CHAPTER 1 · CONTRACTS

Section 1: Contract Formation

A. Introduction

In professional team sports the personal service contract between a player and his team establishes the basic legal relationship between the parties. League rules invariably state that no athlete may compete without signing a standard player contract.

In the last two decades, largely because of free agency and the emergence of rival leagues, athletes have seen the value of their contracts rise from thousands to hundreds of thousands to millions of dollars. Signing bonuses can reach eight figures. Veteran players now receive no-cut and long term contracts. Given the high stakes involved, it is essential that the competent sports attorney be able to fully understand the significance of each and every provision in a sports contract to best serve a client's interests. This chapter will assist students in gaining an appreciation for the unique contract problems arising in professional sports.

Contract issues, in the context of Sports Law, can be broken down into three broad topics: Contract Formation, Powers of Termination, and Judicial Enforcement. Contract formation in sports can involve unique rules of construction, especially in the area of "offer and acceptance" and the role of "bonus money." Moreover, professional sports contracts usually afford teams and players unusual bi-lateral powers of termination. Finally, issues surrounding judicial enforcement of personal service contracts, typical in the sports industry, compel sports attorneys to have a firm understanding of particular legal and equitable principles. A conceptual understanding of these broad topics and their interrelationships enables the sports attorney to be an effective counselor and advocate for his client.

The negotiation of employment contracts in professional sports probably receives more public attention than any other area of employment. The large salaries, the tension created by the superstar holdout and the excitement of signing a first round draft choice all contribute to the mystique and glamour surrounding these contracts. Contrary to popular belief, however, very few terms in an athlete's employment contract are negotiated. The majority of the terms in a standard player contract are the product of collective bargaining between a players' union and management and are incorporated in the labor management agreement. In theory, the union and management could agree on all of the terms of employment including salary and term of the contract. And, were they to do so, those collectively bargained terms would take precedence over any individually negotiated contract. In practice, however, individual athletes and teams begin with the standard contract and negotiate the terms governing salary, length of employment, signing bonus and incentives.

Generally, all of the basic principles governing contract formation apply to the employment relation between a player and his team. The process of contract formation begins after the rights to negotiate with a player have been acquired in a league draft or through free agency. In most cases, the team will submit a standard form contract to the player for his signature. Based on this practice, one might presume that the team made the offer and that when the player signed the contract and placed it out of his control, he had accepted. This, however, is not the only possible characterization. The player's act of signing the standard form contract may, in fact, constitute an offer, which will ripen into a contract when accepted by the team. Ultimately, the resolution of these questions will depend on the intent of the parties.

B. Offer and Acceptance

There are two schools of thought concerning the role of the team and the player in the process of offer and acceptance. Under one view, the process of formation proceeds as follows: the team submits the standard form contract to the player and by doing so makes an offer to the player. The player then accepts by signing the

agreement. According to this view, the team is the offeror and the player the offeree. Under the alternative view, the player signs the standardized contract and returns it to the team. In this instance, the player makes the offer to perform personal services. Note that if the offer is not also an option contract, it may be withdrawn at any time prior to acceptance by the player communicating such intention to the team. The general rule is that the intention of the parties governs whether the parties contemplated that further acts of execution remained to be performed to have a contract.

Courts will deem an offer accepted upon any outward manifestation of assent which would lead a reasonable person to believe that party intends to be bound by the precise terms of the offer. Such outward manifestation may in fact bind a party even where he does not subjectively intend to commit himself to the bargain. Where the court is confronted with vague or ambiguous terms, custom and trade usage will dictate their meaning. Modern courts are generally more willing to supply terms and definitions which are not included in the parties' agreement so that the outward manifestations established are given legal effect. 1 CORBIN ON CONTRACTS §§ 29, 95-100.

The following case demonstrates how evidence of outward manifestations controls judicial construction of professional sports contracts. Notice how the court treats the issue of bargaining at arms length with respect to the team and individual player. The issues in these cases highlight the value of sports attorneys to contract formation.

LOS ANGELES RAMS FOOTBALL CLUB v. CANNON

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

[In the fall of 1959, the Los Angeles Rams had earned the right to the first draft choice in the National Football League by virtue of their tie for last place in the League standings and a fortunate flip of a coin. They chose Billy Cannon, "a remarkable football player" and a senior at Louisiana State University, which was to oppose the University of Mississippi in the Sugar Bowl on New Year's Day of 1960. On November 30, 1959, Cannon and Pete Rozelle, the Ram's General Manager, signed three sets of National Football League player contract forms covering 1960, 1961, and 1962 respectively. Cannon took possession of two checks, one a signing bonus check for $10,000 and the other for $500. Rozelle left a copy of the contract for 1960 with the League's acting Commissioner, who approved it on December 1, 1959. Later in December, Cannon decided to play for the Houston Oilers in the newly formed American Football League, and on December 30, he wrote the Rams that he no longer wished to play for them and returned the checks, uncashed and unendorsed. The Rams sued Cannon to enjoin him from playing for Houston.]

LINDBER, District Judge

[The court first concluded that since the signed forms were, by their terms, not binding until approved by the Commissioner, Cannon was not bound by the unapproved forms for 1961 and 1962. The specific language of the approval provision read:

> This agreement shall become valid and binding upon each party hereto only when, as and if it shall be approved by the Commissioner.

The court then concluded that Cannon, by signing the forms, had made an offer to play for three years and that there had only been Commissioner approval for the first year. The court then considered whether Cannon's taking of the bonus check, which both parties understood to be conditioned upon his reporting to the Rams for the 1960 training camp period, could be construed as an acceptance of an "assumed counter offer" by the Rams for the 1960 season only.]

This would depend, in part at least, upon the understanding between the parties as to whether Cannon accepted the check as payment. It is undisputed that he did not endorse the check, that he left it with his banker for safekeeping, and that he returned it before the player's copy of the proposed contract, [the 1960 contract], approved by the Commissioner was sent to him.

* * *

Of course, the great difficulty in resolving the factual issues involved in this case results from the fact that the signing of the alleged contracts — [1960, 1961 and 1962] — was shrouded in secrecy due to the manner in which Rozelle handled the transaction. At this juncture, however, it should be noted that Cannon, granting his outstanding ability and prowess on the gridiron, is anything but an astute business man. His whole life and interest has been directed toward athletics and particularly football; and while he impressed me as being somewhat naive for a college senior I feel certain that he knew he couldn't accept as payment the $10,000 check that was tendered to him and remain eligible to play for his school in the Sugar Bowl, nor do I believe he would intentionally disqualify himself. He didn't need to. With respect to Cannon this wasn't a chance in a lifetime to turn professional which he might lose forever if he didn't grab it immediately. By this time he must have appreciated the fact that his services were in great demand by professional football teams. I, therefore, am led to make the finding that Cannon did not accept the check in payment. Rather, he accepted it, believing it was not his and that he had no claim upon it until after the Sugar Bowl game.

While some, particularly those schooled – to use the vernacular — in the "game for dough" may view my interpretation of the transaction as a "Pollyana" approach and entirely unrealistic it should be borne in mind that Cannon, while having been a highly publicized college ball player, was, in fact, and still is, it would appear, a provincial lad of 21 or 22, untutored and unwise, I am convinced, in the way of the business world. He was without counsel or advice and the whole transaction, including the signing of the alleged contracts, was completed in less than 48 hours. When Cannon arrived at the Warwick Hotel on Monday morning he did not know whether the Rams had acquired the right to draft him. He was immediately brought before the press and, as Rozelle testified, he Rozelle, heard Cannon make the statement to the effect that he would sign a contract with the Rams following the L.S.U. and Mississippi game in the Sugar Bowl on New Year's Day. At that time it is reasonable to assume that Cannon had no idea that Rozelle would expect him to sign a written contract. Thereafter, Rozelle had waiting for signature the partially-completed forms which he presented to Cannon for signature. Just what language Rozelle used in persuading Cannon to sign the documents I do not know and I doubt if either Cannon or Rozelle have completely accurate recollection of what was said. I am persuaded, however, that during the 30 to 45 minutes spent in the room Rozelle conveyed the impression to Cannon that the documents would not become effective or binding upon him until after the Sugar Bowl game on New Year's Day. The admitted fact that Rozelle sought to keep their existence confidential and secret as well as the fact that Rozelle did not become concerned as to the Acting commissioner's approval of [the contract for 1960] until after he had learned on December 22, 1959 of the possibility that Cannon might go with the Houston Oilers lends support to the belief that Rozelle had so assured Cannon.

In view of the foregoing it is my conclusion that the accepting of possession of the check for $10,000 by Cannon was not an acceptance of payment under the alleged contract, [for 1960].

[Judgment for defendant.]

Questions

1. Would the *Cannon* holding have been the same if Cannon were a business or finance graduate from an Ivy League School? Could the court then rely on his naivete concerning the issue of arms length dealing between the parties?

2. Would a valid binding contract have been found by the *Cannon* court if Cannon had endorsed the checks before returning them to the Rams?

3. The court suggests that Pete Rozelle conveyed to Billy Cannon that the documents would not become effective or binding until after the Sugar Bowl on New Year's Day. Under § 24 of RESTATEMENT (SECOND) OF

CONTRACTS, "[A]n offer is the manifestation of willingness to enter into a bargain, so as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Could the court have found that Billy Cannon's acceptance of the check satisfied the manifestation of intent sufficient to enter into the contract?

4. *Cannon* is unusual by today's standards in that he, Billy Cannon, was not represented by legal (or other) counsel. Today, this is not usually the case. Generally, a player will be represented by an agent who will handle the negotiations and prevent the team from taking advantage of the athlete's lack of sophistication in these matters. In *Cannon*, the team failed to insure that the athlete knew and understood everything that was taking place. Since the plaintiff in *Cannon* brought suit for an injunction, might the court have denied relief to the Rams because the contract was induced by unfairness? RESTATEMENT (SECOND) OF CONTRACTS § 364 (1979). If one assumes that Cannon made the offer, could his acceptance of the $10,000 bonus check constitute sufficient consideration of an option contract? RESTATEMENT (SECOND) OF CONTRACTS § 25 (1979).

Notes on Offer and Acceptance

The average professional athlete is not in a strong bargaining position relative to his team. Negotiations, therefore, between the team and a player on the terms of a contract are somewhat limited. *Matuszak v. Houston Oilers, Inc.*, 515 S.W.2d 725, 730 (Tex. Civ. App. 1974) (TUNKS, J., dissenting) (Justice TUNKS pointed to circumstances where Matuszak had no freedom of choice between teams in the NFL; and the evidence showed that the terms of the standard contract tendered him, were not negotiable). The relative bargaining positions change, however, if the athlete is a "superstar." These players are in a much better bargaining position with respect to the team and can often negotiate changes in even some of the standard language, *e.g.*, *Munchak Corp. v. Cunningham*, 457 F.2d 721 (4th Cir. 1972) (player re-negotiated standard contract restriction provision on the assignability of the contract).

To determine when the parties have an agreement where no further acts of execution remain to be performed requires the use of an objective test. Words and other manifestations of intent are examined in deciding whether an agreement is a contract, or whether they consist only of an offer, acceptance, rejection, or revocation of an offer. RESTATEMENT (SECOND) OF CONTRACTS §§ 17, 19, 205 (1979).

Acceptance of the "offer" by either player or the team also presents special problems. Whether an offer has been withdrawn or an intent manifested to be bound by the precise terms of the offer are questions that often arise. RESTATEMENT (SECOND) OF CONTRACTS § 58 (1979). The form of assent may also be prescribed by the offer. RESTATEMENT (SECOND) OF CONTRACTS § 30 (1979). The offeror is the master of his offer and can require any type of acceptance. For example, if the offer prescribes the time, place, or manner of acceptance, the terms of the offer must be complied with (as opposed to the offer merely suggesting such).

C. Role of the Commissioner

Player contracts in team sports have traditionally required commissioner approval as a condition to the formation of a binding contract. Commissioner approval as a condition to formation guarantees that no team will negotiate terms with an individual player which are contrary to the overall best interest of the league. This has a dual effect of enhancing equalized competition on the playing field and preserving the element of equal treatment among players on matters other than salary. Generally, the determination of whether commissioner approval is a condition, and the type of condition, depends on the language of a particular contract and the intention of the parties.

Historically, commissioners in professional sports have been given broad powers not only to disapprove player contracts, but also to formulate other appropriate remedies to deal with conduct which is not in the best interests of the sport. In baseball, the commissioner can take action against conduct which is not in the best interests

of Baseball. Major League Agreement Article I. For a further discussion of his powers see p. 1-21. The National Football League Commissioner has authority to protect the integrity of the sport. The National Basketball Association Commissioner can punish conduct which is detrimental or prejudicial to the Association. NBA Constitution §35. The National Hockey League Commissioner is authorized to deal with conduct which is dishonorable or prejudicial to the league. NHL Bylaws §17. In both the NBA and the NHL any commissioner decision can be appealed to a board consisting of the owners of the league.

DETROIT FOOTBALL CO. v. ROBINSON

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

On December 2, 1959, Robinson was approached in Baton Rouge by the president of the Detroit Football Company and solicited to join the Lions for the 1960 season. He was offered a salary of $14,500, of which $2,500 would be advanced then and there and $1,000 would be paid on January 1. After some discussion, Robinson executed the tendered form, a "Standard Players Contract," and accepted the tendered advance, in currency. It was understood that in view of the forthcoming Sugar Bowl game, no public mention of the arrangement would be made until after New Year's Day. Later in December, however, Robinson was contacted by a representative of the "Dallas Texans," a club in the new American Football League. A trip to Dallas followed swiftly and Robinson was persuaded to change his mind and sign up with the new team. On December 29, he so notified the Detroit Lions. He did not then return the cash advance he had received and, indeed, the remaining $1,000 was sent to him by the Lions. Robinson's "contract" with the Detroit Club was presented to the Commissioner of the National Football League on January 6, 1960, and approved by him on January 12. [S]ubsequently, on January 13, Robinson returned the plaintiff's money. The club refused the tender and filed this proceeding to enforce what it says was Robinson's binding undertaking to play for the Lions and no one else.

The initial question is whether the instrument executed by Robinson on December 2 was, from that date, a binding contract, or merely an offer, revocable until approved by the League Commissioner. The mere fact that the Commissioner's signature was required does not necessarily resolve the issue in defendant's favor. For, of course, the immediate parties might legally bind themselves in a valid contract, though its enforceability would depend upon the occurrence of an event over which neither had final control. Thus, the Commissioner's approval might be deemed a *mere condition precedent to execution of the contract*, or, in Louisiana Civilian terms, a *suspensive condition* delaying the maturity of the reciprocal obligations. On the other hand, the transaction can be viewed as an offer by Robinson to which the club responded by *conditioning its acceptance* on securing the Commissioner's approval, in which event no contract was formed on December 2. In other words, securing the Commissioner's signature might be considered a *condition precedent to the very existence of a contract*.

To determine which was intended, we must look to the instrument itself. As stated, it is there provided in paragraph 13:

> This agreement shall become valid and binding upon each party hereto only when, as and if it shall be approved by the Commissioner.

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.

It is of course elementary law that an offer may normally be revoked at any time before it is effectively accepted by communicating notice of such a change of mind to the offeree. The exceptions relating to situations in which the other party has been misled into "changing position" in reliance on a promise are not applicable here. Robinson's failure to return the advance as promptly as he might cannot have prejudiced the Lions in view of his unequivocal communication indicating the revocation of his offer to play for that club. Nor did his initial acceptance

of the money prevent his subsequent withdrawal, unless, of course, the advance is deemed as consideration for an option granted. But that argument is not strongly pressed, nor could it be in the absence of an express stipulation. The club was not buying time in which to make up its mind. The $3,500 was not an *additional* bonus for holding an offer open. As the "contract" makes plain, it was an advance on his anticipated salary, and it must be viewed as given conditionally, on the contingency that a binding contract would after come into existence.

The conclusion, then is that, despite its efforts to "sign up" this player, and "bait" him with twenty-five one-hundred-dollar bills, Detroit failed to land their fish. His struggle to wiggle off the hook has proved successful. But it might not be amiss to remind Robinson of what Judge ROGERS said to Sam Etcheverry in a similar case:

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

Judgment accordingly.

Questions and Notes on Robinson

1. What is the purpose of Commissioner Approval? Whose interests are protected by such a requirement? The league? The teams individually? The players?

2. Historically, Major League Baseball has prohibited giving a bonus for playing, pitching or batting skills, or which provided for the payment of a bonus contingent on the standing of the club at the end of the season. If you represented a Major League baseball player what type of bonus would you request from the club in light of this provision?

3. The National Basketball Association allows the parties to supplement the provisions of the Uniform Players Contract so long as they do not include terms which contradict, change, or are inconsistent with the Uniform Players Contract. The player is also prohibited from waiving any benefit or sacrificing any right to which he is entitled to under the collective bargaining agreement.

4. If you were called upon to redraft the Commissioner Approval clause used in *Cannon* and *Robinson* how would you word it?

5. In *Cannon* and *Robinson* the clause in the standard player contract requiring Commissioner approval provided that, "[t]his agreement shall become valid and binding upon each party hereto only when, as and if it shall be approved by the Commissioner." *Los Angeles Rams Football Club v. Cannon*, 185 F. Supp. 717, 721 (S.D. Cal. 1960); *Detroit Football Co. v. Robinson*, 186 F. Supp. 933, 935 (E.D. La. 1960).[1] In both cases, the court had no problem deciding that these clauses prevented the formation of a contract allowing Cannon and Robinson to withdraw their "offers" prior to the Commissioner's approval and take advantage of more lucrative offers from a team in a competing league. The court in *Cannon* stated:

> This clause is too definite to be ignored. It jumps out at you. The words employed are too strong

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[1] In contract law clauses which are conditional on validation or approval by some superior or higher authority are very rare. They occur almost exclusively in cases in which the government or one of its agencies is a party to the contract. *See Edmund J. Flynn Co. v. Schlosser*, 265 A.2d 599 (District of Columbia Court of Appeals, 1970)

> to permit of ambiguity. Their selection was obviously made with great care so that there would be no dispute about their meaning, and this court attaches to them the only meaning it can — that is, that the agreement shall only become valid and binding when, as and if approved by the Commissioner. *Cannon*, 185 F. Supp. at 722.

Today, without exception all major leagues require some form of commissioner approval in order to finalize an athlete's contract with a specific team. An example of a modern provision reads:

> 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 (10) ten days of the execution. The Commissioner shall have the right to terminate this contract by his disapproval thereof within (10) ten days after the filing thereof in his office....

With this clause formation is finalized upon the signing of the standard player contract by the athlete and team subject to disapproval by the Commissioner. Thus, approval takes the form of a condition subsequent, *i.e.*, any fact, the existence or occurrence of which operates to discharge a duty of performance after it has become absolute. J.D. CALAMARI & J.M. PERILLO, THE LAW OF CONTRACTS, 399-402 (4th ed. 1998).

There are several reasons why a league might desire to have a requirement for Commissioner approval. It is probably in the best interest of the league as an entity to have a check on the individual contracts entered into by its team members. Various league, division, and team interests may be preserved through the use of Commissioner approval. The rule insures that no individual player contracts will be made which might interfere with the league's right to discipline a player for improper conduct such as gambling or drug use, or from offering financial incentives to players which are contrary to the league's best interest. The approval also prevents a team from negotiating a contract which is contrary to any collective bargaining agreement between the league and the players' association. Commissioner approval could also insure equal treatment and uniform procedures for players who have been injured.

6. In February of 1998 the Carolina Hurricanes offered Sergei Fedarov of the Detroit Red Wings a six year $38 million dollar contract, plus a $12 million dollar bonus. The bonus was to be paid in a lump sum if the Hurricanes made the third round of the Stanley Cup playoffs, otherwise it was to be paid in four equal yearly installments of $3 million dollars. At the time the Hurricanes were last in the northeast with almost no chance of making the playoffs, while the Red Wings were in second place in the western conference. The NHL disapproved the contract. Can you think of any reasons why? Later a labor arbitrator overruled the League and approved the contract. *See* Sports Illustrated p 98, vol 88 no. 10.

MILWAUKEE AMERICAN ASS'N v. LANDIS

49 F.2d 298 (D.C. N.D. Illinois, E.D. 1931)

LINDLEY, District Judge

The original bill, filed by Milwaukee Association (herein termed the Milwaukee Club), sought to enjoin defendant, as commissioner of organized baseball, from disapproving an optional contract between the St. Louis American League (herein termed the St. Louis Club) and said plaintiff, assigning to Milwaukee a then existing agreement between the intervener, Bennett, as player, and the St. Louis Club, as owner, but reserving the right to recall Bennett to St. Louis.

* * *

Under the Major League agreement the office of commissioner was created, and his functions were defined as follows:

(a) To investigate, either upon complaint or upon his own initiative, any act, transaction or practice charged, alleged or suspected to be detrimental to the best interests of the national game of baseball; with authority to summon persons and to order the production of documents; and, in case of refusal to appear or produce, to impose such penalties as are hereinafter provided.

(b) To determine, after investigation, what preventive, remedial or punitive action is appropriate in the premises, and to take such action either against Major Leagues, Major League Clubs or individuals, as the case may be.

He was given jurisdiction to hear and determine finally any disputes between leagues and clubs or to which a player might be a party, certified to him, and authorized, in case of "conduct detrimental to baseball," to impose punishment and pursue appropriate legal remedies; to determine finally a disagreement over any proposed amendment to the rules; and "to take such other steps as he might deem necessary and proper in the interest and morale of the players and the honor of the game." Optional agreements with players were defined and assignments thereof required to be filed with, and approved by, the commissioner. The parties agreed to abide by the decisions of the latter and the discipline imposed by him under the agreement and severally waived right of recourse to the courts. Similar covenants appear in the Major-Minor agreement, the National Association agreement and the uniform contracts with players.

The Major-Minor League agreement recognizes the office of commissioner and the jurisdiction aforesaid and provides that, in case of any dispute between any Major club and any Minor club, the disputants may certify the dispute to the commissioner for decision, and that his determination shall be final.

The 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 proverbial *pater familias*.

Bennett, in July, 1926, being under contract to play for Little Rock, was by it assigned to the Tulsa Club (class "a" of the Minors), with whom he played the remainder of 1926 and all of 1927. On April 5, 1928, Tulsa, with the approval of the commissioner, assigned its agreement with Bennett to St. Louis, and Bennett signed a contract with the latter for 1928. On May 10, 1928, St. Louis assigned this contract to Tulsa under an optional agreement, approved by the commissioner, retaining the right to recall Bennett. On May 25, 1928, St. Louis, having previously requested waivers of all other Major clubs, as required by the rules, canceled the reserved right to claim Bennett. The commissioner thereupon notified the National Association that St. Louis had canceled its option. On May 11, 1928, Bennett signed a contract to play with Tulsa for the remainder of 1928. On September 10, 1928, Tulsa assigned this contract to the Milwaukee Club (class "aa" of the Minors).

On December 5, 1928, Milwaukee, having previously obtained waivers from the seven other clubs of its league — the American Association — assigned its contract with Bennett to the Wichita Falls Club (class "a," Minor League) for $4,500, and Bennett signed a contract with that club for 1929. On September 6, 1929, Pittsburgh offered Wichita Falls $10,000 for Bennett and was advised by the latter that it had already submitted a proposition to St. Louis upon the player and that, if St. Louis did not take him, it would take the matter up further with Pittsburgh. On September 10, 1929, Wichita Falls assigned Bennett's contract to St. Louis for $5,000. In January, 1930, St. Louis requested from all other Major League clubs waivers upon their right to claim the services of Bennett. The New York American Club and the Pittsburgh Club each claimed him and offered St. Louis $7,500 for its contract. St. Louis did not accept the offer of either of the claiming clubs and on or about January 30, 1930, withdrew its request for waivers. On March 9, 1930, Bennett signed a contract with St. Louis for 1930. On April 7, 1930, St. Louis executed an optional agreement, assigning the player to Milwaukee, but reserving an option upon him. This contract was forwarded to the commissioner's office for approval, and was received by him on April 9, 1930. On April 10, 1930, Bennett signed a contract with Milwaukee for 1930 and finished the season there under the stipulation of the parties hereinbefore mentioned.

Upon receipt of the copy of the optional assignment by St. Louis to Milwaukee, the commissioner instituted an investigation of the stock holdings of Ball, president and principal stockholder of the St. Louis Club, in various Minor League clubs and on June 19, 1930, notified St. Louis and Milwaukee that he disapproved the assignment

of Bennett to Milwaukee; that Bennett should be returned to St. Louis, which must either retain him as a Major League player for the year or longer, transfer him outright to some club not controlled or owned by St. Louis or its owners or release him unconditionally. Milwaukee then filed its original bill herein, and after the completion of the season, Bennett returned to St. Louis upon its recall, and the latter and Milwaukee filed the amended supplemental bill.

On September 3, 1930, St. Louis asked for waivers on Bennett, and Pittsburgh claimed his services, whereupon St. Louis withdrew its request for waivers. The offer of the Pittsburgh Club at that time was $7,500.

The investigation of the commissioner disclosed that Mr. Ball, since February 16, 1928, by reason of stock ownership and otherwise, has completely controlled the clubs of St. Louis, Tulsa and Wichita Falls and that since July, 1927, he has owned 50 per cent of the stock of the Milwaukee Club and since January 19, 1929, completely controlled that club.

The commissioner on June 19, 1930, after stating the facts, said that it was clear that, between the time of his "outright" transfer to St. Louis and his reacquisition by that club, the player had had two seasons of Minor League services with clubs controlled by Ball, during which time the St. Louis Club could at any time have reacquired him (because of such control) just as effectively as if it had retained an option upon him. Notwithstanding these facts, he observed, St. Louis proposed to transfer Bennett for the third successive season to a Minor club without securing Major League waivers. The commissioner concluded that Bennett, whose services had been at all times subject to the one club owner's control, through control of the clubs holding ostensible title to his services, could not be regarded as a purchased player as of the date of the last purchase, within the purpose and intent of the Major League rules; that the period within which Bennett could be optioned without waivers expired on April 5, 1930, the end of two years from the date of the original acquisition by St. Louis and that that period, expressed in the rules, could not be extended by the process of apparent outright transfer back and forth amongst clubs actually controlled by one individual.

The question for decision, therefore, is whether, under the code governing organized baseball, and individual controlling a Major League club may so manipulate his control of a number of Minor League clubs also as in the end to achieve a situation whereby a player originally acquired by purchase by the Major club thus controlled may be sold and transferred back and forth from the Major club to the Minor clubs and from the Minor clubs to the Major club for an indefinite period of time, in excess of two years, under apparent outright sales agreements, without disclosing to other Major clubs the secret control mentioned and without furnishing opportunity to them to claim the player's services.

The parties endowed the commissioner with wide powers and discretion to hear controversies that might to submitted to him and of his own initiative to observe, investigate and take such action as necessary to secure observance of the provisions of the agreements and rules, promotion of the expressed ideals of, and prevention of conduct detrimental to, baseball. The code is expressly designed and intended to foster keen, clean competition in the sport of baseball, to preserve discipline and a high standard of morale, to produce an equality of conditions necessary to the promotion of keen competition and to protect players against clubs, clubs against players and clubs against clubs.

Under the rules, a Major League club may assign a player to a Minor League club, but each of the Major clubs must be given an opportunity to take an assignment; and it is only when no such club refuses to waive such opportunity that the player may be sent to a Minor club. There is an exception to this, however, in the Major-Minor rules, which is as follows:

> The contract of a player signed as a free agent or acquired from a Minor League Club otherwise than by selection, may be assigned to a Minor League Club, under approved optional agreement, within two years from date of signing contract, in the case of a free agent; and from date of original transfer agreement recorded with the Secretary-Treasurer of the Advisory Council, in the case of a player acquired from a Minor League Club without giving opportunity to the other fifteen Major League clubs to take such contract through the regular waiver channels; provided, that no such player may be assigned outright, or right of recall cancelled, unless waivers shall have been

asked and granted; and provided, further, that such player shall not, in either case, have been in active service in either or both Major Leagues an aggregate of two full championship seasons, or been transferred under optional assignment by a Major League Club two or more seasons.

Bennett was acquired from a Minor League club otherwise than by selection in April, 1928. Section 13(b) 1 provides that an optional agreement shall be permitted for not more than two successive seasons in the case of any one player. Under section 13(g), the right of a Major League club to a player, except under an optional agreement, approved by the commissioner, ceases when the player becomes a member of the Minor League club, and no arrangement between clubs for the loan or return of a player other than by an approved optional agreement shall be binding by the parties to it or be recognized by other clubs. A club may assign to another club an existing contract with a player. Uniform contracts are required providing that the player will not play during said year with any club other than the one to whom he is assigned. The rules forbid tampering with ball players and enjoin negotiations respecting employment, unless the club with which a player is connected shall have expressly authorized such negotiations, recite that the supply of signed players is not equal to the demand and create definite limits of players for each club. It is agreed that no organization and no individual, player, or owner may by subterfuge or indirection evade the provisions of the code.

The code provides for a selection period of five days at the time of the World's series, during which a Major club may indicate or select one player in a Minor club subject to selection, the assignment of whose contract is desired. The player so acquired is known as a "selected player." Under this method, preference is given to the weaker clubs; the purpose being to strengthen them over the stronger clubs by giving them first choice selection. No agreement is to be made between a Major club and a Minor club or between two Minor clubs for the purpose or with the effect of covering up a player from selection.

A minor club is not compelled to accept the system of selection. Milwaukee and Tulsa were not, but Wichita Falls was, subject to selection. However, under the agreement of May 10, 1928, which St. Louis executed with Tulsa when it returned Bennett to Tulsa, Bennett was made subject to selection, notwithstanding that he might thus be acquired by some club exempt from selection. These and other provisions disclose an intention to preserve the right of selection and increase the number of players subject to offer from Major Leagues, and thus to enable them to advance in their profession.

A club may terminate its relationship with the player by release or assignment, but, before a Major club can release a player unconditionally, it must give every other Major club an option to waive or to refuse to waive on the player. Thus the opportunity of the player of remaining in Major baseball is enhanced.

