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IF YOU BUILD IT, WILL THEY STAY? AN EXAMINATION OF STATE-OF-THE- ART CLAUSES IN NFL STADIUM LEASES

I. INTRODUCTION

The most prominent and cherished asset in many communities across the country is a local professional sports franchise. State and local governments place a high value on the potential benefits of hosting a professional sports franchise, as demonstrated by the extravagant offers of public funds to attract or retain a franchise. With this in mind, it is easy to see how franchises could take advantage of cities¹ and how cities ultimately agree to make promises that are extremely difficult, if not impossible, to keep. One example of such a difficult, if not impossible, promise is the “state-of-the-art” clause: a unique agreement where the city promises to maintain a top-of-the-line sports venue or else the sports franchise is free to break its lease and relocate with minimal, if any, consequences.² It is important to consider the consequences of such a powerful clause in the context of the National Football League (NFL), where there has been an ugly history of franchise relocation. Yet, this is exactly what is poised to happen as the city of St. Louis finds itself wondering how it will comply with the demanding state-of-the-art clause in their lease with the St. Louis Rams.³ An analysis of these clauses will show that they set a dangerous precedent that gives even more power to professional sports teams, with leverage to potentially extract hundreds of millions of dollars from the nation’s urban areas and their citizens.

This Comment will first look at the history of NFL venues and how they have evolved from borrowed baseball fields to palatial billion-dollar facilities.

1. The term “city” is used generally in this article to refer to cities, counties, and statutorily created stadium districts, or any of the three that would own a sports facility and lease it to an NFL franchise.

2. See LEASE BETWEEN ST. LOUIS RAMS AND REGIONAL CONVENTION AND VISITORS COMMISSION AND ST. LOUIS NFL CORPORATION FOR TRANSWORLD DOME art. 16(e)(1) (1995) [hereinafter LEASE].

3. See Jim Thomas, *How Rams Could Get Out of St. Louis Dome Lease*, ST. LOUIS POST-DISPATCH, Aug. 2, 2009, at C1.

This Comment will then examine the city of St. Louis's long and complex relationship with professional football, and how in its agreements to attract the Rams from Los Angeles, the city received more than it bargained for. Next, this Comment will examine the use of clauses in leases that require the facility to be in the "top tier" of all similar sports facilities: state-of-the-art clauses. This Comment will primarily focus on the St. Louis Rams's state-of-the-art clause but will also discuss these clauses as applied to all sports teams and venues. This Comment will also review the volatile history of franchise movement in the NFL, and why both the NFL and individual cities are relatively powerless to stop franchise relocation. Finally, this Comment concludes that state-of-the-art clauses are unconscionable and unenforceable: they exacerbate the problems of franchise free agency, and set an alarming precedent.

II. THE HISTORY OF NFL VENUES

In the early days, NFL teams merely wanted a facility to call their own.⁴ Following World War II, "[m]ost NFL teams played in baseball parks that were owned by baseball teams . . ."⁵ Historically, baseball teams controlled the use of the shared ballparks, which forced NFL teams to schedule their games around conflicts with their baseball landlords.⁶ "[Baseball teams] also drove hard bargains with respect to ancillary revenues: The Detroit Tigers, for example, took all the concessions income when the Lions played in their ballpark."⁷

The state-of-the-art arms race, as it exists today, began in 1965, when the Astrodome opened in Houston "as the self-styled eighth wonder of the world."⁸ This was the first example of a "sports facility in which the building [itself] was as much of an attraction as the team."⁹ The Astrodome soon

4. See JAMES QUIRK & RODNEY D. FORT, *PAY DIRT: THE BUSINESS OF PROFESSIONAL TEAM SPORTS* 131 (1992).

5. *Id.* Cleveland was the only team to play in a publicly-owned stadium. *Id.*

6. *Id.* It should be noted that "those were the days of natural grass playing fields, which created major maintenance problems. Avoiding these maintenance issues required creative scheduling." *Id.* For example, "the Bears didn't start their home season in Wrigley Field until the Cubs' season was over, and the NFL Giants had late home season openings at the Polo Grounds." *Id.*; see also Bill King, *A Century of Change: Evolution of Sports Facilities Driven by New Building Techniques and New Expectations*, *SPORTS BUS. J.*, Sept. 29, 2008, at 21.

7. MICHAEL N. DANIELSON, *HOME TEAM: PROFESSIONAL SPORTS AND THE AMERICAN METROPOLIS* 238 (1997). The Detroit Lions played at Tiger Stadium from 1938 to 1974, when they moved into the Pontiac Silverdome. *Id.*

8. *Id.* at 240.

