PUBLIC FINANCING OF GREEN CATHEDRALS

Jack F. Williams,[*] *Jessica O'Quin,*[**]
& Joshua Stein[***]

[*] Professor, Georgia State University College of Law and Middle East Institute.
[**] Graduate Research Assistant. J.D., Georgia State University 2011.
[***] Associate, Mesirow Financial Consulting, LLC. B.S., University of Georgia 2010.

INTRODUCTION

Sports is no longer simply a business; it is a *big* business. Moreover, as a business, it is still growing financially and is still far from reaching its maturation point. Much of the present financial growth is tied to leveraging existing technologies and devising new ones. Participants in the business of sports aggressively pursue alternative sources of revenue in an effort to drive earnings.

> Traditionally, revenue platforms in the sports sector consist of: (1) gate revenues for live sporting events; (2) rights fees paid by broadcast and cable television networks and TV stations to cover those events; (3) merchandising, which includes the selling of products with team and/or player logos; (4) sponsorships, which include naming rights and payments to have a product associated with a team or league; (5) actual team ownership; and (6) concessions.[1]

More recently, other revenue streams such as from the internet, satellite, or mobile phone subscriptions to sports events or programming are pushing sports toward programming content designed as a means to secure greater revenue. Participants in the business of sports are looking at various angles to make money. Among these participants are state and local governments seeking to generate revenue either directly or indirectly through maintaining and attracting professional sports franchises.

For state and local governments, there appears to be a certain distinction associated with maintaining a professional sports franchise. A city that lands a team makes it into the inner circle of prominence among other cities. There are only thirty Major League Baseball (MLB) teams, thirty-two National Football League (NFL) teams, thirty National Basketball Association (NBA) franchises, and thirty National Hockey League (NHL) teams.[2] With the recent move of the NHL's Atlanta Thrashers to Winnipeg, Manitoba, there are just twelve cities with teams from

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[1] Jack F. Williams, *The Coming Revenue Revolution in Sports*, 42 WILLAMETTE L. REV. 669, 673 (2006).

[2] *See NFL Teams*, NFL.COM, http://www.nfl.com/teams (last visited Oct. 18, 2011); *Team Index*, NBA.COM, http://www.nba.com/home/teams (last visited Oct. 18, 2011); *Team-by-Team Information*, MLB.COM, http://mlb.mlb.com/team (last visited Oct. 18, 2011); *Teams*, NHL.COM, http://www.nhl.com/ice/teams.htm?nav-tms-main (last visited Oct. 18, 2011).

the four major sports.[3] In all, only about forty-nine cities may tout that they are the home of at least one team from a major sports league.

State and local governments outside the elite circle will take exceptional steps to attract and retain major sports franchises, while governments that tout teams often take extreme steps to keep those franchises. Both attracting and retaining a major sports franchise requires funding. Government attempts to attract or retain franchises through the building of stadiums, and the financial structure, terms, conditions, and protections of these attempts to retain or attract sports franchises are the focus of this article. In particular, this article explores the history, role, and typical structure of the government funding of sports stadiums and venues.

Sports franchises relocate to different cities based on the lucrative financial packages tendered by local governments, including the building and financing of a new, sport-specific stadium. Moreover, leagues and sports franchises use the threat of relocation to extract major financial concessions from host cities and states, including the favorable financing of new stadium construction and operations.[4]

Major League Baseball, however, has largely missed this development. Aside from the unique situation involving the relocation of the Montreal Expos to become the Washington Nationals, only one MLB team has relocated since 1972.[5] This lack of movement for over thirty years undermines an MLB team's threats that it will move from a given city if that city does not provide it with a new stadium.[6] In order for a team to

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[3] Joe Favia, *Ranking the Sports Cities With Four Teams in the Major Professional Sports*, BLEACHER REPORT (Sept. 23, 2010), http://bleacherreport.com/articles/471740-ranking-the-sports-cities-with-four-teams-in-the-major-pro fessional-sports; *see Thrashers Headed to Winnipeg*, ESPN.COM (June 1, 2011, 11:16 AM), http//sports.espn.go.com/nhl/news/ story?id=6610414.

[4] Ian Fisher, *Fearing Move by Yankees, Cuomo Explores Idea for a New Stadium*, N.Y. TIMES, June 30, 1993, at A1; *see* John Siegfried & Andrew Zimbalist, *The Economics of Sports Facilities and Their Communities*, 14 J. ECON. PERSP. 95, 99 (2000).

[5] Martin J. Greenberg & Bryan M. Ward, *Sports Law: Non-Relocation Agreements in Major League Baseball: Comparison, Analysis, and Best Practice Clauses*, 21 MARQ. SPORTS L. REV. 7, 8 (2010); *Washington Nationals and Montreal Expos*, BASEBALL ALMANAC, http://www.baseball-almanac.com/teams/washington_nationals.shtml (last visited Oct. 18, 2011).

[6] *See* ANDREW ZIMBALIST, *Share of Ballpark: $16 a Year*, MIAMI HERALD, Apr. 30, 2001, *reprinted in* THE BOTTOM LINE: OBSERVATIONS AND ARGUMENTS ON THE SPORTS BUSINESS 146 (2006). *But see* Marc Edelman, *The House that Taxpayers*

relocate, MLB must consider the financial needs of other, more desperate teams, rather than simply the desires of one discomfited team.[7]

Today, local governments typically pay between seventy and eighty percent of the costs of new stadium construction either to keep a team or to entice a team from another city.[8] The once common multipurpose stadiums, the toast of the 1970s, are now considered obsolete.[9]

The "one-stadium-fits-all" model is viewed as aesthetically unpleasing; too small for football, too big for baseball.[10] Sight-lines are off, fan experience marginalized, and local character quashed.[11]

Interestingly, studies have shown that there is a zone of equilibrium that balances seat scarcity and demand in order to maximize profit. Thus, a multi-purpose stadium seating must accommodate the "8-game football and 81-game baseball seasons."[12] The capacity of one stadium structure to triangulate the "zone" for multiple sports is highly unlikely.

In the typical modern stadium financial deal, sports teams generally pay little to no rent, are given most or all parking revenue, naming rights to the stadium, and, in a few situations, ticket-sale guarantees by the city.[13] In the next section, we will introduce and explore a number of tools used to finance sports stadiums in the effort to retain existing teams or attract new ones.

Built: Exploring the Rise in Publicly Funded Baseball Stadiums From 1953 Through the Present, 16 VILL. SPORTS & ENT. L.J. 257, 258–59 (2009).

[7] *See* ZIMBALIST, *supra* note 6, at 146.

[8] Edelman, *supra* note 6, at 257.

[9] Andrew H. Goodman, *The Public Financing of Professional Sports Stadiums: Policy and Practice*, 9 SPORTS LAW. J. 173, 184 (2002).

[10] *Id*.

[11] *See id.* at 185.

[12] PAUL C. WEILER, LEVELING THE PLAYING FIELD: HOW THE LAW CAN MAKE SPORTS BETTER FOR FANS 241 (2000).

[13] Roger Noll & Andrew Zimbalist, *Build the Stadium—Create the Jobs!*, *in* SPORTS, JOBS, AND TAXES: THE ECONOMIC IMPACT OF SPORTS TEAMS AND STADIUMS 8–9, 12–13, 23 (Roger Noll & Andrew Zimbalist eds., 1997); Dennis Zimmerman, *Subsidizing Stadiums*, *supra*, at 124–25.

I. BACKGROUND

A. Early Financing of Sports Stadiums

Public financing of sports stadiums is not a recent phenomenon. "Since the nineteenth century, stadiums have been built with complete public financing, complete private funding, or more typically, by some combination of both private and public money."[14] Public financing for baseball can be traced back to the formation of the professional teams themselves. In several situations, local politicians and booster clubs organized the founding teams, such as the Cincinnati Red Stockings (Red Socks) in 1869 and the Chicago White Stockings (the Cubs) in 1870.[15] In 1871, the first professional baseball game was played on municipally owned land that was donated to the city by the federal government with stipulation that it must be used for non-profit ventures.[16]

In 1914, San Diego built the first publicly financed stadium.[17] That stadium seated 23,000 people and was built at the cost of $150,000.[18] During the 1920s, several other stadiums were built around the country, including Pasadena's Rose Bowl in 1922, the Los Angeles Coliseum in 1923, and Chicago's Soldier Field in 1924.[19] These stadiums were initially not intended for professional sports use, but rather "to encourage athletics in general and promote the reputation of [the host] cities."[20]

The most famous early municipal stadium was the Los Angeles Coliseum, a football stadium.[21] The Coliseum was constructed by

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[14] Frank A. Mayer, III, *Stadium Financing: Where We Are, How We Got Here, and Where We Are Going*, 12 VILL. SPORTS & ENT. L.J. 195, 196 (2005) (footnote omitted).

