FIDUCIARY DUTIES OF PROFESSIONAL TEAM SPORTS FRANCHISE OWNERS

*John K. Harris, Jr.**

I. INTRODUCTION

If you reside in or near a city with a professional sports franchise, it is likely that you are one of the faithful who follow your team, swell with pride when they win the big game, or take it a little personally when they lose. Your team is the "home" team. When your team plays in your city, it plays at "home." Your city's team, in many ways, acts as your ambassador to the rest of the country, and in some cases, the world. When your team plays a hated rival, your friends from the opposing team's city might call you to chat (or chide). Your city's mayor may make a friendly wager with the opposing city's mayor. If it's an extraordinarily important game or championship, even the governor may get involved. When standings are published in your newspaper's sports section, teams are not listed as "Eagles," "Redskins," "Cardinals," etc., but rather "Philadelphia," "Washington," "Phoenix," etc. It is *your* city's integrity at stake every time your team takes the field. This is the way it has been since ancient Greek cities vied for Olympic championships.

Even though professional sports have become more like a business and less like a game, when push comes to shove, when the strikes are over, when the player contracts have been negotiated, when you have had the chance during the off-season to forgive the players for their huge salaries and to forget the team's failures of last year, when the season starts again, when hope springs eternal, you are there, in your stadium, rooting for your home team.

Fans' feelings of "ownership" of their home teams are deeply rooted in the phenomenon of pride in one's hometown. The rights of ownership are not actual; there is no document or deed transferring title from owner to public. Rather, the feelings are more of a "beneficial" ownership, where the owner of record acts for the ultimate benefit of the beneficiaries - much like in a trust. The "deed of trust"

---

* B.A., University of Pennsylvania, summa cum laude, 1974; J.D., Columbia University, 1977. Mr. Harris is a partner at the law firm of Shutts and Bowen of Miami, Florida.

which gives the fans their feelings of ownership is implied. It arose when the fans supported their teams in good times and bad, cheered for them in rain and in snow and taught their children to do the same. This ownership may seem to be only of a symbolic nature, but, to any fan, it is genuine. A professional sports franchise, as contrasted with other businesses, engenders this kind of feeling of beneficial ownership in its fans. Often it repays the public's support with an "income" or benefit which, while intangible, nevertheless, is real to the fans and bonds those fans all the more to the team.[1]

This article puts forth the proposition that professional sports teams can be (and have been) viewed, in some ways, as public trusts. Consequently, some ownership and management decisions can be guided by a sense of fiduciary responsibility to the public. First, this article will examine the background of the public's stake in professional sports teams and the owners' responses to that public stake. Next, examples of various attempts by the public, through courts and the United States Congress to enforce public "ownership" rights will be discussed. Finally, several trust law analogies will be explored to assist owners in the handling of these "fiduciary" duties.

II. The Public's Stake In Professional Sports Teams

Professional sports teams provide very large and very real economic benefits to the cities where they are located. These benefits come not only in rents and tax revenues, but also in other areas

---

1. *See* John Beisner, *Sports Franchise Relocation: Competitive Markets and Taxpayer Protection*, 6 Yale L. & Pol'y Rev. 429, 438 (1988). Beisner states that

> [t]he bonds that develop between a city and a team make sports special. While workers in a non-sport firm might celebrate a company achievement, such as record profits, that celebration does not overflow into the lives of non-plant employees as reaction to a sporting event does. (citation omitted) For this reason, sports franchise movements product intangible as well as economic effects different from those resulting from plant relocations and closings in non-sport industries.

Id. See also, Ron Fimrite, *Scorecard*, Sports Illustrated, Feb. 25, 1991, at 10 (criticizing a decision by San Francisco 49er Ownership (later changed) to remove the block "SF" from players' helmets). Fimrite asserts that

> [t]here is another issue here besides taste and tradition. In removing the city's initials from the helmet, Eddie is following a disturbing pattern in the NFL of franchises disengaging themselves from the cities of their origin. Some, of course, have done it physically. It's significant that the Oakland Raiders became merely, in Al Davis' peculiar accent, "the Raid-uhs," when that footloose proprietor started making plans to hit the road. All of this leaves one with a feeling of rootlessness and impermanence.
>
> Eddie, unless you know something we don't, your team is not just the 49ers, it's the San Francisco 49ers. That new logo must go.

Id.

which play supporting roles to teams, such as concessions, hotels and restaurants.[2] In addition, a professional sports team helps to create a more attractive environment for other businesses.[3] Senator Thomas F. Eagleton aptly summarized the economic benefits of professional sports teams to cities by commenting that

> [i]t's important both symbolically and economically . . . . If you've got a big league professional team, you're a big league city. Your Chamber of Commerce and industrial development guys can run around the country, trying to get new plants and say "We're big league in every respect." But if you lose a professional team, you're viewed in the eyes of some as a city that once was but maybe ain't no more. You have the taint of failure.[4]

The economic benefits which teams provide their cities are not unrequited by the public. Each year, local taxes are used to support teams by subsidizing costs and rents, and by building and improving stadiums and roads. Indeed, a majority of the facilities used by professional sports teams are currently publicly owned.[5] Cities often feverishly spend public funds in constructing facilities. Sometimes, the results can be spotty.

The case of St. Petersburg, Florida is an example of a large public investment in building a sports facility without a permanent occupant.[6] In the late 1980's, in an attempt to take advantage of its Sun Belt location and its large market, St. Petersburg began building a 43,000 seat domed stadium, costing $85,000,000. The city tried to attract the Chicago White Sox to relocate to the new stadium. The

---

2. Beisner, *supra* note 1, at 433.

3. *Id.* Beisner notes that "identification as a professional sports city . . . creates an environment that attracts non-sports industries." *Id.*

4. Steven V. Roberts, *The Importance of Where Pros Play the Game*, N.Y. TIMES, May 23, 1986, at A16 (quoting Senator Thomas F. Eagleton). *See also* Martin Merzer, *Baseball! A Big League Morale Boost For South Florida*, THE MIAMI HERALD, June 11, 1991, at Al. Merzer states that "as word ricocheted around the region like a line drive deep in the corner, South Florida - and we mean *all* of South Florida - suddenly embraced a wonderful, bang-bang flash of anticipation: we're getting major-league baseball, *we're in the major leagues. . . .*" *Id.* (emphasis in original).