9. *Id.* "[I]n light of the mediocre teams that played in the Astrodome," perhaps this was an example of the building being even more of an attraction than the sports team itself. *Id.*

proved to be a trendsetter, as city after city planned its own versions of “the domed wonder.”¹⁰ Modern luxury seating, arguably “the most important part of state-of-the-art sports facilities” today, made its debut in the Astrodome with fifty-five luxury boxes.¹¹

In the 1990s, the United States found itself in the midst of an unprecedented boom in construction of sports facilities.¹² “Comfortable seats in place of wooden benches, concessionaires peddling crab cakes as well as hot dogs, electronic ‘razzle-dazzle’ in place of minimal score boards—all [became] part of a total package in [fancy] new wrappings designed to increase team and league revenues.”¹³

The newest stadiums today are designed to be multi-purpose venues, capable of hosting conventions as well as football games.¹⁴ This trend makes sense because multi-purpose stadiums generate more revenue and “cost less to build and operate than a pair of stadiums.”¹⁵ “In planning for new stadiums, cities and teams are striving to create the biggest and the best, as well as an individualized stamp for their particular setting.”¹⁶ Of course, building state-of-the-art facilities with the latest bells and whistles has greatly increased the costs of sports arenas and stadiums.¹⁷

The Dallas Cowboys’ new stadium in Arlington, [Texas] . . . debut[ed] in September 2009 at a cost of about \$1 billion, and the \$1.3 billion Meadowlands Stadium in East Rutherford, [New Jersey], which will be home to the [New York] Giants and the [New York] Jets, is scheduled for completion in August 2010¹⁸

In contrast, University of Phoenix Stadium in Glendale, Arizona, which opened in 2006, was built for a total cost of \$455 million.¹⁹

The standard of what is considered to be a “state-of-the-art” sports facility

10. *Id.*

11. *Id.* at 242.

12. See generally Allen R. Sanderson, *Sports Facilities and Development: In Defense of New Sports Stadiums, Ballparks, and Arenas*, 10 MARQ. SPORTS L. J. 173 (2000).

13. DANIELSON, *supra* note 7, at 235-36.

14. See Sanderson, *supra* note 12, at 173.

15. DANIELSON, *supra* note 7, at 238.

16. Bill Coats, *\$1 Billion Price Tag? Glitzy New Stadiums Put City on Notice if It Wants to Keep Rams*, ST. LOUIS POST-DISPATCH, May 30, 2008, at A1.

17. *Id.*

18. *Id.*

19. *Id.*

is constantly evolving and consequently, the cost of meeting this standard is rising.²⁰ It is against this platinum standard that NFL host cities are measuring their sports facilities.²¹ In particular for the city of St. Louis, this is only the latest in a series of problems in keeping an NFL franchise.²²

III. THE SAGA OF PROFESSIONAL FOOTBALL IN ST. LOUIS.

In the spring of 1987, after twenty-eight seasons, the city of St. Louis lost its football team, the Cardinals, to Phoenix, Arizona.²³ The Cardinals had been threatening to leave for years in attempts to get the city to build a new stadium for the team.²⁴ In 1987, antagonism between the team and the St. Louis community was so high that a new stadium was politically impossible.²⁵

“After the loss of the Cardinals, there was almost instant, tangible interest in getting another team.”²⁶ But while everyone wanted to bring NFL football back to the St. Louis community, no one knew exactly how to do it.²⁷ In 1993, the NFL decided to add two new teams, and many believed St. Louis would receive one of these franchises.²⁸ To establish itself as a suitable home for a team, the city of St. Louis and St. Louis County, with help from the State of Missouri, built a \$260 million domed stadium as part of the Cervantes Convention Center.²⁹

Just as Indianapolis had built its Hoosier Dome as part of the Indiana Convention Center and attracted the Colts, St. Louis . . . wanted a . . . football stadium that would . . . provide the [existing] Convention Center with thousands of square feet of exhibition space to help elevate the city’s image as a premier convention site.³⁰

20. See Evan Weiner, *New Stadiums Set High Bar for Rest of the NFL*, N.Y. SUN, June 26, 2008, at 29.

21. *See id.*

22. See MARK S. ROSENTRUB, *MAJOR LEAGUE LOSERS: THE REAL COST OF SPORTS AND WHO’S PAYING FOR IT* 299 (1997) (chronicling the political battles in St. Louis before and after the loss of the Cardinals and during the search for a new football franchise).

23. *See id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 299-300.

29. *Id.* at 300.

30. *Id.*

Unfortunately, problems with establishing a local ownership group in St. Louis eventually led to the NFL awarding its new franchises to Charlotte, North Carolina and Jacksonville, Florida.³¹ St. Louis's only remaining hope for an NFL team was to convince an existing franchise to relocate.³² Around this time, the Los Angeles Rams were becoming increasingly dissatisfied with their home in Anaheim. Although they had left the Los Angeles Coliseum for supposedly greener pastures, the team still wanted a stadium with more of the revenue sources that newer facilities could offer.³³ "When Los Angeles, Anaheim, and Orange County all seemed unwilling to build a new facility, the Rams cast a roving eye toward their original [M]idwestern roots . . ."³⁴ St. Louis was able to offer the Rams a lease that would allow them to control most, if not all, of the revenues produced by the stadium.³⁵

The Rams, however, had other "needs." The team not only needed a way out of their lease obligations to the city of Anaheim and a new practice facility, the team also had the cost of moving the team across the country to consider.³⁶ The revenues to meet many of these additional needs did not come directly from taxpayers, but rather from the fans through the sale of Private Seat Licenses (PSLs).³⁷

On January 17, 1995, Rams owner Georgia Frontiere announced that the Rams would move to St. Louis for the 1995 season.³⁸ Two months later, the other NFL team owners voted overwhelmingly to block the Rams's move.³⁹ However, a sudden reconsideration was in order after threats of litigation came from the Rams and Missouri Attorney General Jay Nixon.⁴⁰ On April 12, 1995, the NFL team owners voted 23-6-1 to approve the Rams move to St. Louis.⁴¹ St. Louis once again had an NFL franchise, and the Rams entered into a sweetheart of a lease.

