POST-MERGER BLUES: INTRA-LEAGUE CONTRACT JUMPING

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In the wake of the Oscar Robertson settlement1 and the demise of the World Football League and the American Basketball Association lies the uncertain plight of “contract jumping,” a phenomenon heretofore most frequently involving the unilateral repudiation by a player of his contract with a team in one major professional sports league to play for a team in a competing league. The most obvious reason for a team in a newly formed league to risk litigation by inducing a player to jump during the term of his existing contract with a team in the established competing league has been the antitrust leverage that could be brought to bear against a player’s old team and league if they attempted to enjoin him from playing for his new team.2 The tendency toward consolidation in professional sports resulting in one major league per sport3 has minimized the possibility that a club will invoke the antitrust laws against its

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1. See Robertson v. National Basketball Ass’n, No. 70-1526 (S.D.N.Y. July 30, 1976) (approving settlement of the case). Robertson was a class action brought by 14 players of the National Basketball Association (NBA) on behalf of themselves and various NBA players against the NBA, its member teams, and the now defunct American Basketball Association (ABA). The lawsuit sought the elimination of practices and procedures such as the college draft, the reserve clause, and the “compensation” rule, which allegedly were designed to prevent competition among the member clubs for player services. The players also sought an injunction against the merger of the NBA and the ABA.
   The settlement agreement modified several challenged practices and eliminated others. For example, the draft or player selection system that formerly vested a club with the exclusive right in the league to negotiate with a player was modified to allow a rookie to negotiate with any NBA club after sitting out of the NBA for two seasons. ANTITRUST & TRADE REG. REP. (BNA) No. 777, at A-2 to -3 (Aug. 17, 1976). The option clause, which binds a player to his team for one year after the expiration of his contract at a reduced salary, was eliminated, although it may be reinstated in individual contracts by the mutual consent of the player and the club. Id. Additionally the settlement agreement provided for the merger of four ABA teams into the NBA.
3. Of the four major professional sports (baseball, basketball, football, and hockey), only hockey has competitive leagues currently functioning above the minor league level. The viability of one of those leagues, the World Hockey Association, is doubtful. As one of the WHA’s superstars commented, “[w]ithout a merger this league [the WHA] can’t survive, not with 6,000 fans at every game. Almost every team in the WHA is getting worse.” SPORTS ILLUSTRATED, Nov. 29, 1976, at 29, quoting Bobby Hull of the Winnipeg Jets Hockey Club.
league and member teams to validate a jump. Thus, in the absence of the antitrust spectre, a player’s old team presumably would be more likely to insist upon its alleged contract rights, and his would-be new team would be less likely to risk the outcome of such litigation. Accordingly, the most reasonable prediction of the future of contract jumping is that owners of professional teams, motivated by enlightened economic self-interest, will not raid their brethren and that transfers of players from one team to another within any given league will occur only when a mutually agreeable trade can be arranged or when a player becomes a free agent after the expiration of the term of his contract plus any applicable option year.

4. Although a few clubs heretofore have initiated antitrust suits against both their leagues and member clubs, these suits were an indirect result of the competition for players caused by competing sports leagues. See, e.g., Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal.), stay vacated sub nom. Haywood v. National Basketball Ass’n, 401 U.S. 1204 (Douglas, Circuit Justice, 1971); Erving v. National Basketball Ass’n, No. 17-194 (N.D. Ga., filed Sept. 23, 1972) (voluntarily dismissed by plaintiff). The consolidation of professional sports leagues portends the end of such suits by teams. Economic history indicates that if there is no orderly manner in which a club can acquire talent, “bidding wars” ensue that inflate players’ salaries to the point of economic ruination for the sport. See, e.g., SPORTS ILLUSTRATED, Nov. 29, 1976, at 28-29 (salary increases in professional hockey threaten the viability of the sport). Additionally, antitrust suits among the clubs of a league undermine the unity of the club owners and their ability to negotiate with player organizations. However, the consolidation of sports leagues is not likely to discourage antitrust actions by players on their own behalf. See, e.g., Flood v. Kuhn, 309 F. Supp. 793 (S.D.N.Y. 1970), aff’d, 443 F.2d 264 (2d Cir. 1971), aff’d, 407 U.S. 258 (1972).

5. Until recently, however, even though a player theoretically could become a free agent by “playing out” his existing contract, his ability to negotiate a contract with another team in the same league was limited, as a practical matter, by the existence of so-called “compensation rules,” the football counterpart of which is commonly referred to as the “Rozelle rule.” The economic and business justification for these rules is that they represent an effort to maintain the type of competitive balance without which the league could not survive and to protect the old club’s investment in the player and compensate it for the resulting loss in continuity and fan identification. Simply stated, the compensation rules are designed to make the player’s old club “whole,” insofar as possible, for the loss of its player. The current status of compensation rules in professional sports is as follows:

Football: The “Rozelle rule” was declared to be a violation of §1 of the Sherman Act in Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976) (applying the “rule of reason”) and Kapp v. National Football League, 390 F. Supp. 73, 82 (N.D. Cal. 1974) (purporting to apply the “rule of reason” but holding the Rozelle rule to be “so patently unreasonable that there is no genuine issue for trial”). The club owners and the NFL Players Association (NFLPA) recently negotiated a new collective bargaining agreement that embodies a revised compensation system — replacing the Rozelle rule that a right of first refusal by the player’s old club to match the offer made by his new team. Collective Bargaining Agreement between NFLPA & NFL Management Council art. XV (1977). This right arises only if the old club has made a “qualifying offer” to the player of a minimum salary based on the number of seasons completed by the player in the NFL. Id. art. XV, § 10. If the old club exercises its right of first refusal within the specified time, a binding agreement is created between the
However, if there is anything to be learned from professional teams, leagues, players, and player representatives over the past several years, it is that the "reasonable" reaction is not a fact of life in the sports world. Actions such as Charles Finley’s attempted sale of three of his star baseball players for $3.5 million,\(^6\) exorbitant bidding between rival leagues for players,\(^7\) and threatened and ac-

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Basketball: Pursuant to the settlement of the Oscar Robertson litigation, see note 1 supra, the NBA’s compensation rule will remain in effect through the 1980-81 playing season. From the 1980-81 season through the 1986-87 season, the compensation rule will be replaced by a "right of first refusal" of the player’s old team to match the offer made by his new team. If the old team does not exercise this right within a specified time period, the player and his new team are free to execute a contract embodying terms which are not less favorable to the player than those contained in the offer which the old team refused to meet. Although the NBA agreed not to reinstitute the “present” compensation rule following the 1986-87 season, the settlement agreement is silent regarding the league’s right to implement some other form of compensation rule at that time.

Hockey: As a result of the settlement of the professional hockey antitrust litigation, see note 2 supra, the NHL’s compensation rule is a part of the NHL Standard Player’s Contract:

The purpose of the equalization payment shall be to compensate a player’s previous Member Club fairly for loss of the right to his services when that player becomes a free agent and the right to his services is acquired by another Member Club or a club owned or controlled by another Member Club.

National Hockey League By-Law Section 9A, § 9A.7 (1973). In the event the old club and new club are unable to agree upon the form and/or amount of the "equalization payment," their dispute is resolved by final and binding arbitration before “a neutral arbitrator selected from time to time by majority vote of the Board of Governors of the League.” Id. § 9A.8(a).

Baseball: Prior to the recent arbitration decision in the Messersmith-McNally case, the “reserve clause” contained in major league baseball players’ contracts was understood and applied so as to bind a player perpetually to his existing club. See note 26 infra. Accordingly, prior to the decision in that case, baseball never felt the need for a compensation rule. The effect of the Messersmith-McNally decision is to leave major league baseball with a one year renewal option and no compensation system.

6. All three players were about to become free agents, and because baseball has no compensation rule under which the player’s old club is compensated by his new club, see note 5 supra, Finley would have received nothing from the players’ new teams. Indeed, two of the players, Rollie Fingers and Joe Rudi, subsequently left Oakland in the free agent draft and Finley received no compensation from their new teams. Baseball Commissioner Bowie Kuhn invalidated the sales because they were not “in the best interest of baseball.” SPORTS ILLUSTRATED, June 28, 1976, at 24. Thereafter Finley sued Kuhn, claiming that Kuhn exceeded his authority as Commissioner by vetoing the sales and that his action constituted an unlawful interference with Finley’s property rights and an unlawful restraint of trade under section 1 of the Sherman Act. Charles O. Finley & Co. v. Kuhn, Cause No. 76C2358 (N.D. Ill. Sept. 7, 1976).

7. For example, the competition for hockey players caused by the creation of a rival league

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tual lawsuits by member clubs against their league and co-
members, all of which have had disruptive, if not catastrophic, 
effects upon the sports industry’s structure and economic frame-
work, are illustrative of unreasonable reactions. Although the public 
may tend to discount such incidents as the egotistical behavior of a 
handful of eccentrics, a more accurate explanation generally may be 
found in the ever-present profit motive and the frequently de-
monstrable correlation between superstars and gate receipts.

To compete with the established National Hockey League (NHL) has been primarily responsi-
ble for a 533 per cent increase in player salaries and benefits from an average yearly salary of 
$18,000 in 1967 to $95,886 in 1975. SPORTS ILLUSTRATED, Nov. 29, 1976, at 28-29. This increase 
is one of the causes of the present financial crisis of professional hockey which is threatening 
the viability of the World Hockey League and a number of teams in the NHL. Id.

8. For example, the Atlanta Hawks of the NBA sued the Association and its member teams 
after a league decision awarded exclusive NBA rights to Julius Erving to the Milwaukee 
Bucks. Erving, an ABA superstar, was originally drafted by Milwaukee but was signed by 
Atlanta. The suit filed by Atlanta after the league voided its contract with Erving alleged 
that the NBA player draft amounted to a violation of section 1 of the Sherman Act, 15 U.S.C. 
Although Atlanta’s suit was dismissed voluntarily prior to trial, the Seattle Supersonics of 
the NBA filed and won a similar antitrust action against the NBA and its member clubs to 
obtain the services of Spencer Haywood. Denver Rockets v. All-Pro Management, Inc., 325 

9. A superstar has been defined as “any player who has made a league all-star team five 
times or, in the case of players with only a few years experience, one who is obviously a 
dominant player in the game.” R. NOLL & B. OKNER, THE ECONOMICS OF PROFESSIONAL 

10. Using the definition of “superstar” in note 9 supra, one study of the correlation between 
superstars and gate receipts observed:

[H]aving a superstar on the team is worth 25,000 attendance during the season. 
This figure, of course, is an average for all teams and for all seventeen players in 
the two leagues classified as superstars by our criteria. Still using the $4.50 
average ticket price, this means that about seventeen professional basketball 
players produce about $100,000 a year in gross revenues for their teams beyond 
whatever contribution these talented athletes make to the won-lost record of the 
team. Including the contribution a superstar makes to his team’s winning per-
centage, the results suggest that basketball superstars are worth salaries exceed-
ing $100,000, as measured by the contribution they make to team revenues. 
Furthermore, a player such as Lew Alcindor is probably worth much more. If 
he is the difference between winning and losing in twenty percent of the Bucks’ 
games and if he is twice the fan attraction of the average of our seventeen 
superstars, then, by himself, he accounts for nearly $500,000 a year in gate 
receipts for the Bucks. Despite the acknowledged statistical error in such regres-
sion estimates, the evidence is strong that Alcindor is grossly underpaid in 
relation to his value to his team - even if he earns $250,000 annually.

The conclusion to be drawn [from] the evidence on tickets and on salaries 
of superstars is that whatever owners believe their motivations to be, they be-
On the one hand, the consolidation of the leagues would seem to portend a decrease in jumping because of increased fear of litigation and the restraint upon owners imposed by league rules against "tampering." On the other hand, the owners' desire to maximize...
ticket sales and media revenue, combined with the scarcity of superstars, may prompt jumping. With the increasing use of long term contracts in recent years, the potential sources of a superstar's disenchantment with his existing team also have increased. The aura of excitement that surrounded his original signing dissipates; changes in management and other team personnel are likely to have occurred, converting a championship team into a perennial "also-ran"; and the salaries of younger, less experienced, and arguably less valuable superstars surpass his. Moreover, the player's agent is unlikely to serve as a restraining force because a jump presents him with an opportunity to justify his existence, to obtain favorable publicity, and to profit financially.

Although league-wide anti-tampering rules agreed to by all of the member clubs in the various professional sports leagues never have been the subject of a direct attack under the federal antitrust laws, their validity under the Sherman Act has been questioned on at least two occasions. Mackey v. National Football League, 407 F. Supp. 1000, 1005-06 (D. Minn. 1975), aff'd, 543 F.2d 606 (8th Cir. 1976); Kapp v. National Football League, 390 F. Supp. 73 (N.D. Cal. 1974). The courts in Kapp and Mackey held that such a rule was unreasonable within the antitrust laws insofar as it is used to aid in the enforcement of other anticompetitive practices such as the draft, the standard player contract, the option clause and the "Rozelle rule". 407 F. Supp. at 1007; 390 F. Supp. at 82.

Whether or not the anti-tampering rules of the various professional sports leagues violate the antitrust laws is beyond the scope of this Article. When these rules are applied to the "typical" fact pattern involved in contract jumping, however, an antitrust violation may come into play. Generally a player who wishes to jump will unilaterally terminate his contract by asserting that his club defaulted on the contract. While the player begins negotiations with other clubs in the league, his old club will assert the applicability of the league's anti-tampering rule. The player and the negotiating club(s) may contend that the anti-tampering rule applies only to players who are under contract and that as a result of the default and the player's termination of the contract, the jumping player is no longer under contract to his old club. There is informal precedent for this type of argument. Mackey v. National Football League, 407 F. Supp. 1000, 1004 (D. Minn. 1975), aff'd, 543 F.2d 606 (8th Cir. 1976) (Commissioner of NFL ruled that a player became a free agent when his club breached contract by failing to exercise its renewal option in a timely manner). See also the discussion of the interpretation of standard player contracts at notes 16-22 infra & accompanying text.

In defense of the application of the anti-tampering rule, the player's old club and the league may argue that because neither the preexistence of the player's contract with the old club nor the player's unilateral claim of default by the old club has been tested in any neutral forum, there is reasonable basis and legal justification for enforcing the anti-tampering rule. Because the effect of such an argument would be to relegate the player to the slow processes of arbitration or the courts until the dispute was finally resolved, a wholesale application of the anti-tampering rule under these circumstances, without regard to the substantiality of the claimed breach by the old club, probably falls within a literal reading of section 1 of the Sherman Act; the anti-tampering rule itself supplies the necessary element of "concerted action". See Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939); Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc., 459 F.2d 138, 146 (6th Cir. 1972). Section 1 of the Sherman Act declares illegal "[e]very contract, combination . . . , conspiracy, in restraint of trade . . . ." 15 U.S.C. § 1 (1970).
After the player makes the decision to change teams, the first step is for the player, his agent, and his attorney to convert his overall dissatisfaction into legal grounds for the jump and to formulate a jumping strategy. The applicable legal framework is composed of both a consensual element, consisting of the contractual terms agreed to by the players and the club owner as set forth in the negotiated uniform player contract, and a non-consensual element, consisting of common law contract principles. Generally, in attempting to effectuate a successful jump, players and jumped-to teams point to the language of the contract, arguing for a literal interpretation that clears the way for the jump by permitting a player to terminate the contract on the basis of the slightest breach by the club. The owners of jumped-from teams, to protect themselves, must base their arguments on mitigating common law contract principles and an interpretation of the contract that comports more closely with normal business practice in an attempt to obviate the harsh, and sometimes unfair, results of a literal reading of the contract.