It is apparent that Ball, by controlling the St. Louis, Wichita Falls, Tulsa, and Milwaukee Clubs and, in addition Springfield, Mo., is and has at all times since April 5, 1928, been able at his own discretion to direct the transfer of Bennett at any time from any one of these clubs to any other of them without asking for waivers from Major League clubs. Though there is nothing in the rules to prohibit an individual owning control of a Major League club from likewise owning control of Minor League clubs, the intent of the code is such that common ownership is not so to be made use of as to give one individual, controlling all of the clubs mentioned, the absolute right, independent of other clubs, to control indefinitely a player acquired and switched about by apparent outright purchases.

Prior to publication of the fact that St. Louis and the Minor clubs concerned are all under one man's control, no one had knowledge thereof except Ball and his associates. Apparently Bennett did not know of this control, and the commissioner had no such knowledge until, after first having vainly endeavored to secure the information from Ball, he made a complete investigation. Therefore, when, on April 7, 1930, Bennett was assigned and contracted to go to Milwaukee, he did not know that he was being sent to a club controlled by the same man who controlled the selling club. When we remember that this transfer to Milwaukee was in the face of an offer of $10,000 for Bennett by Pittsburgh, it is apparent that St. Louis was at work to keep Bennett out of the Major Leagues in the Minors; to keep control of Bennett's services; and to prevent any Major club from securing his services. If the plaintiffs' position were to prevail, this situation might continue indefinitely, and the commissioner would be powerless to prevent the same, even though such conduct is detrimental to the national game of baseball and

violative of the intent of the provisions of the code.

We have observed that, in addition to his jurisdiction over disputes certified to him, the commissioner is empowered to investigate upon his own initiative any act, transaction, or practice charged or alleged to be detrimental to the best interests of baseball, to determine what preventive, remedial, or punitive action is appropriate in the premises and to take such action against leagues or clubs as the case may require. Certain acts are specified as detrimental to baseball, but it is expressly provided that nothing contained in the code shall be construed as exclusively defining or otherwise limiting acts, practices or conduct detrimental to baseball. It is contended that this phrase should be so construed as to include only such conduct as is similar to that expressly mentioned. However, the provisions are so unlimited in character that we can conclude only that the parties did not intend so to limit the meaning of conduct detrimental to baseball, but intended to vest in the commissioner jurisdiction to prevent any conduct destructive of the aims of the code. Apparently it was the intent of the parties to make the commissioner an arbiter, whose decisions made in good faith, upon evidence, upon all questions relating to the purpose of the organization and all conduct detrimental thereto, should be absolutely binding. So great was the parties' confidence in the man selected for the position and so great the trust placed in him that certain of the agreements were to continue only so long as he should remain commissioner.

Plaintiffs contend that the commissioner has no power to declare a player a free agent. In his answer, the commissioner states that it is his view that, by reason of the alleged breach of the code by plaintiffs and their denial of Bennett's rights, plaintiffs have made it his duty to declare Bennett absolved from any contractual obligations which he may have had with either plaintiff and to declare him a free agent. Obviously declaring Bennett a free agent is a mere declaration of legal effect, that is, the result of finding that the St. Louis Club has forfeited its rights by violating the spirit and intent of the code. Whether there is given to the commissioner the power in so many words to declare Bennett a free agent is immaterial, since the agreements and rules grant to the commissioner jurisdiction to refuse to approve Bennett's assignment by St. Louis to Milwaukee, and to declare him absolved from the burdens of the same and of his contract with St. Louis.

Plaintiffs complain that the commissioner's declaration will deprive St. Louis of the benefits of its contract with Bennett. Obviously this is true, but, if St. Louis' conduct has been such as to entitle Bennett to be relieved therefrom, that club cannot complain, because it has created the situation resulting in the loss of his services. During three successive seasons St. Louis, apparently with an intent so to do, prevented Bennett from playing in any Major League, and that club, through its owner and controller, Ball, and through his control of Tulsa, Wichita Falls, and Milwaukee, has been able to accomplish that which the two-year rule hereinbefore referred to plainly forbids.

It is asserted that this wide grant of jurisdiction of the commissioner is an attempt to deprive the court of its jurisdiction and that such a provision as is contained in these agreements, rules, and uniform contract is contrary to public policy. No doubt the decision of any arbiter, umpire, engineer, or similar person endowed with the power to decide may not be exercised in an illegal manner, that is fraudulently, arbitrarily, without legal basis for the same or without any evidence to justify action. The many cases cited upon the power and jurisdiction of such officials are not in serious conflict. An agreement to arbitrate a controverted question and to deprive all courts of jurisdiction, so long as in executory form, is quite commonly held void, but an actual submission to an arbiter or umpire in good faith is proper, and decision under same is binding, unless it is unsupported by evidence, or unless the decision is upon some basis without legal foundation or beyond legal recognition.

Plaintiffs submitted to the defendant as commissioner an optional contract, which under the code could not be effective unless approved by him. After ascertaining the facts, he refused to approve the same. This, if we look at it from the point of arbitration, was an executed agreement for arbitration, and called for more than ministerial action. As we have seen, 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. The commissioner rightfully found that the common control of St. Louis and the named Minor Clubs by one person made it possible to create a situation whereby the clear intent of the adopted code that the players under the control of a Major club should not be kept with a Minor club more than two successive seasons without giving other Major clubs the right to claim him was clearly violated, and a result achieved highly detrimental to the national game of baseball. The

facts negative any assertion that this decision was made arbitrarily or fraudulently. It was made in pursuance of jurisdiction granted to the commissioner with the expressed desire to achieve certain ends, that is, to keep the game of baseball clean, to promote clean competition, to prevent collusive or fraudulent contracts, to protect players' rights, to furnish them full opportunity to advance in accord with their abilities and to prevent their deprival of such opportunities by subterfuge, covering or other unfair conduct. Without control by St. Louis, Wichita Falls would not have accepted $5,000 from St. Louis for Bennett after Major clubs had offered to pay $10,000. Without this control, it would have been impossible for St. Louis to buy Bennett from Wichita Falls for $5,000, when other Major clubs offered $10,000 for him. No sanely managed corporation would have deliberately refused to sell for $10,000 when the highest competing offer was $5,000, unless bidden so to do by its master, inspired by a purpose other than the best interests of the corporation.

The code does not forbid Mr. Ball controlling any number of Minor clubs, but so to manipulate that control as to transfer and retransfer a player under the form of outright sales and purchases, but at all times to retain secret, absolute control and to have at all times the power to switch the player at the whim of one man, irrespective of the player's rights, is to produce a situation where there is no opportunity for other Major clubs to bid for the player, a condition plainly detrimental to baseball. Such situation is inimicable to the best interests of players and competing clubs and directly in the face of the clear intent of the code. Therefore it cannot be said that this commissioner, when he refused to approve the option contract submitted to him and ruled that Bennett was freed from his obligations to St. Louis, endowed as he was, did anything other than enter an order clearly within his discretion, unaffected by any illegal, invalidating element. To have decided otherwise would have exhibited a lack of fidelity to the trust imposed upon him and to the obligations which he had accepted.

Anything that Bennett did when he was wholly unacquainted with the secret control of all of the various entities with whom he contracted can in no wise bind him. Plaintiffs will not be permitted to conceal from him material facts affecting his own rights, and then claim estoppel upon his part by his apparent acceptance induced by plaintiffs' concealment. Familiar rules, unnecessary to be quoted here, are fully decisive of that proposition.

It is contended by plaintiffs that the two-year limitation upon assignments shall apply from the date of the last acquisition of the player; that all prior acquisition contracts must be ignored; that the word "original" in the phrase "two years from the date of the original transfer agreement" refers to the copy of the contract filed with the secretary-treasurer, being one of its counterparts. Avoiding prolonged discussion, the court is of the opinion that the clear intent of this rule is that the two-year limitation shall run from the date of the original contract of acquisition. But, irrespective of this construction, the attempt of St. Louis to transfer Bennett to a Minor club after two years from April 5, 1928, without waivers was, in view of the secret control of the St. Louis Club and the various Minor clubs, wholly void, because it violated the purpose and intent that no player under the control of a Major club should be kept in the Minors more than two seasons without opportunities to other Majors to select or to claim.

There are many other points ably argued by counsel, but the facts and questions necessary to a decision are included within what has been said. The court is of the opinion that the commissioner acted clearly within his authority; that Bennett should be freed from his obligations of any contract with either plaintiff; that the prayer for injunction should be denied, and the bill dismissed for want of equity at the costs of plaintiffs. Proper decree may be submitted.

Question and Note

1. On what bases did Plaintiff challenge Commissioner Landis' action? Based on the Court's opinion, how likely would it be for any challenge to a commissioner decision that certain conduct was detrimental to the best interests of the national game of baseball to succeed? To this day the Commissioner in baseball has very broad powers to act in the best interests of the sports. Why do the owners permit such wide-ranging discretion?

FINLEY v. KUHN
569 F.2d 527 (7th Cir. 1978)

SPRECHER, Circuit Judge

The two important questions raised by this appeal are whether the Commissioner of baseball is contractually authorized to disapprove player assignments which he finds to be "not in the best interests of baseball" where neither moral turpitude nor violation of a Major League Rule is involved, and whether the provision in the Major League Agreement whereby the parties agree to waive recourse to the courts is valid and enforceable.

I

The plaintiff, Charles O. Finley & Co., Inc., an Illinois corporation, is the owner of the Oakland Athletics baseball club, a member of the American League of Professional Baseball Clubs (Oakland). Joe Rudi, Rollie Fingers and Vida Blue were members of the active playing roster of the Oakland baseball club and were contractually bound to play for Oakland through the end of the 1976 baseball season. On or about June 15, 1976, Oakland and Blue entered a contract whereby Blue would play for Oakland through the 1979 season, but Rudi and Fingers had not at that time signed contracts for the period beyond the 1976 season.

If Rudi and Fingers had not signed contracts to play with Oakland by the conclusion of the 1976 season, they would at that time have become free agents eligible thereafter to negotiate with any major league club, subject to certain limitations on their right to do so that were then being negotiated by the major league clubs with the Players Association.

On June 14 and 15, 1976, Oakland negotiated tentative agreements to sell the club's contract rights for the services of Rudi and Fingers to the Boston Red Sox for $2 million and for the services of Blue to the New York Yankees for $1.5 million. The agreements were negotiated shortly before the expiration of baseball's trading deadline at midnight on June 15, after which time Oakland could not have sold the contracts of these players to other clubs without first offering the players to all other American League teams, in inverse order of their standing, at the stipulated waiver price of $20,000.

* * *

[T]he Commissioner disapproved the assignments of the contracts of Rudi, Fingers and Blue to the Red Sox and Yankees "as inconsistent with the best interests of baseball, the integrity of the game and the maintenance of public confidence in it." The Commissioner expressed his concern for (1) the debilitation of the Oakland club, (2) the lessening of the competitive balance of professional baseball through the buying of success by the more affluent clubs, and (3) "the present unsettled circumstances of baseball's reserve system."

Thereafter on June 25, 1976, Oakland instituted this suit principally challenging, as beyond the scope of the Commissioner's authority and, in any event, as arbitrary and capricious, the Commissioner's disapproval of the Rudi, Fingers and Blue assignments.

* * *

A bench trial took place as a result of which judgment was entered ... in favor of the Commissioner on March 17, 1977.

On August 29, 1977, the district court granted the Commissioner's counterclaim for a declaratory judgment that the covenant not to sue in the Major League Agreement is valid and enforceable. The court had not relied on that covenant in reaching its two earlier decisions.

* * *

II

Basic to the underlying suit brought by Oakland and to this appeal is whether the Commissioner of baseball is vested by contract with the authority to disapprove player assignments which he finds to be "not in the best interests of baseball." In assessing the measure and extent of the Commissioner's power and authority, consideration must be given to the circumstances attending the creation of the office of Commissioner, the language employed

by the parties in drafting their contractual understanding, changes and amendments adopted from time to time, and the interpretation given by the parties to their contractual language throughout the period of its existence.

Prior to 1921, professional baseball was governed by a three-man National Commission formed in 1903 which consisted of the presidents of the National and American Leagues and a third member, usually one of the club owners, selected by the presidents of the two leagues. Between 1915 and 1921, a series of events and controversies contributed to a growing dissatisfaction with the National Commission on the part of players, owners and the public, and a demand developed for the establishment of a single, independent Commissioner of baseball.

On September 28, 1920, an indictment issued charging that an effort had been made to "fix" the 1919 World Series by several Chicago White Sox players. Popularly known as the "Black Sox Scandal," this event rocked the game of professional baseball and proved the catalyst that brought about the establishment of a single, neutral Commissioner of baseball.

In November, 1920, the major league club owners unanimously elected federal Judge Kenesaw Mountain Landis as the sole Commissioner of baseball and appointed a committee of owners to draft a charter setting forth the Commissioner's authority. In one of the drafting sessions an attempt was made to place limitations on the Commissioner's authority. Judge Landis responded by refusing to accept the office of Commissioner.

On January 12, 1921, Landis told a meeting of club owners that he had agreed to accept the position upon the clear understanding that the owners had sought "an authority ... outside of your own business, and that a part of that authority would be a control over whatever and whoever had to do with baseball." Thereupon, the owners voted unanimously to reject the proposed limitation upon the Commissioner's authority, they all signed what they called the Major League Agreement, and Judge Landis assumed the position of Commissioner. Oakland has been a signatory to the Major League Agreement continuously since 1960. The agreement, a contract between the constituent clubs of the National and American Leagues, is the basic charter under which major league baseball operates.

The Major League Agreement provides that "the functions of the Commissioner shall be ... to investigate ... any act, transaction or practice ... not in the best interests of the national game of Baseball" and "to determine ... what preventive, remedial or punitive action is appropriate in the premises, and to take such action...." Art. I, Sec. 2(a) and (b).

> The functions of the Commissioner shall be as follows: (a) TO INVESTIGATE, either upon complaint or upon his own initiative, any act, transaction or practice charged, alleged or suspected to be not in the best interests of the national game of Baseball, with authority to summon persons and to order the production of documents, and, in case of refusal to appeal or produce, to impose such penalties as are hereinafter provided. (b) TO DETERMINE, after investigation, what preventive, remedial or punitive action is appropriate in the premises, and to take such action either against Major Leagues, Major League Clubs or individuals, as the case may be.

This language is identical to Art. I, Sec. 2(a) and (b) as originally executed on January 12, 1921, with the exception that the words in present paragraph (a) "not in the best interests of the national game of Baseball" were originally "detrimental to the best interests of the national game of baseball." The change was made in 1964. The district court implied that the change broadened the Commissioner's powers when it found that "previously the Commissioner had to find conduct `detrimental' to the best interests of baseball in order to take remedial or preventive action...."

The Major League Rules, which govern many aspects of the game of baseball, are promulgated by vote of major league club owners. Major League Rule 12(a) provides that "no ... [assignment of players] shall be recognized as valid unless ... approved by the Commissioner."

The Major Leagues and their constituent clubs severally agreed to be bound by the decisions of the Commissioner and by the discipline imposed by him. They further agreed to "waive such right of recourse to the courts as would otherwise have existed in their favor." Major League Agreement, Art. VII, Sec. 2.

Upon Judge Landis' death in 1944, the Major League Agreement was amended in two respects to limit the Commissioner's authority. First, the parties deleted the provision by which they had agreed to waive their right of

recourse to the courts to challenge actions of the Commissioner. Second, the parties added the following language to Article I, Section 3:

> No Major League Rule or other joint action of the two Major Leagues, and no action or procedure taken in compliance with any such Major League Rule or joint action of the two Major Leagues shall be considered or construed to be detrimental to Baseball.

The district court found that this addition had the effect of precluding the Commissioner from finding an act that complied with the Major League Rules to be detrimental to the best interests of baseball.

RESTRICTIONS ON THE COMMISSIONER'S POWER 1944-1964

The two 1944 amendments to the Major League Agreement remained in effect during the terms of the next two Commissioners, A.B. "Happy" Chandler and Ford Frick. Upon Frick's retirement in 1964 and in accordance with his recommendation, the parties adopted three amendments to the Major League Agreement: (1) the language added in 1944 preventing the Commissioner from finding any act or practice "taken in compliance" with a Major League Rule to be "detrimental to baseball" was removed; (2) the provision deleted in 1944 waiving any rights of recourse to the courts to challenge a Commissioner's decision was restored; and (3) in places where the language "detrimental to the best interests of the national game of baseball" or "detrimental to baseball" appeared those words were changed to "not in the best interests of the national game of Baseball" or "not in the best interests of Baseball."

The nature of the power lodged in the Commissioner by the Major League Agreement is further exemplified "in the case of conduct by organizations not parties to this Agreement, or by individuals not connected with any of the parties hereto, which is deemed by the Commissioner not to be in the best interests of Baseball" whereupon "the Commissioner may pursue appropriate legal remedies, advocate remedial legislation and take such other steps as he may deem necessary and proper in the interests of the morale of the players and the honor of the game." Art. I, Sec. 4.

The Commissioner has been given broad power in unambiguous language to investigate any act, transaction or practice not in the best interests of baseball, to determine what preventive, remedial or punitive action is appropriate in the premises, and to take that action. He has also been given the express power to approve or disapprove the assignments of players. In regard to nonparties to the agreement, he may take such other steps as he deems necessary and proper in the interests of the morale of the players and the honor of the game. Further, indicative of the nature of the Commissioner's authority is the provision whereby the parties agree to be bound by his decisions and discipline imposed and to waive recourse to the courts.

The Major League Agreement also provides that "in the case of conduct by Major Leagues, Major League Clubs, officers, employees or players which is deemed by the Commissioner not to be in the best interests of Baseball, action by the Commissioner for each offense may include" a reprimand, deprivation of a club of representation at joint meetings, suspension or removal of non-players, temporary or permanent ineligibility of players, and a fine not to exceed $5,000 in the case of a league or club and not to exceed $500 in the case of an individual. Art. I, Sec. 3.

The district court considered the plaintiff's argument that the enumeration in Article I, Section 3 of the sanctions which the Commissioner may impose places a limit on his authority inasmuch as the power to disapprove assignments of players is not included. The court concluded that the enumeration does not purport to be exclusive and provides that the Commissioner may act in one of the listed ways without expressly limiting him to those ways.

The court further concluded that the principles of construction that the specific controls the general, or that the expression of some kinds of authority operates to exclude unexpressed kinds, do not apply since the Commissioner is empowered to determine what preventive, remedial or punitive action is appropriate in a particular case and the listed sanctions are punitive only. In fact, from 1921 until 1964, Article I, Section 3, expressly described the enumerated sanctions as "punitive action."

In view of the broad authority expressly given by the Major League Agreement to the Commissioner, particularly in Section 2 of Article I, we agree with the district court that Section 3 does not purport to limit that authority.

III

Despite the Commissioner's broad authority to prevent any act, transaction or practice not in the best interests of baseball, Oakland has attacked the Commissioner's disapproval of the Rudi-Fingers-Blue transactions on a variety of theories which seem to express a similar thrust in differing language.

The complaint alleged that the "action of Kuhn was arbitrary, capricious, unreasonable, discriminatory, directly contrary to historical precedent, baseball tradition, and prior rulings and actions of the Commissioner." In pre-trial answers to interrogatories, Oakland acknowledged that the Commissioner could set aside a proposed assignment of a player's contract "in an appropriate case of violation of [Major League] Rules or immoral or unethical conduct."

It is clear from reading the findings of fact that the district court determined through the course of the trial that Oakland was contending that the Commissioner could set aside assignments only if the assignments involved a Rules violation or moral turpitude.

In its briefs on appeal, Oakland summarized this branch of its argument by stating that the Commissioner's "disapproval of the assignments ... exceeded [his] authority under the Major League Agreement and Rules; was irrational and unreasonable; and was procedurally unfair." The nub of this diffuse attack seems best expressed in a subsequent heading in the brief that the Commissioner's "abrupt departure from well-established assignment practice and his retroactive application of this change of policy to disapprove [Oakland's] assignments was made without reasonable notice and was therefore procedurally unfair."

The plaintiff has argued that it is a fundamental rule of law that the decisions of the head of a private association must be procedurally fair. Plaintiff then argued that it was "procedurally unfair" for the Commissioner to fail to warn the plaintiff that he would "disapprove large cash assignments of star players even if they complied with the Major League Rules."

In the first place it must be recalled that prior to the assignments involved here drastic changes had commenced to occur in the reserve system and in the creation of free agents. In his opinion disapproving the Rudi, Fingers and Blue assignments, the Commissioner said that "while I am of course aware that there have been cash sales of player contracts in the past, there has been no instance in my judgment which had the potential for harm to our game as do these assignments, particularly in the present unsettled circumstances of baseball's reserve system and in the highly competitive circumstances we find in today's sports and entertainment world."

Absent the radical changes in the reserve system, the Commissioner's action would have postponed Oakland's realization of value for these players. Given those changes, the relative fortunes of all major league clubs became subject to a host of intangible speculations. No one could predict then or now with certainty that Oakland would fare better or worse relative to other clubs through the vagaries of the revised reserve system occurring entirely apart from any action by the Commissioner.

In the second place, baseball cannot be analogized to any other business or even to any other sport or entertainment. Baseball's relation to the federal antitrust laws has been characterized by the Supreme Court as an "exception," an "anomaly" and an "aberration." Baseball's management through a commissioner is equally an exception, anomaly and aberration, as outlined in Part II hereof. In no other sport or business is there quite the same system, created for quite the same reasons and with quite the same underlying policies. Standards such as the best interests of baseball, the interests of the morale of the players and the honor of the game, or "sportsmanship which accepts the umpire's decision without complaint," are not necessarily familiar to courts and obviously require some expertise in their application. While it is true that professional baseball selected as its first Commissioner a federal judge, it intended only him and not the judiciary as a whole to be its umpire and governor.

As we have seen in Part II, the Commissioner was vested with broad authority and that authority was not to be limited in its exercise to situations where Major League Rules or moral turpitude was involved. When professional baseball intended to place limitations upon the Commissioner's powers, it knew how to do so. In fact, it did so during the 20-year period from 1944 to 1964.

The district court found and concluded that the Rudi-Fingers-Blue transactions were not, as Oakland had alleged in its complaint, "directly contrary to historical precedent, baseball tradition, and prior rulings." During his

almost 25 years as Commissioner, Judge Landis found many acts, transactions and practices to be detrimental to the best interests of baseball in situations where neither moral turpitude nor a Major League Rule violation was involved, and he disapproved several player assignments.

On numerous occasions since he became Commissioner of baseball in February 1969, Kuhn has exercised broad authority under the best interests clause of the Major League Agreement. Many of the actions taken by him have been in response to acts, transactions or practices that involved neither the violation of a Major League Rule nor any gambling, game-throwing or other conduct associated with moral turpitude. Moreover, on several occasions Commissioner Kuhn has taken broad preventive or remedial action with respect to assignments of player contracts.

On several occasions Charles O. Finley, the principal owner of the plaintiff corporation and the general manager of the Oakland baseball club, has himself espoused that the Commissioner has the authority to exercise broad powers pursuant to the best interests clause, even where there is no violation of the Major League Rules and no moral turpitude is involved.

Twenty-one of the 25 parties to the current Major League Agreement who appeared as witnesses in the district court testified that they intended and they presently understand that the Commissioner of baseball can review and disapprove an assignment of a player contract which he finds to be not in the best interests of baseball, even if the assignment does not violate the Major League Rules and does not involve moral turpitude. Oakland contended that the district court erred in admitting this testimony since parties are bound "only by their objective manifestations and their subjective intent is immaterial." In this bench trial where Oakland was contending that it was not put on notice that transactions alleged to otherwise conform to the Major League Rules might be invalidated, the court could certainly consider what most of the current parties to the agreement believed they were put on notice of when they became signatories.

Oakland relied upon Major League Rule 21, which deals, in Oakland's characterization of it, with "(a) throwing or soliciting the throwing of ball games, (b) bribery by or of players or persons connected with clubs or (c) umpires, (d) betting on ball games, and (e) physical violence and other unsportsmanlike conduct" as indicating the limits of what is "not in the best interests of baseball." However, Rule 21(f) expressly states:

> Nothing herein contained shall be construed as exclusively defining or otherwise limiting acts, transactions, practices or conduct not to be in the best interests of Baseball; and any and all other acts, transactions, practices or conduct not to be in the best interests of Baseball are prohibited, and shall be subject to such penalties including permanent ineligibility, as the facts in the particular case may warrant.

Oakland also took issue with language in the district court's judgment order of March 17, 1977, which relied upon *Milwaukee American Ass'n v. Landis*, 49 F.2d 298 (N.D. Ill. 1931). Oakland contended that the *Landis* case was distinguishable inasmuch as it involved the violation of a certain rule. In that case Judge Lindley held that the Commissioner "acted clearly within his authority" when he disapproved a player assignment after several assignments of the same player to and from different clubs owned by a single individual. The court said in 49 F.2d at 302:

> Though there is nothing in the rules to prohibit an individual owning control of a Major League club from likewise owning control of Minor League clubs, the intent of the code is such that common ownership is not to be made use of as to give one individual, controlling all of the clubs mentioned, the absolute right, independent of other clubs, to control indefinitely a player acquired and switched about by apparent outright purchases.

We conclude that the evidence fully supports, and we agree with, the district court's finding that "the history of the adoption of the Major League Agreement in 1921 and the operation of baseball for more than 50 years under it, including: the circumstances preceding and precipitating the adoption of the Agreement; the numerous exercises of broad authority under the best interests clause by Judge Landis and ... Commissioner Kuhn; the amendments to the Agreement in 1964 restoring and broadening the authority of the Commissioner; ... and most important the

express language of the Agreement itself — are all to the effect that the Commissioner has the authority to determine whether any act, transaction or practice is `not in the best interests of baseball,' and upon such determination, to take whatever preventive or remedial action he deems appropriate, whether or not the act, transaction or practice complies with the Major League Rules or involves moral turpitude." Any other conclusion would involve the courts in not only interpreting often complex rules of baseball to determine if they were violated but also, as noted in the *Landis* case, the "intent of the [baseball] code," an even more complicated and subjective task.

The Rudi-Fingers-Blue transactions had been negotiated on June 14 and 15, 1976. On June 16, the Commissioner sent a teletype to the Oakland, Boston and New York clubs and to the Players' Association expressing his "concern for possible consequences to the integrity of baseball and public confidence in the game" and setting a hearing for June 17. Present at the hearing were 17 persons representing those notified. At the outset of the hearing the Commissioner stated that he was concerned that the assignments would be harmful to the competitive capacity of Oakland; that they reflected an effort by Boston and New York to purchase star players and "bypass the usual methods of player development and acquisition which have been traditionally used in professional baseball"; and that the question to be resolved was whether the transactions "are consistent with the best interests of baseball's integrity and maintenance of public confidence in the game." He warned that it was possible that he might determine that the assignments not be approved. Mr. Finley and representatives of the Red Sox and Yankees made statements on the record.

No one at the hearing, including Mr. Finley, claimed that the Commissioner lacked the authority to disapprove the assignments, or objected to the holding of the hearing, or to any of the procedures followed at the hearing.

On June 18, the Commissioner concluded that the attempted assignments should be disapproved as not in the best interests of baseball. In his written decision, the Commissioner stated his reasons which we have summarized in Part I. The decision was sent to all parties by teletype.

The Commissioner recognized "that there have been cash sales of player contracts in the past," but concluded that "these transactions were unparalleled in the history of the game" because there was "never anything on this scale or falling at this time of the year, or which threatened so seriously to unbalance the competitive balance of baseball." The district court concluded that the attempted assignments of Rudi, Fingers and Blue "were at a time and under circumstances making them unique in the history of baseball."

We conclude that the evidence fully supports, and we agree with, the district court's finding and conclusion that the Commissioner "acted in good faith, after investigation, consultation and deliberation, in a manner which he determined to be in the best interests of baseball" and that "whether he was right or wrong is beyond the competence and the jurisdiction of this court to decide."

It is beyond the province of this court to consider the wisdom of the Commissioner's reasons for disapproving the assignments of Rudi, Blue and Fingers. There is insufficient evidence, however, to support plaintiff's allegation that the Commissioner's action was arbitrary or capricious, or motivated by malice, ill will or anything other than the Commissioner's good faith judgment that these attempted assignments were not in the best interests of baseball. The great majority of persons involved in baseball who testified on this point shared Commissioner Kuhn's view.

For Kuhn

We must then conclude that anyone becoming a signatory to the Major League Agreement was put on ample notice that the action ultimately taken by the Commissioner was not only possible but probable. The action was neither an "abrupt departure" nor a "change of policy" in view of the contemporaneous developments taking place in the reserve system, over which the Commissioner had little or no control, and in any event the broad authority given to the Commissioner by the Major League Agreement placed any party to it on notice that such authority could be used.

* * *

V

Following the bench trial, the district court reached its decision in favor of the Commissioner without considering the impact of Article VII, Section 2 of the Major League Agreement, wherein the major league baseball

clubs agreed to be bound by the Commissioner's decisions and discipline and to waive recourse to the courts.

* * *

Oakland has urged us to apply the substantive law dealing with the "policies and rules of a private association" to the Major League Agreement and actions taken thereunder. Illinois has developed a considerable body of law dealing with the activities of private voluntary organizations and we agree that the validity and effect of the waiver of recourse clause should initially be tested under these decisions.

Even in the absence of a waiver of recourse provision in an association charter, "it is generally held that courts ... will not intervene in questions involving the enforcement of bylaws and matters of discipline in voluntary associations."

* * *

Viewed in light of these decisions, the waiver of recourse clause contested here seems to add little if anything to the common law nonreviewability of private association actions. This clause can be upheld as coinciding with the common law standard disallowing court interference. We view its inclusion in the Major League Agreement merely as a manifestation of the intent of the contracting parties to insulate from review decisions made by the Commissioner concerning the subject matter of actions taken in accordance with his grant of powers.

A second situation in which the waiver of recourse clause must be tested is in conjunction with the provision immediately preceding it which provides that "all disputes and controversies related in any way to professional baseball between clubs ... shall be submitted to the Commissioner, as Arbitrator who, after hearing, shall have the sole and exclusive right to decide such disputes and controversies." Art. VII, Sec. 1. These clauses combine to place the Commissioner in the role of binding arbitrator between disputing parties as compared to his power to act upon his own initiative in the best interests of baseball as in the present case.

