Sonic Bust: Trying to Retain Major League Franchises in Challenging Financial Times

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I. INTRODUCTION

The relationship between a major league team and its market is rarely examined by more than reports in the local media about current games, the team's win-loss record and future stars, along with occasional glances at television ratings and attendance figures. While the aforementioned items can mean a great deal for fans and the media, the reality is that these elements are usually not determinative of a successful long-term relationship between a team and its home community.

Instead, the more important elements of the relationship often run much deeper and involve political machinations, public funding, financial promises made by both sides, requests and commitments for upgrades and new facilities, and the ongoing struggle to protect the benefits owed to both of the parties involved. These are the items that often determine whether the relationship delivers the promised and negotiated value for all involved parties.

As a result, it is vitally important for both parties to have an explicit understanding of their goals and desires for their partnership. They each need to understand what the other is bringing to the table and what they are looking to get out of the deal. The document that ties all of these goals, desires and key elements together in an attempt to protect the long-term economic interests of both parties is the lease agreement.[1]

For the community, the lease agreement is the contractual representation of the team's commitment to a facility and should protect the community's ability to reap the benefits of what it has provided for the team. For example, from 1990 - 2010 communities spent approximately $5.6 billion to build or renovate arenas for National Basketball Association (NBA) franchises.[2] The average public investment in these facilities over this time has been approximately $110 million dollars in public support.[3] In the current economy where public dollars for any project are scarce all over the country, these kinds of figures give pause to many who cannot understand why policy makers within these communities, and often the voting public, see some direct benefits associated with the presence of a major league team and are willing to pay for this presence. At the same time, and often in exchange for this public subsidization, the community will ask the team to promise to stay for the foreseeable future. This commitment to stay is important because it is the team's presence both in the facility and in the overall market that drives the promised long-term economic benefits that the franchise promised and community is paying for.

In today's sports industry, it is more important than ever for communities to try to protect this promise to the greatest extent possible. Franchises from all four of the major professional sports leagues are seemingly exploring relocation possibilities from facilities that received significant public investments on a monthly basis. In addition, team bankruptcies and ongoing threats of league contraction as part of collective bargaining negotiations make it essential for communities to try to protect their financial interests to the highest level possible. Finally, all four major professional sports leagues are now playing exhibition and regular season games in facilities all around the world. This means even communities that "keep the home team at home" could see their number of staged events reduced in their facilities as their

1. Throughout this article the term lease agreement will be used to refer to the many documents that can be used by parties to govern the relationship between sports facility owners and franchises. For example, the Milwaukee Brewers' lease agreement is made up of several different agreements including a Construction Administration Agreement, Shared Ownership Agreement, Ground Lease, Amended and Restated Non-Relocation Agreement, and a separate lease agreement.

2. National Sports Law Institute (NSLI), *Facility Update Charts: National Basketball Association: Appendix 2*, SPORTS FACILITY REPORTS, Vol. 10, Summer 2009, http://law.marquette.edu/cgi-bin/site.pl?2130&pageID=3956.

3. *Id.* Since 1990, 23 of the 30 teams received a new or renovated facility. In addition, of these teams only two, the Boston Celtics in TD Banknorth Garden and the Toronto Raptors in the Air Canada Centre, did not receive any public funding.

heroes play on distant shores. These games theoretically reduce the negotiated for long-term economic benefits coming back to the community that financed the team's home stadium or arena.

On the team side, in order to remain competitive in any of the four major professional sports leagues, owners usually argue that they must play in a state of the art facility that will provide them with the highest revenue earning potential. This usually requires the presence of a public subsidy for the stadium or arena. For example, 83% of the teams in the NBA have received some form of public support toward renovating or building an arena that they will call home.[4] Without this public investment it is unlikely that many teams would locate in a particular city or would be able to afford to build their own facility in the location of their choice. Instead, teams are willing to stay in cities often as a result of this public support, counting on the revenues they will receive from the facility they play in and making promises that they will not leave for a fixed period of time.

This article will analyze the deal that is made between a community and a major league franchise in order to determine what approaches a community can utilize to best protect itself and the investment that it has made to entice the team to play in its community. The analysis will begin with an in-depth look at the circumstances surrounding the recent relocation of the Seattle SuperSonics to Oklahoma City and the subsequent litigation generated by that move. This litigation is the most recent example illustrating what can happen when the relationship between a community and a major league sports team deteriorates and eventually breaks. The article will then examine the new deals that developed surrounding the end of that litigation. Building on this analysis, it will turn to a review of the potential power of a remedy often included within professional sports league lease agreements - specific performance. Finding this remedy to be inadequate at best, the article will conclude by examining potential solutions that communities can negotiate for within the lease agreements that they strike with professional sports franchises.

II. THE FACILITY AND THE DEAL IN SEATTLE

From 1967 to 1994, the Seattle SuperSonics played their home games at the Seattle Center Coliseum. In 1993, the Seattle City Council agreed to renovate the facility at a cost of approximately $74 million.[5] As part of the negotiations connected with the renovations, the city entered in to the

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4. *Id.*

5. City of Seattle v. The Professional Basketball Club, LLC., Complaint for Declaratory Relief, Docket Number: No. 07-2-30997-7 SEA, 2007 WL 5262606, at *3 (W.D. Wash. Oct. 9, 2007).

Premises Use & Occupancy Agreement (the focus of the dispute) with team owner SSI Sports, Inc., on March 2, 1994.[6] Key Bank paid $15 million for a fifteen-year naming rights deal to name the facility.[7]

In 2001, Howard Schultz, chairman and CEO of Starbucks, and head of the Basketball Club of Seattle (BCOS), purchased the Sonics for approximately $250 million.[8] This group owned the team for only five years before selling it for approximately $350 million to the Professional Basketball Club, LLC (PBC), an Oklahoma limited liability company lead by Clay Bennett.[9]

The team's initial commitment to playing in the Coliseum (now Key Arena) was laid out in several clauses within the lease agreement. Initially, the recitals at the beginning of the agreement made clear that:

> WHEREAS, the City desires to construct a new, state of the art professional basketball playing facility in order to enhance the City but cannot do so without a long-term, principal user; and
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> WHEREAS, in order to induce SSI to become the principal user of a new playing facility on a long-term basis in lieu of having the SuperSonics play in an alternative venue, and to maintain the SuperSonics NBA franchise in Seattle, the City will construct a new Seattle Center Coliseum to replace the Current Facility, and
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> WHEREAS, the City and SSI desire to enter into an agreement specifying the terms and conditions under which SSI will use a new Seattle Center Coliseum and certain other facilities at Seattle Center on a long-term basis for the playing of professional basketball by the SuperSonics. . .[10]

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6. Premises Use & Occupancy Agreement between the City of Seattle and SSI Sports, Inc., March 2, 1994. Again, although this document is not titled as the "lease," it is what is typically called the "lease agreement" between the professional sports team and the community. These "leases" are often titled "use agreement," "license," and "management agreement." Regardless of the specific name, all of these types of agreements will be referred to as the "lease" or "lease agreement" within the article.

7. NSLI, *Facility Update Charts: National Basketball Association: Appendix 2*, SPORTS FACILITY REPORTS, Vol. 1, Number 1, Spring 2000, http://law.marquette.edu/cgi-bin/site.pl?2130&pageID=489#facility.

8. NSLI, *Facility Update Charts: National Basketball Association: Appendix 2*, SPORTS FACILITY REPORTS, Vol. 3, Number 1, Spring 2002, http://law.marquette.edu/cgi-bin/site.pl?2130&pageID=473.

9. NSLI, *Facility Update Charts: National Basketball Association: Appendix 2*, SPORTS FACILITY REPORTS, Vol. 7, Summer 2006, http://law.marquette.edu/cgi-bin/site.pl?2130&pageID=2629.

10. Premises Use & Occupancy Agreement, *supra* note 6, at 1.

This lease was supposed to keep the team in Seattle until 2010.[11]

Within the purchase agreement between PBC and BCOS, PBC agreed that it would "use good faith best efforts to negotiate an arena lease, purchase, use or similar arrangement in the King, Pierce or Snohomish Counties of Washington as a venue for the Teams' games, to be used as a successor venue to Key Arena."[12] The team set a deadline of one year to work on getting a deal for a new arena in place.[13]

At the same time, the team signed an Instrument of Assumption. Within this document it agreed to "assume and perform all of the obligations of SSI, Inc. under" the lease agreement, and agreed to "assume [the Seattle owners] liabilities and obligations under the [lease] Agreement on the terms and conditions set forth therein."[14] In addition, PBC agreed to "assume, and hereby agrees to satisfy or perform (as applicable), all liabilities and obligations. . .under the" lease agreement.[15]

11. *Id.* at 6 (II. TERM: USE PERIOD).

12. The City of Seattle's Motion in Limine to Exclude Evidence of Defendant's Efforts to Obtain a "Successor Venue" to Key Arena, City of Seattle v. The Professional Basketball Club, No. 07-1620 MJP (W.D. Wash. May 27, 2008). PBC eventually developed a referendum (submitted too late in the legislative session to be voted on), calling for $400 million in taxpayer support, with a $100 million contribution from the team. *Cities, Teams Struggling to Get Along,* SAN ANTONIO EXPRESS-NEWS, Feb. 18, 2007, at 10C. The city of Seattle did not support this proposal, setting PBC to look to relocate.

13. *Sonics: We're Going to Oklahoma City*, ASSOC. PRESS, Nov. 2, 2007.

14. Instrument of Assumption, at 1 (Oct. 9, 2007).

15. *Id.* at 2.

III. THE DEAL GONE WRONG[16]

After failing to come up with an alternative venue, and believing that its relationship with the city of Seattle was irreparably harmed, PBC sought to get out of its agreement and to get out of Seattle.[17]

1. Arbitration Demand

Pursuant to Article XXV of the lease, on October 9, 2007, PBC initiated a demand for arbitration against the city of Seattle.[18] Although well before the 2010 expiration date of the lease, the team argued that "Key Arena is no longer an economically viable NBA venue."[19] The team also claimed that it had worked diligently to obtain a suitable venue in the Seattle area but had

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16. The litigation between the city and the team was not the only litigation the team faced as a result of its decision to relocate.

Season ticket holders who renewed tickets, and thereby joined an exclusive club for season ticket holders, sued PBC claiming that it breached their contracts and violated the Washington Consumer Protection Act. The plaintiffs also wanted the court, through specific performance, to force the team to sell them tickets in Oklahoma City under the same contract. The district court allowed the contract claims to proceed but would not force PBC to sell tickets in the new city and did not find that the plaintiffs suffered any injury under the consumer protection statute. Brotherson v. Professional Basketball Club, 604 F.Supp.2d 1276 (W.D. Wash. 2009), *motion for reconsideration denied*, 2009 U.S. Dist. LEXIS 97921 (W.D. Wash. 2009). On February 12, 2010, Judge Richard Jones of the United States District Court for the Western District of Washington preliminarily approved a class action settlement between PBC and the plaintiffs for $1.6 million. Brotherson v. Professional Basketball Club, No. C07-1787, Doc. 200 (Feb. 12, 2010).

In addition, former SuperSonics owner, BCOS, led by Howard Schultz, sued PBC claiming that PBC fraudulently induced BCOS into selling the team and promising to keep it in Seattle. The Basketball Club of Seattle, LLC, & Canarsie Holdings, LLC, Complaint for Relief Arising Out of Fraud and Misrepresentation (Derivative Action) (W.D. Wash., April 22, 2008). By August of 2008, Schultz and BCOS had withdrawn the lawsuit because "Seattle's best chance for a professional basketball franchise is to end this litigation and allow the city, state Legislature and other parties to begin the necessary fence mending with the NBA." Greg Johns, *Schultz Withdraws Lawsuit Seeking Sonics' Return*, POST-INTELLIGENCE (SEATTLE), Aug. 29, 2008, available at http://www.seattlepi.com/basketball/377089_schultz30.html.

