Fordham Journal of Corporate & Financial Law

Volume 25 | Issue 1 Article 6

2020

# Is Baseball Shrouded in Collusion Once More? Assessing the Likelihood that the Current State of the Free Agent Market will Lead to Antitrust Liability for Major League Baseball's Owners

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# IS BASEBALL SHROUDED IN COLLUSION ONCE MORE? ASSESSING THE LIKELIHOOD THAT THE CURRENT STATE OF THE FREE AGENT MARKET WILL LEAD TO ANTITRUST LIABILITY FOR MAJOR LEAGUE BASEBALL'S OWNERS

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**ABSTRACT**

This Note examines how Major League Baseball's (MLB) current free agent system is restraining trade despite the existence of the league's non-statutory labor exemption from antitrust. The league's players have seen their percentage share of earnings decrease even as league revenues have reached an all-time high. This reality is due to the players' inability to "cash-in" when their market value hits its apex. Once these players enter the open market, their value has greatly deteriorated and consequently, they are unable to generate earnings commensurate with their value to the league.

This Note first explores the progression of MLB's exemption from antitrust before briefly examining the history of the sport's reserve clause. This Note then chronicles free agency's inception, its subsequent development, the league's brushes with collusion over the past several decades, and how the Curt Flood Act has critically peeled back the sport's antitrust exemption. Finally, it demonstrates how the current system of free agency is restraining trade before positing that the pursuit of antitrust litigation is the optimal measure players can turn to in order to combat the current state of the free agent market.

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## INTRODUCTION

On March 19, 2019, Los Angeles Angels superstar center-fielder Mike Trout signed the most lucrative contract in sports history, guaranteeing him more than $430 million over a twelve-year span.[1] While Trout is considered one of the greatest players of his generation—and to many, one of the greatest to ever play the sport—this is undeniably a large sum of money.[2] The contract was an extension of his current commitment

1. Anthony Wintrado, *Mike Trout Signs A Record-Breaking Extension With The Angels*, FORBES (Mar. 19, 2019), https://www.forbes.com/sites/anthonywitrado/2019/03/19/mike-trout-signs-a-record-breaking-extension-with-the-angels/#3ef4c031686c [https://perma.cc/DN5R-6U94].

2. *See generally* Dale Murphy, *I played against some of the all-time greats. Mike Trout is better than all of them*, THE ATHLETIC (April 23, 2019), https://theathletic.com/

with the Angels–the club Trout has played for since he was drafted into the league at eighteen years-old.[3] With merely two years left on his contract, Trout was close to hitting the market where he would have had the opportunity to sign with the highest bidder for his services. On the market, he would have been one of the most sought-after commodities in the history of the sport.[4] Instead, Trout joined the long list of established players in Major League Baseball (MLB) who have erred on the side of caution by securing their futures with their current employers.[5] When asked why he chose to secure his future before reaching that point, Trout cited the slow progression of the free-agent market during the 2018–2019 off-season as being a major reason for his decision.[6]

During the 2019 off-season, Manny Machado and Bryce Harper—two of baseball's biggest stars—were slated to be highly-coveted free agents.[7] With both players entering the 2019–2020 season at only twenty-six years-old and with multiple productive seasons under their belts,[8] it

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938406/2019/04/23/dale-murphy-i-played-against-some-of-the-all-time-greats-mike-trout-is-better-than-all-of-them/ [https://perma.cc/V53K-7X85].

3. *Complete 2009 Draft Results*, ESPN, http:/www.espn.com/mlb/draft2009/news/story?id=4246340 [https://perma.cc/MTK8-CK7U] (last visited Aug. 11, 2019).

4. *See* Mike Axisa, *MLB Hot Stoce: Why a Mike Trout free agent bidding war could've topped $600M*, CBS SPORTS (Nov. 10, 2017) https://www.cbssports.com/mlb/news/mlb-hot-stove-why-a-mike-trout-free-agent-bidding-war-couldve-topped-600m/ [https://perma.cc/8GMH-PF2D].

5. *See generally* Gabe Lacques, *Panic or pragmatism? Breaking down MLB's $1.7 billion flurry of contract extensions*, USA TODAY (Mar. 28, 2019), https://www.usatoday.com/story/sports/mlb/columnist/gabe-lacques/2019/03/28/mlb-contract-extensions-free-agency-salaries/3287684002 [https://perma.cc/8W5X-JXVE].

6. Fabian Ardaya, *Inside the conversations and texts that convinced Mike Trout to become an "Angel for life,*" THE ATHLETIC (Mar. 25, 2019), https://theathletic.com/886221/2019/03/25/the-conversations-and-texts-that-convinced-mike-trout-to-become-an-angel-for-life [https://perma.cc/58DB-DDEP] ("Trout realized even he might not be safe from the current state of baseball free agency and club spending on the open market.").

7. *Id.*

8. *See* Victor Mather, *How Good is Manny Machado?,* N.Y. TIMES (July 17, 2018), https://www.nytimes.com/2018/07/17/sports/manny-machado-trade.html [https://perma.cc/DS29-AN2N] ("Make no mistake, Machado is a bona fide star. He has four All-Star selections in his six full seasons and has put up consistent numbers with only one significant stretch on the sidelines."); *see also* Scott Miller, *Bryce Harper Rejected $300M, but Is He Really a Generational Superstar Anymore*? BLEACHER REPORT (Dec. 4, 2018), https://bleacherreport.com/articles/2808604-bryce-harper-rejected-300m-but-is-he-really-a-generational-superstar-anymore [https://perma.cc/NL6H-JD8N] ("There is no doubt in my mind that he is a bona fide,

was presumed within the industry that both players would have suitors lining up to pursue them.[9] However, fewer teams than anticipated vied for their services.[10] The absence of serious pursuit from multiple teams for two of the game's transcendent talents has emblemized the notion that the current free agent system in the MLB is broken, and may lead to another prolonged labor dispute for the sport.[11]

Machado and Harper eventually signed long-term deals,[12] but other marquee players in the sport have not been so lucky.[13] Free agents, including pitchers Dallas Keuchel and Craig Kimbrel, remained unsigned well into the 2019 season despite having tremendous track records of success.[14] The situation these free agents have found themselves in is puzzling to many within the industry because while revenue for the MLB is at an all-time high, salaries for its players actually decreased in 2018.[15]

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elite competitive advantage in today's game.") (quoting Minnesota Twins General Manager Thad Levine).

9. *See generally* Jon Tayler, *A Case for Every Team to Sign Bryce Harper*, SPORTS ILLUSTRATED (Nov. 12, 2018), https://www.si.com/mlb/2018/11/13/bryce-harper-free-agency-yankees-cubs-red-sox-dodgers-nationals [https://perma.cc/D2LU-VN8E].

10. *See* Michael Powell, *Why Isn't Anyone Bidding for Bryce Harper and Manny Machado?*, N.Y. TIMES (Jan. 29, 2019), https://www.nytimes.com/2019/01/29/sports/baseball/harper-machado-baseball.html [https://perma.cc/9MEP-YLXA] ("At a time of the off-season when the best free agents typically would have already signed handsome new contracts, most club-owners have tucked away their wallets and claimed to need no more talent.").

11. *See generally* Ken Rosenthal, *The slow market for Harper and Machado is another sign that baseball's current system is broken*, THE ATHLETIC (Jan. 4, 2019), https://theathletic.com/748860/2019/01/04/rosenthal-the-slow-market-for-harper-and-machado-is-another-sign-that-baseballs-current-system-is-broken/ [https://perma.cc/3LBZ-8RSD].

12. *See* Nick Friend, *Many Machado: Record $300m deal agreed, according to Reports*, CNN (Feb, 22, 2019), https://www.cnn.com/2019/02/20/sport/manny-machado-san-diego-padres-deal-spt-intl/index.html [https://perma.cc/3TPD-7CRW]; Todd Zolecki, *Harper, Phils agrees to 13-year deal*, MLB.com (Mar. 2, 2019), https://www.mlb.com/news/bryce-harper-deal-with-phillies [https://perma.cc/SD4K-C2QX].

