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PROFESSIONAL ATHLETIC CONTRACTS AND THE INJUNCTIVE DILEMMA

INTRODUCTION

Professional sports[1] have always been considered as big business. Originally, they were deemed local in nature,[2] but presently they are defined as interstate commerce.[3] Courts from all jurisdictions have recognized that professional sports are businesses of such a unique and peculiar nature[4] that liberties and privileges are granted to their owners which legally are dubious, if not invalid.[5] The foundation of the professional sports business is built upon a standard player contract[6] which is signed by the respective club and the athlete. This foundation is rarely challenged due to the monopolistic control[7] wielded by the respective sport. But the athlete who breaches his contract and attempts to play for another club presents a major threat to the very existence of this foundation.[8] The breaching athlete not only is in derogation of the standard player contract, but from the sport entrepreneur's vantage point, he is an anarchist, capable of disrupting the gold mine which the owner enjoys. Therefore, the owners do not merely desire money damages for the breach, but they seek remedies which will prevent such acts of insurrection. Hence, the clubs' chief weapon in their arsenal of remedies[9] against the breach-

1. The term "professional sports" will be used to denote team sports. Any reference made to an individual sport will be specifically noted.

2. Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Professional Baseball Clubs, 259 U.S. 200, 208 (1922).

3. *See, e.g.*, Flood v. Kuhn, 407 U.S. 258 (1971); Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204 (1970); Radovich v. Nat'l Football League, 352 U.S. 445 (1957); Toolson v. New York Yankees, Inc., 101 F. Supp. 93 (S.D. Cal. 1951), *aff'd*, 200 F.2d 198 (9th Cir. 1952).

4. Nassau Sports v. Peters, 352 F. Supp. 870, 879 (E.D.N.Y. 1972).

5. Note, *Baseball and the Law—Yesterday and Today*, 32 VIR. L. REV. 1164, 1168 (1946) [hereinafter cited as *Baseball*].

6. The standard player contract is used by every team. The league rules provide that every team must use this and no other contract. It is a method of control and uniformity.

7. *Baseball*, *supra* note 5, at 1173-75.

8. Although a player might breach the contract at any time during its term, the breach occurs during the option year in most situations. Hereinafter, references to breaches will pertain to option year breaches unless otherwise specified.

9. The *National Basketball Association Uniform Player Contract*, clause 9, is representative for all sports of the vast number of remedies a club has:

> 9. The Player represents and agrees that he has extraordinary and unique skill and ability as a basketball player, that the services to be rendered by him hereunder cannot be placed or the loss thereof adequately compensated for in money damages, and that any breach by the Player of this contract will cause irreparable injury to the Club and to its assignees. Therefore, it is agreed that in the event

ing athlete is an injunction obtained to enforce the negative covenant[10] in the contract.

The purpose of this article will be to examine the jurisdictional requirements for securing such relief, the discretionary considerations confronting a court after jurisdiction is established, and the question of whether or not the present basis for granting such relief comply with the equitable philosophy it was founded upon. It is the contention of this author that such relief neither complies with the equitable policies it was founded upon, nor does it adequately protect the legal rights of the parties. Therefore, in most instances, injunctive relief should not be granted.

The Basis of Equity Jurisdiction

Historically, courts of equity have refused to order specific performance of personal service contracts, either directly[11] or indirectly, by injunction.[12] Notwithstanding their refusal to order specific performance of a breached affirmative promise, in the landmark case of *Lumley v. Wagner*,[13] a court of equity enjoined the breach of a negative promise.

In *Lumley*, the defendant promised to sing at the plaintiff's theatre for a specified period of time and not to perform for anyone else during that term. When the uniquely talented defendant attempted to sing at another theatre, the plaintiff sought injunctive relief in the Chancery Court. Lord St. Leon-

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it is alleged by the Club that the Player is playing, attempting or threatening to play, or negotiating for the purpose of playing, during the term of this contract, for any other person, firm, corporation or organization, the Club and its assignees (in addition to any other remedies that may be available to them judicially or by way of arbitration) shall have the right to obtain from any court or arbitrator having jurisdiction, such equitable relief as may be appropriate, including a decree enjoining the player from any further such breach of this contract, and enjoining the Player from playing basketball for any other person, firm, corporation or organization during the term of this contract. In any suit, action or arbitration proceeding brought to obtain such relief, the Player does hereby waive his right, if any, to trial by jury, and does hereby waive his right, if any, to interpose any counterclaim or set-off for any cause whatever.

10. The *Uniform Players Contract—The American League of Professional Baseball Clubs*, clause 5(a) provides:

Service

5.(a) The Player agrees that, while under contract, and prior to expiration of the Club's right to renew this contract, he will not play baseball otherwise than for the Club, except that the Player may participate in post-season games, under the conditions prescribed in the Major League Rules. Major League Rule 18(b) is set forth herein.

11. *See, e.g.*, DeRivafinoli v. Corsetti, 4 Paige 264 (N.Y. 1833); Stocker v. Brocklebank, 3 McN.&G. 250 (Eng. 1851); Ball v. Coggs, Brown's Park, Case 140 (Eng. 1710).

12. *See, e.g.*, Marble Co. v. Ripley, 77 U.S. (10 Wall.) 339 (1870); Ulrey v. Keith, 237 Ill. 284 (1908); Welty v. Jacobs, 171 Ill. 624 (1898).

13. 1 De G. M. & G. 604 (Eng. 1852).

ards enjoined the defendant from engaging in the conflicting employment, but he refused to order her to perform for the plaintiff.