Considering the waiver of recourse clause in its function of requiring arbitration by the Commissioner, its validity cannot be seriously questioned. Illinois has adopted the Uniform Arbitration Act allowing contracting parties to require that all existing and future disputes be determined by arbitration. Illinois is joined by numerous other states in encouraging a policy of arbitration, thereby providing private resolution of disputes and reducing litigation. Moreover, it has been made clear that the United States Arbitration Act, 9 U.S.C. §§ 1-14, provides for arbitration of future disputes concerning contracts evidencing transactions in interstate commerce and that this federal law controls state law to the contrary.... We conclude that the waiver of recourse clause is valid when viewed as requiring binding arbitration by the Commissioner for disputes between clubs.

Even if the waiver of recourse clause is divorced from its setting in the charter of a private, voluntary association and even if its relationship with the arbitration clause in the agreement is ignored, we think that it is valid under the circumstances here involved. Oakland claims that such clauses are invalid as against public policy. This is true, however, only under circumstances where the waiver of rights is not voluntary, knowing or intelligent, or was not freely negotiated by parties occupying equal bargaining positions. The trend of cases in many states and in the federal courts supports the conclusion of the district court under the circumstances presented here that "informed parties, freely contracting, may waive their recourse to the court."

Although the waiver of recourse clause is generally valid for the reasons discussed above, we do not believe that it forecloses access to the courts under all circumstances. Thus, the general rule of nonreviewability which governs the actions of private associations is subject to exceptions 1) where the rules, regulations or judgments of the association are in contravention to the laws of the land or in disregard of the charter or bylaws of the association and 2) where the association has failed to follow the basic rudiments of due process of law. Similar exceptions exist for avoiding the requirements of arbitration under the United States Arbitration Act. We therefore hold that, absent the applicability of one of these narrow exceptions, the waiver of recourse clause contained in the Major League Agreement is valid and binding on the parties and the courts.

We affirm the district court's judgments of September 7, 1976, March 17, 1977 and August 29, 1977.

Questions and Notes

1. What reasons did Kuhn give for disapproving the assignments? Why should an owner be prevented from trading his players how and when he chooses?

2. Should courts get involved in dispute between members of a private association? If members of the board of directors of General Motors disagree with a decision of the Chairman of the Board should they be permitted to challenge his decisions in court? Is there difference in professional sports?

3. The general rule of nonreviewability which governs the actions of private associations is subject to exceptions

1) where the rules, regulations or judgments of the association are in contravention to the laws of the land or in disregard of the charter or bylaws of the association and

2) where the association has failed to follow the basic rudiments of due process of law.

Similar exceptions exist for avoiding the requirements of arbitration under the United States Arbitration Act. The court also pointed out that baseball cannot be analogized to any other business or even to any other sport or entertainment. Baseball's relation to the federal antitrust laws has been characterized by the Supreme Court as an "exception," an "anomaly" and an "aberration." Baseball's management through a commissioner is equally an exception, anomaly and aberration. In no other sport or business is there quite the same system, created for quite the same reasons and with quite the same underlying policies. Standards such as the best interests of baseball, the interests of the morale of the players and the honor of the game, or "sportsmanship which accepts the umpire's decision without complaint," are not necessarily familiar to courts and obviously require some expertise in their application. While it is true that professional baseball selected as its first Commissioner a federal judge, until recently it intended only him and not the judiciary as a whole to be its exclusive umpire and governor. In 1994 Baseball's club owners, as a result of a long standing dispute with Commissioner Fay Vincent, redefined the "best interest of baseball' clause in the Major League Agreement. The clause was changed in two critical areas: (1) league matters and (2) collective bargaining. Under the new clause, the commissioner may not invoke the best interests clause in matters requiring votes by owners such as expansion, sale of teams, inter-league play and the alignment of the leagues. In the case of collective bargaining matters, the owners, on the one hand, gave the commissioner exclusive authority for labor matters, but retained the final say in such matters, since as the agreement states, "The clubs, as the employers of the players, are ultimately responsible for the obligations imposed by federal labor law. Chass, Commissioner's Powers Are Diluted by Owners, N.Y. Times Feb 12, 1994 at 29; Whiteside, This Restructuring Is Restrictive, Boston Globe, Feb. 12, 1994 at 31.

Since 1994, without a strong commissioner who can "act in the best interests of baseball", Major League Baseball has continued to act in a self-destructive manner. It has expanded to 30 teams, creating many franchises which are too poor to compete effectively. This year (1999) perhaps 12 of the 30 teams have any possibility of reaching post-season playoffs. In the National League Eastern Division the Braves' and Mets' payroll was $60 million larger than the Marlins'. In the American League (AL) Central Division the Indians' payroll was $50 million more than the Twins'. In the AL West, the Rangers' payroll was $53 million more than the Athletics'. In the AL East, the Yankee's payroll was at least $95 million and exceeded Tampa Bays' by $60 million. Free agency appears to be totally out of control. Kevin Brown has a contract with the Dodgers for $105 million over seven years. Randy Johnson of the Diamondbacks has a four year, $52 million contract. In fact, there are several teams whose entire payroll was approximately the same as the salary of a single opposing player.

D. The Commissioner's Power to Discipline

ATLANTA NATIONAL LEAGUE BASEBALL CLUB, INC. v. KUHN
432 F. Supp. 1213 (N.D. Ga. 1977)

EDENFIELD, District, Judge

Factual Background

* * *

The origin of the instant controversy can be traced to the changes that were made in baseball's reserve system in 1976. Prior to that year, the collective bargaining agreements between the Major League Baseball Players Association and the Major League Club Owners were interpreted to reserve to clubs a perennial one-year option to renew a contract with a player, which option was renewable at the end of each year. This system, which essentially bound a player to a team perpetually unless traded or released, was known as the reserve system. In 1975, the Players Association filed grievances on behalf of two players, Andy Messersmith and Dave McNally, challenging this system. An arbitration panel considered the grievances and concluded that players who had completed their last year of a contract with a particular club would be obligated, at the option of the club, to play only one additional year for that club. Unless the player and club signed a new agreement during this "option year," the player became a "free agent," with the right to negotiate contract terms with other major league clubs at the end of the option year season.

In an effort to implement the Kansas City Royals decision, the representatives of the Players Association and the club owners met to hammer out a new collective bargaining agreement, An agreement was reached in July, 1976 which established a special reentry [sic] draft to be conducted in November of each year for those players who had become free agents at the end of a baseball season. Procedures were established for the November draft whereby negotiation rights with each free agent could be drafted by up to twelve teams, each of which were then given negotiation rights for that player. Between the end of the season and three days prior to the draft, however, only the club of record, the team for which the prospective free agent was playing out his option, had negotiation rights with that player. With the advent of this new reserve system there was concern on the part of the clubs and the Commissioner that the clubs of record have the maximum opportunity to retain their prospective free agents in an effort to preserve a competitive balance among the clubs in professional baseball. Accordingly, during the post-season period in which the club of record has exclusive negotiating rights with a free agent, other clubs were allowed to talk with the free agent or his representative about the merits of contracting with a particular team, "provided, however, that the Club and the free agent shall not negotiate terms of contract with each other." Collective Bargaining Agreement, Art. VII, 3(a). To help ensure that this provision was observed and that tampering was avoided, both the Executive Council, established by the Major League Agreement, and the Player Relations Committee encouraged the Commissioner to issue warnings that tampering violations would not be tolerated, and to make every effort to deter such violations.

On August 27, 1976 the Commissioner issued the first in a series of warnings in the form of a teletyped notice to each major league club. The directive concerned the fact that press reports were circulating which speculated on the amount potential free agents would be paid to sign. Where club personnel were the source of such reports, the conduct was cautioned as constituting tampering, which would no longer be tolerated.

* * *

A second warning was issued on September 28, 1976 which specified that both direct and indirect dealings were prohibited prior to the end of the season:

> (3) There should be no direct contacts of any kind with potential free agent players on another club without the prior written consent of their current club, which should not be sought or given without the advance approval of this office.
>
> (4) The indirect contacts which are prohibited include (A) conversations between a club and the

player through his representative or other third party intermediary; and (B) public comments which would indicate an interest in signing any such player.

The bottom portion of the directive spoke of conduct during the post-season period prior to the November 4 draft and warned against negotiations between free agent and club:

> A player who has completed his option year without signing a new contract will be free to talk with any club and discuss the merits of his contracting with such club when and if he becomes eligible to do so. But the club and the player must not negotiate terms or enter into a contract unless or until the club has acquired negotiation rights with regard to the player as provided in the new basic agreement.

The Commissioner cautioned "all concerned that if they are in doubt concerning the propriety of any particular contact, the preferable course would be to avoid it."

The third warning, issued on October 5, 1976, emphasized that the tampering rule would be enforced and stated that "Possible penalties will include fines, loss of rights under [amateur free agent] and re-entry drafts and suspension of those responsible." Three more notices were issued, directing clubs and players not to inquire of each other concerning financial terms, and advising strict adherence to the guidelines previously announced.

On September 24, 1976 the Commissioner held a hearing on certain alleged tampering violations committed by John Alevizos, then Executive Vice President and General Manager of the Atlanta Club, in communicating with Gary Matthews, who was then completing his option year with the San Francisco club. The Commissioner found that Alevizos had violated 3(g) and fined the Atlanta Club $5,000 for each of two violations and ruled that the Atlanta Club would be denied a selection in the first round of the amateur player draft to held in January, 1977. In his October 5 decision, the Commissioner indicated that he had considered suspending Alevizos, but Alevizos' employment with the Atlanta Club had already been terminated.

On October 20, 1976 Turner attended a cocktail party in New York City sponsored by the New York Yankees Club, and there engaged in a conversation with Robert Lurie, co-owner of the San Francisco club. In the presence of several media representatives, Turner told Lurie that he would do anything to get Gary Matthews and that he would go as high as he had to. Turner's comments were reported by a few San Francisco newspapers. On October 25, 1976, Lurie filed a complaint concerning these statements with the Commissioner, and the Commissioner notified Turner that, based on Lurie's allegations,

> It appears that the Atlanta Club may have violated (1) Major League Rule 3(g); (2) the provisions of the collective bargaining agreement with the Players Association prohibiting negotiation with free agent players; or (3) the guidelines issued by this office by teletypes of September 28 (last paragraph), October 5, 11, 12 and 13, 1976 regarding relationships with free agent players prior to November 1st.

* * *

The draft was conducted on November 4, and twelve teams drafted negotiation rights with Matthews by the fifth round. The same day a formal hearing was held in which Turner admitted making the above comments, claiming that they were made in jest, but denied that there had been any direct or indirect negotiations of contract terms with Matthews or his agent. Matthews testified by way of affidavit that there had been no direct or indirect contacts with the Atlanta Club as to contract terms.

On December 30, the Commissioner announced his decision in the Turner matter. He concluded that Turner's statements were in clear violation of the prohibitions of the directives.... These statements clearly had the effect of subverting the collective bargaining agreement and the re-entry draft procedures adopted pursuant to it. I am therefore compelled to find that they were not in the best interests of Baseball within the meaning of Section 3, Article I of the Major League Agreement.

In considering appropriate sanctions, the Commissioner decided not to disapprove Matthews' contract with the Atlanta Club which had been signed on November 17. This decision was based on the urgings of Turner and upon the Commissioner's conclusion that Matthews had not engaged in any improper contact. Instead, the Commissioner decided to suspend Turner from baseball for one year, reasoning that (1) Turner had suggested that

Turner suspended for one year

such a sanction would be appropriate, (2) this was the second Atlanta tampering violation, and (3) the Commissioner had warned in one of his directives that suspensions might be imposed. As a further sanction, the Commissioner decided that the Atlanta Club would not be entitled to exercise its first round draft choice in the June, 1977 amateur free agent draft.

On January 18, 1977 the Commissioner met with several Atlanta community leaders and then held an additional hearing. An order implementing the suspension was issued on January 25 and stated that for one year Turner could not exercise any powers in connection with the management of the Atlanta Club, or confer, advise or otherwise communicate with persons exercising such powers as to their exercise. In addition he is forbidden to visit the Atlanta clubhouse or offices or communicate with any major league or professional club or its personnel in connection with any matter involving the Atlanta Club or baseball. However, the Commissioner ruled that the suspension would be reviewed after six months, and that Turner could apply to the Commissioner for permission to engage in baseball-related activities in extraordinary circumstances.

On March 8, 1977, Turner and the Atlanta Club filed this action, challenging the Commissioner's authority to (1) issue the six directives, (2) conclude that plaintiffs had violated those directives, (3) enforce the collective bargaining agreement, and (4) impose the sanctions described above. Plaintiffs also alleged that the sanctions imposed constituted a tortious interference with the business relations of the plaintiffs.

* * *

To the extent this case involves a violation of the Major League Agreement, the court has no hesitation in saying that the defendant Commissioner had ample authority to punish plaintiffs in this case, for acts considered not in the best interests of baseball. As one court has said, the Commissioner of baseball has "All the attributes of a benevolent but absolute despot and all the disciplinary powers of the proverbial *pater familias*." *Milwaukee American Assn. v. Landis*, 49 F.2d 298 (N.D. Ill. 1931).

The question which makes the case confusing and difficult, however, is to what extent the Major League Agreement applies here. This doubt arises for two reasons: First, when the current Major League Agreement was made in 1975 there did not exist in baseball any "free agencies" created solely by expiration of the player's contract, and certainly there was no "free-agent draft." Conceding that the Major League Agreement might be sufficiently broad to apply ordinarily to future developments, there is a still bigger obstacle: When such "free-agencies" came into being in 1976 as a result of the arbitration and litigation reported in *Kansas City Royals v. Major League Players Assn.*, *supra*, the parties entered into a new, separate and independent contract to deal with the new situation thus created. This new agreement, in the form of a collective bargaining agreement between the clubs and the Players Association, is complete within itself. It provides for the creation of free agencies upon the expiration of player contracts (Art. XVII, B); spells out reentry procedures (Art. XVII, C); forbids clubs from contracting or negotiating terms with free agents in the interim between the end of the season and the reentry draft (Art. XVII C. (2)); and provides for three-party arbitration "as the exclusive remedy of the parties." (Art. X, prelim. par.)

Obviously this new agreement modified the Major League Agreement at least as to such subject matter as is covered by the later agreement. The two agreements must now be read together as forming the framework for the government of Major League baseball. The powers of the Commissioner under the Major League Agreement are therefore modified only so as to avoid infringing upon the rights secured by the parties to the collective bargaining agreement.

The Directives

Plaintiffs argue that the Commissioner lacked the authority to issue the six directives because (1) the Commissioner's rulemaking authority is limited to procedural rules under § 2(d); (2) the subject matter of the directives was covered by the Collective Bargaining Agreement and the Commissioner has no authority to promulgate rules under that agreement. However, plaintiffs' understanding of the role of the Commissioner is much narrower than was intended by the parties to the Major League Agreement.

The parties endowed the Commissioner with wide powers and discretion... to observe, investigate and take such action as necessary to secure observance of the provisions of the agreements and rules, promotion of the expressed ideals of, and prevention of conduct detrimental to, baseball. Since the Commissioner has the authority

to sanction that conduct that he concludes is detrimental to baseball, he must also have the authority to issue advance notice as to what acts will constitute forbidden conduct. Essentially the directives served to warn that conduct inconsistent with the directives would be considered not in the best interest of baseball and would be severely dealt with. Accordingly, they were "preventive" measures, and the Commissioner had express authority to issue them.

Moreover, there is nothing in the Collective Bargaining Agreement to prevent the Commissioner from promulgating these directives. Plaintiff would argue that since the Collective Bargaining Agreement has its own tampering rule which does not expressly forbid indirect contact between clubs and free agents, the Commissioner cannot extend that rule to preclude such indirect contact. Defendant charges that the Commissioner would have such authority even if an indirect contact rule was inconsistent with the Collective Bargaining tampering rule, so long as the rights of players were not thereby infringed. The court need not decide the validity of defendant's argument since it concludes that a notice forbidding indirect contacts as to contract terms supports and is not inconsistent with free agent tampering rule. Baseball is a highly visible sport; because of its vast media coverage, contract terms can be communicated as easily through the mass media as through private communications. Here, the Commissioner interpreted the intent of the Collective Bargaining Agreement's concern over tampering, and issued warnings against acts inconsistent with the tampering rule. In fact, the September 28 directive tracks the exact language of Article XVII(c)(3) of the Bargaining Agreement. That these directives were encouraged and approved by the Executive Council and the Player Relations Committee lends credence to defendant's position that the Commissioner's authority in this area was understood. The court therefore concludes that in issuing these warnings the Commissioner acted well within the scope of his authority.

Authority to Decide the Case

Plaintiffs argue that inasmuch as the Commissioner charged Turner with violating the terms of the Collective Bargaining Agreement, ... the matter should have been submitted to the arbitration panel established under Article X of the Bargaining Agreement as the "exclusive remedy" for grievances under the Agreement. A grievance is described in relevant part as complaint which involves the interpretation of, or compliance with, the provisions of any agreement between the Association and the Clubs or any of them, or any agreement between a Player and a Club.... Article X, § A(1)(a).

In the instant case, Lurie filed a complaint with the Commissioner complaining of Turner's statements. His grievance against Turner was then investigated by the Commissioner. Although the grievance did involve an interpretation of the tampering rule under the Collective Bargaining Agreement, it was not the type of dispute for which the arbitration panel was established. The clear intent of the arbitration provision and the Collective Bargaining Agreement in general was to settle disputes between player and club, not club and club, or club and Commissioner, as was the case here.

The Commissioner's authority to investigate and decide the case against Turner came not from the Bargaining Agreement, but from Article I, § 2, of the Major League Agreement, where he is given the power to determine what conduct is not in the best interests of baseball. There is nothing in the Bargaining Agreement to prevent him from concluding that conduct which he views as violating the Collective Bargaining Agreement is also not in the best interests of baseball.

However, Turner next argues that his conduct was not in contravention of the Commissioner's directives since such directives only precluded indirect contacts with potential free agents prior to the end of the season and negotiation of contract terms with actual free agents after the season. Plaintiffs claim that the evidence adduced at the hearing clearly established that Turner did not negotiate terms with Matthews, and that his conduct did not have the effect of subverting the draft as the Commissioner concluded. Accordingly, plaintiffs argue that the Commissioner's decision was contrary to the weight of the evidence and that he abused his discretion and violated the mandates of natural justice in disciplining Turner.

In the Commissioner's first directive he stressed the fact that comments to the press may have the same effect as direct communication with a player. Although the September 28 directive only explicitly warned against indirect contacts during the season, the court must conclude that when all of the directives are read together, they give fair warning that commenting to the media concerning the price to be paid for a player is forbidden conduct.

True, the Commissioner possibly overstates his case when he says in his order that Turner's remarks "clearly had the effect of subverting the Collective Bargaining Agreement and the re-entry draft procedures." So far as the evidence discloses this simply is not correct. The draft, so far as appears, went smooth as silk, though the remarks may have convinced San Francisco of the futility of trying to hold its player, Matthews. But however this may be, the remarks certainly displayed a real potential for subverting re-entry drafts both then and in the future; and, according to the evidence, it was this potential to which the Commissioner referred and which he wished to forever entomb.

In 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 interests 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. He has made his finding that Turner's conduct was of this character. The court knows of no authority which prevented him from making it, and cannot say his decision was either arbitrary or wrong. There is no evidence that the Commissioner's decision was the result of bias or ill will, although, during the same period one other tampering violation was dealt with much less severely. The court therefore concludes, with some misgivings, that under this provision, the Commissioner did have authority to punish plaintiffs.

The Sanctions

Viewing the evidence concerning punishment here, a casual, nonlegalistic observer might say that this case represents a comedy of strange tactical errors on both sides. Both at the hearing before the Commissioner and afterward, but before decision, Turner asked for "suspension" as his punishment in lieu of cancellation of the Matthews contract, which he feared. The Commissioner also did some inexplicable things: He approved Atlanta's signing of Matthews, apparently the only tangible mischief resulting from Turner's remarks, but having approved the act of signing he then punished Turner for publicly suggesting in advance he intended to do it. He also forbade Turner the right to manage his business or to even go on his own property except as a paying customer. The Atlanta Baseball Club is called the "Atlanta Braves"; and considering the severity of this punishment, the same casual observer might call this an Indian massacre in reverse. In their encounter with the Commissioner the Braves took "nary" a scalp, but lived to see their own dangling from the lodgepole of the Commissioner, apparently only as a grisly warning to others. At about the same time and for an identical offense, though perhaps not as flagrant, the venerable owner of the St. Louis Cardinals was fined $5,000. All of which adds nothing to the legal power of this court to extricate plaintiffs from a suspension which they invited and to which they assented, both orally and contractually.

* * *

Here the Commissioner could properly conclude that this was the second instance of improper conduct with respect to one player. He could also consider that Turner's comments were made after six warning directives had been issued, one of which cautioned that suspensions would follow from tampering violations. None of these aggravating circumstances were present in the St. Louis case. With these differences present, honest minds could, and indeed do, disagree as to what is an appropriate punishment. The court, therefore, simply cannot say the Commissioner abused his discretion. In Article VII, § 2, of the Major League Agreement the clubs explicitly agreed to be bound by the discipline imposed by the Commissioner and obviously intended to give him a certain amount of leeway to choose the appropriate sanction. Judicial review of every sanction imposed by the Commissioner would produce an unworkable system that the Major League Agreement endeavors to prevent. Here, Turner was warned of the suspension, he asked for the suspension, the contract specifically authorized it, and he got it.

The denial of the June draft choice, however, stands on a somewhat different legal footing. Under the best interests of baseball clause, Article I, § 2, the Commissioner is given the authority to "determine, after investigation, what preventive, remedial or punitive action is appropriate in the premises." (Emphasis added.) Those punitive measures which the Commissioner may take are explicitly enumerated in Article I, § 3:

> In the case of conduct by Major Leagues, Major League Clubs, officers, employees or players which is deemed by the Commissioner not to be in the best interests of Baseball, action by the Commissioner for each offense may include any one or more of the following: (a) a reprimand; (b) deprivation of a Major League Club of representation in joint meetings; (c) suspension or removal of any officer or employee of a Major League or a Major League Club; (d) temporary or permanent ineligibility of a player; and (e) a fine, not to exceed Five Thousand Dollars ($5,000.00) in the case of a Major League Club and not to exceed Five Hundred Dollars ($500.00) in the case of any officer, employee or player.

Denial of a draft choice is simply not among the penalties authorized for this offense.

Defendant argues, however, that the list of sanctions enumerated in this section is intended to be only illustrative rather than definitive, as indicated by use of the language that penalties "may include any one or more of the following." Thus he says that the listing of specific sanctions in § 3 does not preclude the Commissioner from imposing other sanctions that he deems appropriate. He says that *Milwaukee American Ass'n. v. Landis*, *supra*, so holds. The court does not perceive *Landis* as going that far. In *Landis*, the Commissioner had found that the owner of the St. Louis Club, in his handling of a player under contract to that club, had engaged in conduct claimed to be not in the best interests of baseball. As a sanction, the Commissioner declared the player to be a free agent. The St. Louis Club argued that the Commissioner lacked authority to impose the sanction since it was not specifically listed in Article I, § 3. Although the court affirmed the action of the Commissioner and in doing so noted his wide range of powers, the question raised by the St. Louis Club in *Landis* and by the plaintiffs herein was left unanswered:

> [Whether] there is given to the Commissioner the power in so many words to declare Bennett a free agent is immaterial, since the agreements and rules grant to the Commissioner jurisdiction to refuse to approve Bennett's assignment by St. Louis to Milwaukee, and to declare him absolved from the burdens of the same and of his contract with St. Louis.

The recent case of *Finley & Co. v. Kuhn*, 76C-2358 (N.D. Ill. 1977), also did not decide the question of whether the sanctions listed in § 3 are exclusive, although defendant would suggest otherwise. The issue in *Finley* was again the Commissioner's authority to disapprove certain assignments as not being in the best interests of baseball. Although the court noted that the power to set aside assignments of players was not explicitly listed in the Commissioner's powers under § 3, it stated that

> Section 3 does not say that the Commissioner shall have only the power to act in the enumerated ways, though that could have been said if it was intended. The section says that the Commissioner may act in one of the enumerated ways, without expressly so limiting him.
>
> * * *

Other provisions of the Major League Agreement and the Major League Rules support plaintiffs' position that the Commissioner is limited in his authority to take punitive measures. For example, Article I, § 2(a), gives the Commissioner the authority "to summon persons and to order the production of documents, and, in the case of refusal to appear or produce, to impose such penalties as are hereinafter provided." The reference in § 2(a) to "penalties" presumably refers to those enumerated sanctions in § 3, since there is no further reference in the agreement to penalties for failure to appear or produce. In addition, Rule 50, "Enforcement of Major League Rules", provides in relevant part:

> (a) PENALTIES. In case the Commissioner shall determine that a league or club has violated any of the foregoing Rules, as to which penalty provisions are not otherwise set forth in the Major League Agreement or Major League Rules, the Commissioner may impose a fine or, in case of a club, may suspend the benefit of any or all of these Rules as to such club for a period not exceeding thirty (30) days.

The implication of this provision is that the sum total of punitive sanctions available to the Commissioner are those specifically itemized in the Major League Agreement, Article I, § 3, or under the Major League Rules such as Rule 50.

Thus, the language of the Major League Agreement and Major League Rules seems to imply that the list of sanctions in § 3 is exclusive, and basic rules of contract construction support this conclusion. Prior to the original Major League Agreement, there were no presumed powers vested in a Commissioner. The 1921 agreement created the office of the Commissioner and defined his powers out of whole cloth. In such a situation, the maxim "Expressio unius est exclusio alterius" is particularly applicable, *Dorris v. Center*, 284 Ill. App. 344, 1 N.E. 2d 794, 795 (App. Ct. Ill. 1936). Moreover, in light of the fact that this contract purports to authorize the imposition of a penalty or forfeiture, it must be strictly construed, 17A CORPUS JURIS 2D § 320.

Set against this background are numerous instances where the Commissioner has taken action that was not listed in § 3, and testimony on the part of certain parties to the Major League Agreement which indicates that the intention of § 3 was to provide an illustrative list of sanctions available to the Commissioner. The court has little trouble with the numerous instances defendant cites where a Commissioner has declared a player to be a free agent. While the Commissioner may have believed that he was acting pursuant to an unlimited sanction authority, he nevertheless had the explicit authority to disapprove contracts and therefore render players free agents. *See Milwaukee American Ass'n. v. Landis*, *supra*, 49 F.2d at 304; Rule 12(a) of the Major League Rules.

In other instances, however, the Commissioner has taken action which falls outside the enumerated sanctions and which did not involve the disapproval of contracts. Plaintiffs would argue that in these instances, the Commissioner was acting pursuant to his remedial and preventive powers, whereas here he was utilizing his punitive powers. However, at times the distinction between what is remedial and what is punitive is difficult to decipher, since a remedial action in favor of one party will often serve as a punishment to another. Defendant argues that in the instant situation, the deprivation of a draft choice was also a remedial measure which reduced an unfair competitive advantage that Atlanta gained in signing Matthews. The trouble with this argument is that unlike most remedial situations where relief is afforded to the party injured by the wrongful conduct, here the only party which may have been injured, the San Francisco club, received no relief at all.

In any event, the court need not decide whether the Commissioner acted within his authority in those instances which are not now before the court. That the Commissioner's authority in those cases went unchallenged does not persuade this court of the Commissioner's unlimited punitive powers in light of contractual language and established rules of construction to the contrary, *see American League Baseball Club v. Johnson*, *supra*, 179 N.Y.S. at 505. If the Commissioner is to have the unlimited punitive authority as he says is needed to deal with new and changing situations, the agreement should be changed to expressly grant the Commissioner that power. The deprivation of a draft choice was first and foremost a punitive sanction, and a sanction that is not specifically enumerated under § 3. Accordingly, the court concludes that the Commissioner was without the authority to impose that sanction, and its imposition is therefore void.

* * *

Summary

In summary, the Commissioner's decision to deprive plaintiffs of their first round draft choice in the June, 1977 amateur draft is hereby HELD to be ultra vires and therefore VOID. With respect to the balance of plaintiffs' claims, the court CONCLUDES that the Commissioner acted within the scope of his authority and hereby AWARDS judgment in favor of defendant. Each party is to bear its own costs in this action.

SO ORDERED, this 19th day of May, 1977.
Newell EDENFIELD/United States District Judge

ULTRA VIRES – OUTSIDE THE SCOPE OF POWER

WHAT SANCTIONS DID KUHN IMPOSE ON TURNER?

Questions and Notes

In this case, as with all of the previous challenges to the Commissioners's authority, he prevails. Why did the court overturn the Commissioner's denial of a draft choice?

E. Interpretation of Sports Contracts

Observers generally agree that:

> "When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean — neither more nor less."
>
> "The question is," said Alice, "whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master — that's all." LEWIS CARROLL, THROUGH THE LOOKING GLASS, Chapter VI.

When courts engage in the process of contract interpretation, their purpose is to determine what meaning will attach to the relevant contract terms. Unfortunately, in answering this question there is very little agreement on the proper approach. There are three rules which can be employed: (1) the plain meaning rule, (2) the Williston rule (1st Restatement), and (3) the Corbin rule (2d Restatement).

According to the plain meaning rule, if a writing appears to be plain and unambiguous on its face, its meaning must be determined from the instrument itself. Under the Williston approach, a court must first determine whether the agreement is integrated (*i.e.*, a complete and final statement of one or more terms of the contract.) Williston's standard for interpreting an integrated, unambiguous document requires that a court adopt the meaning that a reasonably intelligent person, acquainted with all the operative usages and knowing the circumstances under which the document was created, would attach to the document. Under this approach, the court would exclude any oral statements by the parties regarding what they intended, RESTATEMENT OF CONTRACTS § 230. Thus, in the case of an integrated agreement, the parties could not testify that the word "offer" meant "acceptance". Where an integrated agreement is ambiguous or in the case of an unintegrated agreement, the court will admit oral statements of the parties regarding what they intended the document to mean. In these cases the meaning which the court will adopt is the meaning that the party making the manifestation should reasonably expect the other party to give it — the standard of reasonable expectation — a test based primarily upon the objective theory of contracts.