13. *See generally*, Powell, *supra* note 10.

14. *See generally* Michael Baumann, *There's No Explanation for Why Dallas Keuchel and Craig Kimbrel Remain Unsigned*, THE RINGER (April 16, 2019), https://www.theringer.com/mlb/2019/4/16/18320329/dallas-keuchel-craig-kimbrel-unsigned-red-sox-brewers-nationals-mets-cubs-phillies [https://perma.cc/7EHX-AW2K].

15. *See generally* Maury Brown, *MLB Sees Record Revenues Of $10.3 Billion For 2018*, FORBES (Jan. 7, 2019), https://www.forbes.com/sites/maurybrown

This decline is likely a result of the free-agent market simply not proving as fruitful for players as in years past.

This reality has led to speculation that MLB's club-owners are colluding by implicitly refusing to get into bidding wars for players' services.[16] In theory, doing so would discourage players from pursuing free agency in order to retain their teams' talent at more favorable rates.[17] Collusion—which is prohibited by federal law[18]—is generally defined as any collective action that restricts competition.[19] This would not be the first time MLB's club-owners have been faced with collusion charges.[20] The number of "labor-management disputes have arisen more in [the MLB] than in any other major professional sport played in the United States, particularly since the advent of collective bargaining in the past three decades."[21]

Professional teams in the MLB have enjoyed a special non-statutory labor exemption from antitrust law since 1922.[22] The non-statutory labor exemption is permissible in United States professional sports because of the "peculiar nature of the labor-management relations in the industry."[23]

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/2019/01/07/mlb-sees-record-revenues-of-10-3-billion-for-2018/#340c79c35be [https://perma.cc/PWT9-TUDF]; *see also* Gabe Lacques, *Panic or pragmatism? Breaking down MLB's $1.7 billion flurry of contract extensions*, HERALD-MAIL MEDIA (Mar. 28, 2019), https://www.heraldmailmedia.com/news/usa_today/panic-or-pragmatism-breaking-down-mlb-s-billion-flurry-of/article_18424271-e380-56f2-8aef-379942f5efe6.html [https://perma.cc/T8M4-WUS3] ("As their share of baseball's revenue pie continues to shrink, and methods to suppress their earnings proliferate, 22 emerging or established Major League Baseball stars waved something that looked like a white flag this spring.").

16. *See generally* Jonah Kerri, *Barry Bonds' former agent says MLB owners are colluding against players to suppress salaries*, CBS SPORTS (Jan. 14, 2019), https://www.cbssports.com/mlb/news/barry-bonds-former-agent-says-mlb-owners-are-colluding-against-players-to-suppress-salaries/ [https://perma.cc/8SDP-QVJX?type=image].

17. *Id.*

18. *See* 15 U.S.C. §§ 1-38 (2012).

19. Darren A. Heitner & Jillian Postal, *What If Kaepernick Is Correct?: A Look at the Collusion Criteria in Professional Sports*, 9 HARV. J. SPORTS & ENT. L. 157, 158 (2018).

20. *See* Jeffrey S. Moorad, *Major League Baseball's Labor Turmoil: The Failure of the Counter-Revolution*, 4 VILL. SPORTS & ENT. L.J. 53, 69 (1997).

21. *Id.* at 53–54.

22. *See* Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922).

23. Heitner & Postal, *supra* note 19, at 163.

Sports leagues are asked to promulgate rules that will level the playing field among competitors—such as barring players of a certain age from participating in a sport, or preventing the relocation of a franchise—frequently to the detriment of teams and individual competitors.[24] But if any sports league is incapable of establishing such rules, their ability to remain competitive would be near impossible.[25] Due to this reality, lawsuits from baseball players that claim antitrust violations are exceedingly rare. Instead, players have attempted to settle cases where club-owners have exhibited purposeful anti-competitive practices through grievance proceedings or private negotiations.[26]

Pursuing antitrust litigation in the wake of the 2019 off-season may be a superior alternative to filing for grievances and/or private proceedings. This Note posits that contemporary free agency in baseball is restraining trade by preventing players from capitalizing on their market value at the point in their careers at which market value peaks. This restraint of trade has created an imbalance too great for club-owners to avoid under the non-statutory exemption.

Part I of this Note explores the progression of MLB's exemption from antitrust before briefly examining the history of the sport's reserve clause. Part II chronicles free agency's inception, subsequent development, and brushes with collusion over the past several decades. Finally, Part II discusses how the Curt Flood Act (CFA) has critically peeled back the sport's antitrust exemption. Finally, Part III analyzes how free agency is restraining trade and argues that antitrust litigation is the optimal measure the players can turn to in order to combat the current state of the free-agent market.

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24. *See* Mark C. Anderson, *Self-Regulation and League Rules Under the Sherman Act*, 30 CAP. U. L. REV. 125 (2002).

25. *See* Grant Brisbee, *Noah Syndergaard, George Springer, and Playing Around with Service Time*, SB NATION (Mar. 21, 2014), https://www.sbnation.com/mlb/2014/3/21/5531100/noah-syndergaard-george-springer-THE-SYSTEM [https://perma.cc/V7HF-7F7B] (discussing service time and instances of service time manipulation as necessary evils of competitive balance).

26. *See infra* Part II.

## I. HOW THE MLB HAS HISTORICALLY ESCAPED ANTITRUST LIABILITY & BASEBALL'S RESERVE SYSTEM

The recognition of baseball as one of America's most cherished cultural staples has not been lost on the American legal system. Some legal commentators believe that the sport's popularity enabled it to originally escape antitrust liability.[27] Yet, the exemption remains despite the weakening of its authority that came as a result of a case brought by outfielder Curt Flood.[28]

### A. THE SHERMAN ANTITRUST ACT

The Sherman Antitrust Act of 1890 (the "Sherman Act") is the main governing statute responsible for regulating the MLB's otherwise broad autonomy in molding some of its anti-competitive practices.[29] Specifically, the first two provisions, often referred to as Sherman I[30] and Sherman II,[31] purport to enable unrestricted competition amongst businesses.

Sherman II prohibits any sort of conduct that attempts to monopolize interstate commerce.[32] For the purposes of this Note, Sherman II violations will not be discussed, as they are not relevant in situations involving sports leagues for reasons discussed *infra* Part I.C.

Under Sherman I, it is illegal to conspire to contract in a way that unreasonably restrains trade in interstate commerce.[33] However, not all contracts that restrain interstate commerce are illegal, just contracts that

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27. *See* Shayna M. Sigman, *The Jurisprudence of Judge Kenesaw Mountain Landis*, 15 MARQ. SPORTS L. REV. 277, 295–96 (2005) (arguing that despite Judge Kennesaw Mountain Landis's reputation as a "trust buster," his desire to "save the sport he loved" prevented him from ruling that Baseball was engaged in antitrust activity in Federal League v. Organized Baseball).

28. *See* Flood v. Kuhn, 407 U.S. 258 (1972).

29. 15 U.S.C. §§ 1-38 (2012).

30. *Id.* at § 1. ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

31. *Id.* at § 2. ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .").

