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SUDDEN DEATH: LEAGUE LABOR DISPUTES, SPORTS LICENSING AND FORCE MAJEURE NEGLECT

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I. INTRODUCTION

In most rights agreements entered into with a major professional sports league, team or player association, *force majeure*[1] protection is badly neglected—to the extent it is addressed at all. Until relatively recently, where such protection existed, frequently the provision had been "thrown-in" at the 12th-hour request of the licensee or sponsor ("licensee") with minimal care given to the exact formulation of the clause. Often, the resulting language was simply recycled *force majeure* "boilerplate" long ago borrowed from some other party's agreement. The relative importance of such provisions within an agreement is perhaps best signaled by their typical insertion at the end of the contract, just before the provision that states that "paragraph captions are for convenience only." However, the unprecedented extent of labor strife in Major League Baseball ("MLB"), the National Hockey League (the "NHL") and the National Basketball Association (the "NBA") experienced during the 1994-95 and 1995-96 playing seasons[2] sent many licensees and

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1. "Force Majeure," a French term, literally meaning "superior force." An unforeseeable natural or human event beyond the control of the parties to a contract, rendering performance of a contract impossible. RANDOM HOUSE LEGAL DICTIONARY 101 (1st ed. 1996).

2. A 232-day MLB player strike that forced the cancellation of the final third of the 1994 season, all post-season play, and a 3-week postponement of the 1995 "Opening Day;" an NHL lock-out that delayed the start of their 1994 season from October 1st to January 20, 1995, reducing the season to a 48-game schedule, and resulting in the cancellation of the 1995 All-Star Game; and the 11 week NBA lock-out of its players during the summer of 1995, followed by a 9 week lock-out of its referees. While the major sports leagues are finally enjoying a period of relative labor peace, war drums can be heard in the distance. The National Football League (the "NFL") has recently expressed its dissatisfaction with their current labor contract

licensors alike flipping furiously to the last pages of their agreements to determine what contractual protection was afforded them in the event of a League work stoppage. Too often, the answer was none, or the answer was unclear. Prior to the opening of MLB's spring training in 1995, that precise state of uncertainty metastasized into a suit being filed against the New York Yankees by their radio broadcast partner over the Yankees' use of replacement players[3]— a suit that could have been easily avoided with the mere addition of a single sentence to their agreement.

While the average contract lawyer is undoubtedly familiar with *force majeure* provisions, and views the drafting or negotiation of such provisions as a routine matter, relatively few have much experience with them in a sports licensing context. Unfortunately, this inexperience was often painfully brought to light amid the multi-sport labor discord that reached its zenith in Autumn 1994.[4] In the wake of the then-current MLB player strike, and threatened disruptions of the upcoming NHL and NBA seasons, *force majeure* provisions contained in pre-existing agreements came under close scrutiny. Moreover, such provisions came to be viewed as essential components of every contemplated pro sports rights agreement and were often elevated to "deal breaker" points in many negotiations.

This article is intended to help the attorney casually involved with sports licensing to negotiate these critical provisions, as well as provide some useful suggestions for the well-versed. Part I of this article provides a comparative view of the negotiating posture of parties towards *force majeure.* Part II catalogs the *force majuere* provisions currently in use in professional sports licensing. Part III subsequently analyzes the protection afforded by these provisions under various labor dispute scenarios. Part IV then examines and explains the serious defects com-

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with Commissioner Paul Tagliabue publicly stating that "[a] number of clubs are really struggling with this agreement" and indicating that the league may seek an early out. Don Cronin, *Sportline*, USA TODAY, Apr. 4, 1997, at 1C. Just a few weeks earlier, Major League Soccer ("MLS"), in only its second season of existence, was sued by its players association alleging, among other anti-competitive practices, that the league illegally secured from its players group licensing rights for merchandising. Paul Gardner, *Players Association Sues MLS*, SOCCER AMERICA, Mar. 3, 1997, at 12. For purposes of this article, MLB, MLS, the NBA, the NFL and the NHL are collectively referred to as the "Leagues."

3. WABC-AM Radio, Inc. v. New York Yankees Partnership, No. 95-106671 (N.Y. Sup. Ct. filed March 17, 1995). *See infra* part III(c).

4. October 1994 saw the cancellation of the World Series for the first time in 90 years and the indefinite postponement of the start of the 1994 NHL Season. In addition, only a 12th hour "no strike, no lock-out" agreement reached between the NBA and its players averted a MLB-NHL-NBA work stoppage trifecta.

monly found in such provisions and, lastly, Part V provides practical drafting advice coupled with recommended approaches to various *force majeure* issues.

II. THE FACE-OFF

Providing licensees with *force majeure* protection is outside the licensing modality of the Leagues. The agreements generated by Major League Baseball Properties ("MLBP"), NBA Properties ("NBAP"), National Football League Properties ("NFLP") and NHL Enterprises ("NHLE")—the licensing arms of the respective Leagues (collectively, "Properties")—do not, as a matter of routine, include *force majeure* provisions.[5] A survey of the form merchandise licenses issued by the various Properties (the most numerous forms of agreement in effect[6]), and the three professional player associations ("PAs") engaged in licensing,[7] will reveal that *force majeure* is not included as a standard term or condition. An understanding of the rationale behind this conspicuous absence is critical to developing intelligent and coherent strategies for negotiating these sensitive provisions.

Underlying all licensor aversion to *force majeure* relief is a single universal imperative—the desperate need to meet its earning goals. Over the past decade, licensing has evolved from essentially a public relations function, and negligible source of income, to a major profit center. Fueled by a long string of successive team merchandise sales records, team owners (the exclusive shareholders in each League's Properties) have come to expect ever-increasing royalty and rights fee payments. For each season, benchmarks are established based upon licensing payments made by Properties to their owners the preceding season and revenue projections made based upon guaranteed royalties and scheduled rights

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5. However, *force majeure* provisions are not uncommon in broadcast agreements, and in sponsorship agreements to a lesser extent, for many of the reasons discussed at note 16 *infra*.

6. While each league (and member team) typically has fewer than 20-30 sponsors, and perhaps 2 or 3 broadcast partners, each league has 150 or more licensees (not including local licensees and premium item manufacturers) and both MLB and the NFL have in excess of 300. Because merchandise licenses are by far the most widely circulated forms of agreements, they are, accordingly, the primary focus of this article.

7. The Major League Baseball Players Association ("Baseball PA"), National Football Players Association ("Football PA") and NHL Players Association ("Hockey PA") maintain and administer a so-called "Group" licensing program on behalf of their players (i.e., licensing covering the collective use of a designated minimum number of players). The National Basketball Players Association has by license agreement granted to NBAP the exclusive right to license to third parties the use of current NBA players on a Group basis. MLS, through its form of uniform player contract, has secured such rights directly through their individual players. *See generally* Gardner, *supra* note 2, at 13.

fee payments. The high owner expectations created by the extraordinary marketing success of the past ten years, coupled with soaring team operation costs, places enormous pressure on each League's Properties (or team marketing department in the case of direct licensing arrangements such as local market sponsorships, as opposed to league-wide, sponsorship arrangements) to exceed the past year's performance and to meet their forecasted revenue level.

That pressure has, in recent years, been greatly exacerbated by the new economics wrought by collective bargaining among the Leagues and their respective PAs. Two of the last four collective bargaining agreements ("CBA") negotiated—the NFL and NBA CBAs—provide for profit sharing that guarantees their players near-equal (and even majority) share of broadly defined League revenues,[8] while the recently ratified MLB labor agreement provides for "an unprecedented level of revenue sharing between rich and poor clubs."[9] Furthermore, the NFL/NBA kinds of CBAs provide players with participation in league revenue streams that historically have not been shared with players, such as luxury suite revenues and international television rights fees.[10] As a consequence of the new advent of owner sharing of previously sheltered revenue, leagues and teams are extremely reluctant to assume any financial risk in the licensing area—unlike in their core business (i.e., competitive team sports) where risk is commonplace (e.g., long-term guaranteed player contracts, or the private financing of stadium/arena construction).

Hand-in-hand with the organization imperative is a deeply held fundamental belief about the nature of the merchandise licensing business. Licensors view licensed product agreements as unique investment vehicles. A League license provides a manufacturer entree into the $11.5

8. The NFL CBA currently guarantees the players 63% of "Designated Gross Revenues" (i.e., ticket and broadcast revenues). *See* Larry Weisman, *Judge Tells NFL to Raise Salary Cap $2 Million*, USA TODAY, Feb. 16, 1996, at 1C. At the same time, the NBA CBA guarantees its players up to 50.8% of "Basketball Related Revenues" (i.e., broadcast and licensing revenues, and miscellaneous arena-generated revenues). Clifton Brown, *Labor Agreement Ratified by N.B.A. Players*, N.Y. TIMES, Sept. 14, 1995, at B17, B22.

9. Murray Chass, *Reluctantly, Baseball Owners Approve a Pact With Players*, N.Y. TIMES, Nov. 27, 1996, at A1.

10. For purposes of the NFL CBA, "Designated Gross Revenues" includes ticket revenue, "luxury boxes" revenue, and all broadcast revenues "without limitation." NFL COLLECTIVE BARGAINING AGREEMENT 1993-2000, Art. XXIV, §1(a)(i). The NBA's Basketball Related Revenues definition, for the first time, includes revenue from luxury suites, parking, concessions sales, international television and arena signage. NBA NEWS, vol. 50, Sept. 25, 1995, at 3.

billion sports licensing market (pre-baseball strike)[11]—a market that has enjoyed sustained, often double-digit, growth for over a decade. In light of that, licensors feel justified in insisting upon a guaranteed fee in return for providing a licensee with such an extraordinary investment opportunity. Moreover, a valid argument can be made that every team sport and/or event property carries with it certain inherent risks that are properly borne by the licensee. Team popularity, measured by either merchandise sales or television ratings, has always been a function of on-field success which, by its very nature, is speculative. Event-based licensing is similarly speculative. Typically, licensees are often required to commit to large royalty guarantees well in advance of the event and are, thus, forced to "roll the dice." No protection against under performance is given to them. For example, as a condition to participation in the 1994 World Cup soccer licensing program, manufacturers were required to make significant royalty guarantees without any assurance as to how the event would be received in the United States—a first-time host country. In view of the inherent speculative nature of sports merchandise licensing, licensors of a proven property such as the Leagues do not believe that they should have to share with the manufacturer the risk that their property may be temporarily rendered unpopular, such as by a labor dispute—particularly when diminished popularity has always been a licensee risk. Moreover, licensors are particularly unsympathetic to sharing business loss consequent of a work stoppage in view of the fact that the licensor's loss of revenue and damage to its business will invariably far exceed that of any particular licensee.