Prior to this decision, the breach of a negative covenant would be enjoined only if the injunctive relief provided complete performance of the contract.[14] But the court in *Lumley* liberalized the use of injunctive relief by granting an injunction to remedy the breach of a negative covenant although there also existed a breached positive covenant which could not be remedied by the court.[15] In effect, *Lumley* expanded equity jurisdiction in England, and *McCaull v. Braham*[16] had the same impact in America.[17]

In 1890, this concept of expanded jurisdiction was applied, for the first time, in cases involving professional athletes.[18] The extension of *Lumley* in these cases was logical, since

> [b]etween an actor of great histrionic ability and a professional baseball player, of peculiar fitness and skill to fill a particular position, no substantial distinction in applying the Rule laid down . . . can be made. Each is sought for his particular and peculiar fitness, each performs in public for compensation, and each possesses for the manager a means of attracting an audience.[19]

However, the initial problem confronting the court when a sports club seeks injunctive relief against its breaching athlete is whether the facts satisfy the jurisdictional requirements announced by *Lumley*.

The Bastardization of *Lumley*

The elements set forth by the *Lumley* court were premised upon the philosophy that an injunction is an extraordinary form of relief which should be granted only in exceptional circumstances. These elements are:

1) Unique services,

14. *See, e.g.*, Hamblin v. Dinneford, 2 Edw. Ch. 529 (N.Y. 1935); Burton v. Marshall, 4 Gill 487 (Md. 1846); Kimberly v. Jennings, 6 Sim. 340 (Eng. 1836); Kemble v. Kean, 6 Sim. 333 (Eng. 1829); Clarke v. Price, 2 Wilson's Ch. 157 (Eng. 1819); Ashley, *Specific Performanec by Injunction*, 6 Colum. L. Rev. 82 (1906).

15. 1 De G. M. & G. 604 (Eng. 1852).

16. 16 F. 37 (C.C.S.D.N.Y. 1883).

17. Although *Lumley* became the law, it was not universally accepted. Vicious criticism against such expansion was espoused by legal scholars, *see, e.g.*, Ashley, *supra* note 14; Stevens, *Involuntary Servitude by Injunction*, 6 Cornell L.Q. 235 (1921). and by some courts. *see, e.g.*, Harrisburg Base-Ball Club v. Athletic Ass'n, 8 Pa. Co. Ct. 337 (1890).

18. *See, e.g.*, Metropolitan Exhibition Co. v. Ewing, 42 F. 198 (C.C.N.Y. 1890); Metropolitan Exhibition Co. v. Ward, 24 Abb. N. Cas. 393, 9 N.Y.S. 779 (Sup. Ct. 1890); Philadelphia Ball Club v. Hallman, 8 Pa. Co. Ct. 57 (Ct. of Common Pleas 1890).

19. Metropolitan Exhibition Co. v. Ward, 24 Abb. N. Cas. 393, 410, 9 N.Y.S. 779, 780 (Sup. Ct. 1890).

2) An inadequate remedy at law,
3) A valid personal service contract, and
4) A negative covenant within the contract.

The valid personal service contract and negative covenant elements will not be discussed, inasmuch as both of these requirements no longer present jurisdictional problems, since the club and the athlete sign a standard player contract which satisfies these elements. The uniqueness and adequacy elements will be analyzed to illustrate the initial standards that had to be fulfilled before jurisdiction was established, and the deterioration of them by the courts.

Uniqueness

> A contract to render personal service exclusively for one employer will not be indirectly enforced by injunction against serving another person if, . . . d) the service is not unique or extraordinary in character.[20]

The rationale behind the uniqueness requirement is that damages at law will be adequate if the player possesses merely average skills, but inadequate if the player is unique. When an athlete is considered unique, there will be neither an available market to purchase a player of equivalent talent, nor ascertainable damages.[21] The initial sports cases manifested the principle that injunctive relief was an extraordinary remedy. These courts applied to uniqueness a dictionary meaning of "one and only" or "different from all others,"[22] so that only where it was "impossible to replace the player,"[23] would the court declare that uniqueness was present.[24]

The harsh test of impossibility of replacement was modified in 1902 by the *Philadelphia Baseball Club v. Lajoie*[25] decision. Napolean Lajoie, a second baseman playing in the National League, "jumped" to the newly formed American League when offered more money for his services. The trial court denied the injunctive relief sought by the club because it failed to show that it would be "impossible to replace the player . . . ."[26] On

20. RESTATEMENT OF CONTRACTS § 380(2) (1932).
21. Scheffler, *Injunctions in Professional Athletes' Contracts—an Overused Remedy*, 43 CONN. B.J. 538, 542 (1969); J. POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS 76, § 24 (3d ed. 1926).
22. WEBSTER'S NEW WORLD DICTIONARY (college ed. 1968).
23. Philadelphia Ball Club v. Lajoie, 202 Pa. 210, 215, 51 A. 973 (1902).
24. *See* Allegheny Baseball Club v. Bennett, 14 F. 257 (W.D. Pa. 1882) (another player could be obtained at a higher price to replace the breaching athlete); Columbus Baseball Club v. Reiley, 11 Ohio Dec. 272 (1891) (athlete held not unique because the court feared that to hold otherwise would result in all athletes being deemed unique).
25. 202 Pa. 210, 51 A. 973 (1902).
26. *Id.* at 215, 51 A. at 973.

appeal, this decision was reversed, with the court stating that to deny relief unless there was a showing that it would be impossible to replace Lajoie "has taken extreme ground."[27] Judge Potter, speaking for the court, set forth Pomeroy's[28] test as the applicable standard by which uniqueness should be measured: where "the same service could not easily be obtained from others,"[29] the service is declared unique. In applying this test, Lajoie was said to be an

> expert baseball player in any position; . . . [he had] great reputation as a second baseman; . . . [and] his place would be hard to fill with as good a player; . . . and [his loss] would probably make a difference in the size of the audiences attending the game.[30]

Thus, although Lajoie was not "the sun in the baseball firmament, . . . he is certainly a bright particular star."[31]

Two cases immediately followed which applied the *Lajoie* test, but injunctive relief was denied.[32]

According to the test propounded by the court in *Lajoie*, a player's uniqueness is to be tested by how easily a replacement can be obtained. But this test is premised upon the theory that only a player possessing special skill, knowledge or ability is irreplaceable. Therefore, it is only the combination of replacement and the quantum of special skill that forms the *Lajoie* rule.