32. *Id.*

33. *See* Anderson, *supra* note 24, at 127.

are found to be unreasonable.[34] To determine whether any particular restraint is unreasonable under the federal antitrust laws, a court will generally apply one of the following two approaches: (a) per se test or (b) rule of reason test.[35]

Restraints analyzed under the per se rule are those that are always so inherently anticompetitive and damaging to the market that they do not require further inquiry into their effects on the market or the existence of an objective competitive justification.[36] If it is not apparent that this situation exists, the rule of reason test is applied. "The focus of an inquiry under the [r]ule of [r]eason is whether the restraint imposed is justified by legitimate business purposes, and is no more restrictive than necessary."[37] To establish a Section 1 violation of the Sherman Act, a party must prove two elements: (1) a conspiracy, and (2) an unreasonable restraint of trade.[38] Sports leagues are considered to be joint ventures, which are entities that rely on the success of their members to profit.[39] Since joint ventures are reliant upon the success of their members to be profitable, they are permitted to engage in practices—such as price fixing and wage restraints—that might otherwise be illegal under Sherman I.[40]

### B. ORIGINS OF BASEBALL'S RESERVE SYSTEM

Baseball became a legitimate business in the United States when the National League was formed in 1876.[41] The National League was a denominated major league that was eventually united through the National Agreement with another major league named the American League, that collectively formed the National Association of Professional

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34. *Id.* at 128.
35. *See* Mackey v. Nat'l Football League, 543 F.2d 606, 616 (8th Cir. 1976).
36. *See* U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).
37. *Mackey*, 543 F.2d at 620.
38. *See* Heitner & Postal, *supra* note 19, at 159.
39. *See Mackey*, 543 F.2d at 619.
40. *See* Texaco Inc. v. Dahger, 547 U.S. 1 (2006) (deciding that two oil companies' production and marketing joint venture, to sell separately branded gasoline to service station club-owners at same price, was not per se illegal horizontal price fixing agreement, as companies were not competing in relevant market.)
41. *See* Joshua P. Jones, *A Congressional Swing and Miss: The Curt Flood Act, Player Control, and the National Pastime*, 33 GA. L. REV. 639, 644 (1999).

Baseball Leagues.[42] The league consisted of a large number of minor leagues of professional baseball in addition to the major leagues, which attracted superior players.[43]

Before the merger with the American League, however, the league's preliminary club-owners reached a "secret agreement to 'reserve' up to five players per team who would become bound to their current employer [which persisted past the merger]."[44] This agreement eventually extended "to include all players in their league."[45] This clause essentially enabled clubs to hold on to players for all ensuing seasons on a perpetual basis.[46]

The economic effect of this "reserve system" was "entirely to the club-owners' advantage."[47] Under this system, players were hardly capable of negotiating their salaries and thus benefited little from the game's increasing revenues.[48] Player salaries barely increased from the 1900s through the 1960s, "even as club-owners were becoming increasingly wealthy."[49]

### C. BASEBALL'S NON-STATUTORY LABOR EXEMPTION FROM THE SHERMAN ACT

Club-owners are able to manipulate the market for a player's services because the MLB is virtually immune from antitrust liability. This immunity arose through a series of U.S. Supreme Court decisions.

The first major case that questioned the extent to which the league could be held liable for antitrust violations was *Federal Baseball Club of*

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42. Nat'l League of Prof'l Baseball Clubs v. Fed. Baseball Club of Baltimore, 269 F. 681, 683 (D.C. Cir. 1920), *aff'd sub nom.* Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Base Ball Clubs, 259 U.S. 2000 (1922).

43. *Id.*

44. *See* Marc Edelman, *Moving Past Collusion in Major League Baseball: Healing Old Wounds, and Preventing New Ones*, 54 WAYNE L. REV. 601, 605 (2008).

45. *Id.*

46. *See* Noah J. Goodman, *The Evolution and Decline of Free Agency in Major League Baseball: How the 2012-2016 Collective Bargaining Agreement Is Restraining Trade*, 23 SPORTS L. J. 19, 23 (2016) (noting that the National League club-owners colluded to establish a reserve clause—one that gave them the ability to unilaterally renew a player's contract into the next season).

47. *See* Edelman, *supra* note 44.

48. *Id.*

49. *Id.*

*Baltimore v. National League of Professional Baseball Clubs*.[50] The Federal League was a competing baseball league that at one point was comprised of eight independent teams.[51] By 1915, however, Baltimore was home to the only club in the Federal League.[52] The rest of the clubs had been bought out by either the National or American Leagues—these two leagues went on to become the MLB.[53]

The Baltimore club, however, refused to be bought out and asserted that the National and American leagues were monopolizing the industry through their aggressive buyout strategies, and were thus violating antitrust laws.[54] Its claims were ultimately unsuccessful, as the Court reasoned that the sport's exhibitions were strictly the affairs of the state in which they were being played.[55] This rationalization prevented the National and American Leagues from falling under the jurisdiction of federal law under Sherman I even if a restraint of trade had been found, and thus, resulted in the birth of baseball's non-statutory antitrust labor exemption.[56]

The exemption remained intact and faced little resistance for the next three decades. However, the MLB was eventually faced with another Sherman Act challenge in 1953.[57] George Toolson, a minor league pitcher for the New York Yankees, refused to accept an assignment to the Yankees' minor league team in Binghamton, New York.[58] His refusal resulted in his placement on the ineligible list, which prohibited him from joining any other Major League club and effectively forced him to remain

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50. *See* Nathaniel Grow, *The Curiously Confounding Curt Flood Act*, 90 TUL. L. REV. 859, 865 (2016) (stating that "baseball's antitrust exemption dates back to the Supreme Court's 1922 decision in Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs").

51. Fed. Baseball Club of Baltimore v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 207 (1922).

52. *See* Grow, *supra* note 50.

53. *Id.*

54. *See Fed. Baseball Club*, 259 U.S. at 207 (The plaintiff asserted that the defendants, by buying up some of the constituent clubs and inducing all of them except plaintiff to leave the Federal League with assistance by the Federal League president defendant, took part in the conspiracy.).

55. *Id.* at 208–09.

56. *Id.*

57. *See* Toolson v. New York Yankees, Inc., 346 U.S. 356, 357–58 (1953) (comparing the antitrust issues in question to those presented to the Court before in Federal Baseball Club v. National League of Professional Baseball Clubs).

58. *See* Goodman, *supra* note 46, at 30.

in the Yankees organization.[59] Toolson challenged the league under the Sherman Act, but the Supreme Court rejected his claim.[60]

The Supreme Court interpreted Congress' inaction in the aftermath of *Federal Baseball Club* as demonstrating a desire to keep the MLB exempt from antitrust laws.[61] The Court held that "stare decisis concerns warranted maintaining baseball's antitrust immunity because the MLB had 'been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation.'"[62]

Nearly two decades would pass before there was another challenge to the sport's antitrust exemption. In October 1969, the St. Louis Cardinals traded Curt Flood to the Philadelphia Phillies, leading to another attack on the exemption's validity.[63] Flood objected to the trade and asked to be proclaimed a free agent so that he could instead sign with a team of his choice.[64] When the league refused, Flood filed a lawsuit challenging the reserve clause in his contract under the Sherman Act.[65] The District Court for the Southern District of New York held that the reserve system's legal invalidity stemmed from a forced restraint of trade through his inability to choose his place of employment.[66]

In its decision, the Supreme Court acknowledged that "[p]rofessional baseball is a business and it is engaged in interstate commerce," thus effectively repudiating the underlying basis of the *Federal Baseball Club* decision, which held that the sport was an intra-state enterprise.[67] The Court also admitted that baseball's antitrust immunity was an "exception and an anomaly" and decided to retain the exemption.[68] Consequently, the antitrust exemption's legal validity remained, but cracks in its foundation, which had previously been perceived as impregnable, began to surface.

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59. *See id.*

60. *See Toolson*, 346 U.S. at 357.

61. *Id.* (explaining that the Court was hesitant to overturn its 1922 decision in light of the fact that "Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect.").

62. *Id.*

63. *See* Flood v. Kuhn, 407 U.S. 258, 265 (1972).

64. *Id.*

65. Grow, *supra* note 50, at 868. Flood additionally claimed the reserve system violated the Thirteenth Amendment's prohibition of slavery.

66. Flood v. Kuhn, 316 F. Supp. 271, 272 (S.D.N.Y. 1970) ("By way of relief plaintiff seeks a declaration of the illegality of baseball's reserve system, an injunction restraining defendants from agreeing among themselves to refuse him employment.").

67. *See Flood*, 407 U.S. at 273.

68. *Id.* at 282.