There are also technical reasons for the absence of *force majeure* provisions in most sports licenses. The purposes of a *force majeure* provision are "to limit damages in a case where the reasonable expectations of the parties and the performance of the contract have been frustrated by circumstances beyond the control of the parties."[12] The essence of a trademark license (or agreement granting rights of publicity) is the conveyance of intellectual property rights. Because of the nature of such rights, the occurrence of a *force majeure* provision arguably should neither impair the ability of the licensor to convey its property rights nor arguably the licensee's ability to exercise them. Accordingly, since a

11. McGee, *Sport-Anon: A 12-Step Program Developed to Get the Sporting Goods Business Back On Its Feet,* SPORTSTYLE, July 1995, at 23.

12. United Equities Co. v. First Nat. City Bank, 383 N.Y.S.2d 6, 9 (1st Dept. 1976), *aff'd mem*, 41 N.Y.2d 1032, 363 N.E.2d 1385 (1977); *see generally* 407 East 61st Garage v. Savoy Corp., 23 N.Y.2d 275, 282, 244 N.E.2d 37, 42 (1968).

force majeure provision should not frustrate a party's performance, protection against such occurrences is not required.

From the licensor's perspective, there are also two significant practical reasons for its distaste for *force majeure* provisions. First, it is simply sound business and legal practice for a licensor to not gratuitously include any provision that primarily, if not exclusively, operates to the benefit of the licensee. This is particularly true in merchandise licensing. Under a merchandise license, the grantor has few affirmative obligations: to convey incontestable rights; to provide guidance on proper usage of the licensed properties; to exercise reasonable quality control, and to maintain and enforce its rights in and to the licensed properties. All of these obligations can be performed notwithstanding any manner of *force majeure.* On the other hand, a merchandise license imposes numerous non-waivable requirements upon the licensee such as: meeting a product launch date; the manufacture of specific numbers of product lines or styles; the maintenance of prescribed inventory levels; merchandise support obligations; the active advertisement and promotion of the licensed products; and minimum royalty payments to name a few. These types of obligations may be difficult, if not impossible, to meet in the face of the more "common" *force majeure* conditions such as fire, natural disasters and other "acts of God." Until the acute labor strife of the past three years, it was usually with these more common events in mind—occurrences affecting product manufacture or distribution—that licensees were motivated to request *force majeure* protection.[13]

The second, and in some circumstances the most compelling, reason for licensor resistance to labor-based *force majeure* is that in the event of a work stoppage, royalties and rights fee payments may be the licensor's principal or only source of revenue. This is particularly true of player associations. For PAs, licensing revenues are even more critical than they are for Leagues or teams; they constitute their single-largest source of income and fund such union work stoppage related activities as litiga-

13. In many of the most profitable licensing categories for the Leagues, the outerwear, headwear and technology categories (e.g., video games, CD-ROM products, etc.), the licensees typically subcontract the manufacture of all or part of their products to third-party operations located in countries in the Asian Pacific and Latin America. Because of the long lead times required for the manufacture of these products, the frequency of natural disasters (monsoons, floods, etc.) in many of these areas, the political and/or economic instability that exist in many countries within these regions, coupled with the vagaries of ocean transit, much is beyond the reasonable control of the licensee. Consequently, this "key" group of licensees has powerful incentives to insulate themselves from the types of risks characterized above as "common" *force majeures.*

tion and hardship benefits for players.[14] As Donald Fehr, Executive Director of the Baseball PA, has stated with respect to licensing revenues, "[t]he ability to generate income on behalf of the players provides [the Players Association] with resources that otherwise would be difficult to secure".[15]

It is against the above backdrop that a licensee must negotiate for relief against League labor disputes.[16] While licensors are reluctant to grant such concessions, chiefly because of their risk aversion, relief is often available to a licensee making a substantial financial commitment to the League and willing to support a League's brand building activities through significant electronic media and event sponsorship support.

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14. Mike Freeman, *Sports Unions Flex Muscles With Financial Clout*, N.Y. TIMES, Mar. 21, 1995, at B11, B15.

15. *Id.* In addition to the foregoing practical reasons, in some cases, *force majeure* protection is simply superfluous. If a League has a signed CBA that extends through the term of a license agreement to be entered into, the licensor will not be vulnerable to the one type of *force majeure* occurrence that can arguably disable it, namely a work stoppage. Under such circumstances, sometimes a licensor will unwisely include work stoppage protection at the behest of a licensee. Typically, this concession is made as a display of a licensor's flexibility and justified as a "no-harm, no-foul" accommodation. This cavalier approach can seriously undermine a licensor's position on the issue in a subsequent negotiation. If a licensor is going to "throw-in" a *force majeure* provision, it should only do so mindful of the reality that non-standard terms generally have a life-span that is coterminous with the length of the particular licensing relationship. Invariably, the point of departure in any contract renewal discussions are the terms of the current agreement. Given that, and the fact that there is frequently a different League lawyer involved in each successive contract negotiation, it is likely that any specifically requested provision will be grandfathered into successor agreements without any further discussion or renewed deliberation, and even though there has been a "sea change" in circumstances. Put simply, having once agreed to a provision, it may be impossible to object to its inclusion in subsequent agreements with the same party. This is particularly true in the case of work stoppage protection. If such a provision is included under circumstances where the risk is remote (i.e., where a CBA is in place), there cannot be any principled justification for not including such protection where the risk is significant.

16. While the reasons discussed above in this section with respect to merchandise licensing are equally applicable within the sponsorship context, *force majeure* provisions are not uncommon in broadcast and sponsorship agreements. Unlike in the merchandise licensing setting, under a broadcast or sponsor agreement, the League or team frequently has numerous affirmative performance obligations that it may not be able meet in the event of a work stoppage. The most obvious example is in the case of broadcast agreements where the licensor is responsible for the delivery of the product to the broadcaster. Less apparent examples include TV ratings and audience delivery guarantees promised to advertisers, media placement obligations and League commitment to execute specific promotional programs (e.g., All-Star balloting) or stage specific events (e.g., League championships or All-Star Game).

III. READING THE COVERAGE

A. Checking The Formation

To the extent *force majeure* protection can be found in sports marketing agreements, three types are the most common: (i) the generic *force majeure* provision ("Generic Provision"); (ii) the so-called "Strike Clause;" and (iii) the sports-specific *force majeure* provision ("Sports FM").

Generic Provisions tend to be formulated in one of two ways. One is the truly generic form. This form simply provides that relief is available "[i]f either party hereto shall have been prevented, in whole or in part, from performing its obligations hereunder by virtue of any cause beyond such party's control . . ." The other common form of Generic Provision contains an enumeration of specific *force majeure* conditions limited to casualties, "acts of God" and governmental prohibitions. Typical of this latter form is the following clause which relieves performance in the event of "fire, flood, war, governmental law or restrictions, natural disaster, Acts of God, or other similar causes beyond the reasonable control of such party."

A Strike Clause is essentially a generic provision containing a reference to labor disputes in the form of a strike. *Force majeure* provisions containing strike language generally follow the same construction as the Generic Provision but include a non-specific reference to strike. The following enumeration is typical: "fire, flood, war, riot, strike, natural disaster, compliance with law or governmental regulation, or any other event beyond the control of the party."

The third variation, the Sports FM, is tailored to relationships involving sports property licensors and specifically contemplates League labor disputes. The following examples are common forms of this type of provision:

> Neither party shall hold the other responsible for any delay or failure of performance occasioned or caused by acts beyond the reasonable control of the party including, but not limited to, acts of war, fire, natural disaster or other acts of God, *interruption of the . . . Season . . .* (emphasis added)

or

> Neither party shall hold the other responsible for any delay or failure of performance occasioned or caused by acts beyond the reasonable control of the party including, but not limited to, labor disputes [*between the League and its players*], acts of war, fire, natural disaster . . . (emphasis added)

B. Zone Coverage

As the Generic Provision illustrates, it is not uncommon to find a *force majeure* provision that does not list labor disputes in its enumeration. To a party seeking to take advantage of such a provision in the event of a League labor dispute, the availability of relief will depend on the form of the particular provision. If the provision does not contain an enumeration, then a labor dispute is likely to be deemed covered consistent with the principle of *contra proferentem* which provides that an ambiguous provision is construed against the party that selected the language[17]—which in most cases, will have been the licensor/drafter. Conversely, if the provision contains an enumeration, the omitted reference to strike will be fatal to the charging party. With respect to enumerations, it is a well-settled principle of contract interpretation that "only if the *force majeure* clause specifically includes the event that actually prevents a party's performance will that party be excused."[18]

In the absence of specific reference to labor events, a party could nonetheless assert that a League work stoppage is covered under the commonly included catch-all clause "and other acts beyond the control of a party." However, a party is unlikely to prevail on this theory either. Applying the principle of *ejusdem generis* that governs the interpretation of such clauses, general words following a detailed enumeration are not to be given expansive meaning; they are confined to things of the same nature as the particular matter aforementioned.[19] Since the recited conditions all pertain to occurrences affecting the ability to manufacture or distribute merchandise, a League work stoppage is different in kind and nature from the enumerated *force majeure* events and, therefore, falls outside the events contemplated by the provision.

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17. United States v. Seckinger, 397 U.S. 203, 216, 25 L.Ed.2d 224, 235 (1970), *reh'g denied*, 397 U.S. 1031 (1970).

18. Kel Kim Corp. v. Central Markets, Inc., 70 N.Y.2d 900, 902-03, 519 N.E.2d 295, 296 (1987). This article assumes the application of New York substantive law pursuant to either the choice of law designation contained in MLBP, NBAP, NFLP, NHLE and Baseball PA agreements (each of these licensors, as well as the recently relocated offices of MLS, are headquartered in New York City; the Football PA is headquartered in Washington D.C. and the Hockey PA in Toronto), or conflicts principles. *See generally* Gould Entertainment Corporation v. Bodo, 107 F.R.D. 308, 312, n. 3 (S.D.N.Y. 1985) (Finding New York law applicable in an action for a breach of a licensing agreement, brought by a New York corporation, even though defendants were Italian residents and the territory for the license was Italy. In reaching this conclusion, the Court placed great weight upon, among other considerations, the fact that the license was negotiated in New York, the contract was signed in New York, and the payments under the license were made to plaintiff in New York.).