While the *Lajoie* test eliminated the impossibility of replacement test, it permitted subsequent courts great latitude for interpretation and application. What appears to be the result of this grant of interpretive flexibility is that subsequent courts, in attempting to apply this vague test and formulate some logical reasoning and common standards, have emasculated the *Lajoie* test into a presumption that any athlete who has signed a professional standard player contract is unique.[33]

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27. *Id.* at 216, 51 A. at 973.
28. J. POMEROY, SPECIFIC PERFORMANCE OF CONTRACTS 76 (3d ed. 1926).
29. 202 Pa. 210, 216, 51 A. 973.
30. *Id.* at 217, 51 A. at 974.
31. *Id.*
32. In the first case, Brooklyn Baseball Club v. McGuire, 116 F. 782 (E.D. Pa. 1902), the court held that
> the evidence adduced is by no means conclusive upon the question whether the services which the defendant contracted to render were so unique and peculiar that they could not be performed, and substantially as well, by others engaged in professional baseball playing, who might easily be obtained to take his place. *Id.* at 783.

The second case was American Baseball and Athletic Exhibition Co. v. Harper, 54 Cent. L.J. 449 (Cir. Ct. of St. Louis, May, 1902), where the court found that a player of limited experience but with outstanding potential could be replaced. It was reasoned that this evidence "did not tend to show that Harper's services are of a unique character, or that he has special or peculiar knowledge, skill or ability." *Id.* at 450.
33. Washington Capitals Basketball Club, Inc. v. Barry, 304 F. Supp.

The development of this presumption through the varied interpretations and applications of *Lajoie* is clearly illustrated by the cases of *Central New York Basketball, Inc. v. Barnett*,[34] *Dallas Cowboys Football Club, Inc. v. Harris*,[35] *Winnipeg Rugby Football Club v. Freeman*,[36] and *Long Island American Ass'n Football Club v. Manrodt*.[37]

In *Barnett*, the court had to determine whether an above average first year basketball player was unique. The Syracuse Nationals Basketball Club had the playing rights to Dick Barnett for the 1961-62 season by virtue of the option clause in his 1960-61 contract. Barnett, disregarding the option clause, signed a contract to play for the newly formed Cleveland Basketball Club. The court found Barnett to be unique, even though he was not selected to participate in the East-West All-Star Game, or chosen as a member of the Basketball Writers All N.B.A. Team in 1961, and notwithstanding the fact that he had only been a professional for one year. The court reasoned that:

> [W]hether 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 to the plaintiff.[38]

In applying the *Lajoie* test, the court concluded that "such players, . . . are not easily replaceable."[39] Although it appears that the *Barnett* court properly considered both aspects of the *Lajoie* test, it is submitted that the quantum of skill requirement was inadequately satisfied.

The court in *Harris* retreated from the *Lajoie* test a step farther when presented with the issue of whether an average player is unique. The court held that the athlete was unique, but only because there were no other players of Harris' ability then available to the club.[40] Thus, the *Lajoie* test was again applied without the special skill requirement being satisfied.

The presumption that all professional athletes are unique was strengthened in the *Winnipeg* case where the breaching athletes were untested rookies. In determining that these athletes were unique, the court stated that

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1193, 1197 (N.D. Cal. 1969); Brennan, *Injunction Against Professional Athletes Breaking Their Contracts*, 34 BKLYN. L. REV. 61, 70 (1967).

34. 19 Ohio Op. 2d 130, 181 N.E.2d 506 (C.P. 1961).
35. 348 S.W.2d 37 (Tex. Civ. App. 1961).
36. 140 F. Supp. 365 (N.D. Ohio 1955).
37. 23 N.Y.S.2d 858 (Sup. Ct. 1940).
38. Central New York Basketball, Inc. v. Barnett, 19 Ohio Op. 2d 130, 137, 181 N.E.2d 506, 514 (C.P. 1961).
39. *Id.* at 139, 181 N.E.2d at 517.
40. Dallas Cowboys Football Club, Inc. v. Harris, 348 S.W.2d 37, 45 (Tex. Civ. App. 1961).

> appraisal of skill and unique ability of a player, as they relate to contracts of this type, must depend somewhat upon his prospects and potential. Otherwise, such a contract with a college football player seldom would stand up for the professional club that first signed him.
>
> . . . [Furthermore,] the standard of special skill and exceptional ability to some extent must have a relation to the class and character of play.[41]

The court distinguished the class and character of competition between the competing professional leagues. In conclusion, the court held that evidence given by the defendant's witness that the athletes were merely "good" football players in relation to the class of competition in the more established league was

> not sufficient to overcome the persuasive evidence in support of the plaintiff's claim that these two defendant players, for the purposes of the plaintiff's Club and the character of the game in its League, had special skill and exceptional ability for their respective positions and were of peculiar value to the Winnipeg Club.[42]

The *Manrodt* case presented another twist to the *Lajoie* test. Does a player become unique, regardless of ability, because of the peculiar and special problems involved in the organization of a new football team?[43] As in *Harris*, the *Manrodt* court applied the *Lajoie* test, but only as a test of replacement, and thus the skill of the player was not considered. The court justified this application by reasoning that new teams have difficulty in securing players, and as a result, a breaching athlete will make it overly burdensome for a new team to replace him with a player of equal ability. This case has the same effect as the other three—*Lajoie* has been liberally interpreted so as to diminish its effectiveness as a test for uniqueness.