31. *Id.* at 307-08.

32. *See id.* at 310.

33. *Id.*

34. *Id.*

35. *Id.* at 310-11.

36. *Id.* at 310-11.

37. *Id.* at 311.

38. *Id.* at 309.

39. *Id.*

40. *Id.*

41. *Id.* Interestingly, the owner of the Raiders abstained from this vote and the owner of the Cardinals—the team that had just left St. Louis only a few years earlier—voted no. "Ironically, Rams owner Ms. Frontiere cast the deciding vote since twenty-three were required for approval." *Id.*

IV. THE STATE-OF-THE-ART CLAUSE

The St. Louis Rams are able to break their lease at ten-year intervals as a result of a unique clause that requires the Edward Jones Dome to be in the “‘top’ twenty-five (25%) percent of all NFL football stadia [or] all NFL football facilities, if such NFL football stadia and facilities were to be rated or ranked according to the matter sought to be measured.”⁴² As the lease specifies, the stadium or any of its components must be in the “First Tier” by March 1, 2005, and again by March 1, 2015, or the thirty-year lease becomes a one-year lease:

In the event [that] the Facilities and each Component thereof is not First Tier [by] March 1, 2005, or March 1, 2015, the RAMS may by written notice to CVC convert the term of this Amended Lease to an annual tenancy from the date of notice . . . with the RAMS having successive unilateral [sic] annual renewal options thereafter until then end of the original term of this Amended Lease.⁴³

The lease goes on to provide that “the RAMS will then be entitled to negotiate and execute a lease with any person or entity and to relocate from [the Edward Jones Dome] as of the end of any year of the lease period.”⁴⁴

There are a number of very good questions raised by this provision: Who ranks the NFL stadiums? By what criteria are they ranked? The language of the lease on this topic is, surprisingly, both exhaustive and vague.⁴⁵ Annex 1 of the lease states that:

the Facilities, taken as a whole, and each Component of the Facilities, respectively taken as a whole, must be among the ‘top’ twenty-five percent (25%) of all NFL football stadia and NFL football facilities, if such stadia and facilities were to be rated or ranked according to the matter sought to be measured.⁴⁶

42. ANNEX 1 TO LEASE BETWEEN ST. LOUIS RAMS AND REGIONAL CONVENTION AND VISITORS COMMISSION AND ST. LOUIS NFL CORPORATION FOR TRANSWORLD DOME, art. 1.3.1-3.2 (1995) [hereinafter ANNEX].

43. LEASE, *supra* note 2.

44. *Id.*

45. Thomas, *supra* note 3.

46. ANNEX, *supra* note 42, at art. 1.3.2.

No less than fifteen components that must be “first-tier” are listed: “everything from luxury boxes to club seats, lighting, to scoreboards, . . . regular stadium seating, concession areas, common areas (such as concourses and restrooms), electronic and telecommunications equipment,” locker and training rooms, and even the playing surface of the field itself.⁴⁷

None of the provisions for luxury boxes, club seats, or stadium seats, however, specifically dictates the number of seats or suites.⁴⁸ It is not as if adding a magic number of club seats or suites will automatically make the stadium comply with the first-tier standards. Are the seats cushioned? Are the seats six inches wider? How wide are the seating aisles? Is there more legroom in other stadiums? Are the concourses wider? Is the lighting better? Are the scoreboards more high tech? Is Wi-Fi Internet access offered to the fans throughout the stadium? These are all areas that can be measured fairly easily.⁴⁹ When St. Louis opened its new football facility in 1995, it was a \$281 million, state-of-the-art, 66,000-seat sports palace; yet, “the state-of-the-art facility from the mid-1990s is antiquated in 2008.”⁵⁰

The next scheduled deadline for St. Louis’s Edward Jones Dome to meet first-tier status is March 1, 2015. However, the process of the Rams getting out of the lease and potentially relocating could start within the next two years.⁵¹ On or before February 1, 2012, the St. Louis Convention and Visitors Commission must deliver a preliminary compliance plan.⁵² The Rams will then have until March 1, 2012, to notify the St. Louis Convention and Visitors Commission if they approve.⁵³ If the St. Louis Convention and Visitors Commission and the Rams ultimately cannot agree, the matter will go before an arbitration panel on June 15, 2012.⁵⁴ If the St. Louis Convention and Visitors Commission cannot afford the renovations called for by arbitrators, the lease states, “[t]he Rams shall be entitled to negotiate and execute a lease with any person or entity and to relocate from the [Edward Jones Dome] after the 2015 First-Tier Measuring Date.”⁵⁵ “The stadium lease would become a