19. *Kel Kim*, 70 N.Y.2d at 903, 519 N.E.2d at 297; WILLISTON, CONTRACTS §1968 209 (3d. ed. 1979).

A licensee fortunate enough to have a Strike Clause in its agreement may well consider itself protected in the event of a League labor dispute. However, even when strike is included in the *force majeure* enumeration, whether such language will provide the licensee with protection in the event of various forms of labor dispute is far from clear.

If the reference to strike is non-specific, and therefore may refer to those of a manufacturer's workers, material supplier, shippers, *et cetera*, and a licensee seeks to take advantage of a Strike Clause in the event of a player strike, a licensor may be able to successfully rebut the presumption that a Strike Clause contemplates player strikes. The mere reference to strike in this kind of generic *force majeure* provision is not so free from ambiguity as to preclude extrinsic evidence. The proper interpretation of words in an agreement frequently depends on the circumstances that existed when the contract was concluded and then within the contemplation of the parties.[20] As discussed above, it has usually been with production or distribution thwarting events in mind that manufacturers have sought *force majeure* protection. Upon a trial or in arbitration, a licensor may be able to show that such occurrences were the expressed and exclusive concern of the licensee and, thus, establish the understanding of the parties as of the inception of the agreement.[21] As any such case will necessarily turn on its particular facts, it is impossible to predict the likelihood of a licensor's success under such a scenario.

The likely result is much clearer in a case where a licensee seeks to invoke a Strike Clause in response to an owner lock-out; the licensee is unlikely to prevail. Many Strike Clauses are silent on the effect of a lock-out. Typically, licensees are narrow in their request for *force majeure* protection. In negotiating such a provision, licensees regularly make a specific request for the inclusion of the word "strike." The experienced drafter, in keeping with the time-honored principle of providing for only as much as was expressly requested and agreed upon, will only provide for strikes. Unfortunately, such an oversight on the part of the licensee can have devastating consequences.

While it is not uncommon for lay people and licensing lawyers unfamiliar with labor law—as is sometimes the case with those responsible for negotiating licensing agreements—to think of strike and lock-out as

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20. Osborn v. Wilson & Co., 193 N.Y.S. 241 (1922), *aff'd*, 206 A.D. 787, 200 N.Y.S. 938 (1923); WILLISTON, *supra* note 19, at 209.

21. There is another inchoate issue raised by the ambiguity in the use of the term strike. Under the principle of *contra proferentem*, ambiguous contract language is resolved against the drafter. WILLISTON, *supra* note 19, §621, at 760-62. However, such language could be just as easily construed against the licensee, the party that frequently provides the exact language.

being interchangeable, the two terms clearly are not. The term strike is statutorily defined[22] and distinguished from lock-out throughout the National Labor Relations Act ("NLRA").[23] Consequently, the term strike is unlikely to be interpreted by any court as being inclusive of lock-out. Accordingly, absent specific reference to lock-out, the doctrine that only the occurrence of a specifically enumerated event will excuse a party's non-performance should obtain to bar reliance upon a Strike Clause in the event of a lock-out.[24] While a licensee can argue that a lock-out is an event of the same kind and nature as a strike and, therefore, should be covered under the principle of *ejusdem generis*, such argument should be unpersuasive since a lock-out is a clearly foreseeable event that could have been easily guarded against in the agreement.[25] Indeed, in view of an express reference to strike in an enumeration, a court should conclude that the omission of lock-out from such a provision was intentional.

C. *The Curve Ball: Use of Replacements*

Assuming the existence of a *force majeure* provision that covers a "work stoppage" or "interruption of the season," what is the effect of conducting games using replacement players? For instance, the NFL played three regular season games using replacement players during the 1987 strike-shortened season.[26] More recently, MLB opened Spring Training and the 1995 exhibition season with replacement players. The use of replacement players raises a unique paradox—the existence of a covered *force majuere* occurrence (i.e., a strike or lock-out), but a continuation of play. If this contingency is not specifically addressed in an agreement, it may be left to the courts to determine the obligations of the parties. Such was the case in *WABC-AM Radio v. New York Yankees.*

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22. 29 U.S.C. §142(2) (1988).

23. 29 U.S.C. §151 *et seq.*, *passim.* While the NLRA contains no specific definition of "lock-out," the term is given statutory recognition in four separate sections: §8(d)(4) prohibits lock-outs (and strikes) for the purposes of terminating or modifying a collective bargaining contract until the 60-day notice period has run, 29 U.S.C. §158(d)(4); §203(c) requires the Director of Federal Mediation and Conciliation Service to seek settlements of disputes "without resort to strike, lock-out, or other coercion" by the parties, 29 U.S.C. §173(c); and §206 and §208(a) both grant powers to the President to deal with "threatened or actual strike or lock-out" which constitute national emergencies, 29 U.S.C. §176; §178(a).

24. See text accompanying note 18 *supra.*

25. *See Kel Kim*, 70 N.Y.2d at 902, 519 N.E.2d at 296.

26. THE OFFICIAL NATIONAL FOOTBALL LEAGUE 1996 RECORD & FACT BOOK 274, col. 2 (1996).

WABC-AM Radio holds the radio broadcast rights to New York Yankee games and earns revenues in connection therewith through its sale of advertising time in these broadcasts.[27] In its complaint, WABC asserted that it "would not have agreed to pay millions of dollars to [the Yankees] for such rights unless it was understood that professional Major League baseball games by the real Yankees would be scheduled and made available for broadcast."[28] Following the Yankees' announced plan to provide for broadcast games to be played by replacement players, and WABC's determination that such games were "valueless" to [the station] because virtually no advertiser will pay to advertise on broadcasts of such games" and that the provision of such games was "a breach by [the Yankees] of its contractual obligations,"[29] WABC filed an action seeking a court declaration of each party's contractual obligations and seeking $10 million in damages—a suit necessitated only because of the failure of the parties to address this foreseeable occurrence in their contract.[30]

Presumably, it is only because the agreement between the parties does not contain a *force majeure* provision dealing with labor disputes that the station was compelled to resort to litigation for a determination of its rights.[31] As a result of this same omission, Plaintiff's claim was fashioned to rely upon classic principles of contract law. The gravamen of WABC's claim was that the Yankees' decision to provide the station with "replacement games" to broadcast because of the player strike "deprive[d] WABC of its reasonably expected benefits under the Agreement"[32] and "breach[ed] the implied covenant of good faith and fair

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27. The Complaint at ¶1.

28. *Id.*

29. *Id.*

30. While the parties entered into the subject agreement as of September 24, 1986, it must be noted that WABC had been the Yankees' radio station through two previous League work stoppages: the 50-day player strike during the 1981 Season and the 2-day strike during the 1985 Season. In view of these experiences, WABC should have, at the very least, foreseen the possibility of a strike or lock-out (and, arguably, even the potential use of replacement players given the NFL's conduct of replacement games in 1987) and explicitly addressed such an occurrence. The Complaint at ¶4.

31. As plaintiff states: "WABC faces the prospect of having to perform its obligations under the Agreement, including payment of substantial sums of money and broadcast of Replacement Baseball games, to its considerable loss and damage, for an indefinite period of time. [The New York Yankees] den[y] that its scheduling and making available of Replacement Baseball games is in breach of its obligations pursuant to the Agreement. A real and live legal controversy between the parties therefore exists as to their respective obligations under the Agreement." The Complaint at ¶¶24-26.

32. *Id.* at ¶16.

dealing in the Agreement."[33] While the players' return to work effectively mooted this action and resulted in the suit being dropped,[34] the fact remains that without a *force majeure* frame of reference in which to interpret the rights of the parties, it would have been difficult to predict the outcome of this suit. However, it is clear that with the inclusion of a Sports FM, the Court's decision would have at least been based on an interpretation of specific agreement terms rather than basic contract principles.[35]

IV. TECHNICAL FOULS

As a result of the cursory consideration often involved in last-minute agreement to include a *force majeure* provision in a particular license, it is not surprising that a close reading of such provisions often reveals a variety of drafting flaws. The most serious of these flaws are found in their scope of coverage, the triggering language used, tolling clauses and in the lack of a damage requirement.

A. Scope of Coverage

For the reasons discussed in Section III above, the failure to fully address the scope of coverage can have disastrous consequences. Often, in order to ensure the fullest extent of coverage, parties will use terms such as "labor dispute," "work stoppage" or "season interruption," rather than specific reference to strike and lock-out. While the use of such terms will avoid the interpretation problems discussed above, nonetheless, underlying each of these word choices is a potential dispute. Typical of the above-described provisions is the following:

> Neither party shall hold the other responsible for any delay or failure of performance occasioned or caused by acts beyond the

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33. *Id.* at ¶20.

34. *Airwaves*, N.Y. TIMES, Apr. 7, 1995, at B10. The players' return likely averted a spate of similar litigation. Less than two weeks earlier, an industry survey cited television outlets of 12 MLB teams as having decided, or considering, dramatically changing their broadcast plans because of the use of replacement players. The extent of their stated contractual rights to do so was unclear from the survey, however, based upon individual team responses, few parties appeared to have provisions in their contracts covering labor-related issues. *Baseball On TV: Who Will Carry Replacement Games?*, THE SPORTS BUS. DAILY, Mar. 23, 1995, at 6.

35. In the absence of a *force majeure* provision, under the alleged facts it appears that Plaintiff may have had a meritorious defense to nonperformance based upon the principle of commercial frustration, a defense that may be similarly viable under certain types of merchandise and sponsor agreements. However, an examination of this defense is beyond the scope of this article.

reasonable control of the party including, but not limited to, *labor disputes*, acts of war, fire, natural disaster . . . (emphasis added).