5. This public investment, unfortunately, is felt most when franchises relocate. *See* Beisner, *supra* note 1, at 432. *See also* Lisa J. Tobin-Rubio, Note, *Eminent Domain and the Commerce Clause Defense: City of Oakland v. Oakland Raiders*, 41 U. MIAMI L. REV. 1185, 1212 (1987).

6. *See* E. M. Swift, *The Sunshine Sox*, SPORTS ILLUSTRATED, May 30, 1988, at 40. The St. Petersburg facility, the Suncoast Dome, was visited, in early 1991, by the National League's baseball expansion committee, as a potential home for a National League franchise in 1993. The Suncoast Dome has been referred to as a structure "which from the outside looks like a spaceship run aground and from the inside looks like a bomb shelter." Steve Wulf, *You Aren't My Sunshine*, SPORTS ILLUSTRATED, Jan. 14, 1991, at 100.

White Sox, dissatisfied with their Comiskey Park location, considered moving the franchise to St. Petersburg. Unfortunately for St. Petersburg, the White Sox ultimately declined to relocate and instead built a new stadium directly across from the old Comiskey Park. Today, the Florida Suncoast Dome sits in St. Petersburg waiting for its first home professional sports game. The public has obviously invested substantial funds in the project and its interest in whatever team which decides to locate there is very real; 26,000 season tickets were sold to view whichever team that eventually establishes its home there.

Public economic investment in professional team sports has become so pervasive that it is no longer limited to the major league level or even to home cities of major league teams. Baseball's spring training, for example, has become big business in and of itself generating several hundred million dollars a year. This, in turn, has led some cities to follow the St. Petersburg example to attract spring training sites. For instance, the city of Homestead, Florida recently completed a state-of-the-art spring training facility, which was built with public funds. The city then finalized a deal to bring the Cleveland Indians to Homestead for spring training activities.

This public economic investment may not be excessive or unwarranted. But understanding its magnitude is critical to any evaluation of the public's stake in sports franchises. The investment is real and so are the feelings that the investment entitles the public to beneficial ownership. As the public's economic partnership with owners grows, the manner in which owners react becomes more important.

III. Ownership's Response To The Stake Of The Public

Professional sports teams often formalize their interrelationship and interdependence by entering into contractual arrangements which create league play, constitutions and by-laws to govern that play, and assure its uniformity. The goal of league formation, presumably, is to present the best possible sporting entertainment to the public. Contracts creating leagues sometimes may also create offices of commissioners to oversee league matters. The role and authority of each commissioner may vary. For example, it is said of the Commissioner of Baseball's office that

> [t]he various agreements and rules, constituting a complete code for, or charter and by-laws of, organized baseball in America, disclose a clear intent upon the part of the parties to endow the commissioner with all

> the attributes of a benevolent but absolute despot and all the disciplinary powers of the pater familias.[7]

Ostensibly, in their formation of leagues and particularly in the creation of commissioners, owners have attempted to safeguard the public's interest in obtaining the best possible sports product at the highest level of play governed by an objective third party. However, the commissioners' roles and duties are only derived from powers given to the commissioners by the owners themselves.

Commissioners seldom have authority to take action not specifically authorized by the documents creating their position.[8] Indeed, if action is taken outside the delegated scope of authority, courts will generally not interfere, except in extreme cases.[9] This attitude has been described as making the courts "hesitant, but not powerless," to interfere with the discretion allowed to commissioners.[10] Since the powers of the leagues and commissioners are derived from team owners and because courts are slow to resolve disputes in these areas, commissioners remain subject to owners and the limits placed on the roles of the commissioners' offices. The case of *Professional Sports Ltd. v. Virginia Squires Basketball Club, Ltd. Partnership*[11] is in-

---

7. Milwaukee American Ass'n. v. Landis, 49 F.2d 298, 299 (N.D. Ill. 1931). In that case, Commissioner Kenesaw Mountain Landis disapproved the option contract of player Fred Bennett because the Commissioner felt that one person, who controlled several clubs including a major league club, should not be allowed to send a player back and forth among controlled clubs, without allowing other clubs an opportunity to claim the player's services on waivers. The court upheld Landis' actions noting that "the Commissioner is given almost unlimited discretion in the determination of whether or not a certain state of facts creates a situation detrimental to the national game of baseball." *Id.* at 303.

8. JOHN C. WEISTART & CYM M. LOWELL, THE LAW OF SPORTS, § 3.15, at 308 (1979). *See also Landis*, 49 F.2d 298. The *Landis* court went to great length to first describe the documents which delegated authority to the Commissioner, and then held that Mr. Landis acted within that authority. *Id.* at 303-04.

9. WEISTART & LOWELL, *supra* note 8, at 309.

10. *See* Atlanta National League Baseball Club, Inc. v. Kuhn, 432 F. Supp. 1213, 1218 (N.D. Ga. 1977). In *Kuhn*, the Atlanta Braves baseball club brought an action against Commissioner Bowie Kuhn, challenging the Commissioner's authority to, among other things, impose certain sanctions against Braves owner, Ted Turner for alleged "tampering" concerning Gary Mathews. The court hesitated to interpose itself in the situation stating that

> [i]n any event, the court must hold in check a close scrutiny of the reasons given for the Commissioner's decision to discipline Turner. The Commissioner has general authority, without rules or directives, to punish both clubs and/or personnel for any act or conduct which, in his judgment, is "not in the best interest of baseball" within the meaning of the Major League Agreement. What conduct is "not in the best interests of baseball" is, of course, a question which addresses itself to the Commissioner, not this court.

Id. at 1222.

