant-Appellee, Munchak Corp. v. Cunningham, 457 F.2d 721 (4th Cir. 1972).

performance of which involves a breach of contract with a third person is illegal."[76] Thus, if the player can show that his contract with the second team involved a breach of his contract with his original team he may be successful in preventing that second team from enforcing its contract. The comments to the Restatement indicate, however, that a contract will only be declared illegal if its performance not only involves the breach of another contract but also requires for its performance the breach of that other contract.[77] Therefore, to a large degree the ability of a player to successfully raise this defense will depend upon the wording of the contract with the second team.

If the contract calls for immediate performance when the player has remaining contractual obligations to his present club it would be illegal under the Restatement view.[78] Usually, however, contracts between clubs and players currently under contract to a different club are so worded that performance is to begin only after the player has freed himself from his contractual obligations to his present club.[79] In *Washington Capitols Basketball Club, Inc. v. Barry*,[80] the Ninth Circuit Court noted that Barry's contract with the San Francisco Warriors terminated September 30, 1968, even including the option season, whereas his contract with the Oakland Oaks[81] was to begin "October 2, 1968 or such earlier date as [Barry's] services as a basketball player are not enjoined."[82] The court construed this language as an indication of an awareness on Oakland's part of Barry's contractual obligations to the San Francisco Warriors and an expression of Oakland's intention to create a contract which would not be illegal as calling for a breach of Barry's contract with the Warriors: "Parties to a contract are deemed to have intended a lawful rather than an unlawful act."[83] The con-

76. RESTATEMENT OF CONTRACTS § 576 (1932).
77. *Id.* at 1081, comment *a.*
78. *Id.* at 1081, comment a, illustration 1: "A bargains with B for B's employment at a stated salary for a term beginning immediately. B at the time is under a contract of employment to C which has not terminated. The bargain between A and B is illegal."
79. *See* note 82 and accompanying text *infra.*
80. 419 F.2d 472 (9th Cir. 1969).
81. The Oakland Oaks franchise was sold to the Washington Capitols. Barry's contract was specifically mentioned as one of the assets sold by the Oaks to the Capitols and thus Washington, as assignee of Oakland, brought suit when Barry breached the contract by signing a conflicting contract to play with his original team, the San Francisco Warriors. Washington Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472 (9th Cir. 1969).
82. *Id.* at 477.
83. *Id.* at 478. *See also* RESTATEMENT OF CONTRACTS § 236 (1932).

struction given to this clause was that Barry's obligation to Oakland would begin only after his contractual obligations to San Francisco had ended. Thus interpreted there was nothing illegal about the contract itself nor was it entered into by means themselves unlawful.[84]

In *Munchak Corp. v. Cunningham*,[85] the Fourth Circuit Court adopted the holding of the *Barry* court that a contract to begin only after the expiration of the player's contractual obligation to his present club terminates is not void for illegality:

> In agreement with Washington Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472 (9th Cir. 1969), we think that there was neither illegality nor unclean hands in the Cougars' contracting for Cunningham's services to be rendered *after* the term of his contract with the 76ers had expired, notwithstanding that the negotiations, whether directly or through intermediaries, took place while Cunningham's contract with the 76ers was still in full force and effect. . . . Cunningham was under no obligation, option or restraint with respect to the 76ers after October 1, 1971, and the Cougars had a lawful right to bid and contract for his services to be rendered after that date.[86]

The Cougars had also given Cunningham a promissory note for $80,000. The exact amount to be paid depended upon whether or not Cunningham sat out his option year with the 76ers, in which case the face value of the note was to be paid, or played out the option season, in which case the note was payable to the extent that Cunningham's salary with the 76ers for the option season was less than $100,000.[87] Cunningham contended that the inclusion of this note was an illegal inducement to him to sit out the option season and, therefore, his contract with the Cougars was illegal. The court rejected this contention:

> Of course the note was payable in full if Cunningham "sat out" his option year with the 76ers but Cunningham already had this right since he could not be required to render personal services against his will. The incentive the note provided—to a maximum of $20,000.00 over the amount payable if he did not play—substantially diminished the likelihood that he would exercise this right.[88]

Even if the note had stated that it would be payable only if Cunningham sat out the option year it seems unlikely that the contract with the Cougars would have been illegal as involving the breach of another contract.[89] The renewal of the option clause has been

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84. Washington Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472 (9th Cir. 1972).
85. 457 F.2d 721 (4th Cir. 1972).
86. *Id.* at 724.
87. *Id.* at 722.
88. *Id.* at 724.
89. It may have constituted a tortious interference with prospective advantage, however. *See* PROSSER ON TORTS § 123 (3d Ed. 1971).

interpreted as not obligating the player to play for the team for another year but as merely obligating the player not to play for anyone else during the year.[90] Under this view, even a contract requiring the player to sit out his option year would not be one requiring a breach and thus would not be illegal.[91]

It would seem, then, that a defense based on illegality of the player's contract with a new club as involving the breach of the player's contract with his present club will be successful only where the contract with the new club clearly requires immediate performance in breach of the contract with the player's present club. It is unlikely in today's sports world, where legal decisions are followed as closely as the pennant races, that such a contract would be written and therefore, the defense seems to be of little real value to the player.

B. *Unclean Hands*

As previously noted the only way in which a club can effectively enforce a contract with a player is by suing for specific performance of the negative covenant which the player has made.[92] This suit, being in equity, will allow the player to raise equitable defenses.[93] As an alternative to the possible legal defenses the player can present to prevent his contract with the new team from being declared legal, the player may present reasons why the plaintiff club is not entitled to equitable relief.

Perhaps the cardinal maxim governing the availability of equitable relief is "He who comes into equity must come with clean hands."[94]

> This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of a court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on

90. Washington Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472, 477 (9th Cir. 1969); Lemat Corp. v. Barry, 275 Cal. App. 2d 671 (Ct. App. 1969).

91. This would not be so in football where a player cannot terminate his contract with the club by merely sitting out a season. *See* § IIA *supra.*

92. *See* § IIB *supra.*

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

94. J. POMEROY, EQUITY JURISPRUDENCE §§ 397-404 (5th ed. 1941).

> its part to be "the abetter of inequity" (citations omitted).[95]

The view of unclean hands as primarily for the protection of the court allows a defendant to raise this defense even though he himself has been guilty of inequitable conduct.[96] A player who has signed a contract with a new team while still under contract to his original club and then changed his mind may raise the defense of unclean hands against the new club's suit for specific enforcement of his negative covenants even though he himself has breached both his contract with his original club and his contract with the new club.[97]

That the player's inequitable conduct will not prevent him from raising the defense of unclean hands on the part of the plaintiff club is of little use unless the player is also successful in showing that the plaintiff club has acted in so inequitable a fashion as to render its hands unclean. Whether inducing a player to jump leagues, where such jump would not involve a breach of contract, constitutes unclean hands has not yet been clearly answered. In *Minnesota Muskies, Inc. v. Hudson*,[98] the court held that even though the validity of the St. Louis Hawks' contractual hold over Lou Hudson might be questionable, Hudson had at least a moral obligation to continue playing for the Hawks and, therefore, Minnesota's conduct in inducing him to play for them must be considered inequitable.

> Even if the reserve clause in the St. Louis contract was of doubtful validity, the fact remains that the Muskies, knowing that Hudson was under a moral, if not a legal, obligation to St. Louis for the 1967-68 and subsequent seasons, if St. Louis chose to exercise its option, sent for Hudson and induced him to repudiate his obligation to St. Louis. Such conduct, even if strictly within the law because of the St. Louis contract being unenforceable, was so tainted with unfairness and injustice as to justify a court of equity in withholding relief.[99]

The concept that a player has a moral obligation to his present team running beyond the term of his contract and that, therefore, anyone who negotiates with him from another team has unclean hands, is to be seriously criticized for the consequences that its ap-

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

96. *See, e.g.*, Minnesota Muskies, Inc. v. Hudson, 294 F. Supp. 979 (M.D.N.C. 1969); New York Football Giants, Inc. v. Los Angeles Chargers Football Club, 291 F.2d 571 (5th Cir. 1961).

97. *E.g.*, Minnesota Muskies, Inc. v. Hudson, 294 F. Supp. 979 (M.D. N.C. 1969). Lou Hudson was playing with the St. Louis Hawks of the NBA when he signed a contract to play for the Minnesota Muskies of the ABA. Hudson then reconsidered and signed a new contract for the same period with the Hawks. The Muskies then brought suit to enforce their contract.

98. 294 F. Supp. 979 (M.D.N.C. 1969).

99. *Id.* at 990.

plication would bring. Under this view a player could not even sign a new contract until his present one had expired, including all option seasons. Basketball contracts do not expire, however, until October 1 and the basketball season begins a week later. It is very doubtful that any basketball player would go to the expense and risk of playing out his option with his present team on the mere hope that he would be able to sign with a new team in a week's time. Thus, the view taken by the *Hudson* court would result either in a complete freeze in the labor pool of basketball players[100] or in all negotiations for the services of basketball players being carried on in utter secrecy, with no warning to the present club until the option term is over and the new contract had been signed.[101]

It is submitted that the better view as to what conduct by the new club will preclude it, under the clean hands doctrine, from seeking equitable relief is that as long as the inducement is not itself accompanied by unlawful means, there is nothing inequitable about the signing of a player to a contract for services to begin only after his contractual obligations to his present club expires.[102] This view not only allows the strength of the contract to be determined on its own merits, but also increases the bargaining power of players who are thus free to negotiate not only with their present club but also with new clubs during their option seasons.