While the term "labor disputes" provides maximum breadth of coverage, its use can lead to issues as to what kind of occurrence can trigger the operation of the provision.[36] The cited language begs the question of what constitutes a "dispute." Does the expiration of a collective bargaining agreement without reaching a new accord qualify?[37] What about the initiation of antitrust litigation? The pronouncement by a principal that the parties are "far apart," or declaration of an impasse? These are all fairly typical occurrences during a labor negotiation and invariably precede a strike or a lock-out. These types of occurrences create an atmosphere of uncertainty in the marketplace and, more often, it is this uncertainty that is the proximate cause of the injury to a licensee's business. Typically, it is the fear of a work stoppage that prompts retailers to curtail their up-front commitment for merchandise or to adopt a "wait and see" approach to ordering.[38] Given certain kinds of saber rattling, orders for merchandise for the particular sport often decline substantially long before a work stoppage materializes.[39] Consequently, if the reason for inclusion of the provision is to protect a licensee against the adverse affect of a labor dispute, then logically the affected party should be entitled to avail itself of such protection at the earliest point at which its business is demonstrably injured.

Other terms popular with many drafters are the phrases "work stoppage," "interruption of season," or similar language. As with the use of labor dispute, utilizing work stoppage language is an effective means of "covering the bases." While there can be no serious debate that such language encompasses both strike and lock-out scenarios, this language can give rise to issues of coverage as well. Specifically, it is possible for there to be a strike or lock-out, yet for an affected party to not be able to avail itself of protection afforded by these types of provisions precisely because of that language choice. Since these types of provisions are triggered by a halt in play, absent a specific contract carve-out, the use of replacement players would deprive a licensee of a *force majeure* claim

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36. The NLRA provides that "[t]he term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment . . ." 29 U.S.C. §152(9) (1988).

37. If that is the case, then virtually every negotiation will trigger such a provision. In the past 15 years, only once have Leagues and PAs renewed a collective bargaining agreement without any lapse.

38. Jeff Jensen, *NBA Lockout Slows Licensing Juggernaut*, ADVERTISING AGE, July 17, 1995, at 6.

39. *Id. See generally Topps Co.*, THE WALL ST. J., Mar. 27, 1995, at A2; Bruce Horovitz, *Opening Day, and Nothing to Pitch*, USA TODAY, Mar. 31, 1995, at 1B, 2B.

based on work stoppage/interruption for any period of play using replacements. Moreover, should an agreement be entered into during a League's off-season, if a League engages replacement players and opens its season as scheduled (pre-season or regular) using replacements then there will have been no "work stoppage" or "interruption" at all. Finally, if the work action commences during the off-season, such as the NBA's 1995 summer long lock-out, an injured licensee will not be able to seek relief if its entitlement is based on season pre-emption or lost games language.[40]

One of the most common drafting mistakes in the area of coverage is to over describe the labor event. In an effort to be precise, some drafters will gratuitously include modifiers, the unintended effect of which is to convert language that is inclusive into language of exclusion. For example, consider the above-quoted provision but modified as follows:

> Neither party shall hold the other responsible for any delay or failure of performance occasioned or caused by acts beyond the reasonable control of the party including, but not limited to, labor disputes [*between the League and its players*], acts of war, fire, natural disaster . . . (emphasis added).

By the addition of the emphasized language, the extent of coverage is actually lessened. Whereas the clause without the qualifying language was not limited simply to those involving players, with the addition of the adverbial phrase, the type of disputes now covered is specifically limited to those between the League and its players. Nevertheless, given that player-owner labor disputes have been of late the paramount *force majeure* concern of a licensee, and that the addition of qualifying language makes the coverage of any such disputes unequivocal, it may appear that whatever other coverage that is lost by this additional language is of little consequence. However, when one views the other labor dispute potentialities, it is obvious that the risks that have been assumed by virtue of over specification can have equally devastating consequences. For instance, by solely specifying labor disputes involving players, in the event of a strike by game officials (e.g., referees, umpires, etc.) that forces the cancellation or relocation of games a licensee would not be entitled to any relief. Such an occurrence is no phantom risk. Prior to the start of the 1995 MLB Season, league umpires—who had been locked out since the first of that year—successfully petitioned the Onta-

40. The corollary to this loophole is whether a licensee is entitled to relief during the off-season period in a situation where a work stoppage results in the loss of games, and then carries into the off-season—a period when there is no loss of games. Does this occurrence suspend relief?

rio Labour Relations Board to bar MLB's use of replacement umpires in the province.[41] Obviously, in the face of that decision, had the parties not reached a settlement, the removal of Blue Jay games out of the province would have had a significant adverse economic impact upon the team's broadcast partners,[42] sponsors and Canadian licensees. More recently, the NBA played its entire exhibition season schedule, and the first month of the 1995-96 regular season, using replacement officials.

Another common pitfall, and similar to the above, resulting from the ill-considered use of modifiers can be found in clauses that are based upon the interruption of a "Season." As with the over-specification of labor disputes, the addition of qualifying language to the term "Season" can create more problems than it solves. Consider the following clause:

> Neither party shall hold the other responsible for any delay or failure of performance occasioned or caused by acts beyond the reasonable control of the party including, but not limited to, acts of war, fire, natural disaster or other acts of God, *interruption of the [name of League] Season* . . . (emphasis added).

As drafted, the emphasized language provides the broadest coverage possible with respect to the interruption of a League's season. Now, consider the effect of this provision as commonly modified. Insert the word "Regular" before season, and by definition you exclude the interruption of League playoffs. To cover that possibility, some will sandwich Season between the words "Regular" and "Playoffs" so as to read ". . . interruption of the League's Regular Season or Playoffs." The result of such variation is to leave a licensee remediless against an interruption of pre-season play. Add "Pre-Season" to the list, and the clause remains ambiguous as to a cancellation of a League's All-Star event. For example, the NFL's Pro-Bowl is neither part of the Pre-Season, Regular Season or Playoffs.[43] All of the issues presented by this paragraph can be avoided simply by using "Season" on a stand-alone basis. As to the distinctions between the Pre, Regular and Playoff Seasons, all are clearly covered by the term "Season." As to events such as All-Star games, inasmuch as each is typically a "scheduled" event on a League's season

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41. AP News Wire Service, Apr. 28, 1995.

42. This was, in part, borne out by the decision by the Blue Jays' cable TV partner TSN who advised that the team's usual 25 scheduled game broadcasts would not be carried by the network because of the costs of producing Blue Jays' replacement games from Florida, a circumstance that itself was necessitated by Provincial labor law.

43. Arguably, the same can be said of the mid-season All-Star games staged by MLB, the NBA and the NHL. These events, along with certain other regularly televised and sponsored events such as the draft, do not fit neatly into the specified categories of "Pre-Season, Regular Season or Playoffs."

calendar—absent specification that renders them not susceptible to categorization—it would be extremely difficult to argue that they are not part of the "Season."[44] As the foregoing illustrates, in this area, general language is superior to specific language.

Finally, a licensee should insist upon *force majeure* protection throughout the term of its agreement. Too often, when a licensee is negotiating an agreement during a period of labor instability, its focus will be locked on the immediately threatened season. As a result, some licensees will readily settle for a provision that provides protection for the upcoming season. Unfortunately for such licensees, as the labor negotiating history of MLB, the NBA, NFL and NHL each demonstrate, once a CBA expires, it often takes far in excess of a single season to conclude a new pact.[45] Consequently, for the MLB or NBA licensees that accepted a provision that specifically provided relief in the event of an interruption of the 1994 Season of each respective League, it found its hard-won right extinguished by its terms when the MLB strike carried over into the following season and the NBA's lock-out did not commence until after the conclusion of its 1994-95 Season.

B. Triggering Devices

In addition to the coverage problems discussed above, there are a number of other common drafting flaws that can render the applicability of a *force majeure* provision ambiguous. Chief among them is the language that triggers the protection of the provision.

Invariably, the right to invoke the labor-related clause of a *force majeure* provision is based upon the occurrence of some specified event. Unfortunately, some drafters will use as the triggering occurrence an event or scenario that is expressed in vague or ambiguous terms. For example:

> If as a result of a labor dispute . . . there is an interruption of any commercial announcements to be telecast hereunder, which continues for a *prolonged period* of time . . . (emphasis added)

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44. However, depending on the League in question, the status of the respective League's drafts can present different analytical challenges. Whereas the NBA's draft takes place within a few days of the conclusion of the NBA Finals, and is expressly deemed the final event of its season for a number of purposes, the NHL and NFL drafts are scheduled several months after the conclusion of their respective seasons. Accordingly, it would be an extreme stretch to maintain that these events are part of their season.

45. For example, the NFL operated from 1987 to June 29, 1993 without a signed CBA. NFL FACT BOOK, *supra* note 26, at 275, col. 4. The MLB took three years to reach a new labor agreement, and the NBA conducted its last two seasons without a signed CBA.

or

> If *a material number* of games cannot be broadcast because of . . . strike . . . (emphasis added).

The injection of subjective terms provides fertile ground for good faith disagreement. A pre-requisite condition, such as the loss of "material number of games," in addition to being subjective, is necessarily a relative term. What constitutes a "material number" depends on, among other factors, the number of games in the particular season and number of games covered by the particular agreement. For instance, if a regular season is 162 games, a loss of several games may be *de minimus*. On the other hand, if a broadcaster only has the right to broadcast a small fraction of the total number of games in a season, the loss of even a few games can be material.

In addition to the potential interpretation problems, use of subjective terms and relative standards can force a licensor into having to take a position with respect to one licensee that may operate to the licensor's detriment *vis-à-vis* another licensee or, worse, inconsistent positions with licensees. For example, in the area of game broadcasts Leagues and teams invariably have multiple media outlets: an over-the-air TV carrier; a cable TV station; and a radio broadcaster. Assuming the inclusion in each broadcast agreement of an identical provision that conditions relief upon the loss of a "material number" of games, even though the claim of each licensee would arise from the same *force majeure* occurrence, the materiality threshold could vary widely depending on the number of broadcasts each carrier is authorized.[46]

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46. The following baseball-based hypothetical illustrates this potentiality. For the strike-shortened 1994 MLB regular season, a team grants the following rights: (a) to a radio station, the right to broadcast all of its regular season games; (b) to a cable station, the right to televise up to 100 games; and (c) to a "free TV" station, the right to televise 20 specific games. At the point the Baseball Players' commenced their strike each team had played roughly 110 of its scheduled 162 games. In total, approximately 50 games were lost resulting in each of the team's three broadcasters losing the same number of scheduled game broadcasts—ten. Based on such a scenario, it is easy to see how results may differ even though the *force majeure* condition *vis-à-vis* each licensee is identical. As to the radio station, the loss of ten games (less than 10% of its inventory) may not be a material number of games. As to the cable station, the loss of ten dates is arguably a material number of games. As to the over-the-air rights holder, the loss of ten games, 50% of its available inventory, is clearly a material loss of games. If after three weeks of the work stoppage, the over-the-air broadcast partner sought relief under the subject *force majeure* provision and the team agreed that the loss of games had been material, then if either, or both, of the television broadcast partners shortly thereafter sought that same relief, the team would find itself in the difficult position of having already deemed the loss of games to have been material.