47. Thomas, *supra* note 3.

48. *Id.*

49. ANNEX, *supra* note 42, at art. 1.3.1; Thomas, *supra* note 3.

50. Weiner, *supra* note 20; *see also* Coats, *supra* note 16.

51. LEASE, *supra* note 2, at art. 25; Thomas, *supra* note 3.

52. Thomas, *supra* note 3. This “overall plan must include a financial plan as well as the source(s) of funds.” *Id.*

53. *Id.*; LEASE, *supra* note 2, at art. 25

54. Thomas, *supra* note 3. “The arbitration must be completed by the end of 2012.” *Id.*; *see also* LEASE, *supra* note 2, at art. 25.

55. ANNEX, *supra* note 42, at art. 1.3.2.

year-to-year lease, with the Rams free to move after the 2014 season.”⁵⁶

A current \$29 million renovation, which includes, among other things, two new video boards in the end zones, has satisfied the clause requirements for 2005.⁵⁷ However, the new Meadowlands stadium under construction in East Rutherford, New Jersey, along with the recently completed Cowboys Stadium in Arlington, Texas and Lucas Oil Field in Indianapolis, Indiana, are “the cream of the crop” and will be no more than five or six years old by 2015.⁵⁸ Furthermore, these three venues are the eighteenth, nineteenth, and twentieth stadiums built since the Rams moved into the Edward Jones Dome.⁵⁹ Several other stadiums, meanwhile, have undergone significant renovations, some costing upwards of hundreds of millions of dollars.⁶⁰ This all leaves the St. Louis Convention and Visitors Commission and Rams fans everywhere asking a curious question: How does one make a 20-year-old building the caliber of a brand-new \$1 billion dollar stadium?

The state-of-the-art provision seems to assume that additional public funds will need to be spent on the stadium on a fairly regular basis to keep up its standing in stadium rankings.⁶¹ Although the “St. Louis Convention and Visitors Commission has set up a preservation fund with \$4 million per year to maintain the dome’s ranking among all facilities,”⁶² this most likely will not suffice to keep it in the top twenty-five percent of all NFL football venues. One longtime NFL team executive recently estimated that the St. Louis Convention and Visitors Commission would have to put in “10 to 20 times what they’re putting into the dome right now” in order to become a top eight facility by 2015.⁶³ Other estimates put the total public cost over the entire thirty-year term of the Rams’s lease at approximately \$36 million per year.⁶⁴

Other NFL teams with similar clauses in their stadium leases are the Cincinnati Bengals, Kansas City Chiefs, and San Diego Chargers.⁶⁵ The

56. Thomas, *supra* note 3.

57. *Edward Jones Dome Renovation Plans Include New Video Displays*, SPORTSBUSINESS DAILY.COM, Oct. 4, 2007, <http://www.sportsbusinessdaily.com/article/115447>.

58. *See Coats, supra* note 16.

59. *Id.*

60. *Id.*

61. *See id.*

62. ROSENTRAUB, *supra* note 22, at 316.

63. Thomas, *supra* note 3.

64. JOANNA CAGAN & NEIL DEMAUSE, *FIELD OF SCHEMES: HOW THE GREAT STADIUM SWINDLE TURNS PUBLIC MONEY INTO PRIVATE PROFIT* 61 (1998).

65. *See LEASE AGREEMENT BY AND BETWEEN THE BOARD OF COMMISSIONERS OF HAMILTON COUNTY, OHIO AND CINCINNATI BENGALS, INC.*, May 29, 1997, art. 12.3-12.4 [hereinafter *LEASE BENGALS*]; *Chiefs, Royals Plan to Stay Put*, SPORTS BUS. J., Nov. 15, 2004, at 28; *see also City,*

Bengals's lease for Paul Brown Stadium contains a state-of-the-art clause, requiring Hamilton County to install any new technologies in use by fourteen other NFL teams.⁶⁶ With new stadiums being constructed and other stadiums frantically upgrading to compete with them, the cost to the taxpayers of Hamilton County for upgrades to Paul Brown Stadium in the next decade could run into the hundreds of millions of dollars.⁶⁷ The Kansas City Chiefs are currently in the process of renovating Arrowhead Stadium to comply with the state-of-the-art clause triggered in 2007.⁶⁸ "This massive renovation plan, to be completed by 2010, will include [a new] 'Horizons Level' that will be constructed . . . atop the upper deck on the south side of the stadium, . . . a new press box, luxury suites, and premium seats."⁶⁹ The San Diego Chargers also had a lease requirement for the city to maintain a state-of-the-art stadium, but this was eliminated in 2004 under the belief that building a new stadium would be a possibility within a few years.⁷⁰

Although no team has yet exercised this provision in its lease in order to relocate, it is a disturbing possibility. The NFL has had problems with managing franchise relocation in the past,⁷¹ and the use of state-of-the-art clauses could make this problem worse.