[15] David Wyatt, *Chicago Cubs: An Early History (Part One)*, BLEACHER REPORT (July 14, 2009), http://bleacherreport.com/articles/217812-chicago-cubs-a-early-history-part-one; *Cincinnati Reds*, BASEBALL ALMANAC, http://www.baseball-almanac.com/teams/reds.shtml (last visited Oct. 18, 2011).

[16] Steven A. Riess, *Historical Perspectives on Sport and Public Policy*, 15 POL'Y STUD. REV. 3, 4 (1998).

[17] *Balboa Stadium*, STADIUMS OF PRO FOOTBALL, http://www.stadiumsofprofootball.com/past/BalboaStadium.htm (last visited Oct. 18, 2011); *see also Notes from the Richard Amero Collection: Balboa Park History*, SAN DIEGO HISTORY CTR., http://www.sandiegohistory.org/amero/notes-1914.htm (last visited Oct. 18, 2011) [hereinafter *Balboa Park History*].

[18] *Id.*

[19] Riess, *supra* note 16, at 4.

[20] *Id.*

[21] *Id.*

private developers to help attract the 1923 Olympic Games to Los Angeles, after which, the stadium reverted to public use.[22] The structural history behind the financing of the Los Angeles Coliseum is illuminating. Influential boosters formed the Community Development Association (CDA) to spearhead the stadium plan.[23] Initially, the CDA wanted Los Angeles either to issue a bond for the stadium or to pay for it directly.[24] While city and county officials were open to the bond idea, voters turned down the issue in a referendum.[25] In response, the CDA undertook the development of the park.[26] While the city and county were prevented from providing bonds for the construction of the stadium, the city gave the CDA seventeen acres in Exposition Park for the new stadium, underwrote CDA's $800,000 note on the stadium, and agreed to pay the building costs through rental fees of the facility.[27] Eventually, the city and the county paid $499,225 in rent towards the construction of the stadium, gaining joint control of the stadium after the 1932 Olympics.[28]

The Cleveland Municipal Stadium, which opened in 1932, was the first publicly financed stadium intended for MLB use.[29] The financial structure of that stadium is indicative of the modern financial package offered to sports franchises today.[30]

B. Modern Precursors of Financing of Sports Stadiums

While public subsidies and other economic support for sports stadiums can be traced back over a hundred years, the use of public financing as an integral part of the funding for stadiums truly began to develop in the 1950s.[31] This change was largely brought about by changes in the country's demographics, which were primarily caused by large numbers of people moving west.[32] New technology, such as airplanes and televisions, helped to

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[22] CHARLES C. EUCHNER, PLAYING THE FIELD: WHY SPORTS TEAMS MOVE AND CITIES FIGHT TO KEEP THEM 81 (1993).
[23] Reiss, *supra* note 16, at 4–5.
[24] *Id.* at 5.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *See* Edelman, *supra* note 6, at 257.
[30] *See id.* at 257–58.
[31] *Id.* at 258–59.
[32] *Id.* at 259.

increase the popularity of baseball by making it more available, whether by a quick plane ride or from the comfort of the viewer's living room.[33] However, while the fan base and number of potential host cities increased, MLB decided not to expand into these new markets by creating new teams.[34] Major League Baseball did not expand the number of teams to meet this demand until 1961–1962, when it added four new teams.[35] From 1961 to 1993, twelve teams were added to the MLB roster.[36] In 1950, in a desperate attempt to gain an MLB team, Milwaukee began constructing a baseball stadium, offering the stadium, free of rent, to any MLB team that would relocate to the city.[37] In 1953, the Boston Braves moved to Milwaukee, becoming the first major league franchise to change cities since 1903, and ushering in a new era where cities vied with one another for the prestige of having a professional sports team.[38] Several other teams took the Braves' move as their cue to enter into new markets in exchange for favorable stadium deals.[39] Examples include the 1953 move of the St. Louis Browns to become the Baltimore Orioles;[40] the 1954 move of the Philadelphia Athletics to Kansas City; and, in 1958, the move of both the Brooklyn Dodgers to Los Angeles and the New York Giants to San Francisco.[41]

Along with the increase of teams and host cities over the years, the stadiums themselves have changed as the business of baseball has matured. The traditional multipurpose sports facilities are outdated, ugly, and bad for revenue growth. Architects and team owners have captured something that fans have known intuitively for some time: if you build a nice stadium, specifically designed and suited for the game at hand, the fan experience is more gratifying. Build a baseball field, construct a football stadium, erect a basketball arena, and watch the fan base grow.

Additionally, a well-suited facility breeds fan gratification.

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[33] *Id.*

[34] *Id.*

[35] Daniel A. Rascher, *Franchise Relocations, Expansions, and Mergers in Professional Sports Leagues*, *in* 2 THE BUSINESS OF SPORTS: ECONOMIC PERSPECTIVES ON SPORT 67, 74 (Brad R. Humphreys & Dennis R. Howard eds., 2008).

[36] *Id.* at 74–75.

[37] Edelman, *supra* note 6, at 259.

[38] *See* Riess, *supra* note 16, at 8–9.

[39] Edelman, *supra* note 6, at 260.

[40] *Id.*

[41] *Id.*

That gratification translates into more at the gate—both in increased attendance and higher ticket prices.[42] What the architects and financial experts have also uncovered, not so intuitive to us fans, is that the smaller the stadium (within reason), the greater the gate.[43] The data suggest that the smaller the stadium, the smaller the number of seats; the smaller the number of seats, the more scarce tickets become; the more scarce tickets become, the more a team can charge for those tickets.[44] Under the watchful eye of MLB, architects are working to get the supply-and-demand of stadium design at perfect balance.[45] Other sports have also considered the right formula, bigger is not always better, at least from a revenue growth perspective.

II. TYPICAL FINANCIAL STRUCTURE

A. The Use of Bonds

Municipalities may issue bonds that are exempt from federal income tax.[46] The exemption from federal income tax (and often state income tax as well) is designed to allow municipalities to issue bonds at a lower price, compared to corporate public debt, because of the after-tax return investors would experience by investing in such tax-exempt instruments. This exemption allowed municipalities to use bonds to fund the construction of sports stadiums through what is commonly known as an industrial development bond (IDB).[47] "Prior to 1968, the [Internal Revenue] Code did not constrain state and local officials from issuing tax-exempt debt and using the proceeds to finance investment projects for individuals and privately owned businesses."[48] In 1968, the Expenditure Control Act (ECA) was drafted to curb the use of tax-exempt debt issued for private purposes, due in large part to concerns that the widespread use of these "tax-exempt revenue bonds were driving up interest rates

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[42] *See* Tim Reason, *Squeeze Play*, CFO MAG. (Apr. 1, 2004), http://www.cfo.com/article.cfm/3012785?f.

[43] *See id.*

[44] *Id.*

[45] *Id.*

[46] *See* 26 U.S.C. § 103 (2006); Dennis Zimmerman, *New Developments in Stadium Financing*, *in* 3 THE BUSINESS OF SPORTS 99, 101 (Brad Humphreys & Dennis Howard eds., 2008).

[47] Zimmerman, *supra* note 46, at 103.