When such oral evidence is introduced and it shows that the parties had conflicting understandings as to the meaning of a material term, there is a contract based on the meaning of the party who is unaware of the ambiguity if the other party knows or has reason to know of ambiguity. If the understandings conflict as to a material term and each party is guilty or blameless on the issue of knowledge or reason to know the ambiguity, there is no contract. If the parties place the same meaning on the term, there is a contract based on the meaning.

Under Corbin's rule, all relevant extrinsic evidence is admissible on the issue of the meaning of the agreement and whose meaning prevails, including evidence of subjective intention and what the parties said to each other with respect to meaning. This is true even if there is complete integration and the contract is neither vague nor ambiguous. In determining whose meaning prevails, the party proposing the meaning must convince the court that at the time the agreement was made he did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party. Restatement (Second) Contracts 1979 sec. 202. Clearly, one of the best ways to establish what each party knew at the time of the agreement is what they said to each other during negotiations. As you read the cases, ask yourself how often the court really paid any attention to what the parties said.

SAMPLE v. GOTHAM FOOTBALL CLUB, INC.
59 F.R.D. 160 (1973)

Defendant is the owner and operator of a professional football team popularly known as the "New York Jets." On September 1, 1968, it entered into three separately executed written agreements with plaintiff under which plaintiff was required to render services as a professional football player for the 1968, 1969 and 1970 football seasons. Each document represented the agreement between plaintiff and defendant for a different year. The current dispute only pertains to the contract covering the 1969 and 1970 football seasons.

* * *

[T]he court is confronted with the allegation that plaintiff's dismissal in 1969 entitles him to recovery of his 1970 salary under the injury-benefits clause of his contract. This allegation is grounded on plaintiff's contention that both parties intended to enter into one three-year contract covering the 1968, 1969, and 1970 football seasons, notwithstanding the existence of three separately executed documents. Accordingly, plaintiff argues that since his alleged injury was sustained during the performance of a three-year contract he is entitled to his salary for the remaining term of the contract. *But cf. Hennigan v. Chargers Football Co.*, 431 F.2d 308 (5th Cir. 1970).

To the contrary, defendant contends that the three separately executed documents were intended to represent three one-year contracts. Thus, if obligated to pay at all, it would be liable only for the salary provided under the contract pertaining to the season in which the injury was sustained. After a careful and thorough independent review of the record, the court finds that the parties entered into three one-year contracts, rather than a single three-year contract. Accordingly, defendant is granted summary judgment with respect to plaintiff's second cause of action.

Plaintiff argues that he subjectively believed that he was entering into one three-year contract when he affixed his signature to the documents in question. He further alleges that he was duped into the separate-contract-arrangement due to: (1) his lack of sophistication in contract negotiations; (2) his lack of representation by counsel; and (3) the unequal bargaining positions of the parties. All these arguments are unavailing.

In determining whether the simultaneous execution of several instruments results in one contract or in several separate agreements, the intention of the parties must be ascertained from a reading of the several instruments, and from an examination of the facts and circumstances at the time of execution. The New York Court of Appeals has stated that when the terms of a written contract are clear and unambiguous the intent of the parties must be ascertained from the language used to express such intent.

* * *

Here the contracts were plain and unambiguous. The intent of the parties is clearly manifested by the three separate executions, and because each contract pertains to a single football season. Moreover, the relevant contractual intent is that expressed in the contract (or contracts) even though it may not accord with the subjective intent of the parties. It should be noted that although all three contracts were executed contemporaneously by the same parties, this does not necessarily require that they be read together as one instrument.

* * *

Significantly, the three documents in the case at bar did not relate to the same subject matter even though they concerned the same parties. This conclusion is reached because each contract called for performance at different times, *i.e.*, each pertained to a different football season. *United States ex rel. Trane Co. v. Raymar Contracting Corp.*, 295 F. Supp. 234, 236 (S.D.N.Y.), *aff'd.* 406 F.2d 280 (2d Cir. 1968).

Having determined that the parties entered into three separate contracts, it is necessary to evaluate plaintiff's second claim in light of this conclusion.

Paragraph 14 of the 1970 contracts makes it unequivocally clear that the injury-benefits provision is operative only during the relevant contract period. In this instance only during the 1970 football season. Pertinent part, paragraph 14 provides that if a:

> Player is injured in the performance of his services *under* this contract ... the Club will ... continue, *during the term of this contract*, to pay Player his salary ... if and so long as it is the

opinion of the Club Physician that Player, because of such injury, is unable to perform the services required of him *by this contract.*

Since the injury alleged by plaintiff occurred during the term of his 1969 contract, and since the 1970 contract is a separate agreement, plaintiff can not prevail on his second cause of action. Only if plaintiff had sustained a disabling injury during the term of the 1970 contract would he be entitled to invoke the injury-benefits clause of the contract. Hence, defendant is entitled to a summary judgment as a matter of law with respect to plaintiff's second claim.

* * *

Sample's other arguments regarding his second cause of action — "anticipatory breach" and "impossibility of performance" — are without merit and are rejected without detailed discussion.

* * *

So ordered.

F. Note on The Plain Meaning Rule

Traditionally, when courts are called upon to interpret a contract, they profess to engage in a search for the intention of parties. As can be seen in *Sample*, when the contract has been reduced to writing, frequently the search does not extend beyond the "four corners" of the document. The basis for this approach is found in the Plain Meaning Rule which states that if a writing appears to be plain and unambiguous on its face, its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any nature. J.D. CALAMARI & J.M. PERILLO, CONTRACTS 166, 167 (3d ed. 1987). The main advantage of such a rule is simplicity. If it is employed, no lengthy trial is required to determine what the parties meant, nor need one inquire as to what each party might have said to each other, or what each party either knew or had reason to know about the expectations of the other. The main problem with the rule is that the meaning of words varies with the context and the surrounding circumstances. Thus it is virtually impossible to determine what the meaning of the words in a contract are without considering extrinsic evidence. In spite of these short comings, the rule is still employed by courts in a majority of jurisdictions. *Id.* at 167 n. 22.

TOLLEFSON v. GREEN BAY PACKERS, INC.
256 Wis. 318, 41 N.W.2d 201 (1950)

GEHL, Justice

Plaintiff, Charles Tollefson, a professional football player, had played football with defendant, Green Bay Packers, Inc., in the years 1944 and 1945. On May 4, 1946, the parties entered into a contract, which is a printed form with insertions in the handwriting of E.L. Lambeau, manager of defendant corporation. The pertinent provisions of the contract are these:

* * *

The Green Bay Packers herein is called the Club, and Chas Tollefson, of Green Bay Wis. herein is called the Player.

The Club is a member of the National Football League. As such, and jointly with the other members of the League, it is obligated to insure to the public wholesome and high class professional football by defining the relations between Club and Player, and between Club and Club.

In view of the facts above recited the parties agree as follows:

1. The Club will pay the Player a salary for his skilled services during the playing season of 1946 at the rate of 300.00 dollars for each regularly scheduled League game played, provided he has not been released by the Club prior to the playing of the first League game. For all other games the Player shall be paid such salary as shall be agreed upon between the Player and Club. As to games scheduled but not played, the Player shall receive no compensation from the Club other than actual expenses.

Minimum 3600 for season

2. The salary above provided for shall be paid by the Club as follows:

Seventy-five percent (75%), after each game and the remaining twenty-five percent (25%), at the close of the season or upon release of the Player by the Club.

* * *

7. This contract may be terminated at any time by the Club giving notice in writing to the Player within forty-eight, (48), hours after the day of the last game in which he has participated with his Club.

* * *

13. In case of dispute between the Player and the Club the same shall be referred to the Commissioner of the National Football League, and his decision shall be accepted by all parties as final.

14. Verbal contracts between Club and Player will not be considered by this League, in the event of a dispute....

The provision "Minimum 3600 for season" was inserted in the printed form in the handwriting of the manager, E.L. Lambeau. Plaintiff, Tollefson, practiced with the team, appeared in an intersquad game and played in three practice games and a regular league game. He also appeared in uniform and on the bench for the Los Angeles Rams Game, the second scheduled.

Plaintiff was not given formal notice of his discharge; it came to him by an article published in a newspaper after the second game played, reporting that waivers had been asked by the defendant upon him. He understood that a request for waivers and action taken by defendant as reported in the newspaper meant that he had been discharged. Following his release he reported for practice on a number of occasions, obviously as an offer to continue to perform. On those occasions the manager was present but he had no conversation with him. On the second or third day of practice after his release, while on the practice field, he talked with one of the coaches, but the subject of his conversation does not appear.

He was paid $900 for three practice games played and the two league games played before his discharge. He seeks to recover $2700, the difference between the amount paid him and the $3600 provided in the inserted provision.

Plaintiff submitted his case solely upon the theory that the provision, "Minimum 3600 for season," entitles him to payment of that amount regardless of full performance by him. The trial court disagreed and therefore granted defendant's motion for nonsuit.

Plaintiff contends that the inserted provision "minimum 3600 for season", which will be referred to hereafter as the "minimum clause", entitles him to that amount. Defendant does not agree and in its answer sets up the additional defense that plaintiff was discharged for failure to properly perform.

Unquestionably, absent the minimum clause, under the provisions of paragraph 7 of the contract, the defendant might have released plaintiff at any time, with or without cause. Although it was not definitely known when the contract was made how many practice games would be played, the amount stated in the minimum clause appears to have been determined from the fact that it would at least approximately compensate plaintiff for the games scheduled and planned to be played. If plaintiff had been permitted to perform fully he would have been entitled

to the precise amount stated in the minimum clause. This and the mere fact that it was inserted would indicate that it was intended that it should serve some purpose. It is our view that its terms are inconsistent with the provisions of paragraph 7 of the contract which is applicable to the rule: "Where written provisions are inconsistent with printed provisions (of a contract), an interpretation is preferred which gives effect to the written provisions." RESTATEMENT OF CONTRACTS § 236 (e)(1932). *See also* WILLISTON ON CONTRACTS § 1143; *Atlanta Terra Cotta Co. v. Goetzler*, 150 Wis. 19, 136 N.W. 188, Ann. Cas. 1913E, 958.

If as defendant contends, plaintiff would have been entitled to the $3600 only in case he completed the season's play, there would have been no reason for the insertion of the minimum clause.

Before the contract was executed plaintiff and defendant's coach discussed the fact that the former had had an offer to play with another professional football team. No doubt that fact prompted plaintiff to insist upon some form of relative security and induced defendant to agree that he should have it.

We conclude that the minimum clause must be construed to mean that, unless discharged for cause plaintiff was entitled to the full sum of $3600 whether he participated in the games played or not.

Defendant argues that, upon plaintiff's construction, even though plaintiff had not performed or offered to perform to the best of his ability, he might still have been entitled to the full amount of the minimum clause. This is not correct. An employer may discharge an employee for cause at any time without incurring liability even though the employee is engaged for a definite term as plaintiff was here. 35 Am. Jur. 470.

We conclude that plaintiff was entitled to the amount stated in the minimum clause unless it were shown that there was cause for his discharge. Defendant was entitled to that defense. Plaintiff's motion for summary judgment was properly denied. The court was in error in granting defendant's motion for nonsuit.

The order denying plaintiff's motion for summary judgment is affirmed. The judgment granting defendant's motion for nonsuit is reversed, and the cause is remanded for a new trial.

G. Notes on Standard Form Contracts

Note that in *Tollefson* the court talks about trying to determine what the parties intended. Nevertheless, other than referring to the fact that there was a conversation between the player and the coach prior to the execution of the contract it never inquires as to what was said. Would the contents of this conversation be helpful in determining what the parties intended?

The use of standard form contracts gives rise to the problem of ascertaining how much weight should be given to terms modifying the form language of the standard agreement. Questions of interpretation arise when the parties are not careful in incorporating the new provisions into the existing language. This occurs, for example, when hand written or typed variations are made to the standard form contract. To the extent that there is a conflict between the terms of the preprinted standard contract and the hand written or typed terms, greater weight will be given to the written or typed terms. RESTATEMENT (SECOND) OF CONTRACTS § 203. The rationale behind this rule is that new terms added by the parties during negotiations are more likely to represent the parties intent, than those terms that were on the contract before negotiations had begun.

HENNIGAN v. CHARGERS FOOTBALL COMPANY
431 F.2d 308 (5th Cir. 1970)

AINSWORTH, Circuit Judge

In this Texas-based diversity case we must determine whether a former professional football player is entitled to compensation from his Club for the 1967 season of the American Football League (AFL). The player was sent home when he reported for the team's 1967 training camp too injured to play. Terminated without pay,

he seeks redress under the terms of the contract establishing the various rights and obligations of the player and his Club during the so-called option year to which every AFL player commits himself when he signs a standard contract to play football in the League. The District Court granted a summary judgment in favor of the player. This appeal by the Club requires us to consider basic aspects of the Standard Players Contract employed by member clubs of the AFL. The issues with which we deal are (1) whether the team's "renewal" of the player's 1964-1966 contract obligated the Club to pay the player salary in 1967 under the injury clause of the contract and (2) whether this "renewal" required the Club to pay the player under the "no-cut" clause of the 1964-66 contract.

I

The undisputed facts in this case are as follows. On March 19, 1964, Charles T. Hennigan, appellee, signed an AFL Standard Players Contract (AFL Contract) for three years with the Houston Oilers, Inc., a member club of the AFL. A "no-cut" clause was made a part of that contract as an addition to paragraph 6. Both the Standard Players Contract form and the "no-cut" clause form used by the parties are among the standard forms the League requires its member clubs to use.

Paragraph 1 of Hennigan's AFL Contract states:

> The term of this contract shall be from the date of execution hereof until the first day of May following the close of the football season commencing the calendar year *1966*, subject, however, to termination, extension or renewal as specified herein. The phrase "football season" as used herein shall mean the period commencing with the first and ending with the last football game on the League's regular schedule for any year.

Thus Hennigan's services as a professional football player were to be regulated by the provisions of the AFL Contract through the 1966 football season, and the term of the Contract was expressly made subject to "termination, extension or renewal as specified" elsewhere in the Contract.

Paragraph 6 of the AFL Contract specifies grounds upon which an AFL club may terminate its obligations to a player under the Contract. It reads as follows:

> The Player represents and warrants that he has and will continue to have during the entire term hereof both the excellent physical condition and the highly developed skills in all types of football team play necessary to play professional football of the caliber required by the League and the Club, and agree to perform his services hereunder to the complete satisfaction of the Club and its Head Coach. Player shall undergo a complete physical examination by the Club physician at the start of each training season during the term hereof. If Player fails to establish his excellent physical condition to the satisfaction of the Club physician by the physical examination, or after having so established his excellent physical condition, if in the opinion of the head Coach does not maintain himself in such excellent physical condition or fails at any time during the football seasons included in the term of this contract to demonstrate sufficient skill and capacity to play professional football of the calibre required by the League and by the Club, or if in the opinion of the Head Coach the Player's work or conduct in the performance of this contract is unsatisfactory as compared with the work and conduct of other members of the Club's squad of players, the Club shall have the right to terminate this contract, such termination to be effective when the Club sends to the Player written notice of such termination.

In Hennigan's AFL Contract the following sentence (the "no-cut" clause) was added to paragraph 6:

> Notwithstanding the foregoing, the Club, so long as the Player fulfills his representation and warranty that he has and will continue to have excellent physical condition and fulfills his agreement that he will perform services hereunder as directed by the Club and its Head Coach (except to the extent the Player is excused from such performance pursuant to paragraph 15 hereof), agrees that it will not, prior to the first day of May following the close of the football

> season beginning in the calendar year *1966*, terminate this contract because of the Player's lack of skill or capacity to play professional football or the caliber required by the League and by the Club or because the Player's work or conduct is unsatisfactory as compared with the work and conduct of other members of the Club's squad of players.

Paragraph 15 of the Contract, which excuses "such performance" as is referred to in paragraph 6, as amended by the "no-cut" clause, is the standard injury provision contained in AFL player contracts. It reads in pertinent part as follows:

> In the event that Player is injured in the performance of his services under this contract, and if Player gives written notice of such injury within thirty-six hours of its

such *extended* term.... (Emphasis added)

Paragraph 3 is the compensation provision of the Contract which is applicable to the express contract term (the 1964-1966 seasons in Hennigan's Contract) set out in paragraph 1. In Hennigan's Contract this paragraph reads in part as follows:

> For the Player's services as a skilled football player during the term of this contract, and for this agreement not to play football or engage in activities related to football for any other person ... during the term of this contract and for the option hereinafter set forth [in paragraph 10] giving the Club the right to renew this contract, ... the Club promises ... to pay the Player each football season during the term of this contract, unless changed under paragraph 10 hereof, the sum of $21,000....

Hennigan claims that the Chargers broke the promises made in paragraph 3 (compensation provision) and paragraph 10 (option provision) with respect to the 1967 football season. He makes this claim under the following circumstances, which the parties do not dispute: (1) Hennigan engaged in professional football as a player for the Houston Oilers through the 1966 football season. (2) While in the performance of his services, as a professional football player for the Oilers, Hennigan sustained injuries to his right knee during both the 1965 and 1966 football seasons. (3) In March 1967 the Oilers exercised the Club's right under paragraph 9 of the contract with Hennigan and assigned the contract to San Diego Chargers. (4) In April 1967 the Chargers, as the assignee of Hennigan's AFL Contract, exercised the "renewal" option under paragraph 10 of the Contract by means of a letter stating: "This letter will certify that the San Diego Chargers Football Club hereby exercises its option to renew its player contract with you for a further term as provided in Paragraph 10 of the American Football League Standard Player Contract, executed by you...." (5) In July 1967 Hennigan reported as directed to the Chargers for the beginning of the training season. Upon reporting, he was examined by the Chargers' physician as required by paragraph 6 of the AFL Contract. The physician determined that Hennigan's right knee which had been operated upon in February 1967, would not at this time "stand up to the stress and strain of professional football." Accordingly, the physician recommended that Hennigan be rejected for service as a player. (6) On the basis of the physician's report, the Chargers claimed the right under paragraph 6 to terminate its contractual relations with Hennigan because of Hennigan's physical incapacity to perform services as a professional football player, and a wire was mailed to the AFL President which stated: "Charles Hennigan failed physical examination and has been sent home to Louisiana. San Diego Chargers waive Charles Hennigan." (7) Hennigan returned home and performed no services for the Chargers during the 1967 football season.

This suit was subsequently commenced by Hennigan against the Chargers to recover the salary that would have otherwise been payable to him for the 1967 football season had the Chargers not acted to terminate the player's contract. Hennigan asserted two bases for recovery under his contract with the Chargers for the 1967 season. He contended, first, that because he had sustained the disabling injury to his right knee while performing services under the AFL Contract the Oilers had assigned to the Chargers, paragraph 15 of that contract (the injury clause) obligated the Chargers, by virtue of the latter's exercise of the "renewal" option, to pay him his salary for the 1967 season. Secondly, and in any event, he contended that the "no-cut" clause added to paragraph 6 was applicable and operative during the 1967 season and expressly precluded the Chargers from terminating the "renewed" contract because of Hennigan's lack of capacity to play professional football.

On a record comprised of pleadings, answers to interrogatories, and various exhibits and affidavits, each party moved for a summary judgment on the issue of the Chargers' liability to Hennigan. In response the District Court found that there was no contested issue of material fact and concluded in part that (1) Hennigan was unable to perform the services required of him and lacked capacity to play professional football because of injury he had sustained, (2) the "no-cut" clause was binding upon the Chargers upon the exercise of the "renewal" option, (3) Hennigan was entitled to recover under the terms of the "no-cut" clause, and (4) he was entitled to recover under the terms of the injury provision. Accordingly, the District Court granted Hennigan's motion and denied the Chargers' motion. From these actions the Club appeals, contending that it, rather than Hennigan, was entitled to

a summary judgment in its favor.

We conclude that a summary judgment in this case was proper. For reasons that follow we further conclude that the San Diego Chargers, not Hennigan, was entitled to a judgment as a matter of Texas law. Accordingly, we reverse judgment of the District Court.

In paragraph 15 (the injury clause) of the AFL Contract, the words "In the event that Player is injured in the performance of his services under this contract" set forth a condition precedent, the occurrence of which must take place before the Club's duty to perform the promises it makes in that paragraph arises. It is undisputed that Hennigan was injured while performing services for the Houston Oilers as required of him by the contract he signed with the Oilers in 1964. This contract, whose term was to expire on May 1, 1967, subject to "termination, extension or renewal," was assigned to the San Diego Chargers while in effect and neither previously "extended" nor "renewed." By accepting the assignment, the Chargers assumed the Oilers' obligations to Hennigan under paragraph 15 and the "no-cut" clause added to paragraph 6 of the 1964 contract. Hennigan contends that the Chargers, by exercising the "renewal" option in paragraph 10, became obligated to pay him his salary for the 1967 football season, notwithstanding that he was sent home after failing the Club's physical examination, because the contract under which he was injured in 1965 and 1966 and the "renewed" contract under which he reported to the Chargers in 1967 were one and the same. Therefore, he claims the Chargers Club was not relieved of the obligation to pay him for the 1967 season (the "further term" of the "renewed" contract) because he was physically incapable of passing the Club's physical examination at the beginning of the 1967 training season. The Club does not dispute the fact of Hennigan's injuries, when they occurred, or the reason for which the player was sent home without pay. It contends instead that its exercise of the "renewal" option had the effect of creating a new contract with Hennigan. Because Hennigan's disabling injuries occurred in 1965 and 1966, before the 1967 contract was made, the Club contends that the condition precedent to its duty to pay Hennigan for the 1967 season never took place, that is, Hennigan was not injured while in the performance of any services required of him by the option-year contract. The parties thus join issue regarding the proper interpretation of the AFL Contract.

This case, ultimately, turns upon the meaning that should be ascribed to the term "renewal" and its variations as they appear in the AFL Contract signed by Hennigan with the Houston Oilers in 1964. Paragraph 10 of the AFL Contract grants the Club an option, in consideration for the compensation to be paid the player under paragraph 3, to "renew" the contract signed in 1964 for a "further term" of one year on the same terms as are provided by the 1964 contract, with stated exceptions. Considered by itself, the term "renew" is susceptible to two meanings. The option to "renew" for a "further term" may mean, as the Chargers and the AFL contend, that the Club has the right to hold the player to a new, one-year contract, as distinguished from the then existing, possibly multiyear contract. On the other hand, the option to "renew" may mean, as Hennigan contends and the District Court concluded, that the Club has the right to keep the then existing, possibly multiyear contract in force for one more year, with the respective rights and obligations of the Club and the player in the last year as specified in paragraph 10. To determine the meaning of the term "renew" in the context of Hennigan's AFL Contract, we turn to the Texas decisions on the interpretation and construction of contracts.

In Texas, whether the language of a contract is ambiguous is a question of law for the court. If the contract in issue is unambiguous, its interpretation and construction are part of the court's law obligation.

A Texas court will deem a contract ambiguous if the contract, after established rules of interpretation have been applied to its language, remains reasonably susceptible to more than one meaning. If the contract is not reasonably susceptible to more than one meaning, the effect to be given it will be determined, in the usual case, from the contract language alone, without resort to other evidence or to consideration of the conduct of the parties in attempting to comply with its terms or with the term of similar previous agreements. The Supreme Court of Texas has stated:

> [W]here an unambiguous writing has been entered into between the parties, the Courts will give effect to the intention of the parties as expressed or as is apparent in the writing. In the usual case, the instrument alone will be deemed to express the intention of the parties for it is objective, not subjective, intent that controls.... Generally the parties to an instrument intend every clause to have

> some effect and in some measure to evidence their agreement. As said in the [RESTATEMENT OF CONTRACTS § 230 (1932)], "[the] standard of interpretation of an integration, except where it produces an ambiguous result, or is excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, other than oral statements by the parties of what they intended it to mean...."

When a question relating to the interpretation and construction of a contract is presented to a court applying Texas law, the court is to follow a three-step procedure so far as is necessary to determine the meaning of the

season beyond the expiration of the fixed term bargained for in paragraph 1. Unless the player signs a new AFL Contract, itself with fixed term and an option provision, the Club is entitled in the option year to fix the player's salary, certainly an important consideration to the professional athlete, at an amount 10 per cent less than the player was receiving previously. Moreover, the player is not entitled to whatever bonus or other payments he may have been receiving previously unless such payments are specifically agreed upon by the Club and the player. If the player retires from professional football as a player following the last season covered by paragraph 1 of his contract, but before May 1 of the year following, paragraph 14 operates to extend the period of time during which the option may be exercised. Similarly, if the player retires after the Club has exercised its option, but before the training season begins and the physical examination required of the player by paragraph 6 is conducted, paragraph 14 operates to extend the term of the option year. In either event, the player, should he ever desire to return to professional football as a player, will be subject to the Club's option on his services for one football season. Paragraph 10 is not included in the AFL Contract for the player's benefit. An interpretation of paragraph 10 that obligates the Club, upon its exercise of the option, to compensate the player for the option year notwithstanding that the player is physically incapable of passing the physical examination required of him before the option-year season begins — and thus is unable to perform any services as a player for the Club, is an unreasonable interpretation of a provision plainly meant to be for the sole benefit of the Club. Hennigan's interpretation would have this effect, and we reject it.

The AFL Contract is a contract for personal services. Absent provisions in the agreement to the contrary, we may presume that the parties to a contract for personal services contemplate as one of the contract conditions that continuation of the ability to perform of the person whose services are the subject of the contract. In the AFL Contract, this condition is expressed in paragraph 6, in which the player warrants that "he has and will continue to have during the entire term hereof both the excellent physical condition and the highly developed skills in all types of football team play necessary to play professional football...." If a player under contract with an AFL Club is injured while performing services required of him by that contract, and the player is thereafter unable to perform services because of that injury, the club is obligated under paragraph 15 to pay him his salary for the balance of the contract term, notwithstanding that the player is no longer able to fulfill the warranty he makes in paragraph 6. In view of the differentiation made in the Contract between an "extended" term (paragraph 14) and a "further term" (paragraph 10) and of the express contract provisions dealing with warranties of ability to perform and the problem of occupational injuries, we do not find that the option to "renew," when reasonably interpreted, was meant to have the effect upon its exercise of carrying forward injuries suffered during the previous term as occurrences giving rise to the Club's duty to compensate the player in the option year under paragraph 15. If this were the effect, then a retired player attempting to return to professional football as a player could require the Club holding the option on his services to decide at its peril whether to exercise that option. Should the option be exercised, the Club would assume the risk that it might have to pay salary to a person unable to perform any services because of injuries sustained prior to this retirement. Should the option not be exercised, the Club would assume the risk that the once-retired player, actually capable of performing services as a player in the League, might sign a new AFL Contract to play for a competitor. Put to the same choice would be the Club holding an option on a player such as Hennigan, injured in the last football season covered by the base term provision of his contract, operated upon during the off season, and not recovered from the operation when the option period is to expire. We are of the opinion that the option provision does not contemplate that the Club will be required to make this type of decision. We may not, under the guise of interpreting contracts, write agreements that parties themselves never made.

From our conclusion that the exercise of its option on Hennigan's services by the Chargers had the effect of making a new contract with the player for a term of one year, it follows that Hennigan was not entitled to compensation for the 1967 football season from the Chargers. He suffered no injury while in the performance of any services required of him after the option was exercised. Consequently, he is not entitled to payment under paragraph 15 (the injury provision). He was terminated for his inability to pass the physical examination. Because, under the undisputed facts of this case, this inability was not excused by paragraph 15 — his disabling injury not having occurred during the option year, the "no-cut" clause did not protect Hennigan from termination, and the

provision in this clause was inapplicable. Moreover, the "no-cut" clause, by its terms, expired on May 1, 1967. Therefore, summary judgment should have been granted in favor of the Chargers on the issue of their liability to Hennigan.

Reversed.

CLARK, Circuit Judge (dissenting):

I respectfully disagree with my brothers. In my analysis the majority opinion is leveraged on a result-oriented fulcrum which draws an artificial distinction between the terms "renew" and "extend" as used in this contract. I would affirm the district court for two reasons: (1) Such shade of difference in meaning as may be ascribed to "renew" and "extend" supports the district court's construction of the contract; (2) If that premise is not

check" for a substantial amount of money?

c. If the signed contract arrived at the team office, and the club owner signed the contract would there be a binding agreement? Why?

d. What is the purpose of commissioner approval in the process of contract formation?

2. You represent a professional athlete who claims that during negotiation of his employment contract, the owner of the team promised to pay him a bonus of $50,000 if he led the team in quarterback sacks. He did, in fact, lead the team but the owner has refused to pay the bonus.

a. Can the player enforce the prior oral agreement? Do you need any additional facts before you can reach a conclusion?

b. Will the outcome of any litigation be strongly influenced by the law or jurisdiction where the suit is brought? Why?

3. A well known professional athlete has contacted your office claiming that the owner of the team for which he plays stated to him that he would rip up his old contract and give him a new one at twice the salary. The owner now refuses to do so. Does the athlete have a cause of action?

a. Do you need to know any additional facts? Should you explain the law to your client before you ask him for those facts?

b. What if his employment contract has a clause in it which prohibits oral modifications or other changes to the contract?

Section 2: Power of Termination in Professional Sports Contracts: Rights of Franchises and Participants

A. The Right of Sports Franchises to Terminate Player Contracts

Professional sports clubs possess broad power to unilaterally terminate their employment relationships with players. Generally, a team may terminate a player's contract because injuries have reduced his level of performance, or because a physically fit player's "skill, talent, and ability" has been deemed inadequate by the team. These powers are necessary to permit coaches and managers to pursue the best combination of talent, attitude and leadership possible. Furthermore, even though a player may possess the necessary skill and physical fitness required of professional athletes, his personal habits and demeanor may bring into disrepute a team's or the industry's image. Public knowledge or speculation concerning a player's involvement with drugs, alcohol, gambling, or other illicit activity may hamper a team's ability to maintain fan loyalty and attendance levels. Although at first glance, a team's power to terminate professional sports contracts may seem overly broad, wide discretion without undue judicial intervention in the employment relation has been thought to be necessary to the continued existence of professional sports.