IV. Legal Problems of College Athletes Turning Professional

Two distinct problems are encountered by the college athlete[103] wishing to turn professional. If he is a senior or four years have elapsed since he began college, he is considered fair game by the professional leagues and intense pressure will be brought by each league to sign the player first. Ordinarily teams will wait until the athlete's college career is over and then select him in an orderly

100. *See* § VA, *infra* (freezing labor pool may violate Sherman Act).

101. Because far more players play out the option season as a bargaining weapon than ever actually leave their team, it should not be thought that merely playing out the option season is a clear warning to the club that the player is leaving. *See* Sports Illustrated May 1, 1972, at 29.

102. *See, e.g.*, Munchak Corp. v. Cunningham, 457 F.2d 721 (9th Cir. 1972); Washington Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472 (9th Cir. 1969).

103. Because hockey players generally come up from the amateur system in Canada, rather than from college teams, this section will generally be limited to college basketball or football players turning professional.

draft.[104] As the competitive pressure increases in a bidding war, however, teams may attempt to sign a player before his college career is over. Often this has resulted in the athlete signing one contract in secrecy with one league while still playing college athletics[105] and then signing another for more money with the other league after the season is over. This usually results in a suit by the team holding the first contract. This section will discuss the defenses to such a suit.

In contrast to the problem faced by senior athletes who may have signed too many contracts, a star athlete who is not yet in his fourth year of college may find that league rules[106] make him ineligible to play professional basketball so that either no team will hire him or, even if one team does sign him to a contract, the league will refuse to allow that team to use him. This practice has been declared to constitute a group boycott and therefore to be in violation of the Sherman Act in *Denver Rockets v. All-Pro Management, Inc.*[107] In response to this holding some leagues have modified their eligibility requirements somewhat while others[108] still maintain a strict requirement that four years have elapsed since the athlete first entered college. This section will also discuss the legality of these various eligibility rules.

A. *Secret Signings*

A college athlete loses his eligibility immediately upon signing a contract to play professional sports.[109] Nonetheless, in their eagerness to sign a star college athlete before the other league has had a chance to talk to him, representatives from professional teams often begin talks secretly with that athlete before his college season is over. The athlete may in fact be eager to sign, either out of desire for a quick cash bonus or out of fear that leagues will merge or come to an agreement concerning a joint draft before the college season is over.[110]

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104. For a general discussion of the theory behind the draft and how it works, see § VB *infra*.

105. Under the eligibility rules of the National Collegiate Athletic Association, which numbers among its members the vast majority of American colleges and universities, an athlete becomes ineligible to play intercollegiate sports immediately upon signing a contract to play professional sports. National Collegiate Athletic Ass'n, Rules 12-13.

106. *E.g.*, Constitution and By-Laws for the NFL, Art. XII (1972).

107. 325 F. Supp. 1049 (C.D. Cal. 1971).

108. *See* § VB *infra*.

109. *See* note 105 and accompanying text *supra*.

110. A bill has been reported out of committee in the Senate which would allow the two basketball leagues to merge without violating the antitrust laws. S. Rep. No. 92-1151, 92d Cong., 2d Sess. (1972). One obvious effect of such a merger is to deprive the player of a chance to sell his services to the highest bidder since under a merged league, there will be only one club with whom the player can deal. The natural result of a merger is to decrease significantly the prices which college athletes can command by turning professional.

The athlete also usually has a strong desire to finish his college season, especially if his team is headed for the prestigious and exciting post season tournaments and games held annually. In order to prevent the athlete from being declared ineligible[111] to play in these contests, the club may agree to keep the professional contract a secret. The athlete then finishes his college career and is drafted by the other league. If he has done exceptionally well in a post season tournament, he may find that the second contract is for substantially more money. If the player signs this second contract he is usually sued by the first team for breach of contract. This section will examine the various defenses which the player can raise to that suit.[112]

Because the contract signed secretly by the athlete is his initial contract rather than a renewal through the option clause, certain defenses may be available to him that would not be available to an established player.[113] For example the college athlete may claim that he has never entered into a binding contract with the team because he changed his mind before the contract was approved by the commissioner of the league.[114] This has been held to be a valid defense both in the case of *Detroit Football Co. v. Robinson*[115] and in *Los Angeles Rams Football Club v. Cannon.*[116] Both cases involved players on the 1959 Louisiana State University football team who signed professional contracts before the Sugar Bowl in which their school was to play the University of Mississippi. To avoid being declared ineligible, each player asked the professional team to keep the contract secret until after the game was over.[117]

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111. It is important to realize here that keeping the contract secret does not allow the athlete to remain eligible. The athlete's eligibility was lost by signing the contract and the secrecy is designed merely to prevent this ineligibility from becoming known.

112. This section discusses only the legal and equitable defenses which the player can raise in such a suit and does not undertake to judge the ethics of such secret signings on the player's part. For an illustration of how one court was able to uphold the legal rights of the player even though thoroughly disgusted with the ethics of the transaction, see Detroit Football Co. v. Robinson, 186 F. Supp. 933 (E.D. La. 1960).

113. *See* § II *supra.*

114. Each professional league employs a chief executive officer known as a commissioner with broad powers to regulate activity between the players and the clubs. Among these powers of the commissioner are approval or disapproval of contracts between players and clubs in the league. For an illustration of the full scope of the powers of a commissioner, see Constitution and By-Laws for the NFL, Art. VIII (1972).

115. 186 F. Supp. 933 (E.D. La. 1960).

116. 185 F. Supp. 717 (S.D. Cal. 1960).

117. Although it may appear from the discussion and from the fact that both players went to Louisiana State University that these transac-

The contracts were then signed and bonus payments were tendered to the players. Before the teams had submitted the players' contracts to the commissioner, both Cannon and Robinson changed their minds, returned the bonus payments, and signed contracts with different teams. When sued by the clubs with whom they had originally signed, each raised the defense that, until the commissioner approved the agreement, there was no binding contract but merely an offer by the player which he was free to withdraw before acceptance by the commissioner. This defense was based on paragraph 13 of the NFL Standard Player Contract each player had signed, which reads in part: "This agreement shall become valid and binding upon each party only when, as and if it shall be approved by the commissioner."[118] The teams, on the other hand, argued that approval by the commissioner was a mere formality and that the agreements were binding contracts immediately upon being signed by the player. Quoting the clause involved, the *Cannon* court held that the interpretation offered by the player was correct:

> It is the opinion of this court that on this issue the defendant must prevail. Approval of the Commissioner is essential to the formation of a contract here and this is so because the terms of the document make it so. . . . The words "shall become valid" clearly compels the conclusion that—in the absence of approval—it is not yet a valid agreement.[119]

The *Robinson* case, decided nine days later, adopted the same view of the commissioner's approval:

> It is difficult to devise clearer language indicating that no valid or binding contract existed until after the required approval was secured. We must conclude, as have others, interpreting the same clause, that all Robinson executed was an offer which had not yet been unconditionally accepted by the Detroit Football Company when he withdrew it on December 29.[120]

Perhaps in response to rulings which interpreted the commissioner's approval as a condition precedent to the existence of a binding contract, the wording of the clause has been changed in professional athletic contracts. The disapproval of the commissioner is now seen as a condition subsequent which will terminate the contract.

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tions were carried on at the same time and at the same place, this is not in fact the case. Cannon signed with the Rams on November 30, 1959 in Philadelphia and Robinson signed with the Detroit Lions on December 2, 1959 in Baton Rouge, Louisiana.

118. NFL Standard Player Contract, § 13, *as quoted in* Detroit Football Company v. Robinson, 186 F. Supp. 933 (E.D. La. 1960).

119. Los Angeles Rams Football Club v. Cannon, 185 F. Supp. 717, 721 (S.D. Cal. 1960).

120. Detroit Football Co. v. Robinson, 186 F. Supp. 933, 935 (E.D. La. 1960).

> This contract shall be valid and binding upon the parties hereto immediately upon its execution. A copy of such contract shall be filed by the Club with the Commissioner within ten (10) days after execution. The Commissioner shall have the right to terminate this contract by his disapproval thereof in his office; such action by the Commissioner shall be exercised in accordance with and pursuant to the power vested in the Commissioner by the Constitution and By-Laws of the League; in such event, the Commissioner shall give both parties written notice of such termination, and thereupon, both parties shall be relieved of their respective rights and liabilities hereunder.[121]

Under this clause, the player is not free to sign any other contracts until disapproval by the commissioner of the initial contract.[122]

A general principle of contract law is "A bargain the performance of which would tend to harm third persons by deceiving them as to material facts, or by defrauding them, or without justification by other means is illegal."[123] It is obvious that the agreement to keep secret the fact that a star athlete playing college ball has been signed to become professional will harm and defraud numerous third parties. Once the ineligibility is discovered, the school will forfeit all games in which the athlete played so that not only will the schools be harmed with regard to their reputation but they may also have to forfeit gate receipts of games already played and the forfeits may lower their record to the point where the school will no longer be eligible for certain post-season tournaments. Unless the athlete can demonstrate that the agreement to keep the contract secret was an integral part of the contract itself, and in fact was part of the consideration for entering into that contract, it seems likely that the agreement to keep the contract secret and the contract to play ball for the professional club will be regarded as separate agreements, and that only the agreement to keep the

121. NFL Standard Player Contract, § 17 (1972); *accord*, NBA Uniform Player Contract (1972); ABA Uniform Player Contract (1972).