11. 373 F. Supp. 946 (W.D. Tex. 1974).

structive. In 1974, the San Antonio Spurs entered into a contract with the Virginia Squires to obtain George Gervin. Before the deal was completed, the Commissioner of the American Basketball Association (ABA), attempted to intervene. The court held that the Commissioner's authority to arbitrate disputes among league members did not extend to permit him to prohibit the trade. In addition, the court pointed out the restrictions on the office of the Commissioner. It stated that

> [t]he simple truth is that the member clubs have not given the Commissioner the power and authority he claims. He admitted as much when he testified that he didn't think he has "the right to approve or disapprove contracts", and the clubs of the ABA said the same thing when they made it clear in the by-laws that actions by the Commissioner in such things as cancelling contracts, expelling member clubs, or the officers, directors, and stockholders . . . are contingent upon his gaining the approval and ratification of . . . the member clubs.[12]

Accordingly, even though commissioners are intended to be guardians of their sports and often do have very broad powers to act (and often do act) "in the best interests" of those sports, it can be argued that the public's interests are really secondary to those of ownership in the appointment and regulation of commissioners. It is also said that "professional sports leagues have failed to establish fair and objective standards for dealing with many of the problems affecting professional sports. . . . [G]overning bodies of professional sports for years have failed to consider the impact that their rules and regulations have on the people and communities that support professional sport teams."[13]

IV. The Public's Assertions Of Rights

In spite of attempts by owners to self-govern and create independent offices to protect the public's stake in professional sports, the public has, on several occasions, independently and aggressively asserted its rights. This has occurred on two fronts: in the courts and in the United States Congress. This section examines two court cases involving public attempts to prevent relocation of franchises and several bills which have been presented to the United States Congress to deal with various public interests in sports franchises.

---

12. *Id.* at 952.

13. Richard Amoroso, Note, *Controlling Professional Sports Team Relocations: The Oakland Raiders' Antitrust Case and Beyond*, 17 Rutgers L.J. 283, 318 (1986).

The most publicized court cases involving the public's asserted ownership rights in professional sports teams, beneficial or otherwise, began with the move of the Oakland Raiders to Los Angeles in 1980. Following that move, the city of Oakland, under the theory of eminent domain, brought an action to acquire all property rights associated with the Raiders franchise as a member of the National Football League. The Raiders cases, in making their way through the courts, led to two appellate opinions, *City of Oakland v. Oakland Raiders*, sometimes referred to as *Raiders I*[14] and *Raiders II*.[15]

In *Raiders I* the city of Oakland insisted that it had the right to condemn intangible property as part of its eminent domain power. The Raiders argued that the power did not allow the taking of intangible property, such as the Raiders' "network of intangible contractual rights."[16] The Supreme Court of California examined two issues in the case. The first dealt with the intangible nature of the property proposed to be taken, and the second with the question of whether the condemnation of the Raiders franchise was for a "public use" under California law. The court concluded that the eminent domain law of California authorized the taking of intangible property.[17] Likewise, the court held that a "public use" could, theoretically, be served by the exercise of the eminent domain power to obtain a professional sports franchise. The Court stated that

> [f]rom the foregoing we conclude only that the acquisition and, indeed, the operation of a sports franchise may be an appropriate municipal function. If such valid public use can be demonstrated, the statutes discussed herein afford City the power to acquire by eminent domain any property necessary to accomplish that use.[18]

The case was remanded to the trial court for further proceedings.

---

14. 646 P.2d 835 (Cal. 1982). A discussion of *Raiders I* may be found in, Daniel B. Rubanowitz, Note, *Who Said 'There's No Place Like Home?': Franchise Relocation In Professional Sports*, 10 LOYOLA ENTERTAINMENT LAW JOURNAL, 163 (1990).

15. 220 Cal. Rptr. 153 (1985). A brief summary of *Raiders II* may be found in Tobin-Rubio, *supra* note 5.

16. *Raiders I*, 646 P.2d at 837.

17. *Id.* at 840.

18. *Id.* at 843. The economic impact of the loss was large indeed. *See* Hal Lancaster, *Football Hungry Cities Feign Cool But Hustle Hard To Get Pro Team*, WALL ST. J., Mar. 29, 1985, at 31. Lancaster writes that

> Oakland says that losing the Raiders to Los Angeles in 1982 eliminated 1,300 jobs, $36 million in direct spending annually and $180 million a year in overall economic activity, assuming that each dollar passed through at least five hands.

Id.

The public's victory in *Raiders I* was short-lived. On remand, the lower court found for the Raiders, holding that the city's condemnation of the franchise was, among other things, invalid under the Commerce Clause of the United States Constitution.[19] On appeal, the California Court of Appeals, First District, upheld the lower court's decision, particularly because the operation of a professional football franchise was such a nationwide business and so intertwined with interstate commerce that the acquisition of the franchise by the city would impermissibly burden interstate commerce.[20] The court seemed sensitive to the opposing factors in the case, such as the public's economic stake in the Raiders and the owner's right to operate the franchise independent from public control. The court asserted that

> [a]n involuntarily acquired franchise could, at the local government's pleasure, be permanently indentured to the local entity. The League's interests would be subordinated to, or at least compromised by, the new owner's allegiance to the local public interest in matters such as lease agreements, ticket prices, concessions, stadium amenities, scheduling conflicts, etc. As the trial court found, it must also be anticipated that a single precedent of eminent domain acquisition would pervade the entire League, and even the threat of its exercise elsewhere would seriously disrupt the balance of economic bargaining on stadium leases throughout the nation. . . . This is the precise brand of parochial meddling with the national economy that the commerce clause was designed to prohibit.[21]

Less than one month after the decision in *Raiders II*, the United States District Court for the District of Maryland issued its opinion in *Mayor and City Council of Baltimore v. Baltimore Football Club, Inc.*[22] That case involved the attempt by the city of Baltimore to condemn the Baltimore Colts Football franchise, using its power of eminent domain, as had the city of Oakland. The Colts responded that the franchise was outside the state of Maryland on all relevant dates, and accordingly, could not be the subject of eminent domain proceedings.[23] The *Colts* court, while taking note of cases approving the condemnation of intangible property (including *Raiders I*), held that the Colts' situation was different from that of the Raiders' because the city of Oakland had begun its condemnation proceedings prior to the Raiders' relocation to Los Angeles, whereas the city of Baltimore

19. *Raiders II*, 220 Cal. Rptr. at 155.
20. *Id.* at 157.
21. *Id.*
22. 624 F. Supp. 278 (D. Md. 1985).
23. *Id.* at 279.

had not begun its proceedings as timely.[24] In essence, since the Colts franchise was "not in Maryland at that time," the city of Baltimore lacked the power to condemn.[25]

The public ultimately lost in its attempts to restrict the relocations of the Raiders and Colts. But the cases remain as milestones in the public's assertions of beneficial "ownership" of professional teams. The cases are also unique for their examination of public rights in professional sports franchises and in the literature they have generated.[26] Not the least of the concerns expressed by the cases are the factors of franchise continuity, fan loyalty and the public's investment in its teams.