The employment relationship between a team and a player can neither be characterized as purely "at will" or "just cause." Typically, employment contracts for an indefinite term are presumed to be "at will". Such agreements are unilateral contracts for employment in which an employer promises to make periodic payments of salary to the employee in exchange for his actual performance. Since the parties do not agree to be bound for a definite term, termination is permissible, with or without cause, sometimes without regard to "good faith" by the party ordering termination. CALAMARI AND PERILLO, CONTRACTS 61 (1987). In theory, such contracts place the parties on an equal footing with regard to their power to terminate the relationship. Practically, however, an

employer's ability to terminate the contract gives it substantially greater bargaining power over an employee where such employee's skills can be easily replaced. Conversely, if the employee's skills are unique, the bargaining power shifts in his favor. In response to the harsh results created by arbitrary dismissals in non-sports cases, many courts are now construing employment relationships under a "just cause" theory. CALAMARI AND PERILLO, CONTRACTS 62 (1987). The "just cause" theory requires an employer to justify employee dismissals by providing specific and sufficient reasons to support the decision. When an employment contract is for a definite term, neither party may terminate the agreement prior to the expiration of the term without sufficient cause. In professional team sports, employment is always for a fixed contractual period. Thus, a sports franchise is required to provide grounds for terminating the employment relationship. Before a player can be released, he must lack the requisite "skill, ability, and talent" to compete, was not physically fit, failed to observe club and league rules, or otherwise materially breached the contract. However, unlike most contracts for a specific term, if the decision to terminate a player's contract is for poor performance, such a determination with regard to this performance rests, according to standard player contracts, "in the sole judgment of the club." Thus, for purposes of enforcement, professional sports contracts fall somewhere between "at will" contracts and contracts for a definite term.

Two potential issues arise where an employment contract requires an employer to exercise "good faith" in terminating employees. RESTATEMENT (SECOND) OF CONTRACTS § 24 (1979). Under such good faith contracts, the employer's stated reason for termination must be examined to see whether it is the real reason for termination. Moreover, even if the stated reason is accepted as the real reason for termination, courts must determine whether the employment contract sanctioned a termination based upon the proffered reasons. *Sample v. Gotham Football Club Inc.*, 59 F.R.D. 160 (S.D.N.Y. 1973).

The legal consequences of the termination of an employment relationship in sports are dependent upon whether there has been a proper termination. Where a termination is proper, it ends the duties owed by the player and team to each other, and discharges all claims a team has to a player's services, leaving the player free to market his skills to another team. Improper termination by the sports franchise amounts to a breach of contract, entitling the player to damages. *Pasquel v. Owen*, 186 F.2d 263 (8th Cir. 1950); *Schultz v. Los Angeles Dons Inc.*, 107 Cal. App. 2d 718, 238 P.2d 73 (1951), *Egan v. Winnipeg Baseball Club, Ltd.*, 96 Minn. 345, 105 N.W. 947 (1905).

If a player claims that his termination was wrongful, he must establish the following: 1) The player was a member of the squad; 2) The player possessed the requisite degree of skill and fitness; and 3) The player committed no offense for which discipline is appropriate. Sometimes an improper termination occurs during the course of a season. In this situation, courts follow the general rule that when a team wrongfully discharges a player and prevents him from performing, no further performance or offer to perform by the player is required before seeking a remedy for breach of contract. RESTATEMENT (SECOND) OF CONTRACTS § 237 (1979).

Sometimes a sports franchise seeks to alter a player's employment status with an action short of termination, such as suspension. Suspensions are generally employed when a player fails to remain in good physical condition or fails to observe club rules on player conduct. Under the terms of most standard player contracts, suspended players lose their right to payment of salary during a suspension period, but remain bound by all other terms of the contract. Thus, suspended players are not free to negotiate with other teams without the consent of their present team and remain under their present team's employ. Meanwhile, the team must continue to perform its other obligations pursuant to the contract. The duration of a suspension period may be for a period not exceeding the term of the contract. *See* WEISTART & LOWELL, THE LAW OF SPORTS § 3.07, p. 235-6 (1979).

Professional sports contracts generally set forth the grounds upon which the club may terminate a player's contract. There are usually four bases for termination afforded to clubs. First, a player may be terminated if he is found to be not physically fit. Secondly, a club may terminate a player contract if the player fails to exhibit sufficient skill and ability in the particular sport. Decisions based upon these grounds are generally within the exclusive discretion of a club's agent, usually a coach or team designated physician. Third, a player may be terminated for failing to observe either league or club rules, including disciplinary rules. Finally, a club may terminate a player if he "otherwise materially breaches the contract." The material breach clause is usually intended to give a team an alternative to seeking damages or an injunction where a player fails to live up to his promise to follow club policy.

A material breach is non-performance of a duty that is so significant and important as to justify the injured party in regarding the entire contract as terminated. Thus, to support a termination under this clause, a team must be deprived of some substantial advantage it reasonably anticipated under the contract. For example, a player materially breaches a contract where he unjustifiably refuses to participate in a scheduled competition or where he totally refuses to engage in any publicity activities involving his team. *See* THE LAW OF SPORTS, *supra*, § 3.07, p. 236-7.

In addition to the four bases of termination enumerated above, a professional sports contract may also be terminated as a matter of law upon the death of the player, unless a contrary express provision in the contract indicates otherwise. This is in accordance with the general rule that a personal services contract will be terminated automatically upon the death of either party prior to performance.

These broad powers of termination can be limited when a player negotiates a "no-cut contract." "Superstar" or "franchise" player contracts generally contain provisions under which the club relinquishes its right to terminate the employment relationship if the player fails to make the club's roster. Many times, clubs who unsuccessfully gambled on a franchise player's talents will search for nebulous theories to dissolve the contract. No-cut contracts will be considered in greater detail later in this chapter.

Many standard professional sports contracts also include "integrity of the game" provisions. These provisions are generally aimed at controlling a player's off-the-field activities to protect a given sport's image and raise significant legal issues which will be discussed later. This contract term may vest in the commissioner the power to terminate the player's contract or suspend the player's services.

B. Injured Players

TILLMAN v. NEW ORLEANS SAINTS FOOTBALL CLUB

265 So. 2d 284 (1972)

GULOTTA, Judge

This appeal is from a judgment dismissing plaintiff's claim for $7,499.99 allegedly due on a written contract entered into between plaintiff and defendant on June 14, 1967. This was a National Football League Standard Player's Contract. Under its terms, the defendant was to pay plaintiff, a football player, $12,000 for the 1967 football season, subject, however, to the right of prior termination by the Saints as specified therein upon the giving of written notice to plaintiff.

During [a] practice drill, before the commencement of the regular season, Tillman suffered a torn ligament of the knee.

Plaintiff was waived by the Saints on November 1, 1967, was paid $4,500,01, and his salary was terminated. On April 23, 1969, he filed this action for unpaid wages alleging that under the contract the Saints had no right to waive him, because he was injured at the time. [J]udgment, however was granted in favor of defendant based on the trial judge's determination that plaintiff was physically able to return to full play at the time of waiver and termination of the contract.

The question [is] whether plaintiff was physically able to perform his services under the contract at the time it was terminated on November 1, 1967.

Turning now to the question of whether plaintiff was physically able to play at the time the contract was terminated, the record reflects the team physician, Dr. Kenneth Saer, performed an operation on July 10, 1967, to repair the injury. Plaintiff's leg was placed in and remained in a cast until August 3, 1967.

Tillman was instructed to return to the Saints' training camp to begin regaining muscle strength through exercise by weight-lifting and bicycle riding. The doctor testified that at this time plaintiff "was doing quite well, his wound was well-healed...." It was on October 24, 1967, that Dr. Saer felt plaintiff was able to return to full play. His testimony was:

> I would say on October 24th if this were a person playing football, if this was one of the players playing he had a position to play they would play. The average football player would play before that time.

In response to the question whether plaintiff was physically capable of playing professional football insofar as his right knee (the injured knee) was concerned, the doctor responded: "I thought he was. Again, I thought he was on October 24th...."

Dr. Saer submitted a report dated April 13, 1971, in which he stated that the plaintiff did have some "residual disability and early degenerative arthritic changes in the knee joint." We note however, that he further stated:

> Such changes are very commonly seen in the professional football player as a result of injuries in college or professional leagues. A large majority of professional football players with similar injuries and similar relatively mild disability would continue to play with this residual disability.

The only other physician who saw plaintiff was Dr. Harold G. Hutson, an orthopedic surgeon in Little Rock, Arkansas. Two reports of Dr. Hutson, dated November 22, 1967, and April 3, 1968, were stipulated in evidence. In the latter report, Dr. Hutson stated in regard to his examination of plaintiff on November 21, 1967: "It was my impression at that time that this patient was not ready to return to full duty as a professional football player...."

However, Dr. Hutson erroneously concluded in his report that plaintiff "had a repair of the medial collateral ligament and the anterior cruciate ligament." Dr. Saer indicated, to the contrary, there was no damage to the cruciate ligament but only to the medial collateral ligament and that tears to both ligaments, which was the mistaken impression of Dr. Hutson, would have been considerably worse. With this in mind, we cannot give much weight to Dr. Hutson's conclusion that plaintiff was unable to play football.

The trial judge accepted the opinion of the club physician and concluded plaintiff was physically able to play professional football at the time the contract was terminated. We find no error in this conclusion.

Plaintiff seeks to invoke the provision of paragraph 15 of the agreement which provided:

> Player may, within seventy-two hours after his examination by the Club Physician, submit at his own expense to an examination by a physician of his choice. If the opinion of such physician with respect to Player's physical ability to render the services required by him by this contract is contrary to that of the Club physician, the dispute shall be submitted to a disinterested physician to be selected by the Club Physician and Player's Physician or, if they are unable to agree, by the Commissioner of the National Football League, and the opinion of such disinterested physician shall be conclusive and binding upon the Player and the Club....

However, because we have concluded that the opinion of Dr. Hutson was based upon a mistaken impression as to the extent of the injury and have accorded little weight to his evaluation, we find no basis for the application of this provision requiring the dispute to be submitted to a third, disinterested physician. The medical testimony of Dr. Hutson does not satisfy us that there is indeed a dispute. Furthermore, plaintiff failed to comply with the provisions of Paragraph 15 of the agreement which require that an examination is to be had by the player within 72 hours from that by the club physician.

Finally, we find no merit to plaintiff's contention that because defendant failed to notify him in writing of his termination as required by the contract, there was in effect no notice given, and, therefore, the contract was not terminated. It is uncontroverted that Tillman had actual knowledge on November 1, 1967, that he was waived. Counsel for plaintiff stipulated as of that date, the Saints had communicated this fact; furthermore, Tillman alleged in his original petition that he was notified by defendant of the termination of his contract. When Tillman left the Saint's camp in November, 1967, his actions, indicated he had knowledge of his release. Moreover, the record is clear that by plaintiff's admissions and acquiescence to the notice, he waived his contractual right to a letter of

termination.

Written notice would have been superfluous in the instance and mere ceremony. The law will not require a vain and useless thing. *Voss v. Roach*, 35 S.2d 142, 143 (La. App. 2d Cir. 1948).

Accordingly, the judgment of the trial courts is affirmed.

C. Questions and Notes on Sports Franchise Termination of Player Contracts

1. What was at issue in *Tillman*? The nature of his injury? Whether he had given proper notice of his injury to the team? Both?

Under the terms of the standard player contract, the player represents that he is in excellent physical condition and free from any mental or physical condition known to him which might impair his performance under the contract. *See* NFL Player Contract § 8. Thus, if the player lacks the physical capacity to perform, his contract with the team may be terminated and it will not be liable for future salary payments. On the other hand, if the player is injured while performing the contract, the team will generally be responsible for the payment of both his medical expenses and salary. *See* NFL Player Contract § 9. Under the terms of most standard player contracts, the player must establish two things: (1) that the injury arose in the course of his employment, and (2) that he gave proper notice of his injury to the team.

Tillman dealt with whether the team had given proper notice of termination to the player. Note that even though the procedure called for in the contract was not followed, the court held that Tillman's actual knowledge was sufficient to constitute proper notice. Where the giving of notice is a condition to a party's duty to perform, exact compliance will not be required unless it was so essential to the operation of the agreement that a party can justly be held to have perfected his rights when the procedure followed varied from that called for by the contract.

The problem of notice often arises with respect to whether the team properly terminated a player. Where notice is a precondition to the team's requirement to perform, the players failure to give "proper" notice can have disastrous results.

HOUSTON OILERS, INC. v. FLOYD
518 S.W.2d 836 (Tex. Civ. App. 1975)

An action was brought by Donald Wayne Floyd, a professional football player, against Houston Oilers, Inc. to recover the sum of $14,240.00 which he asserted was the balance of his salary due under his player's contract. Floyd alleged that he had suffered an injury to his right ankle on August 23, 1968 which prevented his performing further service as a football player under his contract; that after being examined by the team physician he was carried on the club's injured reserve list until September 30, 1968, when he was returned to the active player list by the team trainer; then about two days later, October 2, 1968, he was notified that his contract was being terminated and that he would receive no further salary, and that such actions constituted a breach of his player's contract. Houston Oilers, Inc. generally denied these allegations and specifically alleged that Floyd had failed to comply with a contractual provision whereby he was to submit himself for examination to a physician of his choice within 72 hours after the decision of the club physician that he was physically able to return to the active player list, and also that he was barred from recovery by reason of a general release of liability which he and his attorney had signed in connection with the settlement of his claim for workman's compensation.

In response to special issues, the jury found that as a result of the injury on August 23, 1968 Floyd was physically disabled from playing football from that date through December 16, 1968 (the end of the regular football season). The jury failed to find that Floyd had intended to release the Houston Oilers from their obligations arising

out of their salary contract with him. The court found, among other facts, that Floyd had been restored to the active player roster on September 30, 1968 and terminated on October 2, 1968; that he had fully performed the terms of the salary contract and that the Houston Oilers had breached the contract in failing to pay his salary. The court further found that the contract called for a total salary of $19,000.00 payable at the end of the football season on December 15, 1968; that Floyd had been paid $6,178.00, and the Houston Oilers should be given credit for the $1400 workman's compensation payment he had received. It awarded judgment to Floyd in the amount of $11,422.00 with interest at the legal rate from date of judgment.

* * *

[The] Houston Oilers, Inc. asserts that the trial court erred in entering judgment for Floyd because the record conclusively establishes that Floyd failed to comply with a condition precedent to his recovery as found in paragraph 14 of his player's contract.

Paragraph 14 of the player's contract with the club provides as follows:

> In the event that Player is injured in the performance of his services under this contract, and if Player gives written notice to the Club Physician of such injury within thirty-six hours of its occurrence, the Club will: (1) provide, during the term of this contract, such medical or hospital care, as in the opinion of the Club Physician, may be necessary; and (2) continue, during the term of this contract to pay Player his salary as provided in § 3 or § 10 hereof, whichever is applicable if and so long as it is the opinion of the Club Physician that Player, because of such injury, is unable to perform the services required of him by this contract; Player, may, within seventy-two (72) hours after his examination by the Club Physician, submit at his own expense to an examination by a physician of his choice.
>
> * * *
>
> Except as provided in this paragraph, Player's failure for any reason whatsoever to perform this contract or the services required of him by this contract, ... shall entitle the club, at its option, to terminate such contract, such termination to be effective when the Club sends to the Player written notice of such termination, or shall entitle the club at its option to terminate Player's salary under this contract.
>
> * * *
>
> If Player is injured in the performance of his services under this contract, this contract shall remain in full force and effect despite the fact that Player, following injury, is either carried by the Club on its Reserve List or is waived out as an injured player while injured; when such Player is, in the opinion of the Club Physician, again physically able to perform his services under this contract, the Club shall have the right to activate such Player, and Player shall be obligated to perform hereunder in accordance with the terms hereof.

Under this provision, the parties agreed the contract would remain in effect and the player would be entitled to his stipulated salary for the contract term despite his inability to perform active service by reason of physical injury. If the club's physician certified the injured player able to perform active service, the player might, within 72 hours after such determination, have an examination made by his own physician. In the event of disagreement between the two physicians, a third disinterested physician was to be selected by the two, and if they were unable to agree, selection was to be made by the Commissioner.

The evidence does not establish whether the club doctor was of the opinion that Floyd was physically able to perform services under the contract. The record shows only that Floyd was advised by the club trainer that he had been placed on the active player list. Floyd testified that the only reason given him by the club trainer for being reactivated was "that he had no choice other than to put me back on, because it was from higher up to reactivate me." It further appears from evidence and the trial court's finding, against which no attack has been made, that Floyd's services were terminated less than seventy-two hours after he was restored to the active player roster. The evidence does not show that he was given the period of time specified in the contract to have an examination made

by a physician of his own choice even if he had decided to take that course of action.

We hold that the evidence does not establish as a matter of law that Floyd failed to comply with the provisions of the contract, as contended by the Houston Oilers, and we overrule appellant's points of error four through seven.

The judgment of the trial court is affirmed.

SCHULTZ v. LOS ANGELES DONS, INC.

107 Cal. App. 2d 718, 238 P.2d 73 (1951)

Respondent had been a professional football player for approximately seven years. During the 1946-1947 football seasons, while playing with the Los Angeles Rams, he was partially incapacitated from a back injury. On June 28, 1948, he was examined by appellant's physician, who reported to it that he was in excellent physical condition and that there was no evidence of prior injury to his back or otherwise. On July 14, 1948 (12 days after the execution of the contract) he was examined by another physician on behalf of the appellant who certified to the appellant that respondent was in excellent condition and there were no symptoms of previous back injury. Between July 14th and July 18th respondent engaged in the regular training activities in Ventura, with the rest of the team and took part in two vigorous scrimmages. On July 18th respondent developed a pain in the back of his leg and numbness in his foot which greatly interfered with his attempts to run and he immediately reported his condition to the team trainer, William Kapela, and the team head coach, James Phelan. During the next few days the trainer gave respondent treatments to alleviate the condition but with little or no success. The trainer made full written reports of respondent's condition to the insurance carrier, it being one of his duties. Shortly after July 18th, under the coach's instructions, respondent was examined by three orthopedic specialists who, after examination, reported to appellant that the respondent was suffering from a herniated disc in his lower back and sometime prior to August 12th informed appellant that it would be very dangerous for him to attempt to play football and that it was doubtful, if not certain, that his playing days were over. Between July 18th and August 12th the respondent reported for practice in proper attire but was not able to engage in the more strenuous activities and was not taken with the team on August 8th when it went to another city to engage in a practice game. Shortly prior to August 12th Mr. Benjamin F. Lindheimer, one of the successors of the club corporation and former chairman of the Board instructed Mr. Don Ameche, President of appellant, to discharge respondent. On August 12th respondent received from Coach Phelan a letter, the body of which read as follows:

> Under the terms of your contract you agreed to be in proper physical condition to play professional football for our club. Our doctor's medical report indicates that you are not in proper physical condition. We wish therefore, to advise you that your contract is terminated effective immediately.

The trial court found that on July 14th, respondent was examined by appellant's physician and found by him to be in excellent physical condition; that such physician was at that time informed of respondent's previous back injury "to-wit, a slipped disc." The court further found that on August 12th, appellant notified respondent his contract was terminated; that respondent "has done and performed any and all conditions and covenants on his part to be done and performed under said contract, and in accordance with the terms and provisions thereof." The court also found that appellant did not terminate the contract for "good and sufficient reason or cause"; that prior to and at the time of the signing of the contract in question respondent did not make any false or fraudulent representation to appellant; that as a result of the termination respondent was damaged in the sum of $7,500; and that none of the allegations in the affirmative defenses were true.

* * *

Our examination of the transcript has revealed no instance in which respondent failed or refused to comply with any request by appellant. It is implicit in a contract of this character that the player can perform only those

services that the coach of his team permits or requests him to perform and it is a matter of common knowledge that a player is under the complete control of his coach.

If we assume appellant made no requests for specific services from respondent after July 18th because of respondent's incapacity from injury, such injury and incapacity were not a ground under the contract for respondent's discharge. The court found that respondent's injury, causing his incapacity, was incurred while he was performing the services required of him. This finding is more fully considered hereafter. Such injury and incapacity was a risk which appellant specifically assumed under paragraph 7 of the contract. The paragraph reads in part as follows: "If this contract is terminated by Club by reason of Player's failure to render his services hereunder due to disability resulting directly from injury sustained in the performance of his services hereunder and written notice of such injury is given by the Player as provided in Regulation 6, Club agrees to pay player at the rate stipulated in paragraph 2 [$8,000]...." Paragraph 7 further provides that in all other cases, if the contract is terminated during the training season, the player will receive only his expenses.

Appellant further contends that it is relieved from liability because respondent admittedly failed to give the written notice required by paragraph 7 and regulation 6. With this we cannot agree. Regulation 6 reads as follows: "Written notice of any injury sustained by Player in rendering services under his contract, stating the time, place, cause and nature of the injury, shall be delivered to Club by Player within 10 days of the sustaining of the injury. In the absence of such notice, disability of Player to perform his services resulting from such injury shall be cause for termination of Player's contract by Club without liability for payment beyond the date of termination." The apparent purpose of the required notice was to make certain that appellant was promptly and fully informed of any such injury so that it could take the necessary steps to have its trainer and doctors treat the injury and protect its investment in respondent. It may also have had some relation to the insurance carried on respondent by appellant. The evidence clearly establishes that respondent promptly gave appellant, through its trainer and coach, all information in his possession in regard to the injury and that appellant took full advantage of it by having respondent treated by its trainer and examined and treated by one of its doctors on July 19th and shortly thereafter by two others, and that these doctors made written reports to appellant of their findings. By so doing appellant waived the requirement of written notice. In addition, the trainer sent reports about the injury to the insurance company. Appellant was therefore as fully protected as if the required information and been given in writing. A written notice from respondent would have been an idle act.

The judgment is affirmed.

Questions and Notes

1. In *Schultz*, how was his job-related injury established? What role did his pre-report physical examinations play? Who had the burden of proving the cause of his injury?

The current NFL standard player contract provides the following procedure for resolving disputes concerning a player's physical ability to perform his contract:

> 13. **Injury Grievance**. Unless a collective bargaining agreement in existence at the time of termination of this contract by Club provides otherwise, the following injury grievance procedure will apply: If Player believes that at the time of termination of this contract by Club he was physically unable to perform the services required of him by this contract because of an injury incurred in the performance of his services under this contract, Player may, within a reasonably brief time after examination by the Club physician, submit at his own expense to examination by a physician of his choice. If the opinion of Player's physician with respect to his physical ability to perform the services required of him by this contract is contrary to that of the Club's physician, the dispute will be submitted within a reasonable time to final and binding arbitration by an

arbitrator selected by Club and Player or, if they are unable to agree, one selected by the League Commissioner on application by either party.

Note that this provision calls for binding arbitration in the case of a disagreement between physicians. Unlike paragraph 15 in *Tillman* the final arbiter need not be a physician. Moreover, in the event the team and player are unable to agree upon an arbiter, the authority to appoint one is vested in the Commissioner. How does this affect the contract and its enforceability? Note also that the requirement in *Tillman* and *Floyd* that the player seek his second examination "within 72 hours" has been changed to "within a reasonably brief time." From the player's standpoint which is preferable?

2. In *Schultz*, the court noted that the team was "as fully protected as if the required information had been given in writing." Do you agree? What is the team's interest in being promptly informed? WEISTANT & LOWELL, THE LAW OF SPORTS § 3.06, 225-26 (1979).

3. In December of 1997, Latrell Sprewell of the Golden Gate Warriors choked his coach P.J. Carlesimo and threatened to kill him. The Warriors terminated the three year contract which called for compensation of $23.7 million dollars. The NBA Commissioner David Stern described the encounter as follows, "First he choked him until forcibly pulled away. Then, after leaving practice, Mr. Sprewell returned and fought his way through others in order to commit a second assault." Sterns continued, "a sports league does not have to accept or condone behavior that would not be tolerated in any other segment of society." The commissioner then suspended Sprewell for one year. Mark Heiser, *Sports Desk*, L.A. TIMES C1, Dec. 5 1997. Arbitrator John Feereck ruled the penalties were too harsh. He reinstated the contract and reduced the suspension by 5 months. TELEGRAPH-HERALD, Sports pg. B4, March 9, 1998.

D. The Right of Players to Terminate Their Contract

Most standard player contracts used in professional sports leagues permit a team to terminate a contract with a player for a variety of reasons including lack of skill or failure to maintain physical condition satisfactory to the Club physician. Those contracts, however, have few or no express provisions under which a player could similarly terminate his employment relation with the team. Accordingly, a player seeking to terminate a relationship must rely on common law principles to establish his right to terminate the contract.

One legitimate justification for a party terminating a contract is the other party's commission of a material breach. As the following case illustrates, the "materiality" of the breach is often a significant issue in these cases. A material breach can occur when a team's grounds for attempting to terminate the contract are either legally insufficient, are not recognized by the contract, or are in violation of league rules or procedures. As in all personal service contracts, a wrongfully discharged player must mitigate his damages by making reasonable efforts to secure substantially similar employment. Although it is relatively rare that a professional athlete is able to successfully terminate a contract because of a team's breach, the following cases illustrate theories which have been successful for players.

AMERICAN AND NATIONAL LEAGUES OF PROFESSIONAL BASEBALL CLUBS v. MAJOR LEAGUE PLAYER ASS'N

59 Cal. App. 3d 497, 130 Cal. Rptr. 626 (1976)

[JIM "CATFISH" HUNTER v. CHARLEY FINLEY]

[In December of 1974, Oakland player Jim "Catfish" Hunter was baseball's most successful and most celebrated pitcher. Then the current Cy Young Award winner, Hunter had finished the previous season with the Athletics with an impressive 25-12 won-lost record. The 28 year old pitcher had been a 20 game winner for four consecutive seasons, and had compiled a total of 88 wins during his four years with the Oakland Club.

Hunter's salary for the Athletics was $100,000 a year. The previous winter, Hunter and Charles O. Finley, owner and operator of the Oakland team, had agreed on a two-year contract whereby $50,000 of Hunter's salary was to be paid to him as direct salary, the remaining $50,000 to be paid to a deferment plan of Hunter's choosing. Hunter had requested a specific deferred payment provision phrased in such a way so that he would be able to avoid tax liability on the money, that being the basic intention of the deferral. Finley, having agreed to the provision, only later discovered that he, Finley, would bear tax liability for the money. He then insisted that the contract clause did not require him to assume this increased burden.

Hunter, in the 1974 season, routinely received the portion of his salary that was to be paid directly to him; the deferred payments, however, were not made to the investment company that Hunter had designated to receive the money. The season ended with the deferred payments still not made, despite several requests by Hunter that this be done. Hunter claimed that the failure to make the deferred payments constituted a breach of contract by Finley and allowed the pitcher to exercise his right to terminate his contract. Hunter maintained that Finley's failure to pay the deferral in the agreed manner allowed him to exercise this right, explicitly granted by the terms of the pitcher's contract with Finley. Hunter then announced that since he had no contract, he was thus a free agent.

Finley insisted that no free agent question was involved. Finley contended that the only dispute was about the method of payment and that there had not been a violation of the contract but merely a difference of interpretation. He offered the other $50,000 to Hunter as direct payment, but Hunter rejected the proposal as not being in accord with the agreement between the parties.

The case was then submitted to arbitration. The arbitrator, Peter Seitz, decided the dispute in Hunter's favor, ruling that there was no ambiguity about the club's obligations, its failure to carry them out, or about Hunter's right to terminate the contract for such failure. The arbitrator ruled that Hunter no longer had a valid contract with the Oakland team, and was a free agent able to entertain offers from any major league baseball club.

Major league baseball's response to the news of Hunter's status was no less than incredible. On Hunter's first day as a free agent he received offers from 20 of the 24 major league teams. An attempt by Finley to obtain an injunction to prevent Hunter from negotiating with other teams was unsuccessful. Hunter continued his negotiations with other clubs, looking for, as he explained it, "the best offer ... including everything — the type of team, the way the money's paid, securities, investments."

Finley, objecting to the fact that Hunter was negotiating with other teams, claimed that the arbitration ruling making Hunter a free agent was not valid. Finley obtained a hearing on the claim on January 3, 1975 before an Alameda County judge. Finley argued that the arbitration panel exceeded its authority by ruling that Hunter could invoke the termination provision before the case was heard. He contended that the arbitration panel was empowered only to decide how the payment clause should be interpreted, and that it could not grant Hunter his free agency. In addition, he argued that the fact that he failed to pay to the investment company the $50,000 deferred income due Hunter did not become a fact until the arbitrator determined it on December 13, and that starting at that date Finley had ten days to correct the situation. Thus, claimed Finley, Hunter was in no way free to negotiate with others before December 23, and payment by Finley before that date would have served to reinstate Hunters original two-year contract with the Oakland team. The court ultimately rejected Finley's contentions.]

Notes on "Catfish" Hunter Case

On December 31, 1974, Hunter accepted an offer from the New York Yankees which consisted of a $100,000 bonus, $150,000 life insurance policy, and $2,600,000 in salary. Only later in March 1976, was it learned that other teams had been willing to pay Hunter much more than the Yankees. In a suit brought by Joekkapp against the National Football League that same year it was disclosed that Hunter had rejected a $3,800,000 offer from the Kansas City Royals. The testimony of Hunter's lawyer concerning the bids was admitted for the limited purpose of showing how open competition for a player could affect their salaries.

The "Catfish" Hunter case is also significant for the arbitrator's resolution of the parties' disagreement over the meaning of the Reserve Clause of the collective bargaining agreement — a matter to be dealt with in the chapter dealing with Labor Law.

The material breach of the contract is only one legitimate justification for the termination of the contract by the other party. A variety of equitable principles may also influence whether a contract can be voided. Traditional grounds for voiding a contract include fraud, duress, undue influence, nonsuitable or breach of fiduciary duty, impracticability or frustration. RESTATEMENT (SECOND) OF CONTRACTS, Chapters 6, 7, and 11.

In determining whether a failure to render or to offer performance is material, the following circumstances are significant:

(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;

(b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

(c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;

(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Question

1. Would this procedure have been helpful in *Hunter*?

ALABAMA FOOTBALL INC. v. GREENWOOD

452 F. Supp. 1191 (W.D. Pa. 1978)

MARSH, District Judge

Defendant, L.C. Greenwood, (hereinafter Greenwood) a professional football player, signed a contract to play football for the plaintiff, Alabama Football, Inc., (hereinafter AFI) beginning in 1975. AFI is an Alabama corporation which operated a professional football franchise known as the Birmingham Americans in the World Football League (hereinafter WFL). Neither Greenwood nor the Birmingham Americans played football in the WFL during 1975 or thereafter. AFI has brought this breach of contract action seeking to recover general damages and a $50,000 bonus it paid to Greenwood. In our opinion AFI is not entitled to recover either.