122. *Id.* This statement is restricted to the question of whether the player has such freedom within the terms of the contract itself and does not prevent the player from asserting any defenses of illegality or unclean hands to show why the contract is unenforceable in spite of this clause. One such defense, although it has never been raised, would be an argument that the secret contract to play professionally violated the player's scholarship agreement with the school (which would require that the player be an eligible amateur athlete) and thus was illegal as "a bargain the making or performance of which involves a breach of contract with a third person." RESTATEMENT OF CONTRACTS § 576 (1932). The difficulty with this defense, of course, lies in the questionable classification of a scholarship agreement as a contract.

123. RESTATEMENT OF CONTRACTS § 577 (1932).

athlete's ineligibility secret will be declared illegal. Thus, in *Houston Oilers, Inc. v. Neely*,[124] the Tenth Circuit Court of Appeals rejected Neely's argument that his professional contract with Houston should be declared illegal on grounds that it was kept secret, referring to the secrecy agreement as merely "an extrinsic oral understanding."[125]

Instead of attempting the difficult task of avoiding the contract on grounds of illegality, perhaps the athlete's best defense would be to assert that the professional club acted so inequitably in keeping the contract secret that it is not entitled, under the clean hands doctrine, to seek equitable enforcement of that contract. This defense does not require that the acts of the plaintiff amount to illegal acts, but only that they be "any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct. . . ."[126] The fact that the interest of the public is involved may be of great significance to the court in its decision whether to bar the club on the grounds of unclean hands.

> Moreover when a suit in equity concerns the public interest as well as the private interests of the litigants this doctrine assumes even wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents the wrong doer from enjoying the fruits of his transgression but averts an injury to the public.[127]

In 1960 the Giants signed Charles Flowers to a contract to play professional football while he was still playing college ball at the University of Mississippi but agreed to keep the signing secret so that Flowers could play in the Sugar Bowl. When Flowers later signed another contract with the Los Angeles Chargers, the agreement by the Giants to keep Flowers' contract secret was held to be such inequitable conduct as to bar them, under the clean hands maxim from obtaining injunctive relief:

> Here the plaintiff's whole difficulty arises because it admittedly took from Flowers what it claims to be a binding contract, but which it agreed with Flowers it would, in effect, represent was not in existence in order to deceive others who had a very material and important interest in the subject matter. If there had been a straightforward execution of the document, followed by its filing with the Commissioner, none of the legal problems now presented to this court to untangle would exist. We think no party has the right thus to create problems by its devious and deceitful conduct and then approach a court of equity

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124. 362 F.2d 36 (10th Cir. 1966).
125. *Id.* at 40.
126. Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806, 815 (1945).
127. *Id.* at 816.

> with a plea that the pretended status which it has foisted on the public be ignored and its rights declared as if it had acted in good faith throughout.
>
> When it became apparent from the uncontradicted testimony of Mara that this deceit was practical in order to bring into being the "contract" sued upon, the trial court should have dismissed the suit without more on the basis of the "clean hands" doctrine.[128]

This interpretation has not been unanimous, however. When Ralph Neely signed a contract with the Houston Oilers on December 1, 1964 the contract was kept secret so that he could play in the Gator Bowl game on January 1, 1965. When Neely changed his mind and signed with the Dallas Cowboys, the Houston Oilers brought suit to enjoin violation of Neely's contract with them. Injunctive relief was denied at the trial level on the grounds that Houston had acted so inequitably as to be barred from equity under the clean hands doctrine. On appeal the decision was reversed.

> It is neither unlawful nor inequitable for college football players to surrender their amateur status and turn professional at any time. Neely was as free to bind himself to such a contract on December 1, 1964 as he would have been after January 2, 1965. Nor was Houston under any legal duty to publicize the contract or to keep it secret. Its agreement to keep secret that which it had a legal right to keep secret cannot be considered inequitable or unconscionable as those terms are ordinarily used in contract negotiations.[129]

Neely had relied on the *Giants* case but the court attempted to distinguish the two cases factually and then went on to specifically disagree with it:

> [I]f the rule announced in that case was intended to apply to every instance in which a contract is entered into with a college football player before a post-season game with an understanding that it be kept secret to permit that player to compete in the game, then we must respectfully disagree with the conclusion.[130]

It is respectfully suggested that the court in the *Neely* case has not only misinterpreted the facts but has misjudged the application of the unclean hands doctrine. The case was not one involving a player voluntarily surrendering his amateur status and turning professional, which would not in itself be illegal or inequitable.

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128. New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc., 291 F.2d 471, 474-75 (5th Cir. 1961). The "Mara" referred to in the quote is Wellington Mara, owner of the New York Giants.
129. Houston Oilers, Inc. v. Neely, 361 F.2d 36, 42 (10th Cir. 1966).
130. *Id.*

Rather it was one in which a player tried to turn professional and, with the club's agreement to keep the contract secret, attempted to present to the public the false image that he was still an amateur. The inequitable conduct is not to be found in turning professional but in attempting to defraud the public into believing that one is not professional and in furtively violating the rules of interscholastic competition. Further, the court continually refers to the legal rights of the parties as a standard by which to judge whether or not the conduct was inequitable. The clean hands doctrine, however, is to be measured by equitable, not legal, standards.[131] Thus, even contracts which were made within the bounds of the law have been declared unenforceable at equity under the clean hands doctrine.[132] Any factual distinction which the court alluded to as existing between the *Neely* and *Giants* cases can only be found in the fact that Flowers actually did play in the Sugar Bowl in spite of being ineligible whereas Neely's signing of a professional contract was discovered[133] before the Gator Bowl and thus he was declared ineligible to play. Although less harm to the school and public interest ensues when a secret contract is discovered prior to a team's disqualification, any contention that the distinction between being caught and not being caught at inequitable conduct is determinative of whether to apply the clean hands doctrine would be a circumvention of the equitable principle that conduct should be judged by intention and not by outward appearances.[134]

Further, the idea offered by the *Neely* court that there should be no blanket rule invalidating all secret contracts encourages further secret signings and implicates the court in the questionable dealings. The maxim should be applied not for the benefit of any particular defendant but as a protection of the court's integrity and the public interest. It is suggested that the best policy would be a refusal on the part of all courts, by application of the clean hands doctrine, to enforce secret contracts. Such a policy would virtually eliminate the serious problems which have been caused recently by secret contracts.[135] Once professional teams realized that contracts written under such circumstances could not be en-

131. Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806 (1945); Keystone Driller Co. v. General Excavation Co., 290 U.S. 240 (1933); J. POMEROY, EQUITY JURISPRUDENCE § 400 (5th ed. 1941).

132. Minnesota Muskies, Inc. v. Hudson, 294 F. Supp. 974 (M.D.N.C. 1969); Schaeffer v. Jones, 193 Pa. 529, 143 A. 197 (1928).

133. The contract was not announced by Houston but was somehow discovered by the press and it was their reports which led to Neely's being declared ineligible by the National Collegiate Athletic Association. Houston Oilers, Inc. v. Neely, 361 F.2d 36 (10th Cir. 1966).

134. J. POMEROY, EQUITY JURISPRUDENCE § 378 (5th ed. 1941).

135. In the 1971 National Collegiate Athletic Association Basketball Tournament, for example, two of the top four teams, Villanova and Western Kentucky, were stripped of their standings and ordered to return all

forced, it seems doubtful that they would persist in furtively carrying on early negotiations. Thus the policy would protect not only the integrity of the courts which would no longer have to hear disputes arising out of disreputable dealings, but also the public which would no longer be victim to deceit.

B. *League Rules Barring Undergraduates*

In contrast to the situation of senior athletes who find too many teams desirous of their services, an athlete whose original class is not due to graduate for at least another year may find that, although he has the ability to be a star in the professional leagues, no team will sign him because the league prohibits teams from employing undergraduates. The NBA's elibibility rule[136] was attacked by Spencer Haywood as a violation of the Sherman Act in that it constituted a group boycott.[137] This section will examine the decision of the district court in that case and discuss how the ruling might effect the eligibility rules of football and whether changes made by the basketball leagues in their eligibility rules are sufficient to evade the impact of the holding.

