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Damning with Fulsome Praise: Assessing the Uniqueness of an Artist or Performer as a Condition to Enjoin Performance of Personal Service Contracts in Entertainment Law

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I. INTRODUCTION

The paradigmatic contract in the entertainment industry has traditionally been considered to be the informal handshake, at least in the mythos of Hollywood. If this impression were ever true, it no longer is. The cause of action for breach of an entertainment contract is alive and well and flourishing in the industry. Litigation includes suits against actors and other performers for breach-

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ing contracts based on what are euphemistically and generically referred to as “artistic differences.” Studios and producers have also been sued for breaching contracts with performers for reasons ranging from negative publicity surrounding the performer’s name to an actress’ unexpected pregnancy. Other typical suits involve disputes regarding accounting of profits, claimed pilferage of credit for authorship, the degree of specificity needed for formation of entertainment law contracts and ownership of rights deriving from evolving technology.

The most interesting, idiosyncratic, and yet consistent aspect of these contract cases is the nature of the remedy pursued and accorded. Traditionally, specific performance is not available in personal services cases. In the seminal opinion of Lumley v. Wagner, an opera singer breached a contract to perform in one theater in order to perform in another. The court declined to enforce her obligation to perform in the original theater, choosing instead to enforce a negative covenant precluding her from performing in any other theater. The psychology employed by the court was that the singer would certainly opt for performing in her original theater when precluded from singing anywhere else. While in that case the singer thwarted the court’s ploy and chose not to perform, the reasoning has been adopted in cases in both the sports and entertainment industries.

3. See Baltake, supra note 2, at A14.


5. See Brian Lowry, ‘Undercover’ Stars End Their Holdout, L.A. TIMES, July 26, 1996, at F2. Some litigation, of course, derives from nothing more substantive than artistic temper tantrums and greed. Actors Malik Yoba and Michael DeLorenzo, stars of the television series “New York Undercover,” caved in and ended their brief walk-out when confronted with a $1.2 million suit alleging breach of contract. See id. The authors had sought, among other perks, a raise to $75,000 per episode, a gym, a star trailer, and better food, along with increased creative control. See id.

6. 42 Eng. Rep. 687 (Ch. 1852).

7. See id. at 687-88.

8. See id. at 693.

9. See id. at 693-94. The court recognized that its power to enjoin other performances would have the effect of binding the parties’ consciences to perform their agreements. See id. at 693. The court, however, denied that it was doing indirectly what it could not do directly. See Lumley, 42 Eng. Rep. at 693.
Lumley v. Wagner has been the progenitor of a long series of cases in sports law. In sports, the inquiry has often revolved around the "uniqueness" or "replaceability" of the athlete, a prerequisite to the court's ordering the equitable relief of enforcing the express or implied negative covenant. This article explores the parallel world of remedies in entertainment law, and compares it with its sports law counterparts.

II. Background

A. Lumley v. Wagner

In an 1851 contract, originally in French and translated for the court, Johanna Wagner, "cantatrice of the Court of His Majesty the King of Prussia," promised to sing at Lumley's Her Majesty's Theatre in London for a three month period. The contract specified the operatic roles she would be singing, and stipulated that those "parts belong exclusively to Mademoiselle Wagner, and any other cantatrice shall not presume to sing them during the three months of her engagement." Further, under a "pay or play" arrangement, even if circumstances prevented the presentation of those operas, Lumley would still be bound to compensate Wagner. An additional clause, subsequently contracted to by a Mr. Bacher, who allegedly was acting on Wagner's behalf, provided that "Mademoiselle Wagner engages herself not to use her talents at any other theatre, nor in any concert or reunion, public or private, without the written authorization of Mr. Lumley."


12. See id. at 688.

13. See id.

14. Id.
While the contract could not have been more explicit, artistic temperament and acquisitiveness, being what they are, Mademoiselle. Wagner then signed with a competitor, F. Gye, to sing at the Royal Italian Opera, Covent Garden for more money. The plaintiff subsequently brought suit to prevent Wagner from performing at the Royal Italian Opera, Covent Garden or anywhere else without Lumley's permission.

Wagner's counsel argued that this agreement was a personal contract and that the awarding of damages would provide adequate relief. In support of this principle, the plaintiff cited several cases, one of which the Lord Chancellor distinguished as containing no negative covenant. Wagner also argued that "this Court never interferes to restrain the breach of the negative part of a contract in any case where it cannot specifically enforce the performance of the positive part of the contract," for example, preventing the court from doing through a back door what it could not do through the front. The Lord Chancellor again distinguished plaintiff's authorities, and went further, respectfully but firmly disagreeing with the inconsistent rulings. The Lord Chancellor noted the public policy concern against breaching a contractual obligation and chided would-be defendants that the court "will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages

15. See id.
17. See id. Counsel for Wagner argued that: [T]he agreement [was] a purely personal contract, for the infraction of which damages are a complete and ample remedy: the agreement is, in fact, nothing more than a contract of hiring and service, and whatever the relation between the employer and employed may be, whether master of servant, or principal and agent, or manager and actor, this Court will, in all such cases, abstain from interfering, either directly or indirectly . . . .

Id. (citations omitted).
18. See id.
19. Id.
20. See Lumley, 42 Eng. Rep. at 689-90. The court concluded that: The agreement to sing for the Plaintiff during three months at his theatre, and during that time not to sing for anybody else, is not a correlative contract, it is in effect one contract; and though beyond all doubt this Court could not interfere to enforce the specific performance of the whole of this contract, yet in all sound construction, and according to the true spirit of the agreement, the engagement to perform for three months at one theatre must necessarily exclude the right to perform at the same time at another theatre. It was clearly intended that J. Wagner was to exert her vocal abilities to the utmost to aid the theatre to which she agreed to attach herself.

Id. at 693.
which a jury may give.” 21 He also acknowledged the circuitous route by which the court sought to compel Wagner to sing for Lumley, calling it justified. 22

B. Aftermath

The doctrinal stance on surreptitiously enforcing a personal services contract would soon be established in British and American law beyond cavil. Still, initial resistance to what might be termed the “Lumley maneuver” may be evidenced by the comments to Restatement First of Contracts, Section 380, allowing for the enforcement of the negative covenant. 23 In what must have been a thinly veiled allusion to the aftermath of Wagner’s operatic battle, the American Law Institute (ALI) added: “The defendant may persist in refusing to perform affirmatively, while strictly obeying the injunctive order. In such case the purpose of inducing performance is not attained; but no contempt and no supervision or testing of performance is necessary.” 24 Mlle. Wagner thwarted the intention of the court by declining to sing for her adversary. 25

The ALI also paid tribute to the practical problems that could still survive this ruse. 26 In recognition of these surviving difficulties,

21. Id.
22. See id. The Lord Chancellor specifically wrote:
   It was objected that the operation of the injunction in the present case was mischievous, excluding the Defendant J. Wagner from performing at any other theatre while this Court had no power to compel her to perform at Her Majesty’s Theatre. It is true that I have not the means of compelling her to sing, but she has no cause of complaint if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfil her engagement . . . . I shall leave nothing unsatisfied by the judgment I pronounce. The effect, too, of the injunction in restraining J. Wagner from singing elsewhere may, in the event of an action being brought against her by the Plaintiff, prevent any such amount of vindictive damages being given against her as a jury might probably be inclined to give if she had carried her talents and exercised them at the rival theatre: the injunction may also, as I have said, tend to the fulfillment of her engagement; though, in continuing the injunction, I disclaim doing indirectly what I cannot do directly.

Id.

23. See Restatement (First) of Contracts § 380 cmt. f (1982). Comment f to Subsection one provides in part:
   If the real purpose of enforcement of the negative duty is the indirect enforcement of an accompanying affirmative promise, the difficulties that are involved in supervising and testing the promised performance are not completely avoided by the fact that the decree is in form an injunction against breach of the negative duty only.

Id.

24. Id.
25. See id.
26. See id. Comment f provides the following:
the ALI in Comment f suggests courts should employ a type of foresight and resist the temptation to grant the equitable relief in those situations.\(^{27}\) "If indirect enforcement by negative decree is likely to fail of its purpose substantially and damages are adequate compensation for harm caused by breach of the purely negative duties, the basis for an injunction becomes comparatively slight."\(^{28}\)

Subsection two of Section 380 provides the situations where a personal service contract will not be enforced indirectly through an injunction.\(^{29}\) The ALI also seems to be eschewing the *Lumley* sleight-of-hand, an impression bolstered by Comment h.\(^{30}\) While the ALI did not condemn all such devices, it argued for caution in their usage.\(^{31}\) The ALI, however, even in illustrating this rule, did not challenge the propriety of the *Lumley* doctrine on its own facts.\(^{32}\)

On the other hand, the injunction may be effective in inducing an incomplete or defective performance. Again, there is no contempt; but the court must then test the performance and determine the extent of the defects in case the plaintiff asks damages for his harm or the defendant asks compensation for his performance.