Today, the original *Lajoie* formula is meaningless. By almost any conceivable method, a club can now show that a player is unique. These methods of proof range from showing actual or potential ability to organizational problems. The present status for player uniqueness was summarized by Professor Brennan as follows:

> [Any] individual who signs a contract as a professional athlete, whether merely a prospect, a league run player, a better than average player or a star will be subject to an injunction against breach of contract.[44]

Case law confirms this observation. In *Nassau Sports v. Pe-*

41. Winnipeg Rugby Football Club, Ltd. v. Freeman, 140 F. Supp. 365, 366 (N.D. Ohio 1955).
42. *Id.* at 366-67.
43. Long Island Am. Ass'n Football Club v. Manrodt, 23 N.Y.S.2d 858, 860 (Sup. Ct. 1940).
44. Brennan, *supra* note 33.

ters,[45] Judge Neaher stated that "recent decisions indicate that the requirement [of uniqueness] is met prima facie in cases involving professional athletes."[46]

Confronted with this new standard, the question is whether the present procedure for testing uniqueness is still in compliance with the equitable philosophy that injunctive relief will only be granted as an extraordinary remedy? It is submitted that the obvious answer is no. To so comply, this author believes that the courts must return to the original *Lajoie* test. A careful reading of that test shows that the skill requirement must be satisfied prior to the application of the replacement test. As has been shown, some courts have been bypassing the skill requirement and relying solely on the replacement test to find uniqueness. The presumption that a professional athlete is unique upon the signing of a standard player contract should not attach. It is necessary to demonstrate that the player possesses special skill, knowledge or ability which distinguishes him from other professional athletes. The mere signing of an athletic contract is not sufficient proof of this fact. Each year many players are injured and suitable replacements are found. Year after year rookies sign professional contracts and replace veterans. It is common knowledge that some players are stars while others are reserves or merely adequate starters. Should all players, therefore, be classified unique? Of course not. The test of special skill should be based on *skill*. There are techniques for measuring potential skill (teams utilize such techniques prior to drafting players) and actual skill (performance charts and statistics). Consequently, the courts should decide, using these or any other aids, what level of skill *within* the ranks of professional athletics is to be deemed unique. Once the courts return to finding only specially talented athletes unique, the philosophy of extraordinariness will once again be viable.

Inadequate Remedy at Law

Standing alone, uniqueness appears to be unimportant, but as a means of ascertaining whether or not damages at law are adequate, it gains relevancy. The interdependence of the uniqueness and adequacy at law elements is illustrated in the statement that where a player is unique, "[t]he 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 services in the labor market."[47] These interdepend-

45. 352 F. Supp. 870 (E.D.N.Y. 1972).
46. *Id.* at 876.
47. J. POMEROY, *supra* note 21.

ent elements serve as the primary jurisdictional prerequisites set out in *Lumley*. But with the deterioration of the uniqueness test into the presumption that all professional athletes are unique, the test regarding inadequate damages was also eroded.

There are aspects of adequacy which are separate and distinct from uniqueness. In addition to the aforementioned deterioration, the adequacy test has been incorrectly applied, resulting in a collapse of the test as a safeguard for equity jurisdiction. The following investigation of the adequacy of damages at law will focus upon these separate aspects of the failure of the adequacy test rather than the simultaneous deterioration of these interdependent elements.

Should the damages which must be shown to be inadequate at law result from a breach of the affirmative promise or from a breach of the negative covenant, or is the form of breach immaterial? Dean Pound[48] and Professor Williston[49] insisted that an injunction should be granted *only* when the damages which resulted from the breach of a negative covenant, separate from the damages which are caused by a breach of the affirmative promise, are inadequately compensable at law. If damages arising from the positive breach alone, or from the positive and the negative breaches when considered together, are used to determine that the remedy at law is inadequate, the negative breach is serving no purpose other than to coerce performance. Therefore, this would constitute a form of indirect specific performance which a court of equity cannot provide.[50]

The case of *Harrisburg Baseball Club v. Athletic Association*[51] exemplifies this theory. The athlete refused to play for the plaintiff-club and intended to play for a rival team. The plaintiff's alleged injury was loss of receipts caused by the loss of the player's services. However, the complaint failed to allege that the club would be injured if the defendant played for the rival team. Since there were no damages caused by the breach of the negative covenant, injunctive relief was denied. If the injunction had been granted, the court noted that this would have been an attempt to remedy the positive breach indirectly by injunction.

Dean Stevens, agreeing with Pound and Williston, defined the inadequacy of the damages resulting from the negative

48. Pound, *The Progress Of The Law, 1918-1919 Equity*, 33 HARV. L. REV. 420, 438-40 (1919-20).
49. 5 WILLISTON, CONTRACTS § 1450 (rev. ed. 1937); RESTATEMENT OF CONTRACTS § 380(1)(a) (1932) (co-authored by Williston).
50. Stevens, *supra* note 17, at 263-70.
51. 8 Pa. Co. Ct. 337 (1890).

breach as the *added injury* to the club.[52] Stevens then went a step farther and described under what circumstances the breached negative covenant would result in *added injury*. His theory was that only when the athlete performed for a rival club in *direct competition* with the team with which he initially contracted could the damages at law possibly be inadequate.[53] Professor Williston[54] and commentators writing in related fields, such as entertainment, agree with this theory.[55] One of these commentators stated the principle as follows:

> [W]here the defendant would appear in some remote part of the world in such a fashion that there would be no conceivable competitive situation existing between plaintiff and defendant's new employer, it would appear that there would be no independent value to plaintiff from the enforcement of the defendant's negative undertaking.[56]

The case of *DePol v. Sohlke*[57] is an application of this theory. In *DePol*, the court refused to enjoin the defendant-danseuse when she attempted to perform for another. The court reasoned that since the defendant would be performing in an area where the plaintiff did not have his business, there would be no direct competition and thus the plaintiff could not be injured by the breach of the negative covenant. Therefore, since the only injury would be diminution of revenue resulting from the loss of the defendant's services, the court could not award injunctive relief because this would have constituted indirect specific performance of the affirmative covenant.