[48] *Id.* at 102.

for general obligation tax-exempt debt," were creating a loss of tax revenue, and allowing state and local officials too much control over government funds.[49]

The ECA defined an IDB as having two requirements: "First, more than 25 percent of the bond proceeds [were] used by a nongovernmental entity. Second, more than 25 percent of debt service payments [were] paid directly or indirectly by property used in a trade or business."[50] The thought behind this financing structure was that only users of the stadium would pay for its services, thus saving general tax revenues from being used.[51] However, the ECA was undermined by exempting stadiums as "inherently quasi-public in nature" from the twenty-five percent requirements.[52]

Over time, the IDB restrictions "proved to be too weak and the volume of tax-exempt debt issued for private purposes continued to grow until the Tax Reform Act of 1986 . . . ."[53] Senator Daniel Patrick Moynihan, a staunch opponent of public financing of sports stadiums, said the goal of the 1986 Act was to "eliminate tax-exempt financing of professional sports facilities [altogether]."[54] The 1986 Act replaced the IDB language in the ECA with the term "private-activity" and reduced the percentage requirements from twenty-five percent to ten percent, for both the "use of proceeds" and "securities interests" tests identified above.[55] Additionally, stadiums were removed from the list of activities eligible to use tax-exempt, private-activity bonds.[56]

With the introduction of the 1986 Act, section 141 of the Internal Revenue Code provided that a bond would be considered a taxable "private-activity bond . . . if more than 10% of the bond proceeds [were] used by a nongovernmental entity and more than 10% of the debt service [was] secured by property used directly or indirectly by a nongovernmental entity."[57] The congressional intent was that if stadiums were non-exempt and the bonds available to finance stadiums were taxable, the use of these governmental bonds would be less attractive to investors, who

[49] *Id.* at 102–03.
[50] *Id.* at 103.
[51] Goodman, *supra* note 9, at 181.
[52] Mayer, *supra* note 14, at 209.
[53] Zimmerman, *supra* note 46, at 103.
[54] Goodman, *supra* note 9, at 182 (footnote omitted).
[55] *Id.*
[56] *Id.* at 183.
[57] *Id.* at 182.

would then find private means of financing the stadium.[58] However, the continued demand for limited sports teams encouraged cities to compete with one another by offering stadium deals to teams.[59] To be eligible for governmental bonds, as opposed to the private-activity bonds, the bonds only had to pass one of the ten percent tests.[60] Since a sports franchise is bound to use more than ten percent of the stadium services, thus failing the use test, "no more than 10% of the debt service on the bonds [could] be secured *directly or indirectly* by any private business."[61] This results in no more than ten percent of the stadium-related revenues being used to finance the debt services.[62] Meanwhile, a loophole was created that allowed payments to be made with general municipal revenues (i.e., tax revenue).[63]

> The practical result of the 1986 Act was to change the method of debt repayment. Municipal officials and stadium owners structured their debt repayment so that revenue streams from the actual stadium accounted for less than 10% of the total repayment, while the public was responsible for the remaining 90%.[64]

This was done generally through increases in sales tax, tourist tax, sin tax, and taxes on lottery proceeds.[65] Additionally, the requirement that no more than "ten percent [of] funding from a private entity [should] fund [a] stadium financed with state or local bonds, [caused the] city to also provide a favorable lease" to the owners of the sports team.[66]

B. Property Taxes and PILOTs

One of the main revenue-generating tools used by a local government is property tax, which accounts for nearly one-third of municipal income.[67] State and local governments regularly impose a tax on real property and have done so to fund local services even before the implementation of the income tax. Most

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[58] Mayer, *supra* note 14, at 209.
[59] Zimmerman, *supra* note 46, at 104.
[60] Goodman, *supra* note 9, at 182–83.
[61] *Id.* at 183.
[62] *See id.*
[63] *Id.* at 183–84.
[64] Mayer, *supra* note 14, at 210 (footnote omitted).
[65] *Id.* at 210–11.
[66] Logan E. Gans, *Take Me Out to the Ball Game, but Should the Crowd's Taxes Pay for It?*, 29 VA. TAX REV. 751, 759 (2010).
[67] *Id.* at 764.

states implement some form of *ad valorem* tax, that is, a tax based on the value of real property multiplied by some rate, often in the form of a millage.[68] Because of the enormous size and value of sports stadiums, along with the possibility of the stadiums being located on valuable property, the potential property tax burden for a team could be financially burdensome.[69]

One major tool local governments use in attracting professional sports teams is to allow for an abatement of these property taxes.[70] These abatements generally last a number of years.[71] Some examples include New York, where the maximum number of years allowed for an abatement is ten years, and Ohio, where the maximum is set at twenty years.[72]

However, to circumvent the abatement term limits, payments in lieu of taxes (PILOT) bonds were created.[73] These bonds were created in 2006, when the Internal Revenue Service issued two letter rulings that allowed the tax-exempt bond financing for two New York stadiums.[74] These rulings allow stadium related revenue to be used to pay debt service on governmental debt as PILOTs.[75]

> These bonds allow a private entity, such as a sports team, to make an annual payment for public bonds being used for their benefit, instead of paying a property tax. Moreover, the local government and the team usually agree that the payments related to the PILOT bonds will never be greater than the property tax that would have been assessed on the property.[76]

This means that revenues from the stadium that would have gone towards paying taxes are now being used to pay off the publicly financed PILOT bonds.[77] Additionally, these "payments qualify as generally applicable taxes and do not count against the 10 percent limitation on using revenue arising from private business activity to pay debt service," so the stadium can be funded with traditional bonds as well.[78]

After the Yankee Stadium project received criticism, the Internal

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[68] 51 FLA. JUR. 2D *Taxation* § 785 (2011).
[69] Gans, *supra* note 66, at 764.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] Zimmerman, *supra* note 46, at 104–05.
[75] *Id.* at 105.
[76] Gans, *supra* note 66, at 764–65.
[77] *Id.* at 765.
[78] Zimmerman, *supra* note 46, at 105.

Revenue Service ("Service") finalized treasury regulations that required a percentage of taxes to be paid instead of Yankee Stadium's financing approach of a fixed payment negotiated years in advance. The regulations permitted already negotiated or completed projects, however, such as Yankee Stadium and Citi Field, to continue according to pre-regulations plans.[79]

C. Sales Tax

Sales taxes can be sorted into two groups: general sales tax and a sales tax levied on stadium goods and services. A general sales tax is a nondiscretionary tax, which is levied on all sales in a given area.[80] Generally, for such an approach to be used, a provision needs to be passed by voters.[81] While the proposed tax is usually small, voters often oppose using their tax dollars to support privately owned sports teams.[82] Examples of general sales taxes are: .1 percent sales tax increase in five counties surrounding the Milwaukee Brewers' new ballpark; .5 percent sales tax for the maintenance and expansion of the Green Bay Packers' stadium; and the one percent sales tax increase to support the SuperSonics' (presently named the Thunder) new stadium in Oklahoma City.[83]

Another possible option for sales tax revenue is to tax stadium-related services and goods such as concessions, tickets, and parking, the so-called focus sales tax.[84] Washington, D.C., exemplifies this approach by "lev[ying] a tax of greater than ten percent on concessions and parking at Washington Nationals baseball events."[85] While these taxes might seem fairer to "those who subscribe to the philosophy that the ones who use a service should be the ones taxed on it," these sales taxes are not widely used because they are dependent upon game attendance and purchases.[86] Additionally, any general sales tax would also apply to stadium tickets and concessions, increasing the price of these items even more,[87] thus possibly driving down their demand.

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79 Gans, *supra* note 66, at 765 (footnotes omitted).
80 *Id.* at 766.
81 *Id.*
82 *Id.*
83 *Id.*
84 *Id.* at 765.
85 *Id.* at 766.
86 *Id.* at 765.
87 *Id.* at 766.

D. Hotel and Rental Car Tax

Other types of focused tax include the hotel and rental car taxes; combined, these taxes are often called a "tourist tax."[88] These taxes are intended to affect tourists who come into town to attend events at the stadium.[89] However, all tourists are targeted equally, regardless of whether they attend stadium events.[90] The intent to narrow the tax to stadium-goers by targeting tourists is further undermined by data that suggests team "fan bases tend to be highly localized rather than heavily tourist oriented."[91] These taxes tend to be supported by voters because they target non-residents.[92] For example, "[a] hotel tax increase . . . helped raise nearly eleven million dollars in one year for the Georgia Dome."[93]

A drawback to hotel and rental-car taxes is the possible dampening effect they can have on tourism. If the taxes are too steep, both tourists and business travelers may choose to bypass the taxing city for a cheaper destination.[94]

E. Sin Tax

One alternative to the tourist tax is specialty sales taxes on tobacco and alcohol, so-called sin taxes.[95] These taxes, however, are not a very reliable source of funds since the number of people who smoke has consistently decreased over the past number of years.[96] Additionally, these items generally already support a sin tax, so either an additional tax must be levied, which will further increase the price of these items and possibly lead to a reduction in consumption; or the already existing sin taxes, which are typically earmarked to support health care and education, will have to be reassigned to go towards the stadium.[97]

While alcohol and tobacco might not be the most appealing items for sin taxes, the increasing popularity of lotteries and

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88 Goodman, *supra* note 9, at 195.