After review of the testimony and other evidence presented at the non-jury trial, and after consideration of the briefs and reply briefs submitted by the parties, the court makes the following findings of fact and conclusions of law.

I

On May 31, 1974, AFI and Greenwood entered into a WFL player's contract (Pl. Exhibit 1). The contract is a standard form of five pages with blanks which were filled in to show the name of the WFL team, the name of the player, the term of the contract, the compensation, and the effective date of the contract.

The compensation section of the contract states that AFI will pay Greenwood a bonus in three installments: $25,000 upon signing of the contract, $25,000 in September, 1974, and $25,000 in April, 1975. In addition, Greenwood was to receive a salary of $90,000 in 1975, $100,000 in 1976, and $110,000 in 1977. The parties indicated in the contract that they desired the contract to be effective on May 31, 1974, and that the contract was for a term of three years. If AFI failed to make payment due to Greenwood under the contract, the payment was to be made by the WFL which then would exercise an option to have the contract assigned to the WFL as property of the league.

* * *

Greenwood had played football during the 1973 season with the Pittsburgh Steelers in the National Football League. Testimony at trial indicated that all parties understood at the time the contract was signed that Greenwood would be obligated under an option clause in his 1973 season with the Steelers. Although not stated explicitly in the contract, it is clear from the testimony that the parties understood that Greenwood would not play football for AFI until the beginning of AFI's 1975 season.

When the contract was signed on May 31, 1974, Greenwood and his agent, Glenda Patterson, received checks totaling $25,000 from AFI representing the first installment of the bonus. The second $25,000 payment was received by Greenwood in September, 1974. AFI made no further payment to Greenwood.

* * *

The evidence shows that AFI did not operate a team in 1975, and that the WFL ceased operated prior to completion of the 1975 season.

On June 18, 1975, Greenwood executed a contract to play football for the Pittsburgh Steelers in the National Football League during the 1975 season.

II

As contemplated by the parties to the contract at issue here, Greenwood's duty to play professional football for the Birmingham Americans was dependent upon AFI's offering an appropriate setting in which the individual defendant could perform his services. By the very nature of the game, Greenwood could perform only if AFI provided a football team on which Greenwood could play.

Greenwood's repudiation of the contract prior to the time his performance was due excuses AFI's abandonment of its responsibilities under the contract. After the repudiation it was no longer necessary for AFI to perform or to tender performance. Nevertheless, it remains a condition precedent to AFI's right to recover damages under the contract that AFI prove that it would have had the willingness and ability to perform if there had been no repudiation. 4 CORBIN ON CONTRACTS § 978; 11 WILLISTON ON CONTRACTS § 1334 at n.4. *See also* the description of plaintiff's proof in *Waters v. Weintraub*, 255 Ala. 530, 52 So. 2d 510, 514 (1951). On this point, AFI has failed to shoulder its burden. AFI has not proved that at the time of Greenwood's repudiation it had the ability to perform substantially its responsibilities under the contract.

* * *

The termination of the AFI professional football franchise frustrated the object of AFI's contract with Greenwood. There is no evidence that Greenwood caused AFI's insolvency, nor is there any evidence that either party contemplated or assumed the risk of franchise termination when the contract was signed. This would appear to be an appropriate situation for application of the doctrine of commercial frustration recognized in § 288 of the RESTATEMENT OF THE LAW OF CONTRACTS. Indeed in a case involving a contract between AFI and another prospective WFL football player, the United States District Court in Dallas held: "It is undisputed that the dissolve of Alabama [Football, Inc.]'s team and the World Football League has made performance of the remaining unexecuted four-fifths of the contract impossible. Accordingly, the parties are excused from further performance

in compliance with the contract." *Alabama Football, Inc. v. Wright*, 452 F. Supp. 182, 185 (Civil Action No. Ca-3-745-1545-D; October 20, 1977, N.D. Texas).

* * *

III

Under a theory of restitution, AFI seeks return of the $50,000 paid to Greenwood as a bonus. Greenwood argues that restitution is not available to AFI because, in exchange for the $50,000, he executed the contract and thereby rendered the agreed equivalent performance which corresponded to the payment of the bonus.

Greenwood submits that the bonus was paid as a "signing bonus" as that term is customarily used in professional sports to mean a bonus paid to the player for his merely executing the contract. In support of this position, Greenwood points to notations on the two checks totaling $25,000 which were prepared and issued by AFI's President on May 31, 1974, and which were given to Greenwood at the time he signed the contract. One check, made out to a third-party on Greenwood's behalf, bears the notation "Part bonus for signing contract (L.C. Greenwood)" and the other check made out to Greenwood personally, indicates "Bonus for Contract" (Def. Exhibit II). AFI argues that the contract was not divisible, but rather was one entire contract calling for a total compensation of $375,000 in exchange for three years of service as a professional football player.

Whether the parties have apportioned their performances into several pairs of agreed equivalents is a matter of contract interpretation. The above-quoted paragraphs require Greenwood to play football during an eight-month football season in each of three contract years. For each of the contract years 1975, 1976 and 1977 a separate salary is designated.

These provisions support a conclusion that the parties apportioned the salary designated for each year as the agreed equivalent for the performance to be rendered by conclusion is also supported by two provisions in the contract which deal specifically with the potential problem of a player who fails to perform adequately under the contract. Paragraph 7.1 states that if the player is not in appropriate physical condition at the beginning of the season, or if he fails to remain in appropriate physical condition during the season, the team has the right to suspend the player.

* * *

Greenwood argues that the performance intended as the corresponding equivalent of the bonus was Greenwood's execution of the contract. While no language in the contract states this intention explicitly, the interpretation is consistent with the terms of the contract and with the apparent intent of the parties at the time of the signing, as shown by the preponderance of the evidence. Furthermore, there is significant legal authority which demonstrates that such an interpretation in professional sports contracts is neither uncommon nor inequitable.

Professor Arthur L. Corbin has recognized that in professional sports contracts it is not unusual for a team to offer a promise of a large bonus to induce a player to sign a specific contract:

> The signature of the promisee to that instrument constitutes the acceptance of the offer, the entire consideration for the offered promise, and the entire performance that is the agreed exchange for the "bonus" in exchange for the player's promise to play, he has not offered the "bonus" itself (the money) in exchange for the performance promised by the player (playing the game). Instead, he has offered his promise to pay the "bonus" in exchange for the making of player's promise (his "entering into" the bilateral service contract). When the player attached his signature on the contract, he had performed an act that constituted the full agreed equivalent of the "bonus" (the money payment). 1 CORBIN ON CONTRACTS § 70 297.

* * *

The evidence here indicates that AFI similarly benefited from Greenwood's signing a contract to play football in Birmingham in future years. Greenwood, a native of Mississippi who played college football in Arkansas, was selected as an All-Pro NFL defensive lineman following the 1973 National Football League season. Greenwood subsequently played in the NFL Pro Bowl game in January, 1974. He was an established professional football player at the time he signed the contract in May, 1974 granting AFI exclusive rights to his football services and non-

exclusive rights to use his name for publicity purposes.

* * *

We conclude that the execution of the professional football contract by Greenwood more than a year before he was to begin playing football for AFI, and the use of his name for promotional purposes by AFI during the 1974 season constitute adequate consideration to support the bonus paid to Greenwood. The bonus was intended as the agreed exchange for performance expected of Greenwood prior to the time he began playing football, namely, execution of the contract.

Where a specific portion of a defendant's performance, such as the execution of the contract has been apportioned as the equivalent of a part of plaintiff's performance, such as payment of the bonus, plaintiff is not entitled to restitution if the defendant has rendered the apportioned consideration in full. RESTATEMENT OF THE LAW OF CONTRACTS § 351; 5 CORBIN ON CONTRACTS § 1111. With respect in exchange for the bonus, we conclude that there was no breach by Greenwood, and that therefore AFI cannot recover. AFI's request for return of the $50,000 in bonus payments made to Greenwood during 1974 will be denied and judgment will be entered for Greenwood on that claim.

E. Notes on Players' Rights to Terminate Their Contracts

Whenever rival leagues compete for players, and one of those leagues is weak, cases similar to *Greenwood* are likely to arise. If a player has contracted with a team which will not survive, he can most likely sever his contract with that team. If a team is merely having financial problems, however, the player will be placed in a difficult position. As long as the team can compete in the league, albeit ineffectively, the purpose of the contract will not be frustrated. It seems from *Greenwood* that the team must be without the financial means to continue as a going concern before the player's duties under the contract will be discharged.

The case seems to be consistent with the position taken in the Restatement (Second) of Contracts which requires the following for the discharge of a party's duties. First, the purpose frustrated must have been a principal purpose of that party in making the contract. Second, the frustration must be substantial. Third, the non-occurrence of the frustrating event must have been a basic assumption on which the contract was needed. RESTATEMENT (SECOND) OF CONTRACTS § 265 (1979).

F. Bonus Money

There are two different forms of bonus. One, the signing bonus, is compensation paid to the athlete as an added incentive to sign a contract and is paid in exchange for his promise to perform the contract. The incentive bonus is compensation paid to the athlete for achieving previously established performance The player, of course, must at least report to camp and make a good faith effort to make the team. The player, of course, must at least report to camp and make a good faith effort to make the team. In October of 1997 the Carolina Panthers were embroiled in a $ 639,000 feud with Kevin Greene. The Panthers not only wanted to collect about $ 289,000 in unpaid fines Greene incurred during his preseason holdout, they also wanted the linebacker to pay back a $ 350,000 roster bonus he received in February. Greene, who signed with the 49ers after the Panthers released him, claimed he owed nothing. With the adoption of salary caps by many professional sports leagues, bonus money has taken on added significance. For example, in 1997 with the creative use of bonus money Junior Seau's six-year contract was structured to give the San Diego Chargers salary cap relief during at least two seasons. The star linebacker signed the six-year extension in September, but the salary cap ramifications don't take effect until next year, when the team executes an option for 1998-2002. When that happens, Seau's salary cap number of $6.88 million for 1998 will be significantly reduced. Instead of a $4 million base salary, he will make $2.2 million in base pay and receive a $2 million signing bonus, which for salary cap purposes will be prorated over the 1998-2002 season. In

modern professional sports contracts, bonus money can constitute a substantial percentage of a player's total compensation. Signing bonus money differs from salary in that a player generally retains this bonus whether or not he makes the team and without regards to his level of play. Signing the contract, not rendering any type of athletic service, entitles the athlete to this compensation.

However, the contract signed by the player must be a valid, binding contract, executed by the team and approved by the Commissioner. Additionally, the player must attend training camp, participate in team functions, and perform to the best of his ability for the team. Assuming the player meets his obligation to the team, the bonus money is his to keep.

Problems often arise, however, in characterizing the precise nature of bonus money. The signing bonus, for example, has been characterized as a gift, an advance on salary, payment for a binding option or a means of apportioning income for tax purposes.

ALABAMA FOOTBALL, INC. v. STABLER

274 Ala. 551, 319 So. 2d 678 (1975)

SHORES, Justice

Stabler filed a complaint on December 4, 1974, seeking a declaratory judgment and other relief, contending that the defendant had breached its contract with Stabler by failing to pay the balance due in 1974 under the contract between the parties; that the terms of the contract prohibited him from negotiating a contract with any other professional football club; and that irreparable damage would result to him if the contract was not held to be null and void.

After a hearing, the trial court entered its judgment on January 6, 1975, holding that the contract between Stabler and Alabama Football, Inc., had been breached by Alabama Football, Inc. and that Stabler was free from any obligation under any of the terms of the contract. This is an appeal from that judgment.

Stabler is a professional football player. In April, 1974, he signed an agreement with Alabama Football, Inc., which was effective immediately, and which in part provided that Alabama Football, Inc. would pay him $50,000 upon signing and an additional $50,000 in the year 1974. The agreement provided that Stabler would play football for Alabama Football, Inc. for seven years after the expiration of his existing contract with the Oakland Raiders for a total consideration of $875,000, $100,000 of which was the bonus for the signing and payable in 1974, $100,000 payable in 1975, and $135,000 per year thereafter through 1980.

The contract also prohibited Stabler from executing any other contract with any other football franchise or team in any football league.

The $50,000 was paid upon execution of the contract. The record indicates that at the time the contract was negotiated, some discussion was had regarding looking into the possibility of some deferred compensation plan, whereby Stabler might avoid taxes on monies due in 1974. It was subsequently determined that no effective means could be worked out to avoid taxes on monies to be received in 1974. When this was discovered, Stabler asked for the balance due him. He received $10,000 of the balance on May 20. In June, he was told that there was no money available to pay the balance; but on June 28, an agreement was entered into which set up a schedule of payments for the $40,000 remaining unpaid. $10,000 was paid under this arrangement, but the remaining payments were to be made as they became due. $30,000 remained due at the time. On October 29, Alabama Football, Inc. delivered a note to Stabler for $30,000 payable on November 29, 1974. When this note was not paid Stabler filed this suit seeking cancellation of the contract, and also asked the court to issue a temporary restraining order prohibiting the use of his name by Alabama Football, Inc. This was granted and was finally made permanent.

* * *

Appellant argues, and the trial court was of the opinion that, under the facts of this case, Stabler was under no obligation to restore the money paid to him. We agree. Obviously, contracts involving professional athletes are

somewhat unique. The evidence indicates that Alabama Football, Inc. benefited from the fact that Stabler had signed a contract to play football with it beginning in 1976. It exploited his notoriety as a successful quarterback with the Oakland Raiders to sell tickets to ball games played in 1974; he appeared at press conferences to publicize Alabama Football, Inc. and the World Football League. While it is true that the general rule is "a party may not disaffirm a voidable contract and at the same time enjoy the benefits received thereunder," *Betts v. Ward*, 196 Ala. 248, 251, 72 So. 110, 112 (1916), such rule must be applied to comport with general equitable principles. *Dermott Land & Lumber Co. v. Walter A. Zelnicker Supply Co.*, 271 F. 918 (8th Cir. 1921).

The record is replete with indications that Alabama Football, Inc. was not able to fulfill its contract with Stabler. He was not paid the amount promised him in 1974, and the team was unable to pay him. Yet, under the contract, he was prohibited from negotiating a contract with any other team so long as he was under contract with Alabama Football, Inc. We agree with the trial court that the balancing of the equities would not require Stabler to return the money received during the year 1974, since there was evidence to support a conclusion that Alabama Football, Inc. had received benefits under the contract which Stabler was entitled to paid for. We note also that the trial court, in holding the contract between the parties null and void, also cancelled the $30,000 note payable to Stabler, finding that the balancing the equities between the parties could be achieved in this manner.

It is next submitted by appellant that the breach in the instant case was not substantial and that a slight or casual breach will not justify rescission. While this is a good statement of the general rule, the appellant overlooks a universal rule more applicable to the facts of this case. The evidence adduced below relating to the financial condition of appellant is uncontradicted. It overwhelmingly supports a conclusion that it was unable to perform the contract with Stabler. While it is true that financial inability to perform "whether due to ... poverty, [or] financial panic...." 17 AM. JUR. 2D, *Contracts* § 415, does not excuse nonperformance of a contract, it is equally true that:

> The inability of a party to perform a contract after it is made is, as a rule, a ground for rescinding it. The fact that substantial performance by one party is impossible or that a party is unable to perform a material part of the contract is a ground for rescission.... 17 AM. JUR. 2D, *Contracts* § 506.

Since there was substantial evidence from which the trial court could have concluded that appellant was unable to perform its contract with Stabler, we find no basis for reversal on this point.

* * *

Finding no error to reverse, the decree appealed from is therefore, affirmed.

Notes and Questions on Stabler

The Court's decision to allow Stabler to keep the $70,000 already paid to him raises some interesting questions. Initially, the court observed the uniqueness of professional sports contracts, but declined to elaborate on the factors or reasons behind characterizing these contracts as such. Also the court failed to explain why the doctrine of rescission would not apply to this case. Allowing Stabler to rescind the contract would generally require the return of the part performance already received, *i.e.*, the $70,000 bonus payment. The court avoided this result by viewing the bonus money as compensation for publicity to the team when Stabler signed.

Should the court have applied equitable principles of restitution in *Stabler*? If it had, how should it have measured the value of Stabler's performance to the team? REST. (2D) CONTRACTS § 374.

Notes and Questions on Bonus Money

Can an option contract creating an irrevocable offer be found if a player accepts the bonus money? Is a player's acceptance of bonus money necessary evidence of the outward manifestation of the player's intention to be bound by an option contract? Remember, if at the time the player signs the contract he receives the bonus money with the understanding that it is not part of his salary, the proper inference is that an irrevocable offer has been created. If, however, the money is accepted as pre-payment on his salary, the offer remains revocable.

An example of a "bonus money" clause used in football contracts in the "old" American Football League, prior to its merger with the National Football League, provided:

> The Club hereby agrees to pay the Player a bonus of $_____, which bonus is separate and distinct from the sum set forth in paragraph 3 of the above-mentioned contract, and the Player acknowledges receipt of such amount. Notwithstanding the foregoing, if the Player fails to get to and remain at training camp at the times and places prescribed by the Club, or fails to render the services required under the contract, or fails to perform such contract by the Club under paragraph 6 thereof ... the Player shall forthwith repay to the Club in full amount of such bonus. THE LAW OF SPORTS, *supra*, § 3.11 p. 275-6.

Contrary to the findings in *Stabler*, the court in *Los Angeles Rams Football Club v. Cannon, supra*, held that the bonus payments were received conditionally and not in consideration of a binding option. Compare the court's language in *Cannon* to that of *Stabler*:

> Addressing myself, now to the contention made by the plaintiff that the $10,000 bonus check is in the nature of consideration for a binding option; that is, consideration for holding open the offer of Billy Cannon for a reasonable length of time.
>
> As I have indicated, Cannon took possession of the $10,000 check thinking that it would be his only if the contract he contemplated for three years' services became effective following the Sugar Bowl game and he further understood as he testified, that even then he had to report to the club for the 1960 training camp period or he would have to return the bonus.
>
> There can be no question but that the $10,000 check represented what is generally referred to in professional athletics as a bonus payment, customarily offered as an inducement to outstanding rookies. But under the facts as I have found them it was received conditionally.
>
> Furthermore, if, as contended by plaintiff, the bonus constitutes consideration for holding the offer open for a reasonable time and assuming further that the offer were held open in consideration thereof but the player failed for some reason other than military service to show up for the training camp, it is my understanding of the plain language of the bonus rider attached to Exhibit A that he would be required to return it. If that be so, the bonus so far as consideration for an option is illusory. I conclude, therefore, that in this case there was no binding or irrevocable agreement on the part of Cannon to hold his offer open.

G. No-Cut Contracts

Historically, most professional athletes had very little job security and continually faced competition from other athletes for their position on the team. Although today the standard player contracts used in all professional sports leagues contain a clause which permits the team to terminate the contract for lack of skill or ability, injury or lack of physical conditioning, a great many contracts are now guaranteed. Most basketball and hockey contracts are guaranteed, many baseball contracts are also guaranteed. Only professional football does not widely employ guaranteed contracts. For example, when Barry Sanders of the Detroit Lions signed a six year, $34 million contract

in 1997, only his $11 million signing bonus was guaranteed. It should be noted that the current NFL 'Hard' salary cap has made Sanders, and other players like him, virtually untradable. His $11 million bonus counts $1.833 million against the cap each year for the six year life of the contract, but if Sanders is traded, the entire balance of the bonus is accelerated to the year of the trade. In 1999, that would cost the Lions $7.333 million against their $57.288 million cap. But even in the NFL, a player gets his full pay for the season in which he is injured. And then up to $150,000 the next year. In many instances the salaries have become astronomical. Glenn Robinson, for example, has a 10 year deal worth $68,150,000. Although many leagues have salary caps, insurance falls outside these caps. Therefore, many wealthy teams simply either buy insurance to cover these contracts, and make the premiums part of a signing bonus.

Since no-cut contract provisions vary, issues may arise as to whether there are any circumstances which would warrant the team in terminating the contract. For example, does the no-cut clause protect the player if he is suspended for disciplinary reasons, exhibits a bad attitude toward his team and fellow players, or reports to training camp out of shape or injured? Additionally, does the no-cut contract require that the team keep the player on the roster for the term of the contract, or just pay the player his salary according to the terms of the agreement? Generally, the resolution of these questions requires contract interpretation in the light of trade usage or trade customs.

In answering these questions, a balancing test is used to weigh the player's interest in job security versus the team's interest in fielding the most competitive team possible. Most often the team's interest out weighs the player's, and generally only requires the team to honor the terms of the contract with respect to compensation, not provide a place on the roster. *See* THE LAW OF SPORTS, *supra,* § 3.09, p. 250-6.

The following clauses are examples of no-cut contracts:

> (1) Notwithstanding the foregoing, the Club, so long as the Player fulfills his representation and warranty that he has and will continue to have excellent physical condition and fulfills his agreement that he will perform services hereunder as directed by the Club and its Head Coach (except to the extent the Player is excused from such performance pursuant to paragraph 15 hereof), agrees that it will not, prior to the first day of May following the close of the football season beginning in the calendar year 1966, terminate this contract because of the Player's lack of skill or capacity to play professional football of the caliber required by the League and by the Club or because the Player's work or conduct in the performance of this contract is unsatisfactory as compared with the work and conduct of other members of the Club's squad of players. *Hennigan v. Chargers Football Co.*, 431 F.2d 308, 310 (2d Cir. 1970).
>
> (2) 27. This contract is a guaranteed no-cut contract for the 1966-67 season and the compensation referred to above shall be payable to the Player in any event.
>
> In addition to the annual compensation referred to in this contract, the Club agrees to and herewith does pay the Player the sum of $4,000.00 as and for a bonus. *Minnesota Muskies, Inc. v. Hudson*, 294 F. Supp 979 (M.D.N.C. 1969).

Section 3: Remedies for Breach of Contract

A. Introduction

The basic goal of contract remedies is to place the injured party in the same position that he would have been had the contract been fully performed. RESTATEMENT (SECOND) OF CONTRACTS § 344 (1979). In most cases this goal can be achieved by an award of money damages which will allow the injured party to purchase a substitute performance thereby placing him in roughly the same position he would have been had the contract been fully

performed. RESTATEMENT (SECOND) OF CONTRACTS §§ 347, 359, 360 (1979). When a professional athlete breaches an employment contract the team will normally find that the traditional remedy of money damages is inadequate. This may be due to the fact that the player simply does not have sufficient funds to make a suit for money damages economically practical. Even if the player is solvent, the team may not be able to prove its damages with sufficient certainty to recover. RESTATEMENT (SECOND) OF CONTRACTS § 352 (1979). The damage a team suffers will usually be reflected in a drop in attendance at its games. Because there are so many factors which influence attendance, it will very likely not be possible to determine how the loss of one player effects gate receipts.

Finally, the player who refuses to perform may be so talented that even if a value could be put on his services it would be impossible for the team to recruit a suitable replacement. RESTATEMENT (SECOND) OF CONTRACTS § 360(b) (1979). At this point it is clear that the team's injury is irreparable in the sense that money damages are not adequate. Under such circumstances the usual remedy is specific performance. RESTATEMENT (SECOND) OF CONTRACTS § 359 (1979).

As a general rule, however, personal service contracts are not specifically enforceable. RESTATEMENT (SECOND) OF CONTRACTS § 367 (1979). This rule has been applied in litigation involving professional athletes. *E.g.*, *Allegheny Baseball Club v. Bennett*, 14 F. 257, 260 (W.D. Pa. 1882), *American League Baseball Club v. Chase*, 86 Misc. 441, 443, 149 N.Y.S. 779, 780 (Sup. Ct. 1890), *Harrisburg Baseball Club v. Athletic Assoc.*, 8 Pa. Cty. Ct. 337, 338 (1890), *Ford v. Jermon*, 6 Phil. Rep. 6, 7 (1865).

Most standard player contracts, however, not only contain a promise that the player will provide his services to the team, they also contain a promise that the player will not perform for any other club (*see* para. 3 of the NFL contract, App A-1 *infra.*). Because other remedies for breach are not available, the team usually seeks specific enforcement of this negative covenant.

B. Nature of the Remedy

The refusal of a court of equity to order specific performance is partly based upon the inability of a judge to compel proper rendition of service. It is also based on the undesirability of compelling the continuance of personal association after disputes have arisen and confidence and loyalty are gone. Finally, in some instances, requiring a person to perform personal services have been likened to involuntary servitude.

C. "It's Not Over Till the Fat Lady Sings"

Madame Wagner, a noted German opera singer, came to England under a contract with Lumley to sing for three months. The agreement provided that during this period she would not sing for anyone else. Before the term of the contract expired, however, she yielded to the solicitation of Lumley's rival, Gye, and agreed to sing for him. Lumley sued Gye and Wagner, praying for an injunction to prevent Wagner from singing for Gye. Lord St. Leonards, then chancellor, granted the injunction restraining Wagner from doing what she had promised not to do. *Lumley v. Wagner*, 42 Eng. Rep. 687 (1852).

Today a team owner can find himself in the same position as Lumley when his star player decides to sign a contract with a rival league. Money damages may prove to be difficult if not impossible to establish with reasonable certainty, and even if established may be impossible to collect.

Modernly, however, teams have sought to avoid these difficulties by securing two reciprocal promises in the contract with the athlete. First, that the athlete promises to perform for the contracting team. Second, that the athlete promises not to perform for any other team during the contract term. The combination of these two clauses permits a court to order a player not to play for another team and assures that a competitor will not economically benefit from the player's services. Therefore, although the team could lose the benefit of its bargain by the athlete's failure to perform it will not have to worry about the athlete performing for someone else. As a consequence, the

athlete is usually compelled to return to the contracting team.

PHILADELPHIA BALL CLUB, LTD. v. LAJOIE
202 Pa. 210, 51 A. 973 (1902)

POTTER, Justice

The defendant in this case contracted to serve the plaintiff as a baseball player for a stipulated time. During that period he was not to play for any other club. He violated his agreement, however, during the term of this engagement, and in disregard of his contract, arranged to play for another and a rival organization. The plaintiff by means of this bill, sought to restrain him, during the period covered by the contract.

The court below refused an injunction, holding that to warrant the interference prayed for, "the defendant's services must be unique, extraordinary, and of such a character as to render it impossible to replace him; so that his breach of contract would result in irreparable loss to the plaintiff." In the view of the Court, the defendant's qualifications did not measure up to this high standard. The trial court was also of opinion that the contract was lacking in mutuality; for the reason that it gave plaintiff an option to discharge defendant on ten day's notice, without a reciprocal right on the part of the defendant.

The learned judge who filed the opinion in the court below, with great industry and painstaking care, collected and reviewed the English and American decisions bearing upon the question involved, and makes apparent the wide divergence of opinion which has prevailed. We think, however, that in refusing relief unless the defendant's services were shown to be of such a character as to render it impossible to replace him, he has taken extreme ground.

It seems to us that a more just and equitable rule is laid down in *Pomeroy on Specific Performance*, page 31, where the principle is thus declared: "Where one person agrees to render personal services to another, which require and presuppose a special knowledge, skill and ability in the employee, so that in case of a default the same service could not easily be obtained from other, although the affirmative specific performance of the contract is beyond the power of the court, its performance will be negatively enforced by enjoining its breach. The damages for breach of such contract cannot be estimated with any certainty, and the employer cannot, by means of any damages, purchase the same service in the labor market.

We have not found any case going to the length of requiring, as a condition of relief, proof of the impossibility of obtaining equivalent service. It is true that the injury must be irreparable; but, as observed by Mr. Justice LOWRIE, in *Commonwealth v. Pittsburgh, & C.R. Co.*, 24 Pa. 160, "The argument that there is no `irreparable' injury is a very unhappily chosen one, used in expressing the rule that an injunction may issue to prevent wrongs of a repeated and continuing character, or which occasion damages which are estimated only by conjecture, and not by any accurate standard."

We are therefore within the term whenever it is shown that no certain pecuniary standard exists for the measurement of the damages. This principle is applied in *Vail v. Osburn*, 174 Pa. 580, 34 A. 315. That case is authority for the proposition that a court of equity will act where nothing can answer the justice of the case but the performance of the contract is specie; and this even where the subject of the contract is what under ordinary circumstances would be only an article of merchandise. In such a case, when owing to special features, the contract involves peculiar convenience or advantage, then the breach may be deemed to cause irreparable injury.

The court below finds from the testimony that "the defendant is an expert baseball player in any position; that he has a great reputation as a second baseman; that his place would be hard to fill with as good a player; that his withdrawal from the teams would weaken it, as would the withdrawal of any good player, and would probably make a difference in the size of the audiences attending the game."

We think that in thus stating it, puts it very mildly, and that the evidence would warrant a stronger finding as to the ability of the defendant as an expert ball player. He has been for several years in the service of the plaintiff

club, and has been re-engaged from season to season at a constantly increasing salary. He has become thoroughly familiar with the action and methods of other players in the club, and his own work is peculiarly meritorious as an integral part of the team work which is so essential. In addition to these features which render his services of particular and special value to the plaintiff, and not easily replaced, Lajoie is well known, and has great reputation among the patrons of the sport, for ability in the position which he filled, and was thus a most attractive drawing card for the public. He may not be the sun in the baseball firmament, but he is certainly a bright particular star.

We feel therefore that this evidence in this case justifies the conclusion that the services of the defendant are of such a unique character, and display such a special knowledge, skill and ability as renders them of peculiar value to the plaintiff, and so difficult of substitution, that their loss will produce irreparable injury, in the legal significance of that term, to the plaintiff. The action of the defendant in violating his contract, is a breach of good faith, for which there would be no adequate redress at law, and the case, therefore, properly calls for the aid of equity in negatively enforcing the performance of the contract by enjoining against its breach.

[Nap Lajoie's career spanned a period of 21 years. He had a lifetime batting average of .338. In 1901 he batted .422 while also leading the league in hits(229), doubles(48), home runs(14) and RBI's(125).]

Note

Throughout the years, the formation of rival leagues has spawned litigation comparable to that in *Lajoie*. In major league baseball, most of the litigation took place in the late 19th and early 20th centuries. Beginning in the 1960's several rival leagues were formed in other professional sports. The American Basketball Association challenged the National Basketball Association. The World Hockey Association challenged the National Hockey league in the 70's. The National Football League encountered the American Football League in the 60's, the World Football League in the 70's and the United States Football League in the 1980's.