Although these venerable scholars and a few courts believe that the *Lumley* inadequacy standard should be interpreted and applied only in this fashion, the majority of courts appear to hold otherwise. These courts held that the mere breach of the affirmative promise is the only allegation needed to show irreparable injury.[58] Moreover, they do not even investigate whether the damages which resulted from the negative breach are inadequate.

Typical of this judicial myopia is the case of *Nassau Sports v. Hampson*.[59] The court found that the damage to the club would be irreparable, based exclusively on the athlete's refusal

52. Stevens, *supra* note 17, at 263-70.
53. *Id.*
54. 5 WILLISTON, CONTRACTS § 1450 (rev. ed. 1937); RESTATEMENT OF CONTRACTS § 380(1)(a) (1932).
55. Tannenbaum, *Enforcement of Personal Service Contracts in the Entertainment Industry*, 42 CALIF. L. REV. 18, 20 (1954).
56. *Id.*
57. 30 N.Y. Supr. (7 Robt.) 280 (1867).
58. Irreparable injury is used interchangeably by courts with a remedy which is inadequate at law. *See, e.g.*, Nassau Sports v. Peters, 352 F. Supp. 870, 882 (E.D.N.Y. 1972).
59. 355 F. Supp. 733 (Minn. 1972).

to play for them, without any allegation of harm stemming from his playing for another club. It was held "that the defendant Hampson is a skilled professional hockey player, . . . [and the] plaintiff has lost the unique services of Hampson and that such loss represents irreparable injury."[60] In *Boston Professional Hockey Association, Inc. v. Cheevers*,[61] even though the district court found no irreparable harm, although reversed on appeal, the court looked only to see whether the affirmative breach would cause irreparable harm: "I find and rule that there has been no showing that the loss of services of Cheevers and Sanderson will cause irreparable harm to the financial affairs and fortunes of the plaintiff."[62] And in *Washington Capitols Basketball Club, Inc. v. Barry*,[63] an inadequate remedy at law was said to exist "when an athletic team is denied the services of an irreplaceable athlete."[64]

In these situations, the courts are achieving exactly what the *Lumley* court stated that it was prohibited from doing—compelling indirect specific performance of an affirmative breach.[65] Therefore, it can be argued that the application of the inadequacy test in most sports cases has been invalid.

In summary, inadequacy, as it is applied by the courts today, fails as a jurisdictional safeguard. First, due to the collapse of the uniqueness test, a correlative deterioration of the adequacy test has occurred. Second, the courts are misapplying *Lumley* when they consider damages other than those arising from the breach of the negative covenant. Third, the courts, by this misapplication, have not used the direct competition test set forth by Stevens, Pound and Williston.

Post Element Inquiry

After a court completes its investigation into whether the *Lumley* elements are satisfied in order to establish jurisdiction, the inquiry then focuses upon the discretionary aspects of granting injunctive relief. Today, a court of equity will assume jurisdiction in any sports case as a result of the court's failure to apply the uniqueness and inadequacy requirements properly. Therefore, the defenses which the athlete can raise to prevent the injunction from issuing gain added importance. The defenses which breaching athletes have raised most frequently and successfully are mutuality of remedy, unclean hands, per-

60. *Id.* at 736.
61. 348 F. Supp. 261 (Mass. 1972).
62. *Id.* at 269.
63. 304 F. Supp. 1193 (N.D. Cal. 1969).
64. *Id.* at 1197.
65. 1 De G. M. & G. 604, 609 (1852).

petual services, reasonableness, and economic harshness. An examination of each of these defenses will illustrate the situations in which they may be asserted successfully.

Mutuality of Remedy

The defense raised most often in opposition to injunctive relief is mutuality of remedy. A negative covenant in a contract will not be specifically enforced by injunction where there is a want of mutuality of remedy. Such a situation will exist if a contractual provision gives the club the right to terminate the contract after giving the player ten days notice.[66] Most courts[67] which have permitted this defense were shocked by the fact that the contract could bind the athlete for a number of years while the club could end all contractual obligations within ten days.[68] Further, the courts dislike the fact that even if they grant injunctive relief, the club could subsequently make the decree a nullity by terminating the contract.[69]

There appear to be two reasons which suggest that this defense is an anachronism. First, most standard player contracts have been modified to allow the club to terminate the contract only for cause. In addition, the player is also given the right to terminate the contract for limited reasons.[70] The second rea-

66. The Cincinnati Exhibition Co. v. Johnson, 190 Ill. App. 630 (1914).

67. *See ,e.g.*, Weegham v. Killefer, 215 F. 168 (W.D. Mich. 1914); Allegheny Baseball Club v. Bennett, 14 F. 257 (W.D. Pa. 1882); Brooklyn American Baseball Club of Chicago v. Chase, 86 Misc. Rep. 441, 149 N.Y.S. 6 (Sup. Ct. 1914); Metropolitan Exhibition Co. v. Ward, 24 Abb. N. Cas. 393, 9 N.Y.S. 779 (Sup. Ct. 1890); The Cincinnati Exhibition Co. v. Johnson, 190 Ill. App. 630 (1914); Am. Baseball Club and Athletic Exhibition Co. v. Harper, 54 Cent. L.J. 449 (Cir. Ct. of St. Louis 1902); Philadelphia Ball Club v. Hallman, 8 Pa. Co. Ct. 57 (Ct. of Common Pleas 1890).