17. Much has been written about allegations that Clay Bennett and other members of the new ownership group planned to move to Oklahoma City from the time they purchased the team. While much of this was discussed in different motions before the court, none of it was admitted to the factual record. In addition, these types of allegations are relatively unimportant in this analysis of the legal relationship between a major league team and a community. Regardless of any comments or the alleged intent of the parties, the lease agreement is the contract that a court will analyze to determine the rights of the parties involved. A community must focus on developing the most favorable agreement to protect its rights and should not rest its protection on allegations and hearsay.

18. Arbitration Demand by The Professional Basketball Club, LLC to the City of Seattle, Sept. 19, 2007.

19 *Id.* at 1.

been unsuccessful, claimed losses of some $17,000,000 in 2007, $55,000,000 over the past five years, and claimed that it had "no alternative but to play the 2007-2008 season in Key Arena, and satisfy all remaining obligations by paying the rent for the balance of the term of the Agreement."[20]

Within this Arbitration Demand, the team tried to focus the dispute on whether it would be appropriate for the franchise to be forced to play the final two seasons under the lease at Key Arena. Answering this in the negative, the team argued that Key Arena had not been an economically viable arena for professional basketball for a number of years because it "lacks the necessary physical infrastructure and amenities and is an economically obsolete venue for men's professional basketball."[21] Specifically, the team argued that the arena was the smallest in the NBA at almost half the average size of other NBA facilities, it did not allow for enough premium seating opportunities, and it had limited points of sale opportunities and for a team store.[22]

The team also argued that the city had repeatedly acknowledged that the team brought no economic benefits to the city, the public did not care if the team left, and the relationship between the team and city leaders had been irreconcilably broken.[23] Specific to a claim of specific performance, and reflecting many of the arguments from past professional sports litigation in this area,[24] the team argued that the lease agreement was not the "type of business relationship that can be meaningfully and effectively 'forced' and supervised on a going-forward basis."[25] As a result, the team asked the arbitrator to enter a declaratory judgment finding that specific performance was not an available remedy that the city could look to under the lease agreement.

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20. *Id.* at 1 & 7. Rent is provided within the lease agreement in Article VIII. SSI PAYMENTS TO THE CITY. Under this provision, after the initial rental fee,

> The annual rent shall be increased each October 1st, beginning in 1996, to reflect the total percentage increase in the "West-A" Consumer Price Index (CPI) for All Urban Consumers, All Items (1982-84 = 100), . . . provided, further, that in no such twelve-month period shall the amount of the annual rent, as adjusted, paid by SSI be less than $800,000.

Premises Use & Occupancy Agreement, *supra* note 6, at 19.

21. Arbitration Demand, *supra* note 18, at 1.

22. *Id.* at 6-7.

23. *Id.* at 2.

24. *Infra* section V(2).

25. *Id.*

2. Complaint Against the Team

The city immediately responded by filing a complaint for declaratory relief asking the court to hold PBC to the lease agreement.[26] The complaint itself is worth a detailed analysis as it provides much of the history leading to the dispute, although admittedly from only the city's perspective. According to the city, the renovations to Key Arena were made in order to "re-construct the old Seattle Coliseum into a new, state of the art professional basketball playing facility *in exchange* for a commitment from the Sonics to play professional basketball at the new facility on a 'long-term' basis."[27] Arguing that the new owners assumed the responsibilities and promises of the previous owners when they purchased the team, the city pointed to Article II of the lease agreement in order to show that the team promised to play its home games at Key Arena.[28] Article II provides that the team will "schedule and ensure that the SuperSonics play all Home Games. . .exclusively in [Key Arena]. . ."[29]

The city argued that the team's arbitration demand was improper because disputes related to Article II are specifically excluded from resolution through arbitration. The city pointed to Article XXV, which provides that all claims related to the lease agreement can be resolved through arbitration, with a few exceptions, including situations where "the claim, dispute, or matter in question relates to the provisions of Article II."[30] The city also argued that the team knew about all of the problems it complained about in its arbitration demand prior to purchasing the franchise and so it should not be able to use arbitration to get out of the agreement.[31] The city intended to focus on Article II in order to bring the matter to court and avoid taking the dispute to arbitration. Presumably, the city's advisors assumed that a court sitting in Seattle would reach a more favorable result than an arbitrator who might merely review the lease agreement and not understand the value of the team to the city.

The city also pointed to Article XXVII, subsection L, which provides for specific performance as a form of recovery under the lease.[32] The city's argument was that because of this provision, and the exception provided

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26. *City of Seattle, Complaint for Declaratory Relief*, 2007 WL 5262606.

27. *Id.* at 1 (emphasis added).

28. *Id.*

29. Premises Use & Occupancy Agreement, *supra* note 6, at 6. This type of provision is often known as a "home team" provision within a professional sports lease.

30. *Id.* at 54.

31. *City of Seattle, Complaint for Declaratory Relief*, 2007 WL 5262606, at *2.

32. Premises Use & Occupancy Agreement, *supra* note 6, at 59.

within Article XXV related to the team's promise to play in Key Arena, the court should force the team to specifically perform its obligation to play in Key Arena for the remainder of the lease term.

In response to the team's argument that it attempted to find a suitable replacement venue, the city argued that the owners "failed to live up to their promises."[33] The city explained that the new owners rejected several financial packages it put together and that the team's legislative efforts were improperly late and relied on too much public subsidization.[34]

Disagreeing with the team, the city made clear in this initial complaint that it agreed with and supported those who advocate for the benefits of the presence of a professional sports team within a community. The city argued that the

> presence of the Sonics in Seattle creates large financial benefits for the City and for local businesses, including. . .income generated from lease payments; ticket sales; concessions and novelty sales; spending at local restaurants and hotels. . .; parking; spending on advertising and merchanding; . . .taxes paid by the team; revenues associated with Sonics players living in the Seattle area; . . .revenues from media covering the team's games. . .and numerous non-quantifiable benefits. . .including. . .enhanced economic growth and ancillary private sector development spurred by the operation of a professional sports facility; convenient entertainment options for local families; facilities for youth activities; charitable events sponsored by the team and by individual players; advertising opportunities for local businesses; increased inducements for businesses to locate in Seattle, and for existing businesses to remain; and enhanced community pride, self-image, exposure, reputation, and prestige.[35]

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33. *City of Seattle, Complaint for Declaratory Relief*, 2007 WL 5262606, at *1.

34. *Id.* at 2.

35. *Id.* at 2-3. Of particular note, within this litigation the team disagreed with these positive impacts. The team argued that there will be

> no net economic loss if the Sonics leave Seattle. Entertainment dollars not spent on the Sonics will be spent on Seattle's many other sports and entertainment options. Seattleites will not reduce their entertainment budget simply because the Sonics leave. As to the impact on the fabric of the community, the PBC will present a recent survey showing that a significant majority of Seattleites-66 percent-say it makes no difference to them if the Sonics leave, and that only a relative handful of people-12 percent-say their life will be 'much worse off.' The overwhelming attitude is apathy.

Joint Status Report and Discovery Plan, City of Seattle v. The Professional Basketball Club, No. C07-1620 MJP, 2008 WL 2472910, at *2 (W.D. Wash. Jan. 16, 2008).

According to the city of Seattle, the public body that put together the package that allowed for public funding of the improvements to Key Arena, the team brought an incredible amount of tangible and intangible benefits to the city. This realization was the foundation for the city's fight to keep the team as it did not want to lose the benefits it had paid for. Pointing to the potential loss of these benefits, the city asked the court for a declaratory judgment holding that the lease could be specifically enforced in order to keep the team from leaving Seattle, and that disputes related to Article II could not be resolved through arbitration.[36] The further litigation surrounding this dispute would prove to be extensive and complicated.

3. Arbitration or Litigation?

After both parties attempted to initiate some sort of resolution to their dispute, the initial focus in court was whether their dispute should be resolved through arbitration or litigation. The day after the city filed suit, the team moved to stay the lawsuit pending completion of arbitration.[37] The team pointed to section D of the lease's arbitration clause, which provides a limitation on judicial relief, "No proceedings based upon any claim arising out of or related to this Agreement shall be instituted in any court by any party hereto against any other party hereto."[38] The team did not specifically disagree that disputes related to the term of the agreement (Article II) were not subject to this requirement, instead it argued that the real issue was what should happen when one party, here the team, breached this provision and could be found to be in default of the lease agreement.[39] Following the team's reasoning, at the point when it no longer planned to play games in Key Arena, it would be in default of the lease, and the actual relief to be granted to the city should then be decided by the arbitrator.

This perspective would then lead an arbitrator to focus on the team's ability to come up with some sort of monetary solution to the dispute. In effect, the team could simply breach the lease, plan to move, and then pay its way out of the lease agreement. This also would make specific performance a mere option for review by the arbitrator. Given the inconsistent and disfavored enforcement of specific performance provisions by courts in

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36. *Id.* at 6.

37. The Professional Basketball Club's Motion to Stay, City of Seattle v. The Professional Basketball Club, No. 07-2-30997-7 SEA (Sup. Ct. Sept. 26, 2007).

38. *Id.* at 9, citing, Premises Use & Occupancy Agreement, *supra* note 6, at 55.

39. *Id.* at 10.

previous cases,[40] it made sense for the team to believe that there was a strong possibility that the arbitrator would also call for damages instead of specific performance.

A few days later the city moved for a stay of the arbitration proceeding.[41] From the city's perspective, the "sole purpose of the Sonics' Arbitration Demand [was] to avoid their express contractual duty under Article II to play all home games in Key Arena."[42] Elaborating on its argument that the promises made in Article II were not subject to arbitration, the city explained that the actual lease went through many drafts and although the lease is ambiguous in relation to which disputes must be arbitrated and which cannot be, the city argued that the "only reasonable interpretation. . .is that the specific, express exception to the arbitration provision for claims 'relate[d] to' Article II controls."[43] The city also made clear that from its perspective the dispute was not merely related to Article II and the team's potential breach, instead it went "to the very heart of that Article."[44] As the city explained, "PBC's interpretation. . .would render the most important provision of the Lease. . . meaningless: the City would have the right to have the Sonics play in Key Arena. . .but would have no means to enforce that right."[45]

In reviewing the dispute, the court focused on "whether Article II [term] or Article XXVI [default and other remedies] under the Lease controls the underlying dispute between the parties."[46] Finding that the dispute revolves around the term of the agreement, the court characterized PBC's argument as a move " 'as errant as a typical Shaquille O'Neal free throw,' ignoring the clear language found in Article II."[47] Therefore, the court found that the dispute really related to whether PBC would fulfill its obligations for the term of the lease agreement.[48] The court also found that the clear language within the lease demonstrated that the parties "*unequivocally* excluded from arbitration

40. *Infra* section V(2).

41. City of Seattle's Cross-Motion for Stay of Arbitration and Opposition to the Professional Basketball Club's Motion to Stay, City of Seattle v. The Professional Basketball Club, No. 07-2-30997-7 SEA (Sup. Ct. Oct. 2, 2007).

42. *Id.* at 2.

43. *Id.* at 8.

44. *Id.* at 11.

45. *Id.* at 12-13.

46. Order Denying Defendant's Motion to Stay and Granting Plaintiff's Cross-Motion for Stay of Arbitration, City of Seattle v. The Professional Basketball Club, No. C07-1620RSM, 2007 U.S. Dist. LEXIS 83139 (W.D. Wash. Oct. 29, 2007).

47. *Id.* at *12.