CENTRAL NEW YORK BASKETBALL, INC. v. BARNETT

19 Ohio Op. 2d 130, 181 N.E.2d 506 (1961)

DANACEAU, Judge

This is an action for injunctive relief brought by the plaintiff, Central New York Basketball, Inc., a New York corporation, against Richard Barnett and Cleveland Basketball Club, Inc., a corporation.

The defendant, Richard Barnett, a professional basketball player, the No. 1 draft choice in 1959 of the plaintiff and who played for the plaintiff during the ensuing 1959 basketball season, played for the Syracuse club throughout the 1960 basketball season under a signed and executed Uniform Player Contract of the National Basketball Association under date of March 16, 1960 by and between the plaintiff and said defendant.

* * *

In July of 1961, the defendants, Barnett and Cleveland Basketball Club, Inc., made and entered into an American Basketball League Player Contract in which the club engaged the player to render his services as a basketball player for a term beginning on September 15, 1961 and ending on September 14, 1962.

* * *

Plaintiff claims that the defendant, Barnett, is a professional player of great skill and whose talents and abilities as a basketball player are of special, unique, unusual and extraordinary character; that the defendant, Cleveland Basketball Club, Inc., knew that he was under contract with the plaintiff; that in accordance with the terms and conditions of said contract the plaintiff exercised a right to renew said contract for an additional year as provided therein and so notified the defendant Barnett, that the defendant Barnett breached the said contract by failing and refusing to play with and for the said plaintiff during the 1961-1962 playing season, and that said breach

of contract was committed with the knowledge and participation of the defendant, Cleveland Basketball Club, Inc.

Plaintiff claims that it cannot reasonably or adequately be compensated for damages in an action at law for the loss of defendant Barnett's services as required by said contract and an oral agreement between plaintiff and Barnett made in May of 1961, and that plaintiff will suffer immediate and irreparable damages.

* * *

The defendant, Cleveland Basketball Club, Inc., admits that the defendant Barnett is a professional basketball player but denies that he is of great skill and denies that his talents and abilities as a basketball player are of special, unique, unusual and extraordinary character; and further admits that the defendant Barnett has played professional basketball in the National Basketball Association as an employee of the plaintiff.

* * *

The written agreement under date of May 16, 1960 and signed by the plaintiff and the defendant Barnett provides in part as follows:

> 9. The Player represents and agrees that he has exceptional and unique skill and ability 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.

The construction of the contract urged by plaintiff, to which it is committed in open court, is reasonably, rational practical, just and in accordance with the foregoing principles, and is adopted by the Court.

The defendant Barnett had previously played for the Syracuse team during the greater part of the 1959-1960 season under a signed contract.

Daniel Biasone, the President and General Manager of the Syracuse Club, testified that near the close of the 1960-1961 season in March of 1961, he told the defendant Barnett that Barnett was one of seven players he would keep exempt from the forthcoming draft of players from all National Basketball Association clubs to stock the new Chicago club and the Barnett was one of seven players he was "protecting."

In the latter part of May, 1961, Mr. Biasone reached the defendant Barnett by telephone and they discussed salary for the next season and agreed upon an increase of $3,000 which would bring the salary of Barnett to $11,500. He further testified that Barnett said, "You mail them (contracts) down and I will sign them and return them." On cross-examination Biasone said that he was not sure and did not know whether Barnett said "I will sign."

* * *

Finding that the contracts mailed to Barnett were not returned and not hearing from Barnett, Mr. Biasone made repeated attempts to contact or reach the defendant Barnett in July and August of 1961 by telephone, telegram and letter, to all of which were there no response. On November 6, 1961, a letter from the plaintiff to the defendant was written and mailed and received by Barnett which reads as follows:

> It is our position that your 1960-1961 contract with us was renewed when we came to terms and we sent you an advance. However, to abide by the letter of the contract and to make the position of the Syracuse Nationals absolutely clear, we hereby notify you that pursuant to Paragraph 22(a) of said contract, we hereby renew the same for the period of one year ending October 1, 1962. The amount payable to you under such renewed contract is hereby fixed at $11,500.

Meanwhile, during the months of June and July 1961, Barnett met and talked to his former coach and advisor, John B. McLendon, who was the coach of the Cleveland Pipers Basketball Club, Inc. Both Barnett and McLendon stated the Barnett did not want to play for Syracuse but did want to play for the Cleveland Pipers. However, they were both concerned about the "Kenney Sears" case, then pending in the California court. It appears

that Sears was trying to "jump leagues" to play for San Francisco and both wanted to see the outcome of the case. Undoubtedly, this explains the lack of communication from Barnett to the Syracuse club during June and July of 1961, his failure to return the contracts and his failure to open the envelope containing the letter and check enclosed therein.

Relying upon a newspaper story and the interpretations thereof to the effect that Sears "would not be penalized for going to this League," Barnett and McLendon proceeded to take the necessary steps culminating in a signed contract between Barnett and the Cleveland Pipers with McLendon signing the contract on behalf of the Cleveland club.

The request of Barnett for an advance, whether it was $300 or $3,000, renders strong support to the claim of plaintiff that an oral agreement on a salary had been reached and that Barnett would play for Syracuse during the 1961-1962 season. Manifestly, unless there was such an understanding, there could be no salary upon which such an advance could be made. The evidence is overwhelming, and this Court finds that the plaintiff and the defendant Barnett reached an understanding that Barnett would play for Syracuse during the 1961-1962 at a salary of $11,500. It is also quite clear that Barnett and McLendon of the Cleveland Pipers were acting in concert in awaiting the ruling in the *Sears* case; and after reading the newspaper report, decided that Barnett could "jump" without penalty and sign up with the Cleveland Pipers.

* * *

The defendants challenge the validity and enforceability of the renewal provisions of the contract on the ground that they lack mutuality. The renewal clauses are an integral part of the contract, and there is sufficient consideration of the obligations and duties arising thereunder.

* * *

This Court holds that the renewal provisions of the contract involved herein are valid and enforceable.

Plaintiff claims that defendant Barnett is a professional basketball player of great skill and whose talents and abilities as a basketball player are of special, unique, unusual and extraordinary character.

There is some disagreement in the testimony as to the ability and standing of Barnett as basketball player. Daniel Biasone, the General Manager of the Syracuse club for the past 16 years, testified that:

> As of now I think Richard Barnett is one of the greatest basketball players playing the game. He is an exceptionally good shooter. He is above average ... with other foul shooters in the National Basketball Association and that he ranked 19th in the whole league (approximately 100 players) scoring, playing as a guard.

* * *

Coach McLendon of the Cleveland Pipers is not so generous in his appraisal. Barnett, in his opinion, is not in the class of specifically named outstanding basketball players. McLendon concedes that both Barnett and Neumann, now playing for Syracuse in his first year as a professional are both "pretty good."

* * *

The increase of salary from $8,500 to $11,500 agreed to by plaintiff, the Cleveland Basketball Club's willingness to pay $13,000, and the latter's eagerness to secure his services, all point to a high regard for his playing abilities. Whether Barnett ranks with the top basketball players or not, the evidence shows that he is an outstanding professional basketball player of unusual attainments and exceptional skill and ability, and that he is of peculiar and particular value of plaintiff.

* * *

An important growth in the field of equity has been the use of injunctions against the breach of negative agreements, both express and implied. POMEROY'S SPECIFIC PERFORMANCE OF CONTRACTS, 3d ed. at page 75 reads:

> Another class of contracts stipulating for personal acts are now enforced in England by means of an injunction. Where one person agrees to render personal services to another which require and

> presuppose a special knowledge, skill, and ability in the employee, so that, in the case of a default, the same services could not easily be obtained from others, although the affirmative specific performance of the contract is beyond the power of the court, its performance will be negatively enforced by enjoining its breach. This doctrine applies especially to contracts made by actors, public singers, artists and others possessing a special skill and ability. It is plain that the principle on which it rests is the same with which applies to agreements for the purchase of land or of chattels having a unique character and value. The damages for the breach of such contracts cannot be estimated with any certainty, and the employer cannot, by means of any damages, purchase the same service in the labor market.

Pomeroy continues:

> The more recent American cases are in accordance with the English rule stated in the text, and where one person agrees to render personal services to another which require and presuppose a special knowledge, skill and ability in the employee, so that in case of default, the same services could not be easily obtained from others, his performance will be negatively enforced by enjoining its breach and proof of impossibility of obtaining equivalent service is not required as condition of relief.

* * *

Professional players in the major baseball, football, and basketball leagues have unusual talents and skills or they would not be so employed. Such players, the defendant Barnett included, are not easily replaced.

The right of the plaintiff is plain and the wrong done by the defendants is equally plain, and there is no reason why the Court should be sparing in the application of its remedies.

Damages at law would be speculative and uncertain and are practically impossible of ascertainment in terms of money. There is no plain, adequate and complete remedy at law and the injury to the plaintiff is irreparable.

Professional baseball, football and basketball require regulations for the protection of the business, the public and the players, and so long as they are fair and reasonable there is no violation of the laws on restraint of trade. The evidence before this Court does not show any unfair or unreasonable act on the part of the plaintiff and the Court concludes that the claim of the defendant that the contract is in restraint of trade is without merit.

The Court also concludes from the evidence that the plaintiff is authorized to bring this action in this court under the laws of Ohio, and is properly before this Court.

The Court finds in favor of the plaintiff on all issues joined and permanent injunctions as requested for the 1961-1962 basketball playing season are decreed. Thereafter the said injunctions shall be dissolved.

NASSAU SPORTS v. HAMPSON

355 F. Supp. 733 (D. Minn. 1972)

LARSON, District Judge

Plaintiff Nassau Sports seeks a preliminary injunction prohibiting defendant Hampson from playing hockey, or being otherwise employed by defendant Midwest Saints, Inc., and also prohibiting the Midwest Saints from alleged interference with the contractual relations of plaintiff and Hampson.

Defendant Hampson is a professional hockey player. He is a signatory with the North Star Financial Corporation (the owner of the Minnesota North Stars Hockey Club) to a "National Hockey League, Standard Player's Contract." The contract is dated July 30, 1971, and by its terms runs from October 1, 1971 until October 1, 1972. Clause 11 of that contract permits the assignment of Hampson's professional services by the North Stars to "any other professional hockey club."

On June 6, 1972, the services of Hampson were assigned by the North Stars to the New York Islanders

Hockey Club owned by plaintiff Nassau Sports. Subsequent to his assignment by the North Stars to the Islanders, Hampson was contacted by the Islanders' general manager, William Torrey. Hampson and his wife traveled to New York, at the expense of the Islanders, to seek housing and to discuss the question of Hampson's salary.

On August 10, 1972, Hampson signed a contract with the Midwest Saints. The Saints are a member of the newly formed World Hockey Association. The contract is for a four year period beginning October 1, 1972. Hampson's contract with the Midwest Saints is in conflict with his contract with the North Stars (that contract since assigned to plaintiff Islanders). The conflict arises from Clause 17 of Hampson's contract with the North Stars, which clause states Hampson's obligation to the North Stars subsequent to the period of time covered by the contract within which it is contained. Clause 17 provides:

> The club agrees that it will on or before September 1st next following the season covered by this contract tender to the Player personally or by mail directed to the Player at his address set out below his signature hereto a contract upon the same terms as this contract save as to salary.
>
> The Player hereby undertakes that he will at the request of the Club enter into a contract for the following playing season upon the same terms and conditions as this contract save as to salary which shall be determined by mutual agreement.

Plaintiff seeks, by way of preliminary injunction here, relief from the breach by Hampson of his obligation under the above quoted Clause 17, as the benefits of that clause accrue to plaintiff by way of the agreement of Hampson's services made to it under Clause 11. The defendants respond by alleging that the contractual obligations of Hampson, as asserted by plaintiff, are unenforceable.

The Court's consideration of whether to grant the preliminary injunction sought by plaintiff is limited to determining if four tests are satisfied by the showing of plaintiff. These tests are:

1. Has the plaintiff shown substantial probability of success at trial on the merits?
2. Has the plaintiff shown irreparable injury?
3. Will the interests of the other party be substantially impaired by issuance of such an Order?
4. How will the public interest be affected?

Plaintiff's first argument for its probability of success at trial on the merits is that Hampson's conduct constitutes breach, prior to October 1, 1972, of a contract valid and enforceable prior to that date, and therefore the validity of the renewal clause (Clause 17 set out above) is not in issue. The argument that Clause 17 is not a factor in the merits may be disposed of summarily. That the validity of Clause 17 is in issue here is apparent from plaintiff's request for injunctive relief covering a period of time subsequent to the expiration of Hampson's contract with the North Stars. Were it not for renewal by way of Clause 17, Hampson's contractual obligations to the North Stars, upon which plaintiff here relies, would be nonexistent after October 1, 1972. Because plaintiff seeks relief for a period of time subsequent to October 1, 1972, the validity of Clause 17 is plainly in issue.

* * *

Because the Court has concluded the plaintiff has failed to sustain its burden of showing substantial probability of success on the merits the preliminary injunction sought will not issue. There remain, for application to the facts of this case, the three other tests employed in the determination of whether to grant a preliminary injunction.

The test of whether plaintiff has shown irreparable injury is the only test which has been satisfied by the showing of plaintiff. Plaintiff has shown, and the Court finds, that defendant Hampson is a skilled professional hockey player, the defendant, Hampson acknowledged in his contract with the North Stars that his services were unique and that it is impossible for plaintiff, given Hampson's refusal to play hockey for plaintiff, to acquire precisely the same services. The Court concludes from these findings, that plaintiff has lost the unique services of Hampson and that such loss represents irreparable injury.

The test of whether the interest of the other party, here Hampson and the Midwest Saints, will be substantially impaired by the issuance of the requested preliminary injunction has not been met be plaintiff. The

Court finds that Hampson is a professional hockey player who supports himself and his family by playing hockey and that he and his family are residents of Minnesota. The Court also finds that defendant Midwest Saints is a new professional hockey team in a new professional hockey league. From these findings the Court concludes that the interest of Hampson in supporting himself and his family in their Minnesota residence by playing professional hockey would be substantially impaired were the Court to grant the preliminary injunction sought by plaintiff, in that such injunction would prohibit Hampson from playing hockey for the Midwest Saints of St. Paul. On the same findings the Court also concludes that the interests of the Midwest Saints would be substantially impaired were it precluded, by the requested injunction, from the benefits of Hampson's professional services for the conduct of its business.

The test of how the public interest will be affected by the issuance of the requested injunction has also not been met by plaintiff. The Court finds that both plaintiff and the Midwest Saints are new teams which have never played a full season and that the Midwest Saints are within the structure of a new league from competition in professional hockey which league is undertaking competition with the established league of which plaintiff is a new member. From these findings the Court concludes that there are two elements of public interest affected by the requested injunction. The first element of public interest is the benefit accruing to the fans of both plaintiff and defendant Saints in observing Hampson play hockey. The public interest as represented by the enjoyment of plaintiff's fans and the defendant Saints' fans would seem to be equally balanced. The second element of public interest is the entry into the market of a new league. It would seem to the Court that, as to this element, the public interest would be better served by the entry of a new league into the professional hockey market. The Court so concludes on the ground that entry of the new league into the market will increase economic competition between commercial enterprises engaged in interstate commerce. The plaintiff has not, therefore, satisfied this last test.

In sum, the Court must deny the application of plaintiff for a preliminary injunction because plaintiff has failed to satisfy three of the four tests required for the issuance of a preliminary injunction.

BOSTON CELTICS L.P. v. SHAW

908 F.2d 1041 (1st Cir. 1990)

BREYER, Chief Judge

On January 23, 1990, Brian Shaw signed a contract with the owners of the Boston Celtics (the "Celtics") in which he promised that he would cancel his commitment to play for an Italian basketball team next year so that he could play for the Celtics instead. When Shaw threatened to break his agreement with the Celtics, they immediately sought arbitration. The arbitrator found that Shaw must keep his promise. The Players Association that represents Shaw agreed with the arbitrator. The Celtics then asked the federal district court to enforce the arbitrator's decision. The court ordered it enforced.

Shaw now appeals the district court's order. We have examined the arbitration award, the district court's determination, the briefs, and the record. We conclude that the district court's decision is lawful, and we affirm it.

I

Background

A. Facts

The basic facts, which are not in dispute, include the following:

(a) In 1988, soon after Shaw graduated from college, he signed a one-year contract to play for the Celtics.

(b) In 1989, Shaw signed a two-year contract to play with the Italian team Il Messaggero Roma ("Il Messaggero"). The team agreed to pay him $800,000 for the first year and $900,000 for the second year. The contract contains a clause permitting Shaw to cancel the second year (1990-91). It says

that Shaw has

> the right to rescind the second year of this Agreement ... [if he] returns to the United States to play with the NBA ... by delivering a registered letter to [Il Messaggero] ... between June 20, 1990 and July 20, 1990.

(c) At the end of January 1990 Shaw signed a five-year "Uniform Player Contract" with the Celtics. The contract contains standard clauses negotiated by the National Basketball Association ("NBA") franchise owners and the National Basketball Players Association (the "Players Association"). It adopts by cross-reference arbitration provisions contained in the NBA-Players Association Collective Bargaining Agreement. In the contract, the Celtics promise Shaw a $450,000 signing bonus and more than $1 million per year in compensation. In return, Shaw promises the Celtics, among other things, that he will cancel his second year with Il Messaggero. The contract says that:

> the Player [*i.e.*, Shaw] and Club [*i.e.*, the Celtics] acknowledge that Player is currently under contract with Il Messaggero Roma (the "Messaggero Contract") for the 1989-90 & 1990-91 playing seasons. The Player represents that in accordance with the terms of the Messaggero Contract, the Player has the right to rescind that contract prior to the 1990-91 season and the player hereby agrees to exercise such right of rescission in the manner and at the time called for by the Messaggero Contract.

(d) On June 6, 1990, Shaw told the Celtics that he had decided to play for Il Messaggero during the 1990-91 season and that he would not exercise his right of rescission.

II

The Legal Merits

Shaw makes two basic categories of argument in his effort to show that the district court lacked the legal power to enter its order. First, he says that the arbitration award was itself unlawful. Second, he says that regardless of the lawfulness of the award, the district court followed improper procedures. We shall address these arguments in turn and explain why we find each not persuasive.

A. The Arbitrator's Decision

Shaw says that the district court should not have enforced the arbitrator's award because that award was itself unlawful, for any of five separate reasons.

1. The termination promise. Shaw argues that the arbitrator could not reasonably find that he broke a contractual promise to the Celtics because, he says, the Celtics had previously agreed with the Players Association that contracts with individual players such as Shaw would not contain promises of the sort here at issue, namely, a promise to cancel a contract to play with a different team. Shaw says that this previous agreement between the Celtics and the Players Association renders his promise to terminate Il Messaggero "null and void." To support this argument, he points to Article I, section 2 of the Collective Bargaining Agreement, which Shaw and the Celtics, through cross-reference, made part of their individual agreement. Section 2 says, "Any amendment to a Uniform Player Contract [of the type Shaw and the Celtics used], other than those permitted by this [Collective Bargaining] Agreement, shall be null and void." The Agreement permits amendments (a) "in ... respect to the compensation ... to be paid the player," (b) "in respect to specialized compensation arrangements," (c) in respect to a "compensation payment schedule," and (d) in respect to "protect[ion]" of compensation in the event of contract termination. Shaw says that his promise to cancel the Il Messaggero agreement was an amendment to the Uniform Players Contract that does not concern compensation, specialized compensation, compensation schedules, or compensation protection; therefore, it is "null and void."

Shaw's argument, while logical, fails to show that the arbitrator's contrary finding is unlawful. The reasons it fails are fairly straightforward. First, the argument concerns the proper interpretation of a contract negotiated

pursuant to a collective bargaining agreement. Second, federal labor law gives arbitrators, not judges, the power to interpret such contracts. The Supreme Court, noting the strong federal policy favoring the voluntary settlement of labor disputes, has written that a labor arbitration award is valid so long as it "draws its essence" from the labor contract. *See United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 4 L. Ed. 2d 1424, 80 S. Ct. 1358 (1960). An award "draws its essence" from the contract so long as the "arbitrator is even arguably construing or applying the contract and acting within the scope of his authority." *United Paperworkers Int'l v. Misco*, 484 U.S. 29, 38, 98 L. Ed. 2d 286, 108 S. Ct. 364 (1987).

Third, one can find "plausible arguments" favoring the arbitrator's construction. Shaw's "rescission" promise defines the beginning of the compensation relationship. It also plausibly determines, at the very least, whether Shaw's compensation will begin at $1.1 million (and continue for three years) or whether it will begin at $1.2 million (and continue for only two years). More importantly, and also quite plausibly, Shaw's overall compensation might have been much different had he declined to promise to play for the Celtics in 1990-91, thereby forcing the Celtics, perhaps, to obtain the services of a replacement for that year. The NBA Commissioner, who reviews all player contracts, found that the term was related to "compensation," as did the arbitrator. We cannot say that their findings lack any "plausible" basis.

* * *

In sum, we find the arbitration award lawful; and, in doing so, it has not been necessary for us to consider the Celtics' additional argument that Shaw bears an especially heavy legal burden in this case because the Players Association does not support him. *Cf. Vaca v. Sipes*, 386 U.S. 171, 190-93, 17 L. Ed. 2d 842, 87 S. Ct. 903 (1967) (employee must show union decision not to bring grievance is arbitrary, discriminatory, or in bad faith).

B. The District Court Proceedings

The district court, as we have pointed out, issued a preliminary injunction requiring Shaw to rescind "forthwith" his contract with Il Messaggero and forbidding him to play basketball for any team other than the Celtics during the term of his Celtics contract. The court also "enforced" an arbitration award containing essentially the same terms. Shaw argues that both the preliminary injunction and the enforcement order are unlawful. Since the district court correctly upheld the award's validity, Shaw's only remaining arguments are that the district court lacked discretion to award preliminary injunctive relief and that it mismanaged the proceedings below. We discuss both points briefly.

1. The preliminary injunction. The disputed award in this case resulted from arbitration procedures contained in a collective bargaining agreement between a labor organization (the Players Association) and an employers' association (the NBA). Shaw bound himself to that collective bargaining agreement in his contract with the Celtics, the terms of which are themselves a product of collective bargaining between employees and employers. Well-established public policy embodied in statute, *see* 29 U.S.C. § 172(d), in Supreme Court decisions, and in numerous lower court opinions, strongly favors judicial action to "effectuate[] ... the means chosen by the parties for settlement of their differences under a collective bargaining agreement...." *American Mfg. Co.*, 363 U.S. at 566. That judicial action clearly may include a preliminary injunction enforcing an arbitration award, *see, e.g., New Orleans Steamship Ass'n v. General Longshore Workers Local 1418*, 626 F.2d 455, 466 (5th Cir. 1980), *aff'd sub nom. Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702, 73 L. Ed. 2d 327, 102 S. Ct. 2672 (1982); *San Francisco Elec. Contractors Ass'n v. International Bhd. of Elec. Workers No. 6*, 577 F.2d 529 (9th Cir.), *cert. denied*, 439 U.S. 966, 99 S. Ct. 455, 58 L. Ed. 2d 425 (1978), even if such a preliminary injunction gives the plaintiff all the relief it seeks, *see Selchow & Righter Co. v. Western Printing & Lithographing Co.*, 112 F.2d 430, 431 (7th Cir. 1940); 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948, at 447 & nn. 50-51 (1973) [hereinafter Wright & Miller]; *Developments in the Law — Injunctions*, 78 HARV. L. REV. 994, 1058 (1965) ("If all other requirements for preliminary relief are met, the fact that the plaintiff would get no additional relief if he prevailed on the merits should not deprive him of his remedy.").

The only legal question before us, therefore, is whether the district court acted outside its broad equitable powers when it issued the preliminary injunction. That is to say, did the court improperly answer the four questions judges in this Circuit must ask when deciding whether to issue a preliminary injunction. They are: (1) have the

Celtics shown a likelihood of success on the merits? (2) have they shown that failure to issue the injunction would cause the Celtics "irreparable harm?" (3) does the "balance of harms" favor Shaw or the Celtics? and (4) will granting the injunction harm the "public interest?" Our examination of the record has convinced us that the court acted well within the scope of its lawful powers. *See Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 842 (1st Cir. 1988) (preliminary injunctions are reviewed only for abuse of discretion).

To begin with, the Celtics have shown a clear likelihood of success on the merits. As we pointed out in section "A," the arbitration award is lawful, and courts have authority to enforce lawful arbitration awards. The Celtics also have demonstrated irreparable harm. Without speedy relief, they will likely lose the services of a star athlete next year, *see* Wright & Miller § 2948, at 439 & n.34 (1972) (collecting cases that have found irreparable harm "in the loss by an athletic team of the services of a star athlete"), and, unless they know fairly soon whether Shaw will, or will not play for them, they will find it difficult to plan intelligently for next season. Indeed, in his contract Shaw expressly represents and agrees that he has extraordinary and unique skill and ability as a basketball player, ... and that any breach by the Player of this contract will cause irreparable injury to the Club.

Further, the court could reasonably find that the "balance of harms" favors the Celtics. Of course, a preliminary injunction, if ultimately shown wrong on the merits, could cause Shaw harm. He might lose the chance to play in the country, and for the team, that he prefers. On the other hand, this harm is somewhat offset by the fact that ultimate success on the merits — *i.e.*, a finding that Shaw was not obligated to terminate Il Messaggero after all — would likely result in the following scenario: Shaw might still be able to sign with Il Messaggero and, if not, he would always have the Celtics contract of over $5 million to fall back upon. At the same time, the court's failure to issue the injunction, if the merits ultimately favored the Celtics, could cause them serious harm of the sort just mentioned (*i.e.*, significantly increased difficulty in planning their team for next season). Given the very small likelihood that Shaw would ultimately prevail on the merits, and the "comparative" harms at stake, the district court could properly decide that the overall "balance" favored the Celtics, not Shaw.

Finally, the court could properly find that issuing a preliminary injunction would not harm the public interest. Indeed, as we have pointed out, the public interest favors court action that "effectuate[s]" the parties' intent to resolve their disputes informally through arbitration.... Where the dispute involves a professional basketball player's obligation to play for a particular team, one could reasonably consider expeditious, informal and effective dispute-resolution methods to be essential, and, if so, the public interest favoring court action to "effectuate" those methods of dispute-resolution would seem at least as strong as it is in respect to work-related disputes typically arising under collective bargaining agreements. *See New England Patriots Football Club, Inc. v. University of Colorado*, 592 F.2d 1196, 1200 (1st Cir. 1979) (collecting cases in which professional sports players were enjoined from playing for rival teams). Shaw, while conceding that the public also has an interest in seeing that contracts between consenting adults are honored, points to a general policy disfavoring enforcement of personal service contracts. That latter policy, however, typically prevents a court from ordering an individual to perform a personal service, *see* H. MCCLINTOCH, MCCLINTOCH ON EQUITY § 63, at 164 (2d ed. 1948); it does not prevent a court from ordering an individual to rescind a contract for services and to refrain from performing a service for others.

Shaw makes an additional argument. He notes that courts will not provide equitable relief such as an injunction to a party with "unclean hands," and he argues that the Celtics' hands are not clean. To support this argument, he has submitted an affidavit saying, in effect, that he signed the contract in a weak moment. His trip to Italy had made him "homesick;" he was "depressed" by what he viewed as undeserved and "negative criticism" in the Italian press; he was not represented by an agent; the Celtics had been urging him to sign up; he read the contract only for about 20 minutes while he was driving around Rome with a Celtics official; and no one ever explained to him that if he did not sign and played with Il Messaggero for another year, he would become a "free agent," able to bargain thereafter with any American team, perhaps for an even greater salary than the Celtics were willing to pay him.

Other evidence in the record, however, which Shaw does not deny, shows that he is a college graduate; that he has played under contract with the Celtics before; that the contract is a standard form contract except for a few, fairly simple, rather clear, additions, ... that he had bargained with the Celtics for an offer that increased from $3.4

million (in December) to $5.4 million (less than one month later); that he looked over the contract before signing it; that he told the American consul in Rome (as he signed it) that he had read and understood it; and that he did not complain about the contract until he told the Celtics in June that he would not honor it.

Given this state of the record, the district court could easily, and properly, conclude that the Celtics' hands were not "unclean." The one case Shaw cites in support of his position, *Minnesota Muskies, Inc. v. Hudson*, 294 F. Supp. 979, 981 (M.D.N.C. 1969), is not on point. The player in *Muskies* had a contract with Team A that permitted Team A, not the player, to renew the contract for additional years. Team B lured the player away from Team A even though it knew that Team A intended to exercise its contractual right to keep the player. The court held that this contractual interference amounted to "unclean hands" and refused Team B's request for an injunction preventing the player from returning to Team A. Here, in contrast, Il Messaggero has no contractual right to retain Shaw; whether or not the contract is renewed or rescinded is entirely up to Shaw, not Il Messaggero. Under those circumstances, we cannot find anything improper, "unclean," or unfair about the Celtics' convincing Shaw (indeed, paying Shaw) to exercise his contractual right in their favor. *Cf.* RESTATEMENT (SECOND) OF TORTS § 768 (1979).

In sum, issuance of the preliminary injunction was legally proper.

For these reasons, the order of the district court is

AFFIRMED.

Notes and Questions

One of the reasons a court of equity can refuse an injunction is because on balance it may cause undue hardship to the defendant. If a player is unhappy with the assignment of his contract (being traded) since he has established personal and business ties to the present franchise city, should a court consider this factor? In any other industry the ability of one employer to force an employee to work for another is unheard of. What makes sports leagues different?

A court's reluctance to enforce a contract for personal services is based, in part, on its desire to avoid constant judicial supervision of the contract. Problems in determining whether the athlete's performance is in compliance with the demand to play and forcing him to perform against his will would continually arise. The right to player services that the contract creates is one only that the player can provide, and therefore, generally no specific compensating remedy is available.