## II. THE BEGINNINGS OF FREE AGENCY & THE INABILITY OF PLAYERS TO AVOID BASEBALL'S ANTITRUST EXEMPTION

While Major League players failed to rid themselves of the reserve clause in the *Flood* litigation they were able to secure the right to free agency within a few years after the decision by relying on collective bargaining and labor arbitration.[69] Securing this right was in large part due to the efforts of the Major League Baseball Players Association (MLBPA), which was becoming increasingly influential.[70] By establishing free agency, the players fleshed out new rights for themselves that strengthened their position against the club-owners' previously limitless autocratic system of player control.[71] Despite this development of new rights for the players, manipulation of their services continued.[72]

### A. FORMATION OF MAJOR LEAGUE BASEBALL'S PLAYERS ASSOCIATION

The players laid the groundwork for the MLBPA's formation in 1954,[73] before it became a "fully functioning union" in the 1960s.[74] The players hired chief economist Marvin Miller as their executive director in 1966.[75] Miller wanted to employ the league's grievance arbitration and collective bargaining "to challenge the game's reserve system."[76]

In 1974, Miller encouraged two players—Andy Messersmith and Dave McNally—not to sign new contracts for the 1975 season but to instead make their teams exercise the "option clause" in their previous contracts, which required the players to play the following season under the previous year's terms.[77] After Messersmith and McNally played one year under the option clause, Miller believed the players would no longer be bound by the reserve system.[78] Baseball's neutral arbitrator ultimately

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69. Grow, *supra* note 50, at 869.

70. Edelman, *supra* note 44, at 605.

71. *Id.* at 608.

72. *Id.* at 608, 610.

73. *See id.* at 605. ("Originally founded in 1954 to represent the players' pension interests.")

74. *Id.* at 605.

75. *Id.*

76. *Id.* at 606.

77. *See* Susan H. Seabury, *The Development and Role of Free Agency in Major League Baseball*, 15 GA. ST. U. L. REV. 335, 352–53 (1999).

78. *See* Edelman, *supra* note 44, at 607.

agreed with Miller, Messersmith, and McNally much to the chagrin of MLB's club-owners.[79] Previously, the club-owners assumed they could perpetually renew the right to maintain a player previously under contract by exercising the option clause at any time.[80]

Unsurprisingly, the club-owners decided to challenge the decision which eventually made its way to the 8th Circuit.[81] In *Kansas City Royals Baseball Corp. v. MLB Player's Ass'n*,[82] the club-owners were unsuccessful in seeking to have the arbitration panel's decision overturned.[83] The court held that since the club-owners and players collectively bargained to establish an arbitration panel, the "MLB derived its jurisdictional authority from the [Basic] [A]greement."[84] Therefore, the club-owners had approved the authority of the arbitration panel by supporting the establishment of the Basic Agreement and its dispute mechanisms.[85] The decision of the Court brought forth the age of free agency in Major League Baseball.[86]

### B. Free Agency & Early Instances of Collusion

Initially, free agency was a boon for the league's players.[87] Members of the MLBPA were mostly satisfied with its implementation, which resulted in both an increase in players' salaries and much greater freedom of movement.[88] The Basic Agreement also included language that specified how players and teams could conduct themselves in free agency through the 1976 Basic Agreement between the MLBPA and the club-owners.[89] Namely, the 1976 Basic Agreement established the "Individual

79. *See id.* at 606–07.

80. *See id.* at 607.

81. Goodman, *supra* note 46, at 37; Kansas City Royals Baseball Corp. v. MLB Player's Ass'n, 532 F.2d 615 (8th Cir. 1976).

82. *Kansas City Royals Baseball Corp.*, 532 F.2d at 615.

83. *See id.* at 616, 629 (noting that "[t]he 1968 agreement clearly permitted the arbitration of grievances relating to the reserve system. It, therefore, cannot be said that the Club Owners never consented to the arbitration of such grievances.").

84. Goodman, *supra* note 46, at 37.

85. *See id.*

86. *See id.*

87. *See* Edelman, *supra* note 44, at 610 ("During the first ten years of baseball free agency, the average MLB player salary increased from $50,000 per year to over $370,000 per year.").

88. *See id.* at 608.

89. *See id.*

Nature of Rights." Originally drafted as Article XVIII, Section H, the "Individual Nature of Rights" clause of the 1976 Basic Agreement stated:

> The utilization or non-utilization of [free agency shall be] an individual matter to be determined solely by each Player and Club for his or its own benefit. [With regard to free agency], Players may not act in concert with other Players, and Clubs may not act in concert with other Clubs.[90]

Without explicitly stating it, the "Individual Nature of Rights" clause foreclosed the opportunity to engage in collusive behavior.[91] Despite the prohibition of collusion, the market for free agents inextricably dried up in 1985.[92] Owners who were previously known to spend vast amounts of money to secure free agents on the open market began "praising the merits of 'fiscal responsibility'" and thereby focused on retaining the players on their respective teams.[93]

During the 1985–1986 off-season, players no longer had any legitimate opportunities to move to new clubs.[94] Consequently, players remained with their current clubs on new contracts for "lesser sums and fewer years than desired."[95] Once the players and agents realized that the club-owners were likely colluding,[96] the MLBPA decided to file a collusion grievance ("Collusion I").[97] The grievance was filed on behalf of the 139 players "purportedly harmed by collusion during the 1985–86 offseason."[98] The MLBPA contended that the club-owners' refusal to pursue players on opposing teams equated to a boycott in the market for free agents once it was undertaken by two or more teams. They argued that this constituted an illegal "concerted action" under Article XVIII(H)

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90. *Id.*

91. *See* Ryan M. Rodenberg & Justin M. Lovich, *Reverse Collusion*, 4 HARV. J. SPORTS & ENT. L. J. 191, 197 (2013) ("The individual nature of the free agency structure would guarantee that owners could no longer collectively agree to artificially restrict the baseball labor market as they had done throughout the 1900s.").

92. *See* Stephen L. Willis, *A Critical Perspective of Baseball's Collusion Decisions*, 1 SETON HALL J. SPORT L. 109, 125 (1991).

93. Heitner & Postal, *supra* note 19, at 171–72.

94. *See* Edelman, *supra* note 44, at 611.

95. *Id.*

96. *See id.* at 611 ("As of New Years Day 1986, not a single free agent player received an offer that induced his changing teams.").

97. *Id.* at 613.

98. *Id.*

of the Basic Agreement,[99] "so long as the teams' actions exhibited a common purpose or goal."[100]

Before Collusion I was decided, the MLBPA filed a second grievance ("Collusion II")[101] due to the similarly slow progression of the free agent market ensuing off-season. Of all seventy-nine free agents available in the 1986–1987 off-season, the MLBPA alleged that none of the players received a bona fide offer from any club besides their former club—until at least the former team declared its lack of interest or became ineligible to sign the player under other free agency provisions.[102] The MLBPA also argued that no eligible free agent had offers from two or more clubs at any one time.[103]

Andre Dawson, a free agent all-star outfielder, emblemized how far the clubs had gone in refusing to work against one another in their respective pursuits to hold onto their talent.[104] Dawson purported to have only received an offer from his previous club—the Montreal Expos—throughout the off-season.[105] Wanting out of Montreal, Dawson approached the Chicago Cubs during spring training and offered to accept a salary that would be unilaterally determined by the club at a later date without a contract.[106] The Cubs signed Dawson to a contract with a base salary of $500,000, which represented less than half of his previous salary.[107] Though Dawson was one of only two free agents to leave their respective clubs in the [1986–1987] off-season, the MLB believed their respective migrations were enough to offset the allegations of collusion.[108]

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99. *Excerpts From the Ruling*, N.Y. TIMES, (Sep. 22, 1987) https://www.nytimes.com/1987/09/22/sports/baseball-excerpts-from-the-ruling.html [https://perma.cc/5A39-L4MX] ("The utilization or non-utilization of rights under this Article XVIII is an individual matter to be determined solely by each Player and each Club for his or its own benefit. Players shall not act in concert with other Players and Clubs shall not act in concert with other Clubs.").

100. *See* Willis, *supra* note 92, at 120.

101. *See* Rodenberg & Lovich, *supra* note 91, at 199.