Finally, in the event of a dispute over the availability of the remedy at a particular point in time, a party believing itself to have the right to withhold certain performances based upon the *force majeure* can be faced with the dilemma of either having to forego the opportunity to mitigate the injury to its business at the earliest opportunity, or withholding performance at its peril. If a licensee fully performs during a period when it may have properly withheld performance, it will likely compound its losses.[47] Conversely, if a licensee withholds performance over the objection of the licensor, and to the licensor's injury,[48] the licensor may terminate the agreement (which is an option incorporated into many *force majeure* provisions) or even bring a claim based upon breach of contract.

C. *Tolling Clauses*

Many *force majeure* provisions contain a clause that tolls the running of the contract term and a concomitant clause that extends the agreement for a period corresponding to the length of the work stoppage. The following is representative of such clauses: "in the event of such delay, interruption or diminution [as a result a *force majeure*], the Term of this Agreement shall be extended for a period equal to the period of such delay, interruption or diminution."

This type of relief can be attractive to both licensees and licensors. Licensees receive the full benefit of the term of agreement for which they bargained, and licensors enjoy guaranteed payments over an extended period and in compensation for a period in which it may have received reduced or no revenues. At first blush, this would seem an equitable solution that would make whole the party seeking relief. However, such an *ad hoc* approach can have many unintended adverse consequences for the licensor while providing no real benefit for the licensee.

In the event of a lengthy work stoppage, an automatic extension for a comparable period can severely hamstring a licensor's normal business

47. While *force majeure* was not at issue in *WABC Radio*, plaintiff faced just such a predicament. The station maintained, in essence, that it could only perform its broadcast obligations (i.e., airing replacement games) at a financial loss.

48. For example, the typical retail product license agreement requires that the licensee contribute to a League-administered promotional fund that is used by the League to execute advertising and promotion of League "Official Licensed Product." These funds are budgeted well in advance of each season. The campaigns funded by these dollars have numerous "hard" costs that the League would have to absorb in the event licensees wrongfully withheld their contributions.

practices and disrupt its business operations. Since the contract year for the purposes of League and team agreements generally coincides with the licensor's fiscal year (which usually coincides with it season),[49] in a case involving a prolonged interruption such as the MLB players' strike, an agreement extension on the foregoing basis would add 232 days to the term of the contract. As a consequence, the so-fixed expiration date will, instead of ending proximate to the conclusion of their season, fall some two months into a new season. Such an abrupt and unscheduled ending can have significant adverse consequences to the licensor.

1. Leverage Considerations

The in-season expiration of any agreement is certain to severely reduce the negotiating leverage of the licensor in a number of ways. For instance, in virtually every significant business or licensing category, because of the considerable lead time necessary to effectively enter a market—whether it be a licensing category, corporate sponsorship of a newly acquired property or producing broadcasts—the licensor will be faced with the inescapable reality that if it does not renew the incumbent, there will be some period of transition when it will have to conduct business without the benefit of the services and revenue provided by the non-renewed party. The inability to reach renewal of certain types of agreements can have disastrous consequences for the League or team. For example, in the case of a broadcast agreement that expires in-season, if a renewal cannot be reached with the incumbent broadcast partner, the League or team may find itself without a carrier for its games.[50] This would be doubly disastrous because, in addition to the loss of the broadcast outlet, the licensor might then be unable to perform the media placement obligations owed to various corporate sponsors. Because the risk of loss in such key areas as broadcasting and sponsorship of certain promotions (e.g., All-Star balloting) or licensor-controlled television programming may be unacceptable, the licensor may be forced to accept

49. For example, an NBA "Contract Year" is a 12-month accounting period that commences August 1st and concludes July 31st, the same as its fiscal year, encompassing a full exhibition, regular and playoff season (a period that runs from October through June).

50. It should be noted that, because it is quite common for broadcast partners and corporate sponsors to have exclusive negotiation windows contained in their agreements, a licensor may be contractually prohibited from even discussing the sale of rights to another party until the 11th-hour of the agreement in effect. Moreover, if a licensee has a right of first refusal, the licensor may be unable to find a party willing to negotiate for the available rights under the circumstances.

considerably less fees than it could command for the same rights, if up for negotiation at the end of a season or during the off-season.

As in the broadcast agreement context, the advent of an in-season expiration can drastically alter the negotiating leverage in the merchandise licensing arena. Given the new end-of-term months covered by an 8-month extension, coupled with the standard 90-day sell-off period at a minimum, a licensee up for renewal goes into negotiations knowing that, in the event terms of renewal cannot be reached, it will have the benefit of selling through the critically important selling windows of: (i) start of season; (ii) the All-Star period; and (iii) the all important "back-to-school" period.[51] Perhaps even through the equally important Christmas selling season.[52] This gives the licensee a significant negotiating advantage. The incumbent licensee, the licensor and any potential competitor for the license will all recognize that because of the foregoing sales rights, the rights of any licensee other than the incumbent will be seriously devalued for its first contract year. Indeed, given that, manufacturers that might otherwise vie for a particular license may opt not to enter into contention because the licensor cannot deliver a "clean" category. If an incumbent licensee is in effect "running unopposed," its leverage is clearly enhanced.

2. Benefits?

For the reasons detailed above, a lengthy extension of an agreement can be of greater detriment than benefit to a licensor. In a similar vain, the extension of the term of a contract may be of minimal value to a licensee under various circumstances. Depending on the part of the season lost to a work stoppage, the extension of a license for a corresponding period may leave a licensee far from whole and without any effective relief.

As a result of the August 12th walkout by the Major League Baseball Players, the 1994 playoffs and World Series were ultimately canceled. As a consequence, baseball experienced massive fan disillusionment that left MLB licensees and sponsors unable to maximize their rights during the peak period of fan interest—the pennant races and the World Series.

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51. "Back-to-school" is the second-biggest shopping season of the year, second only to the Christmas holiday-shopping period. Alice Z. Cuneo, *Back-to-School 'Season' Gets Extended Spending*, ADVERTISING AGE, Sept. 23, 1996, at 16. Indeed, for apparel manufacturers, the back-to-school season is even bigger than the Christmas shopping season. Donna Rosato, *Shopping Season Off to Slow Start*, USA TODAY, Aug. 14, 1995, at 1B.

52. It is fairly common for licensees with significant minimum payment guarantees to successfully negotiate extended sell-off periods.

Deprived of that heightened period of interest, and with the strike's ill effects carrying through the holiday season, many rights holders suffered irreparable harm to their business. League (and many team) broadcast partners and advertisers lost the opportunity to reach the largest viewer audiences of the season, corporate sponsors lost their most important promotional platform, and licensees watched their business free-fall. Licensees, in particular, were perhaps the hardest hit. For most licensees, particularly in the apparel categories, the majority of their sales are made during the final months of the season (a period which overlaps the back-to-school buying season) together with the Christmas shopping season.[53]

Sponsors and licensees of the NHL found themselves in a position similar to that of their MLB counterparts. With the owners' October 1st lock-out of its players, and the warnings and threats that preceded it, hockey's business partners, like baseball's, were unable to capitalize on several periods of heightened attention: the Season's opening and the unique circumstances surrounding it;[54] and the All-Star lead-in. Moreover, as was the case with the baseball strike, the consequences of the lock-out were felt by licensees for a period extending from back-to-school through the holiday shopping season.

Given the timing of both the MLB and NHL work stoppages, the addition of 232 or 75 days (as the case may be) to an agreement is hardly salve for some wounds. To a corporate sponsor or merchandise licensee, the addition to their contract term of days that will run in the off-season is of little or no value. For the sponsor, there are no games to advertise in and no available platform upon which to build any promotion. As for merchandise licensees, there is no adequate substitute for a lost Christmas season or special event opportunity such as the All-Star game. For a marketing partner that has been severely injured, an extension under the foregoing circumstances is a hollow remedy—if it is one's sole remedy. Indeed, for licensees in some product category segments, an extension may prove to be no remedy at all. Given the extent of lost sales during a work stoppage coupled with the residual fan disaffection,[55] loss of popu-

53. *See supra* note 51.

54. The return of the Stanley Cup to New York (the media and advertising center of North America) for the first time in over 50 years and the lack of competition with the baseball playoffs and World Series as a result of their own work stoppage.

55. By baseball's own account, 38% of its fans are angry and 58% are "disgusted." THE SPORTS BUS. DAILY, Dec. 9, 1996, at #11 (quoting the MLB Enterprises CEO, Greg Murphy, state of MLB marketing address at the 1996 MLB winter meetings). This disaffection is also readily evident in post-strike attendance and television viewership figures. For example, at-

larity compared to other sports, and failing League promotional support,[56] a licensee may be unable to meet its minimum royalty payment obligation to the League even with an extension. For example, in the trading card category where baseball accounts for about half of all cards sales, in the immediate aftermath of the strike, the Topps Company—the market leader with a $1.2 billion card business—experienced a third-quarter earnings dive of 68%,[57] saw its fourth-quarter net income down by 77%[58] and its first quarter sales decline by close to $30 million.[59] In that case, the licensee's damages will have been compounded, as it will have lost sales, and will be required to pay "out of pocket" to meet its minimum payment guaranty.

3. Operation Concerns

As discussed in the first subsection, long-term contract extensions resulting from a work stoppage can materially affect the business decision-making process. They can also severely disturb normal business opera-

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tendance for the strike-shortened 1995 MLB Season was down approximately 19% league-wide. *See generally* Phillips, *Ballpark Figures Slide*, USA TODAY, Aug. 11, 1995, at 3 C; Tom Verducci, *Baseball: The Bad News*, SPORTS ILLUSTRATED, July 10, 1995, at 32. Television viewership was also down sharply. *See generally* Rudy Martzke, *All-Star Ratings Take Nose-dive*, USA TODAY, July 13, 1995, at 2C (reporting that the national TV ratings for the 1995 All-Star Game was an all-time low since the telecast was moved to prime-time in 1967). Indeed, two full seasons after the strike, the 1996 All-Star Game posted a second consecutive record low TV rating. *Baseball All-Star Game Plummets to Lowest Rating*, USA TODAY, July 11, 1996, at 2C. The 1996 World Series ratings were down 9% from the low-rated 1995 Series, making the '96 Series the third least-watched Series in history. Rudy Martzke, *Sports on TV*, USA TODAY, Oct. 29, 1996, at 2C; Erik Brady, *Series Ratings 14% Behind Last Season's*, USA TODAY, Oct. 25, 1996, at 4C (projecting final Series ratings based on then to-date ratings for games 1 through 4). The 1996 ratings are even more disappointing in view of the two large television markets involved and a "dream" match-up between the defending world champion Atlanta Braves against the most storied franchise in American sports, the New York Yankees.