**Restatement (First) of Contracts** § 380 cmt. f (1982).

27. See id.

28. Id.

29. See id. Section 380(2) specifically says:
A contract to render personal service exclusively for one employer will not be indirectly enforced by injunction against serving another . . . if

(b) performance of the contract will involve personal relations the enforced continuance of which is undesirable . . . or

(c) the injunction will leave the employee without other reasonable means of making a living; or

(d) the service is not unique or extraordinary in character.

Id.

30. See **Restatement (First) of Contracts** § 380 cmt. h (1982). Section 380 Comment h states:
An injunction to enforce even the negative duty will generally be refused if its effect is substantially to prevent the employee from making a living in his accustomed vocation, the single alternative being the perpetuation of undesirable relations with an employer or other persons with whom he is in serious conflict. This would come near to the creation of an involuntary servitude.

Id.

31. See id. Comment h also provides:
To justify the granting of an injunction, it should appear that the employer is ready and willing to continue the employment in good faith and that the employee is not substantially forced back into the old employ. Here again is a case for the exercise of sound judicial discretion. Among the matters to be given special consideration are the character of the service to be rendered, the probability of renewal of good relations, the degree of inadequacy of other remedies, and the hardship involved in the enforcement by injunction.

Id.

32. See **Restatement (First) of Contracts** § 380(2) illus. 6 (1982). Illustration 6 to Subsection (2) posits the following familiar example:
C. Public Policy Concerns After *Lumley*\textsuperscript{33}

In subsequent analysis of the *Lumley* doctrine in both the sports and entertainment law contexts, various public policy concerns have been raised as support for enforcement of the rather cunning backdoor approach. These concerns include such realities as the relatively short earning period of top athletes, a lesser consideration for performing artists, the desire to let the ruthless marketplace determine an athlete's or entertainer's value, and the presumed benefit to sports fandom when athletes' freedom of mobility generates tougher, more rigorous team competition. As will be discussed below, judges have also expressed contrary public policy concerns, most notably favoring a method of punishment most likely to deter artists and athletes from breaching contracts and avoiding professional responsibilities.

D. *Lumley*’s Application in Sports Law Cases

*Lumley* has a long and cherished toehold in the forum of cases involving athletes attempting the not-yet Olympic sport of “contract jumping.”\textsuperscript{34} In these cases, an athlete already under contract with Team A, signs with Team B for services to be rendered at the same time the athlete is to be playing for Team A. This “contract jumping” usually arose during periods in which new leagues were being formed and were liberally stealing from teams in the preexisting leagues. More often than not, the player attempted to “jump” back to his original Team A for an improved salary. The lawsuits were for breach of contract brought by Team B against the athlete and interference with contract brought by Team B against Team A. The granting of injunctive relief in these double-jump cases inevitably called into question the “clean hands” of plaintiff Team B, which had arguably induced the athlete to breach the contract with Team A.

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\textsuperscript{33} Id. A contracts to employ B, a noted opera singer, the latter promising to sing in A's theater and not to sing at any competing theater for a specified period. In breach of this contract, B contracts to sing in C's competing theater. B's singing there will cause harm to A for which damages are not an adequate remedy. B can easily make a good income singing in theaters not in competition with A's theater. A can get an injunction preventing B from singing in the other theater, although he cannot get an affirmative decree that B shall sing in A's theater.

\textsuperscript{34} Id. 33. See discussion *infra* Part II.C. 34. See, e.g., Nassau Sports v. Peters, 352 F. Supp. 870, 872 n.2 (E.D.N.Y. 1972) (listing cases addressing legal problems generated by contract jumping in baseball, football and basketball).
Whichever team lost the services of this perfidious athlete, however, invariably sued for injunctive relief, asking the court to enjoin the athlete from playing for the other team. The grounds were multifold. First, assuming breach was established, the team would argue that a remedy at law, in the form of money damages, was inadequate. Second, the team would then argue that the loss of the player to the team was incalculable, an argument the team would no doubt forget in subsequent negotiations with that player’s agent. Third, the team would also say that it was impossible to attribute a dollar amount to the ineffable role played by one member of a team and that the player himself contributed inestimably to the revenues generated by the club. Given the fact that suits were unlikely to be brought over a player of modest abilities, courts would be put in the almost burlesque predicament of comparing the player’s witnesses who demeaned their friend’s abilities, on the one hand, with the club’s witnesses, who ascribed godlike attributes to the traitorous player being sued by that club.

The obstacle of showing that an athlete’s uniqueness warrants injunctive relief is the focus of this article and will be discussed more fully below. Once this obstacle has been met, the plaintiff team still must rest its breach of contract claim on something other than an affirmative promise to perform personal services, if the plaintiff team is seeking injunctive relief. If the contract contains an express negative covenant, the court will likely move on to the next step of its analysis. Even if such a covenant is lacking, courts have tended to find such a clause implicit, using the reasoning that a promise to do a task of this nature for one employer usually implied the promise not to do the task for another. Courts will still inquire to determine if the prohibition will be reasonable, limited in duration (generally not a problem with standard players’ contracts for team sports) and geographical scope (also not a problem if the teams are competitors in the same marketplace). Both requirements will face heightened scrutiny for individual sport athletes, such as golfers, bowlers, and boxers.

Courts will also be likely to entertain challenges as to other restrictive covenants in the contract which might operate to the


37. See, e.g., Madison Square Garden Corp. v. Braddock, 90 F.2d 924, 926-27 (3d Cir. 1937) (refusing to find that time limits in earlier contract carry over to superseding contract).
player's detriment. Although the "involuntary servitude" argument was effectively put to rest by the Supreme Court in *Flood v. Kuhn*, courts have persisted in examining the player's contract in search of other illegalities or unconscionability, such as antitrust violations or mutuality of obligation or remedy problems. A case-by-case analysis of the *Lumley* progeny in sports law will serve to demonstrate the consistency with which its rule has been applied, notwithstanding the evolution of companion bodies of law, including the two that most strikingly affected that body of law, antitrust law and labor law.

1. The Unique and Irreplaceable Athlete

In one of the earliest cases to apply *Lumley* to the context of sports, *American League Baseball Club v. Chase*, a New York court made what was to become the customary recitation of testimony extolling the athlete's abilities. In this instance, the *Chase* court stated that the athlete was "the foremost first baseman in professional baseball." The court noted that the *Lumley* rule, requiring the employee's abilities to be "unique and individual" for injunctive relief to lie, "has been frequently applied to actors, or stars in the theatrical profession, of special and attractive talents." After having satisfied itself as to the unique nature of the player's abilities, the *Chase* court found the player's agreement to lack mutuality of consideration and obligation. Next, the court turned to the allegations that the system under which baseball players are tied to their teams violates antitrust regulations. The court also stated that a lengthy study revealed "the involuntary character of the servi-

40. 149 N.Y.S. 6 (Sup. Ct. 1914).
41. Id. at 8.
42. Id. The court said:
Between an actor of great histrionic ability and a professional baseball player, of peculiar fitness and skill to fill a particular position, no substantial distinction in applying the rule laid down ... [in *Lumley*] can be made. Each is sought for his particular and peculiar fitness, each performs in public for compensation, and each possesses for the manager a means of attracting an audience. The refusal of either to perform according to contract must result in loss to the manager, which is increased in cases where such services are rendered to a rival.
*Id.* at 8. (quoting *Metropolitan Exhibition Co. v. Ward*, 9 N.Y.S. 779, 780-81 (Sup. Ct. 1890)).
43. See *id.* at 13-14.
44. See *Chase*, 149 N.Y.S. at 17.
tude which is imposed upon players by the strength of the combination controlling the labor of practically all of the players in the country."\textsuperscript{45}

In colorful language unlikely to resonate with fans today, the court went on:

There is no difference in principle between the system of servitude built up by the operation of this National Agreement, which . . . provides for the purchase, sale, barter, and exchange of the services of baseball players — skilled laborers — without their consent, and the system of peonage brought into the United States from Mexico and thereafter existing for a time within the territory of New Mexico.\textsuperscript{46}

The seminal case applying the \textit{Lumley} rule to sports law contracts is \textit{Philadelphia Ball Club, Ltd. v. Lajoie},\textsuperscript{47} in which a court was confronted with the issue of whether an athlete can be compelled to fulfill his affirmative promise not to play for another team during the term of the contract.\textsuperscript{48} The case implemented the \textit{Lumley} rule in enforcing the negative covenant barring Lajoie from playing for another team during the contract term.\textsuperscript{49} The court opinion contains an elaborate examination of the methodology for ascertaining whether damages at law would be adequate.\textsuperscript{50} It is this portion of the opinion that is so frequently cited by subsequent courts attempting to make a similar determination.\textsuperscript{51}

In \textit{Central New York Basketball, Inc. v. Barnett},\textsuperscript{52} the Ohio Court of Common Pleas granted injunctive relief, agreeing with the plaintiff that Barnett "is a professional basketball player of great skill and whose talents and abilities as a basketball player are of special, unique, unusual and extraordinary character."\textsuperscript{53} The \textit{Barnett} court quoted and considered contradictory testimony as to Barnett's skills, even Barnett's own testimony that he does not have "excep-
tional and unique skill and ability" and that his services are not "of a special, unusual and extraordinary character."\textsuperscript{54}