Spencer Haywood was an All-American basketball player in high school and at Trinidad Junior College and led the United States basketball team to a gold medal in the 1968 Olympics in which he was named the outstanding player. After the 1968 Olympics Haywood enrolled at the University of Detroit where he again was named an All-American basketball player for the 1968-69 season, his sophomore year. In the summer of 1969, Haywood decided not to return to college and signed a contract to play professional basketball with the Denver Rockets.[138] After being named "Rookie of the Year" and "Most Valuable Player" in the ABA for the 1969-70 season, Haywood became embroiled in a contract dispute with the Rockets[139] and informed them that he would no longer play for

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gate receipt shares for using players who had signed secret contracts with the ABA. N.Y. Times, Feb. 24, 1972, at 47, col. 1; N.Y. Times, Mar. 8, 1972, at 50, col. 6.

136. NBA By-Laws, § 2.05 *as quoted in* Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1055 (C.D. Cal. 1971).

137. Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971).

138. The ABA, of which Denver is a member, also had a rule declaring players ineligible until four years after they had entered college but it was decided that such a rule would impose a hardship on Haywood and was, therefore, waived by the league. *Id.*

139. The exact facts of this dispute are not pertinent to this section. It is sufficient to note that Haywood's contract with Denver was to be for $1.9 Million dollars and was held by the court to provide actual compensation of $394,000 and therefore Denver was denied its request that

Denver. On December 28, 1970 Haywood signed a six year contract to play for the Seattle Supersonics of the NBA. At this time however, he had been out of high school for only three years and his college class had not graduated. Thus Haywood was ineligible to play in the NBA under rule 2.05 of its by-laws:

> A person who has not completed high school or who has completed high school but has not entered college, shall not be eligible to be drafted or to be a Player [in the NBA] until four years after he has been graduated or four years after his original high school class has been graduated, as the case may be, nor may the future services of any such person be negotiated or contracted for, or otherwise reserved. Similarly, a person who has entered college but is no longer enrolled, shall not be eligible to be drafted or to be a Player until the time when he would have first become eligible had he remained enrolled in college. Any negotiations or agreements with any such person during such period shall be null and void and shall confer no rights to the services of such person at any time thereafter.[140]

When Haywood first began playing for the Supersonics, other teams in the league objected that he was ineligible under league rules and an official protest was filed after every game in which Haywood appeared.[141] Finally, after several teams announced their intent to sue Seattle,[142] the NBA Board of Governors voted to seek drastic penalties against Seattle including expulsion, if it persisted in using Haywood.[143] Thus, when Denver sued Haywood and his agent All-Pro Management, Inc. for Haywood's violation of his contract with it, Haywood filed a cross-claim against the NBA charging them with conducting a group boycott against him in violation of the Sherman Act.[144] Since the NBA season was already

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a restraining order be issued to prevent Haywood from playing elsewhere. Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971).

140. NBA By-Laws § 2.05 *as quoted in* Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1045, 1055 (C.D. Cal. 1971).

141. An official protest is a formal action whereby the coach or general manager appeals to the commissioner that his team was deprived of a victory in a game by actions of either the officials or the other team which were in violation of league rules.

142. Chicago and Portland announced intent to sue Seattle for using an ineligible player. Portland's grievance seems to have been that, had Seattle not signed Haywood, he would have been available for them to draft when he became eligible in the 1971 draft. Chicago announced plans to sue Seattle for $600,000 after Chet Walker was injured in a game between Chicago and Seattle, claiming the injury to Walker was due to Haywood's presence. N.Y. Times, Jan. 4, at 45, col. 1. After the NBA was enjoined from barring Haywood, these disputes were settled out of court. Seattle was allowed to keep Haywood but had to pay a $200,000 fine to the league. All suits and protests were withdrawn with prejudice. N.Y. Times, Mar. 31, 1971, at 51, col. 1.

143. Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971).

144. *Id.*

underway and approaching the playoff games for the championship, Haywood asked for a preliminary injunction to restrain the NBA from preventing his playing for the Seattle Supersonics. This preliminary injunction was granted.[145] The injunction was stayed on appeal but reinstated by Justice Douglas acting as Circuit Justice for the Ninth Circuit. The case was then remanded for consideration of whether the eligibility rules were in violation of the Sherman Act.[146] On remand, the NBA did not contend that Haywood was unqualified to play in the league but merely defended its right to exclude him under its eligibility rules. Further it was argued that the rules were financially necessary to basketball as a business enterprise and that they were necessary to guarantee that each prospective professional basketball player be given the opportunity to complete four years of college before joining the professional ranks.[147] Haywood, on the other hand, argued that the real purpose of the rules was to provide the professional leagues with a cheap "farm-system"[148] and that the effect of the rules was a group boycott on the part of the NBA against Haywood and all other qualified undergraduates.[149]

Haywood's argument that the rules effected a boycott was accepted by the court, which went on to discuss the harms from such a boycott,

> Application of the four-year college rule constitutes a "primary" concerted refusal to deal wherein the actors at one level of a trade pattern [NBA team members] refuse to deal with an actor at another level [those ineligible under the NBA's four-year college rule].

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145. *Id.*

146. Haywood v. NBA, 401 U.S. 1204 (Douglas, Circuit Justice, 1971).

147. Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1066 (C.D. Cal. 1971). It is important to notice here that the league speaks only of the "opportunity" of getting an education and not the actual obtaining of a degree. This is because the league rules, in fact, are not educational requirements but are based on the mere passage of time since the player graduated from high school. Thus many players merely put in time at schools and then go into professional basketball without getting a degree. This fact has led some to argue that Haywood was correct in his contention that the rules are merely designed to allow use of the colleges as a cheap farm system. *See, e.g.,* N.Y. Times, June 26, 1971, at 28, col. 1.

148. Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1066 (C.D. Cal. 1971). The term "farm system" commonly refers to the practice developed in professional athletics of developing the skills of young players by placing them on affiliated minor league teams where the skill level required is not as great. Such teams are usually found in smaller cities and towns and are less expensive to operate.

149. Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1060 (C.D. Cal. 1971).

> The harm resulting from a "primary" boycott such as this is three fold. First, the victim of the boycott is injured by being excluded from the market he seeks to enter. Second, competition in the market in which the victim attempts to sell his services is injured. Third, by pooling their economic power, the individual members of the NBA have, in effect, established their own private government. Of course, this is true only where the members of the combination possess market power in a degree approaching a shared monopoly. This is uncontested in the present case.[150]

The court then focused on whether such a boycott was in violation of the Sherman Act:

> Before a concerted refusal to deal can be illegal under Section 1 of the Sherman Act, two threshold elements must be present: (1) there must be some effect on "trade or commerce among the several States," and (2) there must be sufficient agreement to constitute a "contract, combination * * * or conspiracy." 15 U.S.C. § 1.
>
> It is uncontested that both of these elements are present in the instant case. The NBA operates teams in seventeen of the major metropolitan areas of the United States. It schedules games in numerous states and receives television and radio revenue from nationwide broadcasts of its games. It is thus clear that the NBA conducts its business in such a manner as to constitute interstate commerce. Furthermore, the members of the NBA have agreed, through their constitution and by-laws, not to deal with those persons described by Sections 2.05 and 6.03 of their by-laws.[151]

Having determined that the activities of the NBA constituted a "primary" boycott and that the threshold requirements of illegality under the Sherman Act had been met, the court next considered the argument that the NBA's rules were economically necessary and, therefore, exempt from the Sherman Act under the rule of reason.[152] The court conceded that the rule of reason had been used by the Supreme Court to allow certain commercially necessary practices to continue even though they violated the technical requirements of the Sherman Act. The court also noted, however, that some practices were too complex to be determined under the rule of reason and were illegal per se:

> The Supreme Court has on numerous occasions recognized these difficulties and has declared that with regard to certain practices the problems of making adequate economic determinations and setting appropriate guidelines are so complex that they simply outweigh the very limited benefits deriving from those practices and have declared

150. Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1061 (C.D. Cal. 1971).

151. *Id.* at 1062.

152. *Id.* at 1063. For an explanation of the "rule of reason," *see* note 194 and accompanying text *infra.*

> them to be illegal per se. A group boycott is one such practice.[153]

Because the eligibility rules effected a group boycott by the NBA the rules were declared illegal per se.[154] Accordingly, the court noted that even the possibility offered by the league that the purpose of the rules was to provide an opportunity for education provided no excuse:

> However commendable this desire may be, this court is not in a position to say that this consideration should override the objective of fostering economic competition which is embodied in the antitrust laws. If such a determination is to be made, it must be made by Congress and not the courts.[155]

After a lengthy discussion, the court granted Haywood's request for partial summary judgment and ordered the NBA not to interfere with Haywood's playing for the Seattle Supersonics.[156]

Reaction to the order forbidding the NBA from enforcing its eligibility rules against undergraduates came quickly from the league itself and from other professional sports leagues with similar rules. The NFL, which has even stricter eligibility rules, requiring completion of college eligibility or a five year lapse,[157] announced that the rules would not be changed and that undergraduates would still be ineligible to play professional football in the NFL.[158] These rules are virtually the same as the rules declared illegal by the court in *Denver Rockets v. All-Pro Management, Inc.*[159] and it

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153. Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1063 (C.D. Cal. 1971).

154. *Id.* at 1067.