102. *See* Willis, *supra* note 92, at 126.

103. *Id.* at 123.

104. *Id.* at 125.

105. *Id.* at 126.

106. *Id.*

107. *Id.*

108. *See* Edelman, *supra* note 44, at 619 (noting that the MLB clubs argued that any finding of collusion must be negated by the movement of free agent players Andre Dawson and Lance Parrish each to new teams).

A third grievance ("Collusion III") was also filed by the MLBPA and was likewise based on allegations of collusion in the free agent market after the 1987 season.[109] Though Collusion I was decided in favor of the players, the free agent market remained quiet and unfruitful for the players.[110] Although many players received free agent offers, the offers remained much lower than expected.[111] At the same time, the club-owners created an "Information Bank" that provided all teams with detailed information about every contract offer made to a player throughout free agency.[112] As a result of every club obtaining intimate knowledge regarding the demand for a player's services, offers were likely to be suppressed, as clubs had sizeable leverage in determining what the player's value to the league was.[113] Of the seventy-six eligible free agents, twelve received offers, and only three such offers led to a player switching teams.[114]

In each respective grievance, the arbitrators ruled in favor of the players.[115] In finding for the players in Collusion I, the arbitrator clarified the function of Article XVIII(H): "What is prohibited is a common scheme involving two or more Clubs and/or two or more players undertaken for the purpose of a common interest as opposed to their individual benefit."[116] In finding for the players in Collusion II, the arbitrator stated that action in the labor market was "meager,"[117] and that the clubs' actions constituted uniform behavior, thus continuing the collusive actions of the type in Collusion I.[118] In finding for the players in Collusion III, the arbitrator ruled that although there was no boycott agreement in place, the collective use of the information bank was an anticompetitive practice that restricted the labor market.[119]

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109. *See id.* at 621.

110. *See id.* (specifying that even after Roberts's stinging ruling, the free agent market did not return to normal).

111. *See* Marc Edelman, *Has Collusion Returned to Baseball? Analyzing Whether A Concerted Increase in Free Agent Player Supply Would Violate Baseball's "Collusion Clause"*, 24 LOY. L.A. ENT. L. REV. 159, 167 (2004).

112. *Id.*

113. *See id.*

114. *Id.*

115. *Id.*

116. *See* Willis, *supra* note 92, at 122.

117. *See id.* at 125.

118. *See id.*

119. *See* Heitner & Postal, *supra* note 19, at 173.

Though the players walked away with favorable rulings,[120] these grievances may have caused more harm than good because it resulted in a rift of distrust between the club-owners and players.[121] This distrust naturally led to further accusations of collusion perpetrated by the club-owners.

Unsurprisingly, the continued hostilities resulted in a failure to agree to terms on a new CBA in 1993, following the expiration of the previously implemented deal.[122] Subsequently, a number of unilateral changes were implemented by the club-owners in the Basic Agreement, and these changes were not received kindly by the players.[123] The modifications included eliminating aspects of the free agency system and salary arbitration provisions of the since-expired CBA.[124] Consequently, the MLBPA filed an unfair labor grievance against the club-owners after the players went on strike to protest the unilateral alterations to the Basic Agreement.[125] The District Court for the Southern District of New York ruled in favor of the players, finding that the club-owners had impermissibly effectuated a change to aspects of the CBA that needed to be collectively bargained.[126]

After an injunction was issued and the players resumed work, many of the issues that led to the lockout prevailed[127] and the economic fallout

120. *See id.* at 173 (noting that the three collusion cases were settled for a sum of $280 million).

121. *See generally* Edelman, *supra* note 111, at 167–76.

122. *See* Alexandra Baumann, *Play Ball: What Can Be Done To Prevent Strikes and Lockouts in Professional Sports and Keep the Stadium Lights On*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 251, 292–93 (2012).

123. *See* Edelman, *supra* note 44, at 625 ("During the 1994 off-season, MLB club-owners further distanced themselves from the players by unilaterally implementing various changes to the Basic Agreement . . .").

124. *See* Silverman v. Major League Baseball Player Relations Comm., Inc., 880 F. Supp. 246, 261 (S.D.N.Y. 1995) (holding that the Board had reasonable cause to believe that baseball club-owners committed unfair labor practices both by eliminating free agency system and salary arbitration provisions of expired collective bargaining agreement).

125. *See id.* at 252.

126. *See id.* at 253 (explaining that a unilateral change of an expired provision on a mandatory topic, such as one involving wages, is an unfair labor practice, as it violates the duty to bargain collectively in good faith).

127. *See* Seabury, *supra* note 77, at 370 ("With the issuing of the injunction, the players went back to work, but nothing was solved.").

was severe.[128] Ensuing negotiations for a new CBA that followed the lockout led to heated debates regarding nearly every aspect of the agreement.[129]

### C. Contemporary Allegations of Collusion & Their Lack of Success

Despite prevailing contention between the club-owners and the players, the league found its financial footing in the years following the lockout.[130] The free-agent market was as desirable as it had ever been for players[131]—in large part due to the sport's increasing revenues in an era dominated by offensive production.[132]

Despite the fiscal benefits these years brought for the league, the club-owners found themselves incapable of escaping allegations of collusion once more. During the 2002 season, rumblings of a potential strike began to surface yet again.[133] When the 2002–2003 off-season arrived, those rumblings only gained momentum, as the MLBPA acquired information that identical bids were being submitted for certain free-agent players.[134]

Notably, the evidence of collusive behavior in the 2002–2003 off-season did not carry the same level of transparency as previous collusion

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128. *See* Moorad, *supra* note 20, at 83 ("[E]stimates placed the total cost of the strike to both parties in the area of $1,000,000,000.").

129. Edelman, *supra* note 46, at 625 ("The parties thereafter remained on poor terms, unable to compromise on even topics of great social importance such as drug testing procedure.").

130. *See* Goodman, *supra* note 44, at 39 (After the strike the MLB was able to rebound quickly; league revenue increased by nearly 20 percent each year between 1996 and 1999).

131. *See id.* at 40.

132. *Id.* at 39–40 ("Baseball's financial growth during the late 1990s is attributed largely to heightened fan interest because the players' offensive production—particularly batting average, home runs, and slugging percentage—increased dramatically.").

133. *See generally* Jason Reid, *Strike Date Could Be Coming*, L.A. Times (July 6, 2002), https://www.latimes.com/archives/la-xpm-2002-jul-06-sp-labor06-story.html [https://perma.cc/4VD2-SVFF].

134. Edelman, *supra* note 44, at 625–26 ("Although the MLBPA never made any of its evidence publicly available, independent information compiled from newspaper reports seems to indicate that certain players were receiving identical bids from multiple teams.").

cases had.[135] This lack of transparency did not negate the fact that some questionable behavior was exhibited by the club-owners.[136] A number of teams released high-caliber players while stressing the need to slash payroll.[137] This sizably increased the number of players available in the free-agent market, which diluted the value of individual players.[138] Despite the suspect nature of league-wide behavior, the MLBPA was awarded $12 million once it settled the case,[139] a relatively minor sum in comparison to the 1980s grievances, even though these players were left in a similar position to that of the players in the 1980s grievances.[140]

Baseball's latest collusion allegation that made its way through litigation stems from what is an unlikely source on the surface. Barry Bonds, often considered one of the greatest players in the history of the sport,[141] found himself unable to land gainful employment following the 2008 season.[142] Bonds was still an incredibly productive player at forty-three years of age.[143] However, by the time Bonds sought a new contract, he found himself at the center of a performance enhancing drug ("PEDs")

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135. *See id.* at 626 ("Although the 2002-03 off-seasons did not seem to produce any 'smoking gun' invitation to collude, there were plenty of troublesome statements.").

136. *See* Edelman, *supra* note 111, at 177 (referencing the questionable behaviors of club-owners and staff of the Atlanta Braves, Boston Red Sox, Los Angeles Dodgers, and New York Mets regarding the need to reduce payroll throughout the league).

137. *See id.* at 176–77.