It is perhaps this portion of the court's analysis which, more than any other, highlights the absurd and ludicrous nature of a factual inquiry as to an individual player's meeting this equitable remedy requirement. The athlete, in order to free himself from his preexisting contractual obligation, must assert and support to the trial court that he is, at best, of average or even subpar ability, hardly superior to other players, and that his loss will not cause his preexisting contractual team incalculable damage. The terminology has changed throughout the years, from "unique" to "not readily replaceable," but the concept has remained the same: I, as an athlete, am not possessed of any skills so valuable that my old team would not easily be able to replace me. Barnett had to admit he was inferior to another player, an admission unlikely from a professional athlete under other circumstances. The Barnett court found that "[w]hether Barnett ranks with the top basketball players or not, . . . he is an outstanding professional basketball player of unusual attainments and exceptional skill and ability, and that he is of peculiar and particular value to plaintiff."\textsuperscript{55}

In \textit{Washington Capitols Basketball Club, Inc. v. Barry},\textsuperscript{56} the California District Court stated that: "Defendants have not shown that the contract . . . is itself unconscionable, unenforcible [sic] or otherwise void . . . . The precedents for granting injunctive relief against 'star' athletes 'jumping' their contracts — and certainly defendants do not deny that Barry is a unique, a 'star' athlete — are numerous."\textsuperscript{57} While one court suggested that the case law now deemed the requirement of uniqueness or irreplaceability to be "met prima facie" in any case involving a professional athlete,\textsuperscript{58} this issue has not yet reached the point of being removed from dispute at the trial level.

In \textit{Dallas Cowboys Football Club, Inc. v. Harris},\textsuperscript{59} the jury specifically found that James Harris "did not have exceptional and unique knowledge, skill and ability as a football player."\textsuperscript{60} Given that this was contrary to representations expressly contained in Harris' con-

\textsuperscript{54} Id.
\textsuperscript{55} Id. at 514.
\textsuperscript{56} 304 F. Supp. 1193, 1197 (N.D. Cal.), aff'd, 419 F.2d 472 (9th Cir. 1969) (citations omitted).
\textsuperscript{57} Id. at 1197.
\textsuperscript{60} Id. at 42.
tract, the Cowboys argued that the defendant be estopped from challenging his uniqueness at trial.\textsuperscript{61} The court did not accept that argument, instead considering Harris’ contractual stipulation as mere opinion.\textsuperscript{62} On this point, the court cited Coach Tom Landry’s testimony, in which he admitted the stipulation was Harris’ opinion.\textsuperscript{63} Still, the appellate court was persuaded that the dictionary definition of “unique” was overly narrow and that there was insufficient evidence to support the jury’s finding of Harris’ mediocrity.\textsuperscript{64} “It is true that the witnesses named other professional football players who are ‘equal or better’ than Harris as players, but the testimony was that players of Harris’ ability were not available to the Club.”\textsuperscript{65}

2. \textit{Express or Implied Covenants}

Courts have demonstrated a willingness to infer a negative covenant where one was not explicitly expressed within a personal services contract.\textsuperscript{66} Particularly in cases involving team athletics, courts have recognized that a player’s promise to play for one team performed a prohibition against playing for another.\textsuperscript{67} “Every express promise to do an act embraces within its scope an implied promise not to do anything which will prevent the promisor from doing the act he has engaged to do.”\textsuperscript{68}

This principle may seem less obvious in cases in which an individual sport athlete has covenanted to perform for one promoter or manager or venue.\textsuperscript{69} When a boxer signs a contract to fight a particular bout in one arena, does that imply the boxer promises to refrain from fighting someone else, somewhere else or for some

\begin{itemize}
\item \textsuperscript{61} See id. at 43.
\item \textsuperscript{62} See id.
\item \textsuperscript{63} See id. Coach Landry testified: “Well, I think the boy probably represents himself as being unique in that respect. Now, maybe he is not the best judge of his ability.” \textit{Harris}, 348 S.W.2d at 43.
\item Also at trial, Harris was told the dictionary definition of “unique” as “‘[o]nly which there is but one, or sole, or only.’” \textit{Id.} Harris was asked, “Do you think you are the only defensive halfback? A. Not by any means of the imagination. Q. It says ‘Unparalleled, or unequal’ — you think you are unparalleled or unequal? A. I wish I were, now. Q. Do you think you are? A. No, sir, I am not. I know my own ability.” \textit{Id.}
\item \textsuperscript{64} See id. at 44.
\item \textsuperscript{65} Id. at 45.
\item \textsuperscript{66} See, e.g., American Ass’n Baseball Club v. Pickett, 8 Pa. C. 232 (C.P. 1890).
\item \textsuperscript{67} See, e.g., \textit{id.} at 233.
\item \textsuperscript{68} Id. at 232.
\end{itemize}
other promoter? Courts have held in the affirmative, owing largely to the physical risks attached to participating in an intervening match. In Madison Square Garden Boxing, Inc. v. Shavers, a promoter sought to enjoin the heavyweight boxer from participating in any boxing match until he fulfilled his contractual obligations to the promoter. The court granted the promoter's motion for an injunction during the contract period because of irreparable injury to the promoter if the boxer could disavow the agreement. The court held that a non-competition clause was implied in the contract (even if it had not been expressed) to fight for the heavyweight championship. Despite the breadth and scope of such an implied restrictive covenant, the court refused to find it unduly harsh or one-sided, and held that it would not unreasonably burden the party to be enjoined.


Moreover, athletes in the major leagues must sign a standard player contract including a boilerplate provision stipulating that they possess unique skills or are irreplaceable. While this clause would seem to parlay itself into a benefit under the contract, the result is the opposite. The clause is considered evidence that damages at law would be inadequate if the player breaches the contract, which is a prerequisite to equitable relief. The existence in standard players' contracts of boilerplate language in which the player attests to his uniqueness and irreplaceability is often noted by courts considering injunctive relief, but in and of itself, these clauses are not considered controlling.

In an early case, Spencer v. Milton, a first baseman with the Albany Black Sox tried to absolve himself from his contract, after which his team sued to enforce the contract through equitable re-

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70. Id.
71. See id. at 449.
72. See id. at 452.
73. See id. at 452 n.11.
74. See Shavers, 434 F. Supp. at 452 n. 11. This view was cited with approval as being "still represent[ative of] the current state of the law" by the court in Arias v. Solis, 754 F. Supp. 290, 294 (E.D.N.Y. 1991). See also Matuszak v. Houston Oilers, Inc., 515 S.W.2d 725, 729 (Tex. Civ. App. 1974) (denying temporary injunction because enjoining jumping football player from any "activities related to football" was too broad).
75. See Arias, 754 F. Supp. at 294 (finding boxer's abilities "unique and extraordinary" by reference to other evidence, not solely by virtue of contractual stipulation).
76. 287 N.Y.S. 944 (Sup. Ct. 1936).
lief.77 Despite allegations in the complaint that the athlete had “‘particular and special qualifications to play the position of first base . . . [and] special proficiency and wide reputation’” as well as the affidavit attesting to the fact that defendant’s play “‘tends to increase the attendance at games,’” the New York court found nothing to suggest that a remedy of law would prove inadequate compensation for the loss.78

In Boston Professional Hockey Association v. Cheevers,79 the court applied a stricter test in denying the plaintiff’s request for injunctive relief. In Cheevers, despite the fact that two of the team’s star players signed with a rival league, the court did not find irreparable harm, and therefore granted no injunctive relief.80 Why? The court willingly noted the players’ skills as “outstanding” and “in the super-star category.”81 More significant to the court seemed to be the plethora of restrictive provisions in the Standard Player’s Contract.82

The court also made a detailed inquiry into the impact that the loss of the players would have on the club’s general economic position.83 The court found the club’s revenues had recently increased and that the financial consequences of these two players leaving, were at best “unknown.”84 “[O]n the present record it cannot be proven that the Bruins will suffer any financial loss whatsoever in their operating revenues, ticket sales, television incomes, etc., due to the absence of these two players . . . .”85 The court, however, found an entirely adequate remedy at law in money damages for contract breach.86 It is not clear what impact Cheevers will have on this area of the law; most later cases have retreated to the more

77. See id. at 944.
78. Id. at 946.
80. See id. at 264, 270.
81. Id. at 263.
82. See id. at 264. For example, clause six of the Standard player’s contract stated:
   The Player represents and agrees that he has exceptional and unique knowledge, skill and ability as a hockey player, the loss of which cannot be estimated with certainty and cannot be fairly or adequately compensated by damages. The Player therefore agrees that the Club shall have the right . . . to enjoin him by appropriate injunction proceedings from playing hockey for any other team . . . .
   Id.
83. See Cheevers, 348 F. Supp. at 269.
84. Id.
85. Id. at 269.
86. See id.
perfunctory analysis of the issue, and even the appellate court seemed to question this strict test.

