

Tulsa Law Review

Volume 6 | Number 1

1969

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Recommended Citation

Peter J. Bosch, *Enforcement Problems of Personal Service Contracts in Professional Athletics*, 6 Tulsa L. J. 40 (1969).

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between the conflicting interests of consumers and creditors, that the drafter felt they had achieved, remains to be seen. One thing is clear; in order for the Oklahoma U3C to operate to the benefit of consumers they must become an informed consumer public, aware of their rights and remedies, and above all educated to be effective consumers.

William D. Nay

ENFORCEMENT PROBLEMS OF PERSONAL SERVICE CONTRACTS IN PROFESSIONAL ATHLETICS

The rise in popularity of professional sports has made it an extremely lucrative field of endeavor for both the owner-promoter and the professional athlete. The foundation, without which professional sports could not survive and on which it depends for its continued success, is the contract between the performing athlete and the one who contracts for his services. This article will deal with the breach of that contract and the availability of specific performance to force compliance with its provisions.

When a party fails to live up to his contractual obligations, the only available remedy at law for the injured party is an action for damages suffered as a result of that breach. Often these damages are either not ascertainable or the remedy is inadequate and not as complete as could be attained by a decree of specific performance. Traditionally, specific performance has been considered an extraordinary remedy for breach of contract, but the liberalized trend today leans more in the direction of giving the parties what they actually bargained for.

As a general rule courts of equity will not decree specific performance in personal service contracts.¹ Among the rea-

¹ See RESTATEMENT OF CONTRACTS § 379 (1932), entitled Contracts for Personal Service, which states: "A promise to

sons cited for this rule are that services under compulsion usually do not produce the results the parties intended, and that it would be impossible for the courts to supervise and

render personal service or supervision will not be specifically enforced by an affirmative decree.”

Comments c, d and e to § 379 state:

c. Among the many varieties of personal service contracts to which the rule of the Section applies are those requiring performance as an actor, a singer, a sales-agent, a ball-player, a teacher, a mechanic, a valet, a cook, a railway gate-tender, a personal custodian of children. Among the contracts that are included are all contracts of employment creating the intimate relation of master and servant; the latter's performance is personal service and that of the former frequently involves personal supervision.

d. The refusal of affirmative specific enforcement in these cases is based in part upon the difficulty of enforcement and of passing judgment upon the quality of performance, and in part upon the undesirability of compelling the continuance of personal association after disputes have arisen and confidence and loyalty are gone. In some cases the decree would seem like the enforcement of an involuntary servitude.

e. There may be negative promises in personal service contracts; within certain limits these may be specifically enforced by injunction (see § 380); *RESTATEMENT OF CONTRACTS* § 380 (1932) entitled *Enforcement of Negative Duties that accompany Affirmative Promises*, which states:

- (1) An injunction against the breach of a contractual duty that is negative in character may be granted either
 - (a) to prevent harm for which money damages are not an adequate remedy caused by the breach of the negative promise itself, even though there are accompanying affirmative promises by either party that will not be specifically enforced, unless such partial enforcement will lead to unjust or harmful results; or

insure the proper performance of the contract.² Furthermore, it has been hld to a form of involuntary servitude, because it interferes with personal liberty thus violating public policy³ and the thirteenth amendment to the Constitution of the United States.⁴

If the party to perform under the contract has, or the services contracted for require, merely ordinary skill and ability, then it can be argued that the injured party could go into the open market and obtain similar services of like kind and quality and then proceed at law for the damages incurred as a result of the breach. In this situation his remedy

- (b) as an indirect mode of specifically enforcing an accompanying affirmative promise, if it is likely to be effective for that purpose and if the affirmative promise is itself one that would be enforced by affirmative decree except for the mere practical difficulties of such enforcement.
- (2) A contract to render personal service exclusively for one employer will not be indirectly enforced by injunction against serving another person, if
 - (a) the employer is not ready and willing to continue to perform his part of the contract; or
 - (b) performance of the contract will involve personal relations the enforced continuance of which is undesirable; or
 - (c) the injunction will leave the employee without other reasonable means of making a living; or
 - (d) the service is not unique or extraordinary in character.