138. *See* Murray Chass, *Baseball Players See a Down Market but Smell Collusion*, N.Y. TIMES (Jan. 31, 2003), https://www.nytimes.com/2003/01/31/sports/baseball-baseball-players-see-a-down-market-but-smell-collusion.html [https://perma.cc/2HGC-24P7] ("It has been that kind of winter for free agents . . . if they have secured jobs at all, they have taken large pay cuts of a sort not seen since the collusion era of the 1980s.").

139. Edelman, *supra* note 44, at 626.

140. *See* Edelman, *supra* note 111, at 183 ("[T]he economic effect of an agreement to increase the number of available free agents seems similar to the effect of an agreement not to sign other teams' free agents.").

141. *See generally* Kate Lombardo, *A-Rod says Barry Bonds is greatest baseball player of all-time*, SPORTS ILLUSTRATED (Aug. 25, 2015), https://www.si.com/mlb/2015/08/21/alex-rodriguez-barry-bonds-greatest-player-all-time [https://perma.cc/ZF2N-AETL]; *see also* Anthony Torrente, *The Dark Side of Professional Baseball: The Fall of Barry Bonds*, 5 ALB. GOV'T L. REV. 352, 353 (2012) ("Bonds won seven Most Valuable Player awards and appeared in 14 All-Star games in his illustrious career.").

142. Torrente, *supra* note 141, at 354.

143. *Id.* at 358 (noting that Bonds hit 28 home runs, had a .276 batting average, a slugging percentage of .565, and an on-base percentage of .480. Bonds' statistics were well above the 2007 MLB batting average of .268, on-base percentage of .336, and slugging percentage of .422).

scandal and had been indicted on four counts of perjury and one count of obstruction of justice.[144] Despite the PED allegations and the indictments, many believed that Bonds should have been offered an MLB club contract based on his tremendous on-the-field production, considering that he was willing to play for the league minimum salary.[145]

In October 2008, the MLBPA announced it had evidence that clubs acted in concert against signing Bonds, and therefore, Bonds was a victim of the club-owners' collusion.[146] The MLBPA sought to engage in private negotiations rather than filing a grievance, so Bonds did not file a grievance until 2015.[147] The arbitrator ruled against Bonds, failing to find a "smoking gun."[148] Bonds' best support for his cause was his statistical resume.[149] Though the previously successful collusion grievances in the 1980s also exclusively relied on circumstantial evidence, Bonds was unsuccessful.[150] His lack of further evidence made it reasonable for the arbitrator to conclude that each club had independently decided not to pursue Bonds, thereby not violating the Basic Agreement.[151]

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144. Heitner & Postal, *supra* note 19, at 180.

145. *See id.*

146. *See* THE ASSOCIATED PRESS, *Union Finds Collusion on Bonds*, N.Y. TIMES (Oct. 16, 2008), https://www.nytimes.com/2008/10/17/sports/baseball/17bonds.html [https://perma.cc/AV2E-BSTH].

147. Heitner & Postal, *supra* note 19, at 181.

148. *Id.* at 182.

149. *See* Jon Heyman, *MLB prevails over Barry Bonds in collusion case over his career ending,* CBS SPORTS (Aug. 27, 2015), https://www.cbssports.com/mlb/news/mlb-prevails-over-barry-bonds-in-collusion-case-over-his-career-ending/ [https://perma.cc/YVQ4-3L6F?type=image] (noting that the basis of the case is believed to have gone something like this: How many folks with a 1.045 on-base plus slugging statistic (OPS) can't get a job?).

150. *Id.*

151. *See* Michael McCann, *Some Colin Kaepernick supporters are crying collusion, but what does that really mean?* SPORTS ILLUSTRATED (Mar. 24, 2017), https://www.si.com/nfl/2017/03/24/colin-kaepernick-protest-nfl-collusion-free-agency [https://perma.cc/W467-FQC5] ("Therein rests a key point about collusion: There must be actual evidence of conspiracy. In the 1980s, some baseball owners and team executives took notes during meetings that later became evidence of collusion. If no such notes exist—emails, texts, . . . admissions of witnesses, whatever it is—there must be evidence that corroborates a player's contention that he has been blackballed. A player merely pointing out that he has been treated worse than players of similar abilities doesn't prove collusion. Teams are not obligated to sign anyone.").

### D. The Curt Flood Act: An Untapped Resource

Congress did not address the MLB's impermeable antitrust exemption until passing The Curt Flood Act in 1998.[152] The CFA resulted from a 1996 agreement between the club-owners and the MLBPA.[153] Both sides agreed to jointly petition Congress to repeal baseball's antitrust exemption to enable Major League players to file antitrust suits against the league.[154]

Debate persists as to whether the repeal of the exemption was meant to hold broader implications beyond merely enabling Major League players to file antitrust suits.[155] What is clear, however, is that the exemption no longer applies to Major League players in regard to conduct, acts, practices, or agreements directly relating to or affecting their employment.[156] Major League players are thus entirely capable of breaking the league's shield from antitrust liability through their non-statutory labor exemption.[157]

To date, no Major League player or collection of Major League players has attempted to utilize this legislation to their benefit in combatting anticompetitive practices implemented by the league.[158] Cases that have attempted to penetrate baseball's antitrust exemption through the CFA have involved broadcasting restrictions,[159] franchise

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152. *See* Nathaniel Grow, *Reevaluating the Curt Flood Act of 1998*, 87 Neb. L. Rev. 747, 748 (2009) ("Congress waited nearly eight decades before finally addressing MLB's longstanding antitrust exemption for the first time.").

153. *See* Grow, *supra* note 50, at 872.

154. *See id.*

155. *See id.* at 894-900; *see also* Wyckoff v. Office of Com'r of Baseball, 138 S. Ct. 2621, 2622 (2018) (A case brought by two MLB scouts attempting to assert that the league was suppressing the wages of scouts was unsuccessful).

156. 15 U.S.C. § 26b(a) (2012) ("Subject to subsections (b) through (d), the conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball directly relating to or affecting employment of major league baseball players to play baseball at the major league level are subject to the antitrust laws to the same extent such conduct, acts, practices, or agreements would be subject to the antitrust laws if engaged in by persons in any other professional sports business affecting interstate commerce.").

157. *See* 15 U.S.C. § 26b(c) (2012) ("Only a Major League baseball player has standing to sue under this section.").

158. *See* Grow, *supra* note 152, at 752.

159. *See generally* Laumann v. Nat'l Hockey League, 56 F. Supp. 3d 280 (S.D.N.Y. 2014).

relocation,[160] and minor league players,[161] each one of which has been unsuccessful.[162] Regardless, Major League players have the option to break through the antitrust exemption carved out for them through the CFA,[163] provided they can demonstrate that the league is violating antitrust law.

## III. POTENTIAL WAYS TO SOLVE THE STAGNANT STATE OF THE FREE AGENT MARKET

Even if club-owners are engaging in collusive behavior, pursuing a collusion grievance against the club-owners would likely be a waste of time. The league's recent trend of collusion grievances—in addition to a lack of overtly suppressive practices by the club-owners in the 2019 off-season—would likely work against the players in arbitration. This does not mean that the players are without a means of recourse, however—the players can break the veil of the league's antitrust exemption through the Curt Flood Act. The free-agent market is currently restraining trade,[164] making this a viable alternative, while forcing club-owners to address some of the inequities its current construction has generated.[165]

### A. WHY PURSUING A COLLUSION GRIEVANCE WOULD PROBABLY BE UNSUCCESSFUL

While baseball's CBA lacks an explicit anti-collusion provision, the "Individual Nature of Rights" clause has set forth the basic anti-collusion provisions that players and clubs have been mandated to follow since 1976.[166] Article XX(E) of the 2017–2021 Basic Agreement states as follows:

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160. *See generally* City of San Jose v. Office of the Comm'r of Baseball, 776 F.3d 686 (9th Cir. 2015).

161. *See generally* Miranda v. Selig, 860 F.3d 1237 (9th Cir. 2015).