89 *Id.*

90 *Id.*

91 Mildred Wigfall Robinson, *Public Finance of Sports Stadia: Controversial but Permissible . . . Time for Federal Income Tax Relief for State and Local Taxpayers*, 1 VA. SPORTS & ENT. L.J. 135, 155 (2002) (footnote omitted).

92 *See* Gans, *supra* note 66, at 767.

93 *Id.*

94 *Id.*

95 Goodman, *supra* note 9, at 196.

96 *See* Gans, *supra* note 66, at 768.

97 *See* Robinson, *supra* note 91, at 157.

casinos makes them appealing targets. Similar disadvantages exist to those of alcohol and tobacco for additional lottery taxes because lotteries are often times taxed to support local school systems.[98]

F. Business Tax

Governments can also choose to target businesses, as well as consumers. These business taxes operate on the premise that local businesses profit from a stadium being nearby. However, the risk of these taxes dampening businesses in a given area is great, so these taxes are rarely used.[99]

Washington, D.C., is the best example of business tax usage to fund a stadium. To help fund the Nationals' stadium, Washington taxed the gross receipts of area businesses, and also, imposed a second tax on local businesses' utility usage, including power and telephone.[100]

G. Miscellaneous Funding Techniques

In addition to issuing bonds and earmarking tax dollars towards stadium construction, a number of fundraising techniques exist including advertising, naming rights, club seats, personal seat licenses, luxury suites, concessions, parking facilities, and nongame events.[101] Stadiums provide ample advertising opportunities.[102] The most traditional form of advertising is signage. Signage is the generic term used to describe any posters, placards, billboards, or signs placed around the stadium.[103] Technological improvements in the signage field have drastically increased advertising real estate within a stadium.[104] Examples include the use of: Dorna Boards, which rotate through approximately twenty-eight separate advertisements; Adsleeves, which cover entryway turn-styles; Glow-Benches, which are rotating advertisements in the back of the stadium bleachers; and virtual ads, which are computer-generated ads projected onto otherwise blank surfaces, such as

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[98] *Id.* at 157–58.
[99] Gans, *supra* note 66, at 768.
[100] *Id.*
[101] *See* Mayer, *supra* note 14, at 198–205.
[102] *Id.* at 199.
[103] *Id.*
[104] *Id.*

walls, fences, or the field itself.[105] Advertisers typically pay between several thousand to several hundred thousand dollars per sign depending on visibility of the sign by spectators, both in the stadium or somewhere watching the game on television.[106]

Another advertising possibility comes in the form of sponsorships. "In a sponsorship deal, 'a sponsor may obtain the right to display its name or logo on team uniforms or other clothing, name a stadium or arena, or offer promotions, like fan contests held as part of a game.'"[107]

The costliest sponsorship comes in the form of naming rights. "[N]aming rights first appeared in 1987 when the Los Angeles Forum was renamed the Great Western Forum."[108] These rights are not limited to stadiums, but also to sections of the stadium, including corners, entryways, breezeways, and the field.[109] Typically, naming rights in the United States for new professional sports stadiums and venues have yielded fees between $2 million to $2.5 million per year with terms of ten to thirty years.[110] Naming rights fees have ranged from a low of $900,000 to a high of $4 million annually.[111] Although quite cumbersome and the butt of many sports commentators' jokes, there seems to be no letting up on the name game.

Stadium pouring rights are a smaller form of available advertising. These rights grant a beverage company the exclusive right to sell its product in the stadium.[112] Added together, the revenues from advertising can run into the hundreds of millions of dollars.

A significant "revenue source simply seeks to retrofit existing stadiums or incorporate by design in new stadiums a new look and feel to the game that is business and corporate user-friendly."[113] Luxury suites and club seats present a lucrative opportunity for increasing revenues.[114] According to some

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105 *Id.* at 199–200.
106 *Id.* at 199.
107 *Id.* (footnote omitted).
108 *Id.* at 200.
109 *Id.*
110 PAUL WILSON & MARY JANE HEDSTROM, MINN. H.R. STADIUM TASK FORCE REPORT: APPENDIX C: SUMMARY OF REVENUE SOURCES 3 (2002), *available at* http://www.house.leg.state.mn.us/taskforces/StadiumRevenueSources.pdf.
111 *Id.*
112 Mayer, *supra* note 14, at 200.
113 Williams, *supra* note 1, at 681.
114 Soonhwan Lee & Hyosung Chun, *Economic Values of Professional Sport Franchises in the United States*, SPORT J. (2002), http://www.thesportjournal.org/

experts, these products represent one of the fastest-growing revenue sources in sports.[115]

Luxury suites, also known as luxury boxes, sky boxes, or executive suites,[116] are the second-largest revenue producers for stadiums.[117] These suites are semi-private to private rooms that ring the stadium and allow groups to mingle, schmooze, and at least occasionally watch the game either through a large window or balcony or on closed-circuit television.[118] As mentioned above, these suites are lucrative, allow the team to increase revenue per seat, and hook corporate sponsors.[119] Major League Baseball stadiums offer luxury suites from as few as 19 to as many as 161.[120] It is not unusual for a team to offer several grades of luxury suites based on size, location, and amenities, in order to capture even greater premiums.[121] The average rental is in excess of $75,000 per season with a range from approximately $15,000 to more than $1 million.[122] And those prices usually do not include the tickets.[123]

While club seats, also referred to as premium seats, do not offer the privacy or most of the amenities of the luxury suite, they do provide patrons with "enhanced amenities, [such as] extra-wide and comfortable seats, exclusive lounges, and wait staff to handle [the] section['s] concessionary needs."[124]

Another popular revenue raising engine that, like luxury suites and club seats, raises funds from stadium-goers, rather than the public at large, is the sale of personal seat licenses.[125] Personal seat licenses (PSLs), ranging from $250 to $16,000, are "paid by individuals to guarantee the individual a right to purchase season tickets in a specified location for designated period of time."[126] In 1997, personal seat licensing was estimated to raise $500,000 in

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article/economic-values-professional-sport-franchises-united-states. *See generally* Craig Lambert, *The Dow of Professional* Sports, HARV. MAG. (Sept.–Oct. 2001) (discussing the increased cost of non-luxury seats).

115 Lee & Chun, *supra* note 114.
116 *Id.*
117 Mayer, *supra* note 14, at 203.
118 Lee & Chun, *supra* note 114.
119 *Id.*
120 *Id.*
121 *See id.*
122 *Id.*
123 Lambert, *supra* note 114.
124 Mayer, *supra* note 14, at 201.
125 *Id.* at 202–03.
126 *Id.* at 202.

one-time fees.[127] That number appears to have increased. The PSL is a "cheap" way in which to raise one-time revenue. However, as a revenue-generating product, it lacks strategic legs.

Another revenue earning source readily available to stadiums is the sale of concession rights. "Concession rights are 'rights transferred to a concessionaire for the sale and dispensing of food, snacks, refreshments, alcoholic and non-alcoholic beverage, merchandise, souvenirs, clothing, novelties, publications, and other articles in the stadium or arena, pursuant to a concession agreement.'"[128] Such agreements control what items can be sold within the stadium and set up profit sharing or rent to be paid by concession owners.[129]

Fees from parking are a smaller source of potential revenue for stadiums.[130] While stadium events create a lot of traffic, such revenue is undercut by pay-parking lots that were in existence before the stadium was built.[131] To gain a greater share of the parking lot market, stadium proponents often petition the local government either to tax the existing parking lots, to create revenue for the stadium, or to have the government take possession of the land through eminent domain.[132]

Stadiums sit empty a majority of the year due to sport off-seasons and away games. To maximize usage and profits, the stadium can be leased out to non-sporting events like concerts, conventions, and trade shows. While any one or combination of these activities can generate revenue for a stadium, the right to collect from these activities is often contracted away to team owners, rather than remaining with the stadium owners.[133]

The article now turns to a case study of the use of public financing to retain one of the most famous of sports franchises—the New York Yankees.