Comments g, h and i to § 380 state:

g. . . . In personal service cases, an injunction should practically never be used primarily as an indirect means of enforcing the affirmative promises; it should be restricted to cases where the breach of the negative promise will in itself cause irreparable harm.

h. An injunction to enforce even the nega-

at law would be adequate and complete; thus an action for specific performance probably would not lie.

However, if the services are of a special, unique and extraordinary nature and of such a character as to make substitution impossible, then clearly there is no adequate remedy at law and an equitable solution can be considered.

tive duty will generally be refused if its effect is substantially to prevent the employee from making a living in his accustomed vocation, the single alternative being the perpetuation of undesirable personal relations with an employer or other persons with whom he is in serious conflict. This would come near to the creation of an involuntary servitude. To justify the granting of an injunction, it should appear that the employer is ready and willing to continue the employment in good faith and that the employer is not being substantially forced back into the old employ. Here again is a case for the exercise of sound judicial discretion. Among the matters to be given special consideration are the character of the service to be rendered, the probability of renewal of good relations, the degree of inadequacy of other remedies, and the hardship involved in the enforcement by injunction.

i. If the service that is involved is not unique or extraordinary, the breach is not likely to cause harm for which damages are not adequate. This is especially true with respect to the injury caused by serving another employer in competition with the plaintiff. Service may be unique and extraordinary because of special knowledge of the plaintiff's customers and business methods as well as by reason of special skill possessed by the employee.

J. Parks, *Equitable Relief in Contracts Involving Personal Services*, 66 U. PA. L. REV. 251 (1918).

² DeRivafinoli v. Corsetti, 4 Paige 264 (N.Y. 1883).

³ Wakeham v. Barker, 82 Cal. 46, 22 P. 1131 (1889).

⁴ See G. CLARK, PRINCIPLES OF EQUITY 71 (1924); W. DEFUNIACK, HANDBOOK OF MODERN EQUITY 165 (1956).

In this area *Lumley v. Wagner*⁵ is the landmark case and provides the basis for the rule that where a contract for personal services of a special, unique and extraordinary nature contains a negative covenant stating that similar services will not be rendered for another during the contract term, equity courts will specifically enforce the *negative* covenant.

The leading case in the United States comparable to the Lumley case is *McCaul v. Braham*.⁶ In that case the defendant, Lillian Russell, contracted to sing exclusively under the management of the plaintiff for one year. Subsequently, while her contract with the plaintiff was still in effect, she contracted to sing for another person. The court issued a decree restraining the defendant from performing for anyone other than the plaintiff during the period covered by the contract.

The *Lumley-McCaul* doctrine was applied, at least by *dicta*, to professional sports in several 1890 baseball cases.⁷ A new baseball league had induced several players to breach their contracts with the existing league and play for it. The clubs which had those players under contract sought injunctions restraining them from playing for anyone else during the period covered by their agreements. Though all of these early decisions went against the plaintiff clubs, this was not a repudiation of the *Lumley* rule. In fact, the courts felt that professional athletes were amenable to the rule and that the court had both the right and the power to enforce the negative covenants in the contracts.⁸ In one of those cases,

⁵ 1 De G., M. & G. 604, 42 Eng. Rep. 687 (1852).

⁶ 16 Fed. 37 (C.C.S.D.N.Y. 1883).

⁷ For a history of baseball and the law, see Note, *Baseball and the Law—Yesterday and Today*, 32 U. VA. L. REV. 1164 (1946).

⁸ *Metropolitan Exhibition Co. v. Ward*, 9 N.Y.S. 779 (Sup.Ct. 1890).

the court made the following analogy:

Between an actor of great histrionic ability and a professional base-ball 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. The refusal of either to perform according to contract must result in loss to the manager, which is increased in cases where such services are rendered to a rival.⁹

The courts in these early cases refused to grant the injunctions on the basis of a lack of mutuality concerning the reserve clauses. The following is representative of the clause in question:

17. It is further understood and agreed that the said party of the first part [club] may at any time by giving the party of the second part [player] ten days' notice of its option and intention so to do, to end and determine all its liabilities and obligations under this contract, in which event, upon the expiration of said ten days, all liabilities and obligations undertaken by said party of the first part in this contract shall at once cease and determine, and said party of the second part shall thereupon be also freed from his obligation hereunder, and shall have no claim for wages for any period after said ten days.