162. *See id.*; *see City of San Jose*, 776 F.3d at 686; *see also Laumann*, 56 F. Supp. 3d at 280.

163. *See generally* Grow, *supra* note 152.

164. *See* Goodman, *supra* note 46, at 44–45; *see generally* Brisbee, *supra* note 25.

165. *See generally* Patrick Kessock, *Out of Service: Does Service Time Manipulation Violate Major League Baseball's Collective Bargaining Agreement?*, 57 B.C. L. REV. 1367, 1382 (2016).

166. *See* Edelman, *supra* note 111, at 163.

> The utilization or non-utilization of rights under [the Consent to Assignment and the Reserve System rules] is an individual matter to be determined solely by each Player and each Club for his or its own benefit. Players shall not act in concert with other Players and Clubs shall not act in concert with other clubs.[167]

The league's previous instances of collusion provide a framework for analyzing whether there is a case to be made for another in the aftermath of the 2018–2019 off-season.[168] The MLBPA could and should then consider as precedent the rulings in Collusion I, II, and III,[169] as well as the relatively unsuccessful grievances since then.[170] Looking at Collusion Grievances I, II, and III, the primary issue for a prospective arbiter to consider is whether any agreement existed between the clubs to avoid—or at least prolong—pursuing free agents in the 2002–2003 off-season long enough to drive their asking prices down.[171]

While the arbiters determined that implicit agreements amongst the club-owners could be enough to constitute collusion under the Basic Agreement in the first two collusion grievances,[172] the realities of some of the disincentives for pursuing free agents who are past their prime,[173] would make the finding of such an implicit agreement highly unlikely. During the off-seasons following the 1986 and 1987 seasons, free agents did not leave their previous employers and the free agent market was virtually non-existent, which is not the case for the majority of free agents in 2019.[174]

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167. *See* Major League Baseball, 2017-2021 Basic Agreement at Art. XX(E).

168. *See* Heitner & Postal, *supra* note 19, at 171 ("Baseball, unlike many other professional sports, has a well-documented history of collusion and, although an arbitrator is not required to follow precedent, the three proven instances of collusion can provide guidance on the threshold burden a grievant must meet.").

169. *See* Edelman, *supra* note 111, at 180.

170. *See* Willis, *supra* note 92, at 147.

171. *See* Edelman, *supra* note 111, at 180.

172. *See id.* at 180–81 ("In Collusion I, Arbitrator Roberts determined that an agreement violating baseball's collusion clause does not have to exist in writing. Similarly, in Collusion II Arbitrator Nicolau determined that a "common scheme for common benefit" is enough to establish collusion even without a writing or spoken evidence.").

173. *See* discussion *supra* Part II.B.

174. S*ee generally* Thomas Harrigan, *2018-19 Free agents by Position*, MLB.COM (Mar. 19, 2019), https://www.mlb.com/news/2019-mlb-free-agents-c293292274 [https://perma.cc/2W2H-TXTY].

Therefore, the 2019 off-season more closely resembles the 2002–2003 off-season than the 1980s off-seasons. The dilution of the market with free agents over the age of thirty and the recognition that these free agents are less valuable has often forced free agents to sign less-than-ideal contracts, but no other circumstantial evidence would suggest there is a "smoking gun" showing collusive actions by the club-owners.[175] Likewise, the rationale used for Barry Bonds' case translates here as well: clubs are not obligated to sign particular players.

Jeff Borris, a thirty-one year-old player agent for the MLBPA—who adamantly believes club-owners are colluding—correctly observed:

> [T]here is no smoking gun, no directive from Commissioner Manfred instructing clubs to limit their competition for free agents or to delay signings until late in the off-season when players panic creating a buyer's market. One hundred years of trial and error has taught the club-owners how to avoid getting caught.[176]

### B. THE CURRENT CBA & HOW FREE AGENCY IS CURRENTLY RESTRICTING TRADE

The current CBA binds players to their clubs for six seasons before they can become eligible for free agency.[177] Eligibility for free agency is based on service time that is acquired only when playing at the Major League level.[178] If a player is promoted to an MLB club and remains on its active roster for the entire season, he will have one full year of credited service at the conclusion of that season.[179]

During a player's first three seasons, he is paid the league's minimum salary.[180] Once a player has been on a roster for three successive

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175. *See* Edelman, *supra* note 111, at 184.

176. *See* Zach Seybert *Continued Collusion Predicted for 2018-19 MLB Free Agent Class–Jeff Borris*, SPORTS AGENT BLOG (Nov. 11, 2018), http://sportsagentblog.com/2018/11/08/guest-post-continued-collusion-predicted-for-2018-19-mlb-free-agent-class-jeff-borris/ [https://perma.cc/6MCN-KYXC].

177. *See* Major League Baseball, 2017-2021 Basic Agreement at Art. XX(B)(1) ("Following the completion of the term of his Uniform Player's Contract, any Player with 6 or more years of Major League service who has not executed a contract for the next succeeding season shall become a free agent . . . .").

178. *See id.*

179. *Id.* at Art. XXI.

180. *Id.* at Art. VI(A) (indicating that players make the minimum annual salary until they are arbitration-eligible after they have three years of service time).

seasons, he becomes eligible for salary arbitration.[181] During arbitration, both the club and player each present a dollar figure to an independent arbiter, who then decides for the player or the club based on comparable players' salaries.[182]

After three years of arbitration, any player with six or more years of service time who has not executed a contract for the following season can become a free agent.[183] However, before a player can become a free agent, his former club has the ability to extend a qualifying offer.[184] A qualifying offer is "a one-year Uniform Player's Contract for the next succeeding season with a guaranteed salary that is equal to the average salary of the highest-paid players each year."[185] If the player accepts the qualifying offer, he is signed for the next season.[186] However, if the player rejects his former club's qualifying offer and elects to become a free agent, his former club is compensated with a draft pick in Baseball's amateur draft.[187]

Free agency, as currently constructed, is restraining trade in myriad ways. Because players earn significantly larger sums once they are eligible for arbitration, club-owners and general managers are incentivized to prevent players from becoming eligible for as long as possible.[188] Consequently, players are often held in the minor leagues in order to prevent their service time clock from starting, so that they will only play in the Major League when they can provide what is perceived to be optimal production during their "prime years."[189]

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181. *See* at Art. VI(E).

182. *See id.* (stating that the arbitrator must choose either the player's salary proposal or the team's salary proposal because he "shall be limited to awarding only one or the other of the two figures submitted").

183. *Id.* at Art. XX(B).

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *See* Kessock, *supra* note 165, at 1382 ("[S]alaries agreed upon during or in advance of salary arbitration generally constitute a significant increase over the near-minimum salaries paid pre-arbitration. MLB teams, therefore, have an incentive to keep a player from salary arbitration eligibility for as long as possible.").

189. *See generally* Travis Sawchick, *Nobody Wants Baseball's 30-Something Free Agents Anymore*, FIVE THIRTY EIGHT (Nov. 8, 2018), https://fivethirtyeight.com/features/nobody-wants-baseballs-30-something-free-agents-anymore-%F0%9F%98%9E/ [https://perma.cc/C8VN-SY4Y].

Kris Bryant, of the Chicago Cubs, is the perfect example of a victim of service time manipulation. Bryant, the second overall pick in the 2013 MLB draft, put up phenomenal statistics while in the Cubs' minor league system during the limited time he was there.[190] Despite his success, he was left off the Major League roster to start the 2015 season.[191] A decision that surprised few—if any—in the industry was Bryant being left off the Major League roster initially, yet he was "called up" to that roster within two weeks after the start of the 2015 season.[192] The Cubs' reasons for doing so were strictly financial, as keeping Bryant in the minor leagues for those two weeks gave the team an extra year of control, thus delaying Bryant's free agency and eligibility to arbitrate for another year.[193]

Manipulation of service time directly ties into the second principal issue with free agency: players are placed on the open market past their window of greatest production.[194] Players' performance peaks as they reach their late twenties.[195] Both physical ability and performance decline when the average player crosses the thirty-year-threshold.[196] The average age for first year players ("rookies") breaking into the Major League in 2005–2009 was 24.4 for position players and 25.3 for pitchers,[197] meaning that most players which make it to free agency do so on the wrong side of thirty.