68. Metropolitan Exhibition Co. v. Ward, 24 Abb. N. Cas. 393, 412 9 N.Y.S. 779, 781 (Sup. Ct. 1890).

69. *Id.*

70. Typical of the new termination clauses is the type used in baseball's standard player contract, which provides in part as follows:

TERMINATION

By Player

7.(a) The Player may terminate this contract upon written notice to the Club, if the Club shall default in the payments to the Player provided for in paragraph 2 hereof or shall fail to perform any other obligation agreed to be performed by the Club hereunder and if the Club shall fail to remedy such default within ten (10) days after the receipt by the Club of written notice of such default. The Player may also terminate this contract as provided in subparagraph (g) (4) of this paragraph 7.

By Player

7.(b) The Club may terminate this contract upon written notice to the Player (but only after requesting and obtaining waivers of this contract from all other Major League Clubs) if the Player shall at any time:

(1) fail, refuse or neglect to conform his personal conduct to the standards of good citizenship and good sportsmanship or to keep

son concerns the courts' new attitude toward mutuality. No longer do both parties need to have the same exact remedies.[71] This idea was expressed as early as *Lajoie*, where the court stated that a unilateral termination right did not constitute a lack of mutuality of remedy.

> We are not persuaded that the terms of this contract manifest any lack of mutuality in remedy. Each party has the possibility of enforcing all the rights stipulated for in the agreement. . . . mere difference in rights stipulated for does not destroy mutuality of remedy. Freedom of contract covers a wide range of obligation and duty as between the parties, and it may not be impaired, so long as the bounds of reasonableness and fairness are not transgressed.[72]

The courts which have applied this principle appear to have reasoned that if there is adequate consideration given for the unilateral termination right, mutuality exists.[73] Section 372 (1) of the *Restatement of Contracts* has accepted *Lajoie in toto* by providing: "The fact that the remedy of specific enforcement is not available to one party is not a sufficient reason for refusing it to the other party." Furthermore, section 376 is almost directly applicable to sports contracts:

> Specific enforcement will not be denied in favor of a party merely because he has a power to terminate the contractual obligation unless the power can be used in spite of the decree in such a way as to deprive the defendant of the agreed exchange for his performance.

But there is disagreement as to whether the *Lajoie* definition of mutuality is the prevalent attitude today. Professors Chafee and Re state that the *Lajoie* rule is not the majority view.[74] Case law lends support to this view. In *Connecticut Professional Sports Corp. v. Heyman*,[75] the court used the old concept of mutuality as an important part of its balancing test

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himself in first-class physical condition or to obey the Club's training rules; or

(2) fail, in the opinion of the Club's management, to exhibit sufficient skill or competitive ability to qualify or continue as a member of the Club's team; or

(3) fail, refuse or neglect to render his services hereunder or in any other manner materially breach this contract.

71. 202 Pa. 210, 219, 51 A. 973, 974 (1902).

72. *Id.*

73. *See, e.g.*, Cincinnati Exhibition Co. v. Marsam, 216 F. 269 (E.D. Mo. 1914); Long Island Am. Ass'n Football Club v. Manrodt, 23 N.Y.S. 2d 858 (1940); Central New York Basketball, Inc. v. Barnett, 19 Ohio Op. 2d 130, 181 N.E.2d 506 (C.P. 1961). *See also* 5A A. CORBIN, CONTRACTS § 1202 (1964); Comment, *Equity: Specific Performance of Service Contracts*, 5 OKLA. L. REV. 84 (1952); Comment, *Enforcement by Injunction of Contracts for Personal Service*, 3 TEMP. L.Q. 431, 432 (1929).

74. CHAFEE & RE, EQUITY, 689 at n.23 (5th ed. 1967).

75. 276 F. Supp. 618 (S.D.N.Y. 1967). *See*, Nassau Sports v. Peters, 352 F. Supp. 870, 876 (E.D.N.Y. 1972).

to deny an injunction. Thus, an athlete and his attorney should be aware of mutuality as a defense.

Unclean Hands

The maxim, that he who comes into equity must have clean hands, has been used as an equitable defense to prevent the club from enjoining the player.[76] In the world of sports, such a defense could be set forth in a case with the following factual situation. A player, who is under contract, is contacted by another team that knows he is still under contract with the original team. The player is then induced into signing a contract and playing for the second team before his contract rights with the first team have terminated.[77] The player then breaches this new agreement and renews his contract with the original club for an extended period. The second club seeks injunctive relief which is denied due to its unclean hands. The determinative factor in such a case is whether the player's contract to play for the second club is to take effect before or after his contract with the first club has expired. The clean hands doctrine would not apply where the second club had contacted the player while he was still under contract with the first club, but did not desire the player's services until after the expiration of the first contract.[78] Today, this defense will probably not be applicable very often since most clubs will sign players to *future service contracts* in order to avoid the unclean hands defense. But if a club wants the player's services immediately and the player decides to re-sign with his former club, the defense could be used, even if the club believes that the original contract is void. This was the situation in *Minnesota Muskies Basketball Club, Inc. v. Hudson.*[79] The Muskies believed that Hudson would be free to play for them during the option year of his contract with the St. Louis Hawks because the option clause could be construed as requiring perpetual services. Hudson, instead of playing for the Muskies, re-signed with the Hawks. The court denied the injunction based on the unclean hands defense.