48. *Id.* at *13.

disputes relating to Article II."[49] Therefore, the court held that the dispute was not subject to arbitration and granted the city's motion to stay the arbitration proceedings.[50]

4. Initial Dealings With Oklahoma City

In the aftermath of Hurricane Katrina, the New Orleans Hornets moved their base of operations and played in Oklahoma City for the 2005-2006 and 2006-2007 seasons. During these seasons, the team was ranked in the top 15 in per game attendance and NBA Commissioner David Stern raved about the city's support of the NBA.[51] After the Hornets left, Oklahoma City residents overwhelmingly approved a one-cent sales tax extension to fund a $121 million renovation of the Ford Center.[52] Because the Seattle SuperSonics ownership group was made up of businessmen from Oklahoma City, they were very familiar with the fan support and renovated facility that was available.

In early 2008, as the relationship between the team and the city of Seattle continued to deteriorate, the team most likely assumed that the litigation would be resolved in a way that would allow it to move. This seems more likely, because before the case went to trial, PBC sent a letter to Oklahoma City mayor Mick Cornett putting forth the material terms and conditions under which the team would move.[53] Although hoping to be able to move for the 2008-2009 season, Bennett made clear that the timing was dependent on a "favorable judgment in the litigation, a settlement agreement with the City of Seattle or expiration of the Key Arena Lease."[54] This document shows PBC's clear intent to leave Seattle regardless of the outcome of its dispute with the city. If the court forced it to stay until the end of the lease term in 2010, the team would then move for the following season.

Another specific demonstration of the team's intent to relocate can be found in its November 2007 application for approval from the NBA of its relocation to Oklahoma City, an application filed a few weeks after the court

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49. *Id.* at *19.

50. *Id.* at *20.

51. Darnell Mayberry, *NBA Owners Meetings; League Owners Vote on Sonics' Relocation Today*, THE OKLAHOMAN, Apr. 18, 2008, at 1C.

52. *Id.*

53. Letter from Clay I. Bennett, Chairman, The Professional Basketball Club, to the Honorable Mick Cornett, Mayor, City of Oklahoma City, Oklahoma (Mar. 14, 2008).

54. *Id.* at 1.

stayed its demand for arbitration.[55] In this initial letter, Bennett laid out the team's expectations related to the lease and other agreements it would sign with the city. The agreement would have an initial 15-year term with a team option for an additional five-year term.[56] Interestingly, and perhaps reflecting the litigation the team was currently involved in, the letter did not address specific performance, arbitration or other remedies, instead it noted only that the lease "will provide for mutually acceptable remedies in the event of a default by any party."[57] In specific response to the alleged losses the team faced in Seattle, the team now expected that its lease would contain an "Economic Benchmark Termination Right." Under this provision, at the end of specific periods of time, the team would retain the right to terminate the agreement "if the average of Team ticket revenues for the preceding two years fall below 85% of a benchmark established. . ."[58] In addition, Oklahoma City would be "responsible for all costs of design and construction" with respect to renovations of the Ford Center and a practice facility for the team.[59] In the midst of its litigation with the city of Seattle this letter and the team's application to the NBA made clear that its relationship with Seattle was coming to an end one way or another.

5. The Litigation: The City's Argument

Regardless of PBC's negotiations with Oklahoma City, the Seattle litigation continued. Attempting to convince the court that the only satisfactory resolution to the dispute was through specific performance, the city made clear that it sought to enforce the lease "to obtain the benefits, economic and intangible, that it bargained for when deciding to pledge taxpayer dollars in a completely renovated basketball arena. Those benefits are unique in nature and cannot be measured in monetary terms."[60] More specifically, as to tangible benefits, the City alleged that the team spent $30 million annually in Seattle, that this spending created approximately 150 jobs, that the team brought in substantial game-related spending from outside the city, and that it made substantial contributions to charitable organizations

55. *Id.*

56. *Id.* at 2.

57. *Id.* at 6.

58. *Id.* at 6-7.

59. *Id.* at 14.

60. City of Seattle's Trial Brief, City of Seattle v. The Professional Basketball Club, No. 07-1620 MJP, at 2 (W.D. Wash. June 11, 2008).

within the city.[61] As to intangible benefits, the city argued that the team "create[d] civic pride, a sense of community, greater visibility to the country and world, and attract[ed] new businesses and residents."[62]

By specifically addressing these benefits the city bolstered its claim in two ways. Initially, it showed that it would suffer significant harm if the Sonics were allowed to relocate. In addition, by including intangible non-economic benefits it showed that it would be difficult, if not impossible, for a court to calculate a specific amount of damages that could compensate the city for these losses.

As to its claim for specific performance, the city initially argued that the parties agreed to this form of recovery within the lease and that specific performance is warranted where the subject matter of the contract involved is unique.[63] In addition, rehashing many of the sports franchise cases discussed later in this article, the city argued that because money damages would be inadequate to repay it for the broad economic and intangible benefits it would lose without the Sonics presence, specific performance was even more appropriate.[64]

6. The Litigation: The Team's Argument

The team's brief focused on the alleged losses it would face by being forced to stay in Seattle. The team argued that it was economically crippled by the limitations associated with Key Arena, because the arena was "no longer economically viable for men's professional basketball."[65] Specifically, of all arenas in the NBA, Key Arena was the smallest, limiting point of sale opportunities for food, beverages, and merchandise.[66] As a result, the team alleged that it lost approximately $30 million for the 2007-2008 season and speculated that it would lose between $60 and $65 million more if it was forced to stay for the final two years of the lease agreement.[67]

In answer to the city's claim that specific performance was warranted as a remedy because monetary damages could not be properly calculated, the team argued that the amounts owed under the final two years of the lease could

61. *Id.* at 4.

62. *Id.* at 5.

63. *Id.* at 6 & 8.

64. *Id.* at 11-13.

65. Defendant's Trial Brief (Redacted Version), City of Seattle v. The Professional Basketball Club, No. 07-1620 MJP, at 4 (W.D. Wash. June 11, 2008).

66. *Id.* at 5

67. *Id.*

easily be calculated. These amounts would include fixed rental payments from the team, and a second rental amount related to suite rentals, suite leases, club seat sales, and a five percent admission tax.[68] The team calculated these amounts as between $4.5 and $5 million for each remaining lease year.[69]

In addition, while the city argued that there were many positive tangible economic and intangible benefits associated with the presence of the team in Seattle, the team argued that its departure would "not have any impact on Seattle's economy."[70] The team pointed to the city's own experts and pre-litigation analysis that also agreed that "the Sonics have a limited economic impact on Seattle."[71]

Although not specifically addressed by the city, the team also addressed previous courts' reluctance to allow specific performance when such a remedy would call for ongoing supervision. As the team bluntly stated, "[t]he dispute has been ugly, and will require that people who no longer wish to associate with each other continue to do so."[72]

IV. THE NEW DEALS

The case was set to be tried on June 16, 2008.[73] At this point it became clear to many observers that even if the court enforced the specific performance provision, the relationship between the team and city, and between the team and community, had deteriorated to such a degree that keeping the team in Seattle would potentially benefit no one.

1. The Settlement

On July 2, 2008, the parties entered into a Settlement Agreement to be completed by August 1, 2008.[74] Under the agreement, the team agreed to pay the city $45 million and in return the city agreed that the lease agreement would be terminated.[75] Once the settlement was executed, the team was

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68. *Id.* at 6.

69. *Id.*

70. *Id.* at 9.

71. *Id.* at 10.

72. *Id.* at 16.

73. Pretrial Order, City of Seattle v. The Professional Basketball Club, No. 07-1620 MJP, at 52 (W.D. Wash. June 13, 2008).

74. The Professional Basketball Club, LLC and City of Seattle Settlement Agreement Memorandum of Understanding (July 2, 2008) [hereinafter "Settlement Agreement"].

75. The city passed Ordinance 122736 on July 14, 2008, terminating the agreement. Ordinance 122736, Termination of the Agreement in accordance with the Professional Basketball Club, LLC and

allowed to relocate immediately to Oklahoma City to start the 2008-2009 season.

Of particular value to the city, after five years, PBC agreed to pay another $30 million unless, (1) the litigation between the parties was resolved forcing the team to play the remaining two seasons under the lease, (2) the state of Washington had not enacted legislation that provided sufficient funding to complete the public sector component of the Key Arena renovation, or, (3) a new NBA franchise had agreed to relocate to Seattle.[76]

In addition, similar to what transpired when the original Cleveland Browns franchise relocated to Baltimore and left behind the Browns name for an expansion franchise, PBC agreed to leave behind all intellectual property associated with the Seattle Supersonics and agreed to transfer these rights to any new owner of a Seattle franchise.[77] It is interesting to note that in light of the dispute over whether arbitration or judicial proceedings should have been undertaken to resolve the dispute between the city and team, the settlement agreement provided that all disputes related to it would be "subject to binding arbitration."[78]

2. The Oklahoma City Deal

In March of 2008, the city of Oklahoma City authorized the extension of a one-cent sales tax that was used to raise $89 million for the renovation of the Ford Center, in an effort to attract an NBA team.[79] The focus of this investment was to "stimulate the development, growth, and expansion of business within the downtown Oklahoma City area and promote tourism. . ."[80]

Preparing for the team's seemingly inevitable relocation from Seattle to Oklahoma City, in April of 2008, PBC and the city of Oklahoma City completed a lease agreement between the parties.[81] The initial term of the agreement was set at fifteen years, with the team given the option to extend the term five times for a period of three years each.[82] In addition, Article XX

City of Seattle Settlement Agreement Memorandum of Understanding, and repealing Ordinance No. 122492 (July 14, 2008).

76. *Settlement Agreement*, *supra* note 74, at 2.

77. *Id.* at 3.

78. *Id.* at 4.

79. Arena Use License Agreement among the City of Oklahoma City, Oklahoma City Public Property Authority, SMG, and The Professional Basketball Club, LLC, at 1, Apr. 15, 2008; NSLI, *supra* note 2.

80. Arena Use License Agreement, *supra* note 79, at 1.

81. *Id.*

82. *Id.* Article II: Grant of License; Term; Use of Licensed Premises, §§2.32 & 2.33, at 22-23.

includes a "Covenant to Play" that provides that "the Team hereby covenants and agrees to play, all of its Home Games in the Arena commencing upon the Commencement Date and continuing throughout the License Term."[83] In addition, the agreement contains an "Economic Viability" clause wherein the team is given a limited right to terminate the agreement during its sixth, ninth and twelfth years if certain economic benchmarks are not reached.[84] Given its alleged losses while in Seattle, PBC presumably wanted Oklahoma City to provide it with a way to get out of the lease if those types of losses were repeated.

3. There Are No Winners Here

Although the litigation was settled it is unclear whether either party actually finds itself better off now than it was before the dispute began. It seems clear that PBC hoped to leave Seattle for Oklahoma City, and the team is now there in a renovated facility with a lease agreement that it believes will lead to higher revenue levels. However, the team paid Seattle $45 million and could have been liable for another $30 million if the State of Washington had committed to funding a new or renovated arena in Seattle.[85] For a team that claimed to have lost so much money in the Emerald City in such a short amount of time, it is hard to believe that the benefits it has received from moving outweigh the costs of the litigation and settlement at this point.

The city of Seattle did receive payments from the team as a result of the Settlement. However, it lost all of the benefits that it argued for as the reason behind the renovation of Key Arena in the first place. In addition, its claim asking the court to invoke the specific performance provision within its lease agreement was never resolved making it unclear whether it would have been able to hold the team to its leasehold promises in this way.

V. THE BACKGROUND: SPECIFIC PERFORMANCE IN SPORTS FACILITY LEASES

The focus of the Seattle litigation was the stand alone "miscellaneous" lease provision found in the Premises Use & Occupancy Agreement that provides, "Enforcement of this Agreement: The obligations of the parties to this Agreement are unique in nature; this Agreement may be specifically

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83. *Id.* at 63.

84. *Id.* §20.4, at 66.