18. It is further understood and agreed that the said party of the first part shall have the right to 'reserve' said party of the second part for the season next ensuing the term mentioned in paragraph 2 herein provided; and said right and privilege is hereby accorded the said party of the first part upon the following conditions, which are to be taken and construed as conditions precedent to the exercise of such extraordinary right or privilege, namely:
not be reserved at a salary less than that mentioned

I. That the said party of the second part shall

⁹ *Id.* at 780-81.

in the 20th paragraph herein except by consent of the party of the second part;

II. That the said party of the second part, if he be reserved by the said party of the first part for the next ensuing season, shall be one of not more than fourteen players then under contract.¹⁰

The courts construing these clauses felt that they were inequitable and lacked mutuality because the club could hold a player to his contract for a year or more while the player's hold over the club was limited to 10 days.¹¹

A contract that is sought to be specifically enforced must be mutual both as to remedy and the obligation. A party not bound by the agreement itself has no right to call upon a court of equity to enforce specific performance against the other contracting party by expressing his willingness in his bill to perform his part of the agreement. His right to the aid of the court does not depend upon his subsequent offer to perform the contract on his part, but upon its original obligatory character.¹²

While all these cases uniformly held that the performer had to possess special, unique and extraordinary ability in order for specific performance to be available, it was conceded that the requirement was met by the fact that the performer was a professional athlete for whose services two rival clubs were vying. That point was not conceded, however, in *Columbus Baseball Club v. Reiley*,¹³ where the court denied the injunction ruling that the player involved did not possess such special, unique and extraordinary skills and

¹⁰ *Id.* at 781-83, quoting pertinent contractual provisions from the contract between the Metropolitan Exhibition Club and John Ward dated April 23, 1889.

¹¹ *Id.* at 784. See also *Metropolitan Exhibition Club v. Ewing*, 42 Fed. 198 (C.C.S.D.N.Y. 1890); *Philadelphia Ball Club, Ltd. v. Hallman*, 8 Pa. C.C. 57 (1890).

¹² 9 N.Y.S. at 784.

¹³ 11 Ohio Dec. 272 (1891).

therefore did not meet the criteria of the *Lumley* rule. The court in its opinion stated:

Professional baseball has become a business, and and should be treated as any other business, with no greater consideration and no less; and if the court undertook to exercise its jurisdiction in this particular case, unless this player were conceded to be an extraordinary and unique player, there would be ground for exercising its jurisdiction in almost every case of a contract for personal services, which, I think, would be something not only extraordinary in the history of jurisprudence, but something which no one would claim that the court ought to undertake.¹⁴

The leading case, and the one that is most often cited for the proposition that specific performance is available against a professional athlete, is *Philadelphia Ball Club, Ltd. v. Lajoie*.¹⁵ Napoleon Lajoie was one of early baseball's leading stars. The club claimed that he had special, unique, and extraordinary skills which the club would be unable to replace, and that his loss would cause the club irreparable injury. The court in discussing that aspect of the case observed:

He has become thoroughly familiar with the action and methods of the 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 peculiar 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 therefor, that the 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,

¹⁴ *Id.* at 275.

¹⁵ 202 Pa. 210, 51 A. 973 (1902).

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.¹⁶

The court having disposed of that issue took up the question of mutuality, an insurmountable hurdle to the granting of injunctions in many previous cases. The court stated:

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. It is true that the terms make it possible for the plaintiff to put an end to the contract in a space of time much less than the period during which the defendant has agreed to supply his personal services; but mere difference in the rights stipulated for does not destroy mutuality of remedy. Freedom of contract covers a wide range of obligation and duty as between the parties, and it may not be impaired, so long as the bounds of reasonableness and fairness are not transgressed.¹⁷

The court in refusing to dissolve the lower court's injunction said that: "Substantial justice between the parties requires that the court should restrain the defendant from playing for any other club during the term of his contract with the plaintiff".¹⁸

In 1914 a series of cases involving these same issues came before the courts again. The cases all recognized that equity had the jurisdiction to enjoin the violation of a negative covenant if the player possessed a special, unique and extraordinary skill which could not be readily replaced.

¹⁶ *Id.* at 974.

¹⁷ *Id.* at 975. *But see*, Brooklyn Baseball Club v. McGuire, 116 Fed. 782 (1902), decided subsequent to *Lajoie*, in which the court held the lack of mutuality of the reserve clause fatal to the granting of injunctive relief.