> 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 a legal, obligation to furnish his services to St. Louis for 1967-68 and subsequent seasons, if

76. New York Giants Football Club, Inc. v. Los Angeles Chargers Football Club, Inc., 291 F.2d 471 (5th Cir. 1961).

77. *See, e.g.*, The Munchak Corp. v. Cunningham, 457 F.2d 721 (4th Cir. 1972); Washington Capitals Basketball Club, Inc. v. Barry, 419 F.2d 472 (N.D. Cal. 1969); Minnesota Muskies Basketball Club, Inc. v. Hudson, 294 F. Supp. 979 (M.D.N.C. 1969).

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

79. 294 F. Supp. 979 (M.D.N.C. 1969).

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.[80]

Perpetual Services

The perpetual services defense will arise when the renewal or option clause[81] is construed as being incorporated into the renewed contract. If the "renewed contract also continued the option of the club perpetually to retain the services of a ballplayer by continuing to exercise its option each year,"[82] the clause should be held unenforceable.[83] The problem is one of interpretation and construction.

In *Philadelphia Ball Club v. Hallman*,[84] a perpetual service defense was asserted, and the court, in agreeing, denied the injunction. In interpreting the option clause, the court believed that the only logical meaning of this clause was that all the terms of the original contract would be a part of the renewal contract, thereby giving the club the right to renew *ad infinitum*. But this same clause was interpreted as not being one for perpetual services in *Metropolitan Exhibition Co. v. Ewing*.[85]

In *Barnett*, an Ohio court announced the rule of construction that if an option clause is susceptible of both a valid and an invalid interpretation, the court should choose the valid one.[86] Hence, the option clause was considered to give the club the playing rights to the defendant for only one additional year, and the renewed contract contained no renewal clause.

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80. *Id.* at 990.

81. The following is the option clause used in professional baseball contracts:

On or before December 20 (or if a Sunday, then the next preceding business day) in the year of the last playing season covered by this contract, the Club may tender to the Player a contract for the term of that year by mailing the same to the Player at his address following his signature hereto, or if none be given, then at his last address of record with the Club. If prior to the March 1 next succeeding said December 20, the Player and the Club have not agreed upon the terms of such contract, then on or before 10 days after said March 1, the Club shall have the right by written notice to the Player at said address to renew this contract for the period of one year on the same terms, except that the amount payable to the Player shall be such as the Club shall fix in said notice; provided, however, that said amount, if fixed by a Major League Club, shall be an amount payable at a rate not less than 80% of the rate stipulated for the next preceding year and at a rate not less than 70% of the rate stipulated for the year immediately prior to the next preceding season.

82. Scheffler, *supra* note 21, at 543.

83. Philadelphia Ball Club v. Hallman, 8 Pa. Ct. 57 (Ct. of Common Pleas 1890).

84. 8 Pa. Ct. 57 (Ct. of Common Pleas 1890).

85. 42 F. 198 (C.C.N.Y. 1890).

86. 19 Ohio Op. 2d 130, 133, 181 N.E.2d 506, 509-10 (C.P. 1961). *See* text accompanying notes 38 and 39 *supra*.

The safest and easiest way to avoid a perpetual service situation is by proper draftsmanship. In *Harris*, the crucial part of the option clause reads: "[A]fter such renewal this contract shall not include a further option to the Club to renew the contract. . ."[87]

With the court's construction favoring validity, it would be difficult to imagine any court construing an option clause as possibly requiring perpetual services. Moreover, why would a club risk an adverse interpretation by a court by not expressly stating that perpetual services are not required by the contract? But in professional hockey and baseball, such interpretations are possible.

In *Hampson*, the court construed the option clause in the professional hockey contract to be one for perpetual services. "There is apparent to the court no reason why Clause 17 [the option clause] can be considered anything but a requirement of perpetual contracting for succeeding one year periods."[88] Regarding baseball, it was recently announced that Bob Tolan was contesting the option clause in an arbitration hearing as being one for perpetual services.[89] Both hockey clubs and baseball clubs are, therefore, still plagued with the possibility that their option clauses will be held unenforceable. These sports should heed Professor Brennan's warning that an injunctioin will not be granted if the renewal clause entitles the club to a future renewal option in the renewed contract.[90]

Reasonableness

Where a court finds that a negative covenant is too broad in either time or area, it may refuse to enforce the negative covenant.[91] In *Machen v. Johansson*,[92] the court said that a negative covenant which would prevent Johansson from fighting anyone in the United States or Floyd Patterson anywhere in the world, until Johansson fought Machen in a rematch, was unreasonable. A controlling factor in this decision was that this covenant would have continued after the affirmative promise had been fulfilled. The court did not decide whether the negative covenant was reasonable during the period that the affirmative promise existed. Most likely it would have been reasonable.

87. 348 S.W.2d 37, 42 (Tex. 1961). *See* text accompanying note 40 *supra*.
88. 355 F. Supp. 733, 735 (Minn. 1972). *See* text accompanying notes 59 and 60 *supra*.
89. *Chicago Sun Times*, Oct. 24, 1974, at 140, col. 1.
90. Brennan, *supra* note 33, at 71.
91. Machen v. Johansson, 174 F. Supp. 522, 530 (S.D.N.Y. 1959).
92. *Id.*

It would appear that the negative covenant in a team sport contract will always meet this reasonableness test inasmuch as it is only enforced for as long as the affirmative promise is supposed to last. But in individual sports, for example boxing where rematches are important, such defenses can be used in the appropriate cases.

Economic Harshness

Section 380(2) of the *Restatement of Contracts* has adopted the position that an injunction will not be enforced when "the injunction will leave the employee without other reasonable means of making a living. . . ." Where a true showing of economic hardship can be demonstrated, injunctive relief may be denied.