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[127] WILSON & HEDSTROM, *supra* note 110.

[128] Mayer, *supra* note 14, at 203 (footnote omitted).

[129] *Id.* at 203–04.

[130] *Id.* at 204.

[131] *Id.*

[132] *Id.*

[133] *See generally* Noll & Zimbalist, *supra* note 13, at 30–53 (explaining sports stadiums' rental agreements).

III. CASE STUDY: THE NEW YANKEE STADIUM

A. Background

In this section, we introduce a case study involving the financing package for the New York Yankees' new stadium in the Bronx, New York. Although steeped in the rich tradition and history of MLB, the old Yankee Stadium became a dilapidated facility with too little space for what modern fans demand from major sports franchises. Yankees' owners also saw the present situation as untenable, with revenue opportunities passing by.

The old stadium presented some health and safety issues. Possible lead-based paint and asbestos may have been present.[134] Moreover, the fan environment was dated. Seats and walkways for both players and fans were not sufficiently spacious, and the kitchen space was inadequate for making and providing food and drink during a game.[135] Present Yankee ownership seized on these facility insufficiencies to negotiate a new arrangement with New York City to finance a new baseball stadium under the threat of leaving New York City.[136]

In 2001, Rudy Giuliani, then mayor of New York City, agreed to a financial package with the Yankees.[137] Under the proposal, the city would fund the building of a new Yankee stadium through a multifaceted financial package.[138] Among other things, the financial package would include an initial payment of $800 million from New York City in tax-exempt bonds.[139]

Present mayor Michael Bloomberg renegotiated the financial package with the Yankees, although he did not have much leverage in his renegotiation.[140] During these negotiations, Mayor Bloomberg was informed that if the city did not issue tax-exempt debt to help the team build a new stadium, the Yankees would relocate.[141] While government entities and non-profit organizations may issue bonds where the interest earnings are exempt from federal and possibly even state taxes, such bonds

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[134] Maria Kucheryavaya, *New York City Strikes Out: The Financing of Yankee Stadium*, 1 COLUM. ECON. REV. 16, 18 (2011).
[135] *Id.*
[136] *See id.* at 18–19.
[137] *Id.* at 18.
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*

place a high initial burden on the government or non-profit organization.[142] In an effort to satisfy the Yankees' demand for tax-exempt debt while reducing New York City's initial debt burden, Mayor Bloomberg utilized PILOTs.[143]

Like traditional bonds, PILOTs are a way in which a government can aid in the financing of a sports stadium. "The main difference between stadium PILOTs and the commonly used tax-exempt sales tax revenue bonds is the burden of payment. . . . PILOT bonds place a lower burden on the government for bond security, although there still exist costs to the government due to the tax exemption."[144] With PILOTs, property valuation also plays an important role. "The higher the assessment of the market value of the land, the higher is each projected property tax payment, and consequently, the higher is the total value of the bonds that the Yankees are permitted to issue."[145] In this matter, fair market value was used to determine property value.[146] That value was set at a range from $26.8 million to $204 million.[147] The property was initially valued without the improvements, that is, the stadium and infrastructure.[148] Later, the property valuation included the value associated with the new Yankee Stadium.[149] As part of the financial package, the Yankees will pay ten dollars a year in rent compared to the $10 million the team paid at old Yankee Stadium.[150]

B. Fall Out

In October 2008, Congressman Dennis Kucinich headed a congressional panel looking into the financing for the new Yankee Stadium.[151] Randy Levine, the Yankees president, told the panel

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[142] *See id.* at 17–18.

[143] *See id.* at 18.

[144] *Id.*

[145] *Id.* at 19.

[146] *Id.*

[147] *Id.*

[148] *Id. See also NYC Officials Deny Cooking Books for Yankee Stadium at Congressional Hearing*, ESPN.COM (Oct. 26, 2008, 1:01 PM), http://sports.espn.go.com/mlb/news/story?id=3662987 [hereinafter *NYC Officials Deny Cooking Books*].

[149] Kucheryavaya, *supra* note 134, at 19. *See also NYC Officials Deny Cooking Books*, *supra* note 148.

[150] Jon Birger & Tim Arango, *The Yankees' Stadium Windfall*, CNNMONEY.COM (Aug. 10, 2007, 11:13 AM), http://money.cnn.com/2007/08/10/news/newsmakers/yankees_stadium.fortune/index.htm.

[151] *See NYC Officials Deny Cooking Books*, *supra* note 148.

that the team would have moved from the Bronx without public financing. Levine also "suggested the city was getting a good deal because there wasn't direct taxpayer funding."[152] Congressman Kucinich responded that "federal taxpayers are deprived of hundreds of millions of dollars of tax revenues" in tax-free bond deals.[153]

The congressional panel focused on the land valuation process. As stated above, the property used for the stadium's construction was valued between $26.8 million and $204 million. Congressman Kucinich believed that the land value was artificially inflated in order to help the Yankees more easily obtain tax-exempt bonds.[154] He also believed that this was accomplished using pressure, citing an email from Seth Pinsky, president of the New York City Economic Development Corporation, to Josh Sirefman, an official in the mayor's office.[155] However, Martha Stark, the city's finance commissioner, stated that the value of the property should be determined under the assumption that the new Yankee Stadium would be built on it and thus, the value was changed.[156]

The Independent Budget Office of New York City prepared an assessment on the social cost of building the stadium versus the social benefit of the stadium.[157] Under the financial package as structured, the Yankees save a projected $786.8 million, with $416.6 million in savings from stadium property taxes abatements alone.[158] In contrast, the social benefit was projected to be $61.3 million.[159]

C. New Stadium Financial Structure

The new Yankee Stadium "is an approximately 1.3 million square-foot open-air stadium containing in excess of 50,000 seats and standing room for approximately 1,875 standees for a total capacity (including luxury suites) of between approximately

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[152] *Id.*
[153] *Id.* (internal quotation marks omitted).
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] Kucheryavaya, *supra* note 134, at 19. *See generally* N.Y.C. INDEP. BUDGET OFFICE, IBO REPORTS: YANKEES & METS (2009), *available at* http://www.ibo.nyc.ny.us/iboreports/yankeesmets011409.pdf.
[158] Kucheryavaya, *supra* note 134, at 19–20.
[159] *Id.* at 20.

52,000 and 53,000 persons . . . ."[160] The new stadium is located in the Bronx, New York, on a parcel of real property consisting of 14.6 acres of land (the Site), which is owned by New York City.[161] The stadium, owned by the New York City Industrial Development Agency (the Issuer), "was constructed by Yankee Stadium LLC (the Company) as agent of the Issuer, and has been built for, among other purposes, the staging of athletic, concert and other entertainment events, including home baseball games played by the MLB team known as the New York Yankees."[162]

The Turner Construction Company built the new Stadium pursuant to a "Construction Management Agreement" that was originally dated February 1, 2005, though construction did not begin until August 16, 2006.[163] The stadium opened April 16, 2009.[164]

As previously mentioned, the Site is currently owned by the city. The Site is leased to the Issuer by New York City for a period of ninety-nine years pursuant to a "Ground Lease"[165] "The Issuer owns the New Stadium and has subleased the Site and leased the New Stadium to the Company for an initial term of approximately forty-three (43) years pursuant to the Lease Agreement . . . ," which in turn leased the stadium to the New York Yankees Partnership (the Partnership).[166] "[T]he Company has the option to extend the Lease Agreement for up to five (5) consecutive terms of ten (10) years each followed by one six (6)-year extension term."[167]

Financing for the stadium, including design, development, acquisition, construction, and the fitting out costs, came from several sources. These sources include: (i) the $25,000,000 aggregate principal amount of Series 2006 Rental Bonds; (ii) the $942,555,000 aggregate principal amount of Series 2006 PILOT

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160 Offering Memorandum from N.Y.C. Indus. Dev. Agency to The Bank of N.Y. Mellon, Rental Revenue Bonds, Series 2009 (Yankee Stadium Project) Federally Taxable, cover, 2 (July 16, 2009) [hereinafter Yankee Stadium Offering Memorandum], *available at* http://www.nycedc.com/AboutUs/FinStatementsPubReports/NYCIDA/Documents/Yankee%20Stadium%20Project%202009%20Official%20Statement%20of%20Debt%20Issuance.pdf.