¹⁸ *Id.* at 976.

Some of these new cases¹⁹ followed the *Lajoie* decision and rationale finding that the parties were free to contract and that there was adequate consideration. However, the majority of the cases held that the contracts involved lacked mutuality and therefore could not be specifically enforced. In *American League Baseball Club of Chicago v. Chase*²⁰ the court in discussing mutuality said:

The plaintiff can terminate the contract at any time on 10 days' notice. The defendant is bound to many obligations under the remarkable provisions of the National Agreement. The Player's Contract executed in accordance with its terms, binds him, not only for the playing season of six months from April 14th to October 14th, but also for another season, if the plaintiff chooses to exercise its option, and if it insists upon the requirement of an option clause in each succeeding contract, the defendant can be held for a term of years. His only alternative is to abandon his vocation. Can it fairly be claimed that there is mutuality in such a contract? The absolute lack of mutuality, both of obligation and of remedy, in this contract, would prevent a court of equity from making it the basis of equitable relief by injunction or otherwise.²¹

The question of mutuality was raised again in *Long Island American Association Football Club, Inc. v. Manrodt*.²² In organizing a football club for its first season of play, the plaintiff had spent months negotiating to procure the best possible players for its team. Two of the players signed for the 1940 season were Manrodt and one Lene. When they subsequently signed to play with the New York Yankees

¹⁹ *Eg.*, *Cincinnati Exhibition Co. v. Marsans*, 216 Fed. 269 (E.D.Mo. 1914).

²⁰ 86 Misc. 441, 149 N.Y.S. 6 (Sup. Ct. 1914). *See also* *Weegham v Killefer*, 215 Fed. 168 (W.D. Mich. 1914); *Cincinnati Exhibition Co. v. Johnson*, 190 Ill. App. 630 (1914).

²¹ 149 N.Y.S. at 14.

²² 23 N.Y.S. 2d 858 (Sup.Ct. 1940).

professional football team, the Long Island Club sought an injunction restraining them from playing with anyone other than the plaintiff during the 1940 season.

The defense contended first that Manrodt and Lene did not possess such extraordinary and unique ability as to make them irreplaceable; and second that the contract could not be enforced due to a lack of mutuality.²³ In determining the question of unique skill and ability the court felt that consideration ought to be given to the special factors and problems involved in the organization of a new football team. It reasoned that once the team had signed the players, trained them in their system, molded them into an effective unit dependent upon certain individuals to make it go, it would be very difficult to replace key players after the season began. These considerations, plus the fact that once the season began all the good football players would already be under contract to some other football club, led the court to set aside the first defense contention.

In disposing of the second argument, lack of mutuality, and granting the injunction restraining the ballplayers from playing for anybody but the Long Island Club during the 1940 season, the court noted that:

Mutuality of obligation was not lacking for the provision for notice makes the contract binding on the plaintiff at least until notice is given [cases cited].

There is no requirement of mutuality of remedy.

“What equity exacts today as a condition of relief is the assurance that the decree, if rendered, will operate without injustice or oppression either to plaintiff or to defendant [citing cases]. Mutuality of remedy is important in so far only as its presence is essential to the attainment of that end. The formula had its

²³ This defense was predicated on the following clause contained in the contract: “This contract may be terminated at any time by the Club upon three (3) days’ written notice to the player.” 23 N.Y.S. 2d at 860.

origin in an attempt to fit the equitable remedy to the needs of equal justice. We may not suffer it to petrify at the cost of its animating principle" [citation omitted].²⁴

The issue of what constitutes special, unique and extraordinary skills was again raised in *Winnipeg Rugby Football club v. Freeman*.²⁵ The defendants completed their college eligibility and signed with Winnipeg, a Canadian Football League team. Subsequently, they also signed a contract to play for the Cleveland Browns of the National League. Winnipeg then brought an action to restrain the players from playing for Cleveland. This case involved neither an option nor a reserve clause and the issue was quickly narrowed to whether or not the defendants were players of such unique and extraordinary ability so as to make them amendable to a decree of specific performance.

The defendants had been good college players and were good professional prospects but were not proven players of unique and extraordinary skill in the professional ranks. The court, taking that into consideration, stated:

The standard of special skill and exceptional ability to some extent must have a relation to the class and character of play.