56. *See* David Leonhardt, *Baseball's Slump is Far From Over*, BUS. WEEK, Nov. 4, 1996, at 82; *see also* Andy Bernstein, *Can Baseball Be Cool Again?*, SPORTING GOODS BUS., June, 1996, at 52.

57. Nancy J. Kim, *Checked Swings*, WASH. POST, Dec. 31, 1994, at Section C.

58. Richard Sandomir, *The Players Are Back, But Are Card Collectors?*, N.Y. TIMES, Apr. 13, 1995, at B14.

59. Topps net sales for its first quarter ending May 27, 1995 were $67,432,000, down from $94,498,000 in 1994. *Topps First Quarter Sales Down Close to $30M From Last Year*, THE SPORTS BUS. DAILY, June 16, 1995, at 1 (citing Topps press release). Almost two years after the baseball players walkout, the trading card industry is still suffering from the ill effects of the strike. According to one industry executive, even though the baseball card business was, by some estimates, down by as much as 50% in 1995, THE SPORTS BUS. DAILY, July 1, 1996, at 3 (quoting television interview of Brian Burr, the president of the Upper Deck Company, on ESPN's SportsCenter, June 28, 1996), sales of a number of the leading cards brands "have not increased at all" and have "probably decreased." *Id.* (quoting collectibles executive Norm Klemonski).

tional matters. As noted above, it is generally broadcast partners, sponsors and "key" licensees that have *force majeure* protection in their agreements. This class of marketing partners typically accounts for a disproportionate percentage of a League or team's non-gate revenues. If these partners, as a class, receive extensions, it can create a myriad of operational complications. For instance, with large advertising and promotion contributions being held in abeyance, budgeting becomes difficult. Similarly, continuing royalty reporting and payments makes revenue forecasting difficult. And, lastly, in view of the foregoing, closing the books on the fiscal year becomes a problem which in turn raises share holder issues because Leagues are normally required to make their annual distribution to their shareholders (i.e., the teams) within a time-certain following the close of the fiscal year.

As illustrated above. while the equitable extension of an agreement may be a mutually satisfactory form of relief and, equally important, be a compromise that is easily reached, such relief should not be settled upon without full consideration and appreciation of all of its repercussions.

D. Damages

Unless a licensee's damages are apparent, such as with a broadcaster that is unable to air games, or an in-game TV advertiser whose commercials cannot be run, because of a work stoppage, the licensor should incorporate into its *force majeure* provision a damage requirement. While a strike or lock-out will undoubtedly have an adverse affect on anyone involved with the particular sport, every work stoppage does not necessarily have such a severe economic impact upon a licensee as to justify any extraordinary relief. For instance, the work stoppage may have been *de minimus* like the recent July 1996 lock-out of players by the NBA which lasted a mere few hours,[60] or the 2-day walkout by the Major League Baseball Players at the start of the 1985 season. Alternatively, it may have occurred late in the season at a point when a licensee has already met its minimum payment obligation or during the off-season when its direct affects are muted.

Because the "purpose of a *force majeure* clause is to limit damages,"[61] and a work stoppage does not necessarily result in a licensee sustaining any significant damages, a licensee should not be permitted to

60. David DuPree, *On-, Off-Again NBA Lockout Stalls Signings*, USA TODAY, July 10, 1996, at 1C.

61. United Equities Co. v. First Nat. City Bank, 383 N.Y.S.2d 6, 9 (1st Dept. 1976), *aff'd mem*, 41 N.Y.2d 1032, 363 N.E.2d 1385 (1977).

invoke such a provision without meeting some damage standard. Further, the standard should include the notion of materiality, particularly under a merchandise license, because a licensee cannot truly be said to have been damaged, at least not in the "frustration" of expectation sense,[62] if it has been able to meet its minimum payment guarantee which, after all, is based on the sales projections provided by the licensee. Without such a standard, a license may use the event of a work stoppage as a pretext to renegotiate more favorable terms or gain some other concession, notwithstanding the fact that it may have already met (or be able to meet) its minimum. Therefore, it is recommended that a licensor include in its *force majeure* provision a clause that provides that relief is only available if the work stoppage "has had a material adverse affect on the sale of the Licensed Products." A final rebuttal argument in support of a materiality standard is philosophical. A licensor should not be a guarantor of a manufacturer's level of profitability with respect to product it licenses. If a licensee has met, or can meet, its minimum guarantee, then *a fortiori* it has profited on its license.

Concededly, the term "material" is subjective and subjective terms should be avoided in the drafting process. However, unlike the problems discussed above with respect to subjective language, in this one context, materiality is easily determined. Since a merchandise licensee is typically required by contract to submit regular periodic sales statements, its sales can simply be compared to its sales figures for a comparable period of the past season (or several seasons) or to even the last pre-work stoppage accounting period. As an alternative to the inclusion of an explicit materiality standard, the parties may elect to include a durational requirement upon the elapse of which material damage is presumed. The following type of clause has such an affect: "if any such [*force majeure*] event prevents performance for a period of time in excess of sixty (60) days, either party may terminate this agreement upon written notice."

V. DRAFT CHOICES

While many licensors and licensees tend to view a *force majeure* provision as simply part of the boilerplate, if included at all, this is the first provision the parties will review at the hint of any potential work stoppage. In the event of a work stoppage, the obligations of each party will be dictated by the terms of such provision. Accordingly, each party

62. *Id.*

should be as attentive to the language of this clause as they are to the so-called "business terms" of their agreement. The well-drafted sports *force majeure* provision should be based upon thorough consideration of the following elements: (i) scope of coverage; (ii) triggering event; and (iii) type of relief. This section discusses the critical considerations relative to these clauses and recommends drafting solutions that avoid the common pitfalls.

A. Scope of Coverage & Triggers

Obviously, the scope of coverage is the most critical element of any *force majeure* provision because it is dispositive on the issue of a party's rights in the event of a labor disputes. Licensees should request a broadly worded provision covering all of the traditional *force majeures* (e.g., acts of God, war, fire, governmental restriction, carrier failure, etc.) as well as specific protection against all forms of League labor disputes. A licensor may, however, justifiably resist such broad coverage. Such expansive coverage can be fairly viewed as an attempt to shift certain business risks that are customarily borne by a licensee. For example, with respect to apparel manufacturers, for many major licensees a significant percentage of their business is attributable to their sale of branded merchandise[63]— and in some cases, even a majority of their overall business[64]—and for which they should assume all *force majeure* risk. Thus, for such manufacturers, a request for broad coverage can be seen as a "grab;" an effort to shift certain inherent business risks, that in all other contexts the licensee assumes sole responsibility for, to a party that may be willing to share them for no compelling reason.

A frequent compromise is to limit *force majeure* protection to strikes. Content with having extracted any concession on protection against strikes, some licensees will rest. However, as discussed in Section III(B) above, to do so is a grave mistake. If the grantor is a League or team and has consented to include a Strike Clause, then the licensee will have gained the high ground in negotiating this particular provision. A licen-

63. For example, NIKE, Champion, Russell and Starter to name a few. Indeed, branded product is one of the "hottest" areas in apparel sales. Kim-Van Dang, *Brand News*, SPORTSTYLE, Feb., 1996, at 82.

64. For example, several large publicly traded companies are involved in team sport licensing: textile giant, VF Corporation, through its subsidiaries Nutmeg Mills and Cutler Sports, holds a number of League merchandise licenses as well as being the maker of the famous "Lee" brand of jeans; the same is true of Fruit of the Loom, best-known for its underwear business but also owns Pro Players among other sports licensing companies; and uniform and apparel maker Champion Products is owned by frozen food giant Sara Lee Corporation.

see should then insist upon specific protection against lock-out. Having acknowledged the appropriateness of work stoppage relief by virtue of the agreement to include a Strike Clause, the licensor is left with no principled reason for not further extending coverage to lock-out if the licensee requests such protection. The cogent argument that follows is that if the licensor consents to protection against a player strike, it can hardly object to extending similar protection to a lock-out; a situation of the League's own making and a matter exclusively within its control.

To avoid any potential ambiguity, the well-drafted Sports FM enumeration should explicitly refer to strikes or lock-outs in which the League is involved. Consistent with the particular form of provision and style employed by the drafter, the following language is suggested to provide for excuse (or suspension) of a party's performance as a result of "strike or lock-out to which the League is party." This sample language will avert the myriad interpretation/construction problems discussed above. The language by its terms expressly applies to both player strike and lock-out as well as covering any disputes involving League officiating personnel. Moreover, it removes any uncertainty as to the affect of the use of replacements. Since a strike or lock-out is a prerequisite to the use of replacements, relief will be available to a party under a so-drafted provision notwithstanding the fact that no work stoppage or interruption of the season may exist, or may have been *de minimus*. If the League wishes to reserve the right to utilize replacements and receive full performance from its licensee (or otherwise provide for some form of modified performance), the drafter should expressly carve out the terms and conditions. If on the other hand, the licensee wishes to be protected against labor disputes involving non-League personnel as well, then the sample language should be modified as follows: "strike or lock-out (including those to which the League is party) . . ."[65]

Finally, in addition to the foregoing benefits of using the recommended language, use of the words strike and lock-out provide ideal triggering events. They are objectively determinable events that are not

65. If a party's performance obligations are heavily dependent upon services provided by an organized labor force, such as broadcasters who are necessarily dependent upon cameramen, engineers, electricians and the like, then such general protection should be desirable. Indeed, last year, only a 12th hour agreement reached between the Canadian Broadcast Company and its major unions averted "the largest strike in the history of the CBC." Adrienne Tanner, *Deals Met, CBC Strike Averted,* THE GAZETTE (Montreal), May 24, 1996, at A7. A strike that would have crippled all CBC operations. Christopher Harris, *Focus at CBC Shifts to Cutbacks: Deal With Unions Lifts Strike Threat,* TORONTO GLOBE & MAIL, May 25, 1996, at A1, A11. Such a strike would have affected NHL playoff coverage in Canada.

susceptible to dispute over the point at which a party may properly invoke the *force majeure* provision. Moreover, these events often provide early warning in that the effective date of these occurrences is typically preceded by an announcement of a deadline.