161 *Id.* at 2, 9.

162 *Id.* at cover, 2 (internal quotation marks omitted).

163 *Id.* at 3.

164 *See* Tyler Kepner, *A Good Day Spoiled in the Bronx*, N.Y. TIMES, Apr. 17, 2009, at B11.

165 Yankee Stadium Offering Memorandum, *supra* note 160, at 10.

166 *Id.* at 10.

167 *Id.*

Bonds; (iii) the $258,999,944.60 aggregate principal amount of Series 2009A PILOT Bonds; and (iv) advances made by the Company from funds made available to it in the form of advances and equity contributions by certain of the Company's Affiliates.[168]

As for rent, "the Company shall pay the Agency Base Rent at the rate of Ten Dollars ($10.00) per year."[169] The Lease Agreement also provides that the Company shall be responsible for various other "Additional Rent" payments.[170] The Additional Rent includes amounts necessary to pay:

> Debt Service on the Rental Bonds, payments due to the Rental Bonds Trustee under the Rental Indenture, payments due to the Bond Insurer in connection with the Rental Bonds and the amount, if any, required to be deposited in any subaccount in the Rental Bonds Prepaid Rent Account in the Rental Bonds Bond Fund for the amount on deposit in such subaccount to equal the Rental Bonds Prepaid Rent Account Funding Requirement for the Series of Rental Bonds supported by such subaccount.[171]

The Lease Agreement also includes a provision that requires the Company to pay an annual fee of $788,600 a year, for forty years to the New York City Department of Parks and Recreation. Such payments are to be made no later than October 1 of each year during this forty-year term and shall commence on October 1, 2009.[172]

As to the valuable naming rights of the Stadium, the Lease Agreement provides that the Company has the "exclusive right to affiliate itself or partner with one or more third parties and/or grant to itself or one or more third parties the Naming Rights."[173] The only restrictions the Lease Agreement provides concerning these overarching rights pertain to the size, location, and appearance of the name. Finally, the Agency approved the name "Yankee Stadium" for the new stadium.[174]

The Lease Agreement grants the Company extensive advertising rights, both interior and exterior. Under the lease terms, the Company has the right to display "Advertising Signage anywhere and everywhere" within the Stadium's interior, subject

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[168] *Id.* at 22.
[169] *Id.* app. C, at 6.
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.* app.C, at 7.
[174] *Id.*

to its sole discretion.[175] These rights include, without limitation, the naming rights for areas of the Stadium.[176]

The Company is also granted exclusive concession rights in the stadium. These rights include the rights to provide and operate concessions, or to "cause or permit other persons to provide or operate" the concession facilities in the Stadium or otherwise on the premises.[177] All revenue collected from the sale of concessions shall be retained by the Company.[178] Finally, the Company has sole discretion to determine the concession prices.[179]

Under the Lease Agreement, the Company has the right to year-round use of the stadium premises.[180] These use rights include:

> (i) Team Events, and (ii) any and all other lawful purposes, including but not limited to other entertainment, religious, sporting, cultural, recreational, promotional, community and civic events (such as private parties, auctions, tours, conventions, convocations, concerts, commercial film and television shoots and meetings) and all purposes incidental thereto.[181]

All revenues derived from such events and activities are to be collected and retained solely by the Company. Additionally, the Company may enter into subleases, licenses, or other agreements pertaining to use of the Stadium.[182]

As to parking revenue, "[n]either the Company nor the Partnership will bear any of the costs of, or receive any of the revenues from, the Parking Facilities."[183] However, the Bronx Parking Development Company, LLC must provide "600 free parking spaces for the Company and the Partnership, at no cost . . . ."[184]

The Lease Agreement provides for certain obligations for the Company beyond the nominal payment of rent. The Company must maintain various types of insurance including property insurance, terrorism insurance, commercial general liability insurance, umbrella liability insurance, motor vehicle insurance, worker's compensation insurance, and employer's liability

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[175] *Id.*
[176] *Id.*
[177] *Id.* app. C, at 10.
[178] *Id.*
[179] *Id.*
[180] *Id.* app. C, at 8–9.
[181] *Id.*
[182] *Id.*
[183] *Id.* at 16.
[184] *Id.*

insurance.[185] "In addition to the coverages required by the Lease Agreement, the Company has purchased a pollution liability insurance policy covering on-site clean-up of preexisting and new conditions, and third party liability, both on-site and off-site."[186]

The non-relocation agreement is of particular interest, especially in light of the history of prior Yankee threats to leave the Bronx. Historically, the first time a court was asked to address a MLB non-relocation agreement occurred when New York City sought an injunction to prevent the Yankees from playing the first three games of the 1983 season in Denver because of ongoing renovations at the original Yankee Stadium.[187] "The court found that the lease provision requiring all home games to be played at Yankee Stadium would be violated if the Yankees played games in Denver under these circumstances."[188] In so holding, the court noted the special relationship the Yankees had with New York, stating:

> Much more is at stake than merely the loss of direct and indirect revenue to the city. The Yankee pinstripes belong to New York like Central Park, like the Statue of Liberty, like the Metropolitan Museum of Art, like the Metropolitan Opera, like the Stock Exchange, like the lights of Broadway, etc. Collectively they are "The Big Apple." Any loss represents a diminution of the quality of life here, a blow to the city's standing at the top, however narcissistic that perception may be.[189]

And as such, the city faced a "threat of irreparable injury" should the Yankees be allowed to violate their agreement with the city[190]

The current Yankees non-relocation agreement includes the typical requirement for the team to play all of its home games of the regular MLB season at the stadium, subject to a *force majeure* exception, the requirement to have the words "New York" incorporated into the team name, the prohibition of team relocation, agreements that the team will take no adverse action that might cause a breach of the agreement, and terms requiring any transfer of the team to contain the non-relocation agreement.[191]

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[185] *Id.* at 19–21.
[186] *Id.* at 21.
[187] Greenberg & Ward, *supra* note 5, at 63–64.
[188] *Id.* (citing City of New York v. N.Y. Yankees, 458 N.Y.S.2d 486, 488 (Sup. Ct. 1983)).
[189] *City of New York*, 458 N.Y.S.2d at 489–90.
[190] *Id.* at 489.
[191] Yankee Stadium Offering Memorandum, *supra* note 160, app. D, at 1–3.

Modern stadium financing arrangements must also allocate risk effectively. This is of particular importance from the perspective of the local government. Under the risk allocation arrangement for the new Yankee Stadium, neither the city, nor the state, of New York is obligated to pay the principal or interest on Rental Bonds.[192]

The risk allocation agreement also shelters the Team, Partnership, and their respective affiliates by stating that none of the above are obligated to make payments towards the Rental Bonds, except for certain Company obligations under the Bond Documents regarding the Rental Bonds.[193]

In addition, allocating risks must also consider parameters regarding the enforceability of documents with respect to bankruptcy of issuers. Concerning the new Yankee Stadium, if the Issuer was to become a title 11 debtor under the U.S. Bankruptcy Code, all rental payments would be stayed until the bankruptcy court could confirm a repayment plan. Such a plan would likely involve reducing or eliminating the amount of debt the Issuer is liable for towards the Stadium, rearrangement of the debt payment schedule, reducing or eliminating the debt interest rate, and modifying the existing debt security arrangements.[194] Additionally, the court could call for the recovery or avoidance of certain creditor payments, including payment made towards the bond debt prior to the Issuer filing for bankruptcy.[195]

IV. FINANCIAL RISKS

Financing a stadium with public funds, either directly or indirectly, is not only a controversial project, but also a high risk one. Publically financed stadiums invariably run over their projected budgets.[196] In the past, municipalities and states were responsible for these budgetary shortfalls. Examples include the New Orleans Superdome's $128 million overage and the Toronto Sky Dome's $215 million overage, both of which were covered by taxpayers.[197] While such overruns traditionally created an additional hardship on the cities and states where the stadium was built, the burden of such overages are slowly shifting to the