85. *Settlement Agreement*, *supra* note 74, at 2. *See also*, Mike Baldwin, *Bennett, Partners Save $30 Million*, THE OKLAHOMAN, Jan. 2, 2010, at 6B.

enforced by either party."[86] An interesting item to note is that many NBA lease agreements have similar provisions.[87] For example, the Phoenix Suns lease agreement for US Airways Center provides that "The Team shall play all of its Home Games at the Arena during the License Term,"[88] while the Miami Heat's lease for American Airlines Arena provides that "the Team shall play all of its Home Games at the Arena during the License Term."[89] These provisions are common as communities continue to believe that a home team clause will protect it when a team attempts to leave by at least providing a contractual remedy that a court can point to when enjoining a team from moving.

It seems almost self-evident that a community negotiating a lease with a major league team will demand that the team warrant that all of its home games be played in the arena envisioned within the agreement. When the community has also spent considerable tax dollars (i.e. Seattle paid almost $74 million to renovate Key Arena for the team), this type of commitment seems both reasonable and logical.

The city of Seattle attempted to tie this provision to Article II of the agreement, which provides that the team would "schedule and ensure that the SuperSonics play all Home Games. . . exclusively in the Coliseum."[90] The city pointed to this provision and asked the court to enforce it and enjoin the team from moving to Oklahoma City. Before the court ruled on the application of this provision, the parties settled their dispute.

Many professional sports team leases also contain specific performance provisions. However, unlike the clause found in the Seattle SuperSonics lease agreement,[91] these provisions are typically included within a default provision that provides what will occur if the parties to the agreement fail to honor the promises they have made.

For example, the default provision within the Phoenix Suns lease provides that if the team fails to pay any fees due under the lease agreement, or fails to "observe or perform any of the other provisions" found in the lease,[92]

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86. Premises Use & Occupancy Agreement, *supra* note 6, at 59.

87. *City of Seattle's Trial Brief*, No. 07-1620 MJP, at 3 n.1.

88. Downtown Multipurpose Arena First Restated Suns License Agreement, by and between Phoenix Arena Development Limited Partnership, "Operator," and Phoenix Suns Limited Partnership, "Team," July 19, 1989, at 5.

89. Miami Heat License Agreement dated as of April 29, 1997, among Metropolitan Dade County, Miami Heat Limited Partnership and Basketball Properties, Ltd., at 10.

90. *Id.* at 6.

91. Premises Use & Occupancy Agreement, *supra* note 6, at 59.

92. Downtown Multipurpose Arena First Restated Suns License Agreement, *supra* note 88, at 31.

including the commitment to play their home games at US Airways Center, the operator may "[e]xercise such rights and remedies as are provided by law or equity, or at any time. . . (i) recover all damages provided by law or equity; or (ii) exercise any other right or remedy at law or in equity including, without limitation, obtaining an injunction and specific performance."[93]

This provision is more clear and expansive than the Seattle lease with its repetition of "remedies provided by law or equity" and is repeated in the recovery provided to the team in the case of the operator's default.[94] A court analyzing this provision would likely have an easier time finding that specific performance was envisioned as a clear remedy available to the city.

The Suns' lease also contains a dispute resolution provision that provides that "[i]n the event of any default, breach or other dispute between the parties in connection with this License. . ." the parties shall undergo an extensive dispute resolution process, involving mediation or facilitation.[95] Although the Suns' lease agreement is similar to the Seattle agreement in that it provides for specific performance and an alternative dispute resolution process, it also provides for recourse to the judiciary to solve disputes. Avoiding the confusion found in the Seattle lease, this dispute resolution provision provides that the parties can seek interim relief and may "initiate the appropriate litigation to obtain such relief."[96] Seemingly under this agreement, the argument provided by PBC claiming that the dispute over its breach of the commitment to play home games in Key Arena could have been brought directly to a court for an interim judgment.

The Minnesota Timberwolves' lease agreement for the Target Center contains a similar specific performance provision, again within an overall default provision. Section 18.04 of the lease provides that

> **Specific Performance**. The [Minnesota Timberwolves Basketball Limited] Partnership acknowledges that the Team, as property, is extraordinary and unique, and that under the organization of major league professional basketball by and through the NBA, Ogden cannot replace the Team as a user of the Arena and that the determination of damages caused by a breach of Section 2.01(d) hereof is uncertain, speculative and not possible of accurate ascertainment. Therefore, the Partnership agrees that there exists no adequate and complete remedy at law to enforce such provisions and that equitable relief by way of

93. *Id.*

94. *Id.* at 33.

95. *Id.* at 34-35.

96. *Id.* at 36.

> injunction or specific performance is an appropriate remedy for the enforcement of such covenants, notwithstanding and without regard to the provisions for liquidated damages. . .[97]

This provision is specifically tied to the team's commitment to "play all Games at the Arena during the Term of this Agreement."[98] The Timberwolves agreement does not provide for any form of alternative dispute resolution, instead it provides that in the event of a default by one party, the other party "may pursue any available remedy against the party in default, including a suit, action or proceeding at law or in equity. . ."[99]

Although many professional sports team leases include specific performance provisions, most of these provisions can be found as specific remedies available when a party breaches its agreement and defaults on the lease. Most of these provisions also are connected directly to a dispute resolution process or judicial remedies discussed in the lease agreement.

In order to understand whether the faith in this remedy is warranted, the analysis will now shift to an exploration of the remedy of specific performance within these types of agreements, and cases within professional sports wherein courts have analyzed similar lease provisions and remedies.

1. Specific Performance in General

In most contracts, specific performance refers to "the ability of one party to force another party to an agreement to fulfill its obligations under the agreement the exact way that is required under the specific terms of the agreement."[100] Often, the party that has not breached the agreement will seek to have the other party specifically perform its obligations when it believes that some sort of damages, in the form of payments of rent or other economic losses, would be insufficient to make them whole and would not provide them with the full benefits that they bargained for within the agreement.

As the sports cases discussed below make clear, courts are often reluctant to award specific performance in certain situations. Initially, in situations where there is a difficulty of supervision, a court may be reluctant to force this type of solution. This was one of the arguments made by PBC in the Seattle litigation. This reluctance is reflected in the *Restatement (Second) of*

97. Arena Use Agreement between Ogden Entertainment Services, Inc. and Minnesota Timberwolves Basketball Limited Partnership, dated as of Mar. 17, 1995, at 48.

98. *Id.* at 11, §2.01(d).

99. *Id.* at 47-48.

100. WILLIAM MILLER & PAUL ANDERSON, MAJOR LEAGUE LEASES: AN OVERVIEW OF MAJOR LEAGUE FACILITY LEASES AND HOW THEY ARE NEGOTIATED 355 (2001).

Contracts, which states "[a] promise will not be specifically enforced if the character and magnitude of the performance would impose on the court burdens in enforcement or supervision that are disproportionate to the advantages to be gained from enforcement and to the harm to be suffered from its denial."[101] In these situations where a court may be asked to watch over the "performance of specialized contracts involving technical knowledge or expertise"[102] it may be reluctant to expand its role into supervising a relationship that it is not well versed in. However, this particular problem may not come in to play in the sports franchise context when specific performance relates to playing games in a facility as originally agreed to under a lease agreement. It would be apparent to anyone whether the team was actually performing this obligation if forced to do so by a court.

An additional concern occurs when courts find that the contract in dispute "is unusually complex and extensive supervision would be required to assure completion of all of its terms."[103] Although sports franchise lease agreements are incredibly complex, often running into the hundreds of pages and including many interrelated agreements that all must be analyzed to truly understand the overall lease arrangement, a home team provision similar to that found in the Seattle, Phoenix or Miami leases, dealing merely with the team playing home games in a specific location, would not likely rise to this level of complexity.

An argument that may bear more weight in the sports context is when a court finds that an award of specific performance is less efficient than a normal damage remedy.[104] Following this argument, if the contract involved allows for specific damages related to a breach, a court may merely hold the breaching party liable for these monetary damages, and may be unwilling to impose a specific performance remedy as well. This particular argument is the one that most sport teams focus on in their attempts to defeat specific performance claims, and was the specific rationale for PBC's calculation of the amounts that it would owe if it breached the Seattle lease.

Even though courts are reluctant to award specific performance in many situations, in two general situations such an award will be warranted. Initially, in situations where there is an "inability to accurately assess the monetary value of the promisor's performance" a court may award specific performance

101. RESTATEMENT (SECOND) OF CONTRACTS §366.

102. Will Hendrick, *Pay or Play?: On Specific Performance and Sports Franchise Leases*, 87 N.C. L. REV. 504, 508 (2008-2009).

103. *Id.*

104. Hendrick, *supra* note 102, at 509.

because this calculation "is a logical prerequisite to awarding damages."[105] If this inability is coupled with a situation where damages would not be a proper substitute for performance under the contract,[106] specific performance may be awarded because damages would be "inadequate to compensate the public (as landlord) for the true loss of its bargain which would result if the club (as tenant) failed to occupy the facility. . .for the agreed duration of its lease."[107]

Both of these claims would be made by most cities seeking to have a team forced to specifically perform under the lease agreement involved. Initially, similar to the city of Seattle's arguments, any city would argue that it would be impossible to properly calculate the value of its losses if the team were let out of an unexpired lease agreement. It would also argue that even if some calculation were possible, any award of damages would not be able to properly substitute for what it would actually lose. In essence, even if a city can receive some sort of monetary penalty for the team's breach, the only real relief it will ever want is for the team to continue playing in the facility covered by the lease agreement.

Of course, a true analysis of the inadequacy of monetary damages as a remedy for the breach of a professional sports lease agreement often leads to a discussion of the potential economic benefits associated with the presence of a sports franchise within a community. Unfortunately, the debate in this area is unresolved. Many communities, teams, and business professionals advocate for the benefits, both tangible and intangible, associated with the presence of a team within a community.[108] On the other side, many academics argue that there is no benefit, that any potential benefit is negligible, or that in fact the costs associated to a city associated with public support for a sports facility, and in some sense then - support for the team, outweigh any potential benefits.[109] However, there is no clear winner here.

> In the end, the stadium debate becomes a battle between those opposed to any form of taxation in support of the sports industry, and

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105. *Id.* at 510.

106. *Id.*

107. Bruce Burton & Matthew Mitten, *New Remedies for Breach of Sports Facility Use Agreements: Time for Marketplace Realism*, 88 IOWA L. REV. 809, 816 (2003).

108. Michael Mondello & Paul Anderson, *Stadiums, Arenas, and Sports Referendums: A Comparative Analysis of Cities Involved in the Stadium Game*, 5 INT'L J. SPORT MAN. 43, 55-57 (2004).

109. *Id.* at 51-55. For an interesting analysis of both sides of this argument see MARK ROSENTRAUB, MAJOR LEAGUE LOSERS: THE REAL COST OF SPORTS AND WHO'S PAYING FOR IT (1999), and MARK ROSENTRAUB, MAJOR LEAGUE WINNERS: USING SPORTS AND CULTURAL CENTERS AS TOOLS FOR ECONOMIC DEVELOPMENT (2010).

> those interested in supporting the industry even if it means using public subsidies. For every analysis that demonstrates there are no positive economic effects associated with stadium construction, there are similar studies on the opposite side demonstrating there are substantial economic and non-economic benefits. The result is that the decision to provide public funding for a stadium or arena is really part of the normal political process of a community. It is that community's decision, often represented in a referendum, that will dictate what the community perceives as the positives and negatives associated with the proposed professional sports facility.[110]

In Seattle there was no confusion in relation to this issue. The community made clear that it wanted the team to stay because of the benefits it associated with the team's presence in the community as it sought to "enforce its contractual rights and to obtain the benefits, economic and intangible, that it bargained for when deciding to pledge taxpayer dollars in a completely renovated basketball arena."[111] Communities must believe in these types of benefits if they intend to argue for specific performance as a court may be more likely to consider this type of remedy when it is unable to calculate some other form of monetary damages.