155. *Id.* at 1066. The Senate Judiciary Subcommittee in its report of the bill which would exempt the proposed merger of the NBA and ABA has indicated that there may soon be congressional action on the matter of the drafting of players who have not completed college:

> The Committee views the practice of drafting high school or college students . . . by professional basketball clubs in cases other than instances of genuine economic hardship warranting termination of academic pursuits as a serious interference with the education of student athletes and a threat to school and college athletic programs. The Committee understands that once the combination of the two leagues is accomplished, the clubs of the merged leagues will discontinue this practice.

Sen. Rep. No. 92-1151, 92d Cong., 2d Sess., 9 (1972). Senator Ervin dissented from this view, arguing that an athlete's career is too short to make him wait until his college class graduates before playing professional ball. Sen. Rep. No. 92-1151, 92d Cong., 2d Sess., 13 (1972).

156. Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1067 (C.D. Cal. 1971).

157. Constitution and By-Laws for the NFL, Art. XII (1972).

158. N.Y. Times, Mar. 23, 1971, at 39, col. 1.

159. 325 F. Supp. 1049 (C.D. Cal. 1971).

would seem that, if challenged in court, they would also be declared in violation of the Sherman Act.[160]

The NBA responded to the ruling of the court by changing its eligibility rules slightly. The basic premise still remains that a player who has not yet completed his college eligibility or who has not been out of high school for four years is ineligible to play in the NBA. Under the revision, however, a player can petition to have his case considered a hardship case and have the eligibility rules waived in his favor.[161] The determination of whether or not to waive the rule is based on considerations of "financial condition, his family, his academic record or lack of it, and his ability to obtain employment in another field."[162] If the player is successful in his petition he will be eligible to be drafted in a special "hardship draft." These revisions make the NBA rules basically the same as those under which Haywood entered the ABA. The fact that the ABA rules were not declared illegal in the *Denver Rockets* case does not necessarily indicate that they are not in violation of the Sherman Act, but merely reflects the fact that they were not challenged by Haywood. The rules still affect a group boycott against players who have not completed their college eligibility or been out of high school for four years. The legality of the rules, therefore, hinges on whether the hardship hearing is sufficient protection from the group boycott for purposes of the Sherman Act.

In *Deesen v. Professional Golfers Association of America*[163] and in *Molinas v. NBA*,[164] the power of an organized athletic association to exclude members after a hearing was upheld despite claims that such expulsion constituted a violation of the Sherman Act. There are basic factual distinctions between these cases and *Denver Rockets*, however, which would make these decisions improper precedent for a holding that the four-year rules are legal as long as there is a "hardship hearing." First, in both cases, the plaintiff was not a person who had been denied admission to an athletic association but was, rather, a member of an athletic association who had been declared ineligible for further competition. Thus, the action on the part of the defendants was not a primary boycott at all but rather a reasonable enforcement of disciplinary rules. Second, and more importantly, the ineligibility in each case was based directly on matters relevant to the plaintiff's athletic

160. This contention is strengthened by the fact that the NFL is the only major professional football league in America and thus any player not eligible to play for it simply cannot play whereas a player rejected by the NBA might still have been able, as Haywood was, to play in the ABA.

161. Statement by Comm'r. Walter Kennedy of the NBA, N.Y. Times, June 25, 1971, at 24, col. 6.

162. *Id.*

163. 358 F.2d 165 (9th Cir. 1965), *cert. denied*, 385 U.S. 846 (1966).

164. 190 F. Supp. 241 (S.D.N.Y. 1961).

ability. Deesen was dropped from the rolls of approved tournament players because he was unable to win more than $240.35 in seven years, never averaging better than 76 strokes per eighteen holes.[165] The court held that the Professional Golfer's Association had to limit the number of players in tournaments out of physical necessity and that it had, through the adoption of try-out systems, adopted reasonable rules for that purpose. The eligibility rules, on the other hand, are not designed to limit numbers for administrative reasons through qualification by ability, but are simply rules designed to prevent certain parties from even demonstrating their ability to play professional basketball.

In the *Molinas* case, the plaintiff had admitted to gambling on games while a member of the Fort Wayne Pistons of the NBA. The commissioner of the league ordered him suspended for life, labelling him a "cancer on the league" which must be excised.[166] The suit by Molinas charging the NBA with violation of the Sherman Act was held barred by the statute of limitations,[167] but the court in dicta declared that the power of the league to expel gamblers was not a violation of the Sherman Act:

> With respect to plaintiff's suspension from the league in January of 1954, and the subsequent refusal by the league to reinstate him, plaintiff has patently failed to establish an unreasonable restraint of trade within the meaning of the anti-trust laws. A rule, and a corresponding clause, providing for the suspension of those who place wagers on games in which they are participants seems not only reasonable, but necessary for the survival of the league.[168]

In contrast to these two cases, the hardship hearing is not a disciplinary proceeding for the protection of the league but a hearing to determine whether to grant permission to even try out for the league. Further, the standards of eligibility were moral integrity in the *Molinas* case and physical ability in the *Deesen* case, both of which are directly relevant to fitness for the sport. A hardship rule, however, determines eligibility on such fortuitous circumstances as whether or not a player comes from an affluent family, a factor which certainly has no bearing on his moral or physical ability to play professional basketball.

The Supreme Court has indicated in *Silver v. New York Stock Exchange*[169] that there may be an exception to the per se illegality

165. Deesen v. Professional Golfers Ass'n, 358 F.2d 165, 167 (1966).
166. Molinas v. NBA, 190 F. Supp. 241, 242 (S.D.N.Y. 1961).
167. *Id.* at 243.
168. *Id.*
169. 371 U.S. 342 (1963).

of group boycotts. It seems unlikely, however, that the hardship rules would be legal under this exception as it was interpreted by the *Denver Rockets* court:

> Thus, *Silver* seems to envision the application of the per se rule to group boycott cases, with one narrow exception. A factual situation falling into this exception would be governed by the "rule of reason." To qualify for this exception it would have to be shown that:
>
> (1) There is a legislative mandate for self-regulation, "or otherwise" . . .
>
> (2) The collective action is intended to (a) accomplish an end consistent with the policy justifying self-regulation, (b) is reasonably related to that goal, and (c) is no more extensive than necessary.
>
> (3) The association provides procedural safeguards which assure that the restraint is not arbitrary and which furnishes a basis for judicial review.[170]

It is obvious that the hardship rule does not come within the *Silver* exception because there is no legislative mandate that authorizes professional basketball leagues to regulate themselves, and even if there were, the procedural safeguards supposedly provided in the hardship hearing are perhaps arbitrary since the standards for granting a waiver under the rule are based not on matters relevant to ability or fitness for professional basketball but on totally extraneous and fortuitous circumstances.

It is suggested that the modification of the eligibility rules to provide for a hardship hearing has succeeded neither in bringing the eligibility rules within the holdings of the *Deesen* and *Molinas* cases nor within the exception to the per se illegality rule suggested by the Supreme Court in the *Silver* case. Rather, it is suggested that the rules still effect a group boycott in violation of the Sherman Act. The fact that the group boycotted has shrunk from all basketball players who have not been out of high school at least four years to all basketball players, other than those few who meet arbitrary standards of hardship set by the league, who have not been out of high school for four years, is not enough to exclude the boycott from the sanctions of the Sherman Act, inasmuch as the Supreme Court has held that a concerted refusal to deal even with only one individual may be a violation of the Sherman Act.[171]

V. Changes in Athletic Contracts

Perhaps the single unifying aspect of suits arising during a bidding war is that all have arisen out of standard form contracts prepared by the club, which the athletes must either accept or reject as a whole.[172] Because the contract has been prepared by the club,

170. Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1064-65 (C.D. Cal. 1971).

171. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

172. *See* note 73 and accompanying text *supra*.

it contains the special clauses already discussed[173] which give the club an extraordinary amount of power over the athlete, in addition to the power already inherent in the fact that the clubs are members of a league which controls all, or nearly all, opportunities for professional employment in the athlete's chosen field. Traditionally, athletes having signed these standard form contracts have not discovered the full impact of the contracts until they attempted to join another team or league. Unfortunately, such discovery was usually made clearest by means of a court order forbidding this intended "jump." Recently, however, substantial changes in the nature of the contractual relations between the player and the club have been proposed. In each of the major sports this change has been initiated in a different manner, but in all sports the proposals have focused on modification of the reserve or option clause. This section will examine the different modifications and discuss how the changes affect the rights of an athlete seeking to market his skills.