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[192] *Id.* at 49–50.
[193] *Id.*
[194] *Id.* at 51.
[195] *Id.*
[196] Goodman, *supra* note 9, at 207.
[197] *Id.*

teams.[198] The New York Yankees borrowed more than $100 million to cover budget overages for the new Yankees Stadium.[199]

Only one MLB team has relocated since 1972.[200] This lack of movement for over thirty years undermines MLB teams' threats that they will move from a given city if that city does not provide them with a new stadium.[201] "Non-relocation covenants first appeared in the late 1980s and early 1990s."[202] The rise in their popularity coincides with the increase in new stadium construction.[203] Twenty-two of the thirty MLB teams currently have non-relocation agreements with their home city, county, state, or separately created stadium district.[204]

At its core, a non-relocation clause prohibits a team from moving to a different location. To further this end, the agreement typically concerns terms regarding the prohibition of team relocation, the requirement that all home games be played at the home stadium (subject only to a few exceptions, such as certain internationally played games and *force majeure* clauses), prohibition of applications to transfer the team, any transferee of the team franchise must assume the non-relocation agreement, and maintenance of the franchise and team office location.[205]

Non-relocation agreements also contain terms governing the protection of the team name and history, right of first refusal to purchase the team, and restrictions on secured creditors (these require any potential secured party to agree to abide by the non-relocation agreement in case of foreclosure).[206] Non-relocation agreements generally support equitable remedies, such as specific performance, injunctive relief, and temporary restraining orders in case of breach.[207] While such agreements typically have language that supports equitable relief, such as stating that

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[198] *Id.*

[199] Maury Brown, *Yankees Borrow $105M to Cover Cost Overruns for New Stadium*, THE BIZ OF BASEBALL (Mar. 17, 2009, 10:48 AM), http://www.bizofbaseball.com/index.php?option=com_content&view=article&id=3084:yankees-borrow-105m-to-cover-cost-overruns-for-new-stadium&catid=41:facility-news&Itemid=56.

[200] Greenberg & Ward, *supra* note 5, at 8.

[201] *See* Zimbalist, *supra* note 6, at 146 (noting MLB Commissioner Bud Selig threatened relocation on multiple occasions but "MLB has not allowed a team to relocate since 1972").

[202] Greenberg & Ward, *supra* note 5, at 8.

[203] *Id.* at 10–11.

[204] *Id.* at 10.

[205] *Id.* at 19–21, 23, 25.

[206] *Id.* at 26–28, 30.

[207] *Id.* at 34.

breach would cause "irreparable harm" or asserting that there is "no adequate remedy at law," there is no guarantee that a court will grant equitable relief.[208] Recognizing this, non-relocation agreements also contain monetary remedies that provide compensation for the "total anticipated losses the home city would incur following the loss of its team."[209] In addition to these monetary damages, non-relocation agreements also include liquidated damages provisions.[210] Liquidated damages are "an amount of compensation to be paid in the event of a breach of contract, the sum of which is fixed and certain by agreement."[211] These damages are allowable in an "amount that is reasonable in the light of the anticipated or actual harm caused by the breach and, in a consumer contract, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy."[212]

One of the biggest financial risks associated with the public funding of stadiums for the benefit of privately owned teams is the risk of bankruptcy.[213] In 2009, the Chicago Cubs filed for bankruptcy, becoming the first MLB team in sixteen years to declare bankruptcy.[214] Eventually, the team was sold for $845 million.[215] The next year, on August 5, 2010, the Texas Rangers were sold at a bankruptcy auction for the final purchase price of $593 million.[216] More recently, on June 27, 2011, the Los Angeles Dodgers filed for bankruptcy relief under Chapter 11.[217]

While none of these teams filed for relief under the Bankruptcy Code to enable them to reject facility leases or non-relocation agreements and move to other cities, bankruptcy is a way in which a team could undermine an existing non-relocation

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[208] *Id.* at 35–36, 38.

[209] *Id.* at 38.

[210] *Id.* at 39.

[211] Chodos v. West Publ'g Co., 292 F.3d 992, 1002 (9th Cir. 2002) (citation omitted).

[212] U.C.C. § 2-718(1) (2010).

[213] *See Fans and Public Left Uninformed on True Cost of Publicly Financed Stadiums*, VIKES GEEK (Feb. 10, 2011, 5:31 PM), http://vikesgeek.blogspot.com/2011/02/fans-and-public-left-uninformed-on-true.html.

[214] *Chicago Cubs File for Bankruptcy Ahead of Team's Sale*, FOX NEWS (Oct. 12, 2009), http://www.foxnews.com/us/2009/10/12/chicago-cubs-file-bankruptcy-ahead-teams-sale.

[215] *Ricketts Family Closes Cubs Deal*, CHI. TRIB., Oct. 28, 2009, at C29.

[216] Greenberg & Ward, *supra* note 5, at 30.

[217] *Dodgers File for Bankruptcy Protection*, ESPN.COM (June 28, 2011, 10:54 AM), http://sports.espn.go.com/los-angeles/mlb/news/story?id=6708046.

agreement.[218] Coincidently, none of these three teams that have recently filed for bankruptcy relief have non-relocation agreements.[219]

Although non-relocation agreements are generally a matter of contract, and thus subject to influence by the practicalities and needs of each franchise and city, there are several common themes and provisions memorialized in these agreements to attempt to temper or avoid the affect of a bankruptcy filing.

> [Most] non-relocation agreement[s] include[ ] language to the general effect that (1) the commencement of any bankruptcy or other insolvency proceedings, voluntary or involuntary, or (2) the appointment of a trustee or receiver, or (3) an assignment for the benefit of creditors all constitute an event of default or breach of the non-relocation agreement and that the non-relocation agreement is not dischargeable in any such proceeding.[220]

These *ipso facto* agreements as described above that seek to prevent a bankruptcy court from permitting a debtor to reject a relocation agreement are generally not enforceable under sections 365(e)(1) and 541(c)(1) of the Bankruptcy Code.

If a sports franchise were to seek relief under title 11 of the U.S. Code (the Bankruptcy Code), it is likely that a bankruptcy court would characterize the contractual relationship between the debtor sports franchise and the local government (through some entity) as one that is executory in nature, or the subject of an integrated lease relationship.[221] This is particularly true of non-relocation agreements. A finding that such agreements constitute executory contracts or integrated real property leases leads to the application of section 365 of the Bankruptcy Code.[222] That section creates a matrix of rights, duties, and obligations that seek to balance a debtor's ability to reject certain agreements in specific circumstances while at the same time accommodating the interests of the non-debtor party to the agreement. If a non-

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[218] Greenberg & Ward, *supra* note 5, at 77 (citing 11 U.S.C. § 365(a) (2006)). *See also* Matt Egan, *The Latest Weapon in the Pro Sports Playbook: Bankruptcy*, FOX BUS. (July 1, 2011), http://www.foxbusiness.com/industries/2011/06/30/pro-teams-throw-chapter-11-into-playbooks/http://www.foxbusiness.com/industries/2011/06/30/pro-teams-throw-chapter-11-into-playbooks (noting that the Rangers declared bankruptcy due to heavy debt, the Cubs declared bankruptcy to facilitate their sale, while the Dodgers filed in an effort to push through a television deal that MLB has persistently denied).

[219] Greenberg & Ward, *supra* note 5, at 60 (detailing MLB team non-relocation agreements).

[220] *Id.* at 76 (footnote omitted).

[221] *See generally* 11 U.S.C. § 365.

[222] *Id.*

relocation agreement is an executory contract or unexpired real property lease, then the debtor franchise may assume the non-relocation agreement,[223] assign the agreement,[224] or reject the agreement.[225] If the debtor franchise either assumes or assigns the agreement, then it must generally cure all defaults and provide adequate assurance of future performance.[226] If the debtor seeks to reject the non-relocation agreement, then the rejection constitutes a breach of the agreement giving rise to a prepetition claim by operation of law.[227] The court will permit the debtor to reject the agreement if it is in the best interests of the bankruptcy estate; the court will not balance the harm to the city against the benefit to the franchise's bankruptcy estate.[228] Section 365 rejections are generally all about the estate.