Beyond these general principles, there have been several interesting cases that have analyzed specific performance claims brought by teams in professional sports.

2. Specific Performance Litigation in Professional Sports Leases

Although the decisions have not been uniform, the professional sports cases discussed below lay a foundation for analyzing an argument made by a community asking a court to force the team to specifically perform its obligations under its lease agreement.[112]

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110. Mondello & Anderson, *supra* note 108, at 57.

111. *City of Seattle's Trial Brief*, No. 07-1620 MJP, at 2.

112. In addition to the cases discussed here, some other cases have discussed specific performance as a subsidiary consideration within bankruptcy proceedings.

The city of Glendale built a new arena for Phoenix Coyotes in 2003. In order to protect the city's investment, the lease agreement required that the team would play all of its home games in the arena and that the city would have the right of specific performance within the lease to enforce this requirement. By 2008, the then-owners of the Coyotes were in serious financial trouble and began to search for potential buyers. Although the court discussed the specific performance provision a bit, at this stage of the litigation it did not decide whether the lease agreement and this particular obligation would survive the bankruptcy claim. In re Dewey Ranch Hockey, LLC, 406 B.R. 30 (U.S. Bank. Ct. 2009).

A. New York Jets (1977)

One of the earliest cases where a court forced a team to live up to its bargain within a lease agreement did not even specifically address the remedy of specific performance. However, the case is instructive in providing the reasoning as to why a court would force a team to live up to its lease obligations.

In 1977, the New York Jets attempted to schedule some early season home games outside of Shea Stadium due to perceived conflicts with the New York Mets schedule. The Mets were given priority rights to schedule their games at Shea for designated times. The City of New York sued the Jets asking the court to stop them from playing games away from Shea due to a provision within the lease agreement requiring that the team play all of its home games in the stadium after September 1st of any given year.[113] Siding with the city, the court discussed the potential harm that the city would face if the Jets played two games at a different facility in great detail:

> The City was not authorized to construct the stadium for the lease money consideration. The City, as a corporate body, has not, will not, or was it intended to make a profit from stadium rental. It is the City as a community, 'the people of the City' to quote the statute (L 1961, ch 729, § 1), who are here threatened with irreparable injury. The purpose of the construction and the leases, and the requirement that home games, both baseball and football, be played at Shea, are inextricably entwined with the vital public interest as quoted above from the enabling legislation. Every home game not played at Shea causes more than a loss of rental. That is only money. It results in injury to the welfare, recreation, prestige, prosperity and trade and commerce of the people of the City.
>
> The Jets argue that 'It's only two games. No big deal.' Every business that leaves the City; every major corporate home office that departs for the suburbs; every drop in the number of people employed reported by the Bureau of Labor Statistics; every downward thrust in the City's credit standing; each team that leaves for a greener (larger)

In a similar bankruptcy case, the owners of the Pittsburgh Penguins were enjoined from initiating any discussions concerning the sale or relocation of the team in violation of their lease agreement. In re: Pittsburgh Sports Associates Holding Company, et. al., 199 Bankr. LEXIS 1870 (W.D. Penn. 1999). Although specific performance was mentioned within the lease agreement, it was not the focus of the court's discussion as the team pointed to a general non-relocation clause instead.

113. City of New York v. New York Jets Football Club, Inc., 394 N.Y.S.2d 799, 803 (Supr. Ct. NY 1977).

> stadium is another drop of the City's life blood. Every reduction in the number of home games seriously adds to the cumulative effect upon the City's viability. Two games may sound small but they are an important part of the home game schedule. Such injuries are not measurable in money damages nor could money repair the harm. . . The threat of irreparable injury has not merely been shown, it is self-evident.[114]

In showing the harm that the city would face by losing the team, albeit for only two games in one season, the court provided perhaps the most detailed analysis of the value of a team to a city.

The court then upheld a motion for an injunction preventing the team from playing outside of Shea Stadium, and as a result invalidated the entire NFL schedule. The court made clear that a party to a lease agreement may not have to perform its obligations if performance is impossible, however, if that impossibility is really due to the party's own conduct performance will not be excused.[115] In other words, because the Jets ignored their obligations under the lease agreement, they could be forced to specifically perform by changing their schedule, and impacting the entire NFL schedule, in order to come into compliance with their obligations under the lease.

B. New Orleans Jazz (1979)

In 1979 the NBA's Jazz franchise moved from New Orleans to Utah. As a result of the move, the corporate manager of the Superdome (where the team played), the state of Louisiana, and the Stadium District, sued the franchise seeking specific performance of the terms of the lease agreement involved.[116] Although the litigation did not focus solely on the specific performance issue, the appellate court's reasoning pointed to the difficulty in analyzing this type of award under a professional sports lease agreement.

The plaintiffs argued that because the team had moved (the Jazz had already moved to Utah at the time of the litigation) it had refused to play its games in the Superdome as required under the lease agreement. The plaintiff sought "specific performance under the terms of the lease requiring the Jazz to play in the Superdome. . ."[117] However, the court recognized the problems associated with this type of remedy, noting "the chaos that would result should

114. *Id.*

115. *Id.* at 805.

116. HMC Management Corp. v. New Orleans Basketball Club, 375 So.2d 700 (Ct. App. La. 1979).

117. *Id.* at 703.

this court seek by specific performance or injunctive relief the requirement that the Jazz play its games in the Superdome, inasmuch as such an order must consistently require some other member team be made to appear and play that game."[118]

Moreover, the plaintiffs argued that the "Jazz impliedly contracted with the City to remain in New Orleans for as long as the franchise continues to exist and as long as the Club plays professional basketball in the NBA."[119] The court disagreed, finding that the plaintiff's expansive theory would "grant legal authority to the City to file suit against any tourist-based industry for relocation."[120] Perhaps as appropriate in 1979 as it is now, the court went on to note that "[i]n today's uncertain times, the right of free enterprise and freedom of the marketplace, and the freedom and mobility of interstate commerce outweigh the City's speculative quasi-contract rights to those types of businesses."[121]

In the end, the appellate court agreed with the trial court decision that specific performance was not an available remedy under the lease because courts generally do not allow for this type of relief "to enforce contracts of lease."[122]

C. New York Yankees (1983)

Over the years, the old Yankee Stadium was renovated many times. In 1982, as renovations were being completed yet again, the Yankees asked for assurances from the city that the renovations would be completed by the start of the 1983 season. Not receiving the assurances they wanted, the team told the city that its home opening series in April of 1983 against the Detroit Tigers would be played in Denver.[123] The City sued to enjoin the Yankees from playing in Denver, pointing to the lease agreement requirement that the team was required to play all home games in Yankee Stadium until 2002.[124]

Granting the injunction, the court recognized the irreparable harm the city would face, in this case if the Yankees played in another stadium for only three games,

118. *Id.* at 706.

119. *Id.* at 708.

120. *Id.* at 709.

121. *Id.*

122. *Id.* at 711.

123. City of New York v. New York Yankees, 458 N.Y.S.2d 486, 487-488 (Supr. Ct. NY 1983).

124. *Id.* at 488.

> The Yankee pinstripes belong to New York like Central Park, like the Statue of Liberty, like the Metropolitan Museum of Art, like the Metropolitan Opera, like the Stock Exchange, like the lights of Broadway, etc. Collectively they are 'The Big Apple.' Any loss represents a diminution of the quality of life here, a blow to the city's standing at the top, however narcissistic that perception may be.
>
> 'Big deal' argue the Yankees. We open in Seattle anyhow on April 5. We will have a New York opening with all the traditional hoopla on April 15. And it's only three games we are talking about which is proportionately a much smaller percentage of the season than the two games in the *Jets* case. However it is the symbolism of the act not the quantity which counts. Any reduction in the number of home games, especially if it involves the home opening games eagerly awaited by the real fans after a long winter in the hot stove league, erodes the ties of loyalty between the people of the city and their team. Dare one whisper the dreaded words: 'The Denver Yankees.'
>
> No money damages can measure or assuage this kind of harm.[125]

D. *California Angels (1994)*

In 1978 the city of Anaheim entered into an agreement with a development company owned by Los Angeles Rams owner Carroll Rosenbloom for extensive commercial development on the stadium parking lot at Anaheim Stadium. The Angels sued to enjoin the project from moving forward, claiming that it violated their lease agreement, which called for their use of the parking lot and the stadium for home games. The trial court agreed with the team and granted specific performance and injunctive relief preventing the development from moving forward.[126] All of the parties appealed.

In a lengthy decision focused on the true nature of the agreement between the parties, the appellate court noted that the agreement between the city and team was the type that could be subject to specific performance, however, it would not uphold the trial court's decision.[127] The appellate court found that although it had the power to enforce a remedy of specific performance under the agreement, such a remedy "is a *remedy* for breach of contract," and here, the city did not breach its contract with the team. The team was still given

125. *Id.* at 490.

126. Golden West Baseball Co. v. City of Anaheim, 25 Cal.App.4th 11 (Ct. App. Cal. 1994)

127. *Id.* at 33.

access to the required minimum number of parking spaces and although there was some dispute as to where and how these spaces should be provided, this did not amount to a breach of the agreement by the city. Therefore, because it had not breached the agreement, there were no obligations that the city was not upholding.

E. Florida Panthers (1996)

The Florida Panthers began playing in the Miami Arena in 1993. Under the lease agreement with the Miami Sports & Exhibition Authority, the team had to exercise an option to renew its lease for the 1996-1997 season by August 1, 1995. Due to "extremely unfavorable economic terms" the team decided not to renew its option.[128] Behind the scenes, the team seemed to be comparing its agreement to the terms found within the Miami Heat's agreement and felt that their deal was worse than the Heat's deal. However, the team also made clear that "if the economic terms of a new License Agreement. . .could be obtained which were comparable to those economic terms presently granted to the Miami Heat basketball team, we would seriously consider remaining. . .for the subsequent season."[129]

Interestingly, although the Heat refused to exercise its option, it is not clear that it ever considered leaving Miami. Instead, the team continued to negotiate for a revised agreement with Leisure Management International (LMI), the facility operator. Although the team was able to come to an agreement with LMI that it felt was more favorable, the Authority was not comfortable with the terms of the revised agreement and directed the team to vacate the arena.[130] The team then sued to force the Authority to get a court to declare that it had to consent to the revised agreement.

Although this case did not focus on using specific performance to force a team to stay in an arena, the court did analyze specific performance as the team asked it to force the Authority to be held to the revised agreement. The Authority argued that the agreement was merely a personal service contract and so not subject to specific performance. The court responded that the agreement was a typical lease agreement "and such an agreement may be subject to specific performance. . .if it appears from the agreement that the rights and obligations of the parties with respect to the terms and conditions of

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128. Florida Panthers Hockey Club, Ltd., v. Miami Sports and Exhibition Authority, 939 F.Supp. 855, 857 (S.D. Fla. 1996).

129. *Id.*

130. *Id.* at 858.

the contract and the actions to be taken by the parties are clear, definite and certain."[131]

The Authority also argued that the nature of the possible harm the team would face by not being allowed to play in the arena was entirely economic and subject to specific calculation. However, the court disagreed, finding that there was "overwhelming evidence" that showed that the Panthers' entire success rests "on the interest and loyalty of the fans" and if the team were forced to vacate, the "potential harm to the Panthers is incalculable and extends beyond the financial injury."[132] As the court explained, the team could lose "home game advantage," "goodwill among its fans," and its relationship with the NHL could also be harmed.[133] The court also found that the Authority's disapproval would cause its own economic harm as "the Panthers Lease Amendment provides economic benefits to the public."[134] Therefore, the court enjoined the Authority from forcing the team to vacate and forced the Authority to specifically perform its obligations under the lease agreement.