V. FRANCHISE MOVEMENT IN THE NFL

Franchise movement, sometimes called "[f]ranchise free agency,"⁷² tarnishes the image of the NFL. The public sees "extraordinarily rich owners involved in high-stakes pursuit of new stadiums that will make them wealthier, yet expect huge taxpayer funding."⁷³ "When an owner uses one city's offer of [a new venue] to up the ante in another city, that impression only gets

Chargers Reach Middle Ground, SPORTS BUS. J., July 12, 2004, at 32.

66. See LEASE BENGALS, *supra* note 65, at art.12.3. Interestingly, the Cincinnati Bengals's lease specifies that the county must install any new technologies in use, up to and including "holographic replay systems." *Id.*

67. See Ken Belson, *Stadium Booms Deepens Municipal Woes*, N.Y. TIMES, December 25, 2009, at B8.

68. See *Chiefs, Royals Plan to Stay Put*, *supra* note 65.

69. *Arrowhead Stadium*, STADIUMSOFPROFOOTBALL.COM, <http://stadiumsofprofootball.com/afc/ArrowheadStadium.htm> (last visited Feb. 4, 2010).

70. *City, Chargers Reach Middle Ground*, *supra* note 65.

71. Paul Attner, *Seeing is Deceiving*, THE SPORTING NEWS, Sept. 23, 1996, at 31.

72. See Katherine C. Leone, Note, *No Team, No Peace: Franchise Free Agency in the National Football League*, 97 COLUM. L. REV. 473, 495-506 (1997) (quoting Attner, *supra* note 71, at 31).

73. Attner, *supra* note 71, at 31.

worse.”⁷⁴ Unfortunately, “[n]either the NFL nor cities with franchises possess the regulatory tools necessary to stem the tide of franchise free agency.”⁷⁵ Thus, franchise free agency poses a threat to the stability and vitality of the league because it engenders negative public perceptions and erodes fan support.⁷⁶

The trend of teams threatening to leave for greener pastures, greener in the monetary sense at least, if cities did not build new stadiums for them can be traced back to the 1950s.⁷⁷ Many thought that these were idle threats was abandoned when team owner Walter O’Malley, after several years of increasingly vocal lobbying for a new stadium, pulled Major League Baseball’s Brooklyn Dodgers out of town in 1957.⁷⁸ Similar sentiments were echoed in 1966, when the Milwaukee Braves moved to Atlanta, and into a brand-new \$18 million, 52,000-seat ballpark.⁷⁹ Mayors and city managers everywhere got the hint, and began to invest in either updating, or completely replacing, older facilities owned by existing major teams, in order to keep the teams from leaving town.⁸⁰

The NFL, like other sports leagues, has sought to restrict franchise relocation, and to control the geographic territories occupied by its league members.⁸¹ The NFL has a “home territory” clause in its constitution.⁸² This clause defines a team’s home territory as “the city in which such club is located and for which it holds a franchise and plays its home games and includes the surrounding territory to the extent of 75 miles in every direction from the exterior corporate limits of such city”⁸³ Rule 4.3 of Article 4 of the NFL Constitution provides that three-fourths of the league’s members must approve any request to relocate a franchise before relocation can occur:

The League shall have exclusive control of the exhibition of football games by member clubs within the home territory of each member. No member club shall have the right to transfer its franchise or playing site to a different city, either within or outside its home territory, without prior approval by

74. Leone, *supra* note 72, at 495.

75. *Id.*

76. *Id.*

77. QUIRK & FORT, *supra* note 4, at 134-35.

78. *Id.*

79. *Id.* at 129.

80. *Id.* at 135.

81. See NFL CONST. AND BYLAWS art. IV, §4.1 (rev. 2006).

82. *Id.*

83. *Id.*

the affirmative vote of three-fourths of the existing member clubs of the League.⁸⁴

Despite these constitutional provisions, “the NFL has a very limited ability to control franchise relocation under present antitrust laws.”⁸⁵ Furthermore, the NFL is reluctant to use its limited ability in large part due to the landmark antitrust case *Los Angeles Memorial Coliseum Commission v. National Football League (Raiders I)*.⁸⁶

The Oakland Raiders’s lease with the Oakland Coliseum expired in 1978.⁸⁷ On March 1, 1980, Al Davis, the club’s managing general partner, and Los Angeles Coliseum officials signed an agreement outlining the terms of a proposed Raiders relocation to Los Angeles.⁸⁸ At an NFL meeting two days later, Davis announced his intentions.⁸⁹ Davis further objected to Rule 4.3, and insisted that it was illegal under federal antitrust laws.⁹⁰ Nevertheless, NFL team owners voted on March 10, 1980, 22-0 against the move.⁹¹ This vote did not meet Rule 4.3’s requirement of three-quarters approval.⁹²

The Coliseum Commission and the Oakland Raiders responded with an antitrust suit against the NFL, charging that the League’s three-fourths approval rule for franchise relocations violated Section 1 of the Sherman Act.⁹³ The Coliseum Commission and the Oakland Raiders eventually won a jury verdict, and on July 14, 1982 the United States District Court for the Central District of California permanently enjoined the NFL from interfering with the Raiders’s move.⁹⁴

Until recently, the Ninth Circuit’s decision in *Raiders I* has been the preeminent authority as to whether a professional sports league has the power to deny approval of relocation.⁹⁵ However, further complicating this issue is the Seventh Circuit’s recent decision in *American Needle Inc. v. National*

84. *Id.*, at art. IV, §4.3 [hereinafter Rule 4.3].