The contract is the foundation on which the team's rights against the player rests. The intent of the team is to retain exclusive rights to athlete's services for the term of the contract. Generally, this is accomplished by using three types of clauses. First, the team receives the athlete's promise to play only for that team. Second, the team attempts to limit athletic and non-athletic activities the athlete can engage in. This clause is inserted to reduce the athlete's exposure to injury. Third, the team enunciates the remedies available to them in the event of a breach by the player. This clause usually states that the athlete's services are unique and, therefore, money damages are not available; and that the team is entitled to seek an injunction. The following clauses are examples of the type of language teams use in its contracts.

NFL Contract Paragraph 8 (1975):

> The Player hereby represents that he has special, exceptional and unique knowledge, skill and ability as a football player, the loss of which cannot be estimated with any certainty and cannot be fairly or adequately compensated by damages and therefore agrees that the Club shall have the right, in addition to any other rights which the Club may possess, to enjoin him by appropriate injunction proceedings against playing football or any other professional sport, without the consent of the Club, or engaging in activities related to football for any reason, firm, corporation, institution, or on his own behalf, and against any other breach of this contract.

When the NFL contract was rewritten in 1977 the covenant of exclusive service was rephrased and combined with another provision dealing with the player's outside activities. The new clause is as follows:

> **3. Other Activities:** Without prior written consent of Club, Player will not play football or engage in activities related to football otherwise than for Club or engage in any activity other than football which may involve a significant risk of personal injury. Player represents that he has special, exceptional and unique knowledge, skill, ability and experience as a football player, the loss of which cannot be estimated with any certainty and cannot be fairly or adequately compensated by damages. Player therefore agrees that Club will have the right, in addition to any other right which Club may possess, to enjoin Player by appropriate proceedings from playing football or engaging in football-related activities other than for Club or from engaging in activity other than football which may involve a significant risk of personal injury.

Courts will enforce either express or implied clauses limiting the athlete's rights if the clause satisfies the test of reasonableness. The test is applied by determining whether the limitations in the contract are of "reasonable duration."

Prior to seeking injunction relief, the team must satisfy two requirements. First, the team and athlete have a valid contract. Second, that the athlete possess unique skills. A valid contract, for example, would require an offer and acceptance, inclusion of essential terms, and satisfaction of the Statute of Frauds. The requirement that the athlete possess unique skill is losing its importance as courts assume a professional athlete possess the requisite unique skills. The need to show that the team's remedies are inadequate at law may still, however, require a showing of unique skill.

D. Effect of Unfairness on Power of Termination

Historically, equity courts were considered courts of conscience. Thus, a chancellor might, in his discretion, withhold relief based on considerations of fairness or morality. Gradually these restrictions evolved into rules, sometimes referred to as equitable maxims such as: "he who comes into equity must come with clean hands"; "he who seeks equity must do equity"; "equity aids the vigilant"; and "equity follows the law." One of the most troublesome of these rules dealt with mutuality. Over the years the requirement of mutuality has taken many different forms. Today most aspects of the doctrine are ignored but some remnants still remain.

AMERICAN LEAGUE BASEBALL CLUB OF CHICAGO v. CHASE
86 Misc. 441, 149 N.Y.S. 6 (Sup. Ct. 1914)

[Plaintiff Baseball Club of Chicago sought to enjoin Harold Chase, its star first baseman, from playing for any other team during the period of his contract. The Court had granted a temporary injunction, *pendente lite*, and now faced Chase's motion to dissolve the injunction.

Defendant Chase signed a standard form Player's Contract with the plaintiff Club on March 26, 1914. On June 15, 1914, Chase gave notice to the Club that he would not perform his part of the agreement and on June 20, 1914, signed a contract to play for the Buffalo team of the Federal League. The court's temporary injunction against Chase was granted five days later.

The court continually referred to the scheme of "organized baseball" under which Chase had been employed. This scheme consisted of the so-called National Agreement, a written agreement amount 40 major and minor leagues, the Rules of the National Commission, adopted to implement the National Agreement, and the standard form Player's contract which Chase had signed with plaintiff. (The Federal League in which Chase sought employment was the only League of importance which was not a party to the National Agreement.)

The National Agreement, for example, provided that "no nonreserve contract shall be entered into by any club operating under [this agreement]." To enforce this provision, a Rule of the National Commission stated that "a nonreserve clause in the contract of a major league player ... shall not be valid." Accordingly, the Player's Contract signed by Chase contained the following:

> The player agrees to perform for no other party during the period of this contract.... The player will, at the option of the club, enter into a contract for the succeeding season upon all the terms and conditions of this contract ... and the salary to be paid the player ... shall be the same ... unless it be increased or decreased by mutual agreement.

The Court first considered whether it could specifically enforce the negative covenant in Chase's contract. It noted the general rule that equity will not specifically enforce a personal service contract, but recognized the well-known exception "where services contracted for are of a special, unique, and extraordinary character, and a substitute for the employee cannot readily be obtained who will substantially answer the purpose of the contract." The Court found that the services of Chase, "generally regarded as the foremost first baseman in professional baseball," were sufficiently unique to give equity jurisdiction to enforce the negative covenant "providing the contract does not lack mutuality and is not part of an illegal scheme or combination."

The Court then examined whether the contract was a mutual one "furnish[ing] consideration for the negative covenant sought to be enforced." This part of the Court's opinion analyzed in detail the three instruments referred to above which constituted "the general agreement or plan regulating the employment and conduct of the defendant as a National Agreement player." Under the scheme, a team could terminate all its obligations under the Player's Contract with only 10 days written notice. On the other hand, the Player's Contract provided for an option year, the option exercisable by the team only. A team could require a player to stay with it indefinitely by continually insisting on contracts with option years available. The National Agreement provided further than the "right and title of a major league club to its players shall be absolute...." When a player refused to sign a contract, his only alternative was to seek another vocation.

Under such a scheme, there was an "absolute lack of mutuality," and equity would grant no injunctive or other relief. The Court stated the general rule that a negative covenant in a personal service contract would not be enforced where the party seeking the injunction could terminate or revoke the contract on notice. The contract was without mutuality since if the team did so terminate the contract, the player would be remediless, unable to acquire specific performance or damages in an action at law. The Court added, conversely, that the breach of the negative covenant by Chase would have been enjoined had there been no contractual provision for the Club's termination upon notice. This was sufficient to grant Chase's motion to dissolve the injunction.]

MINNESOTA MUSKIES, INC. v. HUDSON

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

Edwin M. STANLEY, Chief Judge

The plaintiffs seek by this action to enjoin the defendant, Louis C. Hudson, from playing professional basketball for any professional basketball team other than the plaintiff, Florida Professional Sports, Inc., for the term of an alleged contract he signed with the plaintiff, Minnesota Muskies, Inc., on May 3, 1967, and assigned to the plaintiff, Florida Professional Sports, Inc., on July 31, 1968. Jurisdiction is based on diversity of citizenship and the amount in controversy.

In the spring of 1966, Hudson was drafted by St. Louis in a player-draft held by the NBA, and on May 17, 1966, he signed an NBA Uniform Player Contract with St. Louis. The contract provided for the employment of Hudson as a basketball player for one year from October 1, 1966, with the following provision, known as a "reserve clause":

On or before September 1 next following the last playing season covered by this contract and renewals and extensions thereof, the Club may tender to the Player a contract for the next succeeding season by mailing the same to the Player at his address shown below, or if none is shown, then at his address last known to the Club. If the Player fails, neglects, or omits to sign and return such contract to the Club so that the Club receives it on or before October 1st next succeeding, then this contract shall be deemed renewed and extended for the period of one year, upon the same terms and conditions in all respects as are provided therein, except that the compensation payable to the Player shall be the sum provided in the contract tendered to the Player pursuant to the provisions hereof, which compensation shall in no event be less than 75% of the compensation payable to the Player for the last playing season covered by this contract and renewals and extensions thereof.

The Club's right to renew this contract, as herein provided, and the promise of the Player not to play otherwise than for the Club and its assignees, have been taken into consideration in determining the amount of compensation payable under paragraph 2 hereof.

The contract between Hudson and St. Louis also provided that St. Louis would pay Hudson a salary of $15,000.00 for the 1966-67 season, and contained the following provisions:

This contract is a guaranteed no-cut contract for the 1966-67 season and the compensation referred to above shall be payable to the Player in any event. In addition to the annual compensation referred to in this contract, the Club agrees and herewith does pay the Player the sum of $4,000.00 as and for a bonus.

Hudson played for St. Louis during the 1966-67 regular season, and during the NBA play-off games until St. Louis was eliminated from the play-off games on April 12, 1967.

The ABA began organizing in 1966, but its teams did not commence playing until the 1967-68 professional basketball season. The Muskies joined the ABA and received a franchise for the Minneapolis, Minnesota, area in January of 1967.

* * *

On May 3, 1967, Hudson signed an ABA Uniform Player Contract with the Muskies. The contract provided for the employment of Hudson as a professional basketball player for a period of three years from October 2, 1967. In a addendum to the contract, the Muskies agreed to pay Hudson for his services as follows:

October 2, 1967 to October 2, 1968 -	$37,500.00
October 2, 1968 to October 2, 1969 -	$42,500.00
October 2, 1969 to October 2, 1970 -	$47,500.00

The addendum to the contract also provided that Hudson was to be paid a bonus of $7,500.00 upon execution of the contract, which sum was paid to Hudson by the Muskies as provided.

The addendum to the contract between the Muskies and Hudson further provided as follows:

In the event legal proceedings be instituted to prevent and enjoin the Player from playing for the first year of this contract, and if the said legal proceeding be successful in that said Player be enjoined from playing for one year, then and in that event the Club will pay the Player the sum of $25,000.00 for the said year. The Player agrees to then play for the Club the next ensuing three years under the terms and conditions as set forth in Clause 1 of this Addendum. The Club shall choose, provide and pay for legal counsel for the defense of any such legal proceedings, save and except that Player reserves the right to choose his own counsel.

* * *

If at the end of three years (or four years if the Player is enjoined by law as referred to above) from and after October 2, 1967 the Club is nonoperative, is in receivership or bankruptcy,

then the injunction proceedings as provided for in paragraph 5 of the main contract shall not apply to the Player.

Under all other circumstances paragraphs 5 and 17 of the main contract remain in full force and effect.

The contract between Hudson and the Muskies also contains the following provision:

Injunctive Relief. The PLAYER hereby represents that he has special, exceptional and unique knowledge, skill and ability as a basketball player, the loss of which cannot be estimated with any certainty and cannot be fairly or adequately compensated by damages and therefore agrees that the CLUB shall have the right, in addition to any other rights that the CLUB may possess, to enjoin him by appropriate injunction proceedings against playing basketball, or engaging in activities related to basketball for any person, firm, corporation or institution, or injunction against any other breach of this contract.

As disclosed by the deposition testimony of the various individuals involved, the parties are in disagreement with respect to the details of the negotiations that led to the signing of the Hudson-Muskies contract. From the conflicting testimony, it is found that some time in March of 1967, at a time Hudson was still playing for St. Louis in playoff games, and while his contract with St. Louis was in full force and effect, Hudson was contacted by a representative of the Muskies for the purpose of determining whether he was interested in signing a professional basketball contract with the Muskies. After a series of telephone calls between Hudson and representatives of the Muskies organization, Hudson contacted his agent, Edward M. Cohen, an attorney in Minneapolis, and advised Cohen of these conversations with representatives of the Muskies and asked him to see what the Muskies had to offer. Hudson also advised Cohen that he would be a free agent after the NBA play-offs, and that he was Hudson's representative for the purpose of negotiating contracts for future performances by Hudson as a basketball player. Thereafter, Cohen and Holman had a series of conferences. On April 7 or 8, 1967, Hudson went to Minneapolis, and took with him a copy of his contract with St. Louis and showed it to Cohen. Cohen immediately called to Hudson's attention the "reserve clause" in the contract, and questioned whether he would be a free agent at the end of the current basketball season. Nevertheless, it was decided that Cohen would continue his negotiations with the Muskies and keep Hudson advised as to the progress of the negotiations. Pursuant to instructions, Cohen continued his negotiations with the Muskies, during which time various offers and counter-offers were made. During the latter part of April of 1967, at Holman's request, Cohen called Hudson and asked him to come back to Minneapolis for further discussion, and advised him that the Muskies would pay his travel expense. As a consequence, Hudson was in Minneapolis on May 1, 2 and 3, 1967, during which time a series of meetings were held in Cohen's office with respect to a contract between Hudson and the Muskies. Cohen, Hudson, Barnett, Holman and Shields each attended some of the meetings, but all were not present at every meeting. The meetings culminated in Hudson and the Muskies signing the aforementioned contract on May 3, 1967.

All responsible officials of the Muskies, including Holman and Shields, were fully aware of the contract Hudson had with St. Louis before the contract between Hudson and the Muskies was prepared and signed, and had every reason to believe St. Louis would either exercise its option under the "reserve clause" of its existing contract or negotiate a new contract with Hudson. While some doubt was expressed as the validity of the "reserve clause" in the St. Louis contract, officials of the Muskies recognized that Hudson might very well have additional contractual responsibilities to St. Louis for the 1967-68, and possibly subsequent, basketball seasons. Holman did not recognize any responsibility for conferring with St. Louis before executing the contract with Hudson, feeling that it was Hudson's duty to advise St. Louis as to the negotiations and the execution of the new contract.

Both parties to the Hudson-Muskies contract, as well as their attorneys, were uncertain as to the legal effect of the "reserve clause" in the St. Louis contract, and this uncertainty prompted Hudson to request that Paragraph 6 of the addendum be inserted in his contract with the Muskies. Further, it was Cohen's feeling that in the event St. Louis was successful in restraining Hudson from playing under his contract with the Muskies, Hudson was entitled to some financial protection.

* * *

On May 25, 1967, one week after the Hudson-Muskies contract was publicly announced, St. Louis filed suit against the Muskies, all the other members of the ABA, and George Mikan, Commissioner of the ABA, in the United States District Court for the District of Minnesota, charging a conspiracy among the defendants, with respect to the Hudson-Muskies contract, to deliberately, maliciously, wrongfully and unjustifiably interfere with the contractual relationship which existed between St. Louis and Hudson, and seeking actual damages in the sum of $2,000,000.00 and punitive damages in the sum of $1,000,000.00

On May 25, 1967, St. Louis also filed suit against Hudson in the United States District Court for the District of Minnesota, seeking an injunction against Hudson from playing basketball for any other person, firm or corporation, during the 1967-68 and the 1968-69 professional basketball seasons.

* * *

Sometime in June or July of 1967, Hudson advised Cohen of the signing of the new St. Louis contract and instructed Cohen to return the Muskies the $7,500.00 bonus the Muskies had paid him at the time he signed the Muskies contract. After receiving the instructions, Cohen called Holman and offered to return $5,000.00 of the $7,500.00 bonus, stating that this was all the money Hudson had at that time and that the balance would be paid "very shortly." Holman refused to accept the tender of $5,000.00, and also stated that he would refuse to take the full $7,500.00 should it be tendered.

On October 13, 1967, Holman wrote a letter to Hudson, in care of his attorney, Cohen, in which he stated that the Muskies were agreeable to Hudson playing out a one-year option with St. Louis, but that he was expected to perform his contract with the Muskies at the end of the one-year option period, which was understood to be October 2, 1968. Hudson was requested to respond to the letter and acknowledge that he intended to honor his contract with the Muskies. The letter was received by Hudson, but he has never responded to same. Hudson was of the opinion that he had advised St. Louis of the receipt of the letter, but Kerner has no recollection of the matter. On May 3, 1968, in response to an inquiry, Cohen advised the Muskies that Hudson's position was that he did not have any contractual obligation to perform for the Muskies.

On October 3, 1968, counsel for Hudson tendered to counsel for plaintiffs a certified check in the amount of $7,500.00, as reimbursement for the bonus paid Hudson by the Muskies. The tender was refused by counsel for the plaintiffs. Counsel for Hudson have informed counsel for the plaintiffs by letter that the tender remains open for acceptance by the plaintiffs.

Hudson is presently playing with Atlanta; and has testified that he wants to continue to play for Atlanta. He has been Atlanta's high scorer in several games this season.

* * *

Hudson is highly skilled and talented, and possesses special, exceptional, and unique knowledge, skill and ability as a basketball player.

Discussion

The sole question presented for decision is whether the plaintiffs are entitled to an injunction restraining Hudson from playing professional basketball with any team or club other than Miami for the term of the contract he signed with the Muskies on May 3, 1967, and assigned by the Muskies to Miami on July 31, 1968. Jurisdiction is not questioned, and unique knowledge, skill and ability as a basketball player has been conceded.

It is generally held that where a person agrees to render personal services to another, which require special and unique knowledge, skill and ability, so that in default the same services cannot easily be obtained from others, a court of equity is empowered to negatively enforce performance of the agreement by enjoining its breach. While acknowledging this principle of law, the defendants correctly assert that equitable relief should be denied to a suitor who comes into court with unclean hands.

One of the most fundamental principles of equity jurisprudence is the maxim that "he who comes into equity must come with clean hands." Equity demands of suitors fair dealings with reference to matters concerning which they seek relief. This maxim is stated in 2 POMEROY, EQUITY JURISPRUDENCE §§ 397 and 398 (5th ed. 1941), as

follows:

> [W]henever a party, who, as *actor*, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine*; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.
>
> The principle involved in this maxim is merely the expression of one of the elementary and fundamental conceptions of equity jurisprudence.... Whatever may be the strictly accurate theory concerning the nature of equitable interference, the principle was established from the earliest days, that while the court of chancery could interpose and compel a defendant to comply with the dictates of conscience and good faith with regard to matters outside of the strict rules of the law, or even in contradiction to those rules, while it could act *upon the conscience* of a defendant and force him to do right and justice, it would never thus interfere on behalf of a plaintiff whose own conduct in connection with the same matter or transaction had been unconscientious or unjust, or marked by a want of good faith, or had violated any of the principles of equity and righteous dealing which it is the purpose of the jurisdiction to sustain.
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Measured by these fundamental principles of equity jurisprudence, the conclusion is inescapable that the Muskies, in its dealings with Hudson soiled its hands to such an extent that the negative injunctive relief sought should be denied. This is not to say that Hudson was an innocent bystander, or that he was an unwilling participant in his dealings with the Muskies. On the contrary, viewed strictly from the standpoint of business morality, his position in this litigation, like that of the Muskies, is not an enviable one.

On May 17, 1966, Hudson an adult with four years of university education, freely and voluntarily executed a contract to play professional basketball with St. Louis for one year with the provision that St. Louis might renew the contract for successive basketball seasons under certain prescribed conditions. A sizeable bonus for executing the contract was paid by St. Louis and received by Hudson.

Beyond question, both Hudson and St. Louis anticipated that the contract would be renewed for subsequent years. A short time before his initial contact with the Muskies, Hudson had borrowed $4,000.00 from St. Louis with the specific provision that it was to be repaid by deductions from his 1967-68 contract with St. Louis. Additionally, by his leading his team in scoring, and his being named Rookie of the Year in the NBA, Hudson's skill and ability as a professional basketball player had been well established during his first year with St. Louis.

While not a controlling factor, the Court is convinced that the Muskies, admittedly desirous of acquiring a winning basketball team as quickly as possible, either contacted Hudson, or caused him to be contacted by someone on its behalf, while he was still actively engaged in play-off games with St. Louis. Without this unwarranted interference on the part of the Muskies, there is every likelihood that Hudson would have fulfilled his contractual and moral obligations with St. Louis. The fact that Hudson advised Cohen, who in turn advised Holman, that Hudson would be a free agent, effective with the termination of the NBA playoffs, is of no consequence. Even if this information had been conveyed in good faith, everyone involved in the negotiations had seen a copy of Hudson's contract with St. Louis, and had full knowledge of its contents, long before the Hudson-Muskies contract was drafted and signed.

Basically, the plaintiffs argue that Hudson's original contract with St. Louis, because it provides for perpetual service, and is lacking in the necessary qualities of definiteness, certainty, and mutuality, is void. The contract being void and unenforceable beyond the 1966-67 season, the plaintiffs contend that their contract with Hudson is in all respects valid, and unenforceable beyond the 1966-67 season, the plaintiffs contend that their contract with Hudson is in all respects valid, and that the Hudson-St. Louis contract executed on June 5, 1967, with knowledge of the existence of the Hudson-Muskies contracted on May 3, 1967, is likewise void. Under these circumstances, plaintiffs assert that they are entitled to have their contract enforced in a court of equity. There is no merit to this argument. Even if the "reserve clause" in the St. Louis contract is of doubtful validity, the fact remains that the Muskies, knowing that Hudson was under a moral, if not legal, obligation to furnish his services

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.

St. Louis furnished a forum for Hudson and the Muskies to test the legality of the "reserve clause" in its contract by the commencement of actions against the Muskies and other members of the ABA, and Hudson, in the United States District Court for the District of Minnesota one week after the Hudson-Muskies contract was publicly announced. Hudson chose not to defend the action, but instead signed another contract with St. Louis. The Muskies chose to let Hudson return to St. Louis for the 1967-68 season rather than litigate the matter. The Muskies explained its inaction by stating that it recognized that Hudson was perhaps obligated to play for St. Louis for one more year. Notwithstanding its recognition of this obligation, the Muskies agreed to pay Hudson to sit out the 1967-68 season even if the Court should decree that the St. Louis contract was enforceable. This alone is sufficient for a court of equity to refuse relief.

Finally, plaintiffs insist that they are entitled to relief, notwithstanding their unfair and unjust conduct, because St. Louis was also guilty of inequitable and unlawful conduct in signing Hudson to a second contract on June 5, 1967, when it knew that Hudson had signed a valid contract with the Muskies on May 3, 1967. The argument is also lacking in merit. The doors of a court of equity are closed to one tainted with unfairness or injustice relative to the matter in which he seeks relief "however improper may have been the behavior of the defendant." It is irrelevant that the conduct of St. Louis may have been more reprehensible than that of the Muskies, since it is the devious conduct of the Muskies that created the problems presented in this litigation. Consequently, a determination of the validity of the "reserve clause" in the St. Louis contract is immaterial to a resolution of this controversy. No effort was made to avoid the contract in an honest way, but instead the Muskies consciously attempted to nullify and ignore it to the manifest injury of St. Louis. In so doing, it foreclosed its right to seek the aid of a court of equity.

The injunctive relief sought by the plaintiffs must be denied, not because the Hudson-St. Louis contract was of "any legal force and effect" or is one that "the courts will enforce," and not because the merits of the controversy are necessarily with St. Louis, "but solely because the actions and conduct of the [Muskies] in procuring the contract, upon which [its] right to relief is and must be founded, do not square with one of the vital and fundamental principles of equity which touches to the quick the dignity of a court of conscience and controls its decision regardless of all other considerations."

There can be no question that Miami acquired no greater rights to the services of Hudson than those acquired by the Muskies in its contract of May 3, 1967, and that Atlanta's rights to his services are not superior to those of St. Louis.

Conclusions of Law

1. The Court has jurisdiction over the parties and the subject matter.
2. The plaintiffs are not entitled to the negative injunctive relief sought.

Accordingly, a judgment will be entered dismissing the complaint with prejudice.

WASHINGTON CAPITOLS BASKETBALL CLUB, INC. v. BARRY

419 F.2d 472 (9th Cir. 1969)

TRASK, Circuit Judge

This is an appeal from an order of The United States District Court for the Northern District of California which granted a preliminary injunction to the plaintiff, Washington Capitols Basketball Club, Inc., (1) enjoining the defendant, Richard F. (Rick) Barry III from playing basketball for any professional team other than the Washington "Caps" and (2) enjoining the San Francisco Warriors and Lemat Corporation from attempting to enforce a five year playing contract signed on August 26, 1969 between Rick Barry and the Warriors.

* * *

The basic controversy is whether Rick Barry will play professional basketball pending final determination of this action as a member of the Washington "Caps" of the American Basketball Association or the San Francisco Warriors of the National Basketball Association. The District Court of Sept. 26, 1969, on the basis of the facts and the law then presented, ruled in favor of the Washington "Caps". 304 F. Supp. 1193. We affirm.

All parties agree that the playing ability of Rick Barry on a basketball court is such that he is a legally "unique" party a player's contract. After an outstanding collegiate career at The University of Miami, he signed and played with the Warriors during the 1965-66 basketball season and was named the league's "Rookie of the Year." On August 29, 1966, he signed a second contract with the Warriors for one year beginning October 1, 1966 and executed a National Basketball Association Uniform Player Contract containing a "reserve" or "option clause". Such a clause gives the club the right to contract with the player for an additional year. This option was exercised on or about June 22, 1967 by the Warriors for the playing year 1967-68.

In the meantime, on June 19, 1967, Barry signed an option agreement with Pat Boone and Kenneth Davidson giving the optionees or their assigns the right on or before October 2, 1967, to contract with him for three years beginning 1967-68, or if he were to be enjoined, to begin at a later date and in the meantime reserved the right to play with the Warriors. On October 31, 1967, Barry signed the contract in question here with Oakland Basketball, Inc. a corporation, to play for Oakland for three years commencing on October 2, 1968.

This contract likewise contained a reserve clause for an additional year. In addition to his salary, Barry also received an annual bonus plus a 15% stock interest in the corporation which owned the Oakland Franchise.

This dispute resulting from Barry's action in signing the allegedly conflicting contracts caused the Warriors to file suit against him to determine their contract rights under their 1966 contract. They asserted claims for both damages and equitable relief by way of injunction. The Court of Appeal of California determined that the Warriors were entitled to enjoin Barry from playing for anyone else until September 30, 1968. The Court further held that the Warriors were not entitled to injunctive relief beyond that date and that they could not recover damages from Barry in addition to the equitable relief granted. *Lemat Corporation v. Barry*, Cal. App., 80 Cal. Rptr. 240 (1969). That decision settled all issues as between the Warriors and Barry arising out of the August 29, 1966 contract. Neither the Oakland Club nor its franchise owners were parties to that litigation. Barry did not play during the 1967-1968 season. However, he played for Oakland during the 1968-1969 season pursuant to the terms of the contract with Oakland signed on October 31, 1967. No question was apparently raised by the Warriors against either Barry or the Oaks as to the legality of this performance under the contract.

On August 28, 1969, the Oaks, having lost substantial sums of money during their two years' existence, entered into an agreement of sale with the Washington Capitols Basketball Club, Inc. in which Washington contracted to purchase all property and assets of the Oaks including the contracts of basketball players under contract to the Oaks. A specific amount of the purchase prices was allocated to the contract between Oakland and Barry which was being assigned. Subsequently a Bill of Sale was executed by Oakland transferring the assets to Washington.

Although his Oakland contract would remain in effect until October 1, 1971, upon the day following the Oakland-Washington purchase agreement, Barry entered into a new contract to play professional basketball with

the San Francisco Warriors for a term of five years beginning October 2, 1969 and ending October 1, 1974.

Promptly upon learning of Barry's contract with the Warriors, the plaintiff, Washington Capitols Basketball Club, Inc., brought this action against Barry, Lemat Corporation and the Warriors. The action sought to enjoin Barry from playing basketball with any club other than the Caps during the remainder of the term of the contract which Washington had acquired. It further sought to enjoin the Warriors from asserting any contract with Barry or interfering with the performance of the Caps contract. It also sought damages both compensatory and punitive. A temporary restraining order was issued on September 15, 1969, the date the action was filed.

A hearing was held on September 23, 1969 on the application for a preliminary injunction. The Honorable Gerald S. Levin issued an option and judgment on September 26, 1969, granting the injunction against both Barry and the Warriors pending final determination. Barry and the Warriors appeal from that order.

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The court discussed the factors which should be considered in issuing a preliminary injunction and then decided that the issuance of an injunction in this case to maintain the *status quo* was proper.

Alleged Illegality

The legality of the Oakland contract which is under attack by the Warriors must be determined by the substantive law of California, the place of making the contract.

As no illegality of the contract is disclosed by plaintiff's complaint or the contract itself, illegality is an affirmative defense and defendants-appellants have the burden of pleading and proof.

The District Court did find that "[d]efendants have not shown that the contract between Oaks and Barry, which was assigned by Oaks to Washington, is itself unconscionable, unenforceable or otherwise void." 304 F. Supp. at 1197. We agree with this finding. Appellants have not cited to us, nor have we found, any constitutional provision or civil or criminal statue which this contract violates. Nor do we think the contract is contrary to public policy. Appellants rely upon the RESTATEMENT OF CONTRACTS, § 576 (1932), which reads: "A bargain, the making or performance of which involves breach of a contract of a third person is illegal." The comment to this Restatement section, however, reveals that the section is inapplicable to the facts of this case. The comment states: "a. Since breach of contract is a legal wrong, a bargain *that requires for its performance* breach of contract with another is opposed to public policy." (Emphasis supplied.) Barry's performance under his Oakland contract to begin October 2, 1968, did not require breach of his Warrior contract which expired September 30, 1968. The Warrior contract, entered into on August 29, 1966, had a duration of one year beginning October 1, 1966. On or before September 1, 1967, the Warriors had a right to tender to Barry a contract for the 1967-1968 season. They exercised this right and, as Barry failed to sign and return the proffered contract by October 1, the contract was "deemed renewed and extended for the period of one year." Barry was not obligated, by the original contract, to refrain from playing for any other team until the contract terminated on September 30, 1968. This interpretation of the contract has been upheld in *Lemat Corp. v. Barry, supra*, 80 Cal. Rptr. 240 (1969).

Barry signed his contract with Oakland while still under contract to the Warriors, who claim that his act was a breach of Barry's contract to them. The Oakland contract, however, was a contract for future services "for a term of three (3) years commencing on October 2, 1968, or such earlier date as [Barry's] services as a basketball player are not enjoined." Performance and consideration therefore were to begin only upon the termination of the Warrior contract.

Neither Barry's signing nor Oakland's inducement of him to sign was an illegal act rendering the Oakland contract illegal. Associate Justice HUFSTEDLER of the California Court of Appeal, now Judge HUFSTEDLER of this Court, stated in *Diodes, Inc. v. Frazen*, 260 Cal. App. 2d 244, 67 Cal. Rptr. 19, 25-26 (1968):

> Even though the relationship between an employer and his employee is an advantageous one, no actionable wrong is committed by a competitor who solicits his competitor's employees or who hires away one or more of his competitor's employees who are not under contract, so long as the inducement to leave is not accompanied by unlawful action.

In each of these cases, the hired-away employee was not under contract to his employer. Barry was under contract