4. Harsh/Unconscionable/Lacking Mutuality

Even in light of the resistance to an involuntary servitude argument, courts will still engage in an inquiry as to the harshness of the player’s plight under the personal services contract. While “harshness” seems a ludicrous concept given the million-dollar figures bandied about as payment for those personal services, courts have still weighed the principles underlying freedom of contract with the public policy supporting antitrust legislation. Courts will nurture and foster freedom of contract, and over the past half-century have virtually rewritten labor agreements to bring them into harmony with antitrust policies, but this balancing act will not always protect breaching athletes. For instance, where a hockey player voluntarily accepted employment under an allegedly illegal contract, and he presented an antitrust question only when it appeared to be no longer in his economic interest to comply with his agreement, the court found the antitrust argument specious as a justification for breach. The court noted that the claimed illegality, if any, was divisible from the personal services commitment made.

Courts are loathe to achieve through a back door what is legally abhorrent when confronted face to face. Thus, a court is likely to examine the terms of the contract, including the negative covenant, to ensure it is neither “unduly harsh” nor “too one-sided.” The contract must not violate requirements of mutuality of obligation and mutuality of remedy, or risk forfeiting court enforcement of even an explicit and express negative covenant.

This court has weighed the financial effect that the loss of the services of these two super-stars would have on the Bruins on the one hand, and the effect it would have on the two individual players and the intervening defendant the Blazers, on the other hand. I find that the balance of hardship favors the defendants, who would suffer a much more serious hardship if the injunction was granted than the Bruins would suffer by the denial of the injunctive relief.

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\textit{id.} at 269-70.


88. \textit{See id.} at 880-81.

89. \textit{See id.}


Only in the most unusual case will a court of equity act upon the person of the defendant to restrain him from doing some act which the plaintiff claims may cause him irreparable injury. This is particularly true where, as in this case, the plaintiff seeks to restrain the defendant from freely
Weegham v. Killefer, however, shows that an assertion that a contract lacks mutuality of remedy may not always be enough to prevent the enforcement of a negative covenant. Weegham is a case arising out of the player raids which followed the formation of the Federal Baseball League in the early 1900s. In Weegham, the Chicago club in the Federal League offered Killefer a contract with a higher salary after Killefer agreed to play for the Philadelphia National League club for the contract period. The Chicago club therefore had blatantly interfered with an existing relationship, but it had a substantial defense for its actions: The player had no enforceable obligation to his original employer because their contract lacked mutuality of remedy. Still, the court found the Chicago club undeserving of equitable relief because “Killefer was under a moral, if not a legal, obligation” to play for Philadelphia.

Despite the willingness of many courts to provide relief to parties who had contracted with the breaching athlete, most courts have been fairly tolerant of the athlete’s actions. In Detroit Football Co. v. Robinson, the National Football League (NFL) Detroit Lions were vying, with the American Football League (AFL) Dallas Texans, for the services of Johnny Robinson. Judge Skelley Wright, then sitting on the United States District Court for the Eastern District of Louisiana, delivered a stern admonition to Robinson:

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

practicing his trade. His right to this relief must be clear, reasonable and well defined.

Id. at 527.
92. See id. at 170. The ballplayer continued to play for Philadelphia and the Chicago club sought an injunction to return him to Chicago and restrain him from playing for any other team.: See id.
93. See id. at 170-71.
94. Id. at 172.
95. 186 F. Supp. 933 (E.D. La.), aff’d, 283 F.2d 657 (5th Cir. 1960).
96. See id. at 954.
97. Id. at 935-36. (quoting Chicago Cardinals Football Club, Inc. v. Etchevery (D.N.M. filed June 26, 1956) (unreported opinion)) (alteration in original).
Despite Judge Skelley Wright's tone, the courts in general have been tolerant of "contract jumping." The reason for this is the countervailing public policy reasons fostering competition, including the interest of the sports fan and the interest of the professional athlete, who has a limited number of high-earning years. The latter is substantiated and quantified by the evidence that the formation of new leagues prompts a general increase in players' salaries, and the competition-generated salaries more accurately reflect the players' competitive value.

In deciding whether to provide equitable relief to a party injured by a breaching athlete, courts will not do so blindly, but will look to the intent of the parties. The plaintiff will have to show the athlete's arrangement with his employer was intended to be an exclusive one. This is not always as clear or obvious with the individualized sports (tennis, golf, boxing) as with definite-term contracts involving team sports. Also relevant to a determination of parties' intent is their agreement with respect to the remedies available in the event of a breach, as evidenced in *Madison Square Garden Corp. v. Braddock.* In that case, Braddock, a boxer, had entered into an agreement with his promoters in which he covenanted that he would not engage in competing performances for a stated term. Within that term, Braddock injured his hand, preventing him from being able to fight Max Schmeling at the Garden. This agreement was then superseded by another which differed in two respects: First, it did not include a promise of exclusive services; and second, it added a provision for liquidated damages in the amount of $5,000. Yet a third contract was subsequently entered into, and under this agreement, Braddock covenanted that he "cannot participate in any bout with Joe Louis until after June 3, 1937." When Braddock later contracted to fight Louis on June 22, 1937, the Garden alleged that this was an express repudiation. Whether the repudiation was express was a technicality the court considered meaningless because repudiation was clear.

99. 90 F.2d 924 (3d Cir. 1937).
100. See *id.* at 925.
101. Id.
102. See *id.*
103. *Id.*
104. *Braddock,* 90 F.2d at 926.
105. *See id.* The court said, "[t]here was practical repudiation for the reason that a heavyweight boxer, through sheer physical limitations, cannot engage in two
When litigation arose, the employer argued that the court ought to find that the parties intended that the original negative covenant would carry over to the second agreement. This had some merit since the boxer presumably would understand that the promoter had an interest in controlling the boxer's exposure in order to heighten public interest in the planned championship event. The court found that the parties' agreement, with respect to the liquidated damages, impliedly negated the possibility of equitable relief, since the parties obviously intended that any breach could be compensated by money damages. Thus the court stated there was no negative covenant, although it held for Braddock on other grounds. "[Even if] the covenant in question was carried into the subsequent contracts with legal effect, none the less it could not be enforced." The court found the contract deficient for failing to satisfy the requirement of mutuality of remedy.

Judge Buffington, in dissent, quoted Braddock's own words:

'I will not fight again until June, 1936. Then I will stake my all against the foremost contender under the auspices of Madison Square Garden. I believe in loyalty. . . . The Garden took me off the bread line by giving me three fights and then to the Baer engagement. Naturally I will stick to the Garden.'

major contests involving the title of World's Heavyweight Champion within nineteen days." Id.

106. See id.
107. See id. at 927.
108. See Braddock, 90 F.2d at 927.
109. Id.
110. Id. The court said:
It is well settled law both in the United States and in England that there must be mutuality of remedy between parties to a contract before a negative covenant against one of them will be enforced . . . . [U]nless a right be given under the contract whereby the party not in breach may be compelled to perform his obligation, then the party in breach will not be subjected to injunction under the negative covenant. To do so would be to subject that party to undue hardship.

. . . .

Braddock cannot at this time compel the Garden to make use of his services as a boxer because the obligations of the Garden to Braddock expired upon June 3, 1937, by the terms of his last contract of employment. There is therefore no mutuality of remedy and therefore this court, even assuming the existence of a negative covenant, could not as a matter of law enjoin Braddock from engaging in the contest with Louis upon June 22, 1937, or in any other boxing contest.

Id.

111. Id. at 927-28 (Buffington, J., dissenting).
To support his view that an injunction was justified, Judge Buffington went on at some length about the public policy supporting injunctive relief. In order to enforce even express covenants, courts will stringently evaluate the reasonableness of the restrictive agreement. The employer will not be imbued with unlimited power to control the athlete's activities in the event of a breach. Courts will look to both geographical scope (for example, to ensure that the two employers are competitors in the same market) and duration (especially for individual sport athletes).

Courts have often found that injunctions cannot be upheld where the negative covenant lacks a time limit or is overly broad geographically. An additional inquiry arises when the negative covenant, or covenant not to compete, is so expansive that it bars certain avenues of performance or athletic activity, subsequent to the contractual term. An example of an enforceable negative covenant was found in *New England Patriots Football Club, Inc. v. University of Colorado.* In this case, an injunction was granted in a "contract jumping" case that enjoined the coach from activities which competed with the football club and from other jobs with the University while he was still under his professional contract.

In determining whether injunctive relief is appropriate, courts are increasingly giving short shrift to the "inadequacy of legal remedy" requirement for equitable relief. The reasons behind such treatment include the likelihood that it is a star athlete involved in the litigation, the likelihood that the player's contract included a stipulation attesting to the player's unique abilities and the unlikeli-

112. See *Braddock*, 90 F. 2d at 929 (Buffington, J., dissenting).

[I]t is apparent that Braddock contracted for services personal and unique . . . that apart from all questions of money damage, Braddock is undermining and lessening the established good will of Garden in destroying its ability to promote worthy sports and manly contests, and that the destruction of Garden's good will cannot be estimated in money damages; that Braddock's continuing to be seduced from the path of contract duty by sordid money making promoters, has made it, and will make it, impossible for ball players, boxers, artists, authors, singers, and movie folk and other persons rendering unique and person service, to enlist the needed aid of helpful promoters, if Braddock's contract is but a scrap of paper and binds no one but the promoter.

*Id.* (Buffington, J., dissenting).