A. *The NFL Option Clause*

After escalating to the point where All-American football players could command contracts in excess of a half million dollars for turning professional, the bidding war between the NFL and the AFL came to an end in 1967 when the two leagues merged under special congressional authorization.[174] The basic option clause has been retained in the standard player contract used by the merged league, but the ability of a player to actually become free to sign with any club willing to meet his terms after he has played out his option has been severely limited by the adoption of a requirement that any new club signing the player must provide compensation to his former club.[175] This rule has been attacked recently in a suit filed by the NFL Players Association against the NFL,[176] charging the league with violating the Sherman Act by enforcement of its rule.[177]

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173. *See* § II in text *supra.*
174. 15 U.S.C. § 1291 (1967); *see* note 3 *supra.*
175. Constitution and By-Laws for the NFL, Art. XII, § 12.1(H) (1972). Because of the extraordinary amount of power which this rule gives the commissioner, the rule has been called "the Rozelle Rule" by the players in their suit against the league. Complaint at 10, Mackey v. NFL, Civil No. 4-72-277 (D. Minn., filed May 23, 1972).
176. Mackey v. NFL, Civil No. 4-72-277 (D. Minn., filed May 23, 1972).
177. Complaint, Mackey v. NFL, Civil No. 4-72-277 (D. Minn., filed

The option clause in the Standard Player Contract of the NFL reads:

> The Club, may, by sending notice in writing to the Player, on or before the first day of May following the football season referred to in paragraph 1 hereof, renew this contract for a further term of one (1) year on the same terms as provided by this contract, except that (1) the Club may fix the rate of compensation to be paid by the Club to the Player during said further term, which rate of compensation shall not be less than ninety percent (90%) of the sum set forth in paragraph 3 hereof and shall be payable in installments during the football season in such further term as provided in paragraph 3; and (2) after such renewal this contract shall not include a further option to the Club to renew this contract. The phrase rate of compensation as above used shall not include bonus payments or payments of any nature whatsoever and shall be limited to the precise sum set forth in paragraph 3 hereof. . . .[178]

Even though the affect of such a clause is that a player can sever relations with a club and become free to deal with others only at great expense and risk,[179] the validity of the option clause has been upheld by the courts.[180] The Constitution of the NFL, which is incorporated by reference into the player contracts, however, contains an article which makes it far more difficult for the player to play out his option and join another team:

> Any player, whose contract with a League club has expired, shall thereupon become a free agent and shall no longer be considered a member of the team of that club following the expiration date of such contract. Whenever a player, becoming a free agent in such manner, thereafter signed a contract with a different club in the League, then, unless mutually satisfactory arrangements have been concluded between the two League clubs, the Commissioner may name and then award to the former club one or more players from the Active, Reserve or Selection list (including future selection choices) of the acquiring club as the Commissioner in his sole discretion deems fair and

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May 1, 1972). This complaint is filed in two counts. The first names thirty-four players as plaintiffs and all of the clubs of the NFL, the Commissioner and the league itself as defendants and charges them with violation of the Sherman Act by application of the Rozelle Rule. The second count names ten players as plaintiffs and the same defendants as the first court and alleges that each player has played out his option and became a free agent but because of the application of the rule the players have been unable to sign on with new teams. Each player alleged that this is due to an illegal combination on the part of the clubs by application of the Rozelle Rule and the players pray for treble damage under the provisions of the Clayton Act. 15 U.S.C. § 15 (1914).

178. NFL Standard Player Contract, § 10 (1972).

179. *See* note 13 *supra.*

180. Dallas Cowboys Football Club, Inc. v. Harris, 348 S.W2d 37 (Tex. Civ. App. 1961); *see* § IIA in text *supra.*

> equitable; any such decision by the Commissioner shall be final and conclusive.[181]

The most notable example of the effect of this rule is to be found in the case of Dave Parks. While with the San Francisco 49ers, Parks was an all-pro receiver but he became unhappy with the team and played out his option. When the New Orleans Saints signed him to a contract, Pete Rozelle ordered that they surrender their 1968 first round draft choice to the 49ers and also granted to San Francisco the first round draft choice of New Orleans for 1969. First-round draft choices are extremely valuable and this price exacted by the commissioner is an indication that signing a supposedly free agent who has played out his option may cost the team more than the player is worth.[182] Thus a player who has played out his option must now convince a new team that he is worth not only the salary he is seeking but also the loss of any player on the new team which the commissioner, in his total and unappealable discretion, considers to be adequate compensation to the old team.[183] The severe restriction which this puts on a player's actual ability to play out his option and go to another team is reflected in the fact that few players ever play out their options and, that, since the Dave Parks case, no player of all-league caliber has played out his option and gone to a new team.[184] Not only does this rule impinge upon the ability of a player to join a new team, but it also gives his present team an unconscionable advantage at the bargaining table. This advantage lies in the fact that if the player refuses to accept any offer the club makes, the worst that can happen to the club is that they will receive the same services for an additional year for 10% less and then will receive "compensation" from any new team which the player may join. It is hard to imagine any owner giving in to a player's salary demands at the threat of such consequences. It is suggested that the total effect of the Rozelle Rule is, therefore, a severe restraint of trade.

Section 1 of the Sherman Act reads in part, "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with for-

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181. Constitution and By-Laws for the NFL, Art. XII, § 12.1(H) (1972) [hereinafter cited as the Rozelle Rule].

182. An important factor to consider here is that the poorer a team's record is the better its draft choice will probably be since the teams pick in inverse order of finish. Thus the teams that need players the most will have to risk the most valuable draft choices to sign those players.

183. The Rozelle Rule, *supra* note 181.

184. SPORTS ILLUSTRATED, May 1, 1972, at 29. *See also* B. PARRISH, THEY CALL IT A GAME (1972).

eign nations, is declared to be illegal. . . ."[185] As noted in *Denver Rockets v. All-Pro Management, Inc.*,[186] two threshold requirements to a showing of illegality under the Sherman Act are an effect on interstate commerce and sufficient agreement to constitute a contract, combination or conspiracy.[187] In *Radovich v. NFL*,[188] the Supreme Court declared "the volume of interstate business involved in organized professional football places it within the provisions of the [Sherman] Act."[189] The question of whether the by-laws of the league constituted a contract for the purposes of the Sherman Act was decided in *United States v. NFL*.[190] In sustaining the government's challenge to by-laws of the league relating to broadcasting of games, the court held: "The by-laws have been agreed to by all the League members and are binding upon all of them. They clearly constitute a contract within the meaning of the word as it is used in the Sherman Act."[191]

In early cases interpreting the Sherman Act, the mere showing that an act was in restraint of trade and a meeting of the threshold requirements of conspiracy and effect on interstate commerce was sufficient for a declaration that the act complained of was illegal under the Sherman Act.[192] In *Standard Oil Co. v. United States*,[193] the Supreme Court recognized the fact that some restraints of trade were necessary for a healthy business climate and narrowed the prohibition of the Sherman Act to unreasonable restraints of trade.[194] Under this construction of the Sherman Act, if the contention that the Rozelle Rule constitutes a violation of the Sherman Act is to be sustained, it must be shown not only that it constitutes a restraint of trade, but also that such restraint is unreasonable. The unreasonableness can be shown either by evidence that it would have been illegal at common law[195] or by a showing that the restraint in this case is similar to other restraints forbidden by the courts as violations of the Sherman Act.

A key factor to be considered in the determination of whether the restraint effected by the Rozelle Rule would be illegal under

185. 15 U.S.C. § 1 (1890).
186. 325 F. Supp. 1049 (C.D. Cal. 1971); *see* § IVB *supra*.
187. Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049, 1062 (C.D. Cal. 1971).
188. 352 U.S. 445 (1957).
189. *Id.* at 451.
190. 116 F. Supp. 319 (E.D. Pa. 1953).
191. *Id.* at 321.
192. *E.g.*, United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1896).
193. 221 U.S. 1 (1911).
194. *Id.* at 60. This view of the Sherman Act has come to be known as the rule of reason. *But see* § IVB *supra* (group boycotts are still illegal per se).
195. United States v. E.I. duPont de Nemours and Co., 351 U.S. 377 (1956); Denison Mattress Factory v. Spring-Air Co., 308 F.2d 403 (10th Cir. 1962).

common law rules is that, by the very terms of the Rozelle Rule, a player who has played out his option has "become a free agent, and shall no longer be considered a member of the team of that club."[196] Thus the player's relationships with his former club have terminated and the club is being compensated for the loss of a player no longer employed by it. Corbin[197] notes that restraints on an employee after his term of employment were generally invalid at common law, except where the employee has acquired trade secrets, but that the development of exceptional or unique skill was not enough to justify such restraints.[198] Nor would the fact that the club acquiring the player is being made a stronger competitor be sufficient justification for the restraints.

> Sufficient justification is not thought to exist if the harm caused by service to another consists merely in the fact that the new employer becomes a more efficient competitor just as the first employer did through having a competent and efficient employee.[199]

Because the Rozelle Rule effects a severe restraint on an employee who has quit his former job,[200] it would seem that under the common law principles delineated by Corbin the Rozelle Rule would constitute an unreasonable restraint of trade. By application of the rule of reason set forth in *Standard Oil Co. v. United States*,[201] the rule would also be illegal under the Sherman Act.

A more direct method of showing that this restraint of trade is in violation of the Sherman Act is illustrating that the means of achieving the restraint and the effect it has are substantially similar to restraints which have already been declared in violation of the Sherman Act. Important aspects to be considered in this light are that the restraint is effected by giving the commissioner "final and conclusive"[202] discretion in naming the players who will go to the original club; and that the effect is a freeze in the labor pool of the league in that a player can usually leave his team only by retirement or by trade.