THE UNIFORM PLAYER CONTRACT AS A DETERMINANT OF PLAYERS' STRATEGY

A party generally is not legally justified in terminating or rescinding a bilateral contract absent a breach or default by the other party on a matter so substantial and fundamental as to defeat the object of the contract. However, under a literal interpretation of the uniform player contracts used in the National Hockey League (NHL)
and in major league baseball, a player may terminate his contract upon any default or breach by the club of its obligations thereunder, regardless of materiality. For example, the NHL Standard Player's Contract provides:

If the Club shall default in the payments to the Player provided for in Section 1 hereof or shall fail to perform any other obligation agreed to be performed by the Club hereunder, the Player may, by notice in writing to the Club, specify the nature of the default, and if the Club shall fail to remedy the default within fifteen (15) days from receipt of such notice, this contract shall be terminated, and upon the date of such termination all obligations of both parties shall cease, except the obligation of the Club to pay the Player's compensation to that date.18

If judicially tested, a literal interpretation of this clause should prevail because in the immediately succeeding paragraph of the NHL contract, the club's right to terminate the contract is expressly limited to "material" breaches by the player.19

The standard National Football League (NFL) player contract, on the other hand, contains little guidance in the area of termination by the player. It provides merely that "[t]he rights of termination set forth in this contract will be in addition to any other rights

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**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.

7.(b) Upon any termination of this contract by the Player, all obligations of both Parties hereunder shall cease on the date of termination, except the obligation of the Club to pay the Player's compensation to said date.

The National League of Professional Baseball Clubs' Uniform Player Contract ¶ 7(b). 19. Paragraph 13 of the NHL Standard Player's Contract provides:

The Club may terminate this contract upon written notice to the Player (but only after obtaining waivers from all other League clubs) if the player shall at any time:

(a) fail, refuse or neglect to obey the Club's rules governing training and conduct of players,

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

The standard player contract of professional baseball is to the same effect. E.g., National League of Professional Baseball Clubs, Uniform Player Contract ¶ 7(b).
of termination allowed either party by law. Termination will be effective upon the giving of written notice . . . ." 20 Although a player might argue that this language grants the player an unqualified right to terminate the contract upon any breach by the club, a more reasonable and less strained interpretation of the NFL contract is that it does not address itself to the question of whether and under what circumstances a player may terminate the contract, thus relegating the player to his common law rights and remedies. 21

Only in the National Basketball Association (NBA) does the standard player contract contain an express limitation upon the player’s right to terminate upon default or breach by the club:

In the event of an alleged default by the Club in the payments to the Player provided for by this contract, or in the event of an alleged failure by the Club to perform any other material obligation agreed to be performed by the Club hereunder, the Player shall notify both the Club and the Association in writing of the facts constituting such alleged default or alleged failure. If neither the Club nor the Association shall cause such alleged default or alleged failure to be remedied within five (5) days after receipt of such written notice, the National Basketball Players Association shall, on behalf of the Player, have the right to request that the dispute concerning such alleged default or alleged failure be referred immediately to the Impartial Arbitrator in accordance with Article XV, Section 2(g), of the Agreement currently in effect between the National Basketball Association and National Basketball Players Association. If, as a result of such arbitration, an award issues in favor of the Player, and if neither the Club nor the Association complies with such award within ten (10) days after the service thereof, the Player shall have the right, by a further written notice to the Club and the Association, to terminate this contract. 22

Thus, in the NBA, a player desiring to jump is contractually obligated to test his legal grounds beforehand through arbitration, and the club has ten days from an adverse arbitral decision within which to "cure" its default, thereby preventing the jump.

In hockey, baseball, and probably football, however, the player desiring to jump may take the initiative and attempt to identify or

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20. NFL Player Contract ¶ 12.
21. For a discussion of when a breach of an employment contract entitles an employee to terminate his contract see 4 A. CORBIN, CONTRACTS § 958 (1962).
22. NBA Uniform Player Contract ¶ 20(a).
structure a breach by the club, terminate his contract, and purport to negotiate as a free agent. This concept of "structuring" a breach is not as Machiavellian as it initially seems because a player's decision to jump from his present club is often an outgrowth of a dispute over the proper interpretation of the club's obligations under the contract rather than a preconceived plan initiated for economic self-interest. Such a situation led to "Catfish" Hunter's jump from the Oakland Athletics to the New York Yankees. The dispute in that case was whether Oakland's deferred compensation obligation to Hunter required the club to comply with Hunter's request to purchase current annuities with the "deferred" amounts, as earned by Hunter each year, or whether the club had the right to control and to use these deferred amounts until the period of deferment ended. The language of the contract did not provide a clear answer. When the owner of the Oakland franchise refused to accede to Hunter's position, Hunter terminated the contract and declared himself a free agent.

Catfish Hunter's dispute with Oakland was apparently a legitimate, good faith difference of opinion between two contracting parties regarding their respective rights and obligations. The same type of dispute, however, may be created by a dissatisfied player and his representatives after combing the contract in search of technical breaches upon which a jump may be based. This type of exercise

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23. The contract provided, in relevant part:

   It is agreed that as a part of the consideration of this Uniform Player's Contract between Oakland Athletics, Division of Charles O. Finley & Co., Inc., hereinafter called the 'Club,' and James A. Hunter, hereinafter called the 'Player,' that the said Club will pay to any person, firm or corporation designated by said Player, the sum of Fifty Thousand ($50,000.00) Dollars per year, for the duration of this contract to be deferred compensation, same to be paid [at any time requested by the said Player].