114. See *Machen v. Johansson*, 174 F. Supp. 522, 528 (S.D.N.Y. 1959). Within *Machen*, the only temporal limitation identified by the court was language which stated "until the above agreements have been fulfilled." *Id.* at 528.

115. 592 F.2d 1196 (1st Cir. 1979).

116. See id. (holding that coach was unable to pursue opportunities at other university, even if not involving football club).
hood that a “replacement” athlete could readily fit within the team unit as easily as the defector team member.\textsuperscript{117} Thus, even with a player who might fall somewhat short of “superstar” status, courts tend to employ a rebuttable presumption of uniqueness.\textsuperscript{118} This situation was the one at issue in the case of \textit{Winnipeg Rugby Football Club v. Freeman}.\textsuperscript{119} Despite allegations of mediocrity, the \textit{Winnipeg} court found the players to satisfy the requirements of uniqueness and special skills.\textsuperscript{120}

\textit{Boston Celtics Ltd. Partnership v. Shaw} is a strong example of a court spending little time with the “inadequacy of legal remedy” requirement.\textsuperscript{121} In \textit{Shaw}, Brian Shaw, having already signed a five-year deal with the Celtics, committed to play for an Italian basketball team for two years within the same five-year period.\textsuperscript{122} Shaw subsequently notified the Celtics he would not rescind the second year of his Italian contract in order to return to the Celtics.\textsuperscript{123} The First Circuit found persuasive the contractual representation in Shaw’s contract in which he “represents and agrees that he has extraordinary and unique skill and ability as a basketball player, . . . and that any breach by the Player of this contract will cause irreparable injury to the Club.”\textsuperscript{124} With regard to the occasionally com-


\textsuperscript{118} See id.

\textsuperscript{119} Id. at 366. In this case, the court noted: [The coach] testified that the two defendants only were ‘good’ football players but not specially skilled, although the consideration for their contracts . . . seemed to me to recognize in them . . . rather promising talent of something more than ordinary skill for a beginner in professional football (although they had to make the team to get the consideration called for by those contracts).

\ldots While it also is a fact that the skill and ability of college football players ordinarily improves with experience in professional play, nevertheless, it also is recognized that some college players who exhibit special skill and unique ability in college immediately upon entering professional play exhibit such skill and outstanding ability . . . .

\ldots Appraisal of skill and unique ability of a player, as they relate to contracts of this type, must depend somewhat upon his prospects and potential. Otherwise, such a contract with a college football player seldom would stand up for the professional club that first signed him. Id. at 366.

\textsuperscript{120} See id. at 366-67. \textit{But see} Connecticut Prof’l Sports Corp. v. Heyman, 276 F. Supp. 618, 621 (S.D.N.Y. 1967) (rejecting injunctive relief because of unduly harsh or one-sided contract terms which would have prevented basketball player from playing for team in newly organized league).

\textsuperscript{121} 908 F.2d 1041 (1st Cir. 1990).

\textsuperscript{122} See id. at 1043-44.

\textsuperscript{123} See id.

\textsuperscript{124} Id. at 1048 (alteration in original).
peting public policies of promoting free competition and discouraging breach of contract, the court noted the distinction between ordering a person to perform a personal services contract and restraining a person from contracting with others to perform such services. The court upheld the injunction despite claims of unclean hands on the part of the Celtics, who had induced him to rescind with the Italian team during a "weak moment" of "homesick[ness]."

5. **Timing**

Finally, timing is of critical importance with regard to enforcement of the negative covenant. The issue of remedies for "contract jumping" usually will arise in cases in which the player would begin performing for another team during the term of the initial contract. This has occasionally posed a problem when the duration of the initial contract is unclear. In *Metropolitan Exhibition Co. v. Ewing*, the court found the contract's reserve clause to be an invalid basis for enjoining the baseball player from signing with another club during the reserve year. Therefore, the player was free to sign with another club because being under reserve for a year was merely an agreement to negotiate that year and did not preclude entering into a contract with another party.

E. **Lumley's Rule as Embodied by the Restatement Second of Contracts Section 367**

The Restatement Second of Contracts codifies in Section 367(1) and (2) and its appurtenant comments much of the *Lumley* doctrine and what was formerly Section 380 of the Restatement

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125. See id. at 1049. The First Circuit noted: Shaw, while conceding that the public also has an interest in seeing that contracts between consenting adults are honored, points to a general policy disfavoring enforcement of personal service contracts. That latter policy, however, typically prevents a court from ordering an individual to perform a personal service . . . ; it does not prevent a court from ordering an individual to rescind a contract for services and to refrain from performing a service for others. Shaw, 908 F.2d at 1049 (citation omitted).

126. Id. at 1049.


128. 42 F. 198 (C.C.S.D.N.Y. 1890).

129. See id. at 205 (holding that although reserved for one team, refusal to negotiate with that team did not constitute enforceable breach).

130. See Ewing, 42 F. at 204.
First. Section 367(1) provides "[a] promise to render personal services will not be specifically enforced." Subsection (2), which addresses the "mischievous" aspect of Lumley, prevents enforcement of a contract to render personal service if the enforcement would be unreasonable or would deprive the individual of an income.

Thus, while Section 367 acknowledges the backdoor method of enforcing the negative covenant, it prohibits such enforcement in situations where "the enforced continuance . . . is undesirable or will . . . leave the employee without other reasonable means of making a living." Section 367, therefore, neither retreats nor advances from its position under its predecessor Section 380. The comments to Section 367 suggest that, in addition to the discomfort with the concept of "involuntary servitude," there are concerns with compelling personal service and the "difficulty of enforcement inherent in passing judgment on the quality of performance."

Illustration 1 posits a scenario based on De Rivafinoli v. Corsetti, with a different outcome under the Restatement (and, notably, an outcome and perspective at odds with the grudging homage to Lumley in Section 380's Illustration 6 to Subsection 2 discussed above). Within the illustration, specific performance was denied the owner of an opera house when an opera singer repudiated the contract to appear elsewhere. Under this set of circumstances,

133. See Restatement (Second) of Contracts § 367(2) (1981).
134. Id.
135. Id. § 367 cmt. a (1981); see also id. § 365.
136. See id. § 367 cmt. a.
137. Restatement (Second) of Contracts § 367 cmt. a (1981); See also id. § 367 cmt. b. Comment b explains: The importance of trust and confidence in the relation between the parties, the difficulty of judging the quality of performance rendered and the length of time required for performance are significant factors. Among the parties that have been held to render . . . personal services . . . are actors, singers and athletes . . . .
138. De Rivafinoli v. Corsetti, 4 Paige Ch. 264 (N.Y. Ch. 1833).
139. See Restatement (Second) of Contracts § 367 cmt. b, illus. 1 (1981). The illustration presented in the Restatement is as follows: A, a noted opera singer, contracts with B to sing exclusively at B's opera house during the coming season. A repudiates the contract before the time for performance in order to sing at C's competing opera house, and B sues A for specific performance. Even though A's singing at C's opera house will cause B great loss that he cannot prove with reasonable certainty, and even though A can find suitable jobs singing at opera houses.
the Restatement makes no allowance for an express or implied negative covenant. Comment c to the same section provides for that contingency in noting that "[a] contract for personal service is usually exclusive in the sense that it imposes not only a duty to render the service to the other party but also a duty to forbear from rendering it to anyone else."140 The American Law Institute stipulates that, given the public policy and enforcement difficulties noted in Subsection (1), granting injunctive relief based on that "duty to forbear" is especially problematic.141 Section 367, Comment c, contemplates the notion that damages would suffice except when the employee's services are "unique" or "extraordinary" due to skills or knowledge the employee possesses.142 Further, even if this standard is satisfied, the court will not enforce that duty to forbear if it denies the employee the means to make a living.143 Therefore, Comment c disavows the backdoor method employed by Lumley, clearly denying use of an injunction to compel performance.144

The ALI does make allowance for those occasions when an injunction to forbear would not compel performance. In such situations, the ALI urges that, "if the probable result of an injunction will be the employee's performance of the contract, it should appear that the employer is prepared to continue the employment in good faith so that performance will not involve personal relations the enforced continuance of which is undesirable."145 To assist in such a determination, Comment c suggests as relevant considerations "the character and duration of the service, the probability of the renewal of good relations, the extent to which other remedies are adequate, and the probable hardship that will result from an injunction."146 Illustration 4, based on, inter alia, Lumley's facts, hy-
pothesizes that, if the owner of the opera house was not in direct competition with the individual who has now contracted with the singer, the injunction would not be granted because it would force the singer to remain in the employ of the opera house against the singer’s desire.\footnote{\textit{Restatement (Second) of Contracts} § 367 cmt. c, illus. 4 (1981). The illustration is provided below:  

The facts being otherwise as stated in Illustration 1, B sues A for an injunction ordering A not to sing in C's opera house. The injunction may properly be granted. If, however, C is not a competitor of B, the injunction will not be granted because its principal effect would be indirectly to compel A to continue in B's service.} Thus, even under the Restatement's articulated concern with public policy and its disavowal of \textit{Lumley}'s backdoor machinations, courts may achieve by enforcement of negative covenants what they could not under the affirmative covenant, as long as the negative prohibition is reasonable in scope and duration (that is, the scope must be limited to competitors in the same marketplace).