85. Leone, *supra* note 72, at 495.

86. See generally *Los Angeles Mem’l Coliseum Comm’n v. Nat’l Football League*, 726 F.2d 1381 (9th Cir. 1984) [hereinafter *Raiders*].

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. See MATTHEW J. MITTEN ET.AL., *SPORTS LAW AND REGULATION* 459 (2nd ed. 2009) (discussing the background facts leading up to *Raiders*). Five teams abstained from this vote. *Id.*

92. *Id.*

93. *Id.*; see also Sherman Act, 15 U.S.C. §1 (2009).

94. *Raiders*, 726 F.2d at 1386.

95. Leone, *supra* note 72, at 495.

Football League (American Needle).⁹⁶ The underlying facts of *American Needle* are straightforward. For more than twenty years, American Needle held a nonexclusive license to design and manufacture hats and other headgear with the names and logos of NFL clubs.⁹⁷ Nine years ago, the NFL decided to offer an exclusive license to Reebok, American Needle's main competitor.⁹⁸ American Needle sued, contending that the new NFL licensing arrangement violated Section 1 of the Sherman Act.⁹⁹ The NFL responded by alleging not only that their licensing agreement was procompetitive, but they also raised the same "single entity" defense that was unsuccessfully used in *Raiders I*.¹⁰⁰ The district court found that the NFL's teams acted as a single entity for purposes of the licensing of intellectual property, and therefore, could issue an exclusive license without violating the Sherman Act.¹⁰¹ On review, Judge Kanne of the Seventh Circuit Court noted that the record amply established that the league's teams had long "acted as one source of economic power . . . to license their intellectual property," meaning that there was no basis for a claim under Section 1 of the Sherman Act.¹⁰² Remarkably, *American Needle* held that when the league's clubs are producing NFL football as a product, they are acting as a single economic entity.¹⁰³ Just because the individual clubs are independently owned and operated, they can still be looked at as a single collective entity.¹⁰⁴ On June 29, 2009, the Supreme Court agreed to review the *American Needle* decision.¹⁰⁵ The case will be argued in either late 2009 or early 2010.¹⁰⁶

Could the Supreme Court's holding in *American Needle* potentially overrule *Raiders I*? "This will be the first time the Supreme Court will consider the merits of the single entity defense'" ¹⁰⁷ Although a broad sweeping holding on the single entity defense is unlikely, it is possible that "a favorable court decision could [potentially] give the league 'a lot more [breathing] room not to have to fear suits' on issues such as

96. See generally *American Needle Inc. v. Nat'l Football League* 538 F.3d 736 (7th Cir. 2008).

97. *Id.* at 738.

98. *Id.*

99. *Id.* at 739.

100. *Id.* at 738-39.

101. *Id.* at 739-40.

102. *Id.* at 744.

103. *Id.* at 743.

104. *Id.*

105. *Court Takes Case Over Licensing of NFL Apparel*, ESPN.COM, June 29, 2009, <http://sports.espn.go.com/nfl/news/story?id=4294204>.

106. *Id.* The case is *American Needle v. National Football League*. *Id.*

107. *Id.*

relocation . . .”¹⁰⁸ Yet, until the Supreme Court decides otherwise, the looming uncertainty and threat of treble damages under *Raiders I* puts the NFL in no position to prohibit franchise relocations.¹⁰⁹

Unfortunately, cities are in no better position than the league to prevent relocations or even to protect their investments.¹¹⁰ Although cities have tried to find creative ways to keep these teams from jumping from place to place, there has never been any true stability for cities and fans subject to the whims and demands of team owners.¹¹¹ Even “Congress, in response to calls for help from leagues, city officials, and stadium commissioners who feel abandoned or ‘blackmailed’ by franchise owners,” has tried to help.¹¹² Yet, out of the numerous bills that would regulate team relocations, or otherwise protect the cities, not one of them has passed.¹¹³

Ultimately, the current fixed number of thirty-two NFL franchises coupled with the obviously greater number of cities vying for professional sports teams allows owners to “shop around for the best package of subsidies a city is willing to offer.”¹¹⁴ “The multiple [franchise] movements in [1995] illustrated that even owners of mediocre teams could manipulate cities” due to some cities’ desperation to host an NFL team.¹¹⁵

108. *Id.*; see also Lester Munson, *Antitrust Case Could be Armageddon*, ESPN.COM, July 17, 2009, http://sports.espn.go.com/espn/columns/story?columnist=munson_lester&id=4336261 (quoting Matt Mitten, Director, National Sports Law Institute, Marquette University Law School). “Experts agree that the case known as American Needle vs. NFL could easily be the most significant legal turning point in the history of American sports.” *Id.*

109. Commissioner Tagliabue said that if not for the league’s antitrust exposure, “[t]he Rams move [to St. Louis] would have been blocked.” *Antitrust Issues in Relocation of Professional Sports Franchises: Hearing before the Subcomm. on Antitrust, Bus. Rights, and Competition of the Senate Comm. on the Judiciary*, 104th Cong. 55 (1995) (statement of Comm’r Tagliabue).