There has been some discussion of whether a non-relocation agreement is an executory agreement or an unexpired lease. The determination of an executory contract is rather conceptually difficult.

Bankruptcy Code section 365 allows a debtor in possession or a trustee to assume or reject executory contracts and unexpired leases. While the Bankruptcy Code fails to define the term "executory contract," the courts have generally interpreted the term to include contracts in which both parties have unfulfilled future obligations, apart from the mere repayment of money.[229] As such, the repayment of a promissory note is not an executory contract.

Partial performance of a contract, where one party has fully performed their contractual obligations and the other party has not, increases the difficulty in determining whether a contract is executory in nature, or not. Courts take two main approaches to determining if a contract is an executory contract. First, some courts hold that if one party has fully performed, the contract is not executory. Other courts, however, utilize the traditional test, which holds a contract executory if the debtor's estate is benefited

223 *Id*. § 365(a), (b).
224 *Id*. § 365(f).
225 *Id*. § 365(a), (g).
226 *Id*. § 365(b).
227 *Id*. §§ 365(g), 502(a).
228 *See, e.g.*, Lubrizol Enters. v. Richmond Metal Finishers, 756 F.2d 1043, 1046–48 (4th Cir. 1985), *superseded by statute*, Act of Oct. 18, 1988, Pub. L. 100-506, § 1(b) (codified at 11 U.S.C. § 365(n)).
229 C. RICHARD MCQUEEN & JACK F. WILLIAMS, TAX ASPECTS OF BANKRUPTCY LAW AND PRACTICE § 1:70 (3d ed. 2011), *available at* Westlaw TAXBLP.

by characterizing the contract as executory.[230]

Like the term "executory contract," the Bankruptcy Code also fails to define an "unexpired lease." Chapter 2A of the Uniform Commercial Code, as well as the law on real property leases, and state law are consulted to define "unexpired lease."[231] Generally, however, unexpired leases will refer to both real and personal property leases.[232]

It is our opinion that non-relocation agreements do constitute executory contracts or, if embedded as a clause in a facility management lease, a lease as those terms are understood under bankruptcy law. Thus, section 365(c)(1) is generally applicable. Therefore, although such agreements are an impressive attempt to protect local taxpayers, such non-relocation provisions are generally unenforceable under the Bankruptcy Code, rendering them useless when in most need.[233] To avoid the possible application of section 365 to the non-relocation agreement, a party to the agreement may seek to separate the non-relocation agreement from the lease, arguing that the former is a standalone document.[234] However, the willingness of a court to find severability of the non-relocation agreement from the remaining agreements turns on compliance with the goals of bankruptcy policy.[235] Although no persuasive guidance may be teased from this body of law, the resolution does tend to turn on the intent of the parties. It is our opinion that these attempts may largely fail from precluding the application of section 365 to the non-relocation agreement.

Assuming the non-relocation agreement is an executory contract or part of an unexpired lease, "under chapter 7 of [the Bankruptcy Code], if the trustee does not [expressly] assume or reject an executory contract or unexpired lease . . . within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected."[236] Further, in any nonresidential lease situation, the assumption or rejection must be done within 120 days after the order for relief (with a 90 day

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230 *Id.*
231 *Id.*
232 *Id.*
233 *Id.*
234 Greenberg & Ward, *supra* note 5, at 77.
235 *Id.* at 78, 81.
236 11 U.S.C. § 365(d)(1) (2006).

extension for cause).[237] In a Chapter 11 case, as a general rule, the debtor or trustee (if a trustee has been appointed) "may assume or reject an executory contract or unexpired lease . . . at any time prior to confirmation of a plan . . . ."[238] However, a party to the executory contract or unexpired lease may request the court to require the debtor or trustee to assume or reject the unexpired lease or executory contract within a specified time.[239]

There is a limbo period between the filing of the petition and the time of assumption or rejection, where the debtor is not in default on the executory contract and the other party must continue to perform.[240] Otherwise, the other party need not perform unless the contract is cured and assumed.[241] If the matter deals with nonresidential real property, performance must be executed.[242]

The assumption of an executory contract binds the estate and the non-debtor party. Most contracts and leases may be assumed except personal service contracts, a lease of nonresidential real property that had been terminated under non-bankruptcy law prior to the order for relief, and other financial accommodations under section 365(c).[243] The effect is to make the contract an administrative expense of the estate as if the estate had originally entered into the contract. A post-assumption breach gives rise to an administrative expense under section 365(g)(2); but it is limited and capped.[244] To assume an executory contract or unexpired lease, a debtor must cure any defaults, compensate the other party to the contract or lease for any pecuniary loss resulting from any defaults, and provide adequate assurance of the debtor's future performance.[245] Prior to the assumption of an unexpired lease, the debtor or trustee must pay for any services or supplies furnished after commencement of the case under the lease and, if

[237] *Id.* § 365 (d)(4)(A)(i), (d)(4)(B)(i).
[238] *Id.* § 365(d)(2).
[239] *Id.*
[240] *See id.* § 362(a) (provided that the automatic stay has not been lifted). If the debtor fails to provide adequate protection, that may be grounds for lifting the automatic stay. *Id.* § 362(d)(1).
[241] *Id.* § 365(b)(1)(A).
[242] *Id.* § 365(d)(3).
[243] *Id.* § 365(c)(1)–(3).
[244] *Id.* §§ 503(b)(1)(A), 365(g); *see also In re* Hall, 202 B.R. 929, 930–35 (Bankr. W.D. Tenn. 1996) (providing an analysis of provisions and case law showing that post-petition, post-assumption rent may be treated as administrative expenses).
[245] 11 U.S.C. § 365(b)(1)(A).

the lease is a lease of nonresidential real property and the debtor is the lessee, perform all obligations of the debtor under the lease.[246]

An unexpired lease or executory contract may be assumed and assigned by the trustee in accordance with the requirements described above, and with adequate assurance of future performance by the assignee.[247] Once an executory contract or unexpired lease is assigned, the non-debtor party to the contract will no longer have a claim against the estate.[248] Finally, an executory contract to make a loan or extend credit may not be assumed.[249]

If the debtor rejects the executory contract, the rejection is treated as a breach of the contract and gives rise to a prepetition claim.[250] Through rejection, a debtor might loosen itself from the restriction found in a typical non-relocation agreement.[251] To be sure, the rejection gives rise to a claim on behalf the local government.[252] However, that claim, usually unsecured, is administered in the bankruptcy case with the other unsecured claims against the bankruptcy estate.[253] This is usually a dire consequence for the local government.

CONCLUSION

Public financing of sports stadiums is not without controversy. The time-honored practice of committing public resources to retain a private sports franchise or attract a new franchise is not without its detractors. Notwithstanding the hue and cry leveled at such practices, local governments continue to develop more sophisticated revenue and tax packages to attract teams. The practice is not without risk and is far from inexpensive. In the past, local governments focused on the benefits from public financing to retain or attract professional sports franchises; little attention was paid to the costs or downside associated with such substantial finance and resource commitments. That time has gone.

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[246] *Id.* § 365(b)(1)(A), (d)(3).
[247] *Id.* § 365(f)(1)–(2).
[248] *Id.* § 365(k).
[249] *Id.* § 365(c)(2).
[250] *Id.* § 365(g).
[251] *Id.* § 365(e)(1); *see also* Greenberg & Ward, *supra* note 5, at 75–78.
[252] *See* 11 U.S.C. § 365(e)(1).
[253] Greenberg & Ward, *supra* note 5, at 79–80.

As local governments continue to craft enticing financial packages, concerned citizens and public officials are taking closer looks at "sweetheart deals." Although these local governments may continue to go forward with the public financing proposal, they do so with one eye on protecting their investment through various covenants in the operative documents, and the other eye on preventing harm through relocation and/or bankruptcy relief.

There appears to be no abatement in public financing of sports stadiums. However, it is fair to say that local governments have become more aware and better protected in such arrangements. Time will tell whether, in these hardest of financial times, strapped local governments will continue to subsidize the construction and maintenance of stadiums for private sports enterprise. We shall see.