III. \textit{The Lumley Doctrine in Entertainment Law}

While the so-called \textit{Lumley} doctrine in the entertainment context runs almost parallel to the doctrine as it evolved in the sports law setting, it bears reminding that \textit{Lumley} itself was a doctrine created in an entertainment case, almost literally involving an employer's attempt to compel a "caged bird" to sing. Thus, such parallelism will be apparent with issues such as avoidance of involuntary service, the implication of negative covenants where affirmative ones are express, the possible lack of mutuality as preventing enforcement, the scrutiny of overly harsh or oppressive provisions prerequisite to enforcement, the requirement for reasonableness in scope and duration of the negative covenant, the effect of noncompetitive clauses during or subsequent to the contractual period and the standard to be used in determining money damages. Also, one must consider whether, in an endeavor by definition artistic rather than economic, adequacy of performance could ever be quantified. When one considers how the Restatements First and Second addressed the conundrum of judicial compulsion in an arena requiring personal supervision, one wonders whether the ALI could ever envision a circumstance in which an artist's performance could ever be gauged as compliant. There is no case law confronting the situation in which a recalcitrant artist abjures breach, yet engages in a campaign to diminish the performance to express disaffection with...
the employer. Anecdotal evidence suggests, however, that this is occasionally offered as an excuse for an uncharacteristically flawed performance by an artist disgruntled with a record company or a film or play director.\textsuperscript{148} One is somewhat compelled to presume that ego, or pride of authorship, would ordinarily motivate even the most resentful of artists to give the best performance despite professional strife.

IV. ENTERTAINMENT LAW CONTRACTS CASES

In \textit{Shubert Theatrical Co. v. Rath},\textsuperscript{149} in which defendants performed acrobatics for plaintiff producer, the court engaged in a lengthy analysis of the nature of defendants' abilities.\textsuperscript{150} Utilizing the standard of "extraordinary, unique and cannot be replaced," the court relied on \textit{Lumley}, as well as \textit{McCaull v. Braham},\textsuperscript{151} in which Lillian Russell's performance of comic opera, at a theatre other than the one with whom she had initially contracted, was enjoined through enforcement of an express negative covenant.\textsuperscript{152} The court in \textit{McCaull} reiterated the belief that contracts for personal services may be of such a nature as to preclude damages as a just remedy and to warrant specific performance.\textsuperscript{153}

\begin{footnotesize}
\begin{enumerate}
\item[148.] See cases cited supra note 174.
\item[149.] 271 F. 827 (2d Cir. 1921).
\item[150.] See id. at 829-30. The court described the acrobats' abilities, stating: The testimony shows that their feats are unique and extraordinary. A prominent theatrical manager and producer . . . testified. One of the feats of the defendants' performances . . . is that one of the defendants with one hand raises the other defendant, a full-grown man, from the floor, his body being stretched at full length upon the floor. The witness . . . said this was done without apparent effort, 'just as easy as you would lift a straw.' . . .[H]e declared 'It is a fact that it is the most marvelous thing that has ever been before.' [The witness] added that it had never before been done with a grown-up man in the history of this country.
\item[151.] 16 F. 37 (C.C.S.D.N.Y. 1883).
\item[152.] See id. at 38.
\item[153.] \textit{Shubert}, 271 F. at 831 (quoting \textit{McCaull}, 16 F. at 40). The \textit{McCaull} court stated:
Contracts for the services of artists or authors of special merit are personal and peculiar; and when they contain negative covenants which are essential parts of the agreement, as in this case, that the artists will not perform elsewhere, and the damages . . . are incapable of definite measurement, they are such as ought to be observed in good faith and specifically enforced in equity.
\item[Id.] (quoting \textit{McCaull}, 16 F. at 40).
\end{enumerate}
\end{footnotesize}
The court also cited to the sports law cases of *Cincinnati Exhibition Co. v. Marsans*,154 and *Philadelphia Ball Club, Ltd. v. Lajoie*.155 In addition, the court cited *Pomeroy on Specific Performance* which, although precluding affirmative specific performance, enforced the breach of negative covenants involving special skills, knowledge and/or ability through an injunction.156

In dismissing the damages remedy, the court concentrated on the difficulty of ascertaining damages and the inability of the producer to secure a replacement contract.157 The court noted the frequent application of such a policy when the individual contracting has an established reputation and their contract prohibits engagement elsewhere.158

The *Shubert* court went on to address the underlying policy and practicality problems leading to this doctrine. A court of equity will not enforce an affirmative covenant for personal services because there is no efficient way to compel performance, for example, to make a singer sing up to par. They can, however, efficiently prevent breach through the issuance of an injunction.159 The court

154. 216 F. 269 (E.D. Mo. 1914) (holding that ten days notice requirement before defendant ballplayer could be terminated did not defeat requirement of mutuality).


156. *Shubert Theatrical Co. v. Rath*, 271 F. 827, 831 (2d Cir. 1921) (quoting *Pomeroy on Specific Performance*, page 31). The language reiterated by the *Shubert* court stated:

> Where one person agrees to render personal services to another, which require and presuppose a special knowledge, skill and ability in the employee, so that in case of a default the same service could not easily be obtained from others, although the affirmative specific performance of the contract is beyond the power of the court, its performance will be negatively enforced by enjoining its breach.

*Id.*

157. *See id.* at 831. The court noted that the determining criterion was the fact that the damages “cannot be estimated with any certainty, and the employer cannot by means of any damages purchase the same services from others.” *Id.*

158. *See id.* at 832 (quoting 5 *Pomeroy’s Equity Jurisprudence*, § 289 (1918)). The court noted:

> The most frequent application has been in cases of actors and actresses of established reputation. Contracts for their services often stipulate that they shall not perform elsewhere during their engagement with a particular manager. Their services being extraordinary and special, an injunction is generally granted against the breach of such a stipulation. It will likewise be granted when an artist agrees to work for the complainant and for no one else.

*Shubert*, 271 F. at 832.

159. *See id.* The court explained their inability to compel action under an affirmative covenant:

> [T]hey cannot in any direct manner compel an actor to act or a singer to sing. But . . . courts . . . may restrain by injunction the breach of a nega-
sidestepped the issue of whether the negative covenant need be express, as it was in that case.160

The process of weighing a performer’s artistic cache is nowhere treated with as much gravity as in Harry Hastings Attractions v. Howard,161 in which the breach of contract by the defendant comedian was enjoined through enforcement of a negative covenant. The comedian was praised by several newspapers and he himself admitted in the contract “... that his services were unique, special and extraordinary.”162 The court did not find that wholly controlling because whether his services were unique and extraordinary was a matter of law.163 The court then engaged in a straight-faced examination of the defendant’s reviews by critics of defendant’s performances in burlesque acts across the country, which they deemed the best determinant of his actual placement in that class.164

The Second Circuit in 1922, in Winter Garden Co. v. Smith,165 addressed a case in which a contract specified that the artists, a burlesque comedy group, were rendering services which were “unique and extraordinary” and that they could not be replaced.166 The Winter Garden court engaged in a somewhat derisive assessment of

Id. covenant by which an actor or a singer of unusual gifts has agreed not to act or not to sing in a specified period, except under the management of the other party to the contract.

Id. at 230.

Id. at 230-31. The court stated that “the question whether his services are unique, special and extraordinary must be determined by the court as one of law... It cannot be determined by the particular calling, but by the personality exhibited in the conduct of one’s work.” Id.

Id. (“I know of no better way to determine whether this defendant falls within the class mentioned than by a perusal of the critiques of persons in his calling.”). Citing papers filed in the comedian’s defense, the court concluded that “[i]t is hardly consistent to say that a burlesque comedian was so adept as to be the principal character in a Broadway burlesque show, and at the same time to say that he is of ordinary ability and in a class with many other mediocre actors.” Howard, 196 N.Y.S. at 233.

Id. 282 F. 166 (2d Cir. 1922).

Id. at 167. The contract specified that the performers:

[N]ow admit that [they] are... artist[s] of magnitude sufficient to carry one of the leading parts in the Winter Garden attractions, or any other attraction, and that no one can be engaged to replace you in your particular line in the event of your refusal to perform. You agree, therefore, that the salary herein required to be paid you is being paid because of your exceptional talents, and because such services are unique and extraordinary.

Id.
defendants' talents as it applied the "unique and extraordinary" standard, referring to their act as a sort of "low comedy order." The defendants' manager was cited as an authority on the skills of his client. He listed their talents as the ability to do "grotesque gymnastics," singing and dancing. The court then reasoned from the manager's testimony concerning the high salary they received that the defendants must have had the ability to draw quite a crowd.

In poetic review of the meaning of "unique and extraordinary," the court rhapsodized in terms appropriate to the vagaries of evaluating artistic talent. The court referred to the "personality" of the performer, including the ability to use "gesture, expression, method of speech rendition, [and] a keen understanding of what provokes amusement" to be successful. The court continued, in less romanticized language, by comparing analogous precedent, such as *Hammerstein v. Mann* and *Shubert v. Angeles*.