B. Type of Relief

A *force majeure* provision, like any athletic protective equipment, can only provide the user with maximum protection if it fits. These provisions come in a number of different configurations; one-size does not fit all. To ensure adequate protection, it is essential that the form of relief provided is fitted to the nature of a licensee's obligations, to its business and to practical realities.

Force majeure provisions commonly provide for one or more of the following forms of relief: (i) excuse of performance; (ii) suspension of performance; (iii) right of termination; (iii) credit, or rebate; or (iv) equitable adjustment.

1. Excuse vs. Suspension

A typical form of *force majeure* clause that excuses performance provides in pertinent part as follows:

> If either party hereto shall have been prevented in whole, or in part, from performing its obligations hereunder by virtue of acts beyond the reasonable control of the party including, but not limited to, acts of war, fire, natural disaster or other acts of God, then the obligation of such party shall be *excused* . . . (emphasis added).

Suspension-type *force majeure* provisions are similarly constructed. The following is typical:

> Neither party shall be deemed in default of any obligation under this Agreement to the extent that such default results from acts of God, strike, fire, flood, acts of the public enemy or other Force Majeure causes; provided that all performances affected by said Force Majeure shall be *suspended* during the currency of such cause; and provided that the obligor shall resume the performance of its obligations in good faith as soon as possible . . . (emphasis added).

While excusal and suspension effect the same immediate result—the discharge of a party from the performance of a present obligation—these two forms of relief are not equivalents.

In drafting a *force majeure* provision, the words "excuse" and "suspend" should not be used loosely, and only with full consideration of the

import of the term used. Whereas suspension merely postpones performance for a period of time, excuse permanently discharges a party from the affected specific obligation. The failure to take into account this hyper-technical distinction can have significant repercussions. It can mean the difference between receiving an expected benefit late, and not receiving the benefit at all.

2. Right of Termination

As an alternative to the foregoing forms of relief, a licensor can elect to provide a right of termination in the event a *force majeure* condition prevents a party's performance for a specified period. A typical form of this type of provision provides in pertinent part that "if any such [force majeure] event prevents performance for a period of time in excess of sixty (60) days, either party may terminate this agreement upon written notice." Some licensees may view such a termination right as an adequate remedy inasmuch as it allows a party a means of complete discharge. Because of the "out" this provides, and given that a licensee can rightly consider it a major achievement to have extracted a concession on *force majeure* at all, many licensees will accept such relief if proffered without further negotiation. While a licensee should be pleased at prevailing on the macro issue of work stoppage relief, a licensee should not be so quick to acquiesce as to this particular form of relief. As discussed below, this form of relief may not be suitable for a particular company.

If the decision to provide a licensee with a right to terminate as its sole form of relief reflects a strategic choice on the part of the licensor, it is a shrewd gambit. This approach preserves for the licensor the full performance by the licensee through the currency of a strike or lock-out (at least until a specified length of time, which can be quite significant)—a fact that a licensee should consider—while providing relief that is, as discussed below, somewhat specious.

At first blush, it may seem that providing a right of termination puts a licensor at considerable risk. In reality, the risk of actual termination is relatively remote for several reasons. First, by the terms of the provision, relief may not be available even in the event of a work stoppage. The option to terminate is contingent upon the continuation of a strike or lock-out for more than the specified period. That period can be as long as mutually agreed: 60 days, 90 days, or even longer. It is worth

noting, that only twice in the approximately 40-year history of PAs has a work stoppage continued for more than a 60-day period.[66]

Second, a licensee is unlikely to take advantage of the right to terminate (if the durational requirement has been met) because business reality militates against taking such a drastic measure. Typically, the only licensees able to secure protection against a player strike or owner lock-out are sponsors and a League's most substantial (in terms of royalties generated) merchandise licensees. Invariably, these types of licensees fall into three categories. In one category are those companies whose brands are synonymous with a particular sport such as NIKE with basketball, the ubiquitous CCM and Bauer brands in hockey, or Topps with baseball. In a second category are companies whose overall sales are disproportionately dependent upon the sale of the licensed product of a particular sport — again, such as Topps with baseball cards. Falling within the third category are so-called "authentics" licensees, whose overall sales are driven by a particular League's endorsement or use of their signature product such as an "official" game jersey manufacturer like Champion, or a game ball supplier like Wilson (NFL footballs) or Spalding (NBA basketballs). For these types of companies, to give-up their license is not a real alternative. For Topps to exit the baseball card business would be suicidal; if a company like Spalding gave up its designation as the supplier of the "Official Game Ball of the NBA," its market share in the basketball category would likely plummet. In view of these often symbiotic relationships, it is highly improbable that any so-situated licensee would opt to terminate its League license.

Finally, even if a licensee is inclined to terminate its agreement, a licensor would still have an unarticulated fall-back position that makes termination unlikely. Upon notice of termination, a licensor can simply offer other forms of relief such as excusing or suspending the party's performance, extending the term of the license, or reducing minimum payment guarantees or rights fees. Given such concessions, the probability of a licensee resigning its license is virtually zero.

Not every licensee has the same amount of negotiating leverage. A licensee with minimal royalty guarantees, or whose royalties can easily be replaced by another (or new) licensee, that requests protection against a work stoppage may well be offered the above form of relief on a "take it or leave it" basis. The most common mistake made by a licensee confronted with this set of circumstances is to assume that there is nothing negotiable. While a licensor may be steadfast as to the basic

66. The 1994 baseball strike and hockey lock-out.

form of relief it has chosen, there may still be areas within the provision that are negotiable. A licensee should request interim relief such as excuse or the suspension of performance during the waiting period. Moreover, the licensor may be willing to reduce the "waiting period" from 60 days to 30 days. For the licensee, it should be noted that four out of the last five League work stoppages have lasted more than 30 days.[67] If the licensor has already agreed that work stoppage relief is warranted, then it will likely exhibit some flexibility on these micro points.[68] However, such concessions will not be volunteered. A licensee must specifically request such further modifications.

If, in the end, the licensor opts for the right of termination as the form of relief, the termination option should not be left open-ended, as is in the above-cited provision. The option should be made exercisable within a time-certain following the elapse of the specified period of disability. The following type of clause is recommended: "if any such [force majeure] event prevents performance for a period of time in excess of sixty (60) days, either party may terminate this agreement upon *thirty (30) days' written notice served upon the other party not later than ten (10) days after the elapse of the 60-day period*" (emphasis added). This additional language will prevent a licensee from using the *force majeure* as a pretext for terminating an agreement that it comes to view as unfavorable, or from using the threat of termination as a "re-opener" device. Moreover, a fixed deadline will force the licensee to make a timely determination and permit the licensor to proceed forward, either one way or another, with a needed degree of certainty.

3. Credit or Rebate

As mentioned, a particular form of relief may not be suited for a particular licensee or types of business. For example, the mere right to terminate is not a meaningful choice for a licensee whose business is dependent upon a specific license. An incremental extension of an agreement's term can be meaningless for some licensees. For a licensee that is thinly capitalized or has a heavy debt burden, a requirement to fully perform during the pendency of a work stoppage can be crippling. On the other hand, to permit certain types of licensees to suspend their

67. The most recent baseball strike, the hockey lock-out, the 1982 Football Players strike and the 1981 baseball strike.

68. Indeed, if the licensor is willing to accommodate the licensee on these further modifications, it may well elect to reverse itself and simply provide the licensee with a suspension-type relief since the net effect will be the same, and the licensor would not have to expose itself to the risk of licensee termination.

performance could be disastrous for the licensor. Into this last category falls "key" sponsors and broadcast partners in particular.

Unlike merchandise licenses where the rights granted are bundled and indivisible (e.g., right to manufacture, distribute, sell and promote Licensed Product), the elements of a sponsorship agreement (e.g., use of trademarks and "Official Sponsor" designation in advertising, specific promotion rights, purchase of League-controlled media, etc.) or broadcast agreement are severable. Moreover, unlike royalty payments which are based on actual sales and generally payable on a monthly basis, sponsorship rights fees are typically allocated to specific elements and payable in relatively large installments that are fewer and farther between than royalty payments. If such substantial fees were withheld or diminished, it would severely impact a licensor's ability to meet its operational expenses as well as other financial commitments. Accordingly, as to "cash cow" licensees, excuse or suspension of certain performances should be avoided. Thus, in the first instance, the licensor should offer relief in the form of a rights fee credit or other forms of credit.

From a licensor's perspective, agreement by a licensee to accept a credit or rebate in lieu of other relief is an extremely licensor-favorable resolution of the relief issue: full payment is ensured through the work stoppage; the relief afforded is all post-stoppage; and the relief does not require any out-of-pocket payment. While such a resolution can be equitable, a licensee may balk nonetheless. The discerning sponsor or broadcast partner is likely to find such a proposal unsatisfactory for a number of reasons.

First, depending on the point in the term of the agreement that the work stoppage occurs, there may not be a guaranteed subsequent season in which to apply the credit; for instance, if a strike occurs in the final year of an agreement. Secondly, for a myriad of reasons, comparable advertising inventory or promotional opportunities may not be available in a subsequent season. For instance, some sponsored events are not available on an annual basis such as the NBA's McDonald's Championship—a pre-season tournament played abroad and featuring the reigning NBA champions team in tournament play against championship teams representing various foreign basketball leagues—which is staged every other year. Other events, such as League all-star games, are hosted by different cities each year and therefore can have differing promotional value for a particular sponsor. Other opportunities are truly unique, such as a League anniversary season like the NFL's recent diamond anniversary or the NBA's current 50th anniversary season. Finally, opportunities may not be available simply because of prior commitments made

by the licensor to other sponsors or advertisers. Moreover, in the case of corporate sponsors, companies routinely review marketing plans weighing costs against effectiveness and decide alternative promotional activities will be more efficient and therefore change their marketing focus.