   In re Arbitration between American & National Leagues of Professional Baseball Clubs (Oakland Athletics, Division of Charles O. Finley & Co., Inc.) & Major League Baseball Players Ass'n (James A. ("Catfish") Hunter), Decision No. 23, at 3 (Dec. 13, 1974).

24. Hunter prevailed in arbitration. Id.

25. For example, the entire area of a club's deferred compensation obligation, particularly the timing and funding, is a fertile source of potential default by the club. Many player contracts provide that the player becomes "entitled" to deferred compensation for each season he plays, to be paid according to a contractually prescribed timetable after the player's retirement. Rarely does a club, however, actually fund its deferred compensation obligations; they generally are treated in practice as promises to pay at a future time, evidenced merely by bookkeeping entries or reserves. A serious question exists whether such internal treatment by a club of its deferred compensation obligations arising out of past years is consistent with a player's contractual "entitlement" to those amounts, particularly when the club is consis-
gives meaning to the concept of “structuring” a breach.

A potential source for a structured breach lies in a club’s inadvertent failure to meet one or more of its obligations under the contract, such as its obligation to tender the player a specified percentage of his previous year’s compensation to take advantage of the one year renewal option after the fixed term of the contract has expired. This was the basis upon which Joe Caldwell jumped from the Atlanta Hawks in the NBA to the Carolina Cougars in the now defunct American Basketball Association (ABA). With the ever increasing complexity of the financial packages and in-kind compensation received by players today, it is frequently difficult for the club to determine how much to tender to exercise its renewal option properly. Moreover, a dissatisfied superstar who wishes to jump is unlikely to provide much help to a club in making such a determination.

Perhaps the most fertile sources of potential default by the club, and the ones that lend themselves most readily to possible abuse by the player and his representatives, are obligations arising out of

26. The standard player contracts presently in effect in football, baseball, and hockey all provide for some type of renewal option on the part of the club. Such an option binds the player to his club for one year beyond the expiration of the fixed term of his contract. NFL Standard Player Contract ¶ 17, NHL Standard Player Contract ¶ 17 (1974 Form), National League of Professional Baseball Clubs Uniform Player Contract ¶ 10.

Although the renewal option was eliminated as a mandatory clause in the NBA’s standard player contract by the Oscar Robertson settlement, an option clause is permitted with respect to rookie players who sign one year player contracts and any other players who specifically negotiate an option clause with the club. See note 1 supra.

As a result of the Messersmith - McNally decision, Kansas City Royals Baseball Club v. Major League Baseball Players Ass’n, 409 F. Supp. 233 (W.D. Mo.), aff’d, 532 F.2d 615 (8th Cir. 1976) (affirming arbitration award limiting the reserve clause to a one year option period), baseball is left with a one year renewal option and no compensation system.

Renewal option provisions have been held to be enforceable, Nassau Sports v. Peters, 352 F. Supp. 870 (E.D.N.Y. 1972); Central New York Basketball, Inc. v. Barnett, 19 Ohio Op. 2d 130, 181 N.E.2d 506 (C.P. Cuyahoga County 1961), at least if it cannot be shown that to enforce the option clause would effectuate some broader restraint of trade or monopolization under sections 1 or 2 of the Sherman Act. Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 503-06 (E.D. Pa. 1972). The renewal option clause is to be contrasted with the so-called “reserve clause”, which existed in major league baseball prior to the arbitration decision in the Messersmith-McNally case, under which the player was bound perpetually to his existing club. See Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass’n, 409 F. Supp. 233 (W.D. Mo.), aff’d, 532 F.2d 615 (8th Cir. 1976) (affirming arbitration award limiting reserve clause to a one year option period).

alleged pre-contract representations by the club that never made their way into the written contract. Such a representation formed the basis upon which Julius Erving, the famous "Dr. J", recently structured an alleged breach of contract by the New York Nets, refused to report for the 1976-77 season, and thus "leveraged" himself into a trade to the Philadelphia 76ers and a new six-year contract at an estimated $3 million.\(^2\) The alleged breach was a refusal by the Nets to carry out a precontractual oral promise to renegotiate the contract after the expiration of two years.\(^2\)

The types of pre-contract representations that might form the basis for a player's breach of contract claim are limited only by the imagination. For example, Jeff Burroughs, an outfielder with the Texas Rangers who recently was traded to the Atlanta Braves in exchange for five players and $250,000, attempted to veto the trade because of an alleged verbal no-trade agreement with the Texas club.\(^3\) Similarly, in 1972, Julius Erving attempted to jump from the Virginia Squires in the ABA to the Atlanta Hawks in the NBA based in part upon the breach of an alleged pre-contract promise by one of the Squires' owners to provide an individual guaranty of the Squires' contractual obligations to Erving.\(^4\)

Once a player decides that a tenable ground of default exists, his next step is to parlay the breach into a renegotiated higher salary with his existing club, to force a trade to another club, or to declare the contract terminated and attempt to negotiate with other clubs as a free agent. The player's optimism may be heightened at this point by a literal reading of the standard players contract\(^5\) and the recent tendency of clubs to succumb to such demands.\(^6\)