167. *Id.* at 170. The court stated, "The so-called acting of defendants was of the clean low comedy order, affording amusement to that part of the public which regards such performances as entertaining and recreative." *Id.*

168. *See Winter Garden Co.*, 282 F. at 170 ("No one was better qualified to describe defendants than Hart, who had been their manager for 14 years.").

169. *Id.* The defendants' manager testified, "They are very talented, because they could do all kinds of entertainment; outside of being comedians, they had the ability of doing grotesque gymnastics, which very few comedians could do; besides, they were very capable dancers and singers." *Id.*

170. *See id.* Noting the manager's testimony that the defendants were paid "the highest salary of which he knew for a quartette [sic] of this kind," the court reasoned that "so large a compensation would not be paid ... unless these defendants had that kind of ability which draws audiences, and hence makes their employment commercially valuable." *Id.*

171. *Winter Garden Co.*, 282 F. at 170. The court stated:

We hardly need expert testimony to inform us that what one of the witnesses called "personality" is what counts. One performer can speak or act a line of a play, which to a layman would be dull or meaningless in cold print, in such manner as to provoke laughter or tears, while another would call forth no emotion. Gesture, expression, method of speech rendition, keen understanding of what provokes amusement, are all part of those accomplishments which make one man a successful comedian and another a failure. When, therefore, actors such as these have been successful for many years because of individual characteristics, and command salaries of a size rarely known in the liberal arts and sciences, their peculiar ability in the field in which they perform is almost res ipsa loquitur.

*Id.*


173. *See id.* (quoting *Shubert v. Angeles*, 80 N.Y.S. 146 (App. Div. 1903) (holding defendant with "special talent as a mimic" was unique)).
The heart of this taboo against enforcing an affirmative covenant may be said to be twofold: abhorrence to involuntary servitude, particularly in light of the Thirteenth Amendment to the U.S. Constitution, and the more pragmatic discomfort with trying to quantify an artistic endeavor. While the first dilemma is of conscience, the second is entirely practical. In sports, it is difficult to affix a dollar amount to an athlete’s contribution to his team. In entertainment law, the difficulty—-not incomparable to that in sports--lies in determining when performance satisfying the contractual obligation is met. Did the athlete play to par? Did the singer perform with her customary flair and distinction?174

In Associated Newspapers v. Phillips,175 the “artist” in question was a writer of feature articles for the New York Globe, a daily newspaper, who wished to circulate his articles in additional territories.176 The standard articulated by the Second Circuit in this case was that an injunction could be issued if the services were “unique, and cannot readily be obtained from others.”177 The Phillips court cited to Shubert Theatrical Co. v. Gallagher,178 for the proposition that an injunction is the proper remedy when the actor’s services are unique.179 In a typically lengthy analysis of defendant’s talents, the Second Circuit referred to the testimony of newspaper editors, who found de-

174. American Broad. Cos. v. Wolf, 438 N.Y.S.2d 482, 485 n.4 (N.Y. 1981); De Rivafinoli v. Corsetti, 4 Paige Ch. 264, 270 (N.Y. Ch. 1833); see also Christopher T. Wonnell, The Contractual Disempowerment Of Employees, 46 Stan. L. Rev. 87 (1993). In Wolf, the court, quoting De Rivafinoli, stated:

I am not aware that any officer of this court has that perfect knowledge of the Italian language, or possesses that exquisite sensibility in the auricular nerve which is necessary to understand, and to enjoy with a proper zest, the peculiar beauties of the Italian opera, so fascinating to the fashionable world. There might be some difficulty, therefore, even if the defendant was compelled to sing under the direction and in the presence of a master in chancery, in ascertaining whether he performed his engagement according to its spirit and intent. It would also be very difficult for the master to determine what effect coercion might produce upon the defendant’s singing, especially in the livelier airs; although the fear of imprisonment would unquestionably deepen his seriousness in the graver parts of the drama. But one thing at least is certain; his songs will be neither comic, or even semi-serious, while he remains confined in that dismal cage, the debtor’s prison of New York.

Wolf, 438 N.Y.S.2d at 485 n.4 (quoting De Rivafinoli, 4 Paige Ch. at 270).

175. 294 F. 845 (2d Cir. 1923).
176. See id. at 847-48.
177. Id. at 850.
179. See Phillips, 294 F. at 850 (citing Gallagher, 201 N.Y.S. at 580). The court stated that, “when an actor’s services are of a special, unique, and unusual quality, he may be enjoined from violating his contract of service by performing for others than the one with whom he had previously engaged.” Id. at 850.
fendant's work to be "of distinctive character," and that "it would be
difficult, if not impossible . . . to replace."180 One editor went on to
say that he knew "of no newspaper writer whose work resembles his,
nor do I know of any such who could duplicate his work, or provide
a substitute for it."181 Other "experts" in journalism also praised
defendant's work as unusual and extraordinary.182

The court rejected Phillips' efforts at undermining the credi-
ability of these witnesses by arguing that these newspapermen made
little use of Phillips' supposedly extraordinary pieces. In this sense,
at least, we see a glimpse of logic in the outraged writer bitterly
quarreling with those who would praise him for his gifts.

The defendants in Gallagher were vaudevillians, and the appel-
late division acknowledged that in determining "whether the de-
fendants' services are of that special, unique, and unusual quality
which renders them liable to be enjoined,"183 recourse must be
made to expert opinion. It found that even when there is a differ-
ence in opinion as to the uniqueness of the defendants' perform-
ance, the testimony of some experienced in that area as to the
uniqueness and special character of their performance is usually
sufficient to render their replacement impossible.184

Even the performers' witnesses, according to the court, at-
tested to the success defendants had enjoyed, noting that defend-
ants had been "headliners" in the local circuit; that their names had

180. Id.
181. Id.
182. See id at 851. The "experts" described the work of the defendant as:
[E]xceptional . . . unusual and extraordinary . . . [B]etter adapted to
being syndicated than that of any other columnist now writing in the
American press, for the reason that he has a general human interest ap-
peal, which is so necessary where syndicated matter is to be published in
all sorts of papers, and go to readers of all kinds and sorts.

Phillips, 294 F. at 851.
1923).
184. See id. at 580-81. The court stated:
[A]s usual in such instances, a conflict of opinion upon the part of those
experienced in stage craft and stage management, as to whether these
defendants are ordinarily vaudeville performers, easily replaceable, and
not at all unique or specially gifted, or whether their presentation with
unusual talent of a peculiar melody by the carrying out of unusual man-
erisms in the execution of their act, and the ability through unusual attai-
ments, unique stage business, and attractive personality and powers of
attraction to render themselves of special value to a theatrical com-
pany, make them of that unique and special character which renders
their replacement or substitution almost impossible according to com-
mon standards of endeavor.

Id.

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been "‘in the top’ for years and have had a special meaning to the theater-going public; that ‘big type’ had been used for them.”

The court concluded that the defendants “come within the class whose services are of such a character that they will be deemed practically irreplaceable.”

In its 1990 opinion, in *Zink Communications v. Elliott*, the United States District Court for the Southern District of New York addressed itself to the skills of Gordon Elliott, the British television personality. The test remained one of "unique services" and "irreparable injury." The court referred to the precedents in *Winter Garden* and *Wolf*, and surveyed the differences between cases in which an injunction was issued and those in which it was denied.

In *Edwards v. Cissy Fitzgerald*, the First Department of the Appellate Division in 1910 described the defendant as having "a charm peculiar to herself. By her grace, beauty and artistic methods she has become a special attraction." The *Edwards* court concluded that “[t]he plaintiff would undoubtedly find it difficult to procure a substitute who would be likely to produce a similar impression upon the public.” The *Zink* court also cited *Ziegfield v. Norworth*, in which the First Department described the defendant saying “‘[s]he was the real star around whom the whole production of the plaintiff’s play centered and she had been heavily featured in announcements and advertisements so as to give her chief prominence.’” In a 1911 circuit court case, *Comstock v. Lopokowa*, the court stated that, while the Russian dancers at issue were “‘of a very high order and possessing unusual personal attractions, . . . [with] such unusual attainments and personal characteristics and of such especial value to the complainants’” as to merit enforcement of the negative covenant, injunctions need not be limited to such instances in which “‘the employees should be the stars or the only

185. *Id.* at 581.
186. *Id.*
188. See *id.* at *1.
189. *Id.* at *17.
190. See *id.*
193. *Id.* (quoting *Edwards*, in *Hammerstein*, 122 N.Y.S. at 278).
196. 190 F. 599 (C.C.S.D.N.Y. 1911).
stars of the complainant's performances or that the performances should be brought to a standstill because of their withdrawal."