110. See generally *Indianapolis Colts v. Mayor & City Council of Baltimore*, 741 F.2d 954 (7th Cir. 1984), *cert. denied*, 407 U.S. 1052 (1985). Baltimore also tried to keep the Colts from playing in Indianapolis through the power of eminent domain. *Id.* at 955.

111. *Id.*; see generally *City of Oakland v. Oakland Raiders*, 176 Cal. Rptr. 646 (1981), *vacated and remanded*, 646 P.2d 835 (1982). The city of Oakland attempted to use the power of eminent domain to condemn the Oakland Raiders football team so they could manage the team and keep it playing in Oakland-Alameda County Coliseum. Many leagues themselves have rules that require individual team owners to get league approval before they relocate to a new city, but it is argued that these restrictions are also illegal. Daniel E. Lazaroff, *The Antitrust Implications of the Franchise Relocation Restrictions in Professional Sports*, 53 *FORDHAM L. REV.* 157, 210-11 (1984); Daniel S. York, *The Professional Sports Community Protection Act: Congress’ Best Response to Raiders?*, 38 *HASTINGS L.J.* 345, 351-54 (1987) (explaining that many leagues are afraid to try to enforce their own rules against relocation after *Raiders*).

112. York, *supra* note 111, at 345-46.

113. *Id.*

114. Leone, *supra* note 72, at 481.

115. Bradley J. Stein, *How the Home Team Can Keep from Getting Sacked: A City’s Best Defense to Franchise Free Agency in Professional Football*, 5 *TEX. REV. ENT. & SPORTS L.* 1, 4-9

Although the biggest period of franchise free agency happened in 1995,¹¹⁶ the threat of further franchise movement in the NFL is alive and well today.¹¹⁷ The St. Louis Rams are not the only NFL franchise that may be shopping around for a new home.¹¹⁸ The Minnesota Vikings currently “play in a[n] . . . antiquated and poor revenue-producing stadium, and have a lease [that runs only] through 2011.”¹¹⁹ The Oakland Raiders’s deal with McAfee Coliseum, which first opened in 1966, ends in 2010;¹²⁰ the Buffalo Bills’s lease with Ralph Wilson Stadium expires in 2012.¹²¹ There are also rumors that the Jacksonville Jaguars may be interested in a new home.¹²² Potential host cities are paying close attention, though none more closely than Los Angeles.¹²³

After losing not one but two professional football franchises, Los Angeles expressed a renewed interest in hosting an NFL team.¹²⁴ In April 2008, Majestic Realty Chair & CEO Ed Roski unveiled plans for an NFL stadium “‘aimed at luring the league back’ to the L.A. area.”¹²⁵ Similar to St. Louis’s approach in the early 1990s, Roski is employing a “build it and they will come” strategy.¹²⁶ “Roski said that if an NFL team is ‘willing to relocate, construction on the stadium can begin this fall and be finished in time for the 2011 season.’”¹²⁷ Roski’s initial timeline has suffered a few setbacks, but the Los Angeles businessman remains committed to moving forward with this project.¹²⁸ On October 22, 2009, Governor Arnold Schwarzenegger signed a bill “granting final approval to an NFL stadium proposal.”¹²⁹

(2003). In addition to the Los Angeles Rams relocating to St. Louis, 1995 also saw the Oilers’s relocating from Houston to Nashville, the Raiders moving back to Oakland, and, perhaps the most infamous relocation of that year, the Browns forsaking Cleveland in favor of Baltimore. *Id.*

116. See Stein, *supra* note 115, at 4-9.

117. See Weiner, *supra* note 20.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Roski Set to Unveil Plans for Proposed L.A.-Area NFL Stadium*, SPORTSBUSINESSDAILY.COM, Apr. 17, 2008, <http://www.sportsbusinessdaily.com/article/120117> [hereinafter *Roski*]. For more information on Roski’s proposed stadium, see also *Los Angeles Stadium Homepage*, LOSANGELESFOOTBALLSTADIUM.COM, <http://www.losangelesfootballstadium.com> (last visited Jan. 16, 2010).

125. *Id.*

126. *Id.*; *FIELD OF DREAMS* (Universal Studios 1989).

127. *Id.*

128. *Id.*

129. *City of Industry Stadium Bill Signed Into Law Today*, SPORTSBUSINESSDAILY.COM, Oct. 22, 2009, <http://www.sportsbusinessdaily.com/article/134291>.