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29. Erving's agent described the alleged breach:
   When the written contract was signed by Roy Boe, the president of the Nets, and Erving, there was an oral agreement between Boe, Erving and me that the Nets would renegotiate Erving's contract after two years.
   The Nets failed to honor their agreement to renegotiate Erving's contract even though Julius wanted to remain with the Nets. However, the Nets sought to enforce the terms of the written contract. In my opinion, that was unconscionable and constituted a breach of contract.
   Id. § 5, at 4, col. 4.
32. See notes 16-21 supra & accompanying text.
33. E.g., Julius Erving's trade from the New York Nets to the Philadelphia 76ers, described at notes 28-29 supra & accompanying text.
tioned above, however, an interpretation of the terms of the contract in light of common law contract principles may bar the player from succeeding in his effort to structure a breach.\textsuperscript{34}

**COMMON LAW CONTRACT PRINCIPLES AND THE CLUB'S STRATEGY**

A club's initial decision upon being confronted with a player's demands will be whether to adopt a combative posture or a policy of reconciliation. With a legitimate superstar, the economic consequences of his loss\textsuperscript{35} coupled with fan pressure will likely force a club to adopt the latter approach. If, however, its efforts to resolve the dispute amicably are unsuccessful or if the club refuses to capitulate to the player's demands, the club must look to common law contract principles to mitigate the harsh result seemingly dictated by the termination clause in the standard player contract.

The first and most obvious contention a club may assert on its behalf is that the termination clause is applicable only to material breaches of the contract. Under such an argument, only a default so fundamental that it defeats the object of the contract justifies a player's abandonment of the contract. As a corollary to this argument, a club may attempt to categorize the term that it allegedly breached as "subsidiary," "independent," and "severable," a categorization which, if accepted, should prevent the player from being discharged from further performance and relegate him to an action for damages for any loss occasioned by the breach.\textsuperscript{37}

However sympathetic a court may be to these attempts by a club to place a gloss upon the termination clause, there is little legal support for such an approach. On the contrary, courts recognize that the slightest breach may effect termination, if the contract so specifies, regardless of whether such a breach would be sufficient, without the termination clause, to justify the rescission of the contract.\textsuperscript{38}

An additional argument available to a club to frustrate a player's

\textsuperscript{34} See note 15 supra & accompanying text.
\textsuperscript{35} For a discussion of the economic worth of a superstar see note 10 supra.
\textsuperscript{36} See notes 16-21 supra & accompanying text.
\textsuperscript{38} Hal Roach Studios, Inc. v. Film Classics, Inc., 156 F.2d 596 (2d Cir. 1946); Ritter v. Perma-Stone Co., 325 P.2d 442 (Okla. 1958). See generally 1A, 6 A. Corbin, supra note 21, §§ 265, 1266.

For a discussion of the termination clauses used in the uniform player contracts of the various professional sports leagues see notes 16-22 supra & accompanying text.
jump is based on the arbitration clause in all standard player contracts which requires the parties to resolve their disputes by arbitration. Arguably, when the termination clause and the arbitration clause are read in pari materia, the player is required to arbitrate any dispute as a condition precedent to rescission or abandonment. Unless such an interpretation is adopted, what was intended to be a comprehensive arbitration clause applicable to all disputes is applicable only if the player seeks arbitration.

This argument, however, was expressly rejected by the arbitrator in the Catfish Hunter case, who, after finding the termination clause to be clear and unambiguous, stated:

[The termination clause] does not declare, as the Club would have the Panel decide, that if, on a grievance appealed to the Panel it appears that a Club defaulted in an obligation agreed to be performed by the club and the Panel so finds, then, and only then, the Player may terminate this contract, upon written notice to the Club provided there had been a failure to remedy the default so found within 10 days. To the contrary, it plainly and directly states that the Player may terminate his contract upon written notice of the the default if the Club shall fail to remedy such default within 10 days after receipt of the written notice.

Faced with such clear and unequivocal provisions, the Arbitration Panel has no alternative but to enforce them. As the writer has been admonished by the representatives of each of the parties when it serves their interests so to argue, the Arbitration Panel would be derelict in its duties if it sought to rewrite the contract or to subtract (or add) to the provisions signed by the contracting parties. The Panel has no authority to write into Section 7(a) the condition that if the Arbitration Panel first decides that a claimed default has occurred, then, and only then, the Player may terminate the Contract should the Club fail to remedy the Contract [sic] within ten days after his notice of default.


Another tactic a club may employ to counter a jump is to posture the player's position as arbitrary, unreasonable, and in bad faith. The foundation of this approach, which involves difficult problems of proof for the club, lies in those cases holding that a party cannot create the conditions upon which it purports to terminate its contract. Of course, a club that adopts this strategy will want to appear as reasonable as possible in its own position.

In its attempt to appear reasonable, the club should maintain that the dispute is merely a good faith difference of opinion between two contracting parties over the proper interpretation of the contract and it should offer to continue to perform in accordance with its interpretation of the agreement. There is authority to support the proposition that the adoption of such a position does not constitute a breach of contract by the club, even if its interpretation of the contract subsequently is held to be erroneous. The more substantial the alleged default by the club, however, the more difficult conceptually it becomes to defend as a matter of general contract law.

If a club is willing to go one step further and "tender" the disputed performance according to the player's interpretation of the contract, expressly reserving its right to maintain and pursue its contrary interpretation, a player's jump should be thwarted. More-

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44. For example, the club could tender the disputed performance in escrow, with the only condition of the escrow keyed to the final resolution of the contractual dispute.