The public's assertion of ownership rights has not stopped with the courts. Several proposals have been presented to the United States Congress to govern, and in some cases, restrict the rights of professional sports franchise owners to relocate at will, particularly in situations where offers to purchase have been submitted by persons or organizations willing to keep the franchises in their home cities. The various proposals represent not only outlines for possible governance of relocation and other sports franchise management in the future, but also, and more importantly, they exhibit an increase in public pressure on elected representatives to "protect" the public from the perceived whims of owners who transfer franchises away from current cities to new locales.[27] Indeed, communities such as Oakland and Baltimore argued that, but for their support, professional sport franchises would not be the lucrative businesses they have become. Because of this support, some commentators believe that federal legislation is necessary to protect the public and its economic and intan-

---

24. *Id.* at 285. Time was surely of the essence in this case. On March 29, 1984, Colts owner, Robert Irsay, informed the National Football League Commission that he had relocated the Colts to Indianapolis. *Id.* at 280. On March 30, 1984, the Maryland Legislature passed a bill authorizing the City of Baltimore to condemn sports franchises. *Id.*

25. *Id.* at 287.

26. *See, e.g.*, Lisa J. Tobin-Rubio, *supra* note 5; Kenneth L. Shropshire, *Opportunistic Sports Franchise Relocations: Can Punitive Damages in Actions Based Upon Contract Strike a Balance?*, 22 LOY. L.A. L. REV. 569 (1989); Beisner, *supra* note 1.

27. An Excellent Summary of Major League Baseball Community Protection Act, the Professional Football Stabilization Act of 1985, the Professional Sports Franchise Relocation Act, the Sports Community Protection and Stability Act, the Professional Sports Team Community Protection Act and the Professional Sports Community Protection Act of 1985, is found in Daniel S. York, Note, *The Professional Sports Community Protection Act: Congress' Best Response to Raiders?*, 38 HASTINGS L.J. 345 (1987).

gible interests in sports franchises.[28] This public perception may or may not be well founded. Nevertheless, the combination of public "beneficial ownership" of home team franchises, with more frequent franchise relocation, seasoned by the ever growing economic investments which fans have in their teams, has led to a stronger public assertion of its "ownership" rights.

V. The Owner As Trustee

Consequent upon the financial and emotional interdependence of professional sports franchise owners and their fans, a relationship exists between owners and fans akin to that between trustees and beneficiaries. Although sports franchises are "for-profit" businesses, an examination of some of the duties owed by trustees to beneficiaries can be useful to better define the relationship between owners and fans. This section examines several basic duties which trustees owe to beneficiaries. By better understanding these duties, owners can more effectively deal with their relationships with the public.

The Restatement of the Law of Trusts (Restatement) and the Uniform Probate Code (UPC) define trustee's duties to beneficiaries. These authorities may, by analogy, apply to professional sports.

A. Duty Of Loyalty

The Restatement imposes a duty on trustees "to administer the trust solely in the interest of the beneficiary."[29] This obligation, known as the duty of loyalty, is the most fundamental duty owed by a trustee to a beneficiary. It is imposed, not by the terms of the trust instrument or contract, but rather by the very nature of the trustee-beneficiary relationship.[30] The duty of loyalty imposed on trustees is

---

28. *See* Amoroso, *supra* note 13, at 318. Amoroso argues that league structures are insufficient to protect the public's interest. Amoroso states that

> [t]he number of congressional proposals indicate that, left to their own devise, professional sports leagues have failed to establish fair and objective standards for dealing with many of the problems affecting professional sports. The NFL and the other governing bodies of professional sports for years have failed to consider the impact that their rules and regulations have on the people and communities that support professional sports terms. Ordinarily, governmental intervention of this nature should be criticized as an interference with private business enterprise. However, given the past history of the actions of professional sports leagues, the legislation proposed by Senators Gorton, Eagleton and DeConcini should be praised.

Id.

29. Restatement (Second) of the Law of Trusts § 170 (1) (1959).

30. The Law of Trusts Volume II A, § 170, at 311 (1987).

designed to prevent conflicts of interest between the trustee and the beneficiaries. This is based on the presumption that it is difficult for the same person to act on behalf of two interests in the same transaction because, consciously or unconsciously, he will favor one side.[31] Accordingly, the rule guards the valued fiduciary relationship between the trustee and beneficiary by not allowing a trustee to attempt to explain or justify any representation of two interests. The rule simply prohibits all disloyal acts.[32]

Certainly, fans view their loyalty to a team and the team's loyalty in return as very important. When the public perceives that team management has breached the duty of loyalty, the public's reaction, as in the case of the Raiders' relocation, can be swift and adamant. Less obvious, but very real examples include the public reacting negatively to increases in prices of tickets, parking and concessions.

Baseball's "collusion" cases can be viewed as a breach of the duty of loyalty by owners to their fans. In these cases, the Players' Association filed a complaint alleging a computer registry had been created by owners so that clubs could obtain information regarding offers made to 1987 free agents. The information itself was accurate but was not disseminated among the "beneficiaries" (the players, agents and union). Arbitration resulted in a ruling stating that the teams had attempted to quietly cooperate with each other by disseminating the information only among themselves.[33] It can be argued

---

31. THE LAW OF TRUSTS AND TRUSTEES, ch. 26, § 543, at 204-05 (1987).

32. *Id.* at 207.