Upholding state-of-the-art clauses in stadium leases could lead to a new wave of “franchise free agency.”¹³⁰ Combined with the current inability of the NFL to control relocations, owners could move from city to city without concern for fans or taxpayers. This nomadic situation could cause the erosion of fan loyalty so as to harm the NFL beyond repair.

VI. THE SOLUTION

State-of-the-art clauses are unconscionable because they are inherently one-sided in favor of the franchise. Furthermore, public policy outweighs the interest in enforcing these clauses because they set the stage for an escalating facilities arms race that cannot be won. The best solution would be to hold such lease provisions unenforceable.

In contract law, something is said to be unconscionable when it “affronts [the] sense of decency.”¹³¹ A much-quoted judicial definition says that “an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party [is unconscionable].”¹³² Furthermore, section 2-302(1) of the Uniform Commercial Code (UCC) provides that:

[i]f the court as a matter of law finds the contract or any clause term of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause term, or it may so limit the application of any unconscionable clause term as to avoid any unconscionable result.¹³³

However, courts will not simply make a new contract for the parties merely because it has turned out badly for one of them.¹³⁴ Official Comment 1 to UCC section 2-302 states that the ultimate question is “whether . . . the term or contract involved is so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.”¹³⁵

State-of-the-art clauses are inherently one-sided in favor of NFL team

130. See Leone, *supra* note 72, at 495-506.

131. *Gimbel Bros., Inc. v. Swift*, 307 N.Y.S.2d 952, 954 (N.Y. Civ. Ct. 1970).

132. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

133. U.C.C. § 2-302(1) (2008).

134. § 2-302(1), Official Comment.

135. *Id.*

owners.¹³⁶ The disproportionate number of NFL franchises versus the number of willing host cities allows for franchise owners to obtain a substantial windfall simply by threatening to leave.¹³⁷ State-of-the-art clauses conveniently write these threats directly into the facility lease.¹³⁸ Although fan attendance usually increases after upgrading a sports facility, city revenue is virtually unaffected.¹³⁹ Consequently, the city gains no benefit by agreeing to a state-of-the-art clause in a lease with a professional sports franchise other than the continued presence of the franchise in the city, which should be otherwise guaranteed by the length of time the lease runs.¹⁴⁰

The lopsided nature of these clauses is apparent in the lease for the St. Louis Rams.¹⁴¹ What is particularly alarming about the Rams's scenario is that the state-of-the-art clause is rather vague. Although there are several components listed,¹⁴² nowhere does it define how much money should be set aside for stadium maintenance, which aspects of the stadium should be upgraded first, or even what the Rams consider a "tier one" stadium to actually be. As such terms are never defined, the Rams could make any number of demands, reasonable or otherwise, and if these requests are not met, the team could just move.¹⁴³ This is not only overwhelmingly one-sided in favor of the franchise owners, but also against public policy.¹⁴⁴

State-of-the-art clauses should be unenforceable on public policy grounds because of the dangerous precedent that they set. There are a number of NFL franchises that may actively seek new homes within the next few years.¹⁴⁵ As previously mentioned, the Minnesota Vikings have a lease that runs only through 2011, the Oakland Raiders's deal with McAfee Coliseum ends in 2010, and the Buffalo Bills's lease expires in 2010.¹⁴⁶ These could be three more teams that might want to include a powerful state-of-the-art clause in their new leases. Hypothetically speaking, if all thirty-two teams in the league were to add a clause to their venues' leases stating that the venue must be within the top twenty-five percent of venues in use by the NFL every five

136. See Stein, *supra* note 115, at 4-9.

137. See Leone, *supra* note 72, at 481.

138. See LEASE, *supra* note 2, at art. 16(e)(1).

139. See generally QUIRK & FORT, *supra* note 4, at 137-76.

140. See Leone, *supra* note 72, at 481.

141. See *supra* Part IV (listing of fifteen first-tier components in St. Louis Rams's Lease).

142. See LEASE, *supra* note 2, at art. 16(e)(1).

143. See Thomas, *supra* note 3.

144. See § 2-302.

145. Weiner, *supra* note 20.

146. *Id.*

years, or in the top eight of up to thirty-two venues in use, chaos would surely follow. These clauses would be habitually violated as there would be only a handful of wealthy cities able to keep up with the excessive requirements.

VII. CONCLUSION

In some sense, St. Louis's situation could be seen as a lesson in contract drafting for other communities and their professional sports franchises. However, St. Louis's agreement to include the state-of-the-art clause in the lease should not be construed as giving any kind of legitimacy to such clauses. Franchise relocation has historically been one of the biggest problems that the NFL has had to face.¹⁴⁷ The victims of franchise relocations are the fans, cities, taxpayers, and, ultimately, the league itself. Although there have not been any recent NFL franchise movements, only time will tell if state-of-the-art clauses are the sparks that ignite a new fire of NFL franchise movement.

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147. See *supra* Part V discussing franchise movement in the NFL.

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