45. Viramontes v. Fox, 65 N.M. 275, ——, 335 P.2d 1071, 1075 (1959); cf. Mobley v. New York Life Ins. Co., 295 U.S. 632, 637-39 (1935). In Viramontes, a dispute arose between the parties over the proper interpretation of the terms of their contract. The defendant refused to perform, claiming that plaintiff's assertion of the correctness of his position constituted a breach or repudiation of the contract. The court rejected this defense, holding that the defendant's refusal to perform itself amounted to a breach of contract:

Thus, the disagreement was nothing more nor less than an attempt on the part of each party to insist on performance according to his own interpretation of the contract terms . . . .

Under the facts presented we would therefore be unwarranted in holding there was a breach or repudiation by [the plaintiff] justifying nonperformance by [the defendant] . . . . A repudiation which may be treated as a breach justify-
over, the club's tender may be considered to be a "remedy" of its alleged default within the meaning of the termination clause itself, thereby tolling the running of the player's termination notice period.\(^4\) To accord legal efficacy to the club's tender does not destroy the legitimate expectations of the player, who attains his desired objective subject to a condition subsequent of resolution of the contractual dispute in his favor. The tender also protects the club from honest mistakes and from superstar extortion.

Not every alleged default, however, is susceptible of being "tendered" under protest.\(^7\) Moreover, a tender does not fulfill the club's ultimate objective of "freezing" the rights and obligations of the parties prior to the expiration of the period within which it must either cure its alleged default or allow its superstar to terminate his contract and become a free agent.\(^8\) To effectuate its objective, a club must waive its right to compel arbitration under the arbitration clause in the standard player contract,\(^9\) and initiate a breach of contract action requesting temporary and preliminary injunctive relief and a declaratory judgment as to the respective rights and obligations of the parties.\(^0\) The club's request for injunctive relief is supported by the standard player contract:

\[\text{50. To counter the club's attempt to circumvent the result mandated by the "Catfish" Hunter arbitration, see notes 41 \& 49 supra, a player might contend that under the contract the club must arbitrate all disputes. Nevertheless, despite the inclusion of an arbitration}\]
The Player represents and agrees that he has exceptional and unique knowledge, skill and ability as a . . . player, the loss of which cannot be estimated with certainty and cannot be fairly or adequately compensated by damages. The Player therefore agrees that the Club shall have the right, in addition to any other rights which the Club may possess, to enjoin him by appropriate injunction proceedings from playing . . . for any other team and/or for any breach of any of the other provisions of this contract.51

By initiating a lawsuit, the club forces the player to make the difficult choice of forum, either judicial or arbitral, in which the contractual dispute will be resolved. If the player does not seek to compel arbitration,52 a court might grant injunctive relief to preserve the status quo pending its final decision.53 If, on the other hand, the player does move to compel arbitration,54 the club should

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51. NHL Standard Player's Contract ¶ 6 (1974 Form); comparable provisions are found in the standard player contracts for baseball, basketball, and football. National League of Professional Baseball Clubs, Uniform Player's Contract ¶4(a); NBA Uniform Player Contract ¶ 9; NFL Player Contract ¶ 3.

52. One reason the player might prefer a judicial forum over an arbitrator is the identity of the arbitrator. For example, paragraph 18 of the NHL Standard Player's Contract provides that the President of the League shall arbitrate all contractual disputes other than those relating to "the compensation to be paid to the Player on a new contract."

53. In attempting to balance the relative convenience and hardship to the parties of granting or denying a preliminary injunction, it is likely that the court will be influenced by the difficulty of rectifying the error if the club ultimately wins the case, together with the inadequacy of money damages to compensate the club in such event. In contrast, the injury to the player during the interim is both more speculative and more susceptible of being adequately indemnified by a bond if the final decree is in his favor. See Calagaz v. DeFries, 303 F.2d 588, 589 (5th Cir. 1962). See generally 7 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 65.04[1] (2d ed. 1975).

54. Although at common law an executory agreement to arbitrate present or prospective disputes not made a rule of court will not be enforced by a court, e.g., Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 (1924), a number of jurisdictions have enacted arbitration statutes under which an arbitration agreement that complies with the statutory requisites is generally enforceable either at law or in equity by virtue of the statute. See, e.g., Bernhardt
argue that the court, to preserve the efficacy of any award in favor of the club, nevertheless should restrain the player from terminating his contract and negotiating as a free agent pending the outcome of arbitration.55

The player's most forceful arguments against the issuance of a preliminary injunction enjoining his termination of the contract and thereby preventing him from negotiating with other clubs as a free


If a club's lawsuit is filed in federal court, a player may compel arbitration by invoking the federal arbitration statute. E.g., Sterling Foundations, Inc. v. Merritt-Chapman & Scott Corp., 134 F. Supp. 327 (E.D.N.Y. 1955), implementing the Federal Arbitration Act, 9 U.S.C. § 3 (1970). If, however, the club brings its action in state court, and if grounds for removal exist, the player may remove to federal court to take advantage of the Federal Arbitration Act and to avoid the anti-arbitral bias sometimes found in state courts.

55. Illustrative of the judicial attitude likely to exist in this situation is the position adopted by the court in Erving v. Virginia Squires Basketball Club:

Arbitration may be futile . . . if the status quo is not preserved pending the arbitrator's determination. "The status quo has been frequently defined as the last uncontested status which preceded the pending controversy." Here, it appears that the last uncontested status predated [Erving's jump to] the Atlanta Hawks. Since that time [Erving] has, pursuant to [his contract with the Hawks], been photographed in their uniform, played in [their] exhibition games . . . . The very purpose of the arbitration is to determine whether [the Virginia Squires, the jumped-from club] is exclusively entitled to [Erving's] unique services. It is clear that the activities described above may well jeopardize the enforcement of any award in favor of the [Squires].