33. *See* WASH. POST, Sports Section, July 19, 1990, at C8. The imposition of fiduciary duties in the context of professional sports is not new. For example the Commissioner of Baseball, elected by owners, was seen as a fiduciary by the court in Milwaukee American Ass'n v. Landis, 49 F.2d 298, 303 (N.D. Ill. 1931). The *Landis* court concluded that to hold otherwise "would have exhibited a lack of fidelity to the trust imposed upon him and to the obligations which he had accepted." *Id.* at 303. The fundamental importance of the duty of loyalty arose in the appointment of Carl Barger as president of the fledgling Florida Marlins baseball club at a time when he was still the president of the Pittsburgh Pirates. The potential for conflicts of interests and breach of the duty of loyalty to both clubs was pointed out as follows:

> Potential conflicts abound. This may be farfetched, but what's to prevent Barger from negotiating a short-term Pirates contract with potential free-agent Bobby Bonilla with an eye toward signing him in the future for the Marlins? How can Barger be devoting his full energy to the Pirates at the same time that he has to start building a rival franchise? Both the Pirates and the Marlins are looking for spring training sites in Florida. If Barger deems, say, Naples more desirable than Homestead, which of his clubs gets Naples? And what does he say to Pirates underling who asks about a job with the Marlins?

Steve Wulf, *Scorecard*, SPORTS ILLUSTRATED, July 29, 1991, at 11.

that collusion among owners may have breached the duty of loyalty to fans because the owners placed their self interests above the ultimate beneficiaries' interests.

Is it reasonable for professional sports team ownership and management to use the duty of loyalty as a guide in daily operations? Probably the most important way ownership can show the public its loyalty is to openly communicate as often as possible with the public. Newsletters, press releases and good marketing all aid in demonstrating to fans that owners are loyal to their interests.

All professional sports teams are business enterprises. Ownership's retention of profit from operations of teams is the main objective of the business side of professional sports. However, retention of what the public sees as "too much" of the profits and not enough reinvestment back into the team is often seen by the public as disloyal.

Ownership of more than one franchise in the same sport is an obvious conflict of interest, and therefore, disloyal. However, operating multiple professional sports franchises in *different* sports may not be viewed as disloyal, unless profits are not allocated among the various teams in proportion to their production of those profits.

It can be seen as disloyal to employ a high percentage of friends, relatives and affiliates in positions which impact on team performance. The prohibition against this conduct is rooted in the distrust of a trustee placing himself in a position where his individual interest may conflict with operation of the trust.

The duty of loyalty is meant to enforce the high levels of conduct to which trustees are held. When trustees are acting in the interests of their beneficiaries, the standards for behavior, discussed below, are generally reasonable degrees of care, skill and caution. When a trustee acts in his own interest, however, "the standard becomes more rigorous."[34] Consequently, when dealing with the public, ownership should involve itself in transactions in which no unfair advantage to ownership is present, and where fair disclosure has been made to the public.

B. Duty To Account

The duty to furnish information to the beneficiary is a second elemental duty of trustees and is designed to safeguard the beneficiary's right to know what the trust property is and how the trustee

34. THE LAW OF TRUSTS, § 170.25.

has handled the trust property. Additionally, in many cases, beneficiaries are entitled to examine the trust property itself and the accounts, the vouchers and other documents relating to the trust's administration.[35]

According to the Restatement, a trustee is under a duty to maintain clear and accurate accounts with respect to the administration of the trust and to render those accounts to the beneficiary.[36] These accounts are to show in detail the nature and amount of all trust property and its administration.[37] The trustee must supply accountings to beneficiaries at regular intervals or at the request of beneficiaries.[38] The UPC expands upon the Restatement's duties, and states that in addition to keeping beneficiaries of a trust "reasonably informed," a trustee must also provide the beneficiaries with relevant information concerning the assets of the trust and particulars relating to its administration.[39] This rule is designed to allow a beneficiary to have adequate protection and sources of information.[40]

Accurate records of profits and losses are important to any business, including professional team sports. In situations where there is a loss, it may be even more important to document and convey this information to the public. Public perceptions of the size of team coffers can be critical in how the public judges management. Too often,

---

35. *Id.* § 173.

36. RESTATEMENT (SECOND) OF THE LAW OF TRUSTS § 172 (1959). A case which helps outline the trustee's duty to keep and render accounts is In Re Johnson, 518 F.2d 246, *cert. denied*, 423 U.S 893 (1975). There, beneficiaries of a creditors' trust, formed under Chapter XII of the Bankruptcy Act, attempted to surcharge the trustee for substantial losses to the trust resulting from defalcations of a bookkeeper. *Id.* at 249. The trustee had failed to check on the bookkeeper's work and did not discover the losses, which became obvious when the trust's accountants discovered them. *Id.* The court determined that in this case the trustee did not properly delegate his recordkeeping to the bookkeeper. *Id.* at 251. The court stated that "[t]he trustee was under a duty to the court and to the beneficiaries and creditors to ascertain the facts. As we view it, he could not discharge his duty of reasonable care by allowing the bookkeeper to have a free hand over a long period of time." *Id.* This does not mean, however, that a trustee should not delegate some functions. Modern trust theory approaches delegation in the following fashion: "The trustee should ask: Is this action reasonably calculated to help me improve the way I perform my job? We no longer want to have trustees think, as the Old Restatement would, that they are not to delegate functions involving discretion unless they simply cannot perform them personally." *Redefining the "Prudent Investor Rule" for Trustees*, TRUSTS & ESTATES, Dec. 1990, at 14, 18 [hereinafter *Redefining*].

37. RESTATEMENT (SECOND) OF THE LAW OF TRUSTS § 172 cmt. a (1959).

38. *Id.* cmt. c. This applies not only to a beneficiary presently entitled to receive benefits from a trust but also to a beneficiary who has a right to receive principal or income from the trust in the future, even if that right is contingent. *Id.*

39. UNIFORM PROBATE CODE art. VII, Trust Administration, § 7-303 (1983).

40. *Id.* § 7-303 cmt.

the public does not believe ownership when it asserts that it loses money on the team. This is because usually the revelation simply comes too late. For example, it could be argued that the public in Baltimore demands less from the ownership of the Orioles, because the public perceives that ownership has done its best and properly applied team funds to obtain quality baseball players. By contrast, New York Yankee fans sometimes believe that ownership does not obtain sufficient quality players to match what is perceived to be unlimited team financial power.