I am satisfied that to the Winnipeg Club and for the character of the game as played in the Canadian League . . . that the two players had special skill and exceptional ability.²⁶

The court continued and in effect broadened the definition of unique and extraordinary skill and ability when it stated:

In view of the acknowledged difference between college and professional football, and even between the Canadian League and the current National League, it seems reasonable to observe that appraisal of skill

²⁴ 23 N.Y.S. 2d at 860.

²⁵ 140 F. Supp. 365 (N.D. Ohio 1955).

²⁶ *Id.* at 366.

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.²⁷

The applicability of using injunctive relief against a league player of average ability was tested in *Dallas Cowboys Football Club, Inc. v. Harris*.²⁸ The defendant, Harris, had played for the Los Angeles Rams during the 1958 season. After a controversy with the club, arising in part out of the option clause in his contract, he decided to sit out the 1959 season. He returned to the University of Oklahoma to complete his degree and while there was employed as an assistant football coach by the University. Harris signed a contract to play for the Dallas Texans of the rival American Football League for the 1960 season, whereupon Los Angeles assigned his contract to the Dallas Cowboys who exercised the option to have Harris play for them for one year. The Cowboy's attempt to secure an injunction against Harris failed in the lower court because of the jury's determination that Harris did not possess exceptional and unique knowledge, skill or ability as a football player and therefore was not amenable to a decree of specific performance. The club appealed and took the position that he did possess such skills and furthermore that Harris was estopped from denying that he had no unique knowledge, skills and ability as a football player because of his express representations that he did possess them in his contract.²⁹ The court denied this

²⁷ *Id.*

²⁸ 348 S.W. 2d 37 (Tex. 1961).

²⁹ The 1958 contract between Harris and the Los Angeles Rams provided in part:

8. 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

contention on the ground that for estoppel to attach the statement relied on must have been one of a material fact and not merely an expression of opinion as in this case.

Taking up the question of whether or not Harris possessed unique and extraordinary skills, the court heard testimony which showed that while Harris was not a star, and that there were players of equal or better ability in the league, players of Harris' ability were difficult to find and not available to the club. The court reversed the jury's finding as to Harris' skill and ability and granted the injunction restraining Harris because it felt that the construction given the word unique had been too narrow and limited. In support of a more liberal interpretation the *Harris* court quoted a statement from *Philadelphia Ball Club v. Lajoie*:³⁰

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 *Pom. Spec. Perf.* p. 31, where the principle is thus declared: "Where one person agrees to render personal services to another, which requires and presuppose[s] a special knowledge, skill and ability in the employe[e] so that in case of a default *the same service could not easily* be obtained from others, * * * its performance will be negatively enforced by enjoining its breach * * *." We have not found any case going to the [same] length of requiring, as a condition of relief, proof of the impossibility of obtaining equivalent service.³¹

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 engaging in activities related to football for any person, firm, corporation or institution and against any other breach of this contract . . . 348 S.W. 2d at 42.

³⁰ See note 15 *supra*.

³¹ 348 S.W. 2d at 44 (emphasis by the court), *quoting*, *Philadelphia Ball Club v. Lajoie*, 202 Pa. 210, 51 A. 973 (1902).

In *Central New York Basketball, Inc. v. Barnett*³² the court was again called upon to determine what constituted unique and extraordinary skill. While Barnett was not a rookie out for the team, neither was he the established star and drawing card that Lajoie was. Barnett had played for the Syracuse Nationals of the established National Basketball Association during the 1960-61 season. The following season he signed to play for the Cleveland Pipers of the new American Basketball League. The Syracuse Nationals exercised their option and the instant law suit resulted.

The defense principally based its case on two points. The first, reminiscent of the mutuality question, was that the option clause in the contract called for perpetual service and was, therefore, void.³³ The plaintiff countered this allegation with the argument that the option clause entitled the club to the defendant's services only for one extra year. The court held for the plaintiff on this point stating:

If the language of a contract is susceptible of two

³² 181 N.E. 2d 506 (Ohio C. P. 1961).