In addition to the foregoing reasons why a licensee may find make-goods unattractive, make-goods may be of little value to certain licensees, given the potential for severe diminished interest in the sport following a prolonged work stoppage. This was evident by the lagging attendance[69] and reduced TV viewership experienced by MLB last season.[70] For a broadcast partner that has been left with unsold advertising inventory as a result of a work stoppage, or has been forced to deeply discount its ad rates, the last thing it will want is additional units to sell or games to broadcast.[71]

Faced with a cool response to the offer of credit, the licensor's fallback is to combine the offer of credit with one or more additional forms of relief. The usual alternative is to combine credit with the option to terminate and/or receive a rebate. The following form of construction is typical:

> If the performance of either party shall be delayed, interrupted or diminished by any cause beyond its reasonable control, such as war, national emergency, fire, restrictions imposed by law, natural disaster or other acts of God, Grantor may in its sole discretion

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69. *See supra* note 55. While it must be noted that the average attendance for the 1996 season, 26,804 fans per game, was the fourth-highest in MLB history and represented a 6.1% increase over the 1995 season average, it was still more than 4000 less fans per game than the 1994 pre-strike average. *Attendance Is Up*, USA TODAY, Sept. 27, 1996, at 7C.

70. *See supra* note 55. The majority of MLB's 30 teams saw an increase in local television viewership over 1995 levels. Michael Freeman, . . . *A Long Way to Go*, MEDIAWEEK, Sept. 23, 1996, at 4. This increase in viewership was fueled largely by a record-setting season of home runs and a wild-card system that kept more than half of the teams in playoff contention well into September. *See* Mark Starr, *Diamond Jubilee*, NEWSWEEK, Sept. 16, 1996, at 78. Only 11 teams "managed to creep back up to the same or similar rating netted before the strike," meaning that 12 teams have lost ratings from last season and 19 have still not recovered to where they were in 1993. MEDIAWEEK, *supra* at 4. Nationally, television ratings are even dimmer. *Id.*

71. Indeed, two full seasons after the 1994 baseball strike, at the conclusion of the 1996 MLB regular season, Fox Sports had only sold 75% of its ad time for the upcoming World Series and felt it necessary to cut the price of a 30-second ad by $75,000. *World Series Just Got $75G Cheaper*, *Id.* at 3. With ad time still available as of the start of the series, remaining inventory was further discounted by another $25,000. *See* Rudy Martzke, *Sports on TV*, USA TODAY, Oct. 17, 1996, at 2C. The saleability of the World Series, the crown jewel of baseball's events, stands in sharp contrast to ad sales for the 1997 Super Bowl, also on Fox. Fox sold out all 58 available 30-second ad slots (at a rate of $1.2 million a spot, up from $1.1 million from the previous year) three weeks in advance of the game. Dottie Enrico, *Super Bowl Ad Roster Filled at $1.2 Million a Spot*, USA TODAY, Jan. 7, 1997, at 1B.

(i) terminate this Agreement, pro rate the fees due to the time of termination, and neither party shall be under any further obligation to the other; or (ii) apply a pro rata credit or make-good.

A good strategy in some cases is to first offer the licensee the right of termination as the alternative form of relief. The reasons are twofold. First, the return of funds is to be avoided if at all possible. Secondly, neither a broadcaster nor a sponsor in a highly competitive product category (and whose target consumers are efficiently delivered by a league's programming such as the case in the soft drink, malt beverage and athletic footwear categories) is likely to exercise the right to terminate for many of the same types of reasons discussed in the above subsection with respect to authentics licensees.

If a rebate is to be provided, to avoid any potential dispute regarding the amount of the rebate, the provision should provide for a means of calculating the refund. This can be achieved by incorporating a formula such as: (a) number of opportunities lost (e.g., games, weeks of play), (b) divided by a base number that is equal to the total number of opportunities, (c) multiplied by the annual rights fee due, (d) the sum of which equals the amount of the rebate. The following examples are illustrative of this approach:

$$\frac{\text{\# Games Lost (8)}}{\text{Total \# Games in Season (16)}} \times \text{Annual Rights Fee (\$1,000,000)} = \text{Amount of the Rebate (\$500,000)}$$

or

$$\frac{\text{\# Weeks Lost (6)}}{\text{Total Weeks in Season (24)}} \times \text{Annual Rights Fee (\$1,000,000)} = \text{Amount of the Rebate (\$250,000)}$$

To minimize the revenue placed at-risk, a licensor should include some type of "cap" device. Such a mechanism might include providing that a refund will only be available if a designated percentage of games

are canceled and, further limiting the amount to a pro rata portion of the rights fee payments and capped at a designated percentage of the fee.[72]

Formulas can be structured in any number of different ways. However, whatever formula is adopted should be tailored to the mutual agreement of the parties and take into account the particular rights granted, the nature of the performance obligations, and the fee structure and payment schedule involved.

4. Equitable Adjustment

In contrast to the credit/rebate form of relief that is particularly suited for sponsors and broadcasters, and wholly unsuitable for many types of licensing arrangements, equitable adjustment is a form of relief that is universally applicable and particularly fitting for merchandise licensees. The following is typical of a *force majeure* provision that provides for such relief:

> [i]n the event of a strike or lock-out ("Work Stoppage") involving the League and its players that causes the pre-emption, in whole or in part, of the Season, all obligations of LICENSEE hereunder shall continue, including all payment obligations, and when such Work Stoppage has ceased, if such Work Stoppage has had a material adverse affect on LICENSEE's Licensed Product sales, LICENSOR and LICENSEE shall in good faith confer with each other to negotiate with respect to an equitable adjustment to LICENSEE's obligations hereunder.

From a licensor's perspective, this is the optimal form of *force majeure* relief. It requires full performance through the duration of the work stoppage; relief, if warranted, is post-stoppage; and it provides the licensor with the maximum amount of flexibility to fashion appropriate relief.

The flexibility such provision provides is perhaps its most attractive feature. By not locking into particular relief, it affords the parties the latitude to customize the relief to their specific circumstances. This can actually be more advantageous to a licensee than prescribed relief because it provides the licensee with a contractual basis to press for what

72. Capping devices can also be applied within the retail licensing context. Under a retail licensing arrangement, one possible approach to limit the extent of any required reduction in the minimum guarantee, and provided the license calls for scheduled minimum installment payments throughout the contract year, is to (i) provide that the mechanism be only triggered by the loss of a minimum number of games, and (ii) cap the maximum amount of the reduction to a designated percentage of the minimum guarantee, and then require licensee to only pay earned royalties on sales in excess of the reduced minimum guarantee.

may be more useful relief under the prevailing circumstances. As discussed above, a licensee can come to find that a right of termination is useless or that an extension will still not enable it to meet its minimum royalty payment guarantee. With the flexibility provided by this type of provision, a full menu of relief is available that can include more desirable relief options such as product additions, reduction of minimum guarantees or advertising support, or cross collateralization of royalty payments.

Notwithstanding some of the advantages that the above form of relief can provide a licensee, a licensee may oppose this type of provision for precisely the same reasons licensors find it desirable: the relief is post-stoppage and is not assured. However, because the most valued marketing relationships are typically long-term, and often long-standing, there is a built-in element of self-policing that militates against any grossly inequitable adjustment. Moreover, a prophylactic can be added by tying the equitable adjustment provision to an arbitration clause. In this way, the parties can avail themselves of an expedient, and cost-efficient, dispute resolution mechanism in the event the parties cannot reach agreement on the extent of the adjustment.

VI. THE POINT AFTER

The MLB and NHL work stoppages in particular have had a profound impact on sports marketing relationships. The enduring aspect of their strife has been to shock Leagues, players and their marketing partners into the realization that true licensing disaster is possible. This realization should forever after make parties to a pro sports licensing arrangement routinely take such possibilities into consideration in their negotiations. As a result of licensee consolidation through corporate acquisition,[73] the steady movement of the Leagues towards the "less is more" philosophy and "marketing partner" model,[74] and ever-increasing League creation of controlled media and special events, allows major

73. For example: VF Corporation owns Nutmeg Mills and Cutler Sports; Rusell owns The Game and Chalkline; Fruit of the Loom owns Salem Sportswear, Pro Player and Artex; NIKE owns Sports Specialties and Bauer; and Tultex owns Logo Athletics and Discus Athletics.

74. That is, having fewer overall merchandise licensees and sponsors but in turn requiring those selected companies to make substantially greater commitments and investments in the licensor's sport. McGee, *supra* note 11; Nichols et al., *The 1994 Annual Industry Report*, TEAM LICENSING BUS., May 1994, at 18, 26. In many instances, the financial commitment of some merchandise licensees now rivals that of corporate sponsors—the long favored participants in a League's licensing program (because of their in-game advertising in national broadcasts and national consumer promotions).

licensees now to enjoy the greatest negotiating leverage since the dawn of sports licensing. Given this, the Leagues must be prepared to share some financial risk, and should be more willing to bargain on the issue of *force majeure* protection.

In dealing with such matters, counsel must recognize that each licensing situation is unique and must be approached as such. A multi-League and entertainment property license holder can divert resources (e.g., production capacity, raw material, etc.) to the production of other merchandise in ways a single license holder cannot. A domestic manufacturer can react more quickly to changing conditions than a licensee that sources offshore. An unaligned apparel company has different risks than a vertical mill. A conglomerate (e.g., Sara Lee) is better able to lay-off business loss than a privately owned sportswear company. A corporate sponsor can switch gears faster and reallocate funds to another sport more easily than a merchandise licensee. A television network is better able to tolerate significant financial pain than is any merchandise licensee.

Because of the widely divergent sizes and resources of licensees and licensors alike, in addressing *force majeure* concerns, counsel should strive for the adoption of a provision that is fully understood and that suits his or her client's goals and the requirements of the client's particular business. As the drafter, once an election is made on the type of provision to be provided, the licensor should steadfastly insist upon acceptance of its standard terms unless circumstances of a particular negotiation dictate an exception, in which case, based on the thorough understanding of the purpose of each clause of the *force majeure* provision, adapt the provision so that as much of that purpose can nevertheless be achieved. The attorney that approaches this now highly-charged area of contract in the foregoing manner will, no doubt, find himself or herself having a distinct advantage over the adversary that approaches this area with nonchalance. More importantly, counsel will ensure that its client is not "blind-sided" by unforeseen, but foreseeable, risk.