Perhaps the best sports example of failure to communicate properly with the public is Major League Baseball's 1990 collusion case discussed above. Owners kept meticulous information but did not disseminate that information, as a trustee would be required to do. This withholding of information cost owners hundreds of millions of dollars in payments to players, and may prove to have additional consequences, such as a loss of goodwill among the public, the ultimate beneficiary of the sport. The breach of fiduciary duty in the collusion cases is a compelling argument for properly disseminating information to all parties concerned.

C. Duty Of Care And Skill

The Restatement states that "[t]he trustee is under a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements and other circumstances of the trust."[41] The trustee is judged not in isolation, but in the context of the trust's investment strategy, including suitable risk and return objectives. The UPC, on the other hand, holds trustees to a stricter standard, that of a prudent person dealing with the property of another.[42] In any event, the key to a trustee's duties of care and skill is to exercise those duties with "prudence." Whether a trustee is prudent in performing a particular act depends upon the circumstances of each trust (which can change over time) and its beneficiaries.[43] Neither the Restatement nor UPC require infallible trustees. But each, in its own way, attempts to hold

41. RESTATEMENT (THIRD) OF TRUSTS § 227 (Proposed Final Draft 1990).

42. UNIFORM PROBATE CODE § 7-302

43. RESTATEMENT (THIRD) OF TRUSTS § 227. An excellent summary of the changes imposed by the partial Restatement Third can be found in *How The Prudent Investor Rule May Affect Trustees*, TRUSTS & ESTATES, Dec. 1991, at 15 [hereinafter *Prudent Investor Rule*].

trustees to external, not subjective, standards. Courts have upheld these high standards as imposed by the trust relationship itself.[44]

In cases where the trustee has special skills, the level of "ordinary" prudence which must be exercised by the trustee is elevated to a level at which the trustee must use his special knowledge or skill.[45]

Fans, not unlike the Restatement and UPC, require team owners and managers to use care and skill in operating their franchises. Because of the intangible and often emotional level of fan support and demands, it can be said that the level of prudence demanded by the public of team owners and managers is closer to that envisioned by the UPC.

Team standings and success rates create different atmospheres which can define prudence in different situations. For example, many people believed that it was prudent when the Dallas Cowboys traded Herschel Walker to the Minnesota Vikings in 1989. The Cowboys were suffering through dismal seasons, and the Dallas faithful felt that the draft choices obtained in the trade would, ultimately, inure to the benefit of the Cowboys in rebuilding the franchise. Conversely, the Vikings' acquisition of Walker was seen as the verge of imprudence by fans of a franchise which was expected to lead its division. Therefore, the same trade was viewed by Vikings' fans as requiring the Vikings to reach the Super Bowl in order for the trade to be considered prudent.

As with the codified trust rules, mere errors in judgment may be excused, but lack of prudence may not. Fans might argue that management's handling of a team's day-to-day lineup may constitute mere mistakes in judgment, but that ownership's decisions in trades and future direction of the team must reach a standard of ordinary prudence.

Some team owners are not experts in their respective sports. Fans do not generally hold these owners to a high technical standard

---

44. *See, e.g.*, Pino v. Budwine, 568 P.2d 586 (1977). There, a trustee allegedly used beneficiaries' and his shares of stock to secure a personal loan at one bank when another bank called upon him personally to pay off another loan secured by trust shares. *Id.* at 587. All this was done without informing the beneficiaries of the particulars. *Id.* The court held that the trustee's actions were improper stating that "[s]uch actions by a trustee, and his silence as to how he managed to refinance the loan, in our opinion, fall far short of his duty as trustee to the beneficiaries. A trust relationship imposes stringent and high standards of conduct upon the trustee." *Id.* at 588.

45. THE LAW OF TRUSTS Volume II A, § 174, at 470-71 (1987). "If he (the trustee) is in a position to do better than the ordinary man, it is not enough to do what the ordinary man would do." *Id.* at 470.

of care and skill, but expect them to hire personnel who possess these qualities. On the other hand, team management, particularly on-field coaches and managers, are expected to possess a higher level of skill. Therefore, they are subject to a correspondingly lower level of fan tolerance for mistakes. Certainly, when Ted Turner donned an Atlanta Braves uniform and managed the team, fans could not demand the quality of field generalship which they would expect from a professional manager. Yet, those same fans might see Mr. Turner's role as owner as hiring the best possible personnel to produce the most success for the team.

Happily for owners, the trust standards of care and skill require mere prudence and do not view the owner as underwriter of team success, which, of course, can vary depending on innumerable external causes. However, ownership and management are well advised to base decisions at a level of prudence which a trustee would observe in administering the property of another.

D. Duty To Control Trust Property

Trustees must obtain and keep control of trust property.[46] The Restatement foresees certain types of trust property which might be *possessed* by agents of the trustee, but, nevertheless, remains under the exclusive *control* of the trustee.[47] The trustee must take reasonable steps to secure and keep control of trust property, which, if not accomplished within a reasonable time, can make the trustee liable to the beneficiaries for losses incurred.[48]

The public, as beneficiary, is not entitled to possess or control a team any more than a beneficiary of any other trust. However, the public has a right to know that ownership has proper possession and control over the team. Control of a professional sports franchise, which is so dependent upon individual players and managers, can include monitoring the antics of players and managers so that the public knows that management is operating the team and not the contrary. Team ownership and management duties include, but are not limited to, monitoring incoming players through drafts and trades,

---

46. RESTATEMENT (SECOND) OF THE LAW OF TRUSTS § 175 (1959).

47. *Id.* cmts. e and f. These comments note that it may be reasonable for the trustee to entrust possession of trust assets to his "attorney, broker, banker or other agent," but that the trustee has the duty "to take and keep exclusive control." *Id.*

48. *See* THE LAW OF TRUSTS Volume II A, § 175, at 478.

and other players through waivers, releases, trades and contract options.

Retaining important players can be critical for a team sports franchise. Indeed, loss of important players can even be viewed as a violation of the standard and skill imposed upon owners. Certainly the most famous loss of a critical player came with the trade, by a baseball team of one of its star pitchers. It can be argued that team ownership and management violated the public's trust. It's a good thing that trust rules do not require the propriety of trustee activities to be judged in hindsight. The team was the Boston Red Sox; the player was Babe Ruth.