In *Anderson v. Shipowners Association*,[203] a sailor sued to enjoin the association from continuing the practice of requiring all

196. Rozelle Rule, *supra* note 181.
197. CORBIN ON CONTRACTS § 1394 (1962).
198. *Id.* at 99.
199. *Id.* at 100. For a leading common law case on such restraints, see Hubert Morris Ltd. v. Sacelby, [1916] A.C. 688 (H.L.).
200. *See, e.g.*, SPORTS ILLUSTRATED, May 1, 1972, at 29; B. PARRISH, THEY CALL IT A GAME (1972).
201. 221 U.S. 1 (1911).
202. Rozelle Rule, *supra* note 181.
203. 272 U.S. 359 (1926).

seamen in the area to register for employment. Upon registration each seaman received a number and had to wait his turn before he could be employed by any ship belonging to an association member. Once his number was called, the shipowner had to give him whatever job was available without regard to qualification, and the seaman had to accept the job. The plaintiff charged that this was a violation of the Sherman Act as an unreasonable restraint of trade. In reversing the dismissal of the complaint,[204] the Supreme Court held that each individual shipowner had surrendered his freedom to carry on business according to his choice and discretion by allowing the final decisions of employment to be governed by the association, and that the practice violated the Sherman Act.[205] That the owners of teams in the league have surrendered their discretion as to employment of a player who has played out his option to the "final and conclusive"[206] judgment of the Commissioner, seems sufficient to classify this restraint as a violation of the Sherman Act.

In *Nichols v. Spencer International Press*[207] an encyclopedia salesman sued his former employer and another encyclopedia company, Crowell-Collier, which refused to hire him, alleging that the two publishers had entered into a "no-switching" agreement whereby each agreed not to hire any former employee of the other for six months after termination of employment. The plaintiff contended that the agreement was in violation of the Sherman Act. The court held that, although the Sherman Act was not designed to regulate employment practices, it was intended to promote competition and where agreements such as this had the effect of cutting down competition, they would be declared illegal.[208] In a case[209] involving a similar "no-switching" agreement among magazine sales agencies, the contention of the FTC that such agreements were in violation of the Sherman Act was upheld on the grounds that such agreements freeze the labor supply in that employees are hesitant to leave one job for fear of being unable to find employment with another company.[210] The freeze on the labor supply within the NFL effected by the compensation requirement is reflected in the fact that, although the total number of players on the active rosters of clubs in the league each season was over one thousand, the number of players actually playing out their options and joining another team in the five seasons between 1966 and

204. Anderson v. Shipowners Ass'n, 10 F.2d 96 (9th Cir.), *rev'd*, 272 U.S. 359 (1926).
205. Anderson v. Shipowners Ass'n, 272 U.S. 359, 365 (1926).
206. Rozelle Rule at 44.
207. 371 F.2d 332 (7th Cir. 1967).
208. *Id.* at 335-6.
209. Union Circulation Co. v. FTC, 241 F.2d 652 (2d Cir. 1957).
210. *Id.* at 658.

1970 was only eleven.[211] Under the reasoning of the *Nichols v. Spencer International Press*[212] and *Union Circulation v. FTC*,[213] this effect of the compensation requirement would also be sufficient to classify it as a violation of the Sherman Act.

It would seem that the requirement that an acquiring club make compensation to the player's former club is, by the reasoning of the cases cited, not only in restraint of trade, but also so unreasonable as to constitute a violation of the Sherman Act. It is suggested, therefore, that the contentions of the NFL Players' Association are valid and that the compensation requirement should be abolished so that a player can actually be free to join a new club after playing out his option.

B. *Arbitration Proceedings under the WHA Uniform Player's Contract*

In 1972, a new professional hockey league was formed to challenge the virtual monopoly which has been enjoyed by the NHL. In order to establish itself quickly, the league began offering star players from the NHL contracts paying unheard of sums. The fabulous salaries being paid by the new league were not the only startling innovation it used to attract players, however. In order to make it attractive for players to join the WHA the league produced a uniform player's contract which contained neither an option nor a reserve clause.[214] This section will discuss the alternative method of leaving a team offered by the WHA.

As noted earlier,[215] the usual professional sports contract runs for a term of one year with an option to the club to automatically renew for a further year by offering the player a stated percentage of the first year's salary. The new contract produced by the WHA runs for a term of one year with no option to renew.[216] Instead, an arbitration system is provided to aid the player and club in reaching settlement on a new contract or, failing that, to aid the player in joining a new team.[217]

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211. SPORTS ILLUSTRATED, May 1, 1972, at 29. *See also* B. PARRISH, THEY CALL IT A GAME (1972).
212. 371 F.2d 332 (7th Cir. 1967) (employment practices which stifled competition held in violation of the Sherman Act).
213. 241 F.2d 652 (2d Cir. 1957) (freeze on labor pool within industry held violation of Sherman Act).
214. WHA Uniform Player's Contract (1972).
215. *See* § II and accompanying footnotes *supra*.
216. WHA Uniform Player's Contract, § 10 (1972).
217. WHA Uniform Player's Contract, § 16 (1972):
16. Player Negotiations,

The advantages that such a clause has over the option clause or reserve clause are apparent. Perhaps most important is that the bargaining strength of the player is greatly increased. As noted in the discussion of the NFL compensation requirement,[218] a player faced with an option clause coupled with a compensation requirement has very little bargaining power. Under the WHA's arbitration system, however, the player can threaten to leave if his terms are not met and can begin negotiating with a new team the next day. Further, unlike the basketball contract which expires a week before the season begins, the player is free to begin negotiations with a new club well in advance of the opening day of the season.

16.1 If the Player and the Club fail to sign a new contract for the season following the termination of this contract before June 1, the arbitration procedure outlined in this Paragraph 16 shall automatically go into effect.

16.2 *Arbitration Procedure*

16.21 On or before July 4 following the last playing season of this contract, in the event the player and the Club fail to enter into a new contract, the Player and the Club shall each appoint one person to hear and determine the dispute preventing the signing of such new contract. If these persons are able to react agreement on or before July 15 of the year of the dispute, no further proceedings are necessary. If they are unable to reach agreement on or before that date, then they shall immediately select a third impartial arbitrator whose decision shall be reached on or before July 31 of the year of the dispute.

16.22 Player and Club agree to arbitrate in good faith.

16.23 If the Player and the Club agree that the decision of the impartial arbitrator is fair, a new contract will be executed embodying the terms of his decision.

16.24 If either the Player or the Club disagree with the decision of the impartial arbitrator, they may refuse to enter into a new contract and the Player automatically enters into a special secondary draft pool on August 1 of the year of the dispute.

16.3 *Secondary Draft*

16.31. Once a Player enters the secondary draft pool, he may not sign a contract with any other club until he is drafted.

16.32. The League will hold, in accordance with its normal draft procedure, a "secondary draft" on or about August 15 of each year. Teams will draft in the same order as in the normal yearly draft.

16.33 The Club with which the Player was under contract immediately prior to the secondary draft may not draft the player in this manner.

16.4 *Subsequent Secondary Drafts*

In the event the player and the club that drafted him in the secondary draft are unable to reach an agreement by September 1, the Player will enter a pool for a new secondary draft, the date of which will be determined by the League President.

16.5 *Costs of Arbitration*

The costs of the arbitration, including costs expended by the President and his staff as his services are required, will be borne equally by the Club and the Player, and the Player hereby authorizes his employing club to deduct his share of the expenses from the first payment due to the Player under the next contract he signs.

218. § VA *supra.*

A disadvantage to the player lies in the fact that, whereas a player who has played out his option supposedly becomes free to negotiate with any other team in the league, under these arbitration proceedings a player who fails to come to an agreement with his present club can only negotiate with the team that selects him in the "secondary draft." The legality of this method of changing teams of course depends upon whether a draft system is a proper employment method or is an unreasonable restraint of trade.

The theory behind the draft is that unlimited competition is not good for professional sports. The adverse effects of unlimited competition were discussed in *United States v. NFL*:[219]

> Thus, the net effects of allowing unrestricted business competition among the clubs are likely to be, first, the creation of greater and greater inequalities in the strength of the teams; second, the weaker teams being driven out of business; and third, the destruction of the entire League.[220]

In order to prevent imbalance between teams in a league, teams are not allowed to hire any and all players they wish but, must, rather select, or "draft," the players with whom they wish to negotiate, such selection to be made in inverse order of league standings. With the weaker teams selecting first and the stronger teams last, the theory is that after several years the weaker teams will become stronger by the addition of the more talented players. Although the efficacy of this system is questionable, the type of draft used by the WHA seems to be a reasonable means of keeping a balance among the teams and probably would not be held to be in violation of the Sherman Act.[221] The secondary draft which the player enters under the WHA is not the ordinary type of draft in which the player either signs with the team selecting him or does not play since the league allows a player to refuse to sign with the selecting team and reenter the secondary draft pool. Conceivably a player who wanted to play for a first place finisher of the previous year could keep reentering the pool until he was selected by that team.[222]

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219. 116 F. Supp. 319 (E.D. Pa. 1953).

220. *Id.* at 324.

221. *See* United States v. NFL, 116 F. Supp. 319 (E.D. Pa. 1953); Comment, *The Sherman Act: Football's Player Controls—Are They Reasonable*, 6 CAL. WEST. L. REV. 133 (1969); Note, *The Super Bowl and the Sherman Act: Professional Team Sports and the Anti-Trust Laws*, 81 HARV. L. REV. 618 (1967).