F. Minnesota Twins (2002)

In 2001, as rumors of Major League Baseball's efforts to contract two financially troubled teams began to circulate, the Metropolitan Sports Facilities Commission asked a Minnesota court to enter a declaratory judgment forcing the Minnesota Twins to specifically perform their obligation to play the 2002 season in the Metrodome, an obligation they had exercised under their lease option a few months earlier.[135]

In reviewing the trial court's decision granting the Commission declaratory relief, the appellate court repeatedly noted that the "major benefit" to the Commission and the entire lease agreement between the parties was "based on the Twins promise to play their 2002 season in the Metrodome."[136] With this as the foundation for its analysis of the lease agreement, the appellate court agreed with the trial court and its discussion of the harm that the city would face if the Twins were allowed to play somewhere else during the lease term,

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131. *Id.*

132. *Id.* at 860.

133. *Id.*

134. *Id.*

135. Metropolitan Sports Facilities Commission v. Minnesota Twins Partnership, 638 N.W.2d 214 (Ct. App. Minn. 2002).

136. *Id.* at 219 & 221.

the commission, the state, citizens, and fans would suffer irreparable harm if the Twins failed to play their 2002 home games at the Metrodome. The court (1) cited the role of baseball as a tradition and as a national pastime, the history of the Twins in Minnesota for some 40 years, including two World Series championships, the role of Twins legends who have bettered the community by their volunteer work with children, and the availability of Twins games as affordable family entertainment; (2) noted that private buildings had been condemned to build the Metrodome; (3) found that the welfare, recreation, prestige, prosperity, trade, and commerce of the people of the community are at stake; and (4) ruled that the vital public trust outweighs any private interest.[137]

The lease agreement itself said that

> If the Team ceases to play its games at the Stadium as required by section 2.3. . .or if the Team ceases to play major league professional baseball games for any reason, the Team shall have breached this agreement and will be liable for such remedies as may be available to the commission at law or in equity, including, but not limited to injunctive relief and *orders for specific performance* requiring the Team to play its Home Games at the Stadium during the Term hereof.[138]

The appellate court found that although "a party does not have an automatic right to specific performance as a remedy for breach of a contract,"[139] this language provided for the remedy of specific performance to force the team to play its home games in the Metrodome.[140]

The court also addressed the typical concern found with the specific performance as a remedy; that enforcement of this remedy would create a burden on the judiciary as it would have to continue to supervise the relationship between the parties. The court found that this potential burden would not defeat the remedy of specific performance because this remedy simply "continues a close, long-term relationship," and therefore, the administrative burden on the court would not be significant.[141]

In the end, because the loss of the Twins would result in a form of intangible loss to the public, a loss that could not be properly calculated by a

137. *Id.* at 221-222.

138. *Id.* at 226, citing Section 18.3 of the use agreement (emphasis modified).

139. *Id.* at 227.

140. *Id.* at 226.

141. *Id.* at 229.

damage award, and because the burden on the court would be minimal, the appellate court affirmed the decision of the trial court and upheld the specific performance award.[142] As a result, MLB was enjoined from attempting to contract the Twins, for at least one season, and the Twins relationship with the city of Minneapolis has continued.

G. *Specific Performance in Professional Sports Leases*

As these cases demonstrate, teams and communities have attempted to invoke specific performance as a remedy in order to get the other party to their lease agreement to fulfill their end of the bargain. The courts that have analyzed this remedy agree that specific performance could be a viable remedy for a breach of a professional sports lease. As the Panthers' and Twins' litigation demonstrated, clear specific performance provisions that provide definite obligations for the parties involved will likely be looked upon more favorably. The courts recognize the value that the presence of a professional sports team can bring to a community. They also agree that the community should have some recourse allowing it to reap the benefits of its bargains and commitment to the team, because if the team leaves the city will be irreparably harmed.

Unfortunately, everything is not so clear. Initially, as the court explained in the Angels' case, it would seem obvious that the team must actually breach the lease agreement before the community can invoke a specific performance clause. But, this is not so clear as the Twins' court enforced a specific performance remedy against a team that had not yet breached its agreement because it had already executed its option to remain in the city for the next year. In addition, while some courts (like the court in the Jazz case) realize the potential problems that can be created when a court enforces a specific performance provision that necessarily impacts the entire league, others do not seem to care and are willing to impose this remedy on the entire league and its overall schedule (as happened in the Jets case).

VI. THE PROBLEM WITH SPECIFIC PERFORMANCE CLAUSES

In addition to the inconsistent treatment of specific performance provisions within professional sports leases by the courts, there are many other problems with the use of the remedy of specific performance to force a team to stay in a community.

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142. *Id.* at 224-225 & 230.

Initially, due to the inconsistent court decisions, many teams will calculate the risk that the court will enforce the specific performance provision against the possible rewards they may receive if they breach the agreement. These rewards could be in the form of better lease terms or benefits, or even a better deal from another community. In addition, if a team knows that the provision will not be enforced because the court will instead look to an award of damages, the team would be making a rational business decision by evaluating the cost of damages that might be imposed for a breach, against the potential benefits the team will realize if it is no longer subject to the lease agreement.[143]

If this scenario seems far-fetched, the possibility that a specific performance provision may actually be enforced could be even more of a problem. Keep in mind that if a court enforced a specific performance remedy enjoining a team from relocating this remedy affects every team within that particular league. And even though some courts do not seem to find this problematic, "[a]n injunction commanding the team and, necessarily, all other teams to play out the. . .season in"[144] a particular arena can have serious consequences. This specific result is what happened in the litigation involving the Jets and the Twins.[145] Each court specifically enjoined the particular league, the NFL and MLB respectively, from scheduling games to be played at locations with the Jets and Twins outside of Shea Stadium and the Metrodome. These decisions necessarily impact the league, every other team, and every other community where a team is located. This result "frustrates the need for national uniformity in regulation of national professional sports leagues,"[146] and "[j]udicially compelling specific performance of a long-term sports playing facility lease, particularly if multiple league franchises have corresponding court-ordered obligations, may severely inhibit a league's ability to produce and market its product in a desirable and efficient manner consistent with consumers' best interests."[147]

This is not the only problem. As explained throughout this chapter, when a community sues in order to force a team to specifically perform its obligations, the community will often rely on the extensive benefits that are associated with the presence of a team within that community. However, one

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143. Bradley Stein, *How the Home Team Can Keep From Getting Sacked" A City's Best Defense to Franchise Free Agency in Professional Football,* 5 TEX. REV. ENT. & SPORTS L. 1, 21 (2003).

144. Burton & Mitten, *supra* note 107, at 816.

145. *City of New York*, 394 N.Y.S.2d 805; *Metropolitan Sports Facilities Commission*, 638 N.W.2d at 230.

146. Burton & Mitten, *supra* note 107, at 834.

147. *Id.* at 842.

has to assume that the relationship between the team and the community is negatively impacted by this type of legal battle.

Initially, even if a team is forced to stay, season ticket holders and other fans "could understandably refuse to support a lame duck team during its final season[s],"[148] which could then become a season "earmarked by public scorn and disaffection with the team and its ownership."[149] In addition, in situations like that in Seattle, where a team is attempting to breach a lease that does not have a long term left, it would make sense for the team to cut its costs in "advertising and special events, as well as such things as high quality players, coaches and managers."[150] In these situations, with hurt feelings and public displays of anger and disappointment on both sides, it is hard to understand how a court could justify its decision to enforce a specific performance provision by pointing to the benefits the team brings to the city.

Still, there is no debate that cities have invested millions of dollars in taxpayer funds in order to provide facilities for professional sports franchises. Cities believe in these investments and continue to make them due to the incredible benefits they perceive from the presence of a professional sports team within their community. Perhaps there is no better evidence of this belief than what has happened in many communities that have lost teams - soon after this loss, they end up committing even more public dollars in order to entice a new team to their facility. As one commentator remarked "many major cities have lost their professional franchises, often for failure to update their facilities, only to go back to the leagues later with promises to provide the financing - at a higher cost, of course - for new facilities in order to acquire a new franchise."[151]

Still, while communities clearly invest significant tax dollars in facilities for professional teams, there is often a point where they are no longer willing to make this commitment. This is what eventually occurred in Seattle. While the city was willing to commit $74 million to renovate Key Arena in an effort to keep the Sonics in Seattle for the foreseeable future, when new owners sought further public funding for a new arena, the city balked at the request. Unfortunately, history shows that communities that do not commit further resources to their team often lose the team, only to pay more money in order to

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148. *Id.* at 832.

149. *Id.*

150. *Id.* at 833.

151. Dean Bonham & Don Hinchey, *Sonics Offer a Lesson for Cities with Major League Franchises*, DENVER ROCKY MOUNTAIN NEWS, May 10, 2008.

entice a new team to the city in the future. Cleveland and Houston provide perfect examples of this situation.

In the early 1990s, the Cleveland Browns were looking for a new or renovated stadium to replace Municipal Stadium, a facility built originally for track and field events almost sixty years earlier. The city refused to assist in paying for a new stadium and instead put together a deal to renovate the stadium with $125 million in public funding through bond sales and tax increases.[152] The Browns responded by attempting to move to Baltimore. The Browns were initially enjoined from moving, as the court agreed that they would be violation of the promise within their lease to play their home games in the stadium.[153] However, they eventually left for Baltimore, becoming the Ravens, for a favorable lease deal and a new stadium in Camden Yards (M&T Bank Stadium) built with some $230 million in public dollars.[154]

Of course, the city of Cleveland still wanted to have an NFL team, and in 1998 the NFL awarded Cleveland an expansion franchise. As part of the agreement with the NFL, the city agreed to build a new stadium at a cost of some $241 million in public dollars.[155] In the end, the only losers in this situation are the taxpayers in Cleveland who ended up paying almost double the initial amount offered before the franchise relocated and spent three years without the benefits associated with the presence of an NFL team in Cleveland.

A similar situation happened in Houston, Texas. In the mid-1990s the team was looking for a new football only stadium to replace the Astrodome, which the team had found to be unsuitable to allow it to compete in the NFL. The team agreed to contribute $65-85 million to the construction of a possible $250 million new facility, but local leaders in Houston could not agree and a proposal never materialized.[156] In response, the team began looking to other cities, and in 1995 it announced that it would move to Nashville, Tennessee after playing in Houston since the 1960s. The city of Nashville offered a brand new facility (now LP Field), that was financed entirely by approximately $290 million in public dollars.[157] After the team left in 1999, the city of Houston searched for a replacement and soon committed almost

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152. Jon Morgan, *When 70,000 Fans Just Aren't Enough Cleveland: Problem for the Browns is the Stadium, Not the Support*, BALTIMORE SUN, Nov. 4, 1995.

153. City of Cleveland v. Cleveland Browns Football Co., No. 297833 (C.P. Cuyahoga, Nov. 24, 1995).

154. NSLI, *supra* note 2.

155. *Id.*

156. Jeff Legwold, *The House that Bud Built*, THE TENNESSEAN, May 19, 2002, at C1.

157. NSLI, *supra* note 2.

$240 million toward Reliant Stadium, the home of the new Houston Texans beginning in 2002.[158]

The most recent NBA example of this phenomenon involved Charlotte, North Carolina. By 2000, the Charlotte Hornets began to ask the city of Charlotte for a new arena.[159] At the time, the team played in the Charlotte Coliseum, and although they had some of the highest attendance figures in the NBA, the arena was designed before luxury suites were standard in NBA arenas and only contained twelve suites.[160] Team owners complained that they were unable to generate the revenue they needed to continue to remain competitive in the NBA, and that they were losing $15-20 million each year.[161] For the next two years the team and city put forth several proposals for a new arena. Eventually voters rejected a $342 million package to build a new arena for the team.[162] By 2002, the Hornets' owners had signed a memorandum of understanding with the city of New Orleans[163] to relocate to New Orleans for the 2002-2003 season. The city of New Orleans pledged to provide at least $18.5 million to renovate an existing arena for the team.[164]

Shortly after the Hornets announced that they would be relocating to New Orleans, former Boston Celtics greats Larry Bird and M.L. Carr sent an inquiry to NBA Commissioner David Stern about the possibility of bringing an expansion franchise to Charlotte.[165] After the NBA made clear that it would not grant a new franchise to the city unless a new arena was built, city leaders put together a $265 million plan to build what became Time Warner Cable Arena.[166] The league approved the expansion Charlotte Bobcats in 2004, and the team initially played the 2004-2005 season in the old Charlotte Coliseum before moving in to the new arena.