E. Duty To Preserve Trust Property

The Restatement places trustees under a duty to beneficiaries to use reasonable care and skill in preserving trust property.[49] The Restatement envisions that trustees, in preserving trust property, use such skill and care as a person of ordinary prudence would exercise in dealing with his own property, and if a trustee has a special level of skill, he must use that skill.[50] If trust property is not lost, destroyed, or diminished in value as a result of the trustee's actions, the trustee may not be subject to surcharge, unless he has failed to exercise the requisite level of skill.[51]

In order to properly preserve trust property, the trustee is required to expend funds of the trust to keep the property in adequate repair. If the trustee neglects this, and the neglect results in damage, the trustee is subject to a surcharge, and sometimes a loss of income.[52] A trustee can also be liable, if as a result of lack of care, stock subscriptions and warrants are permitted to expire when such rights have value.[53] Finally, the trustee is under an implied duty to make

---

49. RESTATEMENT (SECOND) OF THE LAW OF TRUSTS § 176. The Restatement's views on diversification of investments by trustees, have, however, recently been made more flexible in a partial Restatement Third of the Law of Trusts, adopted in May, 1990. RESTATEMENT (THIRD) OF TRUSTS § 227 (Proposed Final Draft 1990). The new diversification rules would permit more flexibility of investment. *See Redefining*, *supra* note 36. The Restatement Third, as noted earlier, now calls for the trustee to invest "not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust." RESTATEMENT (THIRD) OF TRUSTS § 227.

50. *Id.* cmt. a. *See* UNIFORM PROBATE CODE § 7-302 (1983), which places the trustee under a standard observed by a prudent man dealing with the property of another. *Id.*

51. THE LAW OF TRUSTS Volume II A, § 176, at 482 (1987).

52. *Id.* at 483.

53. *Id.* at 488.

repairs as necessary to accomplish the object of the trust, and is under a duty to make such expenditures for this as necessary.[54] The general trust law lesson for professional team sports ownership is clear. Owners should preserve the level of the team, insure the players on the team, be careful not to leave essential players unprotected and keep the facilities of the team in good working order.

It might be a violation of a trust, if, for example, team ownership, following a title-winning season, traded its valuable players only to reduce salaries in order to make more profit for management. Furthermore, teams must take care to properly insure their interests in their players. For example, the losses of Len Bias and David Overstreet to the Boston Celtics and Miami Dolphins, respectively, were devastating personally and in other ways to these teams. Accordingly, teams should obtain adequate insurance, not only for team facilities, but for team personnel as well.

In other contexts, trustees can be liable for letting stock subscription rights expire. Similarly, it seems logical that professional sport teams should be careful not to leave essential players unprotected in expansion drafts or to let options on players' contracts expire without carefully considering these decisions before they are made. The Los Angeles Raiders and Washington Redskins gain notoriety by obtaining "over-the-hill" players from other teams, and immediately doing quite well with these players. This may reflect the skill of the Raiders and Redskins. However, under these circumstances, it may sometimes reflect a lack of ordinary prudence on the part of the owners of the teams who let their options expire on these players, or otherwise did not obtain adequate compensation for the rights to the players.

This duty to preserve trust property does not, of course, mean important players can never be traded. It is a matter of preserving team success. Several teams have traded key players, and continued to be successful. For example, the Edmonton Oilers traded Wayne Gretzky, then proceeded to win the Stanley Cup. In any event, the actions of trustees are to be judged as reasonable at the time the actions are made, and not later when it can be determined that the action has had a favorable or unfavorable result.

---

54. 76 AM. JUR. 2D *Trusts* § 360, at 574 (1975). *See also* Jones v. Harsha 196 N.W. 624 (Mich. 1923), where, in deciding a dispute between a life tenant and trustee over whether a proposed "improvement" to property of the trust was proper, the court stated that "[a]ny expense necessarily incurred by the trustee to prevent such deterioration and to render the premises habitable and rentable is a charge upon the corpus of the estate." *Id.* at 626.

F. Duty To Make Trust Productive

The Restatement instructs trustees to use reasonable care and skill to make trust property productive.[55] While trustees have a duty to invest trust funds so that the funds will produce income, they are permitted a reasonable amount of time in looking for proper investments.[56] Investments can vary greatly depending upon the circumstances and parameters of the trust. However, the primary objects of investment must be safety and income for the trust estate.[57] A trustee must review, and if necessary, restructure investments received at the inception of the trusteeship.[58]

The duty to make trust property productive applies to the many investments which teams make in players and facilities. The most intricate investments teams make are in the players themselves. Teams must strive for current productivity with the best players possible. They must also "invest" in future players through drafts, trades, minor leagues and other vehicles. The Miami Heat basketball franchise is a team which appears to have focused much of its investment energy in the area of young players. In baseball, the Baltimore Orioles are traditionally considered as a team which tries to bring players to the major league level through its farm system. When teams are already of championship caliber, the level of "investment" in players may differ. In these cases, it is usually more a matter of upgrading the team to keep it at a high level.

Investment in physical facilities is also an important aspect of a owner's productivity obligation. Facilities must be maintained, and where needed, improved or replaced. Examples of professional sports franchises which have recently moved to, or are contemplating moving to new facilities are the San Francisco Giants, Toronto Blue Jays, Miami Dolphins and Baltimore Orioles. Minor league facilities, particularly in baseball, have increasingly become an important part of over-all investment by the team. These not only supply the need for first-rate player development facilities, but also, in some cases, generate additional income through conferences and other functions.

---

55. RESTATEMENT (SECOND) OF THE LAW OF TRUSTS § 181 (1959).

56. THE LAW OF TRUSTS Volume II A, § 181, at 542-43 (1987). This section notes that an unreasonable delay before making investments would be a breach of trust. *Id.* Unreasonableness depends upon the circumstances. The importance of different circumstances for different trusts is taken into account by the Third Restatement. *See supra* note 41 and accompanying text.

57. 76 AM. JUR. 2D *Trusts* § 360, at 574.

58. *See Prudent Investor Rule, supra* note 43.