Looking at the production value for players through the game's most popular metric, Wins Above Replacement ("WAR"),[198] the 2017–2018 off-season average age of thirty-two has significantly decreased the

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190. *See* Kessock, *supra* note 165, at 1368.

191. *Id.*

192. *Id.*

193. *See id.* at 1367, 1370.

194. *See* Goodman, *supra* note 46, at 44-45.

195. *Id.* at 44.

196. *Id.*

197. *See* Travis Sawchik, *Nobody Wants Baseball's 30-Something Free Agents Anymore*, FIVETHIRTYEIGHT (Nov. 8, 2018), https://fivethirtyeight.com/features/nobody-wants-baseballs-30-something-free-agents-anymore-%F0%9F%98%9E/ [https://perma.cc/BNN3-V5QM].

198. *See* Tom Van Riper, *Baseball's Most Overpaid Players*, FORBES (July 10, 2014), https://www.forbes.com/sites/tomvanriper/2014/07/10/baseballs-most-overpaid-players-2/#7584377653e9 [https://perma.cc/U5WD-D6B7] (indicating that WAR is now a widely accepted statistic that analyzes both offensive and defensive metrics to determine the number of wins a player contributes to his club and outlining the most overpaid players in MLB based on their WAR).

production value brought to the league.[199] Consequently, teams have recognized that there is a disincentive in allocating their resources on free agents past their prime years of production.[200] Instead, teams are choosing to invest their resources (1) through the MLB amateur draft, (2) on international free agents, and (3) by signing their young players to long-term contract extensions through their prime years.[201]

Additionally, free agency has restricted players' employment opportunities through its implementation of the Qualifying Offer. When a player rejects a Qualifying Offer, clubs are forced to choose between signing that free agent and forfeiting at least one valuable draft pick.[202] The cases of former free agent pitchers Dallas Keuchel and Craig Kimbrel emblemize the negative repercussions of extending a pending free agent the Qualifying Offer. Both players began the 2019 season without a contract and subsequently did not receive one until June, two months into the season, largely so that their new clubs would not forfeit draft pick compensation once they were signed.[203]

While the CFA unquestionably gives Major League players the right to pursue antitrust litigation against the league, the restraint imposed by the league should be considered unreasonable under the Sherman Act. By definition, collusion under Baseball's CBA is not quite identical to collusion under U.S. antitrust laws.[204] However, cases asserting collusion

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199. *See* Sawchick, *supra* note 197 (noting that during the 2017–2018 season, position players aged 32 and older accounted for 12.9 percent of WAR and 18.6 percent of plate appearances, which were the lowest numbers that demographic have contributed since 1975 and 1979).

200. *See id.*

201. *See* Goodman, *supra* note 46, at 45.

202. *See Qualifying Offer*, MLB.COM, http://m.mlb.com/glossary/transactions/qualifying-offer [https://perma.cc/4ZBC-3S4X] (last visited Dec. 3, 2019) ("Any team that signs a player who has rejected a qualifying offer is subject to the loss of one or more Draft picks. While a team's highest first-round pick is exempt from forfeiture, any additional first-round picks are eligible.").

203. *See generally* Michael Clair, *The best closer of the last decade just signed and he's going to cause chaos in the NL Central***,** CUT4: MLB.COM (June 7, 2019), https://www.mlb.com/cut4/craig-kimbrel-signed-with-the-cubs [https://perma.cc/S4XU-BCVX]; *see also* Victor Mather, *Dallas Keuchel Is Returning to the Majors as an Atlanta Brave***,** N.Y. TIMES (June 7, 2019), https://www.nytimes.com/2019/06/07/sports/baseball/dallas-keuchel-braves.html [https://perma.cc/D4L8-2DX7].

204. *See* Marc Edelman, *Barry Bonds Collusion Grievance Had Merit, Despite Outcome*, FORBES (Aug. 28, 2015), https://www.forbes.com/sites/marcedelman/2015/08/28/barry-bonds-collusion-grievance-had-merit-despite-outcome/#2e637717aa57 [https://perma.cc/9XWY-M2ZZ].

in baseball are often successful on grounds that are substantially similar to cases dealing with collusion in non-baseball antitrust cases.[205]

Since free agency has been collectively bargained for by the MLBPA and the club-owners, it is unlikely that the players could utilize the per se test in demonstrating how free agency is currently restraining trade.[206] Likewise, since the league is a joint venture—the per se rule would not likely be permissible.[207] Therefore, the rule of reason test would apply in such litigation.

The rule of reason analysis attempts to determine whether the restraint imposed (1) is justified by legitimate business purposes, and (2) is no more restrictive than necessary.[208] The inquiry is confined to a consideration of the impact on competitive conditions in the marketplace.[209] The rule of reason thus requires the factfinder to decide whether under all the circumstances the agreement imposes an unreasonable restraint on competition.[210]

The anti-competitive aspects of service time manipulation that disables players from reaching free agency until they are in their thirties is undeniable and has led to the stagnant state of free agency today. However, the utilization of such restrictive measures is also a fundamental aspect of professional sports leagues.[211] By the same token, there are alternative measures to the way the free-agent market is currently constructed that would be less restrictive on players' ability to capitalize when their market value is at its peak.

One way this can be accomplished is by implementing a restricted free agency—a hotly debated topic of discussion when the club-owners unilaterally implemented it the 1994 season.[212] As proposed then,

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205. *See id.* ("Under antitrust law, mere parallel behavior among competitors is not enough to trigger a violation. But, parallel behavior along with a plus factor is sufficient.").

206. *See* Mackey v. Nat'l Football League, 543 F.2d 606, 619 (8th Cir. 1976).

207. *See id.* (finding that when an alleged restraint of trade does not completely eliminate competition for players' services, use of the per se rule is inappropriate).

208. *See* discussion *supra*, Section II.A.

209. Nat'l Soc'y. of Prof'l Engineers v. United States, 435 U.S. 679, 690 (1978).

210. L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1387 (9th Cir. 1984).

211. *See generally* Brisbee, *supra* note 25.

212. *See generally* Murray Chass, *Increased Free Agents Will Come With Cap*, N.Y. TIMES (Nov. 27, 1994), https://www.nytimes.com/1994/11/27/sports/baseball-notebook-increased-free-agents-will-come-with-cap.html [https://perma.cc/7HM9-S8GR].

restricted free agency would be implemented after a player serves four years in the league. Thereafter, he would become a restricted free agent, meaning that though other clubs could offer him a contract, his current club can retain his rights by matching the highest offer on the market.[213] Restricted free agency could create a gateway to accumulating greater returns for players by entering the open market earlier, while providing club-owners with the option of holding on to those players.

Another less restrictive alternative would be to enable players to reach free agency after four years of Major League service.[214] This method would curb the number of free agents who find themselves past the age of thirty years-old on the market, and would force front offices to be more competitive by bidding on players with larger windows of production ahead of them.

## CONCLUSION

The MLB has been an intricate aspect of American culture since the late nineteenth century. Neither the players nor club-owners want to see a work stoppage. If one occurs, the consequences could be fiscally catastrophic. Therefore, any means necessary to prevent such a stoppage need to be considered.

Only a handful of players are able to remain productive at such ages in a league buoyed by great young talent. Club-owners' continued manipulation of player service time is restraining trade and inherently violates antitrust laws. In order to receive just compensation, the players and the MLBPA should pursue alternatives such as reducing player service time required for free agency or establishing restricted free agency. The tangible threat of antitrust litigation should be enough to bring both the club-owners and the players to the bargaining table, and therefore, facilitate an agreement that will leave both sides, as well as millions of fans, satisfied.

213. *See* Goodman, *supra* note 46, at 46.

214. *See id.* at 55 ("The present system distorts the market by suppressing labor costs initially and then giving players effectively one shot at a significant contract.").