222. This would, of course, depend upon whether or not a player who wishes to play in a certain city may be considered as bargaining in good faith if he refuses to accept an offer of any other team. WHA Uniform Player's Contract, § 16.22 (1972). It would seem that a player would

It has been held, however, in *Paramount Famous Lasky Corp. v. United States*,[223] that a refusal to deal with a party except on a standard form contract calling for arbitration of disputes constitutes a violation of the Sherman Act. A significant feature of this contract was that the decision of the arbitrator was conclusive and thus the court saw the contract as merely an attempt to suppress competition under the guise of arbitration:

> It may be that arbitration is well adapted to the needs of the motion picture industry, but when under the guise of arbitration parties enter into unusual arrangements which unreasonably suppress normal competition their action becomes illegal.[224]

There are several key distinctions to be made between this case and the arbitration system proposed by the WHA. The most important is, of course, that the arbitration in the WHA is not final and conclusive and thus the player is free to reject it. Moreover, the effect of the contract offered by the WHA is not to suppress normal competition, but to increase the ability of the player to change teams in comparison with the ability of other players in other leagues. Additionally, because the player is not bound for an option season, he may simply reject the arbitration system completely by switching leagues at the start of the new season.[225]

The arbitration system contained in the Uniform Players' Contract of the WHA is a significant improvement from the player's viewpoint in that it grants to the player greater bargaining power if he wishes to stay with his present team and also gives the player greater freedom to leave that team if he so desires.

C. *The Proposed Merger of the NBA and ABA*

The bidding war between the NBA and ABA came to an uneasy truce on May 8, 1971 when the two leagues announced their intention to seek congressional exemption from the Sherman Act for a merger.[226] This was the method used by the AFL and NFL in 1966 to end their bidding war.[227] Unlike the football leagues, which experienced little difficulty in getting approval for the mer-

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have the right to choose which team he will play for. In order to prevent the player from missing any playing time by having to resubmit his name to repeated secondary drafts, it may be a good idea for a player to announce publicly what it is that he is seeking. If this is done only a team willing to meet the player's offer would be likely to draft him and thus negotiations would be expedited.

223. 282 U.S. 30 (1930).

224. *Id.* at 43.

225. The term of the contract is only for one year and thus, the player is free each year to negotiate a new contract. WHA Uniform Player's Contract § 10 (1972). The arbitration system merely regulates the player's contract negotiations with the league but does not prevent his switching leagues. WHA Uniform Player's Contract § 16 (1972).

226. N.Y. Times, May 8, 1971, at 19, col. 1.

227. 15 U.S.C. § 1291 (1967).

ger on their own terms, the basketball leagues have been faced with the opposition of their own players associations which realize that the effect of a merger would be to limit their bargaining power and lower their salaries.[228] In large part because of the opposition of the players, the bill which would allow the merger of the leagues has been reported out of the Senate judiciary committee with an amendment which would abolish option or reserve clauses beyond that contained in a rookie's contract and would do away with any sort of "compensation" requirement.[229]

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228. N.Y. Times, Sept. 22, 1971, at 57, col. 5. The players had earlier rejected a five-point compromise plan offered by the owners to get the players to end their opposition to the merger:

(1) All contracts with rookies would be for one year with an option for another year.
(2) Contracts with veteran players would no longer include either an option nor a reserve clause.
(3) Option clauses in existing contracts would, however, remain in effect.
(4) A player could only begin negotiations with a new team after his contract, including any option, expired and the old club could reclaim the player by matching any offer he accepted.
(5) Any club signing a free agent must make compensation to his former club, such compensation to be determined by arbitration.

This compromise was rejected on the grounds that the last two provisions destroyed the effect of the first three. N.Y. Times, Sept. 19, 1971, § V, at 2.

229. S. Rep. No. 92-1151, 92d Cong., 2d Sess. (1972):

Section 4. (a) Every individual who is already engaged in the organized professional team sport of basketball in or affecting interstate commerce has the right to enter into a contract with any person for the purpose of engaging in such sport with a particular team without agreeing to permit that person to control his right, upon the expiration of his contract, to enter into a contract with any person for such purpose, but this subsection shall not preclude agreement upon a contract containing an option provision as authorized by subsection (b).

(b) No member club of any professional basketball league that has been allocated the right of first negotiation with a player who has not heretofore played professional league basketball may require such player to enter into a contract of employment for a term in excess of one year with an option provision for a further period of one year only. No member club of any professional league shall retain, directly or indirectly or by any means or device whatsoever, any option upon the services of any player beyond the termination date contained in his contract of employment, except for the option provision contained in the first contract of employment and except for an option provision which may not be part of a uniform player contract and which is individually negotiated at the discretion of the player after the effective date hereof for a period of no more than one year after the term contained in his contract of employment.

(c) Any provision of a contract which requires any such an individual or player (1) to agree to permit the other party to the contract to control his right, upon the expiraton of that contract, to enter into a contract with any other person for the purpose of engaging in an organized professional team sport of basketball,

If the legislation were to become law in this amended form, the impact on the rights of a player to sell his services to the highest bidder would be revolutionary. No longer would a player have to buy back his right to play for the team of his choice by going through the process of playing out his option. Instead, like most businessmen, he would be free to take a new job as soon as his present contract expired. Further, the player would be absolutely free to deal with any other team and such other teams would not be required to make any form of compensation to his former team. Thus viewed, the player would be free each year to negotiate not only with his own team but with every other team in the league and would be able to sell his services for the highest price.

Even if the legislation is passed in this form, however, there is some doubt that the leagues will actually use the authority granted by it to merge. The reluctance is apparently based on the idea that, by not merging, the leagues will at least be able to continue the present system of controlling player movement within each league, the view being that this is better than unrestricted competition by all teams of both leagues for every player. However, a close reading of the language of the amendment will make clear that the leagues cannot retain the option clauses merely by not merging. The amendment states that "No member of any professional basketball league"[230] may use option clauses or require compensation by the acquiring club for a player who has played out his option. It would seem, then, that the prohibition would apply to all professional basketball whether in the present two league set-up or in a merged league.

VI. Conclusion

This article has dealt with the contractual rights and liabilities of a professional athlete in today's bidding war from two aspects; how the athlete can best protect his right to play for the team of his choice under contracts as they are now written and how those rights would be effected by certain proposed modifications. Any conclusions which can be drawn, must, therefore, essentially be drawn from these two perspectives.

Under the present system of player-club relations, the player finds himself confronted at best with a two-buyer market or a duoposony, and often finds only one buyer, or a monoposony. Thus,

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or (2) to secure a release from the other party to the contract before entering into or performing under such a contract with any other purpose for such purpose, shall be unenforceable.
(d) Any person who deprives, or conspires with any other person to deprive, an individual or player of his rights under subsection (a) or (b) shall be deemed guilty of a misdemeanor and, upon conviction, shall be fined not more than $50,000, imprisoned for not more than one year, or both.

230. *Id.* at 3.

any contract which the athlete signs to play with a club is not at arm's length but rather an adhesion contract dictated by the clubs containing special clauses such as the "unique skill," "negative covevant" and "option" clauses, all of which are designed to bind a player to a club until it no longer needs his services. In spite of the circumstances under which the athlete and the club sign their contracts, in suits for a player's breach of contract, courts have spoken of the player's "acceptance" of the terms and the "consideration" given for them as valid reasons for granting the clubs the equitable relief authorized by the contracts which they have written.[231] By the trend of modern cases, however, strict enforcement of the language of an adhesion contract is one which even courts of law are reluctant to grant.[232] When it is considered that the courts in which the clubs seek relief are courts of equity, it is distressing to find decisions granting injunctions based upon contract language forced upon an athlete. It is suggested that more consideration should be given by the courts to the onesided nature of present contract formation between the player and the club. Rather than relying upon specially prepared clauses in the contract as sufficient justification for binding a player to a club, it is suggested that courts should refuse to enforce such clauses where they would cause genuine hardship to a player.

The best protection for the rights of all athletes, however, would not be piecemeal judicial decisions protecting individual players in individual sports,[233] but would be provided by legislation such as the proposed basketball merger bill doing away with all option and restrictive clauses. A great problem arising from such legislation is that it would permit unlimited competition for players, which may be bad for the league as a whole.[234] It is suggested therefore, that the leagues should be allowed to preserve competitive balance by an arbitration system similar to that employed by the WHA as long as the player is free to reject any team for whom he does not wish to play. This scheme would protect

231. *E.g.*, Dallas Cowboys Football Club v. Harris, 348 S.W.2d 37 (Tex. Civ. App. 1961).

232. *See, e.g.*, Steven v. Fidelity and Casualty Co., 27 Cal. Rptr. 172, 377 P.2d 284, 58 Cal. 2d 862 (1962); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

233. It is significant to note here that even when courts have intended to protect all the players in a sport, the leagues will react as they see fit, regardless of the spirit of the decision. *See* § IVB *supra* (leagues persist in barring undergraduates even though the practice has been declared illegal).

234. *See* § VB *supra*.

the balance within the league by giving the weaker teams first negotiating rights but it would also protect the player by allowing him the final choice of for whom he will actually play. Only under such legislative protection will the athlete be free, as he should be, to sell his services to the team of his choice.

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