"The courts are not limited in their equity powers to the specific function of enforcing arbitration agreements but may exercise those powers required to preserve the status quo of the subject matter in controversy pending the enforcement of the arbitration provision. To rule otherwise would in effect permit a party to take the law in its own hands while the proceeding is carried on as a result of the specific direction of the Court.

"It would be an oddity in the law if the Court, after compelling a party to live up to his undertaking to arbitrate, had to stand idly by during the pendency of the arbitration . . . . and permit him to assert 'his right to breach a contract and to substitute payment of damages for non-performance.' The stay is an incident of the power to enforce the agreement to arbitrate." This . . . reasoning . . . furnishes the basis for restraining [Erving] from breaching his contract . . . pending the arbitration.

349 F. Supp. 716, 719-20 (E.D.N.Y.), aff'd, 468 F.2d 1064 (2d Cir. 1972), quoting Albatross S.S. Co. v. Manning Bros., Inc., 95 F. Supp. 459, 463 (S.D.N.Y. 1951) (citations omitted). Erving was not initiated by a club seeking to prevent a jump, but by a player seeking rescission of his contract with the jumped-from club and damages based upon pre-contractual misrepresentations and fraudulent concealment. The club sought to compel arbitration under the Federal Arbitration Act. Id. at 717-18. The difference between Erving and the fact situation posited in this Article is that Erving himself initiated that litigation and did not purport to terminate his contract unilaterally pursuant to the type of termination clause previously described. One is unable to determine from the court's opinion whether the ABA Standard Player Contract in effect at that time contained such a termination clause.
agent are: the issuance of coercive injunctive relief in this situation changes the status quo rather than preserves it; the last uncontested status is that established by the parties themselves in the contract; the contract clearly permits the player to proceed unilaterally; the effect of the issuance of an injunction will be to rewrite the contract and to change the substantive legal relationships between the parties prior to any ruling as to the correctness of the club's position; and the club is in reality trying to "bootstrap" itself into avoiding the *Catfish Hunter* result through the type of "procedural fencing" that traditionally has been held to be grounds for refusing a declaratory judgment.  

**CONCLUSION**

Perhaps the most a professional baseball, hockey, or football club can hope for, short of a reversal of the *Catfish Hunter* holding or a renegotiated termination clause comparable to the clause in the NBA players contract, is to maximize its chances of ultimate success on the merits of the breach issue by improving its legal posture through some of the strategy alternatives heretofore described. A few substantial damage awards against jumping players who lose the breach issue undoubtedly would have a sobering effect on future players and their representatives in their consideration of the strength of their alleged grounds for termination.

In the interim, the judicial and arbitral responses to the club's dilemma should be affected by such factors as the materiality of the alleged breach, the adequacy of a damage award to remedy the alleged breach, whether the disputed performance is susceptible of being tendered by the club, whether the player created the conditions allegedly justifying termination of the contract, and the overall good faith of both parties.

In the final analysis, a player who desires to change clubs badly enough probably will find a way. The legal framework, however, within which the player's decision to jump must be made should be structured to discourage unilateral jumps and to encourage the

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56. See 6A J. MOORE & J. LUCAS, supra note 53, ¶ 57.08 [5]
57. One way to narrow the grounds upon which a player unilaterally may declare a default by the club and purport to terminate his contract would be to give literal effect to the "wrap-up" clauses contained in the standard player contracts in all four sports. Paragraph 20 of the National Hockey League Standard Player's Contract (1974 Form), for example, provides: "[t]his Agreement contains the entire agreement between the parties and there are no oral or written inducements, promises or agreements except as provided herein." See also NFL
parties to arrive at a mutually acceptable trade with the player's new club.

Player Contract ¶22; NBA Uniform Player Contract ¶23; National League of Professional Baseball Clubs, Uniform Player's Contract "Supplemental Agreements." A literal interpretation of this clause eliminates the source of potential default that lends itself most readily to abuse by the player, the pre-contractual oral representation. See notes 28-31 supra & accompanying text. Such contractual declarations generally are given conclusive effect by a court absent fraud, mistake, or duress. See 3 A. CORBIN supra note 21, § 578.

To circumvent a literal application of a "wrap-up" clause to an alleged breach of a pre-contractual representation, a player might assert that because the standard player contract is a contract of adhesion, he had no opportunity to negotiate the language of the "wrap-up" clause, and was under a "business compulsion" to agree to this term. Accordingly, the clause should not be given its literal effect. See, e.g., Champlin v. Transport Motor Co., 177 Wash. 659, 33 P.2d 82 (1934). Another potential argument is that when one party induces another to suppose that a pre-contract representation is included in the written contractual document, when in fact it is not, the written contract may be voidable for fraud. See, e.g., International Harvester Co. of Amer. v. Bean, 159 Ky. 842, 169 S.W. 549 (1914).

It is submitted, however, that as a matter of policy, the courts should be extremely reluctant to open the lid on this "Pandora's Box;" the day of contract negotiations between the naive and unsophisticated player and the ruthless, tight-fisted owner are behind us. See Washington Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472, 479 (9th Cir. 1969).