In *Machen*, an alternative ground for denying the injunction was the irreparable harm which would befall the defendant. An injunction would have prevented the defendant from earning a living as a fighter and would have provided only a slight benefit to the plaintiff.[93] The court noted that an athlete in Johansson's chosen profession only has a few high earning years, and to enjoin him during that period would cause an undue hardship upon him.

The same rationale was applied in another boxing case. In *Arena Athletic Club v. McPartland*,[94] the court reasoned that if the plaintiff had the right to enjoin the defendant from fighting until they mutually agreed to another date for the exhibition, the plaintiff might arbitrarily refuse to agree and this refusal would indefinitely deprive the defendant from earning a living.[95]

Although these arguments may be persuasive in boxing or other individual sport cases, it does not appear that a defendant in a team sport will suffer economic hardship in similar situations because the player's future employer will probably pay him during the period of injunction.

In *Munchak Corp v. Cunningham*,[96] the Carolina Cougars sought the services of Billy Cunningham who was under contract with another club. The Cougars agreed to pay Cunningham the full $80,000 salary he was to receive from his present employers if he would sit out the option year of his contract. Likewise, in *Cheevers*, Derek Sanderson's future employer contracted "to pay him his full salary for the first two years even if he is en-

93. *Id.* at 531.
94. 41 App. Div. 352, 58 N.Y.S. 477 (Sup. Ct. 1899).
95. *Id.* at 353, 58 N.Y.S. at 478.
96. 457 F.2d 721 (4th Cir. 1972).

joined by court decree from playing with the Blazers."[97] Inasmuch as these players will receive compensation during the injunctive period, they would be constrained to show economic hardship.

CONCLUSION

Although on a rare occasion a discretionary defense will arise which can prevent an injunction from issuing, usually the sports club owner appears to have little, if any, problem in obtaining such relief. The secondary discretionary defenses do not fill the gaps created by the courts' dilution of the jurisdictional safeguards. Hence, injunctive relief in these cases has become an ordinary remedy rather than the extraordinary one which it was intended to be. This result alone should be grounds for denying such relief, but there are other reasons.

For instance, even in a case where an injunction should be granted, it is doubtful that this remedy is really protecting the plaintiff's interest. A club is in business to make money. The injunction, when issued under the proper circumstances, will only prevent the plaintiff from losing money as a result of the athlete playing on another team which is in direct competition with the plaintiff. The injunction *will only last for one year* since most breaches occur during the option year. Thereafter, all those customers who would rather see the defendant play than watch the plaintiff's team, will then desert the plaintiff. So, by enjoining the defendant for one year, the plaintiff has prevented only a short term financial loss, but has not prevented the larger loss which will follow after the short term injunction expires. Courts of equity should be hesitant to give relief for such a short period when the damage it is preventing is inconsequential compared to the damage which will occur upon the natural termination of the injunction.

Another point against injunctive relief is that it does not appear that the clubs are seeking it to remedy this minor loss, but rather they are using it to prevent the loss which is suffered from the affirmative breach. Theoretically, this injunction should not be given to remedy such a breach, for this would be an attempt to get indirect specific performance, which would be an act of involuntary servitude. But, if it was for this purpose, the injunction does not appear to be working, for most players when enjoined sit out the option year.

Still another reason is that the injunction appears to be is-

97. 348 F. Supp. 261, 264 (Mass. 1972). *See* text accompanying notes 61 and 62 *supra.*

suing not to remedy any loss nor to coerce indirect specific performance, but to punish the breaching player by not allowing him to benefit from his breach. But as was shown in *Cheevers* and *Cunningham*, the player benefits anyway.[98] And the loss of one year's playing time will not decrease the ability of a true star, as Rick Barry and Muhammad Ali have demonstrated with their successful comebacks after layoffs from competition. Therefore, the club is only delighting in a mere reprimand, and not protecting any interest which needs to be guarded.

The last major reason why relief should be denied is because the player is losing his liberty. What liberty? It is the liberty to break a contract and to pay money damages as a result. One reason why a person cannot be ordered to specifically perform a personal service contract is that it is involuntary servitude, which is a form of infringement upon personal liberty. It is submitted that being ordered not to perform for another is just as much an infringement upon personal liberty.

Why then do the courts still continue to order injunctions when it is not serving true to the principles of equity, nor protecting the plaintiff's interests or those of the defendant? Because the law labels the sports business special. The district court in New York reflected upon this by saying that such relief is necessary because of

> the widespread recognition of the unique character of the business of professional sports and the need for some form of protective system to insure the recoupment of investments—often large—made both to develop and to acquire talented players.[99]

It is submitted that this belief is misfounded. The industry will not collapse due to breaching players performing for other teams, or it would have fallen already, inasmuch as the breaching players perform for other teams after the injunction ends.

A possible solution to this problem would be to put a liquidated damages clause, which is expressly intended as the sole remedy for a breached negative covenant, within the contract. Then courts of equity will not have to make a mockery of their jurisdiction by misapplying the *Lumley* and *Lajoie* rules, the plaintiff will receive his lost revenue (which is all he is ultimately after and all that he deserves) and the defendant will have the freedom to break a contract if he so desires. By fixing the liquidated damages, as to each player, at an amount which is a reasonable estimation of the loss to the club in case of a breach,

98. *See* text accompanying notes 96 and 97 *supra*.
99. 352 F. Supp. 870, 879 (E.D.N.Y. 1972).

it would provide a sufficient deterrent against indiscriminate breaching of athletic contracts. Furthermore, the courts would not find it necessary to unreasonably expand their jurisdiction as is now occurring when injunctive relief is granted.

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