G. Duty Not To Delegate

A trustee is under a duty to the beneficiaries of the trust to not blindly delegate to others the performing of acts which the trustee can reasonably be required to perform himself.[59] Trustees may not simply commit the total administration of the trust to others.[60] They may, however, properly delegate certain acts which are unreasonable to require the trustee to personally perform. While there is no clear line in determining which acts can be delegated, the Restatement indicates that the following factors, among others, may be of importance: 1) the amount of discretion involved, 2) the value and character of the property involved and 3) the character of the act as one involving professional skill or faculties possessed or not possessed by the trustee himself.[61]

Team owners, as owners of other specialized enterprises, must delegate certain functions. The functions delegated include those dealing with on-field activities. In this context, it would appear that the Restatement anticipates on-field management as "involving professional skill or facilities . . . not possessed by the trustee."[62] Some owners are perceived by the public to delegate too much. The perception is that the owners treat teams only as profit-making enterprises. This is contrary to how a trustee would treat the trust corpus. These owners typically incur fan criticism for what is perceived as over-delegation. By contrast, some owners are perceived as not delegating enough authority to the persons in the organization who are most familiar with on-field management. The New York Yankee franchise appears to have gone through both extremes of the delegation issue, from CBS' "distant" ownership to the Steinbrenner years, during which fans perceived that ownership meddled too often with the

---

59. RESTATEMENT (SECOND) OF THE LAW OF TRUSTS § 171. *But see* the discussion of newer rules outlined in *Redefining, supra* note 36, at 18. There, it is noted that delegation of *some* acts by the trustee is quite proper, especially with the complexity of modern investments. Professor Edward Halbach, reporter for the American Law Institute, stated that

> [w]e have tried to generalize this so that delegation is viewed affirmatively rather than negatively for all types of trusts. And we broaden its role significantly, inviting consideration of such factors as one's own time and competency, all of which in turn depend on strategies and programs being undertaken. . . . to get good assistance, the trustee may have to do so through delegation.

Id.

60. RESTATEMENT (SECOND) OF THE LAW OF TRUSTS § 171 cmt. c.

61. *Id.* cm d. *See also supra* note 59. The Restatement Third also provides for delegation of investment functions and trusts the delegation as a matter of trustee discretion. *See Prudent Investor Rule, supra* note 43, at 18.

62. *Id.*

team's day-to-day management. Accordingly, ownership should delegate some aspects of management to specialists, should consult with and take advice from these specialists, but must not delegate over-all supervisory and investment duties.

H. Duty To Administer Trust In Appropriate Place

The UPC has defined a trustee's duty of administering the trust at a place appropriate to the purposes of the trust and to the sound efficient management of the trust.[63] The Code foresees that the principal place of administration of a trust may become inappropriate over time and that the trustee may need to be changed as the locus of the trust changes.[64]

This trust duty can be useful in the attempts by the public to prohibit relocation of teams. It could be used in future cases to bolster an argument by the public that team ownership must leave a team where it is most appropriately, soundly and efficiently managed. Of course, teams can use this same argument to relocate, particularly when economic factors show that a move of a team to a new location would promote more sound and efficient management of the "trust." In using the UPC analogy, the public can take heart, however, that the section dealing with the appropriate place of administration states that "views of adult beneficiaries shall be given weight in determining the suitability of the trustee and the place of administration."[65] Accordingly, the public would seem to have a right to be heard in cases of team relocation.

VI. Conclusion

The business of professional sports is unique in that it not only has strong economic ties to its geographical locations, but also emotional ones. These geographical ties, in part, arise out of the strong sense of identity which professional sports teams lend to their cities. These are the ties which turn "consumers" into "fans." They are also the ties which lead to a feeling on the part of the public of beneficial "ownership" of sports teams. The public, understanding that sports teams are profitable enterprises, often looks to team ownership much as a beneficiary would looks to the trustee of a public trust managed for the public good.

---

63. Uniform Probate Code § 7-305 (1983).
64. *Id.*
65. *Id.*

Whether or not the public's feelings of beneficial ownership are well grounded in law,[66] it is a fact that large amounts of public funds are invested in the business of professional sports. Team sports franchises have been treated as a "public use" by many communities, leading to expenditures of large amounts of public funds for a perceived "public good."

As a result of the public's loosely-defined beneficial ownership, combined with its very real investment of funds in team sports, communities have become more assertive in protecting their investments in sports franchises. This assertiveness has surfaced mostly through the courts, particularly in the area of franchise relocation in the public's attempts to prohibit what one writer termed "franchise free agency."[67] But it has not stopped there. Several serious proposals have been presented to the United States Congress to protect the public's stake in their professional sports teams. These proposals not only deal with relocation issues, but also other more general areas of economic importance to the communities which support professional sports franchises.[68] These activities on the part of the public portend an increase in future assertiveness of public ownership rights in sports teams.

Owners have formed leagues and appointed commissioners as guardians of their sports. But, even in leagues where the commissioners have broad authority, that authority, in fact, is delegated from owners. The public's access to the courts to enforce its rights against commissioners is inhibited by the courts' general reluctance to interfere with the owner-commissioner pacts. Unfortunately, the steps owners have taken to enhance their communication with the public and to safeguard the best interests of their sports (while effective at many levels) may not be sufficient to deal with the public's increasing assertiveness.

---

66. As noted *supra* note 33, the application of fiduciary duties to sports is not new. In addition to the Commissioner-owners duties, Professor Shropshire, ably states that the relationship between a league and its individual franchises, a relationship in which each party depends upon the other economically, and for all manner of other activities, is "fiduciary in nature." *See supra* note 26, at 574. *See also* Professional Hockey Corp. v. World Hockey Ass'n, 191 Cal. Rptr. 773 (1983). There, the court, in reviewing a World Hockey Association league-franchise relationship, noted that directors and/or trustees one fiduciary duties of obedience, diligence, loyalty and good faith. *Id.* at 776. It may be anticipated that duties akin to the league-franchise fiduciary duties might some day be argued to apply to the franchise-public relationship as well.

67. *See* Shropshire, *supra* note 26, at 584-85.

68. *See* York, Note, *supra* note 27.

Therefore, trust law analogies, particularly some of the duties owed by trustees to beneficiaries, should prove instructive in dealing with the rights of the public. Team owners, managers and their counsel are well advised to look to the long standing body of trust law as a code of behavior to assist more effectively managing their businesses.