³³ The option clause in Barnett's contract provided:

22. (a) On or before September 1st (or if a Sunday, then the next preceding business day) next following the last playing season covered by this contract, the Club may tender to the Player a contract for the term of that season by mailing the same to the Player at his address following his signature hereto, or if none be given, then at his last address of record with the Club. If prior to the November 1 next succeeding said September 1, the Player and the Club have not agreed upon the terms of such contract, then on or before 10 days after said November 1, the Club shall have the right by written notice to the Player at said address to renew this contract for the period of one year on the same terms, except that the amount payable to the Player shall be such as the Club shall fix in said notice; provided, however, that said amount shall be an amount payable at a rate not less than 75% of the rate stipulated for the preceding year. 181 N.E. 2d at 509.

constructions, one of which will render it valid and give effect to the obligation of the parties, and the other will render it invalid and ineffectual, the former construction must be adopted.³⁴

The second defense contention was that Barnett was not a player of unique and extraordinary skill and ability. Testimony received at the trial showed that Barnett ranked 19th in the League in scoring but he was not among the players selected for the East-West All Star game, nor was he named in the U.S. Basketball Writers All-NBA team for 1961.

The court considering the testimony, both club's eagerness to employ his services, and the defendant's contractual representations,³⁵ stated:

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 skills and ability, and that he is of peculiar and particular value to the plaintiff.³⁶

³⁴ 181 N.E. 2d at 509-10.

³⁵ Barnett's contract with the Syracuse Nationals provided in part:

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. 181 N.E. 2d at 508-09.

The contract Barnett signed with the Cleveland Pipers had substantially the same provision in section 12.

³⁶ 181 N.E. 2d at 514.

The court went on to say that:

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 defendant is equally plain, and there is no reason why the Court should be sparing in the application of its remedies.

Damages at the 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.³⁷

The result reached in *Connecticut Professional Sports Corporation v. Heyman*³⁸ shows clearly that the issue of mutuality is not settled. Art Heyman, after a great collegiate basketball career at Duke University, twice failed to secure a contract to play in the NBA. He contracted to play with the Hartford Capitals of the Eastern Professional League for the 1966-67 season and was the Capital's star and the League's highest scorer. When Heyman learned that the American Basketball League was being formed, he signed a contract to play for the New Jersey Americans during the 1967-68 season for \$15,000, which was considerably more than he made playing for Hartford. Hartford exercised their option and commenced suit to restrain Heyman from playing for anyone else during the period covered by their contract. The only real issue that had to be resolved was the question of mutuality. The court, citing *Winnipeg Rugby Football Club v. Green*³⁹ and *Philadelphia Ball Club v. Lajoie*⁴⁰ among others, admitted that in similar circumstances other courts had granted injunctive relief. Nevertheless, the court said that

³⁷ Id. at 517.

³⁸ 276 F. Supp. 618 (S.D.N.Y. 1967).

³⁹ See note 25 supra.

⁴⁰ See note 15 supra.

in New York "each case is *sui generis* and decisions hinge upon a careful analysis of the contractual terms".⁴¹ After a careful analysis of the contract⁴² the court did not grant the injunction, stating:

The primary reason for denying relief is the fact that the plaintiff seeks to enforce a contract that purports to bind defendant for a one year period and at the same time permit plaintiff to terminate at will. While this court does not adhere to a wooden mutuality rule, the existence of a provision entitling plaintiff to end the contract whenever it chooses is an important factor in determining whether injunction relief is appropriate.⁴³

⁴¹ 276 F. Supp. at 620.

⁴² Paragraph 2 of the contract provided:

That for the consideration above mentioned, the club shall have the option or right to renew this contract with all its terms, provisions and conditions for another period of one year, provided, however, that the rate of salary shall be such as the parties may agree upon, or in default of agreement, such as the club shall fix; and the player hereby agrees to perform similar services and be subject to all the obligations, duties and liabilities prescribed in this contract for the period or periods of such renewal, including the rate of salary fixed by the club in the event the salary rate cannot be fixed by agreement of the parties, provided only that written notice of the exercise of such option of renewal be served upon the player prior to August 31, 1967. 276 F. Supp. at 619.

Paragraph 1 provided:

That the club may at any time after the beginning and prior to the completion of the period of this contract, give written notice of its option and intention to end and terminate all of its liabilities and obligations of the club shall cease and terminate immediately. The playear (sic) shall thereupon be freed and discharged from his obligations hereunder, shall have no claim for salary or other compensation thereafter, and shall be free to negotiate a new contract for himself with any other club in the league. *Id.* at 619-20.