The Charlotte, Cleveland and Houston situations are not unique. Virtually every city in the United States that has lost a professional sports team from

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158. *Id.*, *National Football League: Appendix B.*

159. NSLI, *supra* note 7.

160. *Id.*

161. Associated Press, *Bird, Carr Thinking Pro Hoops in Charlotte?*, USA TODAY, May 23, 2002.

162. NSLI, *Facility Update Charts: National Basketball Association: Appendix 3.2*, SPORTS FACILITY REPORTS, Vol. 2, Number 2 (Fall 2001), http://law.marquette.edu/s3/site/images/sports/nba22.pdf.

163. Of course, New Orleans lost the Jazz in 1979. *See HMC Management Corp.*, 375 So.2d 700.

164. NSLI, *supra* note 8.

165. *Id.*

166. Laura Williams-Tracy, *Arena Bounces Back*, CHARLOTTE BUS. J., Aug. 9, 2002.

any of the major sports leagues, has then fought to come up with a new plan to entice a team to relocate back to the city, or to entice the league to award it an expansion franchise. Cities who balk at what they characterize as exorbitant and exploitive tactics by teams who ask for new or renovated facilities, will independently develop new subsidization plans committing even more tax dollars to a new or renovated facility a few, if not several years later. The real question becomes, "[w]hy didn't they just pony up the money for a new stadium or arena in the first place?"[167]

The answer to this question may be that the community did not have the political will to move forward earlier, and a few years later the climate has changed. Perhaps the community finally realized the benefits it lost, both economic and intangible, when the team moved. Or perhaps the community was willing to start over after stepping away from the poisoned relationship it had with past owners or ownership groups.

Regardless of the reasons, the reality is clear. Communities continue to fight with teams and try to rebuff their requests and proposals for increased public support for new or renovated facilities. At the same time, many communities continue to tout the economic benefits that they can reap from the presence of a major league franchise. Therefore, in an effort to keep the team without paying additional subsidies in order to continue to realize these benefits, cities like New Orleans, New York, Minnesota and Seattle, ask the courts to specifically enforce their agreements with the teams in order to ensure that those teams cannot move. When the teams relocate, a community that may have initially balked at increased public funding will all too often put forth even more funding a few years later to create a relationship with a new team.

VII. A BETTER DEAL?

Communities place incredible value on the presence of a major league team and pay for this value with large amounts of public subsidization. As a result, there must be a way for them to protect themselves from the worst case scenario when the team leaves a city that clearly wants the team to stay. As previously shown, specific performance provisions do not appear to be the answer due to their inconsistent treatment by the courts and due to their nebulous value even if enforced. However, as the United States Court of Appeals for the Ninth Circuit recognized, "local governments ought to be able

167. Bonham & Hinchey, *supra* note 151.

to protect their investment through the leases they negotiate with the terms for the use of their stadia."[168]

The best answer for a city may be to include well-drafted retention clauses within the lease agreement with the team. In general terms, since the early 1990s these clauses have included "lease provisions that provide remedies that allow one party (usually the facility owner [the community]) to protect its position relative to the sports facility lease agreement in the event that the other party seeks to breach that agreement."[169] These provisions can be very powerful because they force the party attempting to breach the lease by relocating to face serious and expensive consequences if they follow through with their attempt.

1. Non-relocation Clauses

The first, and perhaps most commonly used type of retention provision is a non-relocation clause. These clauses have only been seen in major league leases over the past two decades, however, since the majority of facilities within the four major leagues have been built in the past 20 years, the presence of these types of clauses has been increasing.

Similar to a home team clause, a non-relocation clause contains a team's contractual promise that it will play its home games at a particular facility for the duration of the lease agreement, however, in a non-relocation clause this promise is put in the negative. In other words, a team is not merely promising that it "will" play in the facility. Instead, on top of this promise it also promises that it will not "relocate" to another facility or community during the duration of the agreement.

The initial versions of these types of clauses were very short. For instance, the Baltimore Ravens lease for M&T Bank Stadium contains a provision stating that,

> No Relocation: Maintenance of Franchise: During the Term, the Team will not relocate nor, permit any of its home games, during the regular season or otherwise, to be played in any location other than the Football Stadium. . .[170]

The agreement between the Colorado Rockies and the Denver Metropolitan Major League Baseball Stadium District for Coors Field contains

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168. Los Angeles Memorial Coliseum Commission v. NFL, 726 F.2d 1381 (9th Cir. 1984).

169. MILLER & ANDERSON, *supra* note 100, at 337.

170. *Id.* at 357-58, citing Amended and Restated Agreement by and between Maryland Stadium Authority and Baltimore Ravens Limited Partnership.

a similar provision in Article XIII entitled Relocation of Team. The clause is followed by a provision that also allows the team to pursue specific performance remedies for various sections of the agreement.

> Except during any period of untenantability pursuant to Article IX, temporary taking pursuant to Section 16.3 or deferral of the Commencement Date pursuant to Section 3.2, the Partnership shall not apply to the National League for approval to allow the Team to play any Major League Baseball Game anywhere other than in the Stadium during the Term.
>
> The Partnership recognizes that the Stadium is being constructed, the sales tax was imposed, and the bonds were issued solely to bring the Team and the franchise to the District, and agrees that in the event of a violation of this Article XIII, the District shall, without posting any bond, be entitled to seek and obtain an injunction from the District Court of the City and County of Denver, Colorado or any other court of competent jurisdiction, to enjoin any violation of this Article XIII.[171]

The Florida Panthers' lease for the Bank Atlantic Center contains similar language to the Rockies' lease by including a "negative pledge" in the agreement in which "the Team hereby pledges to the County and the Operator not to play any of the Team's Home Games at any location other than the Facility."[172] The lease also contains specific performance language that references the team's covenants to the community.[173]

In many current major league agreements, non-relocation provisions have become much more detailed and comprehensive. For example, the Detroit Lions' lease agreement for Ford Field requires the team to commit to not applying to the NFL to play regular or post-season games at a location other than Ford Field and also explicitly prohibits the team from filing a formal application to the NFL to move the team or from entering into any form of contract or agreement that would transfer the team to a location other than

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[171] Amended and Restated Lease and Management Agreement by and between Denver Metropolitan Major League Baseball Stadium District and Colorado Rockies Baseball Club, Ltd., March 30, 1995, at 79.

[172] Broward County Civic Arena License Agreement by and among Broward County, Florida and Florida Panthers Hockey Club, Ltd. And Arena Operating Company, dated as of May 1996, at 39-40.

[173] Id.

Ford Field without prior written consent from the City of Detroit Downtown Development Authority.[174]

The Pittsburgh Steelers' lease agreement for Heinz Field goes beyond the Lions' deal by imposing an additional requirement. The Steelers' deal requires that the team "maintain their business offices, headquarters, training facilities and camps and football related enterprises in the Commonwealth."[175]

Ironically, perhaps one of the best examples of this approach is found in the city that ended up the beneficiary of the Seattle SuperSonics move. The License Agreement between the city of Oklahoma City and PBC contains an entire article devoted to non-relocation. The provision is called a "Covenant to Play" and includes both a home team provision, and a non-relocation provision.

The initial home team provision is contained in section 20.1.1, "Covenant to Play in Arena. Subject to the provisions hereof. . . the Team hereby covenants and agrees to play, all of its Home Games in the Arena. . .throughout the License Term. . ."[176] Standing alone, this provision would be no different than any of the other home team type clauses discussed earlier. However, this provision is coupled with an extensive non-relocation clause as well.

The non-relocation clause begins with a section that lists "Prohibited Actions." Under this clause, the team is prohibited from applying for or seeking approval from the NBA "for the relocation of the Team outside of the boundaries of Oklahoma City, Oklahoma."[177] This is a much more specific and definite provision than the mere covenant to play games at the arena as it makes clear the team is warranting that it will not even bring up possible relocation with the league.

Perhaps unique to this agreement, and as alluded to earlier in the letter sent from PBC to the mayor of Oklahoma City during the Seattle litigation, this provision also contains a clause related to "Economic Viability." Under this provision the team is given limited rights to terminate the agreement during its sixth, ninth and twelfth years if certain economic benchmarks are not reached.[178] As discussed earlier, during the litigation with the city of Seattle

174. Concession and Management Agreement by and Between City of Detroit Downtown Development Authority and the Detroit Lions, Inc. and Agreed to and Approved by Detroit/Wayne County Stadium Authority, 1998, at 85-86.

175. Lease Agreement by and between Sports & Exhibition Authority of Pittsburgh and Allegheny County and PSSI Stadium Corp., dated as of June 20, 2000, at 32.

176. Arena Use License Agreement, *supra* note 79, at 63.

177. *Id.* at 64, §20.2.1.

178. *Id.* §20.4, at 66.

the team argued that it had lost many millions of dollars each year, because of this one could presume that it wanted Oklahoma City to include these provisions in order to provide the team with a way to get out of the lease if those types of losses were repeated.

Related to this economic viability clause is the other non-relocation clause related to "Third Party Negotiations." Under this clause, if the economic benchmarks are not met, then the city, authority, or operator, will default on their obligations under the lease, and the team is allowed to begin negotiations with third parties to relocate.[179]

If the team breaches the non-relocation clause or covenant to play in the arena, then it will have committed a "Non-Relocation Default."[180] The city may seek declaratory or injunctive relief and may terminate the lease altogether.[181] Interestingly, in explaining why the city would be allowed to seek injunctive relief, the clause includes many of the same explanations that communities have put forth in the litigation discussed in this chapter as it provides that

> The Team acknowledges and agrees that:
>
> (a) In reliance on the Team's commitments to play its Home Games in the Arena. . .the City is developing and constructing the Arena Upgrades at a cost to the taxpayers. . .in excess of $95 million;
>
> (b) But for the Team's commitment to play its Home Games in the Arena. . .the City and Authority would not have gone forward with developing and constructing the NBA Improvements as part of the Arena Upgrades or constructing the Practice Facility. . .;
>
> (c) Having the team play its Home Games in the Arena. . .provides a unique value to the City and the Authority, not only in terms of generating funds to operate the Arena, but also in terms of generating new jobs, additional revenue sources and economic development and increased tourism for the City;
>
> (d) The City and Authority would suffer immediate and irreparable harm if a Non-Relocation Default were to occur; and
>
> (e) Monetary damages may not adequately compensate the City and the Authority for the damage they would incur if a Non-Relocation Default were to occur.[182]

179. *Id.* §20.2.2, at 64.

180. *Id.* §20.3.1, at 65.

181. *Id.* §20.3.2, at 65.

182. *Id.* §20.3.3, at 65-66.

Nowhere in this provision is there any discussion of a specific performance type remedy. However, this language mirrors the arguments made by communities in all of the litigation involving the potential relocation of a professional team. In addition, it specifically acknowledges the inadequacy of damages and the irreparable harm that the city would face if the team relocates.

Overall, a non-relocation clause can provide a higher level of protection for a community as it reinforces the guarantees that the team has made to fulfill its commitments under the lease. Teams faced with these types of clauses no longer need to merely focus on whether a court will impose a specific performance remedy, instead, they have now agreed that they will not even discuss the possibility of relocation with the league or another community. This is a theoretically stronger legal commitment from a team and all communities negotiating with major league franchises should consider demanding it in future lease agreements.