With the athlete, the concern over a player who has signed a contract with another team subsequent to the expiration of the initial contract is that the player may not wish to show up his "new" team. This is another idiosyncratic quality to the entertainment industry that distinguishes it from athletics, and that bears upon remedies for breach of contract. Participation in any individual entertainment project has value to the artist that may be incalculable and impossible to be remedied by anything other than equitable relief. While it is difficult to imagine an athlete playing for a reward other than money, artists frequently perform in exchange for better billing, more creative control, or in exchange for participation in an unrelated endeavor. Financial compensation is often not the goal, or not the only goal, of the artist attempting to obtain a particular role. Compensation is directly linked to issues of creative control in and credit attribution for the project. The effect of performing that role may not be known or quantifiable. Billing itself is considered to have both a "publicity value" and a "recognition value", in which credit for one project is regarded cumulatively with credits for other performances in order to determine an individual artist's value. The number of credits is also tallied for purposes of audience regard as well as membership in certain entertainment unions, such as the Writers' Guild, Directors' Guild and Actors' Equity.

The concept of "pay or play contracts," in which an artist is guaranteed payment regardless of whether the artist is permitted to perform, ignores the interest of the performer in each artistic endeavor. It is unique to the nature of entertainment and art that an artist derives benefit well beyond the immediate economic payoff from participation in particular projects.

Similar balancing of public policy interests has been undertaken when the contract dispute is in entertainment law cases, rather than in sports law. In a suit involving the broadcaster Warner Wolf, New York's highest court noted the "general judicial disfavor of anticompetitive covenants contained in employment contracts."
contracts."\(^{201}\) Still, the court remarked that, even when the performer’s abilities met the criteria of being “special or unique . . . , no New York case has been found where enforcement has been granted, following termination of the employment contract, solely on the basis of the uniqueness of the services.”\(^{202}\) Thus, if an entertainment law contract were analogized to a personal services contract of an athlete in a non-team sport, we may expect courts to scrutinize the contract to determine whether it is too harsh, one-sided or unduly burdensome. We may similarly expect such scrutiny to focus on the geographical and temporal scope of the non-compete provisions inherent in implicit or explicit negative covenants. The geographical scope in entertainment law may include an analysis for each individual medium, a difficult task given the amorphous nature of media in the cybernetic age.

In *American Broadcasting Cos. v. Wolf*,\(^ {203}\) the focus at both the New York Appellate Division and the highest court of New York was whether the negative covenant was enforceable in light of a rigorous scrutiny required. The courts considered the reasonableness of the anti-competitive covenant, with regard to “time, space or scope,” and whether the covenant “operate[d] in a harsh or oppressive manner.”\(^ {204}\) In *Wolf*, there was no express covenant in the contract between ABC and sportscaster Warner Wolf.\(^ {205}\) While the New York Court of Appeals acknowledged that negative covenants may sometimes be implied for the period of the contract, post-contract anti-competitive covenants will not be implied.\(^ {206}\) The court reviewed the history of judicial reluctance to order specific performance of a personal services contract, referring to both the practical difficulties and the distaste for anything smacking of involuntary servitude.\(^ {207}\)

Underlying all of these cases is the resilient thread of the inquiry as to skill. Regardless of the articulation given this inquiry, the standard has not varied greatly since *Harry Rogers Theatrical Enterprises v. Comstock*,\(^ {208}\) in which the test was whether the defendant’s services were “unique, special, or extraordinary [rather than] ordi-


\(^{202}\) Id. at 487 n.6 (citations omitted)(emphasis added).


\(^{204}\) Id. at 486.

\(^{205}\) See id. at 483, 487.

\(^{206}\) See id. at 486.

\(^{207}\) See id. at 485.

nary and . . . easily . . . replaced."209 In Comstock, the New York Appellate Division regarded "facts" rather than "opinions" to be persuasive.210 Those facts included the express representation in the contract that Comstock's services were indeed unique and extraordinary.211 The court found the provision not to be controlling, although they compared it with Comstock's later testimony that his services were not unique.212 Other facts included Comstock's relatively large salary ($1000 weekly) which "compares most favorably with that received by the leaders in the scientific, artistic, and political world."213 The Comstock court found the services of the defendant unique, due to his ability to grasp and maintain the attention of the audience and the fact that the damage caused by the breach of such a contract would be irreparable.214

More recently, as we see in the Warner Wolf case the same test seems to persist today, despite variations in the language used to express that inquiry. Whether the legal standard is "no adequate remedy at law" or "unique and irreplaceable skills," or "not readily replaceable," the court is still compelled to engage in an evaluation as to the abilities of the athlete or performer, measuring their abilities by the extent of economic loss which could be expected or by the kudos bestowed by rival players or performers.

It is perhaps appropriate to close this discussion with a brief reference to the issue of whether a discharged artist may enjoin production of the film or play. The Restatement Second of Contracts notes that the extension of its doctrine against enforcement of affirmative covenants "has sometimes been extended to bar specific enforcement of the employer's promise where personal supervision is considered to be involved."215 Thus, it must be considered whether a performer has a similar weapon to compel being re-

209. Id. at 3.
210. See id.
211. See id.
212. See id.
214. See id. at 4. The court noted that:
[Defendant had] a personality which denotes the unusual and unique artist and enables him to pick up the attention of an audience and hold it interested, amused or in pathos until released. Where, therefore, the services of the actor are shown to be unusual, unique or extraordinary and that the damage to the plaintiff will be irreparable and unascertainable, the latter may enjoin the performer from appearing elsewhere during the period of his contract, and, even though a negative covenant not to appear elsewhere may be lacking, such will be implied . . . .

Id.

tained for an artistic endeavor. If the performer may not compel enforcement of the employer’s affirmative covenant, may the artist prohibit the employer from looking elsewhere for a replacement? Under Illustration 2 to Section 367, “B [owner of opera house with which singer A has contracted] discharges A and A sues for specific performance. Even though singing at B’s opera house would have greatly enhanced A’s reputation and earning power in an amount that A cannot prove with reasonable certainty, specific performance will be refused.”216 In the few published opinions touching this issue, courts consistently have found monetary damages a wholly adequate form of relief when it is the artist seeking the remedy.217

V. Projections and Conclusion

This is not, by all indications, a dead issue in entertainment law. While there is nothing to suggest Lumley will be revisited any time soon, its application remains alive and well. Recent articles reported that the television actress, Sherry Stringfeld, whose departure from the series E.R. was said to be amicable, is nonetheless barred by agreement from appearing in any television series for a period of two years. Thus, she will presumably be permitted to pursue her chosen field of employ while not, at least theoretically, offering competition to her previous employer.

In the entertainment industry these days, however, not all partings are amicable and not all battles are limited to weapons of gossip and innuendo. In a July 1996 article entitled, So Long, Sue Ya Later: When Stars Walk, Lawyers Talk, and Some of Hollywood’s Biggest Courtroom Scenes are not on Film,218 a California movie critic recited a litany of actors who in recent days had walked off movie sets.219

216. Id. illus. 2.
219. See id. The article stated that “[y]ou probably already know about John Travolta’s highly publicized departure from a movie that was to be called ‘The Double’ . . . and Val Kilmer’s controversial decision not to do ‘Batman and Robin . . . .’” Id. But, the article noted that the list goes on: Keanu Reeves has backed out of doing “Speed II,” leaving director Jan De Bont and co-star Sandra Bullock in the lurch; Holly Hunter has decided to pass on James L. Brooks “Old Friends”; Meg Ryan changed her mind about doing Don Roos’ “Easy Women”; and even a filmmaker, Robert Rodriguez, has jumped ship [from the Antonio Banderas version of “Zorro”].

Id.
While the critic acknowledged that this phenomenon was not new, he noted that "there's been a common thread of ingratitude running through some of the recent events that have taken place on and off movie sets." He wondered whether there were unfulfilled contractual obligations, written or oral, which, having been unfulfilled, could be the basis for legal action taken against them. Kim Basinger's ill-fated defection from "Boxing Helena" is cited as one example, and Whoopi Goldberg's unsuccessful attempt to back out of the production of "Theodore Rex" is offered as another. Basinger settled for $3.8 million in damages and Golberg eventually succumbed and made the picture, which went straight to video shelves.

Another controversy arose when actor David Caruso withdrew from the successful Steven Bochco NBC television show, "NYPD Blue." Caruso recently began a new CBS show, "Michael Hayes," and the TV Guide notes with surprise that the "very adult drama" will be scheduled at nine p.m. rather than ten, which would be opposite his former drama series. While Caruso's agreement with Steven Bochco when he was released from his five-year NYPD Blue contract reputedly did not bar him from returning to television, he was prohibited from appearing in direct competition with his former program.

If Bochco and NBC decided to challenge Caruso's new start, one could envision the willing parade of critics eager to testify as to the much maligned actor's "unique and irreplaceable" star qualities, if such testimony would force Caruso off the airwaves. Ironically, it is unlikely that anyone, among Caruso's supporters or detractors, would seek specific performance with the ulterior motive dating back to Lumley itself. If Caruso were banned from appearing on any other program, he would be compelled to return to his former employer, thus presumably supplanting the actor, Jimmy Smits, who took over when Caruso departed and earned critical plaudits along the way. The goal, then, would have to be regarded as punitive, rather than rehabilitative or compensatory relief. Whether a court would recognize this as a valid policy underlying enforcement of the negative covenant remains to be seen.

220. See id. The critic acknowledged that "[t]here's been a common threat of ingratitude running through some of the recent events that have taken place on and off movie sets." Baltake, supra note 218, at EN18.

221. See id.


224. See id.