⁴³ 276 F. Supp. at 621.

CONCLUSION

It is well settled today that injunctive relief is available to restrain and prevent an athlete from performing for another team or person in violation of his contractual obligations. In the years of litigation, the cases have usually turned upon the resolution of two basic issues. The first, which requires a determination of what constitutes possession of unique and extraordinary skill so as to make a person amenable to an injunction, today appears to be conclusively settled. The courts have given "unique and extraordinary skill" such a broad interpretation that for all practical purposes it includes all those athletes who have signed a professional contract.⁴⁴

The second basic issue upon which the courts have founded their decisions is that of mutuality involving reserve and option clauses. The preponderance of the cases have upheld the validity of these contracts as not lacking mutuality. The court's decision in the *Heyman* case points out, however, that this question is not entirely settled.

The courts have realized that the entire professional sports structure is based upon a contractual foundation. Without some means of enforcing these contracts, the entire structure would certainly be shaken and weakened. Since it would be virtually impossible to determine with any degree of certainty the financial harm caused by a player's breach of contract, an action at law for damages would be difficult to maintain. Without a doubt, if a baseball team lost a twenty-game winning pitcher, a football team lost its quarterback,

⁴⁴ *But see* *Safro v. Lakofsky*, 238 N.W. 641 (Minn. 1931), where the court held that a boxer sought to be enjoined was not amenable to injunctive relief because there was nothing to show that he had any peculiar skill or prowess or even any promise whatever. The court felt that the plaintiff could easily replace the defendant and therefore was not irreparably damaged.

or a basketball team lost its leading scorer, the team would be hard-pressed to repeat the success of a preceding year. A decline in league standings in any professional sport is usually paralleled by a decline in attendance, resulting in a monetary loss to the club. There are too many variables involved, however, for a club to directly relate the breach of contract to a specified amount of damages, thus virtually eliminating an action at law for damages. An argument might be made that the risk of proof of loss should be borne by the wrongdoer, in this case the breaching athlete.

This is the position that the U.S. Supreme Court has taken in anti-trust cases⁴⁵ in order to allow plaintiffs to maintain an action for damages despite the fact that they could not prove a specific amount of damages. It is very doubtful, however, that the courts will subscribe to this argument since that decision was necessary to effect the purpose of the anti-trust laws—an overriding Congressional policy not present here.

A provision for liquidated damages in the event of a breach would not solve the problem either, for no “reasonable” amount of damages would adequately compensate a club for the loss of one of its stars or even one of its regulars. Even if the liquidated damages were set at relatively high figure, a club in a rival league would be more than happy to pay it in order to get an established player to jump leagues. Yet the club losing the player still might not be adequately compensated.

Another argument that a club could raise is that the contract gives the club the player’s services for one season and not just the right to enjoin his performance for another club for one year. This argument undoubtedly would be of no avail because it is too restrictive. It would leave the athlete no recourse other than to abandon his profession if he did not

⁴⁵ *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946).

desire to play for the club he had contracted with, and it is unlikely that the courts would go that far.⁴⁶

Thus it appears that the only feasible, and the most equitable solution for both players and clubs is the present method of enjoining the breach of contract. The player can breach his contract if he wants to, sit out of competition for one year, and then play for another club the following year. Most athletes, however, are reluctant to pay the price — giving up one full season out of a relatively short competitive year — thus the injunction appears to be enough of a deterrent in most cases to stop him from breaching his contract.

Peter J. Bosch

⁴⁶ See *Machen v. Johansson*, 174 F. Supp. 522 (S.D.N.Y. 1959). Boxers Machen and Johansson had signed for a match on the condition that if Machen lost, Johansson would give him a rematch before he fought anyone else in the United States or before he fought the champion, Floyd Patterson, anywhere in the world. That was the interpretation of the contract urged upon the court by the plaintiff, Machen, when he sought to enjoin Johansson from fighting Patterson for the Heavyweight Championship in New York, but the court denied the injunction saying:

I find that the instant covenant, even as interpreted by plaintiff is not enforceable by injunction for two reasons:

- (1) It is not reasonable in its terms;
- (2) The granting of an injunction would inflict serious injury on the defendant, while not providing the plaintiff with the protection he seeks. *Id.* at 530.