Unfortunately, few cases have tested the actual enforceability of these types of clauses. The decisions that can be found have focused on bankruptcy issues related to the purchase of a team. Within a bankruptcy proceeding, these types of provisions often will not have their intended effect as the franchise seeking bankruptcy protection may be able to reject the sports facility agreement.183 However, the few reported cases have enjoined the breaching party (usually the team or team owners) from breaching the non-relocation covenant found in the lease agreement. This may be further evidence of the strength of these provisions as teams who have agreed to leases with these types of provisions have not often attempted to relocate, perhaps showing that they to understand the power of this type of commitment.

2. Liquidated Damages Clauses

Another important retention provision is a liquidated damages clause. In general terms these types of clauses "provide the facility owner with at least some form of monetary relief if the team has decided to no longer play at the facility during the term of the lease agreement."[184] Beyond damages that a court might grant to a community when a team breaches the lease, a liquidated

183. *See for example*, In re: Pittsburgh Sports Associates Holding Company, et. al., 1999 Bankr. LEXIS 1870 (U.S. Bank. Ct. W.D. Penn. 1999). *See also* Ralph Anzivino, *Reorganization of the Professional Sports Franchise*, 12 MARQ. SPORTS L. REV. 9, 41 (2001).

184. MILLER & ANDERSON, *supra* note 100, at 363.

damages clause can set the recovery amount at such a high level that the team will never consider relocating and incurring such high costs.

A basic example of this type of provision was contained in the Charlotte Hornets' agreement at the Charlotte Coliseum. This clause provided that if the team "fails or refuses to play its Home Games in the Coliseum. . .In lieu of specific performance,. . .[the team] shall pay. . .as liquidated damages the sum of $3 million for each Basketball Season or portion thereof in which Team Home Games are not played in the Coliseum as required. . ."[185] Although $3 million may not seem like much of a penalty, for teams claiming losses of $15-20 million, additional million dollar losses would still be a deterrent to breaching the lease. The challenge in trying to retain teams can be seen in the fact that the Hornets still relocated despite this liquidated damages provision, proving that significant financial amounts need to be sought in order to best protect a community's interests.

The Minnesota Timberwolves Basketball Playing Agreement for the Target Center contains a similar provision with a much higher liquidated damages amount. Under Section 7.03 "Remedies of MCDA," the team could be liable for liquidated damages in the amount of "Sixty Million ($60,000,000.00) Dollars reduced by Three Million ($3,000,000.00) Dollars for each of the first ten (10) complete Arena Years during which Team Games are played in the Arena. . .and Thirty Million Dollars ($30,000,000) throughout the remaining Term of Team Use."[186] Clearly, a provision that could cause the team to pay these amounts in damages would have a chilling effect on any attempt to relocate.

Overall, liquidated damages can accomplish two goals. Initially, they provide the community with a tangible amount of recovery in the unlikely situation when a team actually relocates. More importantly, especially when set at high amounts, these clauses make teams avoid results that might lead to making these payments and instead may encourage them to work with the community instead of looking to leave.[187] Of course, the challenge community leaders face is getting owners to agree to these amounts during the initial deal-making process as teams often possess a great deal of leverage and seek to minimize the presence or potential effect of these clauses.

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185. *Id.* at 363-364, citing Revised Basketball Agreement, among the Auditorium-Coliseum-Convention Center Authority, George Shinn, and Charlotte NBA Limited Partnership, Dec. 16, 1991.

186. Basketball Playing Agreement by and between Minnesota Timberwolves Basketball Limited Partnership and Minneapolis Community Development Agency, dated as of Mar. 1, 1995, at 23.

187. *See for example*, *In re Dewey Ranch Hockey, LLC*, 406 B.R. 30.

Similar to non-relocation clauses there has been little litigation involving a relocating team's attempt to avoid a payment owed under a liquidated damages provision. The cases that can be found again focus on bankruptcy claims, and therefore, involve situations where the team may be able to reject the clause altogether.

3. Combination Clauses

Perhaps the strongest form of protection for a city is a lease that contains both a non-relocation and liquidated damages clause.

One of the earliest examples of this approach is the 1997 lease agreement between the Nashville Predators and the Metropolitan Government of Nashville and Davidson County for the use of the arena now known as Bridgestone Arena. The deal requires the team to play all playoff and championship home games at the facility.[188] The agreement also requires the team to play its other home games at the facility but interestingly allowed the team to play two such games at facilities other than the arena.[189] If the team violates this provision, the Authority has thirty days to provide written notice to the team to cure the failure.[190] If the team fails to cure, the authority can terminate the damages and pursue a variety of remedies including liquidated damages.[191] The liquidated damages amounts start at $30 million for the first year of the deal and were reduced by $1 million for each year of the deal.[192]

The Arena Agreement between the city of Charlotte (another NBA community that recently suffered from the relocation of its team, only to be given an expansion team soon thereafter) and the Charlotte Bobcats contains an extensive non-relocation provision that also contains a liquidated damages clause. Perhaps because the Bobcats agreement was entered into five years earlier, the non-relocation provision virtually mirrors the clause found in the Oklahoma City lease.[193]

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188. License and Use Agreement by and between the Sports Authority of the Metropolitan Government of Nashville and Davidson County and Nashville Hockey Club Limited Partnership, dated as of June 25, 1997, §8.1 at 20.

189. *Id.*

190. *Id.* §27.1(c) at 43

191. *Id.* §27.2 at 43-44

192. *Id.* at 6-7.

193. Of additional interest, the provision also allows for a remedy of specific performance in the event of a relocation default. Arena Agreement among the City of Charlotte, the Auditorium-Coliseum-Convention Center Authority, RLJ Basketball, LLC and RLJ Arena Operations, LLC, January 13, 2003, §4.4.3, at 34.

Initially, because the Bobcats had to play one year in the Charlotte Coliseum, the agreement contains a covenant to play in that facility until Time Warner Cable Arena was completed, and a covenant to play in the new arena as well.[194] Although the specific "Non-Relocation" clause then contains similar provisions on "Prohibited Actions" and "Third Party Negotiations" it also contains two additional interesting clauses. §4.3.1 "Relocation of Team," expands the prohibition on relocation to include a prohibition from the team transferring, assigning or surrendering its NBA membership resulting in it not playing in the Coliseum and arena or not playing in the NBA at all.[195] In addition, §4.3.5 "Non-Relocation Guaranty" provides that a group of owners, making up 50% of the equity of the team, must execute Owner Guaranty's warranting individually that the team will not relocate.[196] These two additional provisions provide specific and powerful commitments from the team to further dissuade it from considering relocation.

The "Remedies for Non-Relocation Default" provision also mirrors that found in the Oklahoma City lease, except that an additional remedy of liquidated damages is included. The liquidated damages provision provides that in situations where the city is unable to obtain injunctive relief it may recover liquidated damages on a scale starting at $200,000,000 if the breach occurs before June 30, 2010, and declining to $7,000,000 by 2030.[197] The lease also explains that these amounts were "negotiated in an attempt to make a good faith effort in quantifying the amount of damages due to a Non-Relocation Default despite the difficulty in making such a determination."[198]

Perhaps the strongest example can be found in the Non-Relocation Agreement between Bexar County and the San Antonio Spurs. This 28-page agreement contains similar provisions to those found within the non-relocation clause that is part of the Bobcats lease.[199] The Spurs' agreement contains:

- "Covenant to Play,"[200]

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194. *Id.* §4.1, at 30-31.

195. *Id.* at 31.

196. *Id.*

197. *Id.* §4.4.4, at 34-35.

198. *Id.* at 35.

199. The Non-Relocation Agreement is part of an overall package of agreements that set out the details of the relationship between the Spurs and the community. This package includes a Coliseum Agreement, Community Arena Development Agreement, Community Arena Spurs Guaranty Agreement, License Agreement and Operating Agreement.

200. Bexar County Community Arena Non-Relocation Agreement by and between Bexar County, Texas and San Antonio Spurs, L.L.C., d.b.a. San Antonio Spurs Basketball Team, Aug. 22, 2000, Article 2, at 2-3.

- "Non-Relocation" provision,[201]
- provision detailing "Defaults and Remedies,"[202] and,
- "Liquidated Damages" clause that starts at $250,000,000 and declines to $106,000,000 over the term of the lease.[203]

The agreement also contains a dispute resolution provision calling for mediation of disputes as a condition precedent to legal proceedings.[204] Finally, the agreement allows for either party to seek specific performance to enforce any of the promises made by the other party within the Non-Relocation agreement.[205]

These combination provisions can provide a city with the best protection from the possibility of the team leaving. Under a lease with these provisions the team will (1) commit to play in the facility for the term of the lease, (2) commit to not initiate any plans to relocate, and (3) subject itself to court proceedings and incredibly high levels of possible liquidated damages if it ever does actually relocate (damages that can be set at declining rates to match the amount remaining in the debt service or other payments that will reimburse the community for its investment in the facility). Every community negotiating a lease agreement with a major league franchise should strongly consider attempting to follow the aforementioned examples and negotiate for these types of combination provisions in future lease agreements.

Unfortunately, the challenge that communities face in retaining major league franchises can be seen during recent events involving the Phoenix Coyotes and the City of Glendale, Arizona. The lease agreement between the team and the city contains combination provisions that seemingly offered a great deal of protection for Glendale. The deal stated that the team covenanted to play thirty years at Jobing.com Arena and a default would occur if the team took any action to play games at another facility, entered into any contract or agreement to play at another facility, requested permission from the NHL to play home games at any other facility and even allowed the city to pursue remedies if the team took an action that could be considered an anticipatory breach of the covenant.[206] The agreement goes on to include a specific

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201. *Id.* Article 3, at 3-4.

202. *Id.* Article 4, at 4-9.

203. *Id.* §4.4, at 6-7.

204. *Id.* Article 5, at 9-10.

205. *Id.* §4.3, at 6.

206. Arena Management, Use and Lease Agreement by and among City of Glendale, Arena Management Group, LLC, Coyotes Hockey, LLC, Glendale-101 Development, LLC and Coyote Center Development, LLC, dated as of Nov. 29, 2001, at 72.

performance clause backstopped by a liquidated damages clause determined by a formula that involved amounts starting at approximately $794 million minus revenues received by the city divided by the number of years remaining on the deal at the time of the default.[207] Despite these protections, the city has endured several threatened relocation attempts because of the team's bankruptcy in 2009.[208]

VIII. CONCLUSION

In today's economy communities are faced with a difficult choice. On the one hand, any use of tax dollars to support a major team, or to build or renovate a facility in order to entice a major league team to relocate to a community, will be viewed negatively by many voters. However, community leaders often believe the presence of a major league franchise can bring many tangible and intangible benefits that could potentially make for a worthwhile investment of any tax dollars used to subsidize the franchise's presence within the community.

It is because of these tangible and intangible benefits that communities must rethink their processes and attempt to craft lease agreements that provide them with stronger protection against a team's efforts to relocate to the first market that comes along and offers it a better deal. The past reliance on simple specific performance provisions appears to be misplaced and lease agreements must now be strengthened with detailed non-relocation and liquidated damages clauses in order to provide strong protection for the community's investment.

In the end, a community must make its own decision as to whether it will fight to keep a team, even when it is clear that tax payers do not support further subsidization of the facility that the team calls home. With proper lease drafting at the beginning of the relationship, a community can try to avoid these difficult decisions and situations, knowing that if a team attempts to relocate the community can turn to its lease agreement for the proper resolution of any dispute.

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207. *Id.* at 97-98.

208. Jeff Klein, *For Now, Coyotes Know Where They Are*, N.Y. TIMES, Apr. 14